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General Court decision on the Spanish amortization of financial goodwill system for indirect acquisitions

General Court – State Aid – Spain – Tax amortization of financial goodwill – Indirect foreign shareholding acquisitions – Legal certainty – Legitimate expectations

On September 27, 2023, the General Court of the Court of Justice of the European Union (General Court or the Court) gave its decision in a series of cases[1] concerning the compatibility of the Spanish rules on financial goodwill amortization for indirect acquisitions with EU State aid rules.

The General Court ruled that the European Commission (the Commission or the EC) was no longer entitled to adopt its 2014 decision (the 2014 Decision), which had initially declared the scheme under dispute as unlawful State aid. The Court justified this conclusion based on the principles of legal certainty and the protection of legitimate expectations. Consequently, the General Court upheld the plaintiffs' appeal and annulled the EC's Decision.

Background

The measure at issue allows companies taxable in Spain to amortize for tax purposes the financial goodwill resulting from the acquisition of a shareholding in a foreign company, under certain conditions. On the other hand, acquisitions of Spanish companies do not benefit from the same amortization rules.

In 2006, when questioned by Members of the European Parliament, the EC stated that the scheme above was not in the scope of the EU State aid rules. However, the rules were subsequently reexamined following a complaint filed with the EC. As a result, in 2009 and 2011, the European Commission issued two decisions (2011/5/EC and 2011/282/EU) in which it concluded that this difference in treatment constitutes unlawful State

[1] T-826/14, T-12/15, T-158/15, T-252/15, T-253/15, T-256/15,T-257/15, T-258/15 and T-260/15

aid and ordered its recovery. Nonetheless, the Commission allowed the rules to continue to apply, subject to specific conditions, in certain cases (based on the principle of protection of legitimate expectations). Several actions for annulment were brought by taxpayers that had benefited from the beneficial amortization rules, where Spain was required to claw back the benefit. After a series of legal proceedings, the CJEU ultimately upheld (in a decision of October 6, 2021), the classification of the Spanish financial goodwill rules as State aid incompatible with the internal market. For additional details on the court proceedings and the reasoning of the CJEU please refer to EuroTaxFlash Issue 311 and E-news Issue 140.

In parallel, on March 21, 2012 (i.e. subsequent to the EC's decision but prior to the CJEU decision confirming that the rules were incompatible with the internal market), the Spanish authorities issued a binding opinion confirming that, in their view, the scheme also applied to financial goodwill arising from indirect acquisitions of shareholdings in non-resident companies (through the direct acquisition of shareholdings in foreign companies that in turn held shares in non-resident companies). The Commission examined this opinion and concluded that it represented a new State aid scheme. The EC based its reasoning on the administrative practice in Spain, where, according to the correspondence with the Spanish tax authorities at that time and other evidence, only the acquisition of direct shareholdings was entitled to benefit from the initial financial goodwill scheme. The EC therefore concluded that the interpretation issued by the Spanish authorities also represented unlawful State aid and ordered its recovery (2014 Decision). Spain and several beneficiaries appealed the Commission's 2014 Decision. The plaintiffs argued that the EC incorrectly classified the Spanish administrative interpretation as new aid. The court proceedings were stayed pending the definitive resolution of the cases concerning the EC's 2009 and 2011 decisions (the Initial Decisions).

The General Court decision

The General Court started by analyzing whether the scope of the Initial Decisions also covered indirect acquisitions. In this respect, the Court recalled that the principle of legal certainty – which is one of the general principles of EU law – requires clear, precise, and predictable rules. These criteria enable interested parties to understand their position in situations and legal relationships governed by EU law. Returning to the facts of the case, the Court noted that the wording of the Initial Decisions indicate that the EC examined the financial goodwill scheme as a whole – covering both direct and indirect acquisitions. The Court rejected the Commission's claim that the new administrative interpretation represented new State aid.

The Court continued by analyzing whether, in the light of the finding above, the Commission was entitled to adopt the 2014 Decision on indirect acquisitions. The General Court noted that whilst the Initial Decisions acknowledged the incompatibility of the financial goodwill scheme with EU law, certain aid was exempted from recovery based on the principle of legitimate expectations. On the other hand, the 2014 Decision failed to recognize that beneficiaries that performed indirect acquisitions also had legitimate expectations that the scheme was lawful. In the Court's view, since the Initial Decisions covered both direct and indirect shareholdings, the EC's 2014 Decision amounted to a withdrawal of lawful decisions. Under EU law, such withdrawal would be allowed – among others, in cases where the Initial Decisions were based on inaccurate information provided during the State aid investigation. However, in the Court's view, this was not the case in the dispute at hand.

The Court also noted its settled case-law based on which even the withdrawal of illegal legal administrative acts should take into account the legitimate expectations of the beneficiaries who relied on the act's legality. As such, this principle would need to be observed even if the Commission had been entitled to issue its 2014 Decision. In this respect, the General Court recalled that the Initial Decisions granted Spain the right to implement the financial goodwill scheme, subject to specific conditions and based on the existence of a legitimate expectation (despite having been declared incompatible State aid). Additionally, the companies benefiting from the scheme were granted an individual right not to reimburse certain unlawful aid. However, the contested decision later withdrew this right as far as it concerned indirect acquisitions. The Court then took the view that EC's actions infringed the principle of legal certainty and the principle of safeguarding legitimate expectations.

In light of the above, the Court concluded that the Commission was not entitled to revoke or withdraw its Initial Decisions. The General Court therefore upheld the appeals and annulled the EC's 2014 Decision.

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Interestingly, when analyzing the existence of a legitimate expectation for the beneficiaries, the Court considered the Commission's replies to the European Parliament questions. In the Court's view, the EC's responses were formulated in such a way that there was nothing to suggest that the scheme concerned only direct acquisitions.

In terms of next steps, the Commission has the option to appeal the decision before the CJEU.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

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