

ACT 1/2002, regarding Co-ordination of the State and Autonomous Communities' Competences on Competition Defence

• Article 1. Points of connection.	5
• Article 2. Settlement of conflicts	6
• Article 3. The Consulting Committee on Conflicts.	7
• Article 4. Institutional Aspects of the execution of Competition Act 16/1989, of 17th July, by the Autonomous Communities.	8
• Article 5. Co-ordination mechanisms	8
• First Additional Provision. References to the Competition Court and Service contained in Competition Act 16/1989, of 17th July.	10
• Second additional provision.	11
• Third additional provision.	11
• Single transitory provision.	12
• Sole Final provision.	12

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EXPLANATORY STATEMENTS

I

The Constitutional Court sentence issued on 11th November 1999, regarding the appeals on grounds of unconstitutionality numbers 2009/1989 and 2027/1989, partially admitted the aforementioned appeals and declared the unconstitutionality of the clause "in all or part of the national market" contained expressly or by reference in Articles 4, 7, 9, 10, 11 and 25 a) and c) of Competition Act 16/1989, of 17th July.

The effects of the judicial decision are reflected in the need to establish, by means of a State Act, the framework for the development of the enforcing powers of the State and the Autonomous Communities foreseen in Competition Act 16/1989, of 17th July.

II

The Legal Consideration on which the Supreme Court supported its sentence acknowledges that the issue known as "competition defence", as such, has not been expressly attributed to the State by the Constitution. Therefore, insofar as the set of powers attributed to the State by the Constitution allow, this issue may correspond to the Autonomous Communities by virtue of their own Statutes.

Analysis of the Statutes of Autonomy shows that there are more or less general references to the attribution of powers to the Autonomous Communities in the field of "domestic trade", which according to the doctrine provided by the Constitutional Court in the aforementioned

sentence, embraces the powers related to “competition defence”, although it is limited to the executive field, whereas the legislative powers lie with the State.

The conclusion to be deduced from the latter is that such Autonomous Communities as have foreseen for this matter in their Statutes have executive powers with regard to “domestic trade” and therefore to “competition defence”.

Nonetheless, the exercise of these powers must be reconciled with the need to protect the unity of the national economy and the demand for a single market that can allow the State to develop its constitutional powers in laying down and co-ordinating the general plans for economic activity – Article 149.1.1^a in the Constitution – in the interests of respecting the equality of the basic conditions for the exercise of economic activity – Articles 139.1 and 149.1.1^a of the Basic Law-. For this reason, the Constitutional Court considers that not only the regulatory powers, but all the executive activities that determine the actual configuration of the single national market should be attributed to the State, which shall therefore be responsible for executive action regarding such practices as may alter free competition in a supra-community field or in the national market as a whole, even though such executive acts must be carried out in the territory of any of the Autonomous Communities.

III

On the other hand, the Constitutional Court has imposed on the State the obligation to articulate the co-ordination mechanisms that ensure a uniform competition regime throughout the national market and, needless to say, establish the pertinent connection mechanisms, as long as they are constitutionally and statutorily correct, as well as the necessary mechanisms for mutual collaboration and information.

IV

The eighth Legal Consideration of the sentence acknowledges the validity of the precepts of the contested Act despite their having been declared null and void, until the State lays down the points of connection that shall allow the Autonomous Communities to exercise the executive powers granted by their Statutes of autonomy. Otherwise, there would be a regulatory void that would impair the relevant constitutional interests regarding competition.

Nevertheless, the Constitutional Court itself acknowledges that postponing the effects of the declared nullity in time generates an anomalous and provisional situation that should be ended as soon as possible, invoking the constitutional loyalty binding on the State to end such a situation in the shortest possible term.

Therefore, a legislative initiative should be adopted to establish the framework for the execution of the competences of the State and the Autonomous Communities, paying full respect to the criteria laid down by the Constitutional Court; an initiative undertaken by the present Act.

V

The Act contains five Articles that develop the sections that according to the Constitutional Court should be established for proper exercise of the powers related to competition defence, three additional provisions, one transitory provision and one final provision.

Article 1 lays down the points of connection that describe in general terms the exercise of the powers by the State and the Autonomous Communities. These points are based on the seventh Legal Consideration in the sentence issued on 11th November 1999, by virtue of

which the objective powers to be attributed to the Autonomous Communities on the matter of competition defence are limited to such executive actions as must be carried out in the territory of the Autonomous Communities and which do not affect the supra-autonomous market. This implies that the competences of the State include not only the regulations, but also such practices as may alter free competition in the supra-autonomous sphere or in the national market as a whole, even though such action is carried out within the territory of an Autonomous Community.

This principle is acknowledged as a general criterion by the Act and includes the powers regarding the procedures aimed at actions that are associated to the agreements that are prohibited, exceptional authorisations for prohibited agreements, abuse of a dominant position and distortion of free competition through disloyal acts. Moreover, with the aim of ensuring correct exercise of the powers, the legal safety of economic operators and uniform application of the rules, in the interests of minimising the conflicts derived from the interpretation of this general criterion, the Act lays down a series of additional rules towards clarifying when conduct falls under the competences of the State and when under an Autonomous Community.

In short, the aforementioned rules imply that the State is attributed competences over conduct that might impair the unity of the national market or principles that have been acknowledged in the Constitution, such as the establishment of a proper and just economic balance among the various parts of Spanish territory, the freedom of movement and establishment of persons and the free movement of goods throughout Spanish territory or the equality of all Spaniards in exercising their rights and fulfilling their constitutional obligations.

Article 2 lays down a dynamic, balanced mechanism to settle the conflicts that may be generated by applying the points of connection. The procedures for settling conflicts are based on a mutual, symmetrical exchange of information on the reports or requests for authorisation received or on the actions carried out ex officio among the competent bodies on the issue of competition so that if there are differences as to who should instruct and settle a given case, once the prudential term for studying the issue in detail has expired, a non-binding report may be issued by the Consulting Committee on these conflicts. The State Administration is to participate in the Consulting Committee on such conflicts, not only in the cases where there is controversy between the latter and the Autonomous Administrations, but also among those which may place the Autonomous Communities against one another, if it is considered that in such a case, the supra-autonomous effects of the conduct in question may be at stake.

This Consulting Committee shall issue a report evaluating the attribution of the competences to process and settle the procedure in question.

If the conflicting Administrations do not accept the result of the report, the law contemplates reference to the terms of Public General Act 2/1979, of 3rd October, regarding the Constitutional Court, so that the Supreme Court may decide on which Administration should settle the procedure in question by proposing a conflict, either positive or negative, between the State and the Autonomous Communities or among the latter Autonomous Communities. However, inasmuch as other procedures have been foreseen for co-operation and co-ordination among the conflicting Administrations, the issue may be brought before the Constitutional Court as a last instance to settle the issue of competences.

Article 3 regulates the Consulting Committee on Conflicts, which, in line with the arbitral nature of this body, is a Joint Board. Therefore, it shall be formed by an equal number of representatives appointed by the State and by the Autonomous Communities, whereas the total number may vary depending on the Autonomous Communities in the conflict, with a view to maintaining the aforementioned parity in its composition.

Article 4 regulates the institutional aspects related to the Autonomous Communities implementing the powers on the issue of competition. Among these aspects, it highlights the possibility that the state bodies may by agreement collaborate with the Communities that have not institutionalised the organic mechanisms to develop their powers; the Law also lays down the framework for the creation of competent institutions in the field of competition defence in the Autonomous Communities and clarifies the rules of procedure applicable to the action of such bodies.

According to the guidelines imposed by the Constitutional Court, Article 5 regulates three classes of co-ordination mechanisms for harmonic development of the competences of the State and the Autonomous Communities; on the one hand, it creates the Competition Council, a body that unites representatives of all the Territorial Administrations with competences on this matter, whose basic functions are related to centralising relevant information on competition in the markets and discussing the criteria conducive to achieving adequate co-ordination in applying the Law and informing as to the provisions that regulate the issues that are related to this matter.

On the other hand, this precept dedicates an essential part to the mechanisms that ensure complete, symmetrical and mutual information on the restrictive conduct of which the competent bodies are aware, with the aim of allowing for the development of their functions.

Lastly, Article 5 attributes legitimisation to the Competition Service (Servicio de Defensa de la Competencia) to intervene in the procedures that are being processed by the autonomous bodies, whereas this legitimisation is understood to be a final instrument to avoid differences in the doctrine that is followed when applying the regulations on competition defence. There is no doubt whatsoever that uniformity in applying the regulations on competition defence is an indispensable element to ensure the unity of the national market and equality in the basic conditions for the exercise of economic activity.

VI

The first additional provision adapts the exclusive references to the Competition Service and Competition Court (Tribunal de Defensa de la Competencia) to be found in the text of Act 16/1989 in the light of the new reality of administrative bodies that shall be created when the model of competences foreseen in the present Law is implemented.

The second additional provision reproduces the mandate of Article 36.3 of Act 30/1992, of 26th November on the Legal Regime applicable to the Public Administrations and the Common Administrative Procedure, inasmuch as it imposes that all the communications and notifications written in their own joint official languages and directed at the Competition Service and Court by the competition defence bodies in the Autonomous Communities must be translated into Spanish, as such translation implies that such texts shall take effect outside the territory of the respective Autonomous Community.

The third additional provision explains the exception made of the competences attributed by the sectorial legislation to the Telecommunications Market Commission.

The single transitory provision foresees the exercise of the enforcement powers corresponding to the Autonomous Communities by the state bodies until the moment in which those with statutory provisions to this end have constituted their own respective competition defence bodies; failure to provide for this supplementary regime would imply running the risk of incurring a regulatory and organic void that could prevent us from pursuing conduct that could impair the competence in autonomous fields.

Article 1. Points of connection. ➡

1. The State shall be responsible for exercising the competences acknowledged in Competition Act 16/1989, of 17th July, on the procedures aimed at the conducts foreseen in Articles 1, 6 and 7 of the aforementioned Act, when such conducts alter or may alter free competition in a supra-autonomous sphere or in the national market as a whole, even when such powers must be exercised in the territory of any of the Autonomous Communities.

2. In any case, it shall be considered that free competition is altered or may be altered in a supra-autonomous sphere or in the national market as a whole, in the following cases:

- a. When conduct alters or may alter free competition in a supra-autonomous sphere or in the national market as a whole or may affect the unity of the national market, among other reasons, due to the dimension of the market involved, the market share held by the corresponding company, the nature and scope of competition defence, or the effects of such conduct on actual or potential competitors and on consumers and users, even when it is carried out in the territory of an Autonomous Community.
- b. When conduct may impair the establishment of a proper and just economic balance between the various parts of Spanish territory, imply measures that can either directly or indirectly hinder the free movement and establishment of persons and free movement of goods throughout Spanish territory, bring about the partitioning of markets or impair the basic conditions that ensure the equality of all Spaniards in the exercise of their rights and the fulfilment of their constitutional rights, even when such conduct is carried out in the territory of an Autonomous Community.

3. The Autonomous Communities with competences in this area shall be responsible for exercising in their territories the powers acknowledged in Competition Act 16/1989, of 17th July, on the procedures aimed at the conduct foreseen in Articles 1, 6 and 7 of the aforementioned Law, when such conduct, without affecting a sphere that is higher than that of an Autonomous Community or than that of the national market as a whole, affects or may affect free competition in the sphere of the respective Autonomous Community.

4. Either the State or the Autonomous Communities shall be responsible for exercising the powers over the authorisations referred to in Article 4 of Competition Act 16/1989, of 17th June, in accordance with the points of connection established in the present Article.

However, if after an authorisation is granted by an Autonomous Community, the circumstances that determined how the powers were attributed change, if the authorised conduct affects a supra-autonomous sphere or the national market as a whole, a new authorisation shall be needed and it shall be granted by the state bodies in charge of the Competition Defence.

5. In any case, the State shall be responsible for the following:

- a. Application of the regulations contained in chapter II and in chapter III of Title I of Competition Act 16/1989, of 17th July.
- b. Authorisation, by means of exceptional regulations, of the categories of agreements, decisions, recommendations, concerted or consciously parallel practices referred to in Article 5 of Competition Act 16/1989, of 17th July.

- c. Representation on competition matters before other national authorities, international forums and bodies and, specifically, before the European Union, the OCDE, the WTO and the UNCTAD.
- d. Application in Spain of Articles 81 and 82 of the EC Treaty and its developing Legislation, in accordance with the terms of Article 25 c) of the Competition Act 16/1989, of 17th July.

Article 2. Settlement of conflicts ➡

1. The Autonomous Communities shall notify the Competition Service all the reports and requests for exceptional authorisations received under the application of this Act, as well as all conducts detected ex officio and about which there are rational indications of infringement, in accordance with the terms of Article 5. Two. Such notification shall express the state or autonomous body that is considered competent on this matter.

The competent body in the Autonomous Community making the notification may open the corresponding proceedings, if the Director of the Service for Competition Defence does not communicate a contrary opinion within fifteen days.

If the Director of the Competition Service considers that it is empowered to apply Competition Act 16/1989, of 17th July, to the notified conduct, the notifying body shall thus be informed.

The notifying body shall be considered to maintain such powers if it does not forward the proceedings to the Competition Service within five days.

If the notifying body maintains its powers over such conduct, the competent body in any of the conflicting Administrations shall request a meeting of the Consulting Committee on the issue of the conflicts as foreseen in Article 3, so that the latter may issue a report within fifteen days.

Once the report mentioned in the previous paragraph has been issued and within ten days of such issue, the State or Autonomous body considered competent may initiate the proceedings, without prejudice to the application of the terms of chapter II of Title IV of Public General Act 2/1979, of 3rd October, regarding the Constitutional Court.

2. The Competition Service shall send the corresponding autonomous bodies a succinct note of all the reports and requests for exceptional authorisation received and of the actions carried out ex officio; this note shall express the state or autonomous body considered competent.

The body that is considered competent in the succinct note forwarded by the Competition Service may initiate the proceedings, if it does not receive any contrary opinion from any other body claiming competences in a fifteen-day period; to this end and as the case may be, the Competition Service shall immediately transfer the report of request for exceptional authorisation received or the actions carried out ex officio.

If another autonomous body considers itself to have powers over this conduct, the Competition Service or the corresponding autonomous bodies shall request the meeting of the Consulting Committee on Conflicts as foreseen in Article 3, so that the latter may issue its report within fifteen days.

Once the report mentioned in the previous paragraph has been issued and within ten days of such issue, the State or Autonomous body considered competent may initiate the proceedings, without prejudice to the application of the terms of chapter II of Title IV of Public General Act 2/1979, of 3rd October, regarding the Constitutional Court.

3. If the Director of the Competition Service considers that the conduct notified by the competent body in an Autonomous Community does not fall under the latter's competences, according to Article 5.Two, but rather under that of an Autonomous Community other than the notifying Community, this information shall be forwarded to the competent bodies in both Autonomous Communities so that they may declare or maintain their competences over the said conduct within fifteen days.

If the bodies in both Autonomous Communities consider that they have competences over the said conduct, the state body or the competent bodies in any of the other conflicting Administrations shall request the meeting of the Consulting Committee on Conflicts as foreseen in Article 3, so that the latter may issue its report within fifteen days.

4. If the conflict begins after the proceedings have been opened, even if this occurs at the settlement stage, the terms of the preceding paragraphs shall apply. A meeting of the Consulting Committee on Conflicts shall automatically interrupt any procedure that may have been in progress and suspend the term to settle the conflict and notify the sentence.

5. Once the sanctioning proceedings have been opened by the competent bodies, the latter may adopt all the measures they consider opportune in order that the infringing conduct may cease; in particular, they shall advise the public as to the conduct that gave rise to the agreement to initiate the proceedings and the measures that were adopted to cease such conduct.

6. In any case, the content of this Article shall be interpreted without prejudice to the use of the pertinent jurisdictional channels.

Article 3. The Consulting Committee on Conflicts. ➡

1. The Consulting Committee on Conflicts is the Consulting body that is specialised in providing advisory services, by means of non-binding reports, towards settling conflicts regarding the attribution of competences that may arise between the State Administration and the Autonomous Communities or among the latter as a result of the application of the legislation on competition defence. In the course of its duties, the Committee may obtain a report from the Competition Court and from the corresponding autonomous bodies.

2. The Chairperson of the Consulting Committee on Conflicts shall be appointed by the Minister of Economy, after hearing the Competition Council, from among people of recognised professional prestige and long experience in the field of competition defence. His/her vote shall be cast in the case of a tie and his/her term of office shall be for five years; nonetheless, once the term of office has expired, he/she shall continue to exercise his/her duties until the new Chairperson takes up office.

3. The Consulting Committee on Conflicts shall be formed by the Chairperson and the following members:

- a. On the part of the General State Administration, a representative appointed by the Minister of Economy, who shall act as Secretary.

- b. On the part of the conflicting Autonomous Community, two representatives appointed by the latter.

Exceptionally, if more than one Autonomous Community is affected by the conflict of competences, a single representative shall be appointed for each one of them. If there are three or more conflicting Autonomous Communities, the number of representatives from the General State Administration shall be increased to ensure the balanced composition of the Committee. The terms of chapter II of Title II of Act 30/1992, of 26th November, regarding the Legal Regime for the Public Administrations and the Common Administrative Procedure and in chapter IV of Title II of Act 6/1997, of 14th April, regarding the Organisation and Functioning of the General State Administration, on the matter of chartered bodies, shall govern the functioning of the committee, the summons for the meetings, the meetings and the regime for adopting agreements by the Consulting Commission on Conflicts.

Article 4. Institutional Aspects of the execution of Competition Act 16/1989, of 17th July, by the Autonomous Communities. ➔

1. The Competition Service and Court may ratify collaboration agreements with the competent bodies in the Autonomous Communities to instruct and settle the proceedings aimed at conduct that falls under the competences of the State and the Autonomous Communities. Such agreements shall establish the concrete issues and mechanisms that shall govern the aforementioned collaboration.

2. The execution procedures established in Competition Act 16/1989, of 17th July, shall be applicable to the actions carried out by the competent bodies in the Autonomous Communities.

Article 5. Co-ordination mechanisms ➔

One.

1. The Competition Council is the body in charge of mutual collaboration, co-ordination and information between the State and the Autonomous Communities to promote uniform application of the legislation on competition.

The Competition Council acts in its Plenary Session, which shall meet at least once a year. The terms of chapter II of Title II of Act 30/1992, of 26th November, regarding the Legal Regime for the Public Administrations and the Common Administrative Procedure and in chapter IV of Title II of Act 6/1997, of 14th April, regarding the Organisation and Functioning of the General State Administration, on the matter of collegiate bodies, shall govern the functioning of the committee, the summons for the meetings, the meetings themselves and the regime for adopting agreements by the Consulting Committee on Conflicts.

2. The Plenary Session of the Competition Council shall be formed by the following members:

One representative from each of the Autonomous Communities with powers in the field of restricted practices.

An equal number of representatives from the General State Administration appointed by the Minister of Economy, including the Director of the Competition Service, who shall chair the Council, and three members from the Competition Court appointed by the President of the aforementioned court.

A Secretary, who shall take an advisory part in the proceedings, appointed by the Minister of Economy.

3. The Competition Council, as the body in charge of participation and collaboration between the General State Administration and the Autonomous Communities, shall be responsible for the following functions:

To follow up on the competition policy implemented by the various public Administrations on a regular basis.

To promote information exchange, carry out and publish studies that show the criteria followed by the various Administrations in applying the regulations on competition defence and, as the case may be, the need for uniformity.

To inform on the drafts of general provisions affecting competition issues over which the Autonomous Communities have implementing powers.

Two. With the aim of facilitating the application of the present Law, the following mutual information mechanisms are hereby established:

- a. The Autonomous Communities shall forward to the Competition Service copies of all the reports and requests for exceptional authorisations received when applying the present Law. Similarly, they shall also notify the Competition Service as to any conduct that is detected *ex officio*, about which there are reasonable indications of infringement.
- b. The Competition Service shall forward to the autonomous bodies a succinct note of all the reports and requests for exceptional authorisations received and as to the actions carried out *ex officio*, about which there are reasonable indications of infringement, when they refer to conduct affecting the respective Autonomous Community.
- c. When the conduct contemplated in sections a) and b) has been detected *ex officio*, the notification shall consist of a description of the detected conduct, indicating the parties, the scope involved and the reasons that justify opening the procedure.
- d. The Competition Service shall inform the corresponding autonomous bodies as to the proceedings initiated affecting their territories.

Three. With the aim of pursuing uniform application of the Competition Act, the Competition Service may appear as an interested party, in the administrative proceedings executed by the competition defence bodies within the Autonomous Communities.

The autonomous bodies shall notify the Competition Service the agreements and resolutions adopted, both at the instruction and resolution stages, that end the proceedings, so that the latter may interpose, as the case may be, an appeal against such agreements before the corresponding courts.

Four. The Competition Service or the Competition Court, in exercising their pertinent duties, shall obtain from the competent autonomous bodies a mandatory, non-binding report, to be issued within a term of ten working days, regarding conduct affecting a supra-autonomous sphere or the national market as a whole that has a significant effect in the territory of the respective Autonomous Community.

First Additional Provision. References to the Competition Court and Service contained in Competition Act 16/1989, of 17th July. ➡

1. The references to the Competition Court and the Competition Service contained in the Articles that make up Competition Act 16/1989, of 17th July, listed below, shall be considered to refer to the bodies in the Autonomous Communities with powers in this regard, when the administrative powers and the procedures regulated therein are exercised or executed with respect to conduct that falls under the competencies of the Autonomous Communities, according to Article 1 of this Act.

Article 4.

Article 7.

Article 9.

Article 10.

Article 11.

Article 12.

Article 13.

Article 29.

Article 39.

Article 40.

Article 41.

Article 42.

Article 43.

Article 44.

Article 45.

Article 31.

Article 32.

Article 33.

Article 34.

Article 36.

Article 36 bis.

Article 37.

Article 38.

Article 46.

Article 47.

Article 48.

Article 49.

Article 51.bis

Article 53.

Article 56.

2. The bodies in the Autonomous Communities that exercise the duties that in the State are attributed to the Competition Court should act independently, professionally and according to the legal system.

Second additional provision. ➡

Translation to Spanish of the Communications and Notifications from the Autonomous Communities with a joint official language and directed at the Competition Service.

In accordance with the terms of paragraph 3 of Article 36 of the LRJAPAC, all communications and notifications from the competent bodies in the Autonomous Communities that are directed at the Competition Service and the Competition Court and contained in the present Law shall be translated into Spanish.

Third additional provision. ➡

Competences attributed to the Telecommunications Market Commission.

The terms of the present Law shall be interpreted without prejudice to the competences attributed by the legislation to the Telecommunications Market Commission.

Single transitory provision. ➡

Until the Autonomous Communities constitute their respective competition defence bodies, the State shall continue to exercise the powers that correspond to them.

Sole Final provision. ➡

Enforcement

The present Act shall enter into force three months after it is published in the “Official State Gazette”.

I order all Spaniards, private individuals and authorities, to abide by this Act and ensure that it is upheld.