Court of Justice of the European Union
PRESS RELEASE No 139/16
Luxembourg, 21 December 2016

Press and Information

Judgment in Joined Cases C-20/15 P Commission v World Duty Free Group (formerly Autogrill España SA) and C-21/15 P Commission v Banco Santander SA and Santusa Holding SL

The Court states that the General Court of the EU erred in law in setting aside the Commission decisions declaring a Spanish tax scheme incompatible with the internal market

The General Court did not correctly apply the condition relating to the selectivity of State aid, which required the General Court to determine whether the Commission had established that the Spanish scheme for deductions with respect to acquisitions of shareholdings in foreign companies was discriminatory

According to the Spanish law on corporation tax, where an undertaking 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 from 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 by a company taxable in Spain of a shareholding in a company established in Spain to be entered separately in the accounts for tax purposes. However, Spanish tax law provides that goodwill may be amortised where there is a business combination.

Following a complaint by a private operator that that scheme of deduction applicable to the acquisition of shareholdings in foreign companies should be classified as State aid, the Commission opened a formal investigation in October 2007. The procedure relating to the acquisition of shareholdings made within the EU was concluded by decision of 28 October 2009,[1] and the procedure relating to the acquisition of shareholdings made outside the EU was concluded 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, World Duty Free Group (formerly Autogrill España), Banco Santander and Santusa Holding, brought actions before the General Court seeking the annulment of the Commission decisions. By its judgments of 7 November 2014,[3] the General Court annulled the two Commission decisions, considering that the selectivity of the Spanish scheme had not been established in those decisions. The Commission then brought an appeal before the Court of Justice requesting that the judgments of the General Court be set aside. The Commission claimed that the General Court erred in law in its interpretation of the condition relating to selectivity.

[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.
[3] T-219/10 Autogrill España SA v Commission and T-399/11 Banco Santander SA and Santusa Holding SL v Commission see Press Release No 145/14.

By today's judgment, **the Court set aside the two judgments of the General Court and refers the cases back to the General Court**.

The Court holds that, in applying the condition relating to selectivity – one of the conditions that must be satisfied if a measure is to be classified as 'State aid' within the meaning of Article 107(1) TFEU –, the General Court **erred in law in annulling the contested decisions of the Commission on the ground that the Commission had failed to identify a category of undertakings that was exclusively favoured by the tax measure**. The Court states that the only relevant criterion in order to establish the selectivity of a national tax measure consists in determining whether that measure is such as to favour certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory. Contrary to the ruling of the General Court, it cannot be deduced from that case-law that, in order to demonstrate the selectivity of a national measure, the Commission is always required to identify a particular category of undertakings that exclusively benefit from that measure.

The Court states that the Commission classified the measures as selective on the ground that those measures derogate from the general Spanish corporation tax system and discriminate between undertakings that are in a comparable situation in the light of the objective pursued by that system: companies that are resident in Spain that acquire a 5% shareholding in another company resident in Spain cannot receive the tax advantage conferred by the measure at issue. In contrast, the benefit of the measure at issue is reserved exclusively to undertakings that make acquisitions of at least 5% shareholdings in a foreign company. The Court adds that a condition for the application of aid may be ground for a finding that it is selective if it represents discrimination against undertakings that are excluded from it. Consequently, **the Court holds that the General Court erred in law in that, having failed to determine whether the Commission had established that the measure at issue was discriminatory, the General Court concluded that the measure was not selective** on the ground that the Commission had not identified a particular category of undertakings exclusively favoured by the tax measure concerned.

NOTE: An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

Press contact: Holly Gallagher ☎ (+352) 4303 3355