General Court of the European Union
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Press and Information

Judgments in Cases T-219/10 Autogrill España SA v Commission and T-399/11 Banco Santander SA and Santusa Holding SL v Commission

The Court annuls the Commission decisions declaring the Spanish tax regime allowing for the deduction of shareholdings in foreign companies to be incompatible with the internal market

The Commission failed to establish the selective nature of that regime

According to the Spanish law on corporation tax, where a company which is taxable in Spain, acquires a shareholding in a 'foreign company' of at least 5% and holds it without interruption for at least one year, the goodwill resulting from that shareholding may be deducted through amortisation of the basis of assessment for the corporation tax for which the undertaking is liable. The law states that, to qualify as a 'foreign company', a company must be subject to a similar tax to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.

Spanish tax law does not allow the goodwill resulting from the acquisition of a shareholding in a company established in Spain by a company which is taxable in Spain to be entered separately in the accounts for tax purposes. By contrast, Spanish tax law also provides that goodwill may be amortised where undertakings are grouped together.

By several written questions in 2005 and 2006, members of the European Parliament asked the Commission whether the provision permitting the deduction applicable to shareholdings in foreign companies, as provided by the Spanish law on corporation tax, should be classified as State aid. The Commission responded, in essence, that, according to the information available to it, the Spanish regime did not constitute State aid. Nevertheless, following a complaint by a private operator in that regard, the Commission opened a formal investigation in October 2007. The procedure relating to the acquisition of shareholdings made within the EU was closed by decision of 28 October 2009[1] and the procedure relating to the acquisition of shareholdings made outside the EU was closed by decision of 12 January 2011.[2] By those decisions, the regime established by the Spanish legislation was declared to be incompatible with the internal market and Spain was directed to recover the aid granted.

Three undertakings established in Spain, Autogrill España, Banco Santander and Santusa Holding, asked the General Court to annul the Commission decisions.

By today's judgments, **the General Court annuls the two Commission decisions.**

According to the General Court, the Commission failed to establish that the Spanish regime was selective, selectivity being one of the cumulative criteria for classifying a measure as State aid.

The General Court observes, first of all, that the existence of a derogation from or an exception to a reference framework (in this case, according to the Commission, the Spanish corporation tax regime in general and, more specifically, the rules relating to the tax treatment of

[1] Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

[2] Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1). That decision was the subject of two corrections published in the Official Journal on 3 March 2011 and 26 November 2011.

financial goodwill contained in the tax regime)**,** if proved**, does not, by itself, establish that a measure favours 'certain undertakings or the production of certain goods' for the purposes of EU law, since that measure is available, a priori, to any undertaking.**

The General Court explains that **the Spanish regime is not aimed at any particular category of undertakings or the production of goods, but a category of economic transactions**. That regime applies to all shareholdings of at least 5% in foreign companies held without interruption for at least one year. In that regard, the General Court notes that **the Spanish regime does not exclude, a priori, any category of undertaking from taking advantage of it**, since its application is independent of the nature of an undertaking's activity. In addition, the Spanish government does not set any minimum amount in respect of the minimum 5% shareholding threshold. The regime, therefore, does not, in fact, restrict the undertakings which can take advantage of it to those which possess sufficient financial resources to do so.

The General Court rejects the Commission's argument that the Spanish regime is selective in so far as it only benefits certain groups of undertakings which make certain investments abroad. The Court points out that **such an approach could lead to every tax measure the benefit of which is subject to certain conditions being found to be selective, even though the beneficiary undertakings would not share any specific characteristic distinguishing them from other undertakings, apart from the fact that they would be capable of satisfying the conditions to which the grant of the measure is subject.**

The General Court recalls that a measure which may confer an advantage on all undertakings without distinction within the State concerned does not constitute State aid as regards the criterion of selectivity, and that a finding of the selectivity of a measure must be based, inter alia, on a difference of treatment between categories of undertakings under the legislation of the same Member State, not a difference in treatment between companies of a Member State and those of other Member States. The General Court concludes from this that the fact that the measure favours undertakings which are taxable in one Member State as compared to undertakings which are taxable in other Member States (in particular, because the measure facilitates undertakings established in that Member State acquiring shareholdings in the capital of undertakings established abroad) does not affect the analysis of the selectivity criterion and supports only the finding that, depending on the circumstances, competition and trade have been affected.

NOTE: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

NOTE: An action for annulment seeks the annulment of acts of the institutions of the European Union that are contrary to European Union law. The Member States, the European institutions and individuals may, under certain conditions, bring an action for annulment before the Court of Justice or the General Court. If the action is well founded, the act is annulled. The institution concerned must fill any legal vacuum created by the annulment of the act.

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