

**REPORT ON THE APPLICATION OF ACT 1/2002 OF 21 FEBRUARY 2002 ON  
COORDINATION OF THE POWERS OF THE CENTRAL STATE AND THE  
AUTONOMOUS COMMUNITIES IN DEFENCE OF COMPETITION MATTERS.**

**2008-2010**

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## **I.- ACT 1/2002 OF 21 FEBRUARY 2002 ON COORDINATION OF THE POWERS OF THE CENTRAL STATE AND THE AUTONOMOUS COMMUNITIES IN DEFENCE OF COMPETITION MATTERS**

Spanish Constitutional Court Judgment 208/99 of 11 November 1999 started the move from a centralised defence of competition system, which up to that point had been applied exclusively by the State bodies, to another, decentralised system, culminating in the passing of Act 1/2002 of 21 February 2002 on coordination of the powers of the Central State and the Autonomous Communities in defence of competition matters.

The purpose of Act 1/2002 was to establish the legal framework for implementing the executive competences of the State and the Autonomous Communities associated, exclusively, with prohibited practices (collusion, abuse and unfair competition), at the same time as establishing the necessary mechanisms for coordination and collaboration between the different administrations, in order to concentrate the activities carried out by each of them, avoiding the duplication of efforts and actions detracting from the single common objective of effective defence of free competition.

Thus Act 1/2002:

- Defines the powers of the State and the Autonomous Communities through the so-called “connection points”.
- Designs the procedures for allocating cases between the State and the Autonomous Communities, together with the mechanism to be used for resolving conflicts, where appropriate.
- Establishes the necessary mechanisms for coordination and collaboration between the State and the Autonomous Communities in order to avoid the risks of decentralisation.

### **CONNECTION POINTS**

The so-called connection points defined by Act 1/2002 correspond with the criteria for determining whether the State or the Autonomous Community is competent in each case, establishing that the fundamental criterion for determining the competent body is the territorial effect of the practice.

Thus the subject matter competence attributable to the Autonomous Communities is limited to those executive actions which have to be carried out within the territory of each Autonomous Community and which do not affect the market beyond the Autonomous Community.

This means that it is up to the State to lay down rules and regulations and to undertake all executive actions in relation to practices that disrupt competition in an area that extends beyond one Autonomous Community or in the national

market as a whole, even though the actions are carried out within the territory of an Autonomous Community.

The State has exclusive competence when it comes to controlling economic concentrations, in relation to representation on competition matters before international bodies and in relation to the application of articles 101 and 102 of the Treaty on the Functioning of the European Union in Spain.

In order to guarantee legal certainty for operators and uniformity when it comes to the application of the rules, and in order to minimise possible conflicts arising out of the interpretation of the general principle of territoriality, the Act establishes a set of additional rules aimed at clarifying when a practice falls within the competence of the State, even if it is carried out within the territory of an Autonomous Community.<sup>1</sup> To date these rules have never been applied in the nine years during which Act 1/2002 has been in force.

The competences are exclusive, so that in each case either the corresponding Autonomous Community or the General State Administration, through the National Competition Commission (CNC), is competent.

## **ALLOCATION OF CASES**

Before any decision is taken on the substance of a case it is necessary to determine the preliminary question of which authority is competent to hear and decide it. For this purpose article 2 of Act 1/2002 establishes a mechanism based on reciprocity of information, according to which:

- The Autonomous Communities notify the Investigations Division of all complaints received and all practices detected by them of their own motion in respect of which there is *prima facie* evidence of an offence.
- The Investigations Division notifies the corresponding Autonomous Community bodies by sending a copy of all complaints received and all actions undertaken by it of its own motion in respect of which there is *prima facie* evidence of an offence that affects the territory of the Autonomous Community in question.

This exchange of information means that, if both authorities agree, the authority that is considered competent may start the relevant actions within a maximum of fifteen days.

Where there is disagreement between the authorities as to which one is competent to hear the case, there is a conflict. Either of the authorities that are

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<sup>1</sup> The State has competence in relation to those practices that may adversely affect the unity of the national market (due to the size of the market affected, the market share of the undertaking in question, the type of restriction and scope of its affects) or that may adversely affect the establishment of an adequate and fair economic balance between the different parts of national territory, the free movement of people and goods or the equality of all Spaniards.

parties to the conflict may request the convening of the Consultative Board for Conflicts,<sup>2</sup> which is obliged to issue the corresponding report within fifteen days.

The report of the Consultative Board is not binding, which means that the authority that does not agree with it can bring the conflict of competence before the Constitutional Court.<sup>3</sup>

In addition, the Investigations Division notifies the respective Autonomous Community of all complaints received and actions undertaken of its own motion where there is the possibility of disturbance of free competition in an area that extends beyond the Autonomous Community in question or in the national market as a whole, so that it is considered that the State has competence, where such competence has to be exercised in the territory of the said Autonomous Community and where it is considered that there is a special impact on that Community.

## **COLLABORATION MECHANISMS**

To the extent that the Autonomous Communities do not have an adequate administrative structure to discharge the competences that rest with to them, that is to say a structure that enables the investigation and resolution of cases to be allocated to separate bodies or agencies and that gives special autonomy or independence to the agency responsible for the said resolution, the State continues to be authorised to exercise resolution-making competences, as was the case with the Autonomous Community of Valencia until July 2008<sup>4</sup> and is currently the case with the Region of Murcia and the Autonomous Community of the Canary Islands, where cases are investigated by their respective Services and decided by the CNC Council.<sup>5</sup>

In this spirit of collaboration, a collaboration agreement was signed in 2009 between the CNC and the Administration of the Principality of Asturias in order to improve enforcement of competition rules and regulations through the reciprocal exchange of information and knowledge on competition matters, amongst other methods. It is proposed to sign the same type of agreement with the rest of the Autonomous Communities that do not have a competition authority set up or in operation.<sup>6</sup>

## **COORDINATION MECHANISMS**

In order to facilitate the uniform application of the competition legislation, Act 1/2002 establishes various channels for the exchange of information in order to

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<sup>2</sup> To date the Consultative Board has been convened three times in relation to four conflicts.

<sup>3</sup> Only one conflict has been raised.

<sup>4</sup> The Competition Tribunal of the Autonomous Community of Valencia was formed on 29 July 2008.

<sup>5</sup> Single Transitional Provision of Act 1/2002.

<sup>6</sup> This would be the case with the Balearic Isles, La Rioja, Navarre and Cantabria.

coordinate actions between the State body and the different bodies within the Autonomous Communities that are competent to deal with competition matters:

- The Competition Council<sup>7</sup> is the body responsible for collaboration, coordination and reciprocal information between the State and the Autonomous Communities in order to promote the uniform application of the competition legislation.

The full Council, which meets at least once a year, is made up of a representative from each of the Autonomous Communities with competence in competition matters and an equal number of representatives from the General State Administration, appointed by the Minister of the Economy, including amongst them the President of the CNC, who acts as the president of the Council, the Head of the Investigations Division of the CNC and three members, with the Secretary of the CNC Council acting as Secretary and having the right to speak but not to vote.

- In order to procure uniform application of Spanish Competition Act 15/2007, the Investigations Division of the CNC may appear as an interested party in administrative proceedings dealt with by the competition bodies of the Autonomous Communities.
- The bodies of the Autonomous Communities are under an obligation to notify the Investigations Division of the decisions and resolutions adopted both during the investigation phase and during the decision-making phase where they put an end to the proceedings, so that where appropriate the Investigations Division can exercise its right of appeal against the decisions in question before the competent bodies.
- By application of article 5.4 of Act 1/2002, the Investigations Division must request a prescribed non-binding report from the corresponding body of the Autonomous Community in those cases in which the practices that are the subject of the proceedings, even though they affect an area beyond the Autonomous Community or affect the national market as a whole, and are therefore within the competence of the CNC, have a significant impact in the territory of that Autonomous Community, as well as in the case of a concentration in the second phase that has a significant impact in its territory.

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<sup>7</sup> Functions of the Competition Council:

- To act as the body for collaboration, coordination and reciprocal information.
- To promote the uniform application of the competition legislation.
- To carry out regular monitoring of the competition policy of the different administrations.
- To promote the exchange of information between the different administrations.
- To undertake and publish studies that show the criteria followed by the different administrations in applying competition rules and regulations.
- To report on proposals for provisions of a general nature that affect shared competences.
- To prepare guidelines on the interpretation of the additional guidelines aimed at providing clarification as to when practices come within the competence of the State, even though the practices are carried out in the territory of an Autonomous Community.

## **II.- NUMERICAL TRENDS IN THE ALLOCATION OF CASES BETWEEN THE CNC AND THE AUTONOMOUS COMMUNITIES**

Over the last three years there has been a consolidation of the system of decentralisation of competition policy due to the huge effort made by all the authorities, as at today's date a total of 12 Autonomous Communities, in order to increase collaboration and coordination between the different authorities (State and Autonomous Community) on different fronts: allocation of cases, competition advocacy activities, pooling of documents and joint training, amongst others.

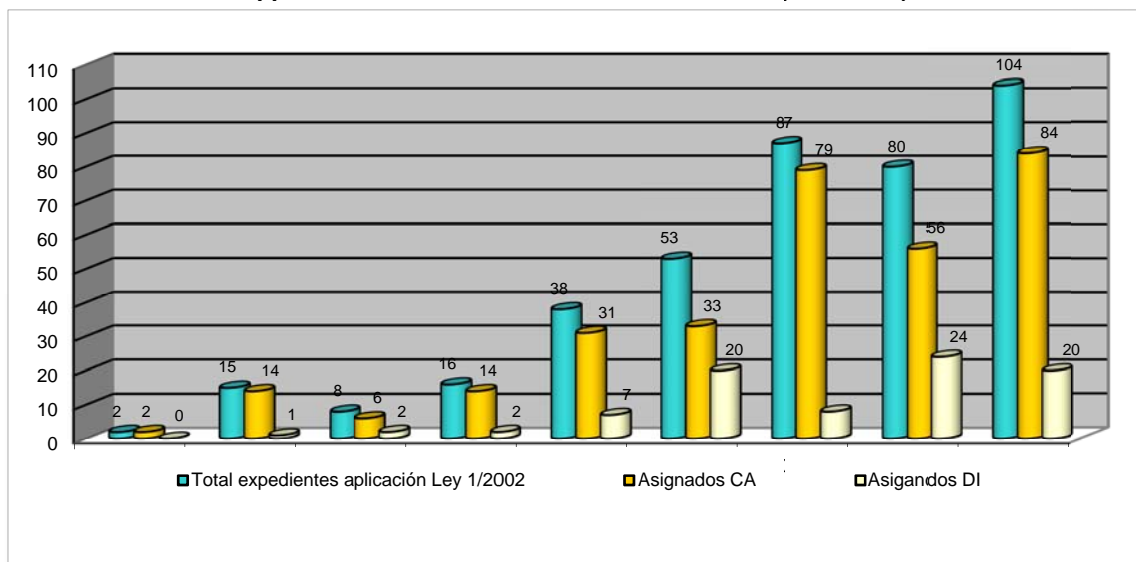
Furthermore, the increased activity by the different authorities has generated new expectations, specifically in terms of the need for greater coordination between authorities in order to improve efficiency and achieve uniformity and consistency of action. This has led to the creation of various ad hoc working groups within the Competition Council, all with a view to facilitating the task of the authorities involved and to preserving and strengthening legal certainty, so that clear, transparent and similar guidelines are applied, resulting, in short, in greater flexibility in cases and procedures.

The development and improved organisation of all the competent authorities has resulted in a larger number of cases being assigned to the Autonomous Communities and to a reduction in the number of cases assigned to the CNC, as well as an increase in the number of cases opened by authorities of their own motion.

This has to be seen as one of the benefits of the decentralisation of competition policy.

Figure 1

**Application of the case allocation mechanisms (2002-2010)**



Source: CNC

[blue: total cases application Act 1/2002; yellow: allocated to Autonomous Community; white: allocated to Investigations Division]

The number of cases submitted to the allocation mechanism varies greatly from one Autonomous Community authority to another, irrespective of how old the authority is, as can be seen from the table below.

**Table 1**  
**Cases submitted to the allocation mechanisms by Autonomous Community (years 2002-2010)**

	Catalonia	Galicia	Madrid	Community of Valencia	Aragón	Castilla y León	Basque Country	Murcia Region	Extremadura	Andalusia	Canary Islands	Castilla – La Mancha	TOTAL Autonomous Communities
2002	2												1
2003	15												1
2004	8												1
2005	10	1	3	2									4
2006	10	8	6	1	3	1	2	1					8
2007	8	11	5	3	7	8	10	0	1				9
2008	8	17	15	5	7	2	12	1	3	14	3		11
2009	11	7	9	9	2	7	7	1	4	14	2	7	12
2010	16	12	21	8	4	5	10	2	2	14	5	5	12
<b>Total</b>	<b>88</b>	<b>56</b>	<b>59</b>	<b>28</b>	<b>23</b>	<b>23</b>	<b>41</b>	<b>5</b>	<b>10</b>	<b>42</b>	<b>10</b>	<b>12</b>	<b>-</b>

Source: CNC

Most of the cases submitted to the allocation mechanism are presented in the corresponding Autonomous Community, which can be interpreted as a logical consequence of the closer proximity of the Autonomous Community authority to the market on which the practices have an effect and a greater knowledge on the part of users and undertakings of the Autonomous Community authorities.

Table 2 Allocation of cases by Autonomous Community (years 2008-2010)					
Autonomous Community	Total cases	Presenting Authority		Authority allocated	
		AC	CNC	AC	CNC
ANDALUSIA	42	31	11	31	11
ARAGON	13	9	4	11	2
CANARY ISLANDS	10	4	6	10	0
CASTILLA - LA MANCHA	12	7	5	8	4
CASTILLA Y LEON	14	9	5	10	4
CATALONIA	35	27	8	29	6
EXTREMADURA	9	6	3	6	3
GALICIA	36	29	7	28	8
MADRID	45	29	16	38	7
MURCIA REGION	4	3	1	3	1
BASQUE COUNTRY	29	28	1	26	3
COMMUNITY OF VALENCIA	22	8	14	17	5
<b>TOTAL</b>	<b>271</b>	<b>190</b>	<b>81</b>	<b>217</b>	<b>54</b>

Source: CNC

In this period the Autonomous Communities have opened a large number of **cases of their own motion**, although there are Communities that stand out in comparison to the others, and the number of cases started by the competition authority of its own motion bears no relation to the age of the authority.

This could be connected with the fact that the Autonomous Communities are more proactive and closer to the practices in question, as well as having the benefit of the greater level of exchange of information between authorities.

Some of the cases started by an authority of its own motion are the result of the exchange of information between authorities about possible practices of which they have become aware by any means and which they do not consider they are competent to hear, so that the receiving authority can carry out whatever checks it considers necessary to determine the truth of the facts and, where appropriate, once they have been submitted to the allocation mechanism, can open the corresponding proceedings. During this three-year period information of this kind has been exchanged on 21 occasions, 17 of which were referrals from the CNC to the corresponding Autonomous Community authority.

Information is also exchanged between authorities if in the course of taking action they take the view that the practice in question may be repeated throughout national territory. In these cases, as well as making all the

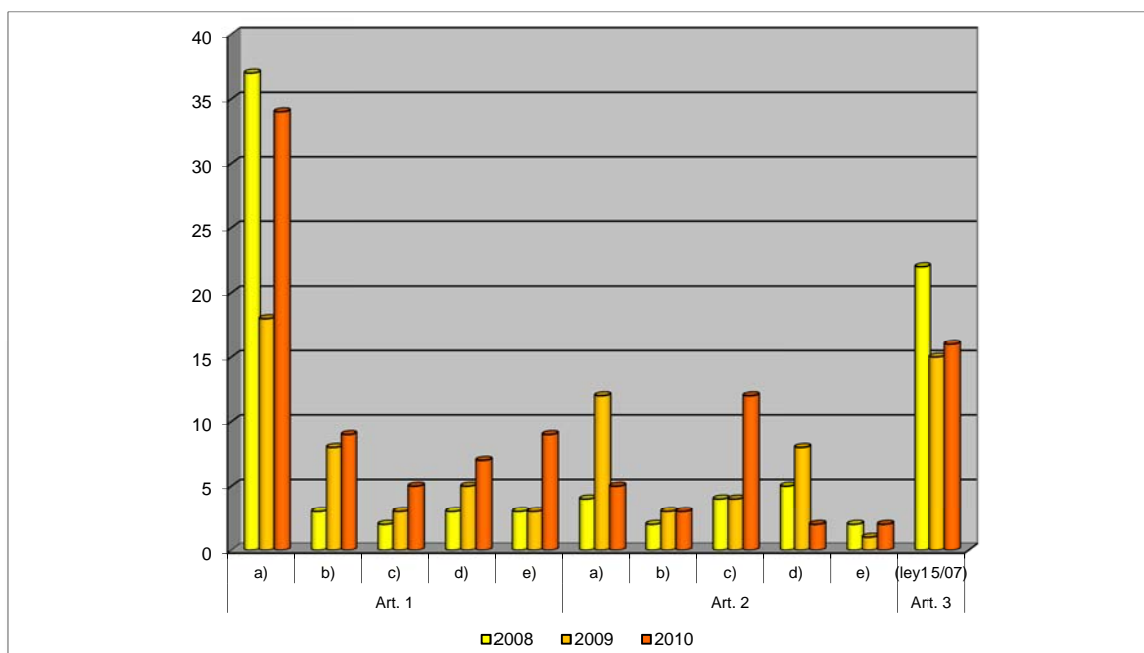
authorities aware of the practices, a working group is formed to unify efforts and adopt common solutions and procedures. This has happened during the period in several cases relating to professional colleges.

Autonomous Community	Total cases	Cases started of its own motion
ANDALUSIA	42	16
ARAGON	13	3
CANARY ISLANDS	10	1
CASTILLA - LA MANCHA	12	3
CASTILLA Y LEON	14	2
CATALONIA	35	8
EXTREMADURA	9	1
GALICIA	36	3
MADRID	45	16
MURCIA REGION	4	0
BASQUE COUNTRY	29	12
COMMUNITY OF VALENCIA	22	2

Source: CNC

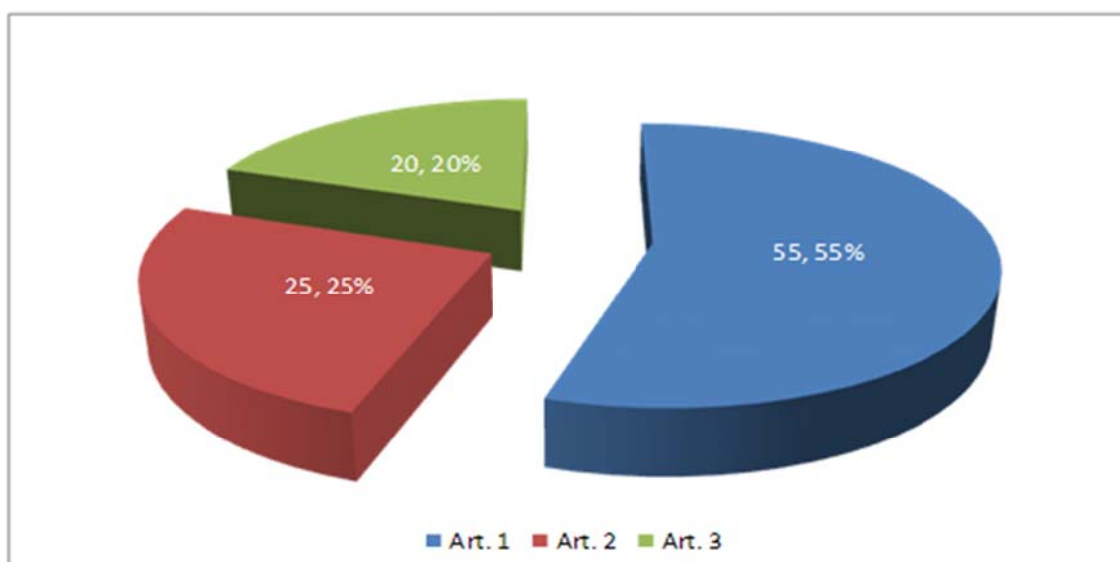
If we look at the **classification** initially given to the cases submitted for allocation, we have to highlight those that affect the different types of practices included in article 1 of Act 15/07 specifically, and, within that category, the fixing of prices and commercial terms and conditions.

**Figure 2**  
Cases allocated by article of Act 15/07 breached (2008-2010)



Source: CNC

**Figure 3**  
Percentage of cases allocated according to article of Act 15/07 breached (2008-2010)

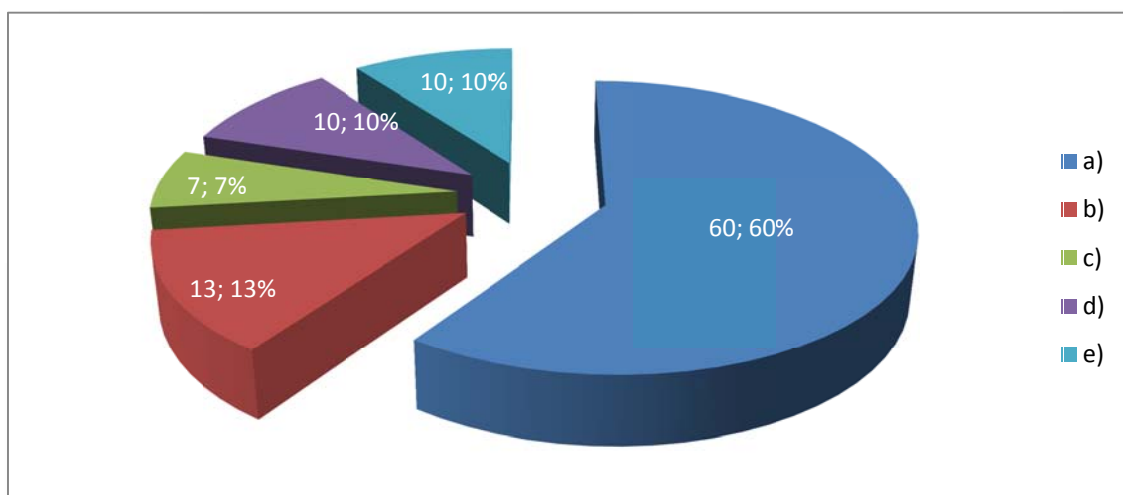


Source: CNC

Table 4 Cases assigned by article/subsection of Act 15/2007 breached (years 2008-2010)	
Article breached	No. of cases
Article 1:	
a) Fixing of prices and commercial terms and conditions	89
b) Restriction of production and distribution	20
c) Market sharing	10
d) Discriminatory conditions	15
e) Making contracts subject to unnecessary supplementary services	15
<b>Total Article 1</b>	<b>149</b>
Article 2:	
a) Imposition of commercial terms and conditions	21
b) Restriction of production	8
c) Refusal to sell and provide services	20
d) Imposition of discriminatory conditions	15
f) Making contracts subject to unnecessary supplementary services	5
<b>Total Article 2</b>	<b>69</b>
<b>Article 3</b>	<b>53</b>

Source: CNC

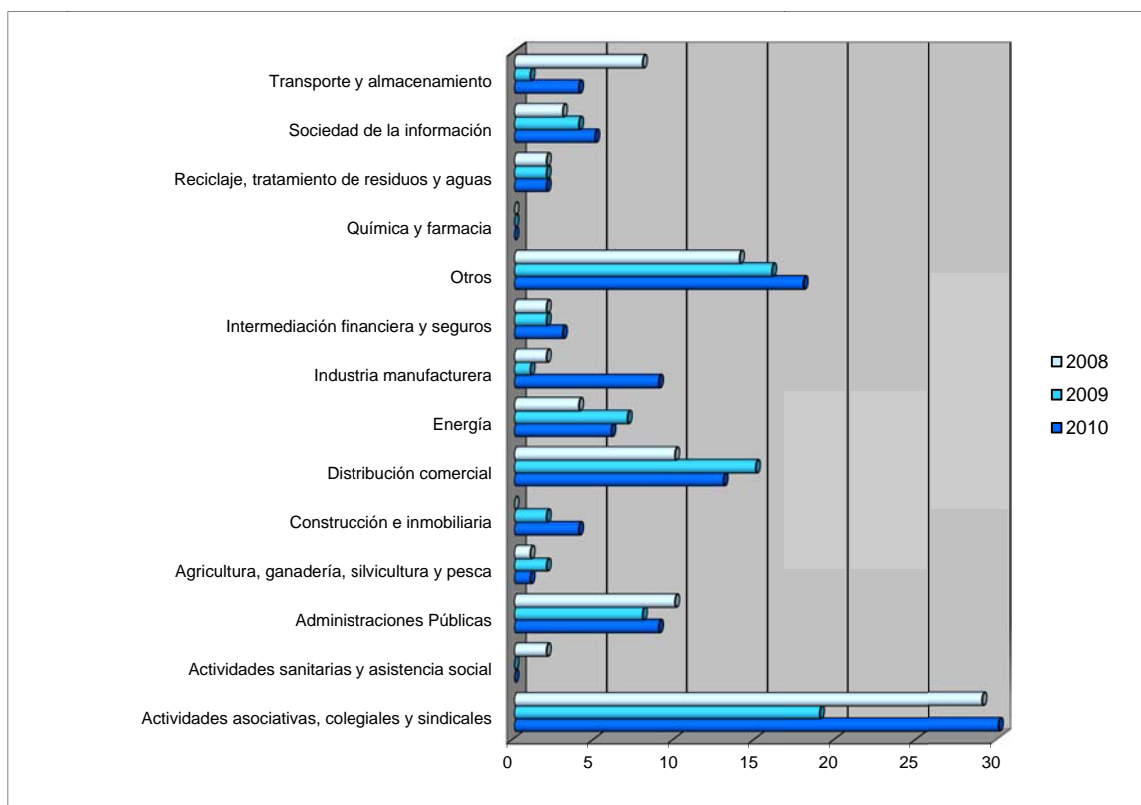
**Figure 4**  
Percentage of cases allocated according to subsection of article 1 of Act 15/07 breached (years 2008-2010)



Source: CNC

As far as the **distribution by economic sectors** is concerned, we see that the largest number of cases related to professional organisations sector (associations, official colleges, unions ...), which is consistent with the higher number of cases opened in relation to article 1.a (recommendations and agreements on prices and commercial terms and conditions).

**Figure 5**  
**Distribution of cases allocated by sectors (years 2008-2010)**



Source: CNC

[Transport and storage  
Information society  
Recycling, treatment of waste and water  
Chemistry and pharmacy  
Others  
Financial broking and insurance  
Manufacturing industry  
Energy  
Retailing  
Construction and real estate  
Agriculture, cattle breeding, forestry and fishing  
Public Administrations  
Healthcare and welfare activities  
Activities of associations, colleges and unions]

In these three years the CNC has dealt with 11 cases which, in principle, would have corresponded to Autonomous Community authorities that have yet to be set up: 6 to the Principality of Asturias, 3 to the Autonomous Community of the Balearic Isles, 1 to the Autonomous Community of Cantabria and 1 to the Community of Navarre.

During the three-year period the prescribed non-binding report referred to in article 5.4 has been requested on 13 occasions, 8 in the context of formal proceedings and 5 in the context of a concentration operation.

Table 5 Request for mandatory non-binding report under article 5.4		
AUTONOMOUS COMMUNITIES	PRACTICES	CONCENTRATIONS
Andalusia	3	
Castilla la Mancha		1
Catalonia	1	1
Galicia	2	
Madrid		2
Basque Country	1	1
Community of Valencia	1	

Source: CNC

On all occasions the reports have been issued within the time allowed and their observations have been considered in the corresponding effects section of the report with the proposal put to the CNC Council for the resolution of the case.

### III.- COLLABORATION AND COORDINATION BETWEEN AUTHORITIES

The approval of Act 15/2007 and its implementing Regulations, the incorporation of new authorities into the network of competition authorities since 2002, with 12 of them being formed so far, the approval of the Regulations on the organisation and operating of the Consultative Board for Conflicts and the approval of the operating rules of the expert committees and working groups within the Competition Council have all been consolidating the system and increasing the need for greater collaboration and coordination between authorities. The overriding aim has at all times been to facilitate uniform application of competition legislation.

With this objective of the greatest possible collaboration and coordination in mind, in the last three years six working groups have been formed within the Competition Council and, therefore, with its approval. Even though they function autonomously, they have to report on their meetings and submit their conclusions, once signed by all the members, to the full Council for approval, without which they will have no status.

#### WORKING GROUPS

**Group on allocation criteria for cases under Act 1/2002.** The group was formed with two objectives: one, to study and analyse cases already allocated in order to be able to fix common criteria between authorities and facilitate the occasionally complicated task of establishing competence to hear the different cases on later allocations, all with a view to greater efficiency and coordination between authorities; and, two, to analyse and interpret the procedure laid down in Act 1/2002 in order to reach a consensus on making it more nimble on prevent the allocation of cases from becoming unduly protracted and, also, to avoid the generation of conflicts that could lead to free competition in the market being harmed instead of protected.

**Working group on coordination.** The group was formed with the aim of reaching consistent conclusions in those cases in which a particular practice pursued by several operators is repeated in different points of the national geography, and on those matters that give rise to queries for a competition authority.

The specific objective of this working group is, first, to carry out a joint analysis of the different cases under investigation and share the available information and, second, to propose clear and common guidelines and solutions, facilitating the actions of the different authorities, thereby streamlining proceedings and procedures and preventing forum shopping by means of constant exchange of information between authorities.

This working group has analysed the cases relating to professional colleges and cases involving the termination by commitments procedure.

**Group responsible for the updating and maintenance of the Cooperation Network for Bodies with Competence in Competition Matters (the Network).** The group was formed with the aim of making the Network the tool for communication and coordination between the competition authorities. It is therefore configured as a forum in which all the authorities can share all the information that may be considered relevant.

In the last three years there has been a review, updating and implementation of new arenas that have been considered necessary by the competition authorities.

**Working group on competition advocacy.** The group was formed with the intention of focusing its attention on the tasks associated with the actions of Public Administrations, specifically regulatory actions, given the important impact that such actions may have in the competition arena, and in order to make progress in terms of monitoring government aid.

The following topics dealt with by it are of particular note: the advocacy functions attributed to each Autonomous Community authority, the application of the principles of good regulation in drafting new rules and regulations (good and bad practices in each Autonomous Community), the process of transposing the Services Directive in terms of good practices in applying those principles, the monitoring of State aid (functions in this field, annual report on government aid, possibilities of the Network), initiatives undertaken in the sphere of government procurement (Guides on procurement and competition) and the communication of significant actions carried out (reports, challenges ...).

In the last Council meeting, held in December 2010, two new working groups were approved:

**Group on amendments to rules and regulations.** The aim of the group is to evaluate whether it is appropriate to propose any amendment in order to resolve, clarify or improve the exercise of the competences of the different authorities.

**Group on coordination in relation to resolutions.** The purpose of the group is to achieve the correct application of the competition rules and regulations by means of the unification of criteria and the establishment of information channels between the bodies issuing the resolutions.

## INSPECTIONS

Inspection represent a tool that in some cases is essential for obtaining evidence of offences which by their nature, complexity or the great specialisation of their perpetrators, would be impossible to determine in any other way.

In line with this, competition authorities are aware of the importance of collaboration in this area, not only in terms of theoretical training but also in practice.

First of all, three training courses on inspections have been organised for the different competition authorities at the CNC headquarters, attended by a total of 36 inspectors from the Autonomous Communities. The programme is similar to the one used for the regular courses for staff of the Investigations Division who are involved in inspections.

The courses include a part which involves practical content relating to organisation and procedures in this area and another part which focuses on IT aspects, which is run by the CNC technological inspectors.

In the last three years there has been an implementation of the policy of collaboration and mutual assistance between the CNC and the investigation bodies of the Autonomous Communities at the request of either the State authority or the Autonomous Community authority. Thus the CNC has requested the collaboration of the Autonomous Community authority corresponding to the place where the inspection was going to be carried out on 13 occasions.

<b>Autonomous Community</b>	<b>No. of inspections with the CNC</b>
Andalusia	2
Catalonia	7
Basque Country	1
Community of Valencia	1
Madrid	2

*Source: CNC*

On every occasion on which the collaboration of the Autonomous Community authorities has been requested, the collaboration was very satisfactory.

The CNC's collaboration has also been requested on one occasion in relation to an inspection organised by an Autonomous Community authority.

## **TRAINING**

In this period, as has become customary since the entry into force of Act 1/2002, the CNC has continued to offer training to the Autonomous Communities.

The cycles of practical training and training sessions at the CNC's headquarters have been continued. They are all aimed at officers of the new Autonomous Community authorities that have been formed who are going to carry out the investigation function in the corresponding Autonomous Community bodies.

In the last year Autonomous Community competition authorities have been invited to participate in the seminars organised by the CNC for its staff (CNColoquios) because they are considered very useful as they cover such important subjects as the detection of cartels, greater choice of public services and analysis of market power, amongst others. The opportunity has been taken up by many officers from the Autonomous Communities.

There has also been an important participation in the virtual training courses on competition run by the CNC and CECO (the Centre for Economic and Commercial Studies), which offer an initiation into the subject of competition. They last seven weeks and are given by CNC staff.

The participation of the Autonomous Communities in conferences and seminars organised by the CNC is also important.

Finally we must highlight the participation of the Autonomous Communities together with the CNC in training activities in the centres of AECID (Spanish Agency for International Cooperation in Development) in Latin America.