

SPANISH INITIATIVE ON REGULATORY REFORM

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Abstract

APEC and OECD economies have recognized that regulatory reform is a useful element to build a fair, competitive and productive economic system based on a competitive market. In light of this, this presentation examines awareness on the part of Spain to promote legal quality of regulations by revising the traditional thoughts and rules of economic sectors such as telecommunications, postal and electricity among others. Spain has been a member of the European Union since 1985, which is tantamount to respect for market economy notwithstanding public responsibilities in economic systems.

1. Regulatory reform: openness to free market

APEC and OECD member economies have promoted regulatory reform in order to enhance competitive markets that ensure an efficient economy and consumer welfare. To speak about regulatory reform is to enhance the economic performance, cost-effectiveness and legal quality of regulations by improving regulation-making processes. It therefore also implies considering deregulation, that is to say, the elimination of over-regulation in a sector in order to improve economic performance. The aim therein is to achieve successful economic improvement by enhancing regulatory reform.

These challenges embraced by member countries and economies of OECD and APEC have likewise been embraced by Spain as a member of OECD and European Community, with the shared conviction that the orientation of the Spanish economy had to coincide with developments in Europe and with the forming of the new globalised world economy.

On an economic and commercial level, globalization expands markets, making it possible to reduce production cost and to open doors to new business opportunities. At the same time, it facilitates the movement of capital and establishes strong connections among remote markets and systems of production. All of the aforementioned stimulate competitiveness among national economies and require individuals, business and public administrations to act with the highest degree of clear-sightedness when it comes to activities that may have repercussions on economic life or may influence economic productivity.

The globalization of economic activity has given rise to radical changes in the way in which competitiveness is conceived. In effect, the appearance of supra-national markets and the fact that the majority of western states have joined free trade organisations, have had the effect of concentrating competitiveness in business and in the productive framework. In this regard, the public administration will be responsible for providing the stimulus for the competitive capacity of business through the improvement of regulations, as well as for the effectiveness and efficiency thereof.

In addition, the emergence on the international scene of new competitors with underdeveloped systems of social protection results in important changes with regard to traditional factors of competitiveness. Given that these factors are strongly linked to cost and price, competitiveness is becoming ever more strongly dependent upon the ability to differentiate products and processes.

In this international context, knowledge has become a decisive factor in economy growth, given that it gives rise to a sustainable competitive advantage. Undoubtedly, internal technological innovation may generate more employment than the use of external patents but the added value that flows from knowledge is not only centered in the areas in which the added value is generated. Such added value extends to all areas in which the knowledge is applied, transferred, distributed or administered.

Hence, the global competitive economy is based on knowledge-intensive processes and will become much more so in the future. For this reason, it has become necessary to implement policies at macro, micro and intermediate levels that will provide stimulation for the generation, improvement and exploitation of knowledge in all areas that are linked, whether directly or indirectly, with the productive world.

At this point, as mentioned above, the Public Administration operates within this network by defining taxes, developing mechanisms, laying down regulations and providing services to the citizens.

The trend of these economic considerations is to ensure that the function of economic policy is the creation of optimum conditions for private initiative and the fruitful interaction between economic agents, thus stimulating the incorporation of idle resources. The optimum conditions called for are a balanced market, based on low inflation and low interest rates. Such a line of thinking holds competitiveness to be defined as productivity, effectiveness and profitability and that the Administration can and should exercise an influence on the improvement by acting within basic sectors as a facilitator, but not as an entrepreneur.

Such were the theories expounded in Europe in the 80', portraying the role of the State at its minimum, by allowing private companies to provide services under market rules and taking advantage of globalization. The State is not seen as necessary to provide economical services.

The Bangeman Report of 1994 follows much the same lines and indicates the lack of competitiveness of the European economy in comparison to those EEUU and Japan, neither of which support the welfare state.

2. The new framework. The universal services

However, those theories have been refuted by those who believed that the State or public services have an important function to achieve, namely to provide security services that guarantee public order. Such a function cannot be denied.

But if the building of public services is in fact necessary, the results of the arguments have important consequences on regulatory reform. The very idea of public services must change. That is to say, if public services usually meant an economic sector closed to competition by building for the Administration, it should now mean sectors able to enhance competitiveness, even though public administrations may place obligation on entrepreneurs.

This is an entirely new concept by which public services are now called "universal service", which means an economic sector that provides services able to be used by all citizens opened to a market system where public and private enterprises worked jointly.

And that is tantamount to changing the regulatory framework, by adapting traditional public services to the new "universal service" such as telecommunications or postal services.

The importance of this impact on regulatory reform is most noticeable among European countries who must transform long-standing ideas into new forms of regulations.

This same attitude is reflected in the European Parliament document "Public Enterprises and Public Services in European Community"

A similar aim was pursued by the European Commission in 1994 in the document "Public Services Charter", which supported the idea of public services opened to market law.

These opinions are defended by the Supreme Court of European Community in the “Corbeau case” of 1994, whereby the Court accepted the exceptional financing of a public service if justified by the necessity to provide public services to all citizens.

The aforementioned signifies that market law and competition which are necessary given that citizens have become accustomed to doing business under a free market, must respect other values such as solidarity, social cohesion or equity. Market rules therefore need a complement in order to provide a fair system.

3. Spain: adapting to a new situation

Spanish entry in the European Union implied, among other things, the application of liberalization and structural reform measures to different economic sectors. This has become an important economic policy instrument. Within this framework, structural measure reforms are an essential mechanism for ensuring the reallocation of resources in the Spanish economy. Accordingly, the greater the flexibility of supply, the greater the capacity to deal with unforeseen events without high cost to competitiveness, growth or employment.

This aim inspires the new framework in many sectors, an example being the following section (industry). It likewise means benefits for consumers insomuch as the new economic measures enhance competition and produce greater wider choice and better service quality.

3.1. Industry

The main step in the industry framework reform was the creation of SEPI (Industrial holding company) in order to deal with shares of public enterprises such as gas (Enagas), electric and oil (Repsol) companies belonging to the State.

The purpose of SEPI is to privatize companies which have been rationalized to meet the established public deficit established by European Community demands on Spain to converge into the European Monetary System (Euro). The Spanish government thereby obtains an open market by eliminating monopolies (energy, oil and communications companies.), implying the elimination of exceptional and privileged positions so as to enhance competitiveness.

As a result of that process, firms such as Telefonica de España (Communications sector), Repsol (Oil), Endesa (electric) or Argentaria (bank and credit sector) were privatized.

3.2. Regulations on trade

Liberalization measures were implemented in retail distribution and remote sales, a sector within which small and medium-size enterprises are most usual in trade, and which form a basic pillar of Spain’s productive system as well as a key factor for stability.

Spain has liberalized this sector and authorization is solely required of supermarket companies of more than 2500 square meters set up by the Public authorities (Autonomous Communities or regional authorities sharing competences with State).

3.3. *Price regulations*

Spain has liberalized prices, implying the reduction of controls over production or prices. The sole sectors subject to public price intervention since the 1996 reform (by Royal Decree (a legal disposition passed by Parliament - 7/1996) are the electric sector, gas, pharmaceutical items, agricultural insurance, and telephone and public transport fees.

The only prices to be fully intervened were those referring to the agricultural and health sectors

The Treaty Establishing the European Community prohibits all restrictions on movement of capital between Member States but also between Member States and third countries. However the Member States may retain certain restrictions in relation with countries outside the EU.

As from 1 January 1994, which corresponds to the start of the *second stage of economic and monetary union*, Articles 56 to 60 of the Treaty establishing the European Community (EC Treaty) introduced new arrangements for capital movements

The Treaty of Amsterdam renumbered the articles of the treaties and removed certain provisions which had become obsolete.

At present, all the Member States enjoy full freedom of capital movements and payment. Spain passed 44/2002 law to enhance liberalization in this area.

4. **The beginning of new framework to openness to market: telecommunications sector**

Regulatory reform to enhance competitiveness has been significant in telecommunications, providing a case within which European Commission has been very active in changing the current framework to a new approach in order to liberalize the sector, leading to a new framework of service known as “universal service“, as previously mentioned.

The liberalization of Europe's telecommunications market reached its peak on 1 January 1998 with the complete liberalization of all telecommunications networks and services in all Member States

The developments in technology, innovation in the services being offered, price reductions and improvements in quality brought about by the introduction of competition provided the basis for Europe's transition to the Information Society

In this context, a review is needed of the current regulatory framework for communications, responding to the need for a more horizontal approach to regulation of communications infrastructure.

Several principles will underpin the new regulatory framework and govern regulatory action at European Community and national level. Future regulation should namely:

- be based on clearly defined policy objectives,
- be the minimum necessary to meet those objectives (for example by introducing mechanisms to reduce regulation further where policy objectives are achieved by competition),
- further enhance legal certainty in a dynamic market,
- aim to be technologically neutral (not to impose, nor discriminate in favor of the use of a particular type of technology,

At this point Europe defines this new framework as a universal service, within which the Commission recognizes the importance of universal service and proposes:

- maintaining the current definition and scope of universal service at this stage (but proposes to define criteria for its possible extension, as well as mechanisms for periodic review),
- developing pricing principles at EU level to ensure the affordability of universal service.

The European Community approved several directives that built the new framework. Among them are Directive *2002/58/EC* of the European Parliament and of the Council of 12 July 2002, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) and Directive *2002/21/EC* of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive).

These directives have been the basis of the new Spanish regulation system, which incorporated these principles. Therefore the new law regulating telecommunication (Law 32/2003, law of telecommunication passed by Parliament) defines principles such as:

- The separation between the public agent regulating market and the agents providing services
- To enhance free market by reducing administrative barriers to market entry with a view to promoting a competitive market for telecommunications services. In particular it follows the European market by:
 - using general authorizations as the basis for licensing communication networks and services, with specific authorizations reserved for the assignment of radio spectrum and numbers,
 - applying a complete and coherent policy framework to communications infrastructure, including broadcasting networks,
 - ensuring that the fees for authorizations cover only justifiable and relevant administrative costs,
 - continuing to authorize the communications services provided via the Internet in an equivalent manner to other communications services

In conclusion we must admit the new Spanish framework changes to the new European regulation by approaching the regulatory reform to enhance market openness

5. The progressive liberalization of Postal services

Yet another main example of regulatory reform to open market to competition is the progressive liberalization of Postal services.

Spain begins to liberalize its postal services in 1998 in keeping with EC directive 97/67/CE referring to the progressive deregulation of domestic postal services markets and raising service quality while maintaining part of the postal services within the public sector in keeping with the peculiarities of each country.

Today, of all European Community member states, this liberalization has been taken to the furthest extent by Spain and Austria. Only 60% of Spanish postal services remain within the public sector while public monopolies have been maintained in Portugal, United Kingdom, Greece, France etc

During the liberalization process, the European Commission also guaranteed the achievement of a positive impact on economic activity and the economic and social cohesion of the European Union and the maintenance of a universal postal service with a local operator assigned by each country

In Spain the public agency that by legal mandate guarantees the rights of all citizens and companies to regular postal services at affordable prices and adequate levels of quality is the public postal operator Correos y Telégrafos (Post and Telegraphs)

Correos has undertaken a modernization process and now operates as a state enterprise. In fact it is today the largest company in the country, distributing more than 5 billion pieces of mail each year.

This modernization will continue through the implementation of a 2001 –2003 strategic plan, which in line with the plans of all major European postal service operators, pursues four main objectives:

- To strengthen traditional postal activities in the domestic market where Correos holds a leading position
- To strengthen its market position in other sectors such as parcel deliveries and banking services
- To devise new products and services, availing itself of its large network of offices and distribution facilities.
- To enter the business and services derived from the new information technologies

In this vision of a future based on competitiveness in a free market, the profitability sought by Correos does not lose sight of its principal objective: the provision of comprehensive postal services. Accordingly the strategic plan includes the following measures:

- To improve access to the postal network with longer hours and improved management of postal offices
- To improve service quality, which means speeding up delivery until it surpasses European standards
- In order to modernize the public operator, in 2002 Correos invested 243 million, 49% more than in the previous year and total investments planned for the 2001-2004 period reach 963 euros, a 164% increase over investment spending in the 1996-1999 period. This is to be achieved by means of several programs, such as infrastructures plan 2001-2004, automation plan 2001-2004 (intending to raise the proportion of automatic mail) and systems plan 2001-2003, enlarging investment to define the new scenario of information technologies system.

6. Regulatory reform in electricity

Directive *96/92/EC* of the European Parliament and of the Council of 19 December 1996 concerning common rules for the internal market in electricity establish the framework of the new electric market

Spain has incorporated this new regulation by defining new principles in its domestic regulations under law 54/1997.

The Directive establishes common rules for the production, transmission and distribution of electricity, these same principles being followed by Spanish regulation.

As a consequence, Electricity enterprises must be operated on a commercial basis and may not be the object of discrimination as regards their rights or obligations. Just as other Member States of Europe, Spain may impose public service obligations on them as regards the safety, regularity, quality and price of supplies.

The construction of new production installations is subject to a licensing procedure. The granting of licenses is subject to compliance with criteria relating to the security and safety of electric power systems, the environment, land use, public ground use, energy efficiency, the nature of primary energy sources and the technical, economic and financial capacity of the applicant. Reasons must be given for any refusal to grant a license and an appeal procedure is established

A system operator designated by the State is responsible for operation, maintenance and development of the transmission system and its interconnectors. The system operator controls the energy flows so as to maintain a secure, reliable and efficient electricity system and a distribution system operator designated by the Member States or by the enterprises responsible for the distribution systems is responsible for operation, maintenance and development of the distribution system.

In Spain this system operator is a public agent, REDESA, which is responsible for maintaining the electric system in working order.

The distribution system operator must maintain a secure, reliable and efficient distribution system whereas the State is responsible for several obligations for maintaining electric service, such as planning and prices.

The access to the electric system is allowed in fair conditions. The State must take whatever measures are necessary to guarantee that their electricity markets are kept open.

Protective measures may be taken in the event of a sudden crisis in the energy market or where the physical safety or security of persons, apparatus or installations or system integrity is threatened.

In conclusion, despite the public competences over the sector, new regulation in Spain has enabled the opening of the electric market to private companies.

7. Regulatory reform: the harmonization of regulations

Europe: the building of an internal market

When discussing regulatory reform it is necessary to note that domestic regulations may set up barriers which impose unnecessary burdens and might, for instance, hinder the free circulation of goods.

According to the European Treaty, free circulation of goods can be banned by member states. For this reason Europe has undertaken the harmonization of disposition measures. This is likewise the aim of European Supreme Court, which does not allow the imposition of measures that may serve as instrument for restricting the free market

If a Member State takes steps to prevent the free movement or the placing on the market of a particular model or type of product lawfully produced or marketed in another Member State, it must notify the Commission accordingly where the direct or indirect effect of the measure

This kind of measures reinforces the building of a free market and enhances competitiveness. Spain consequently assumed these principles upon joining the Europe Community.

As a consequence, the mutual recognition principle is established and guarantees the free movement of goods and services without the need to harmonize Member States' national legislation. Goods which are lawfully produced in one Member State cannot be banned from sale on the territory of another Member State, even if they are produced to technical or quality specifications different from those applied to its own products. The only exception allowed - overriding general interest such as health, consumer or environment protection- is subject to strict conditions

However, there are still some obstacles regarding technical standards and regulations. The service sector estimates that in general the obstacles to free movement of goods remained practically unchanged between 1996 and 1998. Other problematic issues have been identified:

- on *consumer* protection grounds, controls that are not always necessary are imposed in the countries of destination;
- in the internal administrative organization, better management is hampered by administrative delays, costs of procedures and inability to deal with complex issues (for example innovative products and services);
- a lack of mutual confidence in the acts of other Member States continues.

These problems have prompted some operators to adapt their products to local requirements or even, in extreme cases, to forgo marketing their products or services in another Member State.

As Member States are the main actors in the implementation of the mutual recognition principle, the Commission proposes that they undertake the following;

- to apply the judgments of the Court of Justice on including mutual recognition clauses in national legislation;
- to reply within a reasonable time to requests for the application of mutual recognition, except in particularly sensitive cases;

- to strengthen cooperation between national administrations of the Member States with the new telematics contact network, meetings of heads of coordination centers, and more systematic use of contact points and national coordinators in the area of regulated professions;
- to prepare regular reports on problems with application along with their potential solutions.

All of the above proves the maintenance of barriers which hinder free markets and even shows the necessity of continuing to pursue regulatory reform.

In Council Resolution of 28 October 1999 on mutual recognition the Council stresses the importance of mutual recognition for proper functioning of the single market.

The Council urges Member States to:

- review and simplify relevant national legislation and application procedures and to step up the effectiveness and speed of these procedures and strengthen administrative cooperation;
- make economic operators and the general public aware of their rights;
- keep the Commission informed about the problems with application and ensure that obligations relating to exchange of information are honored.

The Council welcomes the conclusion of mutual recognition agreements between the European Community (EC) and Australia, Canada, New Zealand and the United States of America aiming at ensuring effective market access across the whole territory of the parties to all products covered by the agreements

8. General provisions of rule making: Spanish legal framework of administrative procedure.

Regulatory reform includes rule making proceedings and at this point we can discuss regulation of guiding principles of administrative action, guaranteeing that the Public Administrative action is fully subject to the Legislation and law.

As called for by Spanish 30/1992 Act of legal regime of Public Administration and the common administrative procedure act is ruling.

This act contains regulates the common administrative procedure applying to all Public Administrations, defining the minimum guarantees of citizens in relation to administrative activity.

This Act is the legal framework for citizens who can turn to any administrative authority in the certainty that they all operate with consistent criteria by establishing rules of reviewing administrative actions or rules to use remedies against administrative decisions.

But the most important achievement of this act is to establish principles of administrative procedure such as a public hearing in order to allow citizens to submit considerations relating to an administrative decision. This act imposes the obligation of Public power to respond to all considerations submitted by citizens to Public Administration.

This act is based on jurisprudential principles established by Supreme Court of Europe such as the obligation of Public Administrations to respond to the citizen's demands (Chomel case 21-9-1989) or the citizen's rights to be heard in sanction procedure (Musique diffusion Française act 7-6-1984).

Those principles are examples of the legal principle to submit Public Administration to Law, in order to guarantee citizens rights.

In conclusion, Spanish regulatory reform must be aware of legal formalities to submit Public Administration to Law in order to provide fair, transparent and respectful public decision for all citizens

9. Conclusion

Spanish main achievements on regulatory reform strengthened many economical sectors by improving home rules in order to adapt to Europe and to the other important international economical organization such as OCDE of which Spain forms a part.

Although defects may be observed in its economic system, by revising its rule making, Spain is improving its economy by converging with the main economical principles established, such as openness to free market.