WORKING GROUP FIDE REGULATORY LAW

CONCLUSIONS AND PROPOSALS

Madrid, March 27th, 2019

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1.- Initial Premises:

The Fide Working Group has met throughout five working sessions, from October 2016 to February 2018, in which it has reflected on the basic and constitutive aspects of Regulatory Law.

In these sessions the participation of the practical jurists has relied on the participation of those who have missed, and have thanked, the reflection with systematic eagerness in which they could find their measure and sense to their direct knowledge, generally linked to a very sectorized legislation and in constant mutation. Bearing this objective in mind, Fide has held the working sessions in which we have counted on the presence of prestigious jurists, who carry out their professional activity at law firms, companies, the Public Administration, academia and regulatory agencies.

All the professionals who have participated in this working group of Fide, have done so in **on a personal basis** and not on behalf of institutions, professional law firms, universities, companies, or Ministries, where they carry out their professional work, so these conclusions do not reflect institutional positions but particular ones of each member of the group. The following are conclusions drawn from the contributions and interventions of all the participants in the Group, which although logically do not represent the unanimous opinion of all, notably on the root causes of some of the current problems and their solutions, do reflect the issues on which the debate and collective reflection have focused.

2.- Conclusiones y propuestas del Grupo de Trabajo:

1. **Proposal**:

   "Without prejudice to the fact that the final selection corresponds to democratically legitimated political bodies (Parliament and/or Government), all the members of the regulatory bodies must be elected with criteria that ensure their professionalism, with the prior intervention of technical committees, and valuing their previous exercise and performance above all."

2. **Proposal:**

   "Assess the advisability of separating the regulatory and competition bodies into different agencies; ensuring interaction mechanisms (market valuation, non-binding reports but which entail an obligation to motivate the different criteria)".

3. **Proposal:**

   "The division of functions between the regulatory bodies and the General State Administration must comply with homogeneous criteria in all sectors, offering legal certainty and allowing the consolidation of concepts, techniques and even similar procedures and bodies.

4. **Proposal:**

   "To reduce, as far as possible, the use of the Royal Decree Law. The determination of modules, prices and other market elements should be assigned to the decisions of regulators."

5. **Proposal:**

   "The Parliament must analyse the major strategic determinations that may affect investments in the sectors in a lasting way: either through non-binding planning but guiding the regulatory bodies (so that they can reasonably depart from it), or through the approval by the Parliament of multiannual plans of the regulatory bodies, or through similar instruments".

6. **Proposal:**

   "The law of contentious-administrative jurisdiction must be reformed with regard to "distribution" procedures, the execution of private contracts with public elements, and the extension of the powers of the jurisdictional bodies in the process of execution: or in its case, to enable an abbreviated procedure of execution in the presence of the regulator, with judicial supervision."

3.- Contents subject to analysis and reflection by the Working Group:

I. Characterization and content of Regulatory Law.
- **A. Characteristics of the sectors that identify and model regulatory law.**
- **B. The objectives and means of the regulatory law on these sectors.**

II. The regulatory powers.
- **A. Sources of regulatory law.**

III. Legal regulation formulas and instruments.

IV. Judicial review and alternative dispute resolution formulas.

I. CHARACTERIZATION AND CONTENT OF REGULATORY LAW.

Prior to any attempt to delimit regulatory law, the problematic nature of such definition must be noted. Since "regulating" is understood as a synonym of defining the scope of the activity with norms, every administrative norm is a regulation, and thus, there are those who identify regulatory law with economic administrative law, and even with administrative law. On the contrary, there are those who refer to the two most recently "deregulated" sectors, understanding as such only the law of telecommunications and that of energy.

On the other hand, and as it will be seen, an indication of this nature is the fact that there is a regulatory agency in this area. Going from a conception that qualifies the regulatory by object and matter, to one that puts the existence of a regulatory agency in the center of gravity, which by exercising its powers, is regulating and forging the corresponding regulatory law.

Rather than opting for one concept over another, the pragmatic thing is to accept that there is an essential core of the concept, with an aura of irradiation, with a halo that brings this right closer to others. The reason for the concept is not so much legal entomology, but the observation of the permeability of techniques and concepts, and the need to suggest to legislators, regulators and jurisdictional control bodies the use of common concepts and techniques to deal with and solve similar problems and to provide legal certainty in the practice of operators.

In any case, regulatory law lacks substantivity and full autonomy since it is actually administrative law: the regulatory activity that we have studied and analysed is, however, a new form of administrative activity as it is already recognized, for example, in the recent expositions of administrative law and categorizations of its forms of activity by the rigorous German dogma. Without attempts to systematize academic court, the jurisprudence of the National High Court and the Supreme Court (the two jurisdictional bodies that deal more directly and frequently with these cases) maintains that the law of regulation is administrative law. This does not prevent us from maintaining that regulatory law has its own characteristics that characterize it and give it its own profile, perhaps more accused than other genres of administrative law such as

sanctioning law, urban planning law or the law of public goods. In any case, the working group did not consider addressing these dogmatic aspects in detail.

Regulatory law is characterized by two fundamental elements: a) the sectors in which it is projected and b) the type of regulation it applies.

A. Characteristics of the sectors that identify and model regulatory law.

Sectors are those that could be generically identified as essential services, services of general interest, public utilities. Also, in the regulation of banking and insurance -especially banking- some of the features attributed to regulatory law appear.

These are sectors with a clear tendency towards monopoly, which have traditionally been subject to monopolistic public regulation, which placed them outside the market and competition between operators. The management regime was monopolistic because it was operated by a public company, or a private company through a concessional relationship. Also the cases in which the monopoly derives from previous market failures, which have led a company without public privileges to occupy a position that could be abused to the detriment of consumers, third parties or the innovation itself; or the existence of agency conflicts between the operator owner and the users of the service; or the mere existence of an informative asymmetry in favour of an operator against third parties, whether competitors or clients. Finally, the existence of positive or negative externalities may also determine the regulatory intervention, in order to distribute or avoid them. These are all reasons in favour of the regulation of these sectors.

On the contrary, we should not consider the right of regulation to refer to sectors without this monopolistic tendency, without informative asymmetries, or in which the appropriate or harmful externalities are not big. In this case, the possibility of administrative intervention is not denied, but it does respond to the logic of regulation, as we understand it.

Sectors that, especially in the 1990s, were liberalized by establishing a new system of regulation that is the matrix of what is known today and can be characterized as regulatory law.

The previous regulatory model could be characterized as vertical: the public power controls the monopolistic operator so that it attends correctly to the users. After liberalization, regulation is projected on the horizontal axis that is formed around the relations between operators and competition between them.

There are elements in the law regulating these sectors that "define, shape and reconfigure" markets; on the other hand, **recent reforms qualify the way in which the principle of legality is applied in these sectors.**

B. The objectives and means of the regulatory law on these sectors.

The objective of regulatory law is double:

a) **To ensure that the general interest unambiguously present in these sectors is taken into account;**
b) And **to promote effective competition between operators** (which is considered the main means of achieving the above objective) in sectors in which there are a whole series of congenital limitations (space limitations, necessarily monopolistic networks, information asymmetries, etc.), to a full game of competition between operators that have to be overcome by this new regulatory law that must continuously **adapt and restore the conditions for effective competition.**

It is this orientation that marks the peculiar depth of the regulatory powers with faculty to define, configure and reconfigure the markets in which operators operate.

Regulatory powers act by reference to market variables and their economic expressions. Therefore, it is not an activity of execution of a program enunciated in the laws. They are not integrated into what could generically be called the executive apparatus. Their link with the principle of legality is therefore a negative link (the law as a limit, not as a mandate to execute), fulfilled it, its references are not in the legal system, but in the markets they regulate. This regulation is especially projected on market failures that are frequently characterized by situations of asymmetry (in information in access to networks or on other fronts).

It bears many similarities with another great front of regulation: the regulation of risks, the references here are not offered by the economy, but by science, the knowledge from which to decide on risks and their regulation.

But, this identity of the objectives of regulatory law leads to the use of similar techniques and concepts, which pose similar problems for private operators, regulators and courts.

II. REGULATORY POWERS.

The regulatory activity itself, clearly differentiated from execution, requires to be defined and applied by Administrations or independent authorities, free from the action and direction of the executive power.

These entities do not define a political programme (they do not define or implement a policy on energy, telecommunications, etc.), which is the legislator and government´s responsibility.

This does not mean that these authorities and their actions are politically neutral. The regulatory task is not and can never be politically aseptic. Its distance and independence must be from party politics.

The real problem that affects independent institutions in our country (and between them, the regulatory and supervisory bodies) is not, strictly as it is usually thought, the politicization of their activity, but the partidization of their composition, that is, the colonization and partidary instrumentalization of these institutions through the appointment of those responsible for the region of the adequate professional preparation for the exercise of their functions. There is no better guarantee of independence - not only with respect to party politics, but also and

fundamentally with respect to the business interests of the regulated sectors - than the professional competence and contrasted reputation of the elected persons.

1. **Proposal: "Without prejudice to the fact that the final selection corresponds to democratically legitimated political bodies (Parliament and/or Government), all the members of the regulatory bodies must be elected with criteria that ensure their professionalism, with the prior intervention of technical committees, and valuing their previous exercise and performance above all."**

The constitutionality problem raised by these authorities can be understood as definitively overcome with the full assumption of the model by the European law to which our constitutional order opens up.

It is possible that other instances that are not configured as independent administrations, exercise regulatory functions, although the logical and desirable tendency is to integrate them into this type of entities as has already occurred in some cases.

Certainly, the CNMC is not the only entity with regulatory powers, there is regulation beyond the CNMC, without ignoring the relevance of this entity that has deserved specific attention.

The debate on the advisability of integrating the regulation of highly relevant sectors and the defence of competition into a single entity remains open. These are very different mentalities. The regulated sectors themselves have very marked singularities.

2. **Proposal: "Assess the advisability of separating the regulatory and competition bodies into different agencies; ensuring interaction mechanisms (market valuation, non-binding reports but which entail an obligation to motivate the different criteria)".**

3. **Proposal: "The division of functions between the regulatory bodies and the General State Administration must comply with homogeneous criteria in all sectors, offering legal certainty and allowing the consolidation of concepts, techniques and even similar procedures and bodies.**

The sources of regulatory law are fundamentally three:

a. Framework legislation made up of state and European legislation.
b. Regulatory power of regulatory authorities.
c. Self-regulation by operators may be sanctioned by regulatory authorities (regulated self-regulation).

In this respect, there are unreasonable differences between the different sectors.

In the first place, the massive use of the Royal Decree-Law in some specific sector, with the problems that it raises from legitimate confidence in sectors of massive investments, and from the mutability of the legal system, to the problem of the exemption from jurisdictional control of the Royal Decree-Law. On the contrary, in other cases the interpretation of a "principal" legislation (referring to values and principles of general character) and its concretion is

attributed to the regulating organ, so that decisions of first nature for entire sectors can be adopted without enough political support. Therefore, it seems that in some cases the laws generality principle is violated, and eventual decisions are crystallized, which can then only be corrected in the same way, even contrary to each other (sometimes even against the standards that the law itself included) while in other cases the legal determinations are broad, vague and indeterminate, allowing hundreds of regulatory possibilities. An intermediate level, not necessarily binding, that would add concreteness to the determinations of markets, future evolutions, public needs, would allow private operators to gain security in their investments, and would load with legitimacy the decisions of the regulators, facilitating on the other hand the later valuation of these before the jurisdiction. Finally, the consideration of an act or regulation of certain regulator´s decisions, of a conformational nature, is contemplated. Definitions of the market, of significant market positions, of measures to be imposed for this reason. Are they hierarchically linked? Can one rectify another, or it is a case of singular non-derogability of regulations? Sometimes regulators have imposed some additional obligation; and although the Supreme Court has demanded a "detailed motivation" to accept the change, it has considered such rectification valid.

4. **Proposal: "To reduce, as far as possible, the use of the Royal Decree Law. The determination of modules, prices and other market elements should be left to the decisions of the regulators".**

5. **Proposal: "The Parliament should analyse the major strategic determinations that may have a lasting effect on investments in the sectors: either through non-binding planning but providing guidance for the regulatory bodies (so that they can reasonably depart from it), or through Parliament's approval of multiannual plans by the regulatory bodies, or through similar instruments".**

II. LEGAL FORMULAS AND INSTRUMENTS OF REGULATION

They are ascribed to the two fundamental objectives of the regulation that have been pointed out.

a. Instruments of attention and guarantee of the benefits from the perspective of the General interest. They are based on and nurtured by the principles of the social state.

   The notion of universal service (not only in the energy and telecommunications sectors: there are already European standards that classify having a deposit account as such) and public service obligations. Guarantees of prices and conditions of provision for disadvantaged social sectors. The action of the guarantor state which does not act through its performance administration but by imposing obligations on private operators.

b. Instruments for promoting competition between operators.
   Access to networks regulation. Demands for unbundling activities.

c. Multifuncional instruments.

Market entry formulas (authorisation, qualification, registration). Instruments of supervision, corrective and repressive.

Formulas and methods for generating and obtaining information on the market and on operators.

Market exit formulas (think of the restructuring and resolution of credit and investment institutions, more complex modalities than the exercise of the constitutional power to intervene in companies).

IV. JUDICIAL REVIEW AND ALTERNATIVE DISPUTE RESOLUTION FORMULAS.

From a formal point of view, **it should be reviewed whether the structure of the contentious-administrative appeal is adapted to the problems of the regulated sectors.** The formal channel of the administrative contentious, as the prosecution of an act by an administered against an administration for a defect of legality, is not compatible with the debate, quasi-arbitral, on the "distribution" resolutions between a closed group of operators that normally appeal against the same act for partially similar and partially confronted reasons, and that due to vicissitudes alien to the operators they are processed without accumulation and without many possibilities of articulation of the interests at stake.

Also from a formal point of view, there are also problems with the resolution of sentences executions which, when referring to the public elements of private contracts but under the protection of the administration, lend themselves to a pilgrimage of jurisdictions. And not least is the case in which annulling an administrative determination as unreasonable, the court refuses to determine the reasonable solution, restarting the normative administrative process in the regulatory body, like weaving Penelope's shroud: or the case in which before an incident of execution the court instead of resolving it in that instance, the court refers to a new ordinary procedure to be started.

6. **Proposal: "The law of contentious-administrative jurisdiction should be reformed with regard to "distribution" procedures, the execution of private contracts with public elements, and the extension of the powers of the jurisdictional bodies in the process of execution: or, where appropriate, to enable an abbreviated execution procedure in the presence of the regulator, with judicial supervision".**

From a material point of view, the great problem of judicial control of the actions of regulatory authorities is related to their scope and, correlatively, the deference recognized to the agencies.

While judicial control shows important limitations, and in some cases can be frustrating, it is an important dissuasive element of discretion. In fact, considerable progress has been made,

especially in the control of facts, with implications of the courts for experts who no longer see it as a technical activity outside their control.

The technical nature of the actions and decisions of the regulatory authorities cannot justify abandonment by the courts. Also in the European Union the judge cannot rely on the Commission's margin of discretion to refrain from exercising an in-depth review of both the fact and the law. Discretion can be controlled not only by its purposes but also by the effect of the measure on rights and freedoms.

On the other hand, the democratic deficit of the agencies should impose greater transparency and rigour in the motivations that must promote judicial review.

As it has been pointed out, there has been a very perceptible advance in the control of the facts. Beyond this, the criterion towards the courts tend is the reasonableness of the decision, which tends to be understood in the sense that everything is admissible as long as it is reasonable. What is considered correct and proposed as an assessment criterion is whether the means are the ideal ones, or at least the right ones, in a line similar to that of the principle of proportionality.

The relationship between the arbitral functions of regulatory agencies and private voluntary arbitrations in respect of disputes with underlying regulatory implications remains to be defined, as does the relationship between regulatory arbitration and administrative dispute resolution by regulatory agencies in general.

4.- Working group members:

Director of the Working Group: José Esteve Pardo, Professor of Administrative Law at the University of Barcelona.

Participants in this work of reflection and collective debate: Jesús Avezuela Cárcel, General Director, Pablo VI Foundation, Of Counsel Squire Patton Boggs; **Mariano Bacigalupo Saggese,** Professor of Administrative Law (UNED), Member of the Appeal Chamber of the European Agency for the Cooperation of Energy Regulators (ACER), Member of the Academic Council of Fide.; **Raquel Ballesteros Pomar,** Partner, Lawyer, Bird & Bird, Administrative Law, Public Contracting and Energy Departments; **Dimitry Berberoff Ayuda,** Magistrate of the Third Chamber of the Supreme Court; **Helmut Brokelman,** Managing Partner, Martínez Lage, Allendesalazar & Brokelmann Abogados; **Dolors Canals Ametller,** Professor of Administrative Law, Faculty of Law, University of Girona Professor of Administrative Law; **Juan Antonio Carrillo Donaire,** Professor of Administrative Law, Partner of SdP Estudio Legal; **Javier Cepeda Morrás,** Head of SSJJ Naturgy Renovables; **Joaquín de Fuentes Bardají,** Head of the Public Law Department in Alemany, Escalona & de Fuentes; **Juan de la Cruz Ferrer,** Partner, López Rodó & Cruz Ferrer; **Iñigo del Guayo Castiella,** Professor of Administrative Law at the University of Almería; **José Esteve Pardo,** Professor of Administrative Law, University of Barcelona; **Santiago Garrido de las Heras,** Partner at Hogan Lovells; **José Giménez Cervantes,** Partner, Linklaters,

specialist in the areas of Administrative Law, Administrative Contracts, Town Planning, Administrative Heritage; **Guillermo González de Olano**, Law Director of Suez Agua; **Alejandro Jiménez Marconi**, Law Director of Suez-Spain; **José Carlos Laguna de Paz,** Professor of Administrative Law, University of Valladolid; **Pablo Lucas Murillo de la Cueva,** Magistrate of the Administrative Litigation Chamber, Supreme Court; **Mariano Magide Herrero,** Partner, Uría Menéndez. Associate Professor at ICADE-UPCO; **Pablo Mayor Menéndez,** Partner, Allen & Overy. State Lawyer on leave of absence; **Juan José Montero Pascual,** Of Counsel, Martínez Lage, Allendesalazar & Brokelmann**; José Antonio Morillo-Velarde,** Head of the Legal Department, State Ports, Ministry of Public Works; **José Vicente Morote Sarrión,** Partner-Director of the Administrative and Regulatory Law Practice, Andersen Tax & Legal Iberia S.L.P; **José Luis Palma Fernández,** Partner, Gómez-Acebo & Pombo; **Javier Puertas Rodriguez,** Legal Director, Area Manager North – Centre of the concessions field, Grupo Suez; **Isabel Puig Ferrer,** Public Policy Head, Banco Santander-Spain; **Mª Amparo Salvador Armendáriz,** Professor of Administrative Law, University of Navarra; **Javier Ramírez Iglesias,** Legal Vice-President and Associate General Counsel of HP worldwide. Member of the Academic Council of Fide, **Marina Serrano González,** Of Counsel of the Department of Litigation, Public and Regulated Sectors, Pérez-Llorca; **José Ignacio Vega Labella,** Partner in charge of the Department of Public Law and Regulated Sectors, Ramón y Cajal Abogados; **Juan Velázquez Sáiz,** Professor of Constitutional Law, Business Institute; **Fernando Villena Adiego,** Head of Legal Advice, Department of Regulation and Legal Advice, Energya VM.

Academic Coordination of the Working Group: Victoria Dal Lago Demmi, Academic Coordination at the Foundation for Research on Law and Business, Fide.

5.- Annex: Working sessions held

Opening session 9 June 2016

Speakers: **José Esteve Pardo,** Professor of Administrative Law at the University of Barcelona and **Cristina Jiménez Savurido,** Fide´s President.

1st session October 5th, 2016: Characterization and Limits of Regulatory Law.

Speakers: **Luis María Díez-Picazo,** President of the Third Chamber of the Supreme Court and **José Esteve Pardo,** Professor of Administrative Law at the University of Barcelona.

2nd session January 19th, 2017: Regulatory Agencies and Powers.

Speakers: **Joaquim Hortalà i Vallvé,** Head of Legal Advice, CNMC; **Mariano Magide Herrero,** Partner, Uría Menéndez. Associate Collaborating Professor ICADE-UPCO and **Marina Serrano González,** Of Counsel of the Department of Litigation, Public and Regulated Sectors, Pérez-Llorca.

3rd session October 26th, 2017: Formulas and instruments of regulation.

Speakers: **José Carlos Laguna de Paz,** Professor of Administrative Law, University of Valladolid and **Juan José Montero Pascual,** Of Counsel, Martínez Lage, Allendesalazar & Brokelmann Abogados.

4th session January 17th, 2018: Judicial review and alternative dispute resolution formulas.

Speakers: **Mariano Bacigalupo Saggese,** Professor of Administrative Law (UNED). Member of the Appeal Courtroom of the European Agency for the Cooperation of Energy Regulators (ACER). Member of the Academic Council of Fide; **Javier Cepeda Morrás,** Head of SSJJ Naturgy Renovables; **José Giménez Cervantes,** Partner, Linklaters and **Pablo Mayor Menéndez,** Partner, Allen & Overy. State Attorney on leave of absence.

5th session February 15th, 2018: Reality and perspectives of Regulatory Law in the EU.

Speakers: **Manuel Campos Sánchez-Bordona,** Advocate General at the Court of Justice of the European Union.

6th meeting April 25th 2018: Discussion session on the conclusions document.

7th meeting June 14th, 2018: Discussion session on the conclusions document.

6.- FIDE:

FIDE Foundation is nowadays a **permanent meeting place** for professionals of the highest level or with a long professional career, who develop their activity in **companies, professional firms** and the **Public Administration.**

Fide is a legal-economic think-tank, an operational centre of knowledge in a practical stage, made possible thanks to the active participation of all levels of civil society that have something to say about it: from top companies management to law firms, from university chairs to justice courts, from all levels of administration to professionals from different fields related to the world of Law and Business.

At Fide we have set up a series of working groups whose purpose is to make a **continuous and profound reflection** on some of the major issues that we have considered that, due to their **urgency, need for reform or capacity for improvement,** deserve to be the object of special reflection by a group of experts. Some have already published their first conclusions, have made concrete normative proposals or have advanced an initial analysis of the situation. Others will do so throughout the year. But there is no doubt that in each group we have **an essential point of reference**. The composition of each group, with **professionals with extensive experience and in-depth knowledge** of each subject, allows us to tackle all those issues that we collectively believe merit reflection. Sometimes this can be reflected in **mostly accepted conclusions**, or in **specific normative proposals**, in others the debate itself reveals the **complexity and distance of**

the positions and therefore the work value is reflected in specific summaries on the topics addressed. In any case, any professional involved in the evolution, development, application or improvement of regulation and especially of economic regulation must be familiar with these works and contribute to their development, knowledge and dissemination.

The members of these working groups are **members of Fide** and regular attendees to Fide's sessions and forums, which are closely linked to the matters dealt with in the respective areas of analysis.

7.- Acknowledgements:

Fide thanks **José Esteve Pardo,** Professor of Administrative Law at the University of Barcelona, for his management work. It also thanks **Juan Velázquez Sáiz,** Professor of Constitutional Law at the Business Institute, for incorporated all the contributions of each of the members of the working group for the preparation of this document of conclusions.

We are also grateful to the speakers who have participated by introducing the topics for debate and to all the members of the working group who have contributed their experience, knowledge in the matter and their personal reflections. It has been months where we have been able to debate and work intensely and it has been an honour and a privilege to be able to count on everyone's contributions.