

Market unity guarantee Act 20/2013: ten key reforms

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The Market Unity Guarantee Act 20/1013 of 9 December (BOE – the Official Journal of Spain – of 10 December), has been enacted in order to “lay down the necessary provisions to make market unity effective throughout the national territory” (art. 1). This introduces a number of surprisingly novel measures to remove administrative barriers and harmonise legislation, largely inspired – however paradoxical it may seem – by procedures applied in the European Union to guarantee a single market. The statutory provisions are reinforced with the creation of an administrative complaint track for operators and a new type of judicial-administrative proceedings, characterised by their priority status and summary management, where *locus standi* is granted

to the Spanish Competition and Markets Authority (CNMC, its Spanish acronym).

The Act repeals or amends statutory rules that are affected with its entry into force; particularly noteworthy is the amendment to the Spanish Judicial-Administrative Jurisdiction Act 29/1998, of 13 July (hereinafter, JAJA), so as to introduce the new distinct market unity guarantee proceedings. Its entry into force took place the day after publication, except for the specific provisions set out in the seventh final provision, which will come into effect in three months time. The Government is authorised to approve the regulatory rules implementing the Act, as are the Ministers of Finance and Public Administration and for Economic Affairs and Competition to issue the necessary orders.

1. The new principle of non-discrimination of economic operators

(part II)

The Act outlines a set of general principles of economic activity to guide legal practitioners in the interpretation and application of the rules of market liberalization and unification it introduces.

- Most of these principles are but a reiteration and specification for economic operators of principles already contained in Act 30/1992. Of these, note that the principle of “necessity and proportionality of the actions of the competent authorities” which adds – to the already recognized “principles of public administration intervention for the pursuit of an activity” under article 39 *bis* of this Act – that the setting of limits or restrictions on an economic activity must be based on the existence of “some overriding reason of public interest” from among the reasons included (and restricted) in the Free Access to Service Activities and their Pursuit Act 17/2009;
- Novel, however, is the “principle of non-discrimination of economic operators”, which contains the most innovative provisions of the Act, inasmuch as it involves applying the principle of “country of origin” – “devolved region of origin” you could say – to effectively guarantee market unity without establishing the legislative uniformity proscribed by the jurisprudence of the Spanish Constitutional Court.

This principle goes beyond the guarantee of “basic equal conditions in the pursuit of an economic activity” postulated by the Constitutional Court’s jurisprudence¹, as it imposes effective equal rights in the pursuit of an economic activity: “*all economic operators shall have the same rights throughout the national territory and with respect to all competent authorities*”.

The Act, however, avoids establishing a “rigorous uniformity in the legal system”, which would exceed the limits of the state legislature’s powers according to the jurisprudence of the Constitutional Court (vide Judgment of the Constitutional Court (JTC) 76/1983, on the Regional Harmonization Process Act). Far from it, as it does not even provide for, as would be desirable, uniformity in the technical specifications of products. The objective of the rule is much more modest: it intends that regional regulations, while maintaining their diversity, do not hinder market unity, for which some common basic requirements or conditions are imposed. Such requirements or conditions intend to (i) guarantee free establishment and movement, and (ii) eliminate duplication in administrative control over one and the same activity or product through a “single licence” system.

¹ The TC believes that “effective uniqueness of the national economic order presupposes the existence of a single market and the market unity rests, in turn (as noted by JTC 96/1984 and 88/1986), on two irreducible premises: the free movement of goods and people throughout the Spanish territory, which no authority may directly or indirectly hinder (article 139.2 Spanish Constitution), and the basic equal conditions in the pursuit of an economic activity (arts.139(1) and 149(1) para. 1 Spanish Constitution), without which the degree of integration that its unitary nature imposes cannot be achieved in the domestic market” (Judgment 64/1990).

2. Elimination of prior controls

(article 17)

The Act requires the elimination of all prior controls (authorisations, licenses and registration of an approval nature) for all economic activities, unless one of the following reasons applies:

- a) With respect to economic operators: where justified by reasons of public order, safety or health or environmental protection in the specific place where the activity is conducted and provided, that is, where these cannot be safeguarded by subsequent control techniques.
- b) With respect to physical facilities or infrastructure necessary for the pursuit of economic activities: where they are likely to cause damage to the environment and the urban setting, public safety or health and artistic heritage, and the control is proportional.
- c) Where, due to the scarcity of natural resources, the use of the public domain, the existence of unequivocal technical impediments or the existence of public services subject to regulated rates or tariffs, the number of economic operators in the market is limited (the Explanatory Memorandum specifies that this occurs in the taxi and car rental with driver service, in administrative concessions and pharmacies);
- d) Where the rules of the European Union or international treaties and conventions provide for this. This is the only case where authorisations “may be provided for in a rule ranking lower than an Act”.

Eliminated prior controls may be replaced by prior communication or statements of liability but, as a novelty, to set these controls subsequently, the principles of proportionality and necessity must also apply. In the case of statements of liability, this will happen when legislation provides for compliance with requirements based on overriding reasons of general interest and such requirements are proportional. In the case of prior communication, where “knowledge of the number of economic operators, the physical facilities or infrastructure in the market” is required for some overriding reason of general interest.

3. Removal of obstacles to freedom of establishment and movement

(article 18)

The authorities must ensure that any measure, limit or requirement adopted or maintained does not have the effect of creating or maintaining an obstacle to free market, and specifies, with much detail (which will facilitate judicial control) a set of actions that are forbidden insofar as limiting “freedom of establishment and freedom of movement” and contravening the principles enshrined in part II of the Act.

The desire to recover the unity of the internal market, today hindered by the proliferation of regional and local statutory instruments and red tape, is very much evident here, with the application of prescriptions as those used by the European Union to achieve the single market.

A large number of requirements, without limitation, are forbidden, taking them to be based, directly or indirectly, on the place of residence or establishment of the economic operator: not only the need for the registered office to be located in the territory of the competent authority or that it has there a physical establishment, but the mere fact of "delivering a training course within the territory of the competent authority", the requirement of a professional qualification in addition to that of the place of origin - by, for example, any homologation or recognition of qualifications -, liability requirements in addition to the rules of the place of origin or, notably, the "technical specifications, for the legal movement of a product or for its use to provide a service, different from those established in the place of manufacture.

In the interests of the "principle of effectiveness" (of market unity, that is), the Act introduces, even though not referring to it as such, a "single trade licence": economic operators shall only need a licence from a devolved region to operate and sell their products or services throughout the national territory. Two fundamental rules are set out in this respect:

- The Act provides that *"from the moment that an economic operator is legally established in a part of the Spanish territory, it may pursue its economic activity in the whole territory, by way of a physical establishment or not, provided it meets the requirements for access to the activity in the place of origin, even when economic activity is not subject to requirements therein"*. Exceptions to this rule are "authorisations, statements of liability and communication related to a specific physical facility or infrastructure", but without being able to impose on the operator established in another part of the territory requirements which are not specifically related to the facility or infrastructure.
- Similarly, *"any product legally produced under the rules of a place within the Spanish territory may be freely moved and offered in the rest of the territory from the moment it is placed on the market"*.

For this "single licence" to be possible, "effectiveness throughout the national territory of administrative acts" of intervention is recognised from a dual perspective:

- a) In cases where some means of intervention of the competent authority is applied to allow access to an economic activity or its pursuit, or to demonstrate compliance with certain qualities, qualifications or circumstances, these controls "shall be fully effective throughout the national territory, without being able to demand from the economic operator compliance with new requirements or additional procedures".
- b) The same applies to "recognitions or accreditations, qualifications or certifications from a competent authority or dependent agency, recognised or authorised by the same", which shall be valid throughout the national territory. Not only that, but, from now on, assessment, accreditation and similar bodies legally established anywhere in Spain "shall have full capacity to perform their functions throughout the national territory".

4. Principle of effectiveness throughout the national territory: the "single trade licence"

(article 19)

The application of these two aspects of the principle of effectiveness is excepted in three cases: (i) in the already mentioned case of prior controls applicable to a specific physical facility or infrastructure, (ii) in the case of administrative acts related to the occupation of a given public domain, and (iii) where the number of operators in a part of the territory is limited, based on the existence of public services subject to regulated rates or tariffs.

5. Supervision of economic operators

(article 21)

The supervision and control of economic operators shall be guaranteed by state intervention where the means of such intervention lies with the state "for reasons of public order, including the fight against fraud, administrative procurement and ensuring financial stability" (first additional provision). In the event that such competence does not lie with the state, this function is shared between:

- a) the authorities of the place of origin, as regards control over compliance with the requirements for access to the economic activity;
- b) the authorities of the place of destination, as regards supervision and control of the pursuit of the economic activity;
- c) the authorities of the place of manufacture, for control over compliance with the legislation related to production and product requirements for use and consumption.

The implementation of this new system of control over economic activities, with its cross-competences, will no doubt raise endless problems and conflicts, not least the one that will derive from the fact that the powers to sanction the operator for non-compliance with requirements for the pursuit of an economic activity resides in the authority of origin, whilst who will in practice exercise control will be the authority of destination.

Thus, the Act includes a provision whose implementation will require a lot of cooperation and loyalty between administrations: "if, in the control process, the authority of destination detects non-compliance either with requirements for access to the activity of operators or with production standards or product requirements, it shall inform the authority of origin so that it may take appropriate measures, including sanctions". In addition, articles 24 and 25 of the Act regulate the exchange of information between the authorities of origin and destination whilst performing their supervision and control functions, setting a maximum period of fifteen days, unless otherwise agreed, to respond or provide the requested information.

6. Common database for operators, establishments and facilities

(article 22)

As a means to enable the implementation of this single market system, the Act provides for the creation, within the electronic single window referred to in the Free Access to Service Activities and their Pursuit Act 17/2009, of a database common to all Public Administrations that contains all the information available in the various records “concerning economic operators, establishments and facilities necessary for the performance of the supervisory and control powers conferred to competent authorities, in particular over those activities subject to a legal regime of authorisation, statement of liability or communication” (art. 22). It is stated, however, that data inclusion in the single window’s database is not, in any event, a prerequisite to initiate or pursue the activity.

Once the information has been included, the competent authorities have the statutory duty to electronically transmit, with the regularity determined by regulation, information regarding either new authorisations granted or statements of liability or communication submitted by operators.

7. Administrative cooperation measures: the Market Unity Council and sectoral conferences

(part III:
arts. 10-14)

- Creation of a body of administrative and supervisory cooperation and promotion of the effective implementation of the market unity measures, the Market Unity Council, chaired by the Minister of Finance and Public Administration and including a representation of competent ministers of the devolved regions. This body, with the assistance given by a technical Secretariat, is entrusted various supervisory, cooperation and reporting functions to ensure the implementation of the Act. Among other initiatives, the Act provides for the drawing up of a list of best and worst practice with an impact on market unity, as well as the preparation of semi-annual reports on the operation of the new system.
- Direct cooperation between the various competent authorities will be conducted through sectoral conferences; these are charged, in particular, with the analysis of conditions and requirements for access to and pursuit of economic activities and the distribution and marketing of products, as well as with boosting necessary legislative changes and reforms.

8. Measures for the adaptation of legislation to the Act

(eighth additional provision and part III: arts. 14 and 15)

- In order to review and adapt the rules regulating the various existing economic sectors to the prescriptions of the Act, the eighth additional provision provides that, within three months of its entry into force, sectoral conferences shall be convened to analyse national and regional (and, where appropriate, local) legislation and develop a proposal of legislative changes.
- Subsequently, and regularly, authorities should assess their legislation to ensure its adaptation to market unity. This assessment and the proposed legislative revisions may also be pushed forward by sectoral conferences on matters within their remit, as well as by the Market Unity Council when obstacles have been detected in a given sector.
- Special attention is required in the preparation of statutory and regulatory rules affecting, in a relevant manner, market unity: the competent authority must make available in good time to the other authorities the text of the proposed body of rules, accompanied by reports or documents that allow for adequate assessment. This "joint assessment" procedure (also with clear EU roots), will analyse, for example, the consistency of the new requirements for access to or pursuit of an economic activity with the rest of competent authorities' legislation, and if intervention measures are provided for, these shall be compared with those already established by other competent authorities that affect the same activity. It expressly provides for a public hearing of economic operators or their associations to hear their views on the legislation's impact on market unity.
- Lastly, as a measure to ensure legislative harmonization, one should note the possibility of sectoral conferences adopting, in the performance of their reform proposal function, resolutions establishing "sectoral regulation standards, in matters within the regional and local remit, in accordance with the principles of this Act". Obviously, these standards will not be legislative in nature, but may be used as a parameter for judging the adequacy of existing provisions to the principles of the Act.

9. The special administrative complaint procedure for the defence of economic operators

(articles 26 and 27 and fifth final provision)

The Act creates a new administrative track complaint procedure for operators to challenge administrative acts, omissions or actions (including, of course, penalties) which violate the rights to freedom of establishment and movement in the terms of the Act. Below follows a description of its main characteristics.

- a) It is a procedure alternative to administrative or judicial appeals, as appropriate in each case.
- b) In the event of choosing the same, the affected operator shall address his complaint to the Market Unity Council's Secretariat, which shall review and, if found with merit, forward it to the contact point of the concerned competent authority for its decision (the Act sets out the criteria for determining which is the competent authority). The complaint will also be sent to other points of contact, so they can make "contributions". Depending on the competent authority, these points of contact shall be: a) the CNMC's Secretariat; b) the CNMC; c) each ministerial department; d) the authority designated by each devolved region or city with a Devolution Act.

- c) The reply from the competent authority must be issued within a maximum period of fifteen days from filing of the complaint, after which the complaint shall be deemed dismissed according to the “negative administrative silence” principle. If the decision is one of dismissal, the Act provides the operator with the possibility of directing his request to the CNMC. Also, if there are grounds to challenge other than violation of freedom of establishment or movement (e.g. formal defects), operators must assert them, separately, by seeking administrative or judicial remedies, but the time limit for filing starts when the rejection or dismissal of the complaint arises (to avoid duplication of resources against the same activity or provision, and based on the premise that the administrative complaint must be determined very fast).
- d) The “second instance” before the CNMC does not consist of a review of the competent authority’s decision, but involves an application to the Authority to assess and decide, within five days, if it will appeal against the administrative action or provision through the priority track of the distinct market unity guarantee proceedings discussed below.
- e) In the event that the CNMC decides against appealing, the operators may resort to ordinary judicial review proceedings before the courts, the Act providing for a suspension of the time limit to lodge such an appeal until the CNMC’s decision is delivered.
- f) In addition, the CNMC may always act of its own initiative, as its standing is recognised lodge this distinct judicial review appeal “against any provision, act, action or inaction of any competent authority which is deemed contrary, under this Act, to the freedom of establishment or movement”.
- g) The fifth final provision states that the action to seek – before administrative bodies and, through the CNMC, courts – compliance with the provisions of the Act and the provisions passed for its implementation and execution is open to the public. In particular, said final provision grants corporations, associations and affected groups the “right to petition” to the CNMC and to become parties to the distinct market unity guarantee proceedings.

10. The distinct judicial review proceedings to guarantee market unity

(first final provision)

If the operator’s application is allowed or if it decides to act of its own initiative, the CNMC shall lodge a judicial review appeal to be determined through the “market unity guarantee proceedings”, with priority status and summary management, regulated by the Act (by introducing a new part IV under title V JAJA). These new proceedings boasts several special features that are worth noting:

- a) The jurisdiction to manage and determine the matter is entrusted to the Judicial-Administrative Division of the *Audiencia Nacional* court (as provided by the new letter h of art. 11(1) JAJA, also added by this final provision), and this irrespective of the national, regional or local nature of the Administrations behind the challenged actions or provisions.

- b) They are organised as fast track proceedings, dispensing with the need for a hearing or closing statements and bestowing acceleration: time limits are reduced and, unless lodged by the CNMC (which is two months), they are similar to proceedings for the protection of fundamental rights. The priority status of the management of these appeals is also recognised.
- c) The possibility is provided for the court, in the case of matters where there are no further appeals available, to summon the parties to appear for the purpose of giving judgment *viva voce*, verbally stating the reasoning behind the decision, ruling on the grounds of appeal and pronouncing judgment (which will be recorded pursuant to JAJA's provisions regarding the hearing in fast track proceedings).
- d) The automatic suspension of the provision, act or decision challenged ensues once the appeal has been allowed and no civil bond for any damage or loss that may arise is required. It will be here that the contested Administration may request discharge of the suspension, provided that it proves that continuation of the same "could lead to a serious disturbance in general or third party parties, which the court shall weigh taking into account all circumstances".
- e) It is expressly stated that the determination by the court of compensation for damages caused by unlawful conduct includes consequential damage and loss of earnings.
- f) The unique provision, unprecedented in the Spanish contentious legal system, that during the management of proceedings "any economic operator with a direct interest in the annulment of a contested act, action or provision, which he has not contested independently", may request to be a party to the proceedings as an appellant.
- g) The possibility provided in article 110(1) JAJA that the effects of favourable judgments extend to interested parties, who are in the same situation and request such extension within one year, applies to these distinct proceedings.

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