Linklaters

December 2016

European Court of Justice rules in favour of broader state aid concept in landmark judgment

In Brief

> On 21 December 2016, the European Court of Justice (the "**ECJ**") handed down its much-awaited judgment in the so-called Spanish goodwill case. In this landmark ruling, the ECJ sets aside two General Court judgments which had raised the bar for finding "selectivity" — one of the key conditions that must be satisfied in order for a tax measure to be classified as 'State aid'.

> The ECJ holds that, contrary to the ruling of the General Court, in order to demonstrate the selectivity of a national fiscal measure, the European Commission (the "**Commission**") **is not required to identify a particular category of undertakings that benefit from it**. As a consequence, tax measures which are in principle open to all undertakings may nevertheless be considered selective and classified as State aid in so far as they imply a unjustified deviation from the "regular tax regime".

> This ruling is likely to encourage the Commission to continue using state aid law to tackle what it perceives as unfair tax avoidance or tax advantages. However, the implications of this judgment for recent cases regarding tax rulings, such as those concerning Apple, Starbucks and Fiat, should not be overstated.

Background

Spanish goodwill amortisation regime

Spanish corporate tax law[1] allowed undertakings which had acquired shareholdings in foreign companies of at least 5% to deduct — in the form of annual amortisation — the target companies' goodwill value from their own taxable income.

However, the target companies' goodwill in domestic share acquisitions was not deductible under Spanish tax law.

Contents

1 Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades.

European Commission decision

Following a complaint, the Commission opened formal investigations into the Spanish goodwill amortisation scheme in 2007. The case relating to the acquisition of shareholdings within the EU was closed by decision of 28 October 2009[2] and the case relating to the acquisition of stakes outside the EU was closed by decision of 12 January 2011[3]. In both decisions, the European Commission declared that the foreign goodwill deductibility provided for in Spanish legislation amounted to illegal state aid to companies involved in acquisitions of foreign shareholdings which was incompatible with the internal market.

General Court judgments

A number of affected companies appealed these decisions before the General Court, which handed down its judgments on 7 November 2014[4].

In these rulings, the General Court interpreted the concept of 'selectivity' in a more restrictive manner and annulled the Commission's decisions. In particular, the General Court found that, even though the Spanish legislation did establish an exception for investments in foreign companies, the scheme did not qualify as State aid since it was open to any undertakings and the Commission was unable to identify a particular category of favoured undertakings. According to the General Court, the tax scheme was not aimed at any particular category of *undertakings or production*, as required by article 107(1) of the Treaty of the Functioning of the European Union, but merely at a category of *economic transactions*.

ECJ findings

By its Grand Chamber judgment of 21 December 2016, the ECJ sets aside the two judgments and referred the cases back to the General Court.

The ECJ holds that, in order to meet the selectivity criterion, it is enough to establish that a measure constitutes a derogation from the "regular" tax regime. In contrast to the General Court's finding, the ECJ concludes that the Commission does not need to identify, ex-ante, a well-defined category of undertakings exclusively favoured by the tax measure at hand.

In particular, according to the ECJ, the "*only relevant criterion*" in order to establish the selectivity of a national tax measure is whether the measure in question is such as to favour certain undertakings over other undertakings which, in the light of the objective pursued by the general tax system concerned, are in a comparable factual and legal situation to those that are subject to the general tax system. Following Advocate General Wathelet's opinion, the ECJ considers that the fact that the benefits deriving from a tax measure are available to many companies from different sectors does not call

[2] 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).

[3] Decision 2011/282/EU of 12 January 2011, on the tax amortisation of financial goodwill for foreign shareholding acquisitions C45/07 (ex NN51/07, ex CP 9/07).

[4] Judgment of the General Court of 7 November 2014 in Case T-399/11, Banco Santander and Santusa Holding v. European Commission; and judgment of the General Court of 7 November 2014 in Case T-219/10, Autogrill España v. European Commission.

into question the selective nature of the measure as such but rather its degree of selectivity.

Consequently, the ECJ concludes that, regardless of its degree of selectivity, the Spanish goodwill amortization regime constitutes illegal state aid since it favours Spanish resident companies that make foreign share acquisitions as compared to Spanish resident companies that are involved in domestic share acquisitions.

Conclusion and implications

The ECJ judgment generally supports the Commission interpretation of the concept of selectivity and will no doubt encourage the Commission to continue using state aid regulation to strike down what it perceives as unfair tax avoidance or tax advantages.

According to the ECJ, selectivity can be shown when (i) a given tax measure is a "*deviation from the regular reference framework*" that constitutes an advantage for certain companies by comparison with others in a comparable factual and legal situation and (ii) such deviation is not justified by the nature or general scheme of the system. Beyond these requirements, there is no need for the Commission to show an additional "material discrimination", i.e. to identify a particular category of undertakings which are the only ones favoured by the measure in question. As such, state aid may exist even if the beneficial measure is, in theory at least, open to all companies.

While this judgment will definitely be welcome by the Commission, the debate on the selectivity concept is far from over. The focus will probably now shift elsewhere, to the discrimination issue, which is one of the cornerstones of the Commission's and the ECJ's analysis and still remains open: when are two companies in a "comparable" factual and legal situation?

Finally, the implications of this judgment for recent tax ruling cases, such as Apple, Starbucks and Fiat, should not be overstated. Spanish corporate tax law offered a clear benchmark against which to measure the existence of an advantage in this case. No such clear benchmark exists in national law in the tax ruling cases. As such, the ECJ's judgment in the Spanish goodwill cases will be of limited relevance for those cases, which raise a series of issues beyond the scope of this ruling.

Linklaters

Contacts

For further information please contact:

Christian Ahlborn
Partner
(44 20) 7456 3570
christian.ahlborn@Linklaters.com

Natura Gracia
Partner
(44 20) 7456 4941
natura.gracia@linklaters.com

Henk Vanhulle
Partner
(32 2) 501 9158
henk.vanhulle@linklaters.com

Bernard van de Walle de Ghelcke
Of Counsel
(32 2) 505 0302
bernard.van_de_walle@linklaters.com

Thomas Franchoo
Counsel
(32 2) 505 0330
thomas.franchoo@linklaters.com

Fredrik Löwhagen
Counsel
(34) 91399 6135
fredrik.lowhagen@linklaters.com

Caroline Borgers
Associate
(32 2)501 9208
caroline.borgers@linklaters.com

Linklaters LLP
One Silk Street
London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222

Linklaters.com

Authors: Natura Gracia, Fredrik Löwhagen, Hugo Roldán