EUDTG Newsalert
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# European Court of Justice rules the Spanish Financial Goodwill amortization regime constitutes an aid scheme

On 6 October 2021, the European Court of Justice ("ECJ"), sitting as the Grand Chamber, delivered its judgments on several appeals (C-50 to C-53/19P, C-64/19P and C-65/19P) lodged by different beneficiaries of the regime and the Kingdom of Spain against the decisions of the General Court of the European Union ("General Court") of 15 November 2018 in which the General Court, adjudicating on a previous referral back from the ECJ, dismissed the appeals against the final State aid decision of the European Commission of 28 October 2009 and 12 January 2011 ("contested decisions") (click here to have access to our previous newsalert).

The dispute between the Spanish Government, the impacted companies and the European Commission has been ongoing for more than fifteen years. The disputed tax measure was introduced in 2001 into the Spanish Corporate Tax Law and allowed the deduction of the financial goodwill resulting from the acquisition by a resident undertaking of a shareholding of at least 5% in a foreign company, in the form of an amortisation, from the basis of assessment for the corporate tax for which the resident undertaking was liable, provided that relevant shareholding was held without interruption for at least one year. By the contested decisions, the European Commission declared that such tax measure constituted an aid scheme incompatible with the internal market and ordered its recovery, except in the case of beneficieries protected by legitimate expectations (i.e. acquisitions conducted prior to 21 December 2007). The General Court annulled both decisions by judgments of 7 November 2014*,* taking the view that the European Commission had not established that the measure was selective since, being a measure of general application, the European Commission failed to identify a category of undertakings which are exclusively favoured by the measure at issue. In the appeal brought by the European Commission against those judgments, the ECJ set them aside and referred the case back to the General Court in its judgment of 21 December 2016. In the judgments delivered in the referral back, the General Court found that, considering the findings of the ECJ judgments, the measure was selective and dismissed the actions for annulment brought against the contested decisions.

The ECJ dismissed all the appeals brought against the judgments of the General Court claryfing to some extent its complex case-law on the selectivity of tax measures, particularly in the case of measures of general application that constitute an aid scheme. In particular the ECJ confirmed that a measure can still be selective even if the transaction benefitting from the measure is open to all undertakings.

**Takeaway**

Even if the decision represents the end of the debate on the selectivity of the amortisation of financial goodwill, it does not put an end to the legal battle that surrounds this measure, since there are still pending appeals with the General Court against the third decision issued by the European Commission in relation to the measure (i.e. application of the amortisation in the case of goodwill resulting from the acquisition of holding companies) and an important amount of recovery procedures at different national administrative or judicial stages that raise questions on the application of the legitimate expectations recognized in the contested decisions.

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## Let's talk

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