

IMPACT OF COMPETITION ADVOCACY AND MARKET UNITY REFORMS IN SPAIN

SUMMARY FOR THE 2023 ANTITRUST WRITING AWARDS

REFORM/ SC2020/062

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1. INTRODUCTION

The National Commission of Markets and Competition (CNMC) is the independent public institution that safeguards, preserves and promotes proper market functioning in Spain, as well as transparency and the existence of effective competition and regulation across all production sectors and markets to the benefit of consumers and users. Since its creation in 2013, the CNMC has been prolific in its advocacy activity, issuing general market reports and competition enhancing opinions on draft regulations and on cases arising from market unity claims filed by interested parties. It has also, on several occasions, used its most powerful instrument: the challenge in court of acts by public authorities subject to administrative law and general provisions of subordinate legislation which impede the maintenance of effective competition in the markets.

However, the effectiveness of such a diverse advocacy activity is difficult to monitor and it is also hard to ascertain compliance with the large and heterogeneous set of recommendations issued by CNMC.

Moreover, some regulatory recommendations, especially those that have a direct impact on specific economic groups, need to be well backed by impact data to ensure support. In this regard, CNMC carries out compliance assessments of its recommendations. However, these types of detailed analyses are highly resource and time consuming and cannot be performed for every single advocacy act.

To address these shortcomings, CNMC was interested in improving its advocacy tools. Firstly, by having a better and systematic knowledge of the effectiveness of its previous acts and understanding the extent to which the different authorities have followed its recommendations. Secondly, by applying a methodology and a set of indicators to assess the impact of its recommendations, which may support CNMC in its advocacy efforts and prioritization of resources.

As a result, in 2019, CNMC submitted a project to the European Commission's 2017-2020 Structural Reform Support Program to assess the degree of follow-up of its recommendations on competition advocacy and market unity.

The project has been funded by the European Union through the Technical Support Instrument, and implemented independently by KPMG and VVA, in cooperation with the European Commission's Directorate-General for Structural Reforms Support (DG REFORM). The implementation period has been September 2020 - March 2022.

The aim of this project is to enhance the capacity of the Spanish authorities to formulate and implement reforms aligned to better regulation principles, pursuing an integrated and consistent approach across sectors and horizontal policies. It

contributes to this objective by improving the functioning of two relevant instruments: (i) the Advocacy activity of CNMC¹ and (ii) the Market Unity mechanisms².

The project responds to the commitment adopted by the CNMC in the 2021-26 Strategic Plan to evaluate the impact of its actions in order to improve the achievement of its objectives (strategic action 7).

2. PROJECT DESCRIPTION

The project, inspired by a holistic perspective, was organized in several phases:

- Phase 1: Initial organization and team experts' mobilization
- Phase 2: Database on the regulatory and administrative acts
- Phase 3: Report
- Phase 4: Design of an impact assessment methodology: application to selected cases
- Phase 5: Manual and training on impact assessment methodology
- Phase 6: Summary and conclusions of the project

Each phase includes a deliverable, which collects all the information resulting from the work that has been carried out. Each of these documents is focused on the final recipient of the document, but all of them have been subject of debate among DG REFORM and the CNMC in order to obtain a holistic and enriched result with different points of view.

The following paragraphs of this section provide a brief summary of the main phases and deliverables of the project. For a detailed description, reports of the [executive summary](#)³ and main [deliverables](#) are available on the CNMC website.

The first deliverable of the project consisted of the compilation of a large database, based mainly on the OECD Competition Assessment Toolkit, of all the CNMC's advocacy actions during the analysis period, which covered Market Studies, Regulatory proposals, Reports on Regulatory and Administrative process, Reports on Market Unity and Judicial Appeals, as shown in Chart 1. This

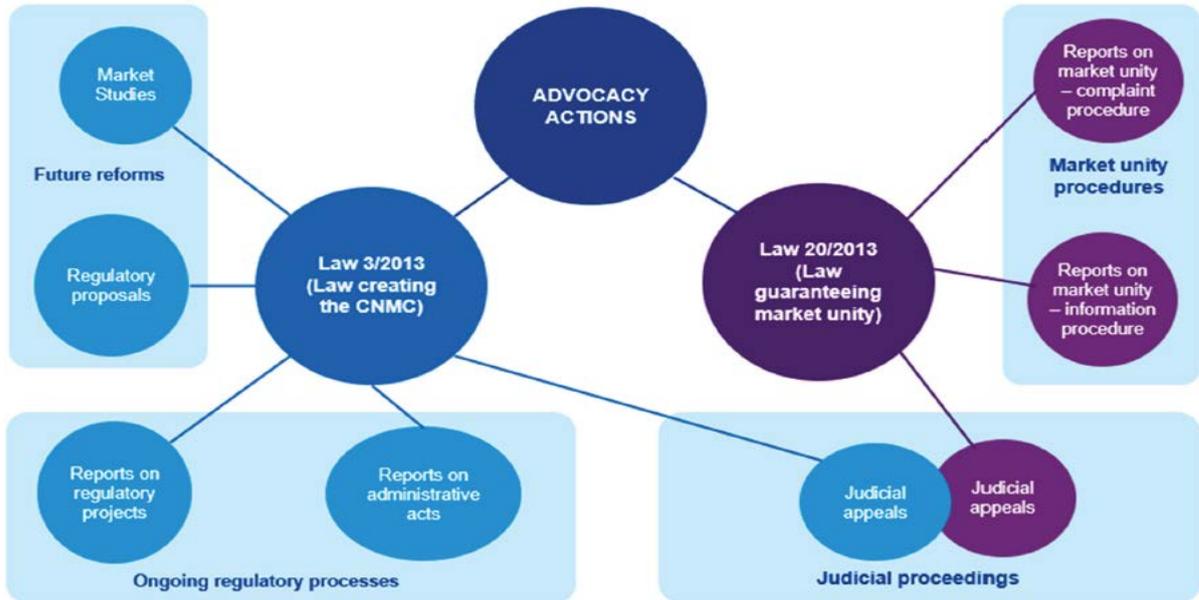
¹ Regulated by CNMC Creation Law (*Ley 3/2013, de 4 de junio, de creación de la Comisión Nacional de los Mercados y la Competencia*).

² In which the CNMC intervenes in accordance with the provisions of articles 26, 27 and 28 of the Market Unity Guarantee Law (*Ley 20/2013, de 9 de diciembre, de garantía de la unidad de mercado*).

³ Only available in Spanish.

toolkit is a very useful guidance to evaluate draft laws and regulations in order to identify which situations or market failures might require a competition assessment.

Chart 1. CNMC Advocacy Actions



Source: own elaboration based on the work provided by the consultants

The database revealed, as displayed in Table 1, a prolific advocacy and market unity activity during the period under study, with more than 510 actions (including court challenges) and the issuance of more than 2,500 recommendations. The project also showed that the largest number of CNMC recommendations fell into category A of the OECD Assessment Toolkit (“limits the number or range of supplier”), followed by B (“limits the ability of suppliers to compete”) and C (“reduces the incentives of suppliers to compete”).

Table 1. Distribution of CNMC Advocacy Acts by number of reports and number of recommendations

	Type of report	Number of reports	Number of recommendations / claims ²
Law 3/2013	Market Studies	11	122
	Regulatory Proposals	11	38
	IPN Reports	113	1,412
	INF Reports	54	442
	Article 5.4 Appeals	19	70
Law 20/2013	Article 26 Reports	127	279
	Article 28 Reports	121	121
	Article 27 Appeals	58	84
TOTAL		514	2,568

Source: compliance report elaborated by the consultants.

² A recommendation is reported only once, even if there are different addressees (such as the case where a single recommendation is addressed to all Spanish regions)

Secondly, the project contained a report, [available on the CNMC website](#)⁴, on the degree of compliance with all the recommendations issued by the CNMC in the aforementioned actions. In order to prepare this report, several meetings with relevant stakeholders (academia, public administrations and consumers, business and citizens associations) were held.

Thirdly, in addition to the compliance report, the consultants also evaluated the impact of CNMC's actions on the Spanish economy as a whole, which is included in "Deliverable 4. Report on the design of a methodology for impact assessment of CNMC acts and analysis of selected cases".

To this end, an ad hoc methodology, also based on the OECD Competition Assessment Toolkit, was designed with the objective to be sufficiently reliable, homogeneous, flexible and consistent to adapt to the particularities of the different sectors and regulations of the Spanish economy. The consultants applied this methodology to 12 specific CNMC's actions, [available on CNMC's](#)

⁴ The "File 1. Informe de Seguimiento" of this link contains the English version of the Compliance report.

[website](#)⁵, in the following sectors: public procurement, fuels, fintech, driving schools, technical inspection of vehicles, private hire vehicles (PHV), freight transport, activity reserve and shopping centers.

Finally, the project also included some training sessions given by the consulting firms to CNMC's employees, to improve internal capacity to continue with the impact assessment analysis once the project is concluded.

3. MAIN RESULTS OF THE PROJECT

3.1. Compliance report

Before tackling the main results of the Compliance report, it is important to note that the advocacy work of the CNMC is not a homogeneous corpus, but an assorted set of activities where the different tools at its disposal play different and relevant roles.

At this respect, it is clear that the success of these advocacy activities cannot be merely assessed by the degree of compliance with its recommendations and pleadings. As different stakeholders have pointed out, the CNMC is in a unique position to make an independent assessment of different sectors and activities and its opinion is necessary for contributing to the public debate, especially in sensitive or innovative sectors.

Also, these actions are an essential part of CNMC's obligation to promote competition as a whole. Thus, in several cases the CNMC reports go beyond the particularities of the case at stake and include broader analyses.

However, none of the advocacy roles of the CNMC involve binding opinions precisely because its role is not legislate or regulate, but to inform the legislator and regulators about the competition implications of a particular option. As such, the success of the CNMC must be assessed by the number of its reports and, eventually, the presence of its arguments on the public debate.

The diverse nature of the advocacy actions of the CNMC clearly appears in the results of assessment of the degree of compliance displayed in Table 2, which varies in relation to the different instruments used and their purpose.

⁵ The "File 2. Análisis 12 casos prácticos" of this link contains the English version of the Impact Assessment for the 12 selected cases.

Overall, the analysis yields a significant level of compliance, exceeding 60% on average for the different instruments. This is a very positive figure, taking into account that CNMC's recommendations are not binding, the legislative process is complex, and the addressees of the recommendations are very varied (national, regional, and local policymakers, public administrations and the judiciary).

Table 2. Degree of compliance with CNMC Advocacy Actions.

Type of action		Number of reports	Number of recommendations	Degree of compliance
Law 3/2013	Market study	11	122	53%
	Reports on regulatory proposal	11	38	73%
	Reports on draft regulations	113	1.412	36%
	Reports on administrative acts	54	442	28%
	Legal appeals	19	70	69%
Law 20/2013	Market unity reports	127	279	96%
	Legal appeals	58	84	84%
TOTAL		514	2.568	63%

Source: own elaboration based on the work provided by the consultants

Regarding the lessons learned from this exercise, considering the heterogeneity of these instruments, of the issues assessed by the authority, of the nature of the acts subject to assessment and of the origin of the cases, it is difficult to identify meaningful patterns directly from the degree of the compliance. Nevertheless, the project also included interviews carried out by the consultants, without the presence of CNMC, with the main stakeholders (academia, administrations, associations, etc.). In the view of the stakeholders, the impact of the CNMC is a useful input which is pondered in the decision-making process with other interests at stake, particularly in the legislative processes.

Additionally, several recommendations were made in order to increase the degree of compliance⁶:

⁶ Those are mainly addressed to IPN / INF Reports since they represent over two thirds of the total recommendations issued by the CNMC and are the categories with a higher degree of non-compliance. However, the recommendations may be extended to the rest of the cases, *mutatis mutandis*

- a) Consider the context of the report: the nature and competences of the addressee of the recommendations and the situation of the legislative / regulatory process.
- b) Narrow the recommendations clearly within the scope of the report or any ongoing normative process. In the event that the CNMC considers necessary to exceed this scope in order to include recommendations for other normative changes, the former should be clearly identified in the report.
- c) In the reports, clearly identify each specific restriction to competition addressed as a competition concern, and the associated recommendations.
- d) Clearly identify the competition advocacy recommendations from the purely regulatory ones or other based on formal regulatory efficiency.
- e) In each case, try to prioritize the recommendations that are more relevant from those that are mere non-essential improvements.
- f) Make the recommendations as clear and specific as possible, identifying the concerning issue and, when possible, providing a suitable alternative wording.

Finally, there are external and accessory considerations that could also improve the effectiveness of the CNMC's assessment:

- a) Legally state a clear consequence for any infringement of the obligation for the administration to regulate in line with principles of efficient regulation and only allow the introduction of competition restraints through a motivated decision that considers these principles (beyond general statements based on convenience or opportunity). This would help not only to increase the importance of the CNMC's position in the normative process, but also the chances of success in the judicial appeals.
- b) Legally strengthen the CNMC's position in some reports. If the authority had the obligation to consider the CNMC's position and provide reasons to depart from it ("comply or explain"), it would greatly help to increase the degree of compliance.
- c) Increase the visibility and the dissemination of the conclusions of the reports, especially in relation to Market Studies and Regulatory proposals. The broader the CNMC's position is known, the easier it would be for the different stakeholders involved in the normative processes to understand it and apply it.

3.2. Impact assessment

This section attempts to summarize the second main goal of the project: the impact assessment of CNMC's recommendations and proposals.

In this regard, it is important to consider two main challenges that, to a large extent, are common to any assessment of the effects of policy interventions.

The first challenge is to solve the attribution or causality problem. Any effects observed in the market and/or in the regulatory framework can only be attributed to the act if a plausible link to its output (typically, policy recommendations) can be made. Otherwise, any observed change in legislation could be the consequence of simultaneous events (i.e., regulatory changes not in line with CNMC's recommendations, wider legislative reforms, regulatory changes brought by other institutions, etc.). Similarly, any observed effects in the market could be induced by changing market conditions.

The second challenge concerns the balance between, on the one hand, accuracy and reliability of the estimations and, on the other hand, time and resources needed to obtain them. The favoured approach is to rely on easily applicable estimations. This general rule does not preclude carrying out an in-depth analysis for selected cases in the future.

The evaluation methodology proposed by the consulting firms ([accessible here](#)⁷) divides the evaluation of each action into 2 distinct parts:

1. The evaluation of compliance. The degree of compliance with the recommendations contained in each action is analyzed, providing useful information for a better allocation and prioritization of available resources.
2. Evaluation of effects. An analysis is made of whether the action has been successful in influencing regulation and what are the real or potential benefits associated with the recommendations issued.

This methodology was applied to 12 CNMC actions in a wide variety of sectors. The main results of the potential effects of the recommendations contained in the analyzed cases (both for having followed the recommendations and for the loss of welfare in those cases in which the recommendations were not complied with) are the following:

⁷ The "File 3. Manual metodología evaluación de impacto" of this link contains the English version of the Impact Assessment Methodology.

- A direct monetary impact of between 2,000 and 2,300 million euros, by way of lower prices for consumers, shorter waiting times, savings for public administrations and higher turnover for companies.
- A non-monetary impact through the creation of 490 jobs, the entry of 54 new operators and 67 new service stations per year, the granting of 1,575 new PHV licenses, between 330,000 and 750,000 new customers and 69,400 additional bids in public sector tenders.

Even though all the evaluations are available on our [website](#), we will briefly highlight the results in the sectors of public procurement, fuel sector and Fintech.

- **Public Procurement**

The [CNMC report](#) on the Draft Bill of the Public Sector Contracts Law (2015) has 145 recommendations, most of which were not followed. The evaluation considered that the main consequence of not following the recommendations was a lower number of bids in tenders (4.6 instead of 5.1) and a higher award price (the total cost would amount to about 1 billion euros, given the great weight of public procurement in the Spanish economy).

- **Fuel sector**

In this sector, two CNMC actions have been evaluated: the [study](#) on the wholesale market for motor fuels in Spain (2015) and the [regulatory proposal](#) of the fuel distribution market through automatic service stations (2016). While the impact of having followed all the recommendations of the first study is estimated in a range of between €75 million and €300 million, the second would have generated a benefit of €607 million due to the potential reduction in prices and the opening of at least 67 new automatic service stations.

- **Fintech**

The [study](#) on the impact on competition of new technologies in the financial sector (2018) put forward a series of recommendations to improve competition and efficiency in financial services. The consultancy firms' report considered that compliance with all the recommendations would have resulted in an impact of €20.5 million in terms of turnover of companies in the sector, 48 new operators and 135 new employees.

4. CONCLUSIONS

This project will allow the dissemination of the agency's actions (i.e., increased awareness of our activity and support from policymakers, public administrations,

and the general public). In this line, the CNMC has published on its website an [executive summary](#) and the main [deliverables of the project](#): compliance report, handbook with the methodology for evaluating CNMC's advocacy acts and the 12 impact assessment cases. Furthermore this project has been presented at the ICN and as part of the OECD Regional Centre for Competition in Latin America [newsletter](#). In order to reach a non-specialized audience, the main features of the project have been summarized in two blog posts ([here](#) and [here](#)).

The project highlights the intense activity of the CNMC in promoting competition and market unity, as well as the significant degree of compliance of CNMC's recommendations and the positive impact that efficient economic regulation can have on the welfare of consumers and users.

The project is an exercise of transparency, impact assessment and accountability of the CNMC that will build in the credibility of the agency's actions.

The Study has helped the CNMC build a stronger case for pro-competitive reforms in Spain, as it shows direct and potential impact of its recommendations.

It has also been helpful in raising awareness of CNMC's advocacy proposals, bringing back to the table past recommendations.

The project will also have a future impact on the CNMC's advocacy. First, it will enable the CNMC to keep track record of compliance with its advocacy proposals, by updating the database that was set in the project. Second, it will improve the effectiveness of its work to promote competition and market unity, by identifying the sectors and addressees that are more reluctant to follow CNMC's recommendations and the areas where CNMC's intervention can be more promising.

Finally, thanks to the project, the CNMC has a coherent and consistent impact assessment methodology, which will be very useful to know the effectiveness of its actions and will allow the institution to incorporate good practices and lessons learned to increase the degree of compliance with future recommendations.