Language of document : English ECLI:EU:C:2016:981

JUDGMENT OF THE COURT (Grand Chamber)

21 December 2016 (*)

(Appeal — State aid — Article 107(1) TFEU — Tax system — Corporation tax — Deduction — Amortisation of goodwill resulting from acquisitions by undertakings resident for tax purposes in Spain of shareholdings of at least 5% in undertakings resident for tax purposes outside Spain — Concept of 'State aid' — Condition relating to selectivity)

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

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 19 January 2015,

European Commission, represented by R. Lyal, B. Stromsky, C. Urraca Caviedes and P. Němečková, acting as Agents,

appellant,

the other parties to proceedings being:

World Duty Free Group SA, formerly Autogrill España SA, established in Madrid (Spain) (C-20/15 P),

Banco Santander SA, established in Santander (Spain) (C-21/15 P),

Santusa Holding SL, established in Boadilla del Monte (Spain) (C-21/15 P),

represented by J.L. Buendía Sierra, E. Abad Valdenebro and R. Calvo Salinero, abogados,

applicants at first instance,

supported by:

Federal Republic of Germany, represented by T. Henze and K. Petersen, acting as Agents,

Ireland, represented by G. Hodge and E. Creedon, acting as Agents, and by B. Doherty, Barrister, and by A. Goodman, Barrister,

Kingdom of Spain, represented by M.A. Sampol Pucurull, acting as Agent,

interveners in the appeal,

THE COURT (Grand Chamber),

composed of K. Lenaerts, President, A. Tizzano, Vice-President, R. Silva de Lapuerta, T. von Danwitz, J.L. da Cruz Vilaça, E. Juhász and A. Prechal (Rapporteur), Presidents of Chambers, A. Borg Barthet, J. Malenovský, E. Jarašiūnas, F. Biltgen, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2016,

after hearing the Opinion of the Advocate General at the sitting on 28 July 2016,

gives the following

Judgment

By its appeal in Case C-20/15 P, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T-219/10, EU:T:2014:939; 'the judgment under appeal *Autogrill España* v *Commission*'), whereby the General Court 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; 'the first contested decision').

By its appeal in Case C-21/15 P, the Commission asks the Court to set aside the judgment of the General Court of the European Union of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T-399/11, EU:T:2014:938; 'the judgment under appeal *Banco Santander and Santusa* v *Commission*'), whereby the General Court 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; 'the second contested decision').

Background to the proceedings

The background to the proceedings, as set out in the judgments under appeal, may be summarised as follows.

On 10 October 2007, after a number of written questions had been sent to the Commission in 2005 and 2006 by Members of the European Parliament and after a private operator had submitted a complaint to it in 2007, the Commission decided to initiate the formal investigation procedure with respect to an arrangement laid down in a provision of Spanish corporate tax law introduced by Ley 24/2001, de Medidas Fiscales, Administrativas y del Orden Social (Law 24/2001 on fiscal, administrative and social measures) of 27 December 2001 (BOE No 313, of 31 December 2001, p. 50493), and reproduced in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley

del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the recast text of the Corporate Tax Law; 'TRLIS') of 5 March 2004 (BOE No 61, of 11 March 2004, p. 10951), namely Article 12(5) TRLIS ('the measure at issue').

The measure at issue provides that, in the event that an undertaking taxable in Spain acquires a shareholding in a 'foreign company' equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least 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 for the corporation tax for which the undertaking is liable. The measure at issue states that, to be classified as a 'foreign company', a company must be liable to pay a tax that is identical to the tax applicable in Spain and its income must derive mainly from business activities carried out abroad.

In paragraphs 10 to 13 of the judgment under appeal *Autogrill España* v *Commission*, which are identical to paragraphs 15 to 18 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, the General Court added the following:

It follows from the [first] contested decision that, under Spanish law, 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 (recital 23 of the [first] contested decision [, identical to recital 32 of the second contested decision]).

In the [first] contested decision, share acquisition is to mean an operation whereby one company acquires a shareholding in the capital of another company without obtaining a majority or the control of the voting rights of the target company (recital 23 of the [first] contested decision [, identical to recital 32 of the second contested decision]).

Furthermore, it is stated in the [first] contested decision that, according to the measure at issue, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding. It is also stated that the concept of financial goodwill, as referred to in the measure at issue, introduces into the field of share acquisitions a concept that is usually used in transfers of assets or business combination transactions (recital 20 of the [first] contested decision [, identical to recital 29 of the second contested decision]).

Finally, it should be noted that under Spanish tax law, the acquisition by an undertaking which is taxable in Spain of a shareholding in a company established in Spain does not allow the goodwill resulting from that acquisition to be recorded separately for tax purposes. However, again according to Spanish tax law, goodwill can be amortised [only in the case of] a business combination (recital 19 of the [first] contested decision [, identical to recital 28 of the second contested decision]).'

By the first contested decision, the Commission concluded the procedure with respect to shareholding acquisitions within the European Union.

In Article 1(1) of that decision, the Commission declared incompatible with the common market the scheme introduced by the measure at issue ('the scheme at issue'), whereby a tax advantage was granted to undertakings taxable in Spain in order to enable them to amortise the goodwill resulting from acquisitions of shareholdings in foreign undertakings, where it was applied to acquisitions of shareholdings in undertakings established within the European Union. In Article 4 of that decision, the Commission ordered the Kingdom of Spain to recover the aid granted under that scheme.

The Commission maintained open, however, the procedure as regards acquisitions of shareholdings outside the European Union, the Spanish authorities having given an undertaking that they would provide further details concerning the obstacles to cross-border mergers outside the European Union.

By the second contested decision, the Commission declared incompatible with the common market the scheme at issue, whereby a tax advantage was granted to undertakings taxable in Spain in order to enable them to amortise the goodwill resulting from acquisitions of shareholdings in foreign undertakings, where it applied to acquisitions of shareholdings in undertakings established outside the European Union (Article 1(1) of that decision), and ordered the Kingdom of Spain to recover the aid granted under that scheme (Article 4 of that decision).

The procedure before the General Court and the judgments under appeal

By an 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 seeking the annulment of Article 1(1) and Article 4 of the first contested decision.

In support of its action in so far as it is directed against Article 1(1) of that decision, WDFG relied on four pleas in law: (i) an error of law in the Commission's application of the condition relating to selectivity; (ii) the measure at issue is not selective in so far as the differentiation that it introduces flows from the nature or general structure of the system of which it is part; (iii) the measure provides no advantage to companies to which the scheme at issue applies; and (iv) with respect to both the criterion relating to selectivity and that relating to the existence of an advantage, a failure to state adequate reasons for that decision.

By an application lodged at the Registry of the General Court on 29 July 2011, Banco Santander SA and Santusa Holding SL ('Santusa') brought an action seeking the annulment of Article 1(1) and Article 4 of the second contested decision.

In support of their action in so far as directed against Article 1(1) of that decision, Banco Santander and Santusa relied on five pleas in law: (i) an error of law in the Commission's application of the condition relating to selectivity; (ii) an error in identifying the reference system; (iii) the measure at issue is not selective in so far as the differentiation that it introduces is a result of the nature or general structure of the system of which it is part; (iv) the measure provides no advantage to the companies to which the scheme at issue applies; and (v) with respect to both the criterion relating to

selectivity and that relating to the existence of an advantage, a failure to state adequate reasons for the contested decision.

In the judgments under appeal, the General Court, on essentially identical grounds, upheld the first plea of law in each of the two actions, namely that Article 107(1) TFEU had been misapplied with respect to the condition relating to selectivity, and consequently annulled Article 1(1) and Article 4 of the contested decisions, without examining the other pleas raised in those actions.

Form of order sought by the parties and procedures before the Court

The Commission claims that the Court should:

set aside the judgments under appeal;

refer the respective cases back to the General Court; and

reserve the costs.

WDFG, in Case C-20/15 P, and Banco Santander and Santusa, in Case C-21/15 P, contend that the Court should dismiss the appeals, uphold the judgments under appeal and order the Commission to pay the costs.

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

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

The appeals

In support of its appeals, the Commission relies on a single ground of appeal, which has two parts, consisting of the claim that the General Court erred in law in the interpretation of the condition relating to selectivity as laid down in Article 107(1) TFEU.

The first part of the single ground of appeal

Arguments of the parties

By the first part of its single ground of appeal, the Commission claims that the General Court erred in law by holding that the Commission was obliged, in order to demonstrate that a measure is selective, to identify a group of undertakings with specific characteristics.

The Commission maintains that, in the contested decisions, it rigorously followed the method for the analysis of selectivity in tax matters, as that method is set out in the Court's settled case-law. The Commission accordingly established that the measure at issue constituted a derogation from a reference system, in that the effect of the measure was that the tax treatment of undertakings taxable in Spain acquiring shareholdings of at least 5% in companies established outside Spain differed from that applicable to undertakings taxable in Spain making identical acquisitions in companies established in Spain, although those two categories of undertakings were in comparable situations in the light of the objective pursued by the general Spanish system for the taxation of companies.

The Commission considers that the General Court, by imposing on it the additional obligation of demonstrating that the measure at issue favours certain undertakings capable of identification by reason of characteristics specific to them that other undertakings do not possess, in other words *ex ante* identifiable features that are characteristic of them, erred in law, since, in so doing, the General Court attributed a meaning to the condition relating to selectivity that is more restrictive than that defined by the Court.

The Commission maintains, in particular, that, contrary to what was held by the General Court in paragraphs 57 and 58 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 61 and 62 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, measures can be classified as selective even if those measures are to be applied regardless of the nature of the activities of the beneficiary and create a tax advantage for certain investment transactions without setting a minimum investment amount.

According to the Commission, in that context, the General Court erred in inferring from the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), that a national measure which is to be applied regardless of the nature of the activity of undertakings is not, a priori, selective. The statement in paragraph 36 of that judgment, that 'national measures such as those at issue in the main proceedings do not constitute State aid … if they apply to all undertakings in national territory, regardless of their activity' should be understood to mean that the reason why there is no selectivity is that the national measure applies indiscriminately to all undertakings in the Member State concerned.

The Commission also claims that the General Court erred in law in holding, in paragraphs 59 to 62 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 63 to 66 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that a measure such as the measure at issue is not selective where it is linked to the purchase of particular financial assets, namely shareholdings in foreign companies, and where no category of undertakings is, a priori, excluded from benefiting from it.

The Commission submits that the General Court wrongly relied in this regard on the judgment of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467). 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 concerned 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 addition, the Commission criticises the General Court for having held, in paragraphs 66 to 68 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 70 to 72 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that it would be contrary to the case-law of the Court of Justice to regard as selective a national tax measure the benefit of which is subject to certain conditions, even though the beneficiary undertakings do not share any feature characteristic of them that distinguishes them from other undertakings, apart from the fact that they are capable of satisfying the conditions governing the application of the measure.

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

With respect to the judgment of 15 November 2011, *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 that case concerned a particular situation in which the Court considered the reference tax system itself to be selective, in that it favoured 'offshore' undertakings as such, rather than any derogation from it. The reference made 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 were favoured for tax purposes under a reference system that was inherently selective and cannot be extrapolated beyond that particular context.

As regards paragraph 42 of the judgment of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184), the General Court failed to take into account the second sentence of that paragraph, which sets out the principle, enshrined in 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' over other undertakings, who are, in the light of the objective pursued by the scheme, in a comparable factual and legal situation.

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

They contend that it follows from the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598), that a measure from which all undertakings can benefit cannot be considered to be selective. That judgment does not however permit the inference, as claimed by the Commission, that a national measure is not selective where it applies to all the undertakings in a Member State without exception, since, if that argument were valid, almost all tax rules would have to be considered to be selective.

WDFG and Banco Santander and Santusa also dispute the Commission's argument that national tax measures have on many occasions previously been classified as selective even though they set no minimum investment amount and applied regardless of the nature of the beneficiary's activities. In any event, the measure at issue, in that it confers a tax advantage on any undertaking that wishes to benefit from it, irrespective of which category it falls into, for that reason alone cannot be deemed to be prima facie and *de jure* selective.

The General Court was correct to rely on the judgment of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467), since, in the decision that was at issue in that judgment, the Commission had expressly accepted that the national measure was not selective as regards the investors concerned, a position confirmed by the Court.

In its decision-making practice, moreover, the Commission has on many occasions previously 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.

What is more, the application of that criterion would not lead to a finding that measures relating to the purchase of certain assets as referred to by the Commission were not selective. Such measures could be classified as selective if it were shown that they do in fact benefit 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 it is legitimate to hold that the purchasers concerned form a particular category.

With regard to the judgment of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), WDFG and Banco Santander and Santusa take the view that the General Court was right to consider that the measure at issue in the case which gave rise to that judgment differs 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 exporting.

WDFG and Banco Santander and Santusa further submit that it follows clearly from the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), and in particular paragraph 104 thereof, that a measure can be classified as selective only if it benefits a category of undertakings sharing 'properties' which are 'specific' to them. It follows moreover from that judgment that the identification of a derogation from an ordinary system is not an end in itself. All that matters is the actual effect of the measure, namely the fact that it does or does not benefit specific undertakings or the production of specific goods.

WDFG and Banco Santander and Santusa argue that the interpretation of the judgment of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184), advocated by the Commission, can again not be accepted. First, in that judgment, the Court did not uphold the definition of a reference system and a derogation from that system. Second, that judgment does not permit a conclusion that a measure is selective by reason of the fact that the undertakings which satisfy the conditions to benefit from that measure form a distinct category.

Last, the General Court was correct to hold that a measure cannot be classified as selective, within the meaning of Article 107 TFEU, if the benefit of that measure depends on conduct that is prima facie open to any undertaking,

irrespective of an undertaking's sector of activity. That follows from the finding, in the judgment of 19 September 2000, *Germany* v *Commission* (C‑156/98, EU:C:2000:467), that a national measure was not selective as regards investors.

The Kingdom of Spain submits that the judgment of 8 November 2001, *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 before the Commission, to the effect that an economic advantage can be classified 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.

In the course of that administrative procedure, the Spanish authorities demonstrated that the measure at issue was generally accessible, on the ground that it was applied to undertakings active in very different business sectors, thereby supporting the analysis set out in the judgments under appeal and the fact that the Commission had failed in the contested decisions to demonstrate that that measure was selective.

Ireland submits that, contrary to what is argued by the Commission, the General Court did not infer from the judgment of the Court of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598), and the judgments of the General Court of 6 March 2002, *Diputación Foral de Álava and Others* v *Commission* (T‑92/00 and T‑103/00, EU:T:2002:61), and of 9 September 2009, *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 dependent on a minimum amount were selective, but held that selectivity could not be established with respect to a measure from which all undertakings resident for tax purposes in Spain and making acquisitions of at least 5% shareholdings in foreign undertakings could benefit, regardless of the nature of their activities and the amounts invested.

The General Court was correct to rely on the judgment of 15 November 2011, *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 hold that it was necessary, if different tax treatment was to be classified as aid, that a particular category of undertakings capable of benefiting should be identified, by reason of their specific properties. The condition relating to selectivity as laid down in Article 107(1) TFEU should moreover be defined in the same way in all cases concerning alleged State aid of a fiscal nature. Accordingly, the principle expressly stated in paragraph 104 of that judgment cannot be limited to a situation in which a tax system taken as a whole is selective.

Ireland considers that measures such as the measure at issue, which do not a priori exclude any undertaking or any particular economic sector from the ambit of its recipients, cannot be regarded as being selective. The Commission has on several occasions previously relied on that ground in order to determine that certain national measures are not selective.

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 only that that measure is similar to a subsidy. Consequently, after an examination designed to determine that the measure has the nature of a derogation, it is appropriate, in accordance with the case-law and, in particular, the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C‑106/09 P and C‑107/09 P, EU:C:2011:732), and as the General Court correctly held in the judgments under appeal, thereafter to determine whether the category of taxpayers favoured by a tax measure involves sufficiently specific undertakings or the production of sufficiently specific goods within the meaning of Article 107(1) TFEU.

It follows accordingly from the Court's case-law that the category of undertakings which receive a tax advantage is sufficiently specified where the Commission has been able to demonstrate that the advantage concerned was for the benefit of only undertakings belonging to a single economic sector and carrying out particular transactions (judgment of 15 December 2005, *Unicredito Italiano*, C‑148/04, EU:C:2005:774), only undertakings that have a particular legal form (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C‑222/04, EU:C:2006:8), only undertakings of a certain size (judgment of 13 February 2003, *Spain* v *Commission*, C‑409/00, EU:C:2003:92) or only undertakings resident for tax purposes outside the territory of a region (judgment of 17 November 2009 *Presidente del Consiglio dei Ministri*, C‑169/08, EU:C:2009:709).

The Federal Republic of Germany recalls that the Court has previously 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 economic operators, cannot be classified as State aid (judgment of 19 September 2000, *Germany* v *Commission*, C‑156/98, EU:C:2000:467, paragraph 22).

A fortiori, therefore, a tax measure such as that at issue, 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 not be considered to be selective.

Last, the Member States intervening in these cases submit that, if the selectivity of a national measure as a condition for its classification as State aid, within the meaning of Article 107(1) TFEU, were to be understood in the broad sense advocated by the Commission in its appeals, the consequence would be an undermining of the division of powers within the European Union. If such scope were to be conferred on the selectivity condition, the Commission could review almost

all direct tax measures by virtue of its powers in the field of State aid, although direct taxation falls, as a general rule, within the legislative competence of the Member States.

Findings of the Court

First, it must be recalled that, according to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between the Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (see, inter alia, judgment of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 24).

So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of 'State aid', within the meaning of Article 107(1) TFEU, it is clear from equally settled case-law of the Court that the assessment of that condition requires a determination whether, under a particular legal regime, a national measure is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory (see, inter alia, judgments of 28 July 2011, *Mediaset* v *Commission*, C-403/10 P, not published, EU:C:2011:533, paragraph 36; of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 75 and 101; and of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraphs 53 to 55; and of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 59).

Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity (see, to that effect, inter alia, judgment of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraphs 49 and 50).

As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (see to that effect, inter alia, judgment of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 18).

In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (see to that effect, inter alia, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see, to that effect, inter alia, judgments of 29 April 2004, *Netherlands* v *Commission*, C-159/01, EU:C:2004:246, paragraphs 42 and 43; of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 64 and 65; and of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 40).

Further, it must be recalled that the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (judgment of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 42).

It follows from all the foregoing that the appropriate criterion for establishing the selectivity of the measure at issue consists in determining whether that measure introduces, between operators that are, in the light of the objective pursued by the general tax system concerned, in a comparable factual and legal situation, a distinction that is not justified by the nature and general structure of that system (see, to that effect, judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 61).

Those are the factors that must guide the Court's examination of whether, in this case, the General Court misconstrued Article 107(1) TFEU, as interpreted by the Court, by holding that the Commission had not, in the contested decisions, demonstrated to the requisite legal standard that the measure at issue conferred a selective advantage on 'certain undertakings or the production of certain goods'.

In this case, the measure at issue confers a tax advantage that consists in a deduction from the taxable base for corporation tax in the form of an amortisation of the goodwill resulting from the acquisition by undertakings resident for tax purposes in Spain of at least 5% shareholdings in undertakings resident for tax purposes outside that Member State. That measure must, since it is capable of conferring an advantage on all such undertakings which carry out such transactions, be regarded as capable of constituting an aid scheme. It was therefore for the Commission to establish that that measure, notwithstanding that it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or on certain sectors of activity.

In that regard, the General Court stated, in paragraph 50 of the judgment under appeal *Autogrill España* v *Commission* and in paragraph 54 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that the Commission,

in order to establish that the measure at issue was selective, had primarily relied, in the contested decisions, on the ground that that measure constitutes a derogation from a reference system, in that the effect of that measure was the application to undertakings taxable in Spain, acquiring shareholdings in companies established outside Spain, of a tax treatment that differed from that applied to undertakings taxable in Spain making such acquisitions in companies established in Spain, although those two categories of undertakings were in comparable situations in the light of the objective pursued by that reference system, namely the general Spanish system for the taxation of companies and, more specifically, the rules relating to the tax treatment of financial goodwill within that tax system.

The General Court held, in paragraph 51 of the judgment under appeal *Autogrill España* v *Commission* and in paragraph 55 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that the Commission had thereby applied the analytical method that may be deduced from the case-law of the Court and of the General Court cited, respectively, in paragraphs 29 to 33 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 33 to 37 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, which essentially corresponds to the Court's case-law cited in paragraphs 53 to 60 of this judgment.

However, in paragraphs 44, 45, 52 and 53 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 48, 49, 56 and 57 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, the General Court held that the existence, were it to be established, of a derogation or an exception to the reference system identified by the Commission was not sufficient, in itself, to 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 accessible, a priori, to any undertaking and it was directed not to a particular category of undertakings, which would have been the only undertakings favoured by that measure, but to a category of economic transactions.

It is, however, clear that that reasoning is based on a misapplication of the selectivity condition laid down in Article 107(1) TFEU, as described in this judgment.

As is apparent from paragraphs 53 to 60 of this judgment, with respect to a national measure conferring a tax advantage of general application, such as the measure at issue, that condition is satisfied where the Commission is able to demonstrate that that measure is a derogation from the ordinary or 'normal' tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators, although the operators who qualify for the tax advantage and those who do not are, in the light of the objective pursued by that Member State's tax system, in a comparable factual and legal situation.

It is apparent from the judgments under appeal that the Commission relied, in the contested decisions, in order to establish that the measure at issue was selective, on the fact that the consequence of that measure was that resident undertakings were not treated equally. Pursuant to that measure, only resident undertakings who acquired at least 5% shareholdings in foreign companies could, under certain conditions, qualify for the tax advantage at issue, whereas resident undertakings making the acquisition of such a shareholding in undertakings taxable in Spain could not obtain that advantage, notwithstanding the fact that, according to the Commission, they were in a comparable situation in the light of the objective pursued by the ordinary Spanish tax system.

However, the General Court considered that the measure at issue, on the grounds that it did not affect any particular category of undertakings or the production of any particular category of goods, that it was applicable regardless of the nature of an undertaking's activity and that it was accessible, a priori or potentially, to all undertakings that wanted to acquire shareholdings of at least 5% in foreign companies and that held those shareholdings without interruption for at least one year, had to be regarded not as a selective measure but as a general measure within the meaning of the case-law cited in paragraph 56 of this judgment. In so doing, the General Court erred in law.

Thus, in paragraphs 41, 45, 67 and 68 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 45, 49, 71 and 72 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, the General Court held that, if the condition relating to the selectivity of a national measure relevant to the recognition of State aid, in respect of a measure that is a priori accessible to any undertaking, is to be satisfied, it is always necessary that a particular category of undertakings, who are exclusively favoured by the measure concerned and who can be distinguished by reason of specific properties, common to them and characteristic of them, be identified.

However, the imposition of such a supplementary requirement to identify a particular category of undertakings, additional to the analytical method applicable to selectivity in tax matters that may be deduced from the Court's settled case-law, which essentially involves ascertaining whether the exclusion of certain operators from the benefit of a tax advantage that arises from a measure derogating from an ordinary tax system constitutes discrimination with respect to those operators, cannot be inferred from the Court's case-law and, in particular, from the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732).

It is true that, in paragraph 104 of that judgment of 15 November 2011, *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, in order to be capable of being recognised as conferring selective advantages, the criteria forming the basis of assessment which are adopted by a tax system must be such as to characterise the recipient undertakings, by virtue of 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.

However, that ground of the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), must be read in the context of the set of grounds of which it forms part, set out in paragraphs 87 to 108 of that judgment.

It follows from a reading of all those grounds that the measure at issue in that judgment did not take the form of a tax advantage that derogated from an ordinary tax system, but rather involved the application of a 'general' tax scheme based on criteria that were, in themselves, also general. The Court held that the nature of that scheme did not preclude a finding that the measure concerned was selective, contrary to the ruling of the General Court, since the condition relating to selectivity has a broader scope that extends to measures which, by their effects, favour certain undertakings, in that case 'offshore' companies, on account of the specific features characteristic of those undertakings. That measure accordingly operated *de facto* discrimination against undertakings that were in a comparable situation in the light of the objective pursued by that regime, in that case the objective of putting in place generalised taxation of all resident companies.

By contrast, as stated above in paragraph 63 of this judgment, in the contested decisions, the Commission, in order to establish the selectivity of the measure at issue, relied primarily on the ground that the consequence of that measure is discrimination, in that it confers a tax advantage on certain resident undertakings and not on others who are subject to the same ordinary tax system from which the measure at issue is a derogation.

While it therefore follows from the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C‑106/09 P and C‑107/09 P, EU:C:2011:732), that the selectivity of a tax measure can be established even if that measure does not constitute a derogation from an ordinary tax system, but is an integral part of that system, the fact remains that that judgment is consistent with the Court's settled case-law, cited in paragraph 57 of this judgment, to the effect that it is sufficient, in order to establish the selectivity of a measure that derogates from an ordinary tax system, to demonstrate that that measure benefits certain operators and not others, although all those operators are in an objectively comparable situation in the light of the objective pursued by the ordinary tax system.

Indeed, while it is not always necessary that a tax measure, in order for it to be established that it is selective, should derogate from an ordinary tax system, the fact that it can be so characterised is highly relevant in that regard where the effect of that measure is that two categories of operators are distinguished and are subject, a priori, to different treatment, namely those who fall within the scope of the derogating measure and those who continue to fall within the scope of the ordinary tax system, although those two categories are in a comparable situation in the light of the objective pursued by that system.

Contrary to what was held by the General Court in the judgments under appeal, neither can it be required of the Commission, in order to establish the selectivity of such a measure, that it should identify certain specific features that are characteristic of and common to the undertakings that are the recipients of the tax advantage, by which they can be distinguished from those undertakings that are excluded from the advantage.

All that matters in that regard is the fact that the measure, irrespective of its form or the legislative means used, should have the effect of placing the recipient undertakings in a position that is more favourable than that of other undertakings, although all those undertakings are in a comparable factual and legal situation in the light of the objective pursued by the tax system concerned.

Further, according to the Court's settled case-law, the fact that the number of undertakings able to claim entitlement under a national measure is very large, or that those undertakings belong to various economic sectors, is not sufficient to call into question the selective nature of that measure and, therefore, to rule out its classification as State aid (see, inter alia, judgments of 13 February 2003, *Spain* v *Commission*, C‑409/00, EU:C:2003:92, paragraph 48, and of 8 September 2011, *Commission* v *Netherlands*, C‑279/08 P, EU:C:2011:551, paragraph 50).

Accordingly, contrary to what was held by the General Court in paragraphs 53 to 58 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 57 to 62 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, the potentially selective nature of the measure at issue is in no way called into question by the fact that the essential condition for obtaining the tax advantage conferred by that measure is that there should be an economic transaction, more particularly an 'entirely financial' transaction, for which no minimum investment is required and which is available regardless of the nature of the business of the recipient undertakings.

In that context, contrary to what was held by the General Court in paragraph 57 of the judgment under appeal *Autogrill España* v *Commission* and in paragraph 61 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, it cannot be inferred from paragraph 36 of the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598), according to which measures are not selective where they apply to all the undertakings in the national territory, 'regardless of their activity', that a measure whose application does not depend on the nature of the undertakings' activity is, a priori, not selective.

It is apparent from reading all the grounds of that judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598), that, in paragraph 36, read in the light of paragraph 35 of that judgment, the Court held that national measures, such as those at issue in that case, were not selective where they applied indiscriminately to all undertakings in the Member State concerned and constituted, for that reason, a general measure within the meaning of the case-law cited in paragraph 56 of the present judgment.

It must also be made clear that while the Court, in paragraph 36 of the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C‑143/99, EU:C:2001:598), referred to the activity of undertakings benefiting from the national measures, that reference is explained by the wording of the second question submitted by the referring court in the case that gave rise to that judgment. That is confirmed by the fact that no such reference is made in the subsequent judgments of the Court which restate that principle (see, inter alia, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C‑106/09 P and C‑107/09 P, EU:C:2011:732, paragraph 73, and of 29 March 2012, *3M Italia*, C‑417/10, EU:C:2012:184, paragraph 39).

Moreover, it is true, as stated by the General Court in paragraph 66 of the judgment under appeal *Autogrill España* v *Commission* and in paragraph 70 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that the Court held, in paragraph 42 of the judgment of 29 March 2012, *3M Italia* (C‑417/10, EU:C:2012:184), that the fact that only taxpayers satisfying the conditions for application of the measure concerned in that case could benefit from that measure could not, in itself, make it a selective measure. However, it must be noted that, in that same paragraph, the Court expressly stated that the absence of selectivity was due to the finding that persons who were not eligible for the measure concerned were not in a factual and legal situation comparable to that of taxpayers who were eligible, in the light of the objective pursued by the national legislature.

It follows that a condition for the application or the receipt of tax aid may be grounds for a finding that that aid is selective, if that condition leads to a distinction being made between undertakings despite the fact that they are, in the light of the objective pursued by the tax system concerned, in a comparable factual and legal situation, and if, therefore, it represents discrimination against undertakings which are excluded from it.

Further, while, as stated by the General Court in the judgments under appeal, the tax advantage conferred by the measure at issue can be obtained without any minimum investment requirement and without, consequently, the benefit of that measure being reserved to undertakings having sufficient financial resources, those factors do not preclude the possibility of that measure being classified as selective for other reasons, such as the fact that resident undertakings making acquisitions of shareholdings in companies resident for tax purposes in Spain could not obtain that advantage.

In that regard, it may be added that the Court has previously ruled that a tax measure from which solely undertakings that carried out specified transactions benefited, and not undertakings in the same sector that did not carry out those transactions, could be classified as selective, there being no need to assess whether that measure was of greater benefit to large undertakings (see, to that effect, judgment of 15 December 2005, *Unicredito Italiano*, C‑148/04, EU:C:2005:774, paragraphs 47 to 50).

Contrary to the General Court’s assertion in paragraphs 59 to 62 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 63 to 66 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, no indication to the contrary as regards the analysis of the condition relating to the selectivity of a tax measure may be deduced from the judgment of 19 September 2000, *Germany* v *Commission* (C‑156/98, EU:C:2000:467).

It follows from paragraphs 22 and 23 of the judgment of 19 September 2000, *Germany* v *Commission* (C‑156/98, EU:C:2000:467), that, in the case that gave rise to that judgment, the Commission had classified the measure concerned as selective in relation to certain geographically defined undertakings in which private investors had reinvested the profits derived from sales of financial assets and not in relation to those investors themselves, with respect to whom the Commission had considered that that measure did not constitute aid, since, as a general measure, it benefited all operators indiscriminately, an assessment that was, moreover, not challenged before the Court and on which the Court therefore did not have to give a ruling.

In any event, the situation of those private investors cannot be treated as equivalent to that of the resident undertakings that can benefit from the measure at issue.

In the contested decisions, the Commission, in order to classify the measure at issue as a selective measure, relied on the fact that the tax advantage conferred by that measure did not indiscriminately benefit all economic operators who were objectively in a comparable situation, in the light of the objective pursued by the ordinary Spanish tax system, since resident undertakings acquiring shareholdings of the same kind in companies resident for tax purposes in Spain could not obtain that advantage. The Commission then considered that the justification of that distinction between operators, relied on by the Kingdom of Spain, based on the nature or general structure of the system of which that measure formed part, could not be accepted.

It follows from all the foregoing that the General Court erred in law, in annulling the contested decisions, in part, on the ground that the Commission had failed to define a particular category of undertakings favoured by the tax measure at issue, while omitting to determine whether the Commission, in applying the method of examination, described in paragraphs 29 to 33 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 33 to 37 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, which must be used in order to examine the condition relating to the selectivity of the measure at issue, had in fact analysed the question and had established that that measure was discriminatory.

While, indeed, that examination must be carried out rigorously and while sufficient reasons must be stated to permit full judicial review, in particular of the question whether the situation of operators benefiting from the measure is comparable with that of operators excluded from it and, where appropriate, of the justification for discrimination relied on by the Member State concerned, the fact remains that the General Court erred in law by not undertaking such a review, and by ruling, in the judgments under appeal, that the examination method applied by the Commission in the contested decisions, in failing to define a particular category of undertakings which were exclusively favoured by the tax measure at issue, was based on a misinterpretation of the condition relating to selectivity as laid down by Article 107(1) TFEU.

Consequently, the first part of the Commission’s single ground of appeal is well founded.

The second part of the single ground of appeal

Arguments of the parties

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.

As regards, first, the case-law relating to aid for exports relied on in the contested decisions, in particular the judgments of 10 December 1969, *Commission* v *France* (6/69 and 11/69, not published, EU:C:1969:68), of 7 June 1988, *Greece* v *Commission* (57/86, EU:C:1988:284), and of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), the Commission claims that the General Court erred in law, in holding in paragraphs 69 to 76 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 73 to 80 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that that case-law concerns not the condition relating to the selectivity of a national measure, but only the condition relating to the effect on competition and trade.

According to the Commission, it is apparent from the judgments cited in the preceding paragraph that the Court considered that the tax measures concerned were selective, on the ground that the benefit of them was reserved to undertakings that carried out transactions abroad, such as investments, and not to undertakings carrying out similar transactions domestically. The Commission maintains that it follows that any measure that is to the benefit of cross-border transactions, but excludes the same domestic transactions, is selective.

Second, the Commission claims that General Court was wrong to introduce, in paragraphs 79 to 81 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 83 to 85 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, an artificial distinction between aid for exports and aid for export of capital in holding that it followed from the case-law relating to aid for exports relied on in the contested decisions, in particular the judgments of 10 December 1969, *Commission* v *France* (6/69 and 11/69, not published, EU:C:1969:68), of 7 June 1988, *Greece* v *Commission* (57/86, EU:C:1988:284), and of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), that 'the category of recipient undertakings allowing a finding that the measure at issue was selective was made up of [exporting] undertakings', a category bringing together undertakings which could be distinguished by reason of their common characteristics linked to their export activity.

According to the Commission, the undertakings affected by the measure at issue constitute a distinct category of undertakings, namely that of undertakings that export capital, since they share specific common characteristics linked to their activity of exporting capital.

The Commission considers that, since, with respect to the condition relating to selectivity, there is no difference between the export of goods and the export of capital, the measure at issue was selective to the same degree as the measures concerned in the case-law relating to aid for exports relied on in the contested decisions.

The Commission maintains that a category of exporting undertakings does not exist, as something separate from the group of undertakings that carry out cross-border transactions. Any undertaking within a Member State can carry out a cross-border transaction and, thereby, qualify for an export aid scheme. The Commission considers that a national measure may become selective because of the advantage granted to the beneficiary of the measure, as a result of carrying out an export transaction, of goods, services or capital, and not by reason of the fact that the undertakings concerned are members of an alleged export sector.

Accordingly, as the Court ruled in the judgment of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), in a situation comparable to that in this case, the General Court ought to have held that the Commission had properly established the selectivity of the measure at issue by reason of the fact that the benefit of that measure was reserved to certain undertakings, namely those which were engaged in the activity of exporting capital.

Last, the approach adopted the General Court ignores the role and purpose of the body of State aid rules in relation to the protection of the internal market. That body of rules is intended in particular to ensure that Member States do not grant economic advantages specifically linked to the export of goods or capital. The act of specifically favouring exports of capital could give rise to distortions in the internal market in the same way as the act of specifically favouring exports of goods.

WDFG and Banco Santander and Santusa contend that the General Court was correct to hold that the judgments of the Court relied on in the contested decisions concerned not the condition relating to selectivity, but the conditions relating to the effect on trade.

Further, the General Court was correct to hold that, in the case-law relating to aid for exports relied on in the contested decisions, in particular the judgments of 10 December 1969, *Commission* v *France* (6/69 and 11/69, not published, EU:C:1969:68), of 7 June 1988, *Greece* v *Commission* (57/86, EU:C:1988:284), and of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), the Court considered that the measures concerned were selective, the principal ground being that the recipient undertakings shared certain characteristics, a factor that allowed the conclusion that those undertakings belonged to a particular sector of the economy, namely the export sector, more specifically the goods exporting sector. The measures at issue in the cases that gave rise those judgments favoured undertakings of which it was a characteristic feature that they exported a more or less significant part of their goods or services.

WDFG and Banco Santander and Santusa argue that the measure at issue cannot, moreover, be considered to be selective on the ground that it applies to the category of undertakings described as 'exporters of capital'.

Such a category does not exist, and the Commission referred to it neither in the contested decisions nor before the General Court. That argument is inadmissible in an appeal, since it concerns a question of fact that is moreover raised out of time. It may be added that the argument contradicts the Commission's main line of argument, that the Commission was not obliged to identify a category of undertakings that were affected by a measure in order to establish the selectivity of that measure.

In any event, WDFG and Banco Santander and Santusa contend that the selectivity of a national measure cannot be ascertained on the basis of characteristics such as the capital of an undertaking or its capacity to invest, since such characteristics are inherent in any undertaking.

In addition, the rules governing the free movement of capital do not preclude a measure such as the measure at issue. While that measure involved different treatment that favours acquisitions of shareholdings abroad, that is at most reverse discrimination which is compatible with the fundamental freedoms.

The Kingdom of Spain restates its position, previously argued in the administrative procedure before the Commission, that there is no economic activity that consists of exporting 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.

Ireland maintains that the judgments relied on by the Commission in the contested decisions concerned measures which favoured a readily identifiable category of undertakings or the production of a readily identifiable category of goods, namely those involved in the export sector. However, there is no coherent category of undertakings that 'export capital', since any undertaking that makes an acquisition abroad 'exports capital'.

The Federal Republic of Germany argues 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 exporting undertakings has to be regarded as a retrospective addition of grounds to the contested decisions. The Federal Republic of Germany considers that that argument must be declared to be inadmissible on appeal.

The Federal Republic of Germany contends that the category of exporting undertakings at issue in the case-law relied on by the Commission in the contested decisions is distinct from other undertakings because of common characteristics linked to their exporting activity, which, in some cases, was connected to the making of specific investments.

Findings of the Court

As regards the case-law relating to aid for exports relied on in the contested decisions, in particular the judgments of 10 December 1969, *Commission* v *France* (6/69 and 11/69, not published, EU:C:1969:68), of 7 June 1988, *Greece* v *Commission* (57/86, EU:C:1988:284), and of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), it is clear that, as stated, in essence, by the Advocate General in points 126 to 130 of his Opinion, the General Court erred in law, in holding, in paragraphs 69 to 76 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 73 to 80 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that that case-law did not concern the condition relating to the selectivity of a national measure, but only the condition relating to the question whether competition and trade were affected.

In paragraph 20 of the judgment of 10 December 1969, *Commission* v *France* (6/69 and 11/69, not published, EU:C:1969:68), and in paragraph 8 of the judgment of 7 June 1988, *Greece* v *Commission* (57/86, EU:C:1988:284), the Court, in finding that there was State aid, necessarily held that all the conditions laid down on that subject in Article 107(1) TFEU, including the condition relating to selectivity, were satisfied. Further, in paragraph 120 of the judgment of 15 July 2004, *Spain* v *Commission* (C-501/00, EU:C:2004:438), the Court, referring, inter alia, to the two abovementioned judgments, expressly stated its position on the selectivity of the national measure under examination, holding that, in that case, selectivity followed from the fact that only undertakings engaged in export activities and carrying out certain investment transactions abroad qualified for the tax advantage conferred by that measure.

The General Court also erred in law in holding, in paragraphs 77 to 82 of the judgment under appeal *Autogrill España* v *Commission* and in paragraphs 81 to 86 of the judgment under appeal *Banco Santander and Santusa* v *Commission*, that the case-law relating to aid for exports relied on in the contested decisions had to be understood as meaning that the category of recipient undertakings with respect to whom the selectivity of export aid schemes must be examined was that constituted by 'export undertakings', which had to be defined as a category, which, while admittedly extremely broad, is nevertheless defined, comprising undertakings that could be distinguished by reason of specific, shared characteristics linked to their exporting activity.

As observed, in essence, by the Advocate General in points 133 to 136 of his Opinion, that case-law cannot be understood as meaning that a national measure must necessarily be classified as selective where that measure benefits exclusively undertakings that export goods or services, even if, in fact, that may have been the case with respect to the particular tax measures at issue in the judgments concerned.

On the contrary, taking into consideration the principles enshrined in the Court's settled case-law, as set out above in paragraphs 53 to 60 of this judgment, which are entirely applicable to tax aid for exports, a measure such as the measure at issue, designed to facilitate exports, may be regarded as selective if it benefits undertakings carrying out cross-border transactions, in particular investment transactions, and is to the disadvantage of other undertakings which, while in a comparable factual and legal situation, in the light of the objective pursued by the tax system concerned, carry out other transactions of the same kind within the national territory.

That being the case, the second part of the single ground of appeal is also well founded.

Consequently, since both parts of the Commission's single ground of appeal are well founded, the judgments under appeal must be set aside.

The actions before the General Court

In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

That is not the case here, since the General Court upheld the two actions for annulment but did not examine three of the four pleas in law relied on in each of those actions, pleas which only partly overlap, and did not examine, within its examination of the first pleas in law in those actions, whether those undertakings that did not meet the conditions for obtaining the tax advantage conferred by the measure at issue were, in the light of the objective pursued by the tax system concerned, in a factual and legal situation comparable to that of the undertakings favoured by that measure.

Further, examination of those pleas may involve assessment of matters of fact. The cases must therefore be referred back to the General Court.

Costs

Since the cases are being referred back to the General Court, it is appropriate to reserve the costs.

Pursuant to Article 140(1) of the Rules of Procedure of the Court, the Federal Republic of Germany, Ireland and the Kingdom of Spain, as interveners, must bear their own costs.

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

Sets aside the judgments of the General Court of the European Union of 7 November 2014, *Autogrill España* v *Commission* (T‑219/10, EU:T:2014:939), and of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T‑399/11, EU:T:2014:938);

Refers the cases back to the General Court of the European Union;

Reserves the costs;

Orders the Federal Republic of Germany, Ireland and the Kingdom of Spain to bear their own costs.

[Signatures]

---

* Language of the case: Spanish.