Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 21 January 2021 [1]

Case C-55/19 P

Prosegur Compañía de Seguridad, SA
v

European Commission

(Appeal – Provisions concerning corporate tax allowing companies which are resident for tax purposes in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are resident for tax purposes abroad – Concept of State aid – Selectivity)

1. The present case concerns the appeal brought by Prosegur Compañía de Seguridad, SA ('Prosegur') against the judgment of 15 November 2018, *Prosegur Compañía de Seguridad* v *Commission* [2] ('the judgment under appeal'), by which the General Court dismissed the action brought under Article 263 TFEU by Prosegur seeking the annulment of Article 1(1) of Commission Decision 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions, implemented by Spain ('the decision at issue') [3] and, in the alternative, of Article 4 of that decision.

2. The present appeal forms part of a series of eight parallel actions seeking the annulment of the judgments by which the General Court dismissed the actions brought by certain Spanish undertakings against the decision at issue or against Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions, implemented by Spain ('the Decision of 28 October 2009'). [4]

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

3. On 10 October 2007, after a number of written questions had been sent to it in 2005 and 2006 by Members of the European Parliament and after it had received a complaint from a private operator in 2007, the European Commission decided to initiate the formal investigation

1 Original language: Italian.

2 T-406/11, not published, EU:T:2018:793.

3 Decision No C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 135, p. 1). That decision has been rectified on two occasions, on 3 March 2011 and on 26 November 2011.

4 C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 7, p. 48). The other cases, on which I am presenting my Opinions today, are Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*; C-53/19 P, *Banco Santander and Santusa* v *Commission* and C-65/19 P, *Spain* v *Commission*; and Cases C-50/19 P, *Sigma Alimentos Exterior* v *Commission*; C-52/19 P, *Banco Santander* v *Commission*; and C-54/19 P, *Axa Mediterranean* v *Commission*.

procedure under the current Article 108(2) TFEU[5] ('the opening decision'), in relation to an arrangement laid down in Article 12(5) of the Ley del Impuesto sobre Sociedades (Spanish Corporate Tax Law) introduced by Ley 24/2001, de Medidas Fiscales, Administrativas y del Orden Social (Law 24/2001 on fiscal, administrative and social measures) of 27 December 2001,[6] and reproduced in Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the recast text of the Corporate Tax Law; 'the TRLIS') of 5 March 2004 ('the measure at issue'). The measure at issue provides that, in the event that an undertaking taxable in Spain acquires a shareholding in a 'foreign company' equal to at least 5% of that company's capital and retains that shareholding for an uninterrupted period of at least 1 year, the resulting financial goodwill,[7] [8] may be deducted, in the form of amortisation, from the taxable base for the undertaking's corporate tax liability. 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.

4. By the Decision of 28 October 2009, the Commission closed the formal investigation procedure in respect of acquisitions of shareholdings within the European Union. In that decision, the Commission held that the aid scheme implemented by Spain under the measure at issue was incompatible with the internal market as regards aid granted to beneficiaries in respect of intra-Community acquisitions.

5. The Commission did, however, keep the formal investigation procedure open in respect of acquisitions of shareholdings outside the European Union, pending further information that the Spanish authorities had undertaken to provide. That part of the procedure was closed by the adoption of the decision at issue. Article 1(1) of that decision stated that the aid scheme implemented by Spain under the measure at issue was incompatible with the internal market 'as regards aid granted to beneficiaries in respect of extra-EU acquisitions'.[9] Paragraph 4 of that article states that 'tax reductions enjoyed by beneficiaries under Article 12(5) of the TRLIS in respect of extra-EU acquisitions carried out by the date of publication of this Decision in the *Official Journal of the European Union*, which are related to majority shareholdings held directly or indirectly in foreign companies established in China, India or in other countries where the existence of explicit legal barriers to cross-border business combinations have been or can be demonstrated … can continue to apply over the entire amortisation period established by the aid scheme'. Article 4(1) of the decision at issue requires the recovery of the 'incompatible aid corresponding to the tax reduction under the scheme referred to in Article 1(1) from the beneficiaries whose rights in foreign companies, acquired in the context of extra-EU acquisitions, do not fulfil the conditions laid down in Article 1(2) to (5)'.

5 OJ 2007 C 311, p. 21 ('the opening decision').

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

7 Goodwill is defined in recital 27 of the decision at issue as the 'value of a well-respected business name, good customer relations, employee skills, and other such factors expected to translate into greater than apparent earnings in the future', corresponding to 'the price paid for the acquisition of a business in excess of the market value of the assets constituting the business'. On the basis of Spanish accounting standards, this should be booked as a separate intangible asset as soon as the acquiring company takes control of the target company.

8 Recital 29 of the decision at issue states that 'financial goodwill', as used in the Spanish tax system, is the goodwill that would have been booked if the shareholding company and the target company had merged.

9 Article 1(2) of the decision at issue excluded from the declaration of incompatibility and from the recovery order the tax reductions that the beneficiaries had enjoyed in respect of extra-EU acquisitions under the measure at issue 'which are related to rights held directly or indirectly in foreign companies fulfilling the relevant conditions of the aid scheme by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year'. The Commission took the view that until that date (corresponding to the publication in the Official Journal of the decision to initiate the formal investigation procedure), the beneficiaries of the measure at issue had a legitimate expectation that the measure was lawful (see recitals 186 to 199 of the decision at issue).

II. The procedure before the General Court and the judgment under appeal

6. By application lodged at the Registry of the General Court on 29 July 2011, Prosegur brought an action seeking the annulment of the decision at issue. The procedure was suspended from 13 March to 7 November 2014, the date on which the General Court ruled on the case that gave rise to the judgment of 7 November 2014, *Banco Santander and Santusa* v *Commission*[10] ('the judgment in *Banco Santander and Santusa* v *Commission*') setting aside the decision at issue, on the grounds that the Commission had misapplied the condition of selectivity laid down in Article 107(1) TFEU. The General Court also set aside the Decision of 28 October 2009 by judgment of 7 November 2014, *Autogrill España* v *Commission*[11] ('the judgment in *Autogrill España* v *Commission*').

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

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

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

9. By application lodged with the Registry of the Court of Justice on 25 January 2019, Prosegur brought the present appeal. That party is seeking to have the judgment under appeal set aside, the decision at issue annulled following the upholding of its action before the General Court, and an order for the Commission to pay the costs. The Commission contends that the Court should dismiss the appeal and order the appellant to pay the costs.

IV. Arguments

A. Introductory comments

10. Reference should be made to the statements made and the criteria discussed in points 11 to 21 of my Opinion in Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*, delivered today, for an examination of the case-law, as it now stands, in

[10] T-399/11, EU:T:2014:938.

[11] T-219/10, EU:T:2014:939.

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

relation to the selectivity of tax measures and, in particular, for an illustration of the three-step method for analysing selectivity developed by the Court. It is in the light of those statements and criteria that the complaints put forward by Prosegur will be examined. For information about the implications of the *WDFG* judgment for the purposes of examining the present appeal, please refer to points 23 to 27 of the abovementioned Opinion.

B. The appeal

11. Prosegur has put forward a single ground in support of its appeal, relating to an error in the interpretation of Article 107(1) TFEU in terms of the selectivity criterion. That ground can be broken down into four limbs as the main ground and two in the alternative.

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

12. The complaints raised in the first limb of Prosegur's single ground of appeal relate to the first phase of the selectivity analysis, intended to determine the reference system. Reference should be made to the comments made in points 37 to 51 of my Opinion in Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*, delivered today, for a discussion of the concept of 'reference system' and the applicable criteria for its determination.

(a) The first complaint of the first limb of the single ground of appeal

13. Because the assertions made in the first complaint of the first limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the first complaint of the first limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 52 to 59 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the complaint in question should be rejected.

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

14. Because the assertions made in the second complaint of the first limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the second complaint of the first limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 62 to 82 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the complaint in question should be rejected.

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

15. Because the assertions made in the third complaint of the first limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the third complaint of the first limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 85 to 87 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the complaint in question should be rejected.

2. The second limb of the single ground of appeal: error in determining the objective serving as the basis for examining comparability

16. The complaints raised by Prosegur in the second limb of its single ground of appeal relate to paragraphs 133 to 154 of the judgment under appeal and are intended to dispute the grounds of that judgment by which the General Court identified the objective of the reference system and, in the light of that objective, compared the situation of undertakings benefiting from the measure at issue and those excluded from that measure.

17. Because the assertions made in this limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the second limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 91 to 106 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the assertions in question should be rejected.

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

18. Because the assertions made in the third limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the third limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 109 and 110 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the assertions in question should be rejected.

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

19. Because the assertions made in the fourth limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the fourth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 112 and 113 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the assertions in question should be rejected.

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

20. Because the assertions made in the fifth limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the fifth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 114 to 117 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. On that basis, the assertions in question should be rejected.

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

21. Because the assertions made in the sixth limb of Prosegur's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the sixth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis*

mutandis, for the purposes of their examination, to points 119 to 122 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the sixth limb of Prosegur's single ground of appeal.

7. Conclusion on the appeal

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

V. Costs

23. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Pursuant to Article 138(1) of those rules, which are applicable, *mutatis mutandis*, to the procedure before the Court of Justice on an appeal against a decision of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Because I propose that the Court of Justice should dismiss Prosegur's appeal, that party must, in my view, be ordered to pay the costs, in accordance with the corresponding application from the Commission.

VI. Conclusion

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