Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

6 October 2021 *

(Appeal – State aid – Article 107(1) TFEU – Tax system – Corporate tax provisions allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are tax resident outside that Member State – Concept of 'State aid' – Condition relating to selectivity – Reference system – Derogation – Difference in treatment – Justification for the difference in treatment)

In Case C-50/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 25 January 2019,

**Sigma Alimentos Exterior SL**, established in Madrid (Spain), represented initially by M. Linares-Gil and M. Muñoz Pérez, abogados, and subsequently by M. Muñoz Pérez, abogado,

appellant,

supported by:

**Federal Republic of Germany**, represented by R. Kanitz and J. Möller, acting as Agents,

intervener in the appeal,

the other party to the proceedings being:

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

defendant at first instance,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, A. Arabadjiev, M. Vilaras, E. Regan, M. Ilešič, A. Kumin and N. Wahl (Rapporteur), Presidents of Chambers, D. Šváby, S. Rodin, F. Biltgen, K. Jürimäe, C. Lycourgos, P.G. Xuereb and I. Jarukaitis, Judges,

Advocate General: G. Pitruzzella,

Registrar: L. Carrasco Marco, administrator,

* Language of the case: Spanish.

having regard to the written procedure and further to the hearing on 7 September 2020,

after hearing the Opinion of the Advocate General at the sitting on 21 January 2021,

gives the following

## Judgment

1 By its appeal, Sigma Alimentos Exterior SL asks the Court of Justice to set aside the judgment of the General Court of the European Union of 15 November 2018, *Sigma Alimentos Exterior* v *Commission* (T-239/11, not published, EU:T:2018:781; 'the judgment under appeal'), by which the General Court dismissed its action for annulment of Article 1(1) and, in the alternative, of Article 4 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 decision at issue').

### Background to the dispute

2 The background to the dispute, which was set out by the General Court in paragraphs 1 to 12 of the judgment under appeal, may be summarised as follows.

3 On 10 October 2007, after a number of written questions had been sent to it in 2005 and 2006 by Members of the European Parliament and after a private operator had submitted a complaint to it in 2007, the European Commission decided to initiate the formal investigation procedure, under Article 108(2) TFEU; that procedure concerned the arrangement provided for in Article 12(5) of the Ley del Impuesto sobre Sociedades ('the Corporate Tax Law') as inserted by Ley 24/2001, de Medidas Fiscales, Administrativas y del Orden Social (Law No 24/2001 on fiscal, administrative and social measures), of 27 December 2001 (BOE No 313 of 31 December 2001, p. 50493), and reproduced 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 measure at issue').

4 The measure at issue provides that, should an undertaking which is taxable in Spain acquire a shareholding in a 'foreign company', where that shareholding acquisition is at least 5% and the shareholding at issue is held without interruption for at least one year, the financial goodwill resulting from that shareholding 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 specifies that, in order to be classified as a 'foreign company', a company must be subject to an identical tax to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.

5 The Commission closed 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).

6 By that decision, the Commission declared that the measure at issue, which constitutes a tax advantage enabling Spanish companies to amortise the goodwill resulting from the acquisition of shareholdings in non-resident companies, was incompatible with the internal market where it applied to the acquisition of shareholdings in companies established within the European Union.

7 However, the Commission kept the procedure open as regards shareholding acquisitions outside the European Union, with the Spanish authorities having given an undertaking that they would provide additional details concerning the obstacles to cross-border mergers outside the European Union which they had mentioned.

8 On 12 January 2011, the Commission adopted the decision at issue. By that decision, which was the subject of corrigenda on 3 March and 26 November 2011, the Commission, inter alia, declared that the measure at issue was incompatible with the internal market where it applies to the acquisition of shareholdings in undertakings established outside the European Union (Article 1(1) of the decision at issue) and ordered the Kingdom of Spain to recover the aid granted (Article 4 of that decision).

## The procedure before the General Court and the judgment under appeal

9 By application lodged at the General Court Registry on 3 May 2011, the appellant brought an action for annulment of Article 1(1) and, in the alternative, of Article 4 of the decision at issue.

10 By order of 9 September 2013, the General Court reserved until final judgment its decision on the plea of inadmissibility raised by the Commission.

11 The proceedings were stayed from 13 March until 7 November 2014, the date on which the General Court ruled in the case giving rise to the judgment in *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938) and annulled the decision at issue. The proceedings were again stayed from 9 March 2015 until 21 December 2016, the date on which the Court of Justice ruled in the cases giving rise to the judgment in *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981; 'the judgment in *WDFG*').

12 By the judgment in *WDFG*, the Court of Justice set aside the judgments of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), referred the cases back to the General Court, reserved the costs in part and ordered the Federal Republic of Germany, Ireland and the Kingdom of Spain to bear their own costs.

13 By letter of 16 January 2017, the General Court invited the parties to submit their observations on the judgment in *WDFG*. The Commission submitted its observations within the prescribed period. The appellant did not submit any observations.

14 By the judgment under appeal, the General Court dismissed the action brought by the appellant.

15 In rejecting the two parts of the single plea in law raised by the appellant, alleging, first, that the measure at issue was not prima facie selective (paragraphs 64 to 76 of the judgment under appeal) and, secondly, the existence of obstacles to cross-border combinations (paragraphs 77

to 170 of the judgment under appeal), the General Court held that the action had to be dismissed in its entirety, and that there was no need to rule on its admissibility, which had however been challenged by the Commission (paragraphs 27 and 172 of the judgment under appeal).

16 As regards, more specifically, the first part of the single plea in law, the General Court pointed out that, as is apparent from the judgment in *WDFG*, a tax measure which grants an advantage upon satisfaction of the condition that an economic transaction is performed may be selective including where, having regard to the characteristics of the transaction concerned, any undertaking may freely choose whether to perform that transaction (paragraphs 64 to 76 of the judgment under appeal).

17 As regards the second part of the single plea in law, the General Court examined the measure at issue in the light of the three stages of the method of analysing the selectivity of a national tax measure, set out in paragraphs 47 and 48 of the judgment under appeal, that is to say: first of all, the identification of the common or 'normal' tax regime applicable in the Member State concerned, next, the assessment of whether the tax measure at issue derogates from that common regime, in so far as it differentiates between operators which are, in the light of the objective pursued by the common regime, in a comparable factual and legal situation and, lastly, the assessment of whether such a derogation is justified by the nature and general scheme of that regime.

18 As regards the first stage, the General Court stated that the reference framework defined in the decision at issue, namely the 'tax treatment of goodwill' (paragraph 79 of the judgment under appeal), was the relevant reference system in the present case, in particular since undertakings which acquire shareholdings in non-resident companies are, in the light of the objective pursued by the tax treatment of goodwill, in a comparable legal and factual situation to that of undertakings which acquire shareholdings in resident companies. According to the General Court, the objective of that regime is to ensure a certain parallelism between the accounting treatment and tax treatment of the financial goodwill resulting for an undertaking from the acquisition of shareholdings in a company (paragraphs 103 to 109 of the judgment under appeal). The General Court thus rejected the idea that the measure at issue constitutes an autonomous reference system (paragraphs 112 to 126 of the judgment under appeal), with the result that it rejected the complaint alleging the existence of obstacles to cross-border combinations (paragraphs 108, 124 and 127 of the judgment under appeal).

19 As regards the second stage, the General Court held that the Commission was fully entitled to find, in the decision at issue, that the measure at issue had introduced a derogation from the normal regime. It thus rejected the complaint that the Commission had failed to fulfil its obligation to demonstrate that the acquisition of shareholdings in resident companies and those in non-resident companies were comparable in the light of the objective of fiscal neutrality pursued by the measure at issue (paragraphs 128 to 134 of the judgment under appeal).

20 As regards the third stage, the General Court pointed out that none of the arguments specifically advanced in the present case justified the derogation introduced by the measure at issue and thus the difference in treatment found (paragraphs 135 to 170 of the judgment under appeal).

## Forms of order sought

21 By its appeal, the appellant claims that the Court should:

– set aside the judgment under appeal;

– annul Article 1(1) of the decision at issue since the measure at issue is not unlawful State aid;

– in the alternative, annul Article 1(1) of the decision at issue since that measure does not involve elements of State aid where it is applied to acquisitions of shareholdings entailing the acquisition of control;

– in the further alternative, annul Article 4 of the decision at issue in so far as it provides for the recovery of aid in respect of transactions carried out prior to the publication of the decision at issue in the *Official Journal of the European Union*; and

– order the Commission to pay the costs.

22 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

23 The Federal Republic of Germany supports the form of order sought by the appellant.

## The appeal

24 The appellant relies on two grounds in support of its appeal. The first ground of appeal alleges an error in the interpretation of the judgment in *WDFG* in that the General Court relied on incorrect comparability criteria which, in turn, led to an incorrect assessment of whether there was a selective advantage for the purposes of Article 107 TFEU. By its second ground of appeal, the appellant submits that the General Court misapplied the three-stage method of analysing selectivity, in that it found that the existence of possible legal obstacles to cross-border combinations did not preclude the measure at issue from being selective.

25 The Federal Republic of Germany concurs, in essence, with the appellant's position, challenging the framework for analysing the selectivity of the measure at issue used in the present case. It submits, inter alia, that the General Court erred in law in holding that the fact that the measure at issue is a general measure available to any undertaking which fulfils its substantive conditions is no longer a relevant factor in the assessment of selectivity.

26 As a preliminary point, it should be noted that, according to the settled case-law of the Court of Justice, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between the Member States. Thirdly, it must confer a selective advantage on the recipient.

Fourthly, it must distort or threaten to distort competition (judgment in *WDFG*, paragraph 53 and the case-law cited, and judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 27).

27 It is well established that national measures that confer a tax advantage which, although not involving a transfer of State resources, place the recipients in a more favourable financial position than other taxpayers are capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU (see, to that effect, judgment in *WDFG*, paragraph 56, and judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 21).

28 So far as concerns the condition relating to the selectivity of the advantage – inherent in the concept of a 'State aid' measure within the meaning of Article 107(1) TFEU, and which alone is the subject of the arguments put forward in the present appeal – it follows from the settled case-law of the Court that that condition requires a determination as to whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 28 and the case-law cited).

29 The examination of whether such a measure is selective is thus, in essence, coextensive with the examination of whether it applies to a set of economic operators in a non-discriminatory manner (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 53).

30 Where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity (judgment in *WDFG*, paragraph 55 and the case-law cited).

31 In order to classify a national tax measure as 'selective', the Commission must begin by identifying the reference system, that is the 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that reference system, in so far as it differentiates between operators who, in the light of the objective pursued by that system, are in a comparable factual and legal situation (see, to that effect, judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 36 and the case-law cited).

32 The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified, in the sense that it flows from the nature or general structure of the system of which those measures form part (judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 44 and the case-law cited).

33 Both of the appellant's grounds of appeal must be examined in the light of those considerations.

### *The first ground of appeal*

#### *Arguments of the parties*

34 By its first ground of appeal, the appellant, supported by the Federal Republic of Germany, submits that the General Court misinterpreted the judgment in *WDFG* in stating, in paragraphs 69 and 70 of the judgment under appeal, that the selectivity of a measure may be established on the basis of the intentional conduct of the undertakings excluded from the advantage granted by that measure, without considering the circumstances of those undertakings or their specific characteristics.

35 According to the appellant, it follows from paragraphs 67, 77 and 79 of the judgment in *WDFG* that the analysis of selectivity must be conducted on the basis of the undertakings' situation and not the system applicable to the transactions carried out by them. The fact that certain undertakings can choose to carry out certain transactions and others cannot implies that they are in different situations. Undertakings investing in Spanish companies are free to decide whether to form a business combination and thus benefit from the amortisation of goodwill provided for under Spanish law in such a case. For those undertakings, only the choice not to form such a combination would make it impossible to amortise goodwill. On the other hand, before the measure at issue entered into force, the fact that amortisation was not possible in the event of the acquisition of shareholdings in foreign companies was absolute, especially for non-EU acquisitions, and depended on the situation of the acquiring company rather than its conduct. Undertakings acquiring shares in resident companies are, therefore, in a more advantageous position, since they are able to choose to carry out a specific transaction.

36 The Commission contends that the first ground of appeal is inadmissible because the appellant's action before the General Court did not include any complaint relating to the criteria for comparing the situation of the undertakings qualifying for the measure at issue with that of those which did not. According to the Commission, to allow the appellant to raise new objections at the appeal stage would be to authorise it to bring before the Court of Justice a case of wider ambit than that which came before the General Court. In any case, in the Commission's view, the first ground of appeal is unfounded, since the measure at issue applies not only to undertakings acquiring shareholdings in foreign companies for the purposes of carrying out a merger, but also to undertakings acquiring minority shareholdings.

#### *Findings of the Court*

##### – *Admissibility*

37 It must be borne in mind that, under Article 170(1) of the Rules of Procedure of the Court of Justice, the subject matter of the proceedings before the General Court may not be changed in the appeal.

38 Thus, according to settled case-law, the jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas and arguments debated before the General Court. A party cannot, therefore, put forward for the first time before the Court of Justice a plea in law which it has not raised before the General Court since that would allow that party to bring before

the Court of Justice, whose jurisdiction in appeal proceedings is limited, a wider case than that heard by the General Court (judgment of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission*, C-654/17 P, EU:C:2019:634, paragraph 69 and the case-law cited).

39 That said, an appellant is entitled to lodge an appeal relying, before the Court of Justice, on grounds and arguments which arise from the judgment under appeal itself and seek to criticise, in law, its correctness (judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission*, C-176/06 P, not published, EU:C:2007:730, paragraph 17, and of 4 March 2021, *Commission* v *Fútbol Club Barcelona*, C-362/19 P, EU:C:2021:169, paragraph 47).

40 In the present case, by its arguments, the appellant criticises, in essence, in a precise and detailed manner, the grounds of the judgment under appeal, set out in paragraphs 69 and 70 thereof, by which the General Court referred to certain conclusions which, in its view, had to be drawn from the judgment in *WDFG* for the purposes of examining whether the measure at issue is selective. Thus, inasmuch as the first ground of appeal calls into question the conclusions drawn by the General Court from its own findings of law on a plea argued before it, that ground cannot be regarded as changing the subject matter of the proceedings before the General Court.

41 In the light of those considerations, the first ground of appeal is admissible.

– *Substance*

42 By its first ground of appeal, the appellant criticises the General Court's interpretation of the judgment in *WDFG*, set out in paragraphs 69 and 70 of the judgment under appeal, as regards the criteria for assessing comparability that must be applied when examining whether a measure such as the measure at issue is selective.

43 In that regard, it should be noted that the General Court, applying the principles established by the Court of Justice in the judgment in *WDFG*, rejected the first part of the appellant's single plea in law, in which it had asserted that the measure at issue was not selective because it applied to all undertakings subject to corporate tax and did not restrict the benefit of that measure to a particular type of undertaking.

44 In paragraph 69 of the judgment under appeal, the General Court held that it followed from the Court of Justice's approach in the judgment in *WDFG* that 'a finding that a measure is selective is not necessarily the result of it being impossible for certain undertakings to benefit from the advantage provided for by the measure at issue, because of legal, economic or practical restrictions preventing them from carrying out the transaction which is a prerequisite for granting that advantage, but selectivity may arise simply from a finding that a transaction exists which, while comparable to the transaction which is a prerequisite for granting the advantage in question, does not confer a right to that advantage'. The General Court inferred from this, also in paragraph 69 of the judgment under appeal, that 'a tax measure may be selective even though any undertaking may freely choose whether to carry out the transaction which is a prerequisite for granting the advantage provided for by that measure'. In paragraph 70 of the judgment under appeal, the General Court stated, as regards the solution thus adopted, that 'emphasis has therefore been placed on a concept of selectivity which is based on the distinction between undertakings which choose to carry out certain transactions and other undertakings which choose not to do so, and not on the distinction between the undertakings in terms of their specific characteristics'.

45 Contrary to the appellant's claims, paragraphs 69 and 70 of the judgment under appeal are not the result either of the judgment in *WDFG* being misinterpreted or of criteria for assessing the selectivity of the measure at issue being applied which are inconsistent with that judgment.

46 In those paragraphs, the General Court explained how the Court of Justice had adopted an approach to the concept of 'selectivity' which differed from that adopted by the General Court itself in its judgments of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939), and of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938); it pointed out that the Court of Justice had emphasised an approach to that concept based on the distinction between undertakings choosing to carry out certain transactions and other undertakings choosing not to do so, and not on the distinction between undertakings in terms of their specific characteristics. The General Court based that finding, in paragraph 68 of the judgment under appeal, on the Court of Justice's finding, in paragraph 87 of the judgment in *WDFG*, that the fact that resident undertakings are not entitled to the advantage provided for by the measure at issue, when acquiring shareholdings in companies that are resident for tax purposes in Spain, could lead to the conclusion that that measure is selective.

47 The General Court did not disregard that statement of the law provided in the judgment in *WDFG* in rejecting the appellant's argument that the measure at issue was a national tax measure of general application available to all undertakings liable to corporate tax in Spain, that is to say, prima facie a non-selective measure.

48 Indeed, it was by applying the criteria cited in particular in paragraph 68 of the judgment under appeal that the General Court concluded, in paragraph 75 of that judgment, that the measure at issue, 'which grants an advantage upon satisfaction of the condition that an economic transaction is performed, may be selective including where … any undertaking may freely choose whether to perform that transaction' and, accordingly, rejected the first complaint of the appellant's single plea in law.

49 Contrary to the appellant's submissions, it cannot be inferred from paragraphs 69 and 70 of the judgment under appeal that the General Court asserted that the selectivity of a tax measure can be determined solely on the basis of the conduct of the undertakings excluded from the advantage conferred by the measure at issue, without taking into account the specific situations of those undertakings. Indeed, in those paragraphs the General Court emphasised, in essence, that a national measure may be selective even where obtaining the advantage it confers depends not on the specific characteristics of the undertaking but on the transaction that it may or may not decide to carry out. A measure may be considered selective even when it does not identify ex ante a particular category of beneficiaries and when all the undertakings established in the territory of the Member State concerned, regardless of their size, legal form, sector of activity or other specific characteristics, potentially have access to the advantage conferred by that measure on condition that they make a specific type of investment (see, to that effect, the judgment in *WDFG*, paragraph 78).

50 It follows that the first ground of appeal must be rejected as unfounded.

### *The second ground of appeal*

51 By its second ground of appeal, the appellant complains that the General Court held that the existence of possible obstacles to cross-border combinations did not invalidate the conclusion that the measure at issue is selective. The second ground of appeal is divided into four parts.

*The first part of the second ground of appeal*

– *Arguments of the parties*

52 By the first part of its second ground of appeal, the appellant submits that the General Court made a 'serious' error in identifying the common national tax reference system, such as to require the judgment under appeal to be set aside. More specifically, the appellant submits that the General Court erred in finding that the purpose of the measure at issue was not to ensure fiscal neutrality and thereby avoid situations of double taxation. In that regard, the General Court wrongly concluded that the tax treatment of goodwill is not intended to offset the existence of obstacles to cross-border business combinations or to ensure equal treatment of different types of shareholding acquisitions. In particular, it is clear that companies choosing to acquire shareholdings abroad are in different legal and factual situations which justify a different tax treatment.

53 The appellant submits, first, that the General Court wrongly concluded that the objective of the tax deduction of goodwill was to establish the tax treatment and accounting treatment of goodwill on the same footing, irrespective of whether the undertaking in question acquires shareholdings in resident or non-resident companies. In so doing, the General Court not only lost sight of the actual aim of the tax treatment of goodwill provided for by the legal regime at issue, which is to promote fiscal neutrality by removing obstacles to cross-border combinations of undertakings, but it also substituted its own reasoning for that of the decision at issue, since none of the passages in the decision at issue contained such a conclusion.

54 The appellant submits, secondly, that, under Spanish law, while the tax treatment and accounting treatment of goodwill in the event of the acquisition of shareholdings are linked, they remain separate and apply different rules and criteria.

55 Thirdly, the appellant notes that, in paragraphs 103 and 104 of the judgment under appeal, the General Court itself acknowledged that accounting goodwill may arise without a merger, that is without such a booking having a tax effect.

56 Fourthly, the appellant states that between 2008 and 2015, Spanish law did not permit the accounting amortisation of goodwill, whereas tax deductions of goodwill resulting from mergers were, in any event, allowed. According to the appellant, it was as a result of incorrectly assessing the objective pursued by the measure at issue that the General Court upheld the Commission's decision to identify the tax treatment of goodwill as the reference system, excluding the possibility that the measure at issue could constitute that system.

57 Fifth and lastly, the appellant submits that undertakings acquiring shareholdings in Spanish companies may not only freely create a business combination, availing themselves of the tax deduction of goodwill, but also benefit from additional advantages, such as access to a tax integration system, to which undertakings acquiring shareholdings in foreign companies do not have access. Referring to the acquisitions carried out by it in the United States and Peru, the appellant emphasises the fact that, even if it were to be accepted that there are no legal obstacles to cross-border business combinations, the mere fact that Spanish and foreign companies have different legal or corporate forms constitutes an obstacle in and of itself. Undertakings which acquire shareholdings in resident companies are, therefore, in a different legal and factual situation from those which acquire shareholdings in foreign companies, in particular if, as is the case for the appellant, these are companies in third countries and controlling interests.

58 The Commission contends, first, that the first part of the second ground of appeal is inadmissible for the same reasons as those set out in the context of the first ground of appeal and, secondly, that it is unfounded. The Commission argues that, contrary to the appellant's contention, the measure at issue is not such as to ensure fiscal neutrality and is not proportionate, because it also applies to cross-border acquisitions of minority shareholdings which do not, in any case, enable cross-border business combinations to be carried out. The General Court was, therefore, fully entitled to conclude that the alleged existence of obstacles to cross-border business combinations in Peru or the United States was irrelevant.

– *Findings of the Court*

59 At the outset, it must be recalled that, as is clear from the case-law referred to in paragraph 39 above, an appellant is entitled, on appeal, to put forward pleas and arguments arising from the judgment under appeal itself and which seek to criticise, in law, its correctness. The appellant is, therefore, entitled to call into question the findings made by the General Court, summarised in paragraph 52 above, irrespective of the fact that it did not put forward at first instance arguments intended specifically to challenge the decision at issue on that point.

60 In addition, in so far as the appellant seeks to criticise the merits of the General Court's conclusion in paragraph 108 of the judgment under appeal that 'the objective of the tax treatment of goodwill is to ensure a degree of consistency between the tax treatment of goodwill and its accounting treatment', it must be regarded as challenging the findings of fact by the General Court stemming from its interpretation of the tax and accounting principles applicable to goodwill under Spanish law.

61 In accordance with settled case-law, the assessment of facts and evidence does not constitute, save where the clear sense of the facts and evidence has been distorted, a question of law which is subject as such to review by the Court of Justice in the context of an appeal. It is only when the General Court has established or assessed the facts that the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts and the legal conclusions which have been drawn from them (judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591, paragraph 31 and the case-law cited).

62 Thus, with respect to the assessment in the context of an appeal of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted. By contrast, since the assessment in the context of an appeal of the legal classification which has been attributed to that national law by the General Court under a provision of EU law constitutes a question of law, it falls within the jurisdiction of the Court of Justice (judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 78 and the case-law cited).

63 It should also be borne in mind that, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Article 264 TFEU provides that if the action is well founded, the act concerned must be declared void. The Court of Justice and the General Court cannot, therefore, under any circumstances, substitute their own reasoning for that of the author of the contested act (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 141, and of 28 February 2013, *Portugal* v

*Commission*, C-246/11 P, not published, EU:C:2013:118, paragraph 85). Accordingly, the Court of Justice has jurisdiction in an appeal to ascertain whether the General Court has made such a substitution and thus erred in law.

64 It follows that the arguments, advanced in support of the first part of the second ground of appeal, by which the appellant essentially complains that the General Court substituted its own reasoning for that of the decision at issue, concerning the 'objective' in the light of which the situations of the undertakings qualifying for the advantage resulting from the application of the measure at issue and those not qualifying must be compared, are admissible.

65 In that regard, the appellant submits that the objective of 'ensuring a degree of consistency between the tax treatment of goodwill and its accounting treatment', referred to in paragraph 108 of the judgment under appeal, is in no way reflected in the decision at issue.

66 In the present case, it must be noted that the Commission did not at any point of the decision at issue state that the objective of the reference system that it identified included maintaining a degree of consistency between the tax treatment and accounting treatment of goodwill.

67 Admittedly, the General Court upheld some of the findings in that decision when it stated that the tax treatment of goodwill is based on the criterion of whether or not a business combination has arisen (paragraphs 103 and 105 of the judgment under appeal); it also explained, by reference to recitals 28 and 123 of the decision at issue, that that circumstance is due to the fact that, following an acquisition or contribution of the assets constituting independent businesses or even a merger or a de-merger, 'goodwill … appears, as a separate intangible asset, in the books of the combined business' (paragraph 104 of the judgment under appeal). Similarly, the statement that the tax treatment of goodwill is 'in line with an accounting logic' (paragraph 103 of the judgment under appeal) follows on from certain considerations set out by the Commission in the decision at issue, in particular in recitals 121 to 124 thereof.

68 However, it was without reference to that decision and on the basis of its own interpretation of the tax and accounting rules applicable under Spanish law that the General Court concluded that the objective of the rules on the amortisation of financial goodwill contained in the Corporate Tax Law, as approved by Royal Legislative Decree 4/2004, was to ensure consistency between the tax treatment and accounting treatment of goodwill and that, in the light of that objective, the situation of undertakings investing in Spanish companies is comparable to that of undertakings investing in non-resident companies.

69 Consequently, by substituting its own reasoning for that of the decision at issue, the General Court erred in law.

70 It is necessary, however, to examine whether, notwithstanding the error of law made by the General Court, the second complaint of the single plea in law relied on by the appellant in support of its action before that court should in any event have been rejected, inasmuch as it criticised the Commission for failing to demonstrate that the acquisitions of shareholdings in resident companies and those in non-resident companies were comparable in the light of the objective of fiscal neutrality pursued by the measure at issue.

71 Indeed, according to settled case-law, if the grounds of a judgment of the General Court disclose an infringement of EU law but the operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the setting aside of that judgment

(judgments of 30 September 2003, *Biret International* v *Council*, C-93/02 P, EU:C:2003:517, paragraph 60 and the case-law cited, and of 14 October 2014, *Buono and Others* v *Commission*, C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraph 62 and the case-law cited).

72 In that regard, it must be borne in mind that, in accordance with the case-law mentioned in paragraph 31 above, to which the General Court was fully entitled to refer in paragraph 130 of the judgment under appeal, the examination of comparability at the second stage of the analysis of selectivity must be carried out in the light of the reference system's objective and not that of the measure at issue.

73 As the Court of Justice has held, a measure such as the measure at issue, which is designed to facilitate exports, may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory (judgment in *WDFG*, paragraph 119).

74 In the present case, the General Court was fully entitled to find, in paragraph 109 of the judgment under appeal, that undertakings which acquire shareholdings in non-resident companies are, in the light of the objective pursued by the tax treatment of goodwill, in a comparable factual and legal situation to that of undertakings which acquire shareholdings in resident companies. Since undertakings which acquire cross-border minority shareholdings may benefit from the measure at issue even though they are not affected by the alleged obstacles to business combinations to which the appellant refers, it cannot be claimed that, because of those obstacles, beneficiaries of the measure at issue are in a different legal and factual situation from that of undertakings covered by the normal tax system.

75 In the light of those considerations, it must be concluded that, notwithstanding the error of law made by the General Court in substituting its own reasoning for that of the decision at issue in the examination of the definition of the reference system's objective, the first part of the second ground of appeal must be rejected as unfounded.

*The second part of the second ground of appeal*

– *Arguments of the parties*

76 The appellant submits that the General Court erred in ruling out that the measure at issue might be considered an autonomous reference system, referring in particular to the Opinion of Advocate General Warner in *Italy* v *Commission* (173/73, EU:C:1974:52; 'the Opinion of Advocate General Warner'; p. 728). Indeed, contrary to the General Court's finding in paragraph 124 of the judgment under appeal, the measure at issue does not aim to solve a specific problem in a given industrial sector, but, rather, applies to all undertakings subject to corporate tax.

77 The General Court also erred in that it failed to find that the measure at issue was a general measure intended to offer economic operators a practical solution that would place the tax treatment of cross-border transactions on the same footing as the treatment laid down in Article 89(3) and Article 11(4) of the Corporate Tax Law in respect of national transactions, and thereby ensure that investment decisions are taken by undertakings on the basis of economic, and not tax-related, criteria. The measure at issue is clearly a general economic policy measure

intended to preserve the principle of fiscal neutrality. In the alternative, the appellant submits that the measure at issue is justified on the basis of the tax system's logic, in the light of the principle of fiscal neutrality.

78 The Commission contends that the second part of the second ground of appeal should be rejected. First, it contends that that part of the second ground of appeal is inadmissible since it raises a complaint which was not relied on in the appellant's action before the General Court. Secondly, the Commission contends that the second part of the second ground of appeal is, in any event, unfounded. Contrary to the appellant's submission, the measure at issue does not ensure fiscal neutrality, since it grants acquisitions of shareholdings in foreign undertakings more favourable conditions for the amortisation of goodwill than those provided for in respect of shareholdings in national undertakings. For the former, indeed, the amortisation of goodwill is subject to the sole condition that the acquisition involve a 5% shareholding in the capital of the undertaking acquired, while for the latter, business combination is also required.

– *Findings of the Court*

79 At the outset, the plea of inadmissibility raised by the Commission in respect of the second part of the second ground of appeal must be rejected. As is apparent from the case-law referred to in paragraph 39 above, a party is entitled to put forward pleas and arguments arising from the judgment under appeal itself and which seek to criticise, in law, its correctness. The appellant is, therefore, entitled to call into question the findings made by the General Court, irrespective of the fact that it did not put forward at first instance arguments intended specifically to challenge the decision at issue on that point.

80 As regards the merits of the appellant's arguments, it should be observed that the General Court held that the measure at issue cannot in itself constitute an autonomous reference system. In particular, after recalling, in paragraphs 113 to 119 of the judgment under appeal, the conditions required in order for a tax measure to be capable of constituting its own reference framework, the General Court held, in paragraph 120 of that judgment, that the measure at issue was merely a particular method of applying a broader tax, namely corporate tax, and that, consequently, it did not establish a clearly delimited tax regime.

81 In that regard, the General Court rightly pointed out, in paragraph 121 of the judgment under appeal, that, as the Commission had stated in recital 124 of the decision at issue, the measure at issue did not introduce a new general rule in its own right relating to the amortisation of goodwill; it had, on the contrary, introduced an 'exception to the general rule' that only business combinations may lead to the amortisation of goodwill, with that exception, in the Kingdom of Spain's view, being intended to remedy the adverse effects for the acquisition of shareholdings in foreign companies created by applying the general rule.

82 Consequently, it is apparent from the judgment under appeal that, in support of its conclusion that the reference system could not be limited to the measure at issue alone, the General Court did not rely solely on the fact that that measure, like the measure at issue in the case which gave rise to the Opinion of Advocate General Warner, was intended to pursue a targeted objective and thus to solve a specific problem. It follows that the arguments put forward by the appellant, first, objecting to the present case's being placed on the same footing as that which gave rise to the Opinion of Advocate General Warner and, secondly, intended to demonstrate that the objective

of the measure at issue was to safeguard the principle of fiscal neutrality, and not to solve a specific problem, are insufficient to invalidate the General Court's reasoning and are, therefore, ineffective.

83 In any event, it must be borne in mind that the mere fact that the measure at issue is of a general nature, in that it may a priori benefit all undertakings subject to corporate tax, does not mean that it cannot be selective. As the Court of Justice has already held, with respect to a national measure conferring a tax advantage of general application, like the measure at issue, the condition relating to selectivity is fulfilled where the Commission is able to demonstrate that that measure is a derogation from the ordinary or 'normal' tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators, although the operators who qualify for the tax advantage and those who do not are, in the light of the objective pursued by that Member State's tax system, in a comparable factual and legal situation (judgment in *WDFG*, paragraph 67).

84 In the light of all the foregoing considerations, the second part of the second ground of appeal must be rejected as ineffective and, in any event, unfounded.

*The third part of the second ground of appeal*

– *Arguments of the parties*

85 The appellant submits that even if the reference system had been correctly defined, the General Court committed an error of assessment in concluding, in paragraph 134 of the judgment under appeal, that the measure at issue introduced an exception to the common national regime as reference framework. There is no basis for such a conclusion, since undertakings which acquire shareholdings abroad and those which acquire shareholdings in resident companies are not in a comparable legal and factual situation, given the existence of barriers to cross-border combinations.

86 The Commission contends that the third part of the second ground of appeal should be rejected. First, it contends that that part of the second ground of appeal is inadmissible since it raises a complaint which was not relied on in the appellant's action before the General Court. Secondly, the Commission contends that the third part of the second ground of appeal is, in any event, unfounded.

– *Findings of the Court*

87 At the outset, the plea of inadmissibility advanced by the Commission in respect of the third part of the second ground of appeal must be rejected. As is apparent from the case-law referred to in paragraph 39 above, a party is entitled to put forward pleas and arguments arising from the judgment under appeal itself and which seek to criticise, in law, its correctness. The appellant is, therefore, entitled to call into question the findings made by the General Court, irrespective of the fact that it did not put forward at first instance arguments intended specifically to challenge the decision at issue on that point.

88 As regards the merits of the appellant's arguments, the General Court dismissed the possible existence of obstacles to cross-border combinations as irrelevant for the purposes of examining whether undertakings acquiring shareholdings in companies established in Spain and those acquiring shareholdings in foreign companies were comparable, and did so on the basis of the considerations set out in paragraphs 128 to 133 of the judgment under appeal.

89 In that regard, the General Court was fully entitled to point out, in paragraphs 128 to 130 of the judgment under appeal, that it was necessary, for the purposes of the comparison required at the second stage of the analysis of selectivity, to take into account not the objective of the measure concerned, but that of the common or normal tax system applicable in the Member State in question. Nor did the General Court err in finding, in paragraphs 130 to 133 of the judgment under appeal, that the existence of any obstacles to cross-border combinations was irrelevant during the examination of the second stage of the method of analysing selectivity, inasmuch as the possible existence of those obstacles did not relate to the reference system's objective, but rather to that of the measure at issue.

90 It must be stated that the third part of the second ground of appeal is in no way directed against those grounds of the judgment under appeal, but seeks only to challenge paragraph 134 of that judgment, in which the General Court held 'in addition' that the Commission was fully entitled to find that the measure at issue introduced a derogation from the normal or reference system.

91 Since the appellant's argument is thus directed against a ground included in the judgment under appeal for the sake of completeness, it must be declared ineffective. It is settled case-law that, on an appeal, a plea that is directed against a ground included in the judgment in question for the sake of completeness, the operative part of which is sufficiently founded in law on other grounds, is ineffective and must, therefore, be rejected (see, to that effect, judgment of 29 March 2011, *Anheuser-Busch* v *Budějovický Budvar*, C-96/09 P, EU:C:2011:189, paragraph 211 and the case-law cited).

92 In the light of the foregoing considerations, the third part of the second ground of appeal must also be rejected as ineffective.

*The fourth part of the second ground of appeal*

– *Arguments of the parties*

93 By the fourth part of its second ground of appeal, the appellant contests paragraph 155 of the judgment under appeal in which the General Court concluded, following an analysis developed in paragraphs 147 to 154 of that judgment, that the advantage deriving from the measure at issue had not been shown to benefit undertakings subject to the difference in treatment that that measure was said to remedy and, therefore, that the 'neutralising effects' of the measure at issue had not been established. According to the appellant, if the adjustment provided by that measure did not exist, the principle of fiscal neutrality would be infringed by the persistence of situations in which the obstacles to acquiring shareholdings in foreign companies would prevent the amortisation of goodwill under the same conditions as those to which acquisitions of shareholdings in resident companies are subject. With respect to the existence of obstacles to mergers with American and Peruvian companies, the appellant refers to the information already submitted in the action before the General Court. As regards the General Court's finding in paragraph 154 of the judgment under appeal, according to which the Kingdom of Spain had failed to establish 'that

undertakings that wish to carry out cross-border mergers and cannot do so on account of – in particular, legal – obstacles to business combinations, acquire by default shareholdings in non-resident companies or, at least, maintain the shareholdings that they already have', the appellant asserts that such a test, which does not appear in the decision at issue, represents a further substitution of the grounds of that decision by the General Court.

94 The Commission contends that the fourth part of the second ground of appeal should be rejected. First, it contends that that part of the second ground of appeal is inadmissible since it raises a complaint which was not relied on in the appellant's action before the General Court. Secondly, the Commission contends that the fourth part of the second ground of appeal is, in any event, unfounded.

– *Findings of the Court*

95 At the outset, the plea of inadmissibility advanced by the Commission in respect of the fourth part of the second ground of appeal must be rejected. As is apparent from the case-law referred to in paragraph 39 above, a party is entitled to put forward pleas and arguments arising from the judgment under appeal itself and which seek to criticise, in law, its correctness. The appellant is, therefore, entitled to call into question the findings made by the General Court, irrespective of the fact that it did not put forward at first instance arguments intended specifically to challenge the decision at issue on that point.

96 As regards the merits of the fourth part of the second ground of appeal, which relates to the third stage of the examination of selectivity, which the General Court carried out in paragraphs 135 to 169 of the judgment under appeal, that part of the second ground of appeal seeks to criticise the General Court for failing to take into account the fact that the measure at issue seeks to ensure that the principle of fiscal neutrality is observed.

97 In that regard, the General Court noted, in paragraph 139 of the judgment under appeal, that the Kingdom of Spain could properly rely on the principle of fiscal neutrality for the purposes of justifying the differentiation introduced by the measure at issue between the acquisition of shareholdings in resident companies and the acquisition of shareholdings in non-resident companies.

98 The General Court considered, however, that it was not apparent from the documents before it that the derogation introduced by the measure at issue was justified in the light of the principle of fiscal neutrality, for two distinct reasons set out in paragraphs 145 to 165 of the judgment under appeal.

99 In the first place, the General Court, considering that the measure at issue was necessarily based on the premiss referred to in paragraph 149 of the judgment under appeal – namely, that undertakings that wish to carry out cross-border mergers and cannot do so on account of obstacles to business combinations, acquire, by default, shareholdings in non-resident companies or, at least, maintain the shareholdings that they already have – concluded that the Kingdom of Spain, which was required to justify the derogation from the reference system by the measure at issue, had failed to establish that premiss. The General Court essentially found, in paragraphs 152 to 154 of the judgment under appeal, that since the acquisition of shareholdings is a separate transaction from a merger and not an alternative to it, the measure at issue had in practice conferred an advantage on companies wishing to invest in foreign companies but which did not necessarily intend to merge – in other words, companies other than those which,

according to the Kingdom of Spain, suffered the adverse consequences of the general rules on the amortisation of goodwill. The General Court concluded from this, in paragraph 155 of that judgment, that the 'neutralising effects' of the measure at issue had not been established.

100 In the second place, the General Court held, in paragraphs 157 to 165 of the judgment under appeal, that, even if the measure at issue had the effect of neutralising the allegedly adverse effects of the normal system, linked to the existence of obstacles to cross-border mergers, it was disproportionate and therefore unjustified.

101 To the extent that the appellant's arguments in the fourth part of its second ground of appeal do not relate to the considerations upheld in the context of the second reason which led the General Court to conclude that the Commission had not erred in finding that the Kingdom of Spain had failed to justify the differentiation introduced by the measure at issue, they cannot lead to the judgment under appeal being set aside. As has been pointed out in paragraph 91 above, it is settled case-law that, on an appeal, a plea that is directed against a ground included in the judgment under appeal for the sake of completeness, the operative part of which is sufficiently founded in law on other grounds, is ineffective and must, therefore, be rejected.

102 The argument that the General Court substituted grounds, by referring in paragraph 154 of the judgment under appeal to considerations which are not set out in the decision at issue, cannot succeed either. While it is true that the General Court's reasoning is not expressed in the same terms as those of the decision at issue, it is in line with the rationale of that decision and the approach followed by the Commission in concluding that the measure at issue was inconsistent with, and disproportionate to, the alleged objective of neutralising the adverse effects of the normal regime for the amortisation of goodwill for undertakings acquiring shareholdings in foreign companies and which are unable to carry out cross-border mergers.

103 In the light of those considerations, the fourth part of the second ground of appeal must be rejected as ineffective and, therefore, that ground of appeal must be rejected in its entirety.

104 It follows from all the foregoing that the present appeal must be dismissed.

## Costs

105 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. In accordance with Article 138(1) of those rules of procedure, applicable to the procedure on an appeal by reason of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

106 In the present case, since the Commission has applied for costs and the appellant has been unsuccessful, the appellant must be ordered to pay the costs of the present appeal and of the proceedings before the General Court.

107 In accordance with Article 140(1) of the Rules of Procedure, applicable to the procedure on appeal by reason of Article 184(1) thereof, the Member States which have intervened in the proceedings are to bear their own costs. Consequently, the Federal Republic of Germany, an intervener in the action before the General Court and which participated in the proceedings before the Court of Justice, must bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders Sigma Alimentos Exterior SL to pay the costs;**

3. **Orders the Federal Republic of Germany to bear its own costs.**

[Signatures]