



EU Direct Tax Newsalert

EU General Court confirms European Commission's decisions on the Spanish tax scheme for the amortization of financial goodwill

On 15 November 2018, the General Court of the EU (GC) issued its judgments confirming the European Commission's (EC) decisions on the special Spanish tax regime for the amortization of financial goodwill in the cases: *Deutsche Telekom* (T-207/10), *Banco Santander* (T-227/10), *Sigma Alimentos Exterior* (T-239/11), *Axa Mediterranean* (T-405/11), *Prosegur Compañía de Seguridad* (T-406/11), *World Duty Free Group* (T-219/10) and *Banco Santander* (T-399/11).

Background

The general rule under Spanish tax law is that the amortization of goodwill for tax purposes is only possible in case of business combinations. However, in 2001, a particular tax measure was included in the Spanish Corporate Income Tax Act (CITA) allowing Spanish tax resident corporations to deduct, in the form of an amortization, the financial goodwill arising from the acquisition of shareholdings of at least 5% in non-resident companies. This was subject to the condition that the non-resident company was held without interruption for at least one year.

In 2005 and 2006, some members of the European Parliament asked the EC to determine whether the Spanish measure qualified as State aid. The EC considered that it was not the case. However, in October 2017, a private party requested the EC to start a formal investigation on the Spanish tax measure. The formal investigation was concluded with two decisions in which the EC considered that the tax measure at hand constituted State aid.

Initial findings from the GC and CJEU

Various Spanish undertakings requested the GC to annul the EC's decisions. On 7 November 2014, the GC annulled both decisions (T-219/10 and T-399/11) on the basis that the tax measure was not selective. The EC appealed the judgments of the GC before the Court of Justice of the EU (CJEU).

After the CJEU's judgment of 21 December 2016 in *Joined Cases C-20/15 P and C-21/15 P*, the cases were referred back to the GC to decide again whether the measure at hand was selective under the three-step selectivity approach.

Conclusions from the GC

The key conclusions of the GC in its judgments as referred to above are as follows:

The tax measure at issue was selective, even though its tax advantage was accessible to all undertakings tax residents in Spain. Thus, a measure may be selective even if the difference in treatment is based on the distinction between undertakings choosing to perform the transaction covered by the measure and those undertaking that choose to not perform it. Thus, the difference in treatment based on their specific characteristic is not the key element.

With respect to the identification of the reference system, the GC, in confirming the EC's view, states that the tax treatment on the financial goodwill should be seen as the relevant reference system for the case at hand.

Regarding the beneficiary of the tax advantage, the GC considers that the beneficiary is the company making the acquisition which deducts the financial goodwill following the procedure under the challenged tax measure, and not the vendors as the interested parties argued by stating that the tax advantage was passed on to the disposal price attached to the shareholding in the form of a higher price. The GC concludes that the identification of the beneficiary of the State aid should be done in an objective manner.

Finally, the GC recognizes the right to rely on the principle of legal certainty to challenge any State aid decision from the EC. In particular, in its *Deutsche Telekom* judgment (T-207/10), the GC confirms the application of the tax measure at hand and the non-recovery of the granted aid for those acquisitions performed before 21 December 2007 or those transactions in which an irrevocable obligation to acquire the shareholding was entered into before the aforementioned date. This exception protects the legitimate expectations of the beneficiaries.

Takeaway

These judgments contribute to clarify certain points within the State aid doctrine such as *inter alia* the selective character, the concept of beneficiary and the role of the principle of legal certainty. In the same way, these GC judgments would imply the recovery of the declared State aid by the Spanish government in those cases not covered by the legal certainty exception. These judgments could still be appealed before the CJEU.

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