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-52/19 P,

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

Banco Santander SA, established in Santander (Spain), represented by J.L. Buendía Sierra, E. Abad Valdenebro, R. Calvo Salinero and A. Lamadrid de Pablo, abogados,

appellant,

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,

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

* Language of the case: Spanish

Judgment

1 By its appeal, Banco Santander SA asks the Court of Justice to set aside the judgment of the General Court of the European Union of 15 November 2018, *Banco Santander* v *Commission* (T-227/10, not published, EU:T:2018:785; '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 2011/5/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; 'the decision at issue').

I. Background to the dispute

2 The background to the dispute, which was set out by the General Court in paragraphs 1 to 8 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 On 28 October 2009, the Commission adopted the decision at issue, by which it closed the formal investigation procedure, as regards shareholding acquisitions within the European Union.

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 (Article 1(1) of the decision at issue) and ordered the Kingdom of Spain to recover the aid corresponding to the tax reductions granted on the basis of that measure (Article 4 of that decision).

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.

II. The procedure before the General Court and the judgment under appeal

8 By application lodged at the General Court Registry on 18 May 2010, the appellant brought an action for annulment of Article 1(1) and, in the alternative, of Article 4 of the decision at issue.

9 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 *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939) 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*').

10 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.

11 By letter of 16 January 2017, the General Court invited the parties to submit their observations on the judgment in *WDFG*. The parties submitted their observations within the prescribed period.

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

13 In rejecting the appellant's three pleas in law, alleging, first, that the measure at issue was not selective (paragraphs 26 to 215 of the judgment under appeal), secondly, that there had been an error in determining the beneficiary of the measure at issue (paragraphs 216 to 237 of the judgment under appeal) and, thirdly, that the principle of the protection of legitimate expectations had been infringed (paragraphs 238 to 314 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 24 and 316 of the judgment under appeal).

14 As regards, more specifically, the first plea in law, the General Court pointed out, in the first place, 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).

15 In the second place, 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 50 and 51 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.

16 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 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 113 to 127 of the judgment under appeal), with the result that it rejected the complaint alleging the existence of obstacles to cross-border combinations (paragraphs 108, 125 and 128 of the judgment under appeal).

17 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 129 to 151 of the judgment under appeal).

18 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 152 to 214 of the judgment under appeal).

III. Forms of order sought

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

– set aside the judgment under appeal;

– uphold its action for annulment and annul the decision at issue definitively; and

– order the Commission to pay the costs.

20 The Commission contends that the Court should:

– dismiss the appeal; and

– order the appellant to pay the costs.

IV. The appeal

21 In support of its appeal, the appellant relies on a single ground of appeal, alleging an infringement of Article 107(1) TFEU as regards the condition relating to selectivity. It complains, in essence, that the General Court made a number of errors of law in applying the three-stage method of analysing the selectivity of tax measures, as enshrined in the settled case-law of the Court of Justice.

22 As a preliminary point, it should be noted that, according to the Court's settled case-law, 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).

23 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).

24 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).

25 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).

26 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).

27 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).

28 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).

29 The different parts of the single ground of appeal must be examined in the light of those considerations.

30 The single ground of appeal raised by the appellant is divided into six parts, which essentially concern: (i) the definition of the reference system; (ii) the determination of that system's objective in the light of which the comparison must be carried out at the second stage of the analysis of selectivity; (iii) the allocation of the burden of proof; (iv) compliance with the principle of proportionality; (v) the existence of a causal link between the impossibility of merging abroad and the acquisition of shareholdings abroad; and (vi) the examination of the severability of the measure at issue according to the percentage of control.

A. The first part of the single ground of appeal, alleging errors in determining the reference system

1. Arguments of the parties

31 The appellant submits that the General Court made several errors in determining the reference system.

32 First of all, the appellant argues that the General Court used a reference system different from that defined by the decision at issue, since the General Court described the reference system of that decision as being the 'tax treatment of goodwill' and did not limit that framework to 'the tax treatment of financial goodwill only' (paragraphs 79 and 127 of the judgment under appeal). In the appellant's view, those two 'expressions' relate to substantively different approaches. The appellant submits that by substituting its own reasoning for that of the decision at issue and by having filled, by its own reasoning, a gap in the statement of reasons for the decision at issue, the General Court committed an error of law such as to require the judgment under appeal to be set aside.

33 Next, the appellant submits that it was unjustified for the General Court, at the end of the analysis in paragraphs 113 to 127 of the judgment under appeal, to exclude the idea that the measure at issue could constitute an autonomous reference system. In that regard, not only did the General Court substitute its own reasoning for that of the decision at issue, inasmuch as that decision relied solely on the absence of obstacles to cross-border mergers, but the General Court also carried out a legally incorrect examination. Indeed, the General Court's reasoning, inter alia, makes the definition of the reference framework dependent on the regulatory technique used.

34 Lastly, and in any event, the appellant submits that the reference framework adopted by the General Court in the judgment under appeal was defined arbitrarily and results from a confusion between an exception and a general rule. In particular, there is no explanation as to why the General Court held that the objective pursued was none other than to 'ensure a degree of consistency between the tax treatment of goodwill and its accounting treatment' (paragraph 108 of the judgment under appeal). Nor did the General Court explain why it stated that the absence of a rule precluding the amortisation of financial goodwill where a national shareholding is acquired is nothing less than the 'general rule' of the broad reference system which it has defined (paragraph 122 of the judgment under appeal). Referring in particular to the approach adopted in the case giving rise to the judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission* (C-203/16 P, EU:C:2018:505), in which the Court of Justice held that the measure at issue in that case could not be regarded as constituting an exception to a general rule, the appellant submits that the reference framework was defined reductively in the present case, with the result that the judgment under appeal should be set aside.

35 The Commission disputes the appellant's arguments. It contends, principally, that the arguments advanced are, for the most part, inadmissible, since the action before the General Court did not include any complaint that there were errors affecting the determination of the reference system. Consequently, to allow the appellant to raise new arguments 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 the alternative, the Commission contends that the appellant's arguments are unfounded. Contrary to the appellant's submissions, first, the General Court referred to the same reference system as that identified in the decision at issue, secondly, the measure at issue cannot be regarded as an autonomous reference system and, thirdly, the judgment under appeal is reasoned to the requisite legal standard.

2. Findings of the Court

(a) Admissibility

36 As regards the admissibility of the arguments and evidence submitted in support of the part of the single ground of appeal under consideration – that admissibility being contested by the Commission on the ground that the arguments advanced in support of the appellant's claims concerning the determination of the reference framework are new arguments – it should 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.

37 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).

38 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).

39 In the present case, it is apparent from paragraphs 79 to 128 of the judgment under appeal that the General Court examined whether the Commission had correctly identified the reference tax regime in the context of the first stage of the analysis of selectivity. In those circumstances, the appellant is entitled to challenge, on appeal, the grounds of the judgment under appeal relating to that first stage, notwithstanding the fact that it did not put forward at first instance arguments specifically aimed at challenging the decision at issue on that point.

40 Furthermore, as the Advocate General observed in point 35 of his Opinion in Joined Cases *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:51), it is clear that the appellant's arguments include a detailed and specific criticism of the grounds of the judgment under appeal and seek, to a large extent, to challenge the observance by the General Court of the limits and the detailed rules governing the exercise of its review, and could not, in any event, have been raised before it.

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

(b) Substance

42 The determination of the reference framework is of particular importance in the case of tax measures, since the existence of an economic advantage for the purposes of Article 107(1) TFEU may be established only when compared with 'normal' taxation. Thus, determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 55 and 60, and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraphs 88 and 89).

43 For the purposes of assessing the selective nature of a tax measure of general application, it is, therefore, necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. Since the determination of the reference system constitutes the starting point for the comparative examination to be carried out in the context of the assessment of the selectivity of an aid scheme, an error made in that determination necessarily vitiates the whole of the analysis of the condition relating to selectivity (see, to that effect, judgments of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 107, and of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraph 46).

44 In that context, it must be stated, as a preliminary point, that the determination of the reference framework, which must be carried out following an exchange of arguments with the Member State concerned, must follow from an objective examination of the content, the structure and the specific effects of the applicable rules under the national law of that State. In that regard, the

selectivity of a tax measure cannot be assessed on the basis of a reference framework consisting of some provisions of the national law of the Member State concerned that have been artificially taken from a broader legislative framework (judgment of 28 June 2018, *Andres (insolvency Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 103).

45 Consequently, as the Advocate General observed, in essence, in point 49 of his Opinion in Joined Cases *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:51), where the tax measure in question is inseparable from the general tax system of the Member State concerned, reference must be made to that system. On the other hand, where it appears that such a measure is clearly severable from that general system, it cannot be ruled out that the reference framework to be taken into account may be more limited than that general system, or even that it may equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify a consistent body of rules external to that measure.

46 Next, since outside the spheres in which EU tax law has been harmonised, it is the Member State concerned which defines, by exercising its exclusive competence in the matter of direct taxation, the characteristics constituting the tax, the determination of the reference system or the 'normal' tax regime, from which it is necessary to analyse the condition relating to selectivity, must take account of those characteristics (see, to that effect, judgment of 16 March 2021, *Commission* v *Poland*, C-562/19 P, EU:C:2021:201, paragraphs 38 and 39).

47 It must also be borne in mind that, in so far as the determination of the reference framework must be based on an objective examination of the content and structure of the applicable rules under national law, it is not necessary, during that first stage of the examination of selectivity, to take account of the objectives pursued by the legislature when adopting the measure under examination. In that regard, the Court has held on numerous occasions that the objective pursued by measures of State intervention is not sufficient to exclude those measures outright from classification as 'aid' for the purposes of Article 107 TFEU, since that provision does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 84 and 85, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 48).

48 Lastly, the rules which must make up the reference system should be identified according to objective criteria, in particular to enable judicial review of the assessments on which that identification is based. It is for the Commission to take into account any factors put forward by the Member State concerned and, more generally, to carry out its examination in a rigorous and sufficiently reasoned manner in order to enable full judicial review.

49 It is in the light of those considerations that the Court must assess the merits of the appellant's arguments relating to the determination of the reference system as the first stage and necessary premiss for the analysis of selectivity. As is apparent from paragraphs 31 to 34 above, the appellant submits, in essence, that the General Court erred in law, first, by substituting the grounds of the decision at issue as regards the definition of the reference system adopted, secondly, by excluding the measure at issue from being regarded on its own as an autonomous reference system and by substituting grounds in that regard and, thirdly, by defining that system in an arbitrary manner.

50 It is appropriate to examine those three complaints in turn.

(1) The existence of an error of law in the determination of the reference system (first complaint in the first part of the single ground of appeal)

51 The appellant, by the first complaint in the first part of its single ground of appeal, submits that the General Court erred in law in determining the reference system by substituting its own reference system for that used by the Commission in the decision at issue. While the Commission had designated the rules relating to the tax treatment of financial goodwill as constituting the reference system, the General Court, relying on a substantially different analysis, also included in that system the tax treatment of 'non-financial' goodwill. The appellant refers in particular to paragraphs 79 and 127 of the judgment under appeal.

52 In that regard, the Court of Justice points out 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 27 January 2000, *DIR International Film and Others* v *Commission*, C-164/98 P, EU:C:2000:48, paragraph 38, and of 4 June 2020, *Hungary* v *Commission*, C-456/18 P, EU:C:2020:421, paragraph 70 and the case-law cited).

53 Nonetheless, except where there is no material factor to justify that course of action, the General Court may be led, in proceedings for annulment, to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons (see, to that effect, judgments of 27 January 2000, *DIR International Film and Others* v *Commission*, C-164/98 P, EU:C:2000:48, paragraph 42, and of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 142).

54 In the present case, as is apparent from paragraphs 57, 79, 110 and 127 of the judgment under appeal, the General Court found that the Commission had used the tax treatment of 'goodwill' as the reference system, for the purposes of its assessment of the selectivity of the measure at issue. In particular, the General Court noted, in paragraph 79 of the judgment under appeal, that the Commission '[had] not limit[ed] that framework to the tax treatment of financial goodwill only'. As the appellant has rightly pointed out, the Commission had stated, in recital 96 of the decision at issue, that the appropriate framework for the assessment of the measure at issue was constituted by the rules on the tax treatment of 'financial goodwill'.

55 However, although the terminology used in the judgment under appeal does indeed differ from that of the decision at issue, it cannot be concluded that the General Court thereby identified a reference system that was substantively different from that identified by the Commission or that it relied on a different reasoning from that of the Commission in the decision at issue in order to find that the tax treatment of goodwill constituted the relevant reference system in the present case.

56 As the Commission contends, in the circumstances of the present case, the treatment of goodwill may be fully assimilated to the treatment of financial goodwill.

57 In that regard, as the General Court noted in paragraph 57 of the judgment under appeal, the Commission expressly ruled out, in the decision at issue – in response inter alia to the arguments put forward by the Spanish authorities regarding the identification of the reference system – the limitation of that system to the tax treatment of goodwill resulting from the acquisition of a shareholding in a company established in a country other than Spain. The General Court thus emphasised that, as is clear from recital 89 of the decision at issue, the Commission had stated that the measure at issue had to be assessed in the light of the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit. The Commission clarified, in that decision, that its position could be explained by the finding that the situations in which financial goodwill can be amortised do not cover the whole category of taxpayers placed in a similar factual or legal situation.

58 In that context, it should be noted that, as is apparent from paragraph 58 of the judgment under appeal, for the purposes of identifying the reference system, the General Court relied, inter alia, on the Commission's findings in recitals 19, 20, 99 and 100 of the decision at issue, according to which the reference system provided for the amortisation of goodwill only in the event of a business combination, with the result that, by allowing the goodwill that would have been booked, if the businesses had combined, to appear even in the absence of a business combination, the measure at issue constituted an exception to that reference system.

59 In addition, referring also to recital 100 of the decision at issue, the General Court additionally relied on the Commission's findings that, since the amortisation of goodwill deriving from the simple acquisition of shareholdings was allowed only in the case of cross-border shareholding acquisitions and not in the case of the acquisition of domestic shareholdings, the measure at issue thereby introduced a difference in treatment between domestic transactions and cross-border transactions, with the result that it could not be considered a new general rule in its own right.

60 It is clear from those passages of the decision at issue, to which the judgment under appeal relates, that, as the General Court held, when the Commission designated the 'rules on the tax treatment of financial goodwill' as the reference system, it intended to refer not only to the rules specifically applicable to the amortisation of goodwill in the event of the acquisition of shareholdings, but also to the rules of the general Spanish corporate tax system governing the amortisation of goodwill in general, since those general rules do indeed provide a relevant assessment framework for those more specific rules.

61 It follows that, in paragraphs 57, 79, 110 and 127 of the judgment under appeal, the General Court confined itself to interpreting the decision at issue as regards the definition of the reference system in a manner consistent with the particulars of that decision and did not, therefore, substitute the grounds of that decision within the meaning of the case-law referred to in paragraph 52 of the present judgment. Accordingly, the General Court did not err in law in determining the reference system.

62 The first complaint in the first part of the single ground of appeal must, therefore, be rejected as unfounded.

(2) The refusal to consider the measure at issue as an autonomous reference system (second complaint in the first part of the single ground of appeal)

(i) The existence of a substitution of grounds

63 The appellant complains that the General Court substituted its own reasoning for that of the decision at issue in ruling out the possibility that the measure at issue might constitute a reference system in its own right. In essence, although the Commission had in that decision dismissed the possibility of there being an autonomous reference system constituted by the measure at issue solely because of the alleged absence of legal obstacles to cross-border mergers, the General Court is argued to have relied on a different argument in paragraphs 114 to 127 of the judgment under appeal.

64 In that regard, as has been pointed out in paragraph 57 above, it must be borne in mind that the General Court held that, from the Commission's point of view, the reference system could not be limited to the tax treatment of financial goodwill, introduced by the measure at issue, since that measure benefited only undertakings acquiring shareholdings in non-resident companies, and that, in order to assess the existence of discrimination against undertakings making acquisitions of the same type but in resident companies, it was necessary to take account of the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit.

65 It cannot, therefore, be concluded that the General Court substituted the grounds of the decision at issue by overlooking the fact that the Commission allegedly relied, in reality, on the absence of obstacles to cross-border combinations in order to exclude the measure at issue from constituting the reference tax system.

66 Although, as the appellant submits, the Commission did indeed refer, in recitals 93 to 96 and 117 of that decision, to the alleged absence of legal obstacles to cross-border mergers, it confined itself, by those references, to taking a position on the observations submitted by the Spanish authorities with a view, inter alia, to calling into question not only the reference system as provisionally identified in the decision of 10 October 2007 to initiate the formal investigation procedure, but also the possible elements of comparison and justification under the second and third stages of the examination of selectivity.

67 Consequently, as the Advocate General observed in point 65 of his Opinion in Joined Cases *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:51), contrary to the appellant's contentions, it is not because of a lack of recognition of obstacles to cross-border business combinations that the Commission decided that the measure at issue could not be the correct reference system for the purposes of the selectivity analysis, but because it took the view that that measure should be assessed in the light of a broader set of rules, which included both the rules applicable to the amortisation of financial goodwill in the case of the acquisition of shareholdings in resident companies and the principles applicable to the amortisation of goodwill in general, which, according to the Commission, were aligned with each other in providing that goodwill was deductible only if the acquisition of a shareholding was followed by a business combination.

68 It follows that the claim that the General Court substituted grounds, in paragraphs 114 to 127 of the judgment under appeal, is unfounded.

(ii) The existence of an error of law in the General Court's refusal to regard the measure at issue as an autonomous reference system

69 The appellant submits, in the alternative, that the reasoning followed by the General Court in order to rule out the possibility that the measure at issue might constitute an autonomous reference system is vitiated by an error of law. First, it observes that the aim of that measure is to ensure fiscal neutrality with regard to acquisitions of shareholdings in Spain and abroad and, accordingly, its purpose cannot be reduced to that of solving a specific problem, as the General Court incorrectly stated in paragraph 126 of the judgment under appeal. Secondly, it argues that the General Court's reasoning leads to the selectivity of a measure being assessed differently, depending on whether the national legislature decided to create a separate tax or to modify a general tax, and, therefore, depending on the regulatory technique used.

70 In the present case, the Court of Justice notes that the reasoning set out by the General Court in paragraphs 82 to 128 of the judgment under appeal was intended to respond to the argument that, because of the obstacles to cross-border combinations, the Commission ought to have identified the measure at issue as the reference system.

71 Although the appellant does not criticise the methodology applicable to the determination of the reference system in the context of the first stage of the examination of selectivity set out in paragraphs 82 to 95 of the judgment under appeal, it does, however, criticise the remainder of the examination carried out by the General Court, as set out in paragraphs 96 to 128 of that judgment.

72 As regards, in the first place, the reasoning set out in paragraphs 96 to 112 of the judgment under appeal, that reasoning is concerned with the issue whether, in the light of the objective of the normal regime identified by the Commission, undertakings acquiring shareholdings in resident companies and those acquiring shareholdings in non-resident companies are in a comparable legal and factual situation.

73 However, that examination of comparability is not directly connected to the delimitation of the reference framework which must be carried out under the first stage of the examination of selectivity, notwithstanding the fact that, in paragraph 112 of the judgment under appeal, the General Court found 'the existence of links between those two steps, or even in some cases, such as the present, a common line of reasoning'. Thus, the arguments advanced by the appellant in order to challenge the definition of the objective of the reference system will be assessed at a later stage, in the context of the examination of the second part of the single ground of appeal, alleging an error in the determination of the objective in the light of which the examination of comparability had to be carried out.

74 In the second place, as regards paragraphs 113 to 128 of the judgment under appeal, in those paragraphs the General Court examined whether the measure at issue could in itself, in the light of its own specific characteristics and therefore regardless of any comparative analysis, constitute an autonomous reference framework.

75 In that regard, first, the appellant is wrong to argue that the General Court relied primarily on the regulatory technique chosen by the Spanish legislature, in order to conclude that the measure at issue was selective. It is indeed apparent from the judgment under appeal that the General Court relied on the purpose and effects of that measure and not on merely formal considerations. In

particular, the General Court pointed out, in paragraph 122 of that judgment, that the measure at issue constituted an exception to the general rule that only business combinations may lead to the amortisation of goodwill.

76 Admittedly, as the appellant has rightly argued, it is apparent from the case-law that the use of a particular regulatory technique cannot enable national tax rules to evade, from the outset, scrutiny under State aid rules as provided for under the FEU Treaty, nor is such use sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, since that would cause the form of State intervention to prevail decisively over its effects. Consequently, the regulatory technique used cannot be decisive for the purposes of determining the reference framework (see, to that effect, judgment in *WDFG*, paragraph 76, and judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 92).

77 However, it follows from that case-law that while for the purposes of establishing the selectivity of a tax measure the regulatory technique used is not decisive, with the result that it is not always necessary for it to derogate from a common tax system, the fact that it is a derogation as a result of the use of that regulatory technique is relevant for those purposes where it follows that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime, even though those two categories are in a comparable situation with regard to the objective pursued by that system (judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 93 and the case-law cited).

78 It follows that the General Court cannot be criticised for having held, among other considerations, that the measure at issue constituted a derogation in order to examine whether it was selective.

79 Secondly, as regards the appellant's criticism of the reference to the Opinion of Advocate General Warner in *Italy* v *Commission* (173/73, EU:C:1974:52; 'Advocate General Warner's Opinion'; p. 728), the General Court rightly pointed out, in paragraph 122 of the judgment under appeal, that, as the Commission correctly stated in recital 100 of the decision at issue, the measure at issue had not introduced 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 non-resident companies created by applying the general rule.

80 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 Advocate General Warner's Opinion, was intended to pursue a targeted objective and thus to solve a specific problem. It follows that the arguments advanced by the appellant, first, objecting to the present case's being placed on the same footing as that which gave rise to Advocate General Warner's Opinion 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.

81 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).

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

(3) The arbitrary nature of the definition of the reference system (third complaint in the first part of the single ground of appeal)

83 In the third complaint in the first part of its single ground of appeal, the appellant submits, first, that the reference system used by the General Court was defined arbitrarily, since it is difficult to identify the criterion specifically used to identify the coherent framework of which the measure at issue forms part. It submits, secondly, that the General Court erroneously and invalidly identified, in the reference system which it defined, what constitutes the rule and what constitutes the exception. According to the appellant, the General Court was wrong to hold, in paragraph 122 of the judgment under appeal, that the rule was that it was impossible to amortise goodwill and that the measure at issue introduced an exception to that rule. As in the case which gave rise to the judgment of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, (C-203/16 P, EU:C:2018:505), the General Court confused the rule with the exception.

84 The first submission, alleging that the General Court arbitrarily defined the reference system at issue, must be rejected since, as is apparent from paragraphs 57 to 60 above, the General Court set out to the requisite legal standard the reasoning which led it to refer, in the circumstances of the present case, to the rules applicable under Spanish law to the tax treatment of goodwill for the purposes of determining corporate tax and, thus, to confirm the assessment in that regard in the decision at issue. It should be borne in mind that the premiss on which the Commission relied is based on the finding, endorsed by the General Court, that under Spanish law amortisation of goodwill is generally conditional on there being a business combination.

85 The second submission, alleging that the General Court erroneously and invalidly identified the rule and the exception, must also be rejected. In accordance with the interpretation of the Spanish tax legislation adopted by the General Court, only a business combination generally allows the amortisation of goodwill, including in the case of financial goodwill resulting from the acquisition of shareholdings in resident companies, in accordance with Article 89(3) of the Corporate Tax Law, as approved by Royal Legislative Decree 4/2004. It is not, therefore, the non-amortisation of financial goodwill which constitutes the general rule from which the measure at issue derogates, but the principle that the amortisation is generally possible only in the case of a business combination; the General Court inferred that principle from the provisions on the tax treatment of goodwill for corporate tax purposes, whether those provisions relate to the amortisation of goodwill in the case of an acquisition of an undertaking or to the amortisation of financial goodwill resulting from the acquisition of shareholdings in resident companies followed by a merger.

86 In the light of those considerations, the third complaint in the first part of the single ground of appeal and, consequently, the first part of that ground of appeal in its entirety, must be rejected as unfounded.

B. The second part of the single ground of appeal, alleging an error in the determination of the objective in the light of which the examination of comparability is carried out

1. Arguments of the parties

87 The appellant, in the context of the second part of its single ground of appeal, disputes the grounds of the judgment under appeal, set out in paragraphs 130 to 151 thereof, by which the General Court identified the objective of the reference system and, in the light of that objective, compared the situation of the undertakings qualifying for the advantage established by the measure at issue and those which do not.

88 The appellant submits, in the first place, that the General Court erred in law in determining the objective underlying the comparison to be carried out in the second stage of the examination of the selectivity of the measure at issue. The General Court, which again departed from the decision at issue, misinterpreted the case-law on the determination of the objective applicable to a tax measure. Contrary to what the General Court suggests, there is no contradiction in the case-law of the Court of Justice as to whether the situation of the undertakings qualifying for the 'measure at issue' and that of those not qualifying must be compared in the light of the objective of that measure or that of the 'system of which it forms part'. According to the appellant, those objectives must coincide and, if they do not, it is because the national legislature introduced into the tax system a measure which is inconsistent with its logic. In the present case, the true objective of the regime by reference to which the comparison should be made is, as the Commission itself acknowledged in the decision at issue, fiscal neutrality. Fiscal neutrality is a much more general and logical objective than the parallelism, referred to by the General Court, between the accounting treatment and tax treatment of the goodwill from which an undertaking benefits as a result of acquiring shareholdings in a company, since as a matter of principle any corporate tax departs by definition from the accounting result.

89 In the second place, the appellant submits that the General Court was wrong to hold, in paragraph 108 of the judgment under appeal, that the objective of the tax provisions on goodwill was to ensure a degree of consistency between the tax treatment of goodwill and its accounting treatment. That assertion is not only arbitrary, but wholly unfounded, since by definition all corporate taxes differ from the accounting result. As regards specifically the provisions on the amortisation of goodwill, the various situations provided for by the Corporate Tax Law, as approved by Royal Legislative Decree 4/2004, have in common not the objective of ensuring consistency between the tax treatment and accounting treatment of goodwill, but rather that of avoiding double taxation and of ensuring fiscal neutrality.

90 The Commission contends that those arguments, which it considers inadmissible and, in any event, unfounded, should be rejected.

2. Findings of the Court

(a) Admissibility

91 The Commission contends that the second part of the single ground of appeal is inadmissible. It maintains that the arguments put forward were not raised before the General Court or relate to questions of fact, which include the interpretation of the content and scope of national law.

92 As regards the first plea of inadmissibility raised by the Commission, it must be rejected on the same grounds as those set out in paragraphs 38 to 40 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.

93 As regards the second plea of inadmissibility raised by the Commission, alleging that the appellant intended to call into question findings of fact which are not, in principle, subject to review by the Court of Justice, it must be borne in mind that, according to 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).

94 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).

95 Furthermore, as has been pointed out in paragraph 52 above, the General Court cannot, under any circumstances, substitute its own reasoning for that of the author of the contested act, with the result that 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.

96 Since by its arguments summarised in paragraphs 87 to 89 above 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, those arguments are admissible.

(b) Substance

97 In the first place, as regards the argument directed against the General Court's conclusion that the case-law is inconsistent as to whether the comparison should be carried out in the light of the objective of the measure examined or that of the system of which that measure forms part, that argument must be rejected as ineffective.

98 The appellant merely asserts that the choice between one or other objective is immaterial since they must, in principle, coincide. Consequently, even if the General Court's findings in relation to the scope of the case-law of the Court of Justice were to be incorrect, it must be observed that the appellant does not challenge the General Court's conclusion, set out in paragraph 143 of the judgment under appeal, that the examination of comparability at the second stage of the analysis of selectivity has to be carried out in the light of the objective of the reference system of which the measure under examination forms part, and not in the light of that measure's objective.

99 In the second place, the appellant raises a complaint alleging the substitution of the grounds of the decision at issue as regards the identification of the reference system's objective. It 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 either the decision at issue or the observations submitted by the Kingdom of Spain during the administrative procedure. The appellant also submits that, in any event, the assertion that the tax provisions on goodwill pursue such an objective is arbitrary and unfounded.

100 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.

101 Admittedly, the General Court referred, in paragraphs 104 to 106 of the judgment under appeal, to 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; it also explained, by reference to recitals 19 and 99 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 97 to 100 thereof.

102 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 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.

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

104 It is necessary, however, to examine whether, notwithstanding the error of law made by the General Court, the second complaint of the first 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.

105 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).

106 In that regard, it must be borne in mind that, in accordance with the case-law mentioned in paragraph 27 above, to which the General Court was fully entitled to refer in paragraph 132 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 objective of the reference system and not that of the measure at issue.

107 In the present case, the appellant submits that the objective of the reference system, which, in its view, is indissociable from that of the measure at issue, is to preserve fiscal neutrality. It states that, in the light of that objective, undertakings which acquire shareholdings in domestic companies and those which acquire shareholdings in cross-border companies are in different situations because of the obstacles to cross-border business combinations.

108 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).

109 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, the beneficiaries of the measure at issue are in a different legal and factual situation from that of undertakings covered by the normal tax system.

110 In the light of those considerations, it must be concluded that, notwithstanding the error of law 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 second part of the single ground of appeal must be rejected as unfounded.

C. The third part of the single ground of appeal, alleging an error of law in the allocation of the burden of proof

1. Arguments of the parties

111 The appellant submits that by failing to examine, during the first and second stages of the analysis of selectivity, which undertakings were in a comparable situation in the light of the reference system's objective of fiscal neutrality and by deferring that examination to the third stage, the General Court reversed the burden of proof. In that regard, it follows from the case-law that, during the first and second stages of the examination of the selectivity of a measure, the burden of proving that the situations are comparable in the light of the objective pursued lies with the Commission.

112 The Commission contends that the appellant's arguments are inadmissible and, in any event, unfounded.

2. Findings of the Court

113 In the first place, as regards the plea of inadmissibility raised by the Commission in respect of the appellant's arguments, it must be rejected on the same grounds as those set out in paragraphs 38 to 40 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.

114 As regards the merits of the third part of the single ground of appeal, the appellant complains specifically that the General Court took account of the fact that the measure at issue pursued an objective of fiscal neutrality only at the third stage of the analysis of the selectivity of the measure at issue, and not at the first and second stages of that analysis.

115 The appellant's arguments are based on the premiss that the General Court erred in law in determining the reference system's objective as the consistency between the tax treatment and accounting treatment of goodwill, and not the principle of fiscal neutrality.

116 Suffice it to note in that regard that, as is apparent from the considerations set out in paragraphs 97 to 110 above, although the General Court erred in finding that the objective of the reference system concerned the consistency between the tax treatment and accounting treatment of goodwill, it has not been established that the objective of fiscal neutrality was such as to preclude the aid from being found to be selective at the second stage of the analysis of selectivity.

117 The third part of the single ground of appeal must, therefore, be rejected as ineffective.

D. The fourth part of the single ground of appeal, alleging an error in the application of the principle of proportionality

1. Arguments of the parties

118 The appellant submits, in essence, that the General Court erred in law by examining the proportionality of the measure at issue without having first assessed whether the situations at issue were comparable in the light of the correctly identified objective of the reference system, namely fiscal neutrality. It submits that the examination of the measure at issue from the point of view of compliance with the principle of proportionality, at the third stage of the analysis of selectivity, serves no purpose and has no justification in the present case. It is only after examining whether the measure discriminates between comparable situations in the light of its objective that it should be considered whether that measure is justified by the fact that it is inherent to the essential principles of the system of which it forms part and complies with the principles of consistency and proportionality.

119 The Commission contends that the fourth part of the single ground of appeal is ineffective and, in any event, unfounded.

2. Findings of the Court

120 It must be stated that the appellant's arguments are based on the premiss that the General Court erred in law by deferring the analysis of the proportionality of the measure at issue to the third stage of the examination of selectivity.

121 Those arguments cannot, however, be upheld, since, as is apparent from the case-law, the question whether a selective advantage complies with the principle of proportionality arises at the third stage of the examination of selectivity, which examines whether that advantage can be justified by the nature or general scheme of the tax system of the Member State concerned. At that stage, the Member State is thus called on to demonstrate that a difference in treatment arising from the measure's objective is consistent with the principle of proportionality, in that it does not go beyond what is necessary to achieve that objective and the objective could not be achieved by less restrictive measures (see, to that effect, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 75).

122 Consequently, the fourth part of the single ground of appeal must also be rejected.

E. The fifth part of the single ground of appeal, alleging an error of law relating to the causal link between the impossibility of cross-border mergers and the acquisition of shareholdings in foreign companies

1. Arguments of the parties

123 The appellant submits, in essence, that the grounds of the judgment under appeal relating to the third stage of the analysis of selectivity, set out in paragraphs 167 to 176 of the judgment under appeal, are vitiated by an error of law since the General Court required proof from the Kingdom of Spain of the existence of 'a causal link between the impossibility of merging abroad and the

acquisition of shareholdings abroad'. The appellant submits, first, that those grounds introduce an element of analysis which does not appear in the decision at issue and indeed conflicts with its rationale and, secondly, that the proof requested by the General Court is impossible to furnish.

124 The Commission contends that the fifth part of the single ground of appeal should be rejected.

2. Findings of the Court

125 It should be noted that, in paragraphs 167 to 176 of the judgment under appeal, which are the only paragraphs referred to in the fifth part of the single ground of appeal, the General Court set out the reasons why the Kingdom of Spain had failed to establish that the measure at issue offset the alleged detrimental effects of the normal regime.

126 However, as a supplementary point, it continued its analysis on the assumption that such offsetting had been demonstrated (paragraphs 177 to 185 of the judgment under appeal). The grounds of the judgment under appeal referred to in the fifth part of the single ground of appeal are not, therefore, the only grounds on which the General Court based its conclusion that the Commission did not err in finding that the Kingdom of Spain had not justified the differentiation introduced by the measure at issue.

127 In accordance with settled case-law, on an appeal, a plea that is directed against a ground in the judgment under appeal, the operative part of which is sufficiently founded in law on other grounds, is ineffective and must, therefore, be rejected. In the present case, even if the fifth part of the single ground of appeal were well founded, it must, inasmuch as it is incapable of invalidating the judgment under appeal, be rejected as ineffective, since the conclusion in question remains well-founded on other grounds (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).

128 It follows that the fifth part of the single ground of appeal must be rejected as ineffective.

F. The sixth part of the single ground of appeal, alleging an error of law in the examination of the severability of the measure at issue according to the percentage of control

1. Arguments of the parties

129 The appellant complains that the General Court rejected its plea that was based on the absence of any distinction, in the Commission's analysis, between acquisitions of minority shareholdings and acquisitions of majority shareholdings. The appellant states, first, that all the transactions it carried out in the context of the measure at issue led to the acquisition of control over the target company and, secondly, that the Kingdom of Spain had asked the Commission to analyse the two situations separately. According to the appellant, it is clear from the case-law that if the Member State concerned so requests, the Commission is required to conduct a separate analysis of the measure under examination. As to the severability of the measure at issue, this is apparent from the procedural treatment which the Commission accorded to the analysis of that measure, which resulted in three different decisions.

2. Findings of the Court

130 The sixth part of the single ground of appeal is directed against paragraphs 193 to 202 of the judgment under appeal, by which the General Court examined whether the Commission was required to distinguish between the various transactions which benefited from the application of the measure at issue.

131 In the present case, it must be stated that the grounds of the judgment under appeal set out in those paragraphs – which were intended to respond to the appellant's argument that it was for the Commission to distinguish between acquisitions of shareholdings in non-resident companies resulting in the acquisition of control and other acquisitions of shareholdings, in order to declare that the application of the measure at issue to the acquisitions of shareholdings in non-resident companies did not entail classification as State aid – were included for the sake of completeness.

132 Indeed, the appellant's argument that the Commission was required to make such a distinction was rejected, principally, in paragraph 192 of the judgment under appeal, in which the General Court held, in essence, that the inconsistency introduced by the measure at issue in respect of the tax treatment of goodwill would exist even if that measure benefited only acquisitions of majority shareholdings in non-resident companies.

133 As has been pointed out in paragraph 127 above, on an appeal a plea that is directed against a ground included for the sake of completeness in the judgment under appeal, the operative part of which is sufficiently founded in law on other grounds, is ineffective and must, therefore, be rejected.

134 In any event, the appellant's arguments in the sixth part of its single ground of appeal are unfounded.

135 In that regard, it is true that, in the decision which it adopts at the end of its examination, the Commission may, in the exercise of its discretion, differentiate between the beneficiaries of the aid scheme notified, having regard to certain characteristics they display or conditions which they fulfil. On the other hand, as the General Court rightly pointed out in paragraph 193 of the judgment under appeal, it was not for the Commission, in the decision at issue, to determine conditions for the application of the measure at issue which might have made it possible, in certain situations, for it not to classify that measure as aid. Such a question is a matter for dialogue between the Spanish authorities and the Commission, as part of the notification of the scheme at issue, which ought to have taken place before the scheme was put into effect.

136 In the present case, in its action at first instance, the appellant complained that the Commission, in essence, failed to distinguish between acquisitions of shareholdings in non-resident companies resulting in the acquisition of control and other acquisitions of shareholdings for the purposes of declaring that the application of the measure at issue to that former category of acquisitions of shareholdings in non-resident companies did not entail classification as State aid. In that regard, the General Court recalled, in paragraph 199 of the judgment under appeal, that, with regard to the justification for the distinction drawn by the measure at issue, it is for the Member State concerned to establish that that distinction is justified and also to amend the content or the conditions for the application of that measure if it is apparent that it is justified only in part. The General Court did not err in law in concluding therefrom, in paragraph 201 of the judgment under appeal, that, even if the Commission's examination, during the formal investigation procedure, of cases regarding the acquisition of majority shareholdings was discussed specifically by the

Commission and the Kingdom of Spain on the basis of the documented requests submitted by that Member State, the appellant's complaint had, in any event, to be rejected in the circumstances of the case.

137 Consequently, the sixth part of the single ground of appeal must be rejected as ineffective and, in any event, unfounded.

138 Since none of the parts of the single ground of appeal has been upheld, the appeal must be dismissed in its entirety.

V. Costs

139 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.

140 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.

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

1. Dismisses the appeal;

2. Orders Banco Santander SA to pay the costs.

[Signatures]