



*cutting through complexity*



# Compliance report

*CNMC*

*REFORM/ SC2020/062*

*February 28, 2022*

*Version 3*



## Contents

1. EXECUTIVE SUMMARY .....	2
2. INTRODUCTION AND GENERAL FRAMEWORK .....	6
2.1. COMPETITION ADVOCACY UNDER LAW 3/2013 .....	6
2.2. THE ROLE OF THE CNMC UNDER LAW 20/2013 .....	7
2.3. DIFFERENCES BETWEEN ADVOCACY ROLES UNDER LAW 3/2013 AND LAW 20/2013 .....	8
3. MARKET STUDIES – CODE E.....	10
4. REGULATORY PROPOSALS – CODE PRO .....	17
5. REPORTS ON DRAFT LAWS AND REGULATIONS – CODE IPN .....	22
6. REPORTS ON MATTERS THAT ARE NOT STRICTLY LINKED TO LAWS OR REGULATIONS – CODE INF.....	29
7. JUDICIAL APPEALS EX ARTICLE OF 5.4 OF LAW 3/2013 – CODE LA.....	35
8. MARKET UNITY REPORTS UNDER ARTICLES 26 AND 28 OF LGUM – CODES UM40	
8.1. ARTICLE 26.....	41
8.2. ARTICLE 28.....	43
9. JUDICIAL APPEALS EX ARTICLE 27 OF LGUM – CODE UM.....	46
10. CONCLUSIONS AND RECOMMENDATIONS .....	51
10.1. CONCLUSIONS.....	51
10.2. RECOMMENDATIONS .....	54

## 1. EXECUTIVE SUMMARY

This report summarizes the conclusions of the assessment of the advocacy reports, issued by the CNMC in the use of its competences under Law 3/2013, of 4 June, on the creation of the CNMC and the market unity reports issued by the CNMC under Law 20/2013, of 9 December, on the guarantee of market unity. All reports were approved between 2014 and 2019<sup>1</sup>.

The assessment comprises the following:

Type of report		Number of reports	Number of recommendations / claims <sup>2</sup>
Law 3/2013	Market Studies	11	122
	Regulatory Proposals	11	38
	IPN Reports	113	1,412
	INF Reports	54	442
	Article 5.4 Appeals	19	70
Law 20/2013	Article 26 Reports	127	279
	Article 28 Reports	121	121
	Article 27 Appeals	58	84
<b>TOTAL</b>		<b>514</b>	<b>2,568</b>

The number of competition restrictions addressed by the CNMC is diverse, although there are some areas and sectors where the authority has placed a special interest. The main findings of each category can be summarized as follows:

- a) In the cases of **Market Studies and Regulatory Proposals**, the authority has discretion on selecting the topic of the reports. These cases have mainly focused on recommendations related to guarantees of a correct liberalization of regulated markets, the limitations on the provision of goods and services and, to a lesser extent, the exclusive rights granted to a particular operator, the increase of entry and exit costs and the insufficient regulatory development.
- b) In the case of **IPN Reports** (legislative and regulatory proposals), the sectors of the reports were diverse, with a slight predominance of professional associations (as there were a high number of projects regarding the regulation of professional bodies). In general, the CNMC has overwhelmingly focused on the insufficient regulatory

---

<sup>1</sup> In relation to the assessment on compliance, we have reviewed acts up to June 2021.

<sup>2</sup> A recommendation is reported only once, even if there are different addressees (such as the case where a single recommendation is addressed to all Spanish regions).

developments to ensure liberalization and the ability to provide goods or services.

- c) As to **INF Reports**, these cases mainly address public procurement issues (in relation to administrative acts from the government, regulators and other public bodies). Normally, the CNMC is required to review tender documents and similar acts at a drafting stage and verify whether these documents pose any threat for the maintenance of effective competition. The most frequent type of recommendations aims at the removal of restrictions to the ability of suppliers to provide a good or service. The second most frequent category refers to the assessment of non-normative acts that failed to guarantee an efficient economic regulation or those that granted exclusive rights for a supplier to provide goods or services.
- d) Finally, in relation to **appeals under Article 5.4 of Law 3/2013**, the authority has mainly decided to appeal regulations on tourism (rental of touristic habitations) and road transportation (taxi, bus and private hire vehicles). The main restriction to competition identified in these areas were the limits to the ability of some suppliers to provide a good or service and the increases in the costs of entry or exit by a supplier that resulted from the contested regulations.
- e) In relation to **market unity**, the scope and focus of the instrument are different from the advocacy acts under Law 3/2013. On the one side, the purpose of market unity reports is to remove a regulation hindering competition, rather than suggesting how to enact regulation (as would happen in an IPN or INF report). On the other side, Law 20/2013 aims at preserving market unity on very defined terms and, therefore, the CNMC's market unity reports are considerably more focused.

As to Article 26 and Article 28 Reports, the concerns of the CNMC basically centred on two issues: restrictions that limit the ability of some suppliers to provide a good or service and the grants of exclusive rights to a supplier for providing goods or services. These issues also mark the main concerns raised by the CNMC in relation to Article 27 Appeals.

The assessment of the degree of compliance between the different instruments shows a significant difference between the Law 3/2013 Reports, the Market Unity Reports and the Appeals (considering both Article 5.4 appeals and Article 27 appeals<sup>3</sup>). In any event, the different ratio of compliance in each case must be assessed within the boundaries of each instrument and in relation to its purpose and incardination on the legislative/regulatory process.

Thus, for example, compliance with Law 20/2013 reports measure the degree of compliance by the Market Unity Council Secretariat (*Secretaría del Consejo para la Unidad de Mercado*, SECUM) in face of market unity infringements. By contrast, compliance of INF/IPN reports measures how the authority competent for approving the initiative subject to the CNMC assessment<sup>4</sup> has taken the authority's views in the final drafting of new regulation or administrative actions. Market studies and regulatory proposals aim at convincing the regulator to take some actions without an ongoing legislation procedure on course. Finally, judicial appeals aim at convincing a court that a given administrative action must be annulled on the

---

<sup>3</sup> Covering both formal appeals and previous requests (*requerimientos previos*).

<sup>4</sup> This authority may be the same authority requesting the report or a different authority, *e.g.* a ministerial department consulting the CNMC on a draft law or regulation project, for which final approval corresponds to either the Council of Ministers or the Parliament.

grounds that it creates obstacles for the maintenance of effective competition (Article 5.4 Appeals) or infringes the freedom of establishment or movement within the Spanish market in the terms of the Law 20/2013 (Article 27 Appeals).

These differences may have an impact on the different degree of compliance in each case:

- a) **Law 3/2013 reports:** The degree of compliance is moderate from a strictly quantitative perspective. In relation to Market Studies and regulatory proposals (which are initiated by the CNMC *ex officio* and do not necessarily refer to ongoing legislative / normative processes), the overall degree of compliance is higher than 50%<sup>5</sup> In relation to IPN/INF Reports (which refer to ongoing processes), the degree of compliance is significantly lower. It must be noted, however, that the degree of compliance is significantly higher in relation to local entities than regional or national addressees. As opposed to Law 20/2013 reports and judicial appeals, which refer to existing infringements already in place, **Law 3/2013 reports include recommendations to improve regulation and administrative action (therefore, non-compliance with CNMC recommendations in Law 3/2013 reports does not necessarily imply an infringement of the law), as well as a strong advocacy element that goes beyond the particular object of the report in each case.** The purpose of these reports is not only the primary goal of altering future legislation and administrative acts, but also identify general obstacles to competition and liberalisation and contribute to inform the public opinion on such issues. The CNMC recommendations refer to potential limitations of competition that must be confronted with other public interests at stake. The CNMC role is to enable the final regulator to adopt more informed decisions, taking stock of potential competition issues. A further difference is that, while Law 20/2013 refers to administrative activity and regulations below the rank of a law, Law 3/2013 reports also inform legal provisions.
- b) **Law 20/2013 reports:** Since the primary addressee of the CNMC's recommendations is the SECUM, the degree of compliance with its report is very relevant (exceeding 90% in both cases). In this case, there is not enough public information available as to the degree of compliance by the authority responsible for the administrative act or regulation object of the initial complaint. However, compliance by the SECUM (the authority requesting the reports and its addressee) is considerably higher than compliance with the recommendations under Law 3/2013 reports. Moreover, while Article 3/2013 reports seek the improvement of legislative and administrative proceedings, Law 20/2013 proceedings identify existing infringements of the principles that support the market unity in Spain.
- c) **Judicial appeals:** As to judicial appeals, both Articles allow the CNMC to challenge regulations and administrative acts: Article 27 appeals deal with specific infringements of the Law 20/2013 (restrictions to establishment or movement within the Spanish market in infringement of the same Law) and Article 5.4 appeals seek the annulment of a regulation or administrative act that may result into obstacles for the maintenance of effective competition. In both cases, the degree of compliance is very high, although there is also a difference between appeals lodged under Article 5.4 and those lodged under Article 27. First of all, the number of Article 27 appeals is significantly higher than that of Article 5.4. Secondly, while the underlying principles of both types of appeals are materially the same, appeals lodged under Article 5.4 have a slightly higher degree of

---

<sup>5</sup> Although this figure may be influenced for a high degree of compliance of one report with several recommendations at a regional level.

dismissals from the courts in first instance, and a higher number of pleadings were rejected than in the case of Article 27 appeals.

## 2. INTRODUCTION AND GENERAL FRAMEWORK

The cases studied in this Report show different **degree of compliance** by the Spanish administration and judicial authorities regarding the advocacy recommendations of the CNMC. These recommendations are part of the authority's advocacy role, expressly included in its competences by (i) Law 3/2013, of 4 June, on the creation of the CNMC and (ii) Law 20/2013, of 9 December, on Guarantee of Market Unity. As we will see, these laws define the advocacy role with different levels and scope, resulting in some relevant differences that directly impact on the advocacy activities and their effectiveness.

### 2.1. Competition advocacy under Law 3/2013

The basic competition advocacy competences of the CNMC are defined in Article 5 of Law 3/2013, which identifies **three different levels of advocacy involvement** for the authority:

- a) Firstly, **Article 5.1.h** states that “[i]n order to safeguard, preserve and promote the proper functioning, transparency and existence of effective competition in all production sectors and markets for the benefit of consumers and users, the National Markets and Competition Commission shall perform the following functions: [...] h) To promote and conduct studies and research work on competition and to prepare general reports on economic sectors”. Under this provision, the authority is empowered to conduct general market and sector studies to promote competition and ensure efficient regulation. This competence is aimed at obtaining a general understanding of markets and sectors and, if necessary, propose possible actions to improve competition or remove competition obstacles. The CNMC has complete freedom to decide, in view of its priorities or interests, which sectors or activities should be subject to a study, and to what extent.

This Article provides the legal basis for **Market Studies** and **Regulatory Proposals**. Market Studies normally assess a market as a whole, while Regulatory Proposals focus on a particular area to be improved through legislative changes.

- b) Secondly, **Article 5.2.a** provides that the CNMC “shall act as a consultative body on matters related to the maintenance of effective competition and the good functioning of economic sectors and markets. In particular, it may be consulted by legislative chambers, the Government, ministerial departments, the autonomous communities, local governments, professional associations, chambers of commerce, business associations and organisations of consumers and users. In the exercise of this function, it shall take the following actions: a) To participate, through the issuance of reports, in the process for drawing up rules which affect the scope of its powers in sectors under its supervision, competition legislation and its legal regime, [...]”. As opposed to market studies and regulatory proposals, this Article requires the CNMC a more reactive approach, given that it implies a consulting role on the issues consulted by the different Spanish public authorities, at all territorial levels. In these cases, the CNMC does not choose which laws or regulations are to be analysed but must limit the scope of its work to the drafts submitted by the authorities.

This Article provides the legal basis for **IPN** and **INF Reports**. As it will be seen, the difference between these instruments is the kind of act assessed. While IPN Reports strictly refer to laws and regulations, INF Reports refer to other administrative acts.

- c) Thirdly, **Article 5.4** grants the CNMC legal standing before Spanish courts to challenge any act of a public authority subject to administrative law, which impede the maintenance

of effective competition in the markets. This competence is limited to regulations, not covering legal challenges of rules having a formal legal rank (i.e., Organic Law, Law, Royal Decree-law and Royal Decree-Legislative).

This Article provides the legal basis for the **LA Reports**.

This competence has a significant difference from the others. While Article 5.1 and 5.2 aim at improving competition in general (either in a sector or in relation to a particular public action), under Article 5.4 the CNMC must affirm the existence of an obstacle to competition that should be removed by the Courts. This difference is key for understanding the effectiveness of the measure.

Articles 5.1 and 5.2 allow the authority to propose any recommendation to define a legislative or regulatory action by the relevant legislator or regulator. In the case of Article 5.4; however, the contested action has already been legally adopted by the legislator or regulator in the exercise of its competences, and the court must take a decision on whether to override or confirm the action solely on competition grounds. Therefore, for a court to cancel a regulatory action there must be a significant competition problem that lacks justification, and not just a mere alternative that might be preferable in terms of policy choice.

For the sake of completeness, it must be noted that Article 5.1.e provides an additional legal basis to the CNMC to issue advocacy reports on State aid issues.

## **2.2. The role of the CNMC under Law 20/2013**

Together with those advocacy competences, as indicated, Law 20/2013 has extended the CNMC's advocacy role to market unity cases. This law is essentially aimed at enforcing the principle of market unity within the territory of Spain. Therefore, the basic tenet of the law is that no authority may directly or indirectly jeopardise the free movement of goods and services within the Spanish territory or break the equality in the basic conditions for undertaking an economic activity in Spain.

In itself, Law 20/2013 does not directly assess competition concerns in the sense of Law 15/2007<sup>6</sup> or Law 3/2013. However, competition and market unity are concepts tightly intertwined, as the regulatory obstacles that are the objective of the market unity regulation normally result in competition imbalances in the affected market or sector. For that reason, Law 20/2013 places the CNMC on the core of its enforcement mechanisms. In particular, the market unity competences of the CNMC are developed in the following Articles:

- a) **Article 26:** This Article provides for a non-contentious procedure to challenge an administrative act or regulation affecting the principles of market unity. Although the authority in charge of the procedure is not the CNMC, but the Secretary of the Council for Market Unity (SECUM), the competition authority is allowed to participate in the procedure and issue a report on the case.

Under this Article, any economic operator that believe that their rights under Law

---

<sup>6</sup> Law 15/2007, of 3 July, on the Defence of Competition is the main Spanish competition law. It defines the traditional competition and antitrust concerns, in relation to anticompetitive practices (anticompetitive agreements, abuse of dominant position and competition hindering through unfair competition acts) and merger control.

20/2013 are being trampled by an administrative act or resolution may lodge a complaint before the SECUM<sup>7</sup>. The complaint is subsequently distributed for consideration by the SECUM to the different contact points identified in the law, such as the CNMC<sup>8</sup>. Once the complaint is received, the contact point may issue a report on the case. The reports prepared by the contact points are subsequently sent to the SECUM that, in view of all the reports received, will issue a report on the case. The report of the SECUM may confirm or dismiss the existence of an obstacle to market unity and is addressed to the authority responsible for the restrictive act or regulation, so it can reconsider their position. The report is not binding on the authority. The procedure ends with the resolution of the competent authority regarding the complaint.

- b) **Article 28:** When it is not possible for the operator to lodge an Article 26 procedure (for example, due to the fact that the appeal deadline has lapsed), it may still ask the SECUM to issue a report on the possible obstacles to market unity. The SECUM will request the same reports indicated in Article 26 and once received, will prepare the final report, that will be sent to the authority responsible for the alleged obstacle. This report can also be requested by operators that, having challenged the administrative act before the courts, did not undertake the procedure of Article 26. In substance, these reports are basically the same of Article 26.
- c) **Article 27:** This Article is a mirror of Article 5.4 of Law 3/2013, in the sense that it allows the CNMC to challenge before the courts any administrative act that infringes the principles of the market unity. The CNMC may lodge these appeals *ex officio* but interested parties may formally request the CNMC to lodge the appeal. Although the intervention of the CNMC under Article 27 normally follows an Article 26 procedure where the authority did not accept the changes requested by the SECUM, this is not a requisite.

### 2.3. Differences between advocacy roles under Law 3/2013 and Law 20/2013

In both cases, the competence for the approval of the advocacy reports is vested on the Council of the CNMC. Moreover, in using any of its advocacy powers, the CNMC applies the same reasonings and supports the same arguments in favour of the liberalization of economic activity.

However, advocacy actions under Law 20/2013 have a narrower scope than those under Law 3/2013, as they must be limited to evidencing the existence of an actual infringement of the market unity obligation.

On the contrary, actions under Law 3/2013 can be broader. With the exception of Article 5.4 appeals, advocacy actions under this law refer to future or impending legislation and administrative actions and, as advanced, the recommendations of the CNMC do not only cover actual infringements but may also extend to mere improvements of the existing rules. Therefore, the freedom of the authority to propose changes is complete.

These differences directly affect the degree of compliance. When the CNMC acts on existing

---

<sup>7</sup> This complaint must be lodged within the legal deadline for appeal and have the immediate effect of suspending such deadline.

<sup>8</sup> The other contact points are the Ministries and the authority designated to that effect by each autonomous community or city, together with the SECUM.

rules or acts that are actual legal infringements (under Law 20/2013 or Article 5.4 appeals) it is bound to have a higher degree of success, as the object of the assessment and its objections must be clearly defined and constrained to the case at stake. On the other side, the rest of interventions under Law 3/2013 are issued in the course of legislative process (or even in advance of such procedure), making more difficult to influence the process as a whole in most cases.

To sum up, and as we will develop it in the following sections, although sharing a common purpose, the different advocacy activities of the CNMC differ regarding the freedom of the authority to conduct their studies, the flexibility to propose solutions and the addressee of the decisions. **A sound understanding of these differences is key in assessing the effectiveness of their conclusions.**

For the preparation of this report, we have reviewed 514 reports and assessed 2,568 recommendations, and traced the subsequent compliance from the addressee national authorities. The following sections show an individual assessment of these different advocacy instruments.

### 3. MARKET STUDIES – CODE E

As indicated in the previous section, market studies normally consist of an **in-depth analysis of a sector, economic activity or, in some cases, a set of connected sectors or specific horizontal competition issues common to different sectors**. The main characteristics of these reports are the following:

- (i) They do not necessarily focus on specific normative acts but assess potential competition concerns or threats in sectors or activities as a whole.
- (ii) Market studies do not have to be linked to specific ongoing legislative procedures, but may advance imminent reforms (e.g., Fintech).

As a result of the combination of these factors, the authority has a **high degree of freedom** to decide which sectors to analyse and what aspects should be the focus of their assessment.

The purpose of Market Studies is to issue non-binding recommendations to the Administration or other stakeholders on the basis that improving regulation and promoting competition will lead to stronger economic performance and to higher welfare levels. Due to this general approach, there could be multiple addressees for the recommendations in a single report.

We have assessed the **11 Market Studies reports** issued by the CNMC between 2014 and 2019. The difference between the number of these reports and the rest of the advocacy acts are due to the fact that Market Studies have a broader and more ambitious scope. In terms of recommendations, these studies include 122 recommendations issued to different authorities<sup>9</sup>.

During this period, the **sectors** selected by the CNMC are public procurement, railroad and transport, road transport, energy, health, financial services, and tourism, as displayed in the following table:

	<b>Table 2: Number of Market Studies reports and recommendations</b>			
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
Public Procurement	1	9.1	4	3.3
Regulatory (railroad and airports)	3	27.3	29	23.8
Regulatory (Hydrocarbons and electricity)	3	27.3	32	26.2
Healthcare	1	9.1	18	14.8
Financial Services.	1	9.1	13	10.7
Road Transport.	1	9.1	9	7.4
Tourism	1	9.1	17	13.9
<b>Total</b>	<b>11</b>	<b>100.0</b>	<b>122</b>	<b>100.0</b>

As we may see from this table, most of the areas where the CNMC has acted are regulated sectors, a picture consistent with the fact that these sectors not only affect relevant and challenging areas of the Spanish economy but are also subject to regulations that may not be

<sup>9</sup> In calculating this figure, we have considered each recommendation issued to regional authorities as a single recommendation, not as nineteen. We have only considered the total figure in relation to the compliance figures.

sufficiently justified in terms of economic efficiency.

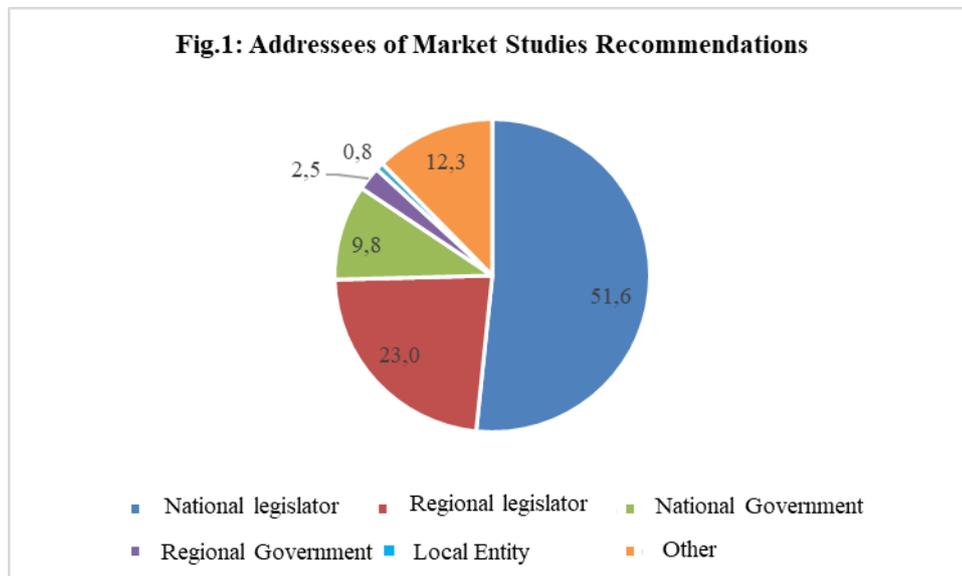
The weight of the regulated sectors is also shown in the number of total recommendations. As shown in the previous chart, most of the recommendations correspond energy and transport sectors. It must be noted, moreover, that a significant number of the recommendations in the healthcare, tourism and transport sectors were addressed to regional authorities and, therefore, the scope of each recommendation is separately addressed to nineteen different bodies, as will be seen in the compliance assessment, below.

If we consider the **nature of the concerns raised by the authority**, 32% of the recommendations (excluding regional duplicates) aimed at addressing an insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation, 21% related to limitations on the ability of some suppliers to provide a good or service and 13.9% to the exclusive rights granted to a supplier.

The full data is summarized in the following table:

<b>LIMITS TO COMPETITION</b>	<b>No. Recommendations</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	18	13.9
A2. Establishes a license, permit or authorisation process as a requirement of operation.	2	1.6
A3. Limits the ability of some suppliers to provide a good or service.	26	21.3
A4. Significantly raises cost of entry or exit by a supplier.	8	6.6
A5. Creates a geographical barrier for companies to supply goods, services, or labour, or to invest capital.	2	1.6
B1. Limits sellers' ability to set prices for goods or services.	3	2.5
B2. Limits freedom of suppliers to advertise or market their goods or services.	2	1.6
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	9	7.4
C1. Creates a self-regulatory or co-regulatory regime.	3	2.5
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	2	1.6
E.1 Insufficient regulatory development to guarantee the safety and protection of consumers and users.	2	1.6
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	39	32.0
F.2 Promotes collusion between economic operators / hinders free competition.	6	5.7

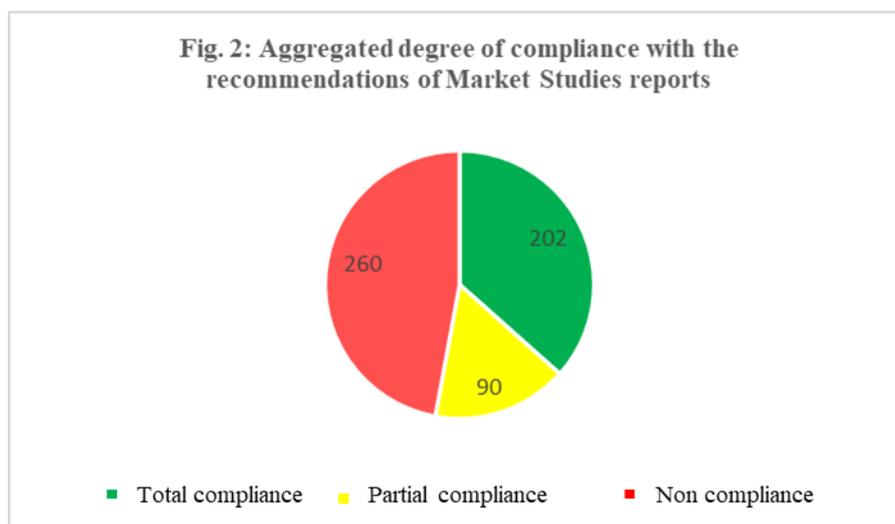
In relation to the **addressees**, we have indicated that Market Studies assess sectors as a whole. It is the CNMC the only agent responsible for the decision of launching a Market Study, which may take this decision *ex officio* or following the request of an interested body or entity. As a result, a single report may have plenty of addressees. As displayed below, however, most of the recommendations of the CNMC were addressed to the national legislator<sup>10</sup>.



In relation to the compliance, it must be advanced that the number of Market Studies Reports is relatively limited, and the reports differ both in terms of object and addressees. Therefore, it is very difficult to extract meaningful conclusions as to the degree of compliance beyond the quantitative approach.

<sup>10</sup> For the purposes of this table, we have considered each recommendation to regional bodies as one single recommendation, even though for the compliance figures we will consider separate compliance in each region.

As to the **degree of compliance** with the recommendations of the Market Studies Reports, the next figure shows a higher percentage of total and partial compliance. As it shall appear from the further assessment, the aggregated result is influenced by the high number of recommendations issued to regional bodies, whose degree of compliance is very high <sup>11</sup>. In any case, non-compliance data in these cases must be read in the context that the reports may affect non-existing legislation.



As to the **degree of compliance per sector**, the figures vary across sectors. On the one hand, there is a high degree of compliance in Touristic Habitations (76%), Fintech (75%), Railroad (63.6%) and Public Procurement (75%). On the other hand, we find a high degree of non-compliance in healthcare (70%), Hydrocarbons (82.5%), Vehicle Technical Inspection (82.4%) and Airport services (93.3%).

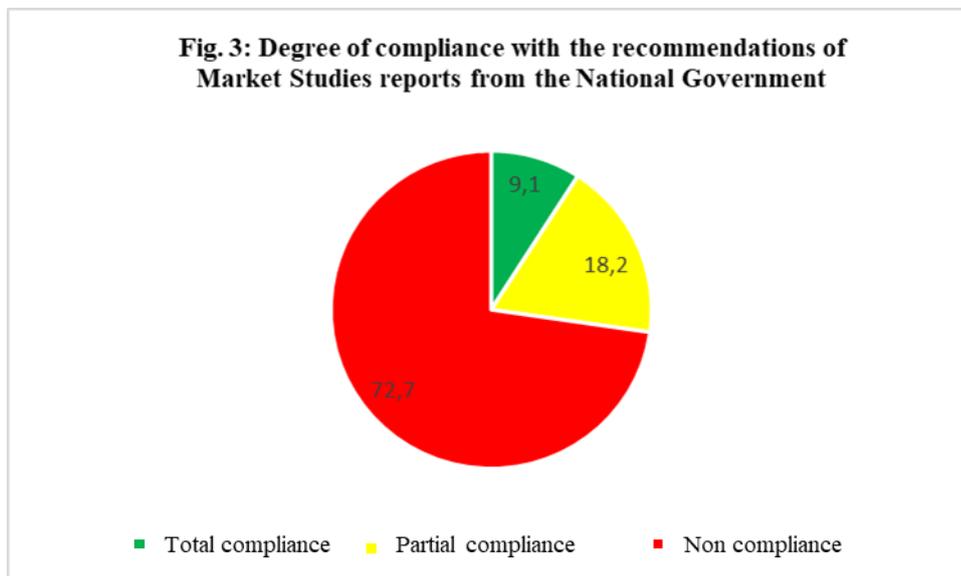
	<b>Table 4: Degree of compliance with the recommendations of Market Studies Reports per sector<sup>12</sup></b>						<b>Total</b>
	<b>Total Compliance</b>		<b>Partial Compliance</b>		<b>Non compliance</b>		
	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	
Public procurement	0	<b>0.0</b>	3	<b>75.0</b>	1	<b>25.0</b>	4
Pharmaceutical.	2	<b>2.2</b>	25	<b>27.8</b>	63	<b>70.0</b>	90
Railroad	6	<b>54.5</b>	1	<b>9.1</b>	4	<b>36.4</b>	11
Fintech.	4	<b>50.0</b>	2	<b>25.0</b>	2	<b>25.0</b>	8
Hydrocarbons	8	<b>12.7</b>	3	<b>4.8</b>	52	<b>82.5</b>	63
Technical Vehicle Inspection	4	<b>5.9</b>	8	<b>11.8</b>	56	<b>82.4</b>	68
Airport services.	0	<b>0.0</b>	1	<b>6.7</b>	14	<b>93.3</b>	15
Tourist habitations	178	<b>60.8</b>	47	<b>16.0</b>	68	<b>23.2</b>	293
<b>Total</b>	<b>202</b>	<b>36.6</b>	<b>90</b>	<b>16.3</b>	<b>260</b>	<b>47.1</b>	<b>552</b>

<sup>11</sup> In these figures we have only considered compliance or non-compliance options. We have excluded the recommendations whose degree of compliance cannot be assessed.

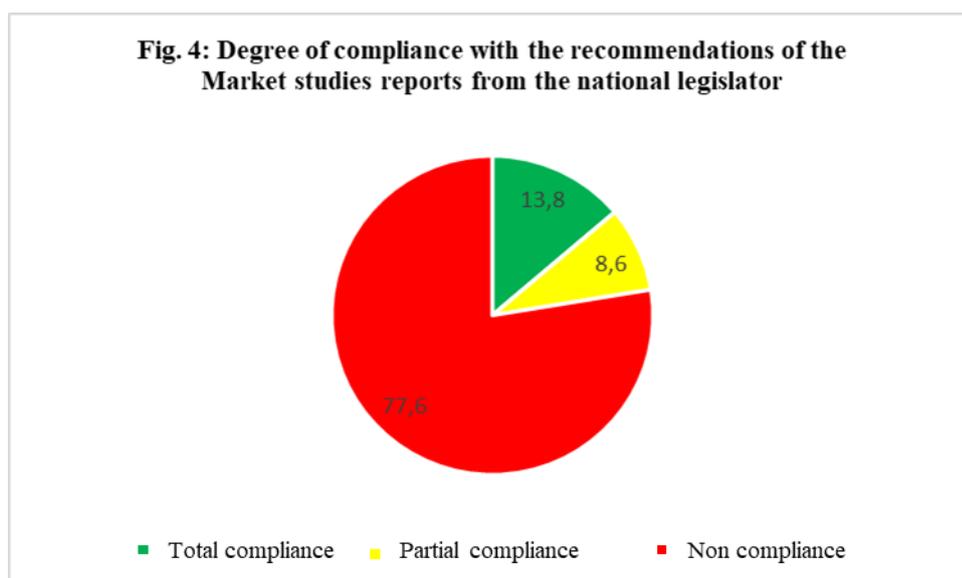
<sup>12</sup> In relation to the total number of recommendations, see footnote 11, above.

If we consider compliance per addressee:

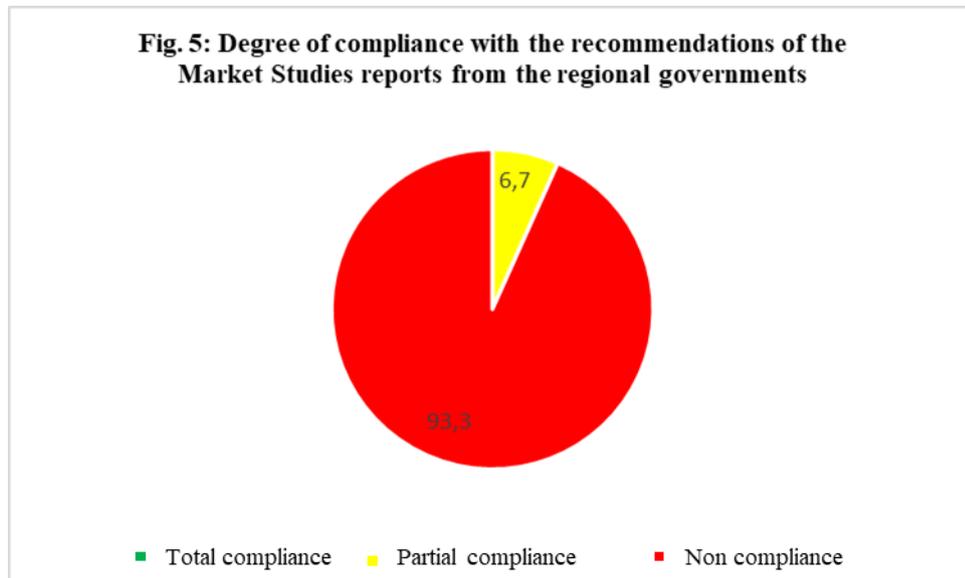
- a) **Compliance by the national government:** The national government failed to comply with 72.7% of the recommendations of the CNMC, with only a 27.3% of total or partial compliance.



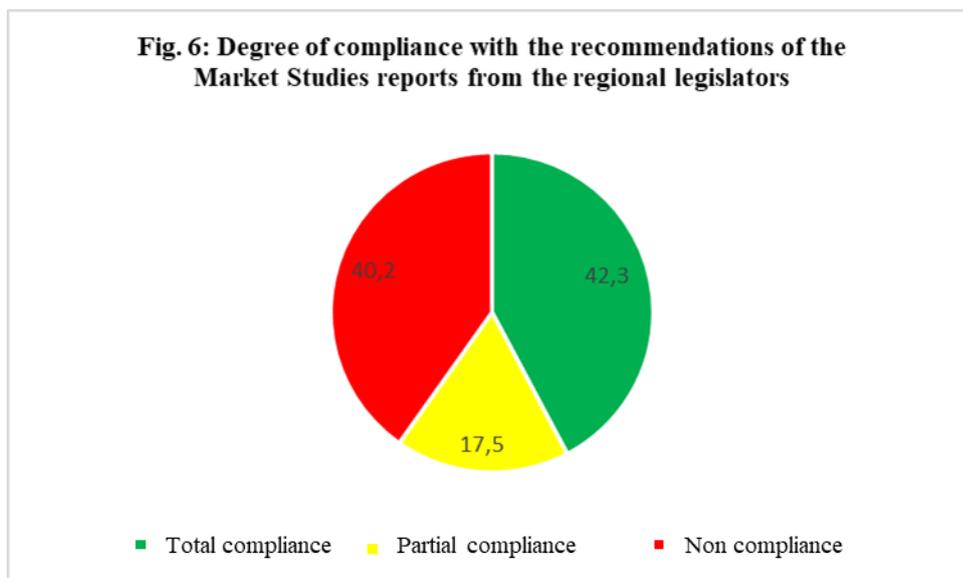
- b) **National legislature:** In the case of the recommendations addressed to the national lawmaker, the degree of non-compliance is higher (77.6%), with a degree of total or partial compliance up to 22.4%.



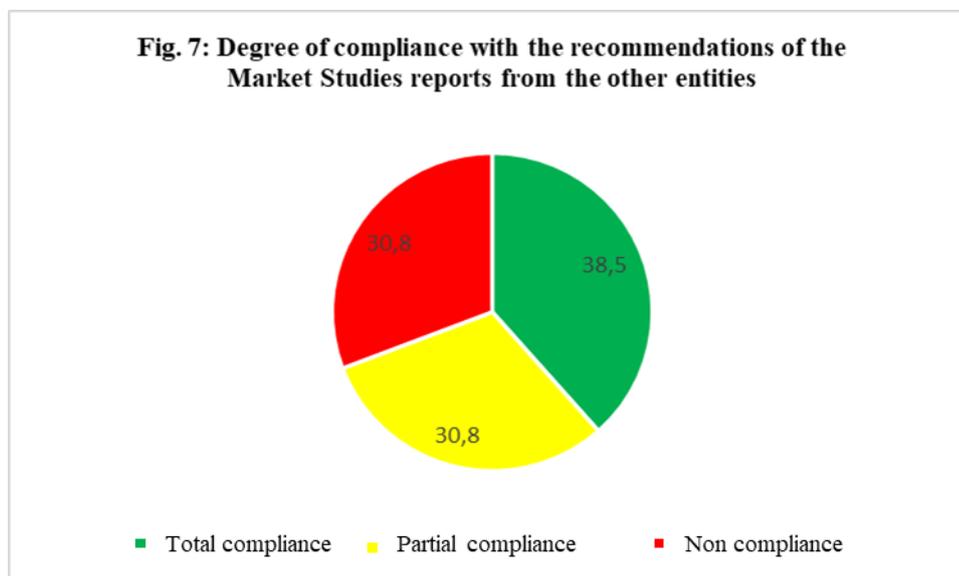
- c) **Compliance by regional governments:** The regional government failed to comply with 93.3% of the recommendations of the CNMC, with only the lowest degree of compliance (6.7% of partial compliance).



- d) **Regional legislators:** Regional legislators have the highest degree of full compliance of the territorial administrations (42.3%), and it is the only case where any category of compliance is higher than 50% (totalling 59.8%). Non-compliance figures represent 40.2% of the total. This higher degree of compliance may be related to the weight of the recommendations on the tourist sector and the alignment of the regional parliaments with this approach.



- e) **Other addressees:** Market Studies also included addressees which are not territorial administrations (such as sector regulators). In this case, the degree of compliance is the highest (38.5% of full compliance and 30.8% of partial compliance), with just a 30.8% of non-compliance. This may be related to the fact that sector regulators are more open to admit recommendations from the CNMC.



Finally, from a temporal perspective, the assessed reports concentrate in separate periods. There are five reports in 2014-2015 and the rest (6 reports) in 2018-2019. There were no market studies in 2016 and 2017. The degree of compliance between these periods greatly differs, as we may see from the table below:

**Table 5: Evolution of the degree of compliance since 2014**

	Reports	% Total Compliance	% Partial compliance	% Non compliance
2014	2	5.1	11.5	83.3
2015	3	6.8	17.6	75.7
2018	3	58.8	16.0	25.2
2019	3	30.0	30.0	40.0

The limited number of reports through the period and the great differences between the reports do not allow us to affirm that there is a positive evolution in the degree compliance linked to the quality of the CNMC's work. The different degree of compliance between these periods, in our view, related to the subject matter, as the reports in the 2018-2019 period included most reports addressed to regional legislators, which, as we have seen, represent the highest degree of compliance.

#### 4. REGULATORY PROPOSALS – CODE PRO

As happens with Market Studies, Regulatory Proposals reports are issued *ex officio*, which means that the CNMC prepares them without a previous request from the Administration. The authority issues these reports when it is important to provide CNMC’s position to the competent bodies of the Administration and raise public awareness of a relevant matter that may have important effects on effective competition and efficient economic regulation.

Regulatory proposals differ from Market studies not in the nature of the recommendations, which are also non-binding recommendations for the Administration, but on the degree of specification pursued by the recommendations issued. This type of reports is addressed to identify possible regulatory changes in the existing legal framework of an activity or sector, as opposed to market studies that aim at a complete understanding of a sector as a whole (that may or may not result in leading to regulatory changes). Therefore, the recommendations provided therein may include drafts of proposals, specific amendments to be done on terms, obligations, etc.

We have assessed the **11 Regulatory Proposals** issued by the CNMC between 2014 and 2019.

Although regulated sectors represent a significant part of the assessment of the CNMC, the activity of the CNMC in the use of these instruments also includes reports on public aids, public procurement, intellectual property or road transportation. In terms of recommendations, the results also show a considerable impact on regulated sectors (weighing 50% of the total recommendations).

<b>Table 6: Number of Regulatory Proposals reports and recommendations<sup>13</sup></b>				
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
State aid	2	18.2	3	7.9
Public procurement	1	9.1	5	13.2
Other sectors	2	18.2	3	7.9
IP	1	9.1	3	7.9
Regulatory (Railroad and airports)	1	9.1	9	23.7
Regulatory (Hydrocarbons and electricity)	2	18.2	10	26.3
Road Transport.	2	18.2	5	13.2
<b>Total</b>	<b>11</b>	<b>100.0</b>	<b>38</b>	<b>100.0</b>

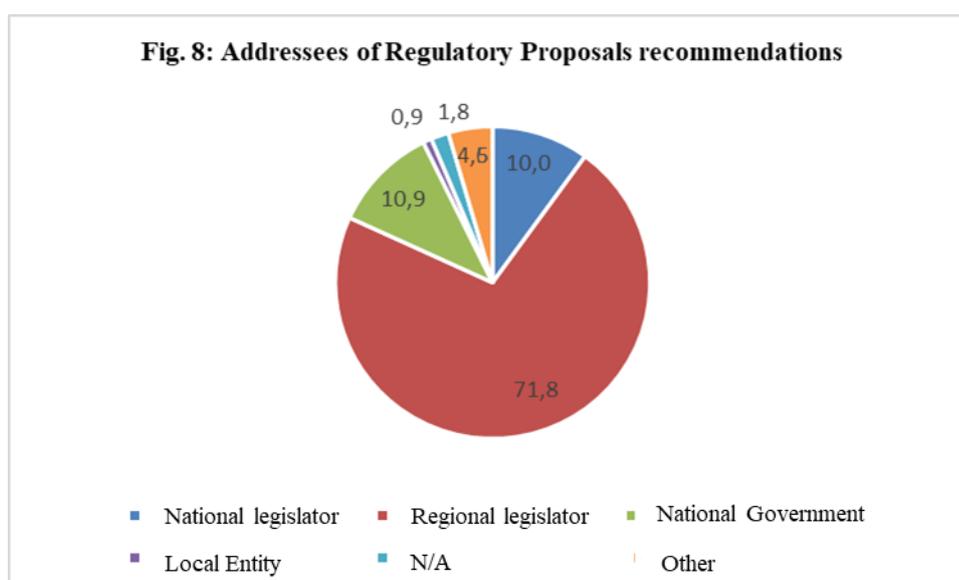
If we consider the nature of the **concerns raised by the authority**: 23.7% of the recommendations are aimed at addressing an insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation and 21.1% to exclusive rights for a supplier to provide goods or services. The two following categories refer to limits to the ability of some suppliers to provide a good or service (13.2%) and the creation of a geographical barrier for companies to supply goods, services, or labour, or to invest capital (10.5%).

<sup>13</sup> In calculating this figure, we have considered each recommendation issued to regional authorities as a single recommendation, not as nineteen. We have only considered the total figure in relation to the compliance figures.

The full data is displayed in the following table:

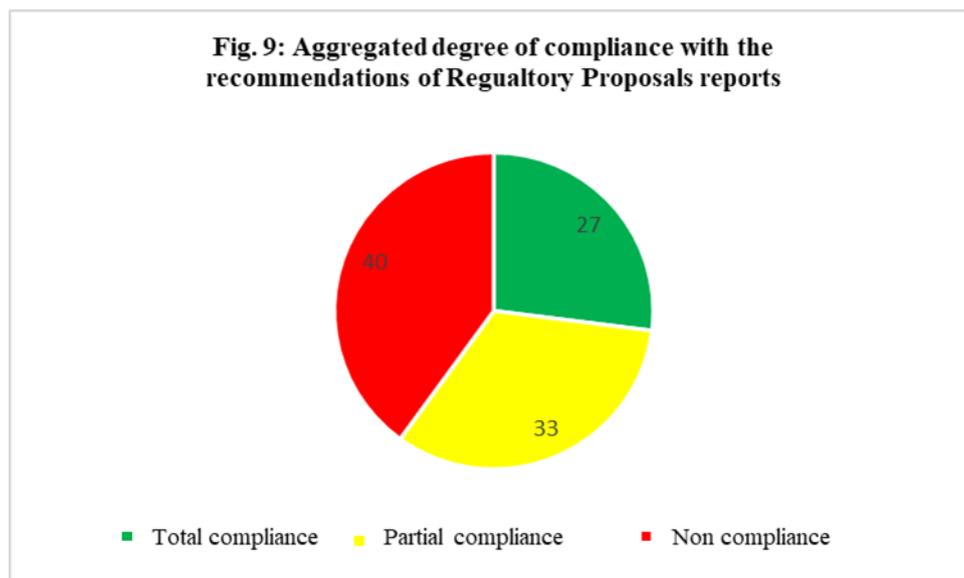
<b>Table 7: Volume of the limits to competition identified by the CNMC in Regulatory Proposals reports</b>		
<b>LIMITS TO COMPETITION</b>	<b>No. Recommendations</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	8	21.1
A2. Establishes a license, permit or authorisation process as a requirement of operation.	3	7.9
A3. Limits the ability of some suppliers to provide a good or service.	5	13.2
A4. Significantly raises cost of entry or exit by a supplier.	2	5.3
A5. Creates a geographical barrier for companies to supply goods, services, or labour, or to invest capital.	4	10.5
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	1	2.6
E.1 Insufficient regulatory development to guarantee the safety and protection of consumers and users.	1	2.6
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	9	23.7
F.1 Taxes are established that generate additional costs and do not have a clear extra-fiscal purpose.	1	2.6
F.3 It may lead to non-compliance with the State Aid scheme.	1	2.6
F.4 Insufficient specification of the non-normative act to guarantee an efficient economic regulation.	1	2.6
N/A.	2	5.3

As to the **addressees**, most recommendations from Regulatory Proposals reports were addressed to regional authorities (totalling 71.8%), followed by proposals addressed to national authorities (representing 20.9%).



Before entering into the assessment of the degree of compliance, it is worth noting that, as with Market Studies Reports, the number of the reports and their heterogeneity makes it difficult to extract meaningful conclusions in some cases.

As to the **degree of compliance** with the recommendations of Regulatory Proposals, the overall figure shows a significant degree of total or partial compliance (60%). As we will see in the following figures, this is due to the fact that most recommendations are addressed to regional legislators, which show a higher degree of compliance.

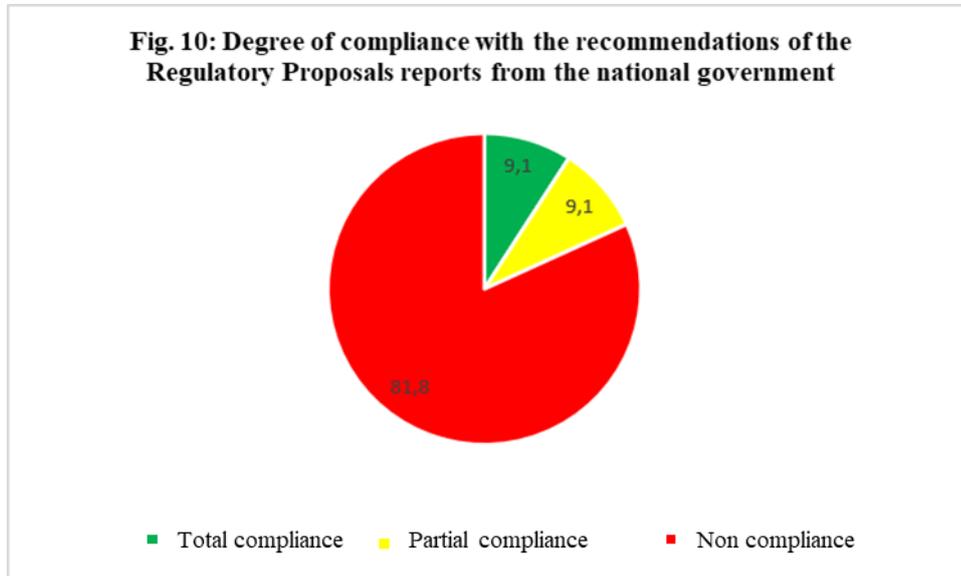


As to the **compliance per sector**, we find a high degree of compliance in Air Transport (100%), Hydrocarbons (74.2%), followed by private hire vehicles (56.4%) and Maritime transport (50%). There has been no compliance at all in the railway, advertising, and air transport.

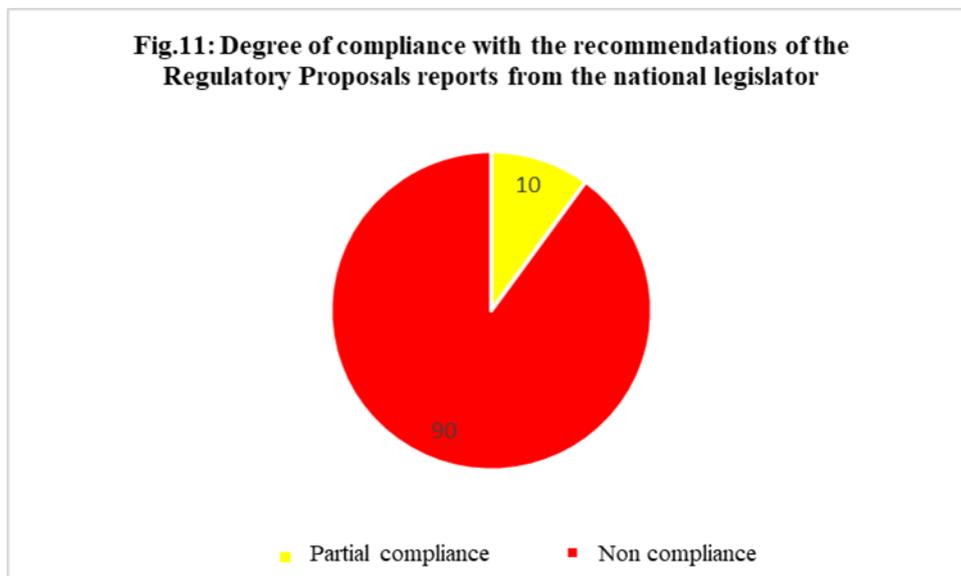
	<b>Table 8: Degree of compliance with the recommendations of Regulatory Proposals Reports per sector</b>						
	<b>Total Compliance</b>		<b>Partial Compliance</b>		<b>Non compliance</b>		<b>Total</b>
	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	
Railroad.	0	0.0	0	0.0	9	100.0	9
Hydrocarbons.	27	43.5	19	30.6	16	25.8	62
Advertising	0	0.0	0	0.0	3	100.0	3
Air transport	1	100.0	0	0.0	0	0.0	1
Maritime transport	0	0.0	1	50.0	1	50.0	2
Private Hire Vehicles	0	0.0	13	56.5	10	43.5	23
<b>Total</b>	<b>28</b>	<b>28.0</b>	<b>33</b>	<b>33.0</b>	<b>39</b>	<b>39.0</b>	<b>100</b>

Considering the different degree of **compliance in relation to the addressee**:

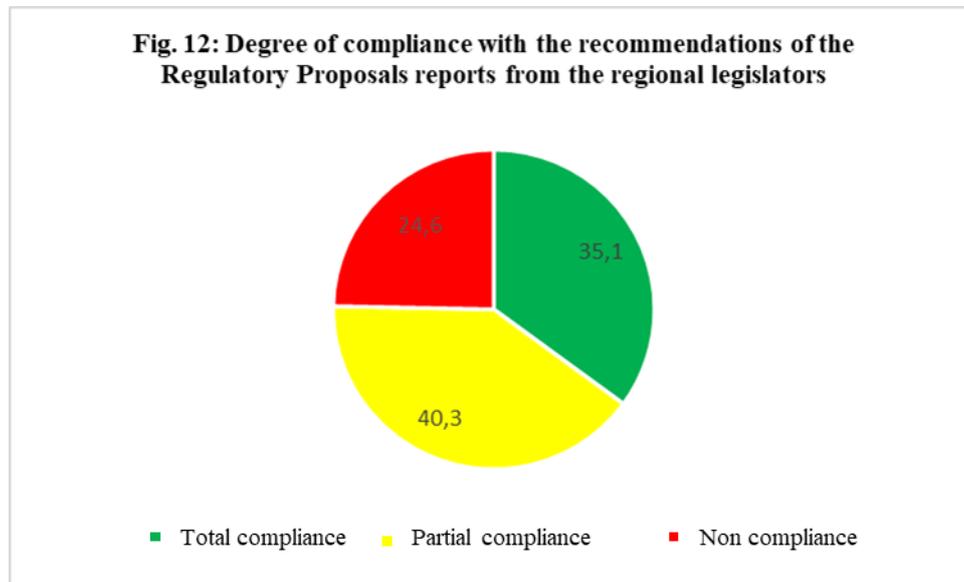
- a) **Compliance by the national government:** The national government failed to comply with 81.8% of the recommendations of the CNMC, with only a 18.2% of total or partial compliance.



- b) **National legislature:** In the case of the recommendation addressed to the national lawmaker, the degree of non-compliance is still overwhelming (90%), with a 10% of partial compliance.



- c) **Regional legislature:** Regional legislators, as in the case of Market Studies, represent the highest degree of compliance in relation to Regulatory proposals, as they have a 35.1% of total compliance and 40.3% of partial compliance.



Regional government, local entities and other addressees do not include a significant degree of recommendations to be relevant for any assessment.

If we look at the evolution of the degree of compliance, we see no discernible pattern. Once again, the limited number of the reports, the different addressees and the differences between them make very difficult to establish a compliance pattern.

**Table 9: Evolution of the degree of compliance since 2014**

	Reports	% Total Compliance	% Partial compliance	% Non compliance
2014	2	0.0	0.0	100.0
2015	3	10.0	0.0	90.0
2016	2	45.0	31.7	23.3
2017	2	0.0	0.0	100.0
2018	1	0.0	50.0	50.0
2019	1	0.0	61.9	38.1

## 5. REPORTS ON DRAFT LAWS AND REGULATIONS – CODE IPN

The IPN reports are carried out at the request of the Administration during the normative process affecting rules related to (i) market competition and well-functioning in all sectors of the Economy or (ii) the CNMC’s own competences or legal regime.

These reports, which are also non-binding for the Administration, are specifically limited by the draft of law/regulation subject of matter. Therefore, recommendations normally address obligations, conditions, terms, etc. provided therein, and not a given sector as a whole. Nevertheless, there may be reports providing general recommendations to re-think how a given sector should be regulated considering different alternatives in order to achieve a more efficient regulation.

We have assessed the **113 IPN Reports**<sup>14</sup> issued by the CNMC between 2014 and 2019, totalling **1,412 recommendations**. The analysis has been limited to those IPN reports that contain purely competition advocacy recommendations. IPN reports that address draft regulatory reforms in the sectors referred to in Articles 6 to 11 of Law 3/2013 have not been considered within the scope of assessment.

As opposed to Market Studies and Regulatory Proposals, the subject of these reports is not decided by the CNMC, but by the authorities that request assessment. From this fact, we can draw two conclusions:

- (i) The number of sectors affected by this advocacy activity is considerably higher.
- (ii) The selection of the sectors or rules subject to the CNMC’s approach does not depend on the CNMC’s policy choice but are the result of the petitions received from the authorities requesting the review.

As shown in the following table, it is remarkable the number of reports related to the regulation of associations (particularly the associations of professionals called *colegios profesionales*), which represent 16.2% of the reports, followed in number of reports by road transportation (9.0%) and agriculture and food (8.1%). The number of recommendations, however, reveals that the recommendations addressing rules governing public procurement (19.8%, mostly in a single report) are followed by the number of recommendations associated with professional associations (15.6%), healthcare (6.9%) and transportation (5.9%).

	<b>Table 10: Number of IPN reports and recommendations</b>			
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
Agriculture and food.	9	8.1	69	4.9
State Aid.	6	5.4	30	2.1
Professional Associations	18	16.2	221	15.6
Retail Trade	6	5.4	52	3.7
Public Procurement.	2	1.8	280	19.8
Gambling.	5	4.5	49	3.5
Environment.	8	7.2	36	2.5
Other.	11	9.9	187	13.2
Provision of Services.	2	1.8	23	1.6

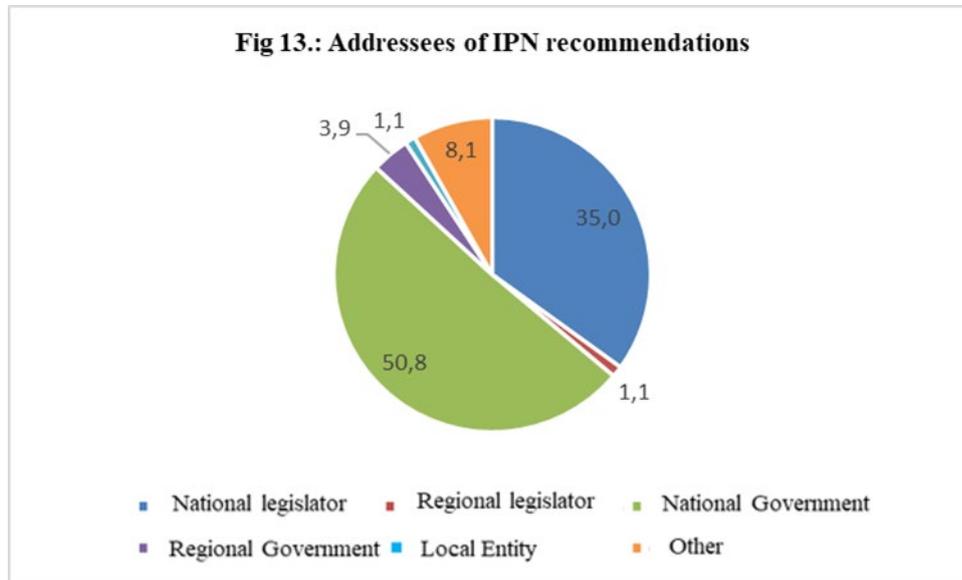
<sup>14</sup> We have assessed 113 acts corresponding to 112 reports because one report contains the analysis of two regulations. For the purposes of this report, we will take into account the figure of 112.

	<b>Table 10: Number of IPN reports and recommendations</b>			
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
IP.	7	6.3	58	4.1
Regulation – Telecommunications and audiovisual	4	3.6	62	4.4
Regulation – Railroad and airports.	2	1.8	58	4.1
Regulation – Hydrocarbons and electricity.	1	0.9	4	0.3
Healthcare.	9	7.2	98	6.9
Financial Services.	5	4.5	59	4.2
Road Transport.	10	9.0	82	5.9
Tourism.	7	6.3	44	3.2
<b>Total</b>	<b>112</b>	<b>100.0</b>	<b>1,412</b>	<b>100.0</b>

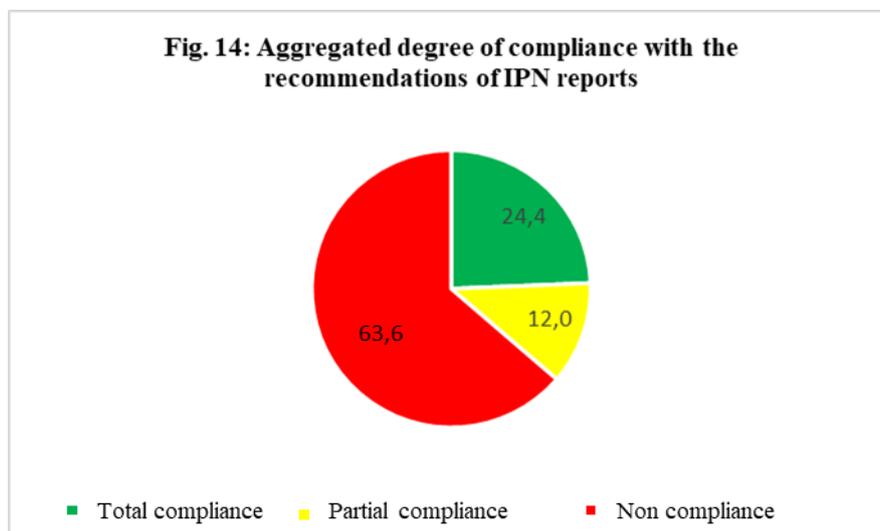
In relation to the competition limitations assessed in its IPN reports, we see a significant majority of recommendations addressing an insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation (61%), followed by the limitations on the ability of some suppliers to provide a good or service (16.8%). The rest of the limits to competition are widely disseminated among the rest of the categories.

<b>Table 11: Volume of the limits to competition identified by the CNMC in IPN reports</b>		
<b>LIMITS TO COMPETITION</b>	<b>No. Recommendations</b>	<b>%</b>
A1. Grants exclusive rights to provide goods or services.	45	3.2
A2. Establishes a license, permit or authorisation process as a requirement of operation.	18	1.3
A3. Limits the ability of some suppliers to provide a good or service.	239	16.8
A4. Significantly raises cost of entry or exit by a supplier.	42	3.0
A5. Creates a geographical barrier for companies to supply goods, services, or labour, or to invest capital.	7	0.5
B1. Limits sellers' ability to set prices for goods or services.	16	1.1
B2. Limits the liberty of a company to advertise or market its goods or services	1	0.1
B3. Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.	1	0.1
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	4	0.3
C1. Creates a self-regulatory or co-regulatory regime.	7	0.6
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	11	0.8
C3. Exempts the activity of a particular industry, or group of suppliers, from the operation of general competition law.	8	0.6
E.1 Insufficient regulatory development to guarantee the safety and protection of consumers and users.	27	1.9
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	862	61.0
F.2 Promotes collusion between economic operators / hinders free competition.	49	3.5
F.3 It may lead to non-compliance with the State Aid scheme.	29	2.1
N/A	45	3.3

In relation to the **addressees**, IPN are mainly addressed to the national government (55.9%) or the national legislator (26.1%). This is consistent with the legal role of IPN Reports in Article 5.2 of the Law 3/2013. These percentages are similar in terms of number of recommendations, as shown in this graph:



In relation to the **degree of compliance**, there is a high degree of non-compliance. It is also worth noting the high number of recommendations that cannot be assessed, as they are not explicit enough, do not refer to the draft under assessment or merely indicate implementation recommendations<sup>15</sup>. These non-assessable recommendations have been left outside the calculation of compliance in the next figures and tables. The general situation of the degree of compliance is shown in the following chart:



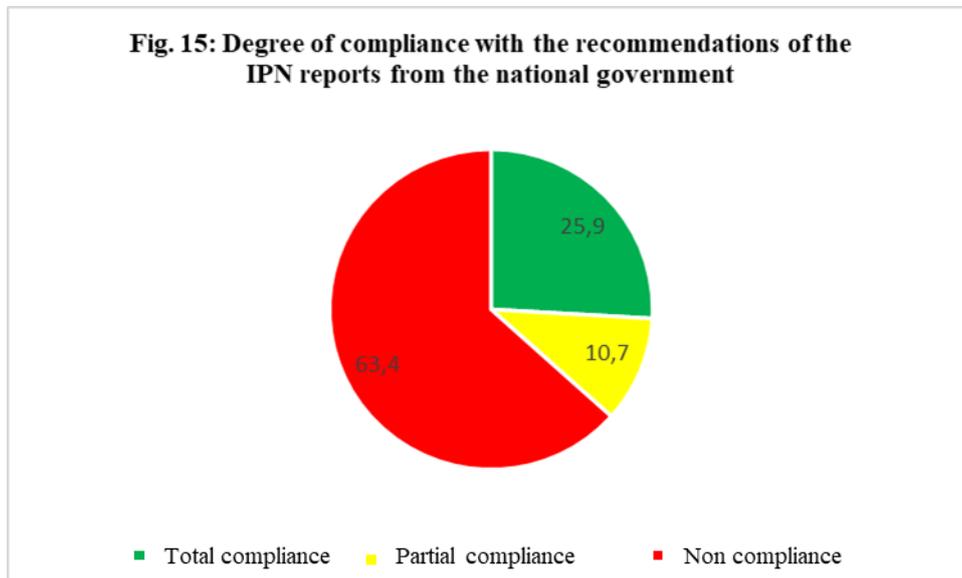
<sup>15</sup> By “*implementation recommendations*” we refer to recommendations that are not based on the text of the draft submitted to consultation, but rather to the subsequent application by the relevant organisms.

As to sectors, it is difficult to draw conclusions from the percentage of compliance without considering the number of recommendations and, for this reason, we have ordered the following table in relation to the number of total assessable recommendations. As we will see, public procurement alone represents 25% of the recommendations, with the five most relevant categories amounting for more than a half of the total recommendations:

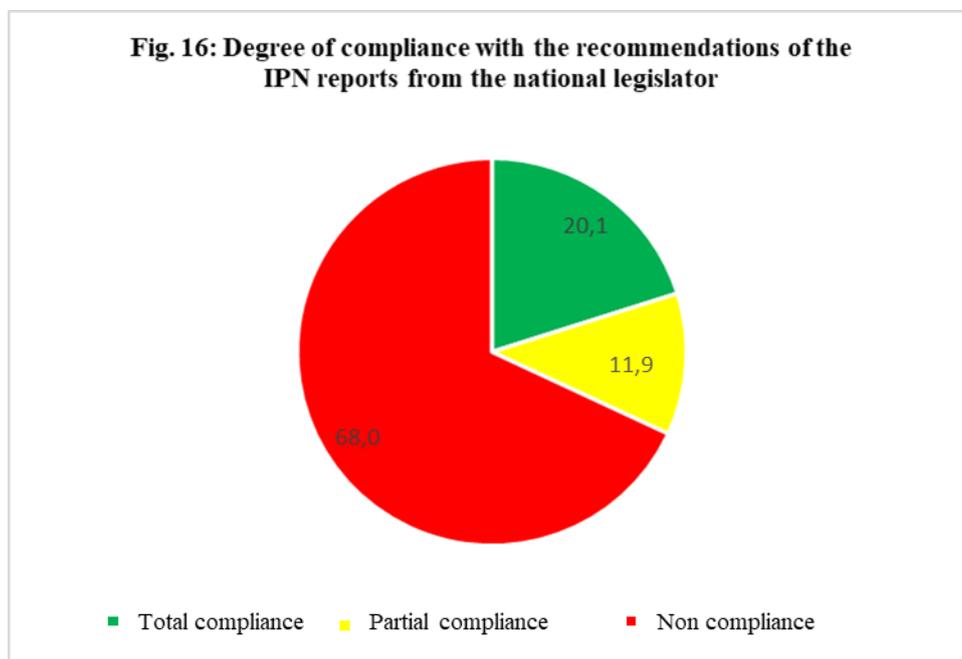
<b>Table 12: Degree of compliance with the recommendations of IPN Reports per sector</b>							
	<b>Total Compliance</b>		<b>Partial Compliance</b>		<b>Non compliance</b>		<b>Total</b>
	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	
Public Procurement.	52	21.3	42	35.0	159	25.0	253
Professional Services.	24	9.8	20	16.7	46	7.2	90
IP.	15	6.1	6	5.0	32	5.0	53
Private Hire Vehicles.	10	4.1	3	2.5	36	5.7	49
Gambling.	8	3.3	5	4.2	26	4.1	39
Airport.	10	4.1	2	1.7	23	3.6	35
Television.	14	5.7	5	4.2	16	2.5	35
Metrology.	10	4.1	3	2.5	21	3.3	34
Insurance.	5	2.0	3	2.5	22	3.5	30
Economy.	2	0.8	1	0.8	21	3.3	24
Audit Services.	5	2.0	2	1.7	16	2.5	23
Tobacco.	4	1.6	3	2.5	16	2.5	23
Healthcare and social service	5	2.0	1	0.8	16	2.5	22
Insurance and investment	2	0.8	3	2.5	16	2.5	21
Dairy products	6	2.5	0	0.0	14	2.2	20
N/A.	7	2.9	3	2.5	9	1.4	19
Touristic Habitation	5	2.0	0	0.0	14	2.2	19
Wholesale distribution	14	5.7	2	1.7	3	0.5	19
Rabbit breeding.	5	2.0	2	1.7	11	1.7	18
Public Sector.	1	0.4	2	1.7	15	2.4	18
Railroad.	8	3.3	0	0.0	9	1.4	17
Pharma and medical device.	0	0.0	0	0.0	17	2.7	17
Waste Management	4	1.6	1	0.8	11	1.7	16
Vehicle inspection	5	2.0	0	0.0	10	1.6	15
Telecommunications.	4	1.6	2	1.7	9	1.4	15
Consumers	3	1.2	6	5.0	4	0.6	13
Industrial Quality and Safety	0	0.0	0	0.0	8	1.3	8
Batteries	0	0.0	0	0.0	7	1.1	7
IT	2	0.8	2	1.7	3	0.5	7
Travel Agencies	3	1.2	0	0.0	3	0.5	6
Food.	2	0.8	0	0.0	4	0.6	6
Automotive.	6	2.5	0	0.0	0	0.0	6
Rural Tourism	0	0.0	0	0.0	6	0.9	6
Environment.	0	0.0	0	0.0	5	0.8	5
Hydrocarbons.	1	0.4	1	0.8	2	0.3	4
Retail trade	1	0.4	0	0.0	2	0.3	3
National Parks	1	0.4	0	0.0	2	0.3	3
Business Secrets	0	0.0	0	0.0	3	0.5	3
<b>Total</b>	<b>244</b>	<b>100.0</b>	<b>120</b>	<b>100.0</b>	<b>637</b>	<b>100.0</b>	<b>1001</b>

In relation to the addressee of the recommendations:

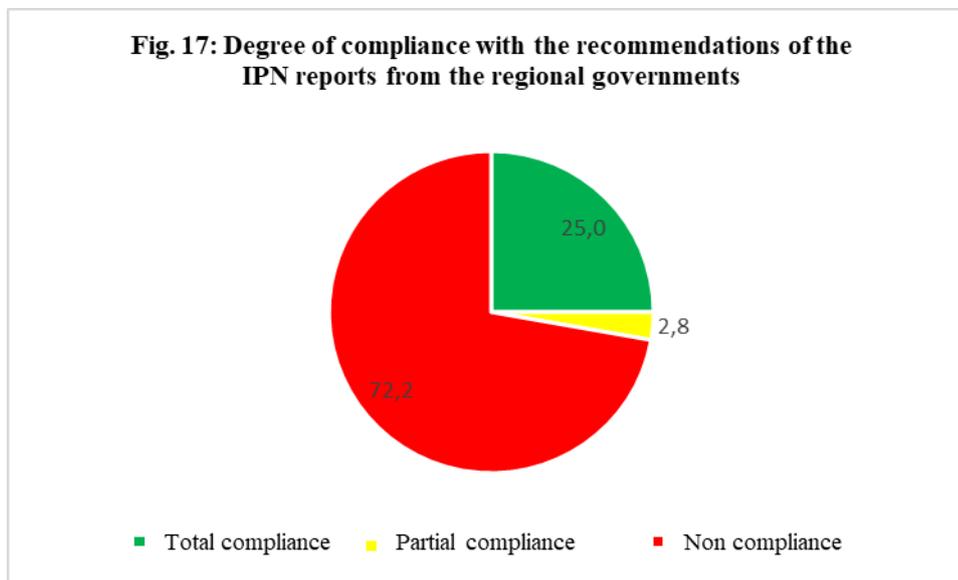
- a) **Compliance by the national government:** The national government failed to comply with 63.4% of the recommendations of the CNMC, with only a 36.6% of compliance (including 25.9% of full compliance).



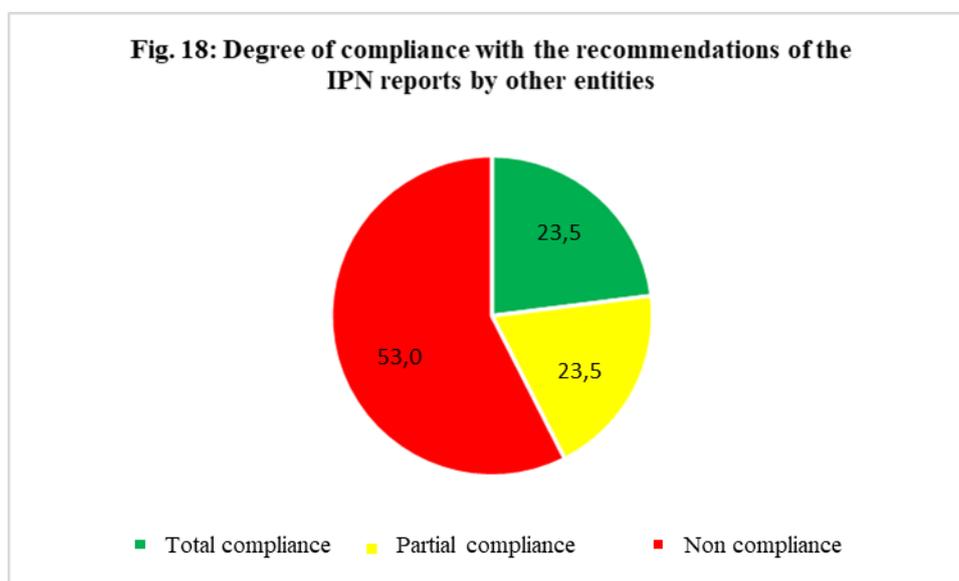
- b) **Compliance by the national legislature:** In the case of recommendations addressed to the national lawmaker, the figures are very similar: 68.0% of no compliance, 20.1% of total compliance, and 11.9% of partial compliance.



- c) **Compliance by the regional governments:** The regional governments failed to comply with 72.2% of the recommendations of the CNMC, with a 25.0% of full compliance and 2.8% of partial compliance:



- d) **Other addressees:** IPN have also other categories of addressees, including non-territorial administrations. The degree of non-compliance in these cases is amounts to 53%, while the degree of compliance amounts to 47% including total and partial compliance.



Finally, although they represent only a limited number of recommendations, it is worth noting that total compliance by **local entities** is 100%.

From a temporal perspective, there is no clear pattern or evolution, probably due to the different number of reports (and the number of recommendations per report) each year.

<b>Table 13: Evolution of the degree of compliance since 2013</b>				
	<b>Reports</b>	<b>% Total Compliance</b>	<b>% Partial compliance</b>	<b>% Non compliance</b>
2013	5	25.8	16.1	58.1
2014	19	34.3	6.3	59.4
2015	24	18.9	12.7	68.4
2016	12	36.5	17.6	45.9
2017	16	17.9	10.7	71.4
2018	18 <sup>16</sup>	27.1	12.5	60.4
2019	18	32.3	10.8	56.9

---

<sup>16</sup> The actual number of reports in 2018 was 19, but two of them are the same report (IPN /CNMC/020/18 and IPN /CNMC/021/18).

## 6. REPORTS ON MATTERS THAT ARE NOT STRICTLY LINKED TO LAWS OR REGULATIONS – CODE INF

The INF reports are carried out at the request of the Administration or any third party but are subject to matters that are not strictly linked to laws or regulations, such as public tenders or public aids, among others. As we will see, the nature of requests greatly influences the topics and the degree of compliance. The recommendations provided in this type of reports are also non-binding for the Administration.

We have assessed the **54 INF Reports** issued by the CNMC between 2014 and 2019, totalling **442 recommendations**.

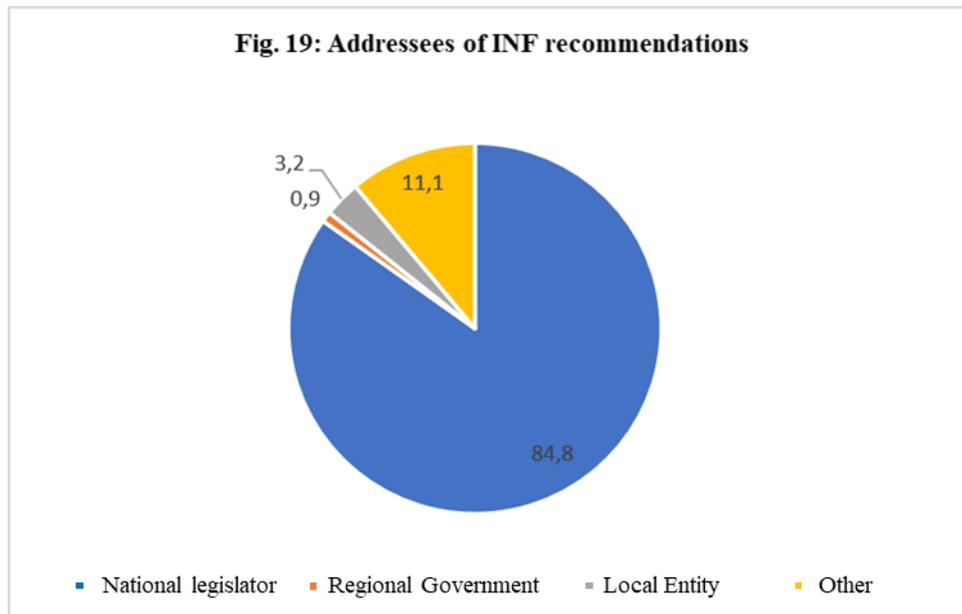
In line with their object, a large majority of INF Reports are related to public procurement processes (65%), a fact that is completely in line with the nature of this instrument. The rest refer to a variety of sectors, with a significant impact of provision of services (7%). The weight of the different sectors is consistent with the number of recommendations per sector.

<b>Table 14: Number of INF reports and recommendations</b>				
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
Agriculture	1	1.9	12	2.7
Professional Associations	1	1.9	11	2.5
Retail distribution	1	1.9	4	0.9
Public Procurement	35	64.8	341	77.1
Environment	1	1.9	8	1.8
Other	4	7.4	11	2.5
Services	4	7.4	17	3.8
IP	1	1.9	8	1.8
Regulatory (Railroad and airports).	1	1.9	2	0.5
Regulatory (Hydrocarbons and electricity)	1	1.9	1	0.2
Healthcare	2	3.7	23	5.2
Road Transport.	2	3.7	4	0.9
<b>Total</b>	<b>54</b>	<b>100.0</b>	<b>442</b>	<b>100,0</b>

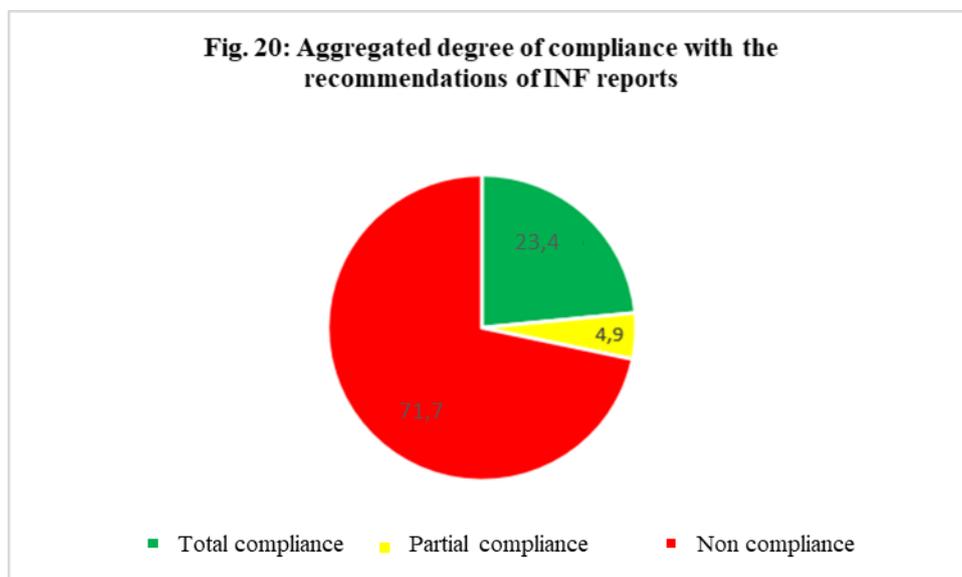
By assessing the limitations on competition analysed by the INF reports, we can see that most recommendations deal with the removal of limits on the ability of some suppliers to provide a good or service (41.9%). This finding is also consistent with the fact that the majority of the reports refer to public procurement, followed by the assessment of insufficient specification of the non-normative act to guarantee an efficient economic regulation (28.1%) and the granting of exclusive rights for a supplier to provide goods or services (10.9%).

<b>Table 15: Volume of the limits to competition identified by the CNMC in INF reports</b>		
<b>LIMITS TO COMPETITION</b>	<b>No. Recommendations</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	48	10.9
A3. Limits the ability of some suppliers to provide a good or service.	185	41.9
A4. Significantly raises cost of entry or exit by a supplier.	17	3.8
A5. Creates a geographical barrier for companies to supply goods, services, or labour, or to invest capital.	2	0.5
B2. Limits freedom of suppliers to advertise or market their goods or services.	1	0.2
B3. Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.	2	0.5
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	1	0.2
C1. Creates a self-regulatory or co-regulatory regime.	12	2.7
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	6	1.4
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	13	2.9
F.2 Promotes collusion between economic operators / hinders free competition	17	3.8
F.3 It may lead to non-compliance with the State Aid scheme.	4	0.9
F.4 Insufficient specification of the non-normative act to guarantee an efficient economic regulation.	124	28.1
N/A	10	2.3

As to the addressees, almost 84.8% of the INF reports are issued at the request of the national government, while 3.2% are the result of a petition from local entities and 11.1%, of a petition from non-territorial administrations. The percentage of recommendations per addressee is very similar:



In relation to the degree of compliance, the overall data shows a degree of non-compliance of almost 71.7%, with a 28.3% of total or partial compliance. as shown in the following chart:

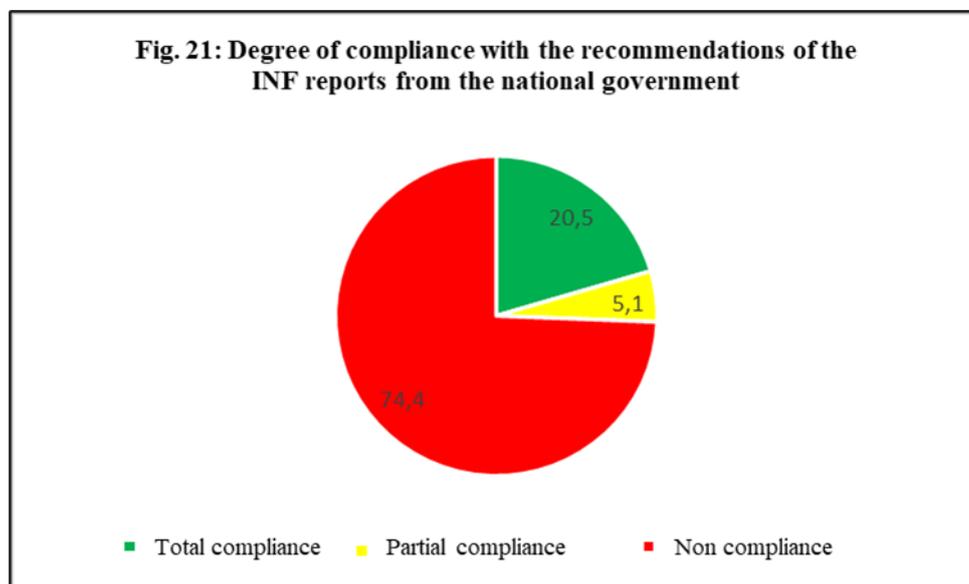


In relation to the degree of compliance per sector, as with IPN Reports, we understand that the percentage of success is to be assessed in relation to the number of total assessable recommendations:

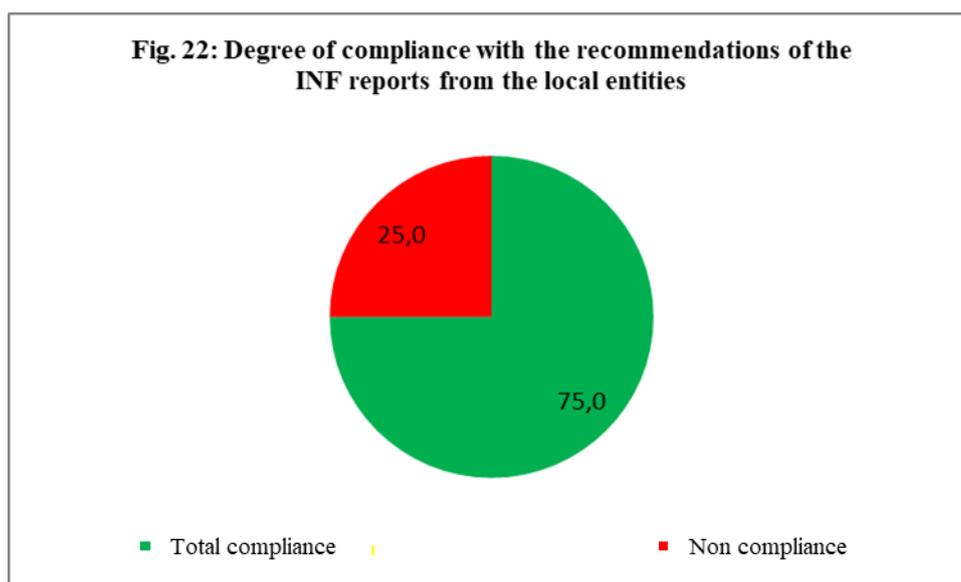
	<b>Table 16: Degree of compliance with the recommendations of INF Reports per sector</b>						
	<b>Total Compliance</b>		<b>Partial Compliance</b>		<b>Non compliance</b>		<b>Total</b>
	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	<b>No.</b>	<b>%</b>	
IP Services	4	8.7	1	2.2	41	89.1	46
Automotive.	1	2.7	1	2.7	35	94.6	37
Telecommunications.	6	18.2	4	12.1	23	69.7	33
Postal services	10	32.3	2	6.5	19	61.3	31
Office supplies	4	21.1	1	5.3	14	73.7	19
Pharmaceutical	3	20.0	1	6.7	11	73.3	15
Advertising	4	26.7	1	6.7	10	66.7	15
Security services	8	53.3	0	0.0	7	46.7	15
Food.	3	25.8	1	8.3	8	66.7	12
Road transport.	6	50.0	0	0.0	6	50.0	12
Professional Services	6	54.5	0	0.0	5	45.5	11
Tourism	1	9.1	0	0.0	10	90.9	11
Electricity.	1	10.0	0	0.0	9	90.0	10
Travel agencies.	0	0.0	1	11.1	8	88.9	9
Hydrocarbons	5	55.6	1	11.1	3	33.3	9
Furniture.	0	0.0	1	12.5	7	87.5	8
Sports (football)	0	0.0	0	0.0	8	100.0	8
IP.	8	100.0	0	0.0	0	0.0	8
Medical Devices	1	14.3	1	14.3	5	71.4	7
Elderly homes	2	28.6	0	0.0	5	71.4	7
Cleaning services.	1	14.3	0	0.0	6	85.7	7
Security systems.	0	0.0	1	16.7	5	83.3	6
Audit services.	4	80.0	1	20.0	0	0.0	5
Wholesale distribution	0	0.0	0	0.0	5	100.0	5
Retail distribution of audio-visual devices	0	0.0	0	0.0	5	100.0	5
Electronics	0	0.0	0	0.0	4	100.0	4
Editorial.	0	0.0	0	0.0	4	100.0	4
Architecture.	3	100.0	0	0.0	0	0.0	3
Public Procurement	2	66.7	0	0.0	1	33.3	3
Engineering	1	50.0	0	0.0	1	50.0	2
Air transport	2	100.0	0	0.0	0	0.0	2
Road transport (goods)	1	100.0	0	0.0	0	0.0	1
Maritime transport	0	0.0	0	0.0	1	100.0	1

The degree of compliance is different in each case:

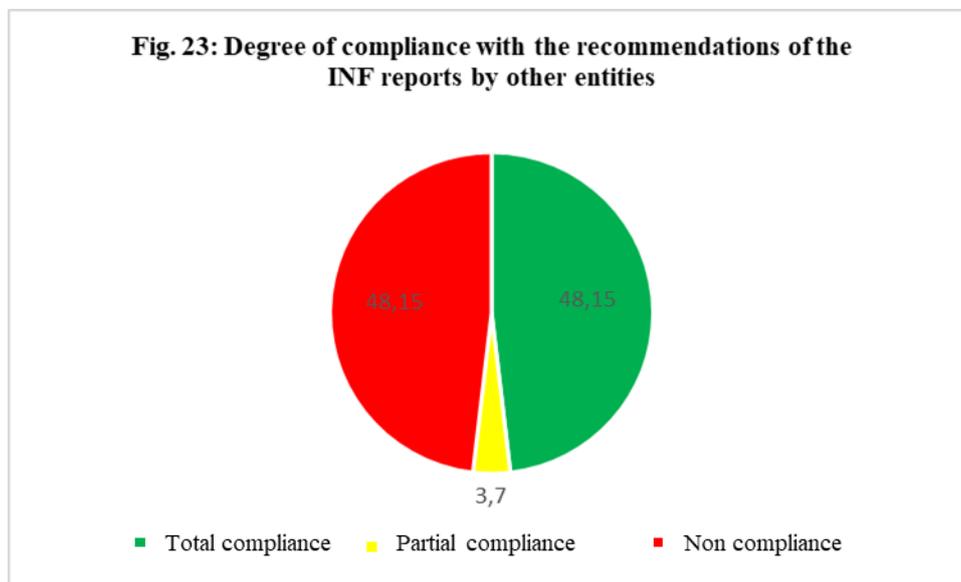
- a) **Compliance by the national government:** The national government failed to comply with 74.4% of the recommendations of the CNMC, with only a 25.6% of compliance (including 20.5% of full compliance).



- b) **Compliance by the regional governments:** Regional governments show a complete disregard to the recommendations of the CNMC, reaching a 100% of non-compliance. However, considering that there are only 4 recommendations to a regional government, the figure is not representative.
- c) **Compliance by local entities:** Local entities show the opposite trend, with a 75% of full compliance against a 25% of non-compliance. There is however, a 43% of cases where there is no published information to complete the assessment.



- d) **Compliance by other entities:** As happens with local entities, in 45% of the cases we have no public information to verify the degree of compliance. In any case, the degree of total compliance reaches 48.15% (with an additional 3.7% of partial compliance) versus 48.15% of no compliance recommendations.



From a temporal perspective, the evolution in the degree of compliance does not show a discernible pattern, aside from the trend of high degree of compliance with a degree of total and partial compliance ranging between 15% and 35%.

**Table 17: Evolution of the degree of compliance since 2014**

	Reports	% Total Compliance	% Partial compliance	% Non compliance
2014	18	29.9	4.8	65.3
2015	5	25.0	3.1	71.9
2016	6	9.8	5.9	84.3
2017	6	27.5	5.0	67.5
2018	14	15.4	4.6	80.0
2019	5	25.0	5.6	69.4

## 7. JUDICIAL APPEALS EX ARTICLE OF 5.4 OF LAW 3/2013 – CODE LA

Law 3/2013 provides a legal standing for the CNMC to bring in judicial proceedings against the Administration for acts or regulations (below the status of law) resulting in market barriers and obstacles. This category includes the reports issued in relation to the judicial proceedings carried out by the CNMC before the Spanish Courts regarding administrative acts and general regulations from which barriers to effective competency in markets may result.

Legal challenges carried out by CNMC are sometimes accompanied by an Economic Report whose objective is to perform an economic analysis of the restrictions on competition subject to legal challenges. The economic reports are also issued by CNMC and they may incorporate a quantification of the costs that such restrictions entail for consumers and social welfare.

From a substantive point of view, LA Reports have things in common both with the Market Study Reports and Regulatory Proposals (the freedom of the CNMC to choose the object of the challenge) and with IPN and INF Reports (the limit of the assessment to a particular regulation or administrative act). Moreover, LA reports do not merely point out suggestions, but actually identify elements in regulatory acts that are non-compatible with competition law principles. The Court must ponder whether the claims of the CNMC are strong enough to annul the adopted act.

We have assessed **19 LA Appeals** involving **70 claims or pleadings**<sup>17</sup>.

If we consider the subject matter of the appeals lodged by the CNMC, we can see that a vast majority are related to tourism (47%) and transport (32%). These percentages are similar if we consider the number of claims instead of the number of appeals. Also, it seems that the tourism and transport sectors involve a higher number of claims per appeal than the other sectors.

	<b>Appeals</b>	<b>%</b>	<b>Pleadings</b>	<b>%</b>
Agriculture and food	1	5.3	1	1.4
Retail distribution	2	10.5	2	2.9
Public procurement	1	5.3	1	1.4
Road Transport.	6	31.6	30	42.9
Tourism	9	47.4	36	51.4

---

<sup>17</sup> Each appeal may involve one single claim or several of them.

The competition limitations of LA Appeals mainly involve to what extent the ability of some suppliers to provide a good or service is limited (35.7%) and whether costs to entry or exit by a supplier are raised (26.4%), followed by the establishment of licenses, permits or authorisations (10.0%) and the granting of exclusive rights (8.3%).

<b>LIMITS TO COMPETITION</b>	<b>No. Pleadings</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	6	8.6
A2. Establishes a license, permit, or authorization process as a requirement of operation.	7	10.0
A3. Limits the ability of some suppliers to provide a good or service.	25	35.7
A4. Significantly raises cost of entry or exit by a supplier.	19	27.1
A5. Creates a geographical barrier for companies to supply goods, services, or labor, or to invest capital.	5	7.1
B1. Limits sellers' ability to set prices for goods or services.	4	5.7
B3. Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.	2	2.9
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	1	1.4
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	1	1.4

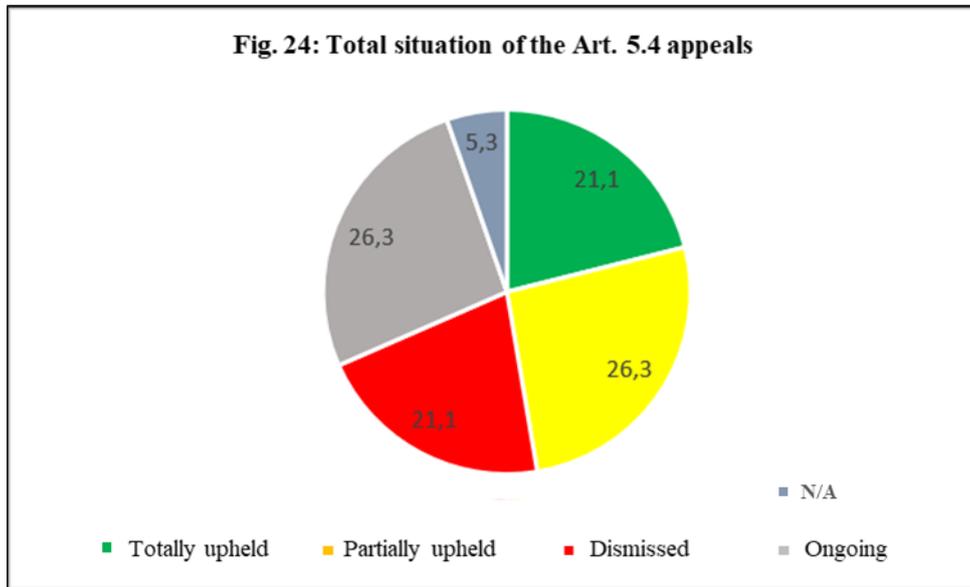
The addressee of the appeals and LA Appeals are the competent courts. As most cases involve appeals against regional or local acts, the most common courts are the High Regional Courts (*Tribunales Superiores de Justicia*). The next table shows the courts that, so far, have known of the CNMC's appeals in first (or only<sup>18</sup>) instance:

<b>Court</b>		<b>Number of appeals</b>	<b>No. of pleadings</b>
Regional High Court	Madrid	4	8
	Cataluña	3	16
	Andalucía	2	12
	Castilla y León	2	6
	Islas Baleares	2	2
	País Vasco	2	6
	Asturias	1	1
	Canarias	1	5
	Galicia	1	12
Supreme Court	1	2	

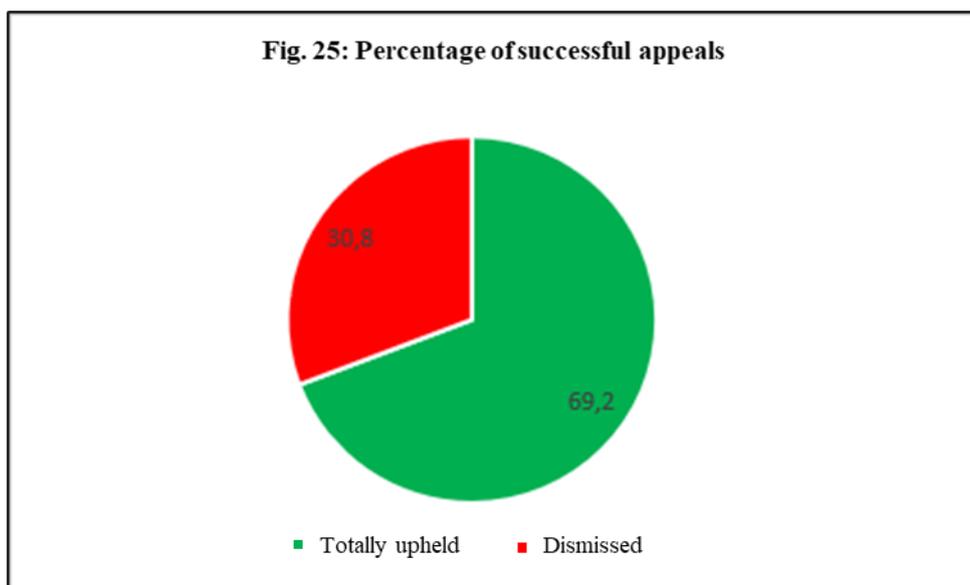
<sup>18</sup> Some of the appealed acts are known in only instance by the Supreme Court. The rest can be appealed before the Supreme Court.

In each appeal, the CNMC may base its claim in one or more individual pleadings.

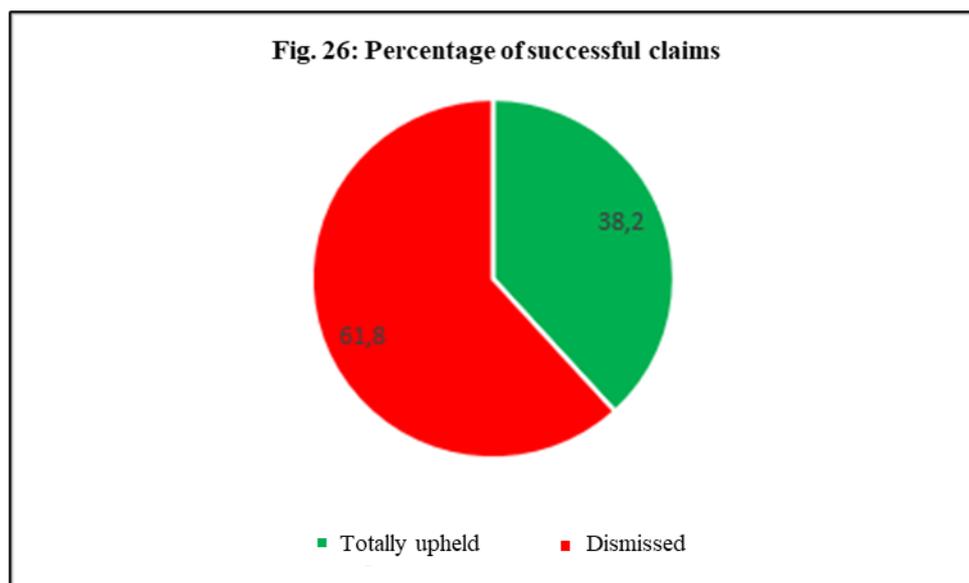
If we were to consider the appeals as a whole, the next figure shows that 47.4% of the appeals were estimated accepted or partially accepted by the Courts, or the CNMC's position was ultimately upheld (implying an overturn or correction of the appealed act). In 22.1% of the cases, the courts in first instance ruled against the CNMC. Other 26.3% of the cases are still ongoing.



If we focus the assessment on the outcome of finalised cases, we will have the following figures:



If we were to conduct the assessment of the degree of success of individual pleadings, we see a different picture, as only 38.2% of the claims were accepted by the court, rejecting a 61.8% of the claims. This may be due to the fact that the courts require a high standard to consider the annulment of a decision appealed under Article 5.4 of Law 3/2013, but also that if the arguments are sound, the courts are willing to annul the decision totally or partially. For the overall result, it is enough that the court accept one pleading for the appeal to be successful. Therefore, the degree of compliance of the courts with the CNMC recommendations should be assessed in terms of successful appeals.



In its turn, the decisions in first instance can be appealed before the Supreme Court. So far, 9 cases have become final (as no appeal was lodged), and 6 cases were presented before the Supreme Court.

If we assess the degree of success in relation to the **existence of an economic report**, the data show that the cases with an economic report do not necessarily have a higher degree of acceptance by the Courts, slightly higher than the average admission rate. However, we understand that the sample is still not too significant to draw meaningful conclusions<sup>19</sup>:

**Table 21: Existence of an economic report on Art. 5.4 appeals**

	No. appeals	Won	% Won	Lost	% Lost
Economic report	8	4	50.0	4	50.0

<sup>19</sup> We have not included data on the degree of success of the appeals that do not incorporate an economic report since, in our view, this would not convey any significant information, as the existence of an economic report does not depend on the decision of the CNMC to elaborate it, but also on external factors.

In relation to the evolution of the Courts' assessment of the CNMC appeals, the low number of solved appeals makes it difficult to set a pattern, although it seems that the Courts have only started rejecting the CNMC's appeals submitted from 2017 onwards, as can be shown from this table:

<b>Table 22: Evolution of the degree of compliance since 2014</b>				
	<b>Won</b>	<b>% Won</b>	<b>Lost</b>	<b>% Lost</b>
2014	1	11.1	0	0.0
2015	3	33.3	0	0.0
2016	1	11.1	0	0.0
2017	1	11.1	0	20.0
2018	1	11.1	3	60.0
2019	2	22.2	1	20.0

Finally, if we were to look at which pleadings have been most successful, the following table shows that the Courts have been mostly willing to accept pleadings related to the grants exclusive rights for a supplier to provide goods or services (60.0%).

	<b>Table 23: Degree of successful pleadings in relation to the competition restriction identified by the CNMC</b>		
	<b>Total pleadings</b>	<b>% Won</b>	<b>% Lost</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	3	66.7	33.3
A2. Establishes a license, permit or authorization process as a requirement of operation.	6	33.3	66.7
A3. Limits the ability of some suppliers to provide a good or service.	17	47.1	52.9
A4. Significantly raises cost of entry or exit by a supplier.	9	77.8	22.2
A5. Creates a geographical barrier for companies to supply goods, services, or labor, or to invest capital.	4	50.0	50.0
B1. Limits sellers' ability to set prices for goods or services.	2	100.0	0.0
B3. Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.	2	50.0	50.0
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	1	100.0	0.0

## **8. MARKET UNITY REPORTS UNDER ARTICLES 26 AND 28 OF LGUM – CODES UM**

This category includes all reports carried out by the CNMC regarding the procedures set by the LGUM for the defence of the rights and interests of economic operators in those cases where market unity is also at a serious risk of being broken by administrative or regulatory obstacles.

In these cases, the proceedings are brought before the SECUM, which may request the participation of the CNMC, among other contact points.

The category covers two different cases:

- (i) Under Article 26 of LGUM, the CNMC may be requested by the SECUM to participate in a specific process to challenge regulations and administrative acts that breach market unity. In particular, the CNMC can be requested to assess whether a specific act or regulation breaches the principles of the national market unity by creating unnecessary or disproportionate obstacles to the economic activity. The CNMC non-binding report is addressed to the SECUM. Although the SECUM issues its own report, the final decision on the case corresponds to the competent authority.
- (ii) Under Article 28 of LGUM, the CNMC may issue a market unity report in cases not covered by Article 26 of the LGUM (such as cases where the appeal deadline has expired). The process has a different nature, as there is not a final administrative resolution by the competent authority, but a mechanism designed to find a solution with the purpose to eliminate any obstacles or barriers detected by economic operators, consumers, or users. The final report is issued by the SECUM.

Each of these categories will be assessed separately.

## 8.1. Article 26

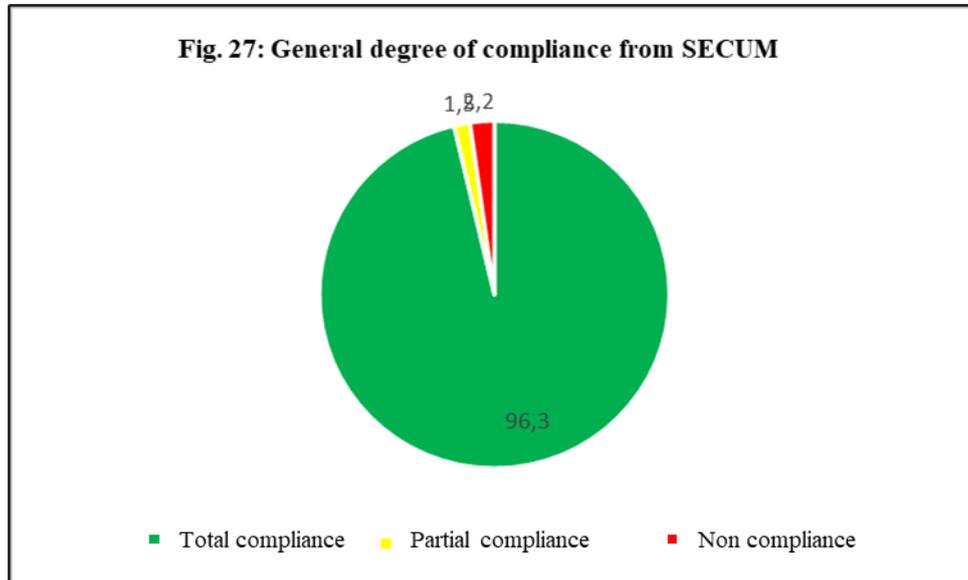
We have analysed **127 Article 26 Reports**, involving 279 recommendations. The subject matter of the recommendations mainly involves the services sector (62.7%), followed by housing (10.4%), road transportation (8.2%) and regulated sectors (electronic communications – 6.5%).

<b>Table 24: Number of Art. 26 LGUM reports and recommendations</b>				
	<b>Reports</b>	<b>%</b>	<b>Recommendations</b>	<b>%</b>
Industry	1	0.8	1	0.4
State aid.	1	0.8	2	0.7
Retail distribution.	3	2.4	6	2.2
Gambling	4	3.1	7	2.5
Environment.	2	1.6	3	1.1
Other	2	1.6	2	0.7
Services.	75	59.1	175	62.7
Regulatory (telecommunications)	9	7.1	18	6.5
Regulatory (hydrocarbons and electricity)	5	3.9	7	2.5
Healthcare.	4	3.1	5	1.8
Road Transport.	9	7.1	23	8.2
Tourism	1	0.8	1	0.4
Housing.	11	8.7	29	10.4
<b>Total</b>	<b>127</b>	<b>100.0</b>	<b>279</b>	<b>100.0</b>

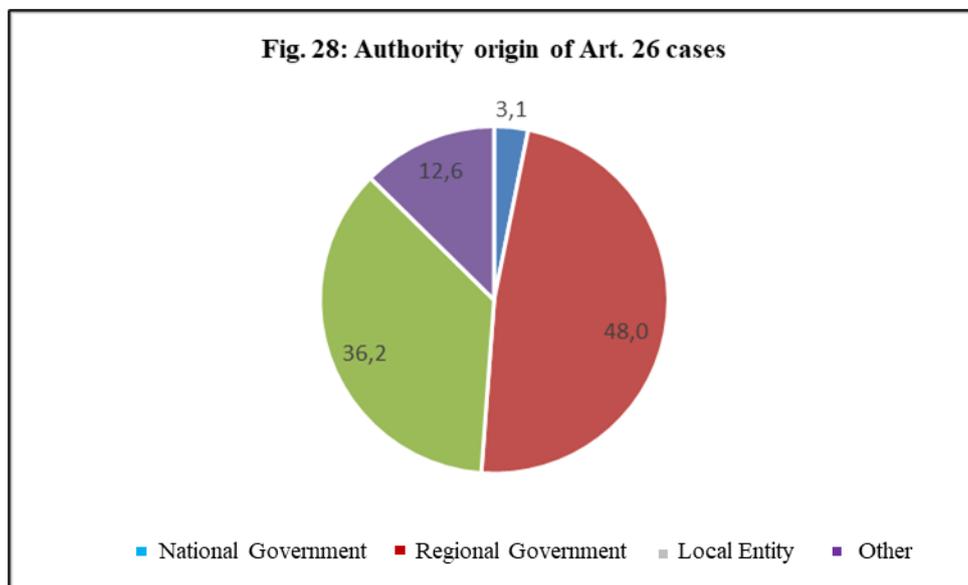
In relation to the restrictions of competition identified by the CNMC, there are two elements that represent more than 90% of the total: limiting the ability of some suppliers to provide a good or service (45.9%) and granting exclusive rights for a supplier to provide goods or services (41.6%)

<b>Table 25: Volume of the limits to competition identified by the CNMC in Art. 26 LGUM Reports</b>		
<b>LIMITS TO COMPETITION</b>	<b>No. Recommendations</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	116	41.6
A2. Establishes a license, permit or authorization process as a requirement of operation.	16	5.7
A3. Limits the ability of some suppliers to provide a good or service.	129	46.2
A4. Significantly raises cost of entry or exit by a supplier.	4	1.4
A5. Creates a geographical barrier for companies to supply goods, services, or labor, or to invest capital.	1	0.4
C1. Creates a self-regulatory or co-regulatory regime.	6	2.2
F.4 Insufficient specification of the non-normative act to guarantee an efficient economic regulation.	1	0.4
N/A.	6	2.2

The addressee of Article 26 Reports is the SECUM that, as explained, issues its own report that may be or not coincident with the CNMC Assessment. We see that the degree of coincidence by the SECUM is almost complete, fully assuming 255 out of the 279 total claims made by the CNMC (plus 5 partial assumptions). The SECUM only took a decision not coincident with the CNMC’s position in relation to 8 claims<sup>20</sup>:



In relation to the authority against which the complaint is lodged, most Art. 26 LGUM cases are related to regional authorities (48%) or local entities (36.2%). These data are fully consistent with the purpose of the LGUM.



<sup>20</sup> As of future developments, it is important to notice the Judgment of the Supreme Court of 13 December 2021, on case no. 4486/2019, by which the Supreme Court has significantly changed the perspective of Article 26 cases by endorsing that certain activities may be subject to an activity reserve (*reserva de actividad*) and, therefore, limited to certain professionals. Although not changing the past decisions, this judgment will certainly impact future cases of the CNMC in this regard.

## 8.2. Article 28

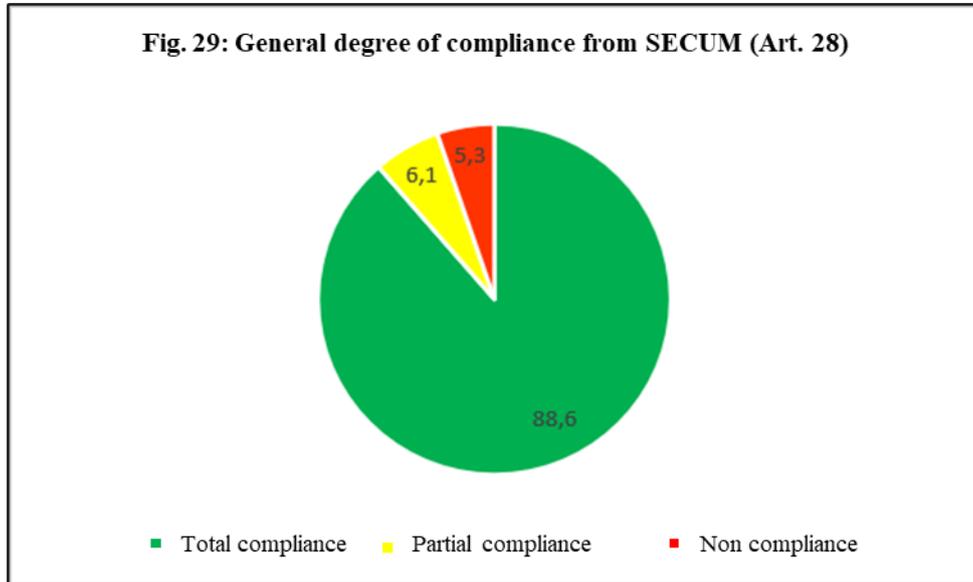
We have addressed a total of **121 Article 28 Reports**, mainly involving the services sector (31%), followed by housing, gambling, and regulated sectors (hydrocarbons), representing 9% each. It is worth noting that Article 28 reports normally have just one recommendation per report.

	<b>Table 26: Number of Art. 26 LGUM reports</b>	
	<b>Reports</b>	<b>%</b>
Agriculture	2	1.7
Professional associations.	1	0.8
Retail distribution	3	2.5
Public procurement.	2	1.7
Gambling.	9	7.4
Environment.	8	6.6
Other	16	13.2
Services.	38	31.4
Regulatory (telecommunications).	6	5.0
Regulatory (railroad and airports)	1	0.8
Regulatory (hydrocarbons and electricity)	9	7.4
Healthcare	6	5.0
Financial Services.	1	0.8
Road Transport.	6	5.0
Tourism	4	3.3
Housing.	9	7.4
<b>Total</b>	<b>121</b>	<b>100.0</b>

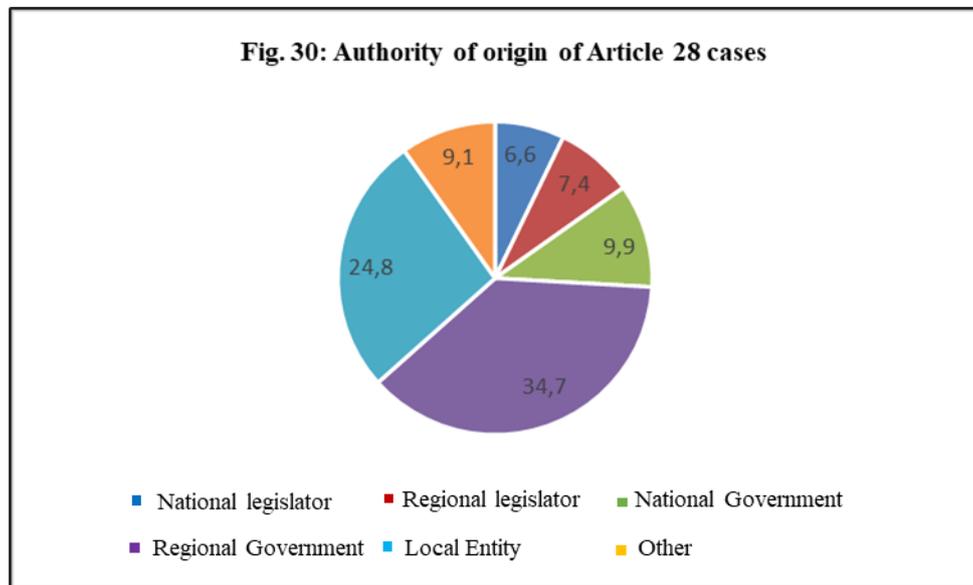
These reports have identified different competition restrictions, although 30.6% of cases refer to granting exclusive rights for a supplier to provide goods or services and 28.9% refer to limiting the ability of some suppliers to provide a good or service. The complete table of the issues raised by Article 28 Reports are displayed in the following table:

<b>Table 27: Volume of the limits to competition identified by the CNMC in Art. 26 LGUM Reports</b>	
<b>LIMITS TO COMPETITION</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	30.6
A2. Establishes a license, permit or authorisation process as a requirement of operation.	11.6
A3. Limits the ability of some suppliers to provide a good or service.	28.9
A4. Significantly raises cost of entry or exit by a supplier.	11.6
A5. Creates a geographical barrier for companies to supply goods, services, or labour, or to invest capital.	0.8
B3. Sets standards for product quality that provide an advantage to some suppliers over others or are above the level that some well-informed customers would choose.	0.8
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	1.7
C1. Creates a self-regulatory or co-regulatory regime.	1.7
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	4.1
F.2 Promotes collusion between economic operators / hinders free competition.	1.7
N/A.	6.6

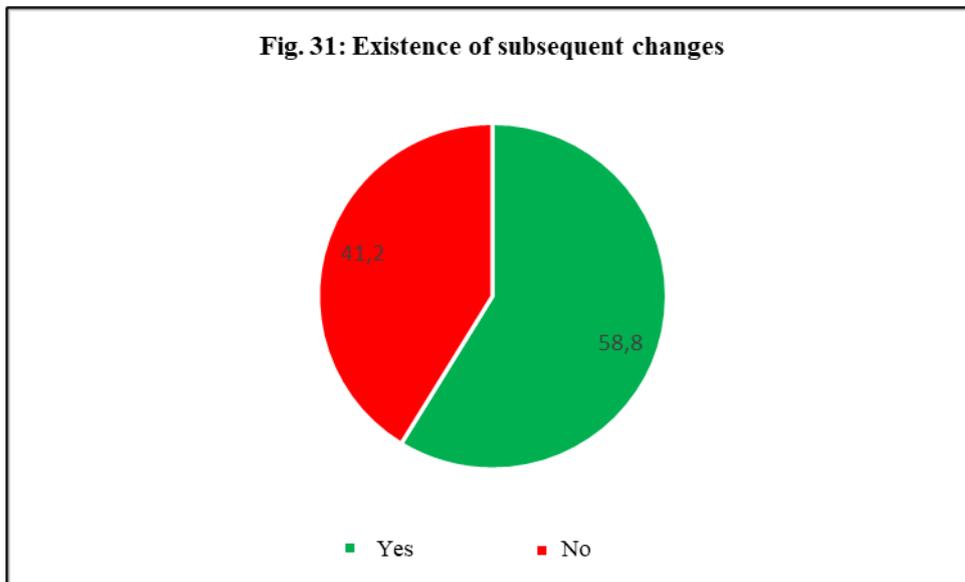
As with Article 26 Reports, the addressee of Article 28 Reports is the SECUM that may incorporate the CNMC Assessment in their own reports. Again, in relation to Article 28 Reports, the degree of coincidence is almost complete. Only in 6 out of 121 cases the SECUM took a decision which was not aligned with the CNMC’s position:



In relation to the authority of origin against which the complaint is lodged, most Art. 28 LGUM cases are related to regional authorities or local entities. These data are fully consistent with the purpose of the LGUM.



As to the subsequent compliance of the authority ultimately subject to the Article 28 procedure, in the 58.8% of the cases where there is information, the challenged act was modified and remained untouched in only 41.2%%. There is no information published as to 7 cases.



## 9. JUDICIAL APPEALS EX ARTICLE 27 OF LGUM – CODE UM

Similarly, to Article 5.4 of the Law 3/2013, Article 27 of the LGUM also allows the CNMC to challenge before the administrative jurisdiction any administrative act or general regulations that may imply a serious risk of breaching the unity of the Spanish markets.

Legal challenges carried out by CNMC under Article 27 of the LGUM normally (but not necessarily) follow a procedure under Article 26 of the LGUM. They may sometimes be accompanied by an expert Economic Report whose objective is to perform an economic analysis of the restrictions on market unit subject to legal challenges. The economic reports are also issued by CNMC and they may incorporate a quantification of the costs that such restrictions entail for consumers and social welfare. Only in eleven cases has the CNMC issued such Economic Report.

Also, it is important to highlight that once this judicial appeal is lodged, the economic operator may join the process, submit allegations or appeal the judicial rulings issued.

We have analysed **58 Article 27 Appeals**, involving **83 claims**.

In relation to the subject matter of the appeals lodged by the CNMC under Article 27 of Law 20/2013, 48.3% of the appeals are related to an obstacle in the provision of services, followed by regulated sectors (electronic communications and audio-visual media). This structure is practically mirrored in relation to the claims supporting the appeals (which is the result of a low number of claims per appeal):

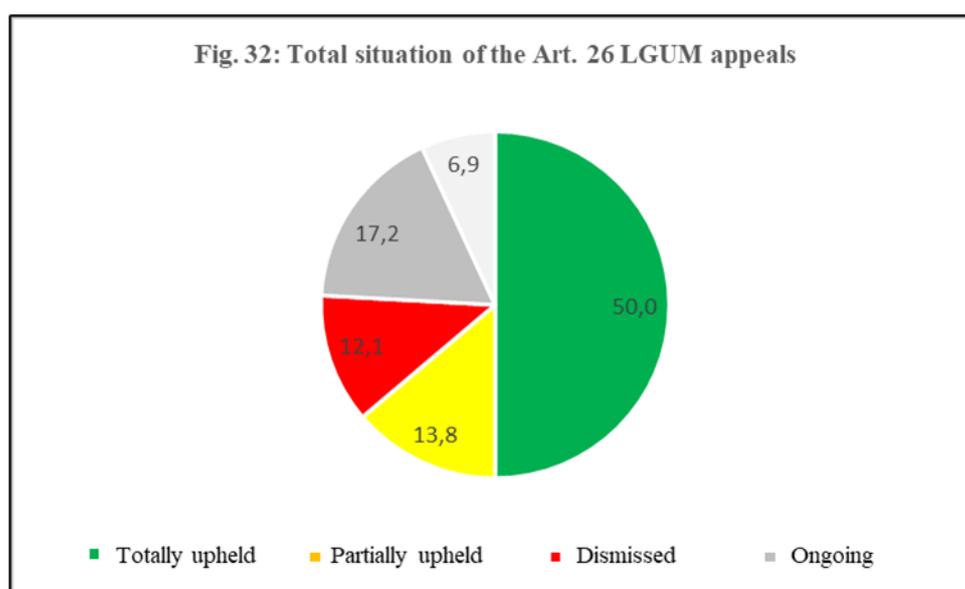
<b>Table 28: Number of Art. 27 LGUM appeals and pleadings</b>				
	<b>Appeals</b>	<b>%</b>	<b>Pleadings</b>	<b>%</b>
Retail distribution	3	5.2	3	3.6
Public procurement.	1	1.7	1	1.2
Gambling	5	8.6	7	8.4
Environment.	1	1.7	1	1.2
Services.	28	48.3	1	1.2
Regulatory (telecommunications).	4	6.9	2	2.4
Regulatory (hydrocarbons and electricity)	3	5.2	43	51.8
Road Transport.	9	15.5	8	9.6
Tourism	1	1.7	3	3.6
Other.	2	3.4	13	15.7
N/A.	1	1.7	1	1.2

Focusing on the subject of the CNMC’s involvement, the main competition restrictions addressed in these appeals are limits on the ability of some suppliers to provide goods or services (51.8%) and granting exclusive rights for a supplier to provide goods or services (18.1%):

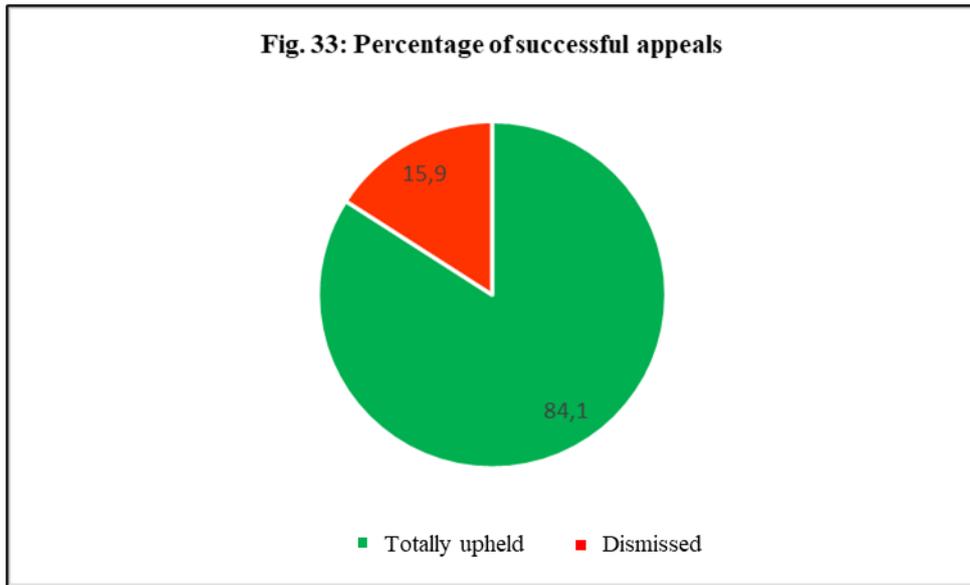
<b>LIMITS TO COMPETITION</b>	<b>No. Pleadings</b>	<b>%</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	15	18.1
A2. Establishes a license, permit, or authorization process as a requirement of operation.	6	7.2
A3. Limits the ability of some suppliers to provide a good or service.	43	51.8
A4. Significantly raises cost of entry or exit by a supplier.	5	6.0
A5. Creates a geographical barrier for companies to supply goods, services, or labor, or to invest capital.	5	6.0
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	3	3.6
C1. Creates a self-regulatory or co-regulatory regime.	1	1.2
E.2 Insufficient regulatory development to guarantee a correct liberalization process or efficient economic regulation.	1	1.2
N/A and other	4	4.8

In view of the provisions of Law 20/2013, most Article 27 appeals are lodged before the Audiencia Nacional. This is a significant difference with Article 5.4 appeals, as in the latter, appeals are lodged before the competent court resulting from the applicable jurisdiction rules, which may lead to a higher degree of consistency in the case of Article 27 appeals (that are assessed by the Audiencia Nacional).

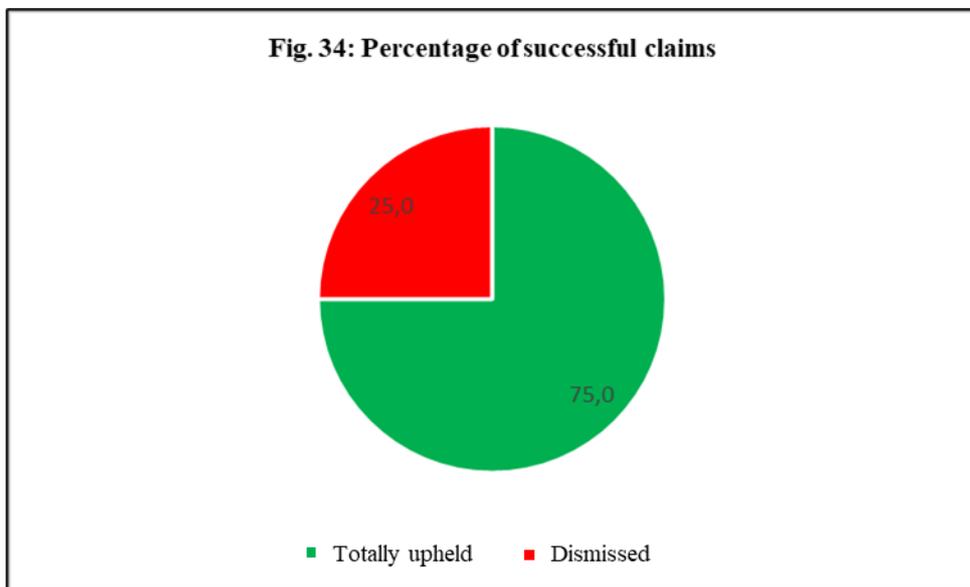
As to the result of the appeals, the CNMC has been successful in most cases (50% of rulings totally in favour of the CNMC and 13.8% partially in favour). Only in 12.1% of the cases there was a ruling against the CNMC’s position.



If we focus the assessment on the outcome of finalised cases, we will have the following figures:



If we were to conduct the assessment of the degree of success of individual pleadings, we see a similar picture, as 75.0% of the pleadings have been accepted by the Courts in these procedures. Only 25.0% of the claims have been rejected. This outcome is different from Art. 5.4 appeals, where most of the pleadings were rejected by the Courts.



As to second instance reviews, only in 4 cases there is information on an appeal of the initial judgment, that have resulted in 2 judgments, both favourable to the CNMC.

If we assess the degree of success in relation to the **existence of an economic report**, the data are very similar, as can be shown from the following table in relation to solved appeals:

<b>Table 30: Existence of an economic report on Art. 27 appeals</b>					
	<b>No. appeals</b>	<b>Won</b>	<b>% Won</b>	<b>Lost</b>	<b>% Lost</b>
Economic report	9	8	88.9	1	11.1
No economic report	35	29	82.9	6	17.1

In relation to the evolution of the Courts' assessment of the CNMC appeals, the low number of solved appeals makes it difficult to set a pattern, although it seems that the Courts have only rejected the CNMC's appeals in three years (2015, 2016 and 2017) and, in all three cases, in a minority of procedures.

<b>Table 31: Evolution of the degree of compliance since 2014</b>				
	<b>Won</b>	<b>% Won</b>	<b>Lost</b>	<b>% Lost</b>
2014	1	100.0	0	0.0
2015	8	66.7	4	33.3
2016	9	90.0	1	10.0
2017	10	83.3	2	16.7
2018	3	100.0	0	0.0
2019	6	100.0	0	0.0

In terms of successful pleadings, the Courts have generally accepted the CNMC's arguments. However, the arguments with a lower degree of acceptance are the raising of cost of entry or exit by a supplier and the creation of a geographical barrier.

<b>Table 32: Degree of successful pleadings in relation to the competition restriction identified by the CNMC</b>			
	<b>Total pleadings</b>	<b>% Won</b>	<b>% Lost</b>
A1. Grants exclusive rights for a supplier to provide goods or services.	11	91.7	1
A2. Establishes a license, permit or authorization process as a requirement of operation.	5	100.0	0
A3. Limits the ability of some suppliers to provide a good or service.	26	70.3	11
A4. Significantly raises cost of entry or exit by a supplier.	3	60.0	2
A5. Creates a geographical barrier for companies to supply goods, services, or labor, or to invest capital.	3	60.0	2
B4. Significantly raises costs of production for some suppliers relative to others (especially by treating incumbents differently from new entrants).	2	66.7	1
C2. Requires or encourages information on supplier outputs, prices, sales, or costs to be published.	1	100.0	0

Finally, it could be interesting to compare the overall success of the CNMC’s advocacy actions before the Courts, making a joint assessment of the final figures of all appeals. It is clear that the CNMC has an overall and overwhelming percentage of winning cases.

<b>Table 33: Overall success in judicial appeals</b>				
	<b>Art. 5.4</b>	<b>Art. 27</b>	<b>Total</b>	<b>%</b>
Appeals Won	7	37	44	78.6
Appeals Lost	5	7	12	21.4

## 10. CONCLUSIONS AND RECOMMENDATIONS

### 10.1. Conclusions

The advocacy work of the CNMC is not a homogeneous corpus, but a diverse activity where the different tools at its disposal play different and relevant roles. It is clear that the success of these advocacy activities cannot be merely assessed by the degree of compliance with its recommendations and pleadings. As different stakeholders have pointed out, the CNMC is in a unique position to make an independent assessment of different sectors and activities and its opinion is necessary for contributing to the public debate, especially in sensitive or innovative sectors. Also, these actions are an essential part of the CNMC's obligation to promote competition beyond particular elements. Thus, in several cases the CNMC reports go beyond the particularities of the case at stake and include broader analyses.

None of the advocacy roles of the CNMC involve binding opinions precisely because its role it is not legislate or regulate, but to inform the legislator and regulators about the competition implications of a particular option. As such, the success of the CNMC must be assessed by the number of its reports and, eventually, the presence of its arguments on the public debate.

The diverse nature of the advocacy actions of the CNMC clearly appears in the assessment of the degree of compliance, which varies in relation to the different instruments used and their purpose.

Considering the heterogeneity of these instruments, of the issues assessed by the authority, of the nature of the acts subject to assessment and the origin of the cases it is not possible to identify meaningful patterns. According to the conversation held with stakeholders, the impact of the CNMC is a useful input which is pondered in the decision-making process with other interests at stake, particularly in the legislative processes.

If we consider each group of instruments, the conclusions would be the following:

- a) **Law 3/2013 reports (Market Studies, Regulatory Proposals, IPN Reports, INF Reports):** These reports aim at including changes in a legislative or normative process or as regards the exercise of powers by public authorities.

In the case of **Market Studies** and **Regulatory Proposals**, the normative process under which CNMC's recommendations would be incorporated in most cases has not been started, and the reports of the CNMC refer to potential reforms. The scope is not just identifying regulatory improvements, but to perform a full-fledge assessment of a particular sector. The recommendations arise from this deep understanding of the sector. As there is no obligation from the Administration to revert on these recommendations, compliance can only be assessed at a later stage, when the sector in question is regulated (not necessarily following the CNMC's recommendations). Even though, and excluding non-assessable recommendations, the CNMC recommendations have been followed in 50-60% of the cases, considering a significant degree of compliance from regional legislators. In both cases, the national authorities are more reluctant to follow the CNMC's position than other authorities (regional or local).

The cases of **IPN** and **INF Reports** involve reports issued at the request of any of the authorities legitimated under Article 5 of Law 3/2013. As it has been shown, despite the fact that the law allows a large number of authorities to request IPN reports, most of them

are issued at the request of the national government in relation to future legislation<sup>21</sup>.

In any case, these reports are issued (i) when there is an ongoing normative process where the recommendations of the CNMC could be heard and (ii) at the relevant regulator's request. It is worth noting that the consulted stakeholders have concurred in their appreciation of the CNMC's work and position. Despite these advantages, quantitative compliance in IPNs/INFs might be affected by other elements.

First of all, the CNMC recommendations refer to potential limitations of competition that regulators must confront with other public interests at stake. The CNMC role is to enable the final regulator to adopt more informed decisions, taking stock of potential competition issues and balancing these risks with other public objectives. In addition, the CNMC report is requested in the middle of the normative and legislative process, with a tighter deadline for the assessment and that can be subsequently affected by political decisions, changes at EU level, intervention of other consulting bodies or evolution of the political agenda.

We see different elements that may influence the level of compliance of the IPN / INF category:

- **Identification of the issues:** The reports normally include a variety of recommendations where the advocacy concerns expressly referred to by Law 3/2013 (i.e., maintenance of effective competition and good performance of the markets) and that are reflected by the OECD methodology are not always clearly identified as such.
- **Prioritization of the issues:** When assessing the reports, it is easy to identify the main general concerns of the CNMC. However, in the particular recommendations it is not always easy to identify the importance of each particular recommendation (therefore, not distinguishing between important "must-have" recommendations from ancillary "nice-to-have" recommendations).
- **Lack of binding character:** The fact that the recommendations of the CNMC can be ignored without any obligation to provide a justification makes it easy for the legislator or regulator to ignore their position. As there is no legal consequence for non-compliance, the CNMC's reports have the risk of becoming a mere formality. In this regard, certain stakeholders have suggested that the impact of the CNMC should be greatly improved if the requesting authority would be legally forced to justify any deviation from the CNMC's recommendations ("comply or explain")<sup>22</sup>.
- **Scope of the recommendation:** We have observed that in some IPN / INF Reports, the CNMC makes recommendations outside the scope of the normative project and suggests recommendations that are also outside the sphere of competence of the administration which requested the report. For example, when the report includes a recommendation in relation to a regulation that implies the change of a law, the

---

<sup>21</sup> This may have an impact in the degree of compliance, as the law subject to consultation is still in a very early step of the legislative process.

<sup>22</sup> This would entail an obligation for the requesting body either to follow the CNMC's recommendations or expressly justify other options. This would not limit the freedom of the legislator/regulator but force them to critically consider the CNMC's opinion.

recommendation is highly likely to be ignored (not just because the addressee pretends to ignore it, but because it does not have the competence to act upon it). Also, there is a risk of IPN / INF reports becoming closer to Market Studies, as they include general recommendations as to the legal framework or future regulation.

The fact that the CNMC identifies big-picture issues in assessing minor regulations or administrative acts is positive, as it points out legislative improvements to be taken at a later stage or by another authority. In this regard, this kind of recommendations in IPN/INF reports operate as limited Regulatory Proposals report. However, from the perspective of the assessment of the compliance, these recommendations should not be considered (as it is not reasonable to expect that the addressee would stop their legislative/normative process to promote a higher change in the law).

- **Precision of the recommendations:** In some cases, the CNMC issues precise and clear recommendations, even proposing the exact drafting or issues suggested. In other cases, however, the CNMC's indications are not easy to follow:
  - i. *Vague recommendations:* There are cases where the recommendation is excessively open and vague. Recommendations like “*these elements should be reconsidered*” or “*the requirements cannot limit competition*”, without further detail are not easy to follow.
  - ii. *Recommendations on the application of the future regulation:* In some cases, the recommendation of the CNMC does not affect the text itself but projects its effects on its future construction (e.g., “*these criteria should be carefully applied to avoid market closure*”). Once again, this question is positive as a whole, as it gives a broader vision of the sector and its evolution. However, from the narrow perspective of assessing compliance, it limits the ability of the addressee to comply with it or to follow it.
  - iii. *Cumulative effects:* In some cases, the anticompetitive nature of a provision is not a binary option, but results from a combination of different factors, so there is no clear indication on which recommendations should be followed.
  - iv. *Recommendations on the statement of reasons of a measure:* It is common that the CNMC issues recommendations whereby the authority is asked to remove a provision or, if it decides to uphold it, to provide additional reasons for that (implying an additional reasoning that must be included in the normative/legislative phase).

Before moving into Law 20/2013, it is important to mention the recommendations involving compliance with EU State aid law. The CNMC has a limited competence in State aid law, but Article 107 of the TFEU has a direct effect. Therefore, it is not uncommon that, when the CNMC identifies possible elements of State aid that have not been properly addressed in the project and its supporting documents, it points out this circumstance in its report. These general warnings are sometimes included as mere indications on possible lack of compliance with State aid regulation. However, due to the special nature of these indications, it is sometimes difficult to make a follow-up of those recommendations, because it implies to

reinforce the state aid assessment, whose put in practice is not always made public by public authorities.

- b) **Law 20/2013 reports (arts. 26 and 28):** The degree of compliance in this case is significantly higher in relation to the primary addressee (SECUM) and even in relation to secondary addressees (although in this case the information is not always available). As opposed to Law 3/2013 Reports, the CNMC does not issue recommendations, but clearly states legal infringements within the scope of a law. For this reason, its intervention is highly successful:

It must be noted that the success data for Article 26 and 28 of Law 20/2013 have been calculated taking into account the degree of compliance of the authority making the final market unity recommendation (i.e., SECUM), but not the compliance of the ultimate addressee.

- c) **Judicial appeals:** Although there are differences between Article 5.4 and Article 27 appeals that can be traced to the differences between the two laws, we have identified appeals as a single category because both instruments have more in common between them than with the other instruments of their respective laws.

Both actions refer to judicial appeals lodged by the CNMC against an administrative act or regulation that has been legally adopted by the competent authority. In both cases, the CNMC can choose to pursue the appeal (is not mandatory), although in cases of Article 27 appeals, the CNMC normally follows a previous petition from the interested company or individual. Finally, and more importantly, in both cases the CNMC requires the court that a particular regulation (or part of it) must be removed or annulled on the grounds that it distorts competition, infringing the principles efficient economic regulation enshrined on Spanish law (including Law 20/2013 and, in some cases, Law 17/2009 for the provision of services, law 39/2015 and Law 40/2015).

The main consequence of this fact is that, as opposed to other advocacy actions under Law 3/2013, in the case of the appeals the CNMC must provide the judge with strong and clear argument which support the nullity of a provision or administrative act non-compatible with good regulation principles. It is not a case where the regulation may be improved, but a case of a blatant infringement of good regulation principles.<sup>23</sup>

In any case, both tools prove useful tools of the CNMC to pursue the liberalization of the Spanish market.

## 10.2. Recommendations

From the above, and just considering factors to increase the degree of compliance, we can draw the following recommendations, that are mainly addressed to IPN / INF Reports, but that may

---

<sup>23</sup> In assessing these figures, we cannot fail to consider the fact that Art. 27 appeals are mainly assessed by a single specialised court (Audiencia Nacional), while 5.4 appeals are lodged before different regional courts, with less technical specialisation in competition economics.

be extended to the rest of the cases, *mutatis mutandis*<sup>24</sup>:

- a) Consider the context of the report: the nature and competences of the addressee of the recommendations and the situation of the legislative / regulatory process.
- b) Maintain the recommendation clearly within the scope of the report or any ongoing normative process. In the event that the CNMC considers necessary to exceed this scope in order to include recommendations for other normative changes, it should clearly identify in the report the specific recommendations at stake from general indications.
- c) In the reports, clearly identify the restrictions to competition addressed as competition concerns, and the associated recommendations.
- d) Clearly identify the competition advocacy recommendations from the purely regulatory ones or other based on formal regulatory efficiency.
- e) In each case, try to prioritise the recommendations that are more relevant from those that are mere non-essential improvements.
- f) Make the recommendations as clear and specific as possible, identifying the concerning issue and, when possible, providing a suitable wording or alternatives.

Finally, there are outside and accessory considerations that could also improve the effectiveness of the CNMC's assessment:

- a) Legally state a clear consequence for any infringement of the obligation for the administration to regulate in line with principles of efficient regulation and only allow the introduction of competition restraints through a specifically motivated decision that takes into account these principles (beyond general statements based on convenience or opportunity). This would help not only to increase the importance of the CNMC's position in the normative process, but also the chances of success in the judicial appeals.
- b) Legally strengthen the CNMC's position in some reports. If the authority had the obligation to consider the CNMC's position and provide reasons to depart from it, it would greatly help to increase the degree of compliance. We understand, however, that this possibility would be difficult to apply to formal legislation (i.e., *norma con rango de Ley*), but it should apply to any regulation and to laws specifically included in Article 5.2 of Law 3/2013.
- c) Increase the visibility and the dissemination of the conclusions of the reports, especially in relation to Market Studies and Regulatory proposals. The broader the CNMC's position is known, the easier it would be for the different stakeholders involved in the normative processes to understand it and apply it.

---

<sup>24</sup> IPN and INF reports represent most of the recommendations represent over two thirds of the total recommendations issued by the CNMC in the assessed reports and are the categories with a higher degree of non-compliance.