Reports of Cases

ORDER OF THE GENERAL COURT (Eighth Chamber)

9 September 2013*

(Actions for annulment — State aid — Aid scheme allowing for the tax amortisation of financial goodwill for foreign shareholding acquisitions — Decision declaring the aid scheme to be incompatible with the common market and not ordering the recovery of the aid — Act entailing implementing measures — Lack of individual concern — No obligation to recover — Inadmissibility)

In Case T-400/11,

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

applicant,

v

European Commission, represented by R. Lyal, C. Urraca Caviedes and P. Němečková, acting as Agents,

defendant,

APPLICATION for partial annulment of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1),

THE GENERAL COURT (Eighth Chamber),

composed of L. Truchot (Rapporteur), President, M.E. Martins Ribeiro and A. Popescu, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

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) of the Ley del Impuesto sobre Sociedades (Corporate Tax Law), introduced into that law by Ley 24/2001 de Medidas Fiscales,

* Language of the case: Spanish.

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 recast by 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'), 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 appear to come within the scope of the rules governing State aid.

2 By letters of 15 January and 26 March 2007, the Commission asked the Spanish authorities to provide it with information to enable it to assess the scope and effects of the scheme at issue. By letters of 16 February and 4 June 2007, the Kingdom of Spain provided the Commission with 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 (summarised in OJ 2007 C 311, p. 21), 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 investigation procedure. Between 18 January and 16 June 2008, the Commission also received comments from 32 interested third parties, including comments from the applicant, Altadis, SA. By letters of 30 June 2008 and 22 April 2009, the Kingdom of Spain gave its reactions to the comments made by the third parties.

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, including the applicant.

7 By letter of 14 July 2008 and by e-mail of 16 June 2009, the Kingdom of Spain submitted additional 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). That decision declares 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 companies, is incompatible with the common market where it applies to the acquisition of shareholdings in companies established within the European Union. 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.

9 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.

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

11 On 12 January 2011, the Commission adopted Decision 2011/282/EU on the tax amortisation of financial goodwill for foreign shareholding acquisitions No C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1) ('the contested decision').

12 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 1(2) and (3) of the contested decision, however, permits the scheme at issue to continue to apply, by virtue of the principle of the protection of legitimate expectations, to acquisitions of shareholdings which took place before the publication in the *Official Journal of the European Union* of the decision initiating the formal investigation procedure on 21 December 2007, and to acquisitions of shareholdings, the completion of which, requiring the approval of a regulatory authority to which the operation had been notified before that date, took place irrevocably before 21 December 2007. Article 1(4) and (5) of the contested decision permits, moreover, the scheme at issue to continue to apply to acquisitions of shareholdings in companies established in China, India or in other countries where the existence of explicit legal obstacles to cross-border business combinations is shown, those acquisitions having been made up to the time of the publication of that decision in the *Official Journal of the European Union* on 21 May 2011, and to such acquisitions of shareholdings, the completion of which, requiring the approval of a regulatory authority to which the operation had been notified before that date, took place irrevocably before 21 May 2011.

Procedure and forms of order sought

13 By application lodged at the Registry of the General Court on 29 July 2011, the applicant brought the present action.

14 By document lodged at the Registry of the General Court on 10 November 2011, the Commission raised an objection of inadmissibility under Article 114(1) of the Court's Rules of Procedure.

15 On 6 January 2012, the applicant submitted its observations on the Commission's objection of inadmissibility.

16 On 5 October and 13 December 2012, the Court, by way of measures of organisation of procedure, requested the applicant to state the inferences that it intended to draw, for the purposes of the present action, from the Court's judgment of 8 March 2012 in Case T-221/10 *Iberdrola* v *Commission* [2012] ECR, and from its order of 21 March 2012 in Case T-174/11 *Modelo Continente Hipermercados* v *Commission* [2012] ECR, and requested the Commission to submit its observations on the applicant's reply to that question. The applicant and the Commission replied to those questions within the period prescribed.

17 The applicant claims, in essence, that the Court should:

— declare the action admissible and order that the proceedings should continue;

— annul Article 1(1) of the contested decision;

— alternatively, annul Article 4 of the contested decision in so far as it provides for an obligation to recover the aid granted for transactions prior to 21 May 2011;

— in the further alternative, annul Article 1(1) and, alternatively, Article 4 of the contested decision in so far as those provisions refer to transactions carried out in Morocco;

— order the Commission to pay the costs.

18 The Commission contends that the Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

Law

19 Under Article 114(1) of the Rules of Procedure, the Court may, if a party so requests, rule on the question of admissibility without going to the substance of the case. Under Article 114(3), unless the Court otherwise decides, the remainder of the proceedings is to be oral. In the present case, the Court considers that the information in the documents before it is sufficient and that there is no need to proceed to the oral stage of the proceedings.

20 The Commission contends that the present action is inadmissible on the ground that the applicant has not shown either that it had an interest in bringing proceedings or that it was individually concerned by the contested decision.

21 It is appropriate to begin by examining the Commission's second ground of inadmissibility.

22 Under the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

23 As the contested decision was adopted following the formal investigation procedure and was not addressed to the applicant, the question as to whether it is of individual concern to the applicant must be assessed according to the criteria laid down in Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, at p. 107. Thus, the applicant must show that the contested decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of these factors distinguishes it individually just as in the case of the person addressed by that decision (see, to that effect, Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 36 and the case-law cited).

24 The applicant relies on the fact that it is a beneficiary under the scheme at issue in order to demonstrate that it is individually concerned by the contested decision declaring that scheme to be unlawful and incompatible with the internal market.

25 It is settled case-law that an undertaking cannot, as a general rule, bring an action for the annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of the fact that it belongs to the sector in question and is a potential beneficiary of the scheme. Such a decision is, vis-à-vis that undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see *Italy* v *Commission*, paragraph 37 and the case-law cited, and Case T-309/02 *Acegas* v *Commission* [2009] ECR II-1809, paragraph 47 and the case-law cited).

26 However, where the applicant undertaking is concerned by the decision at issue not only by virtue of being an undertaking in the sector concerned and a potential beneficiary of the aid scheme, but also by virtue of being an actual beneficiary of individual aid granted under that scheme, the recovery of which has been ordered by the Commission, it is individually concerned by that decision and its action challenging that decision is admissible (see, to that effect, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraphs 34 and 35, and judgment of 10 September 2009 in Case T-75/03 *Banco Comercial dos Açores* v *Commission*, not published in the ECR, paragraph 44).

27 Accordingly, it is necessary to determine whether the applicant is an actual beneficiary of individual aid granted under the aid scheme to which the contested decision relates, recovery of which has been ordered by the Commission (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 53 and the case-law cited, and *Iberdrola* v *Commission*, paragraph 27).

28 In the present case, the applicant has shown that it is an actual beneficiary of the scheme at issue. It annexed a document to the application showing that it had applied the scheme at issue to acquisitions of shareholdings, in 2003 and 2006, in a company established in Morocco. However, under Articles 1(2) and 4(1) of the contested decision, it is not covered by the recovery obligation provided for by that decision.

29 In that regard, the applicant claims, first, in reliance on the case-law, that its status as an actual beneficiary of the scheme at issue is sufficient to establish that it is individually concerned, since the obligation to repay the aid received under that scheme does not constitute an essential condition for recognition of that status. The applicant infers, inter alia from the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, that an undertaking may be regarded as being individually concerned where it benefits from aid granted in the context of an aid scheme in respect of which recovery is ordered in a general way, without it being itself covered by that recovery obligation.

30 In this regard, it is necessary to recall paragraph 53 of the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, on which the applicant bases its argument:

'… the actual beneficiaries of individual aids granted under a system of aids of which the Commission has ordered recovery are, by that fact, individually concerned …'

31 That passage has, however, been interpreted in the decisions of the Court of Justice and the General Court which have referred to it as meaning that the actual beneficiary of an aid scheme is regarded as being individually concerned by a Commission decision relating to that scheme only if it has benefited from aid covered by the recovery obligation provided for by that decision (see, to that effect, *Italy and Sardegna Lines* v *Commission*, paragraphs 31 and 34; Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraphs 46 to 48; and the order in *Modelo Continente Hipermercados* v *Commission*, paragraph 30). The recovery referred to in paragraph 53 of *Comitato 'Venezia vuole vivere' and Others* v *Commission* relates, therefore, to aid which benefited the applicant at issue and not in a general way to aids paid under the aid scheme concerned.

32 That interpretation is, moreover, confirmed by paragraph 56 of the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, which is worded as follows:

'… the order for recovery already concerns all the beneficiaries of the system in question individually in that they are exposed, as from the time of the adoption of the contested decision, to the risk that the advantages which they have received will be recovered, and thus find their legal position affected. Those beneficiaries thus form part of a restricted circle …, without it being necessary to examine additional conditions, concerning situations in which the Commission's decision is not accompanied by a recovery order. Moreover, the eventuality that, subsequently, the advantages declared illegal may not be recovered from their beneficiaries does not exclude the latter from being regarded as individually concerned.'

33 It follows, in the first place, from the first and second sentences of that paragraph of the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, read in conjunction with paragraph 55 thereof, that the Court of Justice merely examined the case, which alone was in issue in that judgment, in which the contested measure provided for a recovery obligation on the part of the applicant. The Court of Justice found, in the first sentence, that the order for recovery individually concerned all the beneficiaries of the aid scheme at issue exposed to the risk of having to repay the

aid received and disregarded, in the second sentence, consideration of the situation in which the Commission decision was not accompanied by a recovery order. It follows, in the second place, from the third sentence of paragraph 56 of the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, also read in the light of paragraph 55 thereof, that such a recovery obligation on the part of an applicant is sufficient to individualise it, it being unnecessary to consider whether that obligation would have effects at national level (order in *Modelo Continente Hipermercados* v *Commission*, paragraph 29).

34 The Court of Justice, in the judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, invoked by the applicant, thus inferred that the applicant was individually concerned, in the proceedings at issue, by the establishment, through the disputed act, of a recovery obligation relating to the aid which it had received, irrespective of whether or not such an obligation was implemented. It cannot, therefore, be inferred from this that the status of actual beneficiary of an aid scheme is sufficient to identify that beneficiary individually, where the latter is not covered by the obligation to recover the aid paid under that scheme which is laid down in the contested measure.

35 The Court's judgment in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099 is also not relevant in this regard. Admittedly, as the applicant submits, the Court held in paragraph 123 of that judgment that annulment of the contested decision finding that the aid at issue was incompatible with the common market would have the consequence that the finding of unlawfulness of that aid measure, which was an individual measure in favour of the applicant, would be null and void, which constituted a legal consequence bringing about a change in its legal position and procuring an advantage for it. However, as the Commission correctly points out, the Court, in that paragraph, expressed a view on the condition for admissibility of the interest in bringing proceedings which is to be distinguished, in particular, from the condition of being individually concerned by the fact that it refers to the benefit obtained by the applicant through the outcome of its action and not the specific connection between that applicant and the decision which is the subject of the action (see paragraph 23 above and also paragraph 38 below).

36 Finally, it is necessary to reject the argument that the actual beneficiary of aid granted under a scheme declared incompatible is subject to an asset-related risk, resulting from the possible effects of such a declaration of incompatibility on the application of the non-cumulation and *de minimis* aid requirements, since the applicant confined itself to a mere statement in that regard by failing to provide any explanation as to the abovementioned potential effects and thus to the alleged asset-related risk.

37 The applicant claims, in the second place, that, on the assumption that the obligation to recover the aid which it received is required in order for it to be capable of being regarded as individually concerned by the contested decision, it is subject to such an obligation in the present case. The exclusion of transactions prior to 21 December 2007 from the scope of the recovery obligation by virtue of the principle of the protection of legitimate expectations is not, it claims, definitive, by reason of the action brought by Deutsche Telekom in Case T-207/10 against that part of the operative part of the contested decision.

38 By that line of argument, the applicant also confuses the condition of admissibility requiring that the appellant must have been individually concerned with the condition of admissibility requiring a legal interest in bringing proceedings. Although a legal interest in bringing proceedings may be established, or, on the contrary, eliminated, inter alia by reason of events extraneous to the applicant and to the contested decision which took place after proceedings had been brought before the European Union Courts, the question whether a natural or legal person is individually concerned is to be assessed on the date on which the proceedings are brought and is determined only by the contested decision. Thus, a person individually concerned by a decision that declares aid to be incompatible with the common market and orders its recovery remains individually concerned, even if it subsequently

emerges that the person will not be required to refund that aid (see, to that effect, judgment in *Comitato 'Venezia vuole vivere' and Others* v *Commission*, paragraph 56, and Opinion of Advocate General Trstenjak in that case, points 81 and 82; see also paragraph 33 above).

39 Furthermore, it should be noted that, in order for the contested measure to be of individual concern to the applicant, the latter must establish that it belongs to a closed class, that is to say, a group which can no longer be extended after the contested measure has been adopted (see, to that effect, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11, and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I-5479, paragraph 63).

40 In the present case, the possible annulment of Article 1(2) of the contested decision by the Court in Case T-207/10 and the subsequent recovery of the aid at issue from the applicant, in addition to being purely hypothetical, do not thus give reason to take the view that the contested decision is of individual concern to the applicant (see, to that effect, *Iberdrola* v *Commission*, paragraph 42).

41 It follows from the foregoing that the contested decision is not of individual concern to the applicant.

42 The applicant claims, however, that it is not bound, in the present case, to show that it is individually concerned by the contested decision, as that decision could be classified as a regulatory act not entailing implementing measures, within the meaning of the fourth paragraph of Article 263 TFEU.

43 The Commission counters by submitting that the contested decision is not a regulatory act not entailing implementing measures, invoking several national measures implementing the contested decision and, in particular, the abolition of the scheme at issue by the Spanish legislature, the recovery by the tax authorities of the aid unlawfully granted under the scheme at issue from the beneficiaries thereof and the agreement or refusal by those authorities to grant the tax advantage at issue.

44 The applicant, by contrast, takes the view that the measures invoked by the Commission are not implementing measures within the meaning of the fourth paragraph of Article 263 TFEU. The recovery measures invoked cannot, it submits, be regarded as such, since the recovery order contained in the contested decision is binding on the Kingdom of Spain in its entirety, without the latter having any margin of discretion. Likewise, the abolition of the scheme at issue which was declared to be incompatible and the agreement or refusal to grant the tax advantage at issue were already determined in the contested decision and are merely the legal consequence of that decision.

45 It should be noted in this regard that, under the fourth paragraph of Article 288 TFEU, a decision, such as that in the present case, is binding in its entirety only on those to whom it is addressed. Consequently, the obligation to refuse to grant the advantage of the scheme at issue, to annul the tax advantages conferred and to recover any aid paid under that scheme are legal consequences of the contested decision that are binding on the Kingdom of Spain, to which that decision is addressed.

46 By contrast, the contested decision does not produce such legal effects vis-à-vis the beneficiaries of the scheme at issue. Article 1(1) of the contested decision does not define the consequences of the incompatibility of the scheme at issue with the internal market with regard to each of the beneficiaries of that scheme, because that declaration of incompatibility does not in itself entail any prohibition or obligation for those beneficiaries. Furthermore, the effect of the incompatibility is not necessarily the same for each of the beneficiaries of the scheme at issue. The consequences of the incompatibility must, therefore, be individually itemised by a legal act emanating from the competent national authorities, such as a tax notice, which constitutes a measure implementing Article 1(1) of the contested decision within the meaning of the fourth paragraph of Article 263 TFEU.

47 It is immaterial in this regard whether, as the applicant claims, the Kingdom of Spain has no discretion in implementing the contested decision. The lack of discretion is a criterion which must, it is true, be examined in order to determine whether the applicant is directly concerned (see Case T-80/97 *Starway*

v *Council* [2000] ECR II-3099, paragraph 61 and the case-law cited). However, the requirement of an act which does not entail implementing measures, laid down in the fourth paragraph of Article 263 TFEU, constitutes a different condition to the requirement that the act be of direct concern to the applicant (orders of 4 June 2012 in Case T-381/11 *Eurofer* v *Commission* [2012], paragraph 59, and of 5 February 2013 in Case T-551/11 *BSI* v *Council*, not published in the ECR, paragraph 56).

48 It follows that the contested decision entails implementing measures and that it cannot, therefore, be classified as a regulatory act not entailing implementing measures within the meaning of the fourth paragraph of Article 263 TFEU. The applicant's argument based on the final clause of that provision must, for that reason, be rejected.

49 That finding is not called into question by the applicant's argument alleging that the right to effective judicial protection has not been respected, in that it could not bring an action against the declaration of incompatibility of the scheme at issue in Article 1(1) of the contested decision.

50 It must be recalled in this regard that the European Union is a union based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law, which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights which they derive from the European Union legal order (see Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others* v *Commission* [2011] ECR II-1311, paragraph 55 and the case-law cited). In the present case, however, the applicant is not in any way deprived of effective judicial protection. Even if the present action is declared inadmissible, there is nothing to prevent the applicant from challenging, before the national courts, the measures implementing the contested decision and, in particular, the tax notices refusing to grant it the benefit of the scheme at issue. The national courts would then be able incidentally to review the validity of Article 1(1) of the contested decision and, if necessary, refer a question to the Court of Justice for a preliminary ruling on the assessment of validity under Article 267 TFEU (see, to that effect and by analogy, the order in *Eurofer* v *Commission*, paragraph 60).

51 Consequently, the present action must be dismissed as being inadmissible, without it being necessary to examine the Commission's first ground of inadmissibility alleging that the applicant has no legal interest in bringing proceedings.

Costs

52 Under Article 87(2) of the Rules of Procedure, 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Commission, in accordance with the form of order sought by the latter.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby:

1. Dismisses the action;

2. Orders Altadis, SA to pay the costs.

Luxembourg, 9 September 2013.

E. Coulon
Registrar

L. Truchot
President