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Global Forum on Competition

COMPETITION, STATE AIDS AND SUBSIDIES

Contribution from Spain

-- Session I --

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COMPETITION, STATE AIDS AND SUBSIDIES

-- Spain --

1. State Aids in Spain

1.1 State Aids in Spain: Order of Magnitude, Goals and Affected Sectors

1. In Spain, State aids are granted regardless of the nationality of the recipient; both Spanish and foreign companies meeting the specified requirements are equally able to benefit from State aids provided they are either resident or located in Spain.

2. The CNC *Annual report on public aid awarded in Spain* of June 2009 shows the most significant State aid figures disaggregated according to diverse criteria. In the report, *State aid* is defined as any public expenditure which may constitute an economic advantage to a company. The figures in the report correspond to State aids notified to, and authorised by, the European Commission (EC) and to State aids exempted from prior notification but subject to communication to the EC. Unfortunately, it is difficult to obtain data corresponding to State aids falling below the *de minimis* thresholds.

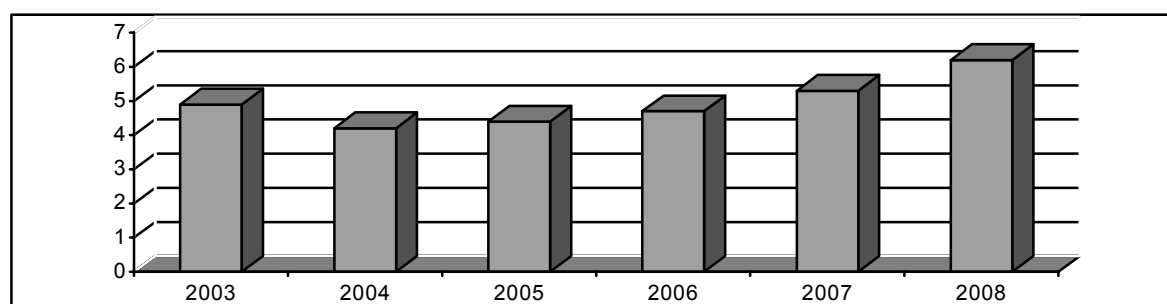
3. In absolute terms, State aid granted in Spain in 2008 - notified or exempted from prior notification, including crisis aid and excluding public financing for railways¹ - amounted to €6.2 billion,² representing 0.56% of Spain's GDP (€5.3 billion, 0.51% of GDP, in 2007). The period 2003 to 2008 revealed a decrease in State aid in the first year and an upward trend in subsequent years, which is expected to be confirmed in 2009 as a result of the measures implemented to tackle the international financial crisis.

4. The vast majority of State aid is concentrated in the industrial and services sectors, followed far behind by agriculture-fisheries and transport. In 2008 the bulk of State aid was allocated to industry and services (0.48% of GDP compared to 0.41% in 2007), whilst State aid allocated to agriculture-fisheries and transport has remained stable in relative terms over the past recent years (0.06-0.08% of GDP in agriculture-fisheries, and 0.01- 0.02% of GDP in transport).

5. In the process of allocating State aid, horizontal objectives (78.9% of State aid in 2008) are more and more preferred to sector objectives (21.1% of State aid in 2008). Horizontal objectives relate to regional development (39% of State aid in 2008), research and development (18.8%), environment (11.7%), SME (3.4%), training (1.4%) and employment (0.8%). Sector objectives include assistance to coal mining (18.5% of State aid in 2008) and, far behind, assistance to the financial sector, to shipbuilding, to ailing companies and to certain other manufacturing activities and services.

¹ A large amount of public financing for railways does not need to be notified to the Commission, either because it does not constitute State aid within the meaning of Article 87 of the EC Treaty or because it is exempted from notification in accordance with Regulations 1191/69 and 1192/69.

² 1 billion = 1,000 million.

Figure 1. State Aid Time History in Spain 2003-2008 (in billion EUR)

Source: State Aid Scoreboard Autumn 2009

6. State aids are most commonly granted through full transfer to the beneficiary, mainly through direct subsidies, although aids in the form of guarantees have been climbing in recent years.

1.2 Access to Government-Owned or Government-Controlled Inputs in Spain

7. The Spanish legislative framework establishes free competition mechanisms for access to the use of government-owned or controlled inputs.³

8. In Spain, Public Administrations manage two kinds of government-controlled inputs: goods of public domain and patrimonial goods.⁴ There three possible types of use for goods of public domain: common, special and exclusive use. Both special and exclusive use are subject to obtaining an empowering title which may consist on either an authorisation or a concession:

- *Authorisations* are granted directly to petitioners who are eligible. If the number of authorisations is limited, then a free competition scheme is applied where appropriate -otherwise authorisations are granted by drawing lots-. Their length is limited to 4 years maximum;
- *Concessions* must be granted under a free competition scheme, but it is possible to directly grant the award under exceptional circumstances -e.g. if a previous auction or contest had been unsuccessful, if the acquirer is either another public administration or a public-utility non-profit organisation-, which must be duly justified. Their length is limited to 75 years maximum.

9. Notwithstanding the peculiarities established by the sector regulation -the case of telecommunications and natural resources, for instance-, of preferential application, arguably the above mentioned general principles are applicable to all sectors.

³ Ley 33/2003, de 3 de noviembre, de Patrimonio de las Administraciones Públicas.

⁴ Patrimonial goods -such as real property-, may be exploited by contracts which will normally be awarded under a free competition scheme. Only if the goods are peculiar, demand is limited or exploitation is urgent, contracts may be directly awarded. The maximum length of the contracts is 20 years.

2. Aid to Ailing Companies, Especially in the Context of the Financial Crisis

2.1 EC Competencies to Control the State Aids Granted by the Member States

10. The EC exercises supervisory powers over State aids -above certain thresholds- granted by the member States. This, of course, also applies to public aids granted in Spain. Thus, in order to be authorised by the EC, Spanish public aids must comply with EU rules on State aids.

11. Following the deepening of the financial crisis in the autumn of 2008, the EC provided guidance in the form of Communications on the design and implementation of State aid in the crisis context.⁵

2.2 Spanish State Aids in the Context of the Financial Crisis

12. The following paragraphs summarise the main Spanish State aid schemes designed in the context of the financial global crisis that have been notified to the EC and have subsequently been authorised.

- In the financial sector:
 - *State aid NN 54/A/2008 Fund for the Acquisition of Financial Assets.*⁶ Its objective is to provide credit institutions with liquidity and to encourage them to grant more credit to businesses and households. The Fund, financed by the State Treasury with €30 billion (expandable to €50 billion), purchases high quality assets from volunteer credit institutions at market prices in order to provide them with additional liquidity. The financial instruments for the investment must be selected taking into consideration the principles of objectivity, security, transparency, efficiency, profitability and diversification;
 - *State Aid NN 54/B/2008 Spanish Guarantee Scheme.*⁷ The State guarantee would cover, against remuneration, the issuance of notes, bonds and obligations admitted to the official secondary market in Spain. The maturity of the financial instruments covered is in principle between three months and three years (up to five years in exceptional circumstances). The scheme's overall budget is set at €100 billion, which may be increased to €200 billion depending on the market conditions. Only solvent banks have access to the guarantee scheme. It covers a period of six months following which it must fade or extended prior notification to the EC. The scheme contains elements of State aid but foresees various safeguards aimed at ensuring that the State intervention is proportionate, limited to what is necessary and set through adequate instruments.

⁵ See Communication on the application of State aid rules to measures taken in relation to financial institutions in the context of the current global financial crisis, OJ C 270, 25.10.2008, p. 8 ("the Banking Communication"); Communication on the recapitalisation of financial institutions in the current financial crisis: limitation of aid to the minimum necessary and safeguards against undue distortions of competition, OJ C10, 15.01.2009, p. 2 ("the Recapitalisation Communication"); Communication on the treatment of Impaired assets in the Community Banking Sector, OJ 72, 26.03.2009 ("the Impaired Assets Communication"); Communication on the return to viability and the assessment of restructuring measures in the financial sector in the current crisis under the State aid rules, OJ C 195, 19.8.2009; Communication on the temporary framework for State aid measures to support access to finance in the current financial and economic crisis, adopted on 17 December 2008; OJ C 16, 22.1.2009, p.1; consolidated version OJ C83 of 07.04.2009.

⁶ Real Decreto-ley 6/2008, de 10 de octubre, de creación del Fondo de Adquisición de Activos Financieros.

⁷ Real Decreto-ley 7/2008, de 13 de octubre, de Medidas Urgentes en Materia Económico-Financiera en relación con el Plan de Acción Concertada de los Países de la Zona Euro.

13. Besides, the *Fondo de Reestructuración Ordenada Bancaria (FROB)*,⁸ which has just been notified to the EC, includes a series of measures aiming at a triple objective: finance restructuring processes of institutions with insolvency problems, strengthen the resources of institutions experiencing short term difficulties but with good prospects of long-term viability, and maintain confidence in the system by increasing its strength and solvency so that surviving institutions can remain strong and provide credit normally. In connection with the restructuring processes, three phases can be distinguished: (i) the search for a private solution by the credit institution, (ii) the adoption of measures to address weaknesses that may affect the institutions' viability -through the participation of the *Fondos de Garantía de Depósitos* (Deposit Guarantee Funds) in such credit institutions- and (iii) restructuring with support of the FROB. The FROB will have a budget of €9 billion, of which €2.25 billion will come from the Deposit Guarantee Funds and €6.75 billion from the State Budget.

14. It is worth noting that the regulation creating the FROB fosters private solutions first -minimising the cost to the taxpayer whenever the use of public funds is necessary, avoiding generalised recapitalisation aimed at preserving non-viable institutions, and encouraging the assumption of responsibility by shareholders and managers. On the other hand, under such regulation the FROB may temporarily⁹ acquire securities of financial institutions that need, and apply for, aid in order to reinforce their own resources in view of integration processes.

- In the real economy:

15. Additionally, for undertakings operating in sectors other than financial, the following aid scheme was notified to the EC: *State aid N 307/2009 Temporary aid scheme for granting limited amounts of compatible aid*. The aim of the scheme is to grant temporary aid to undertakings that have been affected by a sudden shortage or unavailability of credit as a result of the global financial and economic crisis. The scheme provides limited amounts of compatible aid to undertakings until the end of 2010. The aid volume available is estimated €1.400 billion. No aid will be granted to firms that were in difficulty on 1 July 2008, in the meaning of the EU guidelines.

16. The following State aid scheme aiming at the automobile sector is also worth mentioning: State aid N 140/2009 Competitiveness plan of the automotive sector – Realisation of investments aimed at the manufacturing of more environment-friendly products. The aid will be granted in the form of an interest rate subsidy for investment loans for production of green products, i.e. green cars and car components which contribute to the realisation of green cars. The aid is granted only for projects involving early adaptation to, or going beyond, future EU product standards aiming at increasing the level of environmental protection. The scheme applies to companies of all sizes and its overall budget is €690 million.

3. CNC Advocacy and Enforcement in the Field of State Aid

3.1 *The Role of the Spanish Competition Authority Regarding State Aid*

17. The Spanish Competition Act (CA) -Act 15/2007, of July 3-, without prejudice of the EC's competences regarding control of EU member States public aid, establishes that the CNC, ex officio or at the request of the Public Administrations, may analyse State aid award criteria with the aim to analyse the possible effects of State aid on competition in the markets. The CNC may either issue reports on State aid regimes or individual aids or present proposals to the Public Administrations.

⁸ Real Decreto-ley 9/2009, de 26 de junio, sobre reestructuración bancaria y reforzamiento de los recursos propios de las entidades de crédito.

⁹ There is a need for a commitment by the institution to repurchase when capable.

18. As examples, two recently published reports, one on the Draft Royal Decree establishing measures to support the coal mining sector,¹⁰ and the other on the Proposed Draft Act on Audiovisual Communications,¹¹ which discusses considerations regarding the possible existence of State aid elements in the new system for financing the public broadcasting service. Both reports analyse whether the foreseen measures could constitute State aids, recommending, where appropriate, their notification to the EC.

19. The CNC acts independently of the Administrations responsible for granting the aid under consideration, and has insisted that such Administrations should adopt a precautionary approach to State aids since an appropriate design will, in many cases, prevent possible harmful effects on competition, which, once produced, are often irreversible.

20. Furthermore, the CA requires the CNC to issue an *annual report on State aids awarded in Spain*; the first one of which was made public in July 2009.¹²

21. The report devotes a specific section to the description of the *economic criteria that should guide the evaluation of State aids*. The section emphasises the need to take into account the balance between the presumed benefits of the aids and the harm caused by them -to see whether the first outweigh the second-, not only for the recipient companies, but also for the affected markets and the economy as a whole.

22. The idea is to raise awareness among the Public Administrations in charge of designing State aids about the need to perform a cost-benefit analysis to make sure that the benefits of the planned State aid compensate the potential distortion of competition trade it may cause. Such analysis should focus on the following aspects:

- The State aid must be justified (solution for a market failure / other common interest goals);
- The instrument used must be proportional, i.e. the same results cannot be achieved through other less intrusive mechanisms and the aid must have a real incentive effect (to be effective);
- The damage caused to competition in the affected markets.

23. This approach is in line with the so called "new economic approach to State aids", which the EC is planning to adopt and promote in the EU.

24. Furthermore, the CA provides the CNC with an instrument for State aids *ex-post* control. It empowers the CNC to bring actions before the competent jurisdiction against administrative acts and regulations from which obstacles to the maintenance of effective competition in the markets are derived. This mechanism can be particularly useful in the case of *de minimis* State aids -not controlled by the EC- likely to hinder effective competition in the affected markets.

3.2 Examples of Complaints Received by the CNC on the Subject of State Aids

25. The CNC has received various queries and complaints regarding the advantages that certain public entities would be enjoying by virtue of their privileged access to public contracts. Indeed, these "own means of management and technical services of the Public Administrations" can be directly awarded

¹⁰ IPN 33/09 Real decreto de procedimiento de resolución de restricciones por garantía de suministro.

¹¹ IPN 11/09, Anteproyecto de Ley de la comunicación audiovisual.

¹² http://www.cncompetencia.es/Administracion/GestionDocumental/tabid/76/Default.aspx?EntryId=30675&Command=Core_Download&Method=attachment.

contracts for the provision of goods and services to the Public Administrations which would otherwise require a public tender.

26. Extensive use of this figure could, then, eliminate competition in cases where it is desirable and thus, the CNC has advised a very restrictive use of it by the Public Administrations.

27. Other complaints and reports have referred to alleged predatory strategies by public bodies due to their funding advantages, which allow for cross-subsidisation between public interest activities and free market activities.

28. An example in the insurance sector is case ASPA/ASEPEYO (Proceedings R 734/08, Decision of 30 October 2008), where an association of insurance companies filed a complaint against some Social Security mutual insurance companies on grounds that they were subsidising activities subject to free competition with the Social Security funds received in payment for protected activities.¹³ In cases *Centros Deportivos Benicarló* and *Centros Deportivos Castellón*, local authorities were accused of offering sport services in public premises at predatory prices.¹⁴

3.3 *Competition Law and State-Owned Companies*

29. The CA applies to both public and private undertakings without distinction, as did the previous Competition Act of 1989. The CA defines an undertaking, subject to competition law, as any person or entity carrying out an economic activity, regardless of its legal form and the manner in which it is financed. Thus, the recipient of the prohibitions of articles 1 to 3 of the CA -prohibiting anticompetitive agreements, the abuse of dominant positions and the acts of unfair competition which affect the public interest through distortion of free competition- is any entity involved in an economic activity, i.e. any natural or legal person who independently participates in the production or distribution of goods and services, regardless of its legal status, financing and corporate form, and their public or private nature.¹⁵

30. When establishing the Competition Authority's competence to assess Public Administrations' conducts, the key is to identify whether, at the time, they were acting as regulators (in the broadest sense, including when they were acting in the exercise of any public prerogatives) within the scope of their responsibilities, or just as economic operators. Only in the second case the conduct of the Public

¹³ The Council did not think that the accusation had been proven.

¹⁴ Decisions of 10 March 2006. In these cases no abuse was found. The prices offered had been in line with costs in compliance with the rules governing local finance departments and the classes offered had not been intended to eliminate other competitors from the market but to achieve objectives such as promoting exercise and sports among its citizens. Neither did the Competition Authority find a serious distortion of competition in the market nor an impact on the public interest.

¹⁵ The prohibitions of articles 1 to 3 do not apply to conducts harboured by Law, as stated in article 4 of the Competition Act, regardless of the public or private nature of the concerned undertakings. By contrast, the anticompetitive conducts by firms that emerge from the exercise of other administrative powers or caused by the action of public authorities or entities without this legal protection are not exempted. Even if the law allows anticompetitive conducts that cannot be prosecuted by the Competition Authority, the law itself could be breaching article 86 of the European Treaty. In respect of public undertakings, undertakings granted with special or exclusive rights and undertakings that operate services of general economic interest, this article establishes that member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular the rules on competition.

Administration would be subject to competition rules. This criterion emanates from the doctrine of the Spanish Competition Authority, upheld by the revision Courts.¹⁶

31. The Competition Authority has prosecuted and fined several public undertakings. Some examples are hereby presented:

- For participating in anticompetitive agreements: In 1997, *La Lactaria Española S.A.*, a public enterprise attached to the Ministry of Agriculture, was sanctioned with a fine of €1.01 million for leading a cartel of industrial dairy firms that agreed on the basic prices, quality bonuses and discounts for raw milk. Total fines reached € 6.61 million;¹⁷
- For abusing a dominant position: *La Sociedad Estatal Correos y Telégrafos*, the State postal service, a 100% State-owned public limited company has been fined several times for abuse of dominance. In 2003 and 2004 the sanctions rose up to €5.4 million¹⁸ and €15 million¹⁹ respectively. In both cases, the enterprise had taken advantage of its dominant position in the market in which it held a monopoly to prevent new entrants in a connected liberalised market;
- Commitments: In the context of case 2458/03 CORREOS/ASEMPRE. The State postal service committed to implement prices above costs.

32. In case Ports of Andalusia,²⁰ no sanction followed as the abuse of dominance could not be proven, but the CNC warned that the fact that the public enterprise was acting as regulator and as an economic operator in the same market could cause severe distortions on competition due to asymmetric information problems and biased incentives in the drafting and implementation of the regulation.

¹⁶ As an example, case r 267/97 Tragsa 3, case r 409/00 Seguridad marítima, case r 447/00 Piñas Andalucía, case r 621/06 CST/ AENA, case r 572/03 Servicios Deportivos Logroño, case 2779/07 Consejo Regulador de Denominación de Origen Vinos de Jerez y Manzanilla de Sanlúcar.

¹⁷ Case 352/94, Industrias lácteas.

¹⁸ Case 542/02, Suresa-Correos.

¹⁹ Case 568/03, ASEMPRE/Correos.

²⁰ Case R 718/07, Puertos de Andalucía.