Reports of Cases

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

Case C-54/19 P

Axa Mediterranean Holding, SA
v

European Commission

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

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

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

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

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

1 Original language: Italian.

2 T-405/11, not published, EU:T:2018:780.

3 Decision C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 135, p. 1). That decision has been rectified on two occasions, on 3 March 2011 and on 26 November 2011.

4 C 45/07 (ex NN 51/07, ex CP 9/07) (OJ 2011 L 7, p. 48). The other cases, on which I am presenting my Opinions today, are Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*; C-53/19 P, *Banco Santander and Santusa* v *Commission* and C-65/19 P, *Spain* v *Commission*; and Cases C-50/19 P, *Sigma Alimentos Exterior* v *Commission*; C-52/19 P, *Banco Santander* v *Commission*; and C-55/19 P, *Proseguor Compañía de Seguridade* v *Commission*.

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

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

5. The Commission did keep the formal investigation procedure open in respect of acquisitions of shareholdings outside the European Union, pending further information that the Spanish authorities had undertaken to provide. That part of the procedure was closed by the adoption of the decision at issue. Article 1(1) of that decision stated that the aid scheme implemented by Spain under the measure at issue was incompatible with the internal market 'as regards aid granted to beneficiaries in respect of extra-EU acquisitions'.[9] Paragraph 4 of that article states that 'tax reductions enjoyed by beneficiaries under Article 12(5) of the TRLIS in respect of extra-EU acquisitions carried out by the date of publication of this Decision in the *Official Journal of the European Union*, which are related to majority shareholdings held directly or indirectly in foreign companies established in China, India or in other countries where the existence of explicit legal barriers to cross-border business combinations have been or can be demonstrated can continue to apply over the entire amortisation period established by the aid scheme'. Article 4(1) of the decision at issue requires the recovery of the 'incompatible aid corresponding

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

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

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

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

9 Article 1(2) of the decision at issue excluded from the declaration of incompatibility and from the recovery order the tax reductions that the beneficiaries had enjoyed in respect of extra-EU acquisitions under the measure at issue 'which are related to rights held directly or indirectly in foreign companies fulfilling the relevant conditions of the aid scheme by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year'. The Commission took the view that until that date (corresponding to the publication in the Official Journal of the decision to initiate the formal investigation procedure), the beneficiaries of the measure at issue had a legitimate expectation that the measure was lawful (see recitals 186 to 199 of the decision at issue). The same treatment was to apply, in accordance with recital 200 of the decision at issue, to those beneficiaries which have carried out a transaction in other third countries, which have acquired a majority shareholding and which can provide sufficient evidence to demonstrate the existence of an explicit legal barrier, within the meaning of that decision, in the legislation of that third country.

to the tax reduction under the scheme referred to in Article 1(1) from the beneficiaries whose rights in foreign companies, acquired in the context of extra-EU acquisitions, do not fulfil the conditions laid down in Article 1(2) to (5)'.

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

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

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

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

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

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

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

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

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

IV. Arguments

A. Introductory comments

10. Reference should be made to the statements made and the criteria discussed in points 11 to 21 of my Opinion in Joined Cases C-51/19 P, *World Duty Free Group* v *Commission* and C-64/19 P, *Spain* v *Commission*, delivered today, for an examination of the case-law, as it now stands, in relation to the selectivity of tax measures and, in particular, for an illustration of the three-step method for analysing selectivity developed by the Court. It is in the light of those statements and criteria that the complaints put forward by Axa will be examined. For information about the implications of the *WDFG* judgment for the purposes of examining the present appeal, please refer to points 23 to 27 of the abovementioned Opinion.

B. The appeal

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

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

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

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

13. Because the assertions made in the complaint being examined, and the arguments used to support those assertions, are identical to those raised in the first complaint of the first limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 52 to 59 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the first complaint of the first limb of Axa's single ground of appeal.

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

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

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

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

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

16. The complaints raised by Axa in the second limb of its single ground of appeal relate to paragraphs 139 to 160 of the judgment under appeal and are intended to dispute the grounds of that judgment by which the General Court identified the objective of the reference system and, in the light of that objective, compared the situation of undertakings benefiting from the measure at issue and those excluded from that measure.

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

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

18. Because the assertions made in the third limb of Axa's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the third limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 109 and 110 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the third limb of Axa's single ground of appeal.

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

19. Because the assertions made in the fourth limb of Axa's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the fourth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 112 and 113 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the fourth limb of Axa's single ground of appeal.

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

20. Because the assertions made in the fifth limb of Axa's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the fifth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 114 to 117 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the fifth limb of Axa's single ground of appeal.

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

21. Because the assertions made in the sixth limb of Axa's single ground of appeal, and the arguments used to support those assertions, are identical to those raised in the sixth limb of World Duty Free Group's single ground of appeal in Case C-51/19 P, I will merely refer, *mutatis mutandis*, for the purposes of their examination, to points 119 to 122 of my Opinion in Joined Cases C-51/19 P and C-64/19 P, delivered today. For the same reasons stated in those points, I propose that the Court of Justice should reject the sixth limb of Axa's single ground of appeal.

7. Conclusion on the appeal

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

C. Request for substitution of grounds by the Commission

23. In the event that the Court of Justice should consider Axa's single ground of appeal to be well founded, the Commission asks the Court of Justice to substitute the grounds and declare the proceedings before the General Court inadmissible. On that point, I note that the Commission raised a plea of inadmissibility in relation to the proceedings brought by Axa before the General Court, and consideration of that plea was reserved for the final judgment. On the basis of the judgment of 26 February 2002, *Council* v *Boehringer*[13] ('the *Boehringer* judgment'), the General Court nevertheless held, in paragraph 28 of the judgment under appeal, that it was justified in examining the action on the merits in this case without ruling on that plea first.[14]

24. Since I propose that the Court of Justice should dismiss Axa's appeal, I will only make a few brief points below on the merits of the Commission's request, which essentially seeks an examination of the plea of inadmissibility raised by that party before the General Court.

[13] C-23/00 P, EU:C:2002:118, paragraph 52.

[14] The reversal of the logical or natural order for examining actions resulting from application of the *Boehringer* case-law, in the event that the EU judicature rejects an action on its merits even where a plea of inadmissibility has been raised – in particular if it relates to public policy or is submitted in a separate document requesting a ruling without involving the discussion on the merits –, has been the subject of some criticism. See, for example, the 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 in *Council* v *Boehringer* (C-23/00 P, EU:C:2001:511, points 30 to 36). Despite these criticisms, the *Boehringer* case-law continues to be applied both by the General Court (see, most recently, 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 (for a recent application in an appeal, see judgment of 21 December 2016, *Club Hotel Loutraki and Others* v *Commission*, C-131/15 P, EU:C:2016:989, paragraph 68).

25. In that plea, the Commission contended that Axa lacked *locus standi* and an interest in bringing proceedings against the decision at issue, because it had failed to demonstrate that it had applied the measure at issue and therefore that it was an actual beneficiary of the deduction granted under that measure, or that it was required to return such aid in application of that decision or that it was exposed to a risk that aid would be recovered, as is required by the case-law.[15] In its observations on the plea of inadmissibility before the General Court, Axa stated that it had acquired the right to apply the deduction under the measure at issue in 2008, in relation to two acquisitions of majority shareholdings in a Turkish company and a Mexican company, respectively. Axa contended that the measure at issue does not require that the deduction be made in the tax return immediately following the completion of the transaction, but that the beneficiaries may freely decide when to apply it. In those observations, Axa stated that, for the sake of prudence, it had not definitively applied the deduction in question immediately, but had taken account of the measure at issue to reduce its taxable base for calculation of its advance payments for 2009.[16] Under those circumstances, Axa asserted that it had a vested, current interest in seeking the annulment of the decision at issue, because that decision would deprive it of its acquired right to apply the measure at issue to transactions already carried out – unless it can prove the existence of barriers to international mergers in Mexico and in Turkey, in accordance with recital 200 of that decision – and it would expose it to the risk that it might have to pay default interest on the advance payments for 2009.[17] In its response to the Court of Justice, Axa contends that it applied the measure at issue in the context of the self-assessment procedure for 2013 and then once again after the adoption of the judgment of 7 November 2014 in *Banco Santander and Santusa* v *Commission*.[18]As attachments to the response, Axa produced a tax assessment notice dated 18 January 2018, issued as part of the procedure to recover aid granted under the measure at issue, covering, in particular, the amortisation for the 2014 and 2015 financial years of the financial goodwill relating to the acquisition of shareholdings in a Turkish company carried out by Axa in 2008.

26. For my part, I note that, in the judgment of 28 June 2018, *Andres* v *Commission*[19] ('the *Andres* judgment'), the Court of Justice clarified that the fact that an applicant may fall within or outside the category of actual or potential recipients of individual aid granted under an aid scheme declared incompatible with the internal market by a Commission decision is not decisive as regards determining whether the applicant is individually concerned by that decision, where it is in any event established that the applicant is otherwise affected by it by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons. So, if it rules on the Commission's plea of inadmissibility and reaches the conclusion that Axa, because it did not apply the measure at issue until 2014, cannot be considered to be an actual beneficiary of

[15] According to established case-law, the actual beneficiaries of individual aid granted under a system of aid of which the Commission has ordered the recovery are, by that fact, individually concerned within the meaning of the fourth paragraph of Article 263 TFEU (see, specifically, 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 53, 'the *Comitato "Venezia vuole vivere*" judgment'), even if the recovery is only implemented in a subsequent phase, in which it is to be established whether the advantages received actually constitute State aid having to be repaid (see the *Comitato 'Venezia vuole vivere*' judgment, paragraph 55). According to the Court of Justice, the order for recovery already concerns all the beneficiaries of the system in question individually 'in that they are exposed, as from the time of the adoption of the [Commission] decision, to the risk that the advantages which they have received may be recovered, and thus find their legal position affected' (see the *Comitato 'Venezia vuole vivere*' judgment, paragraph 56). Those beneficiaries therefore form part of a limited class within the meaning of the case-law drawn from the judgment of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18, paragraph 31).

[16] The corresponding return was produced as an attachment to the observations on the plea of admissibility before the General Court.

[17] Axa also asserted that the annulment of the decision at issue would avoid it having to provide the Commission with the necessary proof demonstrating the existence of barriers to international mergers in Turkey and in Mexico in order to be able to benefit from the legitimate expectation in accordance with recital 200 of that decision; see footnote 9 of the present Opinion.

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

[19] C-203/16 P, EU:C:2018:505, paragraph 48.

the advantage provided by that measure at the time when the action was brought before the General Court, the Court of Justice must assess whether its situation is in any case such as to distinguish it from other operators that are affected only as potential beneficiaries of that measure and, in particular, whether such a situation could result from the circumstance that Axa applied the amortisation permitted under that measure for the purposes of calculating the advance payments made for 2009. However, I do not believe that the mere fact that Axa carried out a transaction that could fall within the scope of the measure at issue [20] can be sufficient to distinguish its position in the sense required by the case-law. In this regard, I will merely state that, in the case that gave rise to the *Andres* judgment, the General Court held that the applicant in that case had, in a financial year preceding the opening of the formal investigation procedure, made taxable profits from which it claims to have deducted the losses carried forward under the restructuring clause applying in that case, and that binding information received from the German tax authorities showed that it met the conditions for the application of that clause. [21]

V. Costs

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

VI. Conclusion

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

[20] I note that the tax assessment notice produced as an attachment to the reply before the Court of Justice seems to show that the acquisition transactions carried out by Axa in 2008 did actually entitle it to the amortisation permitted under the measure at issue.

[21] See, in particular, paragraphs 13 and 55 of the *Andres* judgment.