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EU Direct Tax Group

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European Commission: Spanish goodwill amortisation scheme constitutes State aid within the meaning of Art. 87(1) EC

On 28 October 2009, the European Commission (Commission) has issued a press release (IP/09/1601) in which the Commission requests Spain to abolish the goodwill amortisation scheme as laid down in article 12.5 of the Spanish Corporate Income Tax Act (SCITA). The Commission ruled that the regime provides for a selective advantage for Spanish companies acquiring foreign companies.

Article 12(5) SCITA provides that a Spanish company may amortise the financial goodwill resulting from the acquisition of a significant shareholding in a foreign company during the 20 years following the acquisition. This results in an economic advantage, amounting to the difference between the acquisition cost of the shares and the market value of the underlying assets of the target company.

Spain did not notify the scheme to the Commission before implementing it, which leads to the potential obligation for the Spanish Government to recover the aid granted if the scheme did breach the EC Treaty. Five years after implementing the regime, in October 2007, the Commission decided to initiate the formal investigation procedure in respect of the Spanish regime.

The Commission has ruled that the regime clearly constitutes a derogation from the general Spanish tax system, and that it provides a selective advantage for Spanish companies acquiring non-Spanish European companies as compared to Spanish companies acquiring shares in other Spanish companies. Given the fact that this selective advantage cannot be justified by the general logic of the Spanish tax system, the Commission ruled that the regime at hand constitutes State aid within the meaning of Art. 87(1) EC.

In order to maintain a level playing field in the single market, especially in the context of competitive takeover bids, Spain must abolish the measure and recover unlawful aid given. However, the Commission decided to limit the scope of the recovery obligation and orders Spain to recover the incompatible aid granted only as of 21 December 2007, because of the existence of legitimate expectations.

As regards acquisitions in non-EU companies, a final decision has not been reached. Constructive discussions between the Commission and Spain are still ongoing, which could lead to the acceptance of a new regime which is compatible with European law requirements.

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