WORKING PAPER 02/2014

THE IMPACT OF ECONOMIC LIBERALISATION ON SPANISH PUBLIC ADMINISTRATION: SOME ALARMING STEPS BACKWARD

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Data de publicació: 6/VI/2014

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Abstract

Economic liberalisation has an impact on the economic activity of States and on the balance between government intervention and free markets. The old national service monopolies now have to be reconciled with basic EU economic freedoms. The introduction of new regulatory techniques requires a different kind of administrative body to govern utilities. National Regulatory Agencies have been set up to guarantee that regulation is exercised on an equal basis, without discrimination in favour of the incumbents from the monopoly era. The results and achievements of liberalisation are to some extent dependent on the administrative context. In many cases, European norms stipulate particular procedures for the organisation of public administration. States are no longer free to implement EU legislation in accordance with the paradigm of institutional autonomy: independent regulatory authorities are imposed as a cornerstone of liberalisation. In this paper we analyse three recent examples in which Spain allegedly failed to fulfil its obligations as a EU member State, and contend that Spain's current legislative reforms are at odds with European requirements.

Keywords: Economic liberalisation; administrative organisation; National Regulatory Agencies; implementation of EU Law.

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1. Introduction

By virtue of European Law, State monopolies must be reconciled with the basic economic freedoms deriving from the European Union legislation. This spells the end of the economic and legal autarchy of individual States, as national economies become involved in the process of interdependence, industry relocation and globalisation. States are thus compelled to revise many of the pre-existing national regulations that do not conform to this liberal European framework. In addition to the elimination of nationality-based discrimination and the elimination of State-run monopolies, European Law requires the transformation of domestic legal order and does away with the traditional model of government intervention in the economy that is so prevalent in southern European countries.

For this process to function, new administrative legislation has to be formulated in order to establish a legal and institutional framework. The legal order is not intended to create operating guidelines in a model of over-regulation and dominant public intervention, but rather to recreate conditions that allow more flexible, dynamic organisation. This neo-regulation of the public sector does not represent an abandonment of the intervention in individual activities, but a transformation of the techniques used – that is, a re-regulation. For example, the formation of a new

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Competition Law substitutes State intervention with surveillance of market operators' behaviour. The idea is not to dismantle Administrative Law, but to change the techniques used. To attribute these changes to a desire to do away with Administrative Law (though possibly justified in some cases) reveals a certain ideological bias.

Economic liberalisation ought also to be understood as a transformation of the legal instruments available for public intervention in the economy. Experts have emphasised the paradigm shift that Competition Law represents. Some authors have used this idea to consider competition policy a contemporary regulatory tool. It is a kind of regulation which does not dictate entrepreneurial behaviour, but in the majority of cases, indicates what companies should not do. More than controlling firms' conduct by means of direct intervention, governments act by supervising respect for a more broadly defined competitive framework, the free market. Individuals, or businesses in this case, have a wide scope for action within the framework of healthy and fair competition, and are not subject to the rigid mandates dictated by public authorities or ministries. So governments are assigned a low profile in the economy, characterised by the demise of the interventionist tools they applied in the past, and the birth of independent bodies to oversee competition policy and the regulation of utilities.

As a result, we need to analyse the new regulatory scenario that the notion "regulation through competition", embodies, as well as the new administrative structures responsible for the implementation of the policy. The whole process of neo-intervention requires the development of new administrative organisations termed National Regulatory Agencies (NRAs): in Spain, the National Energy Commission (CNE), the Commission for the Telecommunications' Market (CMT) and the National Competition Commission (CNC).[2] The degree of independence of these administrative bodies constitutes a crucial element in isolating market regulation both from industry capture and political interference.

[2] .- These three authorities are all now merged in a new macro independent regulator: the Comisión Nacional de los Mercados y la Competencia (the National Commission for Markets and Competition, CNMC). See *ut infra*.

In this paper we analyse three recent case studies, each of which reveals a lack of understanding of the transformation mentioned above. All the studies touch on the legal order in Spain, which is performing particularly poorly in this domain (though the situation may well be similar in other southern European Member States). We conclude with some legal implications.

2. Recent European judgements and legal reform. The fable of the Emperor's new clothes.

2.1 The Spanish Audiovisual Authority

The audiovisual sector is in permanent transformation. Most European countries have strong public broadcasters which operate in a competitive market alongside private channels. The audiovisual sector is a particularly sensitive one since it not only constitutes an important area of economic activity but is also deeply rooted in the protection of fundamental rights such as the freedom of expression and information.

In 2000, the Committee of Ministers of the Council of Europe adopted Recommendation number 23 which obliged member States to create independent regulators in the audiovisual in field, in the following terms:

> "Considering (...) that it is important that member States should guarantee the regulatory authorities for the broadcasting sector genuine independence, in particular, through a set of rules covering all aspects of their work, and through measures enabling them to perform their functions effectively and efficiently; Recommends that the governments of member States:
> a. establish, if they have not already done so, independent regulatory authorities for the broadcasting sector;
> b. include provisions in their legislation and measures in their policies entrusting the regulatory authorities for the broadcasting sector with powers which enable them to fulfil their missions, as prescribed by national law, in an

effective, independent and transparent manner, in accordance with the guidelines set out in the appendix to this recommendation."[3]

The wording of the Recommendation allows no room for discussion: the regulation of broadcasting is to be entrusted to independent authorities. Member States have adopted a wide variety of institutional solutions to set up their audiovisual authorities, as we see from the table below:

Country	Regulator
Austria	Kommunikationsbehörde Austria (KommAustria)
Belgium	Conseil Supérieur de l'Audiovisuel de la Communauté Française
	Medienrat of the German speaking Community of Belgium
	Vlaamse Regulator voor de Media
Bulgaria	Council for Electronic Media CEM
Cyprus	Cyprus Radio-Television Authority
Czech Republic	Council for Radio and TV Broadcasting
Denmark	Radio and Television Board, c/o Media Secretariat
Estonia	Estonian Public Broadcasting Council
Finland	Viestintävirasto Kommunikationsverket (FICORA)
France	Conseil Supérieur de l'Audiovisuel (CSA)

[3] .Recommendation of the Committee of Ministers to Member States on the independence and functions of regulatory authorities for the broadcasting sector. Adopted by the Committee of Ministers on 20 December 2000, at the 735th meeting of the Ministers' Deputies. Available at http://www.coe.int/t/dghl/standardsetting/media/doc/cm/rec%282000%29023%26expmem_EN.asp

Germany	Direktorenkonferenz der Landesmedienanstalten - DLM
Greece	National Council for Radio and Television
Hungary	Nemzeti Hírközlési Hatóság (NMHH)
Ireland	Broadcasting Authority of Ireland - BAI
Italia	Autorità per le Garanzie nelle Comunicazioni (Agcom)
Latvia	National Electronic Media Council
Luxembourg	Conseil National des Programmes
Lithuania	Ryšių reguliavimo tarnyba (RRT)
Malta	Malta Broadcasting Authority (MBA)
Netherlands	Commissariaat voor de Media
Poland	National Broadcasting Council - KRRiT
Portugal	Entidade Reguladora para a Comunicação Social - ERC
Romania	National Audiovisual Council - CNA
Slovakia	Rada pre vysielanie a retransmisiu
Slovenia	Post and Electronic Communication Agency of the Republic of Slovenia
Spain	Consejo Estatal de Medios Audiovisuales (CEMA)
Sweden	Swedish Broadcasting Authority
United Kingdom	Office for Communications (Ofcom)

The French *Conseil Supérieur de l'Audiovisuel* could be taken as a model due to its independence, regulatory fitness and transparency. France's audiovisual authority was partially inspired by the experiences of the USA and Canada, and in the early 1980s a public body for the control of radio and TV operators was created. The *Conseil Supérieur de l'Audiovisuel* is the authority responsible for the independence of the media; it controls respect for the legal framework and the protection of the viewers. It also supervises the quality and diversity of programs.

In the case of Germany, the *ALM (Allgemeine Landesmedienanstalten)* is structured in much the same way as its Spanish counterpart, since a large proportion of its powers are attributed to sub-state entities (the regions in Spain, or the *Länder* in Germany). Thus, the creation and regulation of audiovisual authorities comes under the sphere of regional competences. Germany has a dual broadcasting system in which public and private stations coexist, quite similar to that of the United Kingdom. The *Landesmedienanstalten* are responsible for overseeing market entry and private broadcasting.

The United Kingdom is one of the countries with the most extensive regulation of the audiovisual sector. It has two different control mechanisms, one for public broadcasting and on the other for private. The public sector is represented by the *BBC*, which functions in accordance with its legal status, and private broadcasting is regulated by OFCOM. OFCOM was established as a private body in a clear attempt to isolate it from governmental pressures. Market development, competitive strategies, audiovisual contents and broadcast standards are some of the aspects that come under the jurisdiction of this independent agency.

Given this wide diversity of institutional solutions in different countries, informal fora have been created devoted to international cooperation. The three most important are the European Platform of Regulatory Authorities,[4] the European Observatory of the

[4] .- cfr. www.epra.org

Audiovisual Sector,[5] and the RIRM, the Mediterranean Network of Regulatory Authorities.[6]

This brief overview underlines the great variety of institutional solutions regarding the administrative structures entrusted with audiovisual regulation, ranging from ministerial departments to specialised bodies. We should also distinguish between separate regulators and more general regulators that oversee telecommunications in general. From all these different institutional solutions, a common feature stands out: the need for independence from government structures.

Spain has recently implemented a major reform of the legal framework of its audiovisual sector. The State Radio and Television Act of 2006 introduces some interesting novelties. Firstly, and most importantly, the Act puts an end to the classical notion of the audiovisual sector as a public service: it returns radio and television to the private sphere. The sector is now considered an economic service of general interest, with strong regulation and barriers to entry, and the public monopoly on broadcasting dating from 1980 is eliminated. Under the 2006 Act, the legislator no longer considers the sector as being the responsibility of the State. The paradigm shift is so deep that the question is not just how an economic sector should be regulated, but whether it should in fact be under the sphere of public provision at all.

The first point to note about the new administrative organisation of the public broadcasting company (*Radio y Televisión Española*, RTVE) is that its president will now be appointed by Parliament. The second important point is the legislative mandate for the creation of an Advisory Council. Certainly, when compared with the old model in which the president was named by the government, the new system reinforces independence. The president of the RTVE Corporation (now a state mercantile company with special autonomy, according to current legislation) is now appointed by a two-thirds parliamentary majority from among the 12 members of the Board of Directors of RTVE (eight elected by the Congress and four by the Senate:

[5] .- cfr. www.obs.coe.int
[6] .- cfr. www.rirm.org

persons of recognised ability and professional experience and who appear before a parliamentary hearing to examine their suitability and also approved by a two-thirds parliamentary majority). All members serve a six-year term of office, and the grounds for their dismissal are also regulated.

The system is therefore more independent, but in practice the management body of the public audiovisual corporation has become polarised. In addition, two recent RTVE presidents resigned before completing even half of their mandates. This creates an institutional impasse, and in fact the Parliament has not renewed half of the Board of Dirctors for more than a year after the end of their term. Therefore, the principles of independence and neutrality are far from being fulfilled.

Together with these mechanisms to protect internal independence (the appointment of the president, the creation of the Advisory Council and the News Council), the 2006 Act also entrusts the supervision of the public service's fulfilment of its missions (art. 40) to the audiovisual authority. But, when the 2006 Act was passed, this audiovisual authority had not even been constituted: the legislator conferred this important responsibility on a non-existent administrative body. It was not until the 2010 Act, passed in March of that year, that the regulator of the audiovisual sector listed in the table above, the *Consejo Estatal de Medios Audiovisuales* (CEMA – in English, the National Council of Audiovisual Media) came into being.

Royal Decree 744/2004, of 23 April, created an Expert Committee for the reform of the public media. Among the several recommendations made by this Committee, the most important was the creation of an independent authority in the audiovisual sector. Some twenty years ago, Spain's conservative party (the *Partido Popular*, or PP) presented a Parliamentary motion in order to create a National Media Council, which was passed by the Senate in 1995 but never implemented. The 2006 Act makes constant references to this unsuccessful motion and the 2009 Act compels the Cabinet to submit its draft of the General Communication Act within a year, since this authority has to fulfil the crucial mission of public service control.

Lastly, in its articles 44 and following, the 2010 General Audiovisual Communication Act regulates the CEMA, conceived as an independent regulator and ascribed to the Ministry of the Presidency. As an independent authority for the supervision and regulation of the public broadcasting company (note that its powers do not extend to the entire audiovisual sector), the CEMA's mission is to uphold the independence and impartiality of State radio and television. The Council will be formed by the President and six counsellors[7] appointed by the government by means of a Royal Decree, on the proposal of the Congress by a 3/5 majority from among persons of recognised competence and experience in matters related to the audiovisual sector. If the Congress does not reach the required majority within two months of the first voting, the counsellors will be appointed by a simple majority vote.

The internal structure of the CEMA also includes a Consultative Committee whose composition and rules of appointment will be determined in accordance with future regulations. The Council will submit an annual report to ParliamentParliament describing its activities and discussing the situation of the audiovisual market. The president of the CEMA will present the report to the competent Parliamentary commission. CEMA regulations and resolutions are subject to review before the ordinary courts.

The shortcomings that this regulation presents are clear: there is no regulation of the president's mandate or of his/her election. Nor is there any legal provision regarding his/her dismissal. All these elements are vital in order to guarantee the independence of the institution. But, leaving aside this poor legal regulation, the most flagrant failing is the fact that, seven years after the 2006 Act providing for the creation of this institution and more than three years after its effective regulation in the 2010 Act, the Spanish government has yet to appoint the president and counsellors.[8]

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[7] .- The original wording of the 2010 Act was amended by virtue of Additional Provision 41 of 2011 Sustainable Economy Act, which reduced the number of counsellors from seven to six. The casting vote of the president and the figure of vice-president have also disappeared. Thus, the CEMA now comprises seven members instead of nine.

[8] Its most recent efforts to do so are reflected in Ministerial Order PRE/1483/2011, of 3 June. The Order publishes the Cabinet Agreement to promote the effective creation of the CEMA. (Official State Gazette, 4 June 2011). But this in fact constitutes no more than an appeal to respect legal provisions already in force. What is

To sum up, the situation in Spain panorama before the 2006 Act could hardly be said to fulfil the institutional and administrative criteria for protecting the freedom of expression and information. In 2006, mechanisms were established for the appointment by Parliament of the president of RTVE and for the creation of a News Council made up of professionals and thus not dependent on party politics. However, this system of internal guarantees has proved to be ineffective (both presidents resigned abruptly before completing their mandate), and the recent decision of the RTVE's Board of Directors to adopt a rotating presidency imposes clear restrictions on its independence. The Spanish custom of applying political quotas to occupy the boards of independent institutions, and the refusal of the main political parties to renew certain posts, both bear witness to the urgent need to strengthen the administrative structures in order to meet the standards for protecting the independence of the public audiovisual sector. This grim panorama is rounded off by the fact that the launch of the CEMA is still pending. The 2006 Act provided for its creation as a high authority in the audiovisual sector but it was only with the passing of the 2010 Act (almost four years later) that it was effectively created and regulated, albeit with several grey areas regarding its legal definition and application. In fact, three years after its legal recognition, the members of the CEMA have not been appointed and needless to say, the council is yet to begin its work.

In view of article 10 of the Convention,[9] the European Court of Human Rights places a clear obligation on Member States a to provide an institutional setting able to protect the freedom of information and expression.[10] To quote the ECHR itself: "Genuine, effective exercise of freedom of expression does not depend merely on the State's duty not to interfere, but may require it to take positive measures of protection, through its law or practice" (par. 99). These rights are not protected when a legal order has no effective "*administrative infrastructure*" to prevent current or potential interferences

more, the Order assigned provisional competences to both the Department for Telecommunications and the Information Society (SETSI) and the Telecommunications Market Commission (CMT).

[9] .- article 10.1. ECHR "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises".

[10].- See ECHR judgement Manole v. Moldova 17 September 2009. (Application no. 13936/02).

with that fundamental right. It is no exaggeration to affirm that the Kingdom of Spain is close to breaching the international obligations imposed on it by the ECHR.

We recognise that the European standard on independence of regulators is fixed by virtue of international law (the ECHR) and therefore lacks the primacy or harmonisation effect it would have under European Union Law. However, States must honour their international obligations, and all EU Member States are members of the ECHR. What is more, article 11 of the European Charter of Fundamental Rights contains the same wording in relation to EU law and obligations.

Sadly, the criticism voiced by Professor Bustamante in 2006 remains valid today: "Two challenges facing the Spanish democratic transition regarding the regulation of the media regulation remain unresolved 28 years after the writing of the Constitution: the establishment of an audiovisual public service worthy of the name, that is to say, with precise and distinct social missions and a truly democratic mode of operation, and the creation of an independent authority able to supervise its performance and to organise the audiovisual sector harmoniously in order to protect the interests of all citizens. The two shortcomings mentioned have the same cause: the instrumental, partisan conception of public broadcasting that has characterised all political parties in office, a clear throwback to the authoritarian origin of the structure of these media during Franco's dictatorship. Both elements, in reality two complementary sides of the same process – the unfinished democratic transition – are now on the table." [11]

2.2 The liberalisation of the Spanish Railway system

In the railway sector we find a paradigmatic example of the application of new regulatory techniques to introduce competition and to encourage the entry of new operators in a State-run monopoly. The railway system is considered to be a natural monopoly, and so it is a candidate for unbundling: that is, the separation of the management of the infrastructure from the provision of the service. In Spain, the management of the railway services is divided between ADIF, a State-owned company

[11] BUSTAMANTE, E. "Un auténtico servicio público garantizado por el Consejo Audiovisual" Telos, nº 68. Julio-Septiembre 2006

responsible for infrastructure (track, signalling, and stations) and RENFE, formerly the monopoly holder and now solely responsible for passenger transport, in a market governed by freedom of access. Through this separation of responsibilities, competition can be introduced into a natural monopoly.

In 1990 and 1994 the national railway network, RENFE, was restructured with the creation of separate bodies for infrastructure management and service exploitation. The Royal Decree of January 1994 amended RENFE's legal charter. Legislation passed in 1996 created a public body for infrastructure management,[12] and finally, the Railways Act of 2003 created the current legal framework for the sector, dividing its management between ADIF (infrastructures) and RENFE Operadora (service provision). The Act came into force on 31 December 2004.[13]

The 2003 Railways Act contains separate provisions relating to infrastructures and services and marks the end of the traditional idea of joint exploitation. The two legal bodies, ADIF and RENFE Operadora, are both under the authority of the Transport Ministry (the Ministerio de Fomento). The Royal Decree of 30 December 2004 approves the regulation of the industry and determines general principles for accessing the national railway network (the *Red Nacional Integrada*). Another Royal Decree of the same date establishes the legal regulation of ADIF, and on 16 February 2007, the first contract between ADIF and Spanish government was signed to lay down the principles and goals of the network's management.[14]

ADIF adjudicates infrastructure capacities, and charges a fee for it. Significantly, in order to be able to provide railway services, an operator not only needs an administrative licence but must also have been awarded a contract for a transport connection between two points (origin and destination). The operator also has to

[12] .- See SETUÁIN MENDÍA, B. *La administración de infraestructuras en el derecho ferroviario español: el régimen jurídico del ADIF*. Madrid, IUSTEL, 2009.

[13] .- Extension of "vacatio legis" by Royal Decree-Act of 7 May 2004.

[14] .- available at http://www.sff-cgt.org/juridica/legislacion_ferroviaria/ADIF_Contrato_Programa_2007_2010.pdf. Acceso 1 junio 2013. Sse also the Resolution of 30 December 2009, de la Secretaría de Estado de Planificación e Infraestructuras, "por la que se encomienda al Administrador de Infraestructuras Ferroviarias la ejecución de inversiones contempladas en el Contrato-Programa Administración General del Estado-ADIF 2007-2010 en la Red Ferroviaria de Interés General de titularidad del Estado". BOE 25 March 2010.

obtain a safety certificate. ADIF charges fees for the use of the network which are established by a Ministerial Order of 8 April 2005, amended in 2012, as laid down in articles 74 and 75 of the 2003 Railways Act.[15]

Both ADIF and RENFE Operadora are public companies under the aegis of the Transport Ministry (Ministerio de Fomento).[16] The Ministry has the power to award administrative licences to operators and to fix the fees to be charged for the use of railway infrastructure. Inside this framework, we should analyse ADIF's effective degree of autonomy in its two areas of activity. According to experts opinion, contracts will be awarded in accordance with the criteria previously established by Ministerial Order. In this respect, then, ADIF enjoys a very limited degree of autonomy. Article 81, section 1 of the 2003 Act also grants the Ministry the power to set the fees. This power was developed further in Ministerial Order 897/2005 which established "general price-setting principles", which have been applied since that date.

The 2003 Act also provides for the establishment of a Railway Regulation Committee (the *Comité de Regulación Ferroviaria*). European sectorial regulation foresees the creation of an independent regulator to oversee effective competition in the railway sector, particularly with regard to the fair and non-discriminatory assignment of contracts. This Committee is regulated in articles 82 and 83 of the 2003 Act. "The problem posed by the Committee's absolute dependence on the Ministry lies not so much in its hierarchical submission to government but the fact that both public companies (ADIF and RENFE) operating in the sector are also under the umbrella of the Ministry. The potential efficacy of this body as a genuine regulator of a market that is now being opened up to competition has completely vanished."[17]

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[15] .- BOE 1 November 2012

[16] .- In literature, the very fact that some administrative powers are entrusted to private businesses is questioned. See SETUÁIN MENDÍA, B. *La administración de infraestructuras en el derecho ferroviario español: el régimen jurídico del ADIF*. Madrid, IUSTEL, 2009. p. 131 ff.

[17] .- CARLON RUIZ, M. "El nuevo régimen jurídico del sector ferroviario: un tímido paso hacia la competencia" en Transportes y competencia : los procesos de liberalización de los transportes aéreo, marítimo y terrestre y la aplicación del derecho de la competencia en Fernández Farreres, G. (Coord), Madrid, Thomson Citivas 2004, p. 412

The Spanish legal framework regarding the railway sector was further amended by the 2011 Sustainable Economy Act which, in its Final provision 4, foresaw the creation of a transport regulator. As of today, this body has not been established.[18] Similarly, the status of the Railway Regulation Committee was reformulated in articles 82 and 83.

After an examination of these regulations, on 9 October 2009, the European Commission issued a letter of formal notice to the Kingdom of Spain for infringement of community law. Specifically, the Commission alleged that Spanish legislation does not comply with Article 4(1) of Directive 2001/14, in so far as the fees to be charged are set entirely by Ministerial Order, with the result that the only function allocated to the infrastructure manager, namely ADIF, is the levying of the said fees. Indeed, ADIF does no more than calculate the fee in each particular case, applying a formula established in advance and in detail by the ministerial authorities. As a result, it has no power to adjust the amount in any individual case.

The wording of the Directive provision is very clear:

> Article 4. 1. Member States shall establish a charging framework while respecting the management independence laid down in Article 4 of Directive 91/440/EEC. Subject to the said condition of management independence, Member States shall also establish specific charging rules or delegate such powers to the infrastructure manager. The determination of the charge for the use of infrastructure and the collection of this charge shall be performed by the infrastructure manager.
>
> Article 4.2. Where the infrastructure manager, in its legal form, organisation or decision-making functions, is not independent of any railway undertaking, the functions, described in this chapter, other than collecting the charges shall be

[18] .- Additional Provision 4: "El Gobierno, cuando así lo aconsejen las condiciones de competencia en los mercados de transporte, y, en particular, los avances en el proceso de liberalización del sector ferroviario, remitirá al Parlamento un proyecto de Ley de creación de un organismo regulador del sector transporte, que integre las funciones atribuidas al Comité de Regulación Ferroviaria y la regulación del resto de modos de transporte." When the legislation regarding the creation of the National Commission on Markets and Competition is finally passed, the Railway Regulation Committee will be part of this new macro-regulator.

performed by a charging body that is independent in its legal form, organisation and decision-making from any railway undertaking."

According to the Commission, the Spanish legislation in question also fails to comply with the requirement relating to the management autonomy of the railway infrastructure manager, since, by entrusting the task of setting the fees exclusively to the ministerial authorities, it deprives the infrastructure manager of an essential management tool.

The case ended before the ECJ (**As C-483/10. Judgement of 28 February 2013**), which ruled that: "under the Spanish legislation at issue, it is the Ministry of Infrastructure and Transport which acts as the regulatory body. While it is true that Article 30(1) of Directive 2001/14 provides that the ministry responsible for transport matters may be designated as the regulatory body, that provision nevertheless requires that body to be independent of the charging body. That ministry cannot therefore be regarded as fulfilling its regulatory function in accordance with that provision if, at the same time as it performs its regulatory role, it also determines the amount to be charged. It follows that, in order to ensure that the objective of management independence of the infrastructure manager is fulfilled, the latter must, within the charging framework established by the Member States, be given a degree of flexibility in determining the amount of charges so as to enable it to use that flexibility as a management tool.

In the present case, it is apparent from the file before the Court that the ADIF does not enjoy the management independence necessary for the exercise of its powers, since those powers are confined to establishing the specific charge in each individual case by applying a formula laid down in advance by ministerial order. It must therefore be concluded that, in that regard, the Spanish legislation in question does not comply with Article 4(1) of Directive 2001/14." [19]

[19] .- par. 48 to 50 of the ECJ judgement.

In fact, the infringement declaration is not exclusive to Spain: the railway liberalisation process has experienced similar difficulties in many European countries.[20]

Similarly, the **Communication from the Commission concerning the development of a Single European Railway Area (2010)**[21], also identified the lack of independence of regulatory bodies as a major obstacle in the liberalisation process. "Member States' regulatory bodies encounter difficulties in carrying out their supervision duties over infrastructure managers, in particular to ensure no discrimination against new entrants and to check whether charging principles and accounting separation are properly applied. These difficulties are often due to a lack of staff and other resources, and may be compounded in cases where the regulatory body does not have sufficient independence from the infrastructure managers, incumbent rail undertaking or the ministry which exerts ownership rights over the incumbent operator. The regulation on a rail network for competitive freight requires closer cooperation between infrastructure managers along the national sections of European corridors; this in turn requires parallel closer cooperation between the corresponding national regulators. The experience to be gathered here may be useful should the Commission later consider taking a more integrated approach to market supervision in the single European railway area. Existing legislation already goes some way to dealing with these issues. But the Commission is aware that problems will persist if the EU regulatory framework is not properly implemented. This is why the Commission has already taken the initiative in launching infringement procedures against Member States who fail to apply EU law properly."[22]

The European Parliament is currently working on the amendment of the railway Directive 2012/34/EU. According to the new text, "(9) The existing requirements for

[20] .- Portugal. case C- 557/10. ECJ Judgement of 25/10/2012; Greece. case C-528/10. ECJ Judgement of 8/11/2012; Austria. case C-555/10. ECJ Judgement of 28/02/2013; Germany. case C-556/10. ECJ Judgement of 28/02/2013; Hungary. case C-473/10. ECJ Judgement of 28/02/2013; France. case C-625/10 ECJ Judgement of 18/04/2013; Poland. case C-512/10 ECJ Judgement of 30/05/2013, Czech Republic. Case C 545/10. ECJ Judgement of 11/07/2013; Slovenia. Case C-627/10 ECJ Judgement of 11/07/2013: Italy. case C-369/11 ECJ Judgement of 3/10/2913 and Luxembourg. case C-412/11 ECJ Judgement of 11/07/2013.

[21] .- COM (2010) 474 final. Brussels 17tSeptember 2010.

[22] .- *ibidem*

the independence of infrastructure managers from railway transport undertakings, as laid down in Directive 2012/34/EU, only cover the essential functions of the infrastructure manager, which are the decision-making on train path allocation, and the decision-making on infrastructure charging. It is however necessary that all the functions are exercised in an independent way, since other functions may equally be used to discriminate against competitors. This is in particular true for decisions on investments or on maintenance which may be made to favour the parts of the network which are mainly used by the transport operators of the integrated undertaking. Decisions on the planning of maintenance works may influence the availability of train paths for the competitors.

(10) The existing requirements of Directive 2012/34/EU only include legal, organisational and decision-making independence. This does not entirely exclude the possibility of maintaining an integrated undertaking, as long as these three categories of independence are ensured. Concerning the decision-making independence it must be ensured that the appropriate safeguards exclude control of an integrated undertaking over the decision-making of an infrastructure manager. However, even the full application of such safeguards does not completely remove all the possibilities for discriminatory behaviour towards competitors which exist in the presence of a vertically integrated undertaking. In particular, the potential for cross-subsidisation still exists in integrated structures, or at least it is very difficult for regulatory bodies to control and enforce safeguards which are established to prevent such cross-subsidisation. An institutional separation of infrastructure management and transport operation is the most effective measure to solve these problems.

(11) Member States should therefore be required to ensure that the same legal or natural person or persons are not entitled to exercise control over an infrastructure manager and, at the same time, exercise control or any right over a railway undertaking. Conversely, control over a railway undertaking should preclude the possibility of exercising control or any right over an infrastructure manager.

(12) Where Member States still maintain an infrastructure manager which is part of a vertically integrated undertaking, they should at least introduce strict safeguards to guarantee effective independence of the entire infrastructure manager in relation to the integrated undertaking. These safeguards should not only concern the corporate organisation of the infrastructure manager in relation to the integrated undertaking, but also the management structure of the infrastructure manager, and, as far as possible within an integrated structure, prevent financial transfers between the infrastructure manager and the other legal entities of the integrated undertaking. (...) "[23]

2.3 *Electronic Communications and the new Spanish Competition Authority*

EU Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on the common regulatory framework for electronic communications networks and services (Framework Directive), and in particular, article 3, par. 2 and 3, imposes on Member States the requirement that their national regulatory authorities be independent, in the following terms:

> "2. Member States shall guarantee the independence of national regulatory authorities by ensuring that they are legally distinct from and functionally independent of all organisations providing electronic communications networks, equipment or services. Member States that retain ownership or control of undertakings providing electronic communications networks and/or services shall ensure effective structural separation of the regulatory function from activities associated with ownership or control.
>
> 3. Member States shall ensure that national regulatory authorities exercise their powers impartially and transparently."

[23] .- Proposal for a Directive of the European Parliament and of the Council amending Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area, as regards the opening of the market for domestic passenger transport services by rail and the governance of the railway infrastructure. Brussels 30 Jan 2013. COM (2013) 29 final.

These provisions are explained in point 11 of the Preamble: "In accordance with the principle of the separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authority or authorities with a view to ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States or to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National regulatory authorities should be in possession of all the necessary resources, in terms of staffing, expertise, and financial means, for the performance of their tasks."

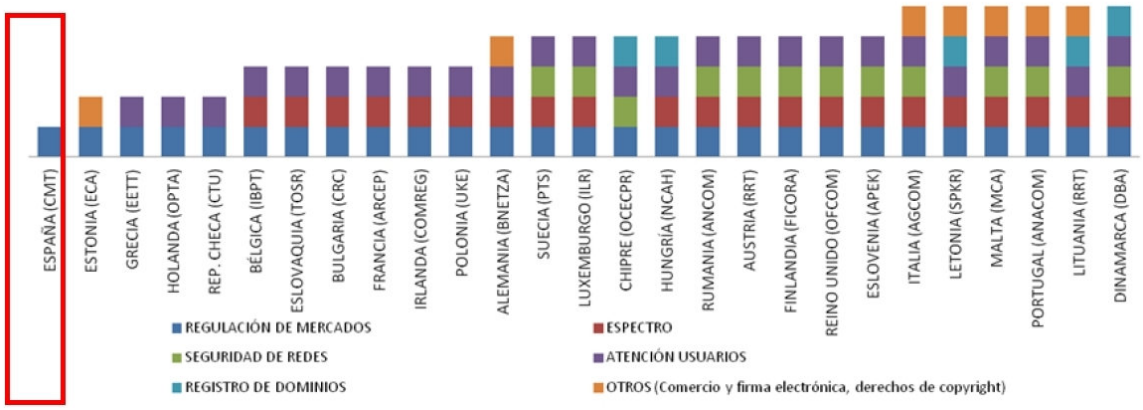
Moreover, the NRA must exercise its powers in accordance with the principles of transparency and impartiality. In 2008, the European Commission initiated an infringement procedure against Poland. The Commission argued that Poland did not fulfil European law since its national legislation did not establish the duration of the mandate of its NRA or a list of grounds for dismissal of its members, and that it left these matters to the discretion of the Prime Minister. Nor was there any effective guarantee that economic operators in which the State was a stakeholder would be treated on an equal footing with other competitors. Poland agreed to amend its legislation, and the case was then closed.[24]

In Spain, electronic communications are under the supervisory powers of the *Comisión del Mercado de Telecomunicaciones* (CMT), the Spanish regulatory agency for the sector. However, the initial wording of Bill 3/2013 proposed to return those functions to the government, specifically to the Ministry of Industry. This crucial reform was given no explicit justification, nor was any kind of explanation offered in the Bill's legal provisions.

The Spanish NRAs in the fields of telecommunications and energy (CMT and CNE) were extremely critical of the planned reform. This process, in which the responsibility for regulation is returned to the government, is unparalleled in Europe.

[24] .- ECJ Order of 17 September 2009. Case C-309/08.

The document "Informe sobre el Anteproyecto de Ley de creación de la Comisión Nacional de los Mercados y la Competencia" (MTZ 2012/398) issued by the *Comisión del Mercado de las Telecomunicaciones*[25] contains a comparative table summarising the different powers of telecommunications NRAs in several European countries.



The table clearly shows that the Spanish regulator lacks most of the powers other European NRAs enjoy. Now, with the reform, the Spanish NRA will have no jurisdiction with regard to numbering, recording operators, resolution of conflicts between operators, data protection, or competences regarding the definition and supervision of universal service obligations. So the position of the recently created *Comision Nacional de los Mercados y la Competencia* (CNMC: in English, the National Commission for Markets and Competition) is a far cry from that of the Bundesnetzagentur in Germany or OFCOM in Britain.

In fact, the reform of the Spanish regulatory system will leave the new creation, the CNMC, with very limited powers in the field of telecommunications. "The Ministry of Industry has deprived the organism that will substitute the CMT of basic areas of jurisdiction such as telephone number portability, numbering, operator registration, universal service and conflict resolution between operators. The telecommunications

[25] .- Comisión del Mercado de las Telecomunicaciones (CMT) "Informe sobre el Anteproyecto de Ley de creación de la Comisión Nacional de los Mercados y la Competencia" (MTZ 2012/398) 15 March 2012.

sector has judged the reform inappropriate. The spirit of the reform bows to the demands of the three companies with the largest infrastructures (Telefonica, Vodafone and ONO) which have always complained about CMT's interventionism favouring small operators. The only relevant power that the CMT (now a section of the CNMC) will retain is that of market analysis."[26]

To quote Professors Ariño and De la Cuétara, "the proposed reform, in its current state, transforms the existing NRA into a huge supervisory body which loses many of its active powers to the Ministries, as the National Energy Commission (the CNE) has already energetically pointed out. Competition policy can work without these powers but regulation cannot. With the transferred powers, it will be the Ministry of Industry and the Ministries of Transport and Telecommunications (Fomento) that will take regulatory decisions, but one of the basic characteristics of an NRA will have been lost: its independence. This is exactly the opposite of what is expressed in the Bill's preamble and the opposite of what PP and PSOE proposed in their respective electoral programs. This cannot work. If we analyse the issue of portability, the new Bill considers it as a mere register which can be managed by ordinary civil servants who will record the changes. However, if the matter were so simple, the problems with number portability would have disappeared a long time ago, and this is far from being the case. The right of users to preserve their own number when changing operator is a basic competitive need and without it, the number of changes will be strongly reduced. Inevitably, big operators try to make these changes difficult in order to not to lose customers. As anyone can see, this is no ordinary register: it implies the interconnection of operators' telematic centres with the regulator, and with their billing services in such a way that a customer is assured that the change of operator will be cleared in 24 hours. The point at issue here is regulation, and not simply administrative management: sectorial regulation and not competition policy, even

[26] .- "La CMT y la CNE se rebelan contra el plan del Gobierno de quitarles poder" El País, 20 March 2012

though the goal is the same: to raise competition to increase sector efficiency and dynamism"[27]

The reform embarked upon by the Spanish legal order in this field was of such a scale that new allocation powers in electronic communications might contravene European law. Although the 2103 bill claims to be based on European models, the fact is that the Vice-President of the European Commission, Neelie Kroes, expressed her doubts regarding the compatibility of this new institutional setting with European law.[28] The bill was finally amended and the final version does not include the devolution of regulatory powers to the government.

In fact, the question of competences not only aroused concern at the European Commission but was also analysed by the European Court of Justice itself. In its **Judgement of 3 December 2009 (Commission c. Germany. Case C-424/07)**, the Court deals with the compatibility of German law with EU law in relation to the "deprivation of competences" of the NRA in the issue of new telecommunications markets. More precisely, by virtue of the *Telekommunikationsgesetz*, the German NRA is not allowed to promote competition in new optical fibre markets, since the German legislator considers that these new markets should be protected from competition in order to guarantee effective infrastructure investment and to support innovation. The legal debate is very complex, but what is relevant to our study is the final result: in spite of the existence of a principle of non-regulation for new markets – as a general rule, new markets should not be subject to ex-ante regulation – the German legislator cannot prevent the NRA from determining the need for regulation of those markets. The electronic communications Framework Directive confers on the NRA, and not on the national legislature, the task of determining the need for regulation of new

[27] .- ARIÑO ORTIZ, G. & DE LA CUÉTARA, J.M. "Reguladores sectoriales y defensa de la competencia. Una aportación al debate de su fusión" *Ariño & Villar WP* nº 42, 2012, p. 25-26.

[28] .- "legislation currently being considered in Spain seems to undermine the independence of the NRA and also planning a major transfer of powers normally exercised by independent NRA to the executive power. From our point of view, it is difficult to understand how such a comprehensive transfer of powers from the independent NRA to ministerial authorities could be compatible with the objectives, principles and obligations of the EU regulatory framework" Letter from the Vice-president of the European Commission to Don José Manuel Soria Lopez, Minister of Industry, Energy and Tourism. 11 February 2013

markets. On this point, the *Telekommunikationsgesetz* fails to fulfil Germany's obligations under EU law.

The opinion expressed by Advocate-General Miguel Poiares Maduro explains in detail the grounds of the ECJ judgement in defining the powers of national regulatory authorities:

"(...) intervention in privately-owned facilities will reduce the incentives to develop these facilities in the first place. That is why, under Article 82 EC, ordering the compulsory access to a facility (as a remedy for an abusive refusal to supply) will be appropriate only if the strictest requirements are met. That is also why, under Community regulation of the telecommunications sector, imposing an obligation to enter into negotiations to grant access must be proportional and truly required by the competitive situation. Therefore, it can be established that the possibilities of intervention that regulation entails will reduce incentives to invest in infrastructure and innovation. (15) As such, it is only natural that the incumbent telecommunications operator does not view regulation kindly; and if Germany wishes to promote investment in telecommunications infrastructure, it would do well to address those concerns. It would come down to a policy choice: to restrain regulation, and suffer the associated effects of substantive market power, in order to favour investment in infrastructure.

In normal circumstances, Germany would be allowed to make such a policy choice; but not when there is Community regulation of the telecommunications sector. Here, the choice has already been made by the Community legislature to submit this sector to regulation, with all the possibilities for intervention that it entails."[29]

After establishing the tension between the principles of competition and regulation, the Advocate-General goes on to discuss the powers of the NRA:

"For Germany, the objectives of the Community regulatory framework can be balanced in different ways, and what its legislature did was to 'instruct' the German NRA on how to perform this balancing, giving priority to one particular objective.

[29] .- Advocate General Opinion, 23 April 2009. Case C-424/07. par. 51 to 53.

Germany argues that such instructions are within the margin of appreciation allowed in transposing the Community regulatory framework. The issue, therefore, is to whom the Community regulatory framework assigns the balancing of its different objectives: to the national legislature, in transposing that framework, or to NRAs, in their specific assessments? I must stress that the answer is independent of the particular objective pursued. It may turn out that Germany is correct, and special attention needs to be given, as regards new markets, to incentives to infrastructure and innovation. However, assigning such balancing to the national legislature has different consequences from assigning it to the NRAs. NRAs have been set up and given particular powers by the Community regulatory framework for a reason: they are expected to be insulated from certain interests and to reach their decisions governed only by the criteria established in that framework.

As such, I believe that the balancing of the regulatory framework's objectives lies with the NRAs. Article 8 of the Framework Directive expressly assigns the pursuit of these objectives – and therefore their balancing – to NRAs, not to the national legislature.

This creates an institutional arrangement whereby the task of the national legislature is limited to ensuring that NRAs take all necessary measures to pursue those objectives, as the Court has confirmed on several occasions. Even the autonomy of the Member States as regards the organisation and structuring of the NRAs has been subordinated to this pursuit. This also presupposes that it is NRAs, faced with specific assessments, which are better placed to decide how those different objectives are to be balanced in order to maximise them. In other words, a decision by a national legislature to give priority to one particular objective would, in fact, affect the way in which the Community legislature intended the specific market assessments to be made: by the NRAs, taking into account the different objectives on a case-by-case basis. The absence of a system attributing priority as between the objectives laid down in the Community regulatory framework, and the consequent discretion granted to the NRAs, was therefore fully intentional on the part of the Community legislature.

Thus, Germany cannot limit the discretion of the German NRA regarding intervention in new markets by subjecting it to conditions, such as those laid down in Paragraph 9a(2) of the TKG, which give priority to one particular regulatory objective."[30]

The ECJ upholds the Opinion of the Advocate-General and declares that "by adopting Paragraph 9a of the Law on Telecommunications (*Telekommunikationsgesetz*), of 22 June 2004, the Federal Republic of Germany has failed to fulfil its obligations under Article 8(4) of Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive), Articles 6 to 8(1) and (2), 15(3) and 16 of 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), and Article 17(2) of Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (Universal Service Directive)".

We thus confirm a kind of reservation of regulatory powers in favour of independent authorities at the expense of the national legislator. This finding should be taken into account as regards the new allocations of powers proposed by Act 3/2013 in the field of electronic communications. In Professor Fernando's opinion: "the ECJ judgement reinforces the discretionality that is characteristic of NRAs, at least in those fields where they enforce EU law. As in the previous case of Poland, this declaration implies that the regulatory options granted to NRAs by virtue of EU law can be restricted, interfered or even eliminated by the national legislator. Not even under the allegation of a greater legal certainty or a better judicial control can such an intervention be justified."[31]

[30] .- Opinion of the Advocate-General. Delivered on 23 April 2009. Case C-424/07. par 62 to 67.

[31] .- FERNANDO PABLO, M.M. ""El Legislador nacional no puede eliminar o limitar el ámbito discrecional concedido a una Autoridad Nacional de Regulación por el derecho comunitario" in GARCÍA DE ENTERRÍA, E. & ALONSO GARCÍA, E. (Coords). *Administración y Justícia: un análisis jurisprudencial. Liber Amicorum al Profesor T.R. Fernandez Rodriguez*. Civitas, Madrid, 2012

To conclude, in the field of telecommunications and electronic communications, the devolution of powers from independent authorities to the government may well clash with the European regulatory framework.

3. Legal implications

3.1 The limits of the democratic legitimacy of government and the conflict between independent agencies and the Spanish Constitution

According to the conventional wisdom taught in Law Schools, the legitimacy of public administration is *derived*. Citizens vote in general elections to elect their representatives who sit in the legislative chambers – in Spain, the Congress and the Senate. The first task that the elected Chambers must perform is to appoint a President and a Cabinet. The government directs public administrations and executes budgetary provisions to develop public policies This paradigm is also reflected in the Spanish constitution of 1978. Article 97 states that: "The Government shall conduct domestic and foreign policy, civil and military administration and the defence of the State. It exercises executive authority and the power of statutory regulations in accordance with the Constitution and the laws."

According to this model, public administration is based on a hierarchical structure, in which different jurisdictions are assigned to different Departments or Ministries, all under the political leadership of the President or Prime Minister. However, after the leading case of Humphrey's Executor v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L. Ed. 1611 (1935), it was established that the president could not remove a commissioner at will (in this case, the head of the Federal Trade Commission, FTC) without cause. The statute that created the commission permitted dismissal of the commissioner only for inefficiency, neglect of duty, or official misconduct. President Roosevelt wished to replace FTC Commissioner William E. Humphrey, who had been nominated by his predecessor President Hoover for a seven-year term in 1931, with someone of his own choice. The Court held that because Humphrey was not an executive officer, the president could not remove him from office except for the causes set forth in the statute. Since then, public officials and civil servants have had to accept

administrative agencies as a new element of contemporary government, although the nature and scope of agency powers remains controversial. This is especially true of independent agencies, which comprise what is known as the "headless fourth branch of government".

The birth of independent agencies – that is, independent from political supervision – constitutes a deviation from the traditional form of understanding public administration. The legitimacy of an independent authority, body, commission or agency lies not in the fact that it has been elected by Parliament but in its specialised competence, impartiality, neutrality and expertise. This is not the place to deal in depth with the justifications for the creation of an agency; we would merely stress that EU law poses a constant challenge to traditional forms of administrative legitimacy.

National regulatory authorities are accountable to Parliament, and their activity is reviewed by the courts. However, their source of legitimacy is not political. Quite the opposite: NRAs are called to exercise their powers – some of them of huge social consequence – in accordance with the principles of neutrality, transparency, and effectiveness. European Law is exporting this model of enforcing public policy in a way that strongly resembles the role of the European Commission itself.

3.2 The false institutional autonomy of Member States

As we noted in the above section, conventional wisdom holds that Member States enjoy full discretion with regard to the implementation of European law at domestic level. The EU has no say in the choice of the national institution or level of government responsible for enforcing European law; nor does it stipulate the legal instruments to be used, provided that full respect of EU law is granted (the *effet utile theory*). Therefore, States enjoy institutional and legal autonomy in the implementation and enforcement of EU law.

Nevertheless, the economic freedoms enshrined in the EU Treaties imply a certain degree of economic liberalisation. Formally, EU law exhibits full deference to the

national legal systems with regard to the organisation and provision of the old public services, but experience shows that State monopolies are subject to European competition law. Since the Corbeau and Almelo rulings, States have had to justify that exceptions to free market are the only way of ensuring that a service is provided and that the public interest is satisfied. In turn, this implies that legal monopoly cannot be the sole mode of provision in any economic sector.

The combination of these two aspects (economic liberalisation and administrative organisation) leads to the emergence of new regulatory techniques. Now, telecommunications, transportation and energy are defined as services of general economic interest. The principles of separation of infrastructure and service provision, third party access, transparent funding and universal service have made their way into our legal vocabulary. When a monopoly is liberalised through unbundling, a new administrative regime is required.

It is true that art. 345 TFEU states the neutrality of EU law in respect of the property of States: "The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership". Therefore, a Member State has no obligation to privatise (by selling the assets of its public firms). But in the new economic scenario, an incumbent may very well demand the existence of an independent administration to guarantee equal non-discriminatory treatment in relation to market access or infrastructure use.

It is also true that article 35 of EU Regulation 1/2003 provides that Member States shall freely designate national competition authorities as long as that the provisions of European competition law are effectively complied with. However, recent ECJ judgements[32] have had a clear impact on national procedural rules, and may compromise the effectiveness of arts. 101 and 102 of the TFEU.

In conclusion, an invisible requirement of EU law is the transformation of national administration from a hierarchical, politically-sanctioned structure to an independent

[32] .- see ECJ Judgement of 7 December 2010. Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW. Reference for a preliminary ruling: Hof van Beroep te Brussel – Belgium. Case C-439/08.

model capable of overseeing a new economic scenario without political interference or without the temptation of privileging old public companies now operating under market conditions.

3.3 A final note on the new Spanish Competition Authority

The Spanish Parliament has just passed Act 3/2013, of 4 June, which creates the National Commission for Markets and Competition (CNMC). This new Commission brings both competition and the regulation of individual sectors (Energy, Telecommunications, Transportation and Audiovisuals) under a sole institution. The aim for this major reform is to obtain administrative savings by reducing areas of overlap, and at the same time to achieve notable improvements in efficiency and legal certainty.

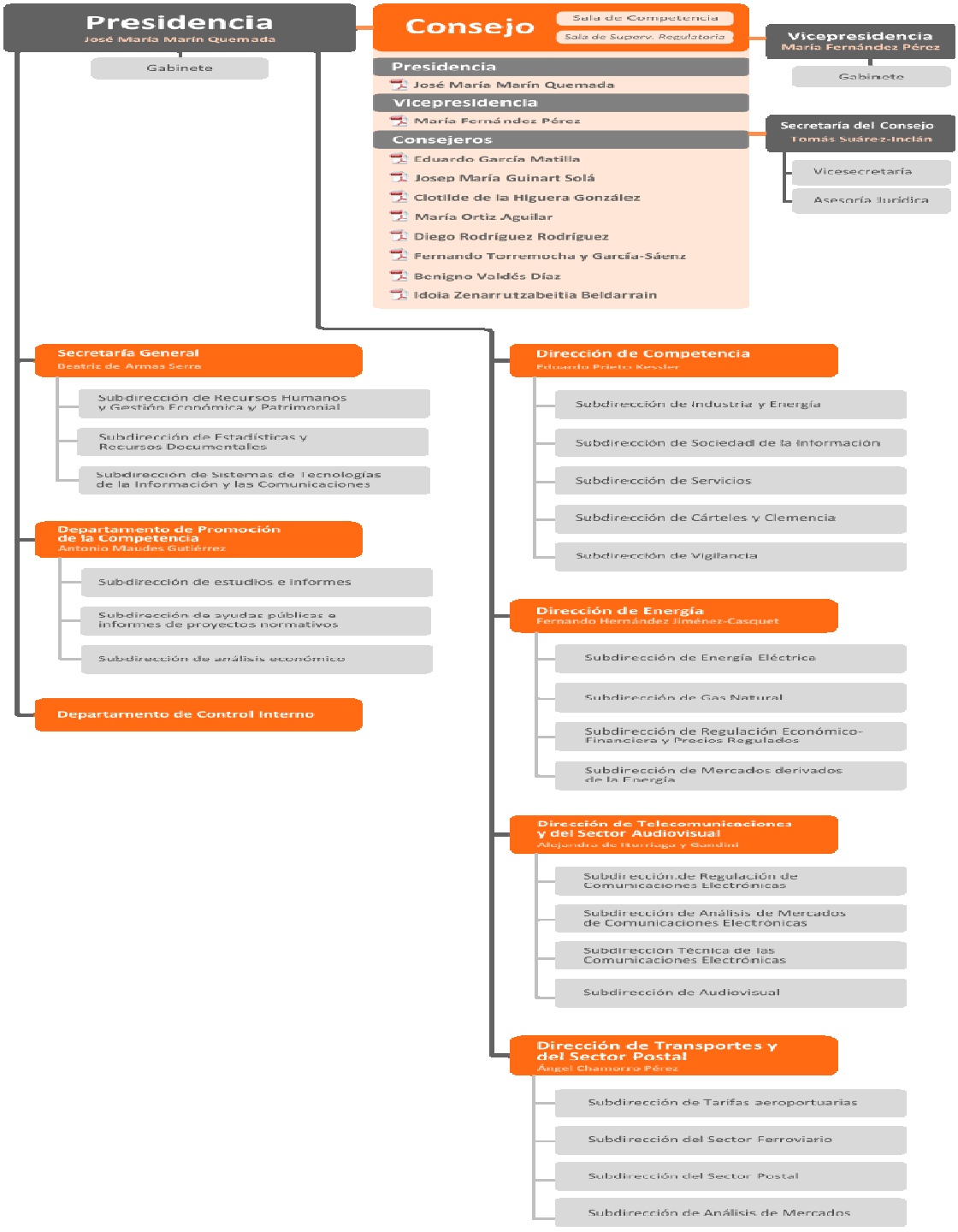
Even though this National Commission has been presented as a rationalising measure, it contains several elements that point in a different direction.

In the first place, although competition and regulation are closely related elements which interact in a particular sector, it is by no means clear that both should be under the same institutional setting. In fact, elsewhere in Europe only the Netherlands has also adopted this approach. While competition is designed to discipline illegal conduct (i.e., as a reactive instrument), regulation focuses more on fixing the market conditions (i.e., as a preventive instrument). Market entry can be used as a regulatory tool, but also impacts on relevant market structures and competition. In order to avoid these potential conflicts, the National Commission divides itself into two sections: a competition chamber, and a regulation chamber. The nine counsellors of the new institution rotate between the two sections during their mandate. In case of disagreement, the plenary of the CNMC will decide. Therefore, in its own internal structure, the CNMC reproduces the duality it is supposed to avoid.

Secondly, the huge number of cases the CNMC will have to deal with are entrusted to only nine counsellors and the president. This means that the institution will lose specialisation and expertise: nobody is capable of adjudicating on very complex issues

such as market dominance in telecommunications, price formation in energy, and infrastructure use in transportation. What is more, the nine recently appointed counsellors have a political background and none of them can be considered as having sectorial competence. This means that decisions will be taken by administrative staff rather than by counsellors, and there is no specific requirement of independence for staff serving in the CNMC.

The real power of the institution, then, moves from the General Council to Directorate Generals, as the organisational chart below shows. Even more worryingly, in this process of bureaucratisation some independent authorities are reduced to mere administrative units. The authority for audiovisuals and media, for example, is now merely a section inside the Directorate General of Telecommunications.


Presidencia
José María Marín Quemada
Gabinete
Consejo
Sala de Competencia
Sala de Superv. Regulatoria
Presidencia
José María Marín Quemada
Vicepresidencia
María Fernández Pérez
Consejeros
Eduardo García Matilla
Josep María Guinart Solá
Clotilde de la Higuera González
María Ortiz Aguilar
Diego Rodríguez Rodríguez
Fernando Torremocha y García-Sáenz
Benigno Valdés Díaz
Idoia Zenarrutzabeitia Beldarrain
Vicepresidencia
María Fernández Pérez
Gabinete
Secretaría del Consejo
Tomás Suárez-Inclán
Vicesecretaría
Asesoría Jurídica
Secretaría General
Beatriz de Armas Serra
Subdirección de Recursos Humanos y Gestión Económica y Patrimonial
Subdirección de Estadísticas y Recursos Documentales
Subdirección de Sistemas de Tecnologías de la Información y las Comunicaciones
Departamento de Promoción de la Competencia
Antonio Maudes Gutiérrez
Subdirección de estudios e informes
Subdirección de ayudas públicas e informes de proyectos normativos
Subdirección de análisis económico
Departamento de Control Interno
Dirección de Competencia
Eduardo Prieto Kessler
Subdirección de Industria y Energía
Subdirección de Sociedad de la Información
Subdirección de Servicios
Subdirección de Cárteles y Clemencia
Subdirección de Vigilancia
Dirección de Energía
Fernando Hernández Jiménez-Casquet
Subdirección de Energía Eléctrica
Subdirección de Gas Natural
Subdirección de Regulación Económico-Financiera y Precios Regulados
Subdirección de Mercados derivados de la Energía
Dirección de Telecomunicaciones y del Sector Audiovisual
Alejandro de Iturriaga y Gandini
Subdirección de Regulación de Comunicaciones Electrónicas
Subdirección de Análisis de Mercados de Comunicaciones Electrónicas
Subdirección Técnica de las Comunicaciones Electrónicas
Subdirección de Audiovisual
Dirección de Transportes y del Sector Postal
Ángel Chamorro Pérez
Subdirección de Tarifas aeroportuarias
Subdirección del Sector Ferroviario
Subdirección del Sector Postal
Subdirección de Análisis de Mercados

Finally, when Spain's conservative party (the PP) won the general elections in Novenber 2011, it faced a difficult scenario with regard to the independent regulators. The PP obtained a large Parliamentary majority, gaining control of 15 out of 17 regional governments and most of the country's leading municipalities. Prior to the elections, however, Bernardo Lorenzo Almedros had been appointed President of the Telecommunications Commission, on 10 May 2011; Alberto Lafuente Félez had been appointed President of the energy regulator on 15 June 2011, and finally, Joaquín García Bernaldo de Quirós had been designated President of the Competition Commission on 14 October 2011. The presidents of these three NRAs, appointed under the outgoing Socialist government, all had a six-year mandate and were to hold office until 2017. The new Cabinet now faced very important and sensitive cases under the legal mandate of those three presidents, without the possibility of changing them before 2017.

In the past, changes in the legal regulation of NRAs had been solved by maintaining the appointed presidents in office till the expiration of their mandate. In this case, the creation of the new CNMC led to the automatic dismissal of all three presidents and the appointment of new members. To put it bluntly, what an administrative reform could not achieve (i.e., the dismissal of NRA members at the will of the government) is now accomplished by a legislative act. The 2013 Act will both amend the legal nature of NRAs and allow the removal of their directors. In this way, administrative independence becomes contingent on legislative reform.

ANNEX I

a) Relevant Spanish legislation

Act 17/2006, of 5 June, on National Public Radio and Television

Act 7/2010, of 31 March, on Audiovisual Communication

Act 2/2011 of 4 March, on the Sustainable Economy

Act 39/2003, of 17 November, on the Railway Sector

Act 3/2013, of 4 June, on the creation of the National Commission for Markets and Competition

b) Spanish literature on the topics analysed

ARIÑO ORTIZ, G. y DE LA CUÉTARA, J.M. (2012) "Reguladores sectoriales y defensa de la competencia. Una aportación al debate de su fusión" *Ariño & Villar WP* nº 42.

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PADROS REIG, C. (2012) "Las características de la Administración pública reguladora del sector audiovisual." in GARCÍA DE ENTERRÍA, E. y ALONSO GARCÍA, E. (Coords).*Administración y Justícia: un análisis jurisprudencial. Liber Amicorum al Profesor T.R. Fernández Rodriguez*. Civitas, Madrid

PADROS REIG C. (2013) "Transformaciones administrativas producto de la liberalización económica: el caso del transporte ferroviario" *Revista de Derecho del Transporte*. vol.12

PADROS REIG, C. (forthcoming) "Comisión Nacional de los Mercados y la Competencia: FAQ" *Anuario de la Competencia*. ICO-UAB, Barcelona

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