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**LAW 3/2013 CREATING THE NATIONAL MARKETS
AND ANTITRUST COMMISSION**

On June 5, 2013, the Official State Gazette published Law 3/2013, of June 4, 2013, creating the National Markets and Antitrust Commission. The Law entered into force on the following day.

The new Law makes sweeping changes to the current system of regulatory supervision by creating a new body, the National Markets and Antitrust Commission (CNMC), which encompasses the existing National Antitrust Commission and the majority of industry supervisory authorities, namely, the National Energy Commission, the Telecommunications Market Commission, the Rail Regulation Committee, the Airport Economic Regulation Commission, and the National Postal Industry Commission. The Law also abandons the plan to set up a future National Gaming Commission and a State Council for Audiovisual Media. However, financial supervisory authorities (National Securities Market Commission, Bank of Spain) and the Nuclear Safety Council are not included within the scope of application of the Law and, therefore, remain as separate bodies.

The Law merely sets out the new institutional structure, leaving the legislative content in the areas of Antitrust law and compliance largely untouched. In particular, the definitions of prohibited conduct, the system for control of concentrations and the rules on monitoring State aid remain unchanged, as do the specific rules in the different regulated sectors.

The creation of the CNMC stems from a critical review of what the Preamble to the Law calls “the proliferation of bodies with supervisory powers,” a situation in practice that can undermine legal certainty and institutional confidence. The new approach should allow economies of scale to be harnessed and an integrated view to be promoted, in line with the trends observed in some neighboring countries. At the same time, the Law reviews the powers attributed to the newly-integrated authorities, removing those that do not require the involvement of an independent authority and transferring them to the relevant Ministries in each area.

Throughout its passage through parliament, the Bill that is now on the statute books was met with heavy criticism from different quarters, not least in the reports issued by the soon-to-be-integrated authorities, which were generally against the reform. The media also echoed various warnings issued by the European institutions. Observations received from Brussels gave rise to the presentation of a significant number of amendments to the Bill in April, and their acceptance by parliament has enabled the rapid enactment of the Law.

1. KEY ELEMENTS OF THE LAW

The Law contains thirty-nine articles grouped into five chapters. Particularly notable is the large number of additional provisions (eighteen) and transitional provisions (ten), which deal with the procedure for creating the new authority and eliminating the existing bodies, and list the powers reassigned to ministerial departments. A summary of the most important provisions is set out below, following the order of the chapters of the Law.

1.1 Nature and Legal Regime

Chapter I of the Law defines the key characteristics of the new Commission: its nature, purpose, functional independence and coordination with the competent autonomous community government bodies and central government. The National Markets and Antitrust Commission is attached to the Ministry of Economy and Competitiveness, notwithstanding its relationships with the competent Ministries in each area (in exercise of the functions referred to in articles 5 to 12 of the Law).

1.2 Functions

Chapter II of the Law defines the functions of the new Commission.

In general, the CNMC takes over the functions of the former National Antitrust Commission with no major changes. However, in some regulated sectors a significant number of powers have been transferred to the corresponding ministerial departments.

Specifically, with respect to *Antitrust* matters, article 5 of the new Law attributes practically all of the functions entrusted to the National Antitrust Commission under Antitrust Law 15/2007, of July 3, 2007 (“LDC”) to the CNMC. The new wording eliminates some references contained in the previous legislation to functions of coordination and promotion of competition and, in particular, to the CNMC’s ability to report at its own initiative on legislative proposals affecting competition, although the CNMC will still conduct studies on, and investigations into, competition matters.

With regard to *electronic communications*, the Law confers the powers of the former Telecommunications Market Commission on the CNMC, without attributing any new functions in this area to the Ministry of Industry, Energy and Tourism, with the exception of the collection of certain taxes. However, in the *audiovisual* field, the Law transfers to that Ministry functions which had been entrusted to the State Council for Audiovisual Media and which the Telecommunications Market Commission was provisionally discharging, such as receiving notices of commencement of operations or keeping the State register of audiovisual media service providers. (For more information, please [see Administrative/Corporate Law Update 2/2013](#)).

In *energy* matters, the Law also transfers the functions of inspection, initiation and conduct of certain enforcement/penalty proceedings, responding to claims made by consumers and informing consumers of their rights and dispute resolution methods, settlement of regulated activities and supervision of the work done by the Office for Switching Energy Supplier to the Ministry of Industry, Energy and Tourism. As from the entry into force of the Law, the concentration control powers attributed to the CNE under

the so-called “Function 14” now fall within the remit of the Ministry, without prejudice to the CNMC’s scrutiny of concentrations. (For more information, please see [Administrative/Corporate Law Update 2/2013](#)).

In relation to the *postal industry*, the Law attributes the functions formerly discharged by the National Postal Industry Commission to the CNMC on the terms established by the industry legislation, and the Ministry of Development retains the duties of informing users, handling complaints and claims by users relating to breach of obligations by postal operators and inspection and punitive powers in this regard.

Lastly, as regards *transportation*, the CNMC inherits functions in the areas of supervision of the procedure for transparency and consultation of modification or review of airport charges by AENA (the Spanish airports authority), previously carried out by the Airport Economic Regulation Commission, as well as the functions falling to the Rail Regulation Committee and envisaged in Law 39/2003, of November 17, 2003.

1.3 Organization and Functioning

Chapter III of the Law sets out the institutional framework, notable for its dual structure, in which regulatory and Antitrust functions coexist. Both functions are performed on two levels: on the one hand, by “governing bodies”, that is, the Board and Chairman, and on the other, by four “directorates”, each tasked with investigating cases in their respective areas.

The Board is composed of ten members and is divided into two five-member Chambers, one dedicated to Antitrust matters and chaired by the Chairman of the CNMC, and one dedicated to regulatory supervision, chaired by the Deputy Chairman of the CNMC. The Plenum of the Board has the function of coordinating and unifying the criteria of the two Chambers and the Law establishes a system of reports to be prepared by each Chamber on certain matters falling under the jurisdiction of the other. The Plenum also acts as the governing body.

Board members, including the Chairman and Deputy Chairman, will be appointed by the Government at the proposal of the Minister for Economy and Competitiveness. Unlike the situation under the current Antitrust Law, candidates must not only appear before the corresponding committee of the Lower House of Parliament but the committee in question may veto the appointment in a decision adopted by absolute majority.

There are four directorates: an Antitrust Directorate; a Telecommunications and Audiovisual Industry Directorate; an Energy Directorate; and a Transportation and Postal Industry Directorate.

The Law grants the Plenum of the Board the power to appoint and remove the heads of each Directorate at the Chairman’s proposal. This power, introduced in the final phase of the Bill’s passage through parliament, further safeguards the independence of such heads when compared with the initial proposal, which contemplated their appointment and removal by the Government.

1.4 Rules of Conduct and Powers

Chapter IV of the Law sets out the powers of the new Commission, including powers to inspect, impose penalties and issue legislative circulars, as well other provisions regarding personnel and the economic regime.

The CNMC may only use data and information obtained within the scope of application of the new Law and the LDC. The new Commission may share confidential information with the relevant Ministries, autonomous community governments, the European Commission, authorities of other EU Member States within the scope of their powers, and with the courts in the relevant court proceedings. However, the possibility of sharing confidential information with these bodies does not extend to data collected under the Antitrust Law.

1.5 Transparency and responsibility

The last chapter of the Law noticeably increases the transparency obligations already provided for in the current Antitrust Law, imposing an obligation on the CNMC to report regularly and in great detail on its activities. The Law also contemplates the creation of an internal control body, the functional dependence and reporting capability of which will be governed by the principles of impartiality, objectivity and avoidance of conflicts of interest.

2. TRANSITIONAL PERIODS

Following the enactment of the Law, the Council of Ministers will approve the CNMC's Organizational Charter in a Royal Decree. Immediately afterwards, the Minister for Economy and Competitiveness will propose the appointment of the members of the Board of the new CNMC to the Government and the Lower House of Parliament may veto such appointments within one month. Once the Royal Decree containing the appointments has been published, the CNMC will be created by appointing its Board and the Board will, in turn, have one month to adopt its first decisions regarding its internal organization. The Commission will become operational on the date determined for such purpose by the Minister for Economy and Competitiveness and, in all cases, within four months following the entry into force of the Law.

The creation of the Commission will mean the demise of the regulatory bodies that have been discharging Antitrust functions to date in the different industries and markets. However, these bodies 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.

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