

DECEMBER 2023

Antitrust Litigation Insights

Beatriz García and Guillermo Cabrera

The public information process for the National Markets and Competition Commission's proposed Arbitration Regulation has been completed

On 23 October 2023, the public information process for the National Markets and Competition Commission's (the "CNMC") proposed Arbitration Regulation (the "Regulation") ended.

Through this Regulation, the CNMC intends to assume the arbitration functions conferred on it by Law 3/2013, of 4 June, creating the CNMC ("Law 3/2013") and, thus, settle disputes between economic operators on matters that are freely available and which, in addition, are related to competition law or the sectors subject to regulation or supervision by the CNMC.

As is well known, such disputes are characterised not only by their legal complexity but also by their complexity in other areas, such as economic and market analysis or the use of econometric techniques, knowledge of which is necessary to understand the underlying facts of the dispute to be resolved.

Thus, the CNMC, which has expertise in these areas through the different areas of which it is composed, seeks to participate in the resolution of those disputes which fall within the aforementioned areas and which, moreover, are submitted to it voluntarily by the parties. Therefore, the

Regulation can be seen as an opportunity to increase the offering of dispute resolution mechanisms in Spain, enabling specialists to participate in the resolution of disputes related to competition law, which may result in the improvement of the functioning of the Spanish market.

However, the current structure of the Regulation raises several issues which, once the public information process has been completed, may lead to the amendment of the final version of the Regulation. Some of these issues are as follows:

The Regulation provides for the possibility of adopting interim measures (Article 24), although it appears from the current wording that it is not possible to adopt them *ex parte*. Furthermore, the Regulation does not provide for the possibility of appointing an emergency arbitrator. This may limit the scope for the parties to obtain interim relief before the commencement of the arbitration proceedings.

Given that one of the main advantages of the arbitration provided for in the Regulation lies in the possibility of having specialists in the subject matter of the dispute, it is striking that regarding the process of appointing arbitrators (Article 6), the Regulation does not provide for the training or experience requirements that arbitrators must meet to be appointed as part of the arbitral tribunal.

The current wording of the Regulation states that hearings in arbitration proceedings may only be held at the offices of the CNMC (Article 6.3). For the time being, the possibility of holding the hearings of the proceedings remotely is not contemplated, which could help to speed up the time taken to process the proceedings, as well as to reduce the costs of the proceedings.

**Beatriz García**

Antitrust and Competition Litigation Partner
bgarcia@perezllorca.com / T: +34 91 423 20 78

The Regulation provides for **two types of proceedings (ordinary and abbreviated)**, which will be implemented according to the complexity and quantum of the case in question (Articles 6.4 and 29). However, regarding the minimum content of the request for arbitration, the claimant is not required to state the value of his claim (Article 9). Thus, to facilitate the determination of the applicable proceedings, it might be appropriate, when establishing the content of the request for arbitration, to require the claimant to state, whenever possible, the value of his claim.

The Regulation assigns the functions of the arbitration proceedings to two bodies. *Firstly*, it confers the function of deciding the dispute on the Council of the CNMC and, *secondly*, it confers the responsibility for the conduct of the proceedings on the CNMC's Legal Adviser (Articles 5 and 18). Accordingly, the CNMC's Legal Adviser is given the power to decide on the admissibility and relevance of the proposed evidence, without the Council being involved in this decision.

Article 18.5 of the Regulation provides for the possibility that both the Council and the CNMC's Legal Adviser may decide on their own initiative to take evidence. However, Article 21 of the Regulation provides that only proposals for the taking of evidence may be made *ex officio*. Thus, **the Regulation seems to require a greater degree of specificity** as to whether the Council or the CNMC's Legal Adviser can either "agree" to the taking of evidence, or only "propose" the taking of evidence to the parties so that the parties can ultimately decide whether or not to consent to the taking of the proposed evidence.

At some key stages of the arbitration proceedings, there is no provision for the parties to be heard, which would allow them to make whatever submissions they deem appropriate in relation to certain decisions, such as, for example, agreeing on the amendment of time limits for the performance of procedural acts (Article 12.3), agreeing on the holding of evidentiary hearings (Article 21.1), or agreeing on whether the arbitration will be conducted as ordinary or abbreviated proceedings (Article 29.2).

Although the highly technical and complex nature of the dispute means that written conclusions are often advisable (as provided for in Article 22 of the Regulation), it might be useful for the Regulation to also provide for the **possibility of oral conclusions**, if the parties so request, and in order to preserve the principle of immediacy. This option could be particularly relevant in the abbreviated proceedings.

Article 28.1 of the Regulation provides that **arbitration proceedings before the CNMC shall be free of charge**, without prejudice to any external costs incurred in the proceedings and to what may be agreed between the parties in terms of costs. Undoubtedly, the fact that the arbitration proceedings before the CNMC are free of charge may be an incentive for the parties to consider resorting to them. However, if the aim is for this dispute resolution mechanism to be able to deal with a considerable number of disputes, or to deal with disputes that, due to their complexity and quantum, are relevant, the fact that the proceedings are free of charge could compromise their sustainability in the medium and long term.

It will be important to analyse the final wording of the Regulation in order to assess the potential that this dispute resolution mechanism may have for economic operators.

