

## ACCOUNTABILITY AND TRANSPARENCY IN PUBLIC AIDS AND SUBSIDIES

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### I. - Introduction

The analysis of the public aids and subsidies can be faced from a purely academic perspective, as the materialization of the participation of the public sector in the operation of the economic system and the expression of the different functions that traditionally are attributed to the public participation in the modelling of this system, to carry out a redistribution of the rents, to impel activities that could lack economic attraction for private agents, or to reach the opportune balance in the operation of the system, among others objectives.

In accordance with this disparity of functions, it is possible to differentiate public aids that without difficulty can be included in the generic concept of activity of promotion of the public sector. They are directly oriented to harness and to stimulate certain economic activities by their impelling influence in all the economic system. Also, in other occasions, these public aids come to compensate the insufficiency of economic-financial resources of citizens to confront certain activities or situations. In this case, the financial and social reach of these aids will prevail.

Complementarily with the different objectives to be covered with the public aids, the different modalities in which these aids can be materialized have to be indicated. Thus, among others variations, aids can be granted through fiscal exemptions or deductions, reduction of financial costs, cover of costs, benefit of public guarantees, or by means of the effective contribution of public funds conditioned to the fulfilment of certain conditions or the presence of certain situations.

Consequently, the concept of public aid admits manifold meanings and different reaches. It will require, at the moment at which it is tried to approach its analysis, to take care of the different modalities, the multiplicity of destinies and the diversity of authorising agents and beneficiaries who can participate in the subsidising activity, along with the different rules that could have been issued in their regulation.

However, even though also the monetary contributions between different public Administrations or bodies could be included in this concept, for financing all or parts of the activity of the aid receptor, the subjective reach of the subvention relations should be limited, restricted to receptors of the private sector. This identification of the collector-beneficiary as a private subject, allows us to divide the participants in this activity in two differentiated scopes: the donor pertaining to the public sector and the receptor or beneficiary subject pertaining to the private sector.

This differentiation, in spite of its elementary and immediate character, will become essential when evaluating the regularity and the effectiveness of this activity. On the other hand, this differentiation takes us to contemplate the subsidising activity like the most elementary expression of public-private collaboration, that later has derived towards a more complex doctrinal construction. It refers to the recognized public-private association, motivated among others reasons by the need to have

alternative routes of financing without incidence in the calculation of the objectives of budgetary stability that had been agreed internationally, as it is the case of the countries that subscribed the Stability and Growth Pact within the European Union.

## **II. - The Spanish regulation**

Although previously there was certain fragmentary regulation on the granting and justification of the public aids and subsidies, it was in November of 2003 when a General Law on Subsidies was approved, being completed by a complementary Regulation. In relation to this legal framework it is possible to highlight two relevant circumstances. Firstly, it has to be indicated that the process of elaboration and approval of this General Law on Subsidies was preceded of a motion (report) of the Spanish Court of Audit sent to the Parliament in which it was recommended to have a new legal framework on this matter. This suggestion of the Court of Audit is mentioned in the foreword of the Law.

A second element of this new Law is that its most relevant sections have the nature of basic legislation of the State, being, therefore, applicable to all the public Administrations that grant subsidies. For an administrative organisation that is as decentralised as the Spanish one, this condition has a great importance, both in its management -strengthening the inter-administrative coordination and the uniformity of criteria and procedures- as in its control.

A direct expression of this coordination is the obligation of all public organizations granting subsidies to inform the internal control body of the General State Administration on the granted subsidies, regulations, calls held, beneficiaries, and possible sanctions, among other issues. In this way, a national database of subsidies is available. It allows knowing all the granted subsidies, the activities that have been subsidised and the beneficiaries of the granted aid. This turns out to be very useful to avoid that the same activity can be subsidised by different administrations or, at least, to facilitate the conciliation of the different subsidies, so that the same beneficiary cannot receive a subsidy from different administrations by an amount higher than the cost of the subsidized activity. All the organizations that grant subsidies can access this database. The Spanish Court of Audit has also all the information periodically incorporated in this database, which facilitates the programming of the audits in this area, facilitating a rigorous selection of the subsidies to be audited and their follow up.

It has to be highlighted that this General Law on Subsidies limits the concept of subsidy. It is identified as all monetary provision performed by the different public administrations and organizations, subjected to the fulfilment of certain objectives and to the satisfaction of the requirements demanded, and that the subsidised project intends the promotion of an activity of public utility or social interest or the promotion of a public purpose. Outside this regulation are located the benefits that could be received from the system of the social security, as well as the subsidies granted to the political parties and the ones coming from the European Union, that are ruled by their own specific legal framework.

The restricted character of the concept of subsidy implies that the procedures and requirements established in this Law also participate in this restriction, without extending its application to other types of aid that public organisations could grant. However, it has to be highlighted that the activity of the Spanish court of Audit is not affected by this restriction, since the regulations of the Court extend its audit activity besides to all the organizations that conform the public sector, to the subsidies, credits, guarantees or other aids from the public sector received by individuals or legal entities. The

audit activity reaches all public funds, whatever its application and the person responsible for its management.

### **III. - Internal Control and external control**

An essential characteristic of the control system on the public management in Spain is its differentiation between internal and external control; differentiation that also appears in the control of subsidies and other public aids. It is considered appropriate to remember this basic differentiation, while the internal control is an important part of the Administration itself and the results of their control remain in this scope. Whereas the external control, located in the scope of the Legislative Power, does not participate in the public management and it is external to it; and its reports are sent directly to the Parliament, among other purposes for it to deal with the political control on the Government, being the internal control one of the immediate elements that must be evaluated in any audit.

Accepted this differentiation it is not possible to share the repeatedly mentioned concept of single audit, when it tries to cover, without major precisions, the internal and external control, as if they would have the same reach and they would respond both to a same organisation and purpose.

It is true that a decentralized administrative organisation can provoke their different administrations are implied in the same activity and that, consequently, the internal controls of the different administrations concurred on it. This circumstance can appear when an activity is subsidised by several administrations. This can originate that the same beneficiary is controlled by the internal control services of each subsidising administration; situation that appears in the control of the aids granted at the expense of the Funds of the European Union and in whose management successive administrations participate. In this context, the coordination of all the internal controls and their incardination in the concept of single audit, in order to avoid unnecessary duplicities, responds to rationality parameters; but the abovementioned reasons prevent to extend this concept to the external control.

In the case of Spain, the mentioned General Law on Subsidies standardizes an administrative procedure for the granting and management of the subsidies. It also establishes a detailed procedure of internal control, respecting in any case the functions attributed in this matter to the Spanish Court of Audit, indicating that this regulation is notwithstanding that established in the regulations of the Court of Audit for the exercise of its audit and jurisdictional functions. Even, it is stated the obligation of the internal control body of the General Administration of the State, of annually sending to the Spanish Court of Audit the report on the follow up of the refunding and sanctioning files that could have been started in the exercise of the financial control in its own scope and regardless of any other action that the Spanish Court of Audit may consider opportune to perform.

### **IV. - Transparency in the management of public aids and subsidies**

The granting of public aids and subsidies is inherent to the activity of the public administrations, to its regulatory capacity and its financial autonomy. Consequently, the many principles that, at any moment, govern public management extend also to the subsidising activity. Regardless of this general reference, the repeatedly mentioned General Law on Subsidies explicit the general

principles which are to be considered when managing subsidies: publicity, transparency, concurrence, objectivity, equality and non discrimination, along with the effectiveness in the fulfilment of the established objectives and the efficiency in the allocation and use of public resources.

Although all the mentioned principles have a specific reach and meaning, the relevance of transparency has to be highlighted, as the rigorous submission to this principle offers sufficient information to be able to evaluate concurrence, objectivity and non discrimination, as well as the degree of effectiveness and efficiency reached in management. Transparency in the public activity, whose reach can be synthesized in the expression of the "*management of the public in public*", acquires this way the maximum relevance as expression of the proper operation of the democratic State and as an impulse of the participation of the citizens in the public activity, in accordance with that demanded by the current society of information and communication.

It is considered, however, that this principle acquires a singular meaning in the management of public subsidies and aids, as they are public funds that go to individuals or legal entities of private nature. It incorporates a greater social sensitivity to this activity and demands to implant the measures necessary to guarantee a suitable selection of the receptors and the pertinent procedures to assess the appropriate application of the public funds and to demand the pertinent accountability supposing that the application of funds had not been properly credited.

The Spanish regulations establish the necessary channels so that transparency can be guaranteed in the successive phases of this management: Firstly, the bodies of the Administrations that plan to grant subsidies, have to previously elaborate a strategic plan, in what the objectives pursued with its application are included (they do not have to affect nor distort the market), as well as the necessary terms, the foreseeable costs and their financing.

Likewise, before granting subsidies, the rules that establish the regulating bases for granting each type of subsidy have to be approved by the corresponding administrative authority and published in the Official Gazette. In these regulating bases it is necessary to define: the object of the subsidy, the requirements demanded to the beneficiaries, their conditions of solution, the granting procedures, the objective criteria for their granting, as well as the terms and procedures for their justification, along with the compatibility -where appropriate- with other public subsidies.

Completing the measures of transparency and publicity, the administrative bodies and the subsidising public organisations have to publish the subsidies granted in the official Gazette, indicating the call, the program and they budgetary credit on which they are charged, the beneficiaries with the granted amount and the purposes to be covered with this subsidy. This publication is excluded only in exceptional and fully justified cases.

On the other hand, the beneficiaries have to give suitable publicity to the financing received and the public function of the subsidised activities or actions. The non publication will constitute a breach punishable with the restoration of the amount received.

This publication in the Official Gazette of all the previous information and that resulting from the granting, along with the singular publicity to which the beneficiary is forced, besides the aggregation of this information to national database, is a guarantee of transparency in this management; that, however, it will later have to be assessed by the different controls to which is put under, as much in the internal scope as in the external one.

## V. - Accountability in the management of public subsidies

The public nature of the activity covered by the subsidies and the resources that are placed for this activity make this operation subject to the demand of the different responsibilities that could incur those who participate in this operation. The incorporation of these public funds, within the global financial requirements that the beneficiary could have, does not cause that those funds lose their public function, independently of the difficulties and alternatives that could be adopted for their follow up. This responsibility can be of an administrative nature, demanded by the subsidising Administration; of an accounting nature, demanded by the Spanish Court of Audit in the exercise of the jurisdictional function that it has been attributed; or of criminal nature that will have to be tried in the corresponding jurisdiction.

Public managers become responsible when not fulfilling those procedures legally settled down, in what concerns the elaboration and publication of the strategic plan or the regulating bases - specifying the conditions and requirements to accede to the subsidy-. Also when the public manager does not watch the suitable accreditation of these requirements, or when he/she had initiated the procedure although the budget would not have the estimated necessary budgetary credits. These circumstances could be cause of invalidity of all the process of granting. All these restrictions are aimed at limiting the discretionary powers over the public managers in the use of the public funds, which should be allocated exclusively to the purpose for which they have been authorised.

Also, it could bear responsibility de non-exigency of the suitable fulfilment in the application of the funds provided, the lack of the respect to the terms legally established and the pertinent justification of the destiny definitively given to the received funds, or having accepted a clearly insufficient justification.

In relation to the justification procedure it is possible to distinguish a diverse reach in the different activities in which it must be materialized. Firstly, the substantive obligation has to be satisfied, consisting of crediting that the programmed activity has been carried out and that the purpose forecast with it has been satisfied. Also the formal reach obligation has to be fulfilled, crediting the meeting of the duties assumed and the application of the funds received. Therefore, in this justification, a material side referred to the activity including imposed conditions and pre-selected targets, and a financial side crediting that the supported payments are lower than the amount of the aid paid, are to be considered.

This responsibility of the public managers could extend to the collaborating organisations, whose participation in this activity is planned, with respect to the fulfilment of the obligations assumed in this participation.

It corresponds to the beneficiary to fulfil the obligation to credit that he/she satisfies the requirements demanded to participate in the selective process of public aids and that has also satisfied the duties assumed with its granting in relation to keeping the accounting books, in the rendering of the accounts of its activity, as well as in the fulfilment of the terms, the application of the funds received to the activity and in the justification of all these issues, among others, through the activity report and

the financial report that the beneficiary has to draft. The breach of these obligations entails to bear the corresponding responsibility to be tried through the pertinent procedure. This responsibility extends also, directly or indirectly, in the part that corresponds, to those who had assumed any obligations in the development of the activity through sub-contracting, that should always have to be previously authorised by the subsidising administrative authority; as well as, where appropriate, to the auditors who had assumed the responsibility to credit through their pertinent report the accomplishment of the activity and to whoever should have contributed with some type of justification in this process.

The conditions assumed by the private beneficiary, all in the act of the reception of the subsidy lead to avoid its discretion and inefficiency in the use of the public funds, that has to satisfy the purpose for what they were granted, assuming otherwise the corresponding responsibility.

However, it is considered appropriate to remember that the private character of the beneficiary restricts its full submission to the audit function of the Spanish Court of Audit. The Court will only be able to audit the actions on the development of the financed activity and the accounting system that in its accomplishment could imply within the general organization that the beneficiary could have adopted in the development of its global activity. This restriction can suppose an added difficulty in the exercise of the control, that will have to be overcome with the keeping and delivery of the accounting books properly stamped, to state the reflection in them of the activity developed with the subsidy received, as well as whichever financial statements and specific registries might have been requested in the regulating bases, along with pertinent justificatory documents that will have to be kept and to be guarded by the beneficiary. These audit restrictions are not applicable to the subsidies when the Spanish Court of Audit has to perform the integral audit of the whole activity developed by the subsidies' beneficiary, as it is the case of the subsidies granted to the political parties, whose ordinary and electoral activity has to be controlled by the Court of Audit, by virtue of the attribution singularly granted by a specific Law.

The beneficiary has the obligation to render accounts to the granting Administration of the management carried out with the public funds received, in the term established in the regulating bases and, at the most, within three months from the conclusion of the term for the accomplishment of the activity, in case the regulating rules would not contemplate any term to satisfy this obligation. This justificatory account should consist, at least, on two parts: an activity report -in which account of the activities developed and the aims achieved is provided-, and a financial report -including all the justifying receipts of the public resources obtained. The justification will be made at market prices, by expert accreditation, auditor report, by modules or any other means admitted in the law. These procedures will be confirmed by the public entity granting the subsidy and they will be subject to the internal or external controls that could be programmed. Supposing that, passed the term, these accounts had not been rendered, the administrative body will require them granting a maximum term of 15 days for its fulfilment. The refund of the public funds in case this requirement were not attended, can be demanded. The subsequent presentation of the justifying receipts will not mean a discharge of this refund.

## **VI. - Activity of the Spanish Court of Audit in the control of the public aids and subsidies**

As it has already been said, the granting and application of the subsidies are included under the audit mandate of the Spanish court of Audit. The accounting responsibilities that could be appraised in this activity, by having failed to fulfil the appropriate regulations, acting with fraud/blame or serious

negligence, having caused damage in the public funds, will also be tried by the Spanish Court of Audit.

A look at the audit reports approved by the Spanish Court of Audit confirms how this matter is permanently present in the audit activity of the Court, dedicating in many of these reports a specific section to the analysis of the subsidized activities developed by the auditee. We even find reports devoted specifically to the analysis of determined public subsidies and aids received by certain entities or private organisations, in which the destiny given to these funds and the justification provided to them are examined; as well as to the audit of determined legal figures like the subscription of agreements, which final objective is the granting of public aids.

The audit is not limited to analyse the performance of public managers in relation to the principles that must preside over this action, evaluating the publicity of the calls and the consistency of the criteria established for the selection of the possible beneficiaries and its correlation with the goal of the activity that is tried to be subsidised. It covers as well all the activities carried out in the verification of the fulfilment of the requirements demanded to the applicants and the guarantees demanded to them to ensure the good end of the public funds, along with the demanded and verified justification of the application of the funds and the payments made.

These verifications on the public managers are completed, depending on the risk level evaluated, with other complementary activities, following the usual audit techniques, through additional circularisation and information and direct verifications on the beneficiary, assessing the reality of the activity developed for achieving sufficient and appropriate reliability of the use given to the public funds provided.

If from these verifications indications of accounting responsibility were appraised, considering that the public funds had been harmed, the opportune jurisdictional procedure is started. If this responsibility were definitively demonstrated, the case will conclude with the corresponding condemnatory sentence to restore the public patrimony in the terms in which it had been harmed.

## **VII. - Conclusion**

The importance of performing a suitable control on the public aids and subsidies has a quantitative expression, which derives from the high amounts of public funds destined to this activity, in each one of the multiple varieties and modalities in which public aid can be materialized. It also has a qualitative materialization, given the singularities that this activity presents and that require a greater sensitivity and social exigency for their granting to take place with total transparency and publicity and that all the citizens can concur to the funds in equality of opportunities.

According to this quantitative and qualitative relevance, the SAIs assume the responsibility to performing a suitable audit on this activity, extending their direct control on the beneficiaries and guaranteeing that the public funds, although applied by private managers, are destined to the activity considered of public interest and that they are used with effectiveness and efficiency in obtaining the aims for which they were granted.