

Euro Tax Flash
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Euro Tax Flash from KPMG's EU Tax Centre



CJEU decision in the Finanzamt Linz case

State Aid – Selectivity – Freedom of establishment – Group taxation – Goodwill amortization - Coherence

On October 6, 2015 the Court of Justice of the European Union (CJEU) ruled that the Austrian rules that allow, under a group taxation regime, an Austrian parent company to deduct amortization of the goodwill resulting from the acquisition of a domestic subsidiary, but denies this tax benefit for participations in EU subsidiaries, are in breach of the freedom of establishment. The CJEU deemed the question regarding state aid inadmissible.

Background

Under the Austrian group taxation regime, Austrian parent companies - when acquiring a holding in a domestic subsidiary which becomes a member of the group – may benefit from a goodwill amortization in the form of a tax deduction. This tax deduction may not be claimed if a holding in a non-resident company is acquired under the same conditions. This is due to the fact that Austrian legislation only allows the amortization of goodwill for participations in group companies that are fully taxable in Austria. The Austrian Administrative Supreme Court referred two questions to the CJEU: whether the Austrian rules constitute illegal State Aid and whether such rules breached the EU freedom of establishment.

CJEU Decision

Prohibition of illegal State Aid measures

Contrary to the Opinion delivered by Advocate General (AG) Kokott in this case, the CJEU dismissed the first question, concluding that assessing the State Aid compatibility of the Austrian rules bore no relation to the subject matter of the proceedings. The CJEU thus considered the outcome of this question not to be relevant for the Austrian court to resolve the dispute before it and underlined that, in the case at hand, the taxpayers would not be in a position to draw any benefit from a possible breach of the EU State Aid rules. By contrast, AG Kokott had argued that the consequences for the claimants of a potential positive outcome to the second question (i.e. breach of the fundamental freedoms) being dependent on the answer to the first question (State Aid prohibition) meant that the latter was admissible. Even if the goodwill amortization was considered to be in breach of the freedom of establishment and hence should also be granted for foreign companies, the potential incompatibility of the regime with State Aid regulations could have prevented the Austrian Court ruling in favor of such a benefit being granted to the claimants. The AG concluded that the goodwill amortization did not constitute unlawful State Aid. In particular, the AG found that the selectivity criterion was not met, because the regime neither favored certain sectors nor certain undertakings that could be separately identified above others.

Infringement to the freedom of establishment

In answer to the second question, the CJEU ruled that granting a goodwill amortization only in respect of newly acquired holdings in resident companies constituted an undue tax advantage that hindered Austrian parent companies from exercising their freedom of establishment by deterring them from acquiring subsidiaries in other Member States. As regards the comparability analysis, the Court referred to its decision in the X-Holding case (C-337/08) and confirmed that parent companies forming a tax group with a resident subsidiary or with a non-resident subsidiary are in a comparable situation as regards the aim of the applicable group taxation regime, insofar as they seek to benefit from the corresponding advantages. As a consequence, this difference in treatment relates to objectively comparable situations and is not permissible if not justified.

The CJEU further considered, but rejected, a number of possible justifications. The Court concluded that no justification can be found in the preservation of the allocation of taxing powers between Member States, since the advantage of the goodwill amortization was granted irrespective of whether the domestic corporation made profits or losses. Second, the Court assessed whether the different treatment can be justified on the basis of the coherence of the Austrian tax system. In that case there must be a direct link between the disputed tax advantage and a corresponding tax levy. Since there is no corresponding tax disadvantage, the Court concluded that this justification also does not apply.

EU Tax Centre Comment

The CJEU's decision as regards the freedom of establishment is largely based on its previous case law and to that extent was generally

anticipated. It is similar to the *Groupe Steria* (C-386/14) case that supports the per element approach under group taxation regimes.

Austria has already taken action and withdrew the benefit of the goodwill to resident companies. Legislation has ceased to apply to the disputed goodwill amortization for acquisitions from March 1, 2014 – aside from transitional rules which allow the goodwill amortization to be continued under certain conditions.

As regards State Aid, the CJEU missed an opportunity to clarify the scope of application to fiscal State aid and to comment on the AG's view on applicable principles, especially regarding the concept of selectivity. We will have to wait and see how the CJEU rules on the Spanish goodwill cases (C-20/15 P and C-21/15), which also concern advantages granted under group taxation regimes and raise similar issues.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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