Reports of Cases

ORDER OF THE GENERAL COURT (Eighth Chamber)

29 March 2012*

(Actions for annulment — State aid — Aid schemes allowing for the tax amortisation of financial goodwill for foreign shareholding acquisitions — Decision declaring the aid scheme incompatible with the common market and not ordering the recovery of aid — Association — Lack of individual concern — Inadmissibility)

In Case T-236/10,

Asociación Española de Banca, established in Madrid (Spain), represented by J. Buendía Sierra, E. Abad Valdenebro, M. Muñoz de Juan and R. Calvo Salinero, lawyers,

applicant,

v

European Commission, represented by R. Lyal and C. Urraca Caviedes, acting as Agents,

defendant,

APPLICATION for annulment of Article 1(1) and, alternatively, Article 4 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 (Eighth Chamber),

composed of L. Truchot (Rapporteur), President, M.E. Martins Ribeiro and A. Popescu, Judges,

Registrar: E. Coulon,

makes the following

Order

Background to the dispute

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 Spanish Corporate Tax Law 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,

* Language of the case: Spanish.

p. 50493) — and 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) of 5 March 2004 (BOE No 61, of 11 March 2004, p. 10951), ('the scheme at issue'), should be classified as State aid. The Commission replied in essence that, according to the information available to it, the scheme at issue did not appear to fall within the scope of the State aid rules.

2 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 sent the Commission the information requested.

3 By fax of 28 August 2007, the Commission received a complaint from a private operator alleging that the scheme at issue constituted State aid incompatible with the common market.

4 By decision of 10 October 2007 (summarised in OJ 2007 C 311, p. 21), the Commission initiated a formal investigation procedure in respect of the scheme at issue.

5 By letter of 5 December 2007, the Commission received comments from the Kingdom of Spain on the 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, Asociación Española de Banca. By letters of 30 June 2008 and 22 April 2009, the Kingdom of Spain gave its reactions to the interested parties' comments.

6 On 18 February 2008, 12 May and 8 June 2009, technical meetings were held with the Spanish authorities. Other technical meetings were also held with some of the 32 interested third parties.

7 By letter of 14 July 2008 and by email of 16 June 2009, the Kingdom of Spain submitted further information to the Commission.

8 The Commission terminated the procedure, as regards shareholding acquisitions within the European Union, by its 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, which constitutes a tax advantage enabling Spanish companies to amortise the financial goodwill resulting from the acquisition of shareholdings in foreign companies, is incompatible with the common market where it applies to the acquisition of shareholdings in companies established within the European Union.

10 Under Article 1(2) and (3) of the contested decision however, the scheme at issue continues to apply, by virtue of the principle of the protection of legitimate expectations, to acquisitions of shareholdings which took place before the publication in the *Official Journal of the European Union* of the decision initiating the formal investigation procedure on 21 December 2007, 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.

Procedure and forms of order sought

11 By application lodged at the Registry of the General Court on 21 May 2010, the applicant brought the present action.

12 By document lodged at the Registry of the General Court on 30 September 2010, the Commission raised a plea of inadmissibility, pursuant to Article 114(1) of the Rules of Procedure of the General Court.

13 On 16 November 2010, the applicant submitted its observations on the Commission's plea of inadmissibility.

14 The applicant claims in essence that the Court should:

— declare the action admissible;

— annul Article 1(1) of the contested decision;

— in the alternative, annul Article 4 of the contested decision in so far as it provides for a recovery obligation for operations carried out prior to the publication of the contested decision in the *Official Journal*;

— order the Commission to pay the costs.

15 The Commission contends that the General Court should:

— declare the action inadmissible;

— order the applicant to pay the costs.

Law

16 Under Article 114(1) of the Rules of Procedure, on the application of a party, the Court can rule on admissibility without going into the substance of the case. In accordance with Article 114(3), the remainder of the proceedings is to be oral, unless the Court decides otherwise. In the present case, the Court takes the view that it has sufficient information from the documents in the file, and decides that there is no need to open the oral procedure.

17 The Commission contends that the present action is inadmissible on the ground that the applicant has not shown that it had *locus standi* to bring an action against the contested decision.

18 Under the fourth paragraph of Article 263 TFEU, '[a]ny natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures'.

19 It should be recalled that a professional association which is responsible for protecting the collective interests of its members, such as the applicant, is entitled to bring an action for the annulment of a final decision of the Commission on State aid only in two sets of circumstances, namely, first, where the undertakings which it represents or some of those undertakings themselves have *locus standi* and, second, if it can prove an interest of its own, in particular because its position as a negotiator has been affected by the measure of which annulment is sought (Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR II-5479, paragraph 56; Case T-380/94 *AIUFASS and AKT* v *Commission* [1996] ECR II-2169, paragraph 50; and Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Diputación Foral de Álava and Others* v *Commission* [2009] ECR II-3029, paragraph 108).

20 The applicant bases its *locus standi*, primarily, on that of its members.

21 Even if the applicant claims, in its observations on the objection of inadmissibility, 'to defend the interests of all its members concerned directly and individually by the contested decision', it submits evidence seeking to establish the *locus standi* of only three of its members, Banco Bilbao Vizcaya

Argentaria, SA ('BBVA') and Banco Santander, SA, which have each brought an action against the contested decision (Case T-225/10 and Case T-227/10, respectively), and Banco Popular Español, SA, which has not brought an action against the contested decision.

22 With regard to BBVA and Banco Santander, the Commission contends that the applicant cannot represent their interests, as they are defending their own interests in the context of the actions they have brought against the contested decision.

23 It should be recalled in that regard that the first situation of admissibility of an action brought by an association, based on the representation of its members (see paragraph 19 above) is, according to the case-law, that in which the association, by bringing its action, has substituted itself for one or more of the members whom it represents, on condition that those members were themselves in a position to bring an admissible action (*AIUFASS and AKT* v *Commission*, paragraph 50, and order of 18 September 2006 in Case T-350/03 *Wirtschaftskammer Kärnten and best connect Ampere Strompool* v *Commission*, not published in the ECR, paragraph 25).

24 As the Court noted in Joined Cases T-447/93 to T-449/93 *AITEC and Others* v *Commission* [1995] ECR II-1971, paragraph 60, the action brought by an association presents procedural advantages, since it obviates the institution of numerous separate actions against the same decisions. That first situation of admissibility of an action brought by an association presupposes that the association acts in place of its members. It follows that an association, acting as the representative of its members, has *locus standi* to bring proceedings for annulment where those members have not themselves brought an action, even though they would have been entitled to do so.

25 The Court thus held in Case T-292/02 *Confservizi* v *Commission* [2009] ECR II-1659, paragraph 55, that the applicant association had not represented the interests of those of its members who had brought their own actions in Cases T-297/02, T-300/02, T-301/02, T-309/02 and T-189/03, as they had represented their own interests by bringing those actions. Contrary to the applicant's submission, the fact that it is not the only consideration that has led to declaring the action inadmissible does not mean that it is erroneous and contrary to the case-law.

26 In this respect, it should be noted that the judgments cited by the applicant do not conflict with that case-law. Those judgments rule on collective actions brought by one or several associations and one or several of their members. In the case of a collective action, where the *locus standi* of one of the parties to the action is accepted, it is settled case-law that it is not necessary to examine the *locus standi* of the other parties (Case C-313/90 *CIRFS and Others* v *Commission* [1993] ECR I-1125, paragraph 31). Accordingly, contrary to what the applicant claims, most of the judgments that it cites are, in fact, limited to declaring the action admissible on the basis of the *locus standi* of one or several members of the association without ruling on the *locus standi* of that association (Case T-442/93 *AAC and Others* v *Commission* [1995] ECR II-1329, paragraph 55; *AITEC and Others* v *Commission*, paragraph 82; Case T-266/94 *Skibsværftsforeningen* v *Commission* [1996] ECR II-1399, paragraph 51; and Case T-82/96 *ARAP and Others* v *Commission* [1999] ECR II-1889, paragraphs 39 to 41).

27 Only one judgment, in Case T-445/05 *Associazione italiana del risparmio gestito and Fineco Asset Management* v *Commission* [2009] ECR II-289, expressly rules on the admissibility of the action brought by the association after ruling on that of the action brought by one of its members: the admissibility of the former is inferred from that of the latter (paragraph 56 of the judgment). However, a general rule cannot be drawn from that regarding the admissibility of actions brought by associations alone, according to which they are entitled to bring actions if their members are so entitled, whether or not those members have brought their own actions. In the case giving rise to that judgment, the member of the applicant association had not brought a separate action, but had brought a single action jointly with the association, so that the procedural advantage, referred to in paragraph 24 above, was not affected.

28 Nor can such a rule be inferred from the judgment in Joined Cases T-425/04, T-444/04, T-450/04 and T-456/04 *France and Others* v *Commission* [2010] ECR II-2099, also cited by the applicant, since that judgment did not rule on the admissibility of the action brought in Case T-456/04 by the applicant association. Moreover, it should be recalled that the action of an association may be declared admissible, even if actions have been brought by its members, because its own interests are affected (see paragraph 19 above). Likewise, the judgment in Case T-613/97 *UFEX and Others* v *Commission* [2006] ECR II-1531, also cited by the applicant, ruling on an action brought by an association and three of its members, contains no consideration relating to the admissibility of the action.

29 Furthermore, contrary to what the applicant claims, such a solution does not deprive Article 263 TFEU of its effectiveness and does not prejudice either the principle of legal certainty or its rights of defence. It is true that it makes the admissibility of an action by associations conditional upon no action having been brought by other parties, in this case their members. However, such a situation cannot be considered as being a source of uncertainty or insecurity, as it can be legitimately expected of an association responsible for protecting the interests of its members that it is aware of actions brought by them and vice versa. Moreover, the inadmissibility of the applicant association's action by reason of actions brought by its members does not affect the effectiveness of Article 263 TFEU and its rights of defence, that is, in essence, its right to effective judicial protection. There are two possibilities: either the applicant association brings an action to defend the interests of its members who have *locus standi* and the action declared admissible will be that of the member of the association or that of the association depending on whether or not one of its members has brought its own action; or the association brings an action to defend its own interest and its action may be declared admissible, even though actions have been brought by its members, where the existence of such an interest is established (see paragraphs 42 to 46 below).

30 It follows that the present action cannot be declared admissible on the basis of the representation by the applicant of BBVA and of Banco Santander since they have brought their own actions, there being no need to rule here on the admissibility of the actions brought by those two companies.

31 As regards Banco Popular Español, which the applicant refers to in the alternative, it attached as an annex to its observations on the plea of inadmissibility a document showing that that company had used the scheme at issue in 2007 and 2008, namely in respect of acquisitions of shareholdings in a Portuguese company in June 2003. However, the applicant states that Banco Popular Español has not been subject to a recovery order.

32 In that regard, the applicant claims, first, on the basis of the case-law, that the recognition of the individual concern of the beneficiary of aid granted under an aid scheme declared illegal and incompatible cannot be limited to cases where the beneficiary is required to refund that aid. According to the applicant, the recovery obligation is examined by the case-law for the sake of completeness only.

33 That argument must be rejected. It is settled case-law that an undertaking cannot, in principle, bring an action for annulment of a Commission decision prohibiting a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see Case C-298/00 P *Italy* v *Commission* [2004] ECR I-4087, paragraph 37 and the case-law cited, and Case T-309/02 *Acegas* v *Commission* [2009] ECR II-1809, paragraph 47 and the case-law cited).

34 However, where the decision in question is of concern to the applicant undertaking not only by virtue of its being an undertaking in the sector concerned and a potential beneficiary of the aid scheme, but also by virtue of its being an actual beneficiary of individual aid granted under that scheme, the recovery of which has been ordered by the Commission, that decision is of individual concern to the

applicant and the applicant's action against it is admissible (see, to that effect, Joined Cases C-15/98 and C-105/99 *Italy and Sardegna Lines* v *Commission* [2000] ECR I-8855, paragraphs 34 and 35, and judgment of 10 September 2009 in Case T-75/03 *Banco Comercial dos Açores* v *Commission*, not published in the ECR, paragraph 44).

35 The judgments cited in paragraph 33 above and the decisions cited by the applicant impose the condition, in identical terms, that a decision declaring an aid scheme to be incompatible is of individual concern to an applicant only if it is demonstrated that the applicant actually benefits from individual aid granted under that scheme and the Commission has ordered recovery of it (Case T-136/05 *Salvat père & fils and Others* v *Commission* [2007] ECR II-4063, paragraph 70; Case T-297/02 *ACEA* v *Commission* [2009] ECR II-1683, paragraph 45; and Case T-301/02 *AEM* v *Commission* [2009] ECR II-1757, paragraph 45). It cannot be inferred from that wording, which puts the recovery obligation and the condition of the applicant being an actual beneficiary on the same level, that the requirement of such an obligation is of secondary importance or even superfluous.

36 It should be noted, moreover, that the judgment in Joined Cases T-254/00, T-270/00 and T-277/00 *Hôtel Cipriani and Others* v *Commission* [2008] ECR II-3269, paragraph 84, also cited by the applicant, merely reiterates the two abovementioned conditions and even attaches a particular importance to the recovery order by considering that the individualisation results, in such cases, from the specific adverse effect of the recovery order on the interests of the members of the closed class, who are fully identifiable. The Court, ruling on the appeal brought against that judgment, found that the General Court was right to have held that the applicant undertakings had *locus standi* in that they were individually concerned by the contested decision by reason of the particular detriment caused to their legal situation by the order for recovery of the aid concerned (Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraph 51). It follows from this that, where a contested act requires the recovery of aid granted under an aid scheme, only applicants subject to the recovery obligation are individually concerned by that act (order of 21 March 2012 in Case T-234/10 *Ebro Foods* v *Commission*, not published in the ECR, paragraph 28).

37 The applicant contends, secondly, that the exclusion of operations prior to 21 December 2007 from the scope of the recovery obligation by virtue of the principle of the protection of legitimate expectations is not definitive, due to the action brought by Deutsche Telekom AG in Case T-207/10 against that part of the operative part of the contested decision.

38 With that line of argument, the applicant is confusing the ground of admissibility requiring that the appellant must have been individually concerned with the ground of admissibility requiring a legal interest in bringing proceedings. Although a legal interest in bringing proceedings may be established inter alia by reference to actions brought before a national court after proceedings have been brought before a Court of the European Union (Joined Cases T-309/04, T-317/04, T-329/04 and T-336/04 *TV 2/Danmark and Others* v *Commission* [2008] ECR II-2935, paragraphs 78 to 82), whether a natural or legal person is individually concerned is assessed on the date on which the proceedings are brought and is determined only by the contested decision. Thus, a person individually concerned by a decision that declares aid incompatible with the common market and orders its recovery remains so, even if it subsequently emerges that the person will not be required to refund it (see, to that effect, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, paragraph 56, and Opinion of Advocate General Trstenjak in that case, ECR I-4727, points 81 and 82).

39 Furthermore, it should also be noted that, in order for the contested measure to be of individual concern to the applicant, the applicant must establish that he belongs to a closed class, that is to say, a group which cannot be extended after the adoption of the contested measure (see, to that effect, Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, paragraph 11, and *Belgium and Forum 187* v *Commission*, paragraph 63).

40 Consequently, in the present case the possible annulment of Article 1(2) of the contested decision by the General Court and the subsequent recovery of the aid at issue from the Banco Popular Español do not give reason to consider that the contested decision is of individual concern to the applicant.

41 Nor can this action be declared admissible, therefore, on the basis of the applicant's representation of Banco Popular Español.

42 The applicant invokes, in the alternative, in support of the admissibility of its action, its own interest resulting from its participation in the formal investigation procedure.

43 According to settled case-law, established in the context of actions brought by associations, in particular since Joined Cases 67/85, 68/85 and 70/85 *Kwekerij van der Kooy and Others* v *Commission* [1988] ECR 219, and *CIRFS and Others* v *Commission*, put forward by the applicant, an applicant can be individually concerned as a result of its having played a significant role in the procedure leading to the adoption of the contested decision. However, the cases concerned particular situations in which the applicant occupied a clearly circumscribed position as negotiator which was intimately linked to the actual subject-matter of the decision, thus placing it in a factual situation which distinguished it from all other persons (see, to that effect, Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, paragraphs 85 to 95 and the case-law cited).

44 In particular, it is apparent from the judgment in Case C-78/03 P *Commission* v *Aktionsgemeinschaft Recht und Eigentum* [2005] ECR I-10737, paragraph 58) that the role of an association which does not go beyond the exercise of the procedural rights granted to interested parties under Article 108(2) TFEU and under Article 1(h) and Article 20 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) cannot be compared to that of the applicants in *Kwekerij van der Kooy and Others* v *Commission* and *CIRFS and Others* v *Commission*.

45 The judgments cited by the applicant do not call into question that interpretation of *Kwekerij van der Kooy and Others* v *Commission*. Paragraph 35 of the judgment in *AAC and Others* v *Commission* appears in the section of the judgment entitled 'Arguments of the parties' and sets out an argument of the Commission contesting the admissibility of the action brought by the Association des amidonneries de céréales de la CEE (AAC) by presenting its interpretation of the judgment in *Kwekerij van der Kooy and Others* v *Commission*. Furthermore, at paragraph 89 of the judgment in *Diputación Foral de Álava and Others* v *Commission*, also cited by the applicant, the General Court accepted that, due to its participation in the administrative proceedings, the party applying for leave to intervene established that it had an interest in the result of the case. The General Court thus ruled on a condition separate from that at issue in the present case, that is, the interest in the outcome of the case, required by the second paragraph of Article 40 of the Statute of the Court of Justice of the European Union, in order to intervene in a case.

46 In the present case, as the applicant merely submitted its comments during the formal investigation procedure, like the other interested parties, its action cannot be declared admissible on the basis of the defence of its own interests in the context of the procedure which led to the contested decision.

47 In the light of all the foregoing, this action must be dismissed as inadmissible.

Costs

48 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs incurred by the Commission, in addition to its own costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

hereby orders:

1. The action is dismissed.

2. Asociación Española de Banca is to pay the costs.

Luxembourg, 29 March 2012.

E. Coulon
Registrar

L. Truchot
President