General Court of the European Union
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Judgments in Cases T-207/10 Deutsche Telekom v Commission, T-227/10 Banco Santander v Commission, T-239/11 Sigma Alimentos Exterior v Commission, T-405/11 Axa Mediterranean v Commission, T-406/11 Prosegur Compañia de Seguridad v Commission, T-219/10 RENV World Duty Free Group v Commission and T-399/11 RENV Banco Santander and Santusa v Commission

Press and Information

The General Court upholds the decisions of the European Commission classifying the Spanish tax scheme for the amortisation of 'financial' goodwill as State aid incompatible with the internal market

Under Spanish tax law, the amortisation of goodwill for tax purposes is possible only in business combinations. However, pursuant to a tax measure inserted in 2001 in the Spanish law on corporation tax, where an undertaking liable for that tax acquires a shareholding in a company which is not tax resident in that State and that shareholding is at least 5% and is held without interruption for at least one year, the resulting 'financial' goodwill may be deducted, in the form of an amortisation, from the basis of assessment for the corporation tax payable by that undertaking. The 'financial' goodwill is equivalent to the goodwill which would have been recorded in the accounts of the acquiring undertaking were the two undertakings to be combined.

By written questions put in 2005 and 2006, Members of the European Parliament asked the Commission whether the tax measure in question was to be classified as State aid. The Commission replied in essence that, according to the information available to it, that measure did not constitute State aid. Nevertheless, following a complaint from a private operator, the Commission initiated a formal investigation procedure in October 2007. The procedure in relation to shareholding acquisitions in the EU was terminated by decision of 28 October 2009,[1] and that in relation to shareholding acquisitions outside the EU by decision of 12 January 2011.[2] Those decisions declare the measure at issue incompatible with the internal market and provide that Spain is to recover the aid granted.

Undertakings established in Spain, in particular Autogrill España, SA (now World Duty Free Group, SA), Banco Santander and Santusa Holding, requested the General Court to annul the decisions of the Commission. By judgments of 7 November 2014,[3] the General Court annulled both decisions of the Commission, finding that it had not established that the measure at issue was selective. The Court of Justice set aside both those judgments in 2016.[4] The General Court therefore had to decide again whether or not the measure at issue is selective, since selectivity is one of the necessary and cumulative criteria required to classify a national measure as State aid.

A measure is selective if it favours certain undertakings over other undertakings, excluding the latter from the benefit it confers or, according to the **three-step method**, whose importance was pointed out by the Court in its judgment of 2016, where it differentiates between undertakings

[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 European Commission 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 corrigenda published in the Official Journal on 3 March 2011 and 26 November 2011.
[3] Cases: T-219/10 Autogrill España v Commission and T-399/11, Banco Santander and Santusa v Commission; see Press Release No.145/14.
[4] Joined Cases C-20/15 P and C-21/15 P; Commission v World Duty Free Group and Others, see Press Release No. 139/16.

which are in comparable situations and that differentiation is not justified. According to that method, in order to classify a national tax measure as 'selective', the Commission must identify the ordinary or 'normal' tax system applicable in the Member State concerned, and demonstrate that the tax measure at issue is a derogation from that ordinary system. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part.

Applying the three-step method, the General Court concludes that the measure at issue is selective, even though the advantage which it provides for is accessible to all undertakings liable for corporation tax in Spain. In this connection, the General Court has observed in particular that undertakings liable for corporation tax in Spain, where they acquire shareholdings in companies tax resident in Spain, may not obtain the benefit which the deduction arrangement in question provides for in respect of those transactions, unlike undertakings acquiring shareholdings abroad. The General Court thus infers that a national tax measures such as the measure at issue, which grants an advantage upon satisfaction of the condition that an economic transaction is performed, may be selective including where, having regard to the characteristics of the transaction concerned, any undertaking may freely choose whether to perform that transaction. On that basis, it notes that, henceforth, according to the Court of Justice, **a measure may be selective even where the resulting difference in treatment is based on the distinction between undertakings which choose to perform certain transactions and other undertakings which choose not to perform them, and not on the distinction between the undertakings from the perspective of their specific characteristics.**

In finding that the tax measure at issue is selective, the General Court considers, like the Commission, that it introduces differences in treatment between undertakings which are not justified by the nature or general structure of the Spanish system for taxing goodwill.

By today's judgments (Cases T-227/10, T-239/11, T-405/11, T-406/11, T-219/10 RENV and T-399/11 RENV), **the General Court therefore upholds both the Commission decisions.**

So far as Case T-207/10 is concerned, **the General Court also upholds the provision of the 2009 decision authorising the continuance of the application of the Spanish tax measure, for the entire amortisation period, to shareholdings acquired prior to 21 December 2007** (the date of publication in the Official Journal of the decision to initiate the formal investigation procedure) **or in respect of which an irrevocable obligation to acquire the shareholding had been entered into prior to that date. That provision was intended to protect the legitimate expectations of the beneficiaries** which, as a result of the answers given by the Commission to that effect in 2006 to the abovementioned parliamentary questions, could legitimately take the view that that measure did not constitute State aid. The General Court holds, in particular, that the Commission had provided precise assurances to the beneficiaries of the measure at issue that such a measure did not fall within the scope of the rules on State aid and that the expectation held by those beneficiaries that the measure was lawful was of a legitimate nature. It furthermore takes the view that the Commission was correct in finding that the legitimate expectations raised by its answers applied to the maintenance of the tax measure which entered into force in 2002 and therefore covered shareholding acquisitions since that date and aid granted in respect of those shareholding acquisitions, even if such aid had been granted prior to the answers given in 2006.

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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