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EU TAX ALERT

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COURT OF JUSTICE OF THE EUROPEAN UNION SPANISH TAX RULES ON AMORTIZATION OF FINANCIAL GOODWILL (CASES C-50/19 P, ET AL.)

THE COURT OF JUSTICE OF THE EUROPEAN UNION ("CJEU") CONFIRMED THE DECISION OF THE GENERAL COURT HOLDING THAT SPANISH TAX RULES ON AMORTIZATION OF FINANCIAL GOODWILL CONSTITUTE A STATE AID SCHEME INCOMPATIBLE WITH THE INTERNAL MARKET

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Facts of the case and the Spanish tax rules

The case concerned a Spanish legislation under which, as from 2001, it was possible to deduct (in the form of amortization) the financial goodwill resulting from the acquisition by a resident Spanish company of a shareholding - of at least 5% - in foreign undertakings, while a similar deduction did not apply in the case of acquisition of participations in Spanish companies. After a formal investigation, the European Commission initiated a procedure, later concluding that such a measure constituted an aid scheme incompatible with the internal market. The case was then brought before the General Court, appealed by the Commission before the CJEU and then decided again by the General Court. The present decision stems from the appeal brough before the CJEU against the latter decision.

CJEU ruling

The CJEU recalled that, in order to classify a national tax measure as selective, the Commission

must follow a three-stage method. **First,** it must identify the common, or normal, tax system applicable in the Member State. **Second**, it must demonstrate that the tax measure at issue is a derogation from that reference system. **Lastly,** it must ascertain whether that differentiation is justified as it flows from the nature or general structure of the system of which the measure is part.

In the cases at issue the CJEU focused on the error allegedly made the General Court in identifying the reference system.

The CJEU observed that the identification of the reference system must follow from an objective examination of the content, structure and specific effects of the applicable national rules, taking into account the characteristics of the tax, as defined by the Member State concerned. Moreover, the Court clarified that the introduction of a derogation from the general rule by the national legislature is not sufficient to characterize the relevant reference system as selective. A national measure may be selective even if that measure is of a general nature and the advantage it confers depends on the transaction that the undertaking may or may not decide to carry out. Indeed, the selectivity may arise simply from a finding that a transaction exists which, while **comparable** to the transaction that is a prerequisite for granting the advantage at issue, does not confer a right to that advantage, so that the relevant legislation ends up favoring only the companies choosing to carry out the specific transaction that grants the benefit.

In this respect, the comparability analysis must be carried out in the light of the **objective of the reference system** and not in the light of the objective of the measure at issue. In turn, where it appears that the measure at issue is clearly severable from that general system, the

reference system may also be more limited than that general system, and even equate to the measure itself, where the latter appears as a rule having its own legal logic. Consequently, the Court concluded that the General Court was right to state that companies, which acquire shareholdings in non-resident companies, are, in the light of the objective pursued by the general tax rules governing the goodwill, in a comparable factual and legal situation to that of companies that acquire shareholdings in resident companies.

Based on the above, the CJEU confirmed the judgement of the General Court, concluding that the Spanish tax regime constituted a state aid scheme.