Reports of Cases

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

Joined Cases C-51/19 P and C-64/19 P

World Duty Free Group, SA, formerly Autogrill España, SA
v
European Commission (C-51/19 P)
and
Kingdom of Spain
v
World Duty Free Group, SA, formerly Autogrill España, SA,

European Commission (C-64/19 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. These joined cases concern the appeals brought by World Duty Free Group SA, formerly Autogrill España SA ('WDFG') (Case C-51/19 P), and by the Kingdom of Spain (Case C-64/19 P) against the judgment of 15 November 2018, *World Duty Free Group* v *Commission* ('the judgment under appeal'), [2] by which the General Court dismissed the action under Article 263 TFEU brought by WDFG for the annulment of Article 1(1) of 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 at issue'), [3] and, in the alternative, for the annulment of Article 4 of that decision.

2. The present appeals form part of a series of eight parallel cases concerning 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 2011/282/EU of 12 January 2011 on the tax amortisation of financial goodwill for foreign shareholding acquisitions, implemented by Spain ('the decision of 12 January 2011'). [4]

1 Original language: Italian.

2 T-219/10 RENV, EU:T:2018:784.

3 C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 7, p. 48).

4 C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 135, p. 1). The other cases, in which I also deliver my Opinions today, are Joined Cases 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* v *Commission*, C-52/19 P, *Banco Santander* v *Commission*, C-54/19 P, *Axa Mediterranean* v *Commission* and C-55/19 P, *Prosegur Compañía de Seguridade* v *Commission*.

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 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 one 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. On 28 October 2009, the Commission adopted the decision at issue, by which it closed the formal investigation procedure in respect of acquisitions of shareholdings within the European Union. Having stated in recital 19 of that decision that 'under Spanish tax policy principles, with the exception of the measure in question, goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets held by independent companies or following a merger or de-merger operation' and after specifying, in recital 20, that 'the concept of financial goodwill under [the measure at issue] … introduces into the field of share acquisitions a notion that is usually used in transfer of assets or business combination transactions', the Commission concluded that the measure at issue was selective in that it only favoured certain groups of undertakings that carry out certain investments abroad and that 'this specific character [wa]s not justified by the nature of the scheme' (see recital 89). According to the Commission, that conclusion was valid regardless of whether the reference system is defined as 'the rules on the tax treatment of financial goodwill under the Spanish tax system' (see recitals 89 and 92 to 114) or as 'the tax treatment of goodwill deriving from an economic interest taken in a company resident in a country other than Spain' (see recitals 89 and 115 to 119). In Article 1(1) of that decision, the Commission declared 'the aid scheme

5 OJ 2007 C 311, p. 21.

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

7 Goodwill is defined in recital 18 of the decision at issue as the 'value of a well-respected business name, good customer relations, employee skills, and other such factors that are 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 20 of the decision at issue, which 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.

implemented by Spain under [the measure at issue] … incompatible with the common market as regards aid granted to beneficiaries in respect of intra-Community acquisitions' and, in Article 4, ordered the recovery of aid corresponding to the tax reductions granted under that scheme. [9]

5. The Commission kept 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 of 12 January 2011, by which the Commission declared the aid scheme implemented by Spain under the measure at issue to be incompatible with the internal market, particularly in so far as it applies to acquisitions of shareholdings in undertakings established outside the European Union.

II. Procedure before the General Court and the judgment under appeal

6. By application lodged at the General Court Registry on 14 May 2010, WDFG brought an action for the annulment of the decision at issue. By judgment of 7 November 2014 in *Autogrill España* v *Commission*, [10] the General Court allowed the action on the ground that the Commission had incorrectly applied the condition relating to selectivity laid down in Article 107(1) TFEU ('*Autogrill España* v *Commission*'). The General Court also set aside the decision of 12 January 2011 by judgment of 7 November 2014, *Banco Santander and Santusa* v *Commission* ('*Banco Santander and Santusa* 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 *Autogrill España* v *Commission*. That appeal, which was registered under number C-20/15 P, was joined to the appeal, registered under number C-21/15 P, that the Commission had brought against the judgment in *Banco Santander and Santusa* 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* ('*WDFG*'), [12] the Court of Justice set aside the judgment in *Autogrill España* 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 *Banco Santander and Santusa* v *Commission*.

8. On 15 November 2018, the General Court delivered the judgment under appeal, dismissing WDFG's action, ordering WDFG to bear its own costs and those of the Commission and declaring that the Federal Republic of Germany, Ireland and the Kingdom of Spain would each bear their own costs. [13]

9 Article 1(2) of the decision at issue excluded from the declaration of incompatibility and from the recovery order the tax reductions enjoyed by the beneficiaries in respect of intra-Community 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 165 to 168 of the decision at issue).

10 T-219/10, EU:T:2014:939.

11 T-399/11, EU:T:2014:938.

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

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.

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

9. By application lodged at the Registry of the Court of Justice on 25 and 29 January 2019 respectively, WDFG and the Kingdom of Spain brought the present appeals.

10. In Case C-51/19, WDFG submits that the judgment under appeal should be set aside, that the decision at issue should be annulled after its action before the General Court is upheld, and that the Commission should be ordered to pay the costs. The Kingdom of Spain submits that WDFG's appeal should be allowed, that the judgment under appeal should be set aside, and that the Commission should be ordered to pay the costs. In Case C-64/19, the Kingdom of Spain submits that the judgment under appeal should be set aside, that Article 1(1) of the decision at issue should be annulled in so far as it finds that the measure at issue constitutes State aid, and that the Commission should be ordered to pay the costs. The Federal Republic of Germany submits in both cases that the appeals should be allowed. The Commission contends, in both cases, that the appeals should be dismissed and the appellants ordered to pay the costs.

IV. Analysis

A. Preliminary observations

1. Analysis of the selectivity of the tax measures

11. In order for a national measure to be characterised as State aid within the meaning of Article 107(1) TFEU, it must be such as to favour 'certain undertakings or the production of certain goods'; in other words, it must confer a selective advantage on the recipient. The selectivity of the advantage is, therefore, a constituent factor in the concept of 'State aid',[14] the assessment of which requires, according to settled case-law of the Court of Justice, a determination whether, under a particular legal regime, a national measure is such as to favour certain undertakings or the production of certain goods in comparison with other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation.[15]

12. National measures that confer a tax advantage,[16] although not involving the transfer of State resources, may satisfy the condition of selectivity and therefore be caught by the prohibition on State aid under Article 107(1) TFEU, where they place the recipients in a more favourable position than other taxpayers.[17] The characteristic of those measures, which complicates the examination, inter alia, of their selectivity, is that, unlike subsidy measures in the strict sense, they confer advantages of a *negative* nature – that is to say, in the form of a reduction in the tax burden to which the beneficiaries would otherwise be subject under the tax system normally applicable to them.

14 These appeals raise questions that relate solely to material selectivity and not regional selectivity which requires the determination of whether the legal regime in question is at the level of the Member State or at that of the infra-state body concerned (see, to that effect, judgment of 6 September 2006 *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraphs 56 and 57).

15 See, inter alia, judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41), and of 6 September 2006, *Portugal* v *Commission* (C-88/03, EU:C:2006:511, paragraph 54), and *WDFG*, paragraph 54.

16 In its judgment in Case 173/73, paragraph 28, the Court made it clear that the fiscal nature of the measure at issue cannot suffice to shield it from the application of the rules on State aid.

17 See judgment in *WDFG*, paragraph 56 and the case-law cited.

13. In order to assess the selectivity of national tax measures in particular, the Court has developed a three-step method of analysis.[18] Developed and refined over the years, that method was recently systematised in the judgment in *WDFG* and subsequently confirmed in the judgments of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*[19] ('*Andres*'), and of 19 December 2018, *A-Brauerei* ('*A-Brauerei*').[20]

14. First, the method involves identifying 'the ordinary or "normal" tax system applicable in the Member State concerned', which serves as a 'reference framework' or 'system'[21] (first step), and then demonstrating 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 (second step).[22] During the first two steps, the analysis is thus essentially intended to establish a benchmark and define the category of undertakings which, by reference to that benchmark, are in a comparable factual and legal situation to that of the beneficiaries of the advantage conferred by the national measure at issue. If, following that analysis, unequal treatment between those undertakings emerges, the measure must be considered 'a priori selective'.[23] Conversely, tax advantages resulting from a general measure applicable without distinction to all economic operators do not constitute aid within the meaning of Article 107(1) TFEU.[24] It is incumbent on the Commission to establish the existence of unequal treatment and that the national measure is, therefore, prima facie selective.

15. In the third step, the Member State concerned has the opportunity to demonstrate that the unequal treatment which emerged in the first two steps 'arises from the nature or scheme of the system of which [the measure in question forms part]' and is, therefore, justified.[25] That step is characterised by a reversal of the burden of proof, as is the case whenever the existence of discrimination has to be assessed: it is for the person to whom the unequal treatment is attributed – in this case, the Member State concerned – to prove that there is a legitimate justification for such unequal treatment and that the measure introducing it is proportionate.

16. Although the method of analysis described above is straightforward in its outline and approach, its practical application is not always simple and can lead to divergent solutions as to the actual selectivity of the measure examined.[26] On several occasions, moreover, the Court has made 'adjustments' or 'clarifications' to take into account the characteristics of the tax systems examined, preferring a case-by-case approach characterised by a limited amount of predictability. Aside from the practical application of that method and the distinctions made in case-law, it seems to me that several fundamental criteria emerge from that case-law which inform the Court's reasoning and influence the solutions adopted each time.

18 The Court has been clear that the application of that method is not limited solely to the examination of tax measures (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 55).

19 C-203/16 P, EU:C:2018:505.

20 C-374/17, EU:C:2018:1024.

21 See, inter alia, *Andres*, paragraphs 80 and 88.

22 See *WDFG*, paragraph 57 and the case-law cited (judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49).

23 *WDFG*, paragraph 58.

24 See, inter alia, judgments of 15 December 2005, *UniCredito Italiano* (C-148/04, EU:C:2005:774, paragraph 49) and of 19 September 2000, *Germany* v *Commission* (C-156/98, EU:C:2000:467, paragraph 22).

25 See, inter alia, judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 33); of 29 April 2004, *Netherlands* v *Commission* (C-159/01, EU:C:2004:246, paragraphs 42 and 43); and of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraph 40). See also *WDFG*, paragraph 58.

26 The case that gave rise to the judgment in *Andres* is a prime example.

17. First, it has become increasingly clear in the case-law of the Court, since the judgment of 15 November 2011 in *Commission* v *Government of Gibraltar and the United Kingdom*[27] ('*Gibraltar*'), that the concept of selectivity is closely linked to that of discrimination.[28] A national measure is considered selective where the advantage it provides is applied in a discriminatory manner.[29] As the Court held in paragraph 71 of *WDFG*, the method of analysis applicable to selectivity in tax matters 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'.[30]

18. Secondly, the examination of the selectivity of tax measures must take into account the *effects* of those measures.[31] This implies, on the one hand, that the objectives pursued by the national tax legislature, extrinsic to the tax system in question, are relevant only for the purpose of identifying the category of entities within which the existence of unequal treatment must be established, but not when justifying such differentiation. On the other hand, the examination of the selectivity of a tax measure does not depend on the form of the measures in question, in order to prevent 'national tax rules [falling] from the outset outside the scope of control of State aid on account of the sole fact that they were adopted under a different regulatory technique although, by adjusting and combining various tax rules, they produce the same effects …'.[32] The analysis based on the effects of the measure may lead the Court to recognise the *de facto selectivity* of a tax rule which, although formally applicable without distinction to all the operators concerned, on the basis of general and objective criteria, in practice introduces unjustified differentiations.[33] The selectivity of such measures which do not derogate from the ordinary system and are, therefore, not *de jure selective*,[34] cannot be ascertained by applying the three-step method of analysis, as *Gibraltar* shows, but requires a specific check to be made as to whether they result in a differentiated tax burden on the recipient undertakings, '[identified] by virtue of the properties which are specific to them, as a privileged category'.[35]

27 C-106/09 P and C-107/09 P, EU:C:2011:732.

28 See paragraph 101 of *Gibraltar*, in which the Court refers for the first time to the concept of discrimination in the context of the examination of the selectivity of aid. Yet the parallel between the two concepts dates back to earlier rulings, such as the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraph 41), in which the idea that selectivity must be ascertained by assessing the existence of unequal treatment between groups of undertakings in a comparable situation came to light. For explicit confirmation of the link between selectivity and discrimination, see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 53).

29 See to that effect, inter alia, the judgments of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, not published, EU:C:2011:533, paragraph 36); 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). See also *Gibraltar*, paragraphs 75 and 101, *Andres*, paragraph 83, and *WDFG*, paragraphs 54, 86 and 93, and, more explicitly, although not in relation to tax law, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 53 and 55).

30 See also judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 53), delivered on the same day as the *WDFG* judgment, and of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 53). The same position is expressed in several recent Opinions of Advocates General. See, for example, Opinions of Advocate General Wahl in *Eventech* (C-518/13, EU:C:2014:2239, point 35) and *Commission* v *MOL* (C-15/14 P, EU:C:2015:32, point 54); of Advocate General Kokott in *Finanzamt Linz* (C-66/14, EU:C:2015:242, point 82); of Advocate General Bobek in *Belgium* v *Commission* (C-270/15 P, EU:C:2016:289, point 29); and of Advocate General Wathelet in *Commission* v *Banco Santander and Santusa* (C-20/15 P and C-21/15 P, EU:C:2016:624, point 80).

31 As the Court has repeatedly held, Article 107(1) TFEU does not distinguish between State interventions according to their causes or objectives, but defines them on the basis of their effects. See, inter alia, judgments of 2 July 1974, *Italy* v *Commission* (173/73, EU:C:1974:71, paragraph 27), and of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 85 and 89). Also *Gibraltar*, paragraph 87.

32 *Andres*, paragraph 91.

33 See, inter alia, *Gibraltar*, paragraph 101, and *WDFG*, paragraph 67. For a definition of de facto selectivity, see point 121 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, C/2016/2946 (OJ 2016 C 262, p. 1 ('the Notice on the notion of State aid').

34 According to the Notice on the notion of State aid, *de jure* selectivity 'results directly from the legal criteria for granting a measure that is formally reserved for certain undertakings only' (see paragraph 121).

35 *Gibraltar*, paragraphs 91 and 93 and 103 to 107.

19. Thirdly, in view of the natural complexity of national tax regulations, which are based on multiple systems, rules and exemptions and in which the fiscal, economic and social objectives pursued by the legislature are implemented by differentiating between categories of taxpayers, the Court essentially undertakes 'a consistency test',[36] interpreting inconsistency as a sign of the selectivity of the measure in question. The consistency test is relevant both in the context of the second step of the method of analysis, where the definition of the categories of recipients and persons excluded from the advantage is assessed in relation to the objective of the tax system concerned, and – where the measure is considered a priori selective – in the context of the third step, when assessing the justification put forward by the Member State concerned with regard to the nature or structure of the tax system in question. A consistency criterion must also be applied, as will be seen later, when identifying the reference system and therefore in the context of the first step.

20. According to the case-law of the Court, the analysis as to selectivity thus consists in an assessment of the discriminatory nature of the measure in question, both in the light of its effects and its consistency with the system of which it forms part, irrespective of the objectives pursued by the tax legislature, which are extrinsic to that system, and the regulatory technique used.

21. Aside from methodology, it is apparent from the case-law – particularly if examined in the light of the different dialectic that has emerged on several occasions between the Court of Justice and the General Court[37] – that the Court of Justice has a general tendency to adopt a broad interpretation of the condition of selectivity in tax matters, at least in defining the outline and scope of the concept of a 'general measure' able to preclude the selective nature of the tax system in question.[38] That approach, which is probably due to the need to prevent the adoption of sophisticated tax arrangements allowing Member States to circumvent the rules on State aid, has not failed to draw criticism; this is because it indirectly limits the freedom of Member States to make national fiscal and economic policy decisions,[39] essentially requiring the Commission, when assessing the compatibility of aid under Article 107(3) TFEU, to examine the legality under EU law of the objectives pursued by Member States through the adoption of direct taxation measures. While there is no doubt that, in exercising their competences, Member States are obliged to comply with EU law, including the provisions on State aid, the Court has nevertheless repeatedly held that 'in the absence of EU rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors'.[40] It is in the context, inter alia, of those delicately balanced competences that the complex examination of the selectivity of tax incentives takes place.

36 See, to that effect, the Opinion of Advocate General Kokott in the Joined Cases in *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, point 82).

37 See, for example, the cases giving rise to the judgments of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757), and of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551), and those giving rise to the judgments in *Andres* and *WDFG*.

38 See, to that effect, *Gibraltar* and *WDFG*. However, the actual identification of the discriminatory nature of the regime in question, given the difficulty of the examination, allows for a more restrictive approach. See, for example, although not tax-related, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971).

39 See, for example, Opinions of Advocate General Kokott in *Finanzamt Linz* (C-66/14, EU:C:2015:242, points 113 to 115), and of Saugmandsgaard Øe in *A-Brauerei* (C-374/17, EU:C:2018:741, points 74 to 81). See also the positions of Ireland, Spain and Germany in the case giving rise to *WDFG*, as set out in paragraph 52 of that judgment and, as will be seen below, the reluctance of the German Government, in its observations in the present cases, to accept the approach taken by the Court in *WDFG*.

40 See judgment of 26 April 2018, *ANGED* (C-236/16, EU:C:2018:291, paragraph 38 and the case-law cited).

22. The complaints advanced by WDFG and the Kingdom of Spain will be examined below in the light of the abovementioned criteria and the points made thus far. Nevertheless, the scope of *WDFG* and its relevance to the analysis of the present appeals still need to be clarified before such an examination can begin.

2. The implications of WDFG for the purpose of examining the present appeals

23. In the judgment in *Autogrill España* v *Commission*, by which it annulled the decision at issue, the General Court held, first, that for the condition of selectivity to be satisfied, a category of undertakings which were exclusively favoured by the measure concerned had to be identified in all cases and that, where that measure was potentially available to all undertakings, as in the case of the measure at issue, the mere finding that a derogation from the common or 'normal' tax regime had been provided for could not give rise to selectivity.[41] Secondly, the General Court held that tax differentiation did not in itself imply the existence of aid, but that, to that end, a specific category of undertakings had to be identified which could be distinguished on account of their specific characteristics.[42] Lastly, the General Court rejected the Commission's arguments based on the case-law on State aid for exports, reasoning that, in the precedents mentioned by the Commission,[43] the Court of Justice had still identified a category of beneficiary undertakings which could be distinguished on account of common characteristics.[44]

24. In *WDFG*, the Court of Justice upheld both complaints raised by the Commission, the first contesting the obligation imposed on it by the General Court to identify a group of undertakings having specific characteristics in order to demonstrate the selective nature of a national measure, and the second contesting the General Court's interpretation of the case-law on export aid. As to the first complaint, after recalling the three-step method of analysis as to selectivity described earlier, the Court of Justice held that since the measure at issue was capable of conferring an advantage on all undertakings resident for tax purposes in Spain which acquire at least 5% shareholdings in undertakings resident for tax purposes outside that Member State, it could be regarded as capable of constituting State aid, and that it was for the Commission to establish that notwithstanding the fact that that measure conferred an advantage of general application, it conferred the benefit of that advantage exclusively on certain undertakings or on certain sectors of activity.[45] The Court of Justice found that the General Court's reasoning had been based on the misapplication of the selectivity condition and that, as a national measure conferring a tax advantage of general application, that condition is satisfied where the Commission is able to demonstrate that the measure in question is a derogation from the ordinary or 'normal' tax system applicable in the Member State concerned, 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.[46] According to the Court of Justice, the General Court had thus erred in law in concluding that the measure at issue had to be regarded not as a selective measure but as a general measure, 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

41 See in particular paragraphs 44 and 45, 53 and 62 of *Autogrill España* v *Commission*.

42 See paragraphs 67 and 68 of *Autogrill España* v *Commission*.

43 See 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).

44 See paragraphs 79 to 81 of *Autogrill España* v *Commission*.

45 See paragraph 62 of *WDFG*.

46 See paragraph 67 of *WDFG*.

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.[47] The Court of Justice also stated that, contrary to the General Court's finding, the potentially selective nature of the measure at issue was 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.[48] It thus concluded that the General Court had erred in criticising the Commission's findings as to the selectivity of the measure at issue, while failing to determine whether the Commission had in fact analysed the question and had established that that measure was discriminatory.[49] As to the second complaint advanced by the Commission, in so far as it is relevant for the purposes of the present cases, the Court of Justice held that the General Court had erred in law by finding that the case-law on export aid, on which the Commission had relied, was not applicable here. In paragraph 119 of *WDFG*, the Court of Justice held that the three-part method of analysing selectivity set out above is 'entirely applicable to tax aid for exports', specifying that a measure such as the measure at issue 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.

25. The judgment in *WDFG* undoubtedly makes a valuable contribution to the definition of the notion of selectivity of tax aid. According to that judgment, a national measure may also be selective where it does not identify a particular category of beneficiaries ex ante and where all undertakings established in the territory of the Member State concerned, irrespective of their size, legal form, sector or other specific characteristics, potentially have access to the benefit provided for by that measure on condition that they make a certain type of investment.[50] The approach taken by the Court, which looks for potential discrimination in measures that appear to be applicable without distinction and which introduce an advantage accessible in law and in fact for all undertakings, is not shared by those who see the rigid application of the three-step method of analysis – untempered by the simultaneous application of a criterion based on the general availability of the tax benefit – as an overextension of the notion of aid and an erosion of the competence of the Member States in the matter of direct taxation.[51] This tallies with the observations of the German Government, which favours a limitation of the scope of *WDFG* and its contextualisation.

26. I will merely observe here that, although in *WDFG*, the Court took a position in a specific context, characterised by a measure which in some respects can be likened to export subsidies – in respect of which the Court has traditionally adopted a stricter approach in terms of their characterisation as aid – I do not believe that the scope of that judgment should be overly relativised. Indeed, given the manner in which it is drafted, and considering that it has been

47 See paragraph 69 of *WDFG*.

48 See paragraph 81 of *WDFG*.

49 See paragraph 93 of *WDFG*.

50 Until *WDFG*, the possibility of regarding as selective an advantage applicable without distinction to all undertakings, although contingent on a particular transaction, appeared to be hindered by the fact that the general measures were not selective in principle. In *WDFG*, however, the Court made it clear that, for the purposes of assessing the selectivity of a measure, unequal treatment which is attributable to the actions of the undertakings is also material. This, in my view, is the most problematic aspect of *WDFG*, which the General Court deliberately sought to emphasise – not without veiled criticism – in paragraphs 82 and 83 of the judgment under appeal.

51 See Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C-374/17, EU:C:2018:741, points 74 to 81). See also Opinion of Advocate General Kokott in the Joined Cases in *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, point 85), which attempts to qualify the scope of the judgment by underlining the nature of the measure at issue as an export subsidy.

reaffirmed in successive judgments of the Court, including in Grand Chamber proceedings,[52] *WDFG* appears to be a landmark judgment which, in confirming the three-part method of analysis as to selectivity, states that any regime that lays down conditions for obtaining a tax advantage, even where that advantage is potentially accessible to all undertakings, may be selective where it leads to a difference in treatment of undertakings in a comparable legal and factual situation.

27. For the purpose of examining the present appeals, I note, however, that the importance of *WDFG* is rather limited. First, none of the complaints advanced by the appellants seeks to challenge the grounds by which the General Court, by rejecting WDFG's arguments alleging the general nature of the measure at issue, applied the principles affirmed by the Court of Justice in *WDFG*.[53] Secondly, in that judgment the Court, while basing its reasoning on the premiss that the Commission had found the measure at issue to be selective given its derogations and the unequal treatment it introduced for resident undertakings, did not take a position on either of those two aspects, which are, however, central to the present appeals.[54] In other words, the Court merely endorsed the method of analysis applied by the Commission to demonstrate the selectivity of the measure at issue, not the outcome of that application, which is under discussion in the present joined cases. It follows that the arguments put forward by the German Government in its response, inasmuch as they criticise the choice in the present case of the three-part method of analysing selectivity, based on discrimination rather than the 'general availability' of the tax advantage, are irrelevant for the examination of the present appeals.

B. The appeals

28. WDFG and the Kingdom of Spain each raise a single ground of appeal alleging misinterpretation of Article 107(1) TFEU as regards the selectivity criterion. Both grounds of appeal are divided into different parts: four main and two alternative, as regards the single ground of appeal raised by WDFG, and four main as regards the single ground of appeal raised by Spain.

29. The complaints advanced in the four main parts of WDFG's single ground of appeal, and in the four parts of the Kingdom of Spain's single ground of appeal, are largely identical or overlapping.[55] Those complaints can thus be consolidated and examined together. I will then examine the parts of WDFG's single ground of appeal put forward in the alternative.

52 See in particular the judgment in *A-Brauerei*, in which the Court, although cautioned by Advocate General Saugmandsgaard Øe (see C-374/17, EU:C:2018:741, point 115) about the consequences of a strict reading of *WDFG*, confirmed the approach taken in that judgment, even outside the specific context in which it was adopted.

53 See paragraphs 77 to 89 of the judgment under appeal.

54 I note, however, that there have been different readings of *WDFG* (see Opinions of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 107), and Advocate General Kokott in Joined Cases in *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, point 85), according to which the Court took a position on the reference system or on the selectivity of the measure at issue.

55 In its response in Case C-51/19, the Kingdom of Spain points out that WDFG's appeal is essentially the same as its single ground of appeal and the reasoning set out therein.

1. The first part of WDFG's 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

(a) Admissibility

30. The complaints formulated by WDFG and the Kingdom of Spain, respectively, in the first part of WDFG's single ground of appeal and in 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, as we have seen, is to determine the reference system. The Commission considers those complaints broadly inadmissible, since WDFG's action before the General Court did not include any complaint regarding alleged errors in determining the reference system. Allowing the appellants to raise new complaints at the appeal stage would mean allowing them to bring before the Court of Justice a wider case than that heard by the General Court.

31. The objection of inadmissibility put forward by the Commission must, in my view, be rejected.

32. Admittedly, according to the settled case-law referred to by the Commission, during an appeal the jurisdiction of the Court of Justice is confined to a review of the findings of law on the pleas argued before the General Court. In principle, therefore, a party cannot put forward for the first time before the Court of Justice a plea in law that it did not raise before the General Court. [56]

33. Nevertheless, the Court has made clear that an appellant is entitled to lodge an appeal relying on pleas arising from the judgment under appeal itself which seek to criticise, in law, its merits. [57]

34. In the case at issue, therefore, even assuming that, as the Commission maintains, the complaints put forward by WDFG and the Kingdom of Spain in their respective appeals constitute 'new pleas' compared with those raised in support of WDFG's action before the General Court, [58] that would not in itself be sufficient to declare them inadmissible. In fact, since the judgment under appeal examined whether the Commission had correctly identified the reference tax system in the context of the first step of the method of analysing selectivity, [59] WDFG and the Kingdom of Spain are entitled to criticise, in law, the findings made in that regard by the General Court, irrespective of the fact that they did not at first instance put forward an argument specifically challenging the Commission's decision in that regard.

[56] See, inter alia, judgments of 1 February 2007, *Sison* v *Council* (C-266/05 P, EU:C:2007:75, paragraph 95), and of 28 February 2019, *Alfamicro* v *Commission* (C-14/18 P, EU:C:2019:159, paragraph 38).

[57] See judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 17); of 10 April 2014, *Commission* v *Siemens Österreich and Others* (C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102); of 20 December 2017, *EUIPO* v *European Dynamics Luxembourg SA and Others* (C-677/15 P, EU:C:2017:998, paragraph 28); of 6 September 2018, *Czech Republic* v *Commission* (C-4/17 P, EU:C:2018:678, paragraph 24); and, lastly, of 26 February 2020, *EEAS* v *Alba Aguilera and Others* (C-427/18 P, EU:C:2020:109, paragraph 54).

[58] In that respect, I note that, in paragraphs 32 and 33 of the judgment under appeal, the General Court stated that the second complaint in WDFG's first plea in law concerned an 'error in identifying the reference system' and that that complaint was supported by a comprehensive line of argument, which could also apply to the third complaint, relating to the justified nature of the measure at issue in the light of the nature and general scheme of the system of which it forms part. In paragraph 94 of the judgment under appeal, the General Court states that WDFG's arguments lead it 'to question the relevance of the reference framework chosen by the Commission in the present case'.

[59] See paragraphs 92 to 141 of the judgment under appeal.

35. I note moreover that the arguments put forward by WDFG and the Kingdom of Spain in the relevant parts of their respective single grounds of appeal contain a precise and detailed criticism of the grounds of the judgment under appeal and are aimed largely at challenging the General Court's observance of the limits and procedures for conducting a review. Consequently, they could not be relied on before the General Court.[60]

36. On the basis of the foregoing, I therefore consider that the first part of WDFG's single ground of appeal and the first and second parts of the Kingdom of Spain's single ground of appeal must be declared admissible.

(b) Substance

(1) Preliminary observations

37. In the Notice on the notion of State aid, the Commission defines the reference system as 'a consistent set of rules that generally apply – on the basis of objective criteria – to all undertakings falling within its scope as defined by its objective'.[61] It should be noted, however, that that definition has not yet been adopted by the Court of Justice, which continues to define the reference system as 'the *ordinary* or "*normal*" *tax system* applicable in the Member State concerned'.[62]

38. Given the complexity of national tax systems and the number of variables affecting the determination of the tax burden for undertakings, several parties have pointed out the difficulty of identifying such an 'ordinary system' in practice, as well as the uncertain outcome of that process.[63] In view of those difficulties, and on the basis that it was impossible to determine a single reference system, it has variously been found that that process was inconclusive and that attention should instead focus on the unequal treatment introduced by the measure in question,[64] or that there should be a return to a system based on the concept of a general measure.[65]

39. While determining the reference system undoubtedly remains one of the most complex aspects of examining the selectivity criterion, particularly given the Court's reluctance to devise precise criteria to guide the Commission and the authorities of the Member States in that task,[66] the approach now established in the case-law of the Court, which tends to equate the notion of selectivity with that of discrimination, means that determining the reference system cannot be disregarded or downplayed. Any examination of discrimination must take place in the light of a *tertium comparationis* – in other words, a benchmark against which the existence of any unjustified difference in treatment can be assessed. The reference tax system, in view of its

60 See, to that effect, judgment of 1 June 2006, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission* (C-442/03 P and C-471/03 P, EU:C:2006:356, paragraph 60).

61 Paragraph 133.

62 *WDFG*, paragraph 57. My emphasis.

63 Advocate General Saugmandsgaard Øe, in points 121 to 140 of his Opinion in *A-Brauerei*, gives a striking account of those difficulties. See also the Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, points 101 to 105).

64 See Opinion of Advocate General Kokott in the Joined Cases in *ANGED* (C-236/16 and C-237/16, EU:C:2017:854, point 88).

65 See Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei*.

66 See Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 101).

objective, is one such benchmark for assessing selectivity.[67] It seems therefore to me that – as repeatedly held by the Court with particular reference to the examination of tax measures[68] – the central importance of that reference system cannot, however, be disputed.[69]

40. So which criteria should be used to determine that system?

41. First of all, it is essential, in my view, that the task of identifying the applicable rules should be carried out on the basis of objective criteria, not least to allow a judicial review of the assessments on which it is based.

42. Further, although the objective reconstruction of the tax burden of the relevant undertakings for the purpose of determining the reference system may sometimes require provisions to be taken into account that are not part of the specific tax regime within which the measure concerned falls,[70] it is important that that process does not result in an abstract construction.[71] Accordingly, it is necessary, in my view, to start from the premiss that it is the Member State concerned that defines the reference system by exercising its exclusive competence in the matter of direct taxation. As will be seen later, this does not mean that – in the context of the procedure for examining the selectivity of a national measure – the Commission is obliged to base its analysis on the reference system indicated by the Member State concerned, without being able to challenge it, but only that that reference system consists in a set of rules and principles drawn from a Member State's tax system and that it is on the basis of that latter system that it must be determined.

43. Lastly, in line with the definition adopted in the Commission Notice on the notion of State aid, the reference system must be composed of a consistent set of rules. In that respect, it should be stressed that the need for consistency acts both as a limit for the Commission and as a basis on which the Commission can challenge the reference system proposed by the Member State concerned.

44. The criteria to be applied in determining the reference system in the context of the first step of the analysis as to the selectivity of a national tax measure are, therefore, objectivity, specific detail and consistency. Even so, it is still necessary to seek to devise a method that would make that determination less uncertain.[72]

45. With that in mind, I do not necessarily think that the way forward is to oversimplify matters. There is no question that, with regard to measures forming part of the general corporate tax system of a Member State, the Court has adopted a broad approach.[73] Despite this, in my view

67 See, to that effect, *Andres*, paragraph 89.

68 In that regard, the Court has pointed out that 'the very existence of an advantage may be established only when compared with "normal" taxation'. See, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03 (EU:C:2006:511, paragraph 56), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 55). See also *Andres*, paragraphs 88 and 89.

69 As previously explained, this only applies to *de jure* selective measures, since the three-step method of analysis does not apply in the case of de facto selective measures.

70 As in the case that gave rise to the judgment of 8 September 2011, *Commission* v *Netherlands* (C-279/08 P, EU:C:2011:551).

71 The Court has already ruled, in *Andres* (paragraph 103), that the selectivity of a tax measure cannot be precisely assessed on the basis of a reference framework consisting in some provisions that have been artificially taken from a broader legislative framework.

72 I am well aware of the difficulty of that task and the strength of the arguments of those who believe that the reference system is (and cannot be) anything other than the result of a subjective choice. However, given the importance that that notion has acquired in the analysis of the selectivity of tax measures, I consider it more useful to try to find a way to 'live' with it, rather than persevere in highlighting the objective difficulties of its practical application.

73 See Opinion of Advocate General Wahl in *Andres* v *Commission* (C-203/16 P, EU:C:2017:1017, point 106).

the general system should not be identified, as a matter of course, as being the reference system for the assessment of those measures, as seems to be evidenced by the Commission's written observations and as has also been suggested in the legal literature.[74] Although this will be the case most of the time, I do not consider it methodologically correct to proceed on the basis of assumptions, since this would lead, for an entire category of tax measures, to the first and second steps of the selectivity analysis being deprived of any real significance. As will be seen later, this does not, however, mean that, depending on the type of measure involved and the tax system of which it forms part, the reference system cannot be determined using criteria which differ in part.

46. In the light of the foregoing, the reference system must, in my view, necessarily be determined by analysing the measure at issue and, more specifically, the differentiations between undertakings which that measure introduces in applying the criteria defined by it.

47. Determining the criteria on the basis of which the situation of one undertaking is distinguished from that of another, and is consequently subject to different tax rules, is at the discretion of the national legislature. The rules on State aid act as a limit on that discretion, applying where seemingly identical situations are subject to rules that lead to discrimination in the entitlement to a tax advantage. In that context, taking as the starting point for the selectivity analysis the differentiations between undertakings resulting from the application of the measure being examined allows concrete form to be given to the task of determining the reference system.

48. From an examination of that measure, and on the basis of the effects of applying it, it is indeed possible to ascertain both the groups of undertakings between which there is differentiation and the factor in relation to which that differentiation operates. In other words, such an examination makes it possible to determine 'between whom' and 'in respect of what' unequal treatment is established. Such unequal treatment may concern, in particular, aspects of the rules governing a specific legal arrangement or a specific tax regime or even form part of the Member State's overall tax system.

49. In that context, identifying the reference system will in general be easier when the differentiation between undertakings takes place in the context of a specific tax scheme – such as a new environmental tax – as in the cases giving rise to the judgments of 26 April 2018, *ANGED* ('*ANGED*'),[75] and of 22 December 2008, *British Aggregates* v *Commission ('British Aggregates')*.[76] In such cases, that differentiation – whether pertaining to the liability to tax or the way in which it is applied – takes place in relation to a specific and distinct body of rules represented by the tax scheme in question. That body of rules is the reference system for assessing the selectivity of the measure. More complex, however, are situations where the measure examined forms part of one or more subsystems within an existing general tax scheme, as in the case of *Andres* and *A-Brauerei*, or is a separate rule in its own right. If so, it is necessary – starting with the measure under examination – to refer back to the body of rules governing the case in question, ensuring that those rules are both consistent and comprehensive. They may correspond to the general tax scheme considered as a whole or to one of its subsystems or even equate to the measure itself, where the latter appears as a rule having its own legal logic and it is not possible to identify an external consistent body of rules. Where the measure in question is inseparable from the overall tax system of the Member State concerned, reference must be made to that system.

74 To that effect, see R. Ismer and S. Piotrowski, *Selectivity in Corporate Tax Matters After World Duty Free: A Tale of Two Consistencies Revisited*, Intertax, 2018, pp. 156 to 158.

75 C-236/16, EU:C:2018:291.

76 C-487/06 P, EU:C:2008:757.

50. Lastly, I consider that the reference system must be determined, in conjunction with the Member State concerned, in the light of the content, structure, systematic arrangement and interrelationships between the rules in question, rather than the objectives pursued by the national legislature. This is because, methodologically, the objectives are identified in a separate step after the determination of the reference system. Additionally, as mentioned earlier, it allows that determination to be as objective as possible.[77]

51. In the light of the foregoing, I will now examine the appellants' complaints in the context of the relevant parts of their respective single grounds of appeal.

(2) The first complaint in the first part of WDFG's single ground of appeal and the first part of the Kingdom of Spain's single ground of appeal

52. WDFG, by the first complaint in the first part of its single ground of appeal, and the Kingdom of Spain, by the first part of its single ground of appeal, submit that the General Court substituted the grounds of the decision at issue, using a different reference system from that adopted by the Commission. Whereas the Commission used the rules on the tax treatment of financial goodwill as a reference system, the General Court, on the basis of a materially different analysis from that carried out by the Commission, also included in that system the tax treatment of non-financial goodwill.[78]

53. I recall in that respect that, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court have jurisdiction in actions brought on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaty on the Functioning of the European Union or of any rule of law relating to its application, or of misuse of powers. Article 264 TFEU provides that if the action is well founded, the act concerned must be declared void. The Court of Justice and the General Court cannot, therefore, substitute their own reasoning for that of the author of the contested act.[79] In the judgment of 27 January 2000, *DIR International Film and Others* v *Commission*,[80] the Court of Justice clarified that 'in proceedings for annulment, the General Court may be led to interpret the reasoning of the contested measure in a manner which differs from that of its author, and even, in certain circumstances, to reject the latter's formal statement of reasons', although this is precluded 'where there is no material factor to justify such a course of action'.[81]

54. The appellants' complaint that the General Court based its analysis on a different reference system from that adopted by the Commission in the decision at issue does not appear, prima facie, to be entirely unfounded. Indeed, as WDFG and the Kingdom of Spain correctly point out, in recital 96 of the decision at issue, the Commission indicates as the 'appropriate reference framework for the assessment of the measure at issue' 'the rules on the *tax treatment of financial*

77 As the Opinion of Advocate General Saugmandsgaard Øe in *A-Brauerei* (C-374/17, EU:C:2018:741, points 149 to 159) demonstrates, by considering the objectives of the legislature, a (further) element of subjectivity is introduced into the determination of the reference system, in addition to making the task much more complex. Moreover, I note that, in the grounds of the Court's judgment relating to the determination of the reference system, there is no mention of the intense debate over the objectives of the relevant rules reported by Advocate General Saugmandsgaard Øe in his Opinion.

78 WDFG refers in particular to paragraphs 92 and 140 of the judgment under appeal.

79 See judgments of 27 January 2000, *DIR International Film and Others* v *Commission* (C-164/98 P, EU:C:2000:48, paragraph 38); of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraph 141); and of 24 January 2013, *Frucona Košice* v *Commission* (C-73/11 P, EU:C:2013:32, paragraph 89).

80 C-164/98 P, EU:C:2000:48.

81 Paragraph 42.

goodwill' [82] contained in the general Spanish corporate tax system. In paragraphs 70, 92 and 140 of the judgment under appeal, the General Court states instead that the Commission used as the reference framework for its analysis as to selectivity the *tax treatment of goodwill* and 'did not limit that framework to the tax treatment of financial goodwill only' (paragraph 92).

55. On closer examination, however, I do not consider that the General Court has distorted the decision at issue, nor has it substituted the grounds of that decision. The complaint under consideration focusses on a difference in terminology between the decision at issue and the judgment under appeal which, contrary to what the appellants claim and as the Commission correctly points out, does not amount to the identification of two materially different reference systems.

56. To appreciate the substantial convergence of results between the Commission's analysis and the General Court's interpretation thereof, reference should be made to recital 89 of the decision at issue, reproduced by the General Court in paragraph 70 of the judgment under appeal. In that section, the Commission, anticipating the conclusion reached at the end of its analysis as to selectivity, replies to the Spanish Government's arguments that the reference system should be limited to the tax treatment of goodwill resulting from the acquisition of a shareholding in a company established in a State other than Spain. It categorically states that, in its view, the measure at issue 'should be assessed in the light of the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit' and explains that its position is due to the fact that 'situations in which financial goodwill can be amortised do not cover the whole category of taxpayers placed in a similar factual and legal situation'.

57. In my opinion, the Commission's reasoning is seamless. The starting point is the finding that the rule at issue provides for the amortisation of goodwill resulting from the acquisition of a shareholding only in the case of shareholdings in a company not established in Spain. That finding led the Commission to question whether the measure at issue could be selective in that it discriminates against undertakings which carry out similar acquisitions but in companies established in Spain. The reference system for the purpose of assessing selectivity should, therefore, include the rules on the tax treatment of goodwill arising from such acquisitions. As is clear from recital 89, the Commission starts from the premiss that, according to the principles of the Spanish accounting and tax system, rules similar to those governing goodwill in general apply to financial goodwill resulting from the acquisition of shareholdings in companies established in Spain, [83] according to which goodwill must be booked as a separate intangible asset as soon as the acquiring company takes control of the target company [84] and can only be amortised following a business combination. [85] That interpretation is supported by recital 99 of the decision at issue, in which the Commission affirms that, for Spanish tax purposes, goodwill, understood in the general sense and therefore not only as financial goodwill, 'can only be booked separately following a business combination', stating immediately thereafter that 'when the acquisition of the business of a company is made by way of the acquisition of its shares … goodwill can only arise if the acquiring company combines subsequently with the acquired company, over which it will then have control'. Even more explicitly, in recital 100 of the decision at issue, the

82 My emphasis.

83 In that regard, I note that, in recital 22 of the decision at issue, the Commission considers Article 89(3) TRLIS, which governs the amortisation of financial goodwill resulting from the acquisition of shareholdings in companies resident in Spain in the event of a business combination, as an application of Article 11(4) TRLIS, which lays down the conditions for the amortisation of goodwill resulting from an acquisition for the purpose of determining the corporate tax base.

84 See recital 18 of the decision at issue.

85 See recital 19 of the decision at issue.

Commission states that 'by allowing financial goodwill, which is the goodwill that would have been booked if the companies had combined, to appear separately – even without there being a business combination – constitutes a derogation from the reference system', stating immediately afterwards that 'the derogation is not due to the length of the period during which financial goodwill is amortised compared with the period that applies to traditional goodwill but to the different treatment received by domestic and cross-border transactions'.

58. Consequently, according to the logic of the decision at issue, where, in recitals 92 to 96 of that decision, the Commission designates as a reference system the 'rules on the tax treatment of financial goodwill', it refers, in addition to the rules specifically applicable to the amortisation of goodwill in the event of the acquisition of shareholdings, to the rules of the 'Spanish corporate tax system' governing the amortisation of goodwill in general, as they provide a relevant framework of those rules.

59. Aside from the different terminology used in the decision at issue and in the judgment under appeal, and accepting that the reasoning of that judgment on the point could have been more explicit, it follows from the foregoing that the reference system adopted by the General Court does not differ from that used by the Commission. The General Court has, therefore, not substituted its grounds for those of the decision at issue, nor has it distorted its content or misinterpreted it. The interpretation adopted in paragraphs 70, 92 and 140 of the judgment under appeal is justified on the basis of the substantial elements of the decision at issue.

60. For the reasons set out above, I therefore consider that the first complaint in the first part of WDFG's single ground of appeal and the first part of the Kingdom of Spain's single ground of appeal must be rejected as unfounded.

(3) The second complaint in the first part of WDFG's single ground of appeal and the second part of the Kingdom of Spain's single ground of appeal

61. WDFG, by the second complaint in the first part of its single ground of appeal, and the Kingdom of Spain, by the second part of its single ground of appeal, raise two separate objections.

62. In the first objection, which WDFG raises as a principal complaint, the appellants submit that the General Court has substituted its reasoning for that of the decision at issue in precluding that the measure at issue could be a reference system in its own right. They submit, in essence, that the Commission rejected the claim that the measure at issue constitutes an autonomous reference system by relying solely on the alleged absence of legal obstacles to cross-border mergers, whereas, in their contention, the General Court, in paragraphs 127 to 140 of the judgment under appeal, followed a completely different argument.

63. On that point, I note, as the General Court pointed out in paragraph 70 of the judgment under appeal, that, in recital 89 of the decision at issue, the Commission took the view that the reference system could not be limited to the tax treatment of financial goodwill introduced by the measure at issue, since that measure benefited only undertakings acquiring shareholdings in non-resident companies and that, in order to assess the existence of discrimination against undertakings making the same type of acquisitions but in resident companies, it was necessary to consider 'the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill [led] to a fiscal benefit'. In recitals 92 to 96 of the decision at issue, on the basis of which the appellants complain that the grounds have been replaced, the Commission merely replied to the observations submitted by the Spanish authorities, which had challenged the

reference system provisionally identified in the opening decision, arguing, inter alia, that since undertakings acquiring shareholdings in foreign companies are in a different factual and legal situation from undertakings acquiring shareholdings in resident companies, the measure at issue had to be regarded as a reference system in its own right. Having found that the factual basis on which that argument was based was not sufficiently substantiated, the Commission confirmed that the reference system was the one identified in the opening decision.

64. As to recital 117 of the decision at issue, also referred to by WDFG, I note that this appears in a part of the selectivity analysis which the Commission describes as 'additional' to the analysis contained in recitals 92 to 114 and which it places under the heading 'analysis of the measure at issue under a reference system consisting of the treatment of goodwill in transactions with third countries'.[86] Notwithstanding that systematic approach, it is apparent from a reading of recital 117 that the findings it contains are more from the perspective of assessing the comparability of the situations of undertakings benefiting from the advantage provided for in the measure at issue and those excluded from it, relating, as we have seen, to the second step of the selectivity analysis, or from the perspective of assessing the existence of a justification for the 'different tax treatment of Spanish shareholding transactions … [and] transactions concerning third countries', relating to the third step. In my view, the same can be said of recitals 114 and 115 of the decision of 12 January 2011, to which the Kingdom of Spain refers, as is clear moreover from the preceding recital 113, in which the Commission states that it 'has investigated the legislation of various non-EU countries simply in order to check the Spanish authorities' allegations about the existence of explicit legal obstacles to cross-border combinations. *This examination does not, however, constitute recognition of the fact that such obstacles could justify a different reference system in the present case*'.[87] Contrary to what the Kingdom of Spain claims, the Commission's procedural approach, by examining in a separate decision the situation of undertakings investing in companies resident in third countries, is fully justified from the standpoint of assessing the comparability between those undertakings and those investing in companies resident in Spain or assessing the existence of a justification for the unequal treatment of those two categories of undertakings, and is fully compatible with maintaining a broader reference framework than that represented by the measure at issue.

65. Consequently, contrary to the appellants' contention, it is not owing to a lack of recognition of obstacles to cross-border business combinations that the Commission decided that the measure at issue could not be the correct reference system for the purpose of the selectivity analysis, but because it took the view that that measure should be assessed in the light of a broader set of rules, which included both the rules applicable to the amortisation of financial goodwill in the case of the acquisition of shareholdings in resident companies, and the principles applicable to the amortisation of goodwill in general, which, according to the Commission, were consistent in providing that goodwill was tax-deductible only if the acquisition was followed by a business combination. That conclusion is, in my view, confirmed by recitals 17 to 22 of the opening decision, to which the Commission refers several times in rejecting the Kingdom of Spain's arguments in paragraphs 92 to 96 of the decision at issue.

66. In the light of the above, I therefore consider that the first objection based on the alleged substitution of the grounds by the General Court, in paragraphs 127 to 140 of the judgment under appeal, must be rejected as unfounded.

86 See recital 89 and section A.2 of the decision at issue.

87 My emphasis.

67. By its second objection, which WDFG raises in the alternative, the appellants submit that the 'substitute' reasoning developed by the General Court to preclude the possibility of the measure at issue constituting a reference system in its own right is vitiated by an error of law. First, they observe that the aim of the measure at issue is to ensure fiscal neutrality with regard to acquisitions of shareholdings in Spain and abroad, and so its purpose cannot be reduced to that of solving a specific problem, as the General Court held in paragraph 139 of the judgment under appeal. Secondly, they argue that the General Court's reasoning leads to a different assessment of the selectivity of a measure, depending on whether the national legislature has decided to create a separate tax or modify a general tax, and therefore depending on the legislative technique used.

68. It follows from paragraph 94 of the judgment under appeal that the reasoning put forward by the General Court in paragraphs 95 to 141 of that judgment is intended to reply to WDFG's argument that, because of the obstacles to cross-border combinations, the Commission should have indicated the measure at issue as the reference system.

69. That reasoning can be divided into three parts.

70. The first part, which covers paragraphs 95 to 108, deals in general with the methodology applicable to the determination of the reference system in the context of the first step of the analysis as to selectivity. In paragraph 98, the General Court states that the delimitation *ratione materiae* of that reference framework is, in principle, in line with the measure analysed. In paragraph 102 – preceded by an analysis of the judgments of 8 September 2011, *Paint Graphos* [88] ('*Paint Graphos*'), and of 8 September 2011, *Commission* v *Netherlands* ('*Commission* v *Netherlands*') [89] – it finds that 'in addition to there being a link between the purpose of the measure at issue and that of the normal regime, the examination of whether situations falling under that measure and situations falling under that regime are comparable also enables the scope *ratione materiae* of that regime to be defined'. The General Court goes on to state, in paragraphs 103 and 104, that since it is the comparability of those situations that enables the finding that a derogation exists where situations which fall under the measure at issue are treated differently from those which fall under the normal regime, 'an overall reasoning with regard to the first two steps of the method [of analysis as to selectivity] may, in some cases, result in both the normal regime and the existence of a derogation being determined'.

71. In the second part of its reasoning, which includes paragraphs 109 to 125 of the judgment under appeal, the General Court, in accordance with the methodology set out in paragraphs 95 to 108 of that judgment, examined whether, in the light of the objective of the normal regime identified by the Commission, undertakings acquiring shareholdings in resident companies and those acquiring shareholdings in non-resident companies are in comparable factual and legal situations. The assessment of comparability, which is normally carried out in the second step of the analysis as to selectivity, is therefore brought forward to the first step, and the General Court makes the correct determination of the reference system dependent on its outcome (paragraph 109 of the judgment under appeal). Following that assessment, the General Court concludes that 'undertakings which acquire shareholdings in non-resident companies are, in the light of the objective pursued by the tax treatment of goodwill, in a comparable factual and legal situation to that of undertakings which acquire shareholdings in resident companies' (paragraph 122 of the judgment under appeal) and that the Commission rightly considered 'under the normal regime, the tax treatment of goodwill and not the tax treatment of financial goodwill introduced by the measure at issue' (paragraph 123 of the judgment under appeal). The

88 C-78/08 to C-80/08, EU:C:2011:550.

89 C-279/08 P, EU:C:2011:551.

General Court goes on to find that 'by allowing the amortisation of goodwill in respect of the acquisition of shareholdings in non-resident companies without there being a business combination, the measure at issue applies to those transactions different treatment to that afforded to the acquisition of shareholdings in resident companies, even though both types of transaction are, in the light of the objective pursued by the normal regime, in comparable legal and factual situations' (paragraph 124 of the judgment under appeal). The General Court concludes that part of its reasoning by rejecting WDFG's arguments not only inasmuch as they seek to challenge the definition of the reference system in the context of the first step of the analysis as to selectivity, but also inasmuch as they relate to the finding that the measure at issue derogates from the normal regime, to be made in the context of the second step, confirming 'the existence of links between those two steps, or even in some cases, such as the present, a common line of reasoning' (paragraph 125 of the judgment under appeal).

72. Lastly, in the third part of its reasoning, which covers paragraphs 126 to 141, the General Court analyses whether 'despite the existence of a tax regime, in relation to the measure at issue and in the light of the objective of that regime that transactions which do not benefit from that measure are in a comparable situation to transactions which do benefit from it, [the measure] … might, in the light of its specific characteristics and thus irrespective of any comparative analysis, in itself, constitute an autonomous reference framework'.

73. The appellants do not raise any objections to the methodology set out by the General Court in paragraphs 95 to 108 of the judgment under appeal. On that point, I will merely note that the amalgamation of the first and second steps which emerges from those paragraphs does not appear to me to be in line with the judgments in *Paint Graphos*[90] and *Commission* v *Netherlands*,[91] on which the General Court relied, or with the most recent case-law of the Court of Justice, which makes a clear distinction between those steps and determines the reference system before identifying the objective of that system, and identifies that objective before determining the undertakings which are in a situation comparable to that of the undertakings benefiting from the measure in question. Such an amalgamation, probably caused by the structure of the decision at issue and by WDFG's arguments, in my view further complicates the already complex framework that emerges from the case-law on the analysis of the selectivity of tax measures. As we saw earlier,[92] although it is important that the reference system should be determined in relation to the measure under examination and the differences it introduces, that determination must be made as objectively as possible – in other words, ignoring at this stage the purported objective of that system or the actual comparability between the situation of the undertakings benefiting from the measure under consideration and that of the undertakings excluded from it.

[90] In paragraph 49 of that judgment, which contains an early version of the three-step method of analysis, the Court sets out what has been consistently applied in subsequent case-law, namely that the common or 'normal' tax regime must be identified first, and only then should any derogation of the measure in question from that regime be assessed, establishing whether that measure differentiates between undertakings which are in a comparable factual and legal situation in the light of the objective pursued by that regime. In paragraphs 50 to 62 of that judgment, the Court followed that method to the letter, first identifying the relevant legal regime of reference for corporation tax (paragraph 50), and then establishing whether the exemption from that tax provided for cooperative societies is a derogation from the rule (paragraphs 51 and 52) and assessing whether the situation of those cooperative societies could be considered comparable to that of commercial companies (paragraphs 54 to 62). Lastly, the Court also referred, in paragraph 64, to the purpose of the third step of the analysis as to selectivity.

[91] In the judgment in *Commission* v *Netherlands*, albeit with less schematic rigour, the Court applies a similar method of analysis to *Paint Graphos*, first identifying the reference system as the national legislation which states that undertakings whose operations produce NO_x emissions must comply with obligations regarding the limitation or reduction of those emissions (paragraph 64) and then finding that, with regard to the objective of that legislation to regulate environmental and atmospheric pollution, the undertakings benefiting from the measure in question and those excluded from that measure but subject to similar obligations to reduce NO_x emissions were in a comparable situation. See also the Opinion of Advocate General Mengozzi in *Commission* v *Netherlands* (C-279/08 P, EU:C:2010:799, points 43 and 44).

[92] See point 50 of this Opinion.

74. The arguments put forward by the appellants in the complaints under examination and challenging the second part of the General Court's reasoning (namely paragraphs 109 to 125 of the judgment under appeal) will be dealt with in the context of the parts of their respective single grounds of appeal specifically contesting the definition of the objective of the reference system.

75. I consider that the arguments concerning the third part of that reasoning (namely paragraphs 126 to 141 of the judgment under appeal) must be rejected.

76. First, unlike the appellants, I take the view that the analysis that led the General Court to conclude that the measure at issue could not constitute an autonomous reference framework 'in the light of its specific characteristics'[93] is not based on the regulatory technique chosen by the Spanish legislature, which, in order to introduce the regime at issue, did not adopt a special tax law but merely reformed the law on corporation tax.

77. It is on the basis of the subject matter and the effects of the measure at issue, and not merely on the basis of formal considerations, that the General Court found that the measure is merely 'a particular way of applying a wider-ranging tax'[94] and did not introduce 'a clearly defined tax regime which pursues specific objectives and is … different from any other tax regime',[95] while finding that the measure was 'an exception to the general rule that only business combinations may lead to the amortisation of goodwill'.

78. In that regard, I would point out that while it is true that, as the appellants observe, the Court of Justice has held that resorting to the regulatory technique used is not 'sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, except in order to ensure that the form of State intervention prevails decisively over its effects',[96] it has also stated, in paragraph 77 of *WDFG*, that the fact that a tax measure derogates from an ordinary tax system is relevant, for the purposes of examining whether it is selective, where the effect of that measure is that two categories of operators subject to different treatment are distinguished and those two categories are in a comparable situation in the light of the objective pursued by that system.[97] Consequently, the General Court cannot be held to have relied on considerations relating solely to the regulatory technique where it recognised the importance of the fact that, in its view, the measure at issue derogated from the ordinary system. I note, moreover, that in *Andres*, it is specifically for failing to recognise that the reference system defined by the Commission was an exception to a rule of general application that the Court of Justice set aside the judgment of the General Court under appeal in the case which gave rise to that judgment.

79. In stating that the measure at issue 'is not … a reform of corporate tax which is independent from that regime', the last sentence of paragraph 137 of the judgment under appeal further confirms that the General Court's approach is not merely formalistic, since it implicitly acknowledges that, despite the regulatory technique employed by the Spanish legislature, that measure could have constituted a regime in its own right had it fulfilled the necessary substantive requirements. Contrary to WDFG's contention, there is nothing to suggest that the logic applied by the General Court would have led it to a different analysis as to selectivity if the Spanish legislature had adopted separate and independent taxes for acquisitions of domestic and foreign

93 See paragraph 126.

94 See paragraph 134 of the judgment under appeal.

95 See paragraph 127 of the judgment under appeal.

96 *Andres*, paragraph 92.

97 See also paragraph 93 of *Andres*.

shareholdings, instead of reforming corporation tax. Instead, the General Court seems to consider, in line with what I stated earlier, that the identification of the reference system must reconstruct the tax burden borne by the undertakings benefiting from the measure under examination and by those that are presumed to be subject to discriminatory treatment under that measure, whether the burdens are part of the same general scheme or covered by special tax laws.

80. Secondly, to the extent that the appellants challenge the reference to the Opinion of Advocate General Warner in *Italy* v *Commission* ('the Opinion of Advocate General Warner')[98] in paragraphs 129 and 130 of the judgment under appeal, I note, first, that their arguments do not seek to criticise, as such, the assertion that the General Court derives from that Opinion, namely that a tax measure cannot constitute an autonomous reference system if its 'objective was to solve a specific problem'.[99] Rather, they challenge the conclusion – which the General Court reached in paragraph 138 of the judgment under appeal – that the removal of the effects of obstacles to cross-border business combinations regarding the tax treatment of goodwill constitutes a 'specific problem', as well as the present case being placed on the same footing as that at issue in that Opinion.

81. I would observe that, contrary to the appellants' contention, it is not in view of the 'specific' nature of the objective pursued by the measure at issue that the General Court decided that that measure could not constitute a system in its own right. It is clear from paragraphs 135 and 136 of the judgment under appeal that the General Court reached that conclusion in view of the fact that the measure constituted 'an exception to the general rule that only business combinations may lead to the amortisation of goodwill', intended to remedy the adverse effects created by applying that rule, in conjunction with the finding that the measure did not make the transaction consisting in the acquisition of shareholdings a new general criterion which would organise the tax treatment of the goodwill, but 'reserve[d] entitlement to the amortisation of goodwill solely to the acquisition of shareholdings in non-resident companies' (paragraph 136 of the judgment under appeal). It is not, therefore, the 'limited' nature of the objective pursued by the measure at issue that the General Court ultimately held to be decisive, despite the statement made at the end of its analysis in paragraph 139 of the judgment under appeal, on which the appellants focus.

82. In those circumstances, the arguments put forward by the appellants objecting to the present case being placed on the same footing as that at issue in the Opinion of Advocate General Warner and seeking to demonstrate that the objective of the measure at issue is to safeguard the principle of fiscal neutrality, not to solve a 'specific problem', are, in my view, insufficient to vitiate the reasoning followed by the General Court in paragraphs 126 to 141 of the judgment under appeal.

83. In the light of all the foregoing considerations, I consider that the second complaint in the first part of WDFG's single ground of appeal and the second part of the Kingdom of Spain's single ground of appeal must be rejected as unfounded.

98 173/73, EU:C:1974:52, p. 728.

99 I note, however, that the Opinion of Advocate General Warner referred to above contains a more detailed assessment of the measure at issue in Case 173/73, which consists in a temporary reduction of social security charges for the textile industry so as to reduce the imbalance that the previous system entailed for sectors with a high proportion of female employees. Advocate General Warner ruled out the introduction of an autonomous tax system by that measure not only because it was intended to address the situation in a specific industrial sector, but also because it was for a limited period, formed an integral part of a statute for the 'restructuring, reorganisation and conversion' of the industrial sector in question, and was not based on general criteria which took account of the proportion of female workers in different industries.

(4) The third complaint in the first part of WDFG's single ground of appeal

84. In the third complaint in the first part of its single ground of appeal, WDFG submits, first, that the reference system adopted by the General Court is arbitrarily defined, since it is not clear which criterion was used to identify the coherent framework of which the measure forms part.

85. Like the Commission, it is my view that the complaint must be rejected. The General Court has sufficiently substantiated the reasoning which led it in the present case to identify the reference system as being the rules on the tax treatment of goodwill for the purposes of determining corporation tax and to confirm the substance of the analysis in the decision at issue. For that reason, I will merely refer to points 56 to 58 of this Opinion.

86. Secondly, WDFG submits that the General Court erroneously and invalidly identified, in the reference system it defined, what constitutes the rule and what constitutes the exception. According to WDFG, the General Court wrongly assumed, in paragraph 135 of the judgment under appeal, that the rule was that goodwill could not be amortised – despite both Article 12(6) TRLIS and Article 89(5) TRLIS allowing such amortisation – and that the measure at issue introduced an exception to that rule. As in the case that gave rise to the judgment in *Andres*, the General Court confused the rule with the exception.

87. That complaint must also, in my view, be rejected. Indeed, as has already been pointed out, in paragraph 135 of the judgment under appeal the General Court confirmed the analysis contained in the decision at issue, according to which, under Spanish tax law, as a rule only business combinations may lead to the amortisation of goodwill, including in the case of financial goodwill resulting from the acquisition of shareholdings in resident companies, in accordance with Article 89(3) TRLIS. Contrary to what WDFG appears to argue, the General Court takes the view that it is not, therefore, the non-amortisation of financial goodwill which constitutes the general rule from which the measure at issue derogates, but the principle that the amortisation is, as a rule, possible only in the case of a business combination – a principle that the General Court infers from the provisions on the tax treatment of goodwill for corporate tax purposes, whether those provisions relate to the amortisation of goodwill in the case of an acquisition or to the amortisation of financial goodwill resulting from the acquisition of shareholdings in resident companies followed by a merger. Consequently, the argument put forward by the Spanish Government during the formal investigation procedure (to which WDFG refers in its written observations), that under Spanish law the rule is the amortisation of goodwill, and the non-amortisation of financial goodwill resulting from the acquisition of shareholdings in resident companies not followed by a merger is actually the exception, is irrelevant, since it does not rebut the presumption relied on by the General Court that, under Spanish law, the amortisation of goodwill is normally contingent on the existence of a business combination.

88. In the light of the foregoing considerations, I consider that the third complaint in the first part of WDFG's single ground of appeal, and consequently the first part of that ground of appeal as a whole, must also be rejected as unfounded.

2. The second part of WDFG's 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

89. The complaints raised by WDFG and the Kingdom of Spain in the second and third parts of their single grounds of appeal concern paragraphs 143 to 164 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.

(a) Admissibility

90. The Commission contends that the second part of WDFG's single ground of appeal and the third part of the Kingdom of Spain's single ground of appeal are as a whole inadmissible. It puts forward two pleas in support of its objection. The first plea is identical to that raised in respect of the first part of WDFG's single ground of appeal and the first and second parts of the Kingdom of Spain's single ground of appeal, which has already been examined in points 31 to 34 of this Opinion. In the light of the assessment made in those points, to which I refer, it is my view that that plea must be rejected in respect of all the complaints raised by WDFG and the Kingdom of Spain in the parts of their respective single grounds of appeal under examination.

91. By its second plea, by contrast, the Commission contests the admissibility of those complaints since they relate to factual matters, including the determination of the content and scope of national law.

92. In that regard, I would point out that, according to settled case-law, the assessment of facts and evidence does not constitute (unless the facts and evidence have been distorted) a question of law which is subject, as such, to review by the Court of Justice in the context of an appeal. However, where the General Court has determined or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn therefrom.[100] Thus, with respect to the assessment, in the context of an appeal, of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law has been distorted.[101] By contrast, since the assessment, in the context of an appeal, of the legal classification which has been given to that national law by the General Court in the light of a provision of EU law constitutes a question of law, it falls within the jurisdiction of the Court of Justice.[102]

93. It follows that the arguments put forward by WDFG and the Kingdom of Spain with regard to the *content or scope* of the rules of Spanish law which the General Court relied on to identify the objective of the reference system as being the degree of consistency between the tax treatment and the accounting treatment must, in the absence of a specific and proven allegation of

100 See *Andres*, paragraph 77 and the case-law cited.

101 See *Andres*, paragraph 78 and, to the same effect, judgments of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited); of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission* (C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 98); and of 20 September 2018, *Spain* v *Commission* (C-114/17 P, EU:C:2018:753, paragraph 75).

102 See *Andres*, paragraph 78, and, by analogy, judgments of 3 April 2014, *France* v *Commission* (C-559/12 P, EU:C:2014:217, paragraph 83), and of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraphs 61 to 63).

distortion,[103] be declared inadmissible. Conversely, the arguments that seek to call into question the choice of objective on the basis of which the assessment is made of the situation of undertakings benefiting from the advantage deriving from the application of the measure at issue and of those excluded from it should be declared admissible. Like the definition of the 'reference system' in the context of the first step of the assessment of the condition relating to selectivity, the determination of the 'objective' in the light of which comparability is assessed under the second step of that analysis also stems from a legal characterisation of national law on the basis of a provision of EU law.[104]

(b) Substance

94. In the second part of its single ground of appeal, WDFG contests, first, the statement contained in paragraphs 143, 150, 155 and 156 of the judgment under appeal that there is an inconsistency in the case-law of the Court of Justice as to whether the situation of the beneficiary undertakings and those excluded from the application of the measure at issue must be compared in the light of the objective of the measure under examination or that of the system of which it forms part. According to WDFG, those objectives must be identical, and if not, that is because the national legislature has introduced into the system for taxation a measure at odds with the latter's logic.

95. In that regard, I merely note that the complaint has no bearing on the legality of the judgment under appeal. WDFG does not challenge the conclusion reached by the General Court in paragraph 156 of the judgment under appeal that, according to the most recent case-law, it is in the light of the objective of the reference system of which the measure under examination forms part, and not of the objective of that measure, that the comparability must be assessed in the context of the second step of the analysis as to selectivity. Instead, WDFG simply states that it makes no difference which objective is chosen since in principle they must be identical.

96. Secondly, WDFG submits that the General Court wrongly held, in paragraph 121 of the judgment under appeal, that the objective of corporation tax was to ensure a degree of consistency between the tax treatment and the accounting treatment. Such a statement would not only be arbitrary, but completely unfounded, since by definition all corporate taxes differ from the accounting treatment. With regard in particular to the rules on the amortisation of goodwill, the various situations provided for by the TRLIS do not share the common objective of ensuring consistency between the tax and accounting treatment of goodwill, but that of avoiding double taxation and ensuring fiscal neutrality. In the present case, therefore, the objective of the reference system defined by the General Court and that of the measure at issue are identical. WDFG also states that there are various situations in which there is no parallel between the tax and accounting amortisation of goodwill. In the third part of its single ground of appeal, the Kingdom of Spain makes similar complaints and, in support of those complaints, puts forward arguments that are largely consistent with those raised by WDFG.

97. Those complaints are, in my view, inadmissible, since they seek to call into question the content and scope of Spanish law as established by the General Court. The arguments put forward in support of those complaints all seek to challenge the findings in paragraphs 116 to 120 of the judgment under appeal, according to which 'in line with an accounting logic, the tax

[103] In the present case, that allegation has not been expressly made. In any event, despite the arguments put forward by Spain in particular, I do not consider that a distortion of the provisions of national law clearly emerges from the documents in the Court's file, contrary to what is required by the case-law. See judgment of 20 September 2018, *Spain* v *Commission* (C-114/17 P, EU:C:2018:753, paragraph 75).

[104] See, by analogy, *Andres*, paragraph 80.

treatment of goodwill is organised on the basis of the criterion related to whether or not a business combination has arisen', in the light of which the General Court concluded, in paragraph 121 of that judgment, that the objective of the tax treatment of goodwill is 'to ensure a degree of consistency' between that treatment and its accounting treatment, and that the tax treatment of goodwill is therefore not 'intended to compensate for the existence of obstacles to cross-border combinations or to ensure that different types of shareholding acquisitions are treated equally'. Those findings, which stem from the interpretation of the tax and accounting principles of Spanish law in the matter of goodwill by the General Court, are – unless a distortion of those principles is alleged and proven – outside the jurisdiction of the Court of Justice in the context of an appeal.

98. Thirdly, in addition to the above complaints, WDFG and the Kingdom of Spain raise a complaint based on the substitution of grounds of the decision at issue as regards the identification of the objective of the reference system. The objective of ensuring 'a degree of consistency between the tax treatment of goodwill and its accounting treatment', referred to in paragraph 121 of the judgment under appeal, is, they contend, in no way reflected in the decision at issue or in the observations submitted by the Kingdom of Spain during the administrative procedure.

99. It is my view that that complaint should be upheld. Indeed, it must be pointed out that in no part of the decision at issue does the Commission mention that the objective of the reference system it identified is to maintain a degree of consistency between the tax treatment and accounting treatment of goodwill. The General Court does uphold the findings of the decision at issue where it states that the tax treatment of goodwill is organised on the basis of the criterion related to whether or not a business combination has arisen (paragraphs 116 and 118) and where it explains, citing recitals 19 and 99 of that decision, that this is due to the fact that, following an acquisition or contribution of the assets constituting independent businesses or even from a merger or a de-merger, 'goodwill … appears, as a separate intangible asset, in the books of the combined business' (paragraph 117 of the judgment under appeal). Similarly, it is consistent with the Commission's finding in the decision at issue (see recitals 97 to 100 in particular) that the tax treatment of goodwill is in line with accounting logic, as set out in paragraph 116 of the judgment under appeal. However, it is entirely independently of that decision and on the basis of its own interpretation of the Spanish tax and accounting rules that the General Court concludes that the objective of the rules on the amortisation of financial goodwill, as laid down in the Spanish Law on Corporate Tax, is to ensure consistency between the tax and accounting treatment of goodwill and that, in view of that objective, the situation of undertakings investing in Spanish companies is comparable to that of undertakings investing in non-resident companies.

(1) Consequences of the soundness of the complaint relating to a substitution of grounds

100. According to settled case-law, if the grounds of a judgment of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such an infringement is not capable of bringing about the setting aside of that judgment, and a substitution of grounds must be made.[105] It must, therefore, be examined whether, notwithstanding the error made by the General Court, the second complaint in WDFG's first plea in law before the General Court should in any event be rejected, in so far as it alleges that

[105] Judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 118 and the case-law cited).

the Commission failed to demonstrate that the acquisitions of shareholdings in resident companies and those in non-resident companies were comparable in the light of the objective of fiscal neutrality pursued by the measure at issue.

101. In that regard, I would point out first of all that, in accordance with the case-law referred to in points 13 to 15 of this Opinion, the assessment of comparability to be carried out in the context of the second step of the selectivity analysis must be conducted in the light of the objective of the reference system and not of the objective of the measure at issue. In the referral to the General Court, WDFG argued that, in the present case, those objectives are identical and can both be identified as fiscal neutrality.

102. In the decision at issue, while stating that the measure at issue also pursued an objective aimed at increasing the international competitiveness of Spanish undertakings (recital 112), the Commission nevertheless examined whether it could be justified in the light of the principle of fiscal neutrality. As WDFG itself stated in its action before the General Court, the Commission ruled out such a justification on two grounds. First, it rejected the Kingdom of Spain's argument that a different treatment of foreign investment was necessary owing to the obstacles to cross-border mergers. That reasoning is contained in recitals 92 to 95 of the decision at issue in the part relating to the definition of the reference system. Secondly, it stated that in any case the measure at issue was disproportionate (recitals 107 to 114 and 118 of the decision at issue).

103. Conversely, it is not apparent from reading the decision at issue that the Commission attributed the objective of fiscal neutrality claimed by WDFG to the *reference system* it had identified. Without explicitly identifying the objective of that system, it considered, in essence, that undertakings investing in domestic companies and those investing in foreign companies were in a comparable situation with regard to the scheme introduced by the measure at issue, which provided, by way of derogation from the reference system, for the amortisation of financial goodwill even if the acquisition of shareholdings was not followed by a merger.[106] In other words, the Commission took the view that the differentiation introduced by the measure at issue between undertakings acquiring shareholdings in resident companies, which necessarily had to carry out a merger in order to amortise goodwill, and undertakings acquiring shareholdings in foreign companies, which *automatically* benefited from the possibility of making such a deduction, irrespective of whether the transaction preceded a merger and whether there was evidence of actual obstacles to such a merger, could amount to discrimination, if not justified by the Kingdom of Spain.

104. While such a course of action may not seem entirely consistent with the three-step analysis of selectivity as set out in the most recent case-law since the decision at issue, starting with *Paint Graphos*, I do not consider that the decision at issue should be annulled for that reason alone.

105. The measure at issue is, as the Kingdom of Spain moreover clearly states, a corrective measure, which serves to remedy the adverse effects of the tax treatment of goodwill in general, according to which amortisation is allowed only in the case of business combinations (or in the case of control and presentation of consolidated financial statements). It therefore tends, by its very nature, to reserve favourable treatment for a certain category of undertakings, in particular those which make a certain type of investment, as the Court held in paragraphs 62 and 119 of *WDFG*, on the assumption that those undertakings would otherwise be penalised by the application of the normal scheme. However, regardless of the systematic framework imposed by

106 Several sections of the decision at issue can be interpreted to that effect. See, in particular, recitals 89 to 91.

the case-law, I consider that the differentiations introduced by measures of that type must generally be assessed not only by examining the veracity of the factual assumptions on which they are based, but also in the light of their proportionality and ability to achieve the objective pursued. This comes under the third step of the selectivity analysis, which is aimed at establishing whether the unequal treatment introduced by a prima facie selective measure is justified by the nature or structure of the tax system of which it forms part. Yet such an examination could be dispensed with automatically if it were sufficient, in the context of the second step of the analysis as to selectivity, to cite as the objective of the reference system – in the light of which the comparability of the differentiation is assessed – the general objective of fiscal neutrality, which also encompasses the specific objective of the corrective action implemented by the measure examined.

106. Fiscal neutrality is an objective of any tax regime, and there is no doubt that that principle also underpins the tax regime for goodwill in the context of Spanish corporate tax. Even so, as the General Court correctly held in paragraph 146 of the judgment under appeal, the objective pursued by that regime 'is not to enable undertakings to benefit from the tax advantage of the amortisation of goodwill when they encounter difficulties which prevent them from combining businesses'. It is, rather, the measure at issue which seeks to achieve this. To uphold WDFG's complaint would thus be to admit, contrary to recent case-law on selectivity, that the assessment of comparability in the context of the second step of the analysis as to selectivity must be conducted in the light of the objective of the measure at issue, and not that of the reference system, irrespective of the fact that that objective was not explicitly identified in the decision at issue and even if it must, according to WDFG's contentions, be identified as fiscal neutrality.

(2) Conclusions on the second part of WDFG's single ground of appeal and the third part of the Kingdom of Spain's single ground of appeal

107. In the light of the foregoing considerations, I propose that the Court of Justice should find that the General Court misinterpreted the decision at issue by substituting its grounds for those of the decision, but that such an error cannot bring about the setting aside of the judgment under appeal, since WDFG's complaint in relation to which that error was committed must in any event be rejected.

108. The second part of WDFG's single ground of appeal and the third part of the Kingdom of Spain's single ground of appeal must therefore, in my view, be rejected in their entirety.

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

109. The appellants submit that since the General Court did not assess, during the first two steps of the analysis as to selectivity, which undertakings were in a comparable situation in the light of the objective of fiscal neutrality of the reference system, leaving that assessment to the third step, it reversed the burden of proof, since it is only during those steps that that burden falls on the Commission.

110. That complaint must, in my view, be rejected, in so far as it presupposes that the appellants have demonstrated that the General Court erred in determining the objective of the reference system, by identifying this as consistency between the tax treatment and accounting treatment of goodwill, and not as fiscal neutrality. In points 92 and 93 of this Opinion, I concluded that the

complaints alleging that error by the General Court must be declared inadmissible, since they seek to call into question the interpretation of Spanish law by the General Court, which is tantamount, on the basis of settled case-law, to an assessment of fact. [107]

111. The third part of WDFG's single ground of appeal and the fourth part of the Kingdom of Spain's single ground of appeal must, therefore, be regarded as factually unfounded.

4. The fourth part of WDFG's single ground of appeal: proportionality

112. In the fourth part of its single ground of appeal, WDFG complains that the General Court examined the proportionality of the measure at issue without first assessing whether that measure was prima facie selective in the light of the correct objective of the reference system.

113. That complaint is based, like the previous one, on the assumption that an error by the General Court has been identified when assessing the comparability of the undertakings to which the measure at issue applies and those which are excluded from it in the light of the correct objective of the reference system. Consequently, it must, in my view, be rejected on the same grounds as those set out in points 110 and 111 of this Opinion.

5. The fifth part of WDFG's single ground of appeal: causal link

114. In the alternative, WDFG submits that the grounds of the judgment under appeal relating to the third step of the analysis as to selectivity are vitiated by an error of law in so far as the General Court had requested proof from the Kingdom of Spain that there was 'a causal link between the companies' inability to merge abroad and the acquisition of holdings abroad'. WDFG submits first that those grounds introduce an element of analysis which does not appear in the decision at issue and indeed is in conflict with its rationale, and secondly that the proof requested by the General Court is impossible to produce.

115. The complaint under examination is directed against paragraphs 180 to 189 of the judgment under appeal; on the basis of the finding that the measure at issue 'is necessarily based on the premiss that undertakings that wish to carry out cross-border mergers and cannot do so on account of … obstacles to business combinations, acquire shareholdings by default in non-resident companies or, at least, maintain the shareholdings that they already have' (paragraph 180 of the judgment under appeal), the General Court concluded that the Kingdom of Spain, which had to justify the derogation from the reference system by the measure at issue, had failed to demonstrate that point. The General Court essentially held that since the acquisition of shareholdings is a separate transaction from a merger and not an alternative to it, the measure at issue in practice conferred an advantage on undertakings which intend to invest in foreign companies but which do not necessarily intend to merge – in other words, undertakings other than those which, according to the Kingdom of Spain, would suffer the adverse consequences of the general rules on the amortisation of goodwill.

116. In that regard, I note first of all that although in the paragraphs contested by the complaint under examination the General Court concluded that the Kingdom of Spain had failed to establish that the measure at issue offset the alleged adverse effects of the normal regime, it nevertheless continued its analysis on the assumption that that evidence had been provided (paragraphs 190

[107] See points 92 and 93 of this Opinion.

and 198 of the judgment under appeal). As is expressly stated in paragraph 199 of the judgment under appeal, the grounds against which that complaint is directed are therefore not the only grounds on which the General Court bases its conclusion that the Commission did not err in finding that the Kingdom of Spain had failed to justify the differentiation introduced by the measure at issue. It follows that, even if the complaint in question were upheld, that conclusion would still be supported by other grounds (set out in paragraphs 190 to 199 of the judgment under appeal). It is settled case-law that, at the appeal stage, a plea directed against a ground included only for the sake of completeness in the judgment under appeal, the operative part of which is sufficiently based on other points of law, is ineffective and must therefore be rejected. [108]

117. I note, however, that although the reasoning set out in paragraphs 180 to 189 of the judgment under appeal is not expressed in the same terms in the decision at issue, it does not, contrary to WDFG's assertion, undermine the rationale of that decision. On the contrary, it is fully in line with the logic on the basis of which the Commission found that the measure at issue was inconsistent with, and disproportionate to, the alleged objective of offsetting the adverse effects of the normal regime of amortisation of goodwill for undertakings that acquire shareholdings in foreign companies and are unable to carry out cross-border mergers. [109] As for the claim that it is impossible to produce the evidence requested by the General Court, I will merely observe that, as is apparent from paragraphs 188 and 189 of the judgment under appeal, the General Court held, in essence, that the neutralising effects of the measure at issue had not been proven because the measure was too imprecise and vague. As a result, it could not be established that the advantage conferred by that measure benefited the category of undertakings penalised by the general scheme. Where the Member State concerned claims that a prima facie selective measure is compensatory, it is logically obliged to provide the evidence necessary to enable such an assessment to be made, failing which the measure cannot be considered justified.

118. For the above reasons, the fifth part of WDFG's single ground of appeal is, in my view, ineffective and, in the alternative, unfounded.

6. The sixth part of WDFG's single ground of appeal: severability of the measure

119. By the sixth part of its single ground of appeal, in the alternative, WDFG complains that the General Court dismissed its plea, in support of the annulment of the decision at issue, alleging that, in the Commission's analysis, there was no distinction between acquisitions of minority shareholdings and acquisitions of majority shareholdings. WDFG states that all the transactions it carried out under the regime of the measure at issue led to acquisition of control over the target company and that the Kingdom of Spain had asked the Commission to analyse the two situations separately. According to WDFG, it is clear from the case-law that if the Member State concerned so requests, the Commission is required to conduct a separate analysis of the measure under examination. As to the severability of the measure at issue, this is apparent from the procedural treatment which the Commission reserved for the analysis of the measure at issue, which gave rise to three different decisions. [110]

[108] See, for example, judgment of 21 December 2011, *ACEA* v *Commission* (C-319/09 P, not published, EU:C:2011:857, paragraph 120 and the case-law cited).

[109] See, in particular, recital 91 of the decision at issue, cited in paragraph 189 of the judgment under appeal. See also recital 113 of that decision.

[110] The third decision is Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain – Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (OJ 2015 L 56, p. 38) ('the decision of 15 October 2014').

120. On that point, I note that the complaint in question is directed against the grounds that were included for the sake of completeness in the judgment under appeal. WDFG's argument that the Commission was required to make a distinction between acquisitions of shareholdings in non-resident companies involving an acquisition of control and other acquisitions of shareholdings is rejected in paragraph 205 of that judgment, in which the General Court affirms that 'the measure at issue introduces inconsistency in respect of the tax treatment of goodwill and that that inconsistency would be introduced even if the measure at issue benefited only the acquisition of majority shareholdings in non-resident companies'. It is only for the sake of completeness that the General Court examines, in paragraphs 206 to 215 of the judgment under appeal, whether the Commission was required to distinguish between the various transactions which benefited from the application of the measure at issue.

121. In any event, the arguments put forward by WDFG to contest the conclusion reached by the General Court as a result of that examination must, in my view, also be rejected on the merits.

122. First, the General Court correctly distinguished, in paragraphs 208 to 211, the present case from those which gave rise to the judgments of 22 November 2001, *Mitteldeutsche Erdöl-Raffinerie* v *Commission*,[111] and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*.[112] Equally irrelevant is the judgment in *ANGED*, also relied on by WDFG in its appeal. The regime at issue in the main proceedings which gave rise to that judgment introduced various criteria for differentiation, in relation to each of which the Court of Justice examined whether it resulted in discrimination between different categories of taxpayer. Secondly, I do not consider that the General Court erred in law by stating, in paragraph 211 of the judgment under appeal, that there was no obligation for the Commission to carry out a separate analysis of the effects of the measure at issue which would have led it to amend the content or conditions of application of that measure. Lastly, paragraph 221 of the judgment under appeal – which, according to WDFG, rejects the severability of the measure at issue – actually refers to the conditions required for an application for partial annulment to be granted. It concludes that those conditions do not exist in the present case because 'the annulment of the [decision at issue], in so far as it establishes the existence of State aid including with respect to acquisitions of majority shareholdings, would have the effect of altering the substance of that decision.'

123. For the above reasons, the sixth part of WDFG's single ground of appeal is, in my opinion, ineffective and, in the alternative, unfounded.

7. Conclusions on the appeals brought by WDFG and the Kingdom of Spain

124. In the light of all the foregoing, I propose that the Court should dismiss in their entirety the appeals brought by WDFG and the Kingdom of Spain.

C. Request for substitution of grounds by the Commission

125. In the event that the Court should consider WDFG's single ground of appeal to be well founded, the Commission asks the Court to substitute the grounds and declare the action before the General Court inadmissible. On that point, I would emphasise that, following *WDFG*, in the proceedings referred back to the General Court, the Commission raised a plea of inadmissibility,

111 T-9/98, EU:T:2001:271.

112 C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368.

alleging, in the main, that WDFG had no *locus standi* and, in the alternative, that it did not have an interest in bringing proceedings. However, recalling the judgment of 26 February 2002 in *Council* v *Boehringer* ('*Boehringe*r'),[113] in paragraph 30 of the judgment under appeal, the General Court held that it was justified in examining the merits of the action without first ruling on that plea.[114]

126. Contrary to what WDFG argues in its reply, the Commission's application is not irregular to the extent that it is not submitted in the form prescribed by Article 176(2) of the Rules of Procedure of the Court of Justice on cross-appeals. Pursuant to Article 178(1) of those rules of procedure, the cross-appeal must seek to have set aside, in whole or in part, the decision of the General Court. In the present case, since the General Court ruled on the substance of WDFG's action *without* ruling on its admissibility, the Commission could not have made, in the context of any cross-appeal, a claim to have the judgment under appeal set aside *on the basis of the inadmissibility* of the action at first instance. The Commission's request has therefore, in my view, been correctly formulated as a request for substitution of grounds and must be decided on the merits.[115] I should moreover point out that even if the Court of Justice were to consider that request to be irregular, it would still have to rule on the plea of inadmissibility of the action raised at first instance by the Commission, at least if, having upheld the appeal and set aside the judgment under appeal, it decided to dispose of the case before the General Court and decide on the merits of the action by upholding it. If, in those circumstances, the Court of Justice decided, on the other hand, to dismiss the action, the option chosen by the General Court, based on *Boehringer*, would also remain open. Lastly, I would observe that, according to settled case-law, the Court of Justice, hearing an appeal under Article 56 of the Statute of the Court of Justice of the European Union, is required to adjudicate, if necessary of its own motion, on the admissibility of an action for annulment and, consequently, on the plea alleging an absolute bar to proceeding arising from disregard of the condition, laid down in the fourth paragraph of Article 263 TFEU, that an applicant may seek the annulment of a decision not addressed to it only if it is of direct and individual concern to it.[116]

127. Since I propose that the Court dismiss the appeals, I will only make a few brief points below on the merits of the Commission's request.

113 C-23/00 P, EU:C:2002:118, paragraph 52.

114 The inversion of the logical or natural order for examining actions that arises from applying the '*Boehringer*' case-law where an EU court dismisses an action on the merits even if a plea of inadmissibility has been raised – in particular a plea alleging an absolute bar to proceedings and advanced by a separate document, seeking a ruling without going to the substance of the case – has been criticised; see, for example, Opinions of Advocate General Jääskinen in *Switzerland* v *Commission* (C-547/10 P, EU:C:2012:565, points 46 to 54); of Advocate General Bot in *Philips Lighting Poland and Philips Lighting* v *Council* (C-511/13 P, EU:C:2015:206, points 50 to 67); of Advocate General Mengozzi in *SNCF Mobilités* v *Commission* (C-127/16 P, EU:C:2017:577, point 163); and of Advocate General Ruiz-Jarabo Colomer specifically in *Council* v *Boehringer* (C-23/00 P, EU:C:2001:511, points 30 to 36). Notwithstanding such criticisms, the *Boehringer* case-law continues to be applied by both the General Court (see the recent judgment of 11 November 2020, *AV and AW* v *Parliament*, T-173/19, not published, EU:T:2020:535, paragraph 42), and by the Court of Justice (see, for a recent example of its application in appeal proceedings, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 68).

115 I would also point out that the present appeal does not concern one of the cases provided for in Article 178(2) of the Rules of Procedure, on the basis of which a cross-appeal 'may also seek to have set aside an express or implied decision relating to the admissibility of the action before the General Court'.

116 See judgments of 29 November 2007, *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, not published, EU:C:2007:730, paragraph 18); of 20 September 2018, *Spain* v *Commission* (C-114/17 P, EU:C:2018:753, paragraph 48); and of 29 July 2019, *Bayerische Motoren Werke and Freistaat Sachsen* v *Commission* (C-654/17 P, EU:C:2019:634, paragraph 44). The existence of an obligation to verify the conditions of admissibility of an action before the General Court, if necessary of its own motion, does not, however, seem to preclude the Court of Justice from applying the *Boehringer* case-law (see, to that effect, judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 68).

128. By its first plea of inadmissibility, raised as a principal plea, the Commission contends that WDFG failed to demonstrate that its amortisation of financial goodwill under the measure at issue concerned a 'direct' acquisition (the only category of acquisitions covered by the decision at issue), as confirmed by the Commission's decision of 15 October 2014.[117] That plea must, in my view, be rejected. First, it is apparent from the action before the General Court brought on 14 May 2010, that it was pursuant to the measure at issue that Autogrill España (now WDFG) amortised the financial goodwill resulting from the transaction in question (the acquisition of all the shares in the British company World Duty Free Europe in May 2008). Secondly, it was on the basis of the decision at issue that a recovery order was issued to Autogrill España for the amounts thus deducted. In those circumstances, which are not contested by the Commission, it appears that Autogrill España was regarded by the Spanish authorities as the actual recipient under the aid scheme declared as unlawful, despite the fact that, at the time, the Spanish administrative and judicial authorities still interpreted that provision as applying only to direct acquisitions.[118] Further, when the action was brought, Autogrill España had *locus standi* to bring an action against that decision, pursuant to which a recovery order had been issued against it. As to the second plea of inadmissibility, raised in the alternative by the Commission and claiming that WDFG had no interest in bringing proceedings following the adoption of the decision of 15 October 2014, I find that that plea likewise must be rejected. Indeed, while accepting that the transaction carried out by Autogrill España is covered, as an indirect acquisition, by the 2014 decision, WDFG retains an interest in bringing proceedings against the decision at issue, at least as long as the recovery order issued pursuant to that decision still stands.

V. Costs

129. 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 of WDFG and of 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. Under 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 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.

[117] By that decision, the Commission gave its opinion on the binding administrative interpretation (*consulta vinculante*) of the measure at issue, adopted by the Spanish authorities on 21 March 2012 and applicable retroactively. Following the adoption of the decision at issue and the decision of 14 January 2011, Spain added a new paragraph to Article 12(5) TRLIS in order to comply with the two decisions. Although Article 12(5) TRLIS had been declared illegal and incompatible aid, it was not formally repealed since it could still be applied by beneficiaries that had legitimate expectations that the aid that had been granted would not be recovered and for which the transition period was recognised in those decisions (see footnote 9 to this Opinion and recital 30 of the decision of 15 October 2014). On the concept of direct and indirect acquisitions, I refer to recitals 25 and 26 of that decision.

[118] See recitals 33 to 36 of the decision of 15 October 2014.

VI. Conclusion

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