

PANORAMIC

STATE AID

Spain



LEXOLOGY

State Aid

Contributing Editor

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OVERVIEW

Policy and track record

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

In general, the Spanish national authorities and courts apply the state aid rules correctly. However, on several occasions the Commission has initiated formal investigation procedures, issued recovery orders and initiated infringement proceedings before the Court of Justice of the European Union (CJEU) for Spain's failure to comply with recovery orders. There are several examples of CJEU decisions finding that the Kingdom of Spain has failed to comply with recovery obligations for aid declared unlawful and incompatible, such as the judgments in Case C-704/19 and Case C-184/11.

The main problems have arisen due to unlawful regional tax breaks and failings in the procedure to recover them. For this reason, in 2015 the General Tax Law was amended to establish a specific procedure for recovering tax state aid.

Apart from the extraordinary aid granted as a result of the covid-19 pandemic, the sector that receives most public aid is air and maritime transport owing to the subsidisation of travel to Spain's islands. Other economic sectors that receive significant amounts in public aid are tourism and telecommunications.

Linked to the topic of state aid, the Spanish government participates in the corporate sector through the state-owned industrial holding company Sociedad Estatal de Participaciones Industriales (SEPI). SEPI holds majority and minority shareholdings in companies in the postal service (Correos Group) and the shipbuilding (Navantia), environmental, agricultural and food (TRAGSA, MERCASA, MAYASA, CERTASA and SAECA), energy and mining (HUNOSA, ENSA and ENUSA) and media (Agencia EFE) sectors, among others.

In the 1990s there was a partial privatisation of state holdings in industrial groups (Seat, ENAGAS, Telefónica, REPSOL, ENDESA, INDRA, etc). However, it is foreseeable that this will be re-evaluated in the coming years. In December 2023, the Spanish government approved the acquisition of 10 per cent of Telefónica's share capital. To this end, in March 2024, the Spanish government initiated the procedures for the creation of the State Society for Technological Transformation (SETT). The intention is for SETT to invest €20 billion in companies in the digital sector over the coming years.

Law stated - 19 marzo 2024

Relevant authorities

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

In Spain, local, regional and national authorities and their agencies may grant state aid. They also verify compliance with state aid rules and their actions are in turn verified by audit bodies (for example, the General Intervention of the State Administration).

According to article 11 of Law 15/2007 of 3 July on the defence of competition, the National Markets and Competition Commission (CNMC) and the regional competition authorities have the power to analyse the criteria applied to grant state aid in terms of its potential effects on competition in the market. The competition authorities may issue reports on general or individual aid schemes and submit proposals to public bodies. The CNMC also publishes an [annual report](#) on the state aid granted in Spain.

The process for notifying state aid to the European Commission is set out in Royal Decree 1755/1987 of 23 December, pursuant to which all aid must be notified through the Interministerial Commission for European Union Affairs, which channels notifications through the Ministry of Foreign Affairs.

Law stated - 19 marzo 2024

Relevant authorities

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

National, regional and local authorities and their agencies have the power to grant public aid. Applications for aid must be submitted to the body stipulated in the terms and conditions of each aid award procedure.

Among the different governmental agencies, we highlight the following:

- The Centre for Technological Development and Innovation (CDTI) is a public company associated to the national government that promotes innovation and technological development in Spanish companies. To this end, the CDTI channels applications from Spanish companies for aid for RDI projects.
- The Official Credit Institute (ICO) is a Spanish public bank associated to the Ministry of Economy and is recognised as a credit institution. In its role as a public bank, the ICO grants loans and other financial instruments to finance investment operations or liquidity needs. These loans may be interest subsidised.

Law stated - 19 marzo 2024

General procedural and substantive framework

Describe the general procedural and substantive framework.

There are no specific regulations that systematically determine the procedure and requirements that a beneficiary must fulfil to obtain state aid. Aid in the form of monetary payments to achieve a purpose that serves the public interest is considered a subsidy and is governed by Law 38/2003 of 17 November on subsidies. Meanwhile, tax aid must meet the formal and material requirements set out in the applicable tax regulations.

In addition, aid granted by public sector entities must be awarded within the framework of an administrative procedure governed by public law and specifically Law 39/2015 of 1 October on the Common Administrative Procedure for Public Authorities. This means that

the requirements a beneficiary must meet to be eligible for the aid must be determined in advance.

Public bodies have some discretion when assessing whether requirements are met if they are configured broadly or if they allow for more than one option. All decisions must explain the reasons on which they are based and can always be reviewed by the contentious-administrative courts.

Law stated - 19 marzo 2024

National legislation

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

Article 9.1 of the General Subsidies Law provides that when aid takes the form of a subsidy, if the European Commission must be notified of the project for its granting, a subsidy may not be granted until it is considered compatible with the common market (stand still obligation).

In the area of public procurement, Law 9/2017 of 8 November on public sector contracts provides that abnormally low bids may be rejected if the bidder has obtained state aid contrary to European rules. In those cases, the contracting authority must inform the European Commission. Likewise, the feasibility study for works or service concessions must assess whether the aid for the construction or operation of the concession constitutes state aid and whether this is compatible with European rules.

In the field of taxation, Title VII of Law 58/2003 of 17 December on taxation establishes the procedure for recovering state aid.

All public aid must be recorded in the National Subsidies Database per Royal Decree 130/2019 of 8 March 2019 and article 3 of Law 19/2013 of 9 December on transparency, access to public information and good governance imposes transparency obligations on entities that receive more than €100,000 in public aid annually.

Finally, on 9 June 2016, the CNMC published a [Methodological Guide on the Evaluation of State Aid](#) that summarises the European state aid measures implemented in Spain.

Law stated - 19 marzo 2024

PROGRAMMES

National schemes

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?

According to the [State aid Scoreboard 2022](#) published by the European Commission on 24 April 2023, in 2021 Spain had 583 active measures, divided as follows:

State aid measures in 2021

Type of procedure	Number of active measures	Share of total
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Agriculture Block Exemption Regulation	98	16.8%
Fisheries Block Exemption Regulation	3	0.5%
General Block Exemption Regulation	442	75.8%
Notified Aid	40	6.9%
Total	583	100.0%

According to the same source, of the 442 General Block Exemption Regulation (GBER) measures, the most used in Spain are 'Investment aid for energy efficiency measures (article 38)' (31.5 per cent), followed by 'Social aid for transport for residents of remote regions (article 51)' (26.5 per cent), 'Additional costs (article 15(4))' (8.6 per cent) and 'Regional aid – investment aid (article 14) – Scheme' (8.1 per cent). In 2021, Spain's covid-19-related expenditure amounted to €12,483.9 million, which represents 61.1 per cent of the total state aid expenditure.

Currently, some of the most important notified schemes relate to the Strategic Projects for Economic Recovery and Transformation (PERTE). These are public-private partnership instruments regulated in Royal Decree-Law 36/2020 of 30 December approving urgent measures to modernise government and to implement the Recovery, Transformation and Resilience Plan, which foresee public aid measures for important economic sectors that are mainly financed through the Recovery and Resilience Facility. These notified schemes include:

- [SA.110763](#). Boosting the electric and connected vehicle value chain (RRF);
- [SA. 107292](#). IND – Aid for industrial strengthening actions in the agri-food sector under the Agri-food PERTE (RRF);
- [SA.104933](#). RRF – Spain – Support for 5G equipment and infrastructure, as amended by Decision [SA. 108821](#);
- [SA.107498](#). MIMAM – PERTE in Circular Economy: aid for the promotion of the circular economy (RRF);
- [SA.107094](#). RRF – TCTF: Integrated action line on the industrial value chain – batteries; and
- [SA.102847](#). RRF – Spain – Support for connectivity in rural areas.

Aid schemes to deal with the consequences of the Ukrainian invasion have also been notified under the Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, such as [SA.106016](#) TCTF – Spain – Aid scheme for compensation of additional costs due to exceptionally severe increases in natural gas prices and [SA. 102771](#) TCF: Umbrella Scheme, as amended by Decision [SA. 110430](#).

Law stated - 19 marzo 2024

General Block Exemption Regulation

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

There are no specific provisions on the systematic implementation of the GBER. However, Law 59/1985 of 27 December sets out rules on regional incentives to correct inter-territorial economic imbalances and Royal Decree 899/2007 of 6 July approves the Regulation on regional incentives and the Regional Aid Map for Spain 2022–2027 ([SA.100859](#)), as amended by Decision [SA.109336](#), of 13 December 2023.

Law stated - 19 marzo 2024

PUBLIC OWNERSHIP AND SERVICES OF GENERAL ECONOMIC INTEREST (SGEI)

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

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

The CNMC reviews the analytic accounts of companies that have a universal service obligation (USO) to ensure that the compensation they receive complies with the Altmark requirements. Some of the publicly held companies currently providing USO in Spain and subject to this review are active in the media, postal services, airport management and train transport markets. This review is in addition to the prior approval that must be sought from the European Commission to the granting of such public funding, where applicable.

The Spanish central government's holdings are mainly held through SEPI, which was created by Royal Decree-Law 5/1995 of 16 June and is associated with the Ministry of Finance. Currently, SEPI directly holds majority stakes in 14 companies, directly holds minority stakes in 10 companies and indirectly holds stakes in more than 100. Some of its notable direct majority shareholdings include Correos Group (postal services), Navantia (shipbuilding), Agencia EFE (media), ENUSA Group (nuclear energy) and RTVE (media). Its direct minority shareholdings include companies such as Enagas (energy infrastructure), Redeia (electricity grid operator) and Indra (technology).

In addition, other ministries have sector-specific holdings in companies that are related to their duties. For instance, the Ministry of Economy, Trade and Companies holds a majority stake in CESCE Group (the Spanish export credit agency), COFIDES (development financing); the Ministry of Transport, Mobility and the Urban Agenda owns RENFE Group (railway company); and the Ministry of Finance owns Sociedad Estatal Loterías y Apuestas del Estado, S.M.E., SA (national lottery).

Following the crisis caused by covid-19, the Spanish government set up – among others – a Solvency Support Fund, managed by SEPI, with a budget of €10 billion to invest in companies affected by the outbreak of the virus. The European Commission approved this as a state aid measure on 31 July 2020 ([SA.57659](#)). This has resulted in equity investments in companies such as Air Europa (airline) and participating loans of €280.5 million in Celsa (steel industry).

In addition, the Spanish government has recently approved the acquisition of up to 10 per cent of Telefónica (the telecommunications operator), following the acquisition of a 9.9 per cent shareholding in Telefónica by Saudi Arabian telecommunications operator STC (which fell just below the 10 per cent threshold for FDI screening). The Spanish central government argues that this measure is comparable to ones carried out by other EU countries and is intended to provide stability and preserve Telefónica's strategic capabilities, which are of major importance to the national public interest. In March 2024, the Spanish government set in motion the creation of Sociedad Estatal para la Transformación Tecnológica (SETT), which will acquire 10 per cent of Telefónica's capital and invest €20 billion in companies in the digital sector.

The CNMC issues reports on intra-group contracting among publicly held companies to ensure that no cross-subsidisation takes place, pursuant to article 321(6) of Law 9/2017 of 8 November on public sector contracts. In recent years, the CNMC has issued reports on intra-group contracting within the CESCE Group (the Spanish export credit agency), the Hunosa Group (energy and environmental restoration company) and the Correos Group (postal services).

Finally, the CNMC closely monitors publicly owned companies' market behaviour, particularly under abuse of dominance rules.

Law stated - 19 marzo 2024

SGEI

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

The notion of a 'service of general economic interest' (SGEI) is not explicitly defined under Spanish law. Article 128.2 of the Spanish Constitution states that 'essential resources or services may be restricted by law to the public sector, especially in the case of monopolies; companies' involvement can be sought if so required by the general interest.'

Spanish regulations have imposed 'public service obligations' on undertakings active in specific sectors, such as telecommunications, energy supply, postal services, aviation, maritime and train transport to ensure that services that are considered essential are provided but that might not be provided in the absence of such obligations. For instance, Correos is entrusted with the universal postal service obligation until 2025 (Decision on 14 May 2020, [SA.50872](#)), whereas Agencia EFE is entrusted with the public service of a news agency (Decision of 9 December 2016, [SA.35474](#)).

Law stated - 19 marzo 2024

CONSIDERATIONS FOR AID RECIPIENTS

Legal right to state aid

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

There is no general right to receive public aid. Each authority will determine in the call for applications or instrument regulating the aid in question that parties may have the status of beneficiary and what requirements a beneficiary must fulfil to obtain the aid. However, in general, and unless there are public interest reasons justifying the direct granting of public aid, aid must be granted in a competitive procedure subject to the principles of publicity and non-discrimination.

Article 13 of the General Subsidies Law sets out a series of conditions that, if met, will mean that an individual may not receive aid in the form of a subsidy (for example, having been disqualified from obtaining public aid, having applied for insolvency, not being up to date with tax or social security obligations, or being resident for tax purposes in a country or territory classified as a tax haven).

Law stated - 19 marzo 2024

Main award criteria

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

Each authority will determine in the call or instrument governing the aid in question which requirements a beneficiary must fulfil to be eligible for the aid. These requirements depend on the purpose of the aid.

For example, in the case of regional incentives, articles 7 and 8 of Royal Decree 899/2007 of 6 July require that the projects involve creating new business establishments, or extending or modernising existing establishments; that they are technically, economically and financially viable; that they are self-financed to some degree and that the aid has an incentivising effect, so that the investment cannot be started before the application is submitted.

Law stated - 19 marzo 2024

Strategic considerations and best practice

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

Although this should be assessed on a case-by-case basis, depending on the type of project for which aid is being requested, in all cases it is necessary to design and assess the project in advance, taking into account what public aid will be required and applied for, so that it can be assessed whether this aid will be compatible with the state aid rules and whether the requirements imposed by the national authorities responsible for granting the corresponding aid will be met.

Law stated - 19 marzo 2024

Challenging refusal to grant aid

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

The decisions of the national authorities may be appealed before the national authorities themselves or before the contentious-administrative courts. In certain cases, an appeal must first be lodged with the authority before the courts can be seised.

These administrative or judicial appeals may also be lodged by any third party that justifies that it has a legitimate interest in having the contested decision annulled (for example, a competitor of the beneficiary), as provided for in article 4 of Law 39/2015 of 1 October on the Common Administrative Procedure for Public Authorities and in article 19 of the Law on the contentious administrative courts.

Law stated - 19 marzo 2024

Involvement in EU investigation and notification process

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

It is customary in both investigation and notification procedures for the aid recipient to be able to submit comments as an interested party, to have access to the administrative file and, if deemed appropriate, to participate in meetings with the EU authorities. It is also customary for the aid recipient to collaborate with national authorities to prepare the aid notification.

Law stated - 19 marzo 2024

STRATEGIC CONSIDERATIONS FOR COMPETITORS

Complaints about state aid

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?

There is no national authority in Spain responsible for dealing with complaints by competitors or interested parties in relation to potentially unlawful or incompatible state aid measures. These complaints should be addressed to the authority that is granting the aid.

Private parties may address complaints to the National Markets and Competition Commission (CNMC) under Law 20/2013 of 9 December to ensure market unity within Spain. This issue can arise when aid granted by regional or local authorities unduly restricts access to companies from other parts of Spain or requires a local nexus.

Law stated - 19 marzo 2024

Dealing with illegal or incompatible aid

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 find out what aid has been granted to a beneficiary in the National Subsidies Database, regulated by Royal Decree 130/2019. Public aid grants must be published in this database.

In addition, article 3 of Law 19/2013 on transparency, access to public information and good governance imposes transparency obligations on entities that receive more than €100,000 in public aid annually. The CNMC also publishes an annual report on state aid granted in Spain pursuant to article 11 of Law 15/2007 of 3 July on the defence of competition.

Law stated - 19 marzo 2024

Dealing with illegal or incompatible aid

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

In ongoing proceedings, third parties may have access to information if they can prove they have a legitimate interest. For closed files, information can be requested under the Transparency Law. This law provides for a general right to access documents gathered or drafted by public authorities within the scope of their duties. There are a number of exceptions that may limit this right, including where allowing access would harm the public interest, pose a risk to national security or ongoing investigations, or divulge personal data or business secrets.

Law stated - 19 marzo 2024

Dealing with illegal or incompatible aid

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

Annual financial statements and annual management reports of companies incorporated under Spanish law are available upon payment of a fee. They are accessible through the Companies Registry and normally contain information recording any public grants received.

Law stated - 19 marzo 2024

Other ways to counter illegal or incompatible aid

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 relevant precedent in this regard.

Law stated - 19 marzo 2024

PRIVATE ENFORCEMENT IN NATIONAL COURTS

Relevant courts and standing

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

The contentious-administrative courts have jurisdiction in the large majority of cases where the action is lodged against the granting authority.

Article 19 of the Law on Contentious-Administrative Jurisdiction recognises the legal standing of individuals or legal entities that have a right or legitimate interest.

Law stated - 19 marzo 2024

Available grounds

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

Competitors may challenge administrative decisions (eg, on the approval of the conditions for applying, approval of beneficiaries and exclusion of other applicants). The grounds for such an appeal would be based on article 47(1)(e) of the Administrative Procedure Law and the authority's failure to follow the correct procedure. This may include the standstill provision in article 108(3) TFEU.

Competitors may also claim damages from the granting authority under state liability for breaches of Union law pursuant to article 32 of Law 40/2015 of 1 October regulating the public sector. However, we are not aware of any precedents awarding meaningful compensation to competitors for this reason.

Law stated - 19 marzo 2024

Defence of an action

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

Pursuant to article 21 of the Contentious-Administrative Courts Law, both the public authority granting the aid and any private party whose rights or legitimate interests are adversely affected by the court ruling (such as a beneficiary of a challenged aid) have legal standing to defend the legality of state aid.

Law stated - 19 marzo 2024

Compliance with EU law

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?

Most case law on enforcement of state aid rules refers to Spanish courts' compliance with recovery orders from the European Commission under national law. It is largely in line with the CJEU's case law.

Pursuant to articles 129 et seq of the Contentious-Administrative Courts Law, companies may request interim relief from the courts, which in cases of potential illegal state aid typically leads to the interim suspension of the decision to enact the state aid programme or to grant aid to its recipients.

Several requests have been made to the Spanish courts, most recently related to the suspension of administrative regulations implementing an extraordinary levy on financial entities and energy companies enacted by Law 38/2022 on the grounds is amounts to unlawful aid (eg, ECLI:ES:AN:2023:6611A or ECLI:ES:AN:2023:6156A). Case law shows that the Courts are generally reluctant to grant suspensions.

Law stated - 19 marzo 2024

Referral by national courts to European Commission

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?

We are not aware of any specific provisions in Spanish law that develop article 29(1) of the Procedural Regulation, which nonetheless has direct effect.

We are not aware of national courts generally using the Procedural Regulation regarding the *amicus curiae*; nor are we aware of the European Commission generally submitting written observations to Spanish courts and requesting authorisation to appear in court hearings on state aid matters.

The Spanish courts do use the referral mechanism under article 267 TFEU. While state aid litigation is rare in Spain, C-50/21 (2023) *Prestige* is a notable example of a case in which the CJEU clarified that quotas for private-hire vehicles do not constitute state aid in so far as the measure does not entail a commitment of state resources.

Law stated - 19 marzo 2024

Burden of proof

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

Under general procedural law rules, the claimant must prove all the facts supporting its action. Pursuant to article 52 of the Contentious-Administrative Courts Law, upon challenging an administrative act the claimant is entitled to have access to the administrative case file that led to the challenged act.

Law stated - 19 marzo 2024

Deutsche Lufthansa scenario

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?

We are not aware of any case referring to the application of the *Deutsche Lufthansa* case law.

Law stated - 19 marzo 2024

Economic evidence

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

We have not identified precedents in Spain of economic evidence being assessed in substantive state aid litigation. However, the contentious-administrative courts (especially the Audiencia Nacional) are responsible for reviewing, in fact and in law, the decisions of the National Markets and Competition Commission (CNMC) and have experience in assessing complex evidence (including economic evidence). Therefore, any challenge against state-wide measures as potential illegal state aid may benefit from this experience.

Law stated - 19 marzo 2024

Time frame

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

Substantive state aid litigation in Spain is rare and the complexity of the matter may be unfit to be measured against general statistics.

Law stated - 19 marzo 2024

Interim relief

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

Pursuant to article 130 of the Contentious-Administrative Courts Law, to get interim relief against a challenged administrative act the applicant must prove both *periculum in mora* and that the relief sought would not seriously harm the public interest. The court may require the claimant to lodge funds to cover any damage caused by the imposition of an interim measure.

Law stated - 19 marzo 2024

Legal consequence of illegal aid

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

Due to the direct effect of article 108(3) TFEU, national courts are expected to give full effect to the standstill obligation, which includes imposing suspension measures or even provisional recovery measures. We have not identified direct references to the *Residex* (and related) case law other than in a judgment of the High Court of Catalonia dated 21 July 2022 (ECLI:ES:TSJCAT:2022:6853) related to the Spanish tax lease system applicable to the purchase of ships constructed in Spanish shipyards. In July 2013, the Commission found that this system amounted to illegal state aid and was partially incompatible with the internal market ([SA. 21233](#)). While the Commission decision was pending appeal when the Catalan judgment was issued, the High Court of Justice made an indirect reference to the *Residex* case law and fully upheld the tax authority's decision to start recovery proceedings. The judgment could be appealed to the Supreme Court.

In terms of unlawful aid given through guarantees, there are Spanish judgments derived from the European Commission decision declaring state guarantees granted by the Valencian Autonomous Government to its domestic football clubs to be unlawful and incompatible with the internal market ([SA. 36387](#)). While this decision was ultimately quashed by the CJEU, in the interim period Spanish courts were required to rule on the enforceability of the recovery order with the additional difficulty that some of these clubs were involved in insolvency proceedings. Interestingly, the Alicante Court of Appeal (the Spanish commercial courts exceptionally have jurisdiction over any claims against a company in insolvency proceedings) ruled that due to the primacy of EU law, claims to recover state aid from insolvent companies are separate to the credit classification procedure under national law, which meant that immediate and full recovery of the guarantees given to Elche CF could be claimed.

Law stated - 19 marzo 2024

Damages

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?

General tort law in Spain requires that there for there to be an intentional or negligent unlawful act, there must be a causal relationship between the unlawful act and the resulting harm. While it cannot be completely ruled out, it is unlikely that a competitor would succeed in proving the recipient of the aid's intent or bad faith since sole responsibility for securing clearance for the aid from the European Commission (when applicable) lies with the authority granting aid.

A state liability action against the granting authority for breaching Union law (brought under article 32 of Law 40/2015 on the public sector) would be more likely to succeed.

We have not identified any precedents of competitors seeking redress for the granting of unlawful aid.

STATE ACTIONS TO RECOVER INCOMPATIBLE AID

Relevant legislation

What is the relevant legislation for the recovery of incompatible aid and who enforces it?

In relation to tax aid, Law 34/2015 of 21 September added a new title VII to Law 58/2003 of 17 December on taxation regulating the recovery of tax state aid. These provisions are further developed by article 208 of Royal Decree 1065/2007 of 27 July approving the general regulations on tax management and inspection actions and procedures and developing the rules on tax application procedures.

In relation to non-tax aid, the authority that granted the aid will rely on the Commission's recovery decision. The Spanish Supreme Court has ruled that in this recovery process, the administration's right of defence must be guaranteed, so that it must be granted a hearing period of 10 to 15 days before demanding repayment of the aid.

Law stated - 19 marzo 2024

Legal basis for recovery

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

The conditions for the granting of aid or the decisions approving the granting of aid must stipulate the situations in which the aid can be recovered. Article 37 of the General Subsidies Law also sets out cases in which aid received in the form of a grant must be repaid plus default interest from the granting date (for example, when a grant is obtained despite not meeting the requirements, or failing to comply with the objectives of the project for which the grant was awarded). These grounds for repayment require a recovery decision issued by the Commission.

In addition, article 47.1 of the Common Administrative Procedure for Public Authorities Law provides a set of grounds on which an administrative act will be declared null (for example, when the act is adopted with total disregard for the statutory procedure). In these cases, if the act is not appealed, the authority can review its own act and demand the return of the aid.

Law stated - 19 marzo 2024

Commission-instigated infringement procedures

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

Yes, on several occasions the Commission has referred Spain to the CJEU for failing to comply with recovery decisions. In Case C-184/11, the CJEU found the Kingdom of Spain

had failed to adopt the necessary measures to recover tax breaks applied in Álava, Vizcaya and Guipúzcoa. In Case C-704/19, the CJEU found the Kingdom of Spain had failed to take the necessary measures to recover aid granted to Telecom Castilla-La Mancha for the roll-out of digital terrestrial television.

Law stated - 19 marzo 2024

Implementation of recovery

How is recovery implemented?

National authorities have the power to demand the reimbursement of aid themselves. If the interested party wishes to challenge a reimbursement decision it must do so before the contentious-administrative courts but this will not suspend the reimbursement process. To do so, the party must apply to the court for an interim injunction suspending the reimbursement. The court will only award an injunction if it is proved that to go ahead with the reimbursement would cause irreparable damage and there is no public interest in seeking immediate reimbursement. When requesting an injunction the party must provide a guarantee to cover the amount claimed by the authority plus any interest accrued for late payment.

Law stated - 19 marzo 2024

Article 108(3) TFEU

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

Yes. Article 47.1.e of the Common Administrative Procedure for Public Authorities Law provides that acts taken in complete disregard for the statutory procedure are null. This includes acts by virtue of which aid is granted that is incompatible with the state aid scheme or that the Commission has not confirmed is compatible.

Article 39 of Law 9/2017 of 8 November on public sector contracts refers to the previous article to determine in which cases a contract concluded by a contracting authority may be declared null.

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Defence against recovery order

On which grounds can a beneficiary defend itself against a recovery order?

How may beneficiaries of aid challenge recovery actions by the state?

As a general rule, a beneficiary cannot challenge the validity of recovery acts adopted by national authorities to implement a Commission recovery decision.

As an exception, the beneficiary may argue that the statutory procedure for recovering aid has not been respected (for example, that it has not been given the opportunity to put forward its position and has therefore been deprived of its rights of defence).

Some beneficiaries have argued that the principle of legitimate expectations has been breached to oppose the recovery of aid but the courts have generally rejected this argument.

Law stated - 19 marzo 2024

Interim relief against recovery order

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

The Contentious-Administrative Courts Law provides that interim relief measures may be granted when the contested act could cause irreparable damage and there is no public interest requiring that it be enforced immediately. It would therefore theoretically be possible to get an interim measure suspending the acts taken by a national authority to implement a recovery order. While we are not aware of any precedents, following a systematic application of EU law, we believe that an interim measure would not be granted because it is in the public interest to execute the recovery order immediately.

In relation to the possibility for beneficiaries to claim compensation for damages arising from the recovery of incompatible aid, the Supreme Court analysed this issue in its judgment 1361/2018 of 5 September (appeal 839/2017). It recalls that to exercise the right to compensation for a breach of EU law, the three conditions laid down by the CJEU in paragraph 51 of its judgment in joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* must be fulfilled:

European Union law confers a right to reparation where three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.

Among other grounds, the Supreme Court's judgment considers that the aid beneficiary was not entitled to compensation since the infringed regulation did not grant him or her a right to obtain the incompatible aid.

Furthermore, in judgment 226/2015 of the High Court of Justice of the Basque Country of 31 March (appeal 382/2013), it was ruled that granting compensation equivalent to the amount of aid granted would frustrate the purpose of the recovery decision.

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UPDATE AND TRENDS

Key developments of the past year

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 enquiries?

We are not aware of any emerging trends relating to state aid control in Spain. In relation to the general aid granted, Spain closed 2020 (latest data available) as the 20th EU member state in terms of expenditure on general state aid in relation to GDP (1.46 per cent of Spain's GDP, compared to 2.43 per cent of the EU's GDP). This is double the share of GDP when compared with previous years (from 0.65 per cent of GDP in 2019 to 1.46 per cent in 2020), mainly due to the increase in aid granted to mitigate the effects of the covid-19 pandemic (0.51 per cent of GDP, 34.70 per cent of total aid).

Aid schemes to deal with the consequences of the war in Ukraine have also been notified under the Temporary Crisis and Transition Framework for State Aid, such as the scheme [SA.106016](#) TCTF – Spain – Aid scheme for compensation of additional costs due to exceptionally severe increases in natural gas prices.

The ongoing political debate around the reform of the EU electricity market might be influenced by the so-called 'Iberian exception'. On 8 June 2022, the European Commission approved, under EU state aid rules, a measure worth €8.4 billion aimed at reducing the wholesale electricity prices in the Iberian market by lowering the input costs of fossil fuel-fired power stations ([SA. 102454](#) and [SA. 102569](#)). The measure was approved under article 107(3)(b) of the TFEU and acknowledges the particular pressure being put on the Spanish and Portuguese economies.

It is worth mentioning the recent decision by the Spanish government to acquire up to 10 per cent of Telefónica, in response to an acquisition of 9.9 per cent of the company by Saudi Arabian telecommunications company STC. While the measure arguably does not fall within the concept of state aid (since the state-owned industrial holding company SETT will acquire these stocks at market price), it is pertinent to note that the Spanish government seems willing to react to foreign capital investment in strategic Spanish companies (even if it falls below the thresholds that trigger other mechanisms such as mandatory investment filings).

Lastly, the Spanish government has ruled out approving a new budget for 2024 after it failed to achieve the necessary political consensus. The 2023 budget will be extended for a further year, which should not prevent public aid that has already been budgeted from being paid out.

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