



Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 21 January 2021¹

Case C-52/19 P

Banco Santander, SA

v

European Commission

(Appeal – Corporate tax provisions allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are tax resident abroad – Concept of State aid – Selectivity)

1. The present case concerns the appeal brought by Banco Santander, SA ('Banco Santander') against the judgment of 15 November 2018, *Banco Santander v Commission* ('the judgment under appeal'),² by which the General Court dismissed the action brought under Article 263 TFEU by Banco Santander seeking the annulment of Article 1(1) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions, implemented by Spain ('the decision at issue')³ and, in the alternative, for the annulment of Article 4 of that decision.

2. The present appeal forms part of a series of eight parallel cases seeking the setting aside of the judgments by which the General Court dismissed the actions brought by certain Spanish companies against the decision at issue or against Commission Decision 2011/282/EU on the tax amortisation of financial goodwill for foreign shareholding acquisitions, implemented by Spain ('the decision of 12 January 2011').⁴

I. The facts, the measure at issue and the decision at issue

3. On 10 October 2007, after a number of written questions had been sent to it in 2005 and 2006 by Members of the European Parliament and after it had received a complaint from a private operator in 2007, the European Commission decided to initiate the formal investigation procedure under the current Article 108(2) TFEU ('the opening decision').⁵ That decision

¹ Original language: Italian.

² T-227/10, not published, EU:T:2018:785.

³ C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 7, p. 48).

⁴ C 45/07 (ex NN 51/07, ex CP 9/07), implemented by Spain (OJ 2011 L 135, p. 1). The other cases, in which I also deliver my Opinions today, are Joined Cases C-51/19 P, *World Duty Free Group v Commission* and C-64/19 P, *Spain v Commission* and Joined Cases C-53/19 P, *Banco Santander and Santusa v Commission* and C-65/19 P, *Spain v Commission*; and Cases C-50/19 P, *Sigma v Commission*; C-54/19 P, *Axa Mediterranean v Commission*; and C-55/19 P, *Prosegur Compañía de Seguridad v Commission*.

⁵ OJ 2007 C 311, p. 21.

concerned the arrangement laid down in Article 12(5) of the Ley del Impuesto sobre Sociedades (Spanish Corporate Tax Law) introduced by Ley 24/2001, de Medidas Fiscales, Administrativas y del Orden Social (Law No 24/2001 on fiscal, administrative and social measures) of 27 December 2001,⁶ and reproduced in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree No 4/2004 approving the recast text of the Corporate Tax Law: ‘the TRLIS’) of 5 March 2004 (‘the measure at issue’). The measure at issue provides that, in the event that an undertaking taxable in Spain acquires a shareholding in a ‘foreign company’ equal to at least 5% of that company’s capital and retains that shareholding for an uninterrupted period of at least 1 year, the resulting financial goodwill⁷⁸ may be deducted, in the form of amortisation, from the basis of assessment of the undertaking’s corporation tax liability. The measure at issue states that, in order to be classified as a ‘foreign company’, a company must be liable to pay a tax that is identical to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.

4. On 28 October 2009, the Commission adopted the decision at issue, by which it closed the formal investigation procedure in respect of acquisitions of shareholdings within the European Union. Having stated in recital 19 of that decision that ‘under Spanish tax policy principles, with the exception of the measure in question, goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets held by independent companies or following a merger or de-merger operation’ and after specifying, in recital 20, that ‘the concept of financial goodwill under [the measure at issue] ... introduces into the field of share acquisitions a notion that is usually used in transfer of assets or business combination transactions’, the Commission concluded that the measure at issue was selective in that it only favoured certain groups of undertakings that carry out certain investments abroad and that that specific character is not justified by the nature of the scheme. According to the Commission, that conclusion is valid regardless of whether the reference system is defined as the rules on the tax treatment of financial goodwill under the Spanish tax system (see recitals 89 and 92 to 114) or as the tax treatment of goodwill deriving from an economic interest taken in a company resident in a country other than Spain (see recitals 89 and 115 to 119). In Article 1(1) of that decision, the Commission declared ‘the aid scheme implemented by Spain under [the measure at issue] ... incompatible with the common market as regards aid granted to beneficiaries in respect of intra-Community acquisitions’, and in Article 4, it ordered the recovery of aid corresponding to the tax reductions granted under that scheme.⁹

5. The Commission kept the formal investigation procedure open in respect of acquisitions of shareholdings outside the European Union, pending further information which the Spanish authorities had undertaken to provide. That part of the procedure was closed with the adoption of the decision of 12 January 2011, by which the Commission declared the aid scheme

⁶ BOE No 61 of 11 March 2004, p. 10951.

⁷ Goodwill is defined in recital 18 of the decision at issue as 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’, corresponding to ‘the price paid for the acquisition of a business in excess of the market value of the assets constituting the business’, to be booked, under Spanish accounting principles, as a separate intangible asset as soon as the acquiring company takes control of the target company.

⁸ Recital 20 of the decision at issue, which states that ‘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.

⁹ Article 1(2) of the decision at issue excluded from the declaration of incompatibility and from the recovery order the tax reductions the beneficiaries had enjoyed in respect of intra-Community acquisitions under the measure at issue ‘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’. The Commission took the view that until that date (corresponding to the publication in the *Official Journal* of the decision to initiate the formal investigation procedure), the beneficiaries of the measure at issue had a legitimate expectation of the lawfulness of that measure (see recitals 165 to 168 of the decision at issue).

implemented by Spain under the measure at issue to be incompatible with the internal market, particularly in so far as it applies to acquisitions of shareholdings in undertakings established outside the European Union.

II. Procedure before the General Court and the judgment under appeal

6. By application lodged at the General Court Registry on 18 May 2010, Banco Santander brought an action for the annulment of the decision at issue. The procedure was suspended from 13 March to 7 November 2014, the date on which the General Court ruled on the case resulting in the judgment of 7 November 2014, *Autogrill España v Commission*¹⁰ ('the judgment in *Autogrill España v Commission*') annulling the decision at issue, on the ground that the Commission had incorrectly applied the condition relating to selectivity laid down in Article 107(1) TFEU. The General Court also annulled the decision of 12 January 2011 by judgment of 7 November 2014, *Banco Santander and Santusa v Commission* ('the judgment in *Banco Santander and Santusa v Commission*').¹¹

7. By application lodged at the Registry of the Court of Justice on 19 January 2015, the Commission brought an appeal against the judgment in *Autogrill España v Commission*. That appeal, which was registered under number C-20/15 P, was joined to the appeal registered under number C-21/15 P that the Commission had brought against the judgment in *Banco Santander and Santusa v Commission*. By decisions of the President of the Court of 19 May 2015, the Federal Republic of Germany, Ireland and the Kingdom of Spain were granted leave to intervene in the joined cases in support of the forms of order sought by WDFG and Banco Santander and Santusa. By judgment of 21 December 2016, *Commission v World Duty Free Group and Others* ('the WDFG judgment'),¹² the Court of Justice set aside the judgment in *Autogrill España v Commission*, referred the case back to the General Court and reserved the costs in part. The Court of Justice also set aside the judgment in *Banco Santander and Santusa v Commission*.

8. The procedure before the General Court, which was once again suspended from 9 March 2015, resumed on 21 December 2016 and concluded with the adoption of the judgment under appeal, by which the General Court dismissed Banco Santander's action and ordered that party to pay the costs.

III. Procedure before the Court of Justice and forms of order sought

9. By application lodged at the Registry of the Court of Justice on 25 January 2019, Banco Santander brought the present appeal. That party seeks the setting aside of the judgment under appeal, the annulment of the decision at issue following the upholding of its action before the General Court, and an order for the Commission to pay the costs. The Commission contends that the appeal should be dismissed and the appellant ordered to pay the costs.

¹⁰ T-219/10, EU:T:2014:939.

¹¹ T-399/11, EU:T:2014:938.

¹² C-20/15 P and C-21/15 P, EU:C:2016:981.

IV. Arguments

A. Introductory comments

10. Reference should be made to the statements made and the criteria discussed in points 11 to 21 of my Opinion in Joined Cases C-51/19 P, *World Duty Free Group v Commission* and C-64/19 P, *Spain v Commission*, delivered today, for an examination of the current case-law position in relation to the selectivity of tax measures and, in particular, for an illustration of the three-step method of analysis of selectivity developed by the Court. It is in the light of those statements and criteria that the complaints put forward by Banco Santander will be examined. For information about the implications of the *WDFG* judgment for the purposes of examining the present appeal, reference should be made to points 23 to 27 of the abovementioned Opinion.

B. The appeal

11. Banco Santander has put forward a single ground in support of its appeal, alleging misinterpretation of Article 107(1) TFEU as regards the selectivity criterion. That ground can be broken down into four main parts and two parts in the alternative.

1. *The first part of the single ground of appeal: error in determining the reference system*

12. The complaints raised in the first part of Banco Santander's single ground of appeal concern the first step of the analysis as to selectivity, the purpose of which is to determine the reference system. For a discussion of the concept of 'reference system' and the applicable criteria for its determination, the comments made in points 37 to 51 of my Opinion in Joined Cases C-51/19 P, *World Duty Free Group v Commission* and C-64/19 P, *Spain v Commission*, delivered today, should be referred to.

(a) *The first complaint of the first part of the single ground of appeal*

13. Since the contentions made in the complaint being examined, and the arguments used to support those contentions, are identical to those advanced in the first complaint of the first part of *World Duty Free Group's* single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 31 to 36 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today, with regard to the plea of inadmissibility raised by the Commission, and to points 52 to 59 of that Opinion with regard to the substance. For the same reasons stated in those points, I propose that the Court should reject the first complaint of the first part of Banco Santander's single ground of appeal.

(b) *The second complaint of the first part of the single ground of appeal*

14. Since the contentions made in the second complaint of the first part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the second complaint of the first part of *World Duty Free Group's* single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 62 to 82 of my Opinion in Joined Cases C-51/19 P and C-64/19 P,

delivered today, in which I propose that all those contentions should be rejected. For the same reasons stated in those points, I propose that the Court should reject the second complaint of the first part of Banco Santander's single ground of appeal.

(c) The third complaint of the first part of the single ground of appeal

15. Since the contentions made in the third complaint of the first part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the third complaint of the first part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 85 to 87 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the third complaint of the first part of Banco Santander's single ground of appeal.

2. The second part of the single ground of appeal: error in determining the objective on the basis of which to assess comparability

16. The complaints raised by Banco Santander in the second part of its single ground of appeal concern paragraphs 130 to 151 of the judgment under appeal. Those complaints challenge the grounds of that judgment by which the General Court identified the objective of the reference system and compared, in the light of that objective, the situation of undertakings benefiting from the advantage conferred by the measure at issue and those excluded from it.

17. Since the contentions made in this part of Banco Santander's appeal, and the arguments used to support those contentions, are identical to those advanced in the second part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 91 to 106 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the second part of Banco Santander's single ground of appeal.

3. The third part of the single ground of appeal: error in law in allocating the burden of proof

18. Since the contentions made in the third part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the third part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 109 to 110 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the third part of Banco Santander's single ground of appeal.

4. The fourth part of the single ground of appeal: proportionality

19. Since the contentions made in the fourth part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the fourth part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 112 and 113 of my

Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the fourth part of Banco Santander's single ground of appeal.

5. *The fifth part of the single ground of appeal: causal link*

20. Since the contentions made in the fifth part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the fifth part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 114 to 117 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the fifth part of Banco Santander's single ground of appeal.

6. *The sixth part of the single ground of appeal: severability of the measure*

21. Since the contentions made in the sixth part of Banco Santander's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the sixth part of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 119 to 122 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court should reject the sixth part of Banco Santander's single ground of appeal.

7. *Conclusion on the appeal*

22. In the light of the above, I propose that the Court should dismiss the appeal in its entirety.

V. Costs

23. In accordance with Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable *mutatis mutandis* to the procedure before the Court of Justice on an appeal against a decision of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since I propose that the Court should dismiss Banco Santander's appeal, that party must, in my view, be ordered to pay the costs, in accordance with the form of order to that effect sought by the Commission.

VI. Conclusion

24. On the basis of all the foregoing considerations, I propose that the Court should dismiss the appeal and order Banco Santander to pay the costs.