



Euro Tax Flash

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AG's opinion in the joined State aid cases Autogrill and Banco Santander

State aid - Tax amortization of financial goodwill - Foreign shareholding acquisitions - Selectivity

On July 28, 2016 Advocate General (AG) Wathelet of the Court of Justice of the European Union (CJEU) issued his opinion in the joined cases *Commission v World Duty Free Group (C-20/15 P)* and *Commission v Banco Santander and Santusa (C-21/15 P)*. These cases concern the Spanish provisions allowing companies which are tax resident in Spain to amortize the goodwill resulting from the acquisition of certain shareholdings in foreign companies. The AG concluded, contrary to the General Court's decision, that this measure is selective and therefore should be regarded as State aid incompatible with the common market.

Background

The measure at issue allows undertakings taxable in Spain to amortize for tax purposes the financial goodwill resulting from the acquisition of a shareholding in a "foreign company" equal to at least 5% of that company's capital, when such shareholding is retained for at least one year. The tax advantage resulting from this measure is however not granted to comparable undertakings acquiring shareholdings in a company established in Spain.

In 2009 and 2011, the EU Commission issued two negative decisions (2011/5/EC and 2011/282/EU) in which it concluded that this difference in treatment constitutes illegal State aid and ordered its recovery. Following appeals brought by Autogrill España (now World Duty Free Group) (T-219/10) and Banco Santander and Santusa (T-399/11), the General Court annulled the EU Commission's decisions. In the two contested judgments, the Court concluded that the EU Commission failed to establish the selective nature of the regime since it was not able to identify *ex ante* a category of undertakings favored by the derogating measure. According to the Court, the scheme – while targeting specific economic transactions - was *a priori* available to all undertakings and therefore not selective. In 2015, the EU Commission filed an appeal before the CJEU, raising the question whether the contested aid is selective.

The AG opinion

According to the AG, a tax measure is by definition selective when it derogates from the general tax system and benefits certain undertakings to the detriment of others, which are in a comparable situation. In the case at hand, the fact that the Spanish rules derogated from the general tax system was not contested. The AG noted that the fact that such a measure is available to a large number of taxpayers, or that the conditions to benefit from it are easy to fulfill, does not call into question its selective nature but only the degree of selectivity.

In the case at hand, the AG concluded that undertakings taxable in Spain and that acquire shareholdings in a foreign company on the one hand, and in a domestic company on the other hand, are in a comparable situation. As a consequence, the Spanish aid is selective, since it benefits undertakings performing cross-border transactions, but not undertakings performing the same transactions at the national level. For the sake of clarity, the AG went on to conclude that the selectivity of a measure is not dependent on the identification *ex ante* of a category of undertakings with specific characteristics, and which would be exclusively favored by the contested aid.

The AG rejected the EU Commission's argument regarding the distinction drawn by the General Court between aid for the export of goods, as referred to in the *Commission v France, Greece vs Commission* and *Spain v Commission* cases, and aid for the export of capital, as in the case at hand. The AG considered irrelevant whether the General Court's interpretation of CJEU case law was incorrect, as the selective character of a measure is not dependent on the identification of a specific sector or category of undertakings.

EU Tax Centre comment

The case represents an opportunity for the CJEU to comment on and further clarify the scope of application of the selectivity criterion, which remains one of the most controversial issues in the area of State aid. The CJEU will have to determine whether selectivity arises merely from the derogation from a normal tax regime, as argued by the AG, or whether it upholds the General Court's decision that a category of undertakings which are exclusively favoured by the aid must also be identified in all cases.

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