JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

7 November 2014 (*)

(State aid — Provisions concerning corporate tax allowing companies which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are tax resident abroad — Decision classifying that scheme as State aid, declaring that aid incompatible with the internal market and ordering its recovery — Concept of State aid — Selective nature — Identification of a category of undertakings favoured by the measure — Absence — Infringement of Article 107(1) TFEU)

In Case T?399/11,

Banco Santander, SA, established in Santander (Spain),

Santusa Holding, SL, established in Boadilla del Monte (Spain),

represented initially by J. Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan and R. Calvo Salinero, and subsequently by J. Buendía Sierra, E. Abad Valdenebro and R. Calvo Salinero, lawyers,

applicants,

v

European Commission, represented by R. Lyal, C. Urraca Caviedes and P. N?me?ková, acting as Agents,

defendant,

APPLICATION for annulment of Article 1(1) and Article 4 of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1),

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of M.E. Martins Ribeiro, President, N.J. Forwood, E. Bieli?nas, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 April 2014,

gives the following

Judgment

Background to the dispute

Administrative procedure

1 By several written questions raised in 2005 and 2006 (E?4431/05, E?4772/05, E?5800/06

and P?5509/06), Members of the European Parliament asked the Commission of the European Communities whether the arrangement provided for in Article 12(5) — a provision introduced into the Spanish Corporate Tax Law by Ley 24/2001 de Medidas Fiscales, Administrativas y del Orden Social (Law 24/2001 on fiscal, administrative and social measures) of 27 December 2001 (BOE No 313 of 31 December 2001, p. 50493) — and in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the recast text of the Corporate Tax Law) of 5 March 2004 (BOE No 61 of 11 March 2004, p. 10951), ('the scheme at issue' or 'the measure at issue'), should be classified as State aid. The Commission replied in essence that, according to the information available to it, the scheme at issue did not constitute State aid.

2 By letters of 15 January and 26 March 2007, the Commission asked the Spanish authorities to provide it with information in order to assess the scope and the effects of the scheme at issue. By letters of 16 February and 4 June 2007, the Kingdom of Spain sent the Commission the information requested.

3 By fax of 28 August 2007, the Commission received a complaint from a private operator alleging that the scheme at issue constituted State aid which was incompatible with the common market.

4 By decision of 10 October 2007, the Commission initiated a formal investigation procedure in respect of the scheme at issue.

5 By letter of 5 December 2007, the Commission received comments from the Kingdom of Spain on that decision initiating the formal investigation procedure. Between 18 January and 16 June 2008, the Commission also received comments from 32 interested third parties. By letters of 30 June 2008 and 22 April 2009, the Kingdom of Spain gave its reactions to the third parties' comments.

6 On 18 February 2008, 12 May 2009 and 8 June 2009, technical meetings were held with the Spanish authorities. Other technical meetings were also held with some of the 32 interested third parties.

7 By letter of 14 July 2008 and by e-mail of 16 June 2009, the Kingdom of Spain submitted further information to the Commission.

8 The Commission terminated the procedure, as regards shareholding acquisitions within the European Union, by its Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48).

9 The Commission declared that the scheme at issue, which constitutes a tax advantage enabling Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign undertakings, was incompatible with the common market where it applied to the acquisition of shareholdings in undertakings established within the European Union.

10 The Commission maintained the procedure open as regards shareholding acquisitions outside the European Union, the Spanish authorities having given an undertaking that they would provide new details concerning the obstacles to cross-border mergers outside the European Union.

11 The Kingdom of Spain provided the Commission with information relating to direct investment by Spanish companies outside the European Union on 12, 16 and 20 November 2009

and on 3 January 2010. The Commission also received observations from several interested third parties.

12 On 27 November 2009, 16 June 2010 and 29 June 2010, technical meetings took place between the Commission and the Spanish authorities.

Contested decision

13 On 12 January 2011, the Commission adopted Decision 2011/282/EU, on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1) ('the contested decision'). That decision, in its version published in the *Official Journal of the European Union*, was corrected on 3 March 2011. A second correction of it was made and published in the Official Journal on 26 November 2011.

14 The measure at issue provides that, should an undertaking which is taxable in Spain acquire a shareholding in a 'foreign company', if that shareholding is at least 5% and if the shareholding at issue is held without interruption for at least one year, the goodwill resulting from that shareholding, which is recorded in the undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment for the corporate tax for which the undertaking is liable. The measure at issue states that to qualify as a 'foreign company', a company must be subject to a similar tax to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad (recital 30 of the contested decision).

15 It follows from the contested decision that, under Spanish law, a business combination is an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company or to a company that they form in exchange for the issue to their shareholders of securities representing the capital of that other company (recital 32 of the contested decision).

16 In the contested decision, share acquisition is to mean an operation whereby one company acquires a shareholding in the capital of another company without obtaining a majority or the control of the voting rights of the target company (recital 32 of the contested decision).

17 Furthermore, it is stated in the contested decision that, according to the measure at issue, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding. It is also stated that the concept of financial goodwill, as referred to in the measure at issue, introduces into the field of share acquisitions a concept that is usually used in transfers of assets or business combination transactions (recital 29 of the contested decision).

18 Finally, it should be noted that under Spanish tax law, the acquisition by an undertaking which is taxable in Spain of a shareholding in a company established in Spain does not allow the goodwill resulting from that acquisition to be recorded separately for tax purposes. However, again according to Spanish tax law, goodwill can be amortised following a business combination (recital 28 of the contested decision).

19 The contested decision declares the scheme at issue to be incompatible with the internal market where it applies to the acquisition of shareholdings in companies established outside the European Union (Article 1(1) of the contested decision). Article 4 of that decision provides in particular that the Kingdom of Spain should recover the aid granted.

Procedure and forms of order sought

20 By application lodged at the Registry of the General Court on 29 July 2011, the applicants, Banco Santander, SA, and Santusa Holding, SL, brought the present action.

21 The applicants claim that the Court should:

– annul Article 1(1) of the contested decision insofar as it declares that the scheme at issue contains elements of State aid;

– alternatively, annul Article 1(1) of the contested decision insofar as it declares that the scheme at issue contains elements of State aid when applied to acquisitions of shareholdings which involve acquisition of control;

– alternatively, annul Article 4 of the contested decision insofar as it provides for the recovery of aid for transactions carried out prior to the publication of the contested decision in the Official Journal;

– alternatively, annul Article 1(1) of the contested decision and, in the further alternative, Article 4, insofar as those provisions refer to transactions carried out in the United States, Mexico and Brazil;

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

Law

The claims seeking annulment of Article 1(1) of the contested decision

23 Within the framework of the claims to annul Article 1(1) of the contested decision, the applicants dispute the Commission's classification in the contested decision of the scheme at issue as State aid. In essence, they put forward five pleas in support of these claims, the first based on an error of law in the Commission's application of the condition relating to selectivity, the second based on an error in identifying the reference system, the third based on a lack of selectivity of the measure insofar as the differentiation that it introduces appears to be a result of the nature or general scheme of the system of which it is part, the fourth based on the fact that the measure would be of no benefit to companies to which the scheme at issue applies and the fifth based, both in terms of the criterion relating to selectivity and that relating to the existence of an advantage, on a failure to state the reasons for the contested decision.

24 It is appropriate to begin by examining the first plea.

25 The applicants claim that the scheme at issue is not selective as provided for in Article 107(1) TFEU and that it is in fact a general measure which can apply to any undertaking taxable in Spain. The Commission thus seems to have incorrectly applied the provisions of Article 107(1) TFEU, by concluding that the measure at issue is selective.

26 The applicants add that it was for the Commission to prove the existence of a category of undertakings to which the measure at issue was limited, which it has not done.

27 The Commission argues that the analysis of selectivity carried out in the contested decision is consistent with the case-law, since it is based on the definition of the relevant reference framework and it goes on to note the existence of an exception created by the measure at issue.

28 The Commission also relies on the existence of an analogy between an advantage granted in the event of the export of capital, as would be the case concerning the measure at issue, and an advantage granted in the event of the export of goods, a situation in which it has already been ruled that such an advantage constituted a selective measure.

29 Before examining the substance of this plea in the light of the circumstances of the case, it is necessary, after recalling that selectivity is one of the cumulative criteria for classifying a measure as State aid, to specify the conditions which must be satisfied to entitle the Commission to conclude that a measure is selective.

Criteria for recognising the existence of State aid

30 According to Article 107(1) TFEU:

‘Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.’

31 According to the case-law, classification as State aid requires that all the conditions set out in Article 107(1) TFEU are fulfilled (see Case C?280/00 *Altmark Trans and Regierungspräsidium Magdeburg* [2003] ECR I?7747, paragraph 74 and the case-law cited).

32 Article 107(1) TFEU makes categorising a national measure as State aid subject to the following requirements: the financing of that measure by the State or through State resources, the existence of a benefit for an undertaking, the selective nature of the said measure, and its effect on trade between Member States and the distortion of competition resulting therefrom (Joined Cases C?393/04 and C?41/05 *Air Liquide Industries Belgium* [2006] ECR I?5293, paragraph 28).

Method of analysis applicable to selectivity as regards tax matters

33 It is clear from settled case-law that Article 107(1) TFEU requires assessment of whether, under a particular statutory scheme, a State measure is such as to ‘favour certain undertakings or the production of certain goods’ in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure at issue (see Case C?88/03 *Portugal* v *Commission* [2006] ECR I?7115, paragraph 54 and the case-law cited; Joined Cases C?106/09 P and C?107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* [2011] ECR I?11113, paragraph 75 and the case-law cited; and Case T?308/00 RENV *Salzgitter* v *Commission* [2013] ECR, paragraph 116).

34 The determination of the relevant legal system, described as ‘the reference framework’, has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with ‘normal’ taxation (*Portugal* v *Commission*, cited in paragraph 33 above, paragraph 56).

35 In order to determine whether a tax measure is selective, it is therefore appropriate to

examine whether, within the context of the reference framework, that measure constitutes an advantage for certain companies in comparison with others which are in a comparable factual and legal situation (*Portugal* v *Commission*, cited in paragraph 33 above, paragraph 56).

36 However, even when, within the reference framework, such a difference in treatment appears between comparable factual and legal situations, according to settled case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of charges of which they are part (*Portugal* v *Commission*, cited in paragraph 33 above, paragraph 52).

37 In order to classify a domestic tax measure as ‘selective’, it is necessary to begin by identifying and examining the common or ‘normal’ regime applicable in the Member State concerned. It is in relation to this common or ‘normal’ tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation (Case T?210/02 RENV *British Aggregates* v *Commission* [2012] ECR, paragraph 49). Thirdly, if necessary, it is appropriate to examine whether the Member State in question has succeeded in establishing that the measure is justified by the nature or overall structure of the system of which it forms part (*Portugal* v *Commission*, cited in paragraph 33 above, paragraph 53).

The need to identify a category of undertakings favoured by the measure at issue

38 The criterion relating to the selectiveness of a measure makes it possible to distinguish between State aid and general measures of tax or economic policy implemented by the Member States (see, to that effect, *Air Liquide Industries Belgium*, cited in paragraph 32 above, paragraph 32).

39 In that regard, the Court of Justice ruled that a measure could be held to be selective even when its application was not limited to a clearly defined sector of activity.

40 Indeed, the Court of Justice recognised the existence of State aid where a measure is ‘essentially intended to apply’ to a sector of activity, or even to several sectors (Case C?169/84 *COFAZ* v *Commission* [1990] ECR I?3083, paragraphs 22 and 23, and Case C?126/01 *GEMO* [2003] ECR I?13769, paragraphs 37 to 39).

41 The Court of Justice also accepted that a measure applying to undertakings manufacturing goods was selective (Case C?143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I?8365, paragraph 40).

42 Furthermore, the Court of Justice ruled that a measure benefiting only undertakings situated in a defined geographical area was prevented from being a general measure of tax or economic policy (see, to that effect, Case C?156/98 *Germany* v *Commission* [2000] ECR I?6857, paragraph 23).

43 The Court even classified as selective a measure applicable for a limited time. It thus ruled that a measure which, given the brief period available to undertakings to carry out the steps making it possible to fulfil the conditions for benefiting from it, was in fact available only to undertakings which had already initiated the steps at issue, to those which had at least contemplated doing so and to those which were ready to undertake such an initiative in a very short time, was selective (see, to that effect, Case T?211/05 *Italy* v *Commission* [2009] ECR

II?2777, paragraphs 120 and 121).

44 Where the category of aid recipients is particularly broad or diverse, it is sometimes the definition of not so much that category which is decisive in assessing whether the measure at issue is selective in nature as that of the excluded undertakings (see, to that effect, Case T?55/99 *CETM* v *Commission* [2000] ECR II?3207, paragraphs 39, 40 and 47).

45 It is clear from the case-law cited in paragraphs 31 to 44 above that the definition of a category of undertakings which are exclusively favoured by the measure at issue is a prerequisite for recognising the existence of State aid.

46 Such an interpretation of the concept of selectivity is consistent with the actual wording of Article 107(1) TFEU, which provides that the advantage must favour ‘certain undertakings or the production of certain goods’.

47 Furthermore, as noted in paragraphs 33 and 37 above, when referring to the method of analysis described in those paragraphs, the Court of Justice recalls that Article 107(1) TFEU requires assessment of whether, under a particular statutory scheme, a State measure is such as to ‘favour certain undertakings or the production of certain goods’ in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question (*Portugal* v *Commission*, cited in paragraph 33 above, paragraph 54).

48 However, where the measure at issue, even though it constitutes a derogation from the common or ‘normal’ tax regime, is potentially available to all undertakings, it is not possible to compare, in the light of the objective pursued by the common or ‘normal’ regime, the legal and factual situation of undertakings which are able to benefit from the measure with that of undertakings which cannot benefit from it.

49 It follows from the foregoing that for the condition of selectivity to be satisfied, a category of undertakings which are exclusively favoured by the measure at issue must be identified in all cases and that, in the situation referred to in paragraph 48 above, the mere finding that a derogation from the common or ‘normal’ tax regime has been provided for cannot give rise to selectivity.

50 Furthermore, it is for the Commission to prove that a measure creates differences between undertakings which, with regard to the objective pursued, are in a comparable factual and legal situation (Case C?279/08 P *Commission* v *Netherlands* [2011] ECR I?7671, paragraph 62).

51 In *Commission* v *Netherlands*, cited in paragraph 50 above (paragraph 63), the Court of Justice thus noted that the Commission had adequately established in the contested decision that only a specific group of large industrial undertakings engaged in trade between the Member States enjoyed an advantage which was not available to other undertakings. The Commission therefore succeeded, in the case giving rise to that judgment, in establishing that the measure at issue applied selectively to certain undertakings or the production of certain goods.

52 Similarly, in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited in paragraph 33 above (paragraph 96), the Court of Justice found that the Commission had adequately established, in the contested decision, that certain undertakings, ‘offshore’ companies, benefited from selective advantages.

53 In this case, it is therefore necessary to assess whether the various reasons on which the Commission relied in the contested decision to find that the measure at issue is selective, which it

restated in the legal proceedings, make it possible to establish that that measure is selective in nature.

54 Firstly, in the contested decision, the Commission, to conclude that the measure at issue is selective, relied primarily on the existence of a derogation from a reference framework. Indeed, it stated that the reference framework which it used for assessing the selective nature of the measure at issue was ‘the general Spanish corporate tax system and, more precisely, the rules on the tax treatment of financial goodwill in the Spanish tax system’ (recital 118 of the contested decision). It considered, ‘as a preliminary remark and on a subsidiary basis’, that the measure at issue derogated from the Spanish accounting system (recital 121 of the contested decision). Furthermore, it noted that the measure at issue had the effect of applying to undertakings taxable in Spain acquiring shareholdings in companies established abroad a tax treatment different to that applied to undertakings taxable in Spain acquiring shareholdings in companies established in Spain, even though those two categories of undertakings are in comparable situations (recitals 122 and 136 of the contested decision). On the basis of such a difference in treatment, the Commission concluded that the measure at issue ‘derogate[d] from the reference system’ (recital 125 of the contested decision).

55 In the contested decision, the Commission thus applied the method of analysis described in paragraphs 33 to 37 above.

56 However, as the applicants rightly claim, the application of the method of analysis described in paragraphs 33 to 37 above does not, in this case, lead to the conclusion that the measure at issue is selective. The existence, even if it were established, of a derogation from or exception to the reference framework identified by the Commission cannot, in itself, establish that the measure at issue favours ‘certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU, since that measure is available, a priori, to any undertaking.

57 It should be noted, first of all, that the measure at issue applies to all shareholdings of at least 5% in foreign companies which are held for an uninterrupted period of at least one year. It is therefore aimed not at any particular category of undertakings or production, but at a category of economic transactions.

58 It is true that, in certain cases, undertakings can effectively be excluded from the scope of a measure which is none the less presented as a general measure (see, to that effect, Joined Cases 6/69 and 11/69 *Commission* v *France* [1969] ECR 523, paragraphs 20 and 21, and *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited in paragraph 33 above, paragraphs 101 and 107).

59 In this case, to benefit from the measure at issue, an undertaking must purchase shares in a foreign company (recitals 26 and 32 of the contested decision).

60 It should be noted that such an operation, which is entirely financial, does not, a priori, require the acquiring undertaking to change its activity and also, in principle, involves for that undertaking only limited responsibility with regard to the investment made.

61 In that regard, it should be recalled that a measure which is to be applied regardless of the nature of the activity of undertakings is not, in principle, selective (see, to that effect, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, cited in paragraph 41 above, paragraph 36).

62 Furthermore, the measure at issue does not set any minimum amount in respect of the minimum 5% shareholding threshold referred to in paragraph 57 above and therefore does not in

fact restrict the undertakings which can take advantage of it to those which possess sufficient financial resources to do so, unlike the measure at issue in the case giving rise to the judgment in Joined Cases T?227/01 to T?229/01, T?265/01, T?266/01 and T?270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II?3029, paragraphs 161 and 162.

63 Finally, the measure at issue provides that a tax advantage is to be granted on the basis of a condition linked to the purchase of particular financial assets, that is to say shareholdings in foreign companies.

64 However, in *Germany* v *Commission*, cited in paragraph 42 above (paragraph 22), the Court of Justice ruled that a tax concession in favour of taxpayers who sold certain financial assets and could offset the resulting profit in the case of shareholding acquisitions in capital companies having their registered office in certain regions conferred on those taxpayers an advantage which, as a general measure applicable without distinction to all economically active persons, did not constitute aid within the meaning of the relevant provisions of the Treaty.

65 The measure at issue therefore does not exclude, a priori, any category of undertakings from taking advantage of it.

66 As a consequence, even if the measure at issue constitutes a derogation from the reference framework used by the Commission, this would not, in any event, be a ground for establishing that that measure favours ‘certain undertakings or the production of certain goods’ within the meaning of Article 107(1) TFEU.

67 Secondly, the Commission stated that ‘the contested measure [was] selective in that it only favour[ed] certain groups of undertakings that carr[ied] out certain investments abroad’ (recital 102 of the contested decision). It argued that a measure which favoured only undertakings satisfying the conditions on which its grant was subject was selective ‘by law’ and that it is not necessary to ensure that that measure is likely to have the effect of conferring an advantage only on certain undertakings or the production of certain goods.

68 However, nor does this other reason for the contested decision make it possible to establish that the measure at issue is selective in nature.

69 According to settled case-law, Article 107(1) TFEU distinguishes between State interventions on the basis of their effects (Case 173/73 *Italy* v *Commission* [1974] ECR 709, paragraph 27, and Case C?159/01 *Netherlands* v *Commission* [2004] ECR I?4461, paragraph 51). It is therefore on the basis of the effects of the measure at issue that it is necessary to evaluate whether that measure constitutes State aid, in particular because it is selective (see, to that effect, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited in paragraph 33 above, paragraphs 87 and 88).

70 Furthermore, in the judgment in Case C?417/10 *3M Italia* [2012] ECR, paragraph 42, the Court of Justice ruled that the fact that only taxpayers satisfying the conditions for the application of the measure at issue in that case could benefit from the measure could not in itself make it into a selective measure.

71 Finally, in *Commission and Spain* v *Government of Gibraltar and United Kingdom*, cited in paragraph 33 above (paragraphs 103, 104 and 107), the Court of Justice ruled that not all tax differentiation involved the existence of aid and that, in order for tax differentiation to be classified as aid, it had to be possible to identify a specific category of undertakings which can be distinguished on account of their specific characteristics.

72 However, the approach proposed by the Commission could, contrary to the case-law referred to in paragraph 71 above, lead to every tax measure the benefit of which is subject to certain conditions being found to be selective, even though the beneficiary undertakings would not share any specific characteristic distinguishing them from other undertakings, apart from the fact that they would be capable of satisfying the conditions to which the grant of the measure is subject.

73 Thirdly, in recital 154 of the contested decision, the Commission stated that it '[considered] that … in the present case, the contested measure [wa]s intended to promote the export of capital out of Spain in order to strengthen the position of Spanish companies abroad, thereby improving the competitiveness of the beneficiaries of the scheme'.

74 In that regard, it should be recalled that a State measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid with regard to the criterion of selectivity (*Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwekre*, cited in paragraph 41 above, paragraph 35).

75 Accordingly, while the assessment of the condition set out in Article 107(1) TFEU and relating to the effect on trade between Member States involves examining whether the undertakings or the production of certain goods of a Member State are placed at an advantage compared to the undertakings or the production of certain goods of other Member States, the condition relating to selectivity, set out in the same paragraph of that article, can be assessed only at the level of a single Member State and emerges only from an analysis of the difference in treatment between the undertakings and the production of certain goods of that State (see, to that effect, the judgment of 11 November 2004 in Case C?73/03 *Spain* v *Commission*, not published in the ECR, paragraph 28).

76 Accordingly, the fact that a measure treats undertakings which are taxable in one Member State more favourably than undertakings which are taxable in the other Member States, in particular because the measure facilitates acquisitions by undertakings established in a Member State of shareholdings in the capital of undertakings established abroad, does not affect the analysis of the selectivity criterion.

77 It is true that in *Commission* v *France*, cited in paragraph 58 above (paragraph 20), the Court of Justice ruled that an advantage granted 'in favour only of national products exported and for the purpose of helping them to compete in other Member States with products originating in the latter' constituted State aid. However, that reference to products originating in other Member States concerned the condition relating to the effect on competition and trade.

78 That interpretation of *Commission* v *France*, cited in paragraph 58 above, is supported by the judgment in Case 57/86 *Greece* v *Commission* [1988] ECR 2855, paragraph 8, in which the distinction between national products and products of other Member States does not appear in the analysis of the criteria relating to selectivity. Similarly, in the judgment in Case C?501/00 *Spain* v *Commission* [2004] ECR I?7617, paragraph 120, the distinction between national products and products from other Member States is not taken into account within the context of the analysis of the selectivity of the measure.

79 It is clear from that case-law that the finding that a measure is selective is based on a difference in treatment between categories of undertakings under the legislation of a single Member State and not a difference in treatment between the undertakings of one Member State and those of other Member States.

80 It follows from the foregoing that the link, which appears in recital 154 of the contested decision cited in paragraph 73 above, between the export of capital and the export of goods would, if it were established, allow only a finding that there is an effect on competition and trade and not a finding that the measure at issue is selective, which must be evaluated within a national framework.

81 Fourthly, it cannot be inferred from the case-law on which the Commission relies that the EU courts have already classified a tax measure as selective without it being established that the measure at issue favoured a particular category of undertakings or the production of certain goods, to the exclusion of other undertakings or the production of other goods.

82 Thus, the Court of Justice ruled that a preferential rediscount rate for exports, granted by a State in favour only of national products exported and for the purpose of helping them to compete in other Member States with products originating in the latter, constituted aid (*Commission* v *France*, cited in paragraph 58 above, paragraph 20) and that interest rate rebates on loans for export (*Greece* v *Commission*, cited in paragraph 78 above, paragraph 8) and a tax deduction which benefits only undertakings which have export activities and which make certain investments referred to by the measures at issue (Case C?501/00 *Spain* v *Commission*, cited in paragraph 78 above, paragraph 120) satisfied the condition of selectivity.

83 In the three judgments cited in paragraph 82 above, the category of recipient undertakings allowing a finding that the measure at issue was selective was made up of the category of export undertakings.

84 The category of export undertakings — even though it is, in the same way as, for example, the category of undertakings manufacturing goods (see paragraph 41 above), extremely broad — must be regarded as comprising undertakings which can be distinguished on account of common characteristics linked to their export activity.

85 The case-law cited in paragraph 82 above, regarding undertakings with export activities, thus does not make it possible to conclude that the EU courts classified a tax measure as selective without the identification of a particular category of undertakings or the production of certain goods which could be distinguished on account of their specific characteristics.

86 That analysis is not undermined by the Commission’s argument that, in the case which gave rise to the judgment in Case C?501/00 *Spain* v *Commission*, cited in paragraph 78 above, the tax advantage at issue primarily related to the purchase of shares in foreign companies. Indeed, to benefit from the advantage at issue, undertakings had to acquire shareholdings in companies directly involved in the exportation of goods or services. Furthermore, the scope of the measure classified as selective by the Court of Justice in that case was not restricted to such shareholdings, but also included other export activities: setting up branches or permanent establishments abroad, setting up subsidiaries directly involved in the exportation of goods or services, as well as promotional and advertising costs for the launching of products, opening and testing markets abroad and attendance at fairs, exhibitions and similar events. As a result, in the case which gave rise to that judgment, the advantage conferred by the measure at issue was restricted to certain undertakings, namely those with export activities, unlike, a priori, the advantage conferred in the present case.

87 It follows from all of the foregoing considerations that the Commission has not established, based on the grounds upon which it has relied, that the measure at issue was selective.

88 By considering that the measure at issue was selective, the Commission thus incorrectly

applied the provisions of Article 107(1) TFEU.

89 Accordingly, the plea under consideration is well founded. It is therefore necessary, without there being any need to examine the other pleas raised by the applicants in support of their main claims, to annul Article 1(1) of the contested decision.

The claims seeking annulment of Article 4 of the contested decision

90 The claims of the applicants specifically referring to Article 4 of the contested decision are based on criticism of the transitional system provided by the contested decision with a view to recovering the aid at issue. The applicants are in particular disputing the date used as a reference to determine the aid which could be recovered. In their 'alternative' claims concerning that article, the applicants are thus seeking to limit the possibilities of recovering the aid granted to them should any possibility of recovering that aid not be eliminated on the basis of their main claims. Thus the applicants' main claims must be viewed as seeking to remove all possibilities of recovering the aid and, therefore, in any event, the annulment of Article 4 of the contested decision.

91 Furthermore, it would be particularly formalistic to hold that the applicants do not seek in their main claims to obtain the annulment of Article 4 of the contested decision, which is the legal basis for the recovery of the aid, while the applicants are entitled to challenge this decision only insofar as they may be subject to a recovery measure (see, to that effect, Joined Cases C?71/09 P, C?73/09 P and C?76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I?4727, paragraph 56).

92 It must therefore be held that, although it is only 'in the alternative' that the applicants seek the annulment of Article 4 of the contested decision, which relates to recovery of the aid, they necessarily seek to obtain, as their main claim also, the annulment of the provision which is the legal basis for recovering the aid which they received.

93 However, since the plea examined above concerning the lack of selectivity of the measure at issue is well founded, it is necessary to annul not only Article 1(1) of the contested decision, which contains the finding of the existence of aid, but also Article 4 of that decision, which provides for the recovery of that aid.

Costs

94 Under Article 87(2) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls Article 1(1) and Article 4 of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain;**

2. **Orders the European Commission to pay the costs.**

Martins Ribeiro

Forwood

Bieli?nas

Gervasoni

Madise

Delivered in open court in Luxembourg on 20 November 2014.

[Signatures]

* Language of the case: Spanish.