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Spain: from monopoly to (progressive) liberalisation

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Abstract

This paper aims at describing the evolution of the telecommunications industry in Spain. It debuts with the monopolist situation of the market in the mid 90s and then analyses the consecutive legal and regulatory reforms designed with a view to the liberalisation and introduction of perfect competition in this economic sector. The paper also considers the relationships and tensions between national Spanish and EU legislation in this area, as well as giving a critical approach on the current organisation model chosen vis-?-vis the independent regulatory authority.

Introduction

The current Spanish telecommunications sector has been shaped by the radical changes in the regulatory system adopted and implemented in the course of the last two decades.

In the mid 1990s, the Spanish telecommunications market was still based on the presence of one single company (*Compañía Telefónica Nacional de España* known as *Telefónica*), which had been granted, during the dictatorship of Primo de Rivera in the 1920s, a monopolistic status in the provision of telephony services.

A wide range of internal and external factors led to the adoption, during the last five years of the XXth century, of a series of legal provisions and political decisions which launched an unstoppable process of privatisation and liberalisation of this sector. Since then, the progressive introduction of competition has not only broken the long-standing monopoly, but also opened the market to a relatively large number of new actors. The most important outcomes, two decades later, of such evolution include a broad choice of different types of services, reasonable prices, and an overall improvement in terms of coverage and quality.

This being said, and as it will be shown in this article, the Spanish system still has a few issues to better tackle, at least in order to achieve a comparable status vis-à-vis the most developed markets within the European Union. These issues include relatively high prices, the significant position still held by the former monopolist, the need for more investment (particularly regarding new generation networks), the presence of excessive regulation in some areas, and an increasing level of market concentration.

As it will also be further shown, recent changes introduced in the structure and functions of the regulator, the *Comisión Nacional de los Mercados y la Competencia* (CNMC) have also affected the proper regulatory supervision of the sector, creating tensions and legal conflicts with the authorities of the European Union (EU), as well as creating spaces for possible political interference.

Last but not least, it should also be noted that telecommunications regulation is still the object of important political discussions in several areas where national regulation is intertwined with pan-European policy decisions. To mention just one example, the issue of net neutrality has become particularly incandescent in a period when the so-called *over the top services* (OTT) providers have become major players, gaining important economic benefits by using pre-existing telecommunications services and infrastructures to reach their users. Despite the fact that net neutrality was finally regulated under Regulation (EU) 2015/2120 of the European Parliament and of the Council on 25th November 2015^[5], and the Guidelines provided by the Body of European Regulators for Electronic Communications (BEREC) were adopted in August 2016, national regulators still have the powers and the obligation to assess traffic management, commercial practices and agreements for all relevant services. In Spain, the recent arrival of these OTT operators (particularly *Netflix*) has generated growing tensions with other industry stakeholders that will need to be properly addressed at the regulatory level (Balderas Blanco 2016^[6]).

The late 90s as the starting point in the liberalisation of the telecommunications sector

As mentioned, *Telefónica* was, for several decades, the sole provider of telephony services in Spain. During this time, the company managed to build a large network covering most of the country. *Telefónica* was created in 1924, on the basis of the investment made by the American company ITT which held an important share of its ownership. The company was granted a contract by the State (a so-called concession, according to Spanish Administrative Law) in order to provide the public service of telephony.

The State acquired control of almost 75% of the company's share, a few years after the end of the Civil War (1945), during the times of the dictatorship of Francisco Franco. However, in the late 190s, the company started a progressive process of privatisation by providing equity to a large number of small, individual shareholders. By 1995, the State's share in *Telefónica* had shrunk to around 20%, before the company's total privatisation in 1997.

Despite successive changes in *Telefónica*'s ownership, what truly brought a real change in the Spanish panorama of telecommunications was not the progressive privatisation of the monopolist, but the introduction of competition by means of the liberalisation process started in 1996.

Until that moment, the legal and economic position had remained the same: *Telefónica* was granted a public contract to provide telephony services through all the country, according to the parameters and conditions established by the State. This formula was confirmed by the first modern and comprehensive legal instrument adopted in Spain on this matter: the Law 31/1987 of 18 of December (*Ley de Ordenación de las Telecomunicaciones*).

The liberalisation process in Spain needs to be considered as part of a project that was launched from the offices of the European Commission in Brussels, particularly with the publication of the seminal document 'Towards a Dynamic European Economy. Green Paper on the Development of the Common Market for Telecommunications Services and Equipment' (COM (87) 290, 30 June 1987)[ii] [7]. This being said, this process is also connected with internal Spanish economic matters, including the need to control inflation with a view to fulfilling the convergence criteria set out in the so-called Maastricht Treaty[iii] [8] in order for Spain to be allowed to adopt the euro as the new currency; as well as the need to increase the overall economic competitiveness of the country in the context of its progressive integration within the European market. However, these objectives were also in conflict with the political need to preserve the monopoly in pursuance of urgently improving service quality and above all, the universality of the telephone service (Calzada & Costas 2013 [9]).

The victory in the legislative elections of 1996 of the conservative *Partido Popular* and the appointment of José María Aznar as the new Prime Minister represented the real starting point in the liberalisation of telecommunications in Spain. Just a few months after taking office, the new Government adopted a Decree on the liberalisation of the telecommunications sector, as well as creating the first independent regulatory authority of the sector, the Commission for the Telecom Market (*Comisión del Mercado de las Telecomunicaciones*, CMT)[iv] [10]. This Decree facilitated the emergence of a first competitor in fixed telephony and was accompanied by two other laws, on telecommunications by cable and satellite, which also opened these markets to new entrants. The whole process culminated with the adoption, in 1998, of the General Law on Telecommunications (Law 11/1998, of 24 of April).

This Law represented a major step forward in the process of liberalisation of telecommunications, as it established the basic rules and common principles for the functioning of the market in Spain.

First, the Law completely dismantled the pre-existing monopolistic system, by replacing it with a model based on the freedom to provide telecommunications services, subject only to obtaining a licence or authorisation from the regulator. The Law also specifies all the requirements that are to be met in order to obtain such authorisations from the authority. From the perspective of the current stage in the process of liberalisation, those requirements may seem burdensome and excessive, but they need to be contemplated as a first step taken in an area where bureaucratisation was still very present.

Secondly, the Law considers the former monopolist as an operator that still keeps a certain *dominant* power within the market and is therefore subject to specific regulations in order to avoid it becoming an obstacle to competition. These regulations cover areas such as interconnection of networks, as well as several responsibilities regarding the provision of the so-called universal service. It has to be stressed that from the point of view of EU law, the key element is the introduction of effective competition in the market and therefore the compliance with a set of common rules, while the public or private ownership of one (or more) companies operating in such market is not seen as a relevant issue. As a matter of fact, article 345 of the Treaty on the Functioning of the European Union (TFEU) provides that the *“Treaty shall in no way prejudice the rules in Member States governing the system of property ownership”*. This being said, the retreat of public authorities from sectors where publicly owned companies cannot be used any more as policy instruments subject to special or privileged rules seems to be a logical consequence (Ruccia 2011 ^[11]).

Still regarding the role of the monopolist, it has already been said that *Telefonica* was fully privatised at the start of the liberalisation process. However, it has to be noted that Law 5/1995 of 23 March 1995 was approved in order for State authorities to keep some form of control over companies that were publicly owned when the Law was passed but were foreseen to move towards full privatisation. According to this Law, the State shall retain the power to decide about specific resolutions that such entities may take in the future, particularly regarding their ownership structure (a power also known as *the golden share*). In a decision of 13 of May 2003, the Court of Justice of the European Union (CJEU) ruled that these provisions violated the EU law by imposing measures that were disproportionate and not justified in the public interest to restrict the free movement of capital.

The third important idea that needs to be stressed regarding the Law of 1998 is the fact that the liberalisation process also affects the notion of public service. The transformation of such an important legal concept is obviously caused by the impact of EU Law in this area. The evolution of telecommunications regulation from the competence of member States to become a broad and solid EU policy was long and complex and cannot be described here. However, in the 90s, the most important legal instruments representing such important change of approach were adopted ^[v] ^[12]. Thus, one of the consequences of the adoption and incorporation into member States' legal system of this new set of rules is the emergence of the notion of services of general economic interest (SGEI).

The notion of SGEI is complex and would require a whole paper (or perhaps a book) to be properly analysed ^[vi] ^[13]. It is however of particular importance within the Spanish context as it has played a relevant role in reshaping the old Spanish legal notion of public service, exclusively based on a monopolistic regime, to become a more modern and flexible concept (Malaret 1998 ^[14]).

This notion refers to a series of economic activities that have special relevance in terms of social and economic cohesion and development. SGEI is used to empower State authorities to intervene and regulate certain aspects of the provision of those services in case the application of competition rules does not suffice to fulfil certain social and public interest needs. Respect for the principle of proportionality in the enactment and application of such regulation is a very clear requirement in this area (Sauter 2008 ^[15]). EU Law contains a series of general provisions regarding SGEI and their essential role within European economies and societies ^[vii] ^[16]. In the specific area of telecommunications, the EU legislation already contains a series of sectors where State intervention may be needed in order to secure certain public interest requirements, particularly regarding the provision of a universal service at affordable prices. These provisions, in the Spanish case, were developed by the Law of 1998 at its subsequent regulatory framework (part III of the Law).

The adoption and implementation of the Law, as well as the establishment of the CMT as the new independent regulator of the sector, represented a very important step ahead in the telecommunications sector in Spain. By the end of the 90s, a reasonable degree of competition was introduced in the different telecommunication markets (including the unbundling of the local loop in fixed telephony), particularly in the case of mobile telephony where provision of 3G services had already started in the year 2000.

The 2000s and the next phases of the liberalisation process

The evolution of the regulation of telecommunications in Spain after 1998 is marked by the changes in the legislation for this sector at the EU level. In 2002, a new and comprehensive *package* was adopted[viii] [17], introducing new rules regarding authorisation, access, universal service, as well as privacy in electronic communications. In order to incorporate this new reform into the Spanish legal system, the Law 32/2003, of 3 November was enacted. The most important change brought by this Law (and the EU reform) was the priority given to *ex post* regulation vis-?-vis *ex ante* intervention. This basically means that most operators do not need to obtain an authorisation but are just requested to ?communicate? with the regulator before starting the provision of their services. The role of regulators thus evolves from controlling access to the markets, to periodically supervising their functioning in order to identify possible areas where regulatory intervention may be needed, particularly in cases where an operator with significant market power (the former dominant operator) is still present.

The changes incorporated in 2003 have also had an impact on a very important aspect of any process of liberalisation and introduction of competition, which is price regulation. The price cap system for fixed telephony was abandoned in 2006, whereas regulation of the subscription fee was kept in place until very recently in 2016. Regarding mobile telephony, termination rates have been kept under regulatory control until the present.

In 2009, a fresh series of reforms were introduced at the EU level, including a Regulation establishing a pan-European regulator with limited powers (the BEREC)[ix] [18]. As a consequence of this, the Decree 13/2012 of 30th of March was adopted, followed by a new general Law on telecommunications (Law 9/2014 of 9th of May). In this context Law 3/2013 of 4 June was also adopted, that creates a new *macro-convergent* regulatory authority with competences over all relevant regulated industry sectors: the National Commission for Markets and Competition (*Comisi?n Nacional de Mercados y de la Competencia*, CNMC).

The new legislative framework of 2013 aims at improving rules and provisions already established in 2003, particularly regarding *ex post* market analysis, the protection of consumers and the resolution of conflicts between operators (Garc?a Castillo 2014 [19]). However, the most important and controversial issue refers to the establishment of a new regulator and a new distribution of powers between the Government[x] [20] and this independent body.

The creation of CNMC, a body that merges the regulatory powers of several pre-existing regulators in diverse areas such as railway transportation, postal services, energy and audio-visual services, as well as in general competition law, has bred a macro-structure that is completely unprecedented in the Spanish environment (and quite unique in Europe, with the sole exception of a similar model in the Netherlands). It is not easy to find any research or policy statement prepared by the Government or the Parliament in order to justify the creation of such an entity. It is important to note, however, that an exhaustive private document commissioned by Telefónica and elaborated in 2012 by PricewaterhouseCoopers on regulatory organisation models and competition suggests precisely this model[xi] [21].

During the discussion of the first drafts regarding the creation of the CNMC, the European Commission raised serious concerns. In a letter sent to the Spanish authorities on 11 February 2013, Digital Agenda Commissioner Neelie Kroes warned about the opening of a possible infringement procedure against Spain (according to article 258 TFEU), as Spain's legislative decision to transfer to the Government important powers in regulatory areas rather than keeping them in the hands of an independent regulator might have contradicted the terms of the different applicable EC Directives[xii] [22]. In particular, the letter refers to access and interconnection, functional separation and the use of shared resources, among other matters.

After a series of exchanges and modifications of the legislation, the Commission decided not to further proceed in regard to this matter. This being said, the distribution of powers between the Government and the CNMC is still strongly criticised as it has become one of the least powerful regulators within the EU (García Castillejo 2014 [19]; Rallo Lombarte 2014 [23]).

Regarding the important issue of the universal service obligation (as an essential component of the SGEI qualification), Law 3/2013 establishes a series of provisions in order to guarantee, in essence, the efficient provision of a number of telecommunications services to the entire population, at affordable prices. The most conflictive issue in this area refers to the broad intervention of the Government (and not the Regulator) regarding this matter. The Government has the power to define the elements that will be part of the universal service, as well as to designate the provider(s) that will provide them. The Regulator is left with the responsibility of calculating its costs and assessing whether specific compensations should be awarded by the rest of the service providers in order to avoid anti-competitive effects.

One measure incorporated into this law has created a conflict that was finally taken to the CJEU. This issue concerns the dismissal of the board members of the existing regulator (the CMT) in order to start a new nomination procedure for the CNMC. In a recent decision of 19 October 2016 the Court has ruled, in the first place, that EU law permits the merger of several national regulatory authorities in order to create a multisectoral regulatory body ? provided that it meets the requirements of competence, independence, impartiality and transparency and that an effective right of appeal is available against its decisions. Secondly, the Court also stresses that ?the dismissal of the President and a board member, members of the collegiate body running the merged NRA, before the expiry of their terms of office in the absence of any rules guaranteeing that such dismissals do not jeopardise the independence and impartiality of such members? violates EU Law, in the case of this legislation. This is a major rebuke to the political decisions taken in this area and the Spanish authorities need to respond accordingly.

The telecommunications market in Spain in 2016

After the long evolution that has been described, the current situation of the telecommunications sector in Spain can be considered to be well-aligned with the rest of the markets within the EU, thus laying the groundwork for a future single European market covering the whole digital economy.

This being said, it should be noted that the Spanish market also features a few specific trends that deserve to be mentioned.

In general terms, it can be said that there are two elements that strongly characterise the telecommunications sector in Spain: a growing market concentration with a still significant market dominance by the former monopolist (López 2009^[24]); and the progressive tendency towards the consumption of convergent bundles of services, i.e. offers that include several services (particularly quadruple or quintuple bundles^[xiii]^[25]).

Probably one of the key features of the current Spanish scene has been the deployment of new generation networks, which can offer broadband access for the provision of convergent services. Penetration of broadband is still slightly lower than that the EU average, but several improvements have been achieved in the last years (CNMC 2016, 15-18). In terms of technology, xDSL is still the predominant broadband technology (around 70%), whereas DOCS and FTTH represent, almost in equal parts, the rest of the cases (19% and 17% respectively) (CNMC 2016^[26], 17).

Regarding the uptake of broadband technologies, there are a number of specific regulatory trends. Firstly, in big and profitable urban areas competition is strictly based on infrastructure, with no possibility of shared use of access networks. Access obligations can only be imposed by regulation in small, non-profitable areas, with regards to the operator in a predominant market position (that is to say, the former monopolist) (CNMC 2016^[26], 12).

The progressive deployment of broadband networks has also facilitated the emergence of OTT services, based on the use of the capabilities that these networks offer. These include video services like *Netflix*, but also other kinds of services that may pose a threat to the traditional business niche of telecommunications companies, such as video, voice and text communication services (like *Whatsapp*, *Viber* or *Skype*). It has to be noted, for example, that the 15% decrease in mobile operators' income during 2015 was partially due to the use of alternative text communication messages instead of traditional SMS (CNMC 2016^[26], 134).

Another important regulatory issue is that of pricing. Spain still has relatively high prices compared to other EU countries, and some operators have even increased them in the last years (particularly for bundled services and for some mobile services) (CNMC 2016^[26], 7). This tendency seems difficult to alter, considering the increasing concentration of the market.

This market concentration can be easily detected through the series of mergers and acquisitions that have recently taken place in the sector, creating a market dominated by three main companies: *Telefónica*, *Vodafone* (including here the recent purchase of the cable operator ONO) and *Orange* (particularly after buying its main competitor in the mobile market, *Jazztel*). Some other smaller companies have also engaged in this concentration process, e.g. the acquisition of *R* by the cable operator *Euskaltel*. In terms of revenue, the three largest operators dominated in 2015 with a combined share of 78.2% of the whole telecommunications market (CNMC 2016^[26], 31). This concentration is even more evident regarding quadruple and quintuple packages, an area where the three main operators represent no less than 98% of the market (CNMC 2016^[26], 40).

If we take a separate look at individual market segments, *Telefonica* still holds 47.1% of the fixed telephony market, whereas *Vodafone* and *Orange* represent 23% and 19.7% respectively. Only 10% of this market is left to other minor operators (CNMC 2016 ^[26], 72). A similar situation can be observed in fixed broadband, where the same three main operators dominate 93% of the market, with *Telefonica* still keeping a quota of more than 40% (CNMC 2016, 15, 92). The mobile telephony market is more competitive, thanks to the presence of a fourth mobile operator, *Yoigo*, with 6.5% of lines (considering that *Telefonica* has 30.7%, *Vodafone* 25.3% and *Orange* 26.9%). It is also worth mentioning that 10.5% of the market is currently covered by the so-called 'virtual operators', that is to say service providers using their competitors' network infrastructure (CNMC 2016 ^[26], 153). Finally, the mobile broadband market segment shows a very similar picture, for obvious reasons (CNMC 2016 ^[26], 165).

A final reflection has to be made regarding the presence and role of consumers' organisations. It needs to be first noted that in Spain there is no solid tradition or culture with regards to consumers' rights. This is an area that still needs to be developed from a legal regulatory perspective, but also from the point of view of public awareness. It should also be noted that the most prominent and active consumer organisations in Spain are not particularly focused on telecommunications matters, but rather consist of nation-wide entities covering the different economic sectors.

Relevant examples worth mentioning are Consumidores en Acci3n [Consumers in Action] ? FACUA (www.facua.org) ^[27], CEACCU (www.ceaccu.org) ^[28], and Organizaci3n de Consumidores y Usuarios [Organization of Consumers and Users] ? OCU (www.ocu.org) ^[29]. In the specific area of telecommunications and digital services in general we may consider, among others, *Asociaci3n de Internautas* (www.internautas.org) ^[30], *Asociaci3n de Usuarios de Internet* (www.aui.es) ^[31], and *Asociaci3n Espa?ola de Usuarios de las Telecomunicaciones y de la Sociedad de la Informaci3n* AUTELSI (www.autelsi.es) ^[32].

Conclusions

Spain has undergone, in the last 20 years, a very interesting and intensive process of liberalisation of telecommunications. The causes and driving forces of this process need to be identified not only in the relevant policies developed by the EU, but also in the modernisation of the Spanish economy, implemented in order to achieve a higher level of competitiveness ? and to fight inflation.

Liberalisation has taken place through a series of legislative changes, which have sometimes raised political controversies, as well as some tensions with Brussels. The recent introduction of a large convergent regulatory body (CNMC) is almost unique within the EU, and it still needs to demonstrate its effectiveness. On the other hand, Spain's comparatively high prices, excessive market concentration (particularly that of the still predominant former monopolist) remain the main problems to be solved in order for the liberalisation to be completed in a satisfactory manner.

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[ii] [40] Available at: http://aei.pitt.edu/1159/1/telecom_services_gp_COM_87_290.pdf [41]

[iii] [42] Treaty of the European Union, adopted in Maastricht in 1992, and one of the core legal instruments of the EU Law.

[iv] [43] Royal Decrees with the force of a law (*Real Decreto-Ley*) 6/1996 of 7 of June, on the liberalisation of telecommunications.

[v] [44] Besides other Directives adopting during that decade, the first comprehensive *telecom package* dates back to 1997 and includes the Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997, on a common framework for general authorisations and individual licences in the field of telecommunications services; the Directive 97/33/EC of the European Parliament and of the Council of 30 June 1997, on interconnection in Telecommunications with regard to ensuring universal service and interoperability through application of the principles of Open Network Provision; and the Directive 97/66/EC of the European Parliament and of the Council, of 15 December 1997, concerning the processing of personal data and the protection of privacy in the telecommunications sector.

[vi] [45] The web page of the European Commission devoted to SGEI is of particular interest: http://ec.europa.eu/competition/state_aid/overview/public_services_en.html [46].

[vii] ^[47] Among others, articles 14 and 106.2 TFEU, article 36 of the Charter of Fundamental Rights of the European Union, as well as article 1 of Protocol 26 of the Treaty of Lisbon.

[viii] ^[48] The full package is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AI24216a> ^[49].

[ix] ^[50] The full package can be consulted through the link <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AI24216a> ^[49].

[x] ^[51] Apart from the Cabinet, this mainly refers to the Secretary of State for Telecommunications and Information Society, as part of the Ministry of Energy, Tourism and Digital Agenda.

[xi] ^[52] Available at: http://www.tudosis.es/wp-content/uploads/Microsoft-Word-Informe-para-Telefonica_Resumen-Ejecutivo_borrador1.pdf ^[53].

[xii] ^[54] Full text of the letter is available at: <http://ep00.epimg.net/descargables/2013/02/24/bc2701232a3bdf5a7d199cb40af021e0.pdf?rel=mas> ^[55].

[xiii] ^[56] Quadruple play refers to services offering mobile, fixed and mobile broadband, as well as fixed telephony, whereas quintuple play adds audiovisual services.

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