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**NEW FEATURES INTRODUCED BY LAW 3/2013, OF JUNE 4, 2013,
CREATING THE NATIONAL MARKETS AND ANTITRUST COMMISSION
IN RELATION TO THE ENERGY INDUSTRY**

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 the energy industry. As a result of the creation of the CNMC, the Law provides for the demise of certain pre-existing 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, among others, the National Energy Commission (the “**CNE**”).

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

Set out below are some of the key aspects of the new Law that affect the energy industry.

**2. THE COMMISSION’S SUPERVISION AND CONTROL FUNCTIONS IN
THE ELECTRICITY AND NATURAL GAS INDUSTRIES**

Article 7 of the Law regulates the Commission’s functions supervising and controlling the correct operation of the electricity and natural gas industries. For these purposes, the CNMC takes over all of the functions that additional provision no. 11 of Oil and Gas Industry Law 34/1998, of October 7, 1998 (the “**LSH**”) attributed to the defunct CNE in this area, except for those passing to the Ministry of Industry, Energy and Tourism (“**MINETUR**”), as will be described in detail in the following section.

In addition, the Law confers new functions on the CNMC in the area of energy so that the CNMC can effectively ensure the correct functioning of the system and the energy markets. Such new functions include most notably the following: i) supervising investments in generating capacity so as to ensure security of supply; ii) managing the system for guaranteeing the origin of electricity produced from renewable sources and high-efficiency cogeneration; iii) managing the system for comparing electricity and natural gas supply prices, based on offers made by wholesalers, and the preparation of reports comparing and tracking the performance of electricity and gas supply prices and of the retail markets; iv) calculating the balance of supply losses in each transmission network; v) approving the contract between the owner of the facilities and the manager of the independent network setting out in detail the contractual conditions and the responsibilities of each party; vi) conducting procedures for exempting third-party access to gas facilities; and vii) inspecting compliance with the requirements incumbent on natural gas and electricity wholesalers, and on charging station managers and direct consumers in the market.

The CNMC will also have jurisdiction to resolve any disputes between operators in the electricity and gas markets in the following areas: i) disputes over agreements on third-party access to transmission or distribution networks; ii) disputes over the economic and technical management of the system and transmission, including connections between facilities.

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

According to the Preamble to the Law, after the Law enters into force, MINETUR will take over all administrative tasks hitherto performed by the CNE and not requiring special independence, as well as tasks that were of negligible use for achieving the Commission's objectives. Accordingly, MINETUR will take over the following functions:

1. In the electricity industry:
 - (a) To inspect, within the scope of its powers: compliance by facilities with technical conditions; compliance with requirements established in authorizations; the correct and effective use of local coal at power plants entitled to receive the premium for consuming local coal; the economic conditions and activities of operators insofar as they may affect the application of tariffs, pricing and remuneration criteria for energy activities; the actual availability of generating facilities under the ordinary regime; proper invoicing, and the terms and conditions of sale, by distributors and wholesalers to eligible consumers and customers; the continuity of power supply; service quality; and the actual unbundling of these activities where required.
 - (b) To decide on initiating and handling enforcement/penalty proceedings, where they fall within the jurisdiction of the Central Government, because bringing and handling such proceedings does not fall within the CNMC's remit, and, where so required, to report on enforcement/penalty proceedings initiated by the various public authorities.

- (c) To report on, deal with and process, in coordination with the competent authorities, through action protocols, any claims made by electricity consumers and to make available to them all the necessary information on their rights, the applicable legislation and the dispute resolution mechanisms available to them.

MINETUR will report, at least every six monthly, to the CNMC on the steps taken, including information on the number of claims reported on, dealt with and processed in order to facilitate the CNMC's task of supervising the functioning of the retail markets.

- (d) To settle electricity transmission and distribution costs, ongoing system operating costs and any other costs established for the system as a whole, where their settlement is expressly entrusted to it and to send CNMC all the necessary information for preparing toll methodologies.
- (e) To supervise the activity of the Office for Changing Supplier.

2. In the oil and gas industry:

- (a) To inspect, within the scope of its powers: compliance by facilities with technical conditions; compliance with requirements established in authorizations; the economic conditions and activities of operators insofar as they may affect the application of tariffs, pricing and remuneration criteria for oil and gas activities; the actual availability of gas facilities; proper invoicing, and the terms and conditions of sale, by distributors to consumers, as regards network access, and by wholesalers; the continuity of natural gas supply; service quality; as well as the actual unbundling of these activities where required.
- (b) To decide, within the scope of application of the LSH, on initiating and handling enforcement/penalty proceedings, where they fall within the jurisdiction of the Central Government, and, where so required, to report on enforcement/penalty proceedings initiated by the various public authorities, without prejudice to the powers attributed to *Corporación de Reservas Estratégicas de Productos Petrolíferos* (i.e., the Oil Product Strategic Reserves Corporation) in article 52.4 LSH or to the exclusive powers of other public authority bodies.
- (c) To make settlements relating to the revenues obtained from tolls and charges for the use of Core Network facilities, secondary transmission and distribution referred to in article 96 LSH, and to communicate them to the interested parties.
- (d) To report on, deal with and process, in coordination with the competent authorities, through action protocols, any claims made by natural gas consumers and to make available to them all the necessary information on their rights, the applicable legislation and the dispute resolution mechanisms available to them.

MINETUR will report, at least every six months, to the CNMC on the steps taken, including information on the number of claims reported on, dealt with and processed in order to facilitate the CNMC's task of supervising the functioning of the retail markets.

- (e) To issue certificates and manage the mechanism for certifying the consumption and sale of biofuels.
- (f) To supervise the activity of the Office for Changing Supplier.
- (g) To exercise the powers attributed by the legislation in force to the CNE in the area of liquid hydrocarbons.

4. THE TAKING-UP OF STAKES IN THE ENERGY INDUSTRY

As from the entry into force of the Law, the concentration control powers attributed to the CNE under the so-called "Function 14" will be taken over by MINETUR, which will scrutinize the following transactions:

- (a) The taking-up of stakes in companies or by companies that engage in activities that are considered regulated activities, that consist in the operation of the electricity market, or that involve activities in island or nonmainland territories pursuant to the provisions of Electricity Industry Law 54/1997, of November 27, 1997 (the "LSE").
- (b) The taking-up of stakes in companies or by companies that engage in activities that are considered regulated activities, that consist in the technical management of the gas system pursuant to the provisions of the LSH, or that engage in oil and gas industry activities, such as oil refining, oil pipeline transmission, or oil product storage.
- (c) The taking-up of stakes in companies or by companies that own assets necessary to engage in the activities indicated in letters a) and b), or strategic energy industry assets included in the National Catalog of critical infrastructure in accordance with the provisions of Law 8/2011, of April 28, 2011, establishing measures to protect critical infrastructure, and its implementing regulations. In any event, the following will be considered strategic assets: nuclear power plants and coal-fired power plants of special relevance in the consumption of nationally-produced coal, as well as oil refineries, oil pipelines and oil product storage facilities.
- (d) Acquisition of the assets mentioned in letter c) above.

For these purposes, companies that engage in activities that are considered regulated activities in accordance with the LSE and/or the LSH must, within fifteen (15) days following the performance of the transaction in question, disclose to the Office of the Secretary of State for Energy at MINETUR:

1. Acquisitions made directly, or through companies controlled by them pursuant to the rules in article 42.1 of the Commercial Code, of stakes in other commercial companies or assets of any nature that, having regard to their value or other circumstances, have a material impact or significant effect on the pursuit of the activities of the company disclosing the transaction.
2. The acquisition of stakes representing a percentage of their capital stock that grants a significant influence over their management, in companies that, directly or through companies controlled by them pursuant to the rules in article 42.1 of the Commercial Code, engage in activities included in letters a) to d) above, or own the assets indicated. Likewise, the direct acquisition of the assets mentioned in letter d) above must be disclosed.

To determine the percentage stake triggering the disclosure requirement, any agreements that the acquiring company may have with other acquiring parties or shareholders for the joint or coordinated exercise of voting rights at the target company will be taken into consideration.

Any modifications considered in isolation or as a whole that may entail a significant change in the stake must also be reported by the acquiring company.

If MINETUR considers that there is an actual and sufficiently serious threat to the electricity, gas and oil supply guarantee within the scope of the acquiring company's activities, it may, in all cases respecting the principle of proportionality and protection of the general interest, set conditions for the pursuit of the business of the companies subject to the disclosed transactions, as well as any specific obligations imposed on the acquiring company to ensure compliance. These risks will refer to the following aspects, taking into consideration, for these purposes, the stakes that the acquiring company owns or intends to acquire in other companies or assets that are subject to the rules on control of the taking-up of stakes in the energy industry:

- (a) security and quality of supply understood as the uninterrupted physical availability of the products or services on the market at reasonable prices in the short or long term to all users, regardless of their geographical location;
- (b) security against the risk of an investment or of insufficient infrastructure maintenance that make it impossible to ensure, on an ongoing basis, a minimum set of required services to guarantee supply. For these purposes, account will be taken of the level of indebtedness to ensure the investments, as well as the fulfillment of the commitments given in this respect.

- (c) Nonfulfillment of the requirements relating to the legal, technical, economic and financial capacity requirements of the acquiring company or target company, in accordance with the provisions of the specifically applicable legislation and, in particular, Nuclear Energy Law 25/1964, of April 29, 1964, the LSE and the LSH, as well as their implementing regulations.

MINETUR's decision must be adopted on a reasoned basis and notified within a maximum of 30 days after disclosure of the transaction, following a report by the CNMC, which will not be binding. MINETUR will also be responsible for supervising the fulfillment of any conditions imposed, and the companies concerned must fulfill any requests for information that may be made for these purposes.

Lastly, the Law establishes that where the acquisition of stakes affects the managers of the electricity or gas transmission network, including independent network managers, regard will be had to the provisions of the LSE and of the LSH.

5. ENERGY CONSULTATIVE COUNCIL

Additional provision 15 of the Law creates the Energy Consultative Council ("CCE"), as a vehicle for the participation and consultation of MINETUR in matters falling within the remit of the Office of the Secretary of State for Energy.

The functions of the CCE, which will be chaired by the Secretary of State for Energy (or such person as is delegated this responsibility by the Secretary of State), will include studying, discussing and making proposals on energy and mining policy, and will deal with the matters that the Government and MINETUR submit to it. In particular, the CCE will report on the drafting of general provisions and circulars by the CNMC on energy matters.

6. PUNITIVE AND OTHER POWERS OF THE CNMC IN THE AREA OF ENERGY

The Law establishes that the CNMC's career civil service personnel will be deemed to be law enforcement officials and may conduct as many investigations as may be necessary at enterprises and business associations for the due application of the Law. Enterprises and business associations are required to accede to any inspections authorized by the competent body.

In addition, the Law gives the CNMC the punitive powers previously attributed by the LSE and the LSH to the CNE. Accordingly, when the Law enters into force, the CNMC may, within its jurisdiction and the scope of the functions entrusted to it, impose penalties on the terms and conditions established in article 66 LSE and article 116 LSH.

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.

In addition, 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 provisions, decisions, resolutions and reports issued by it and, in particular, reports on draft legislation, the annual report on its activities, yearly and multiyear plans, and its economic reports on energy, to be issued annually.

7. FEES

The Law establishes a number of fees and payments of a public nature related to the activities and services regulated in the Law, and which must be satisfied to the Public Treasury. For the discharge of the functions relating to the energy industry, the Law establishes fees applicable to the provision of services and the pursuit of activities in relation to the oil and gas industries (liquid and gaseous hydrocarbons) and the electricity industry. The chargeable event for these fees is the pursuit of activities by MINETUR and the CNMC in relation to these industries in accordance with the provisions of this Law, the LSH, and the LSE.

8. REPEAL OF PROVISIONS ON ENERGY

The Law establishes that the references made in current legislation to the CNE 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 additional provision no. 11, with the exception of subarticle 6, and additional provision no. 12 LSH. The Law also amends articles 66 LSE and article 116 LSH, in order to attribute to the CNMC the punitive power previously held by the CNE until the Law entered into force.

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