Court of Justice of the European Union
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Judgments in Case C-50/19 P *Sigma Alimentos Exterior* v *Commission*, in Joined Cases C-51/19 P *World Duty Free Group* v *Commission* and C-64/19 P *Spain* v *Commission*, in Case C-52/19 P *Banco Santander* v *Commission*, in Joined Cases C-53/19 P *Banco Santander and Santusa* v *Commission* and C-65/19 P *Spain* v *Commission* and in Cases C-54/19 P *Axa Mediterranean* v *Commission* and C-55/19 P *Prosegur Compañía de Seguridad* v *Commission*

Press and Information

# The Court of Justice dismisses the appeals brought against the judgments of the General Court upholding the classification of the Spanish tax rules on the amortisation of financial goodwill as State aid incompatible with the internal market

In 2007, after a number of written questions had been put by Members of the European Parliament and after a private operator had submitted a complaint, the European Commission initiated a formal procedure to investigate whether the Spanish tax legislation on the amortisation of financial goodwill for acquisitions of shareholdings in other undertakings by resident companies was compatible with the State aid provisions of the FEU Treaty.

Under a tax measure introduced in 2001 into the Spanish Corporate Tax Law ('the tax measure at issue'), the financial goodwill resulting from the acquisition by a resident undertaking of a shareholding at least 5% in a foreign company may be deducted, in the form of an amortisation, from the basis of assessment for the corporate tax for which the resident undertaking is liable, provided that the resident undertaking holds that shareholding without interruption for at least one year. By contrast, acquisitions by undertakings taxable in Spain of shareholdings in other resident undertakings do not give rise to amortisation of financial goodwill, unless there is a business combination.

**By decisions of 28 October 2009 [1] and 12 January 2011 [2]** ('the decisions at issue'), **the Commission declared that the tax measure at issue constituted an aid scheme incompatible with the internal market, and ordered Spain to recover the aid granted.**

Seised of several actions for annulment brought by undertakings established in Spain, [3] **the General Court annulled those decisions by judgments of 7 November 2014, [4] finding that the Commission had not established that the tax measure at issue was selective** – selectivity being one of the necessary and cumulative criteria required to classify a national measure as State aid.

Following the appeals brought by the Commission, **the Court of Justice set aside those judgments, on the ground essentially that they were based on an erroneous understanding of the condition relating to the selectivity of an advantage, and referred the cases back to**

[1] Commission 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] Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No 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 of the European Union* on 3 March 2011 and 26 November 2011.
[3] In particular, Autogrill España SA (now World Duty Free Group SA), Banco Santander SA and Santusa Holding SL.
[4] Judgments of 7 November 2014, *Autogrill España* v *Commission*, T-219/10, and *Banco Santander and Santusa* v *Commission*, T-399/11 (see Press Release No 145/14).

**the General Court.** [5] Adjudicating on the referral back, **the General Court confirmed that the tax measure at issue was selective and dismissed the actions for annulment brought against the decisions at issue.** [6]

**Seised on this occasion of the appeals brought by the appellant undertakings and by the Kingdom of Spain** ('the appellants'), **the Court of Justice, sitting as the Grand Chamber, dismisses those appeals, clarifying its case-law on the selectivity of tax measures.**

**Findings of the Court**

First of all, the Court of Justice dismisses the pleas of inadmissibility raised by the Commission, according to which some of the arguments advanced by the appellants in their appeals had not been raised before the General Court.

In that regard, the Court of Justice recalls that grounds and arguments which arise from the judgment under appeal itself and seek to criticise, in law, its correctness cannot be regarded as changing the subject matter of the proceedings before the General Court. Consequently, the arguments by which the appellants challenge the consequences flowing from the findings of law by the General Court on the pleas and arguments debated before it are admissible.

**As regards the selectivity of the tax measure at issue,** the Court of Justice clarifies, next, that **the mere fact that that measure is of a general nature, in that it may a priori benefit all undertakings subject to corporate tax, depending on whether or not they carry out certain transactions, does not mean that it cannot be selective.** It is established that the condition relating to selectivity is fulfilled when the Commission is able to demonstrate that such a measure is a derogation from the normal tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators who are, in the light of the objective pursued by that normal tax system, in a comparable factual and legal situation.

**In order to classify a national tax measure as selective, the Commission must follow a three-stage method.** First, it must **identify the common or normal tax system applicable** in the Member State. Next, it must **demonstrate that the tax measure at issue is a derogation from that reference system,** differentiating between undertakings which, in the light of the objective pursued by the common or normal tax system, are in a comparable factual and legal situation. Lastly, it must **ascertain whether that differentiation is justified** since it flows from the nature or general structure of the system of which the measure forms part.

In the light of those considerations, in **Cases C-51/19 P and C-64/19 P, C-52/19 P, C-53/19 P and C-65/19 P, C-54/19 P and C-55/19 P**, the Court of Justice examines the appellants' plea based on **an alleged error on the part of the General Court in the determination of the reference system.**

In that context, the Court of Justice points out that the determination of the reference system must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law. Consequently, where the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system. On the other hand, where it appears that the measure at issue is clearly severable from that general system, it cannot be ruled out that the reference framework to be taken into account may be more limited than that general system, or even that it may equate to that measure itself, where the latter appears as a rule having its own legal logic. In addition, when determining the reference system, the Commission must take account of the characteristics constituting the tax, as defined by the Member State concerned. By contrast, it is not necessary, during that first stage

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[5] Judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P (see Press Release No 139/16).

[6] Judgments of 15 November 2018, *Banco Santander* v *Commission*, T-227/10, *Sigma Alimentos Exterior* v *Commission*, T-239/11, *Axa Mediterranean* v *Commission*, T-405/11, *Prosegur Compañía de Seguridad* v *Commission*, T-406/11, *World Duty Free Group* v *Commission*, T-219/10 RENV, and *Banco Santander and Santusa* v *Commission*, T-399/11 RENV (see Press Release No 175/18).

of the examination of selectivity, to take account of the objectives pursued by the legislature when adopting the measure under examination.

In the present case, the Court considers, first of all, that **it is clear from the decisions at issue that the reference system adopted by the Commission consists in the general provisions of the corporate tax system governing goodwill in general.**

Next, the Court of Justice rejects the appellants' argument that, in order to determine the reference system, the General Court relied on the regulatory technique chosen by the national legislature in order to adopt the tax measure at issue, namely the introduction of a derogation from the general rule.

In that regard, the Court of Justice points out that the use of a particular regulatory technique, such as the introduction of a derogation from a general rule, by the national legislature is not sufficient to define the relevant reference system for the purposes of assessing selectivity. Such derogation may nevertheless prove relevant where it follows therefrom, as in the present case, that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime. Consequently, **the General Court rightly took into account, among other considerations, the fact that the tax measure at issue constituted a derogation, in order to examine whether it was selective.**

In **Case C-50/19 P**, the Court confirms, in addition, **that a national measure may be selective even where obtaining the advantage it confers depends not on the specific characteristics of the beneficiary undertaking but on the transaction that it may or may not decide to carry out.** Thus, a measure may be considered selective even when it does not identify ex ante a particular category of beneficiaries and when all the undertakings established in the territory of the Member State concerned, regardless of their size, legal form, sector of activity or other specific characteristics, potentially have access to the advantage conferred by that measure on condition that they make a specific type of investment. **A finding that a measure is selective** is not necessarily the result of it being impossible for certain undertakings to benefit from the advantage provided for by the measure at issue on account of its specific characteristics, but **selectivity may arise simply from a finding that a transaction exists which, while comparable to the transaction which is a prerequisite for granting the advantage in question, does not confer a right to that advantage, therefore favouring only undertakings which choose to carry out the latter transaction.**

Lastly, the Court holds that, **in all the cases under consideration**, by identifying, in the context of the second stage of the analysis of selectivity, the objective of the reference system as maintaining a degree of consistency between the tax treatment and accounting treatment of goodwill, **the General Court** substituted its own reasoning for that of the decisions at issue and thereby **erred in law.**

**That error is not, however, capable of bringing about the setting aside of the judgments under appeal, since the operative parts thereof are founded on other legal grounds.** In that regard, the Court of Justice holds that the General Court was fully entitled to refer to its case-law according to which the examination of comparability at the second stage of the analysis of selectivity must be carried out in the light of the objective of the reference system and not in the light of the objective of the measure at issue. **Accordingly, the General Court was right to find that undertakings which acquire shareholdings in non-resident companies are, in the light of the objective pursued by the tax treatment of goodwill, in a comparable factual and legal situation to that of undertakings which acquire shareholdings in resident companies.** In that regard, the appellants had failed to establish, more specifically, that undertakings acquiring shareholdings in non-resident companies are in a different factual and legal situation to, and thus one which is not comparable to, that of undertakings acquiring shareholdings in Spain.

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**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.

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