

administrative/corporate

2-2013
June 2013

**NEW FEATURES INTRODUCED BY LAW 3/2013, OF JUNE 4, 2013
CREATING THE NATIONAL MARKETS AND ANTITRUST COMMISSION
IN THE AREA OF ELECTRONIC COMMUNICATIONS AND AUDIOVISUAL
MEDIA**

1. INTRODUCTION

Law 3/2013, of June 4, 2013 creating the National Markets and Antitrust Commission (the “**Law**”) was published in the Official State Gazette on June 5, 2013.

The Law will enter into force the day after its publication in the Official State Gazette, that is, June 6, 2013.

The purpose of the Law is to create the National Markets and Antitrust Commission (the “**Commission**” or the “**CNMC**”), which will bring together functions relating to the correct functioning of certain markets and regulated sectors, including electronic communications and audiovisual media. As a result of the creation of the CNMC, the Law provides for the demise of certain regulatory bodies, the functions of which will be assumed by the Commission within a maximum of four months from the entry into force of the Law, including the Telecommunications Market Commission (the “**CMT**”) and the State Audiovisual Media Council (the “**CEMA**”).

For more information on the process of creating the CNMC, its organization and functioning, please see [Administrative/Corporate Update 1-2013](#).

Set out below are some of the new Law’s key aspects in the areas of telecommunications, electronic communications and audiovisual media.

2. FUNCTIONS OF THE COMMISSION IN THE ELECTRONIC COMMUNICATIONS MARKET

Article 6 of the Law regulates the Commission’s functions in the area of supervision and control of the electronic communications market. The CNMC takes over all of the functions of the defunct CMT in this area: definition and analysis of the relevant markets; identification of operators with significant market power; imposition of specific obligations as established in General Telecommunications Law 32/2003, of November 3, 2003 (the

“LGTel”) and its implementing regulations in the event there is found to be no effective competition; and resolution of disputes between operators in the electronic communications markets, such as disputes over access, interconnection, interoperability, conditions for shared use of infrastructure or conditions for offering wholesale access services.

3. FUNCTIONS OF THE MINISTRY OF INDUSTRY, ENERGY AND TOURISM IN THE AREA OF TELECOMMUNICATIONS

With respect to the provision of services fees (*tasas*) and the pursuit of activities relating to the telecommunications industry, the Ministry of Industry, Energy and Tourism will be responsible for calculating the general operator fee (section 1 of Schedule 1 LGTel) and the telecommunications fees (Section 4 of Schedule 1 LGTel) previously managed by the CMT. Telephone numbering fees and the fee for reservation of use of the radio spectrum will continue to be calculated by the Ministry.

4. FUNCTIONS OF THE COMMISSION REGARDING AUDIOVISUAL MEDIA

Regarding audiovisual media, article 9 of the Law provides that the CNMC will now be responsible for ensuring the proper functioning of the audiovisual market, based on the provisions contained in General Audiovisual Media Law 7/2010, of March 30, 2010 (the “LGCA”). In general terms, the CNMC will perform supervisory and control functions regarding the proper functioning of this market, inheriting the functions that were to have been discharged by the CEMA and which, since the CEMA was never fully created, are currently shared between the CMT and the Ministry of Industry, Energy and Tourism.

In particular, these functions will consist of monitoring compliance with the obligations imposed on service providers regarding transparency in audiovisual media, annual broadcasts of European works and up-front financing of the production of these kinds of works as provided for in the LGCA.

The CNMC will also supervise compliance with current legislation by audiovisual services providers in all matters relating to the rights of minors and persons with disabilities, and advertising.

The Law authorizes the CNMC to control the exclusive engagement of audiovisual services, the broadcast of content appearing in the catalog of general-interest events, and the trading of Spanish soccer competition rights.

The CNMC will guarantee the freedom to receive audiovisual services in Spain from operators located in another EU Member State, restricting such broadcasts where necessary due to inappropriate content. It should be noted that the CNMC will take measures to safeguard national legislation on service providers whose audiovisual media are entirely or mainly aimed at Spain, where such providers have established themselves in another Member State in order to circumvent stricter Spanish legislation.

The CNMC will also have jurisdiction to resolve audiovisual media disputes and, in particular, disputes between agents operating in these markets (such as disputes over the

allocation of radio or TV channels, the operation of electronic communications networks and audiovisual media services and/or access to stadiums and sports venues by audiovisual media service providers).

In addition, the CNMC will be responsible for collecting contributions to the system for funding Corporación de Radio Televisión Española, which previously fell within the CMT's remit.

5. FUNCTIONS OF THE MINISTRY OF INDUSTRY, ENERGY AND TOURISM AND THE MINISTRY OF THE PRIME MINISTER'S OFFICE REGARDING AUDIOVISUAL MEDIA

The additional provisions of the Law regulate the absorption of certain functions in the area of audiovisual media by bodies other than the CNMC.

In particular, the Law entrusts certain functions to the Ministry of Industry, Energy and Tourism: receipt of notices of commencement of operations from audiovisual media service providers; keeping of the State register of audiovisual media service providers; decisions on the renewal, term, modification and termination of, and legal transactions involving, enabling instruments for audiovisual media services. The Ministry will also review compliance with conditions for the acquisition of holdings between operators and certify network broadcasts by radio audiovisual media service providers.

In turn, the Ministry of the Prime Minister's Office will be responsible for approving the general-interest events catalog containing events of general interest to the public that must be broadcast nationwide on free-to-air television, subject to consultation of audiovisual media service providers and organizers of sporting events.

6. PUNITIVE AND OTHER POWERS OF THE CNMC IN TELECOMMUNICATIONS AND AUDIOVISUAL MATTERS

The Law grants the CNMC inspection and supervision powers, as well as punitive powers. In particular, with respect to audiovisual media, the CNMC will have the punitive and inspection powers formerly held by the CEMA in accordance with the provisions of Title VI of the LGCA and, with respect to telecommunications, the CNMC will take on the functions of the CMT in accordance with the provisions of Title VIII of the LGTel (the types of prohibited conduct and classification of infringements by degree of severity remain unchanged and are subject to the LGTel).

Any decisions or rulings adopted by the Chairman or by the Board set up within the CNMC will exhaust proceedings in the administrative jurisdiction and may only be appealed to or challenged before the judicial review courts. Decisions or rulings adopted by bodies other than the Chairman or the CNMC Board may be appealed in accordance with the provisions of Law 30/1992, of November 30, 1992.

As with the CMT, the CNMC can issue binding circulars and informative circulars. With a view to complying with the principles of transparency and responsibility, the CNMC must publish all reports issued by it and, in particular, the annual report on its activities, yearly

and multiyear plans, and its annual economic reports on electronic communications and audiovisual media.

7. DISBANDING OF THE STATE AUDIOVISUAL MEDIA COUNCIL AND THE TELECOMMUNICATIONS MARKET COMMISSION AND THE TRANSITION PROCESS

As already indicated, the CNMC's creation will entail the demise of the CMT and the CEMA, even though the latter had yet to become fully operational.

Nonetheless, the CMT and the Ministry of Industry, Energy and Tourism, which currently discharge the functions granted to the CEMA by the LGCA, will continue to discharge such functions on a transitional basis, until the new CNMC is up and running, and the members of such bodies will temporarily remain in office during this period.

With respect to the functions to be transferred to the relevant Ministries, the Law provides that the CNMC will perform the functions on a transitional basis until such time as the ministerial departments have the necessary resources to actually take on such functions, without establishing any time frame in this regard.

The Law also provides for continuity with respect to proceedings commenced prior to its entry into force. In this connection, the Law recognizes that the creation and start-up of the CNMC may be considered an extraordinary event justifying an extension of the deadline for deciding on proceedings subject to time bars or affected by administrative silence.

The additional provisions of the Law also envisage the possibility of creating advisory boards for sectors including telecommunications and audiovisual media, the functioning, composition and organization of which must be defined in regulations.

With respect to the CNMC's seat, while its headquarters will be in Madrid (without prejudice to regulations being made to provide for the existence of other offices), the Law envisages that the current telecommunications headquarters in Barcelona will be maintained and will house the Telecommunications and Audiovisual Sector Directorate.

Moreover, the Law provides that the civil service personnel who work at the CMT will be integrated into either the CNMC or the Central Government with the same rights and obligations as those held by them until now. Likewise, the CMT's non-civil service employees will be integrated into the CNMC and, exceptionally, into the ministerial departments where their integration is necessary for performing the functions attributed to the different Ministries by the Law.

8. REPEAL AND AMENDMENT OF PROVISIONS ON ELECTRONIC COMMUNICATIONS AND AUDIOVISUAL MEDIA

The Law establishes that the references made in current legislation to the CMT and to the CEMA must be deemed to be made to the CNMC or to the relevant Ministry, according to the function in question. In this connection, the Law repeals article 48 LGTel, with the

exception of subarticle 4 relating to the CMT, and Title V of the LGCA relating to the CEMA.

Lastly, the following aspects of the LGTel are also amended:

- Article 13 bis:

Subarticle 1 of article 13 bis LGTel is amended so that when the CNMC estimates that there is no effective competition in the wholesale access product markets, it will be authorized to impose on vertically integrated operators with significant market power the obligation to transfer activities relating to the supply of other products to an independent business unit. Under the previous wording of this article, the CMT could only notify the Ministry and the Ministry, in turn, could propose the imposition of such measures to the Government.

In the same vein, subarticle 2 establishes that the CNMC itself will propose the separation of functions and prepare the corresponding proposal which, as indicated in a new subarticle 4, will be submitted to the European Commission once the Ministry of Industry, Energy and Tourism and the Ministry of Economy and Competitiveness have issued the relevant report.

- Section 1 of Schedule I:

Section I of Schedule I LGTel has been amended so that the cap on the annual fee that all operators must pay is reduced from 0.2% to 0.15% of gross operating revenues. The amount of this fee may not exceed the expenses incurred (including management, control and execution expenses). For such purposes, the Ministry of Industry, Energy and Tourism will publish a report before April 30 each year setting out any expenses incurred by the national regulatory authorities in the previous year.

The amount allocated annually to the CNMC out of the General State Budget will be based on the expenses incurred in the previous year. The amount of the fee will be calculated by multiplying the amount of the expenses incurred by the national regulatory authorities, as referred to in article 68 LGTel, by the percentage represented by the individual gross operating revenues of each telecommunications operator in the preceding year with respect to the total gross operating revenues obtained in the same year by all telecommunications operators.

The deadlines and requirements for telecommunications operators to notify the Ministry of the amount of their gross operating revenues will be established by regulations.

- Section 5 of Schedule I:

A new section 5 is included in Schedule I to the LGTel and provides that the Ministry of Industry, Energy and Tourism will manage and collect the fees indicated in Schedule I in the voluntary period.

This publication contains information of a general nature and, accordingly, does not constitute a professional opinion or legal advice.

© June 2013. J&A Garrigues, S.L.P. All rights reserved. The exploitation, reproduction, distribution, public communication or transformation, in whole or in part, of this document is prohibited without the written consent of J&A Garrigues, S.L.P.