

State Aid 2021

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State Aid 2021

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Lexology Getting The Deal Through is delighted to publish the eighth edition of *State Aid*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 a new chapter on United Kingdom.

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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.

Lexology 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 assistance with this volume.



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OVERVIEW

Policy and track record

- 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 2020 annual report on state aid issued by the National Markets and Competition Commission (NMCC, ie, the Spanish NCA), which includes an analysis of the state aid granted by Spain in 2018 (the last year with official data available published by the European Commission (the Commission)), highlights two important conclusions:

- the diminishing significance of aid granted to the financial sector (no aid was granted to this sector in 2016, 2017 and 2018); and
- regular aid (aid not directed to the rail sector or the financial sector) represented 0.39 per cent of GDP in 2018 (which was relatively higher than previous years). Thus, the data indicates a slight increase when compared to previous years, being the highest since 2012 (when regular aid amounted to 0.38 per cent of GDP), but is still lower than when compared to the years during the economic crisis: 0.52 per cent of GDP in 2009; 0.46 per cent of GDP in 2010; and 0.42 per cent in 2011 (unlike previous years, the Commission's published data does not include aid to agriculture, fishery and aquaculture, so some data may vary slightly).

The 2020 annual report on state aid reflects recent measures implemented by the Spanish government to ease the economic downturn sparked by the covid-19 pandemic. In March 2020, the Commission approved the Spanish guarantees scheme worth €20 billion designed for companies and the self-employed affected by the coronavirus pandemic (Case SA.56803). Further on, in April 2020, the Commission approved a national temporary framework that would serve as an umbrella scheme to enable Spanish public authorities to grant support directly, without having to notify individually each measure (Case SA.56851 (2020/N), which was amended and broadened by Decision SA.58778). Afterwards, at the end of April, a second umbrella scheme, which extended the means to grant aid and the fields to which they could be assigned, was approved by the European Commission

(Case SA.57019). Three more relevant schemes were approved by the Commission (SA.57659, SA.58096 and SA.59045).

The schemes have been approved under the State Aid Temporary Framework to support the economy in the context of the covid-19 pandemic adopted by the Commission on 19 March 2020. These packages, together with other direct grants, fall under Commission Regulation (EU) No. 651/2014 of 17 June 2014, declaring certain categories of aid compliance with the internal market in application of articles 107 and 108 TFEU (the General Block Exemption Regulation). The measure was administered by the Spanish national credit bank, the Official Credit Institute, and aid may be granted until the 31 December 2021, subject to more extensions (this last extension, decided by the Commission on 28 January 2021, was the fifth). The aid was found compatible with the internal market pursuant to article 107(3)(b) TFEU, which establishes that the Commission may declare compatible with the internal market aid 'to remedy a serious disturbance in the economy of a Member State'.

Furthermore, the European Court of Justice (ECJ), following a preliminary ruling from the Supreme Court, concluded that the Spanish tax on the use of inland waters for the production of electricity was not selective and did not constitute state aid (judgment of the ECJ of 7 November 2019, Joined Cases C-105/18 to C-113/18).

Equally, in January 2019, the Commission proposed that Spain align its taxation of ports with state aid rules. Following this Commission decision, Spain agreed to amend its corporate income tax legislation to bring it in line with EU state aid rules. Notably, the Spanish authorities have committed to bringing Spanish ports, including those located in the Basque Country, under the normal corporate income tax rules as from 2020. The Commission formally accepted this commitment in a decision adopted in November 2019.

On the other hand, the EU General Court annulled several Commission state aid decisions against Spanish football clubs: in February and March 2019, against three Spanish football clubs (Athletic Club, Fútbol Club Barcelona and Hércules Club de Fútbol) (Case SA.29769); in May 2019, against Spanish football club Real Madrid regarding a real estate refund (Case SA.33754); and, in March 2020, annulling the Commission's decision on aid measures implemented in favour of Spanish football clubs Valencia CF and Elche CF (Case SA.36387). The EU Court of Justice has now, on 4 March 2021, set aside the EU General Court judgment against FC Barcelona.

Relevant authorities

- 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 Commission must 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 Commission.

Second, the Ministry of Foreign Affairs, and more specifically the Secretary of State for the EU, shall notify to the Commission, 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 Commission. 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 Commission. 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. To grant subsidies of more than €12 million, agreement from the Council of Ministers or the Government Delegate Commission for Economic Affairs is necessary.

General procedural and substantive framework

4 | Describe the general procedural and substantive framework.

The general substantive legal framework is that of articles 107 and 108 TFEU and implementing legislation and soft law (eg, on 19 March 2020, the Commission approved the Communication on Temporary Framework for State aid measures to support the economy in the current covid-19 outbreak, which has been extended until 31 December 2021). In Spain, the government approved in April 2020 an umbrella scheme, validated by the EU Commission and further expanded and amended, that enabled Spanish public authorities to grant aid through

direct subsidies, repayable advances or tax and payment advantages, among other measures.

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.

National legislation

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 Commission 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 Commission shall send the relevant projects to the ICEAEU (article 1);
- the General Subsidies Law, which 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

National schemes

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 overleaf:

Case	Objective	Granting authority	Those who benefit	Amount of total aid	Duration
SA.58458	To support the trade credit insurance market in the covid-19 outbreak	National Insurance Compensation Fund (CCS)	Insurance companies	€500 million	4 December 2020–30 June 2021
SA.59045	A guarantee scheme for undertakings with composition agreements	Official Credit Institute (ICO)	The self-employed and companies in the course of judicial insolvency with a composition agreement	Up to €2.55 billion	20 November 2020–30 June 2021
SA.56803	A remedy scheme for a serious disturbance in the economy	ICO	Undertakings registered in Spain (including self-employed)	€20 billion	24 March 2020–30 September 2020
SA.56851	First umbrella scheme: a remedy for a serious disturbance in the economy	General State Administration, Administration of Autonomous Communities, entities from local administrations and other public entities linked to or depending on the previous ones	Undertakings registered in Spain (including self-employed)	Estimated €3.65 billion	02 April 2020–31 December 2020
SA.57019	To support covid-19 research, development and innovation, amendment of the first umbrella scheme	General State Administration, Administration of Autonomous Communities, entities from local administrations and other public entities linked to or depending on the previous ones	Undertakings registered in Spain (including self-employed)	Estimated €3.5 billion	24 April 2020–30 June 2021
SA.57659	Creation of a fund that provide debt and capital support	Sociedad Española de Participaciones Industriales (SEPI)	Non-financial strategic undertakings established in Spain	€ 10 billion	31 July 2020 – 30 June 2021
SA.58096	Amendment of SA.56803 by ensuring liquidity	ICO	Undertakings registered in Spain (including self-employed)	Up to €40 billion	5 August 2020–31 December 2020

Case	Objective	Granting authority	Those who benefit	Amount of total aid	Duration
SA.59196	Third amendment to umbrella scheme (SA.56851)	Same as first umbrella scheme	Same as the first umbrella scheme	Remains the same as the first umbrella	13 December 2020–30 June 2021
SA.59723	Fourth amendment to umbrella scheme	Same as first umbrella scheme	Same as the first umbrella scheme	Not determined	19 February 2021–31 December 2021

Three procedures initiated by the Commission under article 108(2) should be highlighted. In July 2019, the Commission opened an in-depth investigation to assess whether Spain's plan to grant €20.7 million of public support to PSA Group for investing in its existing car plant in Vigo is in line with EU rules on regional state aid (Case SA.49579 (2019/C)). PSA is a large industrial group active in the automotive sector and is investing around €500 million in new production lines for the launch of new vehicles, as well as in process improvements in the exiting plant of Peugeot Citroën Automobles España in Vigo. In November 2017, Spain notified the Commission of its plans to grant €20.7 million of public support for the project. The Commission is doubtful that the planned aid support of €20.7 million in Vigo complies with all the criteria of the Regional State Aid Guidelines. In December 2019, the Commission opened another in-depth investigation to assess whether the plan by the Spanish region of Valencia to grant €9 million of public support to

regional airline Air Nostrum for the renewal of its fleet is in line with the EU state aid rules (Case SA.50707 (2018/FC)). Air Nostrum is a regional airline headquartered in Valencia, and in 2018, the regional government of Valencia approved a subsidy of up to €3 million to it. The Commission doubts that the total intended aid support of €9 million to Air Nostrum falls within the General Block Exemption Regulation and complies with the Guidelines; and finally, the Commission opened an in-depth investigation upon a complaint from an airline with operations in Barcelona-El Prat airport about marketing agreements related to Ryanair's operations in the nearby Girona and Reus airports. The complainant alleged that the agreements amount to illegal state aid in favour of Ryanair (Case SA.33909).

General Block Exemption Regulation

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)

Public undertakings, public holdings in company capital and public-private partnerships

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 and ports.

Although it is a matter not strictly under the legal umbrella of state aid, the Spanish authorities may occasionally tend to protect 'national champions' – for instance, in the framework of sensitive mergers and acquisitions. This was illustrated by the takeover offer for toll motorway concession company Abertis. The Spanish government authorised the operation by which ACS and Atlantia jointly acquired the Abertis motorway concessions group and thereby took control of the satellite operator Hispasat by virtue of two agreements adopted by the Council of Ministers. The transaction required the approval of the government since it implies a change of control of companies that operate a set of Spanish motorways and the country's satellites under a concession regimen, assets that, in both cases, were ultimately owned by the state. In this case, the state has intervened by construing extensively its own authorisation powers. Such a protectionist trend, which is in line with what is being seen internationally, is likely to be amplified in the near future owing to the covid-19 pandemic and is already materialising in the form of a rather broad foreign direct investment screening system that was introduced in March 2020.

SGEI

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

In the 2020 Annual Report on State Aid published by the National Markets and Competition Commission, 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 over-compensation 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, sets as one of its objectives transparency in the management of SGEI.

Law No. 4/2007 establishes the general obligations that undertakings operating SGEI must 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 to the General Intervention of the National Government Administration.

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

CONSIDERATIONS FOR AID RECIPIENTS

Legal right to state aid

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 grant must be made in compliance with the pre-established criteria and within the general requirements established in Law No. 38/2003 of 17 November 2003 on General Subsidies (the General Subsidies Law).

Main award criteria

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 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.

Strategic considerations and best practice

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

First, applicants for subsidies must 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.

Challenging refusal to grant aid

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

If the administrative act that results in the subsidy being 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.

Involvement in EU investigation and notification process

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

This is generally a matter for EU law, which governs the review by the European Commission of projected or illegal state aid. Under national

law, 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 are 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, obtain a copy of the documents issued and to submit comments and provide documents and evidence during proceedings.

STRATEGIC CONSIDERATIONS FOR COMPETITORS

Complaints about state aid

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 having direct effect under article 108(3) TFEU.

Competitors can also inform the National Markets and Competition Commission (NMCC), which is entitled to analyse the criteria and opportunity of aid and to issue reports or address proposals to the relevant granting authority. However, the Commission has an institutional monopoly under EU law with regard to the assessment of compatibility of state aid measures and, consequently, the NMCC has no enforcement powers regarding this matter.

Dealing with illegal or incompatible aid

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 municipalities with fewer than 50,000 inhabitants, this information can be published on the local notice-board); 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 Law No. 38/2003 of 17 November 2003 on General Subsidies, 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.

Other ways to counter illegal or incompatible aid

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 European Commission).

PRIVATE ENFORCEMENT IN NATIONAL COURTS

Relevant courts and standing

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 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.

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 its judgment of 11 July 1996 (Syndicat Français de l'Express international), the European Court of Justice (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 European Commission (the Commission) 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 conduct. 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 has not been notified or approved by the Commission invoking article 108(3) TFEU and the relevant case law conferring direct effect to that provision of EU law.

Available grounds

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

Unfair competition and article 108(3) TFEU.

Defence of an action

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.

Compliance with EU law

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 Commission decisions (eg, Order of the Supreme Court of 10 July 2018, Appeal No. 545/2009; judgments of the Supreme Court of 16 July 2012 Appeal No. 6539/2011, 18 October 2012 Appeal No. 6163/2011 and 6 May 2013 Appeal No. 1484/2012; and Order of the National High Court of 12 January 2015, Appeal No. 188/2010).

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 (eg, see Order of the Supreme Court of 10 March 2016, Appeal No. 951/2014; Order of Contentious-Administrative Court of Madrid of 26 January 2016, Appeal No. 247/2014; or Order of the Contentious-Administrative Court of Ferrol of 12 April 2013, Appeal No. 52/2011).

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

Referral by national courts to European Commission

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 (EU) No. 734/2013, amending Regulation (EC) No. 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 Commission 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 Commission on matters such as the existence of aid and the fact of its notification, and the Commission's response is used in proceedings.

Spanish courts also request the ECJ to issue preliminary rulings when applying EU state aid law when required. For instance, the ECJ

was asked by the Supreme Court 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 regional governments of Aragon (Joined Cases C-236/16 and C-237/16), Cataluña (judgment of the ECJ of 26 April 2018, Case C-233/16) and Asturias (judgment of the ECJ of 26 April 2018, Joined Cases C-234/16 and C-235/16). In these cases, the ECJ ruled that the taxation was not compatible with state aid rules in Cataluña. However, the Court declared this system compatible in Aragon and Asturias.

On 7 November 2019, the ECJ delivered a judgment on a request for a preliminary ruling by the Supreme Court (judgment of the ECJ of 7 November 2019, Joined Cases C-105/18 to C-113/18). The request was made in proceedings between several hydroelectricity producers and the Spanish government, with regard to the lawfulness of a Spanish tax on the use of inland waters for the production of electricity. The ECJ ruled that this taxation was compatible with state aid rules.

In contrast, the ECJ dismissed a request for a preliminary ruling from the Spanish Central Tax Authority (TEAC) concerning the deduction of goodwill resulting from the acquisition by Banco Santander of all shares in a holding company governed by German law (judgment of the ECJ of 21 January 2020, Case C-274/14). The ECJ considered that the TEAC did not qualify as a court or tribunal for the purposes of article 267 TFEU, deeming the request inadmissible.

Burden of proof

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).

Deutsche Lufthansa scenario

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. Spanish courts comply with the *Deutsche Lufthansa* case law (judgment of the ECJ of 21 November 2013, Case-284/12) in the sense that national courts have to remedy the consequences of the infringement to avoid unlawful aid from remaining at the free disposal of the beneficiary before the Commission has adopted a final decision, actively implementing measures that go beyond merely maintaining the proceedings until the final decision is adopted. However, in some cases, courts have opted to dismiss action for nullity with regard to an administrative act under investigation by the Commission for constituting unlawful aid. For instance, the National High Court dismissed an action for annulment by Fred Olsen concerning an administrative act granting alleged unlawful aid to the competitor shipping company Transmediterránea and a claim for damages (judgment of 11 April 2000, Appeal No 1251/1997). In parallel, the Commission had initiated formal proceedings to investigate this aid. However, the National High Court concluded that the Commission's investigation was not final and, thus, it is this institution that must examine if there has been a violation of state aid rules.

Likewise, the National High Court considered that a preliminary ruling was not necessary in this regard.

Economic evidence

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.

Time frame

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.

Interim relief

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 Commission 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; 6 May 2013, Appeal No. 1484/2012 and 22 February 2019, Appeal No. 6020/2018). The Supreme Court confirmed that the authorities of the member state concerned are empowered, within the framework of the legal provisions, to agree on provisional safeguard measures to ensure effective compliance with the subsequent Commission Decision (judgment of the Supreme Court of 29 January 2020, Appeal No. 7010/2018). 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 Commission is not, by itself, reason to suspend the national proceedings.

Legal consequence of illegal aid

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 the case of non-compliance with article 108(3) TFEU. Thus, before analysing the case, the judge must first establish 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*). For instance, the Superior Court of Justice (judgment of 14 July 2015, Appeal No. 73/2015) confirmed the annulment of a state guarantee that had not complied with state aid rules, even though it affected a third party (Banco Mare Nostrum, SA). The court ruled that the administrative act revoking the state guarantee was lawful irrespective of the effects such declaration of illegality could have on the bank, as the authority cannot take into account the existence of private agreements in order to revoke illegal state aid.

Additionally, the Contentious-Administrative Court of Valencia annulled a state guarantee issued by a public entity dependent on the Valencian regional government in favour of the Valencia Club de Fútbol Foundation for an amount of €75 million, owing to the fact that it had not been subject to the mandatory authorisation regime before the Commission. In the ruling, the Court did not take into account third-party interests involved in its decision to revoke the unlawful state aid (judgment of 8 March 2013, Appeal No. 239/2010).

Damages

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: (1) the damage should be effective and economically appreciable; and (2) 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. However, the Supreme Court has recently declared that the damage stemming from unlawful aid cannot be considered effective if the decision by the Commission has been appealed and is still pending (judgment of the Supreme Court of 8 February 2019, Appeal No. 617/2017). Notwithstanding the foregoing, such a situation is extremely rare as the claimant seeking damages was, in fact, the actual beneficiary of the unlawful aid (Real Madrid Club de Fútbol). The Spanish football club claimed that as a result of the illegal aid it had paid a higher amount of corporate tax than it should have paid if the state aid had not existed and, thus, claimed compensation for the damage caused. The Supreme Court rejected the appeal considering that it was not possible to observe the existence of an effective damage at the time of the appeal (as the issue was still pending resolution from the General Court).

In fact, the General Court handed down its judgment upholding the appeal by the Spanish football team against the decision of the Commission, considering that the Commission had not shown to the

requisite legal standard that the measure at issue conferred an advantage on its beneficiaries (judgment of 22 May 2019, Case T-791/16). This judgment from the General Court was overruled by the Court of Justice on 4 March 2020, Case C-362/19, so all clubs implicated in that scheme (ie, FC Barcelona, Real Madrid, Osasuna and Athletic) will have to return the tax benefits they received.

STATE ACTIONS TO RECOVER INCOMPATIBLE AID

Relevant legislation

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, Law No. 38/2003 of 17 November 2003 on General Subsidies (the General Subsidies Law) and the General Taxation Law establish specific provisions related to the recovery proceedings for cases where the Commission adopts a decision resulting in the need for repayment of a subsidy or a tax, respectively.

Legal basis for recovery

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.

Commission-instigated infringement procedures

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 European Commission (the Commission) 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 Commission 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 Commission 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 Commission decision that declared it illegal, owing to insufficient motivation by the Commission 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.

In addition, the ECJ set aside the judgment of the General Court on the Spanish tax lease systems, where the General Court had annulled the Commission's decision that the system constituted state aid. By

Commission Decision of 17 July 2013 (2014/200/EU), the Commission took the view that three of the five fiscal measures under examination constituted illegal state aid to the economic interest companies (EIGs) and their investors, and had been unlawfully implemented by Spain since 1 January 2002. The aid was declared partially incompatible with the internal market. Spain, Lico Leasing (a financial institution having invested in a certain number of EIGs that participated in the Spanish tax lease system) and Pequeños y Medianos Astilleros Sociedad de Reconversión (a company that cooperates with small and medium-sized shipyards to enable them appropriately to achieve their industrial objectives) applied to the General Court for review of the Commission Decision. By a judgment of 17 December 2015 (Joined Cases: T-515/13 *Spain v Commission*, and *Lico Leasing, SA and T-719/13 Pequeños y Medianos Astilleros Sociedad Reconversión SA v Commission*), the General Court annulled the decision of the Commission. The Commission then applied to the ECJ to set aside the judgment of the General Court. The ECJ in its judgment of 25 July 2018 (Case C-128/16 P) set aside the General Court's judgment and the case is thus referred back to the General Court, as the condition relating to selectivity was incorrectly examined by reference to the investors and not the EIGs.

Implementation of recovery

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.

Article 108(3) TFEU

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 a Commission 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).

Defence against recovery order

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 Commission's recovery order).

Interim relief against 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.

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.

In recent years, courts have granted interim relief in very few cases. In 2019 the Supreme Court (see Appeal No. 6020/2018, 22 February 2019), recalled the doctrine regarding this matter:

In short, in the same way that in our Judgement of 23 October 2012 we highlighted the need to protect more actively the precautionary protection of the appellant derived directly from Article 108 TFEU, we must now ask ourselves whether the perspective of reasoning – interpreting Articles 129 and 130 of Law No. 29/1998 within the framework of the provisions of the community sphere – is applicable to cases such as this in which the requested interim relief is related to alleged acts of enforcement of the agreement, contested and suspended in the main proceedings, which have not been contested autonomously.

This doctrine attempts to reconcile the European requirements regarding the analysis of the compatibility of state aid with the European order and the precautionary protection of the appellant (see judgments of the Supreme Court No. 9696/2012, 23 October 2012 and No. 3728/2014, 17 July 2014).

UPDATE AND TRENDS

Key developments of the past year

39 Are there any emerging trends or hot topics relating to state aid control in your jurisdiction? What are the priorities of the national authorities? Are there any current proposals to change the legislation? Are there any recent important cases in the field of fiscal aid (taxes), infrastructure, or energy? Any sector enquires?

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 National Markets and Competition Commission 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.

The EU General Court annulled the European Commission Decision classifying the tax regime of six Spanish professional football clubs as state aid. The Commission declared that Spain had unlawfully implemented state aid in the form of a corporate tax privilege in favour of those six football clubs (Futbol Club Barcelona, Club Atlético Osasuna, Athletic Club de Bilbao, Real Madrid Club de Fútbol, Valencia Club de Fútbol and Elche Club de Fútbol), as that regime was incompatible with the internal market (Cases SA.29769, SA.33754 and SA.36387). The General Court stated that the Commission had erred in its assessment of the facts and had not shown to the requisite legal standard that the measure at issue conferred an advantage on its beneficiaries. On 4 March 2021, in Case C-362/19, the EU Court of Justice set aside the judgment from the General Court and, thus, confirmed the

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Commission Decision that considered the tax regime used by the clubs (FC Barcelona, Real Madrid, Athletic and Osasuna) as state aid.

The most recent state aid measures granted by Spain that have been approved by the Commission, apart from the state guarantees with regard to the covid-19 pandemic, were granted for: (1) aid for investments to put into place irrigation systems in the region of Aragón (Case SA.56549); (2) aid for an investment project in Mérida (Extremadura) for building up a sugar beet processing plant to ensure viable food production and to promote efficient and sustainable use of resources (Case SA.55039); and (3) aid to compensate television audiovisual media service providers for costs resulting from the provision of 5G Mobile Services (Case SA.53925).

On the other hand, the Commission decided to initiate formal proceedings with regard to three cases: (1) regional aid in favour of Peugeot Citroën Automóviles España SAS, awarded in 2017 (Case SA.49579); (2) aid granted by the government of the region of Valencia to the Spanish regional airline Air Nostrum with respect to the renewal of its fleet (Case SA.50707); and (3) aid offered to Ryanair and other airlines and to Girona and Reus Airports (Case SA.33909).

CORONAVIRUS

40 What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The main emergency initiative implemented in Spain as a consequence of the covid-19 outbreak is the umbrella scheme, along with all the amendments and other schemes under the temporary framework approved by the EU Commission.

The umbrella scheme (Case SA.56851), approved by the EU Commission, allowed every public administration in Spain (including the general state, autonomous communities and local entity administrations) to support Spanish undertakings, including the self-employed, during this rough time. The measures included all kinds of instruments to ensure the aid: direct grants, repayable advances, tax and

payment advantages, guarantees on loans and subsidised interest rates for loans.

It was amended by three later measures (Cases SA.57019, SA.59196 and SA.59723) to ensure mainly two things: (1) the existence of liquidity to be able to support Spanish undertakings; and (2) the extension of the temporary framework until 21 December 2021.

Furthermore, the Spanish government also approved a fund to support strategic undertakings, validated by the EU Commission under its temporary framework (Case SA.57659); a guarantee scheme for undertakings with composition agreements, also validated by the EU Commission (SA.59045); and a guarantee scheme, with its pertinent amendments, that enabled undertakings and the self-employed to finance their productive investments (SA.58096).

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