CNC
COMISIÓN NACIONAL DE LA COMPETENCIA

FOURTH ANNUAL REPORT ON PUBLIC AID IN SPAIN

2012

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I. INTRODUCTION

State aid constitutes a form of governmental and public sector intervention in the economy which, without prejudice to the pursuit of certain objectives of public interest, can disturb how the marketplace functions, introduce distortions and inefficiencies and disrupt free competition. Establishing mechanisms to control, monitor and review the impact of State aid contributes to efficient market operation, reducing or avoiding unjustified intervention by government, the type of interventionism that experience has shown leads to a diminishment of business competitiveness, to the weakening of the economy and, ultimately, to harm to overall social welfare and to consumers and users in particular.

For these reasons, Spanish lawmakers have taken the view that it is appropriate to involve the Spanish competition authority, the Comisión Nacional de Competencia (CNC), in the control and monitoring of State aid. The instruments with which the CNC has been endowed include an obligation to prepare an annual public report on State aid granted in Spain (article 11.2 of Spanish Competition Act 15/2007 of 3 July 2007).

This is the fourth such report since the CNC came into being. It has three core aims: the first is to provide a general overview of the statistical context of State aid in Spain by reference to the most recent data available; second, to describe the principal new developments in the rules and regulations and case law emanating from Community authorities since the publication of the previous report; and, third, to summarise the activity carried out by the CNC in relation to State aid since that publication, identifying the main actions.

In relation to the first goal, in the period of reference the impact of the financial and economic crisis in the European Union, and in Spain specifically, has brought with it, even in a context of severe budget restrictions, an intensification in the grant of aid which, independently of certain methodological changes promoted by the European Commission for quantifying the funds involved, is clearly reflected in the volume of aid awarded.

Also, after several years of intense regulatory activity to deal with the crisis, the last year has recorded a slowdown in the pace of regulatory novelties originating in the EU.

In relation to the third of the objectives mentioned above, since the last annual report on Public aid, the CNC has had occasion to pronounce itself on various questions involving these issues.. In some instances the presence of the elements of State aid that are set out in article 107 of the Treaty on the Functioning of the European Union (TFEU) have been analysed in order to recommend their notification to the Community authorities; in others, diverse aid schemes have been examined applying the basic principles of the balancing test described in previous reports.

And lastly we note that, in contrast to what was done in the previous reports, which included an analysis of certain aid schemes in a specific programme or sector, this year we have opted for a formal separation between such sectoral analysis and the annual report. In this connection, during the last year a study has been conducted of the degree to which public authorities utilise certain types of instrumental entities, using management-commissioning arrangements in which the provision of certain goods and services is commissioned directly to those entities, without the need, therefore, to carry out government procurement procedures (in house providing). Despite the possible connections of this question with the proper administration of public resources and even with State aid, it has been decided that the potential implications for effective competition deriving from certain practices involved in these arrangements, especially in certain markets, call for a study that goes beyond the strict contours of the analysis of State aid. Consequently, and without prejudice to its connection with this report, it has been decided to publish the two reports separately, deferring the second one to a later time.

In summary, as with the three previous reports, the CNC hopes that, in addition to continuing to contribute to a greater awareness of regulatory developments, new decisions and statistics on State aid, this fourth Annual Report will be helpful for public authorities charged with granting and designing State aid when it comes to adopting the most appropriate decisions for the public interest objectives pursued with the least possible distortion for competition and for the proper functioning of the marketplace.

II. OVERVIEW OF STATE AID IN SPAIN: 2010

II.1 Introduction to and characteristics of the statistical sources used

The purpose of this chapter is to offer an overall view of State aid in Spain, based on statistical information on Spanish public expenditure on such measures during 2010 (most recent consolidated data available), broken down according to diverse criteria. The starting point in its preparation has been the data sent by various Spanish agents dealing with State aid to the European Commission (EC) in compliance with their obligations under Community rules, along with the information contained in the European Commission's State Aid Scoreboard published in Autumn 2011[1]. The Scoreboard consolidates expenditure on State aid for 2010 in all the EU Member States.

[1] Nevertheless, during the preparation of this report, the European Commission published the *Spring 2012 State Aid Scoreboard*. However, in terms of the spending figures, we use the numbers published in the Autumn 2011 Scoreboard, which must therefore be considered the most up-to-date currently available and which, in any event, refer to 2010.

Nevertheless, when interpreting these results, it is necessary to bear in mind the following points.

First of all, the figures contained in this report make reference to a certain type of aid, specifically State aid coming within article 107 of the TFEU, which provides that "*any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall in so far as it affects trade between Member States, be incompatible with the internal market*". In reality therefore, there is no legal definition of the concept of State aid[2] at the Community level; instead there is a definition of aid that is considered to be contrary to Community law. There has been case law of the Court of Justice of the European Union (CJEU) which has identified the necessary elements for the configuration of this concept. According to the CJEU, they are embodied in the following four cumulative requirements:

- The aid must generate an economic benefit for the party receiving it, in other words it must involve an economic advantage that the undertaking in question would not have obtained in the ordinary course of its business.

- The aid must be granted by the States or come out of State funds or, what amounts to the same thing, there must be a transfer of public resources.

- The aid must be of a selective nature for certain undertakings or products, that is, the aid in question alters the balance existing between certain undertakings and their competitors.

- Lastly, the aid must have an effect on trade between Member States.

Secondly, there is *State aid that is excluded from these statistics*. The data set out below only cover State aid notified to the EC and aid that is exempt from ex-ante notification but subject to ex-post notification. The statistical sources used therefore exclude various types of aid, either because they do not satisfy some element of those required by article 107.1 of the TFEU in order to be considered State aid, or because they refer to certain aspects of internal Community policy for which a specific treatment in relation to aid is contemplated. References to the term "aid" in the statistical charts set out below therefore correspond only to the two types of aid referred to above. In particular, the statistics do not include:

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[2] The concept of aid has also been addressed by other international institutions, in particular, by the *World Trade Organization (WTO)* in the context of the *Agreement on Subsidies and Countervailing Measures in 1995* (SCM Agreement)[2]. This Agreement contains a definition of the term "subsidy" that requires the presence of certain elements: a public financial contribution; conferral of a benefit; and that such benefit be specifically targeted at one undertaking or group of undertakings.

a) *De minimis aid*[3], inasmuch as it does not have any bearing on the Community market and is not therefore considered to be State aid in the strict sense of the term, is not subject to the obligation to inform the EC and hence not included in the statistics sent to the Commission by the Spanish authorities either.

b) Aid to the railway sector, insofar as it is not included in the statistics sent to the EC by Spanish authorities, because it is governed by article 93 instead of by the aforesaid article 107 of the TFEU.

c) Compensation for services provided to discharge public interest objectives[4], as only in certain exceptional circumstances could such compensation be considered State aid, in particular, to the extent that it exceeds the conditions of the compensatory measures admitted by the relevant regulations.

d) Other general measures to stimulate the economy as a whole (such as, for example, most generally applicable tax regimes), along with transfers between different public authorities.

Thirdly, the statistical charts only take into account the aid granted by Member States, which means that in the case of arrangements with EU co-funding, the portion that corresponds to them will not be reflected.

Fourthly, it should be taken into account that the statistical charts do not include quantities in respect of aid measures that are in the processing state, that is, those on which the EC has not yet issued a decision at the date of the report.

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[3] So far as *de minimis* aid is concerned, in the three annual reports on State aid published to date the CNC had evaluated the possibility of including such aid by making use of the information contained in the National Subsidies Database (BDNS), but it has been decided this would not be appropriate insofar as there are certain conceptual differences. The BDNS contains information on grants (provided for in article 2 of the General Subsidies Act 38/2003 of 17 November 2003) and the one-off cash grants to which there applies the reporting obligation regulated in article 20 of that Act (as stipulated by article 35 of Royal Decree 887/2006 of 21 July 2006 approving the General Regulation for the Subsidies Act). This database only includes, as originally conceived and operated, transfers of funds (that is, subsidies and, if applicable, one-off cash grants) and therefore excludes other types of instruments that may be State aid under the Community definition. In addition, there are other reasons, such as possible differences in interpretation between different government bodies and inefficiencies in the transmission of the information, and the fact that inclusion depends to some extent on the office that manages the expenditure, which may lead to not all aid being entered or to aid measures not being recorded in their full amount. Given the current possibilities for identifying and controlling this type of State aid, a rigorous analysis of this information is not feasible. It is therefore necessary to repeat that it would be helpful to have a centralised register which includes all measures that are treated as State aid, including de minimis measures.

[4] See Altmark Judgment of the CJEU (case C-280/00 de 24/7/2003).

Lastly, as required by the EC, the figures on the size of the State aid should preferably be expressed in terms of real expenditure (or real revenues not received in the case of tax relief). Since this is not always possible, when the aid manager of the respective administration does not have the final data on payments, it must provide the EC with the data on the committed spending or budget credits reserved for that expenditure.

Said data seek to reflect the expenditure (or lower revenues) in respect of State aid incurred by each Member State and charged to its funds, on the basis of three interrelated concepts: the approved budgeted volumes, the volumes actually used and the calculation of the aid element involved[5].

However, by way of exception to the above, for 2008, 2009 and 2010, the EC has modified the calculation criteria and methodology with respect to what in this report is termed *crisis aid* (aid to the financial sector and aid under the temporary framework for other sectors of the economy) because applying the traditional method used to quantify these measures is not practicable. Based on that modification, the statistics on this aid are focused solely on the volume of public funds approved and actually used and not on the aid element (that is, the gross grant equivalent), and this important circumstance should be taken into account when analysing the aid figures set out in this report for each type of aid.

II.2 Statistics on State aid relating to Spain: 2010

In this section we analyse State aid granted by the Kingdom of Spain in 2010 by reference to the following indicators: volume of aid, evolution over time, evolution by sector, territorial distribution, public interest objectives pursued, types of instruments used and number of projects dealt with at EC level.

II.2.1 Volume of aid

From a statistical standpoint, the ***volume of State aid*** granted in Spain in 2010 (Chart 1) amounted to **92,500 million euros**[6]. Taking into account that the volume in 2009 was 63,022 million euros, the above figure represents an increase of 46% in the volume of

[5] In the procedure for the preparation of the EC's State Aid Scoreboard, Member States not only have to supply data relating to the financial year in question, but also have to correct the data provided for earlier years where such data have been modified, corrected or completed, whether or not the periods to which they refer have ended. All the figures are received in domestic currency at current prices, although they are redenominated in euros and expressed in constant 2000 prices, referenced to the year in question, except for the figures on crisis aid, which is allocated at current prices of the year in question. For all of these reasons, the data published in different Scoreboards, in respect of the same years, may be modified. Similar modifications, for the same reason, may be made to the data reflected in the different annual reports of the CNC on State aid in relation to past years.

[6] The figures on volume of aid are shown in millions of euros (€ mn), save where expressly indicated otherwise.

aid. Naturally, this also translates into a rise in State aid measured as a percentage of the GDP (from 5.92% in 2009 to 8.70% in 2010) and in aid *per capita* (from €280 in 2009 to €1,960 in 2010). If there is one factor that fundamentally explains this increase it is the impact of the funds aimed at combatting the economic and financial crisis: while that caption was 57,400 million euros in 2009, in 2010 it rose to 87,497 million euros, partly as a result of the changes in the allocation methodology used by the European Commission, as discussed above.

Chart 1: Total volume of aid granted in Spain 2010

	€ mn	% of GDP	€ per capita
Crisis aid	87,497.34	8.23%	1,854.13
Non-crisis aid	5,003.02	0.47%	106.02
TOTAL	**92,500.36**	**8.70%**	**1,960.15**

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); EC State Aid Scoreboard (Autumn 2011); Municipal census (RD 1612/2010 of 7 December 2010, BOE 23 December 2010).

With respect to the **crisis aid** (Chart 2), we may divide it into two groups: measures aimed at supporting financial institutions and those intended to sustain companies in all other sectors of the economy that have specific crisis aid instruments (the so-called *Temporary Framework*).

Chart 2: Crisis aid granted in Spain 2010

	€ mn	% of GDP	€ per capita
Aid to financial sector	87,145.47	8.20%	1,846.67
Aid under temporary framework	351.87	0.03%	7.46
TOTAL	**87,497.34**	**8.23%**	1,854.13

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2010); EC State Aid Scoreboard (Autumn 2010); Municipal census (RD 1612/2010 of 7 December 2010, BOE 23 December 2010).

In specific relation to aid to the financial sector, Chart 3 below summarises the current situation of the State aid notified to the EC by the Kingdom of Spain in respect to said sector:

Chart 3: Cases of aid to financial sector, Spain 2008 – June 2012		
Name of Aid	Type of decision	Date adopted
NN 54a / 2008 Fund for Acquisition of Financial Assets	No objections	4/11/2008
Modification	No objections	8/04/2009
Prolongation N 337/2009	No objections	7/08/2009
NN 54b / 2008 System of Guarantees for credit institutions	No objections	22/12/2008
Prolongation	No objections	25/06/2009
2nd Prolongation N 588/2009	No objections	1/12/2009
Extension N 263/2010	No objections	28/06/2010
Prolongation SA. 32921	No objections	29/11/2010
Prolongation SA. 32990	No objections	1/6/2011
Prolongation SA. 34224	No objections	9/12/2011
Prolongation SA. 34224	No objections	29/06/2012
N 28 / 2010 General Scheme for action by the Fund for Orderly Bank Restructuring (FROB)	No objections	28/1/2010
Prolongation N 317/2010	No objections	23/7/2010
NN 61 / 2009 Restructuring Caja Castilla la Mancha	No objections	29/6/2010
N 392 / 2010 Restructuring Caja Sur	No objections	8/11/2010
SA. 33402 Recapitalisation of the Caja de Ahorros del Mediterráneo (CAM) Group	No objections	24/7/2011
SA. 33096 Rescue aid for NCG Banco	No objections	30/9/2011
SA. 33095 Rescue aid for UNNIM Banc	No objections	30/9/2011
SA. 33103 Rescue aid for Catalunya Banc	No objections	30/9/2011
SA. 33917 (2011/N) Recapitalisation and liquidity support for Banco de Valencia	No objections	21/11/2011
SA. 34820 Rescue measures in favour of Bankia / BFA	No objections	Not published

Source: prepared in house based on data from the European Commission, updated to 30/06/2012

Non-crisis aid (Chart 4), on the other hand, despite declining (from 5,621 million euros in 2009 to 5,003 million euros in 2010), stayed close to the previous year's level. The most significant caption in this aid is for measures targeted at Industry and Services

(4,328 million euros), followed, as usual, by Agriculture/Fisheries (528 million euros) and Transport (146 million euros).

Chart 4: Non-crisis aid granted in Spain 2010

	€ mn	% of GDP	€ per capita
Industry and Services	4,328.53	0.41%	91.72
Agriculture and Fisheries	528.22	0.05%	11.20
Transport	146.27	0.01%	3.10
TOTAL	**5,003.02**	**0.47%**	**106.02**

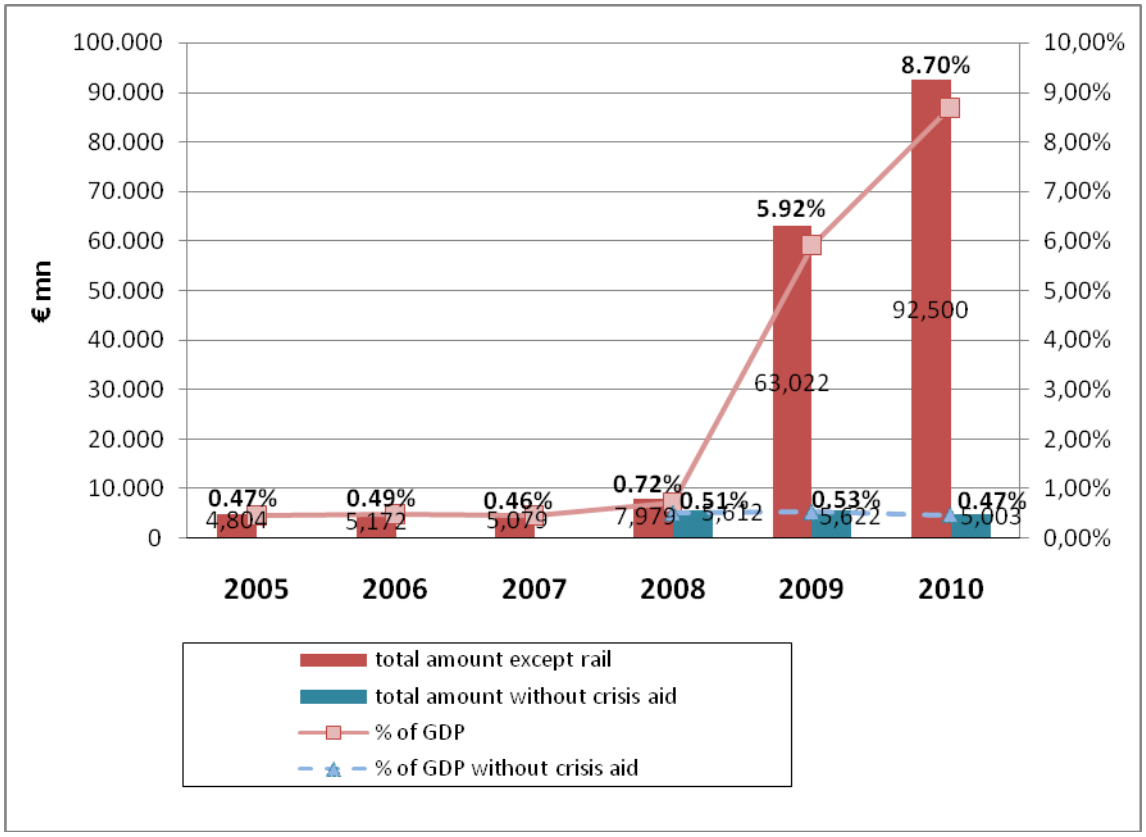
Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); EC State Aid Scoreboard (Autumn 2011). Municipal census (RD 1612/2010 of 7 December 2010, BOE 23 December 2010).

II.2.2 Evolution over time

For the period 2005-2010, Graph 1 shows an upward trend in the total volume of aid throughout the period, with two significant features: first, a slight decline in 2007 and, second, two spikes in 2009 and 2010, as a result of the measures applied to mitigate the effects of the current economic crisis. Indeed, although the volume of aid rose to 92,500 million euros in 2010 versus 4,804 million euros in 2005, the increase is little more than 4% if we strip out crisis-related aid.

The evolution of ***aid in relation to GDP*** is similar, as we can see that there are two clearly differentiated periods: one from 2005 to 2007, in which this ratio remains practically stable at an average of 0.48%, and another from 2008 to 2010 in which it jumps from 0.72% to 8.70% as a consequence of crisis-related aid. If that aid is stripped out, however, the trend in this time interval shows a slight decline from 0.51% to 0.47% of GDP.

Graph 1: State aid granted from 2005 to 2010



Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); EC State Aid Scoreboard (Autumn 2011.

Measuring the dynamics of State aid in the 6-year period 2005-2010 (Chart 5) in terms of **sectoral evolution**, we find the following main elements: strong growth in crisis aid, which comes to the fore as the biggest category, with little or no change in the levels of non-crisis aid (to industry and services, to agriculture-fisheries and to transport). It should be noted that since the data on aid volume for the year in progress and preceding years, as stipulated in the European Commission guidelines, are updated by the Member States themselves every time they submit the annual spreadsheets to the EC (and are therefore never "closed", but remain open to adjustments), there are very significant differences in relation to the crisis aid data of the Kingdom of Spain for 2009 and 2010. Bearing this circumstance in mind, the following main trends can be identified:

Crisis aid rose from 2,367 million euros in 2008 (early stage of the economic crisis) to 57,400 million euros in 2009 and 87,497 million euros in 2010. Naturally, this major increase is also seen in the figures for aid measured as a percentage of GDP, which went from levels significantly below 1% to levels above 8% in 2010. *Aid to industry and services* rose from 3,978 million euros in 2005 to 4,328 million euros in 2010. The effect

of these measures with respect to GDP stayed close to 0.40% of Spain's GDP throughout the 6-year period.

Aid to agriculture-fisheries dropped, in absolute terms, if we take into account the entire period, after the middle years (2006-2007), which recorded significant increases. In relation to GDP, this aid category remained practically stable, at average values close to 0.07% of GDP taking into account the aggregate of both categories. After rising strongly until 2006, when it topped 169 million euros, *aid to non-rail transport* fell sharply in the next two years and then recovered in the last two to reach 146 million euros in 2010. Its weight in relation to GDP remained stable at close to 0.01%.

Chart 5: Evolution by sector. Aid granted in Spain 2005 - 2010

	2005		2006		2007		2008		2009		2010	
	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP
Non-crisis aid	**4,803.65**	**0.47**	**5,171.94**	**0.49**	**5,079.11**	**0.46**	**5,612.26**	**0.51**	**5,621.77**	**0.53**	**5,003.02**	**0.47**
Industry + Services	3,978.37	0.39	3,997.97	0.38	4,012.98	0.37	4,628.38	0.42	4,826.63	0.45	4,328.53	0.41
Agriculture	549.64	0.05	942.11	0.09	733.12	0.07	739.92	0.07	622.58	0.06	514.74	0.05
Fisheries	109.87	0.01	62.71	0.01	191.18	0.02	114.98	0.01	36.88	0.00	13.48	0.00
Transport	165.76	0.02	169.16	0.02	141.83	0.01	128.99	0.01	135.67	0.01	146.27	0.01
Crisis aid	**-**		**-**		**-**		**2,367.08**	**0.21**	**57,400.32**	**5.39**	**87,497.34**	**8.23**
Financial crisis	-		-		-		2,367.08	0.21	57,285.55	5.38	87,145.47	8.20
Temporary Framework	-		-		-		-	0.00	114.77	0.01	351.87	0.03
TOTAL	**4,803.65**	**0.47**	**5,171.94**	**0.49**	**5,079.11**	**0.46**	**7,979.35**	**0.72**	**63,022.09**	**5.92**	**92,500.36**	**8.71**

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); EC State Aid Scoreboard (Autumn 2011).

II.2.3 Distribution by objective

The **public interest objectives** for which the aid is destined may be sectoral or horizontal (cutting across all sectors in pursuit of a concrete aim). Chart 6 analyses the destination of the aid to industry and services in this respect, as this is the most representative aid for these purposes, without taking crisis aid into account. As can be seen, aid earmarked for horizontal objectives maintained its upward trend during the period, although with a slight decline in 2010. Within aid for industry and services (4,328 million euros), horizontal aid accounted for 77% (3,350 million euros), slightly below the 80% recorded in previous years.

Chart 6: Evolution of aid destined for horizontal objectives (aid to industry and services granted in Spain 2005-2010), in € mn

	2005	2006	2007	2008	2009	2010
Promotion of exports	293.4	351.8	101.3	95.8	60.1	16.3
Culture	72.2	77.2	83.7	114.6	121.7	116.6
Employment	48.9	46.4	50.6	25.1	57.5	46.3
Environment and energy savings	187.9	186.7	205.3	523.3	831.4	747.4
Regional development	1,262.7	1,343.7	1,412.2	1,773.6	1,087.7	1,079.4
R&D&i	354.2	454.9	735.5	896.6	1,359.4	1,146.7
SMEs	348.6	387.1	171.4	182.0	185.3	130.1
Training	57.0	84.6	53.5	68.3	123.0	65.7
Others	0.1	0.0	2.6	15.7	5.3	1.6
Total horizontal objectives	**2,624.9**	**2,932.4**	**2,816.0**	**3,695.0**	**3,831.5**	**3,350.0**
Total industry/services	**3,978.4**	**3,998.0**	**4,013.0**	**4,628.4**	**4,826.6**	**4,328.5**

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); State Aid Scoreboard (Autumn 2011).

Aid for "research and development" was once again the most important chapter in horizontal aid, supplanting aid to regional development and confirming a strong upward trend in practically the whole of the six-year period, but particularly in 2009, with a large decline in 2010. Aid for "regional development", a general objective which involves the

attainment of other more specific aims (job creation, investments in production ...), stayed close to the previous year's level (1,079 million euros). The third biggest chapter was aid for “environmental protection and energy savings”. which in the last year was cut 11% with respect to the previous year.

Aid for small and medium enterprises, “SMEs”, for its part, continued its downward trend, with a 30% decline in 2010. Aid for objectives relating to “culture”, “employment”, “training” and “export promotion” remained at modest levels, although the first three categories recorded important percentage increases in the period of reference, before falling in the last year, especially in the “Training” chapter, which was cut 48%. And aid measures earmarked for "export promotion" also recorded a major drop over the course of the period 2005-2010, the largest of all within the horizontal objectives (95%).

The **types of instruments used** in Spain display a heterogeneous mix. Chart 7 shows a breakdown in this respect of the aid earmarked for industry and services, therefore without considering crisis aid. In the period of reference (2008-2010), grants accounted for 60% of the total, while tax exemptions and soft loans combined for approximately the remaining 40%, with the other forms of aid being of negligible importance. Very similar data are seen in the EU, although the percentage of grants is somewhat smaller there (51%) and tax exemptions carry greater weight (41%).

Chart 7: Instruments of aid to industry/services (not including anti-crisis measures) Spain; data represent the average for 2008 – 2010, in € mn

		Grants	Tax exemptions	Equity participation	Soft loans	Guarantees
EU - 27	**Amount**	31,149.81	24,948.04	657.52	1,895.90	1,263.89
	Percentage	51.99	41.64	1.10	3.16	2.11
Spain	**Amount**	2,773.44	1,207.10	0.25	612.48	1.25
	Percentage	60.36	26.27	0.01	13.33	0.03

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2010); State Aid Scoreboard (Autumn 2010). **Note:** Only aid to industry and services is considered. Crisis-related aid and aid for the coal sector are excluded from these amounts. The percentages refer to the total amount of aid granted.

II.2.4 Territorial distribution

The **territorial distribution** of State aid in Spain (Chart 8) indicates that the Autonomous Community receiving the most aid continues to be the Canary Islands (341 million euros) — although it has to be borne in mind that this figure includes aid relating to the special Canary Island zone and its tax regime — followed at a considerable

distance by Andalusia (203 million euros), the Basque Country (170 million euros), Galicia (139 million euros) and Castilla y León (65 million euros). In the Balearic Isles, Ceuta-Melilla and Cantabria, which are the Autonomous Communities recording the least aid, the volume was in all cases less than one million euros. However, these results must be interpreted with caution, as the design of the form required by the EC and the mechanism used for completing it by the different managers within the Spanish public authorities make it hard to precisely identify whether there is a specific geographical destination for the aid in question (that is, an Autonomous Community or, to a lesser degree, a province) and whether the real expenditure is attributable to that Autonomous Community or to another public authority.

The evolution of the size of aid in 2010 in the various Autonomous Communities has been very uneven. Alongside large decreases, such as recorded in the Community of Valencia (from 114 million euros to 58 million euros) and in Castilla y León (from 113 million euros to 65 million euros), there were relatively significant increases in Castilla La Mancha (from 14 million euros to 38 million euros), Navarre (from 44 million euros to 51 million euros) and Catalonia (from 26 million euros to 34 million euros), followed by other regions which, after receiving little in the way of public funds in previous years, in the last year saw their allocation rise considerably, as in the case of (from 0.74 million euros to 4.82 million euros).

Chart 8: Territorial distribution of aid for industry and services, excluding crisis and railway aid; Spain 2005-2010

	2005		2006		2007		2008		2009		2010	
	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP	€ mn	% GDP
ANDALUSIA	178.47	0.14	299.18	0.22	269.95	0.19	238.51	0.16	210.32	0.15	203.85	0.14
ARAGÓN	40.83	0.15	26.43	0.09	25.53	0.08	24.68	0.07	23.24	0.07	15.61	0.05
ASTURIAS	16.97	0.09	46.00	0.22	20.79	0.09	50.32	0.21	51.27	0.23	46.97	0.20
BALEARIC ISLES	7.57	0.03	7.55	0.03	8.36	0.03	3.80	0.01	0.00	0.00	0.00	0.00
CANARY ISLANDS	565.08	1.54	609.26	1.55	736.63	1.77	1,038.15	2.42	268.96	0.65	341.02	0.83
CANTABRIA	12.59	0.11	10.87	0.09	11.73	0.09	7.76	0.06	0.74	0.01	4.82	0.04
CASTILLA Y LEON	95.91	0.20	92.18	0.18	74.82	0.13	90.49	0.16	113.41	0.20	65.17	0.11
CASTILLA - LA MANCHA	17.79	0.06	34.37	0.10	38.10	0.11	30.84	0.08	14.94	0.04	38.28	0.11
CATALONIA	15.34	0.01	20.67	0.01	30.61	0.02	30.30	0.01	26.84	0.01	34.86	0.02
CEUTA and MELILLA	0.06	0.00	0.10	0.00	0.60	0.02	0.60	0.02	0.02	0.00	0.19	0.01
EXTREMADURA	40.67	0.27	15.77	0.10	24.14	0.14	7.42	0.04	10.04	0.06	7.25	0.04
GALICIA	66.87	0.14	124.33	0.25	78.12	0.14	89.51	0.16	141.56	0.26	139.85	0.25
LA RIOJA	19.49	0.29	19.83	0.27	17.71	0.23	27.03	0.34	36.00	0.46	34.67	0.44

MADRID	18.82	0.01	34.30	0.02	50.05	0.03	51.61	0.03	45.39	0.02	34.16	0.02
MURCIA	11.10	0.05	11.50	0.05	7.40	0.03	0.47	0.00	2.97	0.01	3.40	0.01
NAVARRE	53.63	0.35	56.09	0.34	57.31	0.32	59.54	0.32	44.53	0.24	51.59	0.28
BASQUE COUNTRY	99.06	0.18	98.75	0.16	112.73	0.17	154.96	0.23	184.71	0.28	170.97	0.26
VALENCIA	23.35	0.03	30.70	0.03	18.18	0.02	40.58	0.04	114.05	0.11	58.40	0.06
REG	1,283.61	0.14	1,537.89	0.16	1,582.76	0.15	1,946.57	0.18	1,289.00	0.12	1,251.07	0.12
AGE	1,894.36	0.21	1,933.53	0.20	2,128.38	0.20	2,549.04	0.23	3,455.99	0.33	3,077.64	0.29
TOTAL	3,177.97	0.35	3,471.41	0.35	3,711.15	0.35	4,495.61	0.41	4,744.99	0.45	4,328.70	0.41

Source: State Aid Scoreboard (Autumn 2010). Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2010. Regional accounting data of the National Statistics Institute (INE). In all the data only aid to industry and services has been taken into account. Aid to agriculture, fisheries and railways is therefore excluded. **Notes:** The "REG" entry corresponds to the sum of aid whose receipt can be expressly allocated to the territory of each particular Autonomous Community, regardless of the granting authority. The percentage of GDP refers to the sum of the GDP of all regions, according to the INE data. The "AGE" entry corresponds to the difference between total aid recorded in the information sent to the European Commission and the "REG" entry, and seeks to reflect aid that cannot be expressly ascribed to the territory of a particular Autonomous Community.

II.2.5 Measures presented to the European Commission

The **number of projects brought before Community institutions** by the Kingdom of Spain (Chart 9) dropped considerably in 2011 from the previous year, in relation both to the schemes notified (from 66 to 31) and to those exempt from pre-notification (from 135 to 91); on the other hand, the number of schemes not notified, that is, those for which a formal investigation is opened by Community institutions for lack of notification according to the TFEU rules, remained stable (3).

The economic and financial crisis besetting Spanish government has been a decisive factor in explaining the 50% decrease in the number of aid projects notified in 2006-2011, as even though the overall volume of aid was much higher in the last year, the growth is attributable to a few aid schemes aimed at combatting the crisis in contrast to the greater variety of schemes notified in previous year.

Chart 9: Aid schemes brought before the EC, Spain 2006-2011

	2006		2007		2008		2009		2010		2011	
	No.	%	No.	%	No.	%	No.	%	No.	%	No.	%
Notified schemes	63	61.76	67	28.88	64	29.91	60	25.00	66	32.35	**31**	24.80
Non-notified schemes	3	2.94	4	1.72	8	3.74	4	1.67	3	1.47	**3**	2.40

Projects exempt from notification	36	35	161	69.4	178	83.18	202	84.17	135	66.18	**91**	72.80
Total	102	100	232	100	214	100	240	100	204	100	**125**	100

Source: data taken from the aid databases of the CNC and the European Commission. The aid projects not notified refer to the following cases: SA 21233 (11/C) Spanish Aid for the acquisition of ships - Spanish Tax Lease; SA. 24473 Alleged illegal aid in the gas sector and SA. 28685 Reception of digital television in Cantabria.

II.3 Statistics on State aid in the EU: comparison with Spain

The parameters of reference chosen for this comparison are: the volume of aid and the proportion that it represents of GDP in those geographical areas; the financial crisis, including and excluding crisis-related aid; and the degree of horizontality of the main public interest objectives pursued with this aid.

II.3.1 Volume and relative weighting in GDP

As indicated in Chart 10, the volume of EU aid grew considerably in 2010 to reach 1,190,819 million euros (versus 427,365 million euros the previous year) or nearly 10% of EU GDP, as a result, once again, of the impact of the crisis aid, which totalled more than 1,117,000 million euros (compared with 354,140 million euros one year earlier).

Chart 10: Total volume of aid Spain — EU 2010

	Total amount of aid		Amount of aid excluding crisis-related aid		Amount of crisis-related aid	
	€ mn	Proportion of GDP	€ mn	Proportion of GDP	€ mn	Proportion of GDP
SPAIN	92,500	8.71%	5,003	0.47%	87,497	8.23%
EU	1,190,819	9.71%	73,788	0.60%	1,117,031.50	9.10%

Source: Data submitted by Spain to the EC for the State Aid Scoreboard (Autumn 2011); State Aid Scoreboard (Autumn 2011).

Drawing a comparison with individual EU Member States, Chart 11 shows that in 2010 the largest volumes of aid went to Ireland (362,932 million euros), the United Kingdom (205,486 million euros), Germany (184,462 million euros) and France (108,699 million euros), followed by Spain and the Netherlands, the latter two with figures below 100,000 million euros. If we put that aid volume in relation to national GDP, Ireland once again tops the list (235%), followed by Greece (16%) and the United Kingdom (12%), the Netherlands (9%) and Spain (8%).

Chart 11: Comparison of total aid volume in EU Member States 2010

	Total volume of aid	Total volume of aid
	€ mn	% of national GDP
Germany	184,462.21	7.38
Ireland	362,932.60	235.76
Greece	38,455.28	16.71
Spain	92,500.36	8.71
France	108,699.19	5.62
Italy	4,829.36	0.31
Netherlands	56,816.11	9.61
Portugal	6,566.06	3.80
United Kingdom	205,486.42	12.11

Source: State Aid Scoreboard (Autumn 2010). Data submitted by Spain to the European Commission for the State Aid Scoreboard (Autumn 2011).

On the other hand, as can be seen in Chart 12, if we draw an overall comparison of the volume of aid granted in all Member States of the EU, broken down by type of aid, we observe that in the case of Spain aid schemes aimed at responding to the financial crisis are predominant, and the volume of non-crisis aid is in small.

Chart 12: Volume of aid (€ mn) in EU Member States 2010

	Non-crisis aid	Aid in response to financial crisis	Aid earmarked for temporary framework	Total volume of crisis aid	Total volume of aid
EU-27	73,788.3	1,105,275	11,756.1	1,117,031	**1,190,819**
Belgium	2,153.80	29,366.23	223.00	29,589.23	**31,743.03**
Bulgaria	53.06	0.00	0.00	0.00	**53.06**
Czech Republic	1,188.61	0.00	305.32	305.32	**1,493.93**
Denmark	2,131.43	28,669.18	0.00	28,669.18	**30,800.61**
Germany	15,964.62	164,498.65	3,998.95	168,497.60	**184,462.21**
Estonia	42.29	0.00	5.78	5.78	**48.07**

Ireland	1,572.21	361,275.00	85.39	361,360.39	**362,932.60**
Greece	1,838.28	35,076.50	1,540.50	36,617.00	**38,455.28**
Spain	5,003.02	87,145.47	351.87	87,497.34	**92,500.36**
France	15,383.69	91,528.11	1,787.38	93,315.50	**108,699.19**
Italy	4,559.71	0.00	269.65	269.65	**4,829.36**
Cyprus	117.72	2,817.25	0.00	2,817.25	**2,934.97**
Latvia	169.23	1,532.95	45.15	1,578.10	**1,747.33**
Lithuania	158.81	0.00	0.11	0.11	**158.93**
Luxembourg	95.56	1,592.39	7.15	1,599.54	**1,695.10**
Hungary	2,243.35	1,054.04	107.05	1,161.08	**3,404.43**
Malta	88.52	0.00	0.20	0.20	**88.72**
Netherlands	3,162.26	53,625.00	28.85	53,653.85	**56,816.11**
Austria	2,242.47	19,915.80	1,060.52	20,976.32	**23,218.79**
Poland	3,220.58	0.00	1.35	1.35	**3,221.94**
Portugal	1,578.56	4,987.50	0.00	4,987.50	**6,566.06**
Romania	303.99	0.00	325.85	325.85	**629.83**
Slovenia	395.15	2,150.00	429.12	2,579.12	**2,974.27**
Slovakia	303.41	0.00	16.26	16.26	**319.68**
Finland	2,061.42	0.00	451.90	451.90	**2,513.32**
Sweden	2,887.99	19,921.25	217.04	20,138.29	**23,026.28**
United Kingdom	4,868.64	200,120.07	497.72	200,617.78	**205,486.42**

Source: Data submitted by Spain to the European Commission for the State Aid Scoreboard (Autumn 2011) **Note:** The figure of 351.87 million euros for Spain in respect of aid earmarked for the temporary framework, is the sum considered by the European Commission for this calculation, which includes the gross total amount. The value shown in other charts reflects the part considered net aid (aid element), which amounts to 314.13 million euros.

II.3.2 Trends on intensity of State aid to horizontal objectives

In the period examined, the priority given to horizontal objectives by aid instruments is clear in countries such as Estonia, Latvia, Lithuania, Belgium, Bulgaria, Luxembourg and Finland, which, as shown in Chart 13, devote all of their State aid, excluding crisis-related aid, to this type of objective. At the other end, Portugal and Malta only dedicate 17% and 25% to horizontal objectives, respectively. The average percentage for horizontal aid in the EU is 85% of the total aid granted. Spain, with 77% of aid earmarked for horizontal objectives, has decreased its percentage with respect to the one presented in 2009 (80%).

Examining the various subcategories of *horizontal aid*, in Spain a notable proportion was applied to research and development and innovation, R&D&i (26%), nine points above the EU-27 average. Conversely, other objectives such as environment (17% vs. 24%), SMEs (3% vs. 4%) and employment (1% vs. 5%) received less attention in

comparison with our partner countries. The regional development and training objectives stand close to the EU averages.

In terms of *sectoral aid*, the proportion that Spain dedicates to this heading (23%), exceeds the EU average (15%). The national sectors benefitting the most are coal, with a 19% of total sectoral aid (far above the EU average of 5%), and manufacturing industry, with 3% (compared with the EU average of 5%).

Chart 13: Aid by horizontal and sectoral objectives (excluding crisis aid) 2010

	Horizontal Objectives (%)								Sectoral Objectives (%)						Total aid Industry and Services (€ mn)
	Total horizontal objectives	Environment	Regional Development	R&D&i	SMEs	Training	Employment	Other horizontal objectives	**Other sectoral objectives**	Coal	Financial services	Manufacturing	Other non-manufacturing sectors	Services	
EU	**85**	**24**	**24**	**17**	**4**	**1**	**5**	**10**	**15**	**5**	**2**	**5**	**2**	**1**	**61,038**
BEL	100	24	7	43	12	2	7	5	0	0	0	0	0	0	1,834
BUL	100	7	41	16	4	6	25	0	0	0	0	0	0	0	14
CH. REP	81	5	45	27	3	1	0	1	19	0	8	0	11	0	946
DEN	97	15	0	11	0	0	67	5	3	0	0	0	0	3	1,951
GER	88	38	25	19	2	1	0	4	12	12	0	0	0	0	14,695
EST	100	39	15	4	7	0	1	35	0	0	0	0	0	0	14
IRE	90	8	33	27	4	4	2	11	10	0	0	6	0	4	867
GRE	99	0	89	0	10	0	0	1	1	0	0	0	0	0	1,800
SPAIN	**77**	**17**	**25**	**26**	**3**	**2**	**1**	**4**	**23**	**19**	**0**	**3**	**0**	**1**	**4,329**
FRANCE	79	4	34	14	5	1	0	21	21	0	0	20	0	1	12,594
ITALY	96	7	33	17	18	6	6	8	4	0	0	1	0	3	3,328
CYP	96	0	9	2	5	12	0	67	4	0	0	0	0	4	89
LAT	100	78	13	6	1	0	1	2	0	0	0	0	0	0	72
LIT	100	2	67	14	8	0	9	0	0	0	0	0	0	0	81
LUX	100	17	2	51	14	0	0	16	0	0	0	0	0	0	75
HUN	54	1	26	5	1	0	9	12	46	2	0	10	34	0	1,907
MAL	25	0	22	0	0	0	0	3	75	0	0	71	0	4	70

NETH	100	55	1	37	3	0	0	5	0	0	0	0	0	0	1,911
AUS	99	49	6	25	4	1	0	13	1	0	0	1	0	0	2,057
POL	76	11	29	3	0	2	28	2	24	8	0	2	13	1	2,545
POR	17	0	7	3	1	0	4	0	83	0	83	1	0	0	1,547
ROM	71	0	52	16	2	0	0	2	29	29	0	0	0	0	206
SLOVEN	96	29	26	30	0	0	5	4	4	4	0	1	0	0	319
SLOVAK	98	36	47	7	0	7	0	0	2	2	0	0	0	0	241
FIN	100	40	6	30	4	3	6	11	0	0	0	0	0	0	774
SWE	98	86	3	4	0	0	0	5	2	0	0	0	2	0	2,644
UK	93	34	6	19	5	2	0	25	7	0	0	0	6	1	4,132

Source: State Aid Scoreboard (Autumn 2011). **Note:** The chart excludes aid in response to the financial crisis.

III. NEW DEVELOPMENTS IN EU LEGAL FRAMEWORK: 2011 AND 2012

III.1 Regulatory developments in the EU: 20111 and 2012

There follows a brief description of the key measures approved during 2011 and 2012, distinguishing between those which are genuine sources of law and those measures that simply represent guidance given by the EC. The latter do not have legal force in the strict sense but, in practice, they are applied by the Commission when analysing State aid cases. The section ends with a description of other recent actions by Community institutions in the area of State aid, along with the various public consultations launched during the past year.

III.1.1 Regulations, Directives and Decisions

The new EU regulatory change on matters of State aid in 2011 and 2012, as indicated in Chart 14, referred to Services of General Economic Interest (SGEI), specifically to the establishment in a Regulation of de minimis aid for said entities and a Decision on the compensation received by the undertakings that provide those services.

Chart 14: EU Regulations, Directives and Decision in relation to State aid 2011-2012

Regulation	OJEU	Subject matter
Commission Regulation (EU) 360/2012 on the application of articles 107 and 108 of the TFEU to de minimis aid granted to undertakings providing SGEI	26/04/2012	The Regulation stipulates that aid granted to companies that provide SGEI will be considered de minimis if it does not exceed the threshold of €500,000 over any period of three fiscal years
Decision on the application of the provisions of article 106.2 TFEU to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI	11/01/2012	Member States are exempted from the obligation to notify the Commission of public service compensation for certain categories of SGEI. The exemption is extended from hospitals and social housing to a much wider range of social services and lowers the threshold of compensation that triggers the notification obligation in

		other SGEI activities. The notification threshold was lowered from 30 million euros to 15 million euros, having regard to the concern expressed by interested parties that the previous threshold left major contracts in important areas of the internal market outside of the Commission's control.

Source: prepared in house. Information obtained from the website of the DG Competition of the European Commission.

The aforesaid EC Regulation 360/2012 of 25 April 2012 on the application of articles 107 and 108 of the TFEU to de minimis aid granted to undertakings providing SGEI states that the EC's experience has shown that the ceiling below which advantages granted to such undertakings may be deemed not to affect trade between Member States and/or not to distort or threaten to distort competition can, in some cases, differ from the general de minimis ceiling established in Regulation (EC) 1998/2006.

This *Regulation* provides that aid granted to these undertakes must be considered as not affecting trade between Member States and/or distorting or threatening to distort competition when the aggregate amount of the aid received by the beneficiary undertaking does not exceed €500,000 during any period of three fiscal years. With respect to the monitoring obligations, it requires the Member States to record and compile all information on the application of this Regulation for 10 fiscal years from the date on which the aid was granted. The Regulation is scheduled to remain in force until 31 December 2018.

As for the *Decision*, it sets out the conditions under which State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of SGEI is compatible with the internal market and exempt from the requirement of notification laid down in 108.3 TFEU. In relation to compensation for public service obligations, the Decision mandates that such compensation must not exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account a reasonable profit. If it is not possible to use the rate of return on capital, the Member States should rely on other profit level indicators[7] defined in other publications, such as the Communication on SGEI that is cited further ahead.

The Decision will therefore apply to certain categories: compensation for an annual sum of 15 million euros (provided that the aid does not target transport or transport infrastructure); compensation for provision of SGEI by hospitals or social service centres; compensation for provision of SGEI in air or maritime links to islands and compensation for provision of SGEI in airports and ports with a certain amount of traffic.

[7] ROE = average return on equity; ROCE = return on capital employed; ROA = return on assets; ROS = return on sales.

It is limited to an entrustment of 10 years, so that only in special circumstances related to important investments will longer entrustment periods be covered by the Decision and exempt from notification.

III.1.2 Communications and Guidelines

These types of "soft law" instruments have become a key feature of the current organisation and management of State aid. Chart 15 lists the different interpretative documents (Communications, Guidelines ...) published by the EC in the period 2011-June 2012, and is followed by a description of the general contours of the interpretative documents that can be considered the most important.

Chart 15: EU Communications/Guidelines on State aid 2011-2012

Interpretative documents of the European Commission	OJEU	Subject matter
Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis	06/12/2011	The extraordinary rules in the context of the crisis are prolonged in order, inter alia, to facilitate implementation of the «banking package». This COM maintains in force the previous four COMs that determined the conditions for compatibility with the Treaty rules on State aid in the form of guarantees on funding, recapitalisation and asset relief, as well as the requirements for restructuring or viability plans
Framework on State aid to shipbuilding	14/12/2011	The framework reviews innovation aid measures for the sector, extends the term for applying those measures and establishes new areas of application to inland waterway vessels and large floating structures.
Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (SGEI)	11/01/2012	The Communication clarifies basic State aid concepts in relation to SGEI, such as the definitions of aid, SGEI, economic activity, convergence between government procurement procedures, absence of aid, and others
Communication establishing a European Union framework for State aid in the form of public service compensation (2011)	11/01/2012	The new rules introduce, in particular, a more precise methodology for determining the amount of the compensation, the obligation of Member States to introduce efficiency incentives in the compensation mechanisms and the obligation to comply with EU rules on public procurement and on equal treatment of providers of the same service when determining the compensation. In addition, the Commission may require Member States to adopt measures to reduce the anti-competitive effects of certain compensation schemes that have a particularly high potential for distorting competition in the internal market.
Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012	22/05/2012	The Guidelines set out the compatibility criteria that will be applied to aid in the context of the greenhouse gas emission allowance trading scheme, improved and extended by Directive 2009/29. In line with the balancing test, the primary objective will be to ensure a higher reduction of greenhouse gas emissions and that the positive effects of the aid outweigh its negative effects. Application of the principles of necessity and proportionality of the aid will also be ensured.

Source: prepared in house. Information obtained from the website of the DG Competition of the EC.

Communication on the application, from 1 January 2012, of State aid rules to support measures in favour of banks in the context of the financial crisis

The European Commission has updated and extended a series of temporary guidelines for assessing public support for financial institutions during the crisis. This Communication maintains the four previous Communications on the basis of article 107.3b) TFEU: the Banking Communication, the Recapitalisation Communication, the Impaired Assets Communication and the Restructuring Communication, which set out the prerequisites for the compatibility of support in the form of guarantees on liabilities, recapitalisation and asset relief measures, as well as requirements for restructuring or viability plans.

To facilitate the implementation of the aforesaid package of Communications and to take into account developments in the risk profile of banks since the start of the crisis, it is desirable to further clarify and update the rules in certain respects. In particular, this Communication: first, supplements the Recapitalisation Communication, by providing more detailed guidance on ensuring adequate remuneration for capital instruments that do not bear a fixed return; second, explains how the EC will undertake the proportionate assessment of the long-term viability of banks in the context of the banking package; lastly, introduces a revised methodology for ensuring that the fees payable in return for guarantees on bank liabilities are sufficient to limit the aid involved to the minimum, with the aim of ensuring that the methodology takes into account the greater differentiation of bank credit default swap (CDS) spreads in recent times and impact of the CDS spreads of the Member State concerned.

Framework on State aid to shipbuilding

The EC aims, to the greatest extent possible, to eliminate the differences between the rules applicable to the shipbuilding industry and to other industrial sectors, by extending general horizontal provisions to the shipbuilding sector. Nevertheless, the EC acknowledges that certain features of shipbuilding justify continued application of specific provisions while ensuring that such aid does not adversely affect trading conditions and competition to an extent contrary to the common interest. This Framework therefore contains specific provisions in relation to regional aid and innovation aid for shipbuilding, as well as provisions on export credits, in force from 1 January 2012 to 31 December 2013, with an assessment to be performed at the latter date as to whether the justification for those specific provisions remains valid or whether the aid should come under the horizontal rules on aid.

Communication on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (SGEI)

The Communication conducts a review of the general provisions on the concept of State aid. Toward this end, it cites a vast case-law to clarify the definition of undertaking and of economic activity, with special attention to those cases to which article 107 TFEU does not apply because the State acts in the exercise of public authority or the activity relates to schemes in the area Social Security, health care and education. The Communication likewise clarifies the requirements for considering that State resources are involved and for when there is impact on trade between Member States.

It also analyses the criteria established by the CJEU in its Altmark judgment of 24 July 2003 regarding the conditions under which public service compensation does not constitute State aid: the need for a public service entrustment act, the obligation to define the parameters of compensation in advance, the principles concerning the avoidance of overcompensation and proper selection of the service provider.

Communication establishing a European Union framework for State aid in the form of public service compensation (2011)

The Communication contains a series of principles that apply to public service compensation to the extent it constitutes State aid not covered by the Decision summarised above. It is therefore subject to mandatory pre-notification under article 108.3 TFEU, and the Communication specifies the conditions on which the aid may be declared compatible with the internal market provided that it is necessary for the functioning of the SGEI and is not contrary to the Community interest.

In relation to these conditions the most notable changes are: the characteristics that must be met by the SGEI entrustment act are specified in greater detail; the duration of the entrustment act is limited so that it does not exceed the period required for the depreciation of a significant asset required to provide the SGEI and new safeguards are included in relation to the obligation regarding the Directive on transparency of financial relations between Member States and public undertakings; and, furthermore, the Communication mandates observance of the rules on public procurement and on absence of discrimination in calculating the compensation. With respect to the amount of the compensation, the Communication clearly establishes the possible methods that can be used for calculating the costs of the service, revenue and reasonable profit. There are also advances in relation to efficiency incentives and the risks of overcompensation.

Lastly, as a novelty, the Communication contains examples of circumstances in which the system set up may lead to distortions of competition. This would trigger intervention by the EC, which may require conditions or commitments to ensure the necessity and proportionality of the measure, as well as guarantees of transparent reporting.

Guidelines on certain State aid measures in the context of the greenhouse gas emission allowance trading scheme post-2012

Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 established a scheme for gas emission allowance trading in the EU, and Directive 2009/29/EC improved and extended that scheme, with effect as from 1 January 2013. That package was mainly designed to achieve the Union's overall environmental target of a 20% reduction in greenhouse gas emissions compared to 1990 and a 20% share of renewable energy in the Union's total energy consumption by 2020.

The special and temporary measures provided for in the context of implementation of the Directive involve State aid within the meaning of article 107.1 TFEU. The Guidelines indicate that such measures may be declared compatible with the internal market within the meaning of article 107.3.c TFEU if they lead to increased environmental protection (reduction of greenhouse gas emissions) without adversely affecting trading conditions to an extent contrary to the common interest. In assessing the compatibility of an aid measure, the EC balances the positive impact of the aid measure in reaching an objective in the common interest against its potentially negative side effects. Member States must demonstrate that the aid amount to the beneficiary is limited to the minimum necessary, and, naturally, they may in any even grant aid with lower aid intensities than those mentioned in the Guidelines. Lastly, the Guidelines will apply until 31 December 2020.

III.1.3 Public consultations and initiatives

During 2011 and 2012 the EC has pursued different actions with a view to obtaining first-hand information on the application of aid Guidelines to certain sectors. Chart 16 sets out the main consultations opened by the European Commission, which, in the majority of cases, will result in a reform of the current sectoral Guidelines in those areas.

Chart 16: Public consultations launched by the European Commission in 2012

Subject matter of the consultation	Closing date	Activity
Issues paper on the assessment of State aid for films and other audiovisual works	31/05/2012	The current Cinema Communication was issued over 10 years ago. Reflection is proposed in several areas, such as competition to attract large-scale film productions and support for other non-production activities
Review of Community Guidelines on State aid to maritime transport	14/05/2012	A questionnaire is distributed to ascertain the current situation, objectives and main problems facing the

		sector with an eye to reviewing the aid it receives
Review of State aid rules for regional aid	26/04/ 2012	A questionnaire is used to ascertain the extent to which the current rules satisfy the expectations of the players involved
Guidelines for the application of State aid rules in relation to rapid deployment of broadband networks	1/09/2012	Information is compiled from the interested parties on the Guidelines reviewed, in relation to the aid granted for rollout of basic broadband infrastructure and ultra-fast next generation access networks
Review of General Block Exemption Regulation	12/09/2012	In view of the process of modernising the State aid control system, consideration is given to revising this Regulation to make it more flexible with respect to certain aid schemes
Community guidelines on state aid to promote risk capital investments in small and medium-sized enterprises	5/10/2012	Given the upcoming expiry on 31 December 2013 of the Guidelines and GBER, the Commission invites third parties to give their input on the review of the Guidelines; in particular, information on the evolution of the market, availability of own capital, etc.

Source: Information obtained from the website of the DG Competition of the EC in June 2012

III.2 Decisions of Community institutions on State aid that are relevant for Spain

III.2.1 Decisions of the European Commission

We set out below some of the aid cases relating to the period 2011-June 2012 that are particularly relevant for the Kingdom of Spain, either because of the analysis made by the EC of the existence of aid and its compatibility with the Treaty, or because of certain particular characteristics of the aid. All these Decisions can be found on the EC's State aid website[8].

SA.32619 Compensation of damages for the liberation of digital dividend

Description of the measure: in Spain, radio broadcasting services must be reallocated in order to free up spectrum to improve the provision of electronic communication services. To ensure the continuity of those services, public service broadcasters are required to broadcast simultaneously in both frequencies during a transitional period of from six to twenty-four months, while citizens adapt their reception equipment. This gives rise to extraordinary costs so a plan has been designed for compensating public service broadcasters for those expenses.

[8] See http://ec.europa.eu/competition/state_aid/register/

Assessment: The EC has opened a formal investigation procedure to study whether the Spanish plan complies with EU rules on State aid and if the measure is proportionate and necessary. At this stage, the EC also raised doubts in relation to conformity with the technological neutrality principle that requires equal treatment of all transmission platforms, irrespective of the technology used. Furthermore, Spain also includes an aid scheme for associations of owners of multi-household buildings that will allow the necessary investments to be made to maintain reception of free-to-air TV channels after the frequencies have been reallocated. The EC has reached the conclusion that the aid complies with the technological neutrality principle and therefore approved the measure.

SA.33095 Second rescue recapitalisation of UNNIM Bank.

Description of the measure: This is an individual aid measure that is divided into two actions: the conversion of preference shares into ordinary shares of 380 million euros, and a capital injection of 568 million euros, for a total aid amount of 948 million euros.

Assessment: The measure constitutes State aid as it fulfils the conditions established in article 107.1 TFEU. The Fondo para la Restructuración Bancaria (FROB) that provides the aid is funded with State resources; there is selectivity given that it is only granted to this bank; there is an economic advantage insofar as the capital injection will allow the bank to restore its regulatory solvency ratios and thus avoid technical bankruptcy, given that the other market options (for example, mergers with other banks) proved impossible; the maintenance of competition in the internal market could be affected. After due analysis, the EC concludes that the aid in question is compatible with article 107.3.b) of the TFEU and meets the requirements set out in the so-called Banking Communication: appropriateness, necessity and proportionality of the aid measure. The EC has therefore authorised the measure.

SA.33096 Second rescue recapitalisation of Nova Caixa Galicia

Description of the measure: This is an individual aid measure consisting of a capital injection of 2,465 million euros.

Assessment: The measure constitutes State aid as it fulfils the conditions established in article 107.1 TFEU. The FROB that provides the aid is funded with State resources; there is selectivity given that it is only granted to this bank; there is an economic advantage in that the capital injection could not be made by the private sector given its low rate of return and enormous size; the maintenance of competition in the internal market could be affected. After due analysis, the EC concludes that the aid in question is compatible with article 107.3.b) of the TFEU and meets the requirements set out in the Banking Communication: appropriateness, necessity and proportionality of the aid measure. The EC has therefore authorised the measure.

SA. 33103 Second rescue recapitalisation of Catalunya Caixa

Description of the measure: This is an individual aid measure consisting of a capital injection of 1,718 million euros.

Assessment: The measure constitutes State aid as it fulfils the conditions established in article 107.1 TFEU. The FROB that provides the aid is funded with State resources; there is selectivity given that it is only granted to this bank; there is an economic advantage in that the capital injection could not be made by the private sector given its low rate of return and enormous size; the maintenance of competition in the internal market could be affected. After due analysis, the EC concludes that the aid in question is compatible with article 107.3.b) of the TFEU and meets the requirements set out in the Banking Communication: appropriateness, necessity and proportionality of the aid measure. The EC has therefore authorised the measure.

SA.33402 Recapitalisation of the Caja de Ahorros del Mediterráneo Group

Description of the measure: This is an individual aid measure that is divided into two actions: first, a capital injection of 2,800 million euros; second, credit facilities of 3,000 million euros, for a total aid amount of 5,800 million euros.

Assessment: The measure constitutes State aid as it fulfils the conditions established in article 107.1 TFEU. The FROB that provides the aid is funded with State resources; there is selectivity given that it is only granted to this bank; there is an economic advantage in that the capital injection could not be made by the private sector given its low rate of return, its enormous size and the fact that merger negotiations with other banks had failed; the maintenance of competition in the internal market could be affected. After due analysis, the EC concludes that the aid in question is compatible with article 107.3.b) of the TFEU and meets the requirements set out in the Banking Communication: appropriateness, necessity and proportionality of the aid measure. The EC has therefore authorised the measure.

Prolongation of the temporary aid scheme for granting aid in the form of guarantees (State aid N 68/2010)

Description of the measure: In its Decision of 30 March 2010, the EC concluded that the guarantee scheme constitutes State aid within the meaning of article 107.1 TFEU.

Assessment: In view of the continued volatility of financial markets and the uncertainty about the economic outlook, the EC decided that a prolongation until the end of 2011 of the Temporary Community Framework measures targeted to facilitate companies' access to finance was justified in order to assure a gradual return to normal State aid rules while limiting their impact on competition. The Commission observes that the prolongation of the scheme is a response to the continuing difficulties that enterprises in Spain experience in obtaining funding by the banks, and the recovery is still fragile.

Thus the risk persists that the banking system may not be ready to sustain the recovery when credit demands picks up. For these reasons, it has considered it appropriate to approve the prolongation.

SA.32990 Fifth prolongation of the Spanish Guarantee Scheme for credit institutions (State aid case NN 54b/2008)

Description of the measure: this measure is aimed at limiting the risks and re-establishing confidence in the financing mechanisms of credit institutions and fostering lending to businesses and households.

Assessment: In its decision of 23 December 2008, the EC concluded that the guarantee scheme constituted State aid within the meaning of article 107.1 TFEU. The scheme was subsequently modified on various occasions. In this new Decision of 1 June 2011 the EC imposes two new requirements in order to accept its compatibility with Community law: greater market orientation in pricing because they use State guarantees and no further delays in the structural adjustments needed in the case of some of the beneficiaries. For these reasons, and provided the above requirements are met, the EC decided to authorise this prolongation.

SA.34224 Reintroduction of the Spanish guarantee scheme

Description of the measure: on 16 January 2012 Spain notified the EC of a measure involving reintroduction of the Spanish guarantee scheme, with the initial idea of applying it until 30 June 2012. The debt instruments to be guaranteed by the scheme comprise issues of bonds (*bonos*) and debentures (*obligaciones*) admitted to the official secondary markets in Spain with a maturity of between one and five years.

Assessment: The EC considers that the exceptional circumstances that justified the approval of different national guarantee schemes still persist, and are even heightened by the exacerbation of tensions in sovereign debt markets during 2011. It therefore concluded that the measure is compatible with article 107.3.b) TFEU and finally authorised it, prolonging its applicability until 31 December 2012.

SA.33917 Financial aid to Banco de Valencia

Description of the measure: This is an individual aid measure that is divided into two actions: one, a capital injection of up to 1,000 million euros and, two, a liquidity facility of up to 2,000 million euros in favour of Banco de Valencia, a publicly traded bank that primarily operates in eastern Spain. The funds will be released through the FROB.

Assessment: The Commission's decision holds that the rescue measures conform to the guidelines on State aid to credit institutions to overcome the financial crisis. The rescue measures are limited in time and the Kingdom of Spain has committed to

present a restructuring plan for the bank within six months, in which it will have to demonstrate the bank's return to viability, as well as burden-sharing that minimises the distortion of competition.

SA.28685 Reception of digital television in Cantabria

Description of the measure: the measure concerns direct grants which the region of Cantabria gives to end consumers for the technical adaptation of television installations in order to enable them to still receive television after the switchover from analogue to digital television. The scheme is focused on the parts of the population that run the risk of not being able to receive digital television, and the overall amount to be granted is €422,036.

Assessment: the Commission notes that for three of the four calls (*'convocatorias'*), the grants have already been paid out to end consumers. This infringes the standstill obligations of article 108.3 TFEU. However, after applying the balancing test to the aid scheme studied, the Commission reached the conclusion that the scheme is compatible with article 107.3.c) TFEU and therefore authorised it in the end.

SA.21233 Tax regime applicable to certain finance lease agreements also known as the Spanish Tax lease System

Description of the measure: the measure refers to the Spanish Tax Lease System (STL) that is used in the context of transactions between (maritime) shipping companies (buyers) and shipyards (sellers). In relation to the construction and acquisition of sea-going vessels, the Spanish authorities have confirmed that the STL has been used in 273 shipbuilding and acquisition transactions from 1 January 2002 up to 30 June 2010. Buyers are shipping companies from all over Europe and beyond.

In order to obtain the discounted price (after deduction of the STL rebate), a shipping company must accept not to buy the vessel directly from the shipyard, but from an Economic Interest Group incorporated under Spanish law (EIG) set up by a bank. The STL structure is a tax planning construction organised to generate tax benefits at the level of the tax transparent EIG and transfer part of these tax benefits to the shipping company and possibly to other parties involved in the form of a rebate on the price of the vessel, the rest of the benefits being kept by the investors in the EIG.

Assessment: The EC has opened a formal investigation procedure because it concluded that the STL as a whole constitutes State aid within the meaning of article 107.1 TFEU, and that the aid could be granted both to the EIGs that participate in the STL transactions and to their Spanish resident investors, the shipping companies, and possibly to finance leasing companies, banks and other intermediaries involved in the functioning of the system, such as the shipyards. At this stage, the Commission

considers that the STL as a whole constitutes unlawful aid as the system started in 2002 and was not previously approved by the Commission.

Should the assessment of the information received in the formal investigation procedure lead to the conclusion that the scheme is, by way of the necessary prior assent of the tax authorities, limited to Spanish banks or other intermediaries or shipyards, this would constitute a violation of the rules on the free movement of goods and the freedom to provide services. At this stage, the Commission sees no possible justification for such a violation. According to the consistent case law of the Court of Justice, any aid that at the same time violates internal market rules is for that reason alone incompatible with the internal market.

SA.22668 "Ciudad de la Luz" film studios

Description of the measure: «Ciudad de la Luz» is a film studio complex in Alicante. The Valencia Regional Government took its initial decision to invest in the Ciudad de la Luz project on 24 October 2000. Its objective is to carry out the necessary activities for the promotion, organisation, management of the centre, including the construction, management and operation of audiovisual and cinematographic facilities, as well as other leisure and accommodation activities.

The data from the initial 2002 cashflow forecast shows that the total investment required was 204 million euros at 2002 prices. The bulk of this investment was expected to be in construction and the related public works in the years 2005-2007. To date, the investment has been financed in two main ways: equity investments which have now reached 104 million euros, and in April 2005 SPTCV granted Ciudad de la Luz SAU a loan of 95 million euros. The loan was agreed for a 10 year period with fixed interest rate set to the 1 year Euribor rate plus 1% and variable interest rate of 1.25% of profits after tax.

Assessment: The EC had serious doubts that the public involvement in the project conforms to the market economy investor principle. It therefore decided to open a formal investigation procedure which, taking the above considerations into account, has led it to the conclusion that the aid must be declared incompatible with the internal market and must therefore be recovered.

SA.34820 Rescue measures in favour of Bankia/BFA

Description of the facts: Bankia is the banking arm of the BFA group, which was formed from the merger of seven Spanish public sector savings banks (*Cajas*). In 2010 the group received an injection of 4,465 million euros in preference shares subscribed for by FROB, which was authorised by the EC within the framework of Spain's 2010 recapitalisation scheme. With the current decision, the EC has temporarily authorised

two measures: a conversion of those State-owned preference shares into capital and a liquidity guarantee of 19,000 million euros.

The BFA board of directors has asked Spanish authorities for a new capital contribution of 19,000 million euros for BFA, which would in turn inject 12,000 million euros into Bankia. The Spanish authorities are currently studying this request, which is not included in this authorisation.

Assessment: The EC has not raised objections to this rescue measure for Spanish banks, holding the view that it conforms to the guidance on State aid to credit institutions to overcome the financial crisis. The rescue measures are limited in time and the Kingdom of Spain has committed to present a restructuring plan for the bank within six months, in which it will have to demonstrate the bank's return to viability and that the State aid has been limited to a minimum.

III.2.2 Judgments of the Court of Justice of the European Union (CJEU)

CJEU judgment of 15 November 2011 (Gibraltar).

Description of the facts: In 2002 the United Kingdom notified the EC of the proposed reform of corporate tax which the Government of Gibraltar planned to introduce. The reform involved repeal of the former tax system and the establishment of three taxes applicable to all companies in Gibraltar: a registration fee, a payroll tax and a business property occupation tax, with the aggregate liability for the last two taxes capped at 15% of profits.

In 2004 the Commission decided the notified measure constituted a State aid scheme incompatible with the common market that could not be applied, because it favoured offshore companies with no real presence in Gibraltar, and because it was regionally selective since it provides for a system under which companies in Gibraltar are taxed at a lower rate than those in the United Kingdom.

Pursuant to the appeals lodged by the Government of Gibraltar and by the United Kingdom, the Court of First Instance (CFI), in its judgment of 18 December 2008, annulled the Commission's Decision, on finding that the Commission had not followed a correct method of analysis in relation to the material selectivity of the proposed reform. Specifically, it held that the EC had not demonstrated that the new regime was of an exceptional nature with respect to the normal Gibraltar regime, and furthermore found that the reference framework for regional selectivity of the reform corresponded exclusively to limits of the territory of Gibraltar, and not of the United Kingdom.

In response, the EC and the Kingdom of Spain lodged appeals under Article 56 of the Statute of the Court of Justice seeking to have the CFI judgment set aside in the understanding that the Commission Decision it annulled was lawful.

The judgment: The Court of Justice sets aside the Judgment of the CFI which annulled the Commission Decision, and dismissed the appeals for annulment filed by the Government of Gibraltar and the United Kingdom on finding that there was regional selectivity in the measure in question, since it imposed a corporation tax lower than the one applicable in the United Kingdom (which at present has an average rate of 24%) and material selectivity, as it favoured companies without real activity in the colony, and the Commission had not departed in its examination of the selectivity of the tax regime from the Commission *Notice on the application of the State aid rules to measures relating to direct business taxation* (98/C 384/03).

Specifically, the Court of Justice held that the tax advantages to which the offshore companies were entitled were not truly available to all economic agents, without the Commission being obliged to only conclude advantages exist when they entailed an exception from the normal tax regime. The Court of Justice furthermore rejected that the Commission Decision in question represented an exception to its decision precedents, and did not accept that the Decision entailed a violation of the United Kingdom's defence rights.

Gibraltar finally adopted a different tax system that has been in force since 1 January 2011. The Spanish government has filed an appeal against the new tax regime in that territory before the EC[9] arguing that it is incompatible with Community law. Specifically, the new tax regime reduces corporation tax from 22% to 10% —compared with the average of 30% prevailing in Spain— and only applies to revenue generated or from Gibraltar, which in principle benefits companies that register their tax domicile in Gibraltar but conduct their business in Spain.

General Court judgment of 30 November 2011 (Sniace)

Description of the facts: the claimant (Sniace, S.A.) is a Spanish company in the textile chemicals sector that was declared in suspension of payments in March of 1993. The Salary Guaranty Fund (Fogasa), controlled by the Spanish Ministry of Employment and Social Security, paid the company's employees their salaries and compensation. The claimant concluded two refund agreements with the Fund, in 1993 and 1995. In 1996, the claimant concluded with the General Treasury of the Social Security System (TGSS) an agreement to defer payment of its back Social Security contributions. And in 1987 and 1991 the claimant obtained certain mortgage loans from Banco Español de Crédito, S.A. (Banesto).

[9] Income Gibraltar ACT 2010

In response to a complaint, the EC decided to open a formal investigation of the State aid under the previous article 93.2 Treaty establishing the European Community, in relation to State aid measures ostensibly included in the refund agreements and in the payment deferral agreement. At the end of the procedure, the Commission adopted Decision 1999/395/EC of 28 October 1998 on State aid implemented by Spain in favour of Sniace, S.A., located in Torrelavega (Cantabria), in which the aid granted to the claimant by Fogasa and by TGSS were declared unlawful and incompatible with the common market, because the agreements did not respect market conditions, as the interest rates applied in the agreements were below the market rates.

However, later on, in Decision 2001/43, stemming from a review made of Decision 1995/395 as a result of the annulment ordered by the Court of Justice in its judgement of 29 April 1999 Spain/Commission (Tubacex), the Commission held that the interventions in favour of the claimant were not State aid. The Commission concluded that by rescheduling the claimant's debts and applying the legal interest rate, Fogasa and TGSS had tried to exploit to the maximum the possibilities of recovering the whole of the money owed to them, without having to suffer financial losses, and that both public sector bodies, therefore, had acted the same as a hypothetical private creditor would have finding himself in the same situation with respect to the claimant.

Subsequent to an appeal lodged by a competitor, the Court annulled Decision 2001/43 in its judgment of 21 October 2004, Lenzing/Commission (T-36/99, Rec. pg. II-3597), upheld in an appeal by the Court of Justice judgment of 22 November 2007, Spain/Lenzing (C-525/04 P, Rec. pg. I). After a new review was conducted in the execution phase of that judgment of Sniace's debt deferral agreements with Fogasa and the TGSS, the Commission, in Decision 2009/612/EC of 10 March 2009 on measure C 5/2000 (ex NN 118/97) implemented by Spain in favour of Sniace, S.A., located in Torrelavega, Cantabria, and amending Decision 1999/395 (OJ L 210, pg. 4), held that those agreements involved State aid incompatible with the common market within the meaning of the former article 87.1 TEC.

The judgment: the claim filed by Sniace and resolved upon in this judgment invokes two grounds for annulment: manifest insufficiently fulfilment of the duty to reason challenged Decision and absence of economic advantages deriving from the measures adopted by Fogasa and the TGSS. Both grounds are rejected in the judgment discussed here.

IV. ACTIONS OF THE CNC IN RELATION TO PUBLIC AID: 2011 AND 2012

Both the Spanish Competition Act 15/2007 of 3 July 2007 (LDC) and Royal Decree 261/2008 of 22 February 2008 which approved the Competition Regulations strengthen the role of the CNC and of the competition authorities of the Autonomous Communities in this respect. The regulations on public aid are set out in article 11 of the Competition Act and in articles 7 and 8 of the Regulations.

There are two aspects to the CNC's actions in relation to aid: on the one hand, the CNC prepares public reports on intervention measures that present elements which determine the presence of public aid; on the other hand, it makes observations addressed to government bodies which request it to do so, whether as part of the process of assessing draft rules and regulations coordinated by the competent State Secretariat of the Economy of the Ministry of Economy and Competitiveness, or through submission of observations on aid measures that are going to be referred to the EC for the appropriate notification.

IV.1 Public reports

Throughout the last two years, the CNC has continued deepening its use of the tools that the Competition Act makes available to it in relation to State aid. First, in connection with the analysis and monitoring of State aid, without prejudice to the functions of the EC, the CNC has issued various public reports in which it analyses regulatory measures that could contain elements of State aid. A brief summary of those reports follows in the accompanying chart.

Chart 17: CNC reports on State aid matters, 2011-2012

Name of report	Date approved	Subject matter
REPORT ART. 25.a) LDC 15/2007 on the 'baby-cheque' aid of the Government of the Principality of Asturias set out in the Draft Resolution of the Department of Social Welfare and Equality of the Government of Asturias establishing the basic regulatory terms for granting economic aid for childbirths and adoption.	23/11/2011	The inclusion in the basic regulatory terms of this aid of a clause 12 requiring that in order to be benefit from the aid, the related purchases must be made within that region, constitutes a restraint of competition that finds no justification in its necessity or in its proportionality. In addition, it may contribute to consumers not benefiting from the aid to the full extent they could. And it may be contrary to recent case-law on grants of an identical nature, given its discriminatory approach. The measure was eventually not approved.
IPN 70/12 art. 26.1.e) LDC 15/2007 on aid for restructuring the cotton ginning industry	25/04/2012	The measure contained in the Sole Additional Provision of Royal Decree 169/2010 of 19 February 2010 implies for ginning companies who have not carried out ginning operations in 3 of the 4 marketing years from 2007 to 2010 an obstacle to their becoming a collaborating entity with the granting Administration in relation to managing aid for the cotton sector. This differentiated treatment implies a restriction of competition between cotton ginning companies that is not justified in its necessity or proportionality. The Ministry of Agriculture, Food and

		Environment is requested to eliminate the restriction on competition. As at the publication date of this report, the aforesaid Provision has been amended, largely eliminating the impact of said requirement.

Source: prepared in house from information contained on the CNC website.

Report art. 25 LDC Principality of Asturias 'baby-cheque' aid

The purpose of the report was to analyse the 12th provision of the Resolution, which stipulated that *"The aid must be used to acquire goods purchased from any merchant in the territory of the Principality of Asturias"*. The analysis begins with the public interest objectives set out in the basic regulatory terms, specifically, the objective of assisting parents who reside Asturias in connection with the birth or adoption of a child and of reactivating consumer spending in the Principality. The fact that pursuant to those objectives the regulatory provision cited above requires that the subsidised products must be acquired from merchants located in the territory of the Principality of Asturias merits a number of observations regarding its implications for competition.

Article 8.2 of the General Subsidies Act 38/2003 of 17 November 2003 requires a public authority that announces a subsidy affecting a hypothetical market to correct any defects that are clearly identified and to ensure that any distortion of that market caused by the measure is kept to a minimum. Toward this end it is essential that the objective pursued be properly identified. As indicated above, the basic terms pursue two objectives: to give incentives for families to have children and to promote consumer spending at commercial outlets in the region. A separate question is whether those objectives respect the free play of competition, so that the positive effect sought in those objectives does not generate significant, disproportionate and unjustified harm to the principle of free competition.

In this regard, it does not seem that the two public interest objectives can be regarded as equal in terms of their importance and implications for competition. Respect for free competition as a manifestation of the principle of equality and non-discrimination between different merchants is a constitutional mandate addressed to public authorities by article 38 of the Spanish Constitution of 1978, which charges those authorities with guaranteeing and protecting that principle. As systematically established by the Constitutional Court of Spain, regulatory diversifications conform to the equality principle when they cannot be discerned to have an aim contrary to the Constitution and when, moreover, the rules that give rise to differences are structured in a coherent manner, in terms of reasonable proportionality, with the aim pursued.

The report concludes that inclusion of the aforesaid basic provision constitutes a restriction of competition that finds no justification in its necessity or in its proportionality. In addition, it may contribute to consumers not benefiting from the aid to the full extent

they could. And lastly, it may run afoul of recent case-law on subsidies of an identical nature, in view of its discriminatory nature. The measure was eventually not approved.

Report art. 26 LDC Regulatory limitations on cotton ginners' eligibility to participate as collaborating entities in the aid scheme for cotton producers

The purpose of the report is to analyse the Sole Additional Provision (SAP) of Royal Decree 169/2010 of 19 February 2010, which established the basic regulatory terms for the aid within the framework of the national programme to restructure the cotton sector. Said provisions stipulated that: *"To preserve the balance attained between the cotton production and processing phases by the restructuring, and establish the conditions that make possible the viability of operators who remain active after the restructuring, it is necessary to regulate the participation of ginning plants in the cotton aid scheme during the time in which the national restructuring programme is in effect, limiting participation to those ginning plants affected by the restructuring that have ginned during at least three of the four marketing years between 2006/07 and 2009/10".*

The SAP provides that only certain ginners can participate in the scheme, that is, for a cotton producer to qualify for the *cotton aid* it must carry out the ginning phase in one of the ginners that the SAP allows to participate in the programme. Those ginners would be, specifically, the plants affected by the restructuring that were eligible for the dismantling aid but opted to remain active and, in addition, carried out ginning operations in at least three of the four marketing years between 2006/07 and 2009/10. Eligibility is thus subject to a dual requirement: first, the plants must have been "affected by the restructuring", that is, those which the national restructuring plan envisaged within the dismantling process and that were thus eligible for the dismantling aid scheme. There could be other plants which, because they did not meet the eligibility requirements for the plan, did not qualify for the dismantling aid. Second, of the plants that do meet this requirement, only those that ginned during the stipulated time frame qualify to be collaborating entities.

The report concludes that the measure implies that ginners who do not meet the requirements to benefit from the dismantling aid offered under the National Cotton Restructuring Plan, and those who meet those requirements but have not had a given frequency of activity in the preceding years, are prevented from becoming a collaborating entity of the granting authority in relation to processing the aid to the cotton industry.

This difference in treatment restricts competition between ginning companies, with possible effects on the producers and suppliers of the ginners and on the customers of the latter. The restriction is not justified by its necessity (as the sector has already gone through significant supplyside downsizing as a result of other measures) or its proportionality (since to achieve a minimal additional reduction of supply, the measure

implies intervention in the post-restructuring market and limits the capacity of the established operators to compete and of new entrants to enter the market), and the negative effects on the market outweigh the hypothetically positive effects.

The Ministry promoting the measure is requested to take the necessary actions to repeal the SAP, so that the requirements to be a collaborating entity of the administration for processing aid to the sector are focused on elements that do not discriminate between the active ginners and do not introduce unnecessary supply side rigidities, in line with the provisions of articles 14 to 17 of Royal Decree 202/2012 of 23 January 2012 (and hence after said SAP) on post-2012 application of direct payments to agriculture and livestock breeding. As at the publication date of this report, the aforesaid Provision has been amended, largely eliminating the impact of said requirement.

IV.2 Actions within the framework of the internal procedures of public authorities

As we have already said, the CNC issues its observations on proposed rules and regulations on State aid by means of internal inter-agency actions.

The first type of action consists of the CNC's Competition Advocacy Division preparing comments on proposals for rules and regulations which are sent to the State Secretariat for the Economy and Support for Business (SEEAE) of the Ministry of Economy and Competitiveness so that, where appropriate, they are taken into account in any observations that the Ministry makes on measures that may qualify as State aid, whether the aid is granted by the Ministry itself or by other ministerial departments.

The second type of actions occurs within the State aid group of the Inter-Ministerial Committee on EU Affairs in relation to aid that is the subject of notification to the European Commission. This type of aid is notified to the CNC in accordance with the provisions of article 11.3 of the Competition Act. The notification is made by the Spanish Ministry of Foreign Affairs and Cooperation. Shown in Chart 18 is a statistical breakdown of the two types of action:

Requesting authority	No. of reports requested	Reports with observations
State Sec. Econ & Support for Bus. of Min. Econ. & Fin.	59	32
Min. of For. Affairs and Coop.(Inter-Min. Committee)	40	3

Source: prepared in house from the database of the CNC's Competition Advocacy Division, through June 2012.