Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

15 November 2018 *

(State aid — Tax scheme allowing undertakings which are tax resident in Spain to amortise the goodwill resulting from the acquisition of shareholdings in undertakings which are tax resident abroad — Decision declaring the aid to be incompatible with the internal market and ordering its partial recovery — Provision enabling the scheme to continue to apply in part — Application for a declaration that there is no need to adjudicate — Continuing interest in bringing proceedings — Legitimate expectations — Precise assurances given by the Commission — Legitimacy of the expectation — Temporal scope of the legitimate expectation)

In Case T-207/10,

Deutsche Telekom AG, established in Bonn (Germany), represented initially by A. Cordewener and J. Schönfeld, and subsequently by J. Schönfeld, lawyers,

applicant,

v

European Commission, represented initially by B. Martenczuk, T. Maxian Rusche and C. Urraca Caviedes, and subsequently by T. Maxian Rusche and C. Urraca Caviedes, and finally by T. Maxian Rusche, C. Urraca Caviedes and K. Blanck-Putz, acting as Agents,

defendant,

supported by

Ebro Foods, SA, established in Madrid (Spain), represented initially by J. Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan and R. Calvo Salinero, and subsequently by J. Buendía Sierra, E. Abad Valdenebro and R. Calvo Salinero, lawyers,

by

Banco Santander, SA, established in Santander (Spain), represented initially by J. Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan and R. Calvo Salinero, and subsequently by J. Buendía Sierra, E. Abad Valdenebro and R. Calvo Salinero,

by

Iberdrola, SA, established in Bilbao (Spain), represented initially by J. Ruiz Calzado, M. Núñez Müller and J. Domínguez Pérez, and subsequently by J. Ruiz Calzado, J. Domínguez Pérez and S. Völcker, lawyers,

* Language of the case: German.

and by

Telefónica SA, established in Madrid, represented initially by J. Ruiz Calzado, M. Núñez Müller and J. Domínguez Pérez, and subsequently by J. Ruiz Calzado, J. Domínguez Pérez and S. Völcker, lawyers,

interveners,

APPLICATION based on Article 263 TFEU and seeking annulment of Article 1(2) and (3) of Commission Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48),

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni (Rapporteur), President, K. Kowalik–Bańczyk and C. Mac Eochaidh, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 16 November 2017,

gives the following

Judgment

Background

1 By several written questions raised in 2005 and 2006 (E-4431/05, E-4772/05, E-5800/06 and P-5509/06), Members of the European Parliament asked the Commission of the European Communities whether the arrangement provided for in Article 12(5) — a provision introduced into the Ley del Impuesto sobre Sociedades (Spanish Law on corporate tax) by Ley 24/2001, de Medidas Fiscales, Administrativas y del Orden Social (Law 24/2001 on fiscal, administrative and social measures) of 27 December 2001 (BOE No 313 of 31 December 2001, p. 50493) — and in Real Decreto Legislativo 4/2004, de 5 de marzo, 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 Law on corporate tax) of 5 March 2004 (BOE No 61 of 11 March 2004, p. 10951) ('the scheme at issue'), should be classified as State aid.

2 The following answer was given on 19 January 2006 to question E 4431/05:

'The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of State aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain.'

3 The following answer was given on 17 February 2006 to question E-4772/05:

'According to the information currently in its possession, it would however appear to the Commission that the Spanish (tax) rules related to the write off of "goodwill" are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned

because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the State aid rules. The Commission will of course thoroughly investigate any information that may come to its knowledge indicating the contrary.'

4 By letters of 15 January and 26 March 2007, the Commission asked the Spanish authorities to provide it with information in order to assess the scope and the effects of the scheme at issue. By letters of 16 February and 4 June 2007, the Kingdom of Spain provided the Commission with the information requested.

5 By fax of 28 August 2007, the Commission received a complaint from the applicant, Deutsche Telekom AG, claiming that the scheme at issue constituted State aid which was incompatible with the common market.

6 By decision of 10 October 2007, a summary of which was published on 21 December 2007 (OJ 2007 C 311, p. 21), the Commission initiated a formal investigation procedure in respect of the scheme at issue.

7 By letter of 5 December 2007, the Commission received comments from the Kingdom of Spain on that decision initiating the investigation procedure. Between 18 January and 16 June 2008, the Commission also received comments from 32 interested third parties, including comments from the applicant on 12 February 2008. By letters of 30 June 2008 and 22 April 2009, the Kingdom of Spain gave its reactions to the interested third parties' comments.

8 The Commission terminated the procedure, as regards shareholding acquisitions within the European Union, by Decision 2011/5/EC of 28 October 2009 on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain (OJ 2011 L 7, p. 48) ('the contested decision').

9 The contested decision declares that the scheme at issue, enabling undertakings liable to tax in Spain to amortise the goodwill resulting from the acquisition of shareholdings in foreign undertakings established in the European Union, is incompatible with the common market.

10 Article 1(2) and (3) of the contested decision, however, allow the scheme at issue to continue to apply for the entire amortisation period established by that scheme, respectively, to acquisitions of shareholdings which took place before the publication in the *Official Journal of the European Union*, on 21 December 2007, of the decision initiating the formal investigation procedure, and to acquisitions of shareholdings the completion of which, requiring the approval of a regulatory authority to which the operation had been notified before that date, took place irrevocably before 21 December 2007.

11 Article 4(1) of the contested decision provides that the recovery obligation imposed on the Kingdom of Spain does not cover aid relating to the shareholding acquisitions referred to in Article 1(2) thereof. The Commission explained at the hearing that the omission in Article 4 of the contested decision of the shareholding acquisitions referred to in Article 1(3) thereof was a clerical error, which the Court formally noted in the minutes of the hearing.

Procedure and forms of order sought by the parties

12 The applicant brought the present action by application lodged at the Court Registry on 6 May 2010.

13 By documents lodged at the Court Registry on 9 August and 7 September 2010, Ebro Foods, SA, Banco Santander, SA, Iberdrola, SA and Telefónica, SA applied for leave to intervene in the present case in support of the form of order sought by the Commission. By orders of 26 November 2010, the President of the Eighth Chamber of the General Court granted those applications and authorised Iberdrola and Telefónica to use English in the oral part of the procedure.

14 The proceedings were stayed on two occasions: first, by order of the President of the Second Chamber of the Court of 13 March 2014 pending final decisions in Cases T-219/10, *Autogrill España* v *Commission*, and T-399/11, *Banco Santander and Santusa* v *Commission*, and then, by order of the President of the Second Chamber of the Court of 9 March 2015 pending a final decision in the appeals lodged against the judgments delivered in those two cases (judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission*, T-399/11, EU:T:2014:938, and of 7 November 2014, *Autogrill España* v *Commission*, T-219/10, EU:T:2014:939). The proceedings resumed on 21 December 2016 with delivery of the judgment in *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981) adjudicating on those appeals. By decision of 13 February 2017, the President of the Ninth Chamber of the Court rejected the applicant's application to stay proceedings pending a final decision in Case T-219/10 RENV *World Duty Free Group* v *Commission*.

15 By decisions of 20 and 30 October 2017, the President of the Ninth Chamber of the Court authorised the interveners to plead in Spanish at the hearing.

16 By document lodged at the Court Registry on 26 October 2017, the Commission submitted an application for a declaration that there is no need to adjudicate. That application was joined to the substance of the case by order of the Court of 13 November 2017.

17 The parties presented oral argument and answered the written and oral questions put by the Court at the hearing on 16 November 2017.

18 The applicant claims that the Court should:

– 'annul … [the contested decision] in relation to the provision for the protection of the legitimate expectations of the Spanish investors detailed in Article 1(2) and (3) thereof' ('the contested provision');

– order the Commission to pay the costs, except those arising from the interventions which should be borne by the interveners and, in the alternative, if the action is dismissed, order each party to bear its own costs;

– in the alternative, stay proceedings until a final decision has been delivered in the appeals lodged against 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).

19 The Commission contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, declare that there is no need to adjudicate;

– in the further alternative, dismiss the action as unfounded;

– order the applicant to pay the costs.

20 Ebro Foods, Banco Santander, Iberdrola and Telefónica contend that the Court should:

– dismiss the action as inadmissible or, in the alternative, as unfounded;

– order the applicant to pay the costs.

Law

The application for a declaration that there is no need to adjudicate

21 In support of its application for a declaration that there is no need to adjudicate on the action, the Commission submits that the applicant no longer has legal interest in bringing proceedings. According to the Commission, the acquisition by Telefónica, a competitor of the applicant, of a shareholding in the company O2 — which the applicant relies on to substantiate its interest in seeking the annulment of the contested provision, in so far as the provision allowed that competitor to apply the scheme at issue to the relevant shareholding acquisition — is not covered by the contested provision, as is apparent from the Spanish authorities' new administrative interpretation of the scheme at issue (Binding Opinion V0608-12 of 21 March 2012) and its assessment by the Commission in Decision 2015/314. The four interveners stated that they did not support the application for a declaration that there is no need to adjudicate and the grounds underpinning it because, among other things, the examination of those grounds would require the Court to rule on questions put forward in the pleas raised in support of their actions against Decision 2015/314 (Cases T-12/15, *Banco Santander and Santusa* v *Commission*, T-256/15, *Telefónica* v *Commission*, and T-260/15, *Iberdrola* v *Commission*).

22 It should be borne in mind that according to settled case-law, an applicant's interest in bringing proceedings must, in the light of the purpose of the action, exist at the time at which the action is brought, failing which the action will be inadmissible. That purpose must, like the interest in bringing proceedings, continue until the final decision, failing which there will be no need to adjudicate, which presupposes that the action must be liable, if successful, to procure an advantage for the party bringing it (see judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 42 and the case-law cited, and of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 61 and the case-law cited).

23 In the present case, the Commission submits, in essence, that it is apparent from the circumstances subsequent to the bringing of this action that the contested provision did not permit Telefónica to apply the scheme at issue, with the result that it did not confer an advantage on it when it acquired O2. It follows that the applicant no longer has an interest in seeking the annulment of the contested provision so as to secure the retroactive elimination of the advantage granted to its competitor.

24 The continuation of an applicant's legal interest in bringing proceedings must be assessed in the light of the specific circumstances, taking account, in particular, of the consequences of the alleged unlawfulness and of the nature of the damage claimed to have been sustained (see judgment of 28 May 2013, *Abdulrahim* v *Council and Commission*, C-239/12 P, EU:C:2013:331, paragraph 65 and the case-law cited).

25 In the present case, it must be held that even assuming, as the Commission maintains, that Telefónica was unable to benefit from the scheme at issue before the abovementioned administrative interpretation and was thus not covered by the contested provision, the applicant's legal interest in securing the annulment of that provision continues.

26 Such an interest arises, first of all, from the applicant's status as complainant and from the rejection in part and in substance of its complaint by the contested provision.

27 Even if the contested decision, and thus the contested provision, did not constitute an explicit response to the applicants' complaint (see, to that effect, judgment of 12 February 2008, *BUPA and Others* v *Commission*, T-289/03, EU:T:2008:29, paragraph 317 and the case-law cited), the fact remains that, in contrast to the applicant's claims in its complaint, the Commission found in its decision that the scheme at issue could continue to apply in certain situations described therein. Such a rejection is sufficient to differentiate the applicant's interest in bringing proceedings in the present case in so far as the annulment of that rejection on the basis of the single plea which it has raised is likely to procure an advantage for it, consisting in having the scheme at issue declared unlawful and prohibited, including in the situations envisaged by the contested provision.

28 It is not disputed that the applicant is an 'interested party' within the meaning of Article 1(h) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), as amended, 'whose interests might be affected by the granting of aid', who thus by definition has an 'interest' in the formal investigation procedure leading to the adoption of a decision by the Commission and, accordingly, in view of the rejection of its complaint by that decision, has an interest in bringing an action against that decision adversely affecting it. It must be noted that the applicant is also the interested party which submitted the complaint leading to the initiation of the formal investigation procedure and which, in the context of that complaint, explained the reasons for its submission, stating first, before the reference to the competitive disadvantage it was placed at as a result of the O2 transaction, the competitive advantage granted generally to Spanish companies in the telecommunications sector in which the applicant also operates as well as that granted generally to its Spanish competitor, Telefónica, irrespective of its shareholding acquisition in the company O2.

29 It follows that the circumstance claimed by the Commission and which allegedly arose after the present action was brought, to the effect that Telefónica was not able to benefit from the scheme at issue, declared unlawful by the contested decision, when it acquired its shareholding in the company O2 and was not permitted by the contested provision to apply that scheme to that shareholding acquisition, is not capable of calling into question the applicant's legal interest in bringing proceedings against the contested provision. If it were otherwise, and particularly if the interested parties, in particular those at the origin of the initiation of the formal investigation procedure, were required also to prove, as the Commission in essence claims, that they were competitors of an actual beneficiary of the scheme at issue examined in the contested decision, the lines would be blurred between the essential and first prerequisite for all actions, which is the legal interest in bringing proceedings, which must continue until the case has been closed, and the requirement of *locus standi*, which are nonetheless distinct conditions which must be satisfied by a natural or legal person cumulatively (see judgment of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraph 58 and 62 and the case-law cited).

30 In addition, it is not disputed that before the occurrence of the circumstances subsequent to the bringing of the present action on which the Commission relies, Telefónica had actually benefited from the scheme at issue as regards its shareholding acquisition in the company O2, as the Court held in the order of 21 March 2012, *Telefónica* v *Commission* (T-228/10, not published, EU:T:2012:140, paragraph 26), and that such actual benefit from the scheme at issue for the competitor of a complainant, who specifically criticised in its complaint the advantage conferred in connection with that shareholding acquisition, also and in any event indicates that the complainant retains an interest in bringing proceedings against a decision rejecting that complaint.

31 Next, it must be found that the applicant also retains an interest in seeking the annulment of the contested decision in order to prevent its alleged unlawfulness recurring in the future (see, to that effect, judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322,

paragraph 50 and the case-law cited). It should be pointed out in that regard that the alleged unlawfulness is liable to recur in the future notwithstanding the circumstances which gave rise to the present action since it undermines, irrespective of those circumstances, the interpretation of the general conditions for applying the principle of the protection of legitimate expectations and the temporal scope of the protection which may be granted under that principle (see, to that effect, judgment of 24 September 2008, *Reliance Industries* v *Council and Commission*, T-45/06, EU:T:2008:398, paragraph 43).

32 It follows that the Commission's application for a declaration that there is no need to adjudicate must be rejected, without it being necessary to adopt a position on the scope of Decision 2015/314 and, thus, without it being necessary to grant the application to stay proceedings made by the applicant solely if the Court were to rule on that decision, with the result that that application must therefore also be rejected.

Substance of the action

33 The applicant raises a single plea in law claiming that the principle of the protection of legitimate expectations was misapplied. It claims that the Commission was wrong to consider that it had to apply that principle to some beneficiaries of the scheme at issue even though the conditions for the application of that principle were not satisfied. The Commission was required to order the recovery of the aid granted under that scheme and not to permit its continued implementation for shareholdings acquired before publication of the decision to initiate the formal investigation procedure.

34 It should be recalled, in that regard, that the Commission justified the authorisation to continue to apply the scheme at issue to some acquisitions of shareholdings — those which took place before the publication in the Official Journal on 21 December 2007 of the decision initiating the formal investigation procedure and those acquisitions of shareholdings the completion of which, requiring the approval of a regulatory authority to which the operation had been notified before that date, took place irrevocably before 21 December 2007 — and the non-recovery of some corresponding tax reductions by reference to the existence of a legitimate expectation on the part of the beneficiaries that the aid in issue had been granted in accordance with the rules of the EC Treaty. According to the Commission, by its two statements of 19 January and 17 February 2006 in reply to parliamentary questions, it had given, until the date of publication of the decision initiating the formal investigation procedure on 21 December 2007, specific, unconditional and consistent assurances of a nature such that the beneficiaries of the scheme at issue entertained justified hopes that the scheme did not fall within the scope of the State aid rules (recitals 158 to 170 of the contested decision).

35 It should also be noted that, under Article 14 of Regulation 659/1999 'where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary'. The withdrawal of unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful. The aim of obliging the State concerned to abolish aid found by the Commission to be incompatible with the internal market is to restore the previous situation (see judgment of 5 August 2003, *P & O European Ferries (Vizcaya) and Diputación Foral de Vizcaya* v *Commission*, T-116/01 and T-118/01, EU:T:2003:217, paragraph 223 and the case-law cited), causing the beneficiary to forfeit the advantage which it had enjoyed over its competitors (see judgments of 7 March 2002, *Italy* v *Commission*, C-310/99, EU:C:2002:143, paragraph 99 and the case-law cited, and of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraph 75 and the case-law cited; judgment of 15 June 2010, *Mediaset* v *Commission*, T-177/07, EU:T:2010:233, paragraph 169).

36 That provision specifies, however, that 'the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law'.

37 It is settled case-law that the principle of the protection of legitimate expectations is a general principle of EU law. That principle has been progressively accepted into the EU legal order by case-law, which has described it as a 'superior rule of law' for the protection of individuals (judgment of 14 May 1975, *CNTA* v *Commission*, 74/74, EU:C:1975:59, paragraph 44), as 'one of the fundamental principles of the Community' (judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 73) and as a 'general principle' (judgment of 4 October 2001, *Italy* v *Commission*, C-403/99, EU:C:2001:507, paragraph 35). It is considered to be the corollary of the principle of legal certainty, which requires that EU legislation must be certain and its application foreseeable by persons subject to it, in that it seeks, where rules are altered, to ensure the protection of situations legitimately entered into by one or more natural or legal persons in particular (see, to that effect, judgment of 18 May 2000, *Rombi and Arkopharma*, C-107/97, EU:C:2000:253, paragraph 66 and the case-law cited, and the Opinion of Advocate General Léger in joined cases *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:89, paragraph 367).

38 In the present case, it should be noted at the outset that the parties are in agreement that the scheme at issue was not notified to the Commission and that the notification obligation laid down in Article 108(3) TFEU was therefore not complied with.

39 It should also be observed that the applicant conceded at the hearing that the principle of the protection of legitimate expectations was applicable, exceptionally, to non-notified aid and thus withdrew its complaint claiming that it does not apply where an aid scheme is unlawful as a matter of form because it has not been notified, which the Court formally noted in the minutes of the hearing.

40 It follows from the case-law that legitimate expectations may protect the beneficiaries of non-notified aid, but only in exceptional circumstances.

41 Specifically, it has been held that in view of the fundamental role played by the notification obligation to render effective the Commission's review of State aid, which is mandatory in nature, the undertakings in receipt of aid may not, in principle, entertain a legitimate expectation that the grant of the aid was lawful unless it was granted in compliance with the procedure provided for in Article 108 TFEU, and a diligent trader must normally be in a position to satisfy itself that that procedure has been followed. In particular, where aid is implemented without prior notification to the Commission, with the result that it is unlawful under Article 108(3) TFEU, the recipient of the aid cannot have at that time a legitimate expectation that its grant is lawful, unless there are exceptional circumstances (see, to that effect, judgments of 24 November 1987, *RSV* v *Commission*, 223/85, EU:C:1987:502, paragraphs 16 and 17; of 20 September 1990, *Commission* v *Germany*, C-5/89, EU:C:1990:320, paragraphs 14 and 16; of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 134; of 27 January 1998, *Ladbroke Racing* v *Commission*, T-67/94, EU:T:1998:7, paragraph 182; of 16 October 2014, *Alcoa Trasformazioni* v *Commission*, T-177/10, EU:T:2014:897, paragraph 61; and of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraph 214).

42 The permissibility of that exception is justified, inter alia, by the different status of Member States and beneficiaries as regards the obligation to notify. Only the Member States are subject to that obligation. They cannot rely on their own unlawful conduct to defeat decisions of the Commission and the practical effect of Articles 107 and 108 TFEU, nor may they invoke their legitimate expectation as to the lawfulness of aid they did not notify (see judgment of 28 July 2011, *Diputación Foral de Vizcaya and Others* v *Commission*, C-471/09 P to C-473/09 P, not published, EU:C:2011:521, paragraph 65 and the case-law cited) or, in some cases, not even the legitimate expectation of the beneficiaries of that aid (judgments of 14 January 1997, *Spain* v *Commission*, C-169/95, EU:C:1997:10, paragraphs 48 and 49, and of 22 April 2016, *France* v *Commission*, T-56/06 RENV II, EU:T:2016:228, paragraph 43).

43 In contrast, since the beneficiaries of aid may not be criticised for failing to notify it, such non-notification cannot result in them being barred from relying on their legitimate expectation as to the lawfulness of the aid in issue.

44 The exception in favour of the aid beneficiaries is moreover justified by the fact that, as the Commission rightly pointed out, without it, the general principle of the protection of legitimate expectations would be meaningless in relation to State aid, since the recovery obligation which that principle seeks to mitigate applies only to non-notified aid implemented without the Commission's approval. However, the Court has held that the adoption of Regulation No 659/1999 created a new situation for the recovery of aid incompatible with the internal market, by confirming recovery as the rule (first sentence of Article 14(1) of Regulation No 659/1999) whilst providing for an exception (second sentence of Article 14(1) of Regulation No 659/1999) when recovery runs counter to a general principle of EU law, all the legal consequences of which must be observed and which the Commission must take into account in adopting its decisions, including where it reverses a decision to require the recovery of aid incompatible with the internal market (judgment of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08, EU:T:2010:268, paragraphs 275 and 276). Although the aid beneficiaries could not rely on legitimate expectations solely on the ground of non-notification of the aid, Article 14 of Regulation No 659/1999, inasmuch as it provides that the Commission is not to require recovery of the aid if this would be contrary to a general principle of law, would be rendered meaningless, even though it was adopted by the legislature precisely in order to limit the scope of the obligation to recover unlawful aid declared to be incompatible with the internal market by the Commission.

45 The applicant denies that there are exceptional circumstances in the present case capable of justifying the application of the principle of the protection of legitimate expectations for the benefit of some of the beneficiaries of the scheme at issue, arguing that none of the conditions for the application of that principle has been met.

46 It should be borne in mind, in that regard, that according to settled case-law, three cumulative conditions must be satisfied in order to claim entitlement to the protection of legitimate expectations. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the administrative authorities. Secondly, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Thirdly, the assurances given must comply with the applicable rules (see judgments of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraph 81 and the case-law cited, and of 23 February 2006, *Cementbouw Handel & Industrie* v *Commission*, T-282/02, EU:T:2006:64, paragraph 77 and the case-law cited), bearing in mind that assurances given as to the non-recovery of aid, which may be the result of assurances given as to the non-classification of the measure at issue as aid, are compatible with Article 14 of Regulation No 659/1999 (see paragraph 44 above; see also, to that effect, today's judgment in *Banco Santander and Santusa* v *Commission*, T-399/11 RENV, paragraphs 272 to 278).

47 In the present case, the applicant does not dispute that the third condition is met, but argues that the first two are not. The first two conditions are in themselves restrictive and make it possible to discern exceptional circumstances, as evidenced by the paucity of cases in which those circumstances are met (see, to that effect, judgments of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08, EU:T:2010:268, paragraphs 278 to 289; of 27 September 2012, *Producteurs de légumes de France* v *Commission*, T-328/09, not published, EU:T:2012:498, paragraphs 25 to 30; and of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraphs 222, 225 and 252).

48 The applicant also claims that an additional condition is not met in the present case, a condition deriving from a number of judgments concerning the principle of the protection of legitimate expectations which require that the grant of the protection at issue must not infringe an overriding

public interest (see the case-law cited in paragraph 83 below). It can be observed that the balancing of the competing interests — the individual interest of the person concerned and the public interest of the European Union — entailed by the examination of that condition also contributes in itself to the recognition of a legitimate expectation only in exceptional circumstances, since it makes it possible, even where the precise assurances given have created legitimate expectations and the first two conditions for such recognition are thus satisfied, for expectations which have nevertheless been recognised not to be protected on the ground that such protection is precluded by a public interest of the European Union.

49 In the light of all those considerations, it is therefore necessary to examine whether the Commission correctly assessed the three conditions for the recognition of a legitimate expectation which are challenged by the applicant and, if it did, whether it correctly defined the temporal scope of the legitimate expectation recognised, which is also disputed by the applicant.

The precise assurances provided by the Commission's answers to two parliamentary questions

50 In the contested decision, the Commission inferred the existence of precise assurances provided by the EU authorities from the answers given on behalf of the Commission to two parliamentary questions. The Commission's two answers, given in English by a member of the Commission, were partly reproduced and translated in recital 165 of the contested decision.

51 The answer given on 19 January 2006 to written question E-4431/05 ('the first answer') states:

'5. The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of State aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain.'

52 The answer given on 17 February 2006 to written question E-4772/05 ('the second answer') states:

'According to the information currently in its possession, it would however appear to the Commission that the Spanish (tax) rules related to the write off of "goodwill" are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the State aid rules. The Commission will of course thoroughly investigate any information that would come to its knowledge indicating the contrary.'

53 It is settled case-law that precise, unconditional and consistent information that comes from authorised and reliable sources constitutes assurances capable of giving rise to legitimate expectations (judgments of 16 December 2010, *Kahla Thüringen Porzellan* v *Commission*, C-537/08 P, EU:C:2010:769, paragraph 63; of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 132; and of 12 December 2014, *Banco Privado Português and Massa Insolvente do Banco Privado Português* v *Commission*, T-487/11, EU:T:2014:1077, paragraph 125). In contrast, a person may not plead breach of the principle of the protection of legitimate expectations unless he has been given precise assurances by the authorities (judgments of 17 March 2011, *AJD Tuna*, C-221/09, EU:C:2011:153, paragraph 72, and of 18 June 2013, *Schenker & Co. and Others*, C-681/11, EU:C:2013:404, paragraph 41).

54 The applicant disputes the existence of precise assurances given by the Commission and to that end relies on the form and content of its two answers.

– *The form of the Commission's two answers*

55 The Court has consistently held that the form in which the authorities' assurances are communicated is irrelevant (judgments of 14 February 2006, *TEA-CEGOS and Others* v *Commission*, T-376/05 and T-383/05, EU:T:2006:47, paragraph 88, and of 24 September 2008, *Kahla/Thüringen Porzellan* v *Commission*, T-20/03, EU:T:2008:395, paragraph 146).

56 The applicant does not challenge that case-law, which it moreover reiterates, but claims, in essence, that the alleged assurances given by the Commission ought, at the very least, to have been (i) directed at the beneficiaries of the scheme at issue, which is not the case as regards the Commission's answers to parliamentary questions forming part of an interinstitutional legal discussion, and (ii) brought to the beneficiaries' attention, which is not the case either, in view of the method of dissemination used.

57 However, first, there is nothing in the case-law to indicate that only the acts of institutions which are specifically addressed to or directed at traders are capable of causing them to entertain a legitimate expectation. Thus, it has been held that a practice of the Commission in merger cases not involving an operator may provide that operator with precise assurances (see, to that effect, judgment of 28 September 2004, *MCI* v *Commission*, T-310/00, EU:T:2004:275, paragraphs 108 to 112). The same must apply, a fortiori, in the case of an act of an institution which relates specifically to the aid at issue. The Court also held, in its judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 158), that an answer of the Commission to a parliamentary question, such as the questions at issue here, had given the beneficiaries of the contested scheme a legitimate expectation as to the lawfulness of the scheme.

58 It follows from the case-law cited by the applicant not that the interested party must, formally speaking, be the addressee of the act containing precise assurances, but that the reference to assurances 'provided' or 'addressed' to the interested party means that that party must be concerned by and informed about the assurances given (see, to that effect, judgment of 28 September 2004, *MCI* v *Commission*, T-310/00, EU:T:2004:275, paragraphs 108 and 112). As regards the order of 13 December 2000, *Sodima* v *Commission* (C-44/00 P, EU:C:2000:686, paragraph 50), on which the applicant also relies, it must be observed that in that order the Court indeed refused to find that the public statements of a member of the Commission had provided precise assurances to the applicant, but it did so primarily because of the wording of the statements at issue, which were considered to be overly general.

59 It should also be mentioned, as the Commission does, that the purpose of the parliamentary questions procedure — even if it involves two institutions, in this case the Parliament and the Commission — is to inform citizens' representatives in the Parliament of the position of the institution to which the question is addressed — in the present case the Commission, which is the main institution responsible for State aid — on matters of concern to those citizens, thereby enabling them to decide on what action to take as a result.

60 Secondly, as the applicant concedes in the reply, the Court notes that the Commission's answers were made public. Specifically, the number of the question, its author, the subject matter in varying degrees of detail, the addressee institution, and an indication of the existence and date of the answer were published in the Official Journal (OJ 2006 C 327, pp. 164 and 192), with a reference to the Parliament's website containing the full text of the questions and answers, which is tantamount, according to the case-law (order of 19 September 2005, *Air Bourbon* v *Commission*, T-321/04, EU:T:2005:328, paragraph 34, and judgment of 11 March 2009, *TF1* v *Commission*, T-354/05, EU:T:2009:66, paragraph 35), to publication and, in all cases, adequate publicity of the Commission's answers.

61 Furthermore, contrary to the applicant's assertions, the statement on the Parliament's website that 'the information published on this site is of a general nature only and has not been designed to meet any individual needs' does not cast doubt on either the public nature of the information at issue or the possible classification of that information as precise assurances. Besides the fact that that disclaimer was not issued by the author of the information concerned, it should be pointed out that the provision of precise assurances implies that the recipient of them is concerned by those assurances but is not singled out by them, in the sense that he is one of the few or even the only recipient.

62 Similarly, it cannot be held, as the applicant submits, that the publication of some aspects of the Commission's answers in the Official Journal creates legal uncertainty in the present case, in so far as the Commission used as the date of the event giving rise to the legitimate expectation (i) the date of its answers to the parliamentary questions in the contested decision, and (ii) the date of such publication in the Official Journal in the defence. As the Court will make clear in paragraphs 91 to 105 below, the date of the act giving rise to the legitimate expectation is not decisive for the purposes of identifying which aid may be exempted from the recovery obligation. The Court also observes that, in any event, the applicant's claim, which in actual fact challenges a reference made in the Commission's defence, cannot call into question the lawfulness of the contested provision.

63 It follows that, contrary to the applicant's arguments, the nature and method of publication of the Commission's answers are not capable, as such, of ruling out the possibility that those answers provided precise assurances to the beneficiaries of the scheme at issue. In fact, they were likely to strengthen the beneficiaries' confidence in the lawfulness of the scheme.

– *The content of the Commission's two answers*

64 As regards the Commission's first answer, it must be noted that contrary to what the applicant suggests in its claim that the question raised is of a general nature, part 5 of that question clearly identifies the scheme at issue by referring to 'Spain's tax legislation, which enables undertakings to write off goodwill which they have paid'. Furthermore, the Commission gave an answer that was both precise, referring clearly to the legislation mentioned in part 5 of the question (first paragraph of part 5 of the answer), which it moreover contrasted with other Spanish tax legislation (second paragraph of part 5 of the answer), and unconditional, stating in emphatic and unequivocal terms that the scheme at issue was not State aid ('The Commission can confirm, however, that such national legislations [governing the scheme at issue] do not fall within the scope of application of State aid rules').

65 As regards the Commission's second answer, it may indeed be stated, as the applicant does, that although it expresses the same meaning, it is couched in more cautious terms than the first answer. The Commission uses the verb 'appear' twice and ends its answer by stating that a thorough investigation will be carried out should any information to the contrary be brought to its attention.

66 It must, however, be held that this caution in no way undermines the precise, unconditional and consistent nature of the Commission's views on the scheme at issue. Its cautious approach can be explained mainly by the fact that the question raised was specifically confined to the scheme at issue and sought to hold the Commission to account for its inaction in that respect, thus forcing it to provide explanations as regards compliance with its obligations under Regulation No 659/1999. As the Commission usefully pointed out, that is why it stated that if information were to come to light suggesting that the scheme at issue constituted State aid, it would thoroughly investigate the information in question, as required by Article 10(1) of that regulation, but not the scheme at issue, as the applicant claims.

67 The word 'appear' must also be considered alongside the fact that, first, the Commission thereafter sets out a reasoned position ('it would … appear to the Commission that the Spanish (tax) rules related to the writeoff of "goodwill" are applicable to all undertakings in Spain independently from their sizes,

sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules'), and, secondly, it clearly contrasts that position with its lack of a position on the matter addressed in the previous sentence ('the Commission cannot confirm whether … it would however appear'). It is also important to point out that the second answer follows on from the first, which was given less than one month earlier by the same member of the Commission and was along the same lines in that it used some of the same terms ('constitute general depreciation rules'), thereby demonstrating that the information provided was consistent.

68 It follows from all of the foregoing that, contrary to what the applicant claims, the Commission's answers in January and February 2006 to the parliamentary questions provided precise assurances to the beneficiaries of the scheme at issue that it did not fall within the scope of the State aid rules and consisted of general depreciation rules applicable to all undertakings in Spain. The Commission was therefore fully entitled to find, in the contested decision, that that condition for the application of the principle of the protection of legitimate expectations was satisfied.

The legitimacy of the expectation created

69 It is settled case-law that only a 'legitimate' expectation can be protected. Specifically, the expectation is protected only where the person concerned could reasonably count on the continuation or the stability of the situation created (Opinion of Advocate General Bot in *Commission* v *Koninklijke FrieslandCampina*, C-519/07 P, EU:C:2009:256, point 78). The benchmark for the EU Courts' assessment of whether the alleged expectation is legitimate is a reasonably prudent, discriminating and diligent trader (see judgment of 16 October 2014, *Alcoa Trasformazioni* v *Commission*, T-177/10, EU:T:2014:897, paragraphs 60 and 72 and the case-law cited). They also take account of the area or subject matter covered by the alleged legitimate expectation. Thus, in view of the objective nature of the concept of State aid (judgment of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraph 25), the Commission's assessment that a certain measure does not constitute State aid does not create a legal situation which may be regularly altered by the institutions in the exercise of their discretionary power, as may be the case particularly in an area such as that of the common organisation of the markets, the objective of which involves constant adjustment to reflect changes in economic circumstances (Opinion of Advocate General Léger in joined cases *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:89, point 419), so that traders cannot be justified in entertaining an expectation that an existing situation will be maintained (see judgment of 15 July 2004, *Di Lenardo and Dilexport*, C-37/02 and C-38/02, EU:C:2004:443, paragraph 70 and the case-law cited)

70 It follows that, as regards the claim that the beneficiaries of State aid entertained a legitimate expectation, a position taken by the Commission, which is the main authority with responsibility for implementing the State aid rules and the only authority responsible for assessing the compatibility of aid with the internal market, confers, on its own, legitimacy on the expectation resulting from such a position.

71 Therefore, it also follows that all acts and conduct not originating from the Commission, such as those of the press, the applicant, the beneficiaries or the Spanish authorities as referred to by the applicant, are irrelevant for the purpose of assessing whether the expectation entertained by the beneficiaries of the scheme at issue is legitimate.

72 In addition, even if the caution apparent in the Commission's second answer were to require those acts and conduct to be considered further, it could not be inferred from them that the alleged expectation was not legitimate, in the sense that they should have caused the beneficiaries of the scheme at issue to anticipate the adoption of the contested decision.

73 As regards the articles in the international press relied on, it must be observed that, in essence, these simply report on the scheme at issue and its alleged economic consequences, and the only article referring to, but not providing details on, criticism levelled at the rules prohibiting State aid subsequently recounts the statements made by Commission officials to the effect that the scheme at issue does not satisfy the conditions to be classified as State aid, since it does not benefit specific undertakings or sectors.

74 As for the applicant's complaint which the Commission received on 28 August 2007 and the press articles reporting it, it should be recalled that the provision of information regarding allegedly unlawful aid gives rise only to an obligation to examine such information without delay (Article 10(1) of Regulation No 659/1999) and to inform the complainant of the action taken on the complaint (Article 20(2) of Regulation No 659/1999); it does not require the opening of a formal investigation procedure or, a fortiori, the adoption of a 'negative decision' finding that the aid is incompatible with the internal market (Article 7(5) of Regulation No 659/1999). It may also be added that only one complaint about the scheme at issue was submitted to the Commission, even though that scheme had been in force for several years when the complaint was lodged.

75 Regarding the conduct of Telefónica, it is not apparent from that company's letter, which postdates the contested decision and was produced by the applicant, that the company waived the application of the scheme at issue pending the Commission's decision on it. In any event, the particular caution exercised by one of the beneficiaries of the scheme at issue cannot in itself lead to a finding that the expectations of the beneficiaries of the scheme were not legitimate.

76 As for the conduct of the Spanish authorities, which allegedly 'discussed' the compatibility of the scheme at issue with the State aid rules, suffice it to note that this is not supported by the evidence. It is true that the press articles annexed to the reply set out the difficulties encountered and recognised by the Spanish authorities in the implementation of the scheme at issue, but those difficulties are unrelated to the State aid rules. Moreover, the concerns about compliance with the rules prohibiting State aid referred to by those articles refer only to the concerns raised by the Commission (see paragraph 79 below).

77 The following considerations should also be borne in mind specifically as regards the acts and conduct of the Commission which are relied on.

78 First, in respect of the allegedly similar tax schemes which were considered by the Commission to be aid incompatible with the common market in 2000 (decision confirmed by the judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438) and 2006, it must be held that the individual nature of the assessment of each aid that was notified or reported precludes the assessment of a given aid from casting doubt on the legitimacy of the expectation in relation to the assessment of a similar, but separate, aid. Just as a positive decision of the Commission in respect of a particular aid cannot form the basis for a legitimate expectation on the part of the potential beneficiaries of similar future aid projects in their compatibility with the common market (see judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraph 283 and the case-law cited), so a negative decision cannot undermine a legitimate expectation arising from precise assurances given regarding the compatibility of similar national schemes.

79 Secondly, as regards the measures taken by the Commission before the initiation of the formal investigation procedure (requests for information to the Spanish authorities), as reported in two press articles of February and June 2007 (see also paragraph 4 above), those did not entail, at the point in time when they occurred, the adoption of a position by the Commission on the lawfulness of the national legislation at issue (see also paragraph 111 below) and therefore cannot as such undermine

the legitimacy of the expectation arising from precise assurances given, moreover, by the Commission (see, to that effect, judgment of 1 July 2010, *ThyssenKrupp Acciai Speciali Terni* v *Commission*, T-62/08, EU:T:2010:268, paragraph 280).

80 It follows that the Commission was right to find in this case that the expectation entertained by the beneficiaries of the scheme at issue in its lawfulness was legitimate. It might be added that a prudent and discriminating trader would have even less reason to doubt the lawfulness of the scheme given that the Court itself held, in 2014, that the Commission had not established that that scheme, which was open to all undertakings without any category-based distinction, constituted State aid (judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission*, T-399/11, EU:T:2014:938, and of 7 November 2014, *Autogrill España* v *Commission*, T-219/10, EU:T:2014:939, set aside by judgment of 21 December 2016, *Commission* v *World Duty Free Group SA and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981).

The weighing up of competing interests

81 It should be recalled that the Commission found, in recital 168 of the contested decision, that 'in line with previous case-law of the Court of Justice and Commission practice, in the absence of an overriding public interest, … the beneficiaries should be allowed to continue enjoying the benefits of the [scheme] at issue'.

82 It cannot therefore be considered, as the applicant does, that the Commission failed in the present case to examine the condition for recognition of a legitimate expectation relating to the lack of an overriding public interest precluding it. The Commission, albeit briefly, clearly referred to the absence, in the case of the scheme at issue, of a public interest in prohibiting its continued application and in ordering the recovery of aid granted under that scheme, despite the other conditions for recognition of a legitimate expectation having been met.

83 Although the applicant infers from the conciseness of the Commission's assertion that it did not actually check whether an overriding public interest prevented the recognition of a legitimate expectation on the part of the beneficiaries of the scheme at issue, it must be pointed out that the condition relating to 'overriding public interest' (or 'public policy interest', an expression also used in the case-law) is a negative condition, in the sense that it must not exist for a legitimate expectation to be recognised (see, to that effect, judgments of 17 July 1997, *Affish*, C-183/95, EU:C:1997:373, paragraph 57, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 148). It is thus apparent from the judgments validating the protection of legitimate expectations that the Court of Justice and the General Court have confined themselves to a mere reference to the lack of an overriding public interest (see, to that effect, judgment of 17 April 1997, *de Compte* v *Parliament*, C-90/95 P, EU:C:1997:198, paragraph 39), such as that appearing in the contested decision, or have not referred to that interest at all if that condition has not been challenged by the parties (see, to that effect, judgments of 24 November 1987, *RSV* v *Commission*, 223/85, EU:C:1987:502, paragraphs 13 to 17, and of 5 June 2001, *ESF Elbe-Stahlwerke Feralpi* v *Commission*, T-6/99, EU:T:2001:145, paragraphs 188 to 191).

84 It may be inferred from this that the Commission is not required to set out its examination of the condition at issue in more detail unless its intention is not to protect legitimate expectations on the ground that such protection is precluded by an overriding public interest, which is not the case here, or unless claims concerning a particular public interest have been submitted by the interested parties, which was also not the case. The documents relating to the administrative procedure included in the case file do not contain any claims, particularly by the applicant (in its complaint and in its comments on the initiation of the formal examination procedure), concerning the existence in the present case of an overriding public interest which would have precluded the recognition of a legitimate expectation on the part of the beneficiaries of the scheme at issue. Indeed, the applicant stated at the hearing in

reply to a question put by the Court that it was not in a position to confirm that it had invoked an overriding public interest during the administrative procedure, arguing that responsibility for invoking such an interest did not lie with it, having regard to the obligation to withdraw and recover unlawful aid.

85 Although the applicant also submits, in particular by means of that argument, that the Commission should have given precedence to the overriding public interest in the full elimination of the advantages associated with the scheme at issue over the interests of the beneficiaries of that scheme, it must be noted that that public interest is essentially indissociable from the very principle of the recovery of unlawful aid, an exception to which is the protection of legitimate expectations. Accordingly, such an interest cannot, as the Commission rightly pointed out in its pleadings and at the hearing, come under the concept of overriding public interest in the area of State aid, since the latter is concerned with considerations other than those relating to the obligation to recover aid that is unlawful and incompatible with the internal market, such as the protection of health or the environment. Furthermore, even if such an interest could be included in the balancing exercise, the effect of giving too much weight to it would be to abolish the exception laid down in Article 14 of Regulation No 659/1999, which, it should be recalled, aims to ensure compliance with a 'fundamental principle' (see paragraph 37 above).

86 Thus, in the present case, the operations benefiting from the scheme at issue were long-term commitments, in view of the amortisation period of 20 years laid down by that scheme (see, in particular, recitals 168 and 169 of the contested decision), and such commitments may be regarded as capable of tipping the balance in favour of the individual interests of the beneficiaries of the aid (see, to that effect, judgment of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraphs 164 to 166). It is also important to point out that this continuity over the long term concerns only tax deductions for shareholdings acquired during the period covered by the protection of legitimate expectations (2002-2007) and does not mean that the scheme at issue continues to apply to shareholdings acquired after 2007. Lastly, the importance of the individual advantages conferred on the beneficiaries, invoked by the applicant, militates in favour of retaining those advantages to avoid causing the beneficiaries manifest and significant harm, rather than recovering the aid which might be justified if the extent of the adverse effects at EU level was itself significant, for example on account of the number of beneficiaries and shareholding acquisitions concerned, which is not even claimed by the applicant (see, to that effect, Opinion of Advocate General Léger in joined cases *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:89, points 428 and 429).

87 In the light of all those circumstances, it can be found in the present case that the Commission conducted an appropriate examination, on the form and on the substance, of the condition for recognition of a legitimate expectation on the part of the beneficiaries of the scheme at issue relating to the weighing up of interests.

The temporal extent of the legitimate expectation protected

88 The applicant complains that the Commission erred in extending the protection of legitimate expectations to all shareholdings acquired before 21 December 2007, including those acquired prior to the Commission's two answers of 2006 and those acquired after an answer of the Commission of 5 February 2007 to a parliamentary question.

– *The inclusion of aid relating to shareholdings acquired before the Commission's two answers of 2006*

89 It should be recalled that the Commission made the following findings in the contested decision:

'(164) As regards the impact of the Commission's declarations on legitimate expectations of the beneficiaries, the Commission considers that a distinction should be drawn between two periods: (a) the period starting from the entry into force of the measure on 1 January 2002 until the date of publication of the initiating Decision in the Official Journal on 21 December 2007; and (b) the period following the publication of the initiating Decision in the Official Journal.

(165) With reference to the first period, …

(166) … any precise and unconditional statement on the Commission's behalf to the effect that a national measure is not to be considered State aid will naturally be understood as meaning that the measure was "non-aid" from the outset (i.e. also before the statement in question). Any undertaking which had previously been uncertain as to whether or not it would in future be liable, under the State aid rules, to recovery of advantages it had obtained under the goodwill amortisation scheme arising from transactions entered into before the Commission statements could have concluded thereafter that such uncertainty was unfounded, as it could not be expected to demonstrate greater diligence than the Commission in this respect. In these specific circumstances, and bearing in mind that Community law does not require the demonstration of a causal link between the assurances given by a Community institution and the behaviour by citizens or undertakings to which such assurances relate …, any diligent entrepreneur could reasonably expect the Commission subsequently not to impose any recovery … as regards measures which it had itself previously classified, in a statement to another Community institution, as not constituting aid, irrespective of when the transaction benefiting from the aid measure was concluded.

(167) Accordingly, the Commission concludes that the beneficiaries of the contested measure had a legitimate expectation that the aid would not be recovered and hence it is not requiring recovery of the fiscal aid granted to those beneficiaries in the context of any shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company before the date of publication … in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 88(2) of the Treaty, which could have then benefited from the measure at issue.'

90 The applicant challenges the Commission's approach in so far as it resulted in the inclusion of operations completed before the date of the Commission's answers of 2006 within the scope of the protection of legitimate expectations. It bases its argument on the principle of the protection of legitimate expectations, as recognised under German law, and on the Court's case-law.

91 In the first place, it must be held that those two bases do not support the applicant's proposition.

92 Regarding the principle of the protection of legitimate expectations, as recognised under German law, the first judgment establishing the principle of the protection of legitimate expectations under EU law inferred that principle, according to the traditional method of 'discovery' of the general principles of EU law, from a comparative law study of the six Member States of the European Coal and Steel Community (judgment of 12 July 1957, *Algera and Others* v *Common Assembly*, 7/56 and 3/57 to 7/57, EU:C:1957:7, p. 55). Thus, in so far as the applicant relies solely on the principle of German law, which requires the beneficiary of the legitimate expectation to give concrete expression to that expectation by an act of expectation that necessarily comes after the act giving rise to the expectation, that requirement cannot be regarded as also mandatory under EU law. It may also be noted that in his Opinion in *Westzucker* (1/73, EU:C:1973:61), cited by the applicant, Advocate General Roemer indeed

referred to a judgment of the German Bundesverfassungsgericht (Federal Constitutional Court) (p. 741), but he also referred — in accordance with the abovementioned traditional method of identifying general principles of EU law — to a judgment of the French Cour de cassation (Court of Cassation) and one of the Belgian Cour d'Appel, (Court of Appeal) Brussels (p. 739).

93 The requirements under German law which must be satisfied in order to be eligible for the protection of legitimate expectations, particularly the requirement relating to the act of expectation, cannot, therefore, be applied here.

94 Furthermore, it cannot be inferred from the case-law cited by the applicant that only operations which took place after the legitimate expectation was acquired can be covered by that expectation.

95 In all of the judgments cited which apply the principle of the protection of legitimate expectations — the judgment of 18 March 1975, *Deuka* (78/74, EU:C:1975:44, paragraph 14), mainly concerned the principle of legal certainty — what was at issue was the specific situation, different from the situation here, in which the advantages protected by a legitimate expectation had been granted by the authorities of the European Union, where such grant also constituted the act giving rise to the expectation (grant of export certificates and prior fixing of compensation in the judgment of 14 May 1975, *CNTA* v *Commission*, 74/74, EU:C:1975:59; grant of non-marketing premiums in the judgments of 28 April 1988, *Mulder*, 120/86, EU:C:1988:213; of 28 April 1988, *von Deetzen*, 170/86, EU:C:1988:214; and of 10 January 1992, *Kühn*, C-177/90, EU:C:1992:2). The necessary consequence of that overlap was that the legitimate expectation covered only the advantages granted on the basis of the act giving rise to the expectation, without it being possible to infer from this that, particularly in situations such as the present case where the advantage is granted by national authorities independently of the act giving rise to the expectation deriving from the Commission, such advantages alone could be protected.

96 In contrast, it is apparent from the judgment of 5 June 2001, *ESF Elbe-Stahlwerke Feralpi* v *Commission* (T-6/99, EU:T:2001:145), cited by the Commission in the rejoinder, that the Court accepted, at least in principle, albeit in circumstances different from those of this case, that the benefit of legitimate expectations could be applied to operations completed prior to the act giving rise to the expectation. Indeed, in paragraph 190 of that judgment, the Court held that a guarantee granted by the German authorities to the applicant company at the end of 1994 was covered by the legitimate expectation arising out of precise assurances given by the Commission on 13 January 1995. Even though the time lapse between the grant of aid covered by the legitimate expectation and the act giving rise to that expectation was short, the fact remains that the Court accepted that the Commission could give precise assurances such as to create a legitimate expectation as to the lawfulness of aid granted previously. Similarly, contrary to what the applicant claimed at the hearing, the fact that the guarantee at issue bore similarities to another guarantee also covered by a legitimate expectation on account of assurances given on 1 March 1993 is not decisive, since, in line with the case-law referred to in paragraph 78 above, a positive decision of the Commission in respect of a particular aid cannot form the basis for a legitimate expectation on the part of the beneficiaries of similar subsequent aid projects in their compatibility with the common market.

97 In the second place, it must be pointed out that the applicant's proposition confuses the date of acquisition of the legitimate expectation, being the date on which cognizance was taken of precise assurances (see, to that effect, judgment of 17 April 1997, *de Compte* v *Parliament*, C-90/95 P, EU:C:1997:198, paragraph 38), and the subject matter to which the acquired legitimate expectation relates, which may cover operations completed before that date, in accordance with the wording of the precise assurances provided.

98 However, more often than not, and in particular in the present case, the legitimate expectation relates to the continuity of an existing situation, which by definition arose before the act giving rise to the expectation in its continuity. In those circumstances, contrary to the applicant's assertions, the act

giving rise to a legitimate expectation does not have retroactive effect, in the sense that it creates a legitimate expectation as from the earlier events at issue, but simply covers, from the date of its occurrence, events prior to that date and their future effects.

99 If the applicant's proposition were to be accepted, the principle of the protection of legitimate expectations could not be validly relied on to challenge the recovery of unlawful aid which, by its very nature, is granted before the Commission, which is in the best position to provide precise, unconditional, consistent and reliable assurances, has been able to take any sort of decision on its classification as State aid and its compatibility with the internal market. Article 14 of Regulation No 659/1999 would thus be deprived of practical effect.

100 Accordingly, the Commission was fully entitled to find that the legitimate expectation arising from its answers of 2006 related to the continuity of the scheme at issue which had entered into force in 2002 and, therefore, covered shareholdings acquired after that date as well as aid granted under the scheme in respect of those acquisitions, even though such aid was granted before the answers of 2006.

101 That assessment is not called into question by the fact that the scheme at issue was not notified to the Commission in the present case and that the beneficiaries of the scheme may have a legitimate expectation that its grant was lawful only in exceptional circumstances (see paragraphs 39 and 40 above). While the beneficiary of non-notified aid may not entertain a legitimate expectation that such aid is lawful and will continue if there are no exceptional circumstances, the existence of such circumstances means that, once precise assurances have been given such as to cause that beneficiary of the aid to entertain a legitimate expectation as to the lawfulness of the aid — assurances which characterise those exceptional circumstances (see paragraphs 47 and 48 above) — and provided that the assurances given do not stipulate a time limit, the beneficiary may no longer be regarded as having legitimately been aware during a certain period of time of the unlawfulness of the aid in question.

102 Any other approach would amount to disregarding the precision and reliability of the assurances given, particularly as regards their temporal scope, and thus eliminating one of the conditions for recognition of legitimate expectations, which nonetheless contributes, in the case of non-notified aid, to legitimate expectations in the lawfulness of such aid being recognised only in exceptional circumstances (see paragraph 47 above). If legitimate expectations were to cover only operations subsequent to the act giving rise to an expectation, even though the act made clear that it covered previous operations, the result would be to limit the scope of such assurances in infringement of the principle of the protection of legitimate expectations.

103 One other consequence of the applicant's proposed approach would be to require the beneficiaries of a tax measure, such as the advantage established by the scheme at issue, to demonstrate particular diligence going beyond the obligations incumbent on a reasonably diligent trader, diligence which is essentially on a par with that required of a person under a notification obligation, even though the classification of such a measure as State aid cannot be presumed and the very absence of a notification obligation on the beneficiaries is one of the reasons why they may be recognised as entertaining a legitimate expectation in the lawfulness of non-notified aid (see paragraphs 42 and 43 above).

104 It should be added that the applicant's proposition would also, in the present case, lead to the denial of the legitimate expectation entertained by the beneficiaries of the scheme at issue in relation to aid granted under that scheme in respect of shareholdings acquired up to February 2006 and thereafter from November 2007. Besides the complex nature of the recovery obligation that would thus be entrusted to national authorities in connection with a tax deduction aid scheme that applied over a 20-year period, such an approach would, above all, make the scope of the expectation contingent on the vagaries of the acts giving rise to a legitimate expectation and thereby create legal uncertainty in

the application of the principle of the protection of legitimate expectations, a principle that has been consistently held to be the corollary of the principle of legal certainty (see the case-law cited in paragraph 37 above).

105 Furthermore, although not conclusive (see, to that effect, judgment of 30 November 2009, *France and France Télécom* v *Commission*, T-427/04 and T-17/05, EU:T:2009:474, paragraph 277), the approach taken in the contested decision was also adopted in other decisions, as the Commission confirmed at the hearing, and that approach has never been called into question by the EU Courts.

106 It follows that in the present case, contrary to the applicant's submissions, the Commission did not err in finding that the legitimate expectation covered aid granted under the scheme at issue from its entry into force in 2002.

– *The inclusion of aid relating to shareholdings acquired after 5 February 2007*

107 It should be recalled that in recitals 164 and 167 of the contested decision, the Commission found that the legitimate expectation entertained by the beneficiaries of the scheme at issue in the lawfulness of the scheme ended on 21 December 2007, the date of publication in the Official Journal of the Commission's decision to initiate the formal investigation procedure in respect of that scheme, because, from that date onwards, a diligent trader ought to have taken into account the doubts expressed by the Commission as regards its lawfulness.

108 The applicant does not dispute that the legitimate expectation is liable to end on the date of publication of the decision to initiate the formal investigation procedure in respect of an aid measure, in this case on 21 December 2007, which is moreover confirmed by the case-law (see, to that effect, judgments of 22 April 2016, *Ireland and Aughinish Alumina* v *Commission*, T-50/06 RENV II and T-69/06 RENV II, EU:T:2016:227, paragraphs 221 and 224, and of 1 March 2017, *SNCM* v *Commission*, T-454/13, EU:T:2017:134, paragraph 293 and the case-law cited). It submits, however, that the legitimate expectation of the beneficiaries of the scheme at issue ended in the present case on 5 February 2007, the date of the Commission's answer to another parliamentary question.

109 The section of that answer relating to the scheme at issue reads as follows:

'In this case, the Commission has yet to give its opinion on the compatibility, from a State aid point of view, of the Spanish goodwill write-off provisions; they do not, however, appear to be contrary to the Fourth Accounting Directive … In any case, the Commission would point out that it is impossible to predict the outcome of any subsequent investigation of the possible aid measures referred to by the Honourable Member. In this regard, the Commission would reiterate that it may, by virtue of its State aid control powers, order the recovery of any incompatible or illegally granted aid so as to deprive the recipient of any advantage it may have enjoyed over its competitors, thereby restoring the pre-aid competitive market situation.'

110 It must be pointed out that it is apparent from the case-law cited in paragraph 108 above that a diligent trader can no longer entertain a legitimate expectation as to the lawfulness of the grant of aid once the decision to initiate the formal investigation procedure has been published, since the initiation of the formal investigation procedure means that the Commission harbours serious doubts as to the lawfulness of the national measure at issue in the light of the EU rules prohibiting State aid. Therefore, in order to bring an end to a legitimate expectation that has been properly created, the statement made by the Commission in its answer of 5 February 2007 should have, at the very least, raised serious doubts as to the lawfulness of the scheme at issue.

111 However, no such doubts emerge from the answer of 5 February 2007. In accordance with that answer, both the initiation of a formal investigation procedure in respect of the scheme at issue, which could have brought to light serious doubts as to the lawfulness of that scheme, and, a fortiori, the outcome of such a procedure, are hypothetical. It is true that the Commission refers, in essence, in the reply, to the request for information sent to the Spanish authorities on 15 January 2007 (see paragraph 4 above), but such a request in the present case concerns only the preliminary stage of the procedure for reviewing State aid, which is intended merely to allow the Commission to form a prima facie opinion on the national measure concerned (see judgment of 10 July 2012, *Smurfit Kappa Group* v *Commission*, T-304/08, EU:T:2012:351, paragraph 45 and the case-law cited) and does not necessarily lead to the initiation of the formal investigation procedure, since the Commission may not go beyond the preliminary stage for the purpose of taking a decision favourable to a national measure if it is in a position to satisfy itself, on an initial examination, either that the measure does not constitute aid or, if it is to be classified as aid, that it is compatible with the Treaty FEU (judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraphs 186 and 187, and of 16 September 2013, *Colt Télécommunications France* v *Commission*, T-79/10, not published, EU:T:2013:463, paragraph 31). It should also be noted that the Commission does not, in that reply, conduct any assessment, even of a summary or general nature, of the scheme at issue; it merely recalls the powers it has in respect of aid that is unlawful and incompatible with the internal market.

112 It follows from the above that the complaints concerning the temporal limitation of the legitimate expectation applied by the Commission in the contested decision cannot succeed.

113 Consequently, the single plea in law raised by the applicant must be dismissed.

114 The applicant therefore has no valid basis for seeking the annulment of the contested provision, so that, without there being any need to rule on the pleas of inadmissibility raised by the Commission, the present action must be dismissed (see, to that effect, judgment of 26 February 2002, *Council* v *Boehringer*, C-23/00 P, EU:C:2002:118, paragraph 52).

Costs

115 Under Article 134(1) of the Rules of Procedure 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 the applicant has been unsuccessful, and since the Commission and interveners have applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

1. Dismisses the action;

2. Orders Deutsche Telekom AG to pay the costs.

Gervasoni Kowalik-Bańczyk Mac Eochaidh

Delivered in open court in Luxembourg on 15 November 2018.

[Signatures]