Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 28 July 2016[1]

Joined Cases C-20/15 P and C-21/15 P

European Commission
v
World Duty Free Group, formerly Autogrill España SA (C-20/15 P),
Banco Santander SA,

Santusa Holding SL (C-21/15 P)

(Appeal — Article 107(1) TFEU — Spanish provisions concerning corporate tax allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in undertakings which are tax resident abroad — Commission Decision 2011/5/EU and Commission Decision 2011/282/EU — Decisions classifying that scheme as State aid, declaring that aid incompatible with the internal market and ordering its recovery — Concept of State aid — Selective nature — Identification of a category of undertakings as being the only ones favoured by the measure derogating from the common regime)

I – Introduction

1. By its appeal in Case C-20/15 P, the Commission asks the Court to set aside the judgment of the General Court of the European Union of 7 November 2014 in *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939),[2] by which that Court annulled Article 1(1)[3] and Article 4[4] of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain.[5]

1 — Original language: French.

2 — 'The judgment under appeal in *Autogrill España* v *Commission*'.

3 — That provision provides in essence that the aid scheme implemented by Spain under the arrangement provided for in Article 12(5), 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), reproduced by 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' or 'the measure at issue') and unlawfully put into effect by the Kingdom of Spain in breach of Article 108(3) TFEU, is incompatible with the common market.

4 — That provision provides for the recovery of the aid.

5 — OJ 2011 L 7, p. 48, 'the first contested decision'.

2. By its appeal in Case C-21/15 P, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 7 November 2014 in *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938),[6] by which that Court annulled Article 1(1)[7] and Article 4[8] of Commission Decision 2011/282/EU of 12 January 2011 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.[9]

3. By the two contested decisions,[10] the Commission declared incompatible with the common market a tax advantage allowing undertakings taxable in Spain to amortise the financial goodwill[11] resulting from the acquisition of shareholdings[12] in 'foreign companies'[13] and ordered the Kingdom of Spain to recover the aid granted under that scheme.

4. It is settled case-law that, for a measure, as State aid, to come within Article 107(1) TFEU,[14] first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on the recipient; and fourth, it must distort or threaten to distort competition. All those conditions must be fulfilled.[15]

5. The two appeals are concerned only with the third of those conditions, that is to say selectivity. That criterion has long been one of the most controversial issues in the field of State aid. The appeals therefore offer the Court an opportunity to define the scope of that criterion, in particular with respect to tax measures.

6. More specifically, the Court will have to interpret the phrase 'by favouring certain undertakings or the production of certain goods', used in Article 107(1) TFEU, and determine whether selectivity may follow simply from the finding that a derogation from a common or 'normal' tax regime[16] has been introduced or whether, as the General Court held in paragraph 45 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 49 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*,[17] a category of undertakings which are exclusively favoured by the measure derogating from the common regime at issue must also be identified in all cases.

6 — 'The judgment under appeal in *Banco Santander and Santusa* v *Commission*'.

7 — That provision provides that '[t]he aid scheme implemented by [the Kingdom of] 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 [the Kingdom of] Spain in breach of Article 108(3) [TFEU], is incompatible with the internal market as regards aid granted to beneficiaries in respect of extra-EU acquisitions'.

8 — That provision provides for the recovery of the aid.

9 — OJ 2011 L 135, p. 1, 'the second contested decision'.

10 — Referred to jointly as 'the contested decisions'.

11 — According to the contested measure, financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the price paid for the shareholding. The concept of financial goodwill within the meaning of the contested measure introduces into the field of share acquisitions a notion usually employed in connection with transfers of assets or business combination transactions. See recital 20 of the first contested decision, which is identical to recital 29 of the second contested decision.

12 — A share acquisition is defined as 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. See recital 23 of the first contested decision, which is identical to recital 32 of the second contested decision.

13 — The contested decisions state that, in order to be considered a 'foreign company', a company must be liable for a similar tax to that applicable in Spain and its revenue must mainly derive from business activities carried out abroad. See recital 21 of the first contested decision, which is identical to recital 30 of the second contested decision.

14 — Article 107(1) TFEU provides that, 'save as otherwise provided in this Treaty, any aid granted by a 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 common market'.

15 — See to that effect the judgment of 16 April 2015 in *Trapeza Eurobank Ergasias* (C-690/13, EU:C:2015:235, paragraph 17 and the case-law cited). It must be recalled that, in accordance with settled case-law, classification as 'aid' within the meaning of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. Judgment of 1 July 2008 in *Chronopost and La Poste* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraph 121 and the case-law cited).

16 — The common or normal tax regime is also sometimes called the reference regime.

17 — Referred to jointly as 'the judgments under appeal'.

7. In this Opinion I shall argue first of all that, once a tax measure derogates from the 'normal' or reference tax regime and benefits undertakings performing the transactions in question to the detriment of others that perform similar transactions and are therefore in a comparable situation, that measure is by definition discriminatory or selective, unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it forms part.

8. The fact that the conditions attached to the transactions covered by the derogatory tax measure are relatively easy to fulfil and that, for that reason, the benefits which that measure offers are available to a large number of undertakings does not call into question its selective nature but only the degree of selectivity.

9. Neither do I believe that the fact that the text of Article 107 TFEU speaks only of measures 'favouring certain undertakings or the production of certain goods' excludes from the scope of that article economic transactions that are favoured by such measures. Since the transactions are performed by undertakings, the act of favouring certain economic transactions also serves to favour certain undertakings.

10. In my view, therefore, contrary to the General Court's findings in the judgments under appeal, the selectivity criterion provided for in Article 107(1) TFEU does not require the identification of a category of undertakings with specific characteristics [18] on account of which they are the only ones favoured by the tax measure at issue.

11. Secondly, I shall conclude, in accordance with the Court's case-law as set out in the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20), 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8) and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), that the measure at issue is selective since it benefits undertakings performing cross-border transactions but not undertakings performing the same transactions at national level.

II – The background to the disputes

12. On 10 October 2007, following several written questions raised by members of the European Parliament in 2005 and 2006 and a complaint which it had received from a private operator that same year, the Commission decided to open the formal investigation procedure against the measure at issue.

13. That measure 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 one year, the goodwill resulting from that shareholding, as recorded in the undertaking's accounts as a separate intangible asset, may be deducted, in the form of an amortisation, from the basis of assessment to the corporation tax for which the undertaking is liable.

14. Under Spanish tax law, the acquisition by an undertaking which is taxable in Spain of a shareholding in a company established in Spain, on the other hand, does not make it possible for the goodwill resulting from that acquisition to be accounted for separately for tax purposes. Spanish tax law also provides, however, that the goodwill can be amortised in the case of a business combination. [19]

18 — See paragraphs 64 to 68 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 68 to 72 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

19 — See recital 19 of the first contested decision, which is identical to recital 28 of the second contested decision. A business combination is 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. See recital 23 of the first contested decision, which is identical to recital 32 of the second contested decision.

15. The Commission closed the procedure relating to the acquisition of shareholdings within the European Union by adopting the first decision at issue. In Article 1(1) of that decision, the Commission declared that the scheme at issue, consisting in a tax advantage enabling Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign undertakings, was incompatible with the common market in so far as it applied to the acquisition of shareholdings in undertakings established within the European Union. In Article 4 of the same decision, it ordered the Kingdom of Spain to recover the aid granted under that scheme.

16. The Commission had not closed the procedure relating to the acquisition of shareholdings outside the European Union, since the Spanish authorities had undertaken to provide new information in relation to the obstacles to cross-border mergers outside the European Union.

17. By the second contested decision, the Commission also declared the scheme at issue, which consisted in a tax advantage enabling Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign undertakings, to be incompatible with the common market in so far as it applied to the acquisition of shareholdings in undertakings established outside the European Union [20] and ordered the Kingdom of Spain to recover the aid granted under that scheme. [21]

III – Procedure before the General Court and the judgments under appeal

18. By application lodged at the Registry of the General Court on 14 May 2010, Autogrill España SA, now World Duty Free Group SA ('WDFG'), brought an action for the annulment of the first contested decision. In support of its action, WDFG raised four pleas in law, the first of which was based on an error of law in the Commission's application of the condition relating to selectivity. [22]

19. By application lodged at the Registry of the General Court on 29 July 2011, Banco Santander SA and Santusa Holding SL ('Banco Santander and Santusa') brought an action for the annulment of the second contested decision. In support of their action, Banco Santander and Santusa raised five pleas in law the first of which was based on an error of law in the Commission's application of the condition relating to selectivity. [23]

20. By the judgments under appeal, the General Court, on the basis of largely identical grounds, upheld the first plea raised in the two actions, alleging that Article 107(1) TFEU had been misapplied in relation to the criterion of selectivity, and annulled Article 1(1) and Article 4 of the contested decisions at issue without examining the other pleas raised in those actions.

21. In the judgments under appeal, the General Court considers first of all that, 'in order to classify a domestic tax measure as "selective", it is necessary to begin by identifying and examining the common or "normal" regime applicable in the Member State concerned. It is in relation to this common or "normal" tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in the light

20 — See Article 1(1) of the second contested decision.

21 — See Article 4 of the second contested decision.

22 — The second plea was based on a lack of selectivity of the measure in so far as the differentiation that it introduced appeared to be a result of the nature or general scheme of the system of which it was part; the third was based on the fact that the measure would be of no benefit to the companies to which the scheme at issue applied and the fourth was based, both in terms of the criterion relating to selectivity and that relating to the existence of an advantage, on a failure to state the reasons for the contested decision.

23 — The second plea was based on an error in identifying the reference system, the third on a lack of selectivity of the measure in so far as the differentiation that it introduced appeared to be a result of the nature or general scheme of the system of which it was part, the fourth on the fact that the measure would be of no benefit to the companies to which the scheme at issue applied and the fifth, both in terms of the criterion relating to selectivity and that relating to the existence of an advantage, on a failure to state the reasons for the contested decision.

of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation … Thirdly, if necessary, it is appropriate to examine whether the Member State in question has succeeded in establishing that the measure is justified by the nature or overall structure of the system of which it forms part …'. [24]

22. The General Court held, however, that, '… where the measure at issue, even though it constitutes a derogation from the common or "normal" tax regime, is potentially available to all undertakings, it is not possible to compare, in the light of the objective pursued by the common or "normal" regime, the legal and factual situation of undertakings which are able to benefit from the measure with that of undertakings which cannot benefit from it. … [F]or the condition of selectivity to be satisfied, a category of undertakings which are exclusively favoured by the measure at issue must be identified in all cases … [T]he mere finding that a derogation from the common or "normal" tax regime has been provided for cannot give rise to selectivity'. [25]

23. The General Court therefore held that the existence, even if it were established, of a derogation from or exception to the reference framework identified by the Commission cannot, in itself, establish that the measure at issue favours 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU, since that measure is, *a priori*, available to any undertaking. [26]

24. So far as concerns the measure at issue, the General Court found that it applied to all shareholdings of at least 5% in foreign companies which are held for an uninterrupted period of at least one year and that it was aimed not at any particular category of undertakings or production, but at a category of economic transactions. [27]

25. The General Court stated that, to benefit from the measure at issue, an undertaking must purchase shares in a foreign company. [28] It considered that such an operation, which is entirely financial, does not, *a priori*, require the acquiring undertaking to change its activity and also, in principle, involved for that undertaking only limited responsibility with regard to the investment made. [29] The General Court took the view that, in accordance with paragraph 36 of the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), 'a measure which is to be applied regardless of the nature of the activity of undertakings is not, in principle, selective'. [30]

26. The General Court went on to say that the measure at issue did not set any minimum amount in respect of the minimum 5% shareholding threshold and therefore did not in fact restrict the undertakings which could take advantage of it to those which possessed sufficient financial resources to do so. [31] Finally, the General Court pointed out that the measure at issue provided that a tax advantage was to be granted on the basis of a condition linked to the purchase of particular financial

24 — See paragraph 33 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 37 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

25 — See paragraphs 44 and 45 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 48 and 49 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

26 — See paragraph 52 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 56 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

27 — See paragraph 53 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 57 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

28 — See paragraph 55 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 59 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

29 — See paragraph 56 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 60 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

30 — See paragraph 57 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 61 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

31 — See paragraph 58 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 62 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

assets, that is to say shareholdings in foreign companies.[32] 'However, in [the judgment of 19 September 2000 in] *Germany* v *Commission*, … [(C-156/98, EU:C:2000:467] (paragraph 22), the Court of Justice ruled that a tax concession in favour of taxpayers who sold certain financial assets and could offset the resulting profit in the case of shareholding acquisitions in capital companies having their registered office in certain regions conferred on those taxpayers an advantage which, as a general measure applicable without distinction to all economically active persons, did not constitute aid within the meaning of the relevant provisions of the Treaty. … The measure at issue therefore does not exclude, *a priori*, any category of undertakings from taking advantage of it. … As a consequence, even if the measure at issue constitutes a derogation from the reference framework used by the Commission, this would not, in any event, be a ground for establishing that that measure favours "certain undertakings or the production of certain goods" within the meaning of Article [107 TFEU]'.[33]

27. Secondly, the General Court noted that, according to the Commission, the measure at issue was selective in that it only favoured certain groups of undertakings that carried out certain investments abroad and that, as the Commission further argued, a measure which favoured only undertakings satisfying the conditions on which its grant was subject was selective 'by law' and that it was not necessary to ensure that that measure was likely to have the effect of conferring an advantage only on certain undertakings or the production of certain goods.[34]

28. According to the General Court, however, that other reason for the contested decisions did not make it possible to establish that the measure at issue was selective in nature. It considered that, according to settled case-law,[35] Article 107(1) TFEU distinguished between State interventions on the basis of their effects and that the approach proposed by the Commission could lead to every tax measure the benefit of which was subject to certain conditions being found to be selective, even though the beneficiary undertakings did not share any specific characteristic distinguishing them from other undertakings, apart from the fact that they would be capable of satisfying the conditions to which the grant of the measure was subject.[36]

29. Thirdly, the General Court noted that, according to the Commission, the measure at issue was aimed at favouring 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.[37]

32 — See paragraph 59 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 63 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

33 — See paragraphs 60 to 62 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 64 to 66 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

34 — See paragraph 63 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 67 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

35 — See the judgments of 2 July 1974 in *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 27); 29 April 2004 in *Netherlands* v *Commision* (C-159/01, EU:C:2004:246, paragraph 51); and 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87 and 88).

36 — See paragraphs 64 to 68 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 68 to 72 of the judgment in *Banco Santander and Santusa* v *Commission*.

37 — See paragraph 69 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 73 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

30. According to the General Court, the finding that a measure is selective is based on a difference in treatment between categories of undertakings under the legislation of a single Member State and not a difference in treatment between the undertakings of one Member State and those of other Member States.[38] The General Court further considered that the link between the export of capital and the export of goods would, if it were established, allow only a finding that there is an effect on competition and trade and not a finding that the measure at issue is selective, which had to be evaluated within a national framework.[39]

31. Fourthly, the General Court held that the Commission's argument that, in its case-law, the Court of Justice had already allowed a tax measure to be classified as selective without it being established that the measure at issue favoured a particular category of undertakings or the production of certain goods, to the exclusion of other undertakings or the production of other goods, should also be rejected.[40]

32. In this regard, the General Court held, on the one hand, that, in the three judgments relied on by the Commission (judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), the category of recipient undertakings allowing a finding that the measure at issue was selective was made up of the category of 'export undertakings'. This had to be regarded as a category which, even though extremely broad, was nonetheless particular, since it comprised undertakings that could be distinguished on account of common and specific characteristics linked to their export activity.[41]

33. On the other hand, so far as concerns the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), the General Court held that, while it was true that the tax advantage at issue in the case that gave rise to that judgment related to a number of export activities including the purchase of shares in foreign companies, the fact remained that, in order to benefit from the tax advantage at issue, undertakings had to acquire shareholdings in companies directly involved in the exportation of goods or services. That measure was therefore also aimed at the particular category of export undertakings.[42]

IV – Procedure and forms of order sought by the parties

34. By its appeals in Cases C-20/15 P and C-21/15 P, the Commission claims that the Court should:

— set aside the judgment under appeal in *Autogrill España* v *Commission* and the judgment under appeal in *Banco Santander and Santusa* v *Commission*, respectively;

— refer the respective cases back to the General Court of the European Union; and

— reserve the costs.

38 — See paragraph 75 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 79 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

39 — See paragraph 76 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 80 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

40 — See paragraph 77 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 81 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

41 — See paragraphs 79 and 80 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 82 and 83 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

42 — See paragraph 82 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 86 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

35. WDFG (C-20/15 P) and Banco Santander and Santusa (C-21/15 P) contend that the Court should:

— declare admissible and uphold the grounds of opposition to the Commission's appeal as set out in their responses;

— dismiss the Commission's single ground of appeal and uphold the judgment under appeal in *Autogrill España* v *Commission* and the judgment under appeal in *Banco Santander and Santusa* v *Commission*, respectively; and

— order the Commission to pay the costs.

36. By orders of the President of the Court of 19 May 2015, the Kingdom of Spain, Ireland and the Federal Republic of Germany were granted leave to intervene in support of the forms of order sought by WDFG (C-20/15 P) and Banco Santander and Santusa (C-21/15 P).

37. On the other hand, by orders of the President of the Court of 6 October 2015, the applications by Telefónica SA and Iberdrola SA to intervene in support of the forms of order sought by WDFG (C-20/15 P) and Banco Santander and Santusa (C-21/15 P) were refused.

38. The Commission, WDFG, Banco Santander and Santusa, the Kingdom of Spain, Ireland and the Federal Republic of Germany submitted written observations. They all presented oral argument at the hearing which was held on 31 May 2016.

V – The appeals

39. In support of its appeals, the Commission raises a single, identical ground of appeal consisting of two parts and alleging that the General Court committed an error of law in its interpretation of the condition of selectivity as required by Article 107(1) TFEU.

A – *The first part*

1. Arguments of the parties

40. By the first part of its single ground of appeal, the Commission accuses the General Court of having erred in law by requiring it, in order to demonstrate that a measure is selective, to identify a category of undertakings with specific characteristics.

41. The Commission submits that its contested decisions concluded that the measure at issue was an exception to the general regime which favoured only undertakings making a certain type of investment abroad (that is to say, acquisitions of shareholdings of at least 5%) as compared with undertakings that made the same type of investment in Spain and were therefore in a comparable factual and legal situation. The Commission argues that, while the General Court endorsed the use of that method of analysis, it also requires the Commission to establish that the measure favours certain undertakings identifiable on the basis of specific characteristics which other undertakings do not possess, that is to say characteristics which are particular to them and identifiable *ex ante*.

42. According to the Commission, that additional and invariably more restrictive analysis of the concept of selectivity on which the General Court relies in order to order the annulment of Article 1(1) and Article 4 of the contested decisions constitutes an error of law and is contrary to the settled case-law of the EU courts, of which, moreover, it repeatedly gives a distorted reading.

43. The Commission submits that the General Court erred in law by denying that a measure which is to be applied regardless of the activity in which the undertaking engages or which does not make its application subject to any minimum amount can be selective. The Commission submits that, contrary to the General Court's findings in paragraph 57 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 61 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, it cannot be inferred from paragraph 36 of the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598) that a measure which is to be applied regardless of the nature of the activity of the undertakings is not, in principle, selective. The Commission submits that it is clear from the aforementioned paragraph 36 that a measure is not selective if it applies generally and without any distinction to all undertakings in a Member State, and not, as the General Court claims in the judgments under appeal, depending on its connection with the activity of undertakings.

44. The Commission also accuses the General Court of having erred in law in finding, in paragraphs 59 to 62 of the judgment under appeal in *Autogrill España* v *Commission* and in paragraphs 63 to 66 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, that the measure at issue was not selective inasmuch as it was linked to the purchase of particular financial assets and did not exclude, *a priori*, any category of undertakings from taking advantage of it. The General Court, it submits, wrongly relied in this regard on paragraph 22 of the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467). For it follows from paragraphs 22 and 23 of that judgment that, in the case which gave rise to it, the Commission had classified the measure at issue as selective only in relation to certain geographically defined undertakings in which private investors had reinvested the profits from the sale of economic assets and not in relation to those investors themselves, for whom it had held that that measure did not constitute aid. In any event, the assessment of the measure's selective nature was not disputed before the Court in that case.

45. In addition, the Commission criticises the General Court for having held, in paragraphs 66 to 68 of the judgment under appeal in *Autogrill España* v *Commission* and in paragraphs 70 to 72 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, that the case-law of the Court of Justice confirms that a measure the benefit of which 'is subject to certain conditions, … even though the beneficiary undertakings [do] not share any specific characteristic distinguishing them from other undertakings, apart from the fact that they [are] capable of satisfying the conditions to which the grant of the measure is subject' cannot be selective.

46. The Commission submits that the General Court thus relies on an erroneous analysis of the case-law concerned.

47. With regard to the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), the Commission argues that it is clear from paragraphs 90 and 91 of that judgment that the case which had given rise to it concerned a very particular situation in which the Court considered the reference tax system itself to be selective, in that the latter as such favoured 'offshore' undertakings, rather than any derogation from it. The reference in that judgment to the 'specific properties' of a category of undertakings should therefore be understood as referring to the characteristics by reason of which those undertakings are favoured for tax purposes under a reference system that is inherently selective and cannot be extrapolated beyond that particular context.

48. The Commission submits that, in paragraph 66 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 70 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, the General Court cites only the first sentence of paragraph 42 of the judgment of 29 March 2012 in *3M Italia* (C-471/10, EU:C:2012:184),[43] while the second sentence of paragraph 42 reflects the principle, established by the Court's settled case-law, that a measure is selective if it is such as to favour 'certain undertakings or the production of certain goods' by comparison with others which, from the point of view of the objective pursued by that regime, are in a comparable factual and legal situation.

49. The Commission maintains that it adhered to the method for analysing selectivity in matters of taxation as enshrined in the Court's settled case-law inasmuch as it established in the contested decisions that the measure at issue constitutes a derogation from a reference framework in that it prescribes for undertakings taxable in Spain which acquire shareholdings in companies established abroad a tax treatment different from that applicable to undertakings taxable in Spain which acquire shareholdings in companies established in Spain, even though those two categories of undertakings are in comparable situations.

50. It takes the view that, by imposing on it the additional burden of demonstrating that the measure at issue favours certain undertakings identifiable by specific characteristics that other undertakings do not possess, that is to say specific characteristics which are identifiable *ex ante*, the General Court relied on a concept of selectivity necessarily more restrictive than that enshrined in the settled case-law of the Court of Justice and, as such, contrary to that case-law, and, in so doing, erred in law.

51. WDFG and Banco Santander and Santusa submit first of all that, since the Commission did not maintain in the contested decisions that the measure at issue was selective de facto, the present appeals are concerned only with examining the criticisms levelled against the judgments under appeal to the effect that, in them, the General Court held that the grounds relied on by the Commission in those decisions did not support the conclusion that that measure was selective de jure.

52. They submit that it follows from the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598) that a measure that is open and potentially available to all undertakings cannot be considered selective. It cannot, however, be inferred from that judgment, as the Commission does, that, in order for a measure not to be selective, it must actually apply to all the undertakings in the Member State without exception, since such a proposition would have the consequence of rendering almost all tax rules selective.

53. WDFG and Banco Santander and Santusa also dispute the Commission's argument that measures have on many occasions already been classified as selective even though they set no minimum investment amount and apply regardless of the nature of the beneficiary's activities.

54. The measure at issue, on the other hand, inasmuch as it confers a tax advantage for conduct which is open, in fact and in law, to undertakings and sectors of every kind, cannot automatically and on that ground alone be regarded, prima facie, as being selective in law.

55. WDFG and Banco Santander and Santusa submit that the General Court was justified in relying on paragraph 22 of the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467), to the terms of which it strictly adhered. In the decision at issue in the case which gave rise to that judgment, the Commission had itself expressly recognised that the measure was not selective in relation to the investors concerned, which the Court confirmed.

43 — According to the General Court, '[in paragraph 42 of that judgment], the Court of Justice ruled that the fact that only taxpayers satisfying the conditions for the application of the measure at issue in that case could benefit from the measure could not in itself make it into a selective measure'.

56. In its decision-making practice, moreover, the Commission has on many occasions already found tax measures not to be selective on the basis of the same criterion, in other words that general measures which are applicable to all undertakings without distinction and of which all taxable persons may take advantage are not selective.

57. What is more, the measures relating to the purchase of certain assets as referred to by the Commission would not be found not to be selective if measured against that criterion. Such measures would be selective if it were shown that they do in fact favour certain undertakings to the exclusion of others. In any event, their selectivity would follow not from the nature of the assets acquired but from the fact that the nature of those assets supports the view that the buyers form a particular category.

58. With regard to the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), WDFG and Banco Santander and Santusa take the view that the General Court was right to consider that the measure which had given rise to that judgment was different from that in the present case, since it was intended to confer an advantage on a distinct and identifiable category of undertakings, that is to say those engaged in export activities.

59. WDFG and Banco Santander and Santusa further submit that it follows clearly from paragraph 104 of the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732) that a measure can be classified as selective only if it benefits a category of undertakings sharing 'properties' which are 'specific' to them. In their submission, it also follows from that judgment that the identification of a derogation from a common regime is not an end in itself, the important criterion being what effect the measure actually has in the sense of whether or not it benefits particular undertakings or the production of particular goods.

60. In their contention, the interpretation of the judgment of 29 March 2012 in *3M Italia* (C-471/10, EU:C:2012:184) advocated by the Commission cannot be adopted either. In that judgment, the Court held that the fact that only taxpayers satisfying the conditions for the application of a measure are able to benefit from it could not in itself make that measure selective.

61. WDFG and Banco Santander and Santusa argue, finally, that the General Court was right to consider that a measure cannot be classified as selective within the meaning of Article 107 TFEU if the benefit it confers is dependent on conduct that is, prima facie, available to any undertaking regardless of its sector of activity. That is readily apparent from the finding in the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467) that such a measure was not selective. The General Court's analysis is, moreover, essentially the same as that proposed by Advocate General Kokott in her Opinion in the case giving rise to the judgment of 6 October 2015 in *Finanzamt Linz* (C-66/14, EU:C:2015:661). What is more, the contrary proposition would lead to an absurd situation in which any tax measure would automatically be selective if it were not used by all the undertakings in a Member State without exception.

62. The Kingdom of Spain submits that the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598) confirms the position taken by the Spanish authorities during the administrative procedure to the effect that an economic advantage can be regarded as aid only if it is capable of favouring 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU. During the administrative procedure, it contends, the Spanish authorities demonstrated the open nature of the measure at issue, thus confirming the analysis set out in the judgments under appeal and the fact that the Commission did not demonstrate that the measure was selective in the contested decisions.

63. Ireland argues that, contrary to the Commission's submissions, the General Court did not infer from the judgments of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598); 6 March 2002 in *Diputación Foral de Álava and Others* v *Commission* (T-92/00 and T-103/00, EU:T:2002:61); and 9 September 2009 in *Diputación Foral de Álava and Others* v *Commission* (T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01, EU:T:2009:315) that only measures the application of which was linked to the nature of the undertaking's activities or the application of which was made subject to a minimum amount were selective, but only that the measure at issue could not be established as being selective because it was a measure from which all Spanish undertakings investing in a shareholding of at least 5% in a foreign undertaking were able to benefit regardless of the nature of their activity and of the amounts invested.

64. That Member State submits that the General Court was right to rely on paragraph 104 of the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732) in order to rule that, in order for a tax differentiation to be capable of being classified as aid, it was necessary to identify a particular category of undertakings that could be distinguished on the basis of specific properties. According to Ireland, the selectivity condition as laid down in Article 107(1) TFEU has to be defined in the same way in all cases relating to alleged State aid in matters of taxation, so that, contrary to what the Commission maintains, the principle expressly established in paragraph 104 of that judgment cannot be confined to an examination of a tax regime 'taken as a whole'.

65. Ireland takes the view that measures such as that at issue, which are genuinely open to all undertakings, inasmuch as it is impossible to identify a particular sector or a particular undertaking that is excluded from their application and, as such, placed at a disadvantage, should never be considered selective. Indeed, in its decision-making practice, the Commission has relied on that argument as a ground for concluding that certain amnesty measures were not selective even though they derogated from the reference framework. The stance taken by the Commission in the present appeals is therefore inconsistent with that institution's own practice.

66. The Federal Republic of Germany submits that the existence, even if it were established, of a derogation from or exception to the reference framework identified by the Commission is not, in itself, sufficient to conclude that the measure at issue favours 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU. On the contrary, it follows from such a derogation or exception only that the tax advantage can be regarded as being equivalent to a subsidy (that is to say, a financial contribution actually granted to a particular undertaking) and as having a similar incentive effect. Following that examination, therefore, it is necessary, in accordance with case-law (judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104) and the Opinion of Advocate General Kokott in the case giving rise to the judgment of 6 October 2015 in *Finanzamt Linz* (C-66/14, EU:C:2015:661, points 83 to 85), and as the General Court rightly held in the judgments under appeal, to take the further step of ascertaining whether the category of taxable entities benefiting from a tax measure comprises undertakings or the production of goods that are sufficiently specific for the purposes of Article 107(1) TFEU.

67. The Court thus held that the Commission had demonstrated to the requisite legal standard that the category of beneficiary undertakings was sufficiently characterised by the fact that those undertakings belonged to certain sectors or branches of the economy (judgment of 15 December 2005 in *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraph 44 et seq.), had a particular legal form (judgment of 10 January 2006 in *Cassa di Risparmio di Firenze and Others* (C-222/04, EU:C:2006:8, paragraph 136), were of a certain size (judgment of 13 February 2003 in *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraphs 48 and 49) or were established in a particular region (judgment of 17 November 2009 in *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 63).

68. On the other hand, it follows from case-law that the fact of attaching conditions to the grant of a tax advantage or derogating from the general tax regime is not in itself sufficient to establish that a tax measure is selective.

69. The Federal Republic of Germany recalls that the Court has already held that a tax concession in favour of taxpayers who sell certain financial assets and can offset the resulting profit when they acquire other financial assets confers on them an advantage which, as a general measure applicable without distinction to all economically active persons, cannot be classified as State aid (judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467, paragraph 22).

70. A measure such as that at issue, therefore, the application of which is generally linked to a certain category of transactions falling within the scope of company law, in this instance the acquisition of shareholdings regardless of the object and business activities of the undertaking, should certainly not, in principle, be considered selective.

71. Finally, the intervening parties all take the view that acceptance of the proposition that the selectivity condition is to be understood in the broad sense advocated by the Commission in its appeals would have the consequence of upsetting the existing institutional balance. For the Commission would then be able to review almost all measures relating to direct taxation under its powers in matters of State aid, even though direct taxation falls, in principle, within the legislative competence of the Member States.

2. Analysis

72. These appeals concern a national measure relating to direct taxation and the lawfulness of that measure in the light of Article 107(1) TFEU. Article 107(1) TFEU prohibits aid 'favouring certain undertakings or the production of certain goods', that is to say, selective aid. In this regard, it follows from the Court's settled case-law that Article 107(1) TFEU requires an assessment of whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. [44]

73. It should be noted first of all that, where, as in the present case, there is a need to examine whether a tax measure is selective, it is in principle [45] essential [46] to determine the reference framework.

74. Next, it must be examined whether the tax measure at issue derogates from that reference framework and constitutes an advantage for certain undertakings by comparison with others in a comparable factual and legal situation. [47]

44 — Judgments of 14 January 2015 in *Eventech* (C-518/13, EU:C:2015:9, paragraphs 54 and 55) and 22 December 2008 in *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 82).

45 — This is not contradicted by paragraphs 91 to 93 of the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), where the Court held that the classification of a tax system as 'selective' is not subject to the identification of a reference framework and a derogation from that framework where a tax system which, instead of laying down general rules applicable to all undertakings from which a derogation is made for certain undertakings, *achieves the same result by adjusting and combining the tax rules in such a way that their very application results in a different tax burden for different undertakings*.

46 — See the judgment of 6 September 2006 in *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 56), where the Court ruled that, 'in order to determine whether the measure at issue is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. *The determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation …*'. Emphasis added.

47 — At the hearing, the Commission stated that such a measure was to be regarded as being prima facie selective.

75. Finally, in accordance with the Court's case-law, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil that condition of selectivity. [48] [49]

76. It follows from the judgments under appeal that, in the contested decisions, the Commission considered that the measure at issue derogated from the 'normal' or reference tax regime applicable to undertakings taxable in Spain and that that regime did not constitute a general measure of fiscal or economic policy. [50] Under the measure at issue, after all, only the financial goodwill resulting from the acquisition by an undertaking taxable in Spain of shareholdings in a 'foreign company' can be amortised. [51] The financial goodwill resulting from the acquisition by an undertaking taxable in Spain of shareholdings in a company established in Spain, on the other hand, cannot be amortised. [52] Taking as its basis the fact that the two categories of undertaking were thus treated differently even though they were in comparable situations, the Commission concluded that the measure at issue constituted an exception to the reference system. [53]

77. It should be noted that the General Court did not call into question the fact that the comparability of shareholdings acquired by an undertaking taxable in Spain depends on whether that undertaking acquires the shareholdings in a 'foreign company' or in a company established in Spain. Moreover, the General Court did not consider that the differentiation between shareholding acquisitions under the measure at issue was justified by the nature or general scheme of the system of which it was a part.

78. Thus, in the judgments under appeal, the General Court considered that the existence, *even if it were established*, [54] of a derogation from or exception to the reference framework identified by the Commission could not, in itself, establish that the measure at issue favoured 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU, since that measure was available, *a priori*, to any undertaking and was therefore aimed not at any particular category of undertaking or production but at a category of economic transactions. [55]

79. In my opinion, such an interpretation of Article 107(1) TFEU and of the criterion of selectivity cannot be upheld.

48 — Judgment of the Court of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 42 and the case-law cited). In paragraph 49 of the judgment of 8 September 2011 in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550), the Court held that, 'in order to classify a domestic tax measure as "selective", it is necessary to begin by identifying and examining the common or "normal" regime applicable in the Member State concerned. It is in relation to this common or "normal" tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation.' Consequently, if those who benefit from the tax measure at issue and the taxable persons who do not benefit from it are not in a comparable factual and legal situation from the point of view of the objective pursued by the normal regime, the measure is not selective. See to that effect the judgments of 8 September 2011 in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 63 and 64) and 29 March 2012 in *3M Italia* (C-417/10, EU:C:2012:184, paragraph 42).

49 — According to the Commission, that third step serves to ensure that measures which are genuinely general are not considered selective. The Commission therefore considers that the new criterion drawn up by the General Court is unnecessary and undermines the conventional analysis of selectivity developed by the Court of Justice in its case-law. The Commission also notes that, in introducing that new criterion, the General Court has created a new category of measures, that is to say measures which are both general and derogatory. It considers such a category of measures to be illogical.

50 — See, to that effect, paragraph 54 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 58 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

51 — See paragraph 9 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 14 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

52 — See paragraph 13 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 18 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

53 — See paragraph 50 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 54 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

54 — According to WDFG and Banco Santander and Santusa, the General Court certainly did not endorse the definition of the reference system.

55 — See paragraphs 44 and 45 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 48 and 49 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

80. To my mind, where a tax measure constitutes a derogation from the 'normal' or reference tax regime and benefits *certain undertakings or the production of certain goods* to the detriment of others [56] which are in a comparable situation, [57] that measure is by definition discriminatory or selective, [58] unless the differentiation is justified by the nature or general scheme of the system of which it is a part.

81. It should be noted that, in the judgments of 15 December 2005 in *Unicredito Italiano* (C-148/04, EU:C:2005:774, paragraphs 49 and 50) and *Italy* v *Commission* (C-66/02, EU:C:2005:768, paragraphs 97 to 100), [59] the Court, having noted that the tax measures at issue applied only to the banking sector [60] and that, within the banking sector, they benefited only undertakings carrying out the operations covered by those measures, ruled that those measures differentiated not only between the banking sector and other economic sectors but also within the banking sector itself. Consequently, in paragraphs 99 and 100 of the judgment of 15 December 2005 in *Italy* v *Commission* (C-66/02, EU:C:2005:768), the Court ruled that, 'as [the tax measures at issue] do not apply to all economic operators, they cannot be considered as general measures of fiscal or economic policy. … They are, in fact, an exception to the general tax scheme. The undertakings which benefit from them are entitled to tax advantages to which they would have no right under the normal rules of application of that scheme and *to which undertakings in other sectors carrying out similar operations or undertakings in the banking sector not carrying out operations such as those to which the rules apply have no right.*' [61]

82. I note that Article 107(1) TFEU is couched in very broad and abstract terms. Thus, while the expression 'the production of certain goods' might possibly be understood as referring to certain sectors or certain services, and hence to certain categories of undertaking, among other things, the expression 'certain undertakings' is even more general.

83. Article 107(1) TFEU does not only apply to measures which are selective or discriminatory by reason of the limited and predefined number of criteria, such as, for example, the sector at issue or the size or nature of the undertakings. [62] The defining criterion is whether the measure puts those who benefit from it in a more favourable financial situation than other undertakings in a comparable factual and legal situation, [63] whatever the nature of the undertakings, the activities they pursue or the operations at issue, unless the benefits conferred by that measure are justified by the nature or general scheme of the system of which it is a part.

84. It certainly does not follow either from the wording of Article 107(1) TFEU or from the Court's case-law that terms 'favouring certain undertakings or the production of certain goods' require the identification of a category of undertakings which exhibit specific characteristics and are exclusively favoured by the measure at issue, as the General Court stipulates in paragraphs 41 and 45 of the

56 — A State measure which benefits all undertakings in national territory without distinction, on the other hand, is not capable of constituting State aid. See to that effect the judgment of the Court of Justice of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 35).

57 — In paragraph 61 of the judgment of 4 June 2015 in *Commission* v *MOL* (C-15/14 P, EU:C:2015:362), the Court held that 'the appropriate comparator for establishing the selectivity of the measure at issue in the present case was to ascertain whether [it] draws a distinction between operators that are, in the light of the objective of the measure, in a comparable factual and legal situation, a distinction not justified by the nature and general scheme of the system at issue'.

58 — After all, the concept of selectivity is comparable to that of discrimination. See to that effect the judgments of 14 January 2015 in *Eventech* (C-518/13, EU:C:2015:9, paragraph 53) and 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 101). See point 54 of the Opinion of Advocate General Wahl in *Commission* v *MOL* (C-15/14 P, EU:C:2015:32) and point 29 of the Opinion of Advocate General Bobek in *Belgium* v *Commission* (C-270/15 P, EU:C:2016:289).

59 — Those two cases were concerned with Commission Decision 2002/581/EC of 11 December 2001 on the tax measures for banks and banking foundations implemented by Italy (OJ 2002 L 184, p. 27).

60 — The measures did not therefore benefit undertakings in other economic sectors.

61 — Emphasis added.

62 — Tax measures that favour undertakings in one sector to the detriment of [those in] others or large undertakings to the detriment of small ones are obviously selective.

63 — See, by analogy, the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87 and 93).

judgment under appeal in *Autogrill España* v *Commission* and paragraphs 45 and 49 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*. I also consider that the identification of undertakings with specific characteristics would be an extremely imprecise, not to say arbitrary, exercise that would create legal uncertainty.

85. It is my view that, in its analysis of the criterion of selectivity in the judgments under appeal, the General Court favoured an excessively formalistic and restrictive approach in seeking to identify a particular category of undertakings that are exclusively favoured by the measure at issue rather than concentrating on the essential question of whether that measure differentiates between undertakings which are in a comparable situation.

86. It should be noted that the fact that it is often possible to identify one or more sectors or categories of undertakings favoured by a tax measure, by reason in particular of the conditions which taxpayers must satisfy in order to benefit from the derogatory regime,[64] does not mean that the selectivity of the measure is dependent on the identification of such a sector or category of undertakings.

87. Moreover, the fact that the number of undertakings able to claim entitlement under the measure at issue is very large, or that they belong to different sectors of activity, is not sufficient to call into question its selective nature and, therefore, to rule out its classification as State aid.[65]

88. In this regard, I consider that the fact that the conditions imposed by the measure at issue were not very strict[66] and the benefits which that measure conferred were therefore available to many undertakings does not call into question its selective nature but only its degree of selectivity.

89. I note that, at the hearing, the Federal Republic of Germany, in answer to a question from the Court, expressed the view that the measure at issue in this case would be selective if it required the acquisition of a shareholding of 75% rather than 5% and over a period of 10 years rather than one. In such a situation, the German Government submits, the measure at issue would favour only large undertakings and would therefore be selective.

90. I am unable to endorse such an approach, since it is imprecise, impracticable and arbitrary. After all, where would one draw the dividing line between the acquisition of a shareholding of 75% and one of 5% and between the acquisition of a shareholding which is held for 10 years and one held for only one? What criterion would one use to distinguish between two such transactions?

91. I therefore consider that a tax measure which derogates from the general tax regime and differentiates between undertakings performing *similar operations* is selective, unless the differentiation created by the measure is justified by the nature or general scheme of the system of which it is a part.

64 — See, to that effect, the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120). The Court held that a tax deduction that could benefit only one category of undertaking, namely undertakings which have export activities and made certain investments referred to by the contested measures, was selective.

65 — See the judgment of 13 February 2003 in *Spain* v *Commission* (C-409/00, EU:C:2003:92, paragraph 48 and the case-law cited). Aid may be selective for the purposes of Article 107(1) TFEU even where it concerns a whole economic sector [see, in particular, the judgments of 17 June 1999 in *Belgium* v *Commission* (C-75/97, EU:C:1999:311, paragraph 33) and 8 September 2011 in *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraph 53)] or several sectors (see the judgment of 20 November 2003 in *GEMO* (C-126/01, EU:C:2003:622, paragraphs 37 to 39).

66 — It should be recalled that the measure at issue applied to the acquisition of any shareholdings of at least 5% in foreign companies which are held for an uninterrupted period of at least one year, but did not impose any minimum amount or other minimum investment threshold.

92. After all, where the undertakings benefiting from a tax measure enjoy a tax advantage to which they would not be entitled under the normal tax regime and which cannot be claimed by undertakings performing similar operations, such a measure is selective in nature because, contrary to what the General Court claims,[67] it does not actually apply to all[68] economic operators.[69] It is obvious that the measure at issue favours only the entirety of economic operators which satisfy the conditions laid down,[70] that is to say undertakings taxable in Spain which acquire shareholdings in a 'foreign company', and excludes economic operators which carry out similar operations, that is to say which acquire shareholdings but in a company established in Spain.

93. Thus, in accordance with paragraph 42 of the judgment of 29 March 2012 in *3M Italia* (C-417/10, EU:C:2012:184), while 'the fact that only taxpayers satisfying those conditions can benefit from the measure cannot in itself make it into a selective measure', such a tax measure is selective if it differentiates between comparable situations or transactions.[71]

94. Consequently, the selectivity criterion provided for in Article 107(1) TFEU covers tax measures which, irrespective of the techniques used, have the effect[72] of imposing a differentiated tax burden on undertakings[73] which are in a comparable factual and legal situation.[74]

67 — See paragraph 52 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 56 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

68 — In my opinion, the General Court is indulging in sophistry when it considers that a tax measure which is potentially available to all undertakings is not selective even though that measure draws a distinction between undertakings performing similar transactions. Moreover, contrary to the claims of WDFG and Banco Santander and Santusa, as indicated in point 61 of this Opinion, a tax measure is not automatically selective if it is not applied by all the undertakings of a Member State without exception, because not all those undertakings are necessarily in comparable situations. A tax measure is selective only if it differentiates between situations which are comparable. Consequently, contrary to the observations of the intervening parties as reproduced in point 71 of this Opinion, the application of the selectivity criterion where there is discrimination between taxpayers in comparable situations does not jeopardise the institutional balance between the Commission and the Member States but reflects the will of the constituent power as expressed in the wording of Article 107(1) TFEU.

69 — See, by analogy, points 81 and 82 of the Opinion of Advocate General Kokott in *Finanzamt Linz* (C-66/14, EU:C:2015:242), where she notes that 'the mere fact that a tax regime grants an advantage only to those undertakings which satisfy its conditions is not in itself capable of establishing its selectivity. On the other hand, a tax regime also cannot always be said not to be selective on the ground that all economic operators are able without distinction to avail themselves of the tax advantage which it makes available, provided that they satisfy its conditions. For, in that event, a tax regime would always have to be deemed not to be selective. … *As far as tax advantages are concerned, therefore, case-law has made any finding as to their selectivity subject to special conditions. According to that case-law, the ultimately decisive factor is whether, in accordance with the criteria laid down by the national tax system, the conditions governing the tax advantage are selected in a non-discriminatory manner.* …'. Emphasis added.

70 — Contrary to the claims of the Kingdom of Spain (see point 62 of this Opinion) and Ireland (see point 65 of this Opinion), the measure at issue is not available to any undertaking performing comparable transactions.

71 — While the Court did indeed rule in paragraph 42 of the judgment of 29 March 2012 in *3M Italia* (C-417/10, EU:C:2012:184) that 'the fact that only taxpayers satisfying those conditions can benefit from the measure cannot in itself make it into a selective measure', it went on to hold, in that same paragraph, that persons unable to benefit from the measure at issue in that case were not in a comparable factual and legal situation to taxpayers benefiting from that measure from the point of view of the national legislature's objective. Given that, in the judgments under appeal, the General Court did not call into question the comparability between the acquisition of shareholdings by an undertaking taxable in Spain in a 'foreign company' and the acquisition of shareholdings by an undertaking taxable in Spain in a company established in Spain, paragraph 42 of the judgment of 29 March 2012 in *3M Italia* (C-417/10, EU:C:2012:184) is, in my view, of very limited relevance to this case.

72 — Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them in relation to their effects, and thus independently of the techniques used. See the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 87).

73 — See, by analogy, the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 93).

74 — Contrary to what the Federal Republic of Germany claims (see point 66 of this Opinion), there is no reason why such an analysis should also include verification of the existence of a category of advantaged taxpayers. Otherwise, selective tax measures that benefit some taxpayers to the detriment of others in a comparable situation would fall from the outset outside the scope of control of State aid merely because they 'were adopted under a different regulatory technique although they produce the same effects in law and/or in fact'. See the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 92).

95. In this regard, I note that the General Court itself ruled in paragraph 47 of the judgment of 13 September 2012 in *Italy* v *Commission* (T-379/09, EU:T:2012:422) that 'the selective nature of a measure is assessed in relation to all undertakings, not in relation to the undertakings benefiting from the same advantage within the same group … Moreover, the mere fact that a measure may benefit all operators satisfying the conditions laid down, which is to say that it determines its scope on the basis of objective criteria, does not in itself establish that that measure is general in nature and does not preclude its being selective …'.

96. It follows that the fact that a tax measure is directed not at any particular category of undertakings but at undertakings which perform a category of economic operations, in this instance financial operations abroad, and does not make its application subject to any minimum amount [75] does not in any way detract from the selectivity or discriminatory nature of that measure if it imposes a differentiated tax burden on undertakings which are in a comparable factual and legal situation and perform financial operations which are comparable but relate to companies established in the Member State in which they are themselves established.

97. That conclusion is not invalidated by paragraph 22 of the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467), cited by the General Court in paragraph 60 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 64 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

98. After all, in finding, in the judgments under appeal, that 'the Court of Justice ruled that a tax concession in favour of taxpayers who sold certain financial assets and could offset the resulting profit *in the case of shareholding acquisitions in capital companies having their registered office in certain regions* conferred on those taxpayers an advantage which, as a general measure applicable *without distinction to all economically active persons*, did not constitute aid within the meaning of the relevant provisions of the Treaty', [76] the General Court, as the Commission submits in its observations, unjustifiably conflates paragraphs 22 and 23 of the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467), its reading of which is therefore erroneous.

99. In paragraph 23 of that judgment, however, the Court goes on to say that 'it should also be noted that the contested decision classifies the tax concession … as State aid *only in so far as it favours certain undertakings situated in the new* Länder *or West Berlin*, which prevents its being a general measure of tax or economic policy'. [77] Consequently, contrary to what the General Court states in the judgments under appeal, it is clear from paragraphs 22 and 23 of the judgment of 19 September 2000 in *Germany* v *Commission* (C-156/98, EU:C:2000:467) that a tax measure which confers an advantage on certain undertakings in the new *Länder* and West Berlin is not a general measure applicable to all economic operators without distinction but a selective measure within the meaning of Article 107(1) TFEU.

100. Moreover, while it is true that, in paragraph 104 of the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), the Court held that 'the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages,

75 — In my opinion, the fact that the measure at issue does not make its application subject to any minimum amount does not mean that that measure is not selective. The lack of a condition of application based on a minimum amount simply means that there is no selectivity criterion based on the size of the undertakings, which is, *a priori*, selective. See to that effect the judgment of 8 September 2011 in *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551).

76 — Emphasis added.

77 — Emphasis added.

be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring "certain" undertakings or the production of "certain" goods within the meaning of Article [107](1) TFEU]',[78] I do not consider that case-law to be applicable to the present case.

101. There are, after all, important differences between the factual situation, more specifically the tax regime, at issue in the present case and that at issue in the case giving rise to the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), which the General Court disregarded in the judgments under appeal.

102. In paragraphs 92 and 93 of that judgment, the Court of Justice made it clear that the selectivity of the tax measure at issue followed not from a derogation from the 'normal' tax regime but from the fact that that regime in practice discriminated between companies which were in a comparable situation.[79] However, the Court held that, even though the criteria of the regime at issue were of a general nature, they excluded from the outset any taxation of an identifiable category of undertakings, that is to say 'offshore' companies.[80] In those particular circumstances, not present in this instance, the Court considered that, while the application of a 'general' tax regime was not sufficient on its own to establish the selectivity of taxation for the purposes of Article 107(1) TFEU, such a general regime must be considered selective if it is possible to identify a category of undertakings favoured by it.[81]

103. It should be recalled that, in the contested decisions, the Commission considered that the measure at issue derogated from the 'normal' or reference tax regime applicable to undertakings taxable in Spain.[82] Furthermore, the General Court did not call that analysis into question in the judgments under appeal.[83]

104. Given that the judgment of 15 November 2011 in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732) is specifically concerned with a situation where there was no derogation from the normal regime, the Court having held that the normal regime at issue was in itself discriminatory in practice, I consider that, in the judgments under appeal, the General Court interpreted and applied that case-law incorrectly, since the circumstances at issue in those cases were not comparable. Consequently, in requiring the identification of a category of undertakings favoured by the measure at issue, even though that measure derogates from the 'normal' regime, the General Court committed an error of law.

105. What is more, in paragraph 57 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 61 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, the General Court held that it was clear from paragraph 36 of the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598) that a measure which was to be applied regardless of the nature of the activity of undertakings was not, in principle, selective.

78 — Emphasis added.

79 — Judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 101).

80 — Judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 101 and 102).

81 — Judgment in *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 103 and 104).

82 — See paragraph 50 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 54 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*.

83 — See point 77 of this Opinion.

106. I consider, as the Commission submits in its observations, that the General Court's reading of the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598) was erroneous because, while, in paragraph 35 of that judgment, the Court of Justice held that 'a State measure which *benefits* all undertakings in national territory, *without distinction*, [could] not therefore constitute State aid',[84] it went on to say, in paragraph 36 of that judgment, that a tax regime did not constitute aid if it applied to all undertakings in national territory, regardless of their activity.

107. Contrary to what the General Court held in paragraph 57 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 61 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, the judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 35 and 36) does not support the conclusion that a measure which is to be applied regardless of the nature of the activity or the object of undertakings is not, *a priori*, selective.

108. That case-law[85] simply confirms that a tax regime which applies without distinction to all undertakings on national territory is not selective.

109. It is sufficient to recall that the measure at issue draws a clear and sharp distinction between the acquisition of shareholdings by an undertaking taxable in Spain in a 'foreign company' and the acquisition of shareholdings by an undertaking taxable in Spain in a company established in Spain. In the absence of a finding by the General Court that the undertakings performing those transactions are not in a comparable situation, I consider that the General Court erred in law in imposing on the Commission, with a view to demonstrating the selective nature of a measure for the purposes of Article 107(1) TFEU, the obligation to identify a category of undertakings with specific characteristics.

110. It follows from those considerations that the first part of the single ground of appeal raised by the Commission is, in my view, well founded.

B – *The second part*

1. Arguments of the parties

111. By the second part of its single ground of appeal, the Commission claims that the General Court erred in law in applying the case-law relating to aid for exports and introduced an artificial distinction between aid for exports of goods and aid for exports of capital.

112. The Commission claims that the Court's case-law establishes unambiguously that export aid is selective even if the measure favours exports as a whole.

113. First, the Commission considers that, in paragraphs 73 and 74 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 77 and 78 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, the General Court misapplied the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120) in holding that that case-law was concerned not with the selectivity of the measure at issue but only with the condition relating to the effect on competition and trade laid down in Article 107(1) TFEU.

84 — Emphasis added.

85 — Judgment of 8 November 2001 in *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 35 and 36).

114. Secondly, the Commission accuses the General Court of having introduced, in paragraphs 79 to 81 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 83 to 85 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, an artificial distinction between aid for exports of goods and aid for exports of capital.

115. According to the Commission, the General Court stated that the category of beneficiary undertakings supporting the conclusion as to the selectivity of the measure at issue in the cases giving rise to the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120) was made up of export undertakings. It notes that, according to the General Court, that category comprises undertakings which can be distinguished on account of common characteristics linked to their export activity. The Commission takes the view that, so far as concerns the condition relating to selectivity, and in particular the identification of a particular category of undertakings or production capable of being distinguished by reason of common characteristics, there is no difference between the export of goods and the export of capital.

116. The Commission submits that the General Court's approach disregards the role and purpose of the discipline of State aid from the point of view of protection of the internal market. That discipline is intended in particular to ensure that Member States do not grant economic advantages specifically linked to the export of goods or capital. Moreover, the act of specifically favouring exports of capital could give rise to distortions on the internal market in the same way as the act of specifically favouring exports of goods.

117. In its reply, the Commission submits that it has never maintained that export subsidies involve selectivity of a different kind. The Commission contends that it is referring to the errors committed by the General Court in its interpretation and application of the Court's case-law concerning aid for exports.

118. WDFG and Banco Santander and Santusa consider that the General Court correctly interpreted the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120). With regard to the judgment of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20), they note that the review of the concept of aid was limited and that the Court's findings were concerned with the effect on trade and competition. WDFG and Banco Santander and Santusa further submit that the question of selectivity was not addressed in the judgment of 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8). WDFG and Banco Santander and Santusa consider that, in paragraph 71 et seq. of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 75 et seq. of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, the General Court recalled the reference framework to be used for assessing whether or not a measure is selective. It is their view that the General Court indicated that selectivity was to be assessed in the territory of the Member State and that the Commission was required to establish that the measure favoured a particular category of undertakings to the exclusion of other undertakings. According to WDFG and Banco Santander and Santusa, while the Commission had drawn such a distinction in the cases giving rise to the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), such a distinction is entirely lacking in the present case.

119. WDFG and Banco Santander and Santusa submit that, from the point of view of selectivity, aid for exports must be assessed in the same way as other State measures. They consider that, in the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July

2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), the Court rightly took the view that all the beneficiary undertakings had characteristics in common — other than the fact that they satisfied the conditions for benefiting from the measure — which supported their classification as belonging to a clearly defined sector of the economy, the export sector. These were undertakings which produced goods intended for export.

120. According to WDFG and Banco Santander and Santusa, undertakings from all sectors and of all sizes availed themselves of the measure at issue, whether the goods they produced were intended for the national market or for export. They consider that the Commission had many opportunities, both during the administrative procedure and at first instance, to prove the existence of a category of undertakings which benefit from the measure at issue, but never did so. According to WDFG and Banco Santander and Santusa, the Commission's argument that there is a category of 'capital-exporting' undertakings which benefit from the measure at issue is therefore an argument of fact which is inadmissible on appeal.

121. WDFG and Banco Santander and Santusa consider that the export of goods and the export of capital are not equivalent, in particular because the rules applicable to goods and services are not the same as those applicable to capital. They submit that, since all undertakings have capital or are likely to invest it, this does not appear to be a characteristic capable of creating selectivity. Moreover, as the Commission itself recognised in its decision,[86] it is clear that the rules on the free movement of capital do not prohibit a measure such as that at issue, which affords different treatment to transactions (acquisitions of shareholdings in Spanish undertakings and acquisitions of shareholdings in foreign undertakings) which, even if performed by the same undertakings (any undertaking), are also different.

122. The Kingdom of Spain argues that there is no economic activity consisting in the export of capital. The measure at issue does not favour certain undertakings or the production of certain goods since it is not concerned with the supply of goods and services on the market.

123. Ireland agrees with WDFG and Banco Santander and Santusa that the judgments relied on by the Commission concerned measures which favoured an identifiable category of undertakings or products, that is to say the export sector. Exporters are a category of undertakings that can easily be identified. On the other hand, contrary to what the Commission maintains, there is no uniform category of undertakings which 'export capital', since any undertaking which makes an acquisition abroad 'exports capital'.

124. The Federal Republic of Germany states that the Commission's submission in the alternative that the measure at issue is comparable to a measure granting aid for the export of goods and is therefore also aimed at the sufficiently delimited category of export undertakings constitutes a retrospective addition of grounds to the decisions at issue which is inadmissible at the appeal stage.

125. It contends that the category of export undertakings at issue in the case-law relied on by the Commission differs from other undertakings precisely because of common characteristics linked to any export activity pursued by them in connection with the making of specific investments. Thus, in the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438), the Court did not take as its basis the making of investments but simply took this into account as one of a number of criteria — including, first, in accordance with the wording of Article 107(1) TFEU, the nature of the goods produced by the beneficiary undertakings — for distinguishing that group from all other undertakings.

86 — See paragraph 135 of the first contested decision and paragraph 160 of the second contested decision.

2. Analysis

126. First of all, in line with the Commission's arguments as presented in point 113 of this Opinion, I consider the General Court erred in law in holding that the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120) related not to the criterion of selectivity but only to the condition relating to the effect on competition and trade laid down in Article 107(1) TFEU.

127. In paragraph 20 of the judgment of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68), the Court held that a preferential rediscount rate applicable for all national products exported, granted by a State in favour only of national products exported and for the purpose of helping them compete in other Member States with products originating in those other Member States, constitutes aid within the meaning of Article 107 TFEU. Moreover, in paragraph 8 of the judgment of 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284), the Court held that a repayment of interest benefiting only export credits constituted State aid for Greek export undertakings. Then, in paragraph 10 of the judgment of 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284), the Court held that the measure at issue favoured certain undertakings.

128. It should be recalled that, in order to be capable of falling within the scope of Article 107(1) TFEU and constituting State aid, a measure must satisfy cumulatively all of the conditions laid down by that provision. It follows that the Court, in finding the existence of State aid in paragraph 20 of the judgment of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68) and paragraph 8 of the judgment of 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284), held that all the conditions laid down in Article 107(1) TFEU, including the condition relating to selectivity, were fulfilled.

129. Finally, in paragraph 120 of the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438), the Court, in response to the Spanish Government's observation that a measure applicable to all undertakings constitutes State aid only in so far as the national administration enjoys a degree of discretion in order to apply it,[87] noted that that measure (a tax deduction) could benefit only undertakings which had export activities and made certain investments referred to by the contested measures. It considered that such a finding was sufficient to show that that tax deduction fulfilled the condition of specificity which was one of the characteristics of the definition of State aid, that is, the selective nature of the advantage in question.

130. I consider that the Court did indeed rule on the selectivity of the tax measures at issue in the cases giving rise to the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120).

131. Secondly, as regards the Commission's observation that the General Court erred in law in drawing a distinction between aid for the export of goods and aid for the export of capital, it should be recalled that the criterion of selectivity relates to the existence or otherwise of discrimination, that is to say an unjustified differentiation of the tax burden borne by undertakings which, from the point of view of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation. It follows that, even if the tax measure at issue applies regardless of the sector, the three-step analysis described in points 73 to 75 of this Opinion should be used in order to determine whether or not that measure is selective.

87 — See the judgment of 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 96).

132. In my view, therefore, it is irrelevant whether the General Court drew an artificial distinction between the export of goods and the export of capital, as the Commission claims, given that, in order for a tax measure to be classified as selective, there is no need to show that it applies to a specific sector or to a category of undertakings with specific characteristics. [88]

133. It follows that the second part of the single ground of appeal is based on a mistaken premiss.

134. I accordingly take the view that that second part of the single ground of appeal must be rejected as being ineffective.

C – *Additional considerations*

135. For the sake of completeness, I would point out that, contrary to what the General Court held in paragraphs 79 to 83 of the judgment under appeal in *Autogrill España* v *Commission* and paragraphs 83 to 86 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, there is in my opinion no so-called 'category of export undertakings'. The judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120) are concerned simply with measures favouring exports, not with a category of undertakings identifiable *ex ante*.

136. I consider that, as is true of investments or the acquisition of shareholdings in foreign undertakings, any undertaking operating on a national market may potentially export goods or services even if it was not predisposed to do so. Undertakings which invest abroad or which export goods or services do not, in my opinion, have any specific characteristics and do not form a delimited and identifiable category.

137. I take the view, in accordance with the Court's case-law in the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120), that a tax measure is selective if it benefits undertakings carrying out cross-border transactions but not undertakings carrying out comparable transactions at national level. [89] In my opinion, a tax measure of that kind is particularly harmful to the internal market because it creates an immediate distortion of trade between Member States. I would make the point here that the provisions of the FEU Treaty concerning aid granted by States are intended in particular to ensure that a Member State is not able to favour undertakings that pursue cross-border activities. [90] Those provisions are therefore the 'flip side' or 'mirror', as they were called at the hearing, of the FEU Treaty provisions on the free movement of goods, persons, services and capital which are intended to prevent obstacles being put in the way of cross-border activities.

138. It follows that tax measures which favour undertakings that export capital from a Member State to the detriment of others which, in a comparable situation, invest in the national territory [91] are selective within the meaning of Article 107(1) TFEU, in accordance with the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20); 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8); and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120).

88 — See points 83 and 84 of this Opinion.

89 — Paragraph 154 of the second contested decision states that '… 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'. See paragraph 129 of the first contested decision.

90 — See, to that effect, the judgment of 7 July 2009 in *Commission* v *Greece* (C-369/07, EU:C:2009:428, paragraph 119).

91 — And which are in a comparable factual and legal situation.

139. For those reasons, the General Court erred in law when it held, in paragraph 81 of the judgment under appeal in *Autogrill España* v *Commission* and paragraph 85 of the judgment under appeal in *Banco Santander and Santusa* v *Commission*, that 'the case-law [resulting from the judgments of 10 December 1969 in *Commission* v *France* (6/69 and 11/69, EU:C:1969:68, paragraph 20), 7 June 1988 in *Greece* v *Commission* (57/86, EU:C:1988:284, paragraph 8) and 15 July 2004 in *Spain* v *Commission* (C-501/00, EU:C:2004:438, paragraph 120)] regarding undertakings with export activities, thus [did] not make it possible to conclude that the EU courts classified a tax measure as selective without the identification of a particular category of undertakings or the production of certain goods which could be distinguished on account of their specific characteristics'.

VI – Conclusion

140. In the light of the foregoing considerations, I propose that the Court:

— set aside the judgment of the General Court of the European Union of 7 November 2014 in *Autogrill España* v *Commission* (T-291/10, EU:T:2014:939), by which it annulled Article 1(1) and Article 4 of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48);

— set aside the judgment of the General Court of the European Union of 7 November 2014 in *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938), by which it annulled Article 1(1) and Article 4 of Commission Decision 2011/282/EU of 12 January 2011 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 135, p. 1);

— refer the cases back to the General Court of the European Union; and

— reserve the costs.