

State Aid

Contributing editor
Ulrich Soltész



2018

GETTING THE
DEAL THROUGH

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Ulrich Soltész

Gleiss Lutz

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Preface

State Aid 2018

Fifth edition

Getting the Deal Through is delighted to publish the fifth edition of *State Aid*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Romania and Greece.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Ulrich Soltész of Gleiss Lutz, for his continued assistance with this volume.

GETTING THE 
DEAL THROUGH 

London
July 2018

Spain

Pedro Callol and Manuel Cañadas

Callol, Coca & Asociados SLP

Overview

1 Outline your jurisdiction's state aid policy and track record of compliance and enforcement. What is the general attitude towards subsidies in your system?

The granting of state aid, according to Law No. 38/2003 of 17 November 2003 on General Subsidies (the General Subsidies Law), must be carried out in accordance with the principles of:

- publicity, transparency, concurrence, objectivity, equality and non-discrimination;
- effectiveness in complying with the objectives set by the granting authority; and
- efficiency in public resources allocation (article 8 of the General Subsidies Law).

The 2017 state aid report of the National Markets and Competition Commission (NMCC, ie, the Spanish Competition Authority), which includes an economic analysis of state aid granted by Spain in 2015 (the last year with official data available published by the European Commission (EC)), highlights three important conclusions:

- no new aid has been granted to the financial sector. The amount of state aid granted to the financial sector continues to decrease as a percentage of total aid and in relation to GDP compared to 2014, and decreases even more when compared to 2013 (the year in which the maximum level of state aid to the financial sector was reached);
- regular aid (aid not directed to the rail sector or the financial sector) represented 0.24 per cent of GDP in 2015 (compared to 0.33 per cent of GDP in 2014). Regular aid has also decreased when compared to 2013 (0.28 per cent of GDP); and
- Spain is the member state of the EU-28 with the lowest public aid as a percentage of GDP (the EU average is 0.67 per cent of GDP).

In January 2017, the EC lodged a complaint against Spain before the European Court of Justice (ECJ) for failing to recover the total amount of state aid granted by Spain, declared illegal by the EC in 2013 and 2014, for the roll-out of digital terrestrial television (DTT) in Castilla-La Mancha and other areas. Spain had recovered none of the €43.8 million in aid granted to Castilla-La Mancha and had only recovered €5.5 million of the €260 million granted to other areas of Spain. Furthermore, the EC complained that Spain had not suspended payments in these territories. However, in December 2017, the ECJ ruled that Spain did not have to recover the aid granted between 2005 and 2009 to the operators of DTT in rural areas, annulling the EC decision owing to insufficient motivation by the EC on the discriminatory nature of the aid granted.

Furthermore, in November 2017, the EC opened an investigation regarding part of the aid granted by Spain to coal-fired power plants. The investigation affects 14 plants that have received more than €440 million in public aid since 2007.

2 Which national authorities monitor compliance with state aid rules and have primary responsibility for dealing with the European Commission on state aid matters?

The first authority in this regard is the Interministerial Commission for Economic Affairs related to the European Union (ICEAEU). Any public administration proposing to establish, grant or modify any state aid

that should be notified to the EC shall send the relevant project to the ICEAEU at least three months before its implementation. The ICEAEU is in charge of examining state aid projects ex ante to assess their compatibility with EU state aid rules and will also decide on the need to notify the analysed projects to the EC.

Second, the Ministry of Foreign Affairs, and more specifically the Secretary of State for the EU, shall notify to the EC, following the ICEAEU's assessment, a state aid project within a month of receiving the project.

The Ministry of Foreign Affairs should communicate to the NMCC all state aid projects notified to the EC. Additionally, the NMCC can ask for information about any state aid given by any public administration, regardless of whether such aid is subject to prior notification to the EC. The NMCC can issue reports on state aid or aid systems (not only about the criteria for granting state aid) and make recommendations to other public administrations. Finally, the NMCC must publish an annual report on state aid every year, as well as notifying new aid measures. It can also issue reports ex officio or at the request of any public administration. The NMCC is active and issues such reports from time to time.

Moreover, the granting administrative authority can carry out ex post control under article 106 of Law No. 39/2015 of 1 October 2015 on the Common Administrative Procedure (Law No. 39/2015) of its own acts. Article 106 allows public authorities to review their own acts ex officio or at the request of an interested party. Furthermore, after the Council of State has issued a favourable opinion, public authorities may declare the invalidity of final administrative acts that have been previously issued.

3 Which bodies are primarily in charge of granting aid and receiving aid applications?

Granting authorities include the central state, autonomous regions and local authorities (see article 3 of the General Subsidies Law). Other public authorities, with their own legal personality, governed by public law and linked to or dependent on any other public authority (from the national government or any autonomous region), may also grant state aid. Public foundations or public corporations cannot grant state aid, unless expressly authorised by the public administration.

Ministers and secretaries of the national government administration and presidents or directors of agencies and public entities linked to or dependent on the national government administration are the bodies competent to grant subsidies in their respective areas. In order to grant subsidies of more than €12 million, an agreement of the Council of Ministers or the Government Delegate Commission for Economic Affairs will be necessary.

4 Describe the general procedural and substantive framework.

The general substantive legal framework is that of articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU) and implementing legislation and soft law. The general procedural framework that serves as a basis for granting state aid at national level is the General Subsidies Law and its implementing regulation. For the purposes of this law, a subsidy is any payment made by any public authority in favour of public or private persons that meets three requirements:

- the aid is given for no consideration by the beneficiary;
- delivery is subject to the fulfilment of a certain objective or the execution of a project or activity; and

- the project financed promotes an activity of public utility or social interest (article 2 of the General Subsidies Law).

State aid measures are governed by public law – more specifically by the general administrative procedure and budget laws. According to the General Subsidies Law, the granting authority must assess state aid measures on a case-by-case basis.

5 Identify and describe the main national legislation implementing European state aid rules.

The main national legislation implementing European state aid rules in Spain is the following (in chronological order):

- Royal Decree 1755/1987 of 23 December 1987 on the procedure for notifying the EC of projects establishing, granting or modifying aid by public administrations or public entities. It establishes that public administrations proposing to grant or modify any aid that should be notified to the EC shall send the relevant projects to the ICEAEU (article 1);
- General Subsidies Law. This law regulates the general legal regime of subsidies granted by public authorities;
- Royal Decree 887/2006 of 21 July 2006 implementing the General Subsidies Law;
- Law No. 15/2007 of 3 July 2007 on Competition (the Competition Act). It establishes that the NMCC can carry out an ex post review of state aid granted. The NMCC can also issue reports on individual aid or aid systems and make recommendations to other public administrations. In addition, the NMCC must publish an annual report on state aid. It can also issue reports ex officio or at the request of any public administration; and
- Royal Decree 261/2008 of 22 February 2008 implementing the Competition Act. It regulates the transmission of information on state aid between the NMCC and public administrations. It establishes the framework for cooperation between the NMCC and the autonomous competition authorities regarding the control of state aid.

Programmes

6 What are the most significant national schemes in place governing the application and the granting of aid, that have been approved by the Commission or that qualify for block exemptions?

Significant national schemes in place include those detailed in the table below:

Case	Objective	Granting authority	Those who benefit	Amount of total aid	Duration
SA46064 (2016/X)	Financing of projects within the framework of the Innovation Check Programme	Institute of Economic Development of the Principality of Asturias	Small and medium-sized enterprises	€5 billion	19 July 2016–31 December 2020
SA43878	Subsidies for the production of cultural magazines	Ministry of Education, Culture and Sport	N/A	€4.65 million	1 January 2016–31 December 2020
SA37516 (2013/N)	Deduction for investments in cinematographic and audiovisual productions	Ministry of Finance and Public Administration	N/A	€480 million	1 January 2014–1 January 2020
SA40170 (2014/N)	Deduction for investments in cinematographic and audiovisual productions	Ministry of Finance and Public Administration	N/A	€600 million	1 January 2015–1 January 2021

Case	Objective	Granting authority	Those who benefit	Amount of total aid	Duration
SA42771 (2015/N)	Aid for knowledge transfer and information activities in rural areas. Rural development. Training	Ministry of Agriculture, Food and Environment	N/A	€28.0678 million	Ongoing

7 Are there any specific rules in place on the implementation of the General Block Exemption Regulation (GBER)?

No specific rules on the implementation of the GBER have been adopted.

Public ownership and services of general economic interest (SGEI)

8 Do state aid implications concerning public undertakings, public holdings in company capital and public-private partnerships play a significant role in your country?

Former monopolies and state-owned companies are a source of concern in Spain – for instance, the postal sector, state-owned television, railways, ports, etc.

Although it is a matter not strictly under the legal umbrella of state aid, the Spanish authorities seem to display a tendency to protect ‘national champions’ – for instance, in the framework of mergers and acquisitions. This has been illustrated by the recent takeover offer for toll motorway concession company Abertis.

9 Are there any specific national rules on SGEI? Is the concept of SGEI well developed in your jurisdiction?

The SGEI concept is generally known and acknowledged in Spain. In the 2017 Annual Report on State Aid published by the NMCC, SGEI are referred to as economic activities of special importance for citizens (according to public authorities) that, in the absence of public intervention, would not be provided by the market or would be provided in different conditions. Typical examples of SGEI are transport networks, postal services and social services. Public service aid is reported in exceptional cases – for instance, if overcompensation exists.

Law No. 4/2007 of 3 April 2007 on the transparency of financial relations between public administrations and public undertakings, and financial transparency of certain undertakings, establishes as one of its objectives the transparency in the management of SGEI.

Law No. 4/2007 establishes the general obligations that undertakings operating SGEI have to comply with. Undertakings must keep separate accounts when public authorities have granted them special or exclusive rights or have entrusted them with the management of an SGEI, and they receive compensation for managing that SGEI or developing those special or exclusive rights if they carry out ‘market’ activities. These undertakings must provide detailed information of each activity carried out to the General Intervention of the National Government Administration.

Sector-specific regulations might also impose specific rules on SGEI. As the responsibility for deciding the nature and scope of an SGEI lies not only on national, but also on regional and local, public authorities, regional and local provisions should also be taken into account.

Considerations for aid recipients

10 Is there a legal right for businesses to obtain state aid or is the granting of aid completely within the authorities’ discretion?

No absolute legal right to obtain state aid exists in principle. Spanish authorities are competent to grant aid at their discretion within the boundaries and following the parameters of the applicable laws. Any granting must be done in compliance with the pre-established criteria and with the general requirements established in the General Subsidies Law.

11 What are the main criteria the national authorities will consider before making an award?

The ordinary procedure for the granting of aid takes place in a regime of competitive public tendering. This is the proceeding by which the granting authority compares the applications submitted in order to establish a priority among them according to the evaluation criteria previously set.

Before awarding aid, the granting authorities basically assess criteria linked to any market failures. Job creation, supporting (or encouraging) R&D efforts, worker training and environmental protection are the criteria usually considered by the Spanish granting authorities.

12 What are the main strategic considerations and best practices for successful applications for aid?

First, applicants for subsidies have to assess whether they meet the criteria and conditions established for the granting of the subsidy under article 13 of the General Subsidies Law.

Article 13 establishes the requirements to be fulfilled to gain beneficiary status. First, persons or entities that are in a situation that justifies the granting of the subsidy will be able to obtain beneficiary status. Notwithstanding the above, article 13 establishes a list of circumstances that, if met, prevent persons or entities from obtaining beneficiary status.

13 How may unsuccessful applicants challenge national authorities' refusal to grant aid?

If the administrative act as a result of which the subsidy is granted amounts to final administrative action, unsuccessful applicants may challenge the national authorities' refusal to grant aid before the contentious-administrative courts. Generally, prior to court litigation, an administrative appeal can be brought before the hierarchical superior administrative body of the granting authority.

14 To what extent is the aid recipient involved in the EU investigation and notification process?

There is no specific regulation on this regard concerning state aid. According to articles 53a and 53e of Law No. 39/2015 on the Common Administrative Procedure, those with a legitimate interest in any administrative proceeding have the right to know at any moment the status of proceedings in which they have the condition of interested parties; the competent body for the instruction and the resolution; and the administrative acts issued. They also have the right to access the file and obtain a copy of the documents issued, and to submit comments and provide documents and evidence during proceedings.

Strategic considerations for competitors

15 To which national bodies should competitors address complaints about state aid? Do these bodies have enforcement powers, and do they cooperate with authorities in other member states?

The courts are entrusted with safeguarding individual rights under article 108(3) TFEU.

Competitors can also inform the NMCC, which is entitled to analyse the criteria and opportunity of aid and to issue reports or address proposals to the relevant granting authority.

16 How can competitors find out about possible illegal or incompatible aid from official sources? What publicity is given to the granting of aid?

Competitors can access the following official sources:

- the official journals, where available subsidies and subsidies granted by national and regional authorities and by the larger cities must be published. In case of municipalities with fewer than 50,000 inhabitants, this information can be published on the local noticeboard; and
- the NMCC's Information Centre, which gathers information on state aid granted in Spain.

Finally, there is a national database storing information related to the granting of subsidies. However, beneficiaries' competitors are not given access to this database because of the confidential nature of the information.

17 Give details of any legislation that gives competitors access to documents on state aid granted to beneficiaries.

The Spanish legal system does not contain a specific regulation giving competitors access to documents on state aid granted. However, under article 24.4 of the General Subsidies Law, interested parties appearing in the procedure that are not beneficiaries of the subsidy have the right to be notified of a reasoned provisional decision, and to make representations.

Notwithstanding the above regarding the Common Administrative Procedure, article 83 of Law No. 39/2015 establishes the possibility for all natural or legal persons to access any file during a public access period when published by the granting authority.

18 What other publicly available sources can help competitors obtain information about possible illegal or incompatible aid?

The NMCC issues and publishes an annual report on aid granted in Spain, in which it details the most significant state aid measures. Regional competition authorities can issue similar reports on aid granted in their regions.

19 Apart from complaints to the national authorities and petitions to national and EU courts, how else may complainants counter illegal or incompatible aid?

We are not aware of any other common alternative strategies aimed at countering illegal or incompatible aid in Spain (other than complaints to the EC).

Private enforcement in national courts

20 Which courts will hear private complaints against the award of state aid? Who has standing to bring an action?

In the framework of procedures for the awarding of aid, article 76 of Law No. 39/2015 on the Common Administrative Procedure establishes that interested parties may submit comments and provide documents or evidence (see also articles 53e and 82). These comments will be taken into account by the competent body when drafting the award decision. In addition, interested parties may claim procedural errors at any time.

Regarding the concept of interested party, article 4 of Law No. 39/2015 establishes that the following will be considered interested parties in the administrative proceeding:

- those that promote it (the recipient undertaking);
- those that did not initiate the proceeding but have rights that can be affected by the decision (such as competitors); and
- those whose legitimate interests, individual or collective, may be affected by the decision.

Any natural or legal persons having the status of an interested party may bring an administrative action before the hierarchical superior administrative body to the granting authority. Furthermore, under article 19.1a of Law No. 29/1998 of 13 July 1998 on the contentious-administrative courts (Law No. 29/1998), natural or legal persons with a legitimate interest or right can appeal the resulting decision before the contentious-administrative courts if the administrative action is dismissed.

As stated above, competitors may bring actions for damages against the granting authority. However, in certain circumstances, competitors may choose to claim action for damages directly against the beneficiary. In the ECJ judgment of 11 July 1996 (*Syndicat Français de l'Express international*), the ECJ concluded that, because article 108(3) TFEU does not impose any direct obligation on the beneficiary, there is no sufficient basis in EU law for such actions. However, this does not prevent a competitor from lodging a claim for damages against the beneficiary of the aid based on Law No. 3/1991 of 10 January 1991, the Unfair Competition Act (UCA), for receiving state aid without prior notification to the EC in breach of article 108(3) TFEU.

The purpose of the UCA is to protect competition in the interests of all those involved in the market, and to this end the UCA prohibits unfair acts. The legal basis for action against the aid beneficiary is found in article 15 of the UCA, which regulates unfair conduct in cases of breach of laws on regulations, such as illegal state aid gained through breach of article 108(3) TFEU.

Finally, competitors harmed by illegal or unnotified aid can also bring an action before the competent national courts in case of aid that

Update and trends

The priorities of the Spanish authorities focus on the control, surveillance and assessment of state aid to avoid unjustified distortions and to safeguard the effective functioning of the markets. As such, the NMCC must submit an annual report on the state aid granted in Spain to improve the transparency of the state aid system. The annual report on state aid is submitted to the Spanish Parliament and Senate to increase awareness.

To our knowledge, there is no proposal to amend the national legislation on state aid.

Regarding recent case law and state aid practice at the end of 2016 and in 2017, the EC adopted several decisions, some of which are being challenged before the ECJ, concerning state aid granted by Spain. Some of them were negative with recovery:

- state aid to Real Madrid Football Club (sectoral development);
- state aid to Valencia Football Clubs (Valencia FC, Hércules FC and Elche FC) (support for economic activity);
- state aid to certain Spanish football clubs (Athletic Club Bilbao, Club Atlético Osasuna, Barcelona FC and Real Madrid FC) (sectoral development);
- state aid to the state railway company (R&D); and
- state aid to public and private DTT broadcasters (sectoral development). The state aid to the Basque Country for the promotion of the Basque language in digital news media was not considered state aid under Article 107(1) TFEU.

The most recent state aid granted by Spain and approved by the EC was for:

- the financing of projects within the framework of the Innovation

- Check Programme (qualified for block exemption);
- the production of cultural magazines;
- investments in cinematographic and audiovisual productions; and
- knowledge transfer and information activities in rural areas.

On the other hand, regarding the non-compliance with EU law by Spain with regard to state aid, in January 2017, the EC denounced Spain before the ECJ for failing to recover the total amount of the aid granted by Spain for the expansion of DTT in Castilla-La Mancha and other areas, and declared illegal by the EC in 2013 and 2014 (this decision was confirmed by the General Court in November 2015). Spain had recovered none of the €43.8 million in aid granted to Castilla-La Mancha and had only recovered €5.5 million of the €260 million granted to other areas of Spain. Furthermore, the EC complained that Spain had not suspended payments in these territories. Spain had already been the subject of several judgments for not recovering illegal aid immediately and effectively, namely, ECJ judgments of 2 July 2002 (C-499/99); of 26 June 2003 (C-404/00); of 20 September 2007 (C-177/06); of 24 January 2013 (C-529/09); and of 13 May 2014 (C-184/11). However, in December 2017, the ECJ ruled that Spain did not have to recover the aid granted between 2005 and 2009 to the operators of DTT in rural areas, annulling the EC decision that declared it illegal, owing to insufficient motivation by the EC on the discriminatory nature of the aid granted.

Furthermore, in November 2017, the EC opened an investigation regarding part of the aid granted by Spain to coal-fired power plants because of the suspicions about its legality. The investigation affects 14 plants that have received more than €440 million in public aid since 2007.

has not been notified or approved by the EC invoking article 108(3) TFEU and the relevant case law conferring direct effect to that provision of EU law.

21 What are the available grounds for bringing a private enforcement action?

Unfair competition and article 108(3) TFEU. See question 20.

22 Who defends an action challenging the legality of state aid? How may defendants defeat a challenge?

The granting authority. However, the beneficiary may submit allegations if or when afforded the condition of interested party.

23 Have the national courts been petitioned to enforce compliance with EU state aid rules or the standstill obligation under article 108(3) TFEU? Does an action by a competitor have suspensory effect? What is the national courts' track record for enforcement?

National courts have, indeed, been petitioned to enforce compliance with EU state aid rules and the standstill obligation under article 108(3) TFEU. Some of these matters have reached Supreme Court level (see judgment of the Supreme Court, Appeal No. 7349/1992, 22 February 1999).

As for compliance with the standstill obligation under article 108(3) TFEU, courts have a good track record of enforcing EC decisions (for example, judgments of 16 July 2012, Appeal No. 6539/2011; 18 October 2012, Appeal No. 6163/2011; and 6 May 2013, Appeal No. 1484/2012).

Article 22 of Law No. 39/2015 establishes that the course of the legal period set to resolve a proceeding and notify the administrative decision may be suspended when a preliminary ruling by a court is needed to issue the decision.

The cost risk to be assumed if a challenge is unsuccessful is the payment of the costs for the proceeding.

24 Is there a mechanism under your jurisdiction's rules of procedure that allows national courts to refer a question on state aid to the Commission and to stay proceedings?

Regulation 734/2013, amending Regulation 659/1999 laying down detailed rules for the application of article 93 of the EC Treaty, stipulates that the courts of member states may ask the EC to give them its opinion on questions concerning the application of state aid rules (see article 23-bis 1).

As a matter of practice, Spanish courts sometimes question the EC on matters such as the existence of aid and the fact of its notification, and the EC's response is used in proceedings.

Spanish courts also request the ECJ to issue preliminary rulings when applying EU state aid law. For instance, there is an ongoing proceeding pending a judgment where the Spanish Supreme Court asked the ECJ whether the absence of effective taxation of certain commercial establishments for environmental damage caused by large sales areas constitutes state aid in a proceeding between the National Association of Large Distribution Companies and the government of Aragon (Joined Cases C-236/16 and C-237/16) (see conclusions of Advocate General Juliane Kokott of 9 November 2017).

25 Which party bears the burden of proof? How easy is it to discharge?

The acts of the public administration are presumed to be valid. Article 217 of the Civil Procedure Law establishes that the burden of proof corresponds to the claimant (ie, the party asking the Spanish court to consider the illegality of the state aid).

26 Should a competitor bring state aid proceedings to a national court when the Commission is already investigating the case? Do the national courts fully comply with the *Deutsche Lufthansa* case law? What is the added value of such a 'second track', namely an additional court procedure next to the complaint at the Commission?

Article 22 of Law No. 39/2015 establishes that the course of the legal period set to resolve a proceeding and notify the administrative decision may be suspended when a prior and mandatory pronouncement of an organ of the EU must be obtained.

27 What is the role of economic evidence in the decision-making process?

The following means of proof are acceptable before courts: questioning the parties, public documents, private documents, expert opinions, taking of evidence by the court and questioning witnesses.

Economic evidence, such as economic reports from experts or private documents with real accounts and charts of benefits, are important before the courts in state aid proceedings.

28 What is the usual time frame for court proceedings at first instance and on appeal?

First-instance proceedings usually take one to three years; appeals usually take a minimum of two years.

29 What are the conditions and procedures for grant of interim relief against unlawfully granted aid?

Article 129 of Law No. 29/1998 allows any claimant to request either the suspension of the administrative act granting the aid or any other measures deemed necessary to ensure the effectiveness of the final judgment. The court may decide to grant the interim measure when the execution of the contested act or the application of the contested provision could eliminate the legitimate purpose of the appeal, after assessing the possibility that the effectiveness of the final judgment will be put at risk if interim relief is not granted, the balance between public and private interests at stake and the probability of the existence of the right that deserves judicial protection. In any case, interim measures must not lead to the seizure of goods or assets belonging to the public administration.

The assessment of interim measure requests is carried out in a separate proceeding. A hearing with the opposing party will take place within 10 days of the date on which the interim measure is requested, and the decision will be made within the following five days (article 131). Once granted, the interim measures will be in force until a final judgment is issued (see also article 132), but can be modified or revoked during the course of the procedure.

In recent years, the Spanish Supreme Court has granted interim relief under article 108(3) TFEU in several cases after the EC initiated an in-depth investigation of the relevant aid (see the rulings of 16 July 2012, Appeal No. 6539/2011; 18 October 2012, Appeal No. 6163/2011; and 6 May 2013, Appeal No. 1484/2012). However, the justification for interim relief must be analysed on a case-by-case basis, and there is also a recent precedent (10 July 2015, Appeal No. 660/2014) in which the Supreme Court denied the suspension requested by the Spanish government on the basis that the existence of an ongoing investigation by the EC is not, by itself, reason to suspend the national proceedings.

30 What are the legal consequences if a national court establishes the presence of illegal aid? What happens in case of (illegal) state guarantees?

National courts have powers only in case of non-compliance with article 108(3) TFEU. Thus, before analysing the case, the judge must establish, first of all, whether the measure in question actually constitutes illegal state aid; that is, the judge must determine whether the measure falls within the concept of aid embedded in article 107(1) TFEU and, in that case, whether it was subject to the standstill obligation.

National judges must guarantee that all consequences arising from an infringement of article 108(3) TFEU are to be extracted in accordance with national law: the nullity of national acts granting illegal state aid and the return of illegal aid, unless there are exceptional circumstances

that imply that the return is not accurate (see ECJ judgment of 11 July 1996, *Syndicat Français de l'Express international*).

31 What are the conditions for competitors to obtain damages for award of unlawful state aid or a breach of the standstill obligation in article 108(3) TFEU? Can competitors claim damages from the state or the beneficiary? How do national courts calculate damages?

Competitors may claim damages from the state (the granting authority). For competitors to claim damages against the granting authority, the following conditions must be met: (i) the damage should be effective and economically appreciable; and (ii) the injury should be a consequence of the normal functioning of public authorities (except in cases of force majeure). Damages are awarded to a claimant for actual loss and for loss of profit.

State actions to recover incompatible aid**32 What is the relevant legislation for the recovery of incompatible aid and who enforces it?**

Law No. 39/2015 provides a general regime applicable by default, under which the administration that granted the incompatible aid is in charge of its recovery. It recognises the administration's right to recover the amount paid to the beneficiaries of an incompatible aid, which is time-barred after four years. This proceeding of reimbursement may not exceed 12 months.

Moreover, the General Subsidies Law and the General Taxation Law establish specific provisions related to the recovery proceedings for cases where the EC adopts a decision resulting in the need for repayment of a subsidy or a tax, respectively.

33 What is the legal basis for recovery? Are there any grounds for recovery that are purely based on national law?

Law No. 39/2015 establishes causes of invalidity of administrative acts in general, such as the omission of the legally established procedure.

Second, the General Subsidies Law also establishes other causes of invalidity of administrative acts issued in specific state aid proceedings, such as non-compliance of the aid objective.

Finally, the specific provisions of the General Taxation Law are applicable in any case in which, in compliance with EU law, the recovery of state aid in the form of taxes is required.

34 Has the Commission ever opened infringement procedures before the CJEU because of non-recovery of aid under article 108(2) TFEU?

Yes, it has happened in the past in various instances. For instance, in January 2017 the EC lodged a complaint against Spain before the ECJ for failing to recover the total amount of state aid granted by Spain, declared illegal by the EC in 2013 and 2014, for the roll-out of DTT in Castilla-La Mancha and other areas. Spain had recovered none of the €43.8 million in aid granted to Castilla-La Mancha and had only

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recovered €5,5 million of the €260 million granted to other areas of Spain. Furthermore, the EC complained that Spain had not suspended payments in these territories. However, in December 2017, the ECJ ruled that Spain did not have to recover the aid granted between 2005 and 2009 to the operators of DTT in rural areas, annulling the EC decision that declared it illegal, owing to insufficient motivation by the EC on the discriminatory nature of the aid granted. There are other previous prominent instances of such infringement proceedings in the past, such as with the tax advantages in the Basque Country.

35 How is recovery implemented?

It is possible to recover aid based on a unilateral administrative act approved by the public administration that granted the incompatible aid.

The granting authority will normally start the proceeding on its own initiative but, if it refuses to do so, a third party distinct from the granting authority and the beneficiary may go to court to seek a judicial declaration of recovery or the mandatory execution of the recovery.

36 Can a public body rely on article 108(3) TFEU?

A public body can rely on article 108(3) TFEU in domestic court proceedings in the absence of an EC decision, based on the direct effect of article 108(3) TFEU as stated (judgment of the Supreme Court of 2 March 2015). Moreover, a public authority can claim the illegality of state aid granted by another public authority (see judgment of 7 February 2006 of the Supreme Court).

37 On which grounds can a beneficiary defend itself against a recovery order? How may beneficiaries of aid challenge recovery actions by the state?

When the authority issues a final decision, which ends the specific administrative recovery procedure, beneficiaries may appeal the decision before a contentious-administrative court, based on the illegality of the recovery procedure carried out by the Spanish authority (eg, the breach of national law establishing the recovery procedure, or the misinterpretation or wrong application of the EC's recovery order).

38 Is there a possibility to obtain interim relief against a recovery order? How may aid recipients receive damages for recovery of incompatible aid?

By virtue of articles 129 and following of Law No. 29/1998, it is possible to obtain interim relief against a recovery order (see question 29).

According to the case law of the EU courts, when granting interim relief, national courts must respect the *Atlanta/Zuckerfabrik* criteria:

- the national court must have serious doubts as to the validity of the Commission's decision (if the validity of the recovery order is not already being tested before the EU courts, the national court must refer this question to the ECJ);
- the granting of aid must be necessary to avoid serious and irreparable damage to the claimant;
- the national court must take EU interests into account; and
- the national court must fully respect previous decisions by the EU courts.

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