Reports of Cases

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

Joined Cases C-53/19 P and C-65/19 P

Banco Santander, SA
and Santusa Holding, SL
v
European Commission (C-53/19 P)
and
Kingdom of Spain
v
Banco Santander, SA,
Santusa Holding, SL,

European Commission (C-65/19 P)

(Appeal – Corporate tax provisions allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in companies which are tax resident abroad – Concept of State aid – Selectivity)

1. The present joined cases concern the appeals brought by Banco Santander, SA and Santusa, SL ('Banco Santander and Santusa') (Case C-53/19 P) and by the Kingdom of Spain (Case C-65/19 P), respectively, against the judgment of 15 November 2018, *Banco Santander and Santusa* v *Commission* ('the judgment under appeal'), [2] by which the General Court dismissed the action brought under Article 263 TFEU by Banco Santander and Santusa 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, for the annulment of Article 4 of that decision.

[1] Original language: Italian.

[2] T-399/11 RENV, EU:T:2018:787.

[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.

2. The present appeals form part of a series of eight parallel cases seeking the setting aside of the judgments by which the General Court dismissed the actions brought by certain Spanish companies against the decision at issue or against Commission Decision 2011/5/EC 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 procedure under the current Article 108(2) TFEU ('the opening decision'),[5] That decision concerned the 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 No 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 No 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 basis of assessment of the undertaking's corporation tax liability. The measure at issue states that, in order 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 which the Spanish authorities had undertaken to provide. That part of the procedure was closed with the adoption of the decision at issue. Article 1(1) of that decision held that the aid scheme implemented by Spain under the measure at issue was incompatible with the internal market 'as

4 C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 7, p. 48). The other cases, in which I also deliver my Opinions today, are Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*; and Cases C-50/19 P, *Sigma Alimentos Exterior* v *Commission*; C-52/19 P, *Banco Santander* v *Commission*; C-54/19 P, *Axa Mediterranean* v *Commission*; and C-55/19 P, *Proseguor Compañía de Seguridade* v *Commission*.

5 OJ 2007 C 311, p. 21.

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', to be booked, under Spanish accounting principles, 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.

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) 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)'.

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

6. By application lodged at the General Court Registry on 29 July 2011, Banco Santander and Santusa brought an action for the annulment of the decision at issue. By judgment of 7 November 2014, *Banco Santander and Santusa* v *Commission*,[10] the General Court upheld the action on the grounds that the Commission had incorrectly applied the condition relating to selectivity laid down in Article 107(1) TFEU ('the judgment in *Banco Santander and Santusa* v *Commission*'). The General Court also annulled the decision of 28 October 2009 by judgment of 7 November 2014 in *Autogrill España* v *Commission* ('the judgment in Autogrill España v Commission').[11]

7. By application lodged at 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, which was registered under number C-21/15 P, was joined to the appeal registered under number C-20/15 P that the Commission had brought against the judgment in *Autogrill España* v *Commission*. 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 the joined cases in support of the forms of order sought by WDFG and Banco Santander and Santusa. By judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* ('the *WDFG* judgment'),[12] the Court of Justice set aside the judgment in *Banco Santander and Santusa* v *Commission*, referred the case back to the General Court and reserved the costs in part. The Court of Justice also set aside the judgment in *Autogrill España* v *Commission*.

[9] Article 1(2) of the decision at issue excluded from the declaration of incompatibility and from the recovery order the tax reductions the beneficiaries had enjoyed in respect of extra-EU acquisitions under the measure at issue '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 of the lawfulness of that measure (see recitals 186 to 199 of the decision at issue).

[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.

8. On 15 November 2018, the General Court delivered the judgment under appeal, by which it dismissed the action brought by Banco Santander and Santusa, ordered those parties to bear their own costs and to pay those of the Commission and declared that the Federal Republic of Germany, Ireland and the Kingdom of Spain would each bear their own costs. [13]

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

9. By applications lodged at the Registry of the Court of Justice on 25 and 29 January 2019 respectively, Banco Santander and Santusa and the Kingdom of Spain brought the present appeals.

10. In Case C-53/19, Banco Santander and Santusa seek the setting aside of the judgment under appeal, the annulment of the decision at issue following the upholding of their action before the General Court, and an order for the Commission to pay the costs. The Kingdom of Spain contends that the appeal brought by Banco Santander and Santusa should be allowed, the judgment under appeal set aside and the Commission ordered to pay the costs. In Case C-65/19, the Kingdom of Spain seeks the setting aside of the judgment under appeal, the annulment of Article 1(1) of the decision at issue in so far as it declares that the measure at issue constitutes State aid, and an order for the Commission to pay the costs. The Federal Republic of Germany claims that the appeals should be allowed in both cases. The Commission contends in both cases that the appeals should be dismissed and the appellants ordered to pay the costs.

IV. Arguments

A. Introductory comments

11. 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 current case-law position in relation to the selectivity of tax measures and, in particular, for an illustration of the three-step method of analysis of selectivity developed by the Court. It is in the light of those statements and criteria that the complaints put forward by Banco Santander and Santusa and by the Kingdom of Spain will be examined. For information about the implications of the *WDFG* judgment for the purposes of examining the present appeals, reference should be made to points 23 to 27 of the abovementioned Opinion.

B. The appeals

12. Banco Santander and Santusa, on the one hand, and the Kingdom of Spain, on the other, have put forward a single ground in support of their respective appeals, alleging misinterpretation of Article 107(1) TFEU as regards the selectivity criterion. Both grounds are subdivided into various parts: four main parts and two in the alternative for the single ground raised by Banco Santander and Santusa ('the Banco Santander and Santusa single ground of appeal'), and four for the single ground raised by the Kingdom of Spain.

[13] Having been granted leave to intervene in the appeal proceedings before the Court of Justice, the Federal Republic of Germany, Ireland and the Kingdom of Spain, although they did not originally intervene before the General Court, appear as interveners in the proceedings reopened by the General Court following the setting aside and referral back by the Court of Justice.

13. The complaints raised in the four main parts of the ground put forward by Banco Santander and Santusa and the four parts of the single ground of appeal put forward by the Kingdom of Spain essentially overlap or coincide. Those complaints may, therefore, be grouped and examined together. I will then examine the parts of the single ground of appeal that are advanced by Banco Santander and Santusa in the alternative.

1. The first part of the Banco Santander and Santusa single ground of appeal and the first and second parts of the Kingdom of Spain's single ground of appeal: error in determining the reference system

14. The complaints raised in the first part of the Banco Santander and Santusa single ground of appeal and the first and second parts of the Kingdom of Spain's single ground of appeal concern the first step of the analysis as to selectivity, the purpose of which is to determine the reference system. For a discussion of the concept of 'reference system' and the applicable criteria for its determination, 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, should be referred to.

(a) The first complaint of the first part of the single ground of appeal of Banco Santander and Santusa and the first part of the Kingdom of Spain's single ground of appeal

15. Since the contentions made in the first complaint of the first part of the Banco Santander and Santusa single ground of appeal and in the first part of the Kingdom of Spain's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the first complaint of the first part of World Duty Free Group's single ground of appeal in Case C-51/19 P and in the first part of Kingdom of Spain's single ground of appeal in Case C-64/19 P, respectively, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 52 to 59 of my Opinion in those joined cases, delivered today. For the same reasons stated in those points, I propose that the Court should reject the first complaint of the first part of the Banco Santander and Santusa single ground of appeal and the first part of the Kingdom of Spain's single ground of appeal.

(b) The second complaint of the first part of the Banco Santander and Santusa single ground of appeal and the second part of the Kingdom of Spain's single ground of appeal

16. Since the contentions made in the second complaint of the first part of the Banco Santander and Santusa single ground of appeal and in the second part of the Kingdom of Spain's single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the second complaint of the first part of World Duty Free Group's single ground of appeal in Case C-51/19 P and in the second part of the Kingdom of Spain's single ground of appeal in Case C-64/19 P, respectively, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 62 to 82 of my Opinion in those joined cases, delivered today. For the same reasons stated in those points, I propose that the Court should reject the second complaint of the first part of the Banco Santander and Santusa single ground of appeal and the second part of the Kingdom of Spain's single ground of appeal.

(c) The third complaint of the first part of the Banco Santander and Santusa single ground of appeal

17. Since the contentions made in the complaint being examined, and the arguments used to support those contentions, are identical to those advanced in the third complaint of the first part 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. For the same reasons stated in those points, I propose that the Court should reject the third complaint of the first part of the Banco Santander and Santusa single ground of appeal.

2. The second part of the Banco Santander and Santusa single ground of appeal and the third part of the Kingdom of Spain's single ground of appeal: error in determining the objective on the basis of which to assess comparability

18. The complaints raised by Banco Santander and Santusa and by the Kingdom of Spain in the second and third parts of their respective single grounds of appeal concern paragraphs 144 to 165 of the judgment under appeal. Those complaints challenge the grounds of that judgment by which the General Court identified the objective of the reference system and compared, in the light of that objective, the situation of undertakings benefiting from the advantage conferred by the measure at issue and those excluded from it.

19. Since the contentions made in these parts of the Banco Santander and Santusa appeal on the one hand and the Kingdom of Spain's appeal on the other, and the arguments used to support those contentions, are identical to those advanced in the second part of World Duty Free Group's single ground of appeal in Case C-51/19 P and the third part of the Kingdom of Spain's single ground of appeal in Case C-64/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 91 to 106 of my Opinion in those joined cases, delivered today. For the same reasons stated in those points, I propose that the Court should reject the second part of the Banco Santander and Santusa single ground of appeal and the third part of the Kingdom of Spain's single ground of appeal.

3. The third part of the Banco Santander and Santusa single ground of appeal and the fourth part of the Kingdom of Spain's single ground of appeal: error in law in allocating the burden of proof

20. Since the contentions made in these parts of the Banco Santander and Santusa appeal on the one hand and the Kingdom of Spain's appeal on the other, and the arguments used to support those contentions, are identical to those advanced in the third part of World Duty Free Group's single ground of appeal in Case C-51/19 P and the fourth part of the Kingdom of Spain's single ground of appeal in Case C-64/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 109 and 110 of my Opinion in those joined cases, delivered today. For the same reasons stated in those points, I propose that the Court should reject the third part of the Banco Santander and Santusa single ground of appeal and the fourth part of the Kingdom of Spain's single ground of appeal.

4. The fourth part of the Banco Santander and Santusa single ground of appeal: proportionality

21. Since the contentions made in this part of the Banco Santander and Santusa single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the fourth part 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. For the same reasons stated in those points, I propose that the Court should reject the fourth part of the Banco Santander and Santusa single ground of appeal.

5. The fifth part of the Banco Santander and Santusa single ground of appeal: causal link

22. Since the contentions made in this part of the Banco Santander and Santusa single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the fifth part 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. For the same reasons stated in those points, I propose that the Court should reject the fifth part of the Banco Santander and Santusa single ground of appeal.

6. The sixth part of the Banco Santander and Santusa single ground of appeal: severability of the measure

23. Since the contentions made in this part of the Banco Santander and Santusa single ground of appeal, and the arguments used to support those contentions, are identical to those advanced in the sixth part 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. For the same reasons stated in those points, I propose that the Court should reject the sixth part of the Banco Santander and Santusa single ground of appeal.

7. Conclusions on the appeals brought by Banco Santander and Santusa and by the Kingdom of Spain

24. In the light of the above, I propose that the Court should dismiss in their entirety the appeals brought by Banco Santander and Santusa and by the Kingdom of Spain.

V. Costs

25. In accordance with Article 184(2) of the Rules of Procedure of the Court, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable *mutatis mutandis*, pursuant to Article 184(1) of the same rules, 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. Since I propose that the Court should dismiss the appeals brought by Banco Santander and Santusa and by the Kingdom of Spain, those parties must, in my view, be ordered to pay the costs, in accordance with the form of order to that effect sought by the Commission. In

accordance with Article 184(4) of the Rules of Procedure of the Court 'where the appeal has not been brought by an intervener at first instance, he may not be ordered to pay the costs in the appeal proceedings unless he participated in the written or oral part of the proceedings before the Court of Justice. Where an intervener at first instance takes part in the proceedings, the Court may decide that he shall bear his own costs'. I propose, therefore, that the Court should order the Federal Republic of Germany to bear its own costs.

VI. Conclusion

26. On the basis of all the foregoing, I propose that the Court should dismiss the appeals, order Banco Santander and Santusa and the Kingdom of Spain to pay the costs and order the Federal Republic of Germany to bear its own costs.