

## II

*(Non-legislative acts)*

## DECISIONS

## COMMISSION DECISION

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***(notified under document C(2010) 9566)***(Only the Spanish text is authentic)****(Text with EEA relevance)**

(2011/282/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

## I. PROCEDURE

(1) By written questions addressed to the Commission (No E-4431/05, E-4772/05 and E-5800/06) several MEPs indicated that Spain had enacted a special scheme allegedly providing an unfair tax incentive for Spanish companies that acquired significant shareholdings in foreign companies, pursuant to Article 12(5) of the Spanish Corporate Tax Law ('Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades' <sup>(2)</sup>, hereinafter 'TRLIS').

(2) By written question No P-5509/06, Mr David Martin MEP complained to the Commission about the hostile takeover bid by the Spanish energy producer Iberdrola involving purchasing shares of the UK energy generator and distributor Scottish Power Ltd. According to Mr Martin, Iberdrola had unfairly benefited from State aid in the form of a tax incentive for the acquisition. Mr Martin asked the Commission to examine all the competition issues arising from the acquisition, which had been notified on 12 January 2007 for review by the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings <sup>(3)</sup> (hereinafter 'the Merger Regulation'). By Decision dated 26 March 2007 (Case No COMP/M.4517 — Iberdrola/Scottishpower, SG-Greffe(2007) D/201696) <sup>(4)</sup>, the Commission decided not to oppose the notified operation and to declare it compatible with the internal market under Article 6(1)(b) of the Merger Regulation.

(3) By letters dated 15 January and 26 March 2007, the Commission asked the Spanish authorities to provide information in order to assess the scope and the effects of Article 12(5) TRLIS with respect to its possible classification as State aid and its compatibility with the internal market.

(4) By letters dated 16 February and 4 June 2007, the Spanish authorities replied to these requests.

<sup>(1)</sup> OJ C 311, 21.12.2007, p. 21.

<sup>(2)</sup> Published in the Spanish *Official State Gazette* of 11.3.2004.

<sup>(3)</sup> OJ L 24, 29.1.2004, p. 1.

<sup>(4)</sup> See: [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=2\\_M\\_4517](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4517)

- (5) By fax dated 28 August 2007, the Commission received a complaint by a private operator alleging that the scheme set up by Article 12(5) TRLIS constituted State aid and was incompatible with the internal market. The complainant asked for his identity not to be divulged.
- (6) By decision of 10 October 2007 (hereinafter 'the opening Decision'), the Commission initiated the formal investigation procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (hereinafter 'TFEU') (former Article 88(2) of the EC Treaty) in respect of the tax amortisation of financial goodwill provided for by Article 12(5) TRLIS, because it appeared to fulfil all the conditions for being considered State aid within the meaning of Article 107(1) TFEU. The Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) TFEU. The Opening Decision was published in the *Official Journal of the European Union* <sup>(5)</sup>, inviting interested parties to submit their comments.
- (7) By letter dated 5 December 2007, the Commission received comments from Spain on the opening Decision.
- (8) Between 18 January and 16 June 2008, the Commission received comments on the opening Decision from 32 third parties. The third parties that did not ask to remain anonymous are listed in Annex I to this Decision.
- (9) By letters of 9 April, 15 May and 22 May 2008 and 27 March 2009, the Commission forwarded the above-mentioned comments to the Spanish authorities, in order to give them the opportunity to react. By letters of 30 June 2008 and 22 April 2009, the Spanish authorities gave their reactions to the third parties' comments.
- (10) On 18 February 2008, 12 May 2009 and 8 June 2009, technical meetings took place between the Spanish authorities and the Commission representatives to clarify, among others matters, certain aspects of the application of the scheme in question and the interpretation of the Spanish legislation relevant for the analysis of the case.
- (11) On 7 April 2008, a meeting took place between the Commission's representatives and Banco de Santander S.A.; on 16 April 2008 a meeting took place between the Commission's representatives and the law firm J&A Garrigues S.L. representing various interested third parties; on 2 July 2008 a meeting took place between the Commission's representatives and Altadis S.A.; on 12 February 2009 a meeting took place between the Commission's representatives and Telefónica S.A.
- (12) On 14 July 2008, the Spanish authorities submitted additional information regarding the contested measure, in particular data extracted from 2006 tax returns, which provided a general overview of the taxpayers benefiting from the contested measure.
- (13) By e-mail dated 16 June 2009, the Spanish authorities provided additional information and argued that Spanish companies still faced a number of obstacles to cross-border mergers within the European Union.
- (14) On 28 October 2009, the Commission adopted a negative decision <sup>(6)</sup> with recovery concerning aid granted to beneficiaries on the basis of the contested legislation when making intra-EU acquisitions (hereinafter 'the previous Decision'). As indicated in paragraph 119 of this Decision, the Commission maintained the procedure, as initiated by the opening Decision, open for extra-EU acquisitions since the Spanish authorities undertook to provide new details concerning the obstacles to cross-border mergers outside the EU.
- (15) On 12, 16 and 20 November 2009, the Spanish authorities submitted summary information concerning direct investment by Spanish companies in non-EU countries.
- (16) On 16 December 2009, the Commission sent a request for information to the Spanish authorities concerning transactions in non-EU countries which it deemed necessary in order to make the State aid assessment of the scheme along the lines suggested by the Spanish authorities.
- (17) By letter dated 3 January 2010 the Spanish authorities submitted detailed information on 15 non-EU countries in which the vast majority (approximately 70 %) of Spanish foreign direct investment was located. More precisely, the Spanish authorities presented two reports prepared by the law firm Garrigues and by KPMG, which include an analysis of the alleged fiscal and legal obstacles in these third countries.
- (18) By letter of 27 January 2010 the Commission received comments from Banesto, a member of the Santander Group.
- (19) By e-mail of 3 March 2010, the Spanish authorities answered a technical question addressed to them on 26 February 2010.

<sup>(5)</sup> See footnote 1.

<sup>(6)</sup> See Commission Decision C(2009) 8107 final and subsequent corrigendum C(2009) 8107 corr, available since January 2010 on the Commission website: [http://ec.europa.eu/competition/elojade/isef/case\\_details.cfm?proc\\_code=3\\_C45\\_2007](http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=3_C45_2007)

- (20) By letter of 9 July 2010 the Commission received comments from Banco Santander.
- (21) By letter of 25 November 2010 the Commission received comments from Telefónica.
- (22) On 27 November 2009, 16 June 2010 and 29 June 2010, technical meetings took place between the Commission and the Spanish authorities.

## II. DETAILED DESCRIPTION OF THE CONTESTED MEASURE

- (23) The measure in question provides for tax amortisation of the financial goodwill arising from the acquisition of a significant shareholding in a foreign target company.
- (24) The measure is governed by Article 12(5) TRLIS (hereinafter 'the contested measure'). More precisely, Article 2(5) of Law 24/2001 of 27 December 2001 amended the Spanish Corporate Tax Law 43/1995 of 27 December 1995, by adding Article 12(5). Royal Legislative Decree 4/2004 of 5 March 2005 provides a consolidated version of the Spanish Corporate Tax Law.
- (25) The Commission is aware that the Spanish legislation has evolved since the date of the opening Decision<sup>(7)</sup>. Nonetheless, the Commission considers that the latest amendments cannot modify or alter the doubts expressed in the opening Decision. For the sake of consistency, the Commission will refer in the present Decision to the numbering of the Spanish legislation as given in the opening Decision, even though it may have been modified. Any new legal provision will be expressly identified as such.
- (26) Article 12(5) TRLIS, within Article 12 TRLIS 'Value adjustments: loss of value of assets', entered into force on 1 January 2002. It essentially provides that a company which is taxable in Spain may deduct from its taxable income the financial goodwill deriving from the acquisition of a shareholding of at least 5 % of a foreign company, in yearly instalments, over not less than the 20 years following the acquisition.

- (27) Goodwill is understood to represent the value of a well-respected business name, good customer relations, employee skills, and other such factors expected to translate into greater than apparent earnings in the future. Under Spanish accounting principles<sup>(8)</sup>, the price paid for the acquisition of a business in excess of the market value of the assets constituting the business is termed 'goodwill' and should be booked as a separate intangible asset as soon as the acquiring company takes control of the target company<sup>(9)</sup>.

- (28) Under Spanish tax principles, with the exception of the contested measure, goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets constituting independent businesses or following a merger or de-merger operation.

- (29) 'Financial goodwill', as used in the Spanish tax system, is the goodwill that would have been booked if the shareholding company and the target company had merged. The concept of financial goodwill under Article 12(5) TRLIS therefore introduces into the field of share acquisitions a concept that is usually used in transfers of assets or business combination transactions. According to Article 12(5) TRLIS, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding.

- (30) Article 12(5) TRLIS provides that the amortisation of financial goodwill is conditional upon meeting the following requirements, as set by reference to Article 21 TRLIS:

- (a) at least 5 % of the foreign company must be held directly or indirectly by the Spanish acquiring company for an uninterrupted period of at least 1 year<sup>(10)</sup>;

<sup>(7)</sup> Law 4/2008 of 23 December 2008, which introduced modifications to several tax law provisions.

<sup>(8)</sup> See Articles 46 and 39 of the 1885 Commercial Code.

<sup>(9)</sup> Resulting from the implementation of Law 16/2007 of 4 July 2007 on 'the reform and adaptation of company law in the field of accounting for the purpose of its international harmonisation in line with European Union legislation.'

<sup>(10)</sup> See Article 21(1)(a) TRLIS.

- (b) the foreign company must be subject to a tax similar to that applicable in Spain. This condition is presumed to be met if the country of residence of the target company has signed a tax convention with Spain to avoid international double taxation and prevent tax evasion<sup>(11)</sup> with a clause on exchange of information;
- (c) the revenue of the foreign company must derive mainly from business activities carried out abroad, or revenue that can be treated as such. This condition is met when at least 85 % of the income of the target company:
- (i) is not included in the taxable base under Spanish international tax transparency rules and is taxed as profits earned in Spain<sup>(12)</sup>. Income is specifically considered to meet these requirements when it derives from the following activities:
- wholesale trade, when the goods are made available to the purchasers in the country or territory of residence of the target company or in any country or territory other than Spain,
  - services provided to clients that do not have their tax domicile in Spain,
  - financial services provided to clients that do not have their tax domicile in Spain,
  - insurance services relating to risks not located in Spain;
- (ii) is dividend income, provided that the conditions on the nature of the income from the shareholding provided for in Article 21(1)(a) and the level of direct and indirect shareholding of the Spanish company are met (Article 21(1)(c)(2) TRLIS)<sup>(13)</sup>.
- (31) In addition to the contested measure, it is worth presenting briefly the following TRLIS provisions to which the present Decision will refer:
- Article 11(4) TRLIS<sup>(14)</sup>, (Article 11 is entitled 'Value adjustments: amortisation' and is contained in Chapter IV of the TRLIS, which defines the tax base) provides for a minimum of 20 years' amortisation of the goodwill deriving from an acquisition under the following conditions: (i) the goodwill results from an acquisition for value; (ii) the seller is unrelated to the acquiring company. The amendments made to this provision subsequent to the opening Decision and brought in by Law No 16/2007 of 4 July 2007, clarified that if condition (ii) was not met, the price paid used for calculating the goodwill will be the price paid for the share acquired by a related company to an unrelated seller, and, in addition, required (iii) a restricted reserve to have been set up for an amount at least equivalent to that deducted under Article 12(5) TRLIS,
  - Article 12(3) TRLIS, which is contained in Chapter IV TRLIS, permits partial deduction for depreciation of domestic and foreign shareholdings, which are not listed on a secondary market, up to the difference between the theoretical accounting value at the beginning and the end of the tax year. The contested measure can be applied in conjunction with this article of the TRLIS<sup>(15)</sup>,
  - Article 89(3) TRLIS (Article 89 is entitled 'Holdings in the capital of the transferring entity and the acquiring entity'), is contained in Title VII, Chapter VIII on the 'Special system for mergers, divisions, transfers of assets and exchanges of shares and change of domicile of a European company or European cooperative society from one European Union Member State to another'. Article 89(3) TRLIS provides for the amortisation of goodwill arising from business restructuring. Under this provision, the following conditions must be fulfilled in order to apply Article 11(4) TRLIS to the goodwill arising from a business combination: (i) a shareholding of at least 5 % in the target company before the business combination; (ii) it must be proven that the goodwill has been taxed and charged to the seller (iii) the seller is not linked to the purchaser. If condition (iii) is not met, the amount deducted must correspond to an irreversible depreciation of the intangible assets,

<sup>(11)</sup> See Article 21(1)(b) TRLIS.

<sup>(12)</sup> See Article 21(1)(c)(1) TRLIS.

<sup>(13)</sup> See Article 21(1)(c)(2) TRLIS.

<sup>(14)</sup> Under the current legislation, this provision is numbered as Article 12(6) TRLIS.

<sup>(15)</sup> As explicitly stated in the second paragraph of Article 12(5): 'The deduction of this difference (i.e. that provided for in Article 12(5) TRLIS) will be compatible, where appropriate, with the impairment loss referred to in paragraph 3 of this article.'

- Article 21 TRLIS, entitled ‘Exemption to avoid international double taxation on dividends and income from foreign sources arising from the transfer of securities representing the equity of entities not resident in Spain’, is contained in Title IV TRLIS. Article 21 lays down the conditions under which dividends or income from entities not resident in Spanish territory are tax exempt when received by a company which is tax domiciled in Spain,
- Article 22 TRLIS, entitled ‘Exemption of certain income obtained abroad via a permanent establishment’, is contained in Chapter IV TRLIS. Article 22 TRLIS lays down the conditions under which income generated abroad by a permanent establishment not situated in Spain is tax exempt.

(32) For the purposes of this Decision:

- transfer of assets shall mean an operation whereby a company transfers, without being dissolved, all or one or more branches of its activity to another company,
- business combination shall mean an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company or to a company that they form in exchange for the issue to their shareholders of securities representing the capital of that other company,
- share acquisition shall mean an operation whereby one company acquires a shareholding in the capital of another company without obtaining a majority or the control of the voting rights of the target company,
- target company shall mean a company not resident in Spain, whose income fulfils the conditions described in paragraph 30(c) and in which a shareholding is acquired by a company resident in Spain,

- intra-EU acquisitions shall mean shareholding acquisitions, which meet all the relevant conditions of Article 12(5) TRLIS, in a target company which is formed in accordance with the law of a Member State and has its registered office, central administration or principal place of business within the Union,
- extra-EU acquisitions shall mean shareholding acquisitions, which meet all the relevant conditions of Article 12(5) TRLIS, in a target company which has not been formed in accordance with the law of a Member State or does not have its registered office, central administration or principal place of business within the Union.

### III. GROUNDS FOR INITIATING THE PROCEDURE

- (33) In the opening Decision, the Commission initiated the formal investigation procedure laid down in Article 108(2) TFEU (former Article 88(2) of the EC Treaty) in respect of the contested measure, because it appeared to fulfil all the conditions for being considered State aid within the meaning of Article 107(1) TFEU. The Commission also had doubts as to whether the contested measure could be considered compatible with the internal market, as none of the exceptions provided for in Article 107(2) and (3) seemed applicable.
- (34) In particular, the Commission considered that the contested measure departed from the ordinary scope of the Spanish corporate tax system, which is the tax system of reference. The Commission also held that the tax amortisation of the financial goodwill arising from the acquisition of a 5 % shareholding in a foreign target company seemed to constitute an exceptional incentive.
- (35) The Commission observed that the tax amortisation applied only to a specific category of undertakings, namely undertakings which acquire certain shareholdings, amounting to at least 5 % of the share capital of a target company, and only in respect of foreign target companies provided that the criteria in Article 21(1) TRLIS are fulfilled. The Commission also underlined that, pursuant to the case law of the Court of Justice of the European Union, a tax reduction favouring only exports of national products constitutes State aid<sup>(16)</sup>. The contested measure therefore seemed selective.

<sup>(16)</sup> See judgment in Joined Cases 6/69 and 11/69 *Commission v France* [1969] ECR 523. See also point 18 of the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (OJ C 384, 10.12.1998, p. 3).

- (36) In this context, the Commission also considered that the selective advantage did not appear to be justified by the inherent nature of the tax system. In particular, it considered that the differentiation created by the contested measure, which departed from the general rules of the Spanish accounting and tax systems, could not be justified by reasons linked to technicalities of the tax system. Indeed, goodwill can only be deducted in the case of a business combination or transfer of assets, except under the provisions of the contested measure. The Commission also considered that it was disproportionate for the contested measure to claim to attain the neutrality objectives pursued by the Spanish system because it is limited solely to the acquisition of significant shareholdings in foreign companies.
- (37) In addition, the Commission considered that the contested measure implied the use of state resources, as it involved the Spanish Treasury foregoing tax revenue. Finally, the contested measure could distort competition in the European business acquisition market by providing a selective economic advantage to Spanish companies engaged in the acquisition of a significant shareholding in foreign companies. Nor did the Commission find any grounds for considering the contested measure compatible with the internal market.
- (38) The Commission therefore concluded that the contested measure could constitute incompatible State aid. If this were the case, recovery should take place according to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the Treaty. The Commission accordingly invited the Spanish authorities and interested parties to submit their observations as to the possible presence of legitimate expectations or any other general principle of Union law which would permit the Commission to exceptionally waive recovery pursuant to the second sentence of Article 14(1) of the above-mentioned Council Regulation.

#### IV. THE FIRST PARTIAL NEGATIVE DECISION

- (39) In the previous Decision, the Commission concluded that Article 12(5) TRLIS constitutes an aid scheme within the meaning of Article 107(1) TFEU when it applies to intra-EU acquisitions.
- (40) The Commission also found that, since the contested measure had been implemented in breach of Article 108(3) TFEU, it constituted an unlawful aid scheme to the extent that it applied to intra-EU acquisitions.
- (41) The Commission maintained the procedure, as initiated by the opening Decision of 10 October 2007, open for extra-EU acquisitions in the light of the new elements
- which the Spanish authorities undertook to provide as regards the obstacles to cross-border mergers outside the EU.

#### V. COMMENTS FROM THE SPANISH AUTHORITIES AND INTERESTED THIRD PARTIES

- (42) The Commission received comments from the Spanish authorities<sup>(17)</sup> and from 32 interested third parties<sup>(18)</sup>, eight of which were associations.
- (43) To summarise, the Spanish authorities consider that Article 12(5) TRLIS constitutes a general measure and not an exception to the Spanish tax system since this provision allows the amortisation of an intangible asset, which applies to any taxpayer who acquires a significant shareholding in a foreign company. In the light of Commission practice and the relevant case law, the Spanish authorities conclude that the contested measures cannot be considered State aid within the meaning of Article 107 TFEU. In addition, the Spanish authorities consider that a different conclusion would be contrary to the principle of legal certainty. The Spanish authorities also contest the competence of the Commission to challenge this general measure as they consider that the Commission cannot use State aid rules as the basis for harmonising tax issues.
- (44) In general, 30 interested third parties (hereinafter 'the 30 interested parties') support the views of the Spanish authorities, whereas another two third parties (hereinafter 'the two parties') consider that Article 12(5) TRLIS constitutes an unlawful State aid measure incompatible with the internal market. Hence, the arguments of the 30 interested parties will be presented together with the position of the Spanish authorities, whereas the arguments of the two parties will be described separately.

#### A. Comments from the Spanish authorities and the 30 interested parties

- (45) As a preliminary remark, the Spanish authorities stress that direct taxation lies within the competence of Member States. Therefore, the Commission's action in this field should be in line with the subsidiarity principle stated in Article 5 EC Treaty (now replaced in substance by Article 5 TFEU). Moreover, the Spanish authorities recall that Article 3 EC Treaty (now replaced in substance by Articles 3 to 6 TFEU) and 58(1)(a) EC Treaty (now replaced by Article 65 TFEU) allow Member States to establish different tax systems, according to the location of the investment or the tax residence of the taxpayer, without this being considered a restriction to the free movement of capital.

<sup>(17)</sup> See paragraph 7.

<sup>(18)</sup> See paragraph 8.

(46) The 30 interested parties also maintain that a negative Commission decision would breach the principle of national fiscal autonomy laid down in the TFEU, as well as Article 56 EC Treaty (now replaced by Article 63 TFEU) prohibiting restrictions on the free movement of capital.

A.1. *The contested measure does not constitute State aid*

(47) The Spanish authorities and the 30 interested parties consider that the contested measure does not constitute State aid within the meaning of Article 107(1) TFEU since: (i) it does not confer an economic advantage; (ii) it does not favour certain undertakings; and (iii) it does not distort or threaten to distort competition between Member States. In line with the logic of the Spanish tax system, they consider that the contested measure should be considered a general measure applying indiscriminately to any type of company and to any activity.

A.1.1. *The contested measure does not confer an economic advantage*

(48) Contrary to the Commission's position as expressed in the opening Decision, Article 12(5) TRLIS does not constitute an exception to the Spanish corporate tax system since (i) the Spanish accounting system is not an appropriate point of reference on which to base the existence of an exception to the tax system; and (ii) even if it were, the characterisation of financial goodwill as a depreciable asset over time has historically been a general feature of the Spanish accounting and corporate tax system.

(49) Firstly, because of the lack of harmonisation of accounting rules, the accounting result cannot serve as a reference point for establishing the exceptional nature of the contested measure. Indeed, in Spain, the tax base is calculated on the basis of the accounting result, adjusted according to tax rules. Therefore, in the case at hand, accounting considerations cannot, in Spain's view, serve as a reference point for a tax measure.

(50) Secondly, it is incorrect to consider goodwill amortisation not to be within the logic of the Spanish

accounting system since both goodwill<sup>(19)</sup> and financial goodwill<sup>(20)</sup> can be amortised over periods up to 20 years. These empirical rules reflect the loss of value of the underlying assets, whether tangible or not. Therefore, Article 12(5) TRLIS would not constitute an exception as it does not depart from the rules on amortisation of goodwill established in the Spanish accounting and tax systems.

(51) Thirdly, the Spanish authorities point out that the contested measure does not constitute a true economic advantage since, in case of sale of the acquired shareholding, the amount deducted is recovered by taxation of the capital gain, thus placing the taxpayer in the same situation as if Article 12(5) TRLIS had not been applied.

(52) Fourthly, the Commission incorrectly refers to Articles 11(4) and 89(3) TRLIS to establish the existence of an advantage. In the opening Decision, the Commission states that neither a business combination nor takeover of the target company is necessary to benefit from Article 12(5) TRLIS. This statement reflects a misunderstanding of the Spanish tax system since these two articles do not prevent a group of companies that jointly acquires control of a target company from deducting a corresponding fraction of the goodwill resulting from the operation. Hence, application of these two articles does not require individual control of the target company in order to benefit from the contested measure. In this context, it would be inappropriate to consider that Article 12(5) TRLIS offers more favourable treatment than Articles 11(4) or 89(3) TRLIS as regards the controlling position of the beneficiaries. Finally, it should be noted that the 5 % shareholding criterion is consistent with the conditions laid down in Article 89(3) TRLIS and also with Commission guidelines and practice<sup>(21)</sup>.

(53) The Spanish authorities point out that the Commission also incorrectly refers to Article 12(3) TRLIS to establish an alleged advantage under Article 12(5) TRLIS: Article 12(3) applies to situations of depreciation in case of an objective loss recorded by the target company, whereas Article 12(5) TRLIS complements this provision and reflects the loss of value attributable to depreciation of the financial goodwill.

<sup>(19)</sup> The Spanish authorities referred to Article 194 of Royal Decree 1564/1989 of 22.12.1989.

<sup>(20)</sup> The Spanish authorities referred to ICAC (Institute of Accounting and Auditing) Resolution No 3, BOICAC, 27.11.1996.

<sup>(21)</sup> See Commission Decision of 22.9.2004 in case N 354/04, *Irish Holding Company Regime* (OJ C 131, 28.5.2005, p. 10).

- (54) Fifthly, the Commission Notice on the application of the State aid rules to measures relating to direct business taxation<sup>(22)</sup> (hereinafter 'the Commission Notice') explicitly states that amortisation rules do not imply State aid. Since the current amortisation coefficient for financial goodwill over a minimum of 20 years is the same as the amortisation coefficient for goodwill, the rule does not constitute an exception to the general tax system.
- (55) Finally, the 30 interested parties also consider that if the contested measure constituted an advantage, the ultimate beneficiaries would be the target company's shareholders since they would receive the price paid by the acquiring company benefiting from the contested measure.

A.1.2. The contested measure does not favour certain undertakings or the production of certain goods

- (56) Firstly, Spain maintains that Article 12(5) TRLIS is a general measure since it is open to any Spanish company whatever its activity, sector, size, form or other characteristics. The only condition for the taxpayer to be able to benefit from the contested measure is to be tax resident in Spain. The fact that not all taxpayers benefit from the measure in question does not make it selective. Therefore, Article 12(5) TRLIS is neither *de facto* nor *de jure* selective within the meaning of Article 107(1) TFEU. Accordingly, by letter dated 14 July 2008<sup>(23)</sup>, the Spanish authorities provided data extracted from the 2006 Spanish tax returns which show that all types of companies (SMEs and large undertakings), as well as companies active in different economic sectors, had benefited from the contested measure. The Spanish authorities also stress that in a recent judgment<sup>(24)</sup>, the General Court indicated that a limited number of beneficiaries is not sufficient in itself to establish the selectivity of the measure since that group can actually represent all of the undertakings in a particular legal and factual situation. In particular, the Spanish authorities stress that the contested measure bears similarities with a recent case<sup>(25)</sup> that the Commission considered to be a general measure and they therefore request the same treatment.

- (57) Secondly, according to the Spanish authorities and the 30 interested parties, in its opening Decision the Commission mixed up the concept of selectivity and the objective conditions of the contested measure which refer only to certain transactions (i.e. shareholding in a foreign target company). Indeed, the Commission alleges that Article 12(5) TRLIS is selective since the same treatment is not granted to comparable investments in Spanish companies. However, the Commission fails to recognise that the selectivity criterion is not determined by the fact that the beneficiary of the contested measure is a group of companies or a multinational company that has a share in a target company. The fact that a measure benefits only companies that comply with the objective criterion laid down in the contested measure does not in itself make it selective. The selectivity criterion implies that subjective restrictions should be imposed on the beneficiary of the contested measure. The selectivity criterion created for this procedure is inconsistent with previous Commission practice and too vague and broad. Taking this concept further would lead to the erroneous conclusion that most tax-deductible expenses fall within the scope of Article 107(1) TFEU.

- (58) The Spanish authorities add that the fact of limiting the amortisation of financial goodwill to that resulting from the acquisition of a significant shareholding in a target company is not sufficient to remove the general character of the contested measure, since it applies indiscriminately to any company that is tax resident in Spain with no further requirements. In line with the case law of the Court of Justice<sup>(26)</sup>, a measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.

- (59) Thirdly, as regards the 5 % threshold, this level does not set a minimum amount to be invested and therefore the contested measure does not benefit only large undertakings. As for the fact that there is no requirement for the seller to pay for capital gains in order for the contested measure to apply, the Spanish authorities consider this to be irrelevant since control of income received abroad by a seller who is not liable for tax in Spain lies outside their field of competence. Lastly, limiting the scope of a measure — for fiscal technical reasons — to shareholding acquisitions in target companies is consistent with the situation resulting from the implementation of various Community Directives.

<sup>(22)</sup> OJ C 384, 10.12.1998, p. 3.

<sup>(23)</sup> See paragraph 12.

<sup>(24)</sup> See Case T-233/04 *Netherlands v Commission* [2008] ECR II-591.

<sup>(25)</sup> See Commission Decision of 13.2.2008 in case N 480/07, *Reduction in revenue from certain intangible assets* (OJ C 80, 1.4.2008, p. 1).

<sup>(26)</sup> See judgment in Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365.



(60) Fourthly, the introduction of the contested measure is in any case justified by the principle of neutrality, which underlies all Spanish tax legislation. This principle implies that the tax treatment of an investment should be neutral irrespective of the instruments used, whether transfer of assets, business combination or share acquisition. Therefore, the tax amortisation of an investment should be identical whatever the instrument used to carry out the acquisition in question. The final aim of the contested measure, in this broader perspective, is to ensure the free movement of capital by avoiding discriminatory tax treatment between transactions with target companies and purely domestic transactions. Given that acquisitions of significant shareholdings in resident companies could lead to a business combination of the acquiring and the acquired companies with no legal or fiscal barriers, the goodwill that would ensue for tax purposes as a result of the combination could be amortised<sup>(27)</sup>. However, goodwill of cross-border operations cannot arise because harmonisation at Community level is not complete or — even worse — because there is no harmonisation outside the European Union.

(61) Moreover, in the course of the investigation, the Spanish authorities and some of the 30 interested parties provided a very detailed description of the legal obstacles that existed in the legislation of 15 third countries. The technical information contained in the submissions presented by the Spanish authorities and the 30 interested parties are summarised in Annexes II and III to this Decision (hereinafter ‘the reports’). These descriptions have to be read more broadly in the context of the following statement by the Spanish authorities<sup>(28)</sup>: ‘the Spanish tax system thus provides for different tax schemes, as in the case of shareholding acquisitions in foreign companies compared with acquisitions in Spanish companies (impossible to undertake merger operations, risk assumption, etc.), in order to achieve the tax neutrality sought by the Spanish domestic legislation and EU law itself and also in order to ensure that the Spanish tax system is consistent and efficient’. According to those authorities and the 30 interested parties, the barriers described in the reports make business combinations between companies from different Member States impossible. Therefore, the aim of the contested measure is to remove the negative impact of these barriers, for whose existence Spain is not answerable. Consequently, limiting the scope of the contested measure to cross-border acquisitions is necessary to enforce the neutrality principle. In this way, still according to the Spanish authorities, the Spanish tax system treats differently taxpayers who are in different situations<sup>(29)</sup>, thereby ensuring that the Spanish tax system is neutral as required by the Spanish tax system itself and by the TFEU.

(62) To conclude, the contested measure is designed to remove the tax barriers that the Spanish tax system generates in investment decisions by penalising share acquisitions in foreign companies as opposed to acquisitions in domestic companies. The contested measure guarantees the same tax treatment for both types of acquisition (direct acquisitions of assets and indirect acquisitions by purchasing shareholdings): goodwill arising from both of them (direct goodwill and financial goodwill) can thus be identified in order to promote the integration of the different markets, until factual and legal barriers to cross-border business combinations have been removed. The Spanish authorities thus ensure that taxpayers can opt to invest at local or cross-border level without being affected by these barriers. Article 12(5) TRLIS basically restores fair conditions of competition by eliminating the adverse impacts of the barriers.

#### A.1.3. The contested measure neither distorts competition nor affects Union trade

(63) The Spanish authorities state that the Commission has not established, to the requisite legal standard, that Article 12(5) TRLIS restricts competition, as (i) the alleged ‘market for the acquisition of shares in companies’ does not constitute a relevant market for the purposes of competition law; and (ii) even if this were the case, the amortisation of financial goodwill does not in itself affect the competitive position of Spanish undertakings.

(64) First, the Commission qualified the contested measure as an anti-competitive advantage on the grounds that Article 12(5) allows Spanish taxpayers to obtain a premium for the acquisition of significant shareholdings in a target company. However, the Commission did not carry out any benchmarking study on the economic circumstances of Spanish and international companies.

(65) Second, since the contested measure is open to any Spanish company with no restrictions, it cannot distort competition. Indeed, any company in the same situation as a beneficiary of the contested measure can benefit from the measure, thus reducing its tax burden, which cancels any competitive edge that might derive from it. In addition, a lower rate of taxation in a Member State that can increase the competitive edge of local companies should not come under the State aid rules as long as it is of a general nature.

<sup>(27)</sup> In application of Article 89(3) TRLIS.

<sup>(28)</sup> See the letter of 5 December 2007 addressed by the Spanish authorities to the Commission, p. 35, mentioned in paragraph 7.

<sup>(29)</sup> As stated on p. 8 of the Spanish authorities’ letter of 30 June 2008 — see paragraph 9.

- (66) Finally, the Commission has already examined, in the light of the Merger Regulation<sup>(30)</sup>, many Spanish cross-border operations that could have benefited from the contested measure. Yet the Commission did not raise any concerns about potential distortions of competition in any of these cases.
- (67) The Commission's allegations are not only far removed from reality but also out of touch with the investment situation of Spanish companies. The contested measure neither distorts competition nor adversely affects intra-EU trading conditions to an extent contrary to the common interest.
- (68) In a non-harmonised market, as a result of competition between tax systems, identical operations have a different fiscal impact depending on where traders are resident. This situation distorts competition even if the national measures at stake are general measures. In other words, this distortion is not the result of State aid but of a lack of harmonisation. If the Commission's reasoning were followed through, it would have to open formal investigations into hundreds of national measures, which would create a situation of legal uncertainty that is highly detrimental to foreign investment.

#### A.2 Compatibility

- (69) Even if the Commission considers that Article 12(5) TRLIS constitutes State aid within the meaning of Article 107(1) TFEU, this provision is compatible with Article 107(3) TFEU since it contributes to the Union interest of promoting the integration of international companies.
- (70) As stated in the State Aid Action Plan<sup>(31)</sup>, a measure can be considered compatible if it addresses a market failure, if it fulfils clearly defined objectives of common interest and if it does not distort intra-EU competition and trade to an extent contrary to the common interest. In the case at hand, the market failure is the difficulty (or virtual impossibility) of carrying out cross-border business combinations. The effect of Article 12(5) TRLIS is to promote the creation of pan-European undertakings, by putting domestic and cross-border acquisitions on the same footing.

- (71) Therefore, for the Spanish authorities, Article 12(5) TRLIS is compatible with the internal market since, in the absence of European tax harmonisation, it achieves the objective of breaking down barriers to cross-border investment in a proportionate manner. The contested measure is effectively aimed at removing the adverse impact of obstacles to cross-border business combinations and aligning the tax treatment of cross-border and local business combinations in order to ensure that the decisions taken as regards such operations are based not on tax considerations but exclusively on economic considerations.

#### A.3 Legitimate expectation and legal certainty

- (72) Finally, and in the event that the Commission declares that Article 12(5) TRLIS constitutes State aid incompatible with the internal market, the Commission must acknowledge the existence of certain circumstances that justify the non-recovery of the alleged State aid received pursuant to Article 12(5) TRLIS. The beneficiaries should have the right to complete the exceptional amortisation of the financial goodwill corresponding to acquisitions made before the date of publication of the final decision.
- (73) Firstly, the Commission seems to recognise, in the opening Decision, the probable existence of legitimate expectations. Therefore, in line with the case law of the General Court<sup>(32)</sup>, this statement constitutes a clear indication of the existence of legitimate expectations. Since the opening Decision does not prejudge the outcome of the formal investigation, legitimate expectations should be recognised for all the operations that took place before the date of publication of the final decision.
- (74) Secondly, in its answers to written questions from MEPs<sup>(33)</sup>, the Commission stated that Article 12(5) TRLIS does not constitute State aid. This statement constitutes a clear position from the Commission which offers obvious legitimate expectations to the Spanish authorities and the beneficiaries of the contested measure.
- (75) Thirdly, in line with the conclusion reached by the Commission in similar cases<sup>(34)</sup>, the Commission has provided a series of indirect evidence that Article 12(5) TRLIS does not constitute State aid. Taking into account these decisions, a prudent undertaking would not have been able to predict that the Commission could take an opposite position.

<sup>(30)</sup> See the Commission Decisions of 10.6.2005 on Cesky Telecom, of 10.1.2005 on O<sub>2</sub>, of 23.5.2006 on Quebec, GIC, BAA, of 15.9.2004 on Abbey National and of 26.3.2007 on Scottish Power available at <http://ec.europa.eu/competition/mergers/cases/>

<sup>(31)</sup> State Aid Action Plan — Less and better targeted state aid: a roadmap for state aid reform 2005-2009, COM/2005/107 final.

<sup>(32)</sup> Judgment in Case T-348/03 *Koninklijke Friesland Foods v Commission* [2007] ECR II-101.

<sup>(33)</sup> Written questions E-4431/05 and E-4772/05.

<sup>(34)</sup> For example, the Commission Decision of 22.9.2004 in case N 354/04, *Irish Holding Company Regime* (OJ C 131, 28.5.2005, p. 10), and the Commission Decision of 13.7.2006 in case C 4/07 (ex N 465/06), *Groepsrentebox* (OJ C 66, 22.3.2007, p. 30).

(76) Finally, the contested measure should continue to apply to all operations prior to the publication date of a negative decision until amortisation of the financial goodwill is completed. The contested measure corresponds to a right to deduct a given amount, determined at the time of the acquisition, whose deduction is spread over the following 20 years. Moreover, because of the position taken by the Commission in similar cases<sup>(35)</sup>, it is justified to assume that the legitimate expectations should remain until the date of publication of the final decision.

### B. Comments from the two parties

(77) According to the two parties, Article 12(5) TRLIS constitutes State aid. They maintain that there are no legitimate expectations in the case at hand and therefore call on the Commission to order recovery of any unlawful aid granted. Their arguments are summarised below.

#### B.1. *The contested measure constitutes State aid*

##### B.1.1. *The contested measure confers an economic advantage*

(78) According to the two parties, Article 12(5) TRLIS is exceptional in nature because the Spanish tax system, with the exception of this provision, does not allow any amortisation of financial goodwill but only a deduction in the event of an impairment test. Until the introduction of Article 12(5) TRLIS the Spanish corporate tax legislation did not allow the amortisation of shareholdings regardless of whether or not there had actually been an impairment. They stress that Article 12(5) TRLIS is probably unique in the European context, as no other Member State has a similar system for cross-border transactions not involving the acquisition of controlling shares.

(79) Under the Spanish tax system, goodwill can be amortised only if there is a business combination — the sole exception is the contested measure, which allows amortisation in an exceptional case: if a minority shareholding is acquired in a target company. This diverges from the general tax system since amortisation is possible not only without there being a business combination but also in cases where the purchaser does not even acquire control of the foreign target company. Article 12(5) TRLIS thus confers a benefit on certain Spanish companies vis-à-vis (i) other Spanish companies that operate only at national level and (ii) other EU operators that compete internationally with the Spanish beneficiaries of the contested measure.

(80) From an economic point of view, the Spanish authorities are not only providing an interest-free loan that will be drawn over a period of 20 years (interest-free tax deferral), but also effectively leaving the repayment date of the interest-free loan to the discretion of the borrower — if indeed the loan is repaid. If the investor does not transfer the significant shareholding, the effect is the same as cancellation of the debt by the Spanish authorities. In this case, the measure turns into a permanent tax exemption.

(81) One of the two parties estimates that, as a result of the contested measure, Spanish acquirers, for instance in the banking sector, are able to pay some 7 % more than they would otherwise be able to. However, it also recognises that as the offer price is a combination of various additional elements, the contested measure is not the only factor, although probably one of the most decisive factors behind the aggressiveness of potential Spanish bidders benefiting from the contested measure. This party considers also that the measure provides a definite advantage to Spanish bidders in international auctions.

##### B.1.2. *The contested measure favours certain undertakings or the production of certain goods*

(82) There is a clear parallel between the case at hand and the circumstances which led to the Court of Justice judgment of 15 July 2004<sup>(36)</sup>. Despite the arguments put forward by the Spanish authorities that the contested measure in the latter case is not selective because Article 37 TRLIS applies to all Spanish undertakings that invest internationally, the Court concluded that the measure constituted State aid since it was limited to one category of undertakings, namely undertakings making certain international investments. This same reasoning can be applied to Article 12(5) TRLIS. The selectivity of Article 12(5) TRLIS is therefore due to the fact that only companies acquiring shareholdings in foreign companies are eligible for this provision.

(83) Furthermore, only enterprises of a certain size and financial strength with multinational operations can benefit from Article 12(5) TRLIS. Although the company's balance sheet discloses the book values of assets, it is unlikely that it also reflects the tacit market values of assets. Therefore, in practice, only operators with a controlling interest in target companies have sufficient access to a company's records to ascertain the tacit market value of the company's assets. Consequently, the 5 % threshold favours companies that perform multinational operations.

<sup>(35)</sup> See the Commission Decision 2001/168/ECSC of 31 October 2000 on Spain's corporation tax law (OJ L 60, 1.3.2001, p. 57).

<sup>(36)</sup> Case C-501/00 *Spain v Commission* [2004] ECR I-6717.

(84) Moreover, only a Spanish operator with existing business in Spain has a Spanish tax base and can benefit from the depreciation. Therefore, only companies resident in Spain with a significant Spanish tax base can in practice benefit from it, since the potential benefit is linked to the size of the Spanish operation rather than of the acquisition. Although Article 12(5) TRLIS is drafted to apply to all operators established in Spain, in practice only a limited and identifiable number of companies with a Spanish tax base, which make foreign acquisitions in the relevant tax year and have a sizeable tax base against which to offset the financial goodwill deduction, can benefit from the application of the measure on an annual basis. As a result, the contested measure in fact gives a different tax treatment even to Spanish operators in the same position of making acquisitions abroad.

(85) The two parties consider that they have not been able to identify any objective or horizontal criterion or condition that justifies the contested measure. On the contrary, they are of the view that the basic intention of the measure is to give a benefit to certain Spanish operators. In addition, if the contested measure is inherent in the Spanish tax system, foreign shareholdings acquired prior to that date should also qualify for the measure, which is not the case since the tax relief is granted only for shareholdings acquired after 1 January 2002.

(86) Accordingly, and in the light of Commission policy<sup>(37)</sup>, the contested measure must be considered selective.

#### B.1.3. The contested measure distorts competition and affects EU trade

(87) The contested measure is clearly discriminatory as it gives Spanish operators a clear fiscal and monetary benefit that foreign operators are not able to enjoy. In a situation of an auction or other competitive procedure for the acquisition of a company, such an advantage makes a significant difference.

<sup>(37)</sup> See Section II.1.b) et seq. of the Commission Report on the application of the state aid rules to measures relating to direct business taxation, available at [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/rapportaidesfiscales\\_en.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/rapportaidesfiscales_en.pdf)

(88) Takeover bids usually presuppose the payment of a premium over the share price of the target company that would almost always result in financial goodwill. On several occasions, the financial press has reported on large acquisitions by Spanish companies and the respective tax benefits accruing from the Spanish tax rules on the amortisation of financial goodwill. For one of those acquisitions by an investment bank, the tax benefit resulting from Article 12(5) TRLIS was estimated to be EUR 1,7 billion, or 6,5 % of the offer price. Another report indicated that the Spanish acquirer had been able to bid about 15 % more than non-Spanish competitors.

(89) The contested measure also seems to favour certain export activities (export aid for foreign share acquisitions) of Spanish companies, which is at odds with established Commission policy<sup>(38)</sup> in this area.

#### B.1.4. The contested measure impacts state resources

(90) The contested measure is of benefit to undertakings that meet certain requirements and enables them to reduce their tax base and thereby the amount of tax that would normally be due in a given year if this provision did not exist. It therefore provides the beneficiary with a financial advantage, the cost of which is directly borne by the budget of the Member State concerned.

### VI. REACTION FROM SPAIN TO THE COMMENTS FROM THIRD PARTIES

(91) The Spanish authorities point out that the vast majority of third parties' comments support their point of view. Only two parties consider that the contested measure constitutes State aid, whereas all the others conclude that Article 12(5) TRLIS does not constitute State aid within the meaning of Article 107(1) TFEU. Otherwise, fewer economic operators would have submitted comments. In addition, the wide range of activities and size of the interested third parties demonstrates the general nature of the contested measure.

<sup>(38)</sup> See Commission Decision 82/364/EEC of 17 May 1982 concerning the subsidising of interest rates on credits for exports from France to Greece after the accession of that country to the European Economic Community (OJ L 159, 10.6.1982, p. 44), in particular Part IV, which refers to Joined Cases 6/69 and 11/69 *Commission v France*.

(92) Regarding the exceptional nature of the contested measure, the Spanish authorities reject this qualification by recalling the common feature of goodwill and financial goodwill amortisation according to Spanish accounting rules<sup>(39)</sup>. In addition, the deduction of goodwill amortisation constitutes the general rule of the Spanish corporate tax system in accordance with the provisions laid down in Articles 11(4) and 89(3) TRLIS. Article 12(5) TRLIS follows the same logic. It is incorrect to present Article 12(3) TRLIS as the general rule for amortisation of financial goodwill since this article refers to the deduction of shareholdings in non-listed entities. This provision is related to the depreciation of the theoretical accounting value and not to financial goodwill. Article 12(3) and 12(5) TRLIS are two complementary general rules: the first refers to the depreciation attributed to the losses generated by the target company, whereas the second refers to the deduction only of the part of the depreciation attributable to the depreciation of financial goodwill. Finally, the fact that no other Member State has a measure similar to the contested measure is irrelevant since tax systems are not harmonised within the European Union.

(93) Regarding the selective nature of the contested measure, the parallels drawn with the Court of Justice judgment of 15 July 2004<sup>(40)</sup> are incorrect since in that case the Commission had clearly defined the profile of the beneficiary, whereas in the present case this could not be done. Indeed, Article 12(5) TRLIS does not require any link between the shareholding acquisition and the export of goods and services. Therefore the contested measure does not have the effect of increasing exports of Spanish goods or services. The fact that this non-selective measure is not available for domestic operations does not affect its general nature. In fact, the final objective of the contested measure is the same as that of the Cross-border Tax Directive, which is to ensure that investment decisions are based on economic rather than tax considerations. Therefore, since it is possible to carry out business combinations with domestic acquisitions and not with cross-border acquisitions, treating domestic operations and cross-border operations differently is not only legally justified but also necessary in order to guarantee the neutrality of the tax system.

(94) Regarding the alleged distorting features of the contested measure, the Spanish authorities point out that any tax relief that reduces the operating costs of a company increases the competitive edge of the beneficiary. However, this statement is irrelevant since the contested measure is a general measure. The different tax rates applied across the Member States, which impact on the competitiveness of their resident companies, do not fall under the State aid rules. In

addition, the contested measure has not been shown to affect trade between Member States. Moreover, the consequence of amortising financial goodwill is not necessarily to increase the price offered by a competitor.

(95) As regards the compatibility of the contested measure with the internal market, the Spanish authorities consider Article 12(5) TRLIS to be appropriate and proportionate to address a market failure by establishing a neutral tax system for domestic and cross-border operations that fosters the development of pan-European companies.

## VII. ASSESSMENT OF THE SCHEME

(96) In order to ascertain whether a measure constitutes aid, the Commission has to assess whether the contested measure fulfils the conditions of Article 107(1) TFEU. This provision states that 'Save as otherwise provided in the Treaties, any aid granted by Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'. In the light of this provision, the Commission will assess hereunder whether the contested measure constitutes State aid.

### A. Selectivity and advantage inherent in the measure

(97) To be considered State aid, a measure must be specific or selective in the sense that it favours only certain undertakings or the production of certain goods.

(98) The Commission Notice<sup>(41)</sup> states that 'The main criterion in applying Article 92(1) (now Article 107(1) TFEU) to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified "by the nature or general scheme" of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned.'

<sup>(39)</sup> See ICAC Resolution No 3 of November 1996, BOICAC 27.

<sup>(40)</sup> See footnote 36.

<sup>(41)</sup> See footnote 22.

- (99) According to the case law of the Court of Justice<sup>(42)</sup>, ‘as regards the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid, it is clear from settled case law that Article 87(1) EC (now Article 107(1) TFEU) requires assessment of whether, under a particular statutory scheme, a State measure is such as to “favour certain undertakings or the production of certain goods” in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question’<sup>(43)</sup>.
- (100) The Court has also held on numerous occasions that Article 107(1) TFEU does not establish a distinction between the causes or the objectives of state measures, but rather defines them in relation to their effects<sup>(44)</sup>. In particular, tax measures which do not constitute an adaptation of the general system to particular characteristics of certain undertakings, but have been conceived as a means of improving their competitiveness, fall within the scope of Article 107(1) TFEU<sup>(45)</sup>.
- (101) The concept of State aid does not, however, apply to state measures which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part. As explained in the Commission Notice<sup>(46)</sup>, ‘some conditions may be justified by objective differences between taxpayers’.
- (102) As explained in more detail in the following section, the Commission considers that the contested measure is selective in that it only favours certain groups of undertakings that carry out certain investments abroad and that this specific character is not justified by the nature of the scheme. The Commission considers that the contested measure should be assessed in the light of the general provisions of the corporate tax system, and more precisely the rules on the tax treatment of financial goodwill (see paragraphs 48 to 69).
- (103) The Commission has also analysed whether the factual hypothesis used as a basis by the Spanish authorities is sound and whether there are barriers in the legislations of third countries. However, it should be pointed out that this exercise cannot constitute a recognition that such barriers could justify a different tax treatment in the present case. Moreover, the purpose of the present Decision is not to set out the conditions which would have allowed the Member State concerned to avoid the classification of the contested measure as State aid.
- (104) Even if an alternative reference system inspired by the one suggested by the Spanish authorities were chosen, the Commission concludes that the contested measure would still constitute a selective advantage, essentially due to the absence of different factual and legal conditions required for the different scenarios to benefit from the provisions on the goodwill or financial goodwill on foreign transactions. More importantly still, under the contested measure the financial goodwill can be recognised separately and can also be amortised if the beneficiary acquires a minority shareholding of 5 %. This level is well below that needed to apply the general rules on amortisation of goodwill<sup>(47)</sup>. The contested measure is therefore an exception to the reference system, whatever its definition.
- (105) In addition to this, the Commission notes other differences as regards the implementing conditions applying to the contested measure and the provisions of the reference system. Indeed, under the contested measure, shareholding acquisitions made before 1 January 2002 are not taken into account for the calculation of the base to be amortised. By contrast, under a business combination scenario, such a cut-off date does not exist when calculating the goodwill and the taxpayer has to prove that the combination is made for valid economic reasons to avoid combinations being aimed at purely obtaining tax benefits<sup>(48)</sup>, whereas the contested measure only provides tax benefits. The Spanish authorities have been unable to provide convincing arguments to justify these differences, and thus the measure cannot be considered to be justified by the logic of the Spanish tax system.

<sup>(42)</sup> See judgments in Cases C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraph 68; C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; and C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54.

<sup>(43)</sup> See judgment in Case C-88/03 *Portugal v Commission* [2006] ECR I-7115, paragraph 54.

<sup>(44)</sup> See, for instance, judgments in Cases C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79; C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 20; C-75/97 *Belgium v Commission* [1999] ECR I-3671, paragraph 25; and C-409/00 *Spain v Commission* [2003] ECR I-1487, paragraph 46.

<sup>(45)</sup> See, for instance, judgment in Case C-66/02 *Italy v Commission* [2005] ECR I-10901, paragraph 101.

<sup>(46)</sup> See footnote 22.

<sup>(47)</sup> Article 89(3) TRLIS, see paragraph 31.

<sup>(48)</sup> See Article 96(2) TRLIS.

- (106) Hence, the contested measure is too imprecise and indiscriminate since it does not set any conditions, such as the existence of specific, legally circumscribed situations which would justify different tax treatment. Consequently, situations which have not been demonstrated to be sufficiently different to justify a selective derogation from general goodwill rules end up benefiting from the contested measure. The Commission therefore considers that the contested measure concerns the tax deduction of specific types of costs and covers a broad category of transactions in a discriminatory manner, which cannot be justified by objective differences between taxpayers.
- (107) Moreover, in line with the case law of the Court of Justice<sup>(49)</sup>, the Commission considers that it is not necessary, in order to arrive at a conclusion regarding the State aid qualification of a scheme, to demonstrate that all individual aid granted under that scheme qualifies as State aid within the meaning of Article 107(1) TFEU. For this purpose, it is sufficient that the implementation of the scheme under review leads to situations which qualify as aid to be able to conclude that the scheme contains aid elements within the meaning of Article 107(1) TFEU. Hence, reviewing the legislation of all possible non-EU countries for which the Commission investigation procedure is still open is unnecessary in the context of this Decision. Therefore, as indicated already in paragraphs 115 et seq. of the previous Decision<sup>(50)</sup>, the Commission has verified — on the basis of methodology explained in detail below — whether some of the individual applications of the contested aid scheme in non-EU transactions involve State aid. This analysis focused on those non-EU countries with which Spain maintains close economic relations and which were therefore selected according to their importance in terms of foreign direct investment (FDI) between 1 January 2002 and 1 June 2009. Of these non-EU countries, the Commission focused its analysis on the countries likely to yield a greater number of individual applications of the contested measure: United States of America (EUR 35 billion FDI), Mexico (EUR 18 billion FDI), Argentina (EUR 15 billion FDI) and Brazil (EUR 13 billion FDI). According to the information submitted by the Spanish authorities in the course of the procedure, it would appear that, of the 15 non-EU countries for which the Spanish authorities presented information, transactions took place not only in the above-mentioned four countries but also in the Republic of Colombia, the Republic of Peru and the Republic of Ecuador. The Commission has therefore extended its review to these three countries also.
- (108) The Commission's reasoning, summarised above, is developed in the following paragraphs.
- A.1. *Tax treatment of financial goodwill under the Spanish tax system with respect to non-EU acquisitions*
- A.1.1. *Reference system*
- (109) In the opening Decision as well as in the previous Decision, the Commission considered that the appropriate reference system is the Spanish corporate tax system and, more precisely, the rules on the tax treatment of financial goodwill set out in the Spanish tax system. This approach is in line with previous Commission practice and the case law of the European Courts, which consider the ordinary corporate tax system to be the reference system<sup>(51)</sup>. This approach is maintained in the present Decision.
- (110) The Spanish authorities state that, in general, the constraints on cross-border business combinations place taxpayers buying shareholdings in domestic companies in a different legal and factual situation from those buying shareholdings in non-resident companies, and in particular in companies located in non-EU countries. The Spanish authorities have explained that the objective of the contested measure is to avoid a difference of tax treatment between, on the one hand, an acquisition followed by a business combination for valuable consideration and, on the other hand, a share acquisition without a business combination. On this basis, the scope of the contested scheme would be limited to the acquisition of significant shareholdings in a company not resident in Spain because some obstacles would make it more difficult to perform a cross-border business combination compared with a local one<sup>(52)</sup>. As a consequence of the existence of these obstacles, Spanish taxpayers investing abroad would be placed, legally and factually, in a different situation from those investing in Spain. In this respect, the Spanish authorities state that<sup>(53)</sup>: 'In summary, the mere differential nature of certain tax measures does not necessarily imply that they are State aid, since these measures also need to be examined to see whether they are necessary or functional as regards the efficiency of the tax system, as stated in the Commission Notice. Hence the Spanish tax system envisages different tax schemes for objectively different situations, as is the case for acquisitions of shareholdings in foreign companies as against acquisitions in Spanish companies (impossible to perform merger operations, risk management, etc.) with a view to achieving the tax

<sup>(49)</sup> See judgment of the Court of First Instance in Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others v Commission* [2009] ECR II-3029, paragraphs 381 et seq.

<sup>(50)</sup> See paragraph 14.

<sup>(51)</sup> See, inter alia, judgment of the Court of First Instance in Case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933, paragraph 82.

<sup>(52)</sup> See the e-mail dated 16 June 2009 from the Spanish authorities mentioned in paragraph 13.

<sup>(53)</sup> See in particular page 6 of the letter dated 22 April 2009 (A-9531) from the Spanish authorities mentioned in paragraph 9.

neutrality imposed by Spanish domestic legislation and by Community law itself, and ensuring that the logic of the Spanish tax system is consistent and efficient.

- (111) Providing specific tax treatment for cross-border shareholding acquisitions would, according to these authorities, be necessary to ensure the neutrality of the Spanish tax system and to prevent more favourable treatment for domestic shareholding acquisitions. Therefore, the Spanish authorities and the 30 interested parties consider that the correct reference framework for the assessment of the contested measure would be the tax treatment of goodwill for foreign acquisitions.
- (112) In the previous Decision, the Commission maintained the procedure in order to allow the Spanish authorities to provide new information as regards the existence of explicit legal obstacles to cross-border business combinations in non-EU countries.
- (113) In this context, and essentially on the basis of the elements contained in the reports, the Commission has investigated the legislation of various non-EU countries simply in order to check the Spanish authorities' allegations about the existence of explicit legal obstacles to cross-border combinations. This examination does not, however, constitute recognition of the fact that such obstacles could justify a different reference system in the present case. In the course of this examination, the Commission checked mainly whether a Spanish parent company had the legal capacity to combine with a subsidiary resident in a non-EU country.
- (114) The following premises underpin this investigation which was limited to examining the truth of the allegations made in the arguments:
- first, the Commission checked whether, as stated in the previous Decision <sup>(54)</sup>, Spanish companies face an explicit legal barrier, attributable to a non-EU country and not to Spain <sup>(55)</sup>, that prevents them from converting a foreign subsidiary into a branch. Such legal provisions can only constitute a barrier, however, if the company concerned would have been able to exercise effective influence, most notably by means of a majority shareholding, over the target company to such an extent that it would be able to impose a merger if the obstacles were not there. Hence, legal provisions in non-EU countries which prevent a Spanish taxpayer from acquiring

control over a target company in that country cannot be regarded as a relevant explicit legal barrier in the sense alleged by the Spanish authorities: as a result of such provisions, Spanish companies/taxpayers can never fulfil the condition of effective influence since they will always be minority shareholders of the target company. Therefore, they can never have the necessary effective capacity to impose a business combination. The Commission would like to point out that the condition of control was assessed at the level of the beneficiary of the measure (and not of the group to which it may belong) in line with the Spanish tax system. Following the same line of reasoning, the Commission considers that an explicit prohibition on non-resident entities directly owning specific assets (for instance, property on the coast) cannot constitute an explicit legal barrier in the context of this exercise.

The Commission considers that a mere administrative burden or formality <sup>(56)</sup> required of non-resident companies by non-EU countries cannot be regarded as an explicit legal barrier simply because it generates additional costs — which may be tax-deductible under the Spanish tax system — but does not make the business combination impossible,

- second, an allegation that there are no known examples of cross-border business combinations between Spanish companies and companies from certain non-EU countries cannot constitute sufficient evidence or demonstrate the existence of obstacles. The elements taken into account by companies when deciding to carry out a business combination are diverse and not limited only to the capacity of the companies concerned to combine their business activities. This is clearly illustrated by the fact that some of the 30 interested parties own numerous fully-controlled Spanish subsidiaries without having combined their Spanish businesses, even though the Spanish authorities recognise that there are no obstacles to domestic business combinations. Therefore, the Commission considers that, of the elements in the reports, only explicit prohibitions of cross-border business combinations set out in the laws of non-EU countries can be accepted. Indeed, as already indicated in paragraph 93 of the previous Decision, if unsubstantiated elements of a general nature were taken into account, this analysis would risk becoming largely arbitrary.

<sup>(54)</sup> See paragraphs 117 and 118 of the previous Decision.

<sup>(55)</sup> See paragraph 94 of the previous Decision.

<sup>(56)</sup> The Commission would underline that any technicalities necessary to achieve a cross-border business combination, such as setting up a permanent establishment in the country of residence of the target company prior to the combination or complying with certain formalities involving the central bank of the non-EU country, constitute administrative formalities. The Commission also considers that there are valid tax reasons for adopting rules aimed at avoiding arrangements which do not reflect economic reality or whose main reason is to achieve a tax reduction. Such rules also exist in the Spanish tax system.



(115) The findings presented below are based on the information provided by the Spanish authorities in the reports, the truthfulness and completeness of which have been checked by the Commission in the light of the methodological remarks set out above. On this basis, the Commission considers that, contrary to the arguments of the Spanish authorities, it cannot be considered that all the laws of non-EU countries raise explicit legal obstacles to cross-border business combinations. Therefore, similar to what was stated in relation to intra-EU transactions in the previous Decision<sup>(57)</sup>, the Commission cannot share the views expressed by the Spanish authorities, supported by the arguments of the 30 interested parties, as regards the general existence of these alleged obstacles. The Commission considers that outside the EU Member States, and at least in the following relevant non-EU countries, no explicit legal obstacles can be recognised, as indicated below:

— *United States of America:*

(i) first of all, the Commission notes that, in a report presented by the Spanish authorities<sup>(58)</sup>, when assessing whether there are any precedents for cross-border business combinations, the author states 'Not found, but it is likely that this event happened in Delaware'. In contradiction with the Spanish authorities' main arguments, the conclusion in one of the reports<sup>(59)</sup> regarding this country seems to be that there is no general, explicit legal prohibition on cross-border business combinations;

(ii) second, under the general rules of company law<sup>(60)</sup> and tax law<sup>(61)</sup>, there is no explicit prohibition on business combinations with foreign entities;

(iii) third, specific company law provisions<sup>(62)</sup> apply to domestic business combinations. There is, to the Commission's knowledge, no explicit prohibition on applying those provisions to cross-border business combinations, even though the applicable administrative formalities may differ. The Commission points out that at

least the State of Delaware makes cross-border business combinations<sup>(63)</sup> explicitly feasible on condition that the inverse is permitted by the legislation of the country where the foreign company is resident. Therefore, if such a transaction is not feasible between companies located respectively in Delaware and Spain, the Commission considers that the obstacles are attributable to Spain, and therefore not relevant for the present assessment. This finding should be looked at in the context of the importance of the State of Delaware for the location/incorporation of companies in the USA<sup>(64)</sup>;

(iv) fourth, specific tax provisions apply to domestic business combinations in order to avoid unfavourable taxation when carrying out restructuring operations. There is, to the Commission's knowledge, no explicit prohibition on applying them to cross-border business combinations, even though the applicable administrative formalities may differ;

(v) finally, the Commission did not find any case law by the competent US courts that would contradict its conclusion regarding the absence of explicit legal obstacles to cross-border business combinations with a company resident in the United States.

— *Mexico:*

(i) first of all, the Commission notes that Article 8(3) of the tax convention<sup>(65)</sup> between Spain and Mexico, signed on 6 October 1994 and still in force, explicitly provides for cross-border business combination transactions. As a consequence of this provision, such transactions benefit from roll-over relief since unrealised capital gains are not taxed. As far as the Commission can see, the purpose of this international tax convention is to remove the possible exclusion<sup>(66)</sup> of cross-border business

<sup>(57)</sup> See in particular paragraphs 93 et seq.

<sup>(58)</sup> See page 19 of the KPMG report entitled 'Analysis of the existence of specific legal and tax obstacles in cross-border mergers in a number of jurisdictions' — December 2009.

<sup>(59)</sup> See the section regarding United States of America in Annex II to this Decision, which contains a summary of the KPMG report.

<sup>(60)</sup> See footnote 61.

<sup>(61)</sup> See, inter alia, sections 351 et seq. of the Internal Revenue Code of 1986, as amended, section 7874 of the same code, and the Treasury Regulation of 23 January 2006 (T.D. 9242) available at <http://www.law.cornell.edu/uscode/>

<sup>(62)</sup> See footnote 59, sections 361 et seq. and sections 367 et seq. of the Internal Revenue Code <http://www.law.cornell.edu/uscode/>

<sup>(63)</sup> See, inter alia, section 252(a) of the Delaware General Corporation Law available at: <http://delcode.delaware.gov/title8/c001/sc09/index.shtml>

<sup>(64)</sup> According to the official website of the State of Delaware, available at <http://www.corp.delaware.gov/aboutagency.shtml>, 'The State of Delaware is a leading domicile for U.S. and international corporations. More than 850 000 business entities have made Delaware their legal home. More than 50 % of all publicly-traded companies in the United States including 63 % of the Fortune 500 have chosen Delaware as their legal home'.

<sup>(65)</sup> Available at [http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a\\_\\_\\_&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80\\_\\_\\_&idioma=es\\_ES&menu=1&img=8](http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a___&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80___&idioma=es_ES&menu=1&img=8)

<sup>(66)</sup> See, inter alia, Article 14(b) of the tax code of the Mexican Federation available at: <http://info4.juridicas.unam.mx/ijure/fed/718.htm?s=>

combinations from the benefit of the specific tax rules applying to domestic business combinations;

(ii) second, under Mexican legislation (company law and tax law), and taking into account the above tax convention, there is no explicit legal prohibition on business combinations with Spanish entities;

(iii) finally, the Commission did not find any case law by the competent Mexican courts that would clearly contradict its conclusion regarding the absence of explicit legal obstacles to cross-border business combinations with a company resident in Mexico.

— *Brazil:*

(i) first of all, the Commission notes that a precedent of a cross-border business combination (not with Spain) was found by the Spanish authorities<sup>(67)</sup>;

(ii) second, under the general rules of company law and tax law<sup>(68)</sup>, there is no explicit legal prohibition on business combinations with foreign entities, although administrative formalities may differ<sup>(69)</sup>;

(iii) third, some explicit legal restrictions apply to the performance of economic activities in certain sectors<sup>(70)</sup> by entities controlled by foreign companies. However, as stated above (see paragraph 114), legal provisions in non-EU countries preventing a Spanish taxpayer from taking control of a target company in that country cannot be regarded as a relevant explicit legal barrier in the sense alleged by the Spanish authorities: as a result of this provision, Spanish companies/taxpayers can never fulfil the condition of effective influence since they will always be a minority shareholder in the target company. As far as the Commission can see,

this is precisely the situation which arises from the Brazilian legislation referred to in the two reports;

(iv) finally, the Commission did not find any case law that would contradict its conclusion regarding the absence of explicit legal obstacles to cross-border business combinations with a company resident in Brazil.

— *Argentina:*

(i) first of all, the Commission notes that Article 5 of the tax convention<sup>(71)</sup> between Spain and Argentina, signed on 26 August 1994 and still in force, explicitly provides for cross-border business combinations. As a result of this provision, cross-border restructuring operations cannot give rise to unfavourable taxation;

(ii) second, under the general rules of company law<sup>(72)</sup> and tax law<sup>(73)</sup>, there is no explicit legal prohibition on business combinations with foreign entities although the applicable administrative formalities may differ;

(iii) third, the Commission did not find any case law that would contradict its conclusion regarding the absence of explicit legal obstacles to cross-border business combinations with a company resident in Argentina. Moreover, the Commission does not agree with the interpretation in the two reports of the rulings<sup>(74)</sup> issued by the tax administration in certain planned cross-border transactions. These rulings simply clarify the conditions of the Argentinian tax roll-over arrangements. They do not mention the existence of a general and explicit prohibition on applying these arrangements to cross-border restructuring operations. Moreover, the interpretation given in the reports of these specific rulings contradicts the general provision in the above-mentioned tax convention<sup>(75)</sup> between the Kingdom of Spain and the Argentine Republic.

<sup>(67)</sup> See page 29 of the second report. In 2004, Labatt Brewing Canada Holding Ltd, a beverage company with headquarters in the Bahamas and Beverage Associates Holding Lts, also with headquarters in the Bahamas, were combined to form the Brazilian Companhia de Bebidas das Américas, with headquarters in São Paulo.

<sup>(68)</sup> See, inter alia, Law 10 460/02, Law 9 249/95, Law 6 404/76, and Law 9 249/95.

<sup>(69)</sup> See, inter alia, Decree-Law 2 627/40, Law 10 406/02, Law 4 132/62, Law 5 709/1, Law 6 634/79 and Federal Decree 74 965/74 available at <http://www.jusbrasil.com.br/>

<sup>(70)</sup> See, inter alia, Law 9 472/97 and Decree 2 617/98, available at <http://www.jusbrasil.com.br/>

<sup>(71)</sup> Available at [http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a\\_\\_\\_&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80\\_\\_\\_&idioma=es\\_ES&menu=1&img=8](http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a___&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80___&idioma=es_ES&menu=1&img=8)

<sup>(72)</sup> See, inter alia, Commercial Companies Law No 19 550, and Law No 25 156, available at <http://infoleg.mecon.gov.ar/>

<sup>(73)</sup> See, inter alia, Decree 649/97 (Law on Taxation of Earnings) and Decree 1344/98, available at <http://infoleg.mecon.gov.ar/>

<sup>(74)</sup> See the opinion of the AFIP No 37/1997 of 8 July 1997, No 6/1998 of 30 January 1998 available at <http://biblioteca.afip.gob.ar/>

<sup>(75)</sup> Available at [http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a\\_\\_\\_&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80\\_\\_\\_&idioma=es\\_ES&menu=1&img=8](http://www.agenciatributaria.es/wps/portal/Listado?channel=de40217740119010VgnVCM10000050f01e0a___&ver=L&site=56d8237c0bc1ff00VgnVCM100000d7005a80___&idioma=es_ES&menu=1&img=8)

## — Ecuador:

- (i) first of all, the Commission notes that, under the general rules of company law and tax law, there is no explicit legal prohibition on business combinations with foreign entities <sup>(76)</sup>;
- (ii) Second, the Commission notes that a report presented by the Spanish authorities <sup>(77)</sup> recognises that a cross-border business combination is feasible provided that the Spanish acquirer has set up a branch in Ecuador beforehand.

## — Peru:

- (i) first of all, the Commission notes that, under the general rules of company law and tax law, there is, to the Commission's knowledge, no explicit legal prohibition on business combinations with foreign entities <sup>(78)</sup>;
- (ii) second, the Commission notes that Article 2074 of the Peruvian Civil Code sets out the principles applicable to cross-border business combinations and the General Companies Law allows business combinations involving a branch of a foreign entity and a company resident in Peru <sup>(79)</sup>;
- (iii) third, the Law on Income Tax ensures neutral treatment of business combinations involving a branch of a foreign entity and a company resident in Peru <sup>(80)</sup>;
- (iv) the Commission therefore considers that a cross-border business combination is in any case feasible provided that the Spanish acquirer has set up a branch in Peru beforehand.

## — Colombia:

- (i) first of all, the Commission notes that the *Superintendencia de Sociedades* <sup>(81)</sup> explicitly confirms that cross-border business combinations are feasible under Colombian legislation <sup>(82)</sup>;
  - (ii) second, under the general rules of company law and tax law <sup>(83)</sup>, there is no explicit legal prohibition on business combinations with foreign entities even though the applicable administrative formalities may differ;
  - (iii) third, the Commission notes that a report presented by the Spanish authorities <sup>(84)</sup> recognises that cross-border business combinations are feasible provided that the Spanish acquirer has set up a branch in Colombia beforehand.
- (116) The Spanish authorities submitted information on the laws of eight other non-EU countries. As already stated in paragraph 107, the Commission considers that the above findings are sufficient to confirm that, in any event, even if one were to admit that the existence of legal obstacles to cross-border business combinations are significant, the reference system is the rules on the tax treatment of financial goodwill in the Spanish system. Nonetheless, applying the same methodology and criteria as described in paragraphs 114 et seq., the Commission considers, on the basis of the information available, that no explicit legal obstacles to cross-border business combinations of a general nature exist in the laws of Chile, Venezuela, Algeria, Canada, Australia, Japan or Morocco.
- (117) Therefore, on the basis of the above findings, the Commission cannot agree with the Spanish authorities that each potential individual beneficiary of the contested measure is faced, be it only in practice, with insurmountable obstacles to cross-border business combinations.

<sup>(76)</sup> See, inter alia, Ecuador's Companies Law, Organic Law on the Tax System, and Taxation Code, available at <http://www.supercias.gov.ec/>

<sup>(77)</sup> See the conclusion in the Annex on Ecuador's legislation prepared by Garrigues.

<sup>(78)</sup> See, inter alia, the Civil Code, General Companies Law and the Law on Income Tax available at <http://www.supercias.gov.ec/>

<sup>(79)</sup> See footnote 3 of the Annex on Peru in the Garrigues report.

<sup>(80)</sup> See page 8 of the Annex on Peru in the Garrigues report.

<sup>(81)</sup> This institution is described as the technical body through which the President of the Colombian Republic inspects and monitors commercial companies (see <http://www.supersociedades.gov.co/ss/drvisapi.dll?Mlval=sec&dir=280>).

<sup>(82)</sup> See, for instance, the replies by the *Superintendencia de Sociedades* to questions 220-16478 and number 220-62883 available at <http://www.supersociedades.gov.co/ss/drvisapi.dll?Mlval=sec&ldir=45&id=18036>

<sup>(83)</sup> See the Taxation Law, available at: [http://www.secretariassenado.gov.co/senado/basedoc/codigo/estatuto\\_tributario.html#14-1](http://www.secretariassenado.gov.co/senado/basedoc/codigo/estatuto_tributario.html#14-1).

<sup>(84)</sup> See the conclusion in the Annex on the legislation of Colombia produced by Garrigues.

(118) In the light of the above, the Commission considers that there is no reason to depart from the reference system in the opening Decision and the previous Decision: the appropriate reference framework for assessing the contested measure is the general Spanish corporate tax system and, more precisely, the rules on the tax treatment of financial goodwill in the Spanish tax system. This conclusion cannot be affected by the fact that the Commission found two non-EU countries where explicit legal obstacles do exist (India and China). As already stated in paragraph 107, in line with the case law of the Court of Justice<sup>(85)</sup>, the Commission considers that, in order to arrive at a conclusion regarding the State aid qualification of a scheme, it is not necessary to demonstrate that all individual aid granted under that scheme qualifies as State aid within the meaning of Article 107(1) TFEU.

(119) More precisely, as regards China, the 2005 Company Law applying to mergers involving only limited liability companies or joint stock limited companies incorporated in China, and Articles 2 and 55 of the regulation entitled 'Provisions on Acquisitions of Domestic Enterprises by Foreign Investors' issued by the Chinese Ministry of Commerce on 22 June 2009, explicitly exclude non-resident companies from the scope of application of the business combination rules so that a Spanish company would not be able to combine its business with a Chinese-controlled subsidiary.

(120) With reference to the legislation in force in India, Articles 391 to 394 of the Indian Companies Law of 1956 explicitly exclude non-resident companies from the scope of application of the business combination rules so that a Spanish company would not be able to combine its business with any Indian-controlled subsidiary.

#### A.1.2. Existence of a derogation from the reference system

(121) Under the Spanish tax system, the tax base is calculated on the basis of the accounting result, to which

adjustments are then made by applying specific tax rules. As a preliminary remark and on a subsidiary basis, the Commission notes that the contested measure derogates from the Spanish accounting system. The emergence of financial goodwill can only be computed in abstract by consolidating the accounts of the target company with those of the acquiring company. However, under the Spanish accounting system, the consolidation of accounts is required in case of 'control'<sup>(86)</sup> and is done for both domestic and foreign associations of companies, in order to provide the global situation of a group of companies subject to unitary control. Such a situation is deemed<sup>(87)</sup> to exist, for instance, if the parent company holds the majority of the voting rights of the subsidiary company. Nonetheless, the contested measure does not require any such type of control and applies as from a 5 % level of shareholding. Finally, the Commission also notes that, from 1 January 2005<sup>(88)</sup>, in line with accounting rules, financial goodwill can no longer be amortised by most Spanish companies. In effect, in this respect the 30 interested parties refer to provisions<sup>(89)</sup> that are no longer in force under the current Spanish accounting system. As a result of Law 16/2007 of 4 July 2007 reforming and adapting commercial law in the field of accounting for the purposes of international accounting harmonisation under EU legislation, as well as Royal Decree 1514/2007 of 16 November 2007 on the General Accounting Plan, from an accounting point of view the amortisation of neither goodwill nor financial goodwill is allowed any more. These amendments to Spanish accounting law are in line with Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards<sup>(90)</sup>. Therefore, given these considerations, the contested measure constitutes an exception to the ordinary accounting rules applicable in Spain.

(122) That being said, because of the fiscal nature of the contested measure, the existence of an exception must be assessed in comparison with the reference tax system, and not merely on an accounting basis. In this context, the Commission notes that the Spanish tax system has never permitted the amortisation of financial goodwill, except under Article 12(5) TRLIS. In particular, no such amortisation is possible for domestic transactions. This is clear from the following:

<sup>(86)</sup> Pursuant to Article 42 of the 1885 Commercial Code.

<sup>(87)</sup> See Article 42(1) of the 1885 Commercial Code.

<sup>(88)</sup> Companies having issued securities admitted to trading on a regulated market of any Member State within the meaning of Article 1(13) of Council Directive 93/22/EEC, pursuant to Article 4 of this Directive.

<sup>(89)</sup> Article 194 of Royal Decree 1564/1989 of 22 December 1989 approving the revised version of the Law on Limited Liability Companies.

<sup>(90)</sup> OJ L 243, 11.9.2002, p. 1.

<sup>(85)</sup> See judgment of the Court of First Instance in Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others v Commission*, cited above, paragraphs 381 et seq.

- (123) For Spanish tax purposes, goodwill can only be booked separately following a business combination<sup>(91)</sup>, which materialises either in the case of acquisition or contribution of the assets that make up an independent business, or following a legal business combination. In such cases, the goodwill arises as the accounting difference between the acquisition cost and the market value of the assets that make up the business acquired or held by the combined company. When the acquisition of the business of a company is made by way of the acquisition of its shares, as in the case of the contested measure, goodwill can only arise if the acquiring company combines subsequently with the acquired company, over which it will then have control.
- (124) However, under the contested measure, neither control nor the combination of the two businesses is necessary. The mere acquisition of a shareholding of at least 5 % in a foreign company is sufficient. Thus, by allowing the financial goodwill, which is the goodwill that would have been booked if the businesses had combined, to appear separately even in the absence of a business combination, the contested measure constitutes an exception to the reference system. It must be stressed that the exception does not result from the duration of the period during which the financial goodwill is amortised compared with the period that applies to traditional goodwill<sup>(92)</sup>, but rather from the different treatment of domestic and cross-border transactions. The contested measure cannot be considered a new general accounting rule in its own right because the amortisation of financial goodwill deriving from the acquisition of domestic shareholdings is not allowed.
- (125) Given all the above considerations, the Commission concludes that the contested measure derogates from the reference system. As will be demonstrated in paragraphs 153 to 163, the Commission considers that neither the Spanish authorities nor the 30 interested parties have put forward sufficiently coherent arguments to alter this conclusion.

#### A.1.3. Existence of an advantage

- (126) Under Article 12(5) TRLIS, part of the financial goodwill deriving from the acquisition of shareholdings in foreign companies can be deducted from the tax base by way of derogation from the reference system. Therefore, by reducing the tax burden of the beneficiary, Article 12(5) TRLIS provides them with an economic
- advantage. It takes the form of a reduction in the tax to which the companies concerned would otherwise be liable. This reduction is proportionate to the difference between the acquisition price paid and the market value of the underlying booked assets of the shareholdings purchased.
- (127) The precise amount of the advantage with respect to the acquisition price paid corresponds to the net discounted value of the tax burden reduction provided by the amortisation that is deductible throughout the amortisation period following the acquisition. It therefore depends on the corporate tax rate in the years concerned and the discount interest rate applicable.
- (128) If the acquired shareholdings are resold, part of this advantage would be recouped by means of capital gain taxation. Indeed, by allowing amortisation of financial goodwill, if the foreign shareholding in question is resold, the amount deducted would lead to an increase in the capital gain taxed at the time of sale. However, in the event of such uncertain circumstances, the advantage would not disappear completely since taxation at a later stage does not take the liquidity cost into account. As rightly pointed out by the two parties, from an economic point of view, the amount of the advantage is at least similar to that of an interest-free credit line that allows up to 20 annual withdrawals of one-20th of the financial goodwill for as long as the shareholdings are held on the taxpayer's books.
- (129) Taking a hypothetical example, already mentioned by the Commission in the opening Decision, a shareholding acquired in 2002 would yield an advantage corresponding to 20,6 % of the amount of financial goodwill, assuming a discount interest rate of 5 %<sup>(93)</sup> and considering the existing structure of corporate tax rates until 2022 as currently set out in Law No 35/2006<sup>(94)</sup>. The third parties have not contested these figures. In the event that the acquired shareholdings are resold, the advantage would correspond to the interest that would have been charged to the taxpayer for a credit line with the characteristics described in the previous paragraph.

<sup>(91)</sup> Pursuant to Article 89(3) TRLIS.

<sup>(92)</sup> Pursuant to Article 11(4) TRLIS.

<sup>(93)</sup> In accordance with the TRLIS as amended by Law 35/2006, the corporate tax rate used for the calculation was 35 % from 2002 to 2006, 32,5 % in 2007 and 30 % thereafter.

<sup>(94)</sup> Eighth Additional provision, Law 35/2006 of 28 November on Personal Income Tax and partial amendment of the Laws on Corporate Tax and on Income Tax for Non-Residents and Tax on Personal Net Wealth, *Official State Gazette* No 285, 29.11.2006.

- (130) Finally, the Commission cannot share the views of the Spanish authorities and the 30 interested parties that the final beneficiary of the contested measure would only be the seller of the foreign shareholding since it would receive a higher price. The Commission rejects this argument after assessing the effect of the contested measure in its current form. First, there is no mechanism guaranteeing that the advantage is passed on in full or in part to the seller. Second, the acquisition price results from a series of different elements, not just from the contested measure. Third, even if the above two conditions were met, the Spanish taxpayer benefiting from the contested measure must still be considered the beneficiary of the measure. Even if an economic advantage were transferred to the seller, the contested measure would still give the acquirer greater capacity to offer a higher price, which is of the utmost importance in the case of a competitive acquisition operation.
- (131) Therefore, the Commission concludes that, in any event, the contested measure provides an advantage at the time of acquisition of foreign shareholdings.

#### A.1.4. Justification of the measure by the logic of the Spanish tax system

- (132) The Commission considers that, in line with the settled case law of the Court of Justice<sup>(95)</sup>, the measures introducing a differentiation between undertakings do not constitute State aid when that differentiation arises from the nature and overall structure of the system of charges of which they form part. This justification based on the nature or overall structure of the tax system reflects the consistency of a specific tax measure with the internal logic of the tax system in general.
- (133) In this regard, the Commission considers, firstly, that the Spanish authorities have not demonstrated that the effect of the contested measure would be to eliminate double taxation. The scheme in fact does not establish any conditions to prove that the seller has been effectively taxed on the gain derived from the transfer of the shareholding, even though such a condition is imposed for amortising the goodwill arising from a business combination<sup>(96)</sup>. It should be underlined that, although the Spanish authorities claim not to be competent to exercise control over a foreign seller carrying out

operations abroad, the Commission notes that this condition is required for the application of other Spanish tax provisions<sup>(97)</sup> but not for the contested measure.

- (134) Secondly, the contested measure does not constitute a mechanism to avoid double taxation of future dividends that would be taxed upon realisation of future profits and should not be taxed twice when distributed to the company that holds a significant shareholding for the acquisition of which financial goodwill was paid. In fact, the contested measure creates no relation between the dividends received and the deduction enjoyed as a result of the contested measure. On the contrary, the dividends received from a significant shareholding in a foreign company already benefit from both the exemption provided for by Article 21 TRLIS and the direct tax neutrality provided for by Article 32 TRLIS to avoid international double taxation. In this connection, the amortisation of the financial goodwill results in an additional advantage with respect to the acquisition of significant shareholdings in foreign companies.
- (135) Thirdly, the Spanish authorities have not demonstrated that the contested measure is an extension of the impairment rules which presuppose that there is objective evidence of losses based on a detailed and objective calculation that is not required by the contested measure. On the contrary, Article 12(3) TRLIS permits partial deductions for depreciation of equity shareholdings in domestic and foreign shareholdings which are not traded on a secondary market for impairments occurring between the beginning and the end of the tax year. The contested measure — which is, for beneficiaries, compatible with Article 12(3) TRLIS<sup>(98)</sup> — provides for further deductions over and above the decrease in the theoretical accounting value linked to impairment.
- (136) Fourthly, the Commission notes that the financial goodwill deriving from the acquisition of domestic shareholdings cannot be amortised whereas the financial goodwill of foreign companies is amortised under certain conditions. Different tax treatment of the financial goodwill of foreign companies compared with domestic ones is a differentiation introduced by the contested measure which is neither necessary nor proportionate in terms of the logic of the tax system. In fact, the Commission considers that it is disproportionate for the scheme at hand to impose substantially different nominal and effective taxation on companies in comparable situations just because some of them are involved in investment opportunities abroad.

<sup>(95)</sup> See Case C-88/03 *Portugal v Commission*, cited above, paragraph 81. See footnote 49 of this Decision. See also judgments of the Court of First Instance in Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270-01 *Diputación Foral de Álava and Others v Commission*, cited above, paragraph 179 and Joined Cases T-230/01 to T-232/01 and T-267/01 to T-269/01 *Diputación Foral de Álava and Others v Commission* [2009] ECR II-139, paragraph 190.

<sup>(96)</sup> Pursuant to Article 89(3)(a)(1) TRLIS.

<sup>(97)</sup> See Articles 89, 21 and 22 TRLIS.

<sup>(98)</sup> As explicitly stated in the second subparagraph of Article 12(5): 'the deduction of this difference (i.e. Article 12(5) TRLIS) will be compatible, where appropriate, with the impairment losses referred to in paragraph 3 of this Article.'

(137) Moreover, the Commission considers that the comments made by one of the 30 interested parties<sup>(99)</sup> mean that even the rationale behind the justification put forward by Spain would be contrary to the logic of the Spanish tax system. In fact, according to this submission, in a cross-border business combination scenario, the goodwill that would arise would, in all likelihood, be located abroad, more precisely in the foreign permanent establishment resulting from the dissolution of the target company. Therefore, again according to this submission, even in a cross-border business scenario, Spain would not allow goodwill to be amortised in Spain as the goodwill is not located in Spain. In addition to this, the Commission notes additional differences in the conditions applying to each of these two scenarios. Under the contested measure, shareholding acquisitions made before 1 January 2002 are not taken into account for the calculation of the base to be amortised. However, in a business combination scenario, this cut-off date does not exist when calculating the goodwill. Moreover, in a business combination scenario, the taxpayer has to prove that the main objective of the combination derives from economic considerations in order to avoid combinations only aimed at obtaining tax benefits<sup>(100)</sup>, whereas the contested measure only provides tax benefits. The Spanish authorities have not been able to provide convincing arguments to justify these differences, which are thus to be considered as not being duly justified by the logic of the Spanish tax system.

(138) Finally, the Spanish authorities also argue that the contested measure is justified by the neutrality principle which must be applied in the corporate tax context<sup>(101)</sup>. Indeed, the explanatory memorandum to the Corporate Tax Law<sup>(102)</sup> in force when the contested measure was introduced clearly referred to this principle. In this respect, the Commission notes that the ‘*competitiveness principle*’<sup>(103)</sup> invoked by the Spanish authorities, who expressly refer to ‘*an increase in exports*’, also drives this reform. In this context, it should be recalled that, according to previous Commission Decisions<sup>(104)</sup>, it is disproportionate to impose different effective taxation on companies in comparable situations just because they are involved in export-related activities or pursue investment opportunities abroad. In addition, the Commission recalls that, as the Court stated,<sup>(105)</sup> ‘...whilst the principles of equal tax treatment and

equal tax burden certainly form part of the basis of the Spanish tax system, they do not require that taxpayers in different situations be accorded the same treatment’.

(139) In the light of the above, the Commission considers that the neutrality principle cannot justify the contested measure. Indeed, as highlighted also by the two parties, the fact that the acquisition of a 5 % minority shareholding acquired after a given date benefits from the contested measure demonstrates that the measure would include certain situations that bear no significant similarity. In this way it could be said that, under the reference system, situations which are both factually and legally different are treated in an identical manner. The Commission considers therefore that the neutrality principle cannot be invoked to justify the contested measure.

(140) Given the above considerations, the Commission must conclude that the selective advantage aspect of the tax scheme under review is not justified by the nature of the tax system. Therefore, the contested measure must be considered as including a discriminatory element in the form of a limitation regarding the country in which the transaction benefiting from the tax advantage takes place, and this discrimination is not justified by the logic of the Spanish tax system.

A.2. *Complementary reasoning: analysis of the contested measure from the point of view of a reference system based on the one suggested by the Spanish authorities*

(141) Although the Commission considers, as stated in the previous paragraphs, that the arguments raised by the Spanish authorities rely on an incorrect analysis of the de facto legislation of non-EU countries, as in the previous Decision, the Commission also analysed the contested measure from the point of view of a hypothetical reference system based on the one suggested by the Spanish authorities.

(142) The Spanish authorities have explained that the objective of the contested measure is to avoid a difference of tax treatment between, on the one hand, an acquisition followed by a business combination for valuable consideration and, on the other hand, a share acquisition without a business combination. On this basis, the scope of the contested scheme would be limited to the acquisition of significant shareholdings in a company not resident in Spain because some obstacles would make it more difficult to perform a cross-border business combination than a local one<sup>(106)</sup>. As a result of these barriers, Spanish taxpayers investing abroad

<sup>(99)</sup> See comments received from Telefonica on 20 September 2010, page 2.

<sup>(100)</sup> See Article 96(2) TRLIS.

<sup>(101)</sup> See in particular paragraph 60.

<sup>(102)</sup> Corporate Tax Law 43/1995, which was repealed by Royal Legislative Decree 4/2004.

<sup>(103)</sup> Defined by the Spanish authorities in the explanatory memorandum to Law 43/1995, as ‘The competitiveness principle requires the corporate tax system to support and be consistent with the economic policy measures to enhance competitiveness ..., and it also requires incentives to make businesses more international and thereby give rise to an increase in exports, to comply with this principle.’

<sup>(104)</sup> See, inter alia, the Commission Decision of 22 March 2006 on direct tax incentives in favour of export related investments (OJ C 302, 14.12.2007, p. 3) paragraph 51.

<sup>(105)</sup> See paragraph 127 of the judgment cited in footnote 36.

<sup>(106)</sup> See the e-mail dated 16 June 2009 from the Spanish authorities referred to in paragraph 13.

would be placed, legally and factually, in a different situation from those investing in Spain. Indeed, the Spanish authorities state that<sup>(107)</sup>: 'In summary, the mere differential nature of certain tax measures does not necessarily imply that they are State aid, since these measures also need to be examined to see whether they are necessary or functional as regards the efficiency of the tax system, as stated in the Commission Notice. Hence the Spanish tax system envisages different tax schemes for objectively different situations, as is the case for acquisitions of shareholdings in foreign companies as against acquisitions in Spanish companies (impossible to perform merger operations, risk management, etc.) with a view to achieving the tax neutrality imposed by Spanish domestic legislation and by Community law itself, and ensuring that the logic of the Spanish tax system is consistent and efficient.' Hence, providing specific tax treatment for cross-border shareholding acquisitions would be necessary to ensure the neutrality of the Spanish tax system and to avoid more favourable treatment of domestic shareholding acquisitions. Therefore, the Spanish authorities and the 30 interested parties consider that the correct reference framework for the assessment of the contested measure would be the tax treatment of the goodwill for foreign acquisitions.

- (143) However, the Commission points out that, even under this alternative reference system which could be defined as the tax treatment of goodwill and financial goodwill deriving from an economic interest in a company resident in a country other than Spain, the contested measure still constitutes a derogation which is not consistent with the logic of the Spanish tax system. The fact that the acquisition of 5 % minority shareholding which has been acquired after a given date benefits from the contested measure demonstrates that the measure would include certain situations which bear no significant similarity to other transactions requiring at least majority control. In this way it can be said that, under this hypothetical alternative reference system, situations which are both factually and legally different are treated identically. The Commission considers, therefore, that the contested measure constitutes a derogation even under this alternative reference system and that the neutrality principle cannot be invoked to justify it.

#### B. Presence of state resources

- (144) The measure involves the use of state resources as it implies forgoing tax revenue for the amount corresponding to the reduced tax liability of the companies

<sup>(107)</sup> See, in particular, page 6 of the Spanish authorities' letter of 22 April 2009 (A-9531), cited in paragraph 9.

taxable in Spain that acquire a significant shareholding in foreign companies for a period of at least 20 years following the acquisition.

- (145) The forgoing of tax revenues mitigates the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect. Likewise, a measure allowing certain undertakings to benefit from a tax reduction or to postpone payment of tax normally due amounts to State aid. From a budgetary point of view and in line with the case law of the Court of Justice<sup>(108)</sup> and the Commission Notice<sup>(109)</sup>, the contested measure leads to a loss of tax revenue for the state, resulting from the reduction in the tax base, which is equivalent to consumption of state resources.
- (146) For these reasons, the Commission considers that the contested measure involves the use of state resources.

#### C. Distortion of competition and trade between Member States

- (147) According to the case law of the Court of Justice<sup>(110)</sup>, '...for the purpose of categorising a national measure as prohibited State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid...In addition, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned.' Moreover, in line with the settled case law of the Court<sup>(111)</sup>, for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. The Commission considers that the conditions set out in the case law are fulfilled for the following reasons.

<sup>(108)</sup> See judgment in Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] ECR I-289.

<sup>(109)</sup> See footnote 21. In particular, see points 9 and 10 of the Commission Notice.

<sup>(110)</sup> See footnote 42, paragraphs 139–143.

<sup>(111)</sup> Judgment of the Court of First Instance in Case T-214/95 *Vlaams Gewest v Commission* [1998] ECR II-717.



(148) First, the contested measure provides an advantage in terms of financing and, therefore, strengthens the position of the economic unit that can be formed by the beneficiary and the target company. In that regard and in line with the case law of the Court <sup>(112)</sup>, the mere fact of owning controlling shareholdings in a target company and exercising that control by involving itself directly or indirectly in the management of it, must be regarded as taking part in the economic activity carried on by the controlled undertaking.

(149) Second, the contested measure is liable to distort competition, most clearly amongst European competitors, by providing a tax reduction to Spanish companies that acquire a significant shareholding in target companies. This analysis is confirmed by the fact that several companies complained or intervened after the opening Decision to state that the contested measure provided a significant advantage fuelling the merger appetite of Spanish companies, in particular in the context of tendering procedures. These interventions confirm at least that a series of non-Spanish companies consider that their position on the market is affected by the contested measure, irrespective of the correctness of their detailed submissions as regards the existence of aid.

(150) Finally, the Commission would like to state that the selective advantage is granted to companies which are Spanish taxpayers, and not to the activities of Spanish taxpayers outside the EU. The tax base which is eroded is the one which derives from taxable economic activity in Spain. Hence, the advantage is granted directly to the activity of the beneficiary which is carried out in Spain, and not in the permanent establishment outside the EU. Therefore, in the light of this fact, the Commission considers that it cannot be argued, in the case at hand, that the advantage cannot distort competition or trade between Member States because the contested measure applies to non-EU countries. Even though the advantage is granted in line with objective conditions relating to transactions with non-EU countries, this does not alter the fact that the effect of the measure results in an erosion of the tax base deriving from an economic activity carried out in the internal market.

(151) Therefore the Commission concludes that the contested measure is liable to affect trade between Member States and distort competition, mainly in the internal market, by potentially improving the operating conditions of the beneficiaries directly engaged in economic activities which are taxable in Spain.

#### D. The Commission's reaction to the comments received

(152) Before concluding on the classification of the measure, the Commission considers it appropriate to analyse in more detail certain arguments raised by the Spanish authorities and by third parties, which have not yet been explicitly or implicitly addressed in the paragraphs concerning the assessment of the scheme (paragraphs 96 et seq.).

##### D.1. Reaction to the data extracted from the 2006 tax returns and to the comments about the judgment of the Court of Justice in Case C-501/00

(153) As regards the data extracted by the Spanish authorities from the 2006 tax returns in order to demonstrate that the contested measure is not selective <sup>(113)</sup>, the Commission underlines the general lack of precision of the information submitted. First, the data present the distribution of beneficiaries by category (activity, turnover), but do not indicate whether the beneficiaries concerned represent a small or large part of each of the categories concerned. Secondly, although statistics based on the size of the turnover of the beneficiaries could be an interesting indicator in order to demonstrate that the contested measure applies to all companies in Spain, it must be underlined that the contested measure is related to acquisitions of shareholdings. This type of investment does not necessarily generate significant turnover, which implies, for example, that holding companies may be included as SMEs in the data concerned. Therefore, for the data to be considered relevant, it would be necessary to take into account additional indicators, such as the total balance sheet figures, as well as whether the beneficiaries can consolidate their tax base with other Spanish taxpayers. Thirdly, the data also appear unrepresentative because they contain no indication of the level of shareholdings acquired (control or only minority shareholdings) by the beneficiaries. Finally, the data received do not provide any indication making it possible to determine whether the conditions of the 2003 SME Recommendation of the Commission <sup>(114)</sup> are fulfilled. Therefore the Commission considers that its demonstration that the contested aid measure is selective due to the very characteristics of the legislation in question is not undermined by the partial and unrepresentative data provided by the Spanish authorities.

(154) Nonetheless, even if the arguments presented by the Spanish authorities had been complemented by additional evidence, this would not remove the selective nature of the contested measure as only certain undertakings benefit from the measure, also in line with the judgment of the Court of Justice in Case C-501/00 *Spain v Commission* <sup>(115)</sup>. Indeed, as regards the Spanish authorities' classification of the measure as a general measure <sup>(116)</sup> because it is open to any undertakings

<sup>(113)</sup> See paragraph 12.

<sup>(114)</sup> OJ L 124, 20.5.2003, p. 36.

<sup>(115)</sup> See footnote 36.

<sup>(116)</sup> See in particular paragraphs 43 and 56.

<sup>(112)</sup> See judgment in Case C-222/04, cited in footnote 108.

resident in Spain, it is worth recalling this judgment of the Court. That case also concerned an exception to Spanish corporate tax, more specifically a measure entitled 'deduction for export activities'. The Spanish authorities contended before the Court that the scheme was open to any undertaking resident in Spain for tax purposes. However, the Court considered that the tax deduction could 'benefit only one category of undertaking, namely undertakings which have export activities and make certain investments referred to by the contested measures' <sup>(117)</sup>. The Commission considers that also in the present case, the contested measure is intended to promote the export of capital out of Spain in order to strengthen the position of Spanish companies abroad, thereby improving the competitiveness of the beneficiaries of the scheme.

- (155) In this respect it is noteworthy that, according to the Court of Justice, 'in order to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective but it has not been shown that that purpose corresponds to the overall logic of the tax system. ... The fact that the contested measures pursue a commercial or industry policy objective, such as the promotion of international trade by supporting foreign investment, is thus not sufficient to take them outside the classification of "aid" within the meaning of Article 4(c) CS.' <sup>(118)</sup>. In the present case, the Spanish authorities have simply declared that the contested measure is intended to promote international trade and the consolidation of companies, without proving that such a measure is justified by the logic of the system. In the light of the above, the Commission confirms its analysis that the contested measure is selective.

#### D.2. Reaction to the comments on Commission practice

- (156) As regards the reference made to the alleged innovative interpretation of the concept of selectivity in the present case, it should first be underlined that this approach is fully in line with the Commission's decision-making practice and the case law of the Court as described in paragraph 109. Nor does the approach in this particular case depart from Commission Decision N 480/07 <sup>(119)</sup> to which the Spanish authorities refer. In fact, this Decision took into account the specific nature of the objective pursued by referring <sup>(120)</sup> to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee *Towards a more effective use of tax incentives in favour of R & D* <sup>(121)</sup>. In the case at hand, the objective pursued by

the contested measure does not have a similar objective. Moreover, unlike the present case, the Spanish measure covered by Commission Decision N 480/07 did not make any distinction between national and international transactions.

- (157) Finally, as regards the derogation from the corporate tax system resulting from the implementation of Directives <sup>(122)</sup> such as the Parent-Subsidiary Directive or the Cross-border Interest and Royalty Payments Directive, the Commission considers that the situation resulting from implementation of these Directives is fully consistent with the reasoning developed in this Decision. Following harmonisation within the European Union, cross-border operations within the European Union and within each Member State should be considered to be in a comparable legal and factual situation. In addition, the Commission would like to underline the fact that the Court of Justice stated that <sup>(123)</sup>: 'as Community law stands at present, direct taxation falls within the competence of the Member States, although it is settled case law that they must exercise that competence consistently with Community law (see, in particular, Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 20) and therefore avoid taking, in that context, any measures capable of constituting State aid incompatible with the common market.'

#### D.3. Reaction to the comments on Article 65(1)(a) TFEU

- (158) As already pointed out before, it must be borne in mind that, although direct taxation falls within the competence of Member States, they must nonetheless exercise that competence consistently with EU law <sup>(124)</sup>, including the provisions of the TFEU on State aid. Article 65(1)(a) TFEU simply limits the scope of Article 63 TFEU and does not affect in any way the application of the Treaty rules on State aid, including those granting control powers to the Commission in that area.
- (159) Moreover, Article 65 TFEU, as invoked by the Spanish authorities, must be read in conjunction with Article 63 TFEU, which prohibits restrictions on the movement of capital between Member States. In fact, Article 65(1) TFEU provides that 'the provisions of Article 63 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

<sup>(117)</sup> See Case C-501/00, in particular paragraph 120 of the judgment.

<sup>(118)</sup> See Case C-501/00, footnote 36, and paragraph 124 of the judgment.

<sup>(119)</sup> See footnote 25 and paragraph 56.

<sup>(120)</sup> See Commission Decision of 14.2.2008, case N480/07, cited in footnote 25.

<sup>(121)</sup> SEC(2006) 1515, COM/2006/0728 final, Section 1.2.

<sup>(122)</sup> See paragraph 59.

<sup>(123)</sup> See paragraph 123 of the judgment in Case C-501/00, cited in footnote 36.

<sup>(124)</sup> See judgments of the Court of Justice in Cases C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, C-264/96 *ICI v Colmer (HMIT)* [1998] ECR I-4695, paragraph 19 and C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19.

(160) The possibility granted to Member States by Article 65(1)(a) TFEU of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested, has already been upheld by the Court. According to that case law, before the entry into force of Article 65(1)(a) TFEU, national tax provisions which established certain distinctions based, in particular, on the residence of taxpayers, could be compatible with EU law provided that they applied to situations which were not objectively comparable<sup>(125)</sup> or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system<sup>(126)</sup>. In any case, objectives of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty<sup>(127)</sup>.

(161) Also, as regards the period after the entry into force of Article 65(1)(a) TFEU, the Court has inquired into the possible presence of objectively comparable situations which could justify legislation restricting the free movement of capital. With reference to certain tax laws which had the effect of deterring taxpayers living in a Member State from investing their capital in companies established in another Member State and which also produced a restrictive effect in relation to companies established in other Member States in that they constituted an obstacle to their raising capital in the Member State concerned, the Court constantly held that such laws could not be justified by an objective difference in situation of such a kind as to justify a difference in tax treatment, in accordance with Article 65(1)(a) TFEU<sup>(128)</sup>.

(162) In any case, it must be borne in mind that Article 65(3) TFEU states specifically that the national provisions referred to by Article 65(1)(a) TFEU are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments<sup>(129)</sup>.

(163) In the light of the above, and in particular in view of the fact that there are no explicit legal obstacles in some of the non-EU countries to which the contested scheme

applies, the Commission considers that, in the present case, domestic share acquisitions and share acquisitions of companies established in all other Member States, and in some of the non-EU countries where no explicit legal obstacles have been identified, are, for the reasons highlighted above, in an objective comparable situation, and that there are no overriding reasons of general interest which could justify different treatment of taxpayers with regard to the place where their capital is invested.

#### E. Conclusion on the classification of the contested measure

(164) Due to the fact that the scheme applies both within the EU (see the previous Decision) and to a number of situations outside the EU where no explicit legal obstacles have been identified, the Commission considers that the contested measure in its entirety, also to the extent that it applies to non-EU acquisitions, fulfils all the conditions laid down in Article 107(1) TFEU and should thus be regarded as State aid.

(165) In line with the case law of the Court of Justice<sup>(130)</sup>, the Commission would like to reiterate that the purpose of this Decision is not to establish the conditions which would make it possible for the Member State concerned to avoid the classification of the contested measure as State aid. This question should have been discussed by the Spanish authorities and the Commission, as part of the notification of the scheme at issue, before the scheme was put into effect.

#### F. Compatibility

(166) As stated in the opening Decision, the Commission considers that the aid scheme in question does not qualify for any of the derogations laid down in Article 107(2) and (3) TFEU.

(167) In the course of the procedure, the Spanish authorities and the 30 interested parties presented their arguments to demonstrate that the derogations provided for in Article 107(3)(c) TFEU would apply in the present case<sup>(131)</sup>. The two parties considered that none of the provisions of Article 107(2) or Article 107(3) TFEU applied in the present case.

<sup>(125)</sup> See, in particular, judgment of the Court of Justice in Case C-279/93 *Schumacker* [1995] ECR I-225.

<sup>(126)</sup> See judgments of the Court of Justice in Cases C-204/90 *Bachmann v Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305.

<sup>(127)</sup> See judgments of the Court of Justice in Cases C-120/95 *Decker v Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 39, Case C-158/96 *Kohll v Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41 and C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48.

<sup>(128)</sup> See judgments of the Court of Justice in Cases C-315/02 *Lenz* [2004] ECR I-7063 and C-319/02 *Manninen* [2004] ECR I-7477.

<sup>(129)</sup> See judgment of the Court of Justice in Case C-35/98 *Verkooijen*, cited above, paragraph 44.

<sup>(130)</sup> See judgment of the Court of First Instance in Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others v Commission*, cited above, paragraphs 381 et seq.

<sup>(131)</sup> See paragraphs 69 et seq.

- (168) The derogations in Article 107(2) TFEU, concerning aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.
- (169) Nor does the derogation provided for in Article 107(3)(a) apply, which authorises aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious under-employment, because the measure is not conditional upon carrying out any type of activity in specific regions <sup>(132)</sup>.
- (170) In the same way, the contested measure adopted in 2001 cannot be regarded as promoting the execution of a project of common European interest or remedying a serious disturbance in the economy of Spain, as provided for in Article 107(3)(b). Nor does it have as its object the promotion of culture and heritage conservation as provided for in Article 107(3)(d).
- (171) Finally, the contested measure must be examined in the light of Article 107(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In this respect, it should first be noted that the contested measure does not fall under any of the frameworks or guidelines which define the conditions for considering certain types of aid compatible with the internal market.
- (172) As regards the arguments raised by the Spanish authorities and by the 30 interested parties based on the State Aid Action Plan of 2005 <sup>(133)</sup>, where they consider that certain measures can be compatible if they essentially respond to a market failure, the Commission observes that alleged general difficulties in carrying out cross-border mergers cannot be regarded as a market failure.
- (173) The fact that a specific company may not be capable of undertaking a certain project or transaction without aid does not necessarily mean that there is a market failure. Only where market forces would not in themselves be able to reach an efficient outcome measure – i.e. where not all potential gains from trade are realised measure – can a market failure be considered to exist.
- (174) The Commission does not dispute that the costs involved in some transactions may well be higher than those involved in other transactions. However, since these costs are real costs that accurately reflect the nature of the projects being considered — i.e. costs relating to their different geographic location or the different legal environment in which they are to take place — it is efficient for the companies to take these costs fully into account when making their decisions. On the contrary, inefficient outcomes would arise if these real costs were ignored or, indeed, compensated by State aid. The same type of real-cost differences also arise when comparing different transactions within the same country as well as when comparing cross-border transactions, and the existence of these differences does not mean that inefficient market outcomes would arise.
- (175) The examples provided by the Spanish authorities of alleged increased costs for conducting international transactions compared with national transactions are all related to real costs of conducting transactions, which should be fully taken into account by market participants in order to achieve efficient outcomes.
- (176) For a market failure to be present, essentially there would have to be externalities (positive spillovers) generated by the transactions or significant incomplete or asymmetric information leading to otherwise efficient transactions not being carried out. While these may be, theoretically, present in certain transactions, both international and national (e.g. in the context of joint R & D programmes), they cannot be considered inherently present in all international transactions, let alone in transactions of the type in question. In this respect, the Commission considers that the claim relating to market failures cannot be accepted.

<sup>(132)</sup> See other examples of previous Commission practice, such as the Commission Decision 2004/76/EC of 13 May 2003 on the state aid scheme implemented by France for headquarters and logistics centres (OJ L 23, 28.1.2004, p. 1) recital 73; see also, for similar reasoning, the Commission Decision 2003/515/EC of 17 February 2003 on the state aid implemented by the Netherlands for international financing activities (OJ L 180, 18.7.2003, p. 52) recital 105; the Commission Decision 2004/77/EC of 24 June 2003 on the aid scheme implemented by Belgium — tax ruling system for United States foreign sales corporations (OJ L 23, 28.1.2004, p. 14) recital 70.

<sup>(133)</sup> See footnote 31.

(177) Moreover it should be recalled that, when assessing whether aid can be deemed compatible with the internal market, the Commission balances the positive impact of the measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. The State Aid Action Plan, building on existing practice, has formalised a three-step 'balancing test'. The first two steps address the positive effects of the State aid and the third addresses the negative effects and resulting balancing of the positive and negative effects. The balancing test is based on three questions:

- (a) assessing whether the aid is aimed at a well-defined objective of common interest, (e.g. growth, employment, cohesion, environment, energy security);
- (b) assessing whether the aid is appropriate to deliver the objective of common interest, i.e. whether the proposed aid addresses the market failure or other objective. This assessment requires checking whether:
  - (i) State aid is an appropriate policy instrument;
  - (ii) there is an incentive effect, namely whether the aid changes the behaviour of undertakings;
  - (iii) the measure is proportionate, namely whether the same change in behaviour could be obtained with less aid;
- (c) assessing whether the distortions of competition and effect on trade are limited, so that the overall balance is positive.

(178) It is first necessary to assess whether the objective pursued by the aid can indeed be regarded as being in the common interest. Despite the alleged aim of fostering single-market integration, in the present case the objective pursued by the aid is not well defined as it goes beyond market integration, by promoting the expansion of Spanish companies in the European market in particular.

(179) The second step requires assessing whether the aid is properly designed to reach the well-defined objective of common interest. More precisely, State aid must change

the behaviour of a beneficiary undertaking in such a way that it engages in activities that contribute to the achievement of the objective of common interest, which it would not carry out without the aid or which it would carry out in a limited or different way. The Spanish authorities and the 30 interested parties did not present any specific arguments demonstrating the likelihood that this incentive effect would be produced.

(180) The third question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, aid granted to a particular undertaking or economic sector may lead to serious distortions of competition and of trade between Member States. In this respect, the 30 interested parties consider that the aid scheme does not have an impact on the competitive situation of companies liable to corporate tax in Spain, since the financial effect of Article 12(5) would be negligible. However, as already indicated above in paragraphs 126 et seq., there are serious indications that the effect of Article 12(5) is far from negligible. Moreover, since the aid scheme is applicable only to foreign transactions, it clearly has the effect of focusing the distortions of competition on foreign markets.

(181) The last step in the compatibility analysis is to evaluate whether the positive effects of the aid, if any, outweigh its negative effects. As indicated above, in this case the Spanish authorities and the 30 interested parties did not demonstrate the existence of a well-defined objective leading to clear positive effects. They consider, in general terms, that Article 12(5) TRLIS fulfils the Union objective of promoting cross-border transactions, without embarking on the evaluation of the potential and actual negative effects of the contested measure. In any case, even assuming that the positive effect of the measure is to promote cross-border transactions by eliminating obstacles in such transactions, the Commission considers that the positive effects of the measure do not outweigh its negative effects, in particular because the measure's scope is imprecise and indiscriminate.

(182) In conclusion, the Commission considers that, as regards the analysis in accordance with Article 107(3)(c) TFEU in particular, the tax advantages granted under the contested measure are not related to investment, job creation or specific projects. They simply relieve the undertakings concerned of charges normally borne by those undertakings and must therefore be considered to be operating aid. As a general rule, operating aid does not fall within the scope of Article 107(3)(c) TFEU since it distorts competition in the sectors in which it is granted and is at the same time incapable, by its very nature, of

achieving any of the objectives laid down in that provision<sup>(134)</sup>. In line with the standard practice of the Commission, such aid cannot not be considered compatible with the internal market, as it neither facilitates the development of any activities or economic areas, nor is it limited in time, degressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned. The result of the 'balancing test' confirms this analysis.

- (183) In the light of the above, it must be concluded that the entire aid scheme in question, also to the extent that it applies to extra-EU acquisitions, is incompatible with the internal market.

### G. Recovery

- (184) The contested measure has been implemented without having been notified in advance to the Commission in accordance with Article 108(3) TFEU. The measure therefore constitutes unlawful State aid.

- (185) Where unlawfully granted State aid is found to be incompatible with the internal market, the consequence of such a finding is that the aid should be recovered from the recipients pursuant to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty<sup>(135)</sup>. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as possible. No arguments raised by the Spanish authorities or by the 30 interested parties justify a general departure from this basic principle.

- (186) Nevertheless, Article 14(1) of Regulation (EC) No 659/1999 provides that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'. The case law of the Court of Justice and Commission practice have established, among other things, that an order to recover aid infringes a general principle of EU law where, as a result of the Commission's actions, the beneficiary of a measure has legitimate expectations that the aid has been granted in accordance with EU law<sup>(136)</sup>.

- (187) In its judgment in the *Forum 187* case<sup>(137)</sup>, the Court of Justice held that 'the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted...'

- (188) The Spanish authorities and the 30 interested parties have essentially invoked the existence of legitimate expectations based, firstly, on certain Commission replies to written parliamentary questions and, secondly, on the alleged similarity of the aid scheme with earlier measures which have been declared compatible by the Commission. Thirdly, the Spanish authorities and the 30 interested parties consider that the principle of legitimate expectations implies that the Commission can ask for recovery neither of the deductions already realised nor of all outstanding deductions, up to the 20-year period established by the TRLIS.

- (189) As regards the alleged similarity of the aid scheme to other measures, which have been considered not to constitute State aid, the Commission takes the view that the aid scheme is substantially different from the measures assessed by the Commission in its Decision of 1984 concerning Belgian coordination centres<sup>(138)</sup>. The contested measure has a different scope since it does not concern intra-group activities, as in the case of the Belgian coordination centres. Moreover, the contested measure has a different structure, which renders it selective, most notably because it applies only to transactions linked to foreign countries.

- (190) As regards the impact of the Commission's statements on the beneficiaries' legitimate expectations, the Commission takes the view that a distinction should be drawn between two periods: (a) the period starting from the entry into force of the measure on 1 January 2002 until the date of publication of the opening Decision in the *Official Journal of the European Union* on 21 December 2007; and (b) the period following the publication of the opening Decision in the *Official Journal of the European Union*.

<sup>(134)</sup> See judgments of the Court of First Instance in Case T-211/05 *Italy v Commission* [2009] ECR II-2777, paragraph 173 and Case T-459/93 *Siemens v Commission* [1995] ECR II-1675, paragraph 48.

<sup>(135)</sup> OJ L 83, 27.3.1999, p. 1.

<sup>(136)</sup> See, inter alia, Commission Decisions 2003/515/EC, 2004/76/EC and 2004/77/EC.

<sup>(137)</sup> Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL* [2006] ECR I-5479, paragraph 147; see also judgments of the Court of Justice in Case C-506/03 *Germany v Commission*, not yet reported, paragraph 58 and Case C-265/85 *Van den Bergh en Jurgens BV v Commission* [1987] ECR 1155, paragraph 44.

<sup>(138)</sup> Commission Decision SG(84) D/6421 of 16.5.1984.

(191) With reference to the first period, the Commission acknowledges its answers to the parliamentary questions by Mr Erik Meijer and Ms Sharon Bowles regarding the possibility that the contested measure constituted State aid. More precisely, in reply to the parliamentary question by Mr Erik Meijer MEP, on 19 January 2006 a Commissioner answered on behalf of the Commission as follows: 'The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of state aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain' <sup>(139)</sup>. On 17 February 2006, in reply to the parliamentary question by Ms Sharon Bowles MEP, a Commissioner answered on behalf of the Commission as follows: 'According to the information currently in its possession, it would however appear to the Commission that the Spanish (tax) rules related to the write off of "goodwill" are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the state aid rules' <sup>(140)</sup>.

(192) By these statements to the European Parliament, the Commission provided specific, unconditional and consistent assurances of a nature such that the beneficiaries of the contested measure entertained justified hopes that the goodwill amortisation scheme was lawful, in the sense that it did not fall within the scope of the State aid rules, <sup>(141)</sup> and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings. Although these statements did not amount to a formal Commission decision establishing that the amortisation scheme did not constitute State aid, their effect was equivalent from the point of view of the creation of a legitimate expectation, especially in view of the fact that the applicable procedures ensuring the respect of the collegiality principle had been respected in this case. As the notion of State aid is objective <sup>(142)</sup> and the Commission

does not have any discretionary power as regards its interpretation – unlike what happens when assessing compatibility – any precise and unconditional statement on behalf of the Commission to the effect that a national measure is not to be regarded as State aid will naturally be understood as meaning that the measure was 'non-aid' from the outset (i.e. also before the statement in question). Any undertaking which had previously been uncertain as to whether or not it would in future be liable, under the State aid rules, to recovery of advantages it had obtained under the goodwill amortisation scheme arising from transactions entered into before the Commission statements could have concluded thereafter that such uncertainty was unfounded, as it could not be expected to demonstrate greater diligence than the Commission in this respect. In these specific circumstances, and bearing in mind that EU law does not require the demonstration of a causal link between the assurances given by a Community institution and the behaviour by citizens or undertakings to which such assurances relate, <sup>(143)</sup> any diligent entrepreneur could reasonably expect the Commission subsequently not to impose any recovery <sup>(144)</sup> as regards measures which it had itself previously classified, in a statement to another Community institution, as not constituting aid, irrespective of when the transaction benefiting from the aid measure was concluded.

(193) Accordingly, the Commission concludes that some beneficiaries of the contested measure could have the legitimate expectation that the aid would not be recovered and hence is not requiring recovery of the tax aid granted to those beneficiaries in the context of any shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company, before the date of publication <sup>(145)</sup> in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 108(2) TFEU, which could have then benefited from the contested measure.

(194) Beyond these considerations, which are identical to those expressed in the previous Decision, the Commission takes the view that a series of additional factors should be taken into account.

<sup>(139)</sup> Written Question E-4431/05.

<sup>(140)</sup> Written Question E-4772/05.

<sup>(141)</sup> On the principle of legitimate expectation, see judgments of the Court of Justice in *Van den Bergh en Jurgens v Commission*, cited above, and Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL v Commission* [2006] ECR I-5479, paragraph 147; judgment of the Court of First Instance in Case T-290/97 *Mehibas Dordtselaan v Commission* [2000] ECR II-15, paragraph 59.

<sup>(142)</sup> Judgment of the Court of Justice in Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, paragraphs 111-114 and 185-186; judgment of the Court of First Instance in Case T-98/00 *Linde v Commission* [2002] ECR II-3961, paragraph 33.

<sup>(143)</sup> It is not necessary to demonstrate that the citizen or undertaking engaged in activities which it might not otherwise have done, relying on the assurance in question.

<sup>(144)</sup> By analogy, see Commission Decision of 17.2.2003 on Belgian coordination centres (2003/757/EC) and Commission Decision of 20.12.2006 on *GIE fiscaux* (C 46/2004).

<sup>(145)</sup> See footnote 1.

- (195) In accordance with paragraph 117 of the previous Decision, although the Commission considered that the Spanish authorities and the 30 interested parties had provided insufficient evidence to justify different tax treatment of Spanish shareholding transactions and transactions between companies established within the European Union, the Commission stated that it could not 'a priori completely exclude this differentiation as regards transactions concerning third countries. Indeed, outside the Community, legal barriers to cross-border business combinations may persist, which would place cross-border transactions in a different legal and factual situation from intra-Community transactions. As a result, extra-Community acquisitions that could have led to the tax amortisation of goodwill — as in the case of a majority shareholding — may be excluded from this tax advantage because it is impossible to perform business combinations. Amortisation of financial goodwill for these transactions, which fall outside the Community factual and legal framework, may be necessary to ensure tax neutrality.' The Commission concluded its analysis by stating in paragraph 119 of the previous Decision, which has been available on the Commission's website since the beginning of January 2010, that 'In this context, the Commission maintains the procedure, as initiated by the initiating Decision of 10 October 2007, open for extra-Community acquisitions in the light of new elements which the Spanish authorities have undertaken to provide as regards the obstacles to extra-Community cross-border mergers. The procedure as opened on 10 October 2007 is therefore still ongoing for extra-Community acquisitions'.
- (196) In paragraphs 115 to 119 of the previous Decision, the Commission indicated that there could be a differentiation between acquisition transactions which took place within the EU and those taking place outside the EU. In particular, the Commission observed that 'legal barriers to cross-border business combinations may persist, which would place cross-border transactions in a different legal and factual situation from intra-Community transactions'. The references to the criteria of 'legal barriers' and 'majority shareholding' are particularly relevant in those specific circumstances.
- (197) In the light of these specific and characteristic features of the present case, the Commission takes the view that the statement in paragraph 117 of the previous Decision could have given rise to legitimate expectations as regards the application of the contested aid scheme to transactions by Spanish companies in those third countries where there are explicit 'legal barriers' to cross-border business combinations and where a 'majority shareholding' has been acquired by the Spanish company concerned, irrespective of the date on which the transaction took place before the adoption of this Decision.
- (198) On the basis of the information submitted by the Spanish authorities in the reports and without prejudice to the classification of the contested scheme as State aid and its application to individual transactions for the reasons outlined in paragraph 107, the Commission notes that, among the countries analysed, the legislation in force in two of them, i.e. India and China, presents explicit legal barriers to cross-border business combinations.
- (199) In the light of the findings presented in paragraphs 119 and 120 and, the Commission concludes that, for transactions relating to those two countries, the beneficiaries of the contested measure which had acquired a majority shareholding could have the legitimate expectation that the aid would not be recovered.
- (200) The same treatment will apply to those beneficiaries which have carried out a transaction in other third countries, which have acquired a majority shareholding and which can provide sufficient evidence to demonstrate the existence of an explicit legal barrier, within the meaning of this Decision, in the legislation of that third country. For the countries mentioned in the reports, the Commission will take into account that, on the basis of the information provided by the Spanish authorities, it was not possible to identify such barriers, but is willing to examine further relevant evidence.
- (201) For beneficiaries enjoying legitimate expectations either on the basis of the Commission statements to Members of the European Parliament or on the basis of the previous Decision, the Commission also considers that all those beneficiaries should continue to enjoy the benefits of the contested measure until the end of the amortisation period established by the measure. The Commission acknowledges that the operations were planned and investments were made in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the contested measure. Therefore, in line with the previous case law of the Court of Justice and Commission practice<sup>(146)</sup>, in the absence of an overriding public interest<sup>(147)</sup>, the Commission considers that the beneficiaries should be allowed to continue enjoying the benefits of the contested measure over the entire amortisation period provided by Article 12(5) TRLIS.

<sup>(146)</sup> See Commission Decision 2003/755/EC of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25) and judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03 *Forum 187*, cited above, paragraphs 162 and 163.

<sup>(147)</sup> *Forum 187*, cited above, paragraph 149; judgment of the Court of Justice in Case C-74/74 *CNTA v Commission* [1975] ECR 533, paragraph 44.



- (202) Moreover, the Commission considers that a reasonable transition period should be envisaged for companies enjoying legitimate expectations which had already acquired, in a long-term perspective, rights in foreign companies, and which had not held those rights for an uninterrupted period of at least 1 year on the date of the publication of the opening Decision (legitimate expectations arising from Commission statements to Members of the European Parliament) or on the date of publication of this Decision (legitimate expectations arising from the previous Decision). The Commission therefore considers that companies which fulfilled all other relevant conditions of Article 12(5) TRLIS by 21 December 2007, or respectively by the date of publication of this Decision in the *Official Journal of the European Union*, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, should also benefit from legitimate expectations if they held those rights for an uninterrupted period of at least 1 year by 21 December 2008, or respectively 1 year after the publication of this Decision.
- (203) On the other hand, in cases where a Spanish acquiring company does not enjoy legitimate expectations, any incompatible aid will be recovered from this beneficiary unless, firstly, an irrevocable obligation was entered into before 21 December 2007 (legitimate expectations arising from Commission statements to Members of the European Parliament) or before the date of publication of this Decision (legitimate expectations arising from the previous Decision) by a Spanish acquiring company to hold such rights and, secondly, the contract contained a suspensive condition linked to the fact that the operation in question is subject to the mandatory approval of a regulatory authority and, thirdly, the operation had been notified before 21 December 2007 (legitimate expectations arising from Commission statements to Members of the European Parliament) or before the publication of this Decision (legitimate expectations arising from the previous Decision).
- (204) The Commission also considers that the contested measure does not constitute aid if, at the time beneficiaries enjoyed its advantages, all the conditions laid down by the legislation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98<sup>(148)</sup>, which was applicable at the time the tax reduction was utilised, were fulfilled.
- (205) In the light of all the above considerations and as already highlighted in the previous Decision, in a given year, for a given beneficiary, the precise amount of the aid corresponds to the net discounted value of the reduction in the tax burden granted by the amortisation under Article 12(5) TRLIS. It is therefore contingent on the company tax rate in the years concerned and on the discount interest rate applicable.
- (206) For a given year and a given beneficiary, the nominal value of the aid corresponds to the tax reduction granted by the application of Article 12(5) TRLIS for rights in foreign companies that do not fulfil the conditions set out in the preceding paragraphs.
- (207) The discounted value is calculated by applying the interest rate to the nominal value, in accordance with Chapter V of Commission Regulation (EC) No 794/2004<sup>(149)</sup>, as amended by Commission Regulation (EC) No 271/2008<sup>(150)</sup>.
- (208) When calculating the tax burden of beneficiaries in the absence of the unlawful aid measure, the Spanish authorities must base themselves on the transactions that were carried out in the period prior to the publication of the opening Decision in the *Official Journal of the European Union* (legitimate expectations arising from Commission statements to Members of the European Parliament) or prior to the date of publication of this Decision (legitimate expectations arising from the previous Decision), as indicated above. It is not possible to argue that, had these illegal advantages not existed, the beneficiaries would have structured their transactions differently in order to reduce their tax burden. As clearly stated by the Court of Justice in the *Unicredito* judgment<sup>(151)</sup>, these hypothetical considerations cannot be taken into account for the purposes of calculating aid.
- (209) The Commission must consider that, in the light of the above-mentioned case law and the specific features of the case, Article 12(5) TRLIS constitutes a State aid scheme within the meaning of Article 107(1) TFEU, also to the extent that it applies to extra-EU acquisitions. The Commission also finds that the contested measure, having been implemented in breach of Article 108(3) TFEU, constitutes an unlawful aid scheme to the extent that it applies to intra-EU acquisitions.

#### VIII. CONCLUSION

<sup>(148)</sup> OJ L 142, 14.5.1998, p. 1. This Regulation empowers the Commission to adopt a Regulation stating that certain categories of aid do not meet all the criteria under Article 107(1) TFEU (*de minimis* aid).

<sup>(149)</sup> OJ L 140, 30.4.2004, p. 1.

<sup>(150)</sup> OJ L 82, 25.3.2008, p. 1.

<sup>(151)</sup> Case C-148/04 *Unicredito Italiano Spa v Agenzia delle Entrate* [2005] ECR I-11137, paragraphs 117-119.

(210) However, given the presence of legitimate expectations until the date of publication of the opening Decision, the Commission accepts that implementation may continue over the entire amortisation period established by the aid scheme and exceptionally waives recovery of any tax advantage deriving from the application of the aid scheme to shareholdings held directly or indirectly by a Spanish acquiring company in a foreign company before the date of publication in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 108(2), except where, firstly, an irrevocable obligation has been entered into before 21 December 2007 by a Spanish acquiring company to hold such rights and, secondly, the contract contained a suspensive condition linked to the fact that the operation in question is subject to the mandatory approval of a regulatory authority and, thirdly, the operation had been notified before 21 December 2007. Moreover, the Commission must waive recovery and accepts that implementation may continue over the entire amortisation period established by the aid scheme also for any tax advantage deriving from the application of the aid scheme to majority shareholding transactions carried out before the publication of this Decision which relate to third countries where the presence of explicit legal barriers to cross-border combinations is duly justified in accordance with the principles laid down in this Decision,

HAS ADOPTED THIS DECISION:

#### Article 1

1. The aid scheme implemented by Spain under Article 12(5) of Royal Legislative Decree 4/2004 of 5 March 2005, consolidating the amendments made to the Spanish Corporate Tax Law, unlawfully put into effect by Spain in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market as regards aid granted to beneficiaries in respect of extra-EU acquisitions.

2. Nonetheless, tax reductions enjoyed by beneficiaries in respect of extra-EU acquisitions under Article 12(5) TRLIS which are related to rights held directly or indirectly in foreign companies fulfilling the relevant conditions of the aid scheme by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, can continue to apply over the entire amortisation period established by the aid scheme.

3. Tax reductions enjoyed by beneficiaries in respect of extra-EU acquisitions under Article 12(5) TRLIS which are related to an irrevocable obligation entered into before 21 December 2007 to hold such rights when the contract contains a

suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and the operation has been notified before 21 December 2007, can continue to apply for the entire amortisation period established by the aid scheme for those rights held on the date on which the suspensive condition is lifted.

4. Furthermore, tax reductions enjoyed by beneficiaries under Article 12(5) TRLIS in respect of extra-EU acquisitions carried out by the date of publication of this Decision in the *Official Journal of the European Union*, which are related to majority shareholdings held directly or indirectly in foreign companies established in China, India or in other countries where the existence of explicit legal barriers to cross-border business combinations have been or can be demonstrated, can continue to apply over the entire amortisation period established by the aid scheme.

5. Tax reductions enjoyed by beneficiaries when realising extra-EU acquisitions under Article 12(5) TRLIS which are related to an irrevocable obligation entered into before this Decision is published in the *Official Journal of the European Union*, to hold such rights in foreign companies established in China, India or in other countries where the existence of explicit legal barriers to cross-border business combinations have been or can be demonstrated, when the contract contains a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and the operation has been notified before the publication of this Decision in the *Official Journal of the European Union*, can continue to apply over the entire amortisation period established by the aid scheme for those rights held on the date on which the suspensive condition is lifted.

#### Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by a regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 which is applicable at the time the aid is granted.

#### Article 3

Individual aid granted under the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other approved aid scheme, shall be compatible with the internal market, up to the maximum aid intensities applicable to this type of aid.

*Article 4*

1. Spain shall recover the incompatible aid corresponding to the tax reduction under the scheme referred to in Article 1(1) from the beneficiaries whose rights in foreign companies, acquired in the context of extra-EU acquisitions, do not fulfil the conditions laid down in Article 1(2) to (5).

2. The sums to be recovered shall bear interest from the date on which the tax base of the beneficiaries was reduced until the date of recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.

4. Spain shall cancel any outstanding tax reduction provided under the scheme referred to in Article 1(1) with effect from the date of adoption of this Decision, except for the reduction attached to rights in foreign companies fulfilling the conditions laid down in Article 1(2).

*Article 5*

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. Spain shall ensure that this Decision is implemented within 4 months of the date of its notification.

*Article 6*

1. Within 2 months of notification of this Decision, Spain shall submit the following information:

- (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;
- (b) the total amount (principal and interest) to be recovered from each beneficiary;
- (c) a detailed description of the measures already taken and planned to comply with this Decision;
- (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, upon request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and interest already recovered from the beneficiaries.

*Article 7*

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 12 January 2011.

*For the Commission*  
Joaquín ALMUNIA  
*Vice-President*

## ANNEX I

**LIST OF THE INTERESTED THIRD PARTIES THAT SUBMITTED COMMENTS ON THE OPENING DECISION  
AND HAVE NOT ASKED TO REMAIN ANONYMOUS**

Abertis Infraestructuras SA  
Acerinox SA  
Aeropuerto de Belfast SA.  
Altadis SA, Fomento de Construcciones y Contratas SA  
Amey UK Ltd  
Applus Servicios Tecnológicos SL  
Asociación Española de Banca (AEB)  
Asociación Española de la Industria Eléctrica (UNESA)  
Asociación de Empresas Constructoras de Ámbito Nacional (SEOPAN)  
Asociación de Marcas Renombradas Españolas  
Asociación Española de Asesores Fiscales  
Amadeus IT Group SA  
Banco Bilbao Vizcaya Argentaria (BBVA)  
Banco Santander  
Club de Exportadores e Inversores Españoles  
Compañía de distribución integral Logista SA  
Confederacion Española de Organizaciones Empresariales  
Confederacion Española de la Pequeña y Mediana Empresa (CEPYME)  
Ebro Puleva SA  
Ferrovia Services SA  
Hewlett-Packard Española SL  
La Caixa, Iberdrola  
Norvarem SA  
Prosegur Compañía de Seguridad SA  
Sociedad General de Aguas de Barcelona SA (Grupo AGBAR)  
Telefónica SA

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## SUMMARY OF THE KPMG REPORT PRESENTED BY THE SPANISH AUTHORITIES

Summary Table

Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation? (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger? (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger? (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger? (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction? (Yes/No/Not found)	Summary
<b>Argentina</b>	Law 19550  Articles 82 to 87 and 118	Not specifically addressed by either company law or the main legislation on the Trade Registry	Yes  Relevant doctrine states that cross-border mergers are not possible in Argentina	Yes  Registration issues with the relevant Trade Registry	Yes. Taxation of the target company and its shareholders, since it is considered that the Protocol to the Treaty signed by Argentina and Spain should not apply. Moreover, relevant doctrine and the Argentinian tax administration points out that the roll-over regime can apply only to domestic mergers	No	Academic authors point out that a cross-border merger is not possible  Taxation of the absorbed company and its shareholders
<b>Australia</b>	Corporations Act 2001 (main Sections 606, 413 and 611)	The concept of cross-border mergers is not recognised under Australian company law  Corporations Act 2001 lays down only three specific procedures with regard to mergers, none of which deals with cross-border mergers	Not found	Yes  Cross-border mergers are not possible in Australia	Uncertain tax treatment.  A roll-over regime applies only to domestic mergers	Not found	Corporations Act 2001 does not specifically deal with a cross-border merger as a permitted transaction, and is therefore not possible

Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation?  (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger?  (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger?  (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger?  (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction?  (Yes/No/Not found)	Summary
<b>Brazil</b>	Brazilian Civil Code (Law 10.406/02) and Law 6.404/1976	Not specifically addressed	Not found	Approval by the Council of State  Approval by the register in SISBACEN is uncertain  Restrictions in certain economic sectors do not permit a cross-border merger	Uncertain tax treatment  Brazilian and non-Brazilian (i.e. shareholders in the Brazilian company) taxpayers involved in a merger transaction at market value would suffer adverse tax consequences.	No  Only one transaction has been identified but it relates to a reverse merger in which some foreign companies were absorbed by a Brazilian entity	There are major barriers which in practice prevent cross-border mergers
<b>Canada</b>	Canadian Business Corporations Act and applicable company law in Canadian Provinces	Yes  Both merging entities must apply Canadian legislation  Only certain types of mergers (e.g. amalgamations) are theoretically permitted in British Columbia, but there is no precedent	Not found	Yes	Yes/uncertain tax treatment  If a 100 % subsidiary is wound up, the dissolved company and its shareholder would pay tax	Not found	As a rule, cross-border mergers are not possible (only in British Columbia under certain circumstances) except for the winding-up of a 100 % Canadian subsidiary  Taxation of the dissolved company and its shareholders
<b>Chile</b>	Law 18.046  Article 99	Not specifically addressed	Not found	Yes  Requirement for a certificate of cessation of business activity issued by the tax authorities, which can significantly delay the merger process. Other barriers exist in the form of the rules of the Central Bank of Chile, which would require a	Uncertain tax treatment  There is no certainty that domestic roll-over regime can be applied in a cross-border merger to both the shareholders and the target company  A cross-border merger would not generate tax	Yes  Just one, but the only precedent involved a holding entity with no Chilean activities or assets	There are relevant obstacles which may prevent a cross-border merger from being carried out  Uncertain tax treatment for shareholders and absorbed entity

Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation?  (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger?  (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger?  (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger?  (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction?  (Yes/No/Not found)	Summary
				special request in order to carry out such a merger, foreign investment rules under Decree Law 600 and the fact that in certain economic sectors a cross-border merger would not be possible	effects other than the taxation due on retained profits to the date of the merger by the company being acquired  The winding up of a Chilean entity into its direct subsidiary is not considered similar to a merger for Chilean tax purposes. Thus, the shareholders will be subject to Chilean corporation tax to the extent that the assets transferred are stepped up		
<b>China</b>	<p>(a) PRC Company Law of 2005 for mergers involving only limited liability companies or joint stock limited companies established in Mainland China and</p> <p>(b) Provisions on the merger and division of foreign investment enterprises (issued in 2001) which govern mergers involving foreign investment in Mainland China</p> <p>Provisions on mergers of a foreign company issued in 2009</p>	<p>Existing rules refer only to domestic mergers</p> <p>On 22 June 2009 the Ministry of Commerce enacted a new set of provisions on mergers and acquisitions of a domestic company by foreign investors</p> <p>A cross-border merger within the meaning of this document is not possible</p>	Not found	<p>Yes</p> <p>A cross-border merger is not allowed</p>	<p>Uncertain tax treatment</p> <p>Notice 59 (which contains the provisions on the reorganisation of corporation tax) does not apply to cross-border mergers, and hence tax neutrality will not apply, even though cross-border mergers are not allowed in China</p>	Not found	<p>In 2009 a new Company Law applicable to mergers by foreign investors was adopted. However, cross-border mergers (within the meaning of this document) are not allowed</p>

Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation?  (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger?  (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger?  (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger?  (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction?  (Yes/No/Not found)	Summary
<b>Colombia</b>	Articles 172 et seq. of the Commercial Code	Not specifically addressed. However, cross-border mergers are accepted in practice as guidelines are provided by the Companies Supervisor. A Colombian branch would have to carry on the economic activity of the foreign entity in a relevant number of economic sectors, which in practice prevents the completion of a cross-border merger	No	Yes  Foreign investment rules, principally the impossibility of a Colombian branch carrying on certain economic activities	Yes  Taxation of shareholders	Yes, but not with Spanish companies	There are relevant barriers which may delay or prevent a cross-border merger  Taxation of shareholders
<b>Ecuador</b>	Companies Act (R.O. 312 of 5.11.1999)  and  Articles 337 to 344 of the Act Amending the Companies Act (R.O. 519 of 15.5.2009)	Not specifically addressed  It is not possible to carry out a cross-border merger in Ecuador because the Ecuadorian entity would have to be wound up.	Not found	Yes  It is not possible to carry out a cross-border merger in Ecuador	Uncertain tax treatment  A roll-over regime exists only for domestic corporate restructurings	No	Cross-border mergers are not possible in Ecuador
<b>India</b>	Sections 391 to 394 of the Companies Act of 1965	Upstream mergers are prohibited under Section 394(4)(b) of the Companies Act	Not found	Yes  Upstream mergers are not possible	Yes  As regards upstream mergers, tax costs would exist for the absorbed company and its shareholders even though cross-border mergers are not allowed in India	No  There only precedents relate to reverse mergers (no precedents for upstream mergers)	Upstream mergers are not permitted



Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation?  (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger?  (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger?  (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger?  (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction?  (Yes/No/Not found)	Summary
<b>Japan</b>	Companies Act 86 of 26 July 2005	Not specifically addressed  However, using the criterion set by the Ministry of Justice when the Companies Act was introduced in 2006, cross-border mergers should not be allowed	Yes  Relevant doctrine and the Ministry of Justice state that cross-border mergers are not possible in Japan	The Legal Affairs Bureau in Japan does not allow registration of cross-border mergers	In theory, since the Companies Act does not address cross-border mergers, tax treatment is uncertain	No	The Legal Affairs Bureau in Japan does not allow registration of cross-border mergers
<b>Mexico</b>	General Law on Commercial Companies	Not specifically addressed	Not found	Yes  Restrictions in certain economic sectors would not allow a cross-border merger	Yes  As regards upstream mergers, tax costs exist for the target company and its shareholders	Yes, but not with Spanish companies	Taxation of the target company and its shareholders
<b>Morocco</b>	Law 17-95 on Public Limited Companies. (However, all principles also apply to the Law on Private Limited Companies)	Not specifically addressed	Not found in Morocco	Yes  Foreign exchange regulations may prevent a Spanish company from taking over a Moroccan company	Uncertain tax treatment  Tax neutrality rules apply only to mergers between national entities	Not found	No specific legal provisions. The major legal, tax and de facto barriers would prevent a cross-border merger
<b>Peru</b>	Law 268.87 General Companies Act (GCA)	Not specifically addressed  A cross-border merger is not possible in Peru because the Peruvian entity would have to be wound up	Yes	Yes  A cross-border merger is not possible in Peru	Uncertain tax treatment  A roll-over regime exists only for domestic corporate restructuring	Not found	Cross-border mergers are not possible in Peru

Country	Company law governing mergers	Are cross-border mergers prohibited by company law and subsequent legislation?  (Yes/No/Not specifically addressed)	Does case law or doctrine refer to the impossibility of a cross-border merger?  (Yes/No/Not found)	Have relevant de facto barriers been identified that impede a cross-border merger?  (Yes/No)	Have tax rules been identified which impose additional tax costs on a cross-border merger?  (Yes/No/Uncertain tax treatment)	Are there precedents of cross-border mergers in your jurisdiction?  (Yes/No/Not found)	Summary
<b>United States</b>	Company law applicable in US States	US laws do not prohibit or treat mergers differently to other business combinations with foreign entities  However, some States (e.g. Delaware) do not permit such mergers where the laws of the other jurisdiction do not permit a cross-border merger	No	Yes  Strict limitations in certain sectors under certain national security laws  Strict rules for obtaining approval for the cross-border merger process	No  However, failure to comply with tax-free rules would trigger adverse tax consequences  In practice, shareholders in US companies often oppose cross-border mergers because of the tax burdens that could result for them	Not found, but such mergers are likely to have taken place in Delaware	A cross-border merger would only be possible in certain States subject to the completion of a number of requirements
<b>Venezuela</b>	Commercial Code of 26 July 1955 and Article 340 of the Commercial Code	Not specifically addressed  A cross-border merger is not possible in Venezuela because the Venezuelan entity would have to be wound up	No	Yes  A cross-border merger is not possible in Venezuela	Uncertain tax treatment  A roll-over regime exists only for domestic corporate restructurings	Not found	Cross-border mergers are not feasible in Venezuela

## ANNEX III

## SUMMARY OF THE GARRIGUES REPORT PRESENTED BY THE SPANISH AUTHORITIES

**Legal and regulatory aspects**

In the following countries a cross-border merger is not possible under commercial law:

- **India**, under a combination of Articles 3 and 391 to 394 of the relevant Indian legislation (1965 Companies Act),
- **Australia**, because neither the Corporations Act 2001 nor the Foreign Acquisitions and Takeovers Act 1975 recognise cross-border mergers, which are therefore not possible under Australian law,
- **Japan**, since, as confirmed by the Tokyo Legal Affairs Bureau (a department of the Japanese Ministry of Justice, which keeps the register of mergers carried out in Japan), the interpretation of Articles 2 and 748 of the Companies Act excludes the possibility of completing a cross-border merger,
- **Canada**, as Canadian law does not recognise cross-border mergers and the only similar operation recognised is 'amalgamation', which requires that both companies be governed by the same Canadian legislation (Sections 2 and 181 of the Federal Canada Business Corporations Act) and therefore, it is not possible to perform a cross-border merger as defined,
- **Ecuador**, in accordance with Articles 342 and 415 of the Companies Act, published in Official Register No 312 on 5 November 1999, whereby the acquiring company, in order to complete a merger, must have its domicile in Ecuador or must previously form a new company in Ecuador, precluding a cross-border merger such as the one proposed. This approach has also been confirmed by the administrative body that controls and oversees Ecuadorian companies (Companies Supervisor), which is responsible for approving company mergers and other operations in Ecuador,
- **China**, as reflected in regulations governing the acquisition of local companies by non-residents (specifically, Articles 2 and 55 of the Provisions on Acquisitions of Domestic Enterprises by Foreign Investors, issued by the Chinese Ministry of Commerce on 22 June 2009).

There are other countries in which cross-border mergers are not specifically regulated but where there are legal barriers that complicate them to such an extent that, in the opinion of the law firms consulted and/or relevant administrative or academic doctrine, such mergers are in practice impossible, particularly the countries listed below:

- **Argentina**, where the number of legal and practical obstacles (described in detail in the attached report on Argentina) prevent cross-border mergers being carried out. This same conclusion is drawn by most Argentinian doctrine, cited in the report, and by the Argentinian Justice Administration which, through the Pre-Classification Department of the Companies Supervisor (the body that controls legal entities in the Autonomous City of Buenos Aires), describes such mergers as 'test cases' for which there are no precedents,
- **Brazil**, where, in the opinion of the law firm consulted, cross-border mergers are almost impossible due both to the incompatibility of Brazilian laws for the purposes of registering the merger in Brazil and the need to open a branch into which the Brazilian company would be merged, which requires a large number of authorisations from political and economic bodies that are almost impossible to obtain (particularly the specific 'Presidential Decree' mentioned in the Brazilian report),
- **Peru**, because, according to the information provided by the local law firm, Peruvian public registers have in the past rejected the described cross-border mergers registering requests because they are reorganisation operations which do not fall under the scope of the applicable law (*Ley n° 26887 General de Sociedades*),
- **Colombia**, a jurisdiction in which (i) the absence of a specific procedure for cross-border mergers; (ii) the need to open a branch in Colombia, following specific authorisation procedures; and (iii) legal and regulatory restrictions on certain activities in many business sectors, make it impossible to complete a cross-border merger in such sectors, in the opinion of the law firm whose report is attached.

Moreover, as explained in the report on Colombia, in some of the countries analysed the regulatory restrictions on foreign investments in certain business sectors prevent the completion of cross-border mergers since, if such mergers were implemented, the activities would be performed in each country directly by a non-resident, which would generate incompatibilities that would be fully outlawed or seriously restricted in those countries. Of the countries analysed, this is the case of the Latin American countries, particularly **Colombia**, which prohibits all investments by foreign entities in many business sectors; **Brazil**, with similar total prohibitions; **Chile**, with significant prohibitions and restrictions affecting the telecommunications industry, concession-holders, the electricity, healthcare and energy sectors, among others; **Ecuador**, with relevant restrictions affecting the financial and insurance sectors; **Venezuela**, particularly in the telecommunications industry; **Mexico**; and even the **United States**, with certain restrictions related to national security and the financial sector.

#### Tax aspects

Moreover, in the majority of countries analysed there are relevant tax barriers to cross-border mergers. In this sense, if it were possible (*quod non*) to implement a cross-border merger, in the majority of the countries analysed unrealised capital gains would be taxed immediately at target-company and/or shareholder level, and indirect taxes would also be applicable as in any other completed transfer. The accompanying reports reflect this situation in detail in the following countries:

- In **Argentina**, the Law on Income Tax does not allow a cross-border merger to be treated as a 'tax-free reorganisation', as specifically confirmed by the AFIP (Argentina's national tax authority) in a number of rulings, meaning that the target company would be liable for income tax (and its shareholders, regardless of the provisions of the Spain-Argentina Double Taxation Treaty, as will be detailed below) on the unrealised capital gains, as well as indirect taxes applicable to the transaction in Argentina: Value Added Tax, *Impuesto sobre los Ingresos Brutos*, *Impuesto de Sellos* (stamp duty), etc.,
- In **Australia**, all 'amalgamation' transactions are subject to Australian taxes for both the company transferring its assets and liabilities (the dissolved company) and for its shareholders,
- In **Brazil**, these transactions would be subject to the general tax regime for transfers, with respect to all Brazilian taxes, for both the target company and its shareholders. The special regime provided by Article 21 of Law 9.249/95 is applicable only to mergers of Brazilian companies,
- In **Canada**, the only similar operations to cross-border mergers requires the target company to be liquidated and is therefore subject to all applicable Canadian taxes,
- In **Chile**, cross-border mergers would be taxed under the general tax rules for mergers. Under the Law on Income Taxes, all the profits of the dissolved company would be taxed at 35 % and its shareholders would pay 17 % or 35 % tax on the realised gain, provided they obtained an increase in value for tax purposes. The dissolution of the target company would also be previously inspected by the Chilean tax authorities, which is an additional obstacle that discourages and could significantly delay the completion of such transactions,
- In **Colombia**, no merger transaction gives rise to income tax (Article 14.1 of the *Estatuto Tributario*) or value added tax (Article 428.2 of the *Estatuto Tributario*) for the dissolved company. However, in view of the absence of legal provisions governing the tax treatment of shareholders, the Directorate of National Taxes and Customs (Ruling number 053516, 6 July 2009) has stipulated that shareholders obtain a taxable capital gain if the market value of the shares, cash or other assets received is higher than the acquisition cost of the shares received as a result of the merger,
- In the **United States**, there are certain material adverse US federal income tax consequences for a US corporation (USCo) and its US shareholders, as detailed in the US report, that could result from a merger of a USCo with and into a foreign corporation (ForCo) with the ForCo surviving. Because of concerns that the US tax authorities have about US corporations moving offshore to minimise their US federal income tax liability, the rules that allow a merger of two USCos to be tax-free are often rendered inapplicable in the case of a merger of a USCo into a ForCo. Although good business reasons may exist to undertake a cross-border merger, shareholders of US corporations often oppose such mergers because of the punitive US tax regimes that could result from the merger,

- In **Morocco**, a cross-border merger gives rise to tax for the company dissolved and its shareholders, in respect of all applicable Moroccan taxes, since the special regime provided by Article 162 of the General Tax Code (*Code Général des Impôts*) is applicable only to Moroccan companies subject to income tax, as specified in the Code. Moreover, as in the case of Chile, the winding up of a Moroccan company always requires an audit to be carried out beforehand, entailing an additional obstacle to such merger that could also significantly delay execution,
- In **Mexico**, the merger of a Mexican company with a foreign company will give rise to Mexican income tax for the merging company (the wording of the Mexico-Spain Double Taxation Treaty must also be considered for these purposes, as will be explained below) and to other taxes applicable to all transfers of goods or rights: flat-rate business tax (*Impuesto Empresarial a Tasa Única — IETU*), value added tax (*IVA*), local taxes on property transfers (*ISAJ*), etc. Article 14-b of the Federal Tax Code allows the application of a tax neutrality regime only to mergers involving companies resident in Mexico.

As regards the target company's shareholders, Articles 1 and 179 of the Law on Income Tax stipulate that non-residents are also required to pay this tax on assets acquired by the merging company as a consequence of the merger,

- In **Peru**, if a cross-border merger could be completed, this would be treated as a sale for tax purposes and any gain would be taxed at 30 % in the dissolved company. The shareholders would pay tax on the profits on liquidation, on the portion that exceeded the par value of the shares plus the additional capital premium. The merger would also be subject to indirect taxes (basically the General Sales Tax (*IGV*)) at the rate of 19 % of the transfer value. This regime has been specifically confirmed by the Peruvian Tax Administration, on a binding basis, in its Report of 229-2005-SUNAT/2B0000 (28 September 2005),
- Finally, in **Venezuela**, if the merger could be completed from a commercial viewpoint, it would give rise to applicable Venezuelan taxes for the target company and its shareholders, as reported by the Venezuelan law firm in its report.

It should also be noted that none of the Double Taxation Treaties signed by Spain include additional specific advantages for cross-border mergers, as compared to other countries' Double Taxation Treaties based on the OECD Model Convention.

However, in addition to further explanations below regarding the Double Taxation Treaties signed between Spain and Argentina and Mexico, some treaties provide for the possibility of charging tax in the State of origin of the transfer (including, for the purposes of this analysis, a transfer that is the consequence of the amortisation of shares in a merger) of significant shareholdings in companies domiciled in that State.

In this regard, Spain has departed from the OECD's general approach to the taxation of capital gains from the sale by a resident of one Contracting State of stocks and shares in companies of another Contracting State (whether or not the sale takes place in the context of a merger). The OECD's general approach is to assign this tax authority exclusively to the transferor's State of residence (in this case Spain). However, in accordance with Spain's Reservations included in the Commentary on Article 13 of the OECD's Model Convention (point 45), and in accordance with the bilateral agreements concluded, the treaties generally stipulate shared taxation for Spain and the State of residence of the company whose shares are sold (in this case, as a consequence of the amortisation of shares in a merger), in cases in which the shareholding is 'substantial' (of the States analysed here, this applies to the Treaties with Argentina, Australia, Chile, India, China, United States and Morocco).

Nonetheless, in the respective Protocols to the Treaties concluded with two of these countries (specifically, the Protocols to the Treaties signed with Mexico and Argentina), one interpretation is that <sup>(1)</sup>, when the transfer forms part of a cross-border merger between companies of the same group, it is permitted to apply a tax deferral scheme to the capital gains in the State of origin.

In the case of the specific clause in the Protocol to the Double Taxation Treaty signed between Spain and Argentina, the interpretation by law firm of this country, in line with existing doctrine, is that this clause does not allow the application of the Argentinian tax deferral scheme to a cross-border merger of a Spanish and an Argentinian company.

<sup>(1)</sup> This interpretation is questionable since these clauses refer rather to mergers involving companies resident in one Contracting State that own assets in the other Contracting State and which, if the clauses did not exist, would be taxed in that State, whereas, by contrast, the taxes in the State of residence would be deferred under a tax deferral regime.

In the case of the clause in the Protocol to the Double Taxation Treaty signed between Spain and Mexico, the law firm of this country also regards as very doubtful the interpretation that the said clause is applicable to a cross-border merger of a Spanish and a Mexican company and, if it were acceptable (which seems unlikely), this circumstance could, in some cases, even result in a tax cost that is higher than the cost to be deferred, since the 'deferred' tax would pay the 'frozen' taxes irrespective of the existence of actual economic income (and even if the transfer gave rise to a definitive loss).

In any case, it must be borne in mind that the above-mentioned Protocols to the Double Taxation Treaties do not affect the indirect taxes applicable to these transactions in each jurisdiction.

Finally, as evidence of the fact that the above-mentioned tax, legal and de facto obstacles are real, it should be noted that, in general, as described in the different reports on the countries analysed, there have been no cross-border mergers in those jurisdictions.

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