



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

8 March 2012 *

(Action for annulment — State aid — Aid schemes allowing for the tax amortisation of financial goodwill for foreign shareholding acquisitions — Decision declaring the aid scheme incompatible with the common market and not ordering the recovery of aid — Act entailing implementing measures — Lack of individual concern — Inadmissibility)

In Case T-221/10,

Iberdrola, SA, established in Bilbao (Spain), represented by J. Ruiz Calzado, M. Núñez-Müller and J. Domínguez Pérez, lawyers,

applicant,

v

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

defendant,

APPLICATION for 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 C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48),

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of L. Truchot (Rapporteur), President, M.E. Martins Ribeiro, N. Wahl, S. Soldevila Fragoso and H. Kanninen, Judges,

Registrar: B. Pastor, Deputy Registrar,

having regard to the written procedure and further to the hearing on 24 October 2011,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

- 1 By several written questions raised in 2005 and 2006 (E-4431/05, E-4772/05, E-5800/06 and P-5509/06), Members of the European Parliament asked the Commission of the European Communities whether the arrangement provided for in Article 12(5) — a provision introduced into the Spanish Corporate Tax Law by Ley 24/2001 de Medidas Fiscales, Administrativas y del Orden Social (Law 24/2001 on fiscal, administrative and social measures) of 27 December 2001 (BOE No 313 of 31 December 2001, p. 50493) — and in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the recast text of the Corporate Tax Law) of 5 March 2004 (BOE No 61, of 11 March 2004, p. 10951), ('the scheme at issue'), should be classified as State aid. The Commission replied in essence that, according to the information available to it, the scheme at issue did not appear to fall within the scope of the State aid rules.
- 2 By letters of 15 January and 26 March 2007, the Commission asked the Spanish authorities to provide it with information in order to assess the scope and the effects of the scheme at issue. By letters of 16 February and 4 June 2007, the Kingdom of Spain sent the Commission the information requested.
- 3 By fax of 28 August 2007, the Commission received a complaint from a private operator alleging that the scheme at issue constituted State aid incompatible with the common market.
- 4 By decision of 10 October 2007 (summarised in OJ 2007 C 311, p. 21), the Commission initiated a formal investigation procedure in respect of the scheme at issue.
- 5 By letter of 5 December 2007, the Commission received comments from the Kingdom of Spain on the decision initiating the investigation procedure. Between 18 January and 16 June 2008, the Commission also received comments from 32 interested third parties, including comments from the applicant, Iberdrola, SA. By letters of 30 June 2008 and 22 April 2009, the Kingdom of Spain gave its reactions to the interested parties' comments.
- 6 On 18 February 2008, 12 May and 8 June 2009, technical meetings were held with the Spanish authorities. Other technical meetings were also held with some of the 32 interested third parties.
- 7 By letter of 14 July 2008 and by e-mail of 16 June 2009, the Kingdom of Spain submitted further information to the Commission.
- 8 The Commission terminated the procedure, as regards shareholding acquisitions within the European Union, by its Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48) ('the contested decision').
- 9 The contested decision declares that the scheme at issue, which constitutes a tax advantage enabling Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign companies, is incompatible with the common market where it applies to the acquisition of shareholdings in companies established within the European Union.
- 10 Under Article 1(2) and (3) of the contested decision however, the scheme at issue continues to apply, by virtue of the principle of the protection of legitimate expectations, to acquisitions of shareholdings which took place before the publication in the *Official Journal of the European Union* of the decision

initiating the formal investigation procedure on 21 December 2007, and to acquisitions of shareholdings, the completion of which, requiring the approval of a regulatory authority to which the operation had been notified before that date, took place irrevocably before 21 December 2007.

Procedure and forms of order sought by the parties

- 11 By application lodged at the Registry of the General Court on 18 May 2010, the applicant brought the present action.
- 12 By document lodged at the Registry of the General Court on 30 September 2010, the Commission raised a plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the General Court.
- 13 On 16 November 2010, the applicant submitted its observations on the Commission's plea of inadmissibility.
- 14 On 8 June 2011, pursuant to Article 14 of the Rules of Procedure and on a proposal from the Eighth Chamber, the Court decided to refer the present case to the Chamber sitting in extended composition.
- 15 Upon hearing the Report of the Judge-Rapporteur, the General Court (Eighth Chamber, Extended Composition) decided to open the oral procedure in order to rule on the plea of inadmissibility raised by the Commission and to put questions to the parties. The parties replied within the period prescribed.
- 16 The parties presented their oral arguments and replied to the Court's questions at the hearing on 24 October 2011.
- 17 The applicant claims that the Court should:
 - annul Article 1(1) of the contested decision;
 - reject the plea of inadmissibility raised by the Commission;
 - order that the proceedings should continue and specify a time-limit within which the Commission must lodge its defence; that time-limit must not be open to extension in view of the undue delay in the proceedings;
 - order the Commission to pay the costs.
- 18 The Commission contends that the General Court should:
 - declare the action inadmissible;
 - order the applicant to pay the costs.
- 19 In its observations on the plea of inadmissibility, the applicant also applied for a measure of organisation of procedure, requesting the Court to ask the Commission to forward to it the requests for information concerning taxpayers that had made use of the scheme at issue, which the Commission had sent to the Kingdom of Spain during the investigation procedure, together with the Kingdom of Spain's replies, and also to ask the Commission to state whether it was possible for it to ascertain the precise number and the identity of persons benefiting under the scheme at issue up until October 2009.

Law

- 20 The Commission contends that the present action is inadmissible on the grounds that the applicant has not shown either that it had a legal interest in bringing proceedings or that the contested decision was of individual concern to the applicant.
- 21 It is appropriate to begin by examining the Commission's second ground of inadmissibility.
- 22 Under the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.
- 23 Since the contested decision was adopted following the formal investigation procedure and was not addressed to the applicant, the question of whether it is of individual concern to the applicant must be assessed according to the criteria laid down in Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107. Thus, the applicant must show that the contested decision affects it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons and by virtue of these factors distinguishes it individually just as in the case of the person addressed by that decision (see, to that effect, Case C-298/00 P *Italy v Commission* [2004] ECR I-4087, paragraph 36 and the case-law cited).
- 24 The applicant relies primarily and essentially on the fact that it is a beneficiary under the scheme at issue in order to show that the contested decision, declaring that scheme unlawful and incompatible with the common market, is of individual concern to it.
- 25 It is settled case-law that an undertaking cannot, in principle, bring an action for annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see *Italy v Commission*, paragraph 37 and the case-law cited, and Case T-309/02 *Acegas v Commission* [2009] ECR II-1809, paragraph 47 and the case-law cited).
- 26 However, where the decision in question is of concern to the applicant undertaking not only by virtue of its being an undertaking in the sector concerned and a potential beneficiary of the aid scheme, but also by virtue of its being an actual beneficiary of individual aid granted under that scheme, the recovery of which has been ordered by the Commission, that decision is of individual concern to the applicant and the applicant's action against it is admissible (see, to that effect, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines v Commission* [2000] ECR I-8855, paragraphs 34 and 35, and judgment of 10 September 2009 in Case T-75/03 *Banco Comercial dos Açores v Commission*, not published in the ECR, paragraph 44).
- 27 Accordingly, it is appropriate to determine whether the applicant is an actual beneficiary of individual aid granted under the aid scheme to which the contested decision relates, recovery of which has been ordered by the Commission (see, to that effect, Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others v Commission* [2011] ECR I-4727, paragraph 53 and the case-law cited).
- 28 In that regard, first, the applicant argues that it acquired shareholdings in the Greek group Metal Industry of Arcadia C. Rokas, SA in 2008 and 2009 and that the contested decision requires that aid relating to operations post 21 December 2007 must be recovered. Secondly, it contends that it is also individually concerned by reason of the operations it carried out prior to 21 December 2007.

- 29 As regards operations post 21 December 2007, it should be noted that the applicant provides no evidence that the scheme at issue applied in respect of its acquisitions of shareholdings in the Greek group concerned. Thus, it referred in its pleadings merely to an intention to apply that scheme, and it stated at the hearing that it had not asked in any of its tax returns for that scheme to apply.
- 30 The applicant is not therefore, in this respect, in a position different from that of any other undertaking that has carried out an operation that could benefit under the scheme at issue and is therefore a potential, and not an actual, beneficiary under that scheme (see, to that effect, *Acegas v Commission*, paragraphs 51 to 54). It is not therefore possible to consider the contested decision as being of individual concern to it as regards operations post 21 December 2007.
- 31 As regards operations prior to 21 December 2007, the applicant has established that it was an actual beneficiary under the scheme at issue. Indeed, it attaches as an annex to its observations on the plea of inadmissibility a document showing that it had used the scheme at issue in respect of acquisitions of shareholdings, one, dated 23 April 2007, in a company established in the United Kingdom and others, dated 1 December 2004 and 1 December 2005, in a company established in Greece. However, under Article 1(2) and Article 4(1) of the contested decision, the applicant is not covered by the recovery obligation provided for in that decision.
- 32 In that regard, the applicant contends, first, that a measure declaring aid incompatible cannot be recognised as being of individual concern to an applicant only in cases where that measure requires the recovery of that aid. In the present case, the decision is of individual concern to the applicant because it belongs to a closed class of aid recipients whose number and identity were determined and verifiable when the contested decision was adopted. On that point, the applicant asks the Court to approve the application for a measure of organisation of procedure referred to in paragraph 19 above. Moreover, the applicant's active participation in the formal investigation procedure, demonstrated inter alia by the meeting between its representatives and the Commission on 16 April 2008, referred to in recital 11 in the preamble to the contested decision, and also the reference, in recital 2 in the preamble to the contested decision, to its acquisition of shareholdings in the company ScottishPower, show that its specific situation was taken into consideration and that the decision is of individual concern to it.
- 33 First, it must be borne in mind that it is settled case-law that the possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them, where, as in the present case, it applies by virtue of an objective legal or factual situation defined by the measure in question (see, to that effect, Case C-451/98 *Antillean Rice Mills v Council* [2001] ECR I-8949, paragraph 52, and Case T-292/02 *Confservizi v Commission* [2009] ECR II-1659, paragraph 53). There are therefore no grounds for ordering the measure of organisation of procedure applied for by the applicant, which seeks in essence a ruling on whether the Commission was in a position to identify the beneficiaries of the scheme at issue.
- 34 Moreover, case-law has indeed recognised that an applicant could be individually concerned as a result of its having played a significant role in the procedure leading to the adoption of the contested decision. However, the cases concerned particular situations in which the applicant occupied a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons (see, to that effect, Case C-319/07 P *3F v Commission* [2009] ECR I-5963, paragraphs 85 to 95 and the case-law cited).
- 35 In the present case, the applicant confined itself to submitting comments, in the same way as the 31 other parties concerned, and its representatives attended a meeting with the Commission on 16 April 2008, together with representatives of other interested third parties. It is not apparent from those circumstances that the applicant occupied a position as negotiator that would mean that it could be recognised as being individually concerned.

- 36 Although the applicant claims that its involvement in the formal investigation procedure and the reference in the contested decision to its acquisition of shares in ScottishPower show that its particular situation was the subject of detailed discussions that establish that it was individually concerned by virtue of the judgment of 22 November 2001 in Case T-9/98 *Mitteldeutsche Erdöl-Raffinerie v Commission* [2001] ECR II-3367, it provides no evidence to show that its situation is comparable to that of the applicant in the case that gave rise to that judgment.
- 37 In *Mitteldeutsche Erdöl-Raffinerie v Commission*, paragraphs 80 to 82, the provision of the German tax law declared incompatible by the Commission decision at issue had been adopted inter alia on the grounds of the particular features of the applicant's situation. That particular situation had been the subject not only of written observations on the part of the German Government and the applicant's parent company, but also of detailed discussions between that government and the Commission. Furthermore, the German Government had proposed to the Commission that it would apply the contested provision to the applicant only, and would individually notify any other cases in which that provision was applied. The Commission had considered that proposal in its decision and given the reasons why it could not be accepted.
- 38 However, in the present case the applicant has not provided any evidence capable of establishing that a particular situation exists that has been the subject of detailed discussions between the Spanish Government and the Commission. Moreover, there is no question that the scheme at issue was not adopted on the grounds of the applicant's alleged particular situation. Nor does the fact that the applicant's acquisition of ScottishPower was referred to in recital 2 of the contested decision mean that its particular situation was taken into account, since that reference was purely illustrative.
- 39 The applicant contends, secondly, that the exclusion of operations prior to 21 December 2007 from the scope of the recovery obligation by virtue of the principle of the protection of legitimate expectations is not definitive, due to the action brought by Deutsche Telekom in Case T-207/10 against that part of the operative part of the contested decision, nor does it bind national courts hearing actions brought by its competitors.
- 40 As the Commission rightly points out, in putting forward that line of argument the applicant is confusing the ground of inadmissibility requiring that the appellant must have been individually concerned with the ground of inadmissibility requiring a legal interest in bringing proceedings. Although a legal interest in bringing proceedings may be established inter alia by reference to actions brought before a national court after proceedings have been brought before a Court of the European Union (Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others v Commission* [2008] ECR II-2935, paragraphs 78 to 82), whether a natural or legal person is individually concerned is assessed on the date on which the proceedings are brought and is determined only by the contested decision. Thus, a person individually concerned by a decision that declares aid incompatible with the common market and orders its recovery remains so, even if it subsequently emerges that the person will not be required to refund it (see, to that effect, *Comitato 'Venezia vuole vivere' and Others v Commission*, paragraph 56, and Opinion of Advocate General Trstenjak in that case, ECR I-4727, points 81 and 82).
- 41 It should also be noted that, in order for the contested measure to be of individual concern to the applicant, the applicant must establish that he belongs to a closed class, that is to say, a group which cannot be extended after the adoption of the contested measure (see, to that effect, Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477, paragraph 11, and Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I-5479, paragraph 63).
- 42 Consequently, in the present case the possible annulment of Article 1(2) of the contested decision by the General Court and the subsequent recovery of the aid at issue from the applicant, together with actions before a national court, in addition to being purely hypothetical, since the applicant accepted

in response to written questions from the Court and at the hearing that no proceedings had been brought before a national court, do not give reason to consider that the contested decision is of individual concern to the applicant.

- 43 Moreover, to the extent that the applicant relies on the action brought in Case T-207/10 in claiming that a refusal to allow it to challenge the operative part of the contested decision in so far as it is unfavourable to it, whilst accepting the admissibility of that action against the contested decision in so far as it is favourable to it, amounts to depriving the applicant of effective judicial protection, it should be noted that the European Union is based on the rule of law and the acts of its institutions are subject to review by the Court of their compatibility with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the European Union's legal order. However, in the present case, the applicant is not in the least deprived of any effective judicial protection. Even if the present action is declared inadmissible, nothing prevents the applicant requesting the national court, in the course of proceedings before any national court whose existence it alleges, in which pleas are raised putting in issue the absence of a recovery obligation which the applicant enjoys under the contested decision, to make a reference for a preliminary ruling under Article 267 TFEU putting in issue the validity of the contested decision in so far as it finds that the scheme at issue is incompatible (see, to that effect, Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and Others v Commission* [2011] ECR II-1311, paragraph 55 and the case-law cited).
- 44 It follows from the foregoing that the contested decision is not of individual concern to the applicant.
- 45 The applicant claims, in the alternative, that it is not required to demonstrate that the contested decision is of individual concern to it under the last part of the fourth paragraph of Article 263 TFEU. The contested decision is a regulatory act which is of direct concern to it and does not entail implementing measures.
- 46 In the present case, the contested decision cannot be described as an act not entailing implementing measures. Article 6(2) of the contested decision refers to the existence of 'national measures taken to implement [it] until recovery of the aid granted under the scheme [at issue] has been completed'. The very existence of those recovery measures, which constitute implementing measures, justifies the contested decision's being regarded as an act entailing implementing measures. Such measures may be challenged before a national court by persons to whom they are addressed.
- 47 Furthermore, those measures may also, where appropriate, be challenged by the applicant in the event that, as it claims (see paragraph 39 above), the recovery obligation is implemented with regard to it. Moreover, as the Commission stated at the hearing, the measures implementing the contested decision are not confined to those recovery measures, but include also all the measures for implementing the incompatibility decision, including inter alia the measure rejecting an application for the tax advantage at issue, a rejection which the applicant may also challenge before the national court. Consequently, the Court must reject the applicant's argument that the contested decision does not entail or require implementing measures to give it effect since it automatically prevents the continued application of the scheme at issue by the beneficiaries and the Kingdom of Spain.
- 48 It follows that the contested decision entails implementing measures and that therefore, without it being necessary to rule on whether that decision is a regulatory act, the Court must reject the applicant's argument submitted in the alternative, based on the last part of the fourth paragraph of Article 263 TFEU.
- 49 In the light of the foregoing the action must therefore be dismissed as being inadmissible and it is not necessary to examine the Commission's first ground of inadmissibility alleging that the applicant has no legal interest in bringing proceedings.

Costs

50 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Commission, in addition to its own costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

- 1. Dismisses the action;**
- 2. Orders Iberdrola, SA to pay the costs.**

Truchot

Martins Ribeiro

Wahl

Soldevila Fragoso

Kanninen

Delivered in open court in Luxembourg on 8 March 2012.

[Signatures]