

1. First plea in law, alleging a manifest error of law in the analysis of the concept of selectivity and in classifying the measure at issue as State aid.

— The applicants submit that the Commission has not shown that the tax measure at issue favours ‘certain undertakings or the production of certain goods’ as required by Article 107(1) TFEU. The Commission merely assumes that the measure is selective because it applies only to the acquisition of shareholdings in foreign undertakings (in this case in non-Member countries) and not in domestic undertakings. The applicants submit that such reasoning is erroneous and circular: the fact that the application of the measure examined — as for any other tax rule — depends on the fulfilment of certain objective requirements does not render it, in law or in fact, a selective measure. Spain has produced evidence which shows that Article 12(5) TRLIS is a general measure open, in law and fact, to all undertakings which are subject to Spanish corporation tax irrespective of their size, nature, sector or origin.

— In the second place, far from constituting a selective advantage, the *prima facie* difference in treatment under Article 12(5) TRLIS serves to place all transactions for the acquisitions of shares on an equal tax footing, whether they be national or foreign. In non-Member countries, there are considerable barriers to mergers, in practice precluding them; by contrast, mergers are possible in Spain and the amortisation of financial goodwill is permitted in relation to them. Consequently, Article 12(5) TRLIS does no more than extend such amortisation to the purchase of shareholdings in undertakings in non-Member countries, a transaction which represents the closest — and most feasible — functional equivalent to domestic mergers and is thus integral to the scheme and broad logic of the Spanish system.

— The Commission is mistaken to find that there are no barriers to merger transactions with undertakings in non-Member countries, and it is therefore mistaken to set up the reference system for establishing selectivity while not accepting the arguments regarding tax neutrality. It is particularly mistaken in its analysis of the transactions in the United States, Brazil and Mexico.

— Alternatively, the contested decision should be annulled at least in those cases where majority control is acquired of undertakings in non-Member countries in circumstances comparable to domestic mergers and thus justified by the scheme and broad logic of the Spanish system.

2. Second plea in law, alleging an error of law in determining the beneficiary of the measure.

— Alternatively, although it considers that Article 12(5) TRLIS contains elements of State aid, the Commission ought to have carried out an exhaustive economic analysis to ascertain who the beneficiaries of the potential aid were. The applicants claim that the bene-

ficiaries of the aid (in the form of an inflated purchase price for the shares) were those selling the shares and not, as the Commission alleges, the Spanish undertakings which applied that measure.

3. Third plea in law, alleging infringement of the general legal principle of the protection of legitimate expectations, with regard to the manner in which the temporal scope of the recovery order is defined.

— Alternatively, if Article 12(5) TRLIS were to be considered aid, the Commission fails to have regard to the case-law of the Courts of the European Union, in limiting the temporal scope of the principle of the protection of legitimate expectations to the date of publication of the decision to initiate the formal investigation procedure (21 December 2007), and therefore in seeking recovery in those transactions subsequent to that date (except for transactions entailing the acquisition of majority shareholdings, in India and China, for which the principle of the protection of legitimate expectations is extended until 21 May 2011, the date of publication of the final decision, on the basis that in those cases there are explicit legal barriers to international mergers).

— The applicants submit that since, in accordance with the Commission’s practice and with case-law, the initiation of the formal investigation procedure does not prejudice the nature of the measure, the initiation of that procedure cannot constitute the date on which the protection of legitimate expectations ends, but rather the latter should coincide in any event with the date on which the final decision is published in the Official Journal of the European Union.

— Furthermore, the actual limits which the contested decision places on the protection of legitimate expectations recognised between the application of the opening decision and the final decision cannot be justified, since the protection is limited to transactions entailing the acquisition of majority shareholdings in India and China. Such protection of legitimate expectations should be extended, in accordance with case-law, to all transactions in any non-Member country.

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### Action brought on 29 July 2011 — Altadis v Commission

(Case T-400/11)

(2011/C 282/72)

*Language of the case: Spanish*

#### Parties

*Applicant:* Altadis, SA (Madrid, Spain) (represented by: J. Buendía Sierra, E. Abad Valdenebro, R. Calvo Salinero, and M. Muñoz de Juan, lawyers)

*Defendant:* European Commission

**Form of order sought**

The applicant claims that the General Court should:

- admit and uphold the request for evidence;
- admit and uphold the pleas for annulment contained in the application;
- annul Article 1(1) of the contested decision in so far as it declares that Article 12(5) of the Texto Refundido de la Ley del Impuesto sobre Sociedades ('TRLIS') (consolidated text of the Law on Corporation Tax) contains elements of State aid when it applies to acquisitions of shareholdings entailing acquisition of control;
- alternatively, annul Article 4 of the contested decision in so far as it makes the recovery order applicable to transactions completed prior to the publication in the Official Journal of the European Union of the final decision which is the subject-matter of this action;
- alternatively, annul Article 1(1), and in the further alternative Article 4, of the contested decision in so far as they relate to transactions in Morocco;
- order the Commission to pay the costs of these proceedings.

**Pleas in law and main arguments**

This action is brought against Commission Decision C(2010) 9566 of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions.

The pleas in law and main arguments are those already raised in Case T-399/11 *Banco de Santander and Santusa Holding v Commission*.

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**Appeal brought on 27 July 2011 by Livio Missir Mamachi di Lusignano against the judgment of the Civil Service Tribunal of 12 May 2011 in Case F-50/09, Livio Missir Mamachi di Lusignano v Commission**

(Case T-401/11 P)

(2011/C 282/73)

*Language of the case: Italian*

**Parties**

*Appellant:* Livio Missir Mamachi di Lusignano (Kerkhove-Avelgem, Belgium) (represented by F. Di Gianni, R. Antonini, G. Coppo and A. Scalini, lawyers)

*Other party to the proceedings:* European Commission

**Form of order sought by the appellant**

The appellant claims that the Court should:

- Set aside the judgment of the Civil Service Tribunal (First Chamber) of 12 May 2011 in Case F-50/09 *Livio Missir Mamachi di Lusignano v European Commission* rejecting the action brought by Livio Missir Mamachi di Lusignano under Article 236 EC and Article 90(2) of the Staff Regulations for annulment of decision of the appointing authority of 3 February 2009 and an order that the Commission pay compensation for the material and non-material damage arising as a result of the murder of Alessandro Missir Mamachi di Lusignano and his wife;
- Order the Commission to pay to the appellant and the successors of Alessandro Missir Mamachi di Lusignano represented by the appellant a sum of money by way of compensation for the material and non-material damage sustained by them as well as the non-material damage suffered by the victim before his death;
- Order the Commission to pay the costs of the proceedings.

**Pleas in law and main arguments**

The appellant relies on three grounds in support of his appeal:

1. First ground, alleging that the Civil Service Tribunal erred in holding that the claim for compensation for the non-material damage suffered by the appellant, Alessandro Missir and his heirs was inadmissible.

In support of that ground, the appellant submits, first, that the Civil Service Tribunal applied in an illogical, incorrect and discriminatory manner what is known as the rule on consistency, which requires identity of cause and subject-matter solely between the complaint submitted under Article 90(2) of the Staff Regulations and the appeal lodged under Article 91 of those regulations, not between the request under Article 90(1) and the complaint under Article 90(2). Second, the appellant submits that the Civil Service Tribunal's interpretation of the rule on consistency gives rise to a limitation on the exercise of the fundamental right to effective judicial protection, enshrined, inter alia, in Article 47 of the Charter of Fundamental Rights of the European Union.

2. The second ground of appeal, alleging that the Civil Service Tribunal erred in finding that the Commission was only 40 % responsible for the damage caused.

In support of this ground, the appellant submits that the Civil Service Tribunal made an incorrect assessment of the relationship between the Commission's unlawful conduct and the possible consequences of that failure to act, since the damage caused to the official was the direct and foreseeable consequence of that institution's negligent conduct. Moreover, the appellant submits that, while the damage came about as a result of various contributory causes, the Commission is to be held jointly and severally liable with the murderer for the compensation for the damage. It follows that 100 % of the appellant's claim for compensation to be paid by the Commission should be granted.