

The Court of Justice upholds the annulment of the European Commission's third decision on the scheme for the tax amortisation of financial goodwill

The Court of Justice emphasises the importance of the general principles of legal certainty and protection of legitimate expectations in the field of EU State aid rules, in particular as regards the clarity, precision and predictability required of European Commission decisions ordering the recovery of aid.

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The judgment of the Court of Justice of the European Union (Eighth Chamber) of 26 June 2025 (cases C-776/23 P to C-780/23 P) concludes the long judicial pilgrimage, in European courts, of the scheme for the tax amortisation of financial goodwill. The judgment dismissed the appeals lodged by the European Commission seeking the setting aside of the judgments of the Gene-

ral Court of 27 September of 2023¹ which annulled the third of the decisions issued by the Commission in relation to the illegality and incompatibility of the scheme with the general prohibition of State aid.

The origin of the legal dispute can be traced back to the introduction by way of the Fiscal, Administrative and Social Measures Act 24/2001 of 27 December 2001 (with effect

¹ Cases T-826/14; T-12/15, T-158/15 and T-258/15; T-253/15; T-256/15 and T-260/15; T-252/15 and T-257/15.

from 1 January 2002) of a new fifth paragraph in Article 12 of the Recast Version of the Corporate Income Tax Act (approved by Royal Legislative Decree 4/2004 of 5 March 2004). The former Act, in conjunction with

raised by the Commission itself as to the compliance of the scheme with EU law in several answers to questions put by Members of the European Parliament, both decisions limited the recovery order to the date of publication

of the decision to initiate the formal investigation procedure (21 December 2007) and allowed the scheme to continue to apply for the entire amortisation period provided for in the aid scheme in certain cases and subject to certain conditions. The judicial dispute regarding the legality of the first two Commission decisions ended with the Court of Justice definitively

acknowledging its conformity with the law in six judgments of 6 October 2021², dismissing the appeals lodged by the Kingdom of Spain and various companies benefiting from the tax incentive at issue.

On the other hand, in the third of the decisions relating to the scheme for the tax amortisation of financial goodwill (Decision 2015/314 of 15 October 2014), the Commission understood that the interpretation made by the Directorate-General for Taxation in a formal binding answer of 21 March 2012 (VO608-12) - according to which, in accordance with the wording and purpose of Article 12(5) of the Recast Version of the Corporate Income Tax Act, the tax incentive was applicable to both direct and indirect acquisitions of significant shareholdings in non-resident companies - was an extension of the initial scheme for the tax amortisation of financial goodwill arising from indirect acquisitions in non-resident compa-

Where the meaning of a provision of EU law is absolutely plain from the very wording of a decision, the Court cannot depart from the literal rule of interpretation

Article 21 of the aforementioned Recast Version, provided that, in the event that a company taxed in Spain acquired a holding of at least 5% in a foreign company, provided that such holding had been held continuously for at least one year and that other additional requirements were met, the Spanish company could, by way of amortisation, deduct the financial goodwill deriving from that shareholding from its income that was taxable in Spain.

In Decisions 2011/5/EC of 28 October 2009 (limited to the acquisition of shareholdings in companies established in the EU) and 2011/282/EU of 12 January 2011 (limited to the acquisition of shareholdings in companies domiciled in third countries), the European Commission declared the scheme for the tax amortisation of financial goodwill illegal and incompatible with EU State aid rules. However, on the basis of the legitimate expectations

² Cases C-50/19 P; C-51/19 P and C-64/19 P; C-52/19 P; C-53/19 P; C-54/19 P; and C-55/19 P.

nies through direct acquisitions in non-resident *holding* companies. In the Commission's view, that administrative interpretation entailed an extension of the scope and number of potential beneficiaries of the tax scheme at issue and therefore constituted "new aid" within the meaning of Article 108(3) of the Treaty on the Functioning of the European Union, incompatible with the internal market, and it therefore required the Spanish authorities to terminate that tax scheme and recover the incompatible aid granted in full. The General Court, in the judgments of 27 September 2023 cited above, annulled the Commission's third decision on the ground that the Commission had erred in considering that the administrative interpretation of the scope of the tax benefit at issue constituted "new aid".

In the judgment under review, the Court of Justice upholds the annulment of the third Commission decision after rejecting the three grounds of appeal raised by the Commission.

Contrary to the Commission's position, the Court of Justice rules out the possibility that the General Court erred in interpreting the scope of the first two decisions by failing to take account of the context in which they were adopted and the purpose of the rules in the field of State aid. The Court of Justice points out that the principle of legal certainty also applies when the Commission adopts a decision in the field of State aid. That principle requires the rules to be clear, precise and predictable in their effect so that interested parties can ascertain their position in situations and legal relationships governed by EU law and take steps accordingly, a requirement that is indispensable in the case of negative decisions by which the Commission orders the addressee Member State to take all necessary measures

to put an end to the aid and to ensure that it is recovered. In this case, it is clear from both the recitals and the operative part of the first two decisions that the obligations to put an end to the aid and to recover it concerned direct acquisitions - holdings in a company's equity - and also indirect acquisitions - holdings in the equity of a second or lower level subsidiary. Given the clear wording of the first two decisions, the General Court was bound to conclude that their scope covered both. To have understood otherwise would infringe the principle of legal certainty and would be incompatible with the settled case-law of the Court of Justice according to which the EU judicature may not depart from the wording of the rule where the meaning of a provision of EU law is unambiguously apparent from that wording (*ECB v Germany*, C-220/03; *DYKA Plastics*, C-424/23).

Moreover, contrary to the Commission's argument, the General Court integrated the contextual element into its reasoning by observing that the Commission itself had, for the purposes of its assessment in the first two contested decisions, disregarded the distinction between direct and indirect acquisitions, despite the fact that the Spanish authorities had communicated the administrative interpretation followed at the time. As regards the purpose of the rules on State aid, the Court of Justice emphasises that one of the objectives pursued by those rules is the predictability of legal relations as part of the principle of legal certainty, a purpose of "significance where, as in the present case, the dispute concerns more than one decision relating to the same national tax system".

Similarly, the Court of Justice rejects as incorrect the premise on which the second ground of appeal is based, according to which the new

administrative interpretation had the effect of broadening the scope of the scheme for the tax amortisation of financial goodwill to a category of (indirect) shareholdings not covered by the first two Commission decisions. The principles governing the interpretation of EU acts prevented the General Court from reaching a finding other than that those first two decisions concerned both direct and indirect acquisitions of shareholdings.

Similar reasoning is used by the Court of Justice to reject the third ground of appeal relating to the existence of an error of law in the General Court's interpretation and application of the principle of the protection of legitimate expectations. The existence of an alleged error in the interpretation or application of that general principle of EU law by the General Court does not conceal the fact that it was the Commission itself which explicitly found such a legitimate expectation in the first two decisions in respect of both direct and indirect acquisitions.

Consequently, the Court of Justice dismisses the appeals brought by the European Commission and orders it to bear its own costs and to pay those incurred by the other parties to the proceedings relating to the appeals.

That judgment emphasises the importance of the general principles of legal certainty and protection of legitimate expectations in the field of EU State aid rules, in particular as regards the clarity, precision and predictability required of European Commission decisions ordering the recovery of aid and an interpretation and application of those decisions which are consistent and respectful of the requirements of the principle of good faith, which is, to a certain extent, reminiscent of estoppel (*venire contra proprium factum nulli conceditur*).

Lastly, given that the tax authorities had been recovering this aid from the undertakings concerned, they must now return it, together with late payment interest.