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**PUBLIC VERSION**

**WORKING LANGUAGE**

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**Subject: State aid N 480/2007 - Spain - THE REDUCTION OF TAX FROM INTANGIBLE ASSETS**

Sir,

## **1. PROCEDURE**

1. By e-mail dated 14 August 2007, registered at the Commission on the same day, the Spanish authorities, having regard to Article 88 (3) EC Treaty, notified to the Commission the above-mentioned measure.
2. The Commission asked for additional information on 5 October and 14 December 2007. The Spanish authorities submitted the requested information on 6 November 2007 and 25 January 2008.

## **2. DESCRIPTION OF THE MEASURE**

3. The measure grants a 50% reduction on the revenue from certain intangible assets. It is a part of the general system for determining the Corporation Tax base<sup>1</sup>. Reducing the revenue from intangibles has the effect of reducing the tax base. The undertakings

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<sup>1</sup> Article 23 of the revised text of the Corporation Tax Law approved by Royal Legislative Decree 4/2004 of 5 March.

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pay therefore less tax that they would have otherwise paid without taking advantage of the measure.

4. The qualified revenue for exemption is the remuneration from transfer of the right to use or exploit any:
  - patent,
  - design and model,
  - plan,
  - secret formula or process. It includes also the revenue from the right to use information concerning industrial, commercial, or scientific experience.
5. The above list is exhaustive. Therefore, no revenue, for instance, from the transfer of the right to use or exploit trademarks, literary, artistic or scientific works, including cinematograph films, transferable personal rights (such as: image rights, software, industrial, commercial or scientific equipment) qualifies for exemption.
6. The conditions for the exemption are as follows:
  - a) the transferring entity has generated the assets that are to be transferred.

This means that the transferring entity has taken on the risks and benefits arising from the creation of the intangible asset. This does not mean, however, that the assets should be developed materially or physically by the undertaking itself. It is perfectly admissible to externalise and entrust to third parties drawing up or creating those assets. There is no territorial distinction in such a way that the effective development of the intangible assets could be carried out by the undertaking itself in Spain or outside it or entrusted to third parties regardless whether established in Spain or in other countries;
  - b) the transferee uses the transferred rights to carry out an economic activity and not tax avoidance, i.e. the results of the use of transferred rights cannot take the form of the supply of goods or provision of services by the transferee that generate tax deductible expenditure in the transferring entity, if that entity is related to the transferee;
  - c) the transferee does not live in a tax-free country or territory or tax haven;
  - d) where a transfer agreement includes the provision of related services, the contract must indicate the remuneration for these services separately;
  - e) the entity must have the necessary accounting records in order to determine direct and indirect revenue and expenditure corresponding to the assets being transferred;
  - f) in the case of entities that come under the fiscal consolidation system, the revenue and expenditure derived from the transfer will not be eliminated in order to determine the tax base of the tax group.
7. The exemption ceases to apply as from the tax period following that in which the revenue from the transfer of each asset, calculated from the beginning of the transfer qualifying for the reduction, exceeds the cost of the asset created, multiplied by six. In other words, the amount of possible tax advantage is capped at the level of six times the costs of creation of qualifying intangible assets.

8. The application of the tax incentive requires the transferring entity to have the necessary accounting records and to be able to determine revenue and expenditure direct and indirect corresponding to the assets that are subject of the transfer. Those accounting records will serve as a basis for the undertaking itself to be able to identify and calculate both the revenues and expenditure associated with the intangible assets and will also serve tax inspectors for verification. It is a normal procedure in the Spanish legal order. The failure to comply with this makes it impossible to apply this tax scheme.
9. There is no administrative discretion involved in the application of the measure. Taking advantage of the scheme is not subject to any prior authorization by the tax administration. The taxable person applies the reduction himself if he considers that he has met all the requirements laid down by the scheme. The tax authorities can only control this *a posteriori*.
10. It is a measure that applies to all corporate taxpayers in Spain (including self-employed) irrespective of the specific activity they pursue, their sector of activity, the geographical area in which they are established.
11. According to the Spanish authorities there will clearly be prior research and development activity in the enterprises in order to produce the intangible assets and then make use of this measure. Indeed, the aim of the measure is to encourage scientific and technological development in the business sector as a whole by partially exempting certain revenue from certain intangible assets.
12. According to the Spanish authorities the measure will help to increase companies' expenditure on research, development and technological innovation, since the intangible assets that generated the qualifying revenue generally result from these activities. However, this measure does not in any way imply a direct reduction in the cost of pursuing R&D&I activities, since it does not apply to any specific expenditure.

### **3. ASSESSMENT**

13. In order to ascertain whether the regime at hand constitutes aid within the meaning of Article 87(1) EC, the Commission has to assess whether the measure favours certain undertakings or the production of certain goods by granting a selective advantage. Moreover, such selective advantage must distort or threaten to distort competition, being granted through State resources, it must be capable of affecting trade between Member States. These four criteria being cumulative, it is sufficient that the regime does not meet one of them in order to establish that the latter does not constitute state aid.

#### **3.1. Selective advantage**

14. The privileged treatment of income from intangible assets is a derogation from the ordinary corporate taxation rules. It is an advantage, since it mitigates the charges the companies would have to bear without the existence of the measure. However, the scheme is open to any undertaking subject to corporate taxation in Spain that develops intangible assets. Indeed, any corporate tax payer, independently from its size, legal structure and sector in which it operates can be the beneficiary.

15. The Spanish authorities have provided the Commission with statistics showing that the intangible assets and R&D activities preceding them have been undertaken widely throughout all sectors of economy, including the service sector. The fact that not every undertaking decides to self-develop a qualifying intangible asset and then receives remuneration for the transfer of the right to use or exploit such asset merely reflects an economic reality<sup>2</sup>. More importantly, the measure does not strengthen the position of any particular class of undertakings in relation to others competing in intra-Community trade<sup>3</sup> and applies without distinction to all economically active persons.<sup>4</sup> In line with Commission Communications on direct business taxation<sup>5</sup> and the effective use of tax incentives in favour of R&D<sup>6</sup> tax measures which are open to all economic agents operating within a Member State are in principle general measures.
16. In particular, the category of secret formulas or processes is so wide and horizontal in nature that it does not result in favouring undertakings which are in a legally or factually comparable position in the light of general policy objective pursued by the measure in question<sup>7</sup>. Potentially, an indefinite number of sectors can have an interest in developing patentable inventions, designs or models, plans or secret formulas or processes as well as industrial, commercial or scientific experience. According to the Spanish authorities all these intangible assets require previous R&D&I activity, which distinguishes them from other intangible assets.
17. It is true that some undertakings may profit from the measure more than others, but this does not necessarily make the measure selective.<sup>8</sup> Also the fact that the advantage is limited to six times the costs of self-developing the asset is not a sign of selectivity in itself. There is no limitation as regards the costs which can be incurred by the taxpayer in creating the qualified intangible asset.
18. The Commission has verified the preparatory legislative materials which preceded the introduction of the measure. There is nothing in these materials sent to the Commission by the Spanish authorities that may suggest that the objective of the measure was to make it restricted *de facto* to a particular group or sectors of undertakings.
19. As far as the particular conditions of the application of the measure are concerned, they seem to be justified by the logic of the Spanish tax system.<sup>9</sup> Their common feature is that they anti-abusive and prevent artificial settings in order to benefit from

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<sup>2</sup> See in this regard Decision in case N 354/2004 Irish holding regime.

<sup>3</sup> Case C-53/00 *Ferring v ACOSS* [2001] ECR I-9067, para. 21.

<sup>4</sup> Case C-156/98 *Germany v Commission* [2000] ECR I-6857, para 22 in which the ECJ recognised the tax concession can constitute a general measure if it applies without distinction to all economically active person. See also C-75/97 *Belgium v. Commission* [1999] ECR I-3671, para 28.

<sup>5</sup> Commission notice on the application of state aid rules to measures related to direct business taxation, OJ C 384, 10 December 1998, point 13.

<sup>6</sup> SEC (2006) 1515/COM/2006/0728 final, point 1.2.

<sup>7</sup> Case C-143/99 *Adria-Wien* [2001] ECR I-8365, para. 41.

<sup>8</sup> T-92/02 *Stadtwerke Schwäbisch* [2006] nyp., paragraph 109, see also Commission notice on the application of state aid rules to measures related to direct business taxation, OJ C 384, 10 December 1998, point 14.

<sup>9</sup> Case C-143/99 *Adria-Wien* [2001] ECR I-8365, para. 42.

the measure.<sup>10</sup> They also allow tax inspectors to verify whether anti-abusive conditions have been complied with. It is true for the following requirements:

- the transferee uses the transferred rights to carry out an economic activity;
  - the transferee does not live in a tax-free country or territory or tax haven;
  - where a transfer agreement includes the provision of related services, the contract must indicate the remuneration for these services separately;
  - the entity must have the necessary accounting records in order to determine direct and indirect revenue and expenditure corresponding to the assets being transferred;
  - In the case of entities that come under the fiscal consolidation system, the revenue and expenditure derived from the transfer will not be eliminated in order to determine the tax base of the tax group.
20. In light of all above considerations the Commission considers that the measure does not provide a selective advantage.

#### 4. CONCLUSION

21. The Commission considers that the Spanish tax regime is a non-selective measure and therefore it does not constitute state aid in the meaning of Article 87 (1) of EC Treaty.

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European Commission  
Directorate-General for Competition  
Directorate for State Aid  
State Aid Greffe  
**B – 1049 Brussels**  
Fax No.: +32 2 296 12 42

Yours faithfully,  
For the Commission

*Neelie KROES*  
Member of the Commission

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<sup>10</sup> See, to that effect, Case C-308/01 *GIL Insurance* [2004], ECR I-4777, para. 74 and Commission notice on the application of state aid rules to measures related to direct business taxation, OJ C 384, 10 December 1998, point 13.

