

**EMPIRICAL STUDY
OF JUDICIAL REVIEW OF DECISIONS
BY SPANISH COMPETITION AUTHORITY (2004-2021)**

*Estudio empírico de la revisión judicial de las resoluciones
de la Autoridad Española de la competencia (2004-2021)*

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Summary: This article explains the system of judicial review of the decisions of the Spanish National Competition Authority on the application of the prohibitions of anticompetitive conduct under Articles 101 and 102 TFEU (and their national equivalents) and analyses the judgments of the Courts of Appeal from 1.5.2003 to 31.4.2021.

The decisions of the Spanish NCA give rise to a high level of litigation, which is illustrated by the large number of judgments in which individual appeals against them are decided (1390 judgments out of 274 decisions whose judicial review was completed during the period considered). As might be expected, the majority of challenges focus on fines, which are appealed in 95.5% of cases. In 62% of the judgments, the plaintiffs are wholly or partially successful, as a result of which the fines imposed in the reporting period were reduced by 43% (from € 1,670 million to € 738 million). The paper provides data on the grounds for full and partial annulment and illustrates the rigorous and intense judicial scrutiny to which the NCA's decisions are subject.

Keywords: Judicial Review, National Competition Authority, Anticompetitive Conduct, Litigation, Fines, EU Law

Resumen: Este artículo explica el sistema de revisión judicial de las decisiones de la Autoridad Nacional de la Competencia española sobre la aplicación de las prohibiciones de conductas anticompetitivas de los artículos 101 y 102 TFUE (y sus equivalentes nacionales) y analiza las sentencias de los Tribunales de Apelación (Audiencia Nacional/Tribunal Supremo) desde el 1.5.2003 hasta el 31.4.2021.

Las resoluciones de la ANC española dan lugar a un alto nivel de litigiosidad, lo que se ilustra por el gran número de sentencias en las que se deciden recursos contra ellas (1390 sentencias respecto de 274 resoluciones cuya revisión judicial finalizó durante el periodo considerado). Como cabía esperar, la mayoría de los litigios se centran en las multas, que se recurren en el 95,5% de los casos. En el 62% de las sentencias, los demandantes ganan total o parcialmente, gracias a lo cual las multas impuestas en el periodo considerado se redujeron en un 43% (de 1.670 millones de euros a 738 millones).

El trabajo proporciona datos sobre los motivos de anulación total y parcial y muestra el riguroso e intenso escrutinio judicial al que están sujetas las decisiones de la ANC.

Palabras clave: Revisión judicial, Autoridad Nacional de la Competencia, Conducta anticompetitiva, Litigios, Multas, Derecho de la UE.

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Table of contents

Index Figures.....	4
Index Tables.....	4
1. Introduction to the Spanish Competition Law Enforcement System.....	5
1.1. Institutional framework.....	5
1.2. Legal framework: the competition prohibitions.....	8
1.3. Enforcement framework: institutions and powers (investigation/adjudication).....	9
2. Judicial Review of decisions of the NCA	15
2.1. Decisions subject to appeal	17
2.2. First instance Appeals	18
2.3. Appeal of Cassation	19
2.4. Proceedings before the National High Court	21
2.5. Cassation proceedings (Supreme Court).....	22
2.6. Outcome of judicial review	22
3. Prior research	24
4. Quantitative analysis	25
4.1. Sources of information.....	25
4.2. Total number of judgments	27
4.3. Success rates and outcomes	30
4.4. Appeals against fines	31
4.4.1. Appeals resulting in full confirmation	32
4.4.2. Appeals resulting in full annulment	32
4.4.3. Appeals resulting in different outcomes per appellant (case study)	40
4.4.4. Appeals resulting in partial annulment of NCA fines (amount fine).....	42
4.5. Type of competition authority's decisions subject to appeal	45
4.6. Undertakings and Third parties appeals.....	50
5. Qualitative analysis	51
6. Concluding remarks	53

Index Figures

- Figure 1.** Fines imposed by National Competition Authorities in Spain for infringements of competition prohibitions (2003-2022)
- Figure 2.** Types of infringement (per decision)
- Figure 3.** Fines per infringement (€)
- Figure 4.** NCA decisions/NCA fining decisions.
- Figure 5.** NCA Fining Decision/ Fines amount (in Million €)
- Figure 6.** NCA decisions/NCA decisions challenged.
- Figure 7.** Number of judgments according to instances
- Figure 8.** Success of appeals (each NCA's decision counts as 1)
- Figure 9.** Final outcome of judicial review (each NCA decision counts as 1)
- Figure 10.** Grounds High National Court (each NCA decision counts as 1)
- Figure 11.** Grounds Supreme Court (each NCA decision counts as 1)
- Figure 12.** Success of appeals against decision S/0226/10 (Licitaciones de Carreteras)
- Figure 13.** Grounds of appeal against decision S/0226/10 (Licitaciones de Carreteras)
- Figure 14.** First instance outcome appeals against decision S/0226/10 (Licitaciones de Carreteras)
- Figure 15.** Second instance outcome appeals against decision S/0226/10 (Licitaciones de Carreteras)
- Figure 16.** NCA total fines imposed v. Fines surviving.
- Figure 17.** Rule being appealed.
- Figure 18.** Types of restrictions.
- Figure 19.** Object/effect (only for Art. 101/national equivalent infringements)
- Figure 20.** NCA's procedure.
- Figure 21.** NCA's procedure (per year)
- Figure 22.** Number of NCA decisions subject to first instance appeal according to appellant type.

Index Tables

- Table 1.** National competition Laws in Spain
- Table 2.** NCA decisions leading to largest number of appeals (judgments)
- Table 3.** Outcome of appeals by third parties
- Table 4.** Fines/Surviving fines/Confirmation rate
- Table 5.** Annulled fining decisions/grounds

The empirical evidence on the judicial review of competition law enforcement in Spain between May 2004 and the end of April 2021 presented here does not follow the same methodology followed in the analysis carried out in the rest of the jurisdictions on this project. This is not capricious.

The work carried out to date has made it possible to identify the large number of judgments handed down by Spanish courts in reviewing decisions of the competition authority in the relevant period. Judgments in Spain are unstructured, without the information being organized into standard pre-set fields, requiring a substantial amount of manual work to organize and process all the data of each individual judgment. It has not been possible yet to dwell on the arguments used by the parties and the response given by the courts in each case. As will be explained below, each infringing party has its own appeal, and its individualized judgment, with joint appeals being exceptional (even though it would make perfect sense to do so, neither plaintiffs nor defendants, nor the courts want it), but there is also notable diversity in the pronouncements handed down on the same decision, depending on the time and pleas of the appellants.

Sometimes, the final fine for an infringer (or its annulment) is reached after four instances of judicial review, two before the recalculation of the fine, two after the recalculation (with an additional special -double instance- procedure for the protection of fundamental rights). While not all cases have been fully coded as other jurisdictions, this report is structured as closely as possible to others, and all figures are comparable unless stated otherwise.

1. Introduction to the Spanish Competition Law Enforcement System

In order to properly understand the functioning of the judicial review of decisions of the Spanish competition authorities, it is worth briefly explaining how the competition law enforcement system is organized, which institutions are entrusted with this task and which procedures are applied (see *infra* §§ 1.1 and 1.3), pointing out the relevant changes introduced during the period of this research project. The wording of the Spanish national prohibitions of anti-competitive behavior mirrors the wording of the prohibitions in the TFEU (*infra* §1.2).

1.1. Institutional framework

The first Spanish Competition Act was enacted in 1963. Following a beautifully crafted Preamble, it included the standard prohibitions of multilateral and unilateral anticompetitive

behavior and established a specialized administrative authority in charge of the enforcement of the prohibitions (*Tribunal de Defensa de la Competencia/TDC*).¹ Investigations of infringements were conducted by a unit of the Ministry of Economy (*Servicio de Defensa de la Competencia/SDC*). Fines were proposed by the *TDC* but had to be approved by the Government. While the 1963 Act was in force, enforcement was feeble. Not a single fine was imposed.

After Spain joined the EC in 1985, new competition legislation was adopted in 1989.² Yet, the enforcement institutional system did not change significantly. It remained as an administrative bifurcated system, with limited independence from the government. Moreover, the *TDC* was empowered to impose fines and to enforce any infringements of the EC antitrust prohibitions.³

Thereafter, the competition legislation and the institutional enforcement settings of the Spanish System have experienced three major reforms:

- A) Creation of regional competition authorities. A 1999 judgment of the Constitutional Court acknowledging the regions' competition law enforcement powers triggered a decentralization of the domestic enforcement system.⁴ Since then, several regional competition authorities have been created with enforcement powers in relation to the domestic competition prohibitions in their corresponding region.⁵ Regional authorities do not have the power to enforce the EU competition rules.
- B) Strengthening and modernization of the institutional system. The *TDC* and *SDC* were merged in 2007, creating a single independent administrative law authority in charge of the enforcement of both national legislation and EU prohibitions: the *Comisión*

¹ See Repression of Anticompetitive Practices Act of 1963 (*Ley 110/63 de Represión de Prácticas Restrictivas de la Competencia*, [BOE 175 of 23/7/63](#)).

² See Defence Competition Act of 1989 (*Ley 16/89 de Defensa de la Competencia*, [BOE170 of 18/7/89](#)).

³ See Decree 1882/86 of 29/8/86 ([BOE221 of 1/9/86](#)).

⁴ See Constitutional Court judgment 208/99 of 11/11/99 (Rapp. TS Vives, [ES:TC:1999:208](#)).

⁵ Currently there are nine Regional Competition Authorities: Autoridad Catalana de la Competencia, Comisión Gallega de la Competencia, Autoridad Vasca de la Competencia, Jurado de Defensa de la Competencia de Extremadura, Tribunal de Defensa de la Competencia de Aragón, Tribunal de Defensa de la Competencia de Castilla y León, Comisión de Defensa de la Competencia de la Comunidad Valenciana, Agencia de la Competencia y de la Regulación Económica de Andalucía and Consejo Canario de Competencia. Two Regional Competition Authorities had ephemeral existence, being closed shortly after they were created (Tribunal de Defensa de la Competencia de la Comunidad de Madrid and Comisión Regional de Defensa de la Competencia de Castilla la Mancha), see FRANCISCO MARCOS "Autoridades de Defensa de la Competencia en vías de extinción" [Revista de Administración Pública 188 \(2012\) 337-363](#). Some of the Regional Competition Authorities are also empowered to enforce consumer protection law.

Nacional de Defensa de la Competencia (CNC).⁶ The CNC was also empowered to enforce the antitrust prohibitions in sectors subject to sectoral regulation (energy and telecommunications), but there were some conflicts with the regulatory authorities (*Comisión Nacional de la Energía/CNE* in the electricity and hydrocarbons sectors and *Comisión del Mercado de las Telecomunicaciones/CMT* in the telecommunications sector) regarding the fulfillment of their tasks of on those industries.⁷

- C) The National Competition Authority and several independent regulators were merged: in 2013 the CNC and five existing sectoral regulators⁸ -and two that had not been created yet-⁹ were consolidated in the *Comisión Nacional de los Mercados y de la Competencia* (CNMC).¹⁰ The creation of the CNMC was justified on the basis of saving resources and preventing conflicts between the competition and regulatory authorities.¹¹ Given the breadth of powers of the CNMC, it operates as a multi-task authority with regulatory powers in many industries and wide enforcement powers in relation to the competition prohibitions across the economy.

Table 2. National competition Laws and Authorities in Spain

Period	Legislation	National institutions
1963 – 1989	Act 110/1963	Tribunal de Defensa de la Competencia Servicio de Defensa de la Competencia
1989 – 2007	Act 16/1989	
2007 – 2013	Act 15/2007	Comisión Nacional de la Competencia
2013-Current	Act 5/2013	Comisión Nacional de los Mercados y de la Competencia

⁶ See Defense Competition Act of 2007 (*Ley 15/2007 de Defensa de la Competencia*, [BOE 159 of 4/7/2007](#)), translation into English available at the [CNMC website](#).

⁷ The CNE and the CMT were mandated by the relevant legislation at that time to protect and promote competition in exercising their regulatory functions on the relevant industries, see Act 54/97 on the Electric Sector (*Ley 54/97 del Sector Eléctrico*, [BOE285 of 28/11/97](#)), Act 34/98 on the Hydrocarbons Sector (*Ley 34/98 del Sector de Hidrocarburos*, [BOE241 of 8/10/98](#)) and Act 12/98 General Telecommunications (*Ley 11/98 General de Telecomunicaciones*, [BOE99 of 25/4/98](#)).

⁸ CMT, CNE, Comisión de Regulación Ferroviaria, Comisión Nacional del Sector Postal (CNSP) and Comisión Nacional del Juego.

⁹ Consejo Estatal de Medios Audiovisuales (CEMA) and Comisión de Regulación Económica Aeroportuaria (CREA).

¹⁰ See Act 3/13 creating the National Markets and Competition Commission, translation into English available at the [CNMC website](#). See FRANCESC TRILLAS & RAMÓN XIFRÉ "Institutional Reforms to integrate regulation and international perspectives, and the case of the CNMC in Spain competition policy " [Utilities Policy 40 \(2016\) 75-87](#).

¹¹ See, e.g. judgment of 20/6/2006 (*Telefónica v. TDC*, rapp. M Campos, [ES:TS:2006:3887](#)), annulling the €8.414.200 fine imposed to Telefónica by TDC resolution of 8/3/2000 ([Retevisión/Telefónica](#), rapp. M Comenge), regarding some promotions that had been sanctified by the CMT (resolution of 30/4/98).

1.2. Legal framework: the competition prohibitions

Spanish domestic legislation prohibits anticompetitive agreements and abuses of dominance, and since 1989 the phrasing of the prohibitions has evolved to mirror the EU prohibitions.

Agreements, collective decisions, recommendations, concerted and consciously parallel practices that have as their object, produce or may produce the effect of the prevention, restriction, or distortion of competition in all or part of the national market are prohibited.¹² They are unlawful and void unless they contribute to improving the production or commercialization of goods and services or to promoting technical or economic progress as long as they: allow consumers a fair share of the benefits; do not impose restrictions on the undertakings concerned which are not indispensable to the attainment of those objectives; and do not afford the participating undertakings the possibility of eliminating competition in respect of a substantial part of the products or services envisaged.¹³

Abuses of a dominant position by one or several undertakings are also prohibited.¹⁴

Spanish domestic competition legislation also empowers the Competition authorities to investigate as a competition infringement those acts of unfair competition law violations that affect the public interest by distorting free competition.¹⁵ Those violations are not covered by the project.

On the other hand, aside from the public enforcement of the competition prohibitions, it should be noted that private enforcement in Spain has surged in the last few years, mainly following some cartel decisions by the European Commission and the Spanish NCA. Finally, although some of the conduct falling within the competition prohibitions could also be

¹² Article 1.1 of Act 16/1989 and Article 1.1 of Act 15/2007.

¹³ Article 3.1 of Act 16/1989 and Article 1.3 of Act 15/2007. Article 3.2 of Act 16/1989 also provided an exemption to the extent justified by the general economic situation and the public interest.

¹⁴ Article 6 of Act 16/1989 and Article 2 of Act 15/2007. An amendment of Act 16/89 in 1999 included as a competition prohibition the abuse of economic dependence (article 6.1.b) of Act 16/89 introduced by Article Act 52/99, this prohibition ceased to be an antitrust violation in 2007 and is only contained in the Unfair Competition Act (article 16 of Act 2/91 on Unfair Competition, *Ley de Competencia Desleal*, [BOE 10 of 11/1/91](#)).

¹⁵ See Article 7 of Act 16/89 and Article 3 of Act 15/2007. See *OECD, Regulatory Reform in Spain. The Role of Competition Policy in Regulatory Reform*, 2001, 16.

criminally prosecuted,¹⁶ there have been very few attempts to do so, and none have led to a conviction.¹⁷

1.3. Enforcement framework: institutions and powers (investigation/adjudication)

The public enforcement of the competition prohibitions in Spain has always followed an administrative model, in which investigation and adjudication of infringements of the competition prohibitions are decided by administrative authorities. Enforcement for those infringements that solely affect the territory of regions with competition enforcement powers is conducted by Regional Competition Authorities.¹⁸ Those decisions are not covered by the project.

While the 1989 Act was in force, the investigations were carried out by the TDC, which also adopted the final administrative decisions.¹⁹ Mirroring EC competition law enforcement prior to Regulation 1/2003, a system of individual notification and authorization by the TDC for exemptions of anti-competitive agreements or other conduct with pro-competitive benefits was in place.

In 2007, the individual authorization system was abrogated, trusting the affected undertakings with the self-assessment of the applicability of exemptions. The investigation and the adjudication of proceedings for infringements of the competition prohibitions were integrated within the same administrative agency (the CNC), further gaining independence from the Government.²⁰

¹⁶ See article 262 (Alteration of prices in public tenders and auctions) of the Organic Law 10/1995 Criminal Code (Código Penal, [BOE 285 of 24/11/95](#), an English translation available in the [Ministry of Justice webpage](#)).

¹⁷ See MARÍA GUTIÉRREZ & ÍÑIGO ORTIZ DE URBINA "Conductas restrictivas de la competencia y derecho penal" in ANTONIO ROBLES (ed) *La lucha contra las restricciones de la competencia: sanciones y remedios en el ordenamiento español*, 2017, 79-121.

¹⁸ See Coordination of Powers Act of the State and the Regions Act on antitrust matters of 2001 (*Ley 2/2001 de Competencias del Estado y las Comunidades Autónomas en materia de Defensa de la Competencia*, [BOE 46 of 22/2/2002](#)). Regional Competition Authorities decide 85% of the proceedings for infringements of the competition prohibitions, see FRANCISCO MARCOS "Análisis sistemático de la aplicación pública del Derecho de la competencia por las autoridades nacionales en España 2003-2022" [Revista de Derecho de la Competencia y Distribución 2023 §IV.1](#).

¹⁹ *Id.*, 7. Until 2007 the SDC was empowered to decide not to start or to close investigations, but those decisions could be appealed before the TDC (article 47 of Act 16/89).

²⁰ The SDC was a unit dependent of the Ministry of Economy.

Finally, following a global trend of integrating competition law and sectoral regulatory enforcement,²¹ the CNMC was established in 2013. Enforcement decisions on competition law infringement cases are now adopted by the Competition Chamber of the CNMC,²² which also has a separate Regulation Chamber in charge of sectoral regulatory supervision in energy, telecom, railway and air transportation, postal and audiovisual markets.²³

Potential infringements of the competition prohibitions are investigated by the Directorate of Competition, *ex officio* or following a complaint.²⁴ Since 2008, investigations of cartel infringements may also be initiated by a leniency application,²⁵ which as of 31/12/22 led to the uncovering of 37 cartels.²⁶

The CNMC investigative and adjudication powers are in line with Article 5 of Regulation 1/2003 and the ECN+ Directive.²⁷ The CNMC has comparable powers as those of the European Commission. In the investigation of suspected infringements, its Directorate of Competition may conduct dawn-raids,²⁸ request information²⁹ and conduct interviews³⁰. In the enforcement of the prohibitions, the CNMC can accept commitments³¹ and impose interim measures,³² adopt a decision finding an infringement or imposing remedies;³³ and impose fines for procedural and substantive law breaches, as well as for non-compliance with its decisions.³⁴ Many of the decisions adopted by the CNMC in conducting its proceedings can be challenged

²¹ See FREDERIC JENNY "The Institutional Design of Competition Authorities: Debates and Trends" in FREDERIC JENNY & YANNIS KATSOUALACOS (Ed) [Competition Law Enforcement in the BRICS and in Developing Countries. Legal and Economic Aspects, Springer 2017, 17-21.](#)

²² Article 14.1.a) of Decree 657/13, approving the Organic Statute of CNMC ([BOE209 de 31/8/13](#)).

²³ When the infringements of the competition prohibitions occur in sectors subject to the supervision of the CNMC, joint action of the Competition Directorate with the rest of the sectorial Directorates of CNMC is possible and reports may be issued by the Regulatory Chamber, but it is apparent that the creation of the CNMC has led to a postponement of the enforcement of the competition prohibitions to the objectives of regulatory supervision.

²⁴ Article 49.1 of Act 15/2007.

²⁵ Articles 65 and 66 of Act 15/2007. The leniency programme was operative on 28/2/2008, when the Royal Decree 261/2008 entered into force ([BOE 50 de 27/2/2008](#)). See JOAN R. BORREL, JUAN L. JIMÉNEZ & JOSÉ M. ORDÓÑEZ "The leniency programme: obstacles on the way to collude" [Journal of Antitrust Enforcement 3/1 \(2015\) 149-172.](#)

²⁶ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.3.](#)

²⁷ The ECN+ Directive (2019/1) was implemented in domestic law by Decree Law 7/21 of 27/4/21 ([BOE101 de 28/4/21](#)).

²⁸ Article 40 of Act 15/2007 and Article 27 of Act 3/2013.

²⁹ Article 39 of Act 15/2007.

³⁰ Article 39bis of Act 15/2007.

³¹ Article 52 of Act 15/2007.

³² Article 54 of Act 15/2007.

³³ Articles 53 and 63 of Act 15/2007.

³⁴ Article 41 of Act 15/2007.

in court independent or separately of the final decision on the merits, yet such appeals are not covered by this project.³⁵

Enforcement actions are carried out through administrative penalty proceedings, with separate investigation and resolution phases, following the steps and specific rules set out in Act 15/2007.³⁶ The principles and rights set out in the EU Charter of Fundamental Rights are respected.³⁷ The proceedings have a maximum duration of 24 months from the resolution of the Competition Directorate of the CNMC to initiate them.³⁸

The CNMC may also conduct sector inquiries;³⁹ it may issue opinions on matters relating to its competition and regulation enforcement mandate, as well as on proposed or existing regulations.⁴⁰ It is also empowered to challenge in court any administrative action or regulation that creates obstacles to the maintenance of effective market competition.⁴¹

In the last two decades, the size and resources of the Spanish NCA⁴² have grown exponentially: its budget has doubled, and it has a staff of over 100 people in charge of competition law enforcement.⁴³ Intense competition advocacy work is carried out, in addition to an annual average of around fifty decisions (although since 2009 there has been a significant drop in the number of infringement proceedings started). Most of the investigations are reactive (81%), responding to complaints filed, but the leniency program established in 2008 has made

³⁵ Decisions of the Competition Directorate which cause defencelessness or irreparable harm to legitimate rights or interests of the undertakings investigated may be appealed before the Council of CNC/CNMC (article 47.1 of Act 15/2007) and then the decision of the CNC/CNMC council may be challenged in court following the same procedure described *infra* §2 (this occurs, e.g., on decisions on the legality of dawn-raids, decisions not to initiate commitment proceedings)

³⁶ The legal rules governing common administrative proceedings (Act 39/15, *Ley del Procedimiento Administrativo Común de las Administraciones Públicas*, [BOE 236 of 2/10/15](#)) are supplementary to the specific rules on competition proceedings (see articles 44 and 70 of Act 16/89).

³⁷ Article 45 of Act 15/2007.

³⁸ The expiration period has been lengthened by article 219 of Decree-Law 5/23, which will apply only to those proceedings initiated after 30/6/23 (Transitory Provision 9th); it should be noted that previously the maximum duration the proceedings was 18 months (articles 36.1 and 38.1 of Act 15/2007).

³⁹ Article 5.1.h) of Act 3/2013.

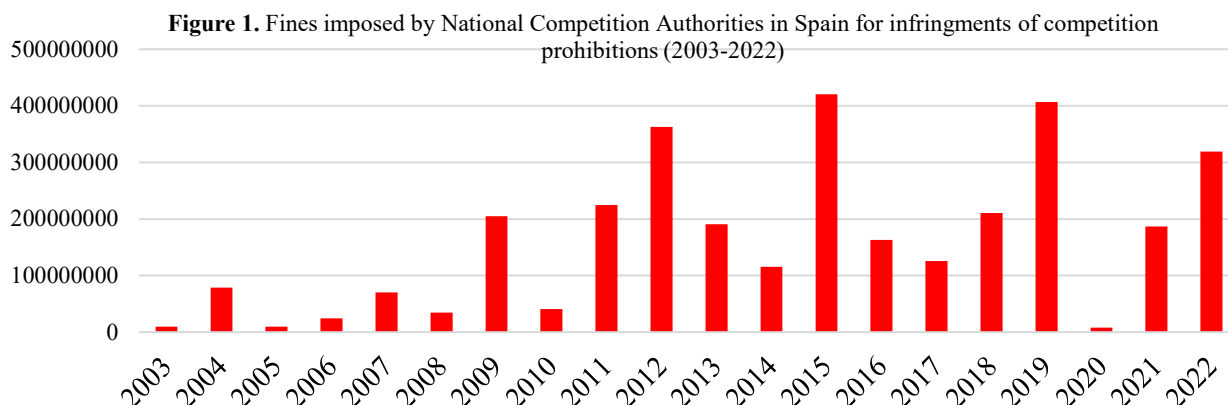
⁴⁰ Article 5.2.a) of Act 3/2013.

⁴¹ See Article 5.4 of Act 3/2013 and Article 127 bis and following of the Act 29/98 governing the administrative jurisdiction (*Ley reguladora de la Jurisdicción contencioso-administrativa*, [BOE 167 of 14/7/98](#)),

⁴² In the rest of the paper, for the sake of simplicity and to avoid confusion, the various administrative authorities in charge of antitrust public enforcement over time (TDC, CNC and CNMC) will be referred to as Spanish National Competition Authority (Spanish NCA).

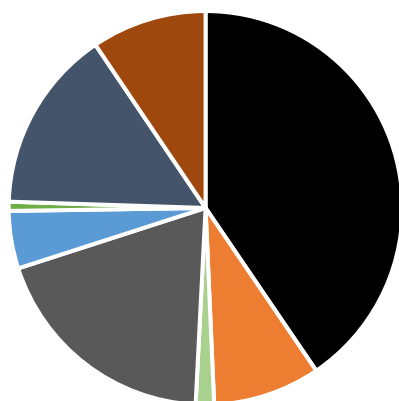
⁴³ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.2.](#)

it possible to investigate and sanction some thirty cartels. In the last twenty years, fines totalling €3,207,374,930 have been imposed (see Figure 1).⁴⁴



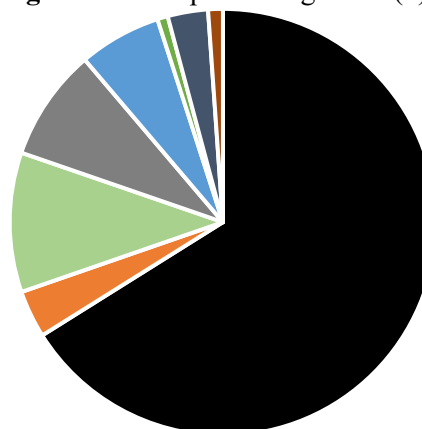
As figures 2 and 3 show, half of the NCA decisions concern multilateral anticompetitive conduct, most of them horizontal restraints (and half of those concluded with fines). A quarter of the NCA decisions examine single-firm abuses (roughly a third of them concluding in fines). Most fines were imposed on more than eighty cartels that had been detected since 2007.⁴⁵

Figure 2. Types of infringement (per decision)



- Horizontal restraints
- Vertical restraints
- Mixed restraints
- Exclusionary abuses
- Exploitative abuses
- Mixed abuses
- Combination of infringements
- Unfair Competition Antitrust

Figure 3. Fines per infringement (€)



- Horizontal restraints
- Vertical restraints
- Mixed restraints
- Exclusionary abuses
- Exploitative abuses
- Mixed abuses
- Combination of infringements
- Unfair Competition Antitrust

⁴⁴ €35.817.087 are fines for acts of unfair competition law violations that affect the public interest by distorting free competition (see [MARCOS Revista de Derecho de la Competencia y Distribución 2023 §§V.51 and IV.6.6](#)).

⁴⁵ €1.898.740.215. Almost every fine for amount larger than €50 million punish horizontal restraints, the majority of those being cartels, see [MARCOS Revista de Derecho de la Competencia y Distribución 2023 §IV.5.1 \(Table1\)](#).

The initiation of punitive proceedings by the NCA is optional and subject to the principle of opportunity.⁴⁶ However, this does not allow the NCA to be arbitrary, since it must give reasons for its actions and decisions, which are subject to control by the courts.⁴⁷ The entire sanctioning procedure is scrupulously regulated, governed by the principle of legality.

When the Spanish NCA detects an infringement of the prohibitions and declares that an infringement has occurred, it always orders the cessation of the infringing conduct, may impose certain conditions or obligations, whether structural or behavioral on the infringer, but fines are the most used remedy.⁴⁸ Thus, administrative fines are the main instrument granted by the legislature to the Spanish NCA to punish competition law infringements, thereby deterring the commission of new infringements. To this end, the amount of the fine must be sufficiently deterrent.⁴⁹ Since 1989, the Competition Act sets a maximum cap for fines of 10% of the sales volume of the infringing undertaking on the fiscal year immediately preceding the NCA

⁴⁶ See ALEJANDRO NIETO *Derecho Administrativo Sancionador*, 5th ed. Tecnos, 2008, 100-101.

⁴⁷ *Ibid.* 103.

⁴⁸ Article 51.1 and 2 of Act 15/2007. See Francisco Marcos “Remedios y obligaciones impuestos por las autoridades de defensa de la competencia” [Cuadernos de Derecho Transnacional 10/1 \(2018\) 331-371](#). In practice most behavioural and structural remedies are included as part of commitment decisions, see MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.5.4](#).

When the offenders are legal entities, their legal representatives and the members of their management bodies involved in the infringement may be fined up to €60,000 (article 63.2 of Act 15/2007). The CNMC has imposed these fines since 2016 in a dozen resolutions, all of them infringements of the prohibition of horizontal multilateral conducts, mainly cartels. In addition, serious infringements of the prohibitions on anticompetitive conduct can be accompanied by a ban on contracting with the public administration for up to three years (article 71.1 b) of Act 9/2017 on Public Procurement, *Ley 9/2017 de Contratos del Sector Público*, [BOE272 of 9/11/17](#)). Since 2019 the CNMC has declared in twelve resolutions that the conditions for the application of the prohibition were present.

⁴⁹ The guiding principle is that the fine should be fixed at an amount high enough to make economically unwise to engage in the prohibited actions and, therefore, it should be higher for those breaches that are more severe, see article 29.2 of Act 40/15 of the Public Sector Legal Regime (*Ley de Régimen Jurídico del Sector Público*, [BOE236 of 2/10/15](#)): “*The imposition of pecuniary sanctions shall provide that the commission of the infringements typified shall not be more beneficial to the infringer than compliance with the rules infringed*”..

decision,⁵⁰ although the current regime and criteria for setting fines (Competition Act 2007) distinguishes between different infringement depending on their gravity.⁵¹

The exercise of the fining power by the NCA is not entirely discretionary, there is some margin of discretion regarding the circumstances of the infringement and its consequences, but the NCA assessment must be made within the framework provided by the law. Determining the amount of the fine is not a mechanical process of automatic subsumption within the parameters set by law. There is room for maneuver for the gradation of sanctions within the framework of the law.⁵²

As shown in Figure 1 *supra*, fines imposed by the NCA have experienced an increasing trend since 2008, coinciding with the creation of the CNC and the launch of the leniency program.

Fining decisions by the NCA take effect immediately.⁵³ However, the infringing parties may request as an interim measure the suspension of the fine and of any other remedies imposed in the contested decision while the appeal is decided.⁵⁴ Requests for suspension of the fine are usually upheld when the appellant shows that complying with the contested decision would deprive an appeal of its legitimate interest or when it causes harm that is impossible or very difficult to repair (e.g., given its financial situation, considering the amount of the fine).⁵⁵

⁵⁰ Article 10 of Act 16/89 and article 63.1.b) of Act 15/2007. Until 2007 the Competition Act included minimal rules on the amount of fines. The general rule was that the amount of the fines may be as large as €901.518,16, but this amount may “*be increased up to 10% of the turnover of the offender corresponding to the financial year immediately prior to court decision*” (article 10 of Act 16/1989). However, there was no scale of the fines depending of the severity of the infringement, the TDC should consider the following factors in setting the amount of the fine: a) the type and scope of the restriction upon competition; b) the size of the affected market; c) the market share of the corresponding undertaking; d) the effect of the violation on the actual or potential competitors, the other parties in the economic process and the consumers and users; e) the duration of the restriction upon competition; f) the recidivism of the offender. The TDC was supposed to adequately reason the criteria and parameters followed in setting the amount of the fine in each case. At that time there was uncertainty about how the TDC calculated the amount of the fine, some even arguing the unconstitutionality of the Competition Act on this regard (FRANCISCO MARCOS, “[The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions](#)” in S. PRASAD (ed.), *Antitrust Law-Emerging Trends*, ICFAI Press 2007, 154). For that reason, e.g., a fine imposed to the former SOE Telefónica was partially annulled (reduced), see Judgment of Supreme Court of 23/3/2005 (*Telefónica v. TDC & BT*, rapp. M Campos, [ES:TS:2005:1817](#)) reducing to €1.803.036 the €3.485.870 fine imposed by TDC resolution of 21/1/1999 ([412/17 BT/Telefónica](#), rapp. J Hernández).

⁵¹ Article 63.1 of Act 15/2007.

⁵² NIETO *Derecho Administrativo Sancionador*, 519 (“*Without prejudice to the aforementioned legality, Administrative Penalty Law is -whether you like it or not- the realm of administrative discretion*”, id. 510).

⁵³ Article 98.1 of Act 39/15.

⁵⁴ The NCA may also impose structural or behavioral remedies, but these are not so frequent, see *supra* note 48.

⁵⁵ See Article 130.1 of Act 29/98. See, e.g. order of High National Court of 26/9/23 (*R.Soc. Canina de España v. CNMC*, rapp. B Santillán, [ES:AN:2023:9610A](#)) granting the suspension of the remedy imposed (provide the export pedigree certificate to those who request it without being able to impose the obligatory prior registration in the

If the fine is suspended, the appellant must provide the necessary security to guarantee that the amount of the fine will finally be made available if the judgment resolving the appeal upholds the validity of the infringement decision.⁵⁶ If the suspension of the NCA decision is not granted, the authority is empowered to monitor the fulfilment and compliance with the remedies imposed.⁵⁷ Failure to comply with them is considered a very serious infringement, that may be punished with fines of up to 10% of the total turnover of the non-compliant undertaking the fiscal year prior to the imposition of the fine,⁵⁸ regardless of the imposition of coercive fines of up to €12.000/day in order to force compliance with the remedies imposed in the decision.⁵⁹ Given that many NCA decisions are appealed, and suspension is generally requested, the NCA must wait until the court resolves on that matter before initiating monitoring proceedings for lack of compliance.⁶⁰

2. Judicial Review of decisions of the NCA

Decisions by the NCA can be appealed before the Courts.⁶¹ In Spain, the judicial System is divided into four specialized judicial orders: Civil (Private Law), Criminal, Administrative and Social (Labor Law/Social Security). The Administrative Order oversees the legality of

RSCE source books) due to the irreparable harm that could be caused. Lately, if the prohibition of contracting with the Administration is included as an additional remedy for severe infringements of the competition act (see article 71.1 b) of Act 9/2017 on Public Procurement, [BOE272 of 9/11/17](#)), given the harm derived from the application of such measure consisting in the prohibition to contract can be serious (depending on the profile of the enterprise), both in the relations of an enterprise with the public sector, as well as in those maintained in the private sector, the Supreme Court has considered that suspension requests of such measure could be granted based on the same reasoning that applies to the fine, see judgment of 14/12/21 (*Autocares Lorca Bus*, [ES:TS:2021:3366](#), rapp. D Córdoba).

⁵⁶ Article 133 of Act 29/98, such surety of the full amount of the fine may be provided in any of the forms permitted by law (bond or guaranty), to avoid possible losses to the Public Treasury that could result from the insolvency of the person or company obliged to pay the related debts in favour of the Public Treasury, see judgment of Supreme Court of 26/4/18 (*Colegio de Arquitectos de Sevilla*, Rapp. AR Arozamena, [ES:TS:2018:1720](#)).

⁵⁷ See article 41 of Act 15/2007.

⁵⁸ See articles 62.4.c) and 64.a.b) pf Act 15/2007.

⁵⁹ See article 67 of Act 15/2007. In the period covered by this project Spanish NCAs adopted several decisions imposing fines for lack of compliance, which may have also been appealed in court. The judgments deciding those appeals are out of the scope of this project (see, e.g. note 160).

⁶⁰ See judgments of National High Court of 5/6/2000 (*Telefónica v. TDC*, rapp. CM Montero, [ES:AN:2000:4720](#)) and 25/4/2001 (*Tabacalera v. TDC & Mc Lane*, rapp. JM^a del Riego, [ES:AN:2001:2545](#)) annulling coercive fines imposed by the competition authority before the decision could be deemed binding and enforceable.

⁶¹ Article 36.1 of Act 3/13, Article 48.1 of Act 15/2007 and Article 49 of Act 16/89. This also includes decisions in merger review proceedings, out of the scope of this project.

actions of the Government and Public Administration.⁶² Appeals against the decisions of the NCA are examined by the Administrative Order.⁶³ Appellants filed a petition seeking a declaration that the infringement decision by the NCA is not in accordance with the law and that it be annulled.⁶⁴ A separate appeal is available for the protection of fundamental rights if the appellants consider that the infringement proceedings violated their fundamental rights (frequently, due process rights).⁶⁵ This special appeal is an express and fast procedure, which is handled separately from other appeals against an infringement decision and which leads to a separate judgment.⁶⁶ It has been used assiduously by some offenders.⁶⁷

Ordinary appeal proceedings follow the rules set out in Act 29/98 governing the administrative jurisdiction, which refers to the rules of the Civil Procedure for supplementary application.⁶⁸

NCA decisions are subject to the full jurisdiction of the reviewing courts competent to hear challenges against them. They may be annulled for any infringement of the law pleaded by the parties, which normally base their appeals on both procedural and substantive pleas. Despite the complexity of the analysis on which some NCA decisions are grounded, their technical assessments can be challenged on appeal, and may be overturned by reviewing courts based on the arguments and evidence presented by the appellants. Naturally, to the extent that

⁶² Courts and judges serving in the administrative jurisdiction are part of the Judicial Power as the rest of judges and courts in Spain, their selection procedure is the same, it is only a matter of specialization. It is wrong to assume that this implies that a lighter review of government and administrative action is foreseen in the Law.

⁶³ Appeals against decisions of Regional Competition Authorities are heard before the High Court of Justice (*Tribunal Superior de Justicia*) of the corresponding Region.

⁶⁴ Article 31.1 of Act 29/98 governing the administrative jurisdiction (*Ley reguladora de la Jurisdicción contencioso-administrativa*, [BOE167 of 14/7/98](#)). See ORIOL MIR "Administrative Procedure and Judicial Review in Spain" (Chapter 13) in GIACINTO DELLA CANANEA & MADRID ANDENAS (Ed) *Judicial Review of Administration in Europe. Procedural Fairness and Propriety*, Oxford University Press; 2021

⁶⁵ See articles 114-122 of Act 29/98. See FABIO PASCUA "El procedimiento para la protección de los Derechos fundamentales: Evolución y disfunciones bajo la Ley 29/1998" [Revista de Administración Pública 185 \(2011\) 113-162](#).

⁶⁶ Almost all the cases registered here reviewing NCA decisions, when the appellant (always a fined company) filed the express separate appeal for fundamental rights violation, it also filed the ordinary proceedings against the decision. The undertakings challenged through this procedure thirteen decisions on the period (including one no-fine decision, see CNC resolution of 2/11/09 ([S/0051/08 UNESA](#)), six of them were annulled.

⁶⁷ And the outcome has occasionally been favorable to them, e.g., REPSOL used it in challenging three decisions (CNC resolution of 30/7/09, [652/07 BP/Cepsa/Repsol](#), rapp. P Sánchez) CNMC resolution 20/2/15, [S/0474/13 Precios Combustibles Automoción](#) and CNMC resolution of 2/7/15, [S/0484/13 Redes Abanderadas](#)), two of which were fully annulled by the courts.

⁶⁸ First Final Disposition, Act 29/98. See Civil Procedure Act 1/2000 (Ley de Enjuiciamiento Civil, [BOE7 of 7/1/2000](#)).

the grounds of appeal on cassation to the Supreme Court are more limited, the scope of review by the Supreme Court is narrower.

2.1. Decisions subject to appeal

Although the law declares that decisions by the NCA can be appealed before the Courts, during the investigation proceedings, most NCA decisions cannot be individually or separately challenged. Due process and defense rights of the investigated parties are assumed to be guaranteed through the availability of appeal against the final decision on the merits.⁶⁹

However, in practice, it is possible to challenge in court not only NCA final decisions closing investigations (with a ruling on the substance of the infringement) but also other previous NCA decisions adopted during the proceedings from which the investigated parties cannot defend themselves or that cause irreparable harm to their legitimate rights or interests.⁷⁰ Challenges to these qualified procedural decisions (*actos de trámite cualificados*) follow the same process indicated below for appeals against final decisions. Unsurprisingly, undertakings under investigation try to challenge procedural decisions as an “anticipatory” appeal of the final decision.

Although outside the scope of this project, the relevance of these appeals against qualified procedural decisions should not be underestimated, since the possible annulment of qualified procedural decisions could lead to the final NCA decision being overturned.⁷¹ For example, when the competition authority introduced a correction in the SO that was material (regarding the duration of the infringement).⁷² Many other appeals on qualified procedural

⁶⁹ According to the Courts, this applies to decisions to initiate the investigation (or even before a preliminary investigation *-información reservada*), decisions enlarging the scope of the investigation (see ee Supreme Court Judgment of 21/11/14, *Iberdrola v. CNC*, rapp. JM Bandrés, [ES:TS:2014:4698](#)) decisions denying interested party status, the statement of objections or the proposal of a final decision, decisions not to initiate commitment proceedings, decisions denying or granting confidentiality to data or documents (either obtained in an inspection or in answering to a request of information by the authority), including confidentiality requests on communications benefiting from attorney client privilege. See Supreme Court Judgment of 21/9/15 (*Balat v. CNMC*, fundamental rights proceedings, rapp. PM^a L Murillo, [ES:TS:2015:4209](#)), confirming High National Court judgment of 11/6/14 (rapp. AI Resa, [ES:AN:2014:2598](#)) and CNC resolution of 16/4/14 ([R/0157/13 Balat 2-Abogado](#), rapp. F Torremocha & B Valdés).

⁷⁰ Article 47.1 of Act 15/2007.

⁷¹ Many appeals to qualified procedural decisions had led to the full annulment of the final decision on the merits, see *infra* §§.4.4.2.2.2 and 4.4.2.2.3.

⁷² See CNMC resolution of 31/7/14 ([R/AJ/00245/14 Nestlé España](#)), annulled by High National Court judgement 11/7/16 (*Nestlé v. CNMC*, rapp. F De la Peña, [ES:AN:2016:3063](#)), confirmed by Supreme Court of 24/7/18 (rapp. M^a I. Perelló, [ES:TS:2018:3007](#)).

decisions concentrated on dawn-raids, challenging several aspects of how dawn-raids were conducted, including the order of inspection and the evidence therein obtained.⁷³

2.2. *First instance Appeals*

Appeals against the NCA decisions are heard by the Administrative Chamber of the National High Court (*Audiencia Nacional/AN*).⁷⁴ The appeal is heard by magistrates serving in the Administrative Chamber, who are specialized in various matters of administrative law.⁷⁵

The Administrative Chamber is further divided into eight sections; among which cases are allocated depending on the Government Department or public entity challenged. Judicial review of public enforcement of the competition rules is conducted by the 6th section of the Administrative Chamber, composed of six magistrates.⁷⁶ The section is not specialized in competition law.⁷⁷ It is understood that specialization in competition law will be acquired

⁷³ See, e.g., Judgments of Supreme Court of 27/4/12 (*STANPA v. CNC*, rapp. NA Maurandi, [ES:TS:2012:3887](#)); 30/9/13 (*Transnatur v. CNC*, rapp. M Campos, [ES:TS:2013:4722](#)) and 25/4/16 (*Lactalis v. CNMC*, rapp. M^a I Perelló, [ES:TS:2016:1846](#)). Courts have ruled that an inspection order must specify, with minimum information on the possible infringements and their scope, what the competition authority is looking for, see, e.g., Judgment of 27/2/15 (*Transmediterránea v. TDC*, [ES:TS:2015:941](#) rapp. M^a I. Perelló) revoking judgment of High National Court of 7/2/12 (rapp. M^aA Salvo, [ES:AN:2012:693](#)), which had rejected the appeal against CNC resolution of 2/7/10 ([R/0046/10 Transmediterranea](#), P Sánchez). See also Judgment of 10/12/14 (*UNESA v. CNC*, rapp. E. Calvo, [ES:TS:2014:5266](#), dissenting JM Bandrés & PJ Yague) revoking judgment of High National Court of 2/6/11 (rapp. M. Pedraz, [ES:AN:2011:2836](#)), which had rejected the appeal against CNC resolution of 1712/2009 ([R/0030/2009 UNESA](#), rapp. I. Gutiérrez).

In case of discrepancy between the inspection order of the authority or the court order, the later prevails. See Judgment of 10/12/14 (*Campezo v. CNC*, [ES:TS:2014:5479](#), rapp. E Espín), annulling the High Court judgment of 20/5/11 (rapp. CM Montero, [ES:AN:2011:2528](#)), which had confirmed CNC resolution of 28/12/2009 ([R/0025/09 Campezo/Guipasa](#), rapp. E Conde).

Courts have also affirmed that the inspection must be limited to the scope provided for in the aforementioned investigation order or the eventual court order, See Judgment of 22/6/15 (*Colgate v. CNC*, [ES:TS:2015:2717](#), rapp. JM^a Bandrés) confirming Judgment of High National Court of 26/11/11, which accepted the appeal against resolution of 3/10/2008 ([R/04/09 Colgate Palmolive España](#), rapp.E. Conde).

⁷⁴ See Article 66 of Organic Act 6/85 of the Judicial Power (*Ley del Poder Judicial*, [BOE157 of 2/7/85](#)) and Additional Provision 4th.3 of Act 29/98 ("*in single instance*"). The High National Court was created in 1976 (succeeding the Franco's Public Order Courts and the Central Criminal Courts, Decree-Law 1/77, [BOE4 of 5/1/77](#)) with country-wide jurisdiction on criminal and administrative matters.

⁷⁵ Administrative judges are selected through competitive examination of their specialization of administrative law. The appointment of magistrates to the AN is made on a competitive basis, through restricted contests among the senior specialist judges of the lower courts with greatest seniority (articles 326 and 330 of Organic Act 6/85).

⁷⁶ In the period covered by this project 14 magistrates served in the 6th Section: Lucia Acín, Ramón Castillo, Francisco De la Peña, José M^a del Riego, José Guerrero, Miguel de los Santos Gandarillas, Javier E. López, Concepción M. Montero, Mercedes Pedraz, Ana I. Resa, M^a Asunción Salvo, Berta Santillán, Santiago P. Soldevila and M^a Jesús Vegas.

⁷⁷ The 6th section of the Administrative Chamber of the National High Court hears also appeals against acts and decisions of the Ministries of Education and Vocational Training, Culture and Sport, Science and Innovation, Universities, Finance and Civil Service (only in matters of contraband and local and regional taxes), Justice (appeals against decisions on nationality by residence), Home Affairs (appeals against decisions on international

through the repeated performance of their work in the matters allocated to each section, given that it is common for judges to occupy the posts in each of the sections for a long period of time.⁷⁸

2.3. Appeal of Cassation

The Administrative Chamber of the National High Court decides on challenges of NCA decisions as a "single instance", i.e., this is the only ordinary appeal provided. However, judgments by the High National Court can be further appealed in cassation to the Administrative Chamber of the Supreme Court (*Tribunal Supremo*).⁷⁹ The Chamber is divided into six sections and appeals against judgments of the 6th section of the High National Court reviewing NCA decisions enforcing the competition prohibitions are heard by the 3rd section. Magistrates in the administrative chamber are specialized in Administrative Law.

The 3rd section of the Administrative Chamber of the Supreme Court is composed of five magistrates.⁸⁰ As with the court responsible for first instance appeals, the 3rd section is not specialized in competition law but hears appeals on many other administrative disputes.⁸¹ Yet, magistrates serving in the 3rd section are said to become specialized in competition law over time by performing their task of reviewing appeals regarding NCA decisions.⁸² Magistrates

protection deriving from the right to asylum and subsidiary protection and the statelessness status) and of the Universities Council. See Resolution of the Permanent Commission of the General Council of the Judiciary of 15/12/22 ([BOE 313 of 30/12/22](#)). In the period covered in this project, the jurisdiction of the 6th section has progressively been reduced, but it has always been the one overseeing challenges against decisions of national competition authorities, see resolution of the Permanent Commission of the General Council of the Judiciary of 24/7/2001 ([BOE 217 of 10/9/2001](#)). A first-person story of the complexities of deciding cases on so many different matters, together with an account of the turmoil that can arise in the dynamics of a collegial body, see JOSÉ GUERRERO, *Memorias de un juez desencantado*, Colex 2020, 124-126.

⁷⁸ Magistrates serving in the National High Court have few chances of promotion in the judicial career, unless if they change to another section in the Court (as it has happened with many of them or are promoted to the Supreme Court, f.e., Jose M^a del Riego). During the period of the research of this project most magistrates in the 6th Section held the position for several years (see *supra* note 76).

⁷⁹ Article 86.1 of Organic Act 6/85 and article 12.2.a) of Act.

⁸⁰ The number increases to six if the president of the Administrative Chamber joins the Section in some case. In the period of the Study there has been ten different magistrates serving in the 3th Section: Angel Arozamena Laso, Jose Manuel Bandrés, Eduardo Calvo, Manuel Campos, Diego Córdoba, Jose M^a del Riego, Jose Luis Delgado, Eduardo Espín, Oscar González, M^a Isabel Perelló and Pedro J. Yagüe.

⁸¹ The 3rd section of the Administrative Chamber of the Supreme Court is also in charge of appeals of cassation against acts and decisions of the Ministries of Economy and Finance, Home Affairs (including Foreigners' Affairs), Development; Industry, Tourism and Trade, Rural and Marine Affairs and Territorial Policy and Public Administration (also concerning public corporations or institutions linked to or dependent on one of them). See Resolution of the Permanent Commission of the General Council of the Judiciary of 29/12/10 ([BOE14 of 17/1/11](#)).

⁸² See *supra* note 76 and corresponding text.

serving in the Supreme Court have reached the top judicial echelon in Spain and they normally serve for long periods of time before retirement on the basis of old age.⁸³

Decisions by the Supreme Court are final and are not subject to any additional appeal. However, an exceptional motion is available for the nullity of the proceedings based on a violation of fundamental rights against either the inadmissibility of cassation or the judgment of Supreme Court addressing the appeal petitions.⁸⁴ The motion for nullity is based on the omissive incongruence or a defect of motivation (*in aliunde*) by the Supreme Court which amounts to an alleged infringement of the constitutional right to effective judicial protection established in article 24.1 of the Spanish Constitution.⁸⁵

The request for nullity of proceedings is not conceived as a new instance or as an ordinary or extraordinary appeal against Supreme Court judgments. Neither can it be interpreted as granting the parties a kind of appeal against the judgment that resolves the cassation appeal. It is a remedy aimed at correcting errors or omissions in the proceedings or in the judgment to avoid constitutional recourse (e.g., presumption of innocence). The motion for nullity of the proceedings would fully exhaust previous judicial appeals, which would be indispensable for a subsequent petition for protection (*amparo*) to the Constitutional Court.

Motions for nullity of proceedings are regularly filed by appellants against NCA decisions, although they have always been rejected. The Supreme Court has always considered that the appellant, under the invocation of the violation of the right for effective judicial protection or of other fundamental rights, sought to reopen the case discussion.⁸⁶

⁸³ Judges and magistrates in Spain are retired by age when they are 70 years old, although they may request a 2-year extension (Article 386.1 of Organic Act 6/85).

⁸⁴ See article 241.1 of Organic Act 6/85 (“*In general, incidents of nullity of proceedings shall not be admitted. However, exceptionally, those who are or should have been a legitimate party may request in writing that the nullity of the proceedings be declared on the grounds of proceedings based on any violation of a fundamental right of those referred to in Article 53.2 of the Constitution, provided that it has not been possible to denounce it before the decision that ends the proceedings is handed down and provided that said decision is not subject to ordinary or extraordinary appeal*”).

⁸⁵ Spanish Constitution of 27/12/1978 (*Constitución Española*, [BOE31 of 29/12/78](#)).

⁸⁶ See Orders of 10/1/96 (*Gestevisión Telecinco*, rapp. O González, [ES:TS:1996:2474A](#)); 16/1/2006 (*COAPI Coruña*, rapp. O González, [ES:TS:2007:479A](#)); 6/11/2008 (*COAPI Aragón y Soria*, rapp. R Enriquez, [ES:TS:2008:12952A](#)); 26/2/2009 (CGAE, rapp. E. Calvo, [ES:TS:2009:2286A](#)); 31/1/11 (Correos, rapp. JM Bandrés, [ES:TS:2011:861A](#)); 29/4/15 (Transcont, rapp. E Calvo, [ES:TS:2015:11023A](#); ALTC y [ES:TS:2015:3346A](#)); 3/9/15 (Swiss Re., rapp. E Calvo, [ES:TS:2015:7472AA](#)) 15/9/15 (*Repsol*, rapp. JM Bandrés, [ES:TS:2015:7105A](#)); 15/9/15 (*SCOR*, rapp. JM Bandrés, [ES:TS:2015:7101A](#)); 17/9/15 (*ASEFA*, rapp. M^a I Perelló, [ES:TS:2015:7628A](#)); 22/9/15 (*CASER*, M^a I Perelló, [ES:TS:2015:8546A](#)); 30/9/15 (*Ecoasfalt*, rapp. M^a I Perelló, [ES:TS:2015:8663A](#)); 16/10/15 (L'Oreal, rapp. E Espín, [ES:TS:2015:8540A](#)); 29/1/16 (KSB ITUR, rapp. E Espín, [ES:TS:2016:504A](#)); 16/2/16 (*Warner*, rapp. JM Bandrés, [ES:TS:2016:1524A](#)); 1/3/16 (*COPISA*, rapp. M^a I Perelló, [ES:TS:2016:2105A](#)); 7/3/16 (*Bombas Caprari*, rapp. E Calvo [ES:TS:2016:2099A](#)); 9/5/16 (*ILPA-Divisiones ILIP*, Rapp. JM Bandrés, [ES:TS:2016:4193A](#)); 10/5/16 (Canteras y Hormigones VRE, rapp. M^a I

Claims for the protection of constitutional rights and freedoms, nevertheless, may be brought before the Constitutional Court that is not part of the judiciary. For the purpose of this study, therefore, they are not considered as an additional level of judicial review. The Constitutional Court is very restrictive in admitting individual appeals for the protection of constitutional rights and it has only delivered one opinion in a handful of cases in relation to the judicial review of NCA decisions.⁸⁷

2.4. Proceedings before the National High Court

Appeals against NCA decisions follow the general rules on the rights of parties and the admissibility of evidence in court in administrative proceedings. The Court could also order *ex officio* the taking of evidence.⁸⁸ The application instituting the proceeding and the statement of defense are written, and so are the submissions to the court during the proceedings, including the closure motions. Hearings are not usually conducted, but the court is empowered to decide otherwise.⁸⁹

Decisions adopted by the NCA are administrative acts, being the general ground of appeal the contravention of the law (illegality).⁹⁰ The appellant petitions the annulment of the decision based on different motives and supporting evidence. As observed below (*infra* §4.4), many appeals are grounded on relevant procedural defects that harm the rights of defense of

Perelló, [ES:TS:2016:4451A](#)); 20/7/16 (Transnatur, rapp. JM Bandrés, [ES:TS:2016:7473A](#)); 25/1/17 (Transconval, rapp. M^aI Perelló, [ES:TS:2017:2688A](#)); 14/6/18 (CVPP, rapp. JM Bandrés, [ES:TS:2018:7281A](#)); 19/7/18 (Abertis, Rapp. M^a I Perelló, [ES:TS:2018:8705A](#)); 5/6/18 (Hewlett Packard Co. v. Oracle, rapp. E. Calvo, [ES:TS:2018:6199A](#)); 7/6/19 (Barna Import Médica, rapp. F. Román, [ES:TS:2019:7028A](#)), 28/6/19 (Grupo General Cable Sistemas, rapp. F. Román, [ES:TS:2019:8413A](#) y [ES:TS:2019:8411A](#)); 5/7/19 (Schaeffler Iberia, rapp. F. Román, [ES:TS:2019:7635A](#); SKF, rapp. F. Román, [ES:TS:2019:7637A](#)); 17/9/19 (AEDA, DAFISA, COALSA, COMASA, CONAGRASA, rapp. D Córdoba, [ES:TS:2019:9242A](#)); 1/10/19 (Algodonera del Sur, rapp. JM^a Del Riego, [ES:TS:2019:10116A](#)), 11/11/20 (Textil Planas, rapp. F. Román, [ES:TS:2020:10866A](#)); 25/11/19 (Bodegas Gonzalez Byass, rapp. AR Arozamena, [ES:TS:2019:12704A](#)); 14/7/21 (Hyundai, rapp. D Córdoba, [ES:TS:2021:10113A](#)); 1/12/21 (Mercedes-Benz, rapp. E Calvo, [ES:TS:2021:16216A](#)); 21/12/21 (General Motors, rapp. E Espin, [ES:TS:2021:16820A](#)); 30/3/23 (Colegio Abogados Madrid, rapp. M^a I. Perelló, [ES:TS:2023:4529A](#)); 27/4/23 (Transportes Ferroviarios Especiales, JM Bandrés, [ES:TS:2023:5296A](#)) and 19/7/23 (Affordable. Medicines Europe, rapp. JM^a del Riego, [ES:TS:2023:10991A](#)).

⁸⁷ Early on there was a judgment regarding the admissibility of a direct challenge to the Constitutional Court of an infringement decision by the TDC, see judgment 80/83 of 10/10/84 (*Agrupación de Vendedores de Prensa de Pontevedra*, Rapp. G Begué, [ES:TC:1983:80](#)); judgment 175/12 of 15/10/12 (*Buque Bus España*, Rapp. R Rodríguez, [ES:TC:2012:175](#)) and judgment 71/22 of 13/6/22 (*Bimética*, Rapp. E. Arnaldo, [ES:TC:2022:71](#)). In other cases, challenges grounded on the violation of fundamental rights by Bombas Caprari, Barna Import Médica y Club de Variedades Vegetales (rec. 477/18) were unadmitted.

⁸⁸ Article 61 of Act 29/98.

⁸⁹ Articles 63 and 64 of Act 29/88, that may occur for example when witness or expert evidence is presented, with the witnesses or experts being summoned to appear before the Court, so the parties and the Court can question them.

⁹⁰ See Article 31 of Act 29/98.

undertakings, ignoring the procedural safeguards set in the law and the right to due process, or when the assessment conducted by the NCA was mistaken.

2.5. Cassation proceedings (Supreme Court)

Cassation appeals are limited to legal or procedural issues, and neither the facts nor the assessment of the evidence is examined by the Supreme Court.⁹¹

The rules governing such appeals, including the grounds of cassation, have changed in 2016 and in 2023. The previous cassation appeals for the unification of doctrine and in the interest of the law were abolished, as well as the minimum amounts that were required in the past. The new rules are aimed to protect and preserve the law and its uniform interpretation (nomophylactic). Appellants need to invoke a specific infringement of the legal rules, whether procedural or substantive, or of the case-law, and to demonstrate an objective interest in the formation of case-law.⁹²

Initially, all challenges of NCA decisions were presumed to have an objective public interest .⁹³ However, mere arguments by the appellants alluding to the potential impact on multiple other cases are not enough (as potential applicability to other disputes must be inherent in the legal debate). Cassation appeals should rather focus on the divergence in the interpretation of the law, lack of case-law, or High National Court judgments deliberately departing from existing and consolidated case-law of the Supreme Court.⁹⁴

2.6. Outcome of judicial review

When the Courts uphold an appeal, the judgment declares the decision by the NCA not to be in accordance with the Law and annul it in whole or in part.

Annulments in full may be due to procedural errors, wrong assessment of the evidence by the NCA or lack of evidence of the infringement.

On the other hand, partial annulments of NCA decisions generally affect the amount of the fine imposed, where deemed excessive and disproportionate by the reviewing court. Reviewing courts can determine and reduce the amount of the fine on appeal themselves,

⁹¹ See Article 87 of Act 29/98 (“*the appeal in cassation before the Administrative Chamber of the Supreme Court is limited to questions of law, excluding questions of fact*”).

⁹² Article 88 of Act 29/98. See JOSÉ LUIS AZOFRA & CLAUDIA LÓPEZ "El acceso al (todavía) nuevo recurso de casación: análisis estadístico y sustantivo en el ámbito de la defensa de la competencia" (Chapter 19) *Anuario de Derecho de la Competencia 2019*, 321-344.

⁹⁴ Article 88.3 of Act 29/98. Even in those cases the Supreme Court could still non-admit those found manifestly to lack objective interest (not against those deliberately departing from existing and consolidated case-law).

depending on the gravity of the infringement and the criteria for setting it, as established in the Competition Acts. Indeed, Courts have done that a few times in the cases examined here, especially in the early years.⁹⁵ However, generally reviewing courts consider that fine determination may not be such a straightforward exercise and accordingly they prefer to order the NCA to recalculate the fine. This has considerably impacted this study because appellants normally challenge the appropriateness and proportionality of the fine imposed and it is not unusual for the courts to uphold their appeals. This means that the NCA decision is annulled only in relation to the amount of the fine, which must be recalculated again by the competition authority, and the new decision is also often appealed (this time with less likelihood of success). For the purposes of this study, there is considerable evidence of a multiplication of judgments reviewing the NCA decision and considerable delay for many decisions to become final (only with respect to the fine's amount).

If a sanctioning decision of the NCA is quashed, the undertaking can claim for compensation for any costs experienced because of the infringement decision. The declaration

⁹⁵ See, e.g., the Supreme Court reduced almost in half the fine to Correos for an abuse of dominance in TDC resolution 15/9/2004 ([568/03 ASEMPRE/Correos](#), rapp. J Pascual) see judgment of 8/6/10 (*Correos v. TDC*, rapp. José M. Bandrés, [ES:TS:2010:3178](#)), reducing the fine from €15.000.000 to €8.149.500. It did the same thing with the €300.000 fine imposed to Federación Gremial de Panadería y Pastelería de la Provincia de Valencia by TDC resolution of 18/10/2006 ([598/05 Panaderías de Valencia](#), rapp. F. Torremocha), see judgment of 1/12/10 (rapp. JM bandrés, [ES:TS:2010:6464](#))

Likewise, the fines imposed by the TDC in resolution of 18/10/2007 ([617/06 Cajas Vascas y Navarras](#), rapp. P Sánchez) were cut in half by the High National Court (and later that was confirmed by the Supreme Court: [ES:TS:2013:3505](#); [ES:TS:2013:1732](#); [ES:TS:2013:5343](#) and [ES:TS:2014:1526](#)), see judgements of the National Court of 6/11/2009 (*BBK v. TDC*, rapp. M Pedraz, [ES:AN:2009:5776](#); *Caja Vital v. TDC*, rapp. JM^a Del Riego, [ES:AN:2009:6310](#)), 1/12/2009 (*Kutxa v. TDC*, rapp. M^aA Salvo, [ES:AN:2009:6180](#) and 23/11/2010 (*Caja Navarra v. TDC*, rapp. L Acín, [ES:AN:2010:5355](#)).

The High National Court also cut in half the €400.000 fine imposed to CERCASA by resolution of 12/3/2007 ([614/06 Cervezas Canarias2](#), rapp. F Torremocha) for vertical restraints, see judgment of 8/10/10 (*CERCASA v. TDC*, [ES:TS:2012:1650](#) rapp. JM^a Del Riego, [ES:AN:2010:4758](#)) confirmed by the Supreme Court ([ES:TS:2012:1650](#)) The High National Court reduced to €100.000 the €450.000 fine imposed for an abuse of dominance by TDC resolution of 4/10/2004 ([570/03 Gas Extremadura](#), rapp. F. Torremocha) Judgment of 20/9/2006 (*DICOGEXSA v. TDC*, rapp. M Pedraz, [ES:AN:2006:6059](#)). Similarly, the €100.000 fine imposed to Inprovo in CNC resolution of 28/9/2009 ([S/0055/08 INPROVO](#), rapp. J.Costas) was reduced In half by High National Court judgment of 13/10/11 (rapp. M. Pedraz, [ES:AN:2011:4567](#)). Of the same amount was the reduction of the €200.000 fine to Propollo by CNC resolution of 29/9/2009 ([S/0044/08 PROPOLLO](#), rapp. P Sánchez) in High National Court judgment of 10/11/10 (rapp. M^a A. Salvo, [ES:AN:2010:5680](#)). Two of the fines imposed by CNC resolution of 14/10/2009 ([S/0053/08 FIAB y Asociados](#), rapp. I. Gutiérrez) were reduced by High National Court judgments of 15/2/12 (*FIAB v. CNC*, rapp. A.I. Resa, [ES:AN:2012:904](#)), reduced from 500.000 to 300.000 and 10/11/11 (*CEOPAN v. CNC*, rapp. L. Acín, [ES:AN:2011:5111](#)) confirmed by the Supreme Court judgment of 22/2/12 (rapp. M^a I. Perelló, [ES:TS:2013:612](#)).

of liability of the Administration will require the fulfillment of certain established legal requirements, and proof of harm caused by the annulled resolution.⁹⁶

3. Prior research

There have been many professional and academic contributions analyzing judicial review of specific decisions of the Spanish NCA.⁹⁷ Most papers focus on the judicial review of prominent decisions with large fines,⁹⁸ and some papers had pointed to trends observed in judicial review of NCA decisions.⁹⁹ While some empirical analysis of judicial review of competition law enforcement has also been conducted, they have not undertaken a meaningful systematic analysis of judicial review of NCA decisions.¹⁰⁰

The Spanish NCA regularly examines the judicial review of its decisions in its annual reports and reports to the OECD,¹⁰¹ but it does not follow a systematic analysis of judicial review, and annual reports tend to make a partial and fragmentary analysis which tends to be

⁹⁶ See articles 32-34 of Act 40/15. See, e.g., judgment of High National Court of 14/3/23 (*Iberdrola v. CNC*, [ES:AN:2012:1109](#), rapp. M^a Salvo) ordering the competition authority to reimburse Iberdrola the cost of the bail (€7.404,99) posted for the suspension of the €901.518,16 fine imposed by TDC resolution 7/7/2004 ([552/02 Empresas Eléctricas](#), rapp. J. Pascual), which was quashed by the High National Court (judgment of 3/11/2006, [ES:AN:2006:6127](#), rapp. JM^a del Riego) and the Supreme Court (judgment of 27/1/10, [ES:TS:2010:351](#), rapp. M^ª Perelló); see also judgment of the Supreme Court of 16/1/15 (*Telefónica v. CNC*, rapp. M Campos, [ES:TS:2015:15](#)) confirming judgment of High National Court of 26/12/13 ([ES:AN:2013:5900](#), rapp. SP Soldevila, with dissenting opinion of S. Soldevila) ordering the competition authority to reimburse Telefónica the cost of the bail (€526.243,11) posted for the suspension of €57million fine imposed by TDC resolution 1/4/2004 ([557/03 Astel/Telefónica](#), rapp. F Torremocha), which was quashed by the High National Court (judgment of 31/1/2007, JM^a del Riego, [ES:AN:2007:1023](#)) and the Supreme Court (judgment of 20/4/2010, M. Campos, [ES:TS:2010:1839](#)). See also High National Court judgment of High Court 20/12/17 (*Gas Natural v. CNMC*, [ES:AN:2017:5217](#), rapp. SH De Castro) concerning the €247.809,45 fine imposed to Gas Natural by CNC resolution of 13/5/11 ([S/0159/09 UNESA y Asociados](#), rap. M Cuerdo).

⁹⁷ See, for example, FRANCISCO MARCOS “[The Enforcement of Spanish Antitrust Law: A Critical Assessment of the Fines Setting Policy and of the Legal Framework for Private Enforcement Actions](#)” in S. PRASAD (ed.), *Antitrust Law- Emerging Trends*, ICFAI Press 2007, 155–156.

⁹⁸ See, for example, FRANCISCO MARCOS “Lecciones de la revisión judicial del cartel del seguro decenal” [Actas de Derecho Industrial y derecho de autor 36 \(2016\) 173-196](#).

⁹⁹ See, for example, FRANCISCO MARCOS “Incontinencia Judicial en defensa de la competencia” [Diario La Ley 8802 of 13/7/16](#).

¹⁰⁰ They either were focus in assessing the scope of judicial review of competition and regulatory authorities, see NURIA RUIZ *El control jurisdiccional de los organismos reguladores*, Thomson-Reuters 2018 and *Regulación Económica y Estado de Derecho*, IVAP/Tirant Lo Blanch 2018, or aim at comparing judicial review between jurisdictions, see LUIS E. MEJIA “Judicial review of regulatory decisions: Decoding the contents of appeals against agencies in Spain and the United States” [Regulatory Governance 15/3 \(2021\) 760-784](#).

¹⁰¹ See, for example, “Note by Spain. The standard of review by courts in competition cases”, [OECD Working Party No. 3 on Co-operation and Enforcement, DAF/COMP/WP3/WD\(2019\)18](#), 21/5/19, 3 (“*Recently the CNMC has analysed the judicial review of its sanctioning decisions regarding articles 1 and 2 –which are equivalent to 101 and 102 of the TFEU– of the Spanish Competition Act. The study carried out for the period 2014-2017 shows that the Spanish National Court has confirmed on average 75% of the Competition Authority’s sanctioning decisions. The percentage rises to 82.7% in the case of the Spanish Supreme Court*”).

biased and focused on the NCA's court successes rather than in its failures.¹⁰² Instead of maintaining and consolidating institutional memory, annual reports have been considered by each serving president as proof of his/her legacy, which transpires in the need for self-assertion,¹⁰³ especially in comparison with his/her predecessors.¹⁰⁴

4. Quantitative analysis

4.1. Sources of information

All judgments handed down by Spanish courts hearing antitrust cases are published. The NCA maintains a database of its decisions, which is also meant to include all the relevant judgments linked to a given case.¹⁰⁵ The database, though fairly comprehensive, is not complete and some information is missing. The full texts of all the reviewed judgments could, nevertheless, be retrieved from the official case law databases maintained by the CENDOJ.¹⁰⁶

During the period of this research project, the Spanish NCA (TDC, CNC and CNMC) adopted 769 decisions concerning potential infringements of articles 101 and 102 TFEU and their domestic equivalents,¹⁰⁷ of which more than one third were fining decisions (figure 4).¹⁰⁸

¹⁰² See CNC, *Memoria 2010*, 6 (in words of the president Berenguer “*moreover, the vast majority of our actions have been endorsed by the courts, which, at least in the first instance, have so far upheld 83.3% of our decisions. This gives us confidence and indicates that we are on the right track*”), including statistical review later from 2007-2011 (id. 55-56).

¹⁰³ See ANDRÉS BETANCOR “Control de las autoridades de defensa de la competencia: virtudes y límites. El caso de los poderes de investigación y sanción” in A. BETANCOR et al (ed) *Defensa de la Competencia: innovación y control en el contexto de la tradición intervencionista*, F. Ramón Areces 2020, 303 (considering self-centeredness one of the pathologies of the institution).

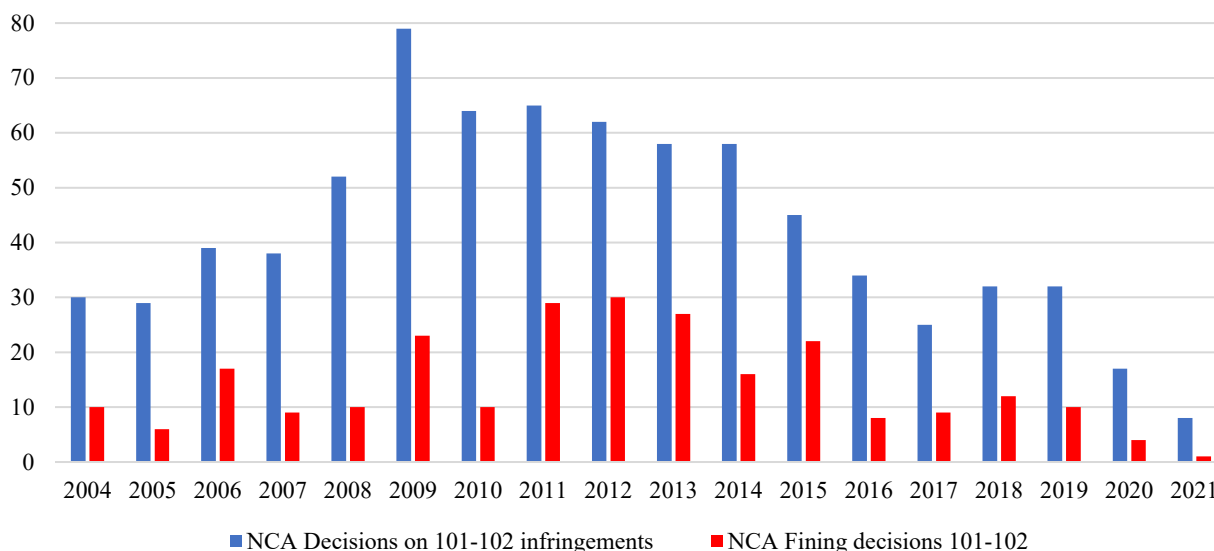
¹⁰⁴ See MARCOS *Revista de Derecho de la Competencia y Distribución 2023 §3 in fine*. NCA Annual reports generally give notice about those judgments delivered in judicial review every year, but given that the NCA is a party to many proceedings, not only proceedings concerning final decisions, and given the circumstances in which judicial review is performed, it is possible to twist the reality and use partial data to manage to depict a positive view of the NCA's performance in court, with the objective of providing the right image of the institution under the reins of each President. See CNMC, *Memoria 2021*, 21 (extracting only the positive information and in a disjointed manner, there is no hesitation in drawing positive conclusions). Eventually, the CNMC is franker in its own assessment, see *Memoria 2020*, 42.

¹⁰⁵ Accessible through the search form available at <https://www.cnmc.es/acuerdos-y-decisiones> (the NCA publicizes and makes available the judgments it is notified as party in the appeal proceedings, they are organized as a link to the appealed decision).

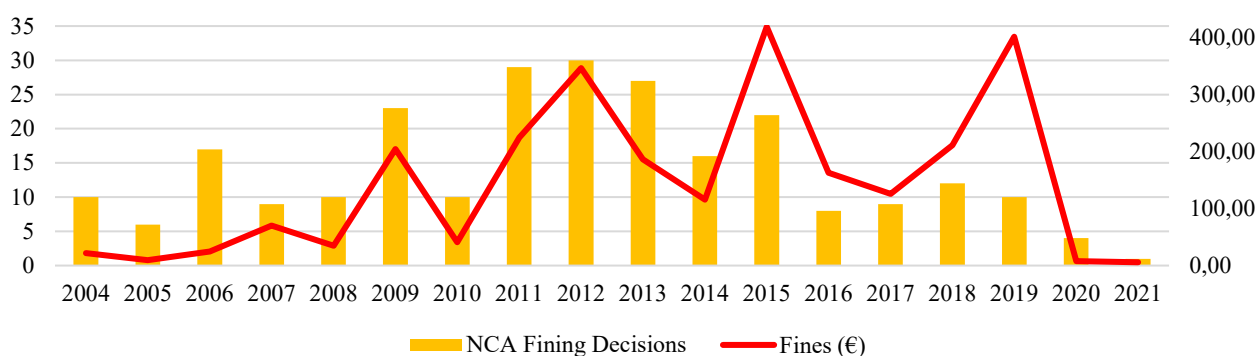
¹⁰⁶ Accessible through the search form available at <https://www.poderjudicial.es/search/indexAN.jsp>.

¹⁰⁷ Nineteen resolutions ruling on infringements of unfair competition acts prohibited by article 3 of Act 15/2007 (article 7 of Act 16/89) were subject to judicial review in the period (out of 79 resolutions, but they are excluded from the study (only four of them are fining decisions).

¹⁰⁸ Although some appeals against them were decided beyond the temporal scope of this Project (or are yet to be decided), up to 2019, 316 decisions were appealed.

Figure 4. NCA Decisions/NCA fining decisions

From 1/5/2004 to 31/4/2021 total fines of an amount of €2.611,88 million were imposed (Figure 5).¹⁰⁹

Figure 5. NCA Fining Decision/ Fines Amount (in Million €)

Due to the delays in the process of judicial review, as at the end of the project period, all appeals have been resolved only in relation to NCA decisions adopted prior to the end of 2015.¹¹⁰

¹⁰⁹ The highest fines in the history of the Spanish competition authorities were imposed in the period under review, with twenty decisions each involving fines exceeding €50 million. These fines are almost always for infringements of Article 101 TFEU (or domestic equivalent), cartels or other horizontal restraints See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §V.5.1](#). Although the number of fining decisions since the peak in 2012 seems to be declining, this has not led to a reduction in the total amount of fines imposed (i.e., the CNMC imposes fewer fines, but their amounts are higher). This may be due, among other reasons, to the fact that in recent years the CNMC has increased the average penalty rate used to calculate fines.

¹¹⁰ Until 31/12/2015 there were 209 fining decisions of the Spanish Competition authorities for infringements of 101 or 102 TFEU (or domestic equivalents), 92,8% were challenged in court by the undertakings fined (total amount €1.697.153.916).

4.2. Total number of judgments

More than one third of all NCA decisions on the application of the competition prohibitions were challenged in court (see figure 6), leading to 1390 judgments (1057 by the High National Court and 333 by the Supreme Court). The appeal rate is 36% at first instance.

Figure 6. NCA decisions/NCA decisions challenged

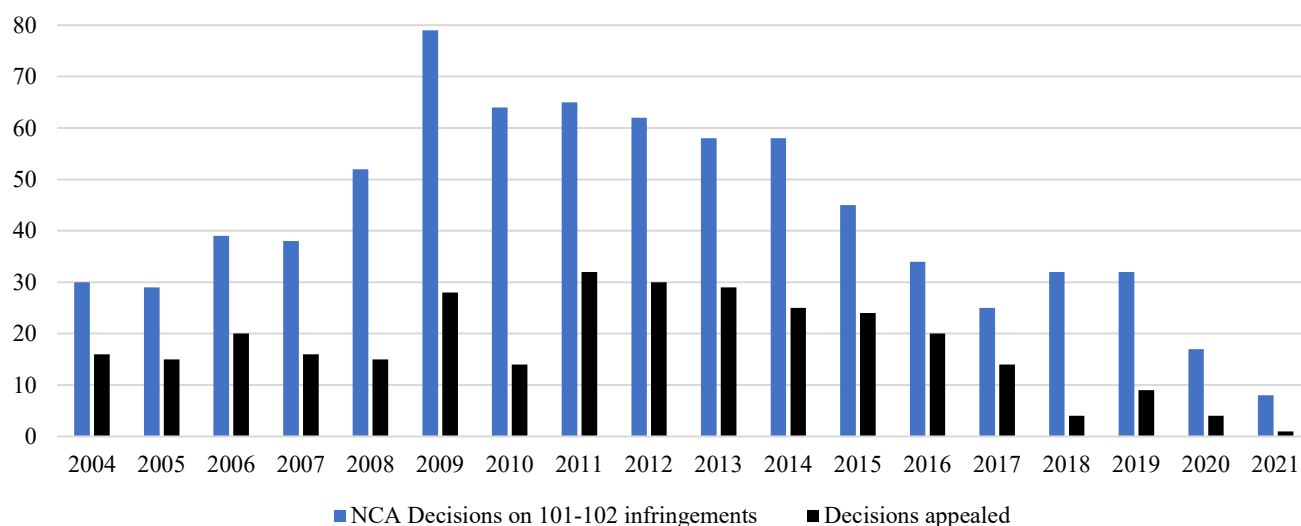
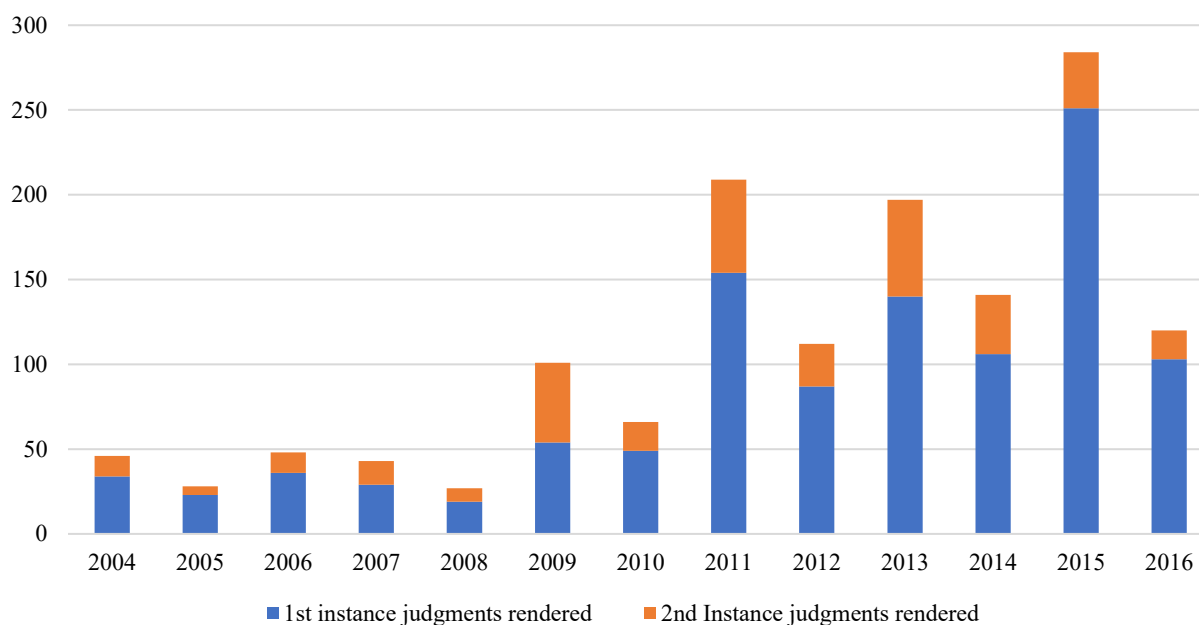


Figure 7. N° of judgments according to instances



Note: Differently from the other comparative reports in this project, here the accumulation of appeal judgments is anchored to the date of the decision, not to the date of the judgment (i.e., each year column represents all the judgments issued on review of all NCA decisions adopted that year).

The number of rulings resolving appeals grew throughout the period at a greater rate than the evolution in the number of decisions adopted by the CNMC (which in fact have decreased). The exponential growth in appeals has been particularly pronounced since 2011, largely due to the judicial review of several cartels involving numerous participants (see Table 2, including all decisions that resulted in more than fifteen judgments on appeal, all relating to cartels).

Table 2. NCA decisions leading to largest number of appeals (judgments)

Date	Case	Reference	Fine (€)	High Nat. Court	Supreme Court
28/5/15	Concesionarios Audi/Seat/VW	S/0471/13	27.338.323	70	11
19/10/11	Licitaciones de Carreteras	S/0226/10	44.033.240	53	24
8/1/15	Residuos	S/0429/12	98.201.302	44	0
22/9/14	Palés	S/0428/12	4.961.683,84	37	19
30/7/13	Coches de Alquiler	S/0380/11	34.634.498	23	4
5/3/15	Concesionarios Opel	S/0489/13	5.379.064	23	1
5/9/16	Cementos	S/0525/14	29.380.936	21	0
23/5/13	Distribuidores Saneamiento	S/0303/10	6.459.087	20	20
24/6/11	Bombas de fluidos	S/0185/09	17.343.581	18	5
23/7/15	Fabricantes automóviles	S/0482/13	92.007.346	18	14
18/6/14	Fabricantes Papel y cartón ondulado	S/0469/13	57.686.188	17	0
6/9/16	Mudanzas internacionales	S/0544/14	4.097.002	15	0

The large number of judgments reviewing the Spanish NCA's decisions is explained by the right of each infringing party to challenge the sanctioning decision with respect to its specific participation in the infringement. Although it is possible that parties may jointly appeal, they rarely do so, each of them filing an individual appeal (even when they belong to the same corporate group).¹¹¹ The National High Court could also decide *ex officio* to join the several appeals filed against the same NCA decision.¹¹² Reasons of efficiency and procedural economy would support a joinder of the appeals when the circumstances of the infringing conduct by various parties are substantially the same, but that has never occurred in the cases examined here.¹¹³

¹¹¹ This explanation is one of the many that Mejia has come up with, see MEJIA [Regulatory Governance 15/3 \(2021\) 772](#).

¹¹² But see article 34.1 of Act 29/98 (“*Claims arising in connection with the same act, disposition or action may be joined in a proceeding*”). In another context, regarding the decision of the High National Court ordering the claimants to lodge separate appeals (involving 15.000 litigants claiming compensation to the State for the closure of Spanish civil airspace on Dec. 3 and 4, 2010), the Constitutional Court has ruled “*the joinder could not be ruled out without further explanation of the corresponding legal premises that link between the claims, in view of the similarity and homogeneity of the elements that outline them, in terms of their objective and causal links, even if there was no absolute identity in the pleadings in view of the different harm caused to each claimant.*”, see 4th legal ground of Constitutional Court judgment 8/14 of 27/1/14 (*AENA*, [ES:TC:2014:8](#), Rapp. F Valdés).

¹¹³ The system of judicial productivity modules and variable remuneration can help to understand this trend, see GABRIEL DOMÉNECH “La perniciosa influencia de las retribuciones variables de los jueces sobre el sentido de sus decisiones” [Indret 3/2008, 44-56](#).

Given the collegiate nature of the reviewing bodies, for the sake of ensuring a degree of coherence in the judgments concerning the same NCA decision, there is often a form of coordinated processing of appeals, so that, although decided individually, they are decided around the same time.¹¹⁴

Naturally, coherence does not necessarily mean that all the rulings handed down on the same sanctioning decision coincide (that may often be the case). Given that it is possible that the motives, arguments, and evidence used by each offender are different, or that the review courts may make a different assessment from that of the NCA regarding the participation of each appellant in the infringing conduct or on the adequacy or proportionality of the fine imposed, it may well be that the outcome of their appeals differs for each appellant.

Judicial review is a lengthy process. Judgments of the National High Court reviewing NCA decisions take two or three years to be issued, and cassation appeals by the Supreme Court are decided three or four years after that. Apparently, given the increase over the years in the workload of the reviewing courts (not only in competition law matters) the duration of judicial review has increased by one additional year or more in each court. Some NCA decisions only become final after even longer periods. The situation is even more dire in those cases in which the court partially annuls the fine imposed by the NCA and orders a recalculation, as this takes further time, and on many occasions, decisions recalculated by the NCA are further appealed, generally without success, but lengthening the process again.

Obviously, this affects the analysis undertaken here, as only a few of the appeals against decisions adopted by the CNMC in 2016 were issued before 30 April 2021 (and when they were, they were only by the High National Court, with cassation appeals still pending). Indeed, judicial review proceedings of six of the twenty-four 2015 NCA decisions appealed were still ongoing at that date.¹¹⁵

¹¹⁴ A recent amendment to the Act 29/98 legally enshrines such a course of action (article 37.2 introduced by Decree-Law 5/2023, [BOE154 of 29/6/23](#)): “When a plurality of appeals with identical subject matter are pending before a judge or court, the court, if they have not been joined, will process one or more appeals on a preferential basis after hearing the parties for a common period of five days, suspending the course of the others, at the stage they are at, until a judgment is rendered in the first ones.

In the event that this plurality of appeals with identical object could, in turn, be grouped by categories or groups that raise a substantially analogous controversy, the court, if they have not been accumulated, will process one or more of each group or category preferentially, after hearing the parties for a common period of five days, suspending the course of the others in the state in which they are until a judgment is rendered in those processed preferentially for each group or category”.

¹¹⁵ Firstly, CNMC Resolution of 20/2/15 ([S/0474/13 Precios Combustibles Automoción](#)) partially annulled for three of the five infringing firms by the High National Court, cassation appeals unadmitted, fully annulled for Repsol and CEPSA by Supreme Court judgments (rapp. D Córdoba) of 5/7/22 (*CEPSA v. CNMC*, [ES:TS:2022:2729](#); *Repsol v. CNMC*, [ES:TS:2022:2729](#)). See CNMC resolution in execution of judgment of

Some disputes run for more than a decade,¹¹⁶ especially in those cases in which, after the review of the case by the National High Court and the Supreme Court (and eventually also through the fundamental rights proceedings), the case is sent back to the NCA, and the new fining decision is appealed again and the undertakings (mostly unsuccessfully) start the appeal process again.¹¹⁷

4.3. Success rates and outcomes

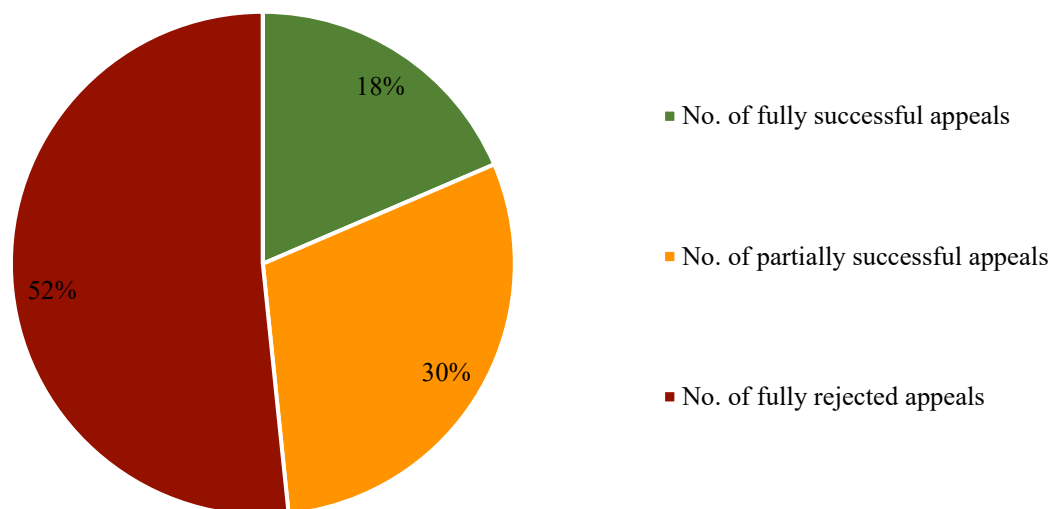
Figure 8 represents the success of appeals at the ends of the proceedings, i.e. final decision of the courts (either after the first instance and/or second instance). Contrary to the information of other reports in the Project, here the data refers to each NCA decision at the end of judicial review: 18% of appeals were fully successful, 30% partially successful and 52% were unsuccessful.

31/5/23 ([VS/0474/13 Precios Combustibles Automoción](#)). Secondly, CNMC resolution of 16/7/15 ([S/0490/13 Acuerdos Telefónica/Yoigo](#), dissenting opinions F. Torremocha & B. Valdés), was partially annulled by the High Court in judgments (rapp. MDSs Gandarillas) of 5/5/21 and 1/6/21 (*Telefónica v. CNMC*, [ES:AN:2021:2617](#) and *Xfera v. CNMC*, [ES:AN:2021:2620](#)), see CNMC resolution in execution of judgment of 15/3/23 ([VS/0490/13 Acuerdos Telefónica/Yoigo](#)). Thirdly, CNMC resolution of 23/7/15 ([S/0436/12 DTS Distribuidora TV Digital](#)), in which the two declared infringers' challenges were rejected by High National Court judgments of 23/12/21 (*DTS v. CNMC*, rapp. F. de la Peña, [ECLI:ES:AN:2021:5643](#)) and 27/12/21 (*Telefonica v. CNMC*, rapp. BM^a Santillán, [ECLI:ES:AN:2021:5660](#)), but cassation appeals have been admitted ([ES:TS:2023:3237A](#); [ES:TS:2022:13940A](#)) and Supreme Court judgments are pending. Fourthly, the CNMC resolution of 26/11/15 ([S/0500/13 AGEDI/AIE Radio](#)) was partially annulled by High National Court judgment of 17/2/22 (*AGEDI/AIE v. CNMC*, rapp. BM^a Santillán, [ES:AN:2022:2417](#)), cassation unadmitted by Supreme Court Order of 15/12/22 (*AGEDI/AIE v. CNMC*, rapp. JM Bandrés, [ES:TS:2022:17546A](#)), and the fine being recalculated by CNMC resolution in execution of judgment of 14/6/23 ([VS/0500/13 AGEDI/AIE Radio](#)). Fifthly appeals CNMC resolution of 3/12/15 ([S/0481/13 Construcciones Modulares](#), dissenting opinion B. Valdés) were only decided by five judgments issued by the High National Court in November 2021 ([ES:AN:2021:4905](#); [ES:AN:2021:4881](#) [ES:AN:2021:4825](#); [ES:AN:2021:4924](#); [ES:AN:2021:4828](#)), one of them -at least- appealed on cassation to the Supreme Court (unadmitted in June 2022, [ES:TS:2022:9402A](#)). Sixthly, CNMC resolution of 12/12/15 ([S/0299/10 Consejo de Colegios de Odontólogos y Estomatólogos](#)) was quashed by judgment of the High National Court of 27/7/22 (*CGCODOEE v. CNMC*, rapp. MDS Gandarillas, [ES:AN:2022:4210](#)).

¹¹⁶ For an extreme case, see TDC resolution of 10/5/2006 ([588/05 Distribuidores cine](#), rapp. J. Huerta), where after 5 judgments of High National Court, 9 judgments of the Supreme Court and several new resolutions by the CNMC re-calculating the fines, the last ones dated 21/12/21 ([VS/0588/05 Distribuidores de Cine-Hispano Fox](#) and [VS/0558/05 Distribuidores de Cine-Warner](#)), the undertakings have managed to reduce the fines roughly €3 million (from €12.900.000 to €8990993,84).

¹¹⁷ A good snapshot is CNMC resolution of 26/2/15 ([S/0425/12 Industrias Lácteas 2](#)), which was annulled by judgment of the High Court of 11/7/16 (*Nestlé v. CNMC*, rapp. F De la Peña, [ES:AN:2016:3063](#)), confirmed by Supreme Court judgment of 24/7/18 (rapp. M^a I. Perelló, [ES:TS:2018:3007](#)) and subsequent judgments of the High Court of 20/9/18 (*Nestlé v. CNMC*, rapp. SP Soldevila, [ES:AN:2018:5373](#); *Lactalis v. CNMC*, rapp. SP Soldevila, [ES:AN:2018:5301](#)); 28/9/18 (*AEG v. CNMC*, rapp. R. Castillo, [ES:AN:2018:5302](#)); 18/10/18 (*Danone v. CNMC*, rapp. R. Castillo, [ES:AN:2018:4039](#)); 24/10/18 (*Schreiber v. CNMC*, [ES:AN:2018:3649](#); *Celega v. CNMC*, rapp. BM^a Santillán, [ES:AN:2018:4035](#) and *C.A.Peñasanta v. CNMC*, [ES:AN:2018:4037](#)); 25/10/18 (*Gremio v. CNMC*, rapp. F De la Peña, [ES:AN:2018:4036](#) and *Pascual v. CNMC*, rapp. F De la Peña, [ES:AN:2018:4040](#)); and 2/11/18 (*CLAS v. CNMC*, rapp.SP Soldevila, [ES:AN:2018:4193](#)). The CNMC sanctioned the cartel again, with some variations in the scope of the infringement in resolution of 11/7/19 ([S/0425/12 Industrias Lácteas 2](#)). All the declared offenders appealed the new resolution, judgments by the High National Court are expected soon.

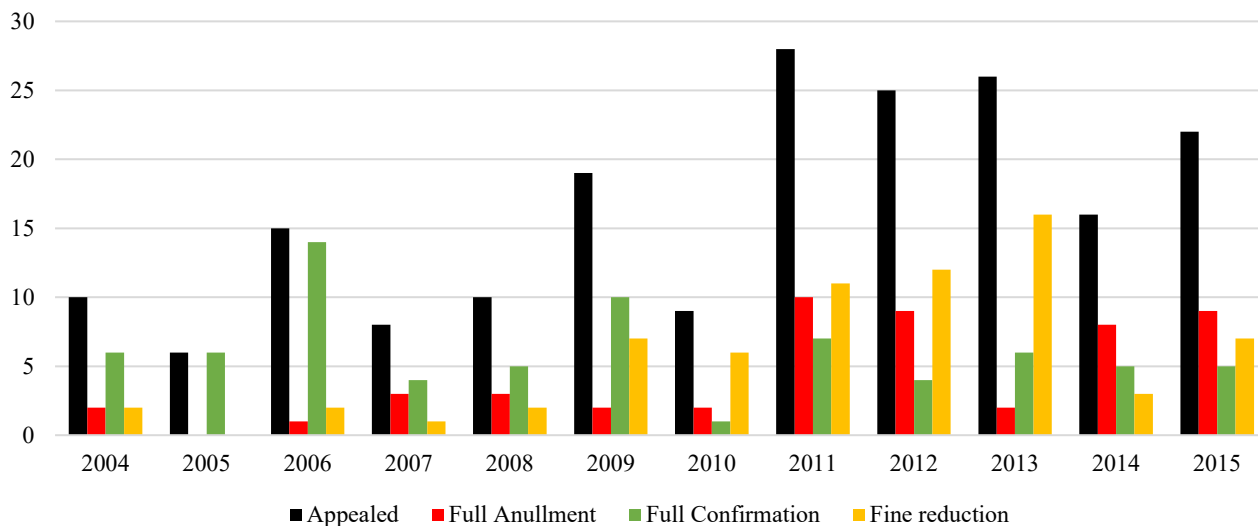
Figure 8. Success of appeals (each NCA's decision counts as 1)



4.4. Appeals against fines

Given the number of individual appeals by fined undertakings, and the large number of judgments issued, this section focuses on the outcome of judicial review of fines (Figure 9).

Figure 9. Final outcome of judicial review (each NCA decision counts as 1)



After looking at the cases in which challenges were rejected (*infra* §4.4.1), those cases in which the courts fully annulled the fining decision will be examined (*infra* §4.4.2). However, in many cases the outcome of judicial review may be different for some of the fined undertakings, so to illustrate the grounds and outcome of appeals in one case with a very large number of appeals, all the challenges to one selected decision are examined (*infra* §4.4.3). Finally, given that the most successful ground of appeal concerns the amount of the fine,

normally leading to the case being sent back to the NCA and the fine being re-calculated, the reasons for litigation over the fine amount are explained (infra §4.4.4).

4.4.1. Appeals resulting in full confirmation

After all judicial review has been completed, 38% of the fining decisions by NCAs challenged in court have been confirmed.¹¹⁸ Notably, since 2006 there has been a decreasing trend in the confirmation rate of NCA fines: annulment or fine reduction have been a more likely outcome of judicial review.

4.4.2. Appeals resulting in full annulment

More than one quarter of the NCA fines imposed from 2004-2015 were totally annulled by the Courts (26%).¹¹⁹ Fifty-one decisions were fully quashed, with the peak of annulments relating to 2015 (almost half of the year decisions imposing fines in that year were annulled).¹²⁰ The figure includes two fines that were later reimposed by the NCA.¹²¹

Fining decisions are deemed to be fully annulled when the courts find the NCA decision to be unlawful, regardless of whether a few sanctioned undertakings did not challenge it, where

¹¹⁸ A CNMC study published in May 2019, [Revisión jurisdiccional en el periodo 2014-2018 de las declaraciones de infracción de la autoridad nacional de competencia](#), probably drafted in reaction to news about the dire performance of the CNMC in the Courts, and lack of control over the collection of fines (see TRIBUNAL DE CUENTAS [Informe de fiscalización de la Comisión Nacional de los Mercados y la Competencia, ejercicio 2014, y del proceso de integración en ella de los organismos públicos declarados a extinguir por la Ley 3/2013](#), 26/5/16, 28), examining 536 judgments deciding challenges against decisions of the CNC and CNMC issued by the High National Court and the Supreme Court. In the period 2014-2018 reports a 73,8% confirmation rate per decision (even higher -83%- in the Supreme Court), but weirdly this study counts as confirmations those annulments of the decision that only concern the amount of the fine.

¹¹⁹ Naturally, this refers only to the period of the project. There are five additional fining decisions adopted in 2016 and 2017 (total fines € 18.998.840) that had been annulled by judgments post 1/5/21 on substantive grounds (resolutions of 7/4/16 [S/DC/0503/14 Fabricantes de Turrón](#); 30/6/16 [S/DC/0540/14 ISTOBAL](#) and [S/DC/0519/14 Infraestructuras ferroviarias](#); 23/2/17 [S/DC/0545/15 Hormigones de Asturias](#); 4/5/17 [SAMAD/06/2015 ICAM-Justicia gratuita/turno de oficio](#); and 12/9/7 [SAMAD/12/2010 Tanatorios Coslada](#)) whilst other two, also annulled on substantive grounds, are pending decision of the cassation appeals filed by the CNMC (resolution of 10/11/16 [S/DC/0555/15 Prosegur-Loomis](#) and of 9/3/17 [S/DC/0512/14 Transporte Balear de Viajeros](#)). The total fines imposed in these two decisions amounted to €55.576.400.

¹²⁰ Within the period of this project until the end of 2015 (which is the last year fully reviewed by the courts), the total amount of fines imposed by the authorities amounted to €1.697.153.916, of which around 40% were fully annulled by the Courts (€723.270.118,30). That is 42,6% of the total fines imposed in the relevant period, the amount is a bit lower if €88.258.813 fine imposed by CNMC resolution of 26/2/15 ([S/0425/12 Industrias Lácteas 2](#)) and €491.884 fine imposed by CNC resolution of 12/10/17 ([SAMAD12/10 Tanatorios Coslada](#)) were excluded.

¹²¹ CNMC resolutions of 11/7/19 ([S/0425/12 Industrias Lácteas 2](#)) and of 12/10/17 ([SAMAD12/10 Tanatorios Coslada](#)), though the later has already been fully annulled (High National Court judgment of 28/6/23 (rapp. MDS Gandarillas, [ES:AN:2023:3466](#)).

it was annulled for all appellants.¹²² They are also considered fully annulled when most of the fine has been quashed.¹²³

¹²² See TDC resolution of 22/7/2004 ([565/03 Materiales Radiactivos](#), rapp. E Conde), which was annulled on substantive grounds by the Supreme Court in judgments of 5/10/2009 (*Nucliber v. TDC*, rapp. JM Bandrés, [ES:TS:2009:6216](#); *Amersham Health v. TDC*, rapp. M Campos, [ES:TS:2009:6096](#); and *Tyco Healthcare Spain v. TDC*, rapp. E Espín, [ES:TS:2009:6161](#)). Schering España did not appeal on cassation, and the High National Court had confirmed the fine (judgment of 10/5/2007, rapp. JM^a Del Riego, [ES:AN:2007:2187](#)). A €356.000 fine limitation of passive sales in resolution of 21/7/2008 ([634/07 MDC Ingeniería/Productos Haller](#), rapp. I.Gutiérrez) was overruled on substantive grounds by High National Court judgments of 17/9/2009 (*CLG Haller v. TDC*, rapp. M Pedraz, [ES:AN:2009:4100](#)), 20/10/2009 (*V-E-C Prieto Puga v. TDC*, rapp. M^o A. Salvo, [ES:AN:2009:4556](#)) and 29/10/2009 (*Haller Umweltsysteme v. TDC*, rapp. M. Pedraz, [ES:AN:2009:4730](#), but there was an undertaking that did not appeal (Sociedade de Montagem y Automóvei). Likewise, but in this case for procedural grounds, resolution of 21/6/2007 ([612/06 Aceites 2](#), rapp. J. Huerta, dissenting Torremocha) in which the resolution was annulled on procedural grounds following the appeal of fundamental rights (for denial of proof) decided by Supreme Court judgment of 10/12/2009 (fundamental rights, *SOS Cuetara v. TDC*, rapp. J Díez, [ES:TS:2009:7888](#)), where some of the fined undertakings did not appeal (or not fully) and paid the fine (Al Campo).

¹²³ E.g., the €32.400.000 fine imposed by CNMC resolution of 20/2/15 ([S/0474/13 Precios Combustibles Automoción](#), dissenting B Valdés & F Torremocha), fully quashed due to expiry of the administrative deadline of the proceedings for Repsol (judgment of 5/7/22, rapp. D Córdoba, [ES:TS:2022:2729c](#)) and Cepsa (€10.000.000, judgment of 5/7/22, rapp. D Córdoba, [ES:TS:2022:2723](#)). The appeals of the three other offenders resulted in the CNMC being ordered to recalculate the fine for them, see judgments of High National Court of 17/12/20 (*Galp v. CNMC*, rapp. R. Castillo, [ES:AN:2020:4183](#), reduced from €800.000 to €708.150), 14/12/20 (*Meroil v. CNMC*, rapp. M^aJ Vegas, [ES:AN:2020:4287](#), same amount:€300.000) and 4/12/20 (*DISA v. CNMC*, rapp. F.de la Peña, [ES:AN:2020:4182](#), same amount). See also CNC resolution of 14/12/11 ([S/0231/10 Productos hortofrutícolas](#), rapp. M^aJ Glez), annulled by judgments of 24/6/13 (*ASAJA-Almería v. CNC*, rapp. CM Montero, rec. n^o 59/112) and 20/6/15 (*Asoc. Comercializadores Alhondiguistas Andalucía v. CNC*, rapp. AI Resa, [ES:AN:2015:2365](#)), but confirmed for COAG-Almería. (29.662€) by judgment of 6/5/13(rapp. M Pedraz, [ES:AN:2013:1944](#)).

The Supreme Court also annulled the €3.977.855 fine imposed by CNC in resolution of 6/11/14 ([S/0430/12 Recogida de papel](#), with 2 dissenting opinions) but for one undertaking that did appeal it (SAICA Natur fine €43.4380; VANPAC €10.000 was ordered to be re-calculated by judgment of High National Court of 3/10/17, rapp. M^aI Resa, [ES:AN:2017:4007](#), and the undertaking did not appeal it in cassation), all the rest being annulled as the CNC decision was based on evidentiary material that had not been obtained in compliance with the law (evidentiary material that was found in the course of a search that was understood to be supported by a clause of the Investigation Order -"treatment of other types of waste"-, which, in reality, lacked any enabling force), see judgments of 29/5/20 (*ISMA 2000 v. CNMC*, rapp. JM^a del Riego, [ES:TS:2020:1257](#)), 25/10/19 (*Rua Gestión v. CNMC*, rapp. E. Espín, [ES:TS:2019:3411](#)), 22/10/19 (*Ultramic v. CNMC*, rapp. JM^a Del Riego, [ES:TS:2019:3256](#)), 11/6/19 (*Recio y Cabral v. CNMC*, rapp. E. Espín, [ES:TS:2019:2005](#)), 12/3/19 (*Destradatos Confidencial v. CNMC*, rapp. A. Arozamena, [ES:TS:2019:812](#)), 4/3/19 (*Ramón Vilella v. CNMC*, rapp. M^aI Perello, [ES:TS:2019:1072](#)); 26/2/19 (*UDER v. CNMC*, rapp. D Córdoba, [ES:TS:2019:581](#); *Hijos de Demetrio Fernández v. CNMC*, rapp. A Arozamena, [ES:TS:2019:585](#); *Irmamol v. CNMC*, rapp. JM^a del Riego, [ES:TS:2019:670](#)); 25/2/19 (*S. Solis v. CNMC*. Rapp. E. Calvo, [ES:TS:2019:583](#)) and 18/2/19 (*Alba Servicios Verdes v. CNMC*, rapp. JM Bandrés, [ES:TS:2019:671](#)). GERSA claimed reimbursement of the €254.323 fine imposed, which the High National Court rejected (judgment of 13/7/21, rapp. M^aJ Vegas, [ES:AN:2021:5504A](#)), but decision by the Supreme Court is still pending ([ES:TS:2023:8730A](#)).

A similar situation occurred with the €8.220.031 fine imposed by resolution 21/1/10 ([S/0084/08 Fabricantes de Gel](#), rapp. P. Sánchez) confirmed for Sara Lee Household & Body Care España ((€3.715.874 fine, judgments of High National Court of 17/7/13, rapp. AI Resa, [ES:AN:2013:3541](#), and Supreme Court of 17/6/15, rapp. E. Calvo, [ES:TS:2015:2806](#))), but annulled for the rest of offenders (Puig Beauty & Fashion Group, fine €2.437.317, [ES:TS:2015:2797](#)), Colgate Palmolive (€2.066.840, [ES:AN:2013:3551](#)) y STS 8/6/15, [ES:TS:2015:2520](#)) and Colomer Group ([ES:AN:2013:3084](#), [ES:TS:2015:2640](#), [ES:AN:2013:1724](#)). Finally, the same happened with CNC resolution of 23/5/13 ([S/0303/10 Distribuidores Saneamiento](#), rapp. I Gutiérrez) and CNMC resolution of 2/1/14 ([S/0404/12 Servicios Comerciales AENA](#) 02/01/2014) without detailing here the number of judgments annulling them (given the large number of judgments).

In those cases, neither the NCA nor the courts extend any annulment to co-offenders that did not themselves appeal the fine when the decision was annulled for other undertakings (or was annulled on the basis of other grounds).¹²⁴ Likewise, the same applies when co-offenders requested an application to them of a reduction granted by the courts to a co-infringer.¹²⁵

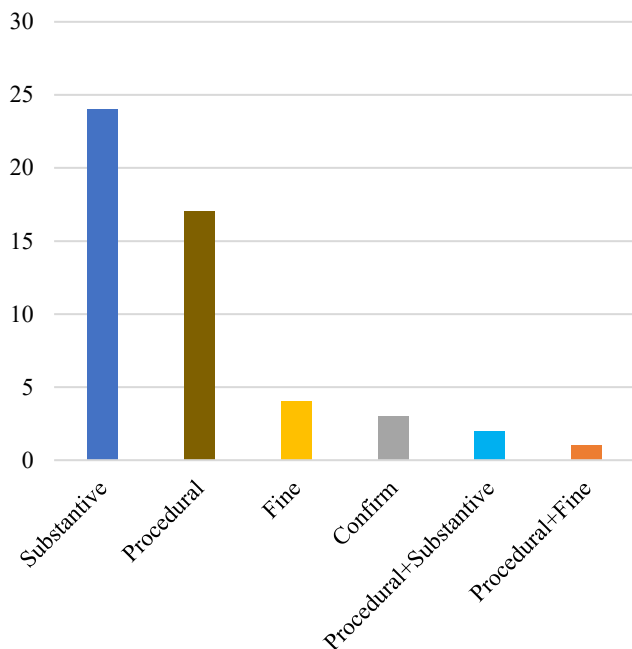
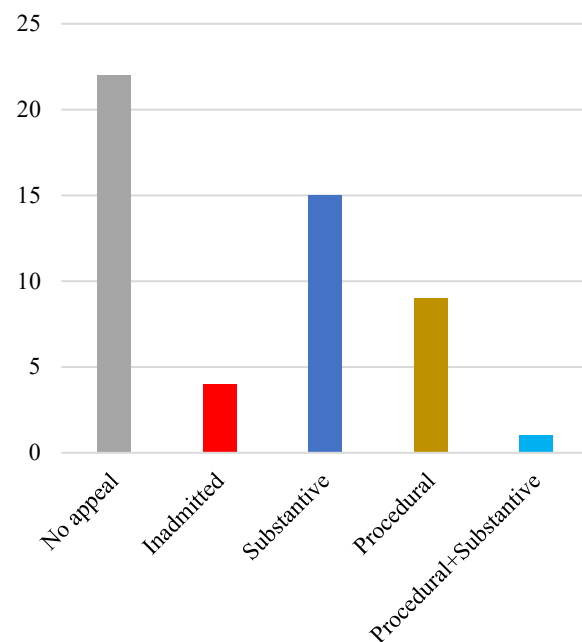
Full annulments normally occur when there is some common error or defect in the NCA decision that makes it invalid for all the undertakings. Most of the annulments were decided by the High National Court, many of them later confirmed by the Supreme Court, which occasionally changed the ground that led to the annulment by the lower court.¹²⁶ Twenty-two NCA decisions annulled at first instance were not appealed in cassation and the appeals were inadmissible for four of them. As Figure 10 shows, the most frequent grounds leading to full annulment by the High National Court were substantive grounds (60%), and the percentage is even higher in the Supreme Court (67%), see Figure 11. In very few cases, decisions were fully annulled both on substantive and procedural grounds.¹²⁷

¹²⁴ Ibid. see also CNMC resolution of 4/10/23 ([R AJ/0128/21 Gersa 2010](#)) rejecting *ex officio* review of the CNMC decision of 6/11/14 ([S/0430/12 Recogida de Papel](#)) which imposed Gersa 2010 a € 254.323 fine. See also Supreme Court judgment of 23/2/23 (*Hormigones Sevilla v. CNMC*, rapp. D Córdoba, [ES:TS:2023:587](#)) annulling the €35.372 fine to one undertaking, despite it had not questioned the substantive grounds on its first appeal against CNMC resolution of 5/9/16 ([S/DC/0525/14 Cementos](#)), which was rejected by the High National Court judgment of 18/10/20 (rapp. F De la Peña, [ES:AN:2020:4261](#)).

¹²⁵ Ten undertakings were fined a total of €1.457.459 by CNC resolution of 27/3/12 ([S/0237/10 Motocicletas](#), rapp. P. Ávila), they all appealed to the High Court which ordered the fines to be re-calculated by CNMC, Saimoto Motor €103.056 fine was confirmed by High National Court judgment of 14/4/14 (Rapp. CM Montero, [ES:AN:2014:1743](#)), the company required that the CNMC either annulled or reviewed the fine given that the High National Court had ordered that concerning other co-offenders, but the [CNMC resolution of 06/10/2016](#) rejected to do so (confirmed by High National Court judgment of 14/1/21 (rapp. R. Castillo, [ES:AN:2021:224](#)).

¹²⁶ CNC resolution of 21/1/10 ([S/0084/08 Fabricantes de Gel](#)) from substantive to both; TDC resolution of 7/7/04 ([552/02 Empresas eléctricas](#)) from procedural to substantive.

¹²⁷ Supreme Court judgments annulling CNC resolution of 21/1/10 ([S/0084/08 Fabricantes de Gel](#)) and High National Court judgments annulling CNC resolution of 24/11/11 ([S/0232/10 Prisa/Zeta](#)).

Figure 10. Grounds High National Court
(each NCA decision counts as 1)**Figure 11.** Grounds Supreme Court
(each NCA decision counts as 1)

Note: The figures represent the information in Table 5 *infra*, relating to 51 NCA decisions overturned in their entirety at the end of the judicial review.

4.4.2.1. Annulments based on substantive grounds

Substantive grounds of annulment are related to the lack of proof of the infringement or a mistaken assessment by the NCA. In these cases, the courts disagree with the NCA on the existence of infringement based on the available evidence. This has occurred both with infringements of 101 TFEU and 102 TFEU (and/or their domestic equivalents). Courts have for instance disagreed with the NCA on market definition and the existence of dominance,¹²⁸ and on the anticompetitive features of joint ventures.¹²⁹ The absence of a single and continuous

¹²⁸ Among the salient ones, see, e.g. CNC resolution 19/10/12 ([S/0248/10 Mensajes cortos](#), rapp. I. Gutiérrez) which was quashed by the National High Court based on the questioning of the definition of relevant market (wholesale message termination market consisting exclusively of each operator's own network) and the alleged dominant positions of the three cellphone operators, see High National Court judgment of 4/9/17 (*Telefónica Móviles España v. CNC*, rapp. B Santillán, [ES:AN:2017:3556](#)), confirmed by 20/12/18 (rapp. D Córdoba, [ES:TS:2018:4393](#)), High National Court judgement of 1/9/17 *Vodafone v. CNC*, rapp. SP Soldevila [ES:AN:2017:3555](#)), confirmed by Supreme Court Judgment of 8/1/19 (rapp. E. Espín, [ES:TS:2019:253](#)) and High national Court judgment of 1/9/17 (*Orange v. CNC*, rapp. SP Soldevila, [ES:AN:2017:3564](#)), confirmed by Supreme Court Judgment of 21/12/18 (rapp. A. Arozamena, [ES:TS:2018:4566](#)). See also, TDC Resolution 28/6/07 ([613/06 Servicios funerarios La gomera](#), rapp. I. Gutiérrez), annulled by High National Court judgment of 16/3/2009 (*MAPFRE Guanarteme v. TDC*, rapp. M^aA Salvo, [ES:AN:2009:1415](#), with dissenting opinion CM Montero & JM^a del Riego).

¹²⁹ Two High National Court judgments annulled on substantive grounds CNC resolution of 15/10/12 ([S/0318/10 Exportación sobres papel](#), rapp. M^aJ González), judgment of 27/4/17 (*PACSA v. CNC*, rapp. CM Montero, [ES:AN:2014:3079](#), dissenting J Lopez, fine €122.902) and judgment of 25/6/14 (*SATMP v. CNC*, rapp. M^a A Salvo, [ES:AN:2014:3201](#), fine €274.028). Two others did the same, but they were later revoked by the Supreme

infringement has led to the annulment of several NCA decisions.¹³⁰ Occasionally, there have been “chain annulments” involving several decisions punishing similar anticompetitive conduct and they are all annulled sequentially as the courts revoked the substantive grounds followed by the NCA.¹³¹

4.4.2.2. Annulments based on procedural grounds

Procedural grounds of annulment are not related to the substance of the infringement but to the handling of the investigation and proceedings by the NCA. This can be due to the expiry of the deadline for the proceedings (*infra* §4.4.2.2.1), for violation of the parties right to due process (*infra* §4.4.2.2.2), or for NCA excesses in conducting dawn-raids (*infra* §4.4.2.2.3).

4.4.2.2.1. Expiry date/deadline of the proceedings

Until 1997, the Competition Acts did not establish expiry deadlines for proceedings, but rather internal deadlines for the many procedures provided for therein.¹³² Since then there has been a specific expiry date/deadline for fining proceedings by NCA (first 30 months, later 24 months, since 2007 it was 18 months and now 24 months again).¹³³

Court, which ordered the CNMC to re-calculate the fine (same amount was imposed): High National Court judgment of 23/6/14 (*Printeos v. CNC*, €629.845 fine, rapp. S. Soldevila, [ES:AN:2014:2921](#)) revoked by Supreme Court judgment of 20/4/17 (rapp. E Espín, [ES:TS:2017:1593](#), the [CNMC resolution of 20/7/17](#) imposing a fine for the same amount) and High National Court judgment of 25/6/14 (*Adveo v. CNC*, €2.013.468 fine, rapp. M^aA Salvo, [ES:AN:2014:3207](#)) revoked by Supreme Court judgment of 20/4/17 (Rapp. JM Bandrés, [ES:TS:2017:1528](#), the [CNMC resolution of 24/4/18](#) imposing a fine for the same amount).

On the other hand, the €5.650.483€ fine imposed to four undertakings by CNMC resolution of 30/6/16 ([S/DC/0519/14 Infraestructuras ferroviarias](#)) was annulled by four High National Court judgments, the cassation appeals being unadmitted by the Supreme Court. See High National Court judgments of 27/12/21 (*JEZ Sistemas Ferroviarios v. CNMC*, rapp. MDS Gandarillas, [ES:AN:2021:5847](#)); 26/1/22 (*Amurrio Ferrocarril v. CNMC*, rapp. F. de la Peña, [ES:AN:2022:401](#)), 28/1/22 (*Duro Felguera Rail v. CNMC*, rapp. BM^a Santillán, [ES:AN:2022:402](#)); *Talleres Alegria v. CNMC*, [ES:AN:2022:399](#)).

¹³⁰ See CNMC resolutions of 8/1/15 ([S/0429/12 Residuos](#), €98.201.302 fine), 11/2/15 ([S/0464/13 Puerto de Santander](#), €90.000 fine), 5/9/16 ([S/DC/0525/14 Cementos](#), €29.380.936 fine) and 12/9/7 ([SAMAD/12/10 Tanatorios Coslada](#), €141.884 fine).

¹³¹ Concerning abuses of dominant position in the electricity supply market, in a context of technical restrictions, see TDC/CNC resolutions of 7/7/04 ([552/02 Empresas eléctricas](#), rapp. M^a J. Muriel, dissenting A. Castañeda & M. Comenge) 28/12/06 ([602/05 Viesgo Generación](#), rapp. E. Conde), 14/2/08 ([624/07 Iberdrola](#), rapp. P. Nuñez) and 25/4/08 ([625/07 Gas Natural](#), rapp. M^aJ González).

¹³² See judgment of Supreme Court of 31/3/2004 (*Caja Provincial de Ahorros de Tarragona, & Caja de Ahorros y Monte de Piedad de las Baleares v. TDC & Ausbanc*, rapp. E. Espín, [ES:TS:2004:2228](#))

¹³³ A maximum period for the proceedings is set to avoid the person concerned by the investigation being subjected to punitive proceedings and the associated legal uncertainty forever for reasons attributable to the NCA. Originally in article 56 of Act 16/89 (introduced by Act 66/97, [BOE 313 of 31/12/87](#)) it was 30 months (18 months in SDC and 12 Months in TDC), subsequently Act 52/99 ([BOE311 of 21/12/99](#)) reduced the duration to 12 months each, for a total of 24 months. Act 15/2007 reduced the expiry date to 18 months, in 2023 this period was extended to 24 months (Decree-Law 5/23, [BOE154 of 27/6/23](#)).

The expiry date of the proceeding (*caducidad*) results in the closure of the proceeding due to its excessive duration (but allows the possibility of initiating a new proceeding until such time as the infringement is time-barred).¹³⁴

The law provides for the possible suspension of the time limit for expiration of the proceedings for specified causes, and in some cases, the appellants have been successful in challenging the validity of the suspension causes.¹³⁵ Several judgments have considered whether a request to the investigated undertakings to provide details of their previous year's turnover in order to establish the amount of the fine would allow the maximum time-period of the proceedings to be extended.¹³⁶

¹³⁴ See e.g., CNMC resolution 17/7/14 ([S/0345/11 Criadores de Caballos](#)) sanctioning ANCCE with a €152.833,32 fine, annulled for exceeding the expiry date of proceedings by judgment of 13/11/15 (*ANCCE v. CNMC*, rapp. JE López, [ES:AN:2015:4121](#)), but led to a re-initiation of sanctioning proceedings, closed by CNMC resolution 21/11/2017 ([S/DC/0580/16 Criadores de Caballos 2](#)) with a €187.677 fine, confirmed by High National Court judgment of 8/9/21 (*ANCCE v. CNMC*, rapp. F.de la Peña [ES:AN:2021:3763](#)), cassation appeal unadmitted by Order of 3/11/22 ([ES:TS:2022:15087A](#)).

¹³⁵ See, for example, judgment of the Supreme Court of 15/6/15 (*Puig v. CNC*, rapp. M^aI Perelló, [ES:TS:2015:2797](#)) that later led the High National Court to declare the expiration of those proceedings which had been suspended by the CNC once the ordinary (and initial) duration of the proceedings (the aforementioned 18 months) had been exceeded, that led to the annulment by the High National Court of most the fines imposed CNC resolution 23/5/13 ([S/0303/10 Distribuidores de Saneamiento](#), rapp. I. Gutiérrez) and CNC resolution of 26/9/13 ([S/0314/10 Puerto de Valencia](#), rapp. M^a J. González), the Supreme Court confirmed the full annulment of the first (but in two cases, see judgments of 26/7/16, *Suministros Marval v. CNC*, Rapp. M^aI Perelló, [ES:TS:2016:3908](#); and of 3/4/18, *Tubos y Hierros Industriales*, rapp. F Román, [ES:TS:2018:1174](#), both ordering fine re-calculation), revoking the judgments annulling the second resolution, ordering instead the fine to be re-calculated by the CNMC.

¹³⁶ See the dissenting opinion of SP Soldevila to High National Court judgments deciding challenges to CNMC resolutions of 5/3/15 ([S/0487/13 Concesionarios Land Rover](#) and [S/0489/13 Concesionarios OPEL](#)) and 28/5/15 ([S/0471/13 Concesionarios AUDI/SEAT/VW](#)). See ANTONIO CREUS “Caducidad suspendida, se solicita volumen de negocios” *Anuario de Competencia ICO 2019*, 97-139. If it had been for the High National Court that extension would not have been possible, and there would also had been another infringement decision annulled for this reason, as it considered that defect to be present also in another case. See CNMC resolution of 26/9/13 ([S/0314/10 Puerto Valencia](#), rapp. M^aJ González), fully annulled for five of the offenders by judgments of 25/1/16, *MSCTV v. CNC*, fine €252.318, rapp. SP Soldevila [ES:AN:2016:206](#) (confirmed by [ES:TS:2016:4870](#), rapp. JM^a del Riego), *FVET v. CNMC*, fine €200.000, rapp. SP Soldevila, [ES:AN:2016:213](#); *APV v. CNC*, rapp. AI Resa, €100.000 fine, [ES:AN:2016:205](#) (confirmed by, [ES:TS:2016:5513](#), rapp. A Arozamena), *TCV v. CNC*, fine €403.096. rapp. R. Castillo [ES:AN:2016:209](#) (confirmed by [ES:TS:2016:4680](#), rapp. A Arozamena); *Noatum Ports Valenciana v. CNC*, €561.390 fine, rapp. R Castillo, [ES:AN:2016:210](#) (confirmed by [ES:TS:2016:4754](#), rapp. M^aI Perelló). For the other five, the annulment by the High National Court was revoked by the Supreme Court, see judgment of High National Court of 25/1/16 (*Transcont Com. Valenciana v. CNC*, fine €3.048.395, rapp. SP Soldevila, [ES:AN:2016:207](#)) revoked by Supreme Court judgment of 28/11/16 (rapp. E. Espín [ES:TS:2016:5192](#)), leading to fine recalculation of €2.286.296 ([CNMC resolution 12/4/18](#)), confirmed by High National Court of 18/6/20 (rapp. B Santillán, [ES:AN:2020:1677](#)); judgment of High National Court of 25/1/16 (*ELTC v. CNC*, fine €12.692.462, rapp. AI Resa, [ES:AN:2016:204](#)) revoked by Supreme Court judgment of 23/4/18 (Rapp. Di Córdoba, [ECLI:ES:TS:2018:1405](#), leading to fine re-calculation of €11.803.990 ([resolution of 12/7/18](#)); judgment of High National Court of 25/1/16 (*Transcoval v. CNC*, € 9.910.829 fine, rapp. B Santillán, [ECLI:ES:AN:2016:208](#)) revoked by Supreme Court judgment of 23/11/16 (rapp. M^aI Perelló, [ES:TS:2016:5193](#), leading to a re-calculated fine of €6.442.039 ([CNMC resolution of 12/4/18](#)), confirmed by High National Court Judgment of 26/7/22 (rapp. R Castillo, [ES:AN:2022:3924](#)); High National Court judgment of 25/1/16 (*ATEIA-OLT Valencia v. CNC*, €13.144.444 fine, rapp. AI Resa, [ES:AN:2016:203](#)) revoked by Supreme Court judgment of 11/11/16 (rapp. JM^a del Riego, [ES:TS:2016:4998](#), leading to the same fine being imposed by [CNMC resolution](#)

In the same vein, another infringement decision was annulled for abuse of the preliminary investigation phase (*information reservada*). The NCA had made an improper (unnecessary and unjustifiable) use of the confidential preliminary phase, with the consequence of postponing the date of initiation of the file and, thereby, artificially extending the limitations period.¹³⁷

4.4.2.2.2. Due process violations

Several fining decisions have been annulled for due process violations (e.g., in relation to the NCA denial of a request for the taking of evidence,¹³⁸ or for a change in the qualification of the offence made by the investigating body without providing the accused with the right of defense).¹³⁹ Similarly, in two other cases, fines imposed on a leniency applicant were annulled because the decision which rejected the fine reduction that had been requested (and was proposed by the NCA Directorate of Competition in the SO and in the decision proposal) has been made without prior hearing being granted to the parties.¹⁴⁰

[of 12/7/18](#)) and High National Court judgment of 25/1/16 (*ANV v. CNC*, €3.307.783 fine, rapp. B Santillán, [ES:AN:2016:141](#)), revoked by Supreme Court judgment of 7/11/16 (rapp JM Bandrés, [ES:TS:2016:4871](#), leading to fine re-calculation of same amount ([CNMC resolution of 12/7/18](#)).

¹³⁷ See judgement of the High National Court of 23/12/13 (*UAHE v. CNC*, rapp. SP Soldevila, [ES:AN:2013:5772](#)), annulling CNC resolution of 14/6/12 ([S/0254/10 Hierros Extremadura](#), rapp. J. García, €500.000 fine). The opening of the preliminary investigation is justified to the extent that it serves to corroborate the *notitia criminis*, a circumstance that in the present case was completely unnecessary, since the CNC had full and absolute knowledge of the evidence founding its decision (e-mails and appellant's allegations regarding them), as they were both expressed within the CNC resolution of 17/5/10 ([S/106/08 Almacenes de Hierro](#), rapp. J Costas), in which the CNC had used them.

¹³⁸ See judgment of 10/12/2009 (fundamental rights proceedings, *SOS Cuetara v. TDC*, rapp. J. Díaz, [ES:TS:2009:7888](#)), leading to three other Supreme Court judgments and four High National Court judgments annulling the decision for that reason.

¹³⁹ Nine judgments of the High National Court annulled for that reason CNC resolution of 2/1/14 ([S/0404/12 Servicios Comerciales AENA](#)). Likewise CNC resolution of 26/2/15 was annulled and the proceedings were retroacted by High National Court judgments (following the rulings cited *supra* note 72) of 20/9/18 (*Nestlé v. CNMC*, rapp SP Soldevila, [ES:AN:2018:5373](#); *Lactalis v. CNMC*, rapp. S.P. Soldevila, [ES:AN:2018:5301](#)); 28/9/18 (*AEG v. CNMC*, rapp. R Castillo, [ES:AN:2018:5302](#)); 18/10/18 (*Danone v. CNMC*, rapp. R Castillo, [ES:AN:2018:4039](#)); 24/10/18 (*Schreiber v. CNMC*, rapp. BM^a Santillán, [ES:AN:2018:3649](#); *Celega v. CNMC*, rapp. BM^a Santillán, [ES:AN:2018:4035](#) and C.A.Peñasanta v. CNMC, rapp. BM^a Santillán, [ES:AN:2018:4037](#)); 25/10/18 (*Gremio v. CNMC*, rapp. F. e la Peña, [ES:AN:2018:4036](#) y *Pascual v. CNMC*, rapp. F De la Peña, [ES:AN:2018:4040](#)); and 2/11/18 (*CLAS v. CNMC*, MP: S. Soldevila, [ES:AN:2018:4193](#)). The same cartel was fined again, with minor variations on the perimeter of the infringement by CNMC resolution of 11/7/19 ([S/0425/12 Industrias Lácteas 2](#)). The High National Court had annulled also for this reason decision fining the pallet cartel (as the qualification of the infringement as a “single and continuous” was done without hearing of the investigated undertakings. Twenty judgment of the High National Court annulled CNMC resolution of 22/9/14 ([S/0428/12 Palés](#)), mostly for that reason, the Supreme Court revoked most of them, ordering the fine to be re-calculated by the CNMC.

¹⁴⁰ See Supreme Court Judgment of 30/10/13 (*Wella v. CNC*, [ES:TS:2013:6144](#), rapp. NA Maurandi) confirming the annulment by the High National Court of the €12.032.000 fine imposed by the CNC (resolution of 2/3/11, [S/0086/08 Peluquería Profesional](#), rapp. M^aJ González). See also Supreme Court judgment of 21/5/2014 (*Balearia*

4.4.2.2.3. Dawn raids

Dawn raids allow the competition authorities to access the business domiciles of the investigated companies to search for evidence if they have suspicion of the commission of an infringement.¹⁴¹ Obviously, the inspection rules must have safeguards that prevent abuses and preserve the guarantees of the investigated undertakings.¹⁴²

Correcting the excesses of the NCA in carrying out dawn raids, six decisions have been annulled as courts considered that they were adopted based on evidence which was obtained in a dawn raid conducted unlawfully. Most rulings concerning the legality of inspections by the competition authorities are founded on the rulings of the CJEU and the General Court on the matter (in relation to challenges against the European Commission's dawn-raids).

Eurolíneas Marítimas v. CNC, [ES:TS:2014:2018](#), rapp. JL Díaz), confirming the annulment by the High National Court (judgment of 8/11/12, rapp. M^a A. Salvo, [ES:AN:2012:4494](#)) of the €15.214.402 fine imposed by the CNC resolution of 23/2/12 ([S/0244/10 Navieras Baleares](#), rapp. P. Sánchez). The last judgment of the Supreme Court is commented by JAVIER FERNÁNDEZ-CORREDOR “Procedimiento Administrativo Sancionador. Divergencia entre la propuesta de resolución y la resolución sancionadora” [Revista CEFLegal 162 \(2014\) 185-190](#).

¹⁴¹ Article 40 of Act 15/2007 and article 27 of Act 13/2013.

¹⁴² See *supra* note 73. Courts require the inspection activity to be duly justified in the investigation order, specifying the object and purpose of the inspection. See Supreme Court Judgment of 1/6/15 (*Transmediterranea v. CNC*, rapp. E Espín, [ES:TS:2015:2560](#)) annulling the €12.102.969 fine imposed to Transmediterranea by CNC resolution of 10/11/11 ([S/0241/10 Navieras Ceuta 2](#), rapp. J Costas); Supreme Court judgment of 1/6/15 (*Transmediterranea v. CNC*, rapp. E Espín, [ES:TS:2015:2559](#)) annulling the €36.110.800 fine imposed to Transmediterranea by CNC resolution of 23/1/12 ([S/0244/10 Navieras Baleares](#), rapp. P Sánchez).

See High National Court judgments of 20/3/15 (*Gas Natural v. CNC*, J. E. Lopez Candela, [ES:AN:2015:876](#); *Endesa v. CNC*, rapp. CM Montero, [ES:AN:2015:1070](#)); 23/3/15 (*Hidrocarbónico v. CNC*, rapp. S. Soldevila, [ES:AN:2015:1069](#)), 24/3/15 (*E.ON España v. CNC*, rapp. JE López, [ES:AN:2015:877](#)) 25/3/15 (*UNESA v. CNC*, rapp. AI Resa, [ES:AN:2015:875](#); *Iberdrola v. CNC*, rapp. AI Resa, [ES:AN:2015:874](#)), annulling the €52.400.000 fines imposed by CNC resolution of 14/5/11 ([S/0159/09 UNESA y asociados](#), rapp. I Gutiérrez).

Eleven of the fourteen undertakings fined by CNMC decision of 6/11/14 ([S/0430/12 Recogida de papel](#), with 2 dissenting opinions) successfully challenged it before the Supreme Court on the basis that the supporting evidence was found in the course of another investigation (*S/0415/12 ABH-ISMA*), see Supreme Court judgments of 18/2/19 (*Alba Servicios Verdes v. CNMC*, rapp. JM Bandrés, [ES:TS:2019:671](#), €577.795), 25/2/19 (*S. Solis v. CNMC*, rapp. E Calvo [ES:TS:2019:583](#), €432.232), 26/2/19 (*Irmamol v. CNMC*, rapp. JM^a del Riego, [ES:TS:2019:670](#), €603.685), 26/2/19 (*Hijos de Demetrio Fernández v. CNMC*, rap. AR Arozamena, [ES:TS:2019:585](#), €465.372), 26/2/19 (*UDER v. CNMC*, rapp. D Córdoba, [ES:TS:2019:581](#), 150.000€), 4/3/19 (*Ramón Vilella v. CNMC*, rapp. M^aI Perelló, [ES:TS:2019:1072](#), €147.280), 12/3/19 (*Destruídos Confidencial v. CNMC*, MP: AR Arozamena, [ES:TS:2019:812](#), €10.000), 11/6/19 (*Utramix v. CNMC*, rapp. JM^a del Riego, [ES:TS:2019:3256](#), €285.830); Recio y Cabral v. CNMC, rapp. E Espín, [ES:TS:2019:2005](#)); 19/10/19 (*Rua Papel Gestión v. CNMC*, rapp. E. Espín, [ES:TS:2019:3411](#), €354.888) and 20/5/20 (*ISMA 2000 v. CNMC*, rapp. JM^a del Riego, [ES:TS:2020:1257](#), €190.298).

The court order authorizing the NCA inspection is not necessary, although the NCA must inform the company if it was requested, and it was rejected. See Supreme Court judgment of 15/6/15 (*Montibello v. CNC*, rapp. M^a I Perelló, [ES:TS:2015:2879](#)), annulling for that reason the €2.555.000 fine imposed to Montibello (Cosmetica Cobar) by CNC resolution ([S/0086/08 Peluquería Profesional](#), rapp. M^aJ González). See also Supreme Court judgment of 17/9/18 (*Repsol v. CNMC*, rapp. E Calvo, [ES:TS:2018:3106](#)) revoking High National Court judgment of 21/7/16 (rapp. AI Resa, [ES:AN:2016:3205](#)), which had confirmed CNC resolution of 24/7/13 ([R/0142/2013 Repsol](#)).

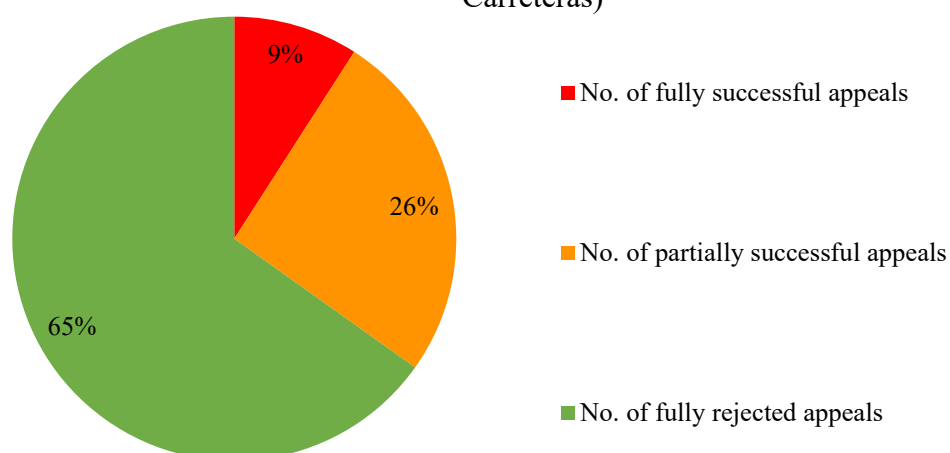
4.4.3. Appeals resulting in different outcomes per appellant (case study)

Given that each fined undertaking makes its own individual appeal against the NCA decision, with different pleas and grounds of appeal, and this leads to a single judgment deciding upon each challenge, it is possible for there to be variations in the outcome of the different appeals, particularly regarding the absence of proof of the involvement of the undertaking in the infringement or in relation to determination of the fine.

In this subsection we will consider the review of one case, showcasing the typical review of a single decision adopted by the Spanish NCA in the period analyzed. This case concerned the infringement of article 101 TFEU and article 1 of the Spanish Competition Act, involving a cartel with forty-six co-offenders, sanctioned with a total fine of €44.033.240 for coordinating their actions to alter the outcome of a roadworks public procurement.¹⁴³ The challenges against that single infringement decision gave way to a large number of judgments (77 in total): 53 first instance and 24 second instance.

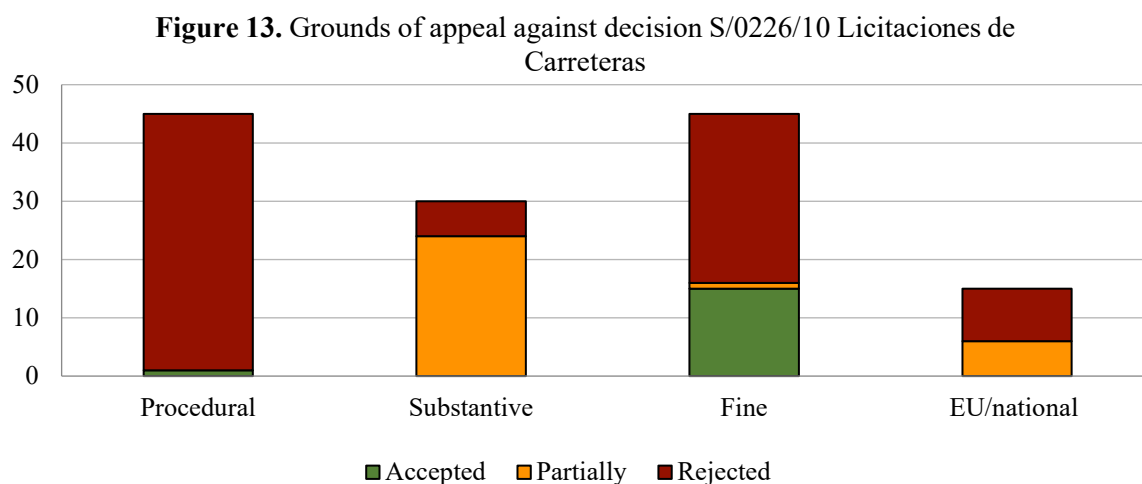
All but two of the companies challenged the decision before the High National Court, seven of them having the infringement decision annulled (for lack of evidence), fifteen of the High National Court judgments were further challenged in cassation to the Supreme Court. For fourteen undertakings the NCA was ordered to re-calculate the fine, and the re-calculated fine was challenged again by eight of them, all of them (but one) being unsuccessful, three of them appealing in cassation to the Supreme Court. Figure 12 summarizes the rate of success of appeals at both instances.

Figure 12. Success of appeals against decision S/0226/10 (Licitaciones de Carreteras)



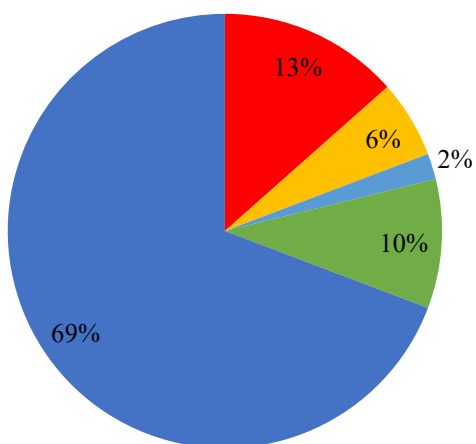
¹⁴³ CNC resolution of 19/10/11 ([S/0226/10 Licitaciones de Carreteras](#), rapp. I Gutiérrez).

On the other hand, Figure 13 identifies the individual pleas and grounds used by each appellant and their degree of success. Substantive grounds followed by fine grounds were the more successful grounds of appeal. Appellants also complained about the conformity with EU Law of the system followed for the calculation of the fine by the NCA (regarding the turnover cap to the fines).



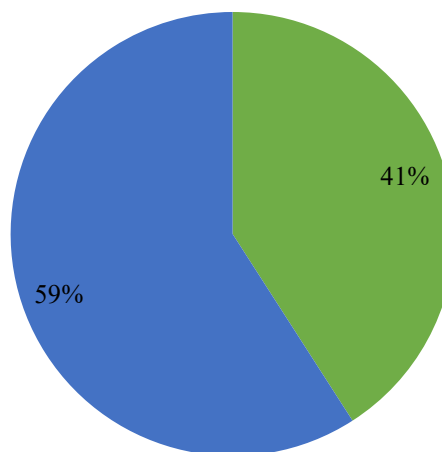
Finally, the next two figures look at the outcomes at first and second instances of all the appeals on this case. Full rejection of any appeal challenges was the most likely outcome both at first and second instances. Figures 14 and 15 show a larger variety of outcomes at first instance than at second instance, something that may be explained by the limited grounds of cassation appeal (see *supra* §2.4) and to the progressive streamlining of the judicial review process following the earlier pronouncements of the High National Court.

Figure 14. First instance outcome appeals against decision S/0226/10 Licitaciones de Carreteras



- fully annulled
- partially annulled, partially replaced
- fully annulled, returned
- partially annulled, returned
- fully rejected (exc. withdrawn)

Figure 15. Second instance outcome appeals against decision S/0226/10 Licitaciones de Carreteras

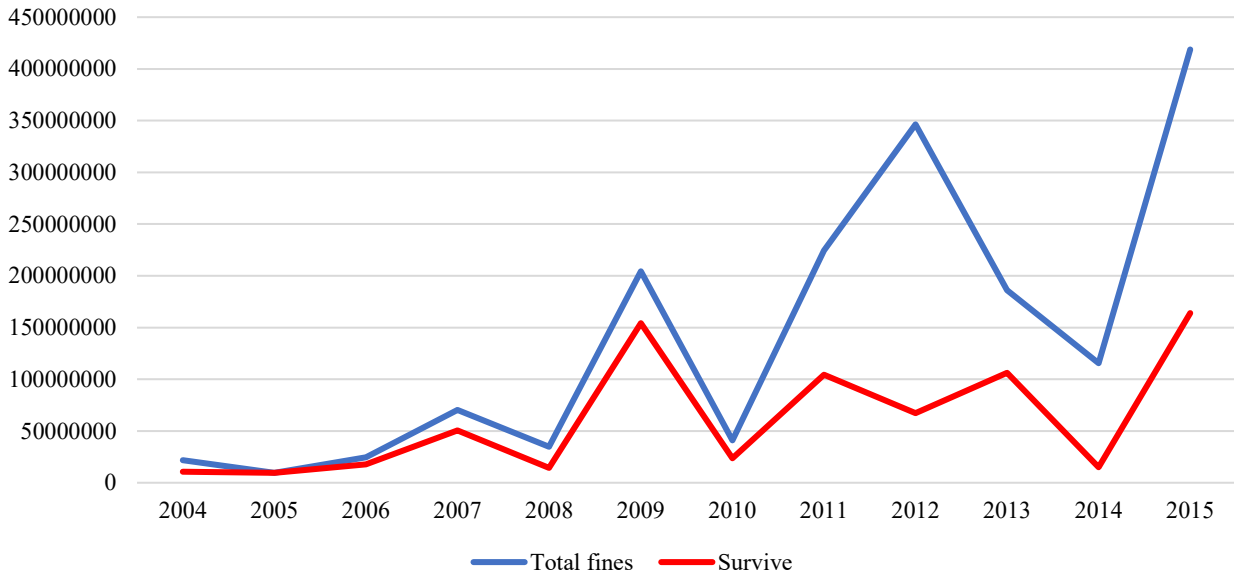


- partially annulled, returned
- fully rejected (exc. withdrawn)

4.4.4. Appeals resulting in partial annulment of NCA fines (amount fine)

In addition to the large number of full annulments of fines, more than half of the 2010-2013 NCA decisions challenged in court were partially annulled by courts because of the calculation of the fine, requiring the NCA to recalculate the fines. This trend seems to have decreased in the judicial review outcomes of the 2014-2015 decisions, although the courts also took a considerable chunk out of the fines imposed these last two years, via total annulments (see Figure 16).¹⁴⁴

¹⁴⁴ Apart from total annulments, fines have been reduced via partial annulments in €336.539.389,3 in the relevant period.

Figure 16. NCA total fines imposed v. Fines surviving

The Courts either reduced the fine (or ordered it to be recalculated by the NCA) in 36% of the NCA decisions challenged in court. The probability that the fine will be reduced after judicial review is the same as the probability that the fine will be upheld.

Of the total amount of fines imposed by the Spanish NCA in the period 2004-2015 (€1.697.072.921), only 43% survived after judicial review (€738.073.925): a cut of around €959 million. Although the reduction in fines after judicial intervention varies over time, ranging from 100% confirmation of fines imposed in 2005, to reductions exceeding 80% of fines imposed in 2014 and 2012 (see table 4).

Table 4. Fines/Surviving fines/Confirmation rate.

	Fines	Survive after Courts	% confirmation rate
2004	21647554,5	10632500	49,1164025
2005	9588000	9588000	100
2006	24467000	17907993,8	73,1924381
2007	70316064	50660849	72,0473333
2008	34784781	14447490,4	41,5339409
2009	204201665	154253486	75,5397788
2010	40988031	23635827,2	57,665193
2011	224498636	104489812	46,5436288
2012	346418014	67251617,5	19,4134297
2013	185951102	106311849	57,1719382
2014	115442838	14916954	12,9215067
2015	418769235	163976916	39,1568679
TOTAL	1697072921	738073295	43,4909594

Until 2010 the Courts rarely contested the amount of the fine imposed by the NCA. Since 2010, first the High National Court and later the Supreme Court have questioned the fines imposed, annulling them, and urging their recalculation downwards, in many cases considering them not to be proportionate.¹⁴⁵ The judgments of the High National Court had as a corollary a judgment of the Supreme Court of 29/1/15.¹⁴⁶ According to the Supreme Court, the scheme followed for calculating the amount of the fine set in the NCA Guidelines on setting the amount of fines lacked an adequate legal basis¹⁴⁷. For the Supreme Court, the initial point and framework for determining the level of fines under the 2007 Competition Act should follow the sliding scale set in article 63.1. This approach should consistently guide the quantification techniques employed in the process. It emphasized that the legal framework cannot merely serve as an external boundary, as seen in the 2009 Guidelines on fines, to be applied once the fine amount is estimated using a specified methodology. While this method might be acceptable in EU Law per Article 23 of Regulation 1/2003, which establishes the ultimate limit for fines, the Supreme Court disagreed that this was a suitable approach within Spanish Law. Here, authorities imposing sanctions must adhere to the fundamental principles and constraints of punitive law. This includes the legal predetermination of maximum and minimum fine amounts –whether they are fixed or percentage-based in relation to certain criteria– as a fundamental and unalterable principle of punitive law.¹⁴⁸ Since 2015 the NCA had to re-calculate many fines set according to the previous system, which were annulled on this point,¹⁴⁹ and it was required to stop following the Communication of fines in new cases, modifying the process and criteria for

¹⁴⁵ A comprehensive empirical analysis of the judgments of the High National Court, in CARMEN LILLO “La Audiencia Nacional ante las sanciones impuestas por la CNMC en aplicación de la Ley 15/2007, de Defensa de la Competencia” *Revista de derecho de la competencia y la distribución* 15 (2014) 51-82.

¹⁴⁶ *BCN Aduanas y Transportes*, [ES:TS:2015:112](#) (rapp. M Campos). See FRANCISCO MARCOS “Blowing hot and cold: The last word of the Supreme Court on setting fines for competition infringements in Spain” *Revista de concorrência e regulação* 25 (2016) 17-34.

¹⁴⁷ CNC, *Communication of 6/2/2009, on the quantification of fines for infringements of Articles 1, 2 and 3 of Act 15/2007, of July 3, 2007, on the Defense of Competition and Articles 81 and 82 of the Treaty of the European Community* ([BOE36 of 11/2/2009](#)). It combined features of the legal regime set out in the 2007 Competition Act with several extra-legal elements which, inspired in the 2006 Guidelines of the European Commission on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation N° 1/2003 ([OJEU C2010 of 1/9/2006](#)).

¹⁴⁸ “*The legal predetermination of the maximum and minimum amount of fines –criminal and administrative (whether they are a fixed amount or a percentage on certain magnitudes)– in order to individualize their calculation may well be considered a common un-surmountable principle of punitive law*” (5th Legal ground, ¶5 of Supreme Court judgment of 29/6/15, *BCN Aduanas y Transportes*, [ES:TS:2015:112](#), rapp. M Campos).

¹⁴⁹ Given that the appeal is granted solely based on how the NCA interpreted and followed the criteria established in the Competition Act to set the amount of the fine, and the motivation given, it may well be that the amount of the fine imposed by infringement decision is the same. The new decision may still be further challenged in court on this same ground, albeit these second time appeals are almost always rejected.

setting fines and their justifications, leading to confusion as to how fines should be calculated. Now, the concern that penalties should respect the principle of proportionality has led to a reduction in their amount, which may mean that they are no longer provide a sufficient deterrent.¹⁵⁰

One of the issues raised by the judicial review of fines imposed is that it affects how EU infringements have been punished by the NCA. EU Law does not require Member States to harmonize their fines.¹⁵¹ Spanish law can follow a different punitive path from that used in EU Regulation 1/2003, and when the NCA applies TFEU articles 101 and 102, the approach employed for infringements of domestic prohibitions should be utilized.¹⁵² Finally, as long as the fines imposed are effective, proportionate and have deterrent force, no objection can be raised against the fines imposed according to the domestic rules.

4.5. Type of competition authority's decisions subject to appeal

The rules and restraints subject to judicial review mirror the corresponding decisions issued by the NCA. Figure 17 indicates the ratio of the different competition law prohibitions subject to the courts' review, across all instances of appeal. It differentiates between the prohibition on anti-competitive agreements and abuse of dominance, and between cases in which both the EU and the national equivalent prohibitions have been applied and purely domestic cases in which only the national equivalent prohibitions have been applied due to the absence of an effect on trade between Member States. The effect on trade between Member States determines the applicability of EU law and this clause is interpreted broadly; when this occurs, the NCA also applies the TFEU prohibitions.¹⁵³

Purely domestic infringements of the prohibition on anti-competitive agreements were the subject of 44% of appeals, whilst the same percentage of appeals concerned both Article

¹⁵⁰ See ANE M. MARTÍN, CARLOS MERINO & JAVIER GARCÍA-VERDUGO "Determinants of the Deterrence of Competition Fines in Spain (2015-2019)" *Journal of European Competition Law & Practice* 13/6 (2022) 401-412 (with reference to previous works arriving to the same conclusion).

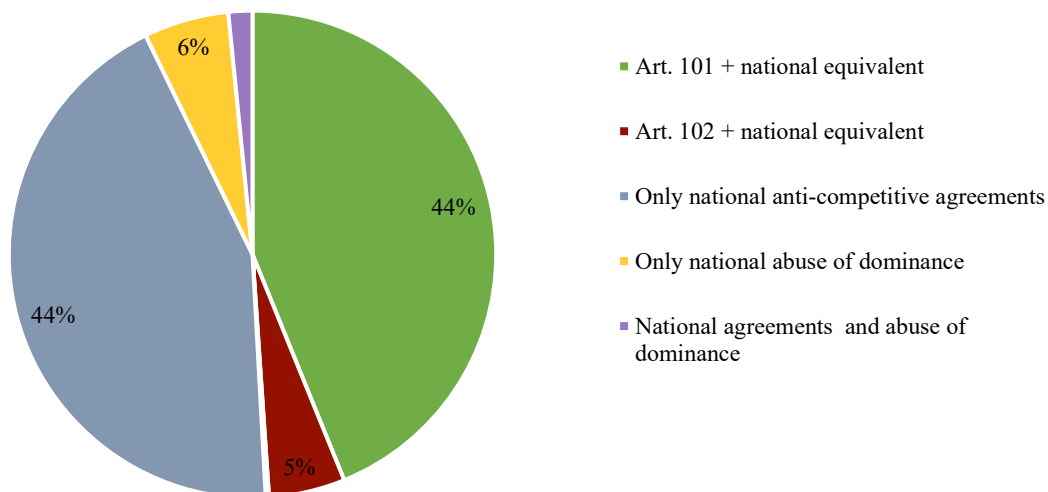
¹⁵¹ Articles 13 to 15 of Directive of 11 /12/18 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, ECN+ Directive ([OJEU 11 of 14/1/19](#)) have reduced the scope of autonomy of national legislators on this point, but has not entailed any modification in Spanish legislation.

¹⁵² Article 5 of Regulation 1/2003.

¹⁵³ Some 27% of the decisions adopted by the Spanish NCA in the last twenty years examine the application of both the provisions of the TFEU and national law. In the last decade, the simultaneous application of the prohibitions contained in national competition law and the TFEU is predominant. This has occurred in almost all proceedings initiated based on leniency application and in a significant percentage of those concluding with a fine (43%). See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV. 6.](#)

101 TFEU and Article 1 of the Spanish Competition Act infringements. The provisions on abuse of dominance were reviewed in 11% of the appeals. Only 1% of the appeals examined infringements of the domestic prohibition on abuse of dominance. Reflecting the practice of the NCA, the rules being appealed are distributed evenly across years, with no discernible patterns.

Figure 17. Rule being appealed

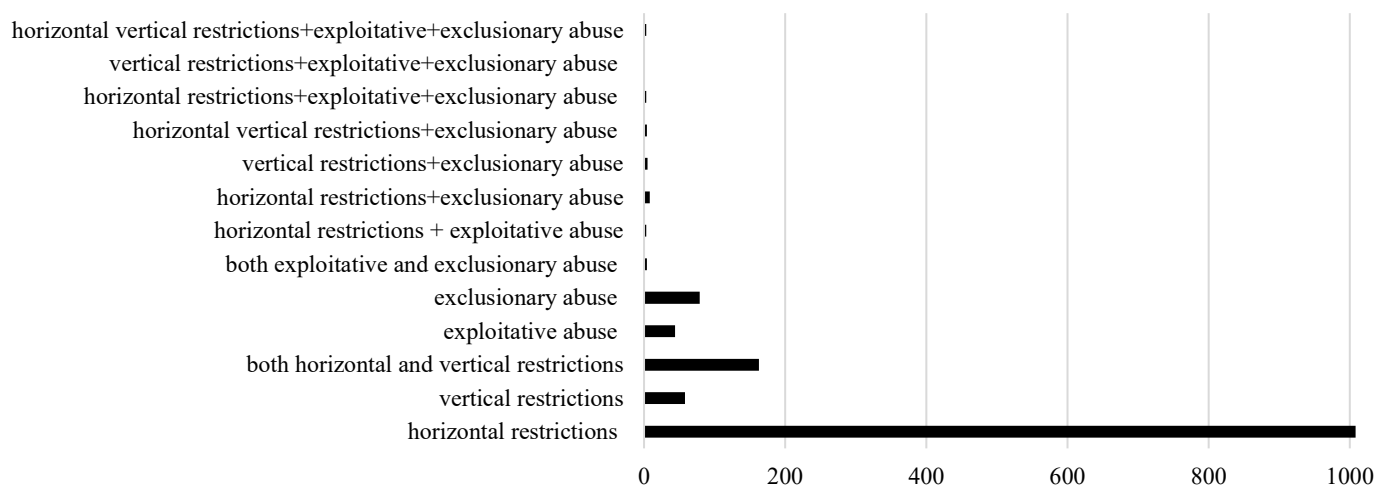


Next, figure 18 summarizes across all instances of appeal the types of restrictions of competition that were examined in the NCA's decisions subject to appeal. For cases in which the EU and/or domestic prohibitions on anti-competitive agreements have been applied, the figure differentiates between horizontal and vertical restrictions. For cases in which the EU and/or national prohibitions on abuse of dominance have been applied, it differentiates between exploitative and exclusionary abuses. It also records cases involving a combination of such restrictions. The figure presents the data from the perspective of each single appeal judgment (noting that more than one judgment may be issued with respect to a single NCA decision).

Most of the appeals are multilateral restraints cases (over 92%), with a few exclusionary and exploitative abuse cases (6%). There is a disproportionate concentration of challenges of NCA decisions on horizontal restrictions (73%), well above the 40% of total NCA decisions on restrictions in this area (see *supra* figure 2). Also significant is the high percentage of appeals on mixed multilateral restraints (11.7% of appeals). On the other hand, appeals against decisions on vertical restraints or abuses of dominance are well below the average number of NCA decisions on those matters in the period.¹⁵⁴

¹⁵⁴ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV. 6.2 and 6.4](#), (4.2% vs. 8.7% on vertical restraints; 9% vs. 24 on abuses of dominance).

Figure 18. Types of restrictions



As figure 19 shows the NCA declares that most of the infringements of the prohibition of multilateral restraints are object restrictions that have produced effects in the market. Most of the NCA assessment is focused on the anticompetitive object, but it includes as a complement some effects analysis.

Figure 19. Object/effect (only for Art. 101/national equivalent infringements)

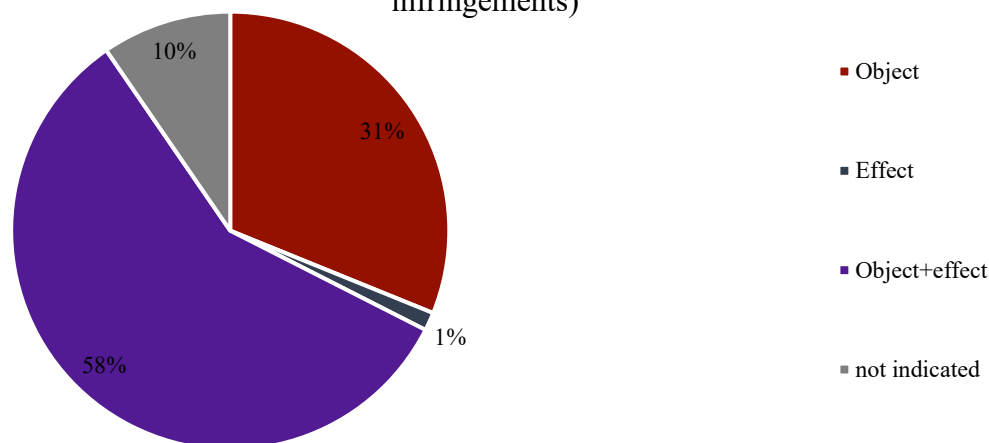
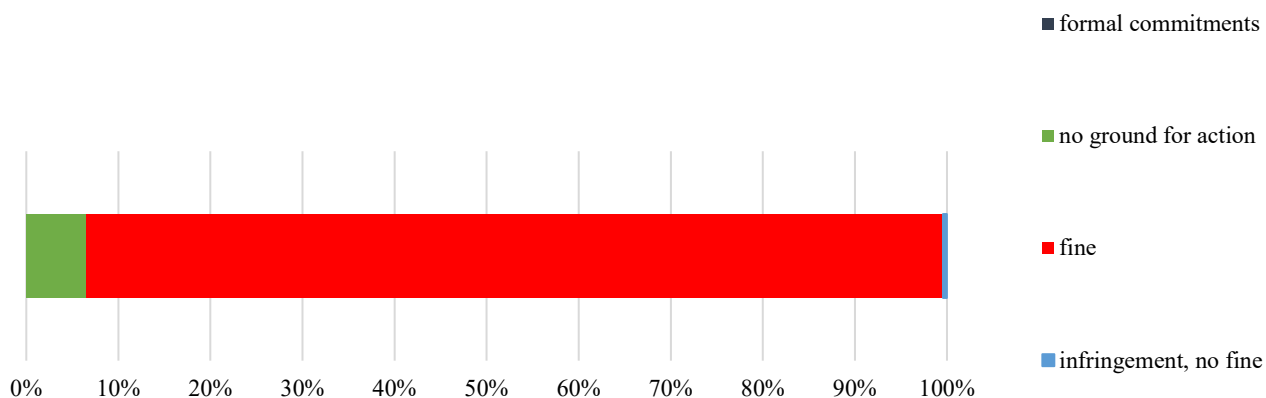


Figure 20 indicates the ratio of the type of NCA’s procedures that were subject to judicial review, across all instances of appeal. It specifies the percentage of appeals on an NCA’s finding of an infringement (distinguishing between cases where a fine was or was not imposed), or of no grounds for action findings, and decisions: to accept formal commitments, reject a complaint, or close an investigation.

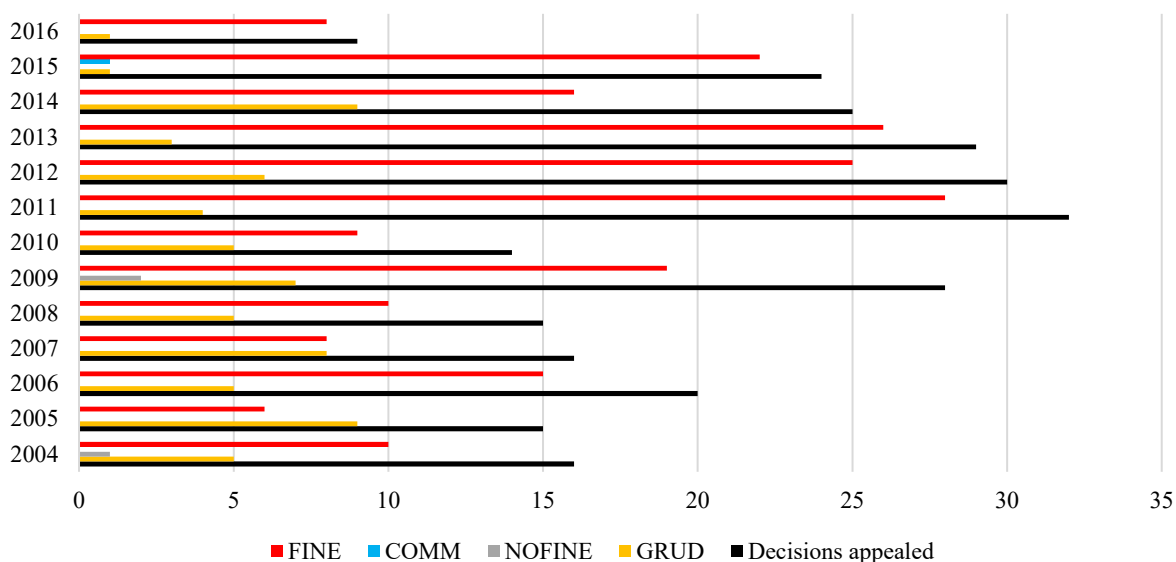
Figure 20. NCA's procedure



Note: The figure presents the data from the perspective of each single appeal judgment (noting that more than one judgment may be issued with respect to a single NCA decision).

Ninety-three per cent of the judgments concern fining decisions, and in most of those NCA decisions that were not challenged in court the amount of the fine imposed was very low (below €10,000).¹⁵⁵ Figure 13 shows the evolution of the appeals per year, indicating the growing predominance of appeals against fines, and the progressive reduction of appeals against the rest of the NCA decisions.

Figure 21. NCA's procedure (per year/per decision)



¹⁵⁵ The largest not challenged fine was €525.000 to DAMM for RPM, resolution of 19/2/09 ([Distribuciones DAMM 647/08](#), rapp. M^a J González).

Slightly less than 6% of all appeals concerned NCA decisions declaring there to be no grounds of infringement, mostly involving challenges by the complainants that originally brought the case before the NCA (see *infra* § 4.5).

The NCA may declare an infringement, but not impose a fine. These decisions are very infrequent,¹⁵⁶ and two of those cases challenged before the courts relate to infringements by the public administration,¹⁵⁷ and in the remaining case the investigating entity was found not responsible for the anticompetitive conduct.¹⁵⁸

During the period of study, the Spanish NCA adopted 43 commitment decisions, because the alleged infringers proposed commitments that resolved the effects on competition arising from the conduct that was the subject of the investigation and the public interest was sufficiently ensured.¹⁵⁹ Only one of them was challenged by a third party, unsuccessfully.¹⁶⁰

23 NCA decisions in which leniency was granted were challenged (6% of all decisions in the period), with three fully successful appeals and fourteen others in which the appeals were partially successful.

43 of the NCA decisions challenged in court included a dissenting opinion (15.6% of the total).¹⁶¹ Moreover, half of the challenges against decisions containing a dissenting opinion

¹⁵⁶ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.5](#).

¹⁵⁷ See TDC resolution of 21/6/2004 ([562/03 Colegio Notarial de Bilbao](#), rapp. F. Torremocha, with his dissenting opinion) and CNC resolution of 14/4/2009 ([639/08 Colegio farmacéuticos Castilla-La Mancha](#), rapp. J. Costas, dissenting opinion M^aJ. González), both were confirmed by courts. See, correspondingly, judgments of High National Court of 21/11/2006 ([ES:AN:2006:6058](#), rapp. JM^a Del Riego) and Supreme Court of 26/4/2010 ([ES:TS:2010:2063](#), rapp. M^aI. Perelló), and judgments of High Court of 6/6/12 ([ES:AN:2012:2564](#), rapp. C.M. Montero) and Supreme Court of 9/3/15 ([ES:TS:2015:800](#), rapp. E. Calvo).

¹⁵⁸ See CNC resolution of 2/11/2009 ([S/0051/08 UNESA](#), rapp. E. Conde), confirmed by High National Court judgment of 22/7/10 ([ES:AN:2010:3671](#), rapp. L. Acín) and judgment of Supreme 14/12/11 ([ES:TS:2011:8851](#), rapp. J Díez).

¹⁵⁹ Article 152 of Spanish Competition Act 15/2007. See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.5.3](#) (5% of the NCA decisions are commitment decisions).

¹⁶⁰ CNMC resolution of 9/7/15 ([S/0466/13 SGAE autores](#)) concerning a potential exploitative abuse (article 102 TFEU and article 2 Spanish Competition Act), judgment of High National Court of 25/4/19 (*RTVE v. CNMC & SGAE*, [ES:AN:2019:1845](#), rapp. SP Soldevila). Appeals against decisions declaring the infringement of the commitment decision are out of the scope of the project, e.g., CNC resolution of 28/1/10 ([S/0020/07 Trio Plus](#), rapp. F Torremocha), in which the undertakings entering the commitments successfully challenged follow-up decisions of the CNC which had declared their breach. Firstly, resolution of 15/9/11 ([VATC/0020 Trio Plus](#), rapp. J. Costas), see judgment of High National Court of 23/12/13 (*Telefónica v. CNC*, [ES:AN:2013:5555](#), rapp. S.P.Soldevila) confirmed by judgment of Supreme Court of 11/1/17 (STS de 11/1/17, [ES:TS:2017:60](#), rapp. M^a I Perelló); judgment of 23/12/13 (*DTS/Prisa TV v. CNC*, rapp. SP Soldevila, [ES:AN:2013:5761](#)) confirmed by judgment of Supreme Court if 11/1/17 ([ES:TS:2017:62](#), rapp. M^a I Perelló). Secondly, resolution of 23/1/13 ([SNC/0016/11 Digital+Mini](#),rapp. L. Díez), see judgments of High National Court of 18/3/14 (*Sogecable v. CNC*, rapp. JE López, [ES:AN:2014:1461](#)) and 24/3/14 (*Telefónica v. CNC*, rapp. CM Montero, [ES:AN:2014:1433](#)).

¹⁶¹ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §V.4](#) (the average of dissenting opinions in all the competition authorities decisions is half that: 7,76%). As could be expected, the empirical data

resulted in the full annulment of the decision (17), and half of the rest resulted in a reduction of the fine (8). Therefore, it seems clear that there is some correlation between dissenting opinions in the NCA decision and the likelihood of full or partial success of any subsequent appeals.

4.6. Undertakings and Third parties appeals

Enforcement decisions in relation to the prohibitions adopted by the NCA can be challenged by anyone with legitimate rights and interests affected by them.¹⁶² At first instance, most of the decisions are appealed by undertakings that are declared to have infringed the prohibitions, but appeals are also made by third parties (complainants).¹⁶³ *Amicus curiae* are not allowed in Spanish Procedure Law, but the European Commission may present written observations on appeals proceedings against decisions by the competition authority when it considers it appropriate to ensure the coherent enforcement of articles 101 or 102 TFEU.¹⁶⁴

At first instance, 73% of NCA decisions are challenged by the undertakings, whilst 27% are appealed by third parties (generally against decisions by the NCA finding no infringement). In appeals before the National High Court, the NCA, as the entity responsible for the decision challenged, always acts as the defendant, and other co-infringers may participate as well. No data is provided regarding second instance appeals but given that often first instance appeals are successful, the NCA is frequently the appellant on cassation to the Supreme Court.¹⁶⁵ Figure 15 shows the evolution in the period, which indicates a clear decreasing trend in third parties' appeals, which runs parallel to the progressive reduction in the number of NCA non-fining decisions.¹⁶⁶

shows that decisions imposing a fine are more likely to have a dissenting opinion (mostly regarding infringements of article 101 TFEU).

¹⁶² Article 19.1.a) of Act 29/98.

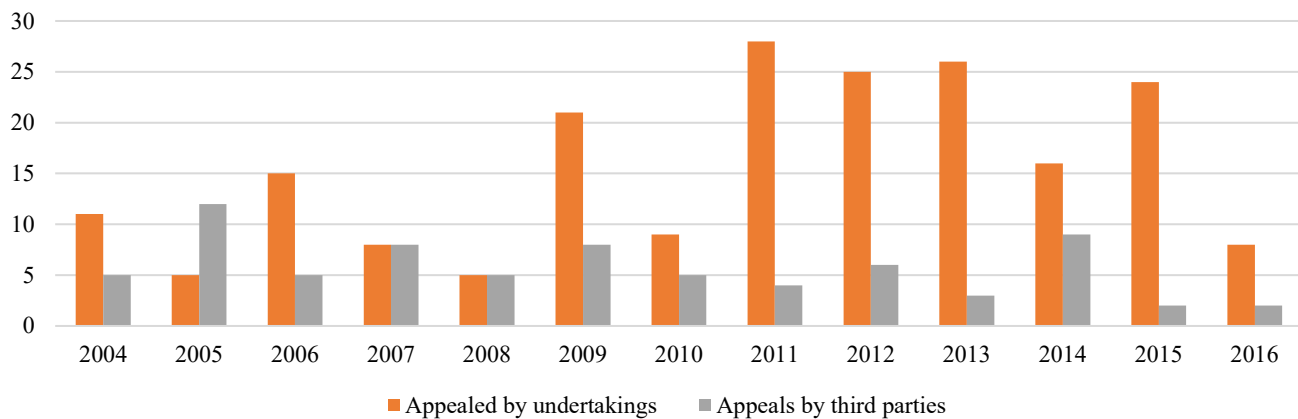
¹⁶³ See Judgment of 26/6/2007 (*Grupo Godó & Prisa*, rapp. E Espín, [ES:TS:2007:5173](#), dissents by M. Campos & O. González) annulling the TDC decision of 18/4/2001 ([487/2000 Radio Fórmula](#), rapp. A Castañeda) declaring the infringement of article 1 of Act 16/89 with no additional remedies.

¹⁶⁴ Article 16 of regulation 1/2003 and article 15bis of Act 1/2000 on Civil Procedure. This seldom occurs but it did in six cassation appeals before the Supreme Court of the infringement decision on the decennial insurance (CNC Resolution of 12/11/2009 ([S/0037/08 Compañías de Seguro Decenal](#), Rapp. J. Costas). An analysis of the catastrophic judicial review of such decision is made in MARCOS [Actas de Derecho Industrial y derecho de autor 36 \(2016\) 173-196](#).

¹⁶⁵ The representation and legal assistance to the competition authorities is carried out by State's legal counsels (see Additional Provision 9th of Act 15/2007; Act 52/97 on legal assistance to the State and Public Institutions, [BOE 285 of 27/11/97](#); Additional provision 4th of Act 50/98, [BOE 313 of 31/12/98](#); and Decree 649/23, [BOE 172 of 20/7/23](#)). The CNMC entered successive agreements with the State Legal Service setting the terms of service (see [agreement 6/6/16](#); [agreement 13/5/18](#) and [addendum 5/3/20](#)).

¹⁶⁶ See MARCOS [Revista de Derecho de la Competencia y Distribución 2023 §IV.3](#).

Figure 22. Number of NCA decisions subject to a first instance appeal according to appellant type (NCA decision/per year)



Note: In a few cases (six NCA decisions), both the undertakings and the third parties appeal the same decision, obviously for contrary reasons.

As Figure 16 shows, third party challenges were rejected in 83% of the cases, in which the courts have ratified the NCA's decision. In addition, 8% of the appeals were found inadmissible, as the appellant was found not to have standing. In the few cases in which third party challenges were accepted (9%), the reviewing court generally sent the case back to the NCA for a new investigation/decision,¹⁶⁷ leading to a new decision being adopted.

5. Qualitative analysis

As the empirical evidence in the previous section shows, most of the challenges against the decisions of the NCA are concentrated in fining decisions (95.5% of the decisions imposing fines were appealed).¹⁶⁸

The fines imposed by the NCA generate unparalleled litigation. Undertakings appeal everything (not only the fine, but prior procedural decisions when feasible, and any subsequent decisions as well), lawyers for the defendants/sanctioned parties take every chance to have the courts scrutinize the action of the NCA. Defense attorneys do not miss any opportunity to challenge the NCA's decisions whenever there is an opportunity to go to court, preferably

¹⁶⁷ In one case, the Supreme Court quashed the dismissal decision of the NCA (TDC resolution of 30/10/08, [R734/08 ASPA/Asepeyo](#), rapp. M Cuerdo) proceeding itself to declare an infringement of article 7 of the Act 16/89, see Supreme Court judgment of 4/3/14 (*ASPA v. CNC*, rapp. M Campos, [ES:TS:2014:784](#)).

¹⁶⁸ In other regulatory areas (financial regulation) the rates of appeal of fines are much lower, see ROY GAVA "Challenging the regulators: Enforcement and appeals in financial regulation" [Regulation & Governance 16/4 \(2022\) 1274](#) (reporting a 38% rate of appeal against fines imposed by the CNMV and 44% rate of appeal against fines imposed by the Bank of Spain),

several times (each and every time it is possible), and for every conceivable reason, without fear that it may harm any relationship with the NCA. Strikingly, they appeal against the fine even if its amount is less than the legal costs of processing the appeals and even if the chances of success of some of the motions filed are minimal.

Challenging the fines delays their final confirmation, but since the offenders have to pay or guarantee the amount of the fine (see *supra* §1.3), this delay is costly. Naturally, the increasing success of appeals filed against fining decisions adopted by the NCA since 2007 changes the incentives to challenge them. Even so, the volume of litigation related to Spanish NCA enforcement proceedings is exaggerated. It is difficult to find a plausible explanation for the above behavior, although it is conceivable that the repetition of motions before the courts is a successful strategy that seeks to contribute to the creation of a momentum in which the courts accept some of the multiple pleas that are raised.

In the case of multiple infringers, separate appeals are filed by each of them, which leads to individual judicial review for each infringer.¹⁶⁹ Although the appeals against each of the NCA decisions are heard around the same period, and there may be common issues raised by appellants, neither the High Court nor the Supreme Court consolidates or hears them jointly. Given that both courts are collegiate bodies, and even though the rapporteurs for each of the individual appeals may be different, there tends to be a consensus as to how appeals concerning each infringement decision of the competition authority are decided (although dissenting opinions are common).¹⁷⁰ One-off changes in the circumstances of each appellant, either regarding its involvement in the infringement or the legal arguments raised, explain potential divergences in the outcome of appeals for each of them.

As this report shows, Spanish Courts exercise a broad and intense review of NCA decisions.¹⁷¹ Aside from the idiosyncratic procedural features of Spanish administrative procedure which explain the large number of judgments delivered, the courts fully scrutinize all questions of law and of fact, reviewing the assessment of the facts and the legality of the investigation/sanctioning proceedings. That helps to explain the large number of decisions

¹⁶⁹ Regularly, those found to be co-offenders appear in court even in other appeals regarding the same infringement decision, as co-defendants, as their rights and interests may be affected by the judgment. See article 21.1.b) of Act 29/98.

¹⁷⁰ Mostly at the High National Court level, less frequently in the Supreme Court.

¹⁷¹ Precisely the opposite of what has been stated in a previous empirical study. see MEJIA [Regulatory Governance 15/3 \(2021\) 773](#) (“litigation against agencies in Spanish generalist courts allow a greater degree of deference to regulatory decisions concerning the technical discretion granted to regulators, and the scope of review is commonly limited to scrutinize procedural aspects of an agency decision (coded in this research as rule of law and individual rights principles)”

quashed on substantive grounds (assessment of the potential infringing conduct by the NCAs) and also on the basis of procedural improprieties.¹⁷²

Judicial review of the substance of the infringements extends not only to the material accuracy of the evidence relied upon, its reliability and consistency but also to the relevance of the data and its adequacy to support the conclusions reached. This includes the definition of the relevant market and the assessment of the market position and the behavior of the undertakings (including the alleged dominant position of one or more undertakings on that market in 102 TFEU cases). Thus, when the courts find that the NCA deductions made do not have a sufficient and reliable basis or that there is no logical correspondence between the decision reached and the data on which it is based, they may annul the NCA decision.¹⁷³

As other empirical studies of administrative appeals before the Spanish courts show,¹⁷⁴ there is no pro-NCA bias on the part of the courts, on the contrary, there is no deference to the NCA's decision. Spanish Courts follow the CJEU's case law on the scope of judicial review of complex economic assessments in their review of NCA decisions.¹⁷⁵ Courts verify the rationality of the assessment reached by the competition authorities, including the reliability, accuracy and coherence of the data supporting the declaration of infringement. They do not afford the competition authorities any margin of appreciation with respect to complex economic assessments in the establishment of an infringement.

6. Concluding remarks

This report analyzes the judicial review of Spanish NCA decisions on infringements of the prohibitions of Articles 101 and 102 TFEU (and their analogues in domestic legislation since between May 2004 and the end April 2021). However, given the backlog in judicial review this only allowed an examination of data relating to the review of decisions adopted by the NCA until 2015. The high number of judgments issued in judicial review and the disparity in their

¹⁷² Other empirical studies of judicial review of regulatory authorities' fines report lower annulment rates, see RUIZ *El control jurisdiccional de los organismos reguladores*, 2018 206-297 (35% in telecommunications and 26% in energy).

¹⁷³ See, e.g., Supreme Court judgments of 20/12/18 (*Telefónica v. CNMC*, rapp. D Córdoba, [ES:TS:2018:4393](#)) and 21/12/18 (*Orange v. CNMC*, rapp. AR Arozamena, [ES:TS:2018:4566](#)) and 8/1/19 (*Vodafone v. CNMC*, rapp. E. Espín, [ES:TS:2019:253](#)).

¹⁷⁴ See SOFIA AMARAL-GARCIA & NUNO GAROUPA "Do Administrative Courts Favour Government? Evidence from Medical Malpractice in Spain?" *Journal of European Tort Law* 6/3 (2015) 795-826 (365 medical malpractice cases decided by the Spanish Supreme Court in 2006–2010).

¹⁷⁵ ¶54 of CJEU judgments 8/12/11 (C-386/10P *Chalkor*, [EU:C:2011:815](#)) on collusion, and ¶54 of CJEU of 10/7/14 (C- 295/12 *Telefónica*, [EU:C:2014:2062](#)) on abuse of dominance.

content makes the information and data provided in this report stand apart from those followed for the rest of the jurisdictions examined in this project, nonetheless empirical evidence on the judicial review of competition law enforcement in Spain between May 2004 to April 2021 presented in this report shows:

- In the period subject to this study, judicial review was complete for 274 NCA decisions, leading to 1390 judgments.
- NCA decisions are regularly appealed, no matter their content.¹⁷⁶ However, as could be expected, an appeal is almost certain in the case of a fining decision, but an appeal cannot be ruled out if the decision is to close the case or not to initiate proceedings, although appeal is very unlikely in commitment decisions.
- 51% of the NCA decisions were confirmed, 19% were fully annulled and 30% annulled in part.
- There is a very low degree of acquiescence of those undertakings fined by the NCA: 95,5% of fining decisions are appealed. 38% of the NCA fines imposed from 2004-2015 were fully confirmed, but 26% of them were totally annulled by the Courts, and 36% of them were reduced. Of the total amount of fines imposed by the Spanish NCA in the period 2004-2015 (€1.697.072.921), only 43% survives after judicial review (€738.073.925),
- Logically, the degree of acquiescence is higher for complainants: 27% of NCA Decisions to close an investigation without declaring an infringement or decision not to open an investigation are appealed (mostly unsuccessfully, in 91% of cases). Moreover, evidence shows that fewer and fewer of this type of decision are challenged and this trend is likely to continue as the NCA prioritization measures are put into practice.

The extraordinary tendency to litigiousness, is highlighted by the fact that investigated parties challenge not only the final NCA decision, until no more appeals are possible (and through all alternative proceedings available), but also a multitude of NCA procedural decisions. Every decision adopted by the NCA is appealed, and this extreme trend is also demonstrated by evidence showing appeals being filed even against NCA advocacy reports.¹⁷⁷

¹⁷⁶ See EMILIO HUERTA “Competencia, Innovación empresarial y productividad: el papel de la defensa de la competencia en la prosperidad de España” in A. BETANCOR et al (ed) [Defensa de la Competencia: innovación y control en el contexto de la tradición intervencionista](#), F. Ramón Areces 2020, 166 (“Controversial court rulings challenging previous investigations carried out by competition authorities are frequently observed”).

¹⁷⁷ See judgment of 5/10/15 (*Repsol YPF v. CNC*, rapp. E Calvo, [ES:TS:2015:4096](#)) confirming the High National Court judgment of 29/11/12 (rapp. M^aA Salvo, [ES:AN:2012:4829](#)), that rejected the challenge against CNC

The prevalent litigation strategy consists in invoking as many arguments as possible in appeals, both substantive and procedural, even if they are relatively weak. Since a court must in any case review all of them, this is seen as a strategy to maximize the chances of raising a point that will lead to annulment or changes in the decision or ruling under appeal.

Practically all the fines imposed by the NCA are appealed in the confidence that it is highly probable that the judges will review the NCA's pronouncement on some point. This can be confirmed by the results set out in this report. Given that the probability of confirmation of the prior decision is lower than that of annulment or reduction, what is the point of acquiescence? In terms of judicial review, the Spanish NCA finds itself in a vicious circle that is difficult to escape.

Finally, contrary to what one might expect, and to what tends to happen in other jurisdictions, Spanish courts' judgments quashing NCA fines are not grounded on formal/procedural issues: more than half of the complete annulments of fines are for substantive reasons, although there are a not inconsiderable number of decisions annulled for procedural reasons, including a dozen cases in which the authorities missed the deadline for the proceedings.

The previous sections clearly reveal the judicial bottleneck generated by appeals against NCA fines, which makes it difficult to perform an exhaustive analysis similar to that undertaken for the rest of the jurisdictions in this project. The Spanish experience tends to involve several companies that appeal simultaneously against the same decision, and subsequent court rulings that may vary in their outcome, depending on the appellant and the outcome of the appeal.

The backlog also affects the NCA itself, since the return of most of the decisions to the authority for the recalculation of the fine allows the undertakings to start the appeal process again (usually without success in that phase), which makes it not unusual for more than a decade to elapse from the initiation of the case until the outcome of the case (and appeal process) is final.

Table 5. Annulled NCA fines/amounts/grounds

Date	Case	Reference	Original Fine	Annulled	Surviving	High National Court	Supreme Court
7/7/04	Empresas eléctricas	552/02	2.704.554	2.704.554	0	PROC	SUBS
22/7/04	Materiales Radiactivos	565/03	750.000	750.000	0	CONFIRM	SUBS
28/12/06	Viesgo Generación	602/05	2.500.000	2.500.000	0	SUBS	SUBS
3/4/07	Excursiones Puerto Sóller	611/06	324.365	324.365	0	CONFIRM	SUBS
21/6/07	Aceites 2	612/06	6.246.350	6.101.350	145.000	CONFIRM	PROC
28/6/07	Servicios funerarios La gomera	613/06	130.000	130.000	0	SUBS	NO APPEAL
14/2/08	Iberdrola	624/07	15.400.000	15.400.000	0	SUBS	SUBS
25/4/08	Gas Natural	625/07	1.500.000	1.500.000	0	SUBS	INADMITTED
21/7/08	MDC Ingeniería / Productos Haller	634/07	356.000	341.000	15.000	SUBS	NO APPEAL
24/3/09	Productos Farmacéuticos Genéricos	649/08	1.000.000	1.000.000	0	FINE	SUBS
23/7/09	AIE /T5	651/08	770.000	770.000	0	SUBS	SUBS
21/1/10	Fabricantes de Gel	S/0084/08	8.220.031	4.504.157	3.715.874	SUBS	BOTH
29/7/10	Ecovidrio	S/0065/08	1.000.000	1.000.000	0	SUBS	SUBS
20/1/11	Colegio Notarial de Asturias	S/0196/09	50.000	50.000	0	SUBS	SUBS
23/2/11	AIEE	S/2785/07	532.686	532.686	0	PROC	NO APPEAL
13/5/11	UNESA y asociados	S/0159/09	52.400.000,00	52.400.000,00	0,00	PROC	NO APPEAL
29/6/11	Colomer	S/0224/10	170.300,00	170.300,00	0,00	PROC	INADMITTED
6/10/11	Productores de Uva y Vinos de Jerez	S/0167/09	544.000	544.000	0	SUBS	NO APPEAL
24/10/11	Televenta	S/0047/08	50.000	50.000	0	SUBS	NO APPEAL
10/11/11	Navieras Ceuta -2-	S/0241/10	16.339.258	12.699.635	3.639.623	FINE	PROC
24/11/11	Prisa/Zeta	S/0232/10	554.542	554.542	0	BOTH	NO APPEAL
14/12/11	Productos hortofrutícolas	S/0231/10	238.446	212.816	25.630	PROC	NO APPEAL
28/11/11	Montesa Honda	S/0154/09	1.830.247	1.664.549	165.699	PROC	PROC
23/2/12	Navieras Baleares	S/0244/10	54.109.767	53.489.992	619.776	PROC+FINE	PROC
27/3/12	Convenio Seguridad	S/0197/09	11.000	11.000	0	SUBS	NO APPEAL
14/6/12	Hierros Extremadura	S/0254/10	500.000	500.000	0	PROC	NO APPEAL
16/7/12	COAM-Viviendas Públicas Municipios Madrid	SAMAD/01/2011	172.000	172.000	0	SUBS	NO APPEAL
30/7/12	Inspecciones periódicas de gas	S/0256/10	1.400.000	1.400.000	0	SUBS	SUBS
26/9/12	CEOE	S/0335/11	200.000	200.000	0	SUBS	NO APPEAL
31/10/12	Col. Abogados Alcalá Henares	SAMAD/0002/11	20.000	20.000	0	PROC	NO APPEAL
7/11/12	Navieras Marruecos	S/0331/11	87.699.066	87.699.066	0	PROC	PROC
19/12/12	Mensajes cortos	S/0248/10	119.965.000	119.965.000	0	SUBS	SUBS
20/2/13	Transcalit	S/0215/10	80.000	80.000	0	SUBS	NO APPEAL
23/5/13	Distribuidores Saneamiento	S/0303/10	6.459.087	4.430.703	3.715.874	PROC	PROC
2/1/14	Servicios comerciales AENA	S/0404/12	3.178.050	2.568.579	609.471	PROC	NO APPEAL
21/1/14	Correos 2	S/0373/11	8.178.698	8.178.698	0	SUBS	SUBS
19/5/14	Página web Col. Dentistas Tenerife	SACAN/011/10	18.354	18.354	0	PROC	NO APPEAL
18/6/14	Fabricantes de papel y cartón ondulado	S/0469/13	57.686.188	57.686.188	0	PROC	NO APPEAL
17/7/14	Criadores de Caballos	S/0345/11	152.833,32	152.833,32	0,00	PROC	NO APPEAL

29/10/14	Contratos de Permanencia	S/0422/12	25.784.341	25.784.341	0	SUBS	SUBS
6/11/14	Recogida de Papel	S/0430/12	3.977.855	3.670.094	0	FINE	PROC
11/12/14	COAPI	S/0477/13	70.000	70.000	0	PROC	NO APPEAL
8/1/15	Residuos	S/0429/12	98.201.302	98.201.302	0	SUBS	NO APPEAL
11/2/15	Puerto de Santander	S/0464/13	90.000	90.000	0	SUBS	INADMITTED
20/2/15	Precios Combustibles Automoción	S/0474/13	32.400.000	30.091.985	0	FINE	PROC
5/3/15	Concesionarios Hyundai	S/0488/13	2.031.171	2.005.003	26.168	SUBS	NO APPEAL
25/6/15	Transporte Frigorífico	S/0454/12	8.859.314	8.859.314	0	BOTH	INADMITTED
2/7/15	Redes Abanderadas	S/0484/13	22.880.639	22.880.639	0	PROC	PROC
1/9/15	Colegio Abogados de Guadalajara	S/0491/13	89.983	89.983	0	SUBS	SUBS
12/12/15	Consejo Col. odontológicos y estomatólogos	S/0299/10	234.738	234.738	0	PROC	NO APPEAL
17/12/15	ICOGAM	S/DC/0516/14	65.655	65.655	0	SUBS	SUBS