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PRIVATE ENFORCEMENT OF STATE AID LAW IN SPAIN

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Luis Arroyo Jiménez & Patricia Pérez Fernández

I. The enforcement of the standstill obligation

A. General Issues

Spanish courts often deal with cases related to state measures that have not been notified with the European Commission (hereinafter 'Commission'), allegedly in connection with a violation of Article 108(3) TFEU. In most cases they are judicial proceedings between different administrative bodies. This is because Spain has a territorially decentralized political structure – the central State, seventeen Autonomous Regions plus two Autonomous Cities, and more than eight thousand local governments. These judicial proceedings are vehicles for

inter-administrative conflicts. Some of them take place amongst bordering Autonomous Regions, as a result of dumping policies implemented in one of them (e.g., ECJ, Case C-428/06 *Unión General de Trabajadores de la Rioja* [2008] ECR I-6747, followed by Judgment of the Supreme Court, 3 April 2012). Others are the result of an action by the central State against regional or municipal measures that had not been notified with the Commission (e.g., ECJ, Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419, followed by Judgment of the Supreme Court, 7 February 2006). Finally, local governments also challenge State or regional measures that provide for local tax exemptions, arguing that they constitute illegal State aid (e.g., ECJ, Case C-387/92 *Banco Exterior de España* [1994] ECR I-877; Case C-522/13 *Navantia* ECLI:EU:C:2014:2262; Case C-74/16 *Congregación de Escuelas Pías Provincia Betania* ECLI:EU:C:2017:496).

Unlike what happened with the private enforcement of competition law thanks to Directive 2014/104/EU, private enforcement of State aid rules has not been harmonized by EU legislators, which makes its enforcement in the different Member States of sizable interest. In Spain, the enforcement of Article 108(3) TFEU based on the initiative of private actors has been very rare.[1] Private parties usually participate as interveners in judicial proceedings that have begun with an action lodged by a public body (e.g., ECJ, Case C-428/06 *Unión General de Trabajadores de la Rioja* [2008] ECR I-6747, followed by Judgment of the Supreme Court, 3 April 2012; Case C-275/13 *Elcogás*, ECLI:EU:C:2014:2314, followed by Judgment of the Supreme Court of 27 February 2015). These cases are very rarely initiated by competitors of State aid beneficiaries (e.g., Judgment of the Supreme Court, 2 January 2008, *Biomasa*; and ECJ, Case C-233/16 *ANGED* ECLI:EU:C:2018:280).[2]

This suggests that private enforcement of Article 108(3) TFEU has huge room for improvement in Spain. It must be underlined that private enforcement of Article 108(3) TFEU in Spain does not face any structural hindrance from a substantive administrative law perspective, nor in terms of procedural law. Neither is the idea of a challenge to State aid being made by the recipient's competitor problematic from the point of view of constitutional principles or the legal tradition. Therefore, the underdevelopment of private enforcement of Article 108(3) TFEU seems to be a consequence of defective incentives derived from EU and domestic legislation.

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1 David Ordóñez Solís, *Enfoques y desenfoques en la aplicación del regimen europeo de ayudas de Estado por los jueces españoles* (2018) 6 Revista Aranzadi Unión Europea 43.

2 J.J. Piernas López, *Revisiting some fundamentals of fiscal selectivity: the ANGED case (C-233/16)* (2018) 17 European State Aid Law Quarterly 274.

B. Legal Framework

The Article 108(3) TFEU obligation is implemented in Spain through general administrative law and procedural law. On the one hand, Article 9(1) LGS establishes that:

> 'When, in accordance with articles 87 to 89 of the Treaty establishing the European Union [current Articles 107 to 109 TFEU], projects for the establishment, granting or modification of a subsidy must be notified, the competent authorities will notify the appropriate projects in accordance with [the specific procedure] with the European Commission. In these cases, a subsidy cannot be paid as long as it is not considered compatible with the common market'.

On the other hand, the specific procedure for the notification of State aid – not only subsidies – is regulated by Royal Decree 1755/1987, of 23 December, as well as by an agreement adopted in 1990 by the Sectorial Conference for matters connected with the European Communities, which constitutes an inter-administrative cooperation body. Any public body planning to grant aid subject to Article 108(3) TFEU must give notice of the project, at least three months in advance, to the Secretary of State for EU matters, which belongs to the central administration controlled by the Ministry of Foreign Affairs. The Secretary of State for EU matters is responsible for ultimately notifying the European Commission through the Permanent Representation of Spain before the EU, as well as for the coordination of contact.

The Spanish Competition Authority (CNMC) is not entitled to enforce State aid law. According to Article 11 LDC, the CNMC is only able to assess the conditions for the granting of aid and its potential effects on competition on its own initiative or at the request of any public authorities. It also may issue reports regarding individual state aid frameworks and submit specific recommendations to public authorities in order to ensure the maintenance of effective competition in the market.

Judicial review of administrative decisions follows a dualist system in Spain: administrative decisions can be reviewed by both administrative law courts (when they have been taken under the application of substantive public law) and civil law courts (when they have been taken under the application of private law). In this area, it all depends on the instrument under which the non-notified State aid has been granted:

> (i) if it has been conferred by means of administrative rules, administrative acts, administrative contracts or civil contracts concluded in order to implement an administrative act (*e.g.*, land selling contracts subscribed by an administrative authority), public law remedies will apply, and judicial review will take place before the administrative law courts;

ii) if it has been granted by a private contract that has not been subscribed in order to implement an administrative act (*e.g.*, land selling contracts subscribed by a public owned company), private law remedies may apply and Article 108(3) TFEU enforcement will be in the hands of civil law courts. This only rarely applies, since most contracts concluded by administrative authorities are either administrative contracts, or civil contracts that implement an administrative act.

A final situation must be taken into consideration: If the State aid was conferred by a parliamentary statute, judicial review can only take place before the Constitutional Court. The Court will focus only on the constitutional review of the statute and not on its compliance with Article 108(3) TFEU, so it will be necessary to challenge the individual implementing decisions before the ordinary courts.

C. *Public Law Remedies*

Within the framework of an action before an administrative law court, the appellant may seek a series of typical remedies that basically cover all means of redress for competitors, as well as for other third parties affected by unlawful State aid which have been identified by the ECJ and the Commission. On the one hand, Article 31 LJCA states that:

> '1. The appellant may file claim seeking a declaration of illegality and, where appropriate, the annulment of the acts and rules that are susceptible of being challenged according to the preceding chapter.
> 2. The appellant may also file claim for recognition of an individualized legal situation and the adoption of appropriate measures for its full restoration, including the compensation of damages, when appropriate'.

On the other hand, Article 129(1) LJCA states that:

> 'Interested parties may request at any stage of the process the adoption of any measure aimed at ensuring the effectiveness of the final judgment'.

These two provisions cover all the relevant means of redress in view of the 2009 Commission Notice on the Enforcement of State Aid Law by National Courts:[3] the prevention of the payment of not-yet-paid unlawful aid; the recovery of paid unlawful aid, as well as the illegality interest; damages suffered by competitors and other third parties; and interim measures against unlawful aid.

[3] Commission notice on the enforcement of State aid law by national courts [2009] OJ C 85/1.

1. Preventing the payment of unlawful aid

When State aid has already been granted but it has not yet been paid, national courts are obliged to prevent this payment from taking place. Spanish administrative law courts can be asked – within a two-month deadline – to declare that the administrative act or rule that conferred the State aid is unlawful and therefore to annul it, in accordance with Article 31(1) LJCA. The logical consequence of the granting act being invalid as a result of the Member State's breach of Article 108(3) TFEU is the suppression of the payment's legal basis. At this stage, such annulment is the way to prevent the execution of the payment.

A substantive problem that arises here is classifying the kind of invalidity of administrative acts or rules that confer State aid when it has not been notified with the European Commission. According to Spanish general administrative law, procedural flaws may lead to three legal consequences in terms of the unlawfulness of administrative acts: (i) as a general rule, they lead to the relative invalidity of the administrative act (*anulabilidad*), which could be cured at a later stage, and whose declaration produces *ex nunc*, i.e., non-retroactive, effects (Article 48(1) LPAC); (ii) they can also have no consequences whatsoever for the act's validity (*irregularidad no invalidante*) if, under the specific circumstances at stake, the specific flaw has not been materially relevant in terms of the content of the administrative decision (Article 48(2) LPAC); and finally (iii) they can also lead to the absolute invalidity of the administrative act (*nulidad de pleno Derecho*), which cannot be cured and whose declaration generates *ex tunc*, i.e., retroactive, effects. This happens, *inter alia*, when they have been adopted with "absolute disregard for the applicable administrative procedure" (Article 47(1) e) LPAC). This third category has been interpreted by the courts as including the infringement of procedural steps that are both compulsory and particularly relevant (Judgments of the Supreme Court, 21 March 1988 and 2 November 2010). The infringement of the standstill obligation should be regarded as a procedural flaw of the third and most serious type of procedural flaws.[4] The same applies to the administrative act that serves as a legal basis for the conclusion of a contract.

Nonetheless, new grants of State aid are usually established by administrative rules. Here the need of choosing between these two forms of invalidity disappears because, according to a rather controversial principle of Spanish public law, administrative rules can suffer only from the third type of unlawfulness – resulting in absolute invalidity (Article 47(2) LPAC). This is the legal effect following the

[4] J.L. Buendía Sierra, *'Spain'* in Paul F. Nemitz (ed) *The Effective Application of EU State Aid Procedures,* Chapter 20, 367 (Kluwer Competition Law Series 2007).

violation of Article 108(3) TFEU, as it can be seen in practice (Judgment of the Supreme Court, 2 January 2008, *Biomasa*; and Judgment of the Supreme Court, 7 February 2006, following ECJ, Case C-71/04 *Xunta de Galicia* [2005] ECR I-7419;[5] and Judgment of the Supreme Court, 24 November 1998, in the fishing ships case[6]).

Therefore, administrative decisions that confer State aid in breach of Article 108(3) TFEU are subject to the most serious type of invalidity, regardless of such aid taking on the form of an administrative act, a contract (Article 47(1) e) LPAC), or a rule (Article 49(2) LPAC).

2. Recovery of unlawful aid and illegality interest

When a State aid has not only been granted but already been paid, national courts are still obliged to protect the rights of individuals affected by violations of the standstill obligation. This should occur in two courses of action provided for by Article 31 LJCA, which have to be addressed in the same complaint. First, competitors or third parties can seek the annulment of the administrative act or rule (Article 31(1) LJCA). This will take place according to the legal framework that has just been described.

Simultaneously, they may seek the acknowledgement of an individualized legal situation and its full reestablishment (Article 31(2) LJCA). The concept of an individualized legal situation as used by the law is vague by design, since it aims at covering both legitimate interests and subjective rights, in accordance with the constitutional definition of the right to effective judicial protection (Article 24 (1) CE). It is therefore immaterial whether competitors have a subjective right or a simple interest in the fulfillment of the standstill obligation. Alongside the annulment of the administrative decision, they can seek judicial recognition of the legal position according to which the public administration may not confer aid before the Commission grants its authorization.

Moreover, competitors can also seek the adoption of measures for the full restoration of the situation before the grant of illicit aid. Ordering the full recovery of unlawful aid is the appropriate measure for claimants to see their rights completely reestablished. Therefore, it is part of the national court's obligation to protect the individual rights of the claimant under Article 108(3) TFEU (2009

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[5] M. Pedraz Calvo *The Validity of National Measures when Implementing Illegal Aid before National Judges: The Xunta de Galicia Judgment* (2017) 17 European State Aid Law Quarterly 446 et seqq.

[6] J.A. Rodríguez Miguez*, 'La aplicación privada en materia de ayudas de Estado o públicas'* in L. A. Velasco et al (eds), *La aplicación privada del derecho de la competencia*, 501 (Lex Nova 2011).

Commission Notice, section 30). The law expressly provides for this link between annulment and reimbursement in the case of subsidies, as Article 36(4) LGS states that:

> 'The judicial or administrative declaration of invalidity will include the obligation to return the amounts received'.

The need to recover the financial advantage resulting from premature implementation of the aid is part of the national courts' obligation under Article 108(3) TFEU. Spanish administrative law expressly provides for this with respect to subsidies, as Article 37(1) LGS states that:

> 'The amounts received will be reimbursed, together with the corresponding interest from the date on which the grant was paid until the date on which the refund is ordered'.

In view of the 2009 Commission Notice, once the national court has decided that unlawful aid has been disbursed in breach of Article 108(3) TFEU, 'it must quantify the aid in order to determine the amount to be recovered' (para. 36). This seems to differ from the practice of Spanish courts, which usually declare a specific amount in terms of financial obligations only if it directly results from the information at their disposal (e.g., from the administrative act granting a subsidy). If quantification requires more or less intricate operations, Spanish courts usually refer the determination them to the subsequent implementation of the ruling by the public administration.

The effectiveness of the recovery obligation depends on both on substantive and procedural circumstances. According to the ECJ case law, the national courts' recovery obligation is not absolute (2009 Commission Notice, section 30 et seqq). Nevertheless, the exceptions to this obligation admitted by EU law are rather strict. According to the 2009 Commission Notice, the legal standard to be applied in this context should be similar to the one applicable under the Procedural Regulation. Article 16(1) of Regulation 2015/1589 states that:

> 'The Commission shall not require recovery of the aid if this would be contrary to a general principle of European Union law'.

Despite a rather reluctant administrative practice in 107(1) TFEU cases, where recovery follows Commission decisions there are no specific Spanish law issues arising with respect to Article 108(3) TFEU. When annulment is decided by a court on the ground of an infringement of Article 108(3) TFEU, there is nothing that hinders the effectiveness of the recovery obligation. Courts have expressly rejected that illegal State aid beneficiaries may claim for damages against the granting authority. In a recent Judgment of 5 September 2018, the Supreme Court has declared that (i) recovery does not cause an actual damage because it is aimed

at suppressing a previously conferred illegal competitive advantage; and that (ii) the recipient cannot invoke the principle of legitimate expectations if Article 108(3) TFEU was infringed.

While the reimbursement obligation is directly declared by the court, its fulfilment requires, on a general basis, the implementation of an administrative procedure.[7] In the case of fiscal State aid, the new recovery procedures established in the 2015 amendment of the General Tax Law will apply (these will be tackled later in sub III.2). These procedures have been created in order to facilitate the implementation of Commission Decisions, as well as to comply in a better way with the relevant EU Regulation. Nevertheless, they will also certainly be applicable in the case of aid declared illegal by national courts.

As for subsidies, the reimbursement procedure is regulated in Article 36 LGS et seqq. The procedure begins with an administrative order; the recipient has a right to be heard; and the procedure has to end within twelve months from the administrative order initiating it. The reimbursement obligation can be directly enforced against the State aid recipient. Despite the fact that Article 39 LGS generally provides for a four-year time limit, in EU law cases courts apply the ten-year limitation period established in Article 17(1) of Regulation 2015/1589, following the primacy principle (Judgment of the Supreme Court, 9 May 2013).

These administrative procedures constitute a way of implementing a legal obligation that has been imposed on the public administration by the court. Where the former fails to implement the reimbursement procedure within that period of time, the appellant can seek judicial enforcement of the recovery obligation. According to Article 108(1) LJCA, the court can implement the ruling through its own means or by requiring the collaboration of other administrative authorities.

If the public administration does not refuse to implement the ruling but carries out an activity that may infringe the judgment, Article 108(2) LJCA entitles the court, at the request of the interested parties, to stop the obstructing administrative behavior and to reestablish the situation according to what the ruling foresees.

3. Damages for competitors and other third parties

The third possible remedy is to claim for damages. Public law remedies allow the awarding of damages only where caused by the public administration, i.e., the authority granting the illegal State aid, and not by the State aid recipient, who will

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[7] D. Ordóñez Solís, *La ejecución forzosa de la recuperación y de la devolución de las ayudas de Estado en la UE y en España* (2009) 9 Gaceta Jurídica de la Unión Europea y de la Competencia 16.

cont.

have to be sued before a civil law court specialized in commercial law (*Juzgado de lo Mercantil*). The emerging procedural avenues are taking mainly two forms.[8] First, damages can be claimed directly before the administrative authority – within a limitation period of one year. This would be the right way to claim for damages if the aid has already been declared illegal. Second, they can be claimed before an administrative law court in the same action aimed at obtaining the annulment of the administrative act or rule. As has been said, competitors and other third parties may seek the recognition of an individualized legal situation and its full reestablishment. Article 31(2) LJCA expressly proclaims that restoration measures may include compensation for damages 'when appropriate'. This last caveat refers to the requirements that a claim for damages has to comply with an order to be upheld by the courts. The problems arising in such a case may likewise materialize in two ways.

As regards the attribution of liability, Spanish administrative law is aligned with EU law. However, there is a difference between both systems: While the *Francovich* and *Brasserie du Pêcheur* case law of the ECJ requires a breach of community law in order to be 'sufficiently serious', according to Spanish law any type of unlawfulness is sufficient. Nevertheless, a closer analysis shows that the abovementioned gap does not really exist. As the 2009 Notice makes clear, 'where the authority in question has no discretion', as regarding the application of Article 108(3) TFEU, 'the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach'. In sum, although departing from different points, both systems seem to converge in conceiving mere unlawfulness as the foundation of liability.

More serious is the problem of proving causation and the existence of actual damage. Article 32 LRJSP establishes that:

> '1. Individuals have a right to be compensated by the corresponding Public Administrations for any injury they suffer in any of their assets and rights, provided that the injury is a consequence of the normal or abnormal functioning of public services except in cases of *force majeure*, or of damages that an individual has the legal duty to support in accordance with the Law.
> 2. The alleged damage must be effective, economically evaluable and individualized in relation to a person or group of people'.

According to the ECJ case law, and also Spanish law, there has to be a direct causal link between the breach of the Member State's obligation and the damage suffered by the injured parties. The fact that the public administration confers illegal State aid to an undertaking, to whom it also confers a selective advantage

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[8] P. Callol García *'Spain'* in T. Jestaedt, J. Derenne and T. Ottervanger, *Study on the enforcement of State aid rules at national level*, 423 (European Communities Publications Office 2006).

in and of itself, certainly inflicts a damage on its competitors, one that can consist of both an emergent damage or a loss of profit. The problem arises when it comes to precisely evaluating this damage, as well as to establishing a cause-effect relation with the granted aid.[9] In this respect, the problematic determination of the damage suffered does not differ from the quantification of damages as a consequence of a violation of Articles 101 or 102 TFEU (anticompetitive agreements/abuse of a dominant position). The burden of proving the suffered damage falls on the claimant because acts of the public administration are presumed to be valid (Article 39(1) LPAC). Furthermore, this is also the general rule established in Article 217 of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*), which also applies to judicial proceedings conducted by administrative law courts. As in general claims for damages cases, different ways or means of proof are acceptable before Spanish courts. These include questioning the parties to the procedure, public or private documents, expert opinions, questioning witnesses, and economic evidence, such as economic reports elaborated by experts that calculate the damage suffered by the claimant (Articles 137 and 299 of the Code of Civil Procedure).

It is rather difficult to accurately evaluate the damage caused to a competitor by the conferral of State aid. Often hypothetical calculations need to take place, which is not always easy. It may be possible that, thanks to the aid, the beneficiary has had access to a business opportunity to the detriment of the claimant. As the 2009 Notice makes clear, in such a case the damage evaluation may be easier.

More common will be the situation in which 'the aid merely leads to an overall loss of market share'. In that case the 2009 Notice recommends that the court 'compare the claimant's actual income situation (based on the profit and loss account) with the hypothetical income situation had the unlawful aid not been granted' (section 49.c). It is doubtful whether this may satisfy the standards applied by Spanish courts in order to accept that an evaluable damage has been caused by the State aid. Indeed, it might be too uncertain or difficult to determine what the hypothetical income situation of the claimant would have been in the event the unlawful aid had not been granted. This uncertainty is probably one of the reasons that explains the lack of incentives for competitors to claim for damages.

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[9] J.A. Pérez Rivarés, *La aplicación del Derecho de la Unión Europea sobre ayudas estatales por los Tribunales nacionales* (2012) 42 Revista de Derecho Comunitario Europeo, 37 ff.; F. Pastor-Merchante, *La aplicación privada de la normative europea sobre ayudas de Estado* (2015) 55 Revista Española de Derecho Europeo, 31 ff; F. Pastor-Merchante, *The Role of Competitors in the Enforcement of State Aid Law*, 75 ff. (Hart 2017).

A good example of these difficulties is the Judgment of the High Court, 15 February 2005, which rejects a claim for compensation made by a shipping company against the central State in regard to subsidies granted to a competitor:

> '[It has not] been proven that the aid received by [Trasmediterránea] was due precisely to the purpose of permitting the reduction of tariffs. Therefore, a linkage of state compensations to this specific purpose of permitting the price reduction has not been established. The complexity of the cost structure of Trasmediterránea, a company that provides various types of maritime services between the islands and that can realize significant economies of scale, determines, in the opinion of this Chamber, that it is not possible to directly attribute the reduction of rates to the subsidies' (para. 11).

This ruling is problematic from various perspectives. Not only does it show an unconvincing identification of the purpose and the effects of the subsidy, it also reflects a reluctance to investigate to what extent the price reductions were potentially due to subsidies enjoyed by the beneficiary.

A final point must be clarified. In Spain, primary legal protection (through annulment and recovery) and secondary legal protection (through compensation of damages suffered) are not alternative avenues but different remedies that are conditioned on the satisfaction of their respective requirements. Therefore, they are not reciprocally related under a principal-subsidiary scheme. Indeed, granting damages to the competitor of the recipient or to other parties would require the State aid to be illegal and therefore imply its previous or simultaneous judicial annulment. On the other hand, the effectiveness of recovery would have an effect on the damage intensity and therefore on the final amount granted by the court. Indeed, if the public administration does not simply refuse to implement the ruling ordering a recovery of the damages suffered, but proceeds to carry out activity that may infringe the judgment, Article 108(2) LJCA entitles the court, as has been said, to reestablish the situation to the status required by the ruling and also to determine the additional damages that have been caused by the obstructionist administrative behaviour.

4. Interim measures against unlawful aid

According to the case law of the ECJ, the duty of national courts to draw the necessary legal consequences from violations of the standstill obligation comprises the adoption of interim measures where this is appropriate to safeguard the rights of individuals and the effectiveness of Article 108(3) TFEU. As has been mentioned, when State aid has already been granted but has not yet been paid, national courts are obliged to prevent this payment from taking place. This can include ordering the suspension of the effectiveness of the relevant administrative act or rule until the substance of the matter is resolved by the court.

Suspension is not the appropriate interim measure when State aid has not only been granted but has already been paid. In these cases, the court might be forced to order the suspension as well as the provisional recovery of the aid. According to Article 129 LJCA, administrative law courts may not only order a suspension but also any type of positive measure that may be deemed appropriate in order to guarantee the effectiveness of its final ruling, such as an interim recovery order.

This assessment of possible interim measures is carried out in a proceeding that is separate from and incidental to the main one. An oral hearing with the opposing party (defendant) is to take place within ten days of the day on which the interim measures are requested. The decision on the interim measures request is to be taken within the following five days (Article 131 LJCA). Where the requested interim measures are granted, they will be in force until the final judgment is issued (Article 132 LJCA). Nevertheless, they could be modified or revoked during the procedure if the situation has changed.

As regards the necessary conditions for an interim measure to be taken, Article 130 LJCA provides that:

> '1. After carefully balancing all the conflicting interests in a specific case, an interim measure may only be ordered when the implementation of the act or provision could cause the action to lose its legitimate purpose.
> 2. The interim measure may be denied when, in a reasoned opinion of the court, it could cause a serious disturbance of general public interests or the interests of a third party'.

Thus, the court could decide to grant the interim measure in question when the execution of the challenged act, or the application of the challenged provision, could eliminate the legitimate purpose of the action. In any case, the court would need to assess the potential that the effectiveness of the final judgment would be put at risk if the interim relief were not granted, and it would need to weigh the balance of public and private interests involved in the specific case; additionally, the court has to consider judicial protection of the potential outcome and the protection of the claimant's right to be awarded compensation for damage.

At a very first view, this can be problematic. According to the 2009 Notice:

> 'Where, based on the case law of the Community courts and the practice of the Commission, the national judge has reached a reasonable *prima facie* conviction that the measure at stake involves unlawful State aid, the most expedient remedy will, in the Commission's view and subject to national procedural law, be to order the unlawful aid and the illegality interest to be put on a blocked account until the substance of the matter is resolved' (section 61).

In Spain, the principle of *fumus boni iuris* has a minor role in general administrative law. Nevertheless, in cases involving EU law, Spanish courts

invariably take this perspective into account when balancing the conflicting interests. Therefore, it would not be a problem for an administrative law court to grant interim protection if the challenged act or rule has apparently conferred non-notified State aid.

Moreover, in a series of Judgments (16 July 2012, 23 November 2012, 30 January 2014, 17 July 2014), the Supreme Court has declared the obligation of lower courts to apply section 62 of the 2009 Notice of the Commission. In the event of an on-going investigation by the Commission, where the lower court wishes to await the outcome of the Commission's compatibility assessment, it should order the placement of the funds on a blocked account. Despite not having a binding nature in and of itself, the Supreme Court has proclaimed that this Notice is an authoritative source when it comes to analysing the legal consequences of Article 108(3) TFEU. And it has to be mentioned that Article 129 LJCA provides the necessary flexibility in terms of designing the appropriate measure.

Article 133(1) LJCA deals with the problem of damages caused by interim measures and confers upon the court the power to condition the order to the offer of some kind of guarantee by the appellant:

> 'When damages of any kind could arise from the interim order, the appropriate measures may be agreed to avoid or mitigate them. Likewise, the presentation of a bond or any other sufficient guarantee may be required to respond to them'.

A final point should be clarified. Despite Article 129 LJCA et seqq providing for an appropriate legal framework in terms of complying with EU law requirements, there are only few cases where the claimants challenging non-notified state aid are seeking interim relief. The reason probably lies in the fact that, as mentioned, they are mainly other public bodies whose incentives to immediately obtain legal protection may not be as strong as the incentives of competitors. Therefore, it can be presumed that if competitors made more use of private enforcement possibilities, this would certainly lead to a more frequent requests for interim measures.

5. Procedural issues

The addressees of the action lodged before the administrative law court will be both the authority that conferred the State aid and its recipient. The action is directly addressed to the former, since, according to Article 21(1)a) LJCA, the defendants will be those administrative authorities whose acts or rules are being challenged. The court is obliged to communicate the complaint to the aid beneficiary, since, according to Article 21(1)b) LJCA, defendants can also be

those whose rights and legitimate interests may be affected if the court decides in favour of the appellant. This is not the burden of the appellant but of the court itself (Article 48 LJCA). The failure to communicate the action and to give the beneficiary an opportunity to intervene would lead to an infringement of his or her fundamental right to effective judicial protection (Article 24(1) CE).

In Spain there is no discussion on whether individuals or firms have a right to lodge an action against administrative measures that provide any kind of benefit to their competitors. Article 24(1) CE proclaims a fundamental right to obtain the effective judicial protection of both subjective rights and legitimate interests. Article 19(1)a) LJCA grants *locus standi* to those holding either a subjective right or a legitimate interest. The concept of legitimate interest is interpreted by the courts very extensively: it can be direct or indirect, individual or collective. But it cannot consist of a mere interest in the implementation of the law. A legitimate interest requires a specific connection of the appellant with the question that is going to be decided by the court. This specific connection can nonetheless be obtaining a specific benefit or preventing a specific harm. There is no doubt that competitors may obtain a specific benefit if State aid that has not been notified to the European Commission is declared illegal by a court and its recovery is ordered. Associations and groups affected by the measure seeking to protect a collective interest also have standing, like public bodies acting within the scope of their competences.

D. Private law remedies

Article 108(3) TFEU enforcement will be in the hands of civil law courts on a rather exceptional basis in Spain. State aid usually has its origin in decisions adopted in the exercise of public law prerogatives, such as a parliamentary statute, an administrative rule, or an administrative act. Even when the aid is granted by an administrative contract, the conclusion of the latter implies the implementation of the award decision, which is contained in an administrative act. In all these cases, the declaration of illegality as a result of the infringement of Article 108(3) TFEU remains in the hands of administrative law courts.

Spanish civil courts have been reluctant to rule in these kinds of cases. They have instead declared that control of the standstill obligation in cases of State aid granted by administrative law instruments – including public contracts – lies beyond their jurisdiction and within the powers of administrative law courts (Judgments of the Supreme Court, 20 May 1996 and 14 November 2002, and of the Madrid Court of Second Instance ('Audiencia Provincial'), 28 December 2012).

If the aid is granted by the State directly through a private contract that is not concluded in the implementation of a previously adopted public law decision, private law remedies may apply and Article 108(3) TFEU enforcement will be open to civil law courts, which will be entitled to verify whether a grant of State aid has not been notified in breach of this provision. In this second scenario, competitors and third parties can seek annulment of the contract (Article 1301 CC), as well as recovery of the aid (Article 1303 CC).

A somewhat different issue is whether, once the illegality of the aid has been declared by the competent administrative court, competitors can sue the beneficiary. On the one hand, Article 15 LCD establishes:

> '1. Acquiring a significant competitive advantage through the violation of laws is an act of unfair competition.
> 2. The mere infringement of competition rules shall also be considered as an act of unfair competition'.

On the other hand, Article 32 LCD establishes that different actions may be exercised against acts of unfair competition. In particular, competitors can seek injunctions and damages.

This avenue has been used in the past in the context of antitrust law (Judgment of Commercial Court Number 5 of Madrid, 11 November 2015 *Conduit/Telefónica*). Early academic literature has suggested that this could be a practicable avenue also in State aid law.[10] Thus, competitors could seek injunctions and damages against the State aid beneficiary, arguing that the defendant had acquired a significant competitive advantage through the violation of Article 108(3) TFEU.

Nevertheless, competitors in Spain have not used Articles 15 and 32 LCD in order to sue the recipient of illegal aid for damages. There are two possible reasons for this. First, it has been argued that in order to consider that unfair competition practices are taking place, Article 15 LCD requires positive conduct on the part of the offending undertaking.[11] In some circumstances it might be true that the recipient does not need to engage in positive conduct in order to obtain the aid. Nevertheless, asking for the application of a tax exception or subsidy, or even concluding a contract are genuinely forms of positive conduct that should suffice in terms of Article 15 LCD.

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[10] J. Massager, *Comentario a la Ley de Competencia Desleal* (Civitas 1999); Callol Garcia, *supra* n. 7, at 422; C. González-Páramo and S. Pérez, *'Spain'* in: *2009 update of the 2006 Study on the enforcement of State aid rules at national level,* 329 (Lovells 2009).

[11] Buendía Sierra, *supra* n. 3, at 361.

A second and more persuasive explanation is the uncertainty of private law remedies that rest on the illegality of State aid, such as those granted by Article 15 LCD, since the violation of Article 108(3) TFEU will usually fall under the competence of administrative law courts. In this dualist context, it is all too risky to sue the recipient before a civil court since the jurisdiction to declare the administrative decision invalid will, on a general basis, belong to administrative law courts. Seeking annulment, recovery and, eventually, damages from the administrative authority before an administrative law court seems a more practicable track. Nevertheless, as it has been already mentioned, this route has been used only occasionally.

II. Cooperation and coordination between national courts and the European Commission

Article 29 of Regulation 2015/1589 provides for two cooperation instruments amongst national courts and the European Commission. On the one hand, national courts may ask the Commission to transfer to them information in its possession, as well as to voice its opinion on questions concerning the application of State aid rules. Spanish courts have rarely made use of this tool. In view of the underdevelopment of private enforcement of State aid law in Spain, this does not seem to be surprising.

On the other hand, Article 29 of Regulation 2015/1589 also establishes that:

> '[T]he Commission, acting on its own initiative, may submit written observations to the courts of the Member States that are responsible for applying the State aid rules. It may, with the permission of the court in question, also make oral observations.
> The Commission shall inform the Member State concerned of its intention to submit observations before formally doing so.
> For the exclusive purpose of preparing its observations, the Commission may request the relevant court of the Member State to transmit documents at the disposal of the court, necessary for the Commission's assessment of the matter'.

From the perspective of national procedural law, this *amicus curiae* intervention could raise some questions. Since the position of *amicus curiae* is not foreseen in Spanish procedural law, the Commission will not be formally considered as a party in the judicial proceeding. If the Commission submits written observations, they would be taken into account only to the extent the parties bring them to the judicial proceeding. Otherwise, the court will only be able to bear them in mind after asking the parties about them. In the same terms, a representative of the Commission could be invited to testify as a qualified expert. Finally, the transmission of judicial information to the European Commission – which eventually can try to reuse this information in subsequent procedures – could be

problematic from the perspective of the right to a fair trial (Article 24(2) CE) where that information had been originally obtained for judicial purposes.

As regards the Lufthansa case (ECJ, Case C-284/12 *Deutsche Lufthansa* [2013] ECLI:EU:C:2013:755), it has already been said that, in recent times, Spanish courts have been very cooperative in the event of an ongoing investigation being carried out by the Commission. The preliminary assessment contained in the decision to initiate the formal examination procedure will certainly be taken into consideration by the national court since it may trigger the *fumus boni iuris* criterion and therefore lead to ordering the interim recovery of the examined aid. As stated, the Supreme Court has even declared the obligation of lower courts to apply section 62 of the 2009 Notice of the European Commission. Nevertheless, it remains unclear whether this should work as an unconditioned duty to order suspension and recovery or rather as a prima facie obligation qualified by proportionality. Indeed, within the context of Spanish procedural law, interim measures have to be decided "after carefully balancing all conflicting interests" (Article 130(1) LJCA). The criteria laid down in Article 13(2) of the Regulation 2015/1589 set the adoption of an injunction decision by the Commission within the same framework.

There are some interesting Spanish precedents in Luxembourg. Unfortunately, most of them were samples of a failure to fulfil Member State obligations (ECJ, Case C-499/99 *Commission v Spain* [2002] ECR I-6031; Case C-404/00 *Commission v Spain* [2003] ECR I-6695; Case C-177/06 *Commission v Spain* [2007] ECR I-7689; Case C-529/09 *Commission v Spain* [2013] ECLI:EU:C:2013:31; Case C-184/11 *Commission v Spain* [2014] ECLI:EU:C:2014:316).

In turn, Spanish courts have not made frequent use of preliminary references. A recent survey[12] counts eleven references made by Spanish courts in the area of State aid law, these regarding very different issues ranging from regional tax policies to subsidies conferred in strategic sectors such as banking, broadcasting, energy, or shipyards. Almost all of them were made by administrative law courts; one was a referral by a labour law court. Interestingly enough, civil law courts – with jurisdiction in unfair practices – have not made any references to Luxembourg in connection with State aid law.

[12] Ordóñez, *supra* n. 1.

III. The enforcement of European Commission decisions

Administrative enforcement of Commission Decisions declaring State aid incompatible with the internal market have traditionally faced a common difficulty in Spain: neither administrative law nor tax law have provided for a specific administrative recovery procedure. This problem has come up under different terms in these two areas of law, where it has been solved in different ways.

A. Recovery of Subsidies

The enforcement of Commission Decisions declaring a subsidy granted by an administrative act to be incompatible with the internal market has been problematic because, according to the general view, the administrative act had to first be formally annulled by the administrative authority. According to Spanish administrative law, favourable administrative acts (i.e., acts conferring a right or improving a party's legal or factual situation), can only be annulled by the authority that adopted them (i) in cases of absolute nullity, and (ii) after having heard the opinion of the Council of State or the equivalent regional advisory body. These substantive and procedural conditions, aimed at protecting the stability of favourable administrative acts, such as those granting subsidies and other State aid, against an administrative declaration of invalidity have been hindering the effectiveness of Commission Decisions and have been in part responsible for enforcement deficits.[13]

In order to comply with the primacy of Commission Decisions, the law on subsidies was modified to make clear that State aid can be recovered following a Decision of the Commission regardless of the granting act being annulled or not. Article 37(1) LGS states that:

> 'The amounts received will be reimbursed, together with the corresponding interest from the moment of the payment of the subsidy until the date on which the reimbursement is agreed, in the following cases:
> […] h) The adoption of a recovery order according to the provisions of Articles 87 to 89 of the Treaty on European Union [current Articles 107 to 109 TFEU]'.

Since 2003, when the LGS was enacted, Spanish courts may apply this specific provision of domestic law in order to recover illegal State aid, particularly, as mentioned, non-fiscal State aid. If there is a Commission Decision declaring the illegality of the subsidy, it is no longer required that the administrative act be

[13] Buendía Sierra, *supra* n. 3, at 366 et seqq; Ordóñez, *supra* n. 6, at 14 et seqq.

annulled. This is an exception to the general rule (Judgment of the Supreme Court, 5 April 2018). While the reimbursement obligation is directly declared by the Commission, its fulfilment requires, on a general basis, the implementation of an administrative procedure. The reimbursement procedure is regulated in Article 41 LGS et seqq. The administrative authority initiates the procedure *ex officio* – on its own initiative, at the request of other bodies or by a complaint. The recovery procedure can also start as a result of the financial control report issued by the General Intervention of the State Administration. The recipient has a right to be heard (see Article 42.3 of the LGS). The procedure has to end within twelve months, calculated from the day the procedure was initiated, by virtue of a declaration of the reimbursement obligation of a certain amount of money within a certain period of time. In case of non-compliance, the reimbursement obligation can be enforced in a mandatory fashion against the state aid recipient, eventually seizing his or her assets (Royal Decree 939/2005). All these administrative actions can be challenged before an administrative law court, although in some cases a previous administrative complaint (before the administrative superiors) may be required.[14]

According to Article 39 of the LGS, the right of the public administration to seek recovery of the illegally obtained aid is time-barred after four years. This period, foreseen by Spanish national legislation, is shorter than the ten-year period foreseen by Article 17(1) of Council Regulation (EU) 2015/1589. Following the principle of primacy of EU Law, the period laid down by the LGS should be in line with the one established by the EU Regulation, consequently, ten years. This is also of clear advantage for the public administration. The Spanish Supreme Court has also clarified that the ten-year period is applicable in this case, following the principle of primacy of EU Law (Judgment of the Supreme Court, 9 May 2013).

B. Recovery of Fiscal State Aids

In a series of rulings (starting with Judgments of 13 May 2013 and 14 October 2013, and reaching as recently as 25 May 2017), the Supreme Court declared that Spanish administrative authorities had violated the right to be heard of fiscal State aid beneficiaries as enshrined in the Constitution (Article 105 CE) as well as in the Charter of Fundamental Rights of the EU (Article 41(2) CFR). In the implementation of Commission Decisions declaring certain aid incompatible with the internal market, national authorities had been ordering reimbursement without

[14] Ordóñez, *supra* n. 6, at 16 et seqq.

giving the aid beneficiaries an opportunity to be heard and to discuss their particular situation. Under these circumstances, an opportunity to be heard was justified because the taxpayers at issue could not ask for the application of other benefits incompatible with the ones initially applied for. Consequently, the court ordered that the administrative procedure be repeated in order to satisfy their right to be heard.

These cases led to the amendment of the General Taxation Act 58/2003, of 17 December (LGT), by means of Act 34/2015, of 21 September. The following reforms were introduced in order to comply with the principles of immediate and effective implementation of Commission Decisions: The first was a specific administrative procedure for recovery of fiscal aid. It is initiated *ex officio* by the tax authority, followed by a provisional assessment of the tax debt, subject to a ten-day period of time for the taxpayer to submit written allegations, and there is to be a final reasoned decision taken within four months, which can also be enforced in a mandatory way against the state aid recipient. These administrative actions can be challenged, first, before administrative tribunals – external to the judicial branch – that are specialized in tax law (Article 264 LGT), and afterwards before an administrative law court. In order to claim before an ordinary court, the action at stake must have been previously challenged before the administrative tribunals (Article 249 LGT; Checa González, 2004).

A second important novelty is the possibility of modifying previous administrative acts, even those having the force of *res judicata* ("*firmeza*"), as established by the ECJ in the *Lucchini* case (ECJ, Case C-119/05 *Lucchini* [2007] ECR I-6199). Despite this doctrine having later been qualified by the ECJ[15] Article 263 LGT makes no distinction in this respect:

> 'If there is a previous administrative act of the Tax Administration regarding the obligation affected by the State aid recovery Decision, the implementation of the latter will determine the modification of the said act, even if it has acquired the force of *res judicata*'.

A third amendment of the General Taxation Act 58/2003, of 17 December (LGT), provided for by Act 34/2015, of 21 September, is the incorporation of the limitation period foreseen in Regulation 2015/1589: ten years from the day when the application of the State aid had legal effects under applicable tax law (Article 262 LGT) instead of the four years established as a general rule according to tax law (Article 66 LGT).

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[15] ECJ, Case C-507/08 *Commission v Slovakia* [2010] ECR I-13489; Case C-505/14 *Klausner Holz Niedersachsen v Land Nordrhein-Westfalen* [2015] ECLI:EU:C:2015:742.

IV. Conclusions

Private enforcement of State aid rules faces problems of transparency and information deficits. Nevertheless, these are not especially acute in Spain, nor is litigation particularly difficult for companies compared to the situation in other Member States. Unlike what happens in terms of incompatible aid, Spanish administrative law has not created significant obstacles for national courts in terms of declaring aid illegal and ordering its recovery.

In our view, the underdevelopment of private enforcement of Article 108(3) TFEU has to do, essentially, with incentives. Leaving aside the difficulties arising from the structural bifurcation between the substantive and procedural regularity of State aid,[16] national law is partially to blame. Before administrative law courts, competitors face prolonged cases with uncertain outcomes. While the annulment of non-notified measures could be an achievable aim, the recovery of the granted aid remains uncertain because it may be at odds with the reluctance on the part of the granting authority. Moreover, obtaining damages is difficult because of the high standards applied by administrative law courts when it comes to proving the existence of an effective and economically evaluable damage, as well as causation. This same situation was formerly the case with the private enforcement of antitrust rules in Spain, but lately we are seeing some judgments granting damages in cartels cases. Thus, we may observe in the near future a similar trend in the field of State aid law. Lastly, seeking compensation for damage caused by the State aid recipient before civil law courts under the law on unfair competition practices (Articles 15 and 32 LCD) faces an important obstacle, namely that the declaration of the illegality of the granted aid falls within the competence of administrative law courts.

Cooperation amongst national courts and the Commission has not been particularly fluid. This also might be a consequence of the underdevelopment of private enforcement in connection with Article 108(3) TFEU. Nevertheless, recent Supreme Court judgments show a more receptive attitude in terms of a more efficient implementation of the 2009 Notice.

The implementation of Commission Decisions in Spain has not been easy in the past because of (i) the difficulties in annulling previous favourable administrative decisions and (ii) the lack of specific recovery procedures. This situation has been improved, firstly, with the modification of specific legislation on subsidies and more recently with the adoption of a specific regulation related to the recovery of fiscal State aid.

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[16] Pastor-Merchante, *supra* n. 10, at 76 et seqq.

V. National legislation

CE	Constitución Española de 1978. *Spanish Constitution*
LJCA	Ley 29/1998, de la Jurisdicción Contencioso-Administrativa. *Administrative Law Courts Act*
LPAC	Ley 39/2015, de Procedimiento Administrativo Común. *Common Administrative Procedure Act*
LRJSP	Ley 40/2015, de Régimen Jurídico del Sector Público. *Act on the Law of Public Sector Bodies*
LGS	Ley 38/2003, General de Subvenciones. *General Subsidies Act*
LGT	Ley 58/2003, General Tributaria. *General Tax Act*
LCD	Ley 3/1991, de Competencia Desleal. *Unfair Competition Act*
LDC	Ley 15/2007, de Defensa de la Competencia. *Competition Act*