2. Outline on the availability of judicial relief under the legal system of Spain

Most of the procedures described below are purely theoretical since Spanish undertakings or individuals have never made use of them before the Spanish Courts. In fact, in the existing case law which has been analysed to prepare the present study, there are only a few cases, which concern appeals before the Supreme Court. Otherwise, most of the cases deal with procedures in front of the Tribunal for the Defence of Competition, and no actions for suspension or liability have so far been brought. However, as far as the EC State aid legislation is concerned, we could apply the following procedures under Spanish law:

2.1. Procedures concerning the direct effect of Article 93(3)

The proper procedure to challenge subsidies paid to competitors in breach of the EC Treaty (such as aid which has not been properly notified or aid which has been awarded before Commission's investigations have been completed) is administrative in nature. An administrative complaint should be lodged with the administrative body which took the decision to grant aid, and, if it rejects the complaint, an action could be brought before an administrative court (*Sala de lo Contencioso-administrativo del Tribunal Superior de Justicia*). Its decision would be subject to appeal before the Administrative Division of the Supreme Court (*Tribunal Supremo*). This action should aim to declare the State aid illegal and void, but not to request the State to comply with the obligation to notify.

Under this procedure, suspension of the aid illegally granted could be requested by invoking Article 122 of the Spanish Act on Administrative Jurisdiction (*Ley reguladora de la Jurisdicción Contencioso-Administrativa*) and the abundant case law regarding the difficult redress of damage and loss. It must be pointed out that the suspension procedure will be regulated under the chapter involving interim measures (from Article 129 on) by the new Act on Administrative Jurisdiction of 13th July 1998, which has not yet entered into force. The Spanish Courts restrictively interpreted this case law until the ruling of the Supreme Court on 20th March 1990 settled this point.

In cases where the administrative decision is declared void but the grant is not suspended, it is clearly possible to argue the State's liability because all the requirements of Article 139 of Public Administration and Administrative Court Common Procedures (*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*) seem to be fulfilled.

Such a claim to enforce liability against the State could also be brought during the procedure aimed to obtain the nullity of the aid, under Article 42 of the Spanish Act on

Administrative Jurisdiction (*Ley de la Jurisdicción Contencioso-Administrativa*), to restore the individual legal situation of the appellant by means including damages. The plaintiff must prove that it has suffered real and effective damage.

A particular problem arises in Spain due to its federal structure: the regional entities may also grant State aid but the competence to notify these plans remains in the hands of the central administration. Therefore, regional organsoare obliged by the Royal Decree 1755/1987, of 23rd December to notify to the competent central organ ("*Comisión interministerial para asuntos económicos relacionados con las Comunidades Europeas*") their plans to grant or to alter aid. They must do so at least three months before applying the aid. In such cases a declaration of the illegality of the aids granted by the regional authorities should be requested at a regional level and before the regional administrative courts.

In conclusion, the claim before the administrative courts can be brought only to restore legality by rejecting the provision in breach with the law. So it would not be possible to ask for the application of the principle of equality, by requesting the grant of another illegal aid to a competitor of the beneficiary of the public aid. The case law of the Constitutional Court is clear in this respect: equality can not be provided within an illegal framework.

Civil procedures on damages against the state are not feasible under the Spanish system since the adoption of Spanish Act 30/1992 on Public Administration and Administrative Court Common Procedures (*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*). In fact, actions for damages can only be brought against the grantor of the aid, which is the state, and not against the applicant nor the recipient of it. Act 30/1992 aimed to unify the state's liability under the administrative jurisdiction and therefore this Act eliminated the civil procedure which existed prior to its adoption.

2.2 Procedures concerning the enforcement of negative Commission decisions

Individuals can only obtain the enforcement of the Commission's negative decision by requesting an order for repayment to the competent administrative bodies, which would differ depending on the nature of the public authority that granted the unlawful aid (regional or central authority). Where those authorities reject the application, an action before the administrative law courts will be necessary.

2.3. Procedures concerning the implementation of positive Commission decisions

One could envisage an action brought before an administrative court by a competitor of the beneficiary of an aid cleared by the Commission, aiming to prevent the granting of the aid by the state. However, the administrative court would probably refer the case for preliminary ruling to the European Court of Justice under Article 177 of the EC Treaty. Therefore, we believe it would be much more appropriate and effective to bring an action directly before the European Court under Article 173 of the EC Treaty.

2.4. Special Procedure under Defense of Competition Act

Article 19 of Defence of Competition Act (16/1989, of 17th July) provides that the Tribunal for the Defence of Competition, upon a request from the Minister of Economy and Finance, may examine the competition effects of aid granted to an undertaking from public funds.

Depending on the report of the Tribunal, the Minister may propose that the public authorities cease or modify the aid, as well as proposing other appropriate measures, if applicable, to maintain or re-establish competition.

To this end, Article 19 empowers the Tribunal for the Defence of Competition to address communications or demands to the undertakings, as well as to forward requests from the public authorities, so that they inform the Tribunal of the amount of public resources or financial benefits which have been granted or obtained.

It is clear from this provision that the regime set up by the Defence of Competition Act differs from the one instituted under the EC Treaty. In particular, the following differences between the systems can be pointed out:

Whereas the EC Commission has the power to investigate on its own initiative, and, if applicable, to decide that a Member State shall abolish the aid which is deemed contrary to Article 92 of the EC Treaty, the Tribunal for the Defence of Competition is only entitled to examine the aid granted to undertakings upon request of the Minister. Therefore, the functions of the CDC are merely consultative, as its advisory decision has no binding effect over the Minister.

The substantive scope of application of Article 19 of the Spanish Defence of Competition Act is also more limited than that of Article 92 of the EC Treaty. Article 19 refers to aids granted to undertakings derived from public funds, whereas the concept of aid under Article 92 of the EC Treaty is much wider, and refers to aid granted by a Member State or through state resources. This means that the concept of aid under Article 19 of the LDC does not include all types of aids entailing a burden on the public finances either in the form of expenditure or of reduced revenue.

The Tribunal for the Defence of Competition is not obliged to examine the aid even if that examination has been duly proposed by the Minister. Under the EC State aids provisions the EC Commission has the duty to declare contrary to Article 92 of the EC Treaty those aids which distort or threaten to distort competition.

Even if the Minister considers that the aid distorts or may distort competition, the only measure he may take is to propose to the public authorities concerned the suppression or modification of the aid, as well as, if applicable, other measures to maintain or re-establish competition. This means that, even if the Tribunal determines in its decision that the aid is restrictive of competition, the Minister might not propose to the public authorities concerned the cessation of the aid.

So far, Article 19 of Defence of Competition Act has never been applied and has often been the object of criticism. It is very clear that the regime set up by Article 19 is unsatisfactory and requires early reform to raise our domestic legislation to EC standards.

It has been proposed that Article 19 could be reworded in similar terms to the EC provisions, to include not only aids derived from public funds but any aid which mitigates the charges which are normally included in the budget of an undertaking, and could contain a list of aids which are deemed to be compatible with the general prohibition. Moreover, it could allow the initiation of proceedings either at the initiative of the Tribunal for the Defence of Competition or at the request of interested third parties.

Notwithstanding the exercise of its copetences by the EC Commission, the tasks of the Tribunal for the Defence of Competition could be made similar to those of this institution. Should that be the case the Tribunal should be informed of all plans to grant, alter or extend aid and have the duty to take binding decisions on the abolition or modification of aids which are restrictive of competition.

Unfortunately, the new draft of Defence of Competition Act, which is currently being prepared, does not go so far. It only increases the jurisdiction of the Tribunal by including the possibility for public authorities, other than the Minister of Economy, and other interested parties, to request an examination of State aid. Regretfully, however, the decision of the Tribunal will still not be binding.

3. List of cases with summaries

3.1. Judgment of the Administrative Division of the Supreme Court (*Sala de lo Contencioso-administrativo del Tribunal Supremo*) of the 10th October 1989[1] (decision not subject to further appeal) (D)

The organisation "F. of T.N." filed an appeal against the approval of the Municipal Council of th seting up of a private company with public capital to carry on business activities. This appeal was partially dismissed by the Supreme Court.

The Court stated that, unlike private individuals who can create their companies with full freedom, activities of public bodies are subject to the public interest, as established in Article 103.1 of the Constitution.

The creation of public undertakings for business purposes is legally possible but subject to a double condition: (i) the business activity to be developed by the public undertaking must be an activity of appreciable public interest and this must be verified at the time of its creation; and (ii) in the exercise of its business activities, the public undertaking must be submitted to the same rules of free competition that govern the market.

Therefore, public authorities cannot grant public funds of any kind, except only under Article 92(2) and (3) of the EC Treaty. They must always notify them (within a minimum period of three months before applying them) to the European Commission.

The agreement approving the setting up of the public undertaking in question was annulled because, at the time it was adopted, the undertaking's activity was unknown and therefore it was not possible to assess its social, technical, legal and financial nature and to determine whether it was in the public interest.

[1] RJ 1989/7352.

3.2. Judgment of the Administrative Division of the Supreme Court (*Sala de lo Contencioso-administrativo del Tribunal Supremo*) of the 26th December 1990[2] (decision not subject to further appeal) (B)

The Supreme Court annulled the Ministerial Order on "Exporting Agreements" and the "Export Agreement on Wine from La Rioja" adopted by the Directorate General of Foreign Trade due to infringement of Article 92 of the EC Treaty and Article 24 of the Spanish Constitution.

The Court recalled the prohibition established in Article 92: "save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market". After declaring the direct applicability of the EC Treaty within the Spanish legal system, the Supreme Court examined whether the Ministerial Order in question granted directly or indirectly an aid to certain companies through State funds.

The Court concluded that it had been established that an aid had been granted through State resources amounting to 22.5 million pesetas in 1987, to 20.875 million pesetas in 1988 and to 20 million pesetas in 1989, to certain companies which were included in the Agreement, and not to other companies which did not reach the export volumes required. The Court stated that whatever the terms used in an act or an agreement, it must rely on the effects and consequences deriving from them. In the present case it was clear that certain undertakings had benefited from public funds to the detriment of other companies in the same sector pursuing the same activities.

The Court added that in the present case the Administration was not only infringing Article 92 of the EC Treaty but also Article 24 of the Spanish Constitution on the principle of equality.

[2] RJ 1990/10148.

3.3. Judgment of the Administrative Division of the Supreme Court (*Sala de lo Contencioso-administrativo del Tribunal Supremo*) of 15th January 1997[3] (decision not subject to further appeal) (B)

The Supreme Court rejected the appeal filed by the "National Association of Building Construction Promoters" against the Royal Decree 1932/1991 of 20th December, on financial measures regarding official protection of housing, stating that the opposed regulatory rules are in accordance with law.

The plaintiff claimed that Articles 9.2, 12.2, 15(a), 16.1(a) and 21(c) of the Royal Decree were contrary to Articles 14 and 38 of the Spanish Constitution, Article 92 of the EC Treaty, Article 1 of Defence of Competition Act 16/1989, of 17th July and Article 132 of Law 3/1987, of 2nd April.

The Court considered that a conflict of interest existed in the present case between the interest of the plaintiff and the general interest. It rejected the appeal, stating that the Royal Decree aimed at facilitating financial aid for the acquisition of "official protection" housing and at promoting the supply of houses at moderate prices to solve housing problems. The beneficiaries may be individuals or grouped in co-operatives, being individuals who have mutual interests.

Therefore the Court decided that the Royal Decree did not breach Article 92 EC Treaty.

3.4. Judgment of the Administrative Division of the Supreme Court (*Sala de lo Contencioso-administrativo del Tribunal Supremo*) of 2nd March 1997[4] (decision not subject to further appeal) (B)

The Supreme Court dismissed the appeal filed by the "National Association of Building Construction Promoters" against the Royal Decree 726/1993, of 14th on activities regarding the rehabilitation of pieces of land. The appeal had alleged violation of Article 92 EC Treaty.

The Court stated that this Royal Decree does not infringe Article 92, since the aid provided by it does not distort or threaten to distort competition, which is prohibited by this Article. They held that promoters who build or rehabilitate the units for their own use cannot be considered operators in the market for real estate. That special circumstance of "own use" and the lack of intention of such promoters to make profits

[3] RJ 1997/67.
[4] RJ 1997/2449.

also prevents a breach of Article 38 of the Spanish Constitution which establishes the freedom of enterprise in a market economy.

The Court also rejected allegation of infringement of the Defence of Competition Act, 16/1989, which refers to restrictive practices among companies which compete in a certain sector of the economy. It states that the mentioned Act is not applicable where there is no competitive element, as in the present case.

3.5. Order of the Administrative Division of the Superior Court of the Community of Valencia (*Sala de lo Contencioso-administrativo del Tribunal Superior de Justicia de Valencia*) of 24th June 1991 and Judgment of the Court of Justice of the European Communities of 15th March 1994[5] (The Spanish court did not take a decision on the case because the appeal was withdrawn after the European Court's decision) (B)

The Tribunal Superior de Justicia de la Comunidad Valenciana, by order of 24 June 1991, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty various questions on the interpretation of Articles 86, 90 and 92 of the EC Treaty and of certain provisions of the Act concerning the Accession of the Kingdom of Spain and the Portuguese Republic and Amendments of the Treaties of 12th June 1985.

The questions were raised in proceedings between Banco de Crédito Industrial SA, and the Ayuntamiento de Valencia, concerning a notice of assessment on a municipal establishment tax for the financial years 1983 to 1986. This tax was charged on the use or enjoyment of premises, whatever their nature, situated in the territory of local authorities, for industrial or commercial purposes or for the exercise of professional activities.

The plaintiff contended that the notice was contrary to Article 29 of Law 13/71 of 19th June 1971 on the organisation of and rules governing official credit. The Article provides that "public credit institutions shall be exempt from taxes payable to the State, province, municipality or any other entity of public law, provided that they possess the status of taxpayers".

The Court stated that it follows from Article 90 of the EC Treaty that, save for the reservation in Article 90(2), Article 92 covers all private and public undertakings and all their production. The aim of Article 92 is to prevent trade between Member States from being affected by advantages granted by public authorities which, in various forms,

[5] 1994 ECR I-877.

distort or threaten to distort competition by favouring certain undertakings or certain products.

The Court also stated that the concept of aid is thus wider than that of a subsidy since it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various ways, mitigate charges are normally incurred by an undertaking and which are therefore similar in character to subsidies and have the same effect.

Therefore, a measure by which public authorities grant to certain undertakings a tax exemption which, although not involving a transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, constitutes a State aid within the meaning of Article 92(1) EC Treaty.

The Court decided that a measure by which a Member State grants a tax exemption to public undertakings constitutes State aid within the meaning of Article 92(1) of the EC Treaty. However, where it constitutes existing aid, as in the present case, such aid may be implemented as long as the Commission has not found it to be incompatible with the common market.

3.6. Decision of the Tribunal for the Defence of Competition (administrative court) (*Tribunal de Defensa de la Competencia*) of 26th June 1995[6] (decision subject to further appeal) (D)

The complainant, Jesús L.L acting in person and as a representative of "Tablada, Sociedad Cooperativa Andaluza", alleged that the Government had authorised the "Instituto Oficial de Crédito" (ICO) to buy the debt of the builders who worked for the Cooperative PSV and were afterwards creditors of ICO which had suspended payments. This operation (value 5.8 billion pesetas) was preceded by the granting of a loan by the State to the trade union UGT of 10.7 billion pesetas to take on the obligations of PSV. The ICO had recognised that the operation at stake surpassed the risk criteria usually applied in other credit operations, where strict market criteria were applied.

The transaction in question was alleged to infringe Article 1 of the Spanish Defence of Competition Act 16/1989, insofar as it constituted an act of discrimination against other enterprises.

[6] AC 1995/1298.

The Tribunal decided to reject the appeal against the dismissal of the case by the *Servicio de Defensa de la Competencia* (Spanish Competition Authority, SDC). It stated that Article 19 of the Act establishes that the Tribunal for the Defence of Competition, upon request from the Minister of Economy and Finance, may examine the effects on conditions of competition aid granted to companies from public funds. Depending on the nature of the Tribunal's report, the Minister may propose the suppression or modification of aid to the public authorities, as well as, if applicable, other measures conducive to maintaining or re-establishing competition. For these purposes, the Tribunal may issue communications or demands to the companies, as well as requests from the public authorities, so that they inform it of the amount of public resources or financial benefits which have been conceded or obtained.

Consequently, the Tribunal has no competence to examine public subsidies nor to request information from the public authorities or the companies where the Minister of Economy has not requested it. This was the situation in this case.

However, this does not mean that public aid, especially when it is aimed to favour certain undertakings, is not capable of provoking serious distortion of competition. That is precisely the reason why Article 92 EC Treaty prohibits State aid. Nevertheless, the Tribunal stated that Article 92 has no direct effect and that it is not entitled to apply it. The Tribunal for the Defence of Competition must observe only the Act 16/1989, which prevented the Tribunal, as stated above, from examining the alleged aid in this case.

3.7. Decision of the Tribunal for the Defence of Competition (administrative court) (*Tribunal de Defensa de la Competencia*) of 27th July 1995[7] (decision subject to further appeal) (D)

The Tribunal partially dismissed the appeal against an SDC decision rejecting the charge of abuse of dominant position against the "*Sociedad estatal para las enseñanzas aeronaúticas S.A*". (Senasa). In the light of new facts, it ordered the SDC to investigate the charge of predatory prices.

Senasa had been accused by AEFA of having violated the Spanish Defence of Competition Act 16/1989, abusing its dominant position (Article 6) and implementing of predatory prices (Article 7) in a market characterised by the absence of competition. The relevant market was for the performance of tests for a pilot certificate.

As far as the alleged State aid granted to Senasa is concerned, the Tribunal stated that the examination of public subsidies must be carried out through the established procedural channel, laid out in Article 19 of Act 16/1989. It also stated that the fact that

[7] C 1995\1400.

certain activities related to State aid are outside the competence of the Tribunal, does not mean that public aid (especially when it is aimed to favour certain undertakings) is not capable of provoking serious distortion of competition. That is the reason why Article 92 EC Treaty prohibits State aid. However, the Tribunal states that Article 92 has no direct effect and therefore it is not entitled to apply it. The Tribunal for the Defence of Competition must observe only the Act 16/1989, which prevents the Tribunal for the reasons set out above from examining the alleged aid in this case.