



**G-2021-01 RECOMMENDATIONS TO
THE PUBLIC AUTHORITIES FOR AN
INTERVENTION IN FAVOR OF
MARKET COMPETITION AND AN
INCLUSIVE ECONOMIC RECOVERY**

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1. PURPOSE OF THE GUIDELINES

The Covid-19 pandemic has caused a strong contraction of the global economy, with a particularly significant impact on the Spanish economy. The economic effects of the crisis have been felt throughout the world, particularly affecting the most disadvantaged groups.

The public intervention measures taken thus far, in Spain and in most developed countries, have sought to contain the damage caused by the twofold crisis — health and economic — while paving the way for a rapid, inclusive and sustainable economic recovery.

The efficient use of public intervention instruments is a key tool. To achieve a rapid, inclusive and sustainable economic recovery, we need to make the most of the resources available to us.

Competition policy is one of the public intervention measures that are required in order to promote a lasting economic recovery. Raising the levels of competition in markets where it is possible to do so benefits society. These benefits materialise directly for the public in the form of lower prices, higher quality and greater variety of available products. For the economy as a whole, given the long-term dynamic effects of competition, this stimulates investment, innovation, competitiveness and productivity, creating jobs and entrepreneurship opportunities, which in the end also ultimately benefits the public¹.

For this reason, the promotion of competition is an appropriate policy for minimising the impact of the economic crisis on the most vulnerable groups. Effective market competition favours access to the most basic goods and services (pharmaceutical or health products, food, supplies, transport, housing, etc.) at the lowest possible cost.

Lastly, competition is a key policy for achieving the goals of the twofold transition, ecological and digital, that will create a stronger economy in the future. In a competitive environment, companies have greater incentives and opportunities to be greener and more digital so as to attract consumers and to improve their own competitiveness.

For these benefits to materialise, public intervention measures must, whenever possible, also be conducive to market competition. In any event, it is important that the decisions of the public authorities should be based on the principles of efficient economic regulation (necessity and proportionality). These decisions

¹ Watch "[The benefits of competition for consumers: questions and answers on competition and regulation](#)"(CNMC, 2021).

apply to all kinds of public interventions affecting market competition and, in general, to the access to and conducting of economic activities.

Every economic crisis represents an important challenge for society, but also an opportunity to modernise economic structures and boost their efficiency and to adapt the forms of intervention. Likewise, the introduction of a cohesive package of reforms is a requirement of the European Union's Recovery and Resilience Facility, which aims to ensure that recovery funds are put to good use.

So as to promote effective market competition and bring about a solid, inclusive and sustainable economic recovery, the CNMC has made available to all public authorities three sets of 10 recommendations (called "decalogues") on the areas where public intervention can have the greatest impact on competition: market regulation, public support and public procurement. The CNMC's competition advocacy functions focus on these three areas, based on the agency's cumulative experience, which it is sharing with all public authorities.

These decalogues have been drawn up in accordance with the commitments made by the CNMC in its [2021-22 Action Plan](#) (action 132).

2. A DECALOGUE OF RECOMMENDATIONS FOR MORE EFFICIENT REGULATION

The pandemic has brought about sharp economic contraction, led to the review of numerous regulations and accelerated the digitalisation of the economy. All of this, in addition, has coincided with the transition towards a greener and more sustainable economy. Against this background, it is imperative to promote efficient regulation in order to achieve a robust, sustainable and inclusive economic recovery.

For regulation to be efficient, the regulatory frameworks that govern the access to and conducting of economic activities must be based on principles of good economic regulation. Such principles require that rules should be necessary and proportionate, in order to attain the desired public interest, and the introduction of barriers to competition should be avoided. But, in addition, regulations must be planned and they must be transparent so as to promote predictability and legal certainty along with SMEs' and independent contractors' ability to compete in the market. They must be subject to *ex ante* and *ex post* evaluations, and it must be possible to quickly adapt them to new circumstances and needs. Protectionist measures or measures that violate competitive neutrality must be avoided when such initiatives do not respect the principles of good regulation.

Furthermore, the introduction of a cohesive reform package is a requirement of the EU's Recovery and Resilience Facility. This requirement should be utilised to review obsolete regulations and unnecessary or disproportionate barriers to competition and to draft better regulations.

For these reasons, the CNMC has decided to draw up a decalogue of principles of good regulation to be used as a practical, convenient tool by public authorities with the intention of promoting economic growth. These recommendations are also valid for times less exceptional than now, and all of the recommendations set forth in this decalogue have in fact been regularly put forth by the CNMC in its interventions.

2.1. Promoting a pro-competition market regulation

- ✓ Avoiding unjustified barriers to entry and to the exercise of economic activities eliminates privileges for incumbent enterprises, intensifies competition and encourages entrepreneurship and innovation.
- ✓ Regulation in favour of competition rewards enterprises mainly based on their performance, stimulating higher levels of investment and improvements to productivity and promoting higher-quality jobs.

Laws and other rules that regulate the markets can serve as barriers to access and to the exercise of economic activities. Such regulations are, at times, necessary and must be in keeping with the principles of efficient economic regulation.

Barriers to access make it difficult for new companies to enter a market or a market segment. According to the OECD (2019), the most common barriers are:

- Exclusive rights to provide goods or services.
- Licences, authorisations and other formalities for entering a market.
- Prohibitions on certain types of enterprises operating in a market.
- Requirements that entail costs for entering or exiting a market.
- Geographic limitations on companies that want to supply products.

Barriers to exercise limit companies' ability to compete effectively. Some of the most common of these barriers are (OECD, 2019):

- Limitations on the ability to set product prices.
- Limitations on the ability to advertise or market products.
- Quality standards that benefit certain players.
- Limitations on suppliers' and clients' freedom of choice.
- Limitations on consumers' ability to change suppliers, and the costs involved in such changes.
- Difficulties for obtaining relevant information for consumption decisions.

Barriers to entry and to the exercise of economic activities benefit already established companies (incumbents), which face lower levels of competition. Companies that do not perceive new sources of actual or potential competition tend to relax, to be less efficient and innovative and to benefit from higher margins, to the detriment of consumers.

2.2. Applying the necessity and proportionality principles

- ✓ Competition should be restricted only to achieve objectives of general interest that the market cannot achieve on its own.
- ✓ Actions must be proportional and must not cause more damage than that is intended to be avoided.
- ✓ Among the different measures available, it should be chosen the least distortive of competition.

Competition and good regulation are not incompatible with the attainment of social, health, environmental or other objectives. Indeed, these goals complement efficient regulation (CNMC, 2020).

When there is a market failure or there are objectives of general interest that the market cannot attain on its own, appropriate regulation can help to reproduce the optimal results of a competitive market or meet objectives of general interest.

Applying the principles of good regulation requires stating the grounds for all options and allows the best decision to be taken, with minimum costs for competition, among all available choices. To be efficient, public intervention must be governed by two principles of good economic regulation:

- **Necessity:** ensuring that only measures strictly necessary to attain the objective are adopted, with a clear rationale based on a reason of general interest.
- **Proportionality:** not causing more harm than that is to be avoided, opting, from among the different choices that may lead to attaining the objective, for measures that are the most appropriate and less distortive of competition..

These principles are laid down in several key elements of Spanish law, including the [Ley de Garantía para la Unidad de Mercado](#) ("Law to Guarantee Market Unity") (Article 5), the [Ley de Régimen Jurídico del Sector Público](#) ("Law on the Legal Rules governing the Public Sector") (Article 4) and [the Ley del Procedimiento Administrativo Común de las Administraciones Públicas](#) ("Law of the Common Administrative Procedure of the Public Administration") (Article 129). When a rule invokes these principles, it must clearly give the grounds for doing so.

In addition, the European Commission's "[Adjusted Commission Work Programme 2020](#)" (page 2) explicitly mentions the importance of all its initiatives abiding by these regulatory principles and considers that these criteria should continue to constitute the lynchpin of regulatory practice (CE, 2020).

2.3. Developing strategic regulatory review planning

- ✓ Strategic planning for regulatory review can serve as an effective tool for systematically identifying and eliminating anti-competitive, inefficient or outdated regulations, as well as unnecessary or disproportionate restrictions on creating businesses and exercising economic activity.
- ✓ Doing so is consistent with introducing a cohesive package of reforms as called for in the EU's Recovery and Resilience Facility.

The most appropriate regulation often depends on the context and the time at which in which it is produced. These circumstances can change and make a regulation obsolete, and, as soon as this is the case, unnecessary. For this reason, public intervention in the markets must be permanently reviewed in order for it to adapt to always-changing circumstances.

Strategic planning for regulatory review, focused on preserving and promoting effective competition and the proper functioning of the various markets and economic sectors, can help identify and eliminate the unnecessary, disproportionate or obsolete anticompetitive restrictions that are contained in regulations and that hamper achieving a prosperous, sustainable and inclusive economy. Such planning should particularly focus on sectors that may be fundamental due to their role in the economy, their carry-over effects as suppliers of intermediate inputs or their importance for consumers.

Preparing a strategic regulatory review plan is consistent with the need to introduce a cohesive package of reforms and investments, as set forth in Arts. 17 and 18 of [Regulation \(EU\) 2021/241 establishing the Recovery and Resilience Facility](#), in order to access most of the funds included in the *NextGenerationEU* instrument, which aims to promote recovery and transform the economy and, therefore, its modernisation and sustainability.

2.4. Evaluating the impact of a regulation before adopting it

- ✓ Evaluating the effects of a regulation makes it possible to anticipate its possible effects and enhance its effectiveness in achieving the intended purposes.
- ✓ A correct ex ante evaluation requires establishing the objectives to be attained at the outset of the designing of the regulation.

The appropriateness of an intervention is measured not by the ends it seeks, but by the effects it will have in practice. The CNMC has traditionally referred to this idea, emphasising that a regulation must take into account the extent to which it will be effective (CNC, 2008, págs. 32-33). The objectives pursued in the first phases of proposing a new regulation must be defined in order for the design of the regulation to be logical and appropriate.

The Regulatory Impact Analysis Report (MAIN)² is a key document for promoting reflection on the quality and efficiency of regulations. Properly identifying the potential harmful effects of a regulation on competition is essential in order to properly apply the principles of good regulation.

Leading international organisations in the area of [smart regulation](#) point out that from the outset the proposed regulation must set forth how it will effectively be complied with ([OECD, 2005](#)). To this end, it must consider what agents will be affected and what will be their incentives or expected responses. In addition, the impact on other institutions should be assessed and the consistency of the various regulatory approaches should be ensured, along with the authorities' ability to apply, develop and monitor their compliance, [as noted by the OECD](#) (2020a, págs. 1-3) .

The importance of conducting *ex ante* impact evaluations is also considered at EU-level. For example, the 2016 [Interinstitutional Agreement](#) signed by the European Parliament, the Council and the European Commission states: "*Impact assessments should cover the existence, scale and consequences of a problem and the question whether or not Union action is needed. They should map out alternative solutions and, where possible, potential short and long-term costs and benefits, assessing the economic, environmental and social impacts in an integrated and balanced way and using both qualitative and quantitative analyses*".

² Regulated, within the scope of the General State Administration, by Royal Decree 931/2017, of October 27.

2.5. Analysing the impact of already-adopted regulations

- ✓ The regulatory impact on agents and markets must be assessed *ex post*, and systematically.
- ✓ This allows for an orderly reflection on whether the objectives have been achieved and whether they can be attained more efficiently.

Regulations, even those that are thought through the most and designed the best, can sometimes be ineffective or have unwanted effects. These problems can result from the uncertainty faced by regulators, from the complexity of our economies and from changing circumstances. It is therefore necessary to carry out a systematic, *ex post* analysis of the impact of regulations in force.

The importance of *ex post* impact analysis has been noted by international institutions that are the leading authorities in good regulation. For example, the OECD (2012) recommends that public authorities carry out systematic *ex post* assessments of relevant regulations to evaluate their fulfilment of the objectives and to ensure that they are up-to-date as well as efficient, effective and consistent.

Ex post assessments must use cost-benefit methods and qualitative and quantitative analyses that make it possible to rigorously determine the economic, social and environmental as well as any other type of regulatory impacts. It is recommended that such assessments be supported by prior work on *ex ante* impact assessment, and that coherence between the two analyses is ensured — in particular with regard to the objectives of the regulation and the efficiency and effectiveness of the measures adopted to achieve them. The *ex ante* and the *ex post* assessments are, therefore, complementary, and the design of one type of assessment must be consistent with the design of the other.

A rigorous *ex post* assessment will serve as an essential reference point to review and adjust an existing regulation in order to improve its efficiency and effectiveness, but also to obtain valuable information with which to improve the design of other regulations.

2.6. Promoting comprehensible, accessible, transparent and consistent regulations

- ✓ To maximise compliance with a regulation, the addressees must understand it and consider it reasonable and justified.
- ✓ The regulation should be based on available empirical evidence, taking into account the opinions of independent experts and an analysis of international experiences and best practices.
- ✓ To the extent possible, there should be a hearing process and public consultations for those affected by the regulation.

The drafting of a regulation in a manner that is comprehensible and accessible for the agents whom it is intended to apply to will facilitate a maximum degree of compliance in practice. If this is not done, [the regulation will not be effective \(OECD, 2005\)](#). Sometimes the degree to which a regulation is understood, and, therefore, the degree of compliance with it, respond to the predictability and consistency of the regulatory framework. This idea is also expressed in the [Guía con recomendaciones a las Administraciones Públicas](#) (CNC, 2008, pág. 34) (Guidelines on recommendations for public authorities). If regulatory interventions are predictable, agents will have a longer timeframe to understand and adapt to it, ensuring greater effective compliance.

The degree of compliance with a regulation also depends on the extent to which the agents consider it to be well reasoned and technically justified. Therefore, international organisations ([OECD, 2020a](#)) recommend relying on the opinions of independent experts from all affected areas, so that regulations will be based on available empirical and scientific evidence. Knowledge based on other international experiences should also be utilised, to encourage best practices.

Likewise it is desirable, to the maximum extent practicable, to have public hearing, information periods and public consultations. Such public consultation processes are viewed positively by international organisations ([OECD, 2006](#)), for various reasons. First, they ensure higher standards of transparency and accountability ([CNC, 2008, pp. 33-34](#)). Second, they can help make regulation more predictable by increasing information (particularly for those affected by a regulatory intervention) prior to the adoption of a definitive solution. Lastly, they allow a measure to be enhanced before its final approval, and the opinions of experts and stakeholders and changes or alternatives to be considered.

2.7. Maintaining competitive neutrality

- ✓ The principle of competitive neutrality means that the regulation does not unduly benefit any player on subjective grounds.
- ✓ When enterprises base their success on regulatory advantages, they devote part of their efforts to reaping such advantages, rather than to improving their products and services for consumers.

Merit-based competition encourages companies to focus on launching offers with more competitive prices, better qualities or more novel products, and seeks to ensure that their success will depend on the consumer's decisions, not the regulator's. To bring about merit-based competition, public powers must maintain regulations that respect competitive neutrality. This implies avoiding the undue existence of companies that benefit from or are protected by regulations, to the detriment of other companies and, also, of consumers.

In general, regulations can undermine competitive neutrality through provisions that grant undue privileges, advantages or benefits:

- To incumbent companies versus new entrants.
- To companies that adopt a certain legal form.
- To companies that have a certain nationality or residence.
- To public companies rather than private companies (or vice versa).
- To companies that use a given technology³.

When competitive neutrality is not maintained, successful companies are not necessarily those that offer better products and services to consumers, but rather those that gain privileges from regulation. In this situation, companies will devote less effort to satisfying consumers and more to securing or maintaining regulations that give them their privileged position, bringing about a loss of efficiency, economic activity and employment, in addition to more expensive, lower-quality products.

Unless there are necessity and proportionality reasons that justified an exception to the general principle, competitive neutrality must be maintained in the regulation, in line with the recommendations of international organisations — for instance, [the OECD's 2021 recommendation](#) (more details can be found [on the OECD website on competitive neutrality](#)).

³ This is without prejudice to the fact that public policies may establish objectives in terms of the environment or the quality of services, among others, the guarantee of which implies a higher valuation of some technologies compared to others.

2.8. Avoiding protectionism against external competition

- ✓ Limiting the entry of goods, services and enterprises from other regions or countries raises consumers' costs for accessing those goods and services.
- ✓ Protecting local enterprises by restricting competition from non-local enterprises reduces the potential competitiveness of the formers and can provoke a similar response, limiting domestic enterprises' ability to compete in other markets.
- ✓ Preserving international cooperation is essential for ensuring an optimal response to current challenges, which are increasingly global.

The CNMC has highlighted in many occasions the benefits of international trade for competition, efficiency and, ultimately, general well-being. Trade liberalisation has had very positive effects on the Spanish economy in recent decades ([CNMC, 2017](#)).

To accelerate the recovery, opening up to international markets is more necessary than ever (Marcos, 2020). Adopting protectionist measures may further aggravate the situation of global crisis (Bown, 2020). It is often overlooked that a country applying protectionist measures may be the country that is harmed the most, and not only because of the risk of reprisals from other countries. This is without prejudice to control on foreign direct investments as provided for in European Union law and domestic legislation.

First, restricting exports of certain basic goods in order to increase their local availability reduces in practice manufacturers' incentives to increase production (Baldwin & Evenett, 2020); hence, this can be a counterproductive measure. In addition, it must not be forgotten that the world today is characterised by complex value chains, in which the components of a given product are manufactured in various countries and assembled in others. Therefore, multiple companies and nations take part in producing a given good. Trade restrictions distort these production chains and can end up harming the country that imposes them by hampering the production flows and value chains within its own geographical borders (Hoekman, Fiorini, & Yildirim, 2020).

For this reason, international organisations ([OECD, 2020a](#)) recommend striving for further global market opening. Therefore, common interest must be considered, in order to maintain cooperation and provide a global response to increasingly global challenges, and to ensure that imports of goods, many of them essential, do not face barriers to entry in the domestic market (Evenett & Winters, 2020; [OECD, 2020a](#)).

2.9. Encouraging pro-competitive regulations that promote the ecological and digital transition

- ✓ Digitalisation needs pro-competitive and effective regulations to guarantee taking advantage of the opportunities it afforded.
- ✓ Digital tools make it possible to increase administrative efficiency by saving unnecessary costs for enterprises, citizens and even own public administration.
- ✓ The transition to a green economy requires efficient regulations that will promote new economic activities and foster sustainability.

Competition offers enormous capacities to support and promote the twofold transition — ecological and digital — that our economy needs. A more competitive environment encourages companies to adopt “green” strategies to attract consumers ([CNMC, 2021](#)) and to accelerate their digital transition in order to be more efficient and productive and provide services that are more highly valued by consumers.

The digital and ecological transformation of the economy, which has been accelerated by the pandemic, also has positive effects and represents an important opportunity for market competition. By lowering barriers to market entry, digitalisation increases efficiency and consumers' choice, as the CNMC has noted with respect to markets such as [urban transport](#), [financial services](#) or [Internet advertising](#). In addition, the promotion of environmentally clean technologies means that new forms of competition and competitors appear in traditional markets.

Digitalisation and the green economy are also an opportunity to improve regulation. The use of digital tools can lower costs for companies and citizens in their relationship with government agencies, in particular in administrative procedures relating to creating enterprises or to regulatory compliance. For example, in its [study on fintech](#), the CNMC referred to the possibilities of the “*regtech*” phenomenon in terms of using new technologies to streamline and automate the supervision of compliance with financial regulation (CNMC, 2018).

Lastly, the opportunities afforded by digitalisation and green transformation should give rise to a review of outdated regulations and barriers to the exercise of certain activities.

2.10. Having the support and advice of competition authorities

- ✓ It should be taken advantage of the technical capacity of regulatory and competition authorities such as the CNMC, legitimised as a consultative body to ensure that regulations are appropriate for achieving their objectives.
- ✓ The CNMC is ready to help and is committed to provide a quick response when the situation requires it.

To ensure that regulatory interventions are consistent and as effective as possible, a good practice is to consult the regulatory and competition authorities, such as the CNMC, on matters relating to the maintenance of effective competition and the good functioning of economic sectors and the markets. According to [Article 5.2 of Law 3/2013, of June 4, creating the National Markets and Competition Commission](#), the CNMC may be consulted by (among others) the public administration, the legislative chambers and the different levels of the central, autonomous and local governments.

The CNMC is ready to offer support ([CNC, 2008](#), pg. 57) and is committed to give a quick response when the situation requires it. Seeking for the CNMC advice can contribute to the improvement of regulations in various ways. On the one hand, it can enrich the measures analysed with regard to good regulation principles, ensuring that necessity and proportionality of the regulation and its effects have been assessed, taking into account all available alternatives and opting for minimum distortion. On the other hand, it enhances the standards of transparency and accountability, since the CNMC's actions receive maximum exposure (in accordance with [Article 37 of Law 3/2013, of June 4, creating the National Markets and Competition Commission](#)). All of this contributes to increase the effectiveness of a regulation, both by an improvement in its design, as by a greater understanding of it.

3. A DECALOGUE OF RECOMMENDATIONS FOR IMPROVING THE EFFECTIVENESS OF PUBLIC AID

Freedom of enterprise and unrestricted competition among market participants makes it possible, ideally, to efficiently allocate resources. However, there are also situations in which the market does not work properly. In the event of a market failure, some variables cannot be solved without government intervention. While on other occasions, market intervention may be necessary to achieve more equitable results or allocations, or to achieve objectives of general interest relating to the environment, security or public health.

Public aid, if properly designed, has enormous potential to contribute to a faster and sustainable economic recovery, and also to mitigate the harmful effects of the economic and health crisis, especially on the most disadvantaged and vulnerable collectives, such as small and medium-sized enterprises, the self-employed and workers.

The size, duration, swiftness and unexpected nature of the pandemic and its economic effects justify the unprecedented mobilisation of funds, which can serve as the cornerstone of the economic recovery.

However, public aid must be implemented in a manner that avoids undermining the efficient functioning of markets or introducing distortions and inefficiencies that jeopardise free competition and general economic well-being.

European funds linked to the European recovery instrument known as “*NextGenerationEU*”, implemented through the Plan for the Recovery, Transformation and Resilience of the Spanish Economy, offers an important opportunity to achieve these objectives, provided that the funds are efficiently managed so as to take advantage of opportunities for a rapid recovery.

To this end, planning and evaluation, both prior and results-based, must be reinforced. In addition, the funds must be used to commit to a strategy aimed at achieving a true digital and environmental transformation that will promote competition and reinforce business competitiveness.

3.1. Identifying the objective pursued and the possible public policy alternatives

- ✓ Once the public interest objective has been clearly identified, a cost-benefit analysis of the available public policy instruments must be carried out.
- ✓ An overall balancing test of the public support must be conducted, which assess the positive and negative aspects of granting it.

Administrations must be aware of the different public policy instruments available for intervening in the markets (regulation, fiscal instruments, public procurement, public investment, etc.). They must accept that there are no pre-established rules to solve problems and that, therefore, a case-by-case analysis must inform all decisions adopted by public authorities.

Following a clear definition of the objective pursued with public intervention, public authorities must carry out a cost-benefit analysis of the practical application of each decision, and leave a documentary record of the arguments in favour of each potential intervention.

Sometimes it may be advisable to use several instruments together. This requires, in addition to joint planning of actions, good internal and external coordination of the actions carried out by the various competent administrations.

The use of State aids as instrument of intervention must begin with a *balancing test* of the measure, to evaluate the positive and negative aspects of granting it, including the suitability of the instrument used, its incentive effect, and its necessity and proportionality.

3.2. Promoting transparency and the concurrence of enterprises in access to public aid, especially for SMEs

- ✓ Transparency allows a larger number of players to react to calls for bids, especially SMEs.
- ✓ There must be a commitment to proactive transparency mechanisms.

Transparency and publicity make it easier for operators to learn of and understand calls for support and to compete for it. Ensuring high levels of transparency encourages a larger number of enterprises, especially SMEs, to respond to calls for public aid, which can increase efficiency in allocating funds.

Given the significant boost to be brought about by the Recovery Plan funds and the expectation that large volumes of funds will be channelled in short order, high levels of transparency should be promoted. In addition, mechanisms should be sought to ensure that information in fact reaches all relevant agents, especially those such as SMEs that are less able to systematically follow the information on possible calls for public aid.

Therefore, it is necessary to comply with the legal obligation to disclose the rules and calls for applications for public aid in official gazettes, but also to:

- **Establish proactive communication mechanisms** that make it easier to access information on calls for public aid.
- **Establish advisory and orientation measures** that make it easier for enterprises to comply, and evidence compliance, with relevant requirements.
- **Provide a sufficient deadlines in the calls** as to allow enterprises that have fewer resources or are less familiar with public aid granting procedures to prepare the documentation required..

In addition, other measures can encourage participation by enterprises that individually have less capacity to take part, such as promoting the grouping together of operators for the submitting applications for public aid with respect to activities related to the Recovery Plan.

3.3. Promoting the incentive effect of the public aid

- ✓ The public aid must give rise to a change in the beneficiary's behaviour such that the scope of the project is broadened considerably or its amount or the pace of its execution increases substantially.
- ✓ It must be ensured that structural modifications are maintained permanently or, at least, for a reasonable period of time.
- ✓

It is important to ensure that the public aid has a clear incentive effect on beneficiaries by directly bringing about a change in business behaviour in line with the intervention's public interest objectives (for example, through truly innovative projects).

Consequently, new production methods must be implemented or existing ones must be improved. Such improvements can refer to: a substantial broadening of the scope of the project or activity, a substantial increase in the total amount disbursed by the beneficiary in the subsidised project or activity or a substantial acceleration in the pace of project's execution or activity.

In addition, there must be a guarantee that these structural modifications are maintained permanently or, at least, for a reasonable period of time. Incentives are to be provided such that any new needed adjustment will be carried out by introducing new measures in line with the digital or environmental challenges delimited by the strategic public aid plan.

3.4. Ensuring competitive neutrality while avoiding protectionist measures

- ✓ Access to public aid must be ruled by objective, non-discriminatory conditions.
- ✓ Economic compensation attached to public service obligations (PSOs) must be sufficient and proportionate to the value of the services actually performed.

A regulatory framework is needed to ensure objective, transparent and non-discriminatory conditions of competition for all economic operators, regardless of their nationality, nature (public or private) or legal form, in line with the recommendations of international organisations such as those made in 2021 by the OECD (more details can be found [on the OECD's webpage on competitive neutrality](#)).

Steps should be taken to avoid giving undue economic advantages to operators, either through public aid or through other public policy instruments such as regulatory or administrative decisions that can, *de jure or de facto*, unduly strengthen their position in the market.

When an operator is subject to PSOs or similar constraints, its economic compensation must be appropriate and proportionate to the value of the services that it in fact performs.

To the maximum extent practicable and unless overriding public policy objectives require otherwise, it should be avoided to give priority to the granting of public aid to those operators registered in the geographic area where the granting Agency is located. When it is essential to establish a territorial condition for receiving public aid, it is preferable to establish, if possible, criteria based on the exercise of economic activities rather than establishment criteria.

3.5. Reinforcing the recovery of efficient enterprises

- ✓ It is necessary to be demanding in terms of the solvency profile of the enterprises that are going to receive the public aid.
- ✓ Instruments that incentivise recipient enterprises to recover their activity, such as loans or guarantees and other conditional instruments, should preferably be used.

To facilitate governments' response to the pandemic, the EU has established more flexible and agile mechanisms to process public aid, in particular, the Temporary Framework⁴. As a general rule, these mechanisms cannot be used to grant public aid to undertakings in difficulty before the crisis.

European regulations allow undertakings in difficulty to receive public aid under exceptional circumstances and provided it is designed cautiously to avoid negative consequences. In the words of the European Commission (2014), "*Rescue and restructuring aid are among the most distortive types of state aid*".

Supporting companies facing closure means altering the normal operation of competitive markets, by distorting business incentives and making it difficult for the markets to readjust naturally. That is why public support to mitigate the effects of the Covid-19 crisis should focus on supporting enterprises return to viability which may lead to economic recovery.

To this end, agencies granting public aid should be demanding in terms of the solvency and viability conditions of the enterprises receiving such aid.

Instruments of public aid that require a future return of part of the benefits obtained are an indirect mechanism that make it more likely that the aid will be channelled to enterprises that are viable and they provide an incentive for the funds to be addressed to solvent business projects. Using instruments such as loans or guarantees, or linking subsidies or recapitalisations to conditions that promote the future return of the benefits received, also encourages public funds to be used for solvent business projects.

⁴ [Temporary Framework for Public Aid Measures to support the economy in the current Covid-19 outbreak](#) .

3.6. Promoting structural improvements in productivity and competitiveness that favour the digital and ecological transition

- ✓ Competition incentivises the transformation of businesses towards digitisation and environmental sustainability.
- ✓ Public aid can accelerate the ecological and digital transition by promoting competition and productive investments in these areas.
- ✓ Mechanisms that aim to objectively identify and select activities eligible for financing should be implemented.

At the same time as it has caused exceptional liquidity and solvency problems in enterprises and economic difficulties for consumers, the pandemic has accelerated the need to move forward in the environmental and digital transition of the economy.

Public aid can play an essential role by promoting business investments in green and digital technologies and processes. Consequently, it seems reasonable for the granting of certain support to be contingent on substantial modifications to the business model that otherwise would not have been made. This can be carried out by supporting investments in new production models or improving existing models, thereby contributing effectively, directly and quantifiably to established objectives of digital and environmental strategy.

The environmental and digital requirements of public aid must be compatible with stimulating competition in the markets, since competition also plays a fundamental role in the twofold transition — ecological and digital — by promoting business actions consistent with it.

It is also important to reduce the risks of subjectivity in designing environmental requirements. The mechanisms for making the granting of assistance more objective include using common environmental taxonomies for the entire EU that help identify whether economic activities can be classified as sustainable based on objective parameters (extent of recycling, emissions level, water use and management, etc.).

3.7. Granting public aid according to competitive criteria when possible

- ✓ Competitive procedures are, in principle, the best way to select the projects and enterprises that can do the most to boost the economy.
- ✓ Horizontal public aid to demand can serve as an alternative mechanism for allocating aid indirectly, according to competitive criteria.

The best way for public funds to be earmarked for the projects most able to improve productivity, employment, competitiveness and economic growth is to follow procedures for granting public aid according to competitive basis. This makes it possible to select the applications that best meet the objective evaluation criteria established in advance.

If it is necessary to grant public aid directly or to allocate public funds based on other criteria, it is important to justify the reasons why the public aid cannot be granted through an open competitive process or perform a comparative assessment for evaluating the proposals.

When it is not feasible to grant funds by a competitive procedure, incentivising the demand (through public aid for consumption) is a mechanism that can facilitate the distribution of public aid among the offerors according to their efficiency and competitiveness in the market. This reinforces competition and the objectivity of public support.

3.8. Developing effective strategic planning

- ✓ Planning makes it possible to analyse needs and thus define the best strategies to meet those needs.
- ✓ Planning minimises errors in forecasts and encourages coordination and consistency among the public authorities' strategies..

To plan means to anticipate. It entails analysing needs and potential alternatives in order to correctly define strategies. Planning is an essential activity for all organisations, both public and private. However, insofar as public organisations are financed with — always limited – public resources and are subject to the constitutional commitment to efficient management, planning is to be considered an essential exercise.

National regulations on subsidies call for strategic subsidy plans which are to specify the objectives and effects that the subsidies are intended to bring about, the amount of time necessary to do so and the expected costs and sources of financing. These regulations also set forth that when the intended objectives affect the market, strategic plans must focus on correcting clearly identified failures and to minimise the distortion to competition.

The content of *strategic public aid plans* must be designed so as to allow market failures or the intended objectives of general interest to be correctly identified. In addition, the desired effects should be clearly visible and quantified whenever possible. These elements should inform their design and ex post assessment.

Correct planning — planning that can be reviewed and reprogrammed in response to changes in circumstances and needs — minimises errors stemming from a lack of foresight. It also promotes coordination and consistency with government agencies that intervene in the markets.

3.9. Implementing a culture of evaluation of the effects of the public aid

- ✓ By monitoring and assessing the effects of public aid it is possible to improve the design of future interventions.
- ✓ Disclosing ex post evaluations improves the effectiveness of other public actors' actions.

It is essential to evaluate the effects of public aid because the design of this kind of intervention, including prior supervision by the European Commission, is fundamentally prospective and therefore subject to errors of foresight and assessment. By evaluating outcomes it is possible to correct deviations and minimise errors of diagnosis or execution in future actions.

Such an evaluation system should ensure that it is possible to modify public aid schemes that does not attain the desired objectives or that is not adequate for the level of resources invested or to replace it with other, more effective and efficient forms of support, or, where necessary, to eliminate such aid.

A good system for monitoring and assessing effects should be based on a correct prior definition of the objectives and the expected results on the basis of measurable and therefore quantifiable criteria.

An assessment should combine intermediate evaluations, which allow operating errors committed during the life of a project to be corrected, with a final ex post evaluation. Periodic reviews make it possible to minimise calculation or design errors and avoid cases of a lack of justification arising, for example, from a change to the initial factual circumstances that led to the granting of the aid.

By disclosing the evaluations and the corrective measures adopted ensures transparency and favours a better supervision of the implementation of public support, which is especially important in the framework of the funds to be mobilised by the Recovery Plan. This also facilitates the flow of information among public actors and promotes the collective improvement of intervention mechanisms, encouraging all public entities to be aligned with recommended best practices and improving the use of their resources.

3.10. Receiving support and advice from competition authorities

- ✓ The CNMC discloses its actions regarding public aid and offers its advice to public entities requesting it.
- ✓ This advice is complementary, and in no event it replaces the controls carry out by other competent authorities.

The CNMC has advisory and consultative functions with respect to public aid. It carries out analytical, methodological and statistical actions that provide recommendations for improvement for public authorities, most notably the annual reports on public aid (which may be consulted in this [section of the CNMC website](#)).

The CNMC's specialisation and its experience analysing and understanding the functioning of the markets can assist public authorities identify market failures that prevent the desired levels of general welfare from being attained. It can also support them identify alternatives for public intervention and their possible costs and benefits and the most appropriate way to design action frameworks with regard to public aid, avoiding undue restrictions on competition.

This support is complementary and in no event does it replace the controls assigned to the competent national authorities (internal and external bodies responsible for supervising the execution of public funds, in addition to judges and courts, etc.), and the prior supervision of State aid by the European Commission.

4. A DECALOGUE OF RECOMMENDATIONS FOR EFFICIENT PUBLIC PROCUREMENT

Public procurement accounts for a considerable portion of domestic GDP (between 10% and 20%⁵) and involves sectors with a significant impact over the economy as a whole. Having regulatory framework and public tender documents that promote effective competition in the markets is crucial.

In recent years, the need for public procurement has become clear, not only to maximise the efficiency of public resources but also to pursue other strategic social or environmental objectives, all while the fight against fraud and corruption continue to play a key role..

In order to achieve a truly strategic public procurement, which makes tendering procedures more complex, requires going one step further in various areas. Projects that promote the twofold transformation — ecological and digital — must be carried out, fostering competition among enterprises and an improvement in their competitiveness.

Public procurement, if properly designed and executed, can effectively contribute to meeting the objectives of the 2030 Agenda, but parameters that guarantee its objectivity must be set. In addition, information must be digitised through electronic procurement, with the consequent improvement in transparency for potential bidders as well as for the remaining contracting authorities.

To ensure compliance with the principle of competitive neutrality, a regulatory and decision-making framework that guarantees objective and non-discriminatory conditions of competition in public procurement must be established. The participation of the largest number of operators (especially SMEs) should be sought. In order to achieve that goal, it is recommended to engage with planning public purchases exercises, proactive advertising, early disclosure of information, sufficient tender preparation and contract execution periods that are long enough to allow successful bidders to properly adjust their services.

To this end, it is essential to invest in the professionalisation of procurers, providing them with the tools they need in addition to human resources and appropriate specific training. This should allow them to better understand the functioning of the markets and their regulation, where so required.

⁵ Triennial Report on public procurement in Spain in 2018, 2019 and 2020, Advisory Board of Public Procurement of the State.

4.1. Performing a strategic planning of procurement needs

- ✓ Strategic needs planning is essential to identify and prioritise those purchases that, in accordance with their objectives, should be considered strategic for the entity's operation.
- ✓ Proper planning reduces forecasting errors and promotes competition in public procurement.

The current economic crisis has made clearer than ever the importance of adequately public procurement planning. A public entity must be able to identify and prioritise those purchases that, based on its objectives, are to be considered strategic for its activity, taking into account any unforeseen circumstances.

As the CNMC has pointed out in its recent [update of the Procurement and competition guide](#), proper planning makes it possible for an entity not only to carry out its public functions, but to do so as efficiently as possible. Planning spurs competition and thereby efficiency, because it avoids purchases that are unnecessary or of questionable viability.

It also promotes transparency and the ability of operators, especially SMEs, to participate in tenders, allowing them to plan their role as public bidders by making available the information they need in order to evaluate which bidding processes they will be able to take part in.

Planning also makes it possible to improve the design of the tenders, through the use of open and competitive contract awarding procedures that promote competition (avoiding abuse in the use direct award for minor contracts or negotiated procedure without prior publication).

Strategic planning will lead to the drafting of a Procurement plan by the contracting authority, disclosing its contractual activity for a given period. Such a plan offers double value: reference guidelines for public-sector managers, and valuable information for potential bidders, encouraging their participation.

4.2. Promoting competition, transparency and the participation of enterprises, especially SMEs

- ✓ Promoting open, transparent and non-discriminatory bidding processes that encourage bidders participation.
- ✓ Establishing proactive communication instruments that complement required forms of publicity.
- ✓ Access to information must be accompanied by measures that effectively promote economic operator's participation in tenders.

Contracting authorities must — strategically — implement open, transparent and non-discriminatory bidding procedures, encouraging bidders to take part and promoting competition among them, thus resulting in better bids in terms of price, quality and innovation and maximising the economic efficiency of public resources ([CNMC Study](#) 2019).

Transparency, publicity and integrity facilitate enterprise's access to public procurement procedures and greater concurrence within tenders. Providing better access to information is important for all operators, but it is especially valuable for SMEs. In addition to mandatory announcements on the contracting platforms and in official gazettes, there must be implemented proactive communication tools, offering relevant, detailed information to all operators.

This should lead to the use of other means of publication, complementing those listed above, as well as to improvements in the accessibility to information and the details provided. Hence, it might be reasonable to carry out open consultations to operators on both issues, with the appropriate measures according to the results obtained.

In order to streamline procedures, the most recent revision of the LCSP (Spanish Law on Contracts of the Public Sector) makes it possible to reduce the time limit for the submission of bids. When this reduction in the time limit for submissions is optional, it is recommended to assess in advanced and for each case the impact of doing so on bidders' participation. In addition, deadlines for submitting bids should be fixed considering the potential impact on competitive dynamics of the procedure and the ability of SMEs, which have fewer resources for these purposes, to participate.

Other measures that can be used to facilitate enterprise and SME participation in tenders and thus increase competition include dividing tenders into lots (general rule set forth in Law on Contracts of the Public Sector), reducing administrative and financial burdens (especially in terms of guarantees and payment times) and simplifying award criteria.

4.3. Restricting the use of alternatives to public procurement, such as in-house contracts and collaboration agreements, to cases in which they are more efficient

- ✓ These alternatives exclude competition.
- ✓ They should be only used in cases in which they represent a net gain in efficiency compared with competitive procedures.

When a contracting authority resorts to mechanisms such as collaborative agreements or in-house providing, it forsakes competitive procedures and, therefore, the gains in efficiency that stem from competition among operators ([2011 guide](#) on procurement and competition and [2013 study on entities' use of their own resources](#)).

The public authorities should provide orientation on the degree of discretion that the regulations recognise with respect to the instruments that most efficiently meet the existing need, including, among the various available possibilities, the option of providing public services either directly or indirectly.. As for direct management, the use of in house contracts should be interpreted restrictively, on a case-by-case basis, after the effects that such mechanisms might have on competition have been appropriately analysed.

In-house contracts, in addition to strictly complying with the applicable legal requirements set out in regulations, should not be awarded whether it cannot be proven to be more efficient than competitive procedures.

In addition, when in-house contracts are excessively awarded, those services are withdrawn from the market. This may reduce competition and even compromise the principle of competitive neutrality between the in house entities and the operators with which they compete in the markets..

As for agreements, the most recent regulatory revision with respect to the management of recovery funds allows lengthening the maximum duration of such agreements, including extensions, to 12 years. This duration is to be restricted to duly justified cases, given that it may directly or indirectly cause the closing of markets, strengthening the position of certain enterprises.

4.4. Improving public procurers capacity building and their market knowledge

- ✓ Implement training of and specialisation among public procurers, within multidisciplinary teams.
- ✓ Raise the level of market knowledge where public procurement takes places, given their increasing complexity.

Efficient public procurement requires investing in the education and training of those responsible for purchases, setting up multidisciplinary teams that have legal, economic and technical know-how in addition to the human resources and tools needed to cope with increasingly complex markets. It is essential to invest specifically in improving public officials' digital skills.

In the preparatory work for bidding processes, procuring entities should analyse the actual conditions (of supply and demand) in the market through internal studies and any external market consultations that may be carried out, all while abiding by the principles of equal treatment and free competition.

Improving public officials' market knowledge where public procurement takes place is a key instrument for improving the efficiency in public procurement. Markets are increasingly complex and globalised, and they are subject to unforeseen changes or disruptions, as was seen during the pandemic. Only with sound knowledge of the markets will it be possible to properly plan for needs and design public tender documents, which should result in greater participation by enterprises and ensure efficiency in public expending.

4.5. Ensuring competitive neutrality while avoiding protectionist measures

- ✓ Public procurement should not favour access by some operators rather than others due to subjective conditions.
- ✓ Measures that require a specific territorial location or proximity should be avoided.

Public authorities have the constitutional duty to guarantee and protect free enterprise principle within the framework of a market economy. Therefore, they must promote efficient markets by eliminating restrictions that unduly impede, limit or distort competition.

To this end, and pursuant to the principle of competitive neutrality, they are required to establish a framework on regulations (general and special public procurement rules) as well as decisions (public tender documents) that guarantees objective and non-discriminatory conditions of competition for all economic actors, irrespective of nationality, nature (public or private) or legal form, in line with the recommendations of international organisations, for instance, [OECD](#) 2021 (for more details, see [the OECD webpage on competitive neutrality](#)).

All provisions that might favour the participation of certain companies or improve their scores because they are located in or have links to a given territory are considered unjustified restrictions to free competition and are prohibited by current regulations. Such protectionist measures do not benefit consumers in the areas in question, given that, especially over the medium and long term, they would be harmed in terms of the goods and services offered by these companies.

4.6. Promoting ecological and digital transformation through competition

- ✓ Promoting tender procedures that give a boost to the digital and environmental transition, setting parameters that ensure objectivity and competition among operators.

Public procurement is an important tool for promoting other public objectives. Properly designed and executed, it can effectively contribute to the goals of the 2030 Agenda and, in particular, to move forward the digital and ecological transitions in Spanish society.

Public procurement regulations offer various possibilities for introducing social and environmental considerations in the tender documents: capacity requirements, award criteria and special execution conditions.

This window of opportunity has enormous positive aspects, but also certain risks with respect to competition, which can undermine the attainment of the objectives of digitisation and environmental sustainability. Social and environmental criteria must be consistent with the subject matter of the contract, be objective and in line with the principles that shape public procurement (including the safeguarding of free competition, transparency and non-discrimination).

Mechanisms can be used to ensure that the design is objective and to minimise the risk of subjectivity. These mechanisms include the common taxonomy for the entire EU, which identifies whether each affected activity can be classified as sustainable on the basis of objective requirements and parameters (level of recycling, level of emissions, water use and management, etc.).

4.7. Digitising information relating to public procurement

- ✓ Completely digitising information related to contract documents and files.
- ✓ Promoting cooperation and interoperability among public entities, especially those with less access to resources.

Public procurement should see to it that information is digitised through the widespread adoption of electronic procurement, in all phases of procurement, from preparation to ex post assessment. The digitisation of information relating to tendering procedures is essential both for contracting authorities and for economic operators.

For public procurers, because, although they are required to publish the tender information according to open, reusable standards, in practice there is much room for improvement in this regard. In addition, measures to promote cooperation and interoperability among public entities are needed, especially among entities with less access to resources, in order for knowledge to be shared.

The effective incorporation of electronic media makes it possible to design more agile, efficient and transparent procedures, freeing up human and financial resources for other tasks. It also makes it possible to obtain relevant sources of information on market reactions to certain procurement techniques can be understood. In addition, it allows tools to be strengthened in order to detect potential collusion agreements based on patterns of behaviour.

For operators, this is because digitisation will reduce the administrative burden and improve the environment for access to public tenders, encouraging them to become familiar with new markets where they can expand as well as to identify the presence of new lines of business.

4.8. Promoting competition in public-private partnerships in order to carry out projects for the structural transformation of the economy

- ✓ Projects managed through forms of public-private partnerships must give rise to an authentic structural transformation of the economy, in line with the objectives of digital and/or environmental transition.
- ✓ Selecting projects and operators through open, transparent, objective, competitive and non-discriminatory procedures ensures that these mechanisms are used more efficiently.

Public-private partnerships can be an interesting instrument regarding the challenges entailed in the receipt of the European recovery funds, for various reasons.

First, because it allows a significant amount of public resources to be mobilised while steps are taken to ensure a more efficient management of those resources. In addition, because it encourages the private sector to also invest in structural transformation projects, from which the community overall can benefit, provided that the projects involve a true structural transformation of the economy, in order for the digital and/or environmental transition objectives to be met.

However, this collaboration is not without risks. To minimise them, the following recommendations should be followed:

- Projects and operators should be selected through open, transparent, objective, competitive and non-discriminatory procedures.
- Adopting measures that encourage the participation of SMEs, such as dividing contracts into lots, subcontracting and seeking alliances.
- Not imposing additional ancillary limitations, the regulation of which may contain undue restrictions on competition from the standpoint of the principles of necessity, proportionality and non-discrimination.
- Designing adequate risk sharing, providing legal certainty and not allowing the entire burden to fall on one of the parties while committing to manage such risks.
- Avoiding excessive market closure by linking the duration to the length of time strictly needed for the return on investment.

4.9. Implementing a culture of evaluating the effects of public procurement

- ✓ A system of control and evaluation of results should be put into practice, especially for cases relating to objectives of innovation, digital transformation and/or environmental sustainability.
- ✓ The conclusions of this analysis, as well as the measures adopted by the main entities involved, should be made public.

As the final element of a process that would begin with the planning of government provisioning, a system for monitoring and evaluating results should be put into practice. For results to be evaluated, they must be based on elements that can be measured (identifying times, indicators and units in charge) and quantified with an appropriate methodology that assesses the effectiveness of the procurement in achieving the proposed objectives.

This is especially important in cases in which the purpose of the procurement is not only to maximise efficiency, but also to achieve complementary objectives in terms of innovation, digital transformation or environmental sustainability. Here it is worth reiterating that there should be a common taxonomy so as to offer comparable data.

The evaluation should make it possible to compare the initial plan with what was ultimately carried out. By carrying out an effective assessment, both mid-term and ex post, it will be possible to draw conclusions as soon as possible on the improvements to be implemented in bidding procedures under way. The digitisation of information should make it possible to streamline implementing such an assessment.

It is essential that the results of the evaluation and the corrective actions be made public. This could be used to design an information network that, especially in the case of entities with fewer resources or capacities, would give rise to an alignment with recommended best practices and better resource use. This is especially important in the context of managing the European recovery funds.

4.10. Receiving the support and advice of competition and regulatory authorities

- ✓ All public entities are encouraged to use the CNMC's advisory and training functions with regard to public procurement.
- ✓ Public entities have the obligation to report to the CNMC any indication of anti-competitive conduct, which they are in a privileged position to detect.

Public procurement is an area to which the CNMC devotes special attention within the framework of its responsibility to promote competition and initiate legal action against practices that restrict competition.

In terms of promoting competition, the CNMC makes recommendations to improve the regulatory framework for public procurement and tender documents. The support that it gives is complementary and in no event replaces the controls entrusted to other authorities.

In addition, it proactively analyses competition deficits in public procurement through its studies and provides guidance on and promotes an improvement in the training of public officials. This is intended to ensure that their performance is consistent with the principles of competition, through, for example, the Guide on public procurement and competition and the training programme on public procurement and competition for public sector employees.

The CNMC is responsible for detecting and penalising collusive conduct, which especially affects public procurement. Procuring entities are in a privileged position to detect and report possible signs of such conduct to this Commission, as provided for in the applicable regulations, and they may consult with CNMC on any questions they have in this regard.

In addition, the CNMC analyses public procurement instruments and compliance with the conduct obligations that apply to operators with significant market power in some sectors (e.g. telecommunications).

It is recommended that all government entities use all the channels provided for in the regulations so as to obtain support and advice from the CNMC with regard to public procurement. This should result in an improvement in the procurement procedures, to the benefit of the overall public.

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