Pleas in law and main arguments

In support of the action, the applicant relies on one plea in law.

1. First plea in law, alleging that the defendant violated Articles 2 and 30(3) of Directive 2004/18/EC, as:

   — Information relevant for submitting the offer was not made available to all participants in the public procurement procedure in the same manner and quality;

   — The successful tenderer was provided information in a discriminatory manner which gave it an advantage as it was able to correct its tender; and

   — The negotiation procedure was conducted in such a way that the defendant influenced the outcome of the procedure by requesting additional information or clarifications from only certain participants, thereby violating the principle of non-discrimination and transparency.

(1) Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)

Action brought on 26 July 2011 — Symfiliosi/FRA

(Case T-397/11)

(2011/C 282/70)

Language of the case: English

Parties

Applicant: Symfiliosi (Nicosia, Republic of Cyprus) (represented by: L. Christodoulou, lawyer)

Defendant: European Union Agency for Fundamental Rights (FRA)

Form of order sought

— Annul the decision of the European Union Agency for Fundamental Rights of 23 May 2011 to award the first framework contract under the tender procedure F/SE/10/03 — Lot 12 Cyprus to First Elements and the second framework contract to Symfiliosi;

— Order the European Union Agency for Fundamental Rights to pay the costs.

Pleas in law and main arguments

In support of the action, the applicant relies on one main plea in law, alleging that the Agency failed to provide reasons for its decision. It further contests the substance of the evaluation of tendering bids, alleging that the latter had been arbitrary, unreasonable and unlawful.

Action brought on 29 July 2011 — Banco Santander and Santusa v Commission

(Case T-399/11)

(2011/C 282/71)

Language of the case: Spanish

Parties

Applicants: Banco Santander, SA (Santander, Spain), Santusa Holding, SL (Boadilla del Monte, 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 applicants claim that the General Court should:

— admit and uphold the pleas for annulment contained in the application and consequently annul Article 1(1) of the contested decision, which classifies Article 12(5) of the Texto Refundido de la Ley del Impuesto sobre Sociedades ('TRLIS') (consolidated text of the Law on Corporation Tax) as State aid;

— alternatively, annul Article 1(1) of the contested decision in so far as it declares that Article 12(5) TRLIS contains elements of State aid when it applies to acquisitions of majority shareholdings;

— 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 (OJ 2011 L 135, p. 1);

— alternatively, annul Article 1(1), and in the further alternative Article 4, in so far as they relate to transactions in Mexico, the United States and Brazil;

— 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.

In support of their action, the applicants rely on three pleas in law.

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 beneficiaries 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 prejudge 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.

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