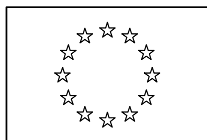

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels,

C (2009) 8107 corr.

COMMISSION DECISION

of 28.10.2009

ON THE TAX AMORTIZATION OF FINANCIAL GOODWILL FOR FOREIGN SHAREHOLDING ACQUISITIONS
n° C45/2007 (ex NN51/2007, ex CP9/2007)

implemented by Spain

(Only the Spanish version is authentic)

(Text with EEA relevance)

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THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to the provisions cited above[1] and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By Written Questions addressed to the Commission (No E-4431/05, E-4772/05 and E-5800/06) several Honourable MEPs indicated that Spain had enacted a special scheme allegedly providing an unfair tax incentive for Spanish companies acquiring significant shareholdings in foreign companies, pursuant to Article 12(5) of the Spanish Corporate Tax Act ("*Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades*"[2], hereinafter "TRLIS").

(2) By Written Question No P-5509/06, the Honourable MEP Mr. David Martin complained about the unsolicited acquisition of control by way of shares' purchase of the UK energy generator and distributor Scottish Power by the Spanish energy producer Iberdrola, which - according to the Honourable MEP - would have unfairly benefited from State aid in the form of an acquisition tax-premium. The Honourable MEP demanded that the Commission examined all competition issues arising from the acquisition, which had been notified on 12 January 2007 for review by the Commission pursuant to Article 4 of Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings[3] ("Merger Regulation"). By Decision dated 26 March 2007 (Case No COMP/M.4517 – IBERDROLA/SCOTTISHPOWER, SG-

[1] OJ C 311, 21.12.2007, p. 21.
[2] Published in the Boletin Oficial del Estado of 11.03.2004
[3] OJ L 24, 29.01.2004, p. 1 – 22.

Greffe(2007) D/201696)[4], the Commission decided not to oppose to the notified operation and to declare it compatible with the common market in application of Article 6(1)(b) of the Merger Regulation.

(3) By letter dated 15 January 2007 (D/50164) and 26 March 2007 (D-51351), the Commission asked the Spanish authorities to provide information in order to assess the scope and the effects of Article 12(5) TRLIS with respect to its possible qualification as State aid and its compatibility with the common market.

(4) By letters dated 16 February 2007 (A/31454) and 4 June 2007 (A/34596), the Spanish authorities provided an answer to these questions.

(5) By fax dated 28 August 2007, the Commission received a complaint by a private operator alleging that the scheme set up by Article 12(5) TRLIS constitutes State aid and is incompatible with the common market. The complainant has asked his identity not to be divulged.

(6) By decision of 10 October 2007 (hereinafter "the Opening decision"), the Commission initiated the formal investigation procedure laid down in Article 88(2) of the EC Treaty on the tax amortization of financial goodwill provided for by Article 12(5) TRLIS, because it appeared to fulfil all the conditions to be considered State aid within the meaning of Article 87(1) EC. The Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the EC Treaty. The Opening decision was published in the Official Journal of the European Communities[5], inviting interested parties to submit their comments.

(7) By letter dated 5 December 2007, the Commission received comments from Spain on the Opening decision.

(8) Between 18 January 2008 and 16 June 2008, the Commission received comments from thirty-two third parties on the Opening decision. The third parties not having requested to be treated anonymously are listed in the Annex to the present decision.

(9) By letters of 9 April 2008 (D/51431), 15 May 2008 (D/51925), 22 May 2008 (D/52035) and 27 March 2009 (D/51271), the Commission forwarded the above mentioned observations to the Spanish authorities, in order to give them the opportunity to react. By letters of 30 June 2008 (A/12911) and 22 April 2009 (A/9531), the Spanish authorities presented their comments to third parties' observations.

(10) On 18 February 2008, 12 May 2009 and 8 June 2009, technical meetings took place between the Spanish authorities and the Commission representatives to clarify, amongst others, certain aspects of the application of the scheme at hand and the interpretation of the Spanish legislation relevant for the analysis of the case.

(11) On 7 April 2008, a meeting took place between the Commission's representatives and Banco Santander; on 16 April 2008 a meeting took place between the Commission's representatives and Garrigues representing various interested third parties; on 2 July 2008 a meeting took place between the Commission's representatives and Altadis; on 12

[4] See: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4517_20070326_20310_en.pdf

[5] See footnote 1.

February 2009 a meeting took place between the Commission's representatives and Telefonica.

(12) On 14 July 2008, the Spanish authorities submitted additional information regarding the contested measure, in particular data extracted from the 2006 tax providing a general overview of the taxpayers benefiting from the contested measure.

(13) By email dated 16 June 2009, the Spanish authorities provided additional elements arguing that Spanish companies still face a number of obstacles to cross border mergers within the European Union.

II. DETAILED DESCRIPTION OF THE CONTESTED MEASURE

(14) The measure at stake provides for a fiscal amortization of the financial goodwill arising from the acquisition of a significant shareholding in a foreign Target company.

(15) The measure is governed by Article 12(5) TRLIS (hereinafter "the contested measure"). More precisely, Article 2(5) of the Law 24/2001 of 27 December 2001 amended the Spanish Company Tax Act 43/1995 of 27 December 1995, by adding Article 12(5). The Real Legislative Decree 4/2004 of 5 March 2004 consolidating the amendments made to the Spanish Company Tax Act.

(16) The Commission is aware that the Spanish legislation has evolved since the date of the Opening decision[6]. Nonetheless, the Commission considers that the latter amendments are not susceptible to modify or alter the doubts expressed in the Opening decision. For the sake of consistency, the Commission will refer in the present decision to the numbering of the Spanish law as described in the Opening decision, even though they may have been modified. Any new legal provision will be expressly identified as such.

(17) Article 12(5) TRLIS, within Article 12 TRLIS entitled *"Correciones de valor: perdida de valor de los elementos patrimoniales"*, entered into force on 1 January 2002. It essentially provides that a company, which is taxable in Spain, may deduct from its taxable income the financial goodwill deriving from the acquisition of a shareholding of at least 5% of a foreign company, in equal yearly instalments, over at least the 20 years following the acquisition.

(18) Goodwill is understood to represent the value of well-respected business name, good customer relations, employee skills, and other such factors expected to translate into greater than apparent earnings in the future. Under Spanish accounting principles[7], the price paid for the acquisition of a business in excess of the market value of the assets composing the business is termed "goodwill" and has to be booked as a separate intangible asset as soon as the acquiring company takes control on the target company[8].

(19) Under Spanish tax purpose principles, except under the contested measure, goodwill can only be amortised following a business combination that materialises either in case of

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6 Law 4/2008 of 23 December 2008, which introduced modifications to several tax law provisions.

7 See Article 46, 39 of *Codigo de Comercio de 1885*.

8 Resulting from the implementation of Law 16/2007 of 4 July 2007 on "reforma y adaptación de la legislación mercantil en materia contable para su armonización internacional con base en la normativa de la Unión Europea".

acquisition or contribution of the assets composing an independent business or following a business combination or a de-merger transaction.

(20) "Financial goodwill", as used in the Spanish fiscal system, amounts to the goodwill that would have been booked if the shareholding company and the participated company would have combined. The financial goodwill concept provided under Article 12(5) TRLIS therefore introduces into the area of share acquisitions a notion usually used in transfer of assets or business combination transactions. According to Article 12(5) TRLIS, the financial goodwill is determined by deducting the market value of the tangible and intangible assets of the acquired company from the acquisition price paid for the shareholding.

(21) Article 12(5) TRLIS provides that the amortization of financial goodwill is conditional upon the following conditions being fulfilled, as set by reference to Article 21 TRLIS:

a) More than 5% of the foreign company must be held directly or indirectly by the Spanish acquiring company for an uninterrupted period of at least one year[9]

b) The foreign company has to be subject to a tax similar to the tax applicable in Spain. Such a condition is presumed to be fulfilled if the country of residence of the target company has signed with Spain a tax convention to avoid double taxation and prevent tax evasion[10];

c) The revenue of the foreign company shall mainly derive from business activities carried out abroad. Such a condition is met when at least 85% of the income of the target company:

I is not of the kind subject to the Spanish controlled foreign company (CFC) anti-deferral rules and taxed, as if income earned in Spain[11]. The incomes from the following activities are expressly considered as fulfilling these requirements:

- Wholesale trading, when neither the country of the transfer of the goods nor the one of the clients of the participated company is Spain,
- Services, provided to beneficiaries not fiscally resident in Spain,
- Financial services provided to clients not resident in Spain,
- Insurance services relating to risks not linked to Spain.

II is dividend income, whenever the conditions on the nature of the income of the shareholding provided for Article 21(1)(a) and the level of direct and indirect shareholding of the Spanish shareholder company are fulfilled (Article 21 (1)(c)(2) TRLIS)[12].

(22) In addition to the contested measure, it is worth presenting briefly the following TRLIS'provisions to which the present decision will refer:

9 See Article 21(1)(a) TRLIS.
10 See Article 21(1)(b) TRLIS.
11 See Article 21(1)(c)(1) TRLIS.
12 See Article 21(1)(c)(2) TRLIS.

- Article 11(4) TRLIS[13], within Article 11 TRLIS entitled "*Correciones de valor: amortizaciones*", which is contained in Chapter IV of TRLIS defining the tax base, provides the amortization of goodwill over minimum 20 years deriving from an acquisition for value under the following conditions: (i) the goodwill results from an outright purchase; (ii) the seller should be unrelated to the acquirer company. The amendments to this provision after the Opening decision, introduced by Law n. 16/2007 of 4 July 2007, further clarified that if condition (ii) is not fulfilled, the price paid used for the calculation of the goodwill will be the price paid for the share acquired by a related company to the unrelated seller and further requests that (iii) a similar amount has been allocated to an indivisible reserve.

- Article 12(3) TRLIS, which is contained in Chapter IV TRLIS, permits partial write downs for impairment of domestic and foreign shareholdings, which are not traded on a secondary market, up to the difference of the theoretical accounting value between the beginning and the end of any tax period. The contested measure can apply in conjunction with Article 12(3) TRLIS[14].

- Article 89(3) TRLIS, within Article 89 entitled "*Participaciones en el capital de la entidad transmitente y de la entidad adquirente*", is contained in Chapter VII, Section VIII on "*Regimen especial de las fusiones, escisiones, aportaciones de activos y canje de valores*". Article 89(3) TRLIS provides the amortization of goodwill arising from business restructuring. Under this provision, the following conditions have to be fulfilled in order to apply Article 11(4) TRLIS to the goodwill arising from a business combination: (i) a shareholding of at least 5% in the target company before the business combination; (ii) it should be established that the goodwill has been taxed in the hand of a seller (iii) which has to be unrelated to the acquirer. If the condition (iii) is not fulfilled, the amount deducted will have to correspond to an irreversible depreciation of the intangible assets.

- Article 21 TRLIS, entitled "*Exención para evitar la doble imposicion economica internacional sobre dividendos y rentas de fuente extranjera derivadas de la transmission de valores representativos de los fondos propios de entidades no residentes en territorio español*", is contained in Chapter IV TRLIS. Article 21 TRLIS provides for the conditions under which dividends and incomes perceived from a foreign company are tax exempted when perceived by a company which is tax resident in Spain.

- Article 22 TRLIS, entitled "*Exención de determinadas rentas obtenidas en el extranjero a través de un establecimiento permanente*", is contained in Chapter IV TRLIS. Article 22 TRLIS provides for the conditions under which incomes generated by a foreign permanent establishment are tax exempted.

(23) For the purpose of the present decision:

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13 Under the current legislation, this provision is numbered as Article 12(6) TRLIS.

14 As explicitly stated in the second alinea of Article 12(5): "The deduction of this difference [i.e. Article 12(5) TRLIS] will be compatible, if it were, with the deduction referred to in point 3 of this article."

- Transfer of assets shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company.

- Business combination shall mean an operation whereby one or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to another existing company or to a company that they form in exchange for the issue to their shareholders of securities representing the capital of that other company.

- Share acquisition shall mean an operation whereby one company acquires a shareholding in the capital of another company without obtaining a majority or the control of the voting rights of the participated company.

- Target company shall mean a company not resident in Spain, whose income is fulfilling the conditions described in point (21) c) and in which a shareholding is acquired by a company resident in Spain.

- Intra-EU acquisitions shall mean shareholding acquisitions, which meets all the relevant conditions of Article 12(5) TRLIS, in a Target company which is formed in accordance with the law of a Member State and having its registered office, central administration or principal place of business within the Community.

- Extra-EU acquisitions shall mean any shareholding acquisitions, which meets all the relevant conditions of Article 12(5) TRLIS, in a Target company which has not been formed in accordance with the law of a Member State or not having its registered office, central administration and principal place of business within the Community.

III. GROUNDS FOR INITIATING THE PROCEDURE

(24) In the Opening decision, the Commission initiated the formal investigation procedure laid down in Article 88(2) of the EC Treaty on the contested measure, because it appeared to fulfil all the conditions to be considered State aid within the meaning of Article 87(1) EC. The Commission also had doubts as to whether the contested measure could be considered compatible with the common market, as none of the exceptions provided for in Article 87(2) and (3) seemed applicable.

(25) In particular, the Commission considered that the contested measure departed from the ordinary scope of the Spanish corporate tax system, which is the tax system of reference. The Commission also held that the fiscal amortization of the financial goodwill arising from the acquisition of a 5% shareholding in a foreign Target company seemed to constitute an exceptional incentive.

(26) The Commission observed that the tax amortization was available only to a specific category of undertakings, namely the undertakings which acquire certain shareholdings, amounting to at least 5% of the share capital of a Target company, and with sole respect to foreign target companies provided that the criteria foreseen by Article 21(1) TRLIS are fulfilled. The Commission also underlined that pursuant to the case law of the Court,

a tax reduction favouring only national products being exported constitutes State aid[15]. The contested measure in question therefore seemed selective.

(27) In this context, the Commission also considered that the selective advantage did not appear to be justified by the inherent nature of the tax system. In particular it considered that the differentiation created by the contested measure, which departed from the general rules from the Spanish accounting and tax system could not be justified by reasons linked to technicalities of the tax system. Indeed, goodwill can only be deducted in case of business combination or transfer of assets, except under the provision of the contested measure. The Commission also considered that it was disproportionate for the contested measure to ensure the attainment of the neutrality objectives pursued by the Spanish system because they are only limited to the acquisition of significant shareholdings in foreign companies.

(28) In addition, the Commission considered that the contested measure implied the use of State resources by foregoing tax revenues by the Spanish Treasury. Finally, the contested measure was susceptible to distort competition in the market of European business acquisition by providing a selective economic advantage to Spanish companies engaged in the acquisition of a significant shareholding in foreign companies. The Commission did not either identify any ground for considering the contested measure compatible with the common market.

(29) The Commission therefore concluded that the contested measure could represent incompatible state aid. In such a case, recovery should take place according to Article 14 of Council Regulation (EC) n° 659/1999 of 22 March 1999. In this respect, the Commission invited Spanish authorities and interested parties to submit their observations as to the possible presence of legitimate expectations or any other general principle of Community law, which would permit the Commission to exceptionally waive recovery pursuant to Article 14(1), second phrase, of the above mentioned Council Regulation.

IV. COMMENTS FROM THE SPANISH AUTHORITIES AND INTERESTED THIRD PARTIES

(30) The Commission received comments from the Spanish authorities[16] and from thirty two interested third parties[17], out of which eight were sent by associations.

(31) In summary, the Spanish authorities consider that Article 12(5) TRLIS constitutes a general measure, not a derogation to the Spanish tax system since this provision allows the amortization of an intangible asset, which applies to any taxpayers purchasing a significant shareholding in a foreign company. In the light of the Commission practice and the case law, the Spanish authorities conclude that the contested measures cannot be qualified as State aid within the meaning of Article 87 EC Treaty. In addition, the Spanish authorities consider that a different conclusion would violate the notion of legal certainty. The Spanish authorities also contest the competence of the Commission to

[15] See the Judgement of the Court of Justice of 10.12.1969, joined Cases 6 and 11/69, *Commission v France*, [1969] ECR 523. See also point 18 of the Commission Notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3.

[16] See point (7) here above.

[17] See point (8) here above.

challenge this general measure: state aid rules would not allow the Commission to harmonize fiscal matters on that basis.

(32) In general, thirty interested third parties (hereinafter "the Thirty parties") support the views of the Spanish authorities, whereas two interested third parties (hereinafter "the Two parties") consider that Article 12(5) TRLIS constitutes an unlawful State aid measure incompatible with the common market. Hence, the arguments of the Thirty parties will be presented together with the position of the Spanish authorities, whereas the arguments of the Two parties will be described separately in the following sections.

A. COMMENTS FROM THE SPANISH AUTHORITIES AND THE THIRTY PARTIES

(33) As preliminary remarks, the Spanish authorities stress that direct taxation lies within the competence of Member States. Therefore, the Commission's action in this field should be in line with the subsidiarity principle stated in Article 5 EC Treaty. Moreover, the Spanish authorities recall that Articles 3 and 58(1)(a) of the EC Treaty allow Member States treating investments differently under their tax system, according to the localization or the fiscal residence of the taxpayer, without this being considered as a restriction to the free movement of capital.

(34) The Thirty parties additionally submit that a negative Commission decision would breach the principle of national fiscal autonomy set forth in the EC Treaty, as well as Article 56 EC Treaty prohibiting restrictions to the free movement of capital.

A.1 The contested measure does not constitute State aid

(35) The Spanish authorities and the Thirty parties consider the contested measure not to constitute State aid within the meaning of Article 87(1) EC Treaty since: (i) it does not confer an economic advantage; (ii) it does not favour certain undertakings; (iii) it does not distort or threatens to distort competition between Member States. In line with the logic of the Spanish tax system, they consider that the contested measure should be considered a general measure applying to any type of company and to any activity indiscriminately.

A.1.1 The contested measure does not confer an economic advantage

(36) Contrary to the Commission's position as expressed in the Opening decision, Article 12(5) TRLIS would not constitute an exception to the Spanish corporate tax system since (i) the Spanish accounting system would not be an appropriate point of reference to base the existence of an exception to the tax system; (ii) and even if it were, the characterization of financial goodwill as a depreciable asset over time would have historically been a general feature of Spanish accounting and corporate tax system.

(37) Firstly, because of the lack of harmonisation of accounting rules, accounting statements could not serve as a reference point to establish the exceptional character of the contested measure. Indeed, in Spain, the tax base is calculated on the basis of the accounting statement, as rectified according to fiscal rules. Therefore, in the case at

hand, accounting considerations could not constitute a reference point for a fiscal measure.

(38) Secondly, it would be incorrect to consider goodwill amortization not to be within the logic of the Spanish accounting system since both goodwill[18] and financial goodwill[19] can be amortized over periods up to 20 years. These empirical rules reflect the loss of value of the underlying assets whether intangible or not. Therefore, Article 12(5) TRLIS would not constitute an exception as it would not depart from the rules on amortization of goodwill established in the Spanish accounting and tax systems.

(39) Thirdly, the Spanish authorities point out that the contested measure would not constitute a true economic advantage since, in case of a sale of the acquired shareholding, the amount deducted would be recaptured by taxation of the capital gain, thus placing the taxpayer in the same situation as if Article 12(5) TRLIS would have not been applied.

(40) Fourthly, the Commission would incorrectly refer to Articles 11(4) and 89(3) TRLIS to establish the advantageous feature. In the Opening decision, the Commission states that neither the existence of a business combination, nor the control of the target is necessary to benefit from the Article 12(5) TRLIS. This statement would reflect an inexact understanding of the Spanish tax system since these two articles do not prevent a group of companies acquiring jointly the control of a Target company to deduct a corresponding fraction of goodwill arising from the operation. Hence, there would be no requirements for these two articles to apply of an individual control of the Target company to benefit from the contested measure. In this context, it would be inappropriate to consider that Article 12(5) TRLIS would offer more favourable treatment compared to Article 11(4) or 89(3) TRLIS as regards controlling position of the beneficiaries. Finally, as regards the 5% investment criterion, it should be underlined that it would be consistent with the conditions set under Article 89(3) TRLIS, but also with the Commission directives and practice[20].

(41) The Commission would also refer incorrectly to Article 12(3) TRLIS to establish an alleged advantageous feature of Article 12(5) TRLIS: Article 12(3) would apply to situations of depreciation in case of an objective loss recorded by the acquired company, whereas Article 12(5) TRLIS would complement this provision and reflect the loss of value imputable to the depreciation of the financial goodwill.

(42) Fifthly, the Commission Notice on the application of the State aid rules to measures relating to direct business taxation[21] (hereinafter "the Commission Notice") would explicitly mention that amortization rules would not imply State aid. Since the current amortization ratio of the financial goodwill over minimum 20 years would be in line with the ratio to amortize goodwill, the rule would not constitute a derogation to the general tax system.

(43) Finally, the Thirty parties also consider that if the contested measure would constitute an advantage, the ultimate beneficiaries would be the acquired company's shareholders

[18] The Spanish authorities referred to Article 194 of the Spanish real decree 1564/1989 of 22.12.1989

[19] The Spanish authorities referred to the resolution of ICAC – nº 3, BOICAC, 27.11.1996

[20] See Commission decision of 22.09.2004, N 354/2004, Irish Holding Company Regime, OJ C 131, 28.5.2005, p. 10.

[21] OJ C 384, 10.12.1998, p. 3.

since they would perceive the price paid by the acquiring company benefiting from the contested measure.

A.1.2 The contested measure does not favour certain undertakings or production

(44) Firstly, Article 12(5) TRLIS would be a general measure since it would be opened to any Spanish company whatever its activity, sector, size, form or other characteristic. The only condition, provided for in the contested measure, in order for the taxpayer to benefit from such measure, would be to be a tax resident in Spain. The fact that all taxpayers do not benefit from the contested measure would not make it selective. Therefore, Article 12(5) TRLIS could not be either *de jure* selective or *de facto* selective within the meaning of Article 87(1) EC. In this perspective, by letter of 14 July 2008[22], the Spanish authorities provided data extracted from the 2006 Spanish tax returns, which would highlight that all types of companies (SMEs and large companies), as well as companies active in different economic sectors, benefitted from the contested measure. The Spanish authorities also underline that, in a recent judgment[23], the Court of First Instance would have indicated that a limited number of beneficiaries should not *per se* turn the contested measure into a selective one since it can represent the whole class of undertakings placed in a similar legal and factual situation. In particular, the Spanish authorities stress that the contested measure would present similarities with a recent case[24] that was considered as a general measure by the Commission, and therefore ask for the same treatment.

(45) Secondly, according to the Spanish authorities and the Thirty parties, the Commission would have mixed up, in its Opening decision, the concept of selectivity and the objective conditions of the contested measure which would be related only to certain transactions (i.e. shareholding in foreign Target company). Indeed, the Commission alleges that Article 12(5) TRLIS is selective since the same treatment would not be granted for comparable investments in Spanish companies. However, the Commission would fail to recognise that the selectivity criterion would not be determined by the fact that the beneficiary of the contested measure is a holding or multinational company that holds shareholding in a Target company. The fact that a measure would only benefit those entities, which comply with the objective criterion set forth in the contested measure, would not make it *per se* selective. The selectivity criterion would imply that subjective restrictions should be imposed on the beneficiary of the contested measure. The selectivity criterion created for this proceeding would be inconsistent with earlier Commission practice and would be too vague and broad. The expansion of this notion would lead to conclude incorrectly that most of the expenses that are tax deductible fall within the scope of Article 87(1) of the EC Treaty.

(46) Limiting the amortization of financial goodwill to the one arising from significant shareholdings of a Target company would not be sufficient to remove the general character of the contested measure, since it would apply indistinctively to any company tax resident in Spain without further requirements. In line with the case law of the

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22 See point (12) here above.

23 See judgement of the Court of First Instance of 10.4.2008, case T-233/04, *Netherlands/Commission*, [2008] ECR, II-591.

24 See Commission decision of 14.02.2008, N 480/07, Tax reduction from intangible assets, OJ C 80, 1.4.2008, p. 1.

European Court of Justice[25], a measure that benefits all undertakings in national territory, without distinction, could not constitute State aid.

(47) Thirdly, as regards the 5% threshold, this level would not set a minimum amount to be invested and therefore the contested measure would not only be to the benefit of large companies. As regard the absence of requirement that capital gain were taxed in the hand of the seller for the contested measure to apply, is considered as irrelevant by the Spanish authorities since they would not have competence to control incomes perceived abroad by a non tax resident seller. Finally, limiting, for fiscal technical reason, the scope of a measure to shareholdings acquisitions in Target companies, would be consistent with the situation resulting from the implementation of various Community directives. For example, as a result of the implementation of the Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States[26] (hereinafter "the Cross-border Interest and Royalty payments directive") and of the Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States[27] (hereinafter "the Parents-subsidiary directive"), the tax treatment of dividends, interests or royalties could differ whether the payment is done to a domestic or to a foreign company.

(48) Fourthly, the introduction of the contested measure would anyhow be justified by the principle of neutrality, which would inspire the entire Spanish tax legislation. This principle would imply that the fiscal treatment of an investment should be neutral irrespective of the instruments used, whether transfer of assets, business combination or share acquisitions. Therefore, the fiscal amortisation of an investment should be identical whatever the instrument used to carry out the acquisition at stake. The final aim of the contested measure, in this broader perspective, would be to ensure the free movement of capital by avoiding the discriminatory fiscal treatment between transactions with Target companies compared to purely domestic transactions. Given that significant domestic acquisitions could lead to the business combination of the acquiring and acquired companies without any legal or fiscal barriers, goodwill, which would arise for tax purpose as a result of the combination, could be amortized[28]. However, goodwill of cross border operations could not arise because of the incompleteness of the harmonisation within the Community or even worse, because of the absence of any harmonisation outside the European Union. Indeed, the Spanish authorities state[29] that "*the Spanish tax system provides different tax schemes for objectively different situations, as it is the case between domestic shareholding acquisition compared to cross border shareholding acquisition (impossibility to realize business acquisition, risk assumption,…), in order to achieve the tax neutrality which is requested by the Spanish system and by the proper European rules but also in order to achieve a consistent and efficient logic of the Spanish tax system*". Although the Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of

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25 See the judgement of the Court of Justice of 08.11.2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, [2001] ECR, I-8365.

26 OJ L 157, 26.06.2003, p. 49.

27 OJ L 7, 13.01.2004, p. 41.

28 In application of Article 89(3) TRLIS.

29 See the letter of 5 December 2007 addressed by the Spanish authorities to the Commission, p 35, mentioned in point (7) above.

different Member States[30] (hereinafter "the Tax cross border directive") would remove fiscal barriers, Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies[31] (hereinafter "the Company law cross border directive") would not have been implemented yet[32]. In practical terms, this situation would make business combinations between companies from different Member States impossible. Therefore, the contested measure would aim at removing the negative impact of these barriers, whose existence would not be imputable to Spain[33]. Thus limiting the contested measure's scope to cross border acquisitions would be necessary to enforce the neutrality principle. The Spanish tax system would thus treat differently taxpayers placed in different situations[34], therefore ensuring that the Spanish tax system is neutral as required by the proper Spanish tax system and by the EC Treaty. In particular, on 16 June 2009, the Spanish authorities recognized that although the Company law cross border directive would have a positive impact, European companies would still face a number of obstacles[35] to cross border mergers because of non-harmonization of national legislation (right of minority shareholders, rights of creditors, brand issues, wider regulatory issues including labor law, general politic and strategic considerations).

(49) As a conclusion, the contested measure would be aimed at removing the fiscal barriers that the Spanish tax system would generate in the investment decision by penalizing shares acquisitions in foreign companies compared to domestic one. The contested measure guarantees the same tax treatment to two types of acquisitions (direct acquisitions of assets and indirect acquisitions by acquiring shareholdings): goodwill arising from both of them (direct goodwill and financial goodwill) could thus be identified in order to promote the integration of the different markets, until factual and legal barriers to cross-border business combinations have been removed. The Spanish authorities would thus ensure that taxpayers would choose to invest locally or cross border without being impacted by these barriers. Indeed, Article 12(5) TRLIS re-establishes a level playing field by suppressing the negative impacts of the barriers.

A.1.3 The contested measure does not distort competition nor affects the Community trade

(50) The Commission would not have established to the requisite legal standard that Article 12(5) TRLIS would restrict competition, as (i) the alleged "market for the acquisition of shares in companies" does not constitute a relevant market for the purposes of competition law; and (ii) even if it did, the amortization of the financial goodwill does not affect *per se* the competitive position of Spanish undertakings.

(51) First, the Commission would have qualified the contested measure as an anticompetitive advantage on the fact that Article 12(5) would allow Spanish taxpayers to pay a premium for the acquisition of significant shareholdings in a Target company. However,

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[30] OJ L 225, 20.08.1990, p. 1.

[31] OJ L 310, 25.11.2005, p. 1

[32] The comments from the Spanish authorities were received on 5 December 2007 whereas the implementation by the Member States of the Directive 2005/56/EC had to take place before 15 December 2007.

[33] See the recitals of the Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) OJ L 207, 18.8.2003, p. 1–24, and the opinion of the Social and Economic Committee of 28 April 2004, COM(2003) 703 final – 2003/2077(COD).

[34] As stated at p.8 of the Spanish authorities' letter dated 30 June 2008, see point (9) here above.

[35] With reference to Commission services'assessment of the implementation of directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids.

the Commission would have failed to carry out any benchmarking study on the economic reality of the Spanish and international companies.

(52) Second, since the contested measure would be opened to any Spanish company without any limitation, it could not distort competition. Indeed, any company placed in the same situation than a beneficiary of the contested measure would have the capacity to benefit from the contested measure, by that way it would reduce its fiscal burden and therefore this would suppress any competitive edge that could derive from it. In addition, a lower taxation within a Member State that can increase the competitive edge of local companies should not fall under the State aid rules as long as it would remain general.

(53) Finally, the Commission already would have examined many Spanish cross border operations[36] under the merger regulation that would have been susceptible to have benefited from the contested measure. However under this exercise, the Commission did not raise any concerns about potential competition distortions.

(54) The Commission's allegations would not only be flawed because distant from reality, but would also be foreign to the investment reality of Spanish companies. The contested measure would neither distort competition nor would it adversely affect the conditions of intra-Community trade in a way contrary to the Community interest.

(55) In a non harmonized market, as a result of the competition amongst tax systems, identical operations would have a different fiscal impact depending on the residence of the operators. This situation would distort competition even if the national measures at stake are general measures. This distortion would, in other words, not result from State aid, but from a lack of harmonisation. If the Commission reasoning were to be followed, the Commission would have to open formal investigations on hundreds of national measures and thus would create legal uncertainty highly detrimental for foreign investments.

A.2 Compatibility

(56) Even if the Commission were to consider Article 12(5) TRLIS as a State aid in the meaning of Article 87(1) EC , this provision would be compatible with Article 87(3) EC since it contributes to the Community interest of promoting the integration of international companies.

(57) As stated in the State Aid Action Plan[37], a measure can be considered as compatible if it addresses a market failure, if it fulfils clearly defined objectives of common interest and if it does not distort intra-Community competition and trade to an extent contrary to the common interest. In the case at hand, the market failure would be the difficulty (or almost the impossibility) to carry out cross-border business combinations. The effect of Article 12(5) TRLIS would be to promote the creation of pan-European undertakings, by placing domestic and cross-border acquisitions on the same foot.

(58) Therefore, Article 12(5) TRLIS would be compatible with the common market since it would achieve the objective, in the absence of European tax harmonization, of breaking

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[36] See the Commission decisions of 10.06.2005 on Cesky Telecom, of 10.01.2005 on O2, of 23.05.2006 on Quebec, GIC, BAA, of 15.09.2004 on Abbey National, of 26.03.2007 on Scottish Power available at http://ec.europa.eu/competition/mergers/cases/.

[37] State aid action plan - Less and better targeted state aid : a roadmap for state aid reform 2005-2009, COM/2005/0107 final, OJ L 1, 04.01.2003, p. 1.

down barriers to cross-border investment in a proportionate manner. Indeed, the contested measure would be aimed at removing the negative impact of barriers to cross border business combinations and equalizing the fiscal treatment of cross border business combinations and local ones in order to ensure that the decisions taken as regards such operations would not be based on fiscal considerations, but exclusively on economic considerations.

A.3 Legitimate expectations and legal certainty

(59) Finally, and in the event that the Commission would declare that Article 12(5) TRLIS constitutes State aid incompatible with the Common market, the Commission should accept the existence of certain circumstances that justify the non-recovery of the alleged State aid received pursuant to Article 12(5) TRLIS. The beneficiaries should have the right to complete the outstanding amortization of the financial goodwill in relation to acquisitions carried out before the date on which a final decision is published.

(60) Firstly, the Commission seems to recognize, in the Opening decision, the probable existence of legitimate expectations. Therefore, in line with the case-law of the Court of First Instance[38], this statement would constitute clear indicative evidence that legitimate expectations would exist. Since the Opening decision would not prejudge the outcome of the formal investigation, the legitimate expectation should be recognized for all operations, which have taken place before the date of publication of the final decision.

(61) Secondly, in its answers to written questions[39] addressed by members of the European Parliament, the Commission would have stated that Article 12(5) TRLIS would not constitute State aid. This statement would constitute a clear position from the Commission providing obvious legitimate expectations to the Spanish authorities and the beneficiaries of the contested measure.

(62) Thirdly, in line with the conclusion drawn by the Commission in similar cases[40], the Commission would have provided a series of indirect evidence that Article 12(5) TRLIS would not constitute State aid. Taking into account these decisions, a prudent company would not have been able to predict that the Commission could take an opposite position.

(63) Finally, the contested measure should continue to apply to all operations dating from before the publication date of a negative decision until the outstanding amortization of the financial goodwill. Indeed, the contested measure would correspond to a right to deduct a given amount, determined at the moment of the acquisition, whose deduction is fractioned over the following 20 years. Moreover, because of the Commission position in similar cases[41], it would be justified to consider that the legitimate expectation should remain until the date of publication of the final decision.

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[38] Judgment of the Court of First Instance of 12.9.2007, T-348/03, *Koninklijke Friesland Foods v Commission*, [2007] ECR II-101.

[39] Written questions E-4431/05 and E-4772/05

[40] Amongst which the Commission decision of 30.07.2004, case N 354/2004, *Irish Holding Company Regime*, OJ C/131/2004, the Commission decision of 13.07.2006, case C4/2007 (ex. N 465/2006), *Groepsrentebox,* OJ C/131/2005.

[41] See the Commission decision of 31.10.2000, n° 2001/168/ECSC, *Spain's corporation tax laws*, OJ L 60, 1.3.2001, p. 57.

B. *COMMENTS FROM THE TWO PARTIES*

(64) According to the Two parties, Article 12(5) TRLIS would constitute State aid. They contest that legitimate expectations are present in the case at hand. Therefore they request the Commission to order recovery of any unlawful aid granted.

B.1 The contested measure does constitute State aid

B.1.1 The contested measure confers an economic advantage

(65) Article 12(5) TRLIS would be exceptional in nature due to the fact that the Spanish tax system, with the exception of this provision, would not permit any amortization of financial goodwill but only write downs in the event of an impairment test. Amortization of shareholdings regardless of whether an impairment has actually occurred would not be permitted by the Spanish corporation tax rules until the introduction of Article 12(5) TRLIS. They stress that Article 12(5) TRLIS would be probably unique in Europe in the context of a cross border transactions relating to non controlling shareholdings.

(66) Under the Spanish tax system, with the exception of the contested measure, goodwill could be amortised only if there is a business combination, except under the contested measure that would allow amortisation in an exceptional case: if minority shareholding is acquired in a Target company. This would diverge from the general tax system since the depreciation is available not only in the absence of business combination but also in circumstances where the purchaser would not even acquire control of the foreign target. Article 12(5) TRLIS thus would provide a benefit to certain Spanish companies *vis a vis* both (i) other Spanish companies that operate only at national level and (b) other EU operators, which compete internationally with the Spanish beneficiaries of the contested measure.

(67) From an economic point of view, the Spanish authorities would provide not only an interest free loan, that would be drawn over a period of twenty years (interest free tax deferral), but also would effectively leave to the discretion of the borrower the date of the repayment of the interest free loan, if indeed this loan would be repaid. If the investor would not transfer at all the significant shareholding, the effect would be the same as forgiving debt by the Spanish authorities. The measure would then become a permanent tax exemption.

(68) One of the Two parties estimates that, as a result of the contested measure, Spanish acquirers, for instance in the banking sector, would be able to pay circa 7% more than they would otherwise be able to pay. However, it also recognises that offer price being a combination of various additional elements the contested measure would not be the only factor, but probably one of the most important factors determining the aggressiveness of the Spanish bidders benefitting from the contested measure. This party considers also that the contested measure would provide a definite advantage to Spanish bidders in international auctions.

B.1.2 The contested measure favours certain undertakings or production

(69) There would be a clear parallel between the case at stake and the circumstances which lead to the Court judgment of 15 July 2004[42]. Despite the arguments raised by the

[42] Judgment of the Court of Justice of 15.7.2004, case C 501/00, *Spain v. Commission*, [2004] ECR I-6717.

Spanish authorities that the contested measure in that case would not be selective due to the fact that Article 37 TRLIS would be applicable to all Spanish undertakings investing internationally, the Court concluded that the measure constituted State aid since it was limited to one category of undertakings, namely undertakings making certain international investments. The very same reasoning could be applied to Article 12(5) TRLIS. The selectivity of Article 12(5) TRLIS would therefore result from the fact that only companies acquiring shareholdings in foreign companies are eligible.

(70) In addition, only enterprises of a certain size and financial strength with multinational operations would qualify for the benefit of Article 12(5) TRLIS. Although company's balance sheet disclose assets' book values, it would be unlikely that the assets' fair market values would also be given. Therefore, in practice, only operators with controlling interests in target companies would have sufficient access to a company's records to ascertain the fair market value of the company's assets necessary to implement the contested measure. Accordingly, it would appear that the 5% threshold would favour companies performing multinational operations.

(71) Moreover, only a Spanish operator with existing business in Spain would have the Spanish tax liabilities to realise the benefit of the amortisation. Therefore, only company resident in Spain with a significant Spanish tax base could in reality benefit of this, since the potential benefit would be linked to the size of the Spanish operation and not of the acquisition. Although Article 12(5) TRLIS would be drafted to apply to all operators established in Spain, in practice, only a limited and identifiable number of companies with Spanish tax base, that make foreign acquisitions in the relevant year and which have sizable taxable income against which to set the financial goodwill deduction, would enjoy its benefit on an annual basis. As a result, the contested measure would reserve different tax treatment even for Spanish operators in the same position of making acquisitions abroad.

(72) The Two parties consider that they would not have been able to identify any objective or horizontal criteria or conditions that would justify the contested measure. To the contrary, they are of the view that the contested measure's basic intention would be to provide a benefit to certain Spanish operators. In addition, if the contested measure would be inherent to the Spanish tax system, foreign shareholdings acquired prior to that date should also qualify for relief, which is not the case since the tax relief is granted only for shareholdings acquired after 1.1.2002.

(73) As a consequence and taking into account the policy of the Commission[43], the contested measure should be considered as selective.

B.1.3 The contested measure distorts competition and affects Community trade

(74) The contested measure would be clearly discriminatory by providing to the Spanish operators a clear fiscal and monetary benefit that the non Spanish operators are not able to enjoy. In a situation of an auction or other competitive process for the acquisition of Target company, such an advantage would make a significant difference.

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[43] See Section II.1.b) ff) of the Commission report on the application of the State aid rules to contested measures relating to direct business taxation, available on http://ec.europa.eu/competition/state_aid/studies_reports/rapportaidesfiscales_en.pdf.

(75) Take-over bids would usually presuppose the payment of a premium over the share price of the target that would almost always result in financial goodwill. On various occasions, the financial press would have reported about large acquisitions by Spanish companies and the respective tax benefits accruing from the Spanish tax rules relating to the amortization of financial goodwill. For one of those acquisitions by an investment bank, the tax benefit of Article 12(5) TRLIS would have been estimated to be at €1.7 billion, or 6.5% of the offer price. Another report indicated that the Spanish acquirer would have been able to bid about 15% more than non Spanish competitors.

(76) The contested measure would also seem to favour certain export activities (export aid for foreign share acquisitions) of Spanish companies, something that is contrary to established Commission policy[44] in this area.

B.1.4 The contested measure impacts State resources

(77) The contested measure would enable the beneficiaries to reduce the amount of their taxable income and thereby the amount of tax that would normally be due in a given year without this provision. It therefore provides the beneficiary with a financial advantage, the cost of which is directly borne by the Member State concerned.

V. REACTION FROM SPAIN TO THIRD PARTIES' COMMENTS

(78) The Spanish authorities note that the vast majority of third parties' comments support their point of view. Only the Two parties would support the qualification of the contested measure as State aid, whereas all the other would reach the conclusion that Article 12(5) TRLIS does not constitute State aid within the meaning of Article 87(1) EC Treaty. If this would not have been the case, more economic operators would have presented comments. In addition, the diversity as regards the activity and size of the interested third parties would demonstrate the general character of the contested measure.

(79) Regarding the derogatory nature of the contested measure, the Spanish authorities reject this qualification by recalling the common feature of goodwill and financial goodwill amortization according to the Spanish accounting rules[45]. In addition, the deduction of the goodwill amortization would constitute the general rule of the Spanish corporate tax system in accordance with the provisions laid down in Article 11(4) and 89(3) TRLIS. Article 12(5) TRLIS would follow the same logic. Article 12(3) TRLIS would have been incorrectly presented as a general rule of amortization of financial goodwill since this article would refer to the deduction of shareholdings in non listed entities. This provision would be related with the decrease of the theoretical accounting value, not with financial goodwill. Article 12(3) and 12(5) TRLIS would be two complementary general rules: the first would refer to the deductibility of losses generated, whereas the second would refer to the amortization of the financial goodwill. Finally, the fact that no other Member State would have a similar contested measure would be irrelevant since tax system is not harmonized within the European Union.

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[44] See Commission Decision of 17.05.1982, 82/364/EEC, *subsidizing of interest rates on credits for France to Greece after the accession of that country to the EEC*, OJ L 159, 10.6.1982, p. 44, in particular part IV, which refers to Court cases 6/69 and 11/69, *Commission v. France*.

[45] Refering to the Instituto de Contabilidad y Auditoria de Cuentas' resolution of November 1996, nº 3, BOICAC 27.

(80) Regarding the selective character of the contested measure, the parallelism established with the Court judgement of 15 July 2004[46] would be incorrect since in that case the Commission would have clearly defined the profile of the beneficiary, whereas in the present case this could not be done. Indeed, Article 12(5) TRLIS would not require any link between the shareholding acquisition and the export of goods and services. Therefore the effect of the contested measure would not be to increase the export of Spanish goods or services. The fact that this non selective measure would not be available for domestic operations would not affect its general nature. Indeed, the final objective of the contested measure would be shared with the one of the Tax cross border directive which would be to ensure that investment decisions are based on economic and not on fiscal considerations. Therefore, given the possibility to carry out business combinations with domestic acquisitions and not with cross border acquisitions, treating differently domestic operations and cross border operations would be not only legally justified to establish the neutrality of the fiscal tax system but necessary.

(81) Regarding the alleged distortive features of the contested measure, the Spanish authorities recall that any fiscal relief reducing the operating costs of a company would increase the competitive edge of the beneficiary. But this statement would be irrelevant since the contested measure would be a general measure. The different tax rates applied across Member States, which impacts on the competitiveness of its resident companies, would not fall under State aid rules. In addition, it would not have been demonstrated that the contested measure would impact trade between Member States. Moreover, the consequence of amortizing financial goodwill would not be necessarily to increase the price offered by a bidder.

(82) Regarding the compatibility of the contested measure with the Common market, the Spanish authorities consider Article 12(5) TRLIS to be appropriate and proportionate to address a market failure by establishing a neutral tax system of domestic and cross border operations to favour the development of pan European companies.

VI. ASSESSMENT OF THE SCHEME

(83) In order to ascertain whether a measure constitutes an aid, the Commission has to assess whether the contested measure fulfils the conditions of Article 87(1) EC Treaty. This provision states that "*Save as otherwise provided in this Treaty, any aid granted by Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market*". In the light of this provision, the Commission will assess hereunder whether the contested measure constitutes State aid.

A. SELECTIVITY AND ADVANTAGE CHARACTER OF THE MEASURE

(84) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings or the production of certain goods.

(85) The Commission stated in the Commission Notice[47] that "*The main criterion in applying Article 92(1)* [now Article 87(1)] *to a tax measure is therefore that the measure provides in favour of certain undertakings in the Member State an exception to the application of*

[46] See footnote 42 here above.
[47] See footnote (21) here above

the tax system. The common system applicable should thus first be determined. It must then be examined whether the exception to the system or differentiations within that system are justified 'by the nature or general scheme' of the tax system, that is to say, whether they derive directly from the basic or guiding principles of the tax system in the Member State concerned."

(86) According to the case-law of the Court of Justice[48], "*as regards the assessment of the condition of selectivity, which is a constituent factor in the concept of State aid, it is clear from settled case-law that Article 87(1) EC requires assessment of whether, under a particular statutory scheme, a State measure is such as to 'favour certain undertakings or the production of certain goods' in comparison with other undertakings which are in a legal and factual situation that is comparable in the light of the objective pursued by the measure in question*"[49].

(87) The Court has also held on numerous occasions that Article 87(1) EC Treaty does not distinguish between the causes or the objectives of State aid, but defines them in relation to their effects[50]. In particular, fiscal measures, which do not constitute an adaptation of the general system to particular characteristics of certain undertakings, but have been conceived as a means to improve their competitiveness, fall into the scope of Article 87(1) EC Treaty[51].

(88) The concept of State aid does not apply however to State measures, which differentiate between undertakings where that differentiation arises from the nature or the overall structure of the system of which they form part. As explained in the Commission Notice[52], *'some conditions may be justified by objective differences between taxpayers'.*

(89) As explained in more detail in the following section, the Commission considers that the contested measure is selective in that it only favours certain groups of undertakings carrying out certain investments abroad and that this specific character of the scheme is not justified by the nature of the scheme, whether the system of reference is defined as the rules on the tax treatment of the financial goodwill under the Spanish tax system (see points (92) to (114) here under) or as the tax treatment of goodwill deriving from an economic interest taken in a company resident in a country other than Spain (see points (115) to (119) hereunder). The Commission considers that the contested measure should be assessed in the light of the general provisions of the corporate taxation system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit (see

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[48] See, to that effect, judgement of the Court of Justice, case C-143/99, *Adria-Wien*, see footnote 25 here above, paragraph 41, judgement of the Court of Justice of 29.4.2004, case C-308/01, *GIL Insurance* [2004] ECR I-4777, paragraph 68, and judgement of the Court of Justice of 3.3.2005, case C-172/03, *Heiser* [2005] ECR I-1627, paragraph 40, judgement of the Court of Justice of 6.9.2006, case C-88/03, *Portugal v. Commission* [2006] ECR I-7115, paragraph 54.

[49] See, to that effect, judgement of the Court of Justice of 6.9.2006, case C-88/03, *Portugal v. Commission* [2006] ECR I-7115, paragraph 54

[50] See for instance judgement of the Court of Justice of 29.2.1996, case C-56/93, *Belgium v Commission* [1996] ECR I-723, paragraph 79; judgement of the Court of Justice of 26.9.1996, case C-241/94, *France v Commission*, [1996] ECR I-4551, paragraph 20; judgement of the Court of Justice of 17.6.1999, case C-75/97, *Belgium v Commission*, [1999] ECR I-3671, paragraph 25; and judgement of the Court of Justice of 13.2.2003, case C-409/00, *Spain v Commission*, [2003] ECR I-10901, paragraph 46.

[51] See for instance judgement of the Court of Justice of 15.12.2005, case C-66/02, *Italy v. Commission*, [2005] ECR I-10901, paragraph 101. See also decision of the Commission of 8 July 2009 on the Groepsrentebox scheme (C 4/2007 (ex N 465/2006), not yet published in the Official Journal, in particular points 75 and following.

[52] See footnote (21) here above.

section A.1. here under), essentially because the Commission considers that the situations in which financial goodwill can be amortised do not cover the whole category of taxpayers placed in a similar factual and legal situation.

(90) Moreover, even if an alternative reference system inspired by the one suggested by the Spanish authorities were chosen (see section A.2. here under), the Commission concludes that the contested measure would still constitute a state aid measure essentially due to the different factual and legal conditions required for the different scenarios benefiting from goodwill provisions for economic interest in company resident in a country other than Spain.

(91) Under this alternative scenario, the contested measure is too imprecise and indiscriminate by not rendering its benefit conditional upon the presence of specific, legally circumscribed situations which would justify a differentiated fiscal treatment. As a consequence of this, the benefit of the contested measure is extended to situations which have not been sufficiently demonstrated to be differentiated in order to justify a selective derogation to general goodwill rules. Hence, the Commission considers that, the contested measure concerns the tax deduction of specific types of costs and covers a broad category of transactions in a discriminatory manner, which cannot be justified by objective differences between taxpayers, thereby leading to a distortion of competition[53].

A.1. Tax treatment of the financial goodwill under the Spanish tax system linked to Intra-EU acquisitions

A.1.1. System of reference

(92) In the Opening decision, the Commission considered that the adequate system of reference is the Spanish corporate tax system, and more precisely the rules on the tax treatment of the financial goodwill contained in the Spanish tax system. This approach is in line with earlier practice of the Commission and with the case-law of the European Courts, which consider the ordinary corporate tax system as the system of reference[54]. Comments provided by the Spanish authorities underline that the constraints to cross border business combinations would place taxpayers buying shareholdings in domestic companies in a different legal and factual situation than the ones buying shareholdings in foreign companies. The reason for this situation would be the existence of barriers that, following shareholdings acquisitions, would not allow Spanish investors to carry out cross border combinations, whereas this would be easily done in a national context.

(93) First, as regards the existence of these alleged barriers, it should be underlined that the Spanish authorities and the Thirty Parties did not provide detailed information on the existence of such barriers and limited themselves, even in their latest submissions, to general and unsubstantiated allegations, highlighting general features such differences arising from the non implementation of the Company law cross border directive, differences concerning minority shareholders rights, creditors rights, labour law, national brand, and general political or commercial considerations. If unsubstantiated elements of such general nature could be taken into account for determining the scope of article 87 EC Treaty, the notion of aid would risk becoming largely arbitrary. Moreover, these subjective statements have no grounds and are not substantiated In addition, the

[53] See in this sense, decision of the Commission of 8 July 2009 on the Groepsrentebox scheme (C 4/2007(ex N 465/2006), not yet published in the Official Journal, in particular points 83 and following.

[54] See, *inter alia*, judgement of the Court of First Instance of 1.7.2004, case T-308/00, *Salzgitter v. Commission*, [2004] ECR II-1933, par. 82.

Spanish authorities also cited the Report of the Commission on the implementation of the Directive on Takeover Bids[55] but did not show the relation between the barriers to take overs and the alleged barriers to cross border business combinations.

(94) Second, as regards the nature of these alleged barriers, the Spanish authorities and the Thirty Parties did not explicitly identify fiscal barriers within the Common market. Since 1 January 1992, date by which Tax cross border directive had to be implemented by Member States, fiscal barriers to cross border business combinations have been removed. The fiscal treatment of business combinations, whether taking place in the context of national or cross border operations, is therefore considered to be harmonised. As regards, non fiscal barriers and in particular company law barriers imputable to the State of residence of the target country, the Commission considers that as from 8 October 2004, date on which Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees[56] together with the Council Regulation (EC) No 2157/2001[57] establishing a Statute for a European company (SE) or, at the latest, from the transposition date[58] of the Company law cross border directive, obstacles to business combinations had been abolished within the Common market. Therefore the company law treatment of business combination is, at least as from 15 December 2007, similar for domestic and cross border operations. The preamble of the Spanish Law 3/2009 of 3 April 2009[59] on structural modifications of companies (*Ley 3/2009, de 3 de abril, modificaciones estructurales de las sociedades mercantiles*) transposing the Company Law Directive, confirms this analysis when stating that "[…] *the Spanish practice already knew cross border mergers between companies submitted to different laws of different Member States* […]". The Commission has not been made aware by the Spanish authorities or the Thirty Parties of any other substantiated barrier, which could justify a differentiated legal treatment such as the one foreseen by the contested measure. Although a list of areas of concerns[60] related to constraints of cross border business combinations were provided by the Spanish authorities on 16 June 2009, this document does not contain substantiated information and factual elements of such relevance to justify the discriminatory features of the contested measure.

(95) Third, the Commission observes that, in line with the case law of the Court of Justice[61], in the event Member States would not treat cross border business combinations in similar terms as domestic business combination, such a situation may constitute an infringement to obligations deriving from the EC Treaty. Indeed, when a national law establishes a difference in treatment between companies according to the internal or cross-border nature of the merger, this is likely to deter the exercise of freedom of establishment laid down by the Treaty. More precisely, "*such a difference in treatment constitutes a restriction within the meaning of Articles 43 and 48 EC, which is contrary to the right of establishment and can be permitted only if it pursues a legitimate objective compatible with the treaty and is justified by imperative reasons in the public*

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[55] See document SEC(2007) 268 of 21/02/2007

[56] OJ L 294, 10.11.2001, p. 22, which entered into force on 10 November 2001.

[57] OJ L 294, 10.11.2001 p. 1 which entered into force on 8 October 2004.

[58] 15 December 2007, as foreseen by Article 19 of the Company Law Directive.

[59] Available on http://noticias.juridicas.com/base_datos/Vacatio/l3-2009.html.

[60] non application of the Company law cross border directive, minority shareholders rights, creditors rights, labour law, national brand, local partner, local regulation, economical synergy, political, strategic and commercial considerations.

[61] Judgment of the Court of Justice of 13.12.2005, case C-411/03, *SEVIC Systems*, ECR I-10805, points 23-31.

interest"[62]. Moreover, it shall be reminded that the discretion conferred to the Commission for the application of Article 87(3) EC Treaty, does not allow it to authorise aid measures contradicting provisions of Community law other than those relating to the application of Article 87(1) EC[63].

(96) In the light of the above, the Commission considers that there is no ground to depart from the system of reference of the Opening decision: the appropriate reference framework for the assessment of the contested measure is constituted by the general Spanish corporate tax system, and more precisely by the rules on the tax treatment of the financial goodwill contained in this tax system.

A.1.2. Existence of derogation from that system of reference

(97) Under the Spanish tax system, the tax base is calculated from the accounting statement, to which adaptations are made by applying specific tax rules. As preliminary remarks and in subsidiary order, the Commission notes that the contested measure derogates from the Spanish accounting system. The appearance of financial goodwill can only be computed in abstract by consolidating the accounts of the Target company with the ones of the company holding the participation. However, under the Spanish accounting system, the consolidation of accounts is required in case of "control"[64] and is done both for domestic and foreign associations of companies, in order to provide the global situation of a group of companies subject to unitary control. Such a situation is deemed[65] to take place, for instance if the majority of voting rights of the associate company is held by the mother company. Nonetheless, the contested measure does not require any such type of control and applies as from a 5% level of shareholding. Finally, the Commission also observes that, starting from 1 January 2005[66], financial goodwill can no longer be amortized anymore by any companies under accounting rules. Indeed, in this respect the Thirty Parties refer to provisions[67] not in force anymore under the current Spanish accounting system. Due to the Law 16/2007 of 4 July 2007 on the reform and adaptation of the accounting rules for its International harmonization in line with European Union legislation, as well as Royal Decree 1514/2007 of 16 November 2007 on the General Accounting Plan, from an accounting point of view, the amortization of goodwill or of the financial goodwill are not allowed anymore. These modifications of the Spanish accounting law are in line with Regulation n° 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards[68]. Therefore, given these considerations, the contested measure constitutes an exception from the ordinary accounting rules applicable in Spain.

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[62] Judgment of the Court of Justice of 13.12.2005, *SEVIC Systems*, cited above, point 23.

[63] Judgement of the Court of First Instance of 27.9.2000, case T-184/97, *BP Chemicals Ltd v. Commission*, , ECR II-3145, point 55; see also judgment of the Court of Justice of 12.11.1992, case C-134/91 and C-135/91, *Kerafina*, point 20 and judgement of the Court of Justice of 15.6.1993, case C-225/91, *Matra SA v. Commission*, point 41.

[64] In application of Article 42 of the *Codigo de Comercio de 1885*.

[65] See Article 42(1) of the *Codigo de Comercio de 1885*.

[66] Companies having issued securities admitted to trading on a regulated market of any Member State within the meaning of Article 1(13) of Council Directive 93/22/EEC, in application of Article 4 of the mentioned regulation.

[67] Article 194 of the Real Decree 1564/1989 of 22 December 1989 of Ley de Sociedades Anónimas.

[68] OJ L 243, 11.09.2002, p. 1.

(98) This being said, because of the fiscal nature of the contested measure, the existence of a derogation has to be assessed in comparison to the fiscal system of reference, and not on a pure accounting basis. In this context, the Commission notes that the Spanish tax system has never made possible the amortization of the financial goodwill, except under the Article 12(5) TRLIS. In particular no such amortisation is possible for domestic transactions. This is highlighted by the following elements:

(99) For Spanish tax purposes, goodwill can only be separately booked following a business combination[69], which materialises either in case of acquisition or contribution of the assets composing an independent business, or following a legal business combination. In such cases, the goodwill arises as the accounting difference between the acquisition cost and the market value of the assets composing the business acquired or held by the combined company. When the acquisition of a business of a company is made by way of the acquisition of its shares, as it is the case for the contested measure, goodwill can only arise if the acquiring company combines subsequently with the acquired company, of which it shall thus have control.

(100) However, under the contested measure, control is not necessary, nor is the combination between the two businesses. The mere acquisition of a shareholding of at least 5% of a foreign company is sufficient. Thus, by allowing the financial goodwill, which is the goodwill that would have been booked if the businesses would have combined, to arise separately even in the absence of a business combination, the contested measure constitutes an exception to the system of reference.. It should be stressed that the derogation does not result from the duration of the period during which the financial goodwill is amortized as compared to the period applying for amortising traditional goodwill[70], but rather on the different treatment of domestic and cross border transactions. The contested measure cannot be considered a new general accounting rule in its own right because the amortisation of financial goodwill deriving from the acquisition of domestic shareholdings is not allowed. Given all the above considerations, the Commission concludes that the contested measure constitutes a derogation from the system of reference. As demonstrated further in paragraphs (128) to (138), the Commission considers that neither the Spanish authorities nor the Thirty parties have advanced any argumentation which would be sufficiently articulate to alter this conclusion.

A.1.3. Existence of an advantage

(101) Article 12(5) TRLIS allows to deduct from the tax base part of the financial goodwill deriving from the acquisition of shareholdings in foreign company in derogation to the system of reference. Therefore, by reducing the tax burden of the beneficiary, Article 12(5) TRLIS provides them an economic advantage. It takes the form of a tax reduction, to which the companies concerned would otherwise be subject to. This reduction is proportionate to the difference between the acquisition price paid and the market value of the underlying booked assets of the shareholdings purchased.

(102) The precise amount of the advantage with respect to the acquisition price paid corresponds to the net discounted value of the tax burden reduction provided by the deductible amortization during the whole amortization period following the acquisition.

[69] In application of Article 89(3) TRLIS

[70] In application of Article 11(4) TRLIS

It is therefore contingent on the company tax rate in the years concerned and on the discount interest rate applicable.

(103) In the event that the acquired shareholdings are resold, part of this advantage is indeed recaptured by means of capital gain taxation. Indeed, by allowing amortisation of financial goodwill, if the foreign shareholding in question is resold, the amount deducted would lead to an increase of the capital gain taxed at the moment of the sale. However, if such uncertain circumstance arises, the advantage does not disappear completely since the taxation at a later stage does not take into account the liquidity cost. As rightly pointed out by the Two Parties, from an economic point of view, the amount of the advantage is at least similar to the one of a free credit line allowing up to twenty annual withdrawals of a twentieth of the financial goodwill for a duration as long as the shareholdings are held on the book of the taxpayer.

(104) By means of hypothetical example, as already mentioned by the Commission in the Opening decision, a participation acquired in 2002 would yield an advantage corresponding to 20,6 % of the financial-goodwill amount, assuming a discount interest rate of 5 %[71] and considering the existing structure of company tax rates over the years until 2022 as currently set by Law No 35/2006[72]. Third parties have not contested these figures. In the event that the acquired shareholdings are resold, the advantage would correspond to the interests that would have been charged on the taxpayer for a credit line presenting the characteristics described in the previous paragraph.

(105) Finally, the Commission cannot share the views of the Spanish authorities and the Thirty parties that the final beneficiary of the contested measure would be the seller of the foreign shareholding since they would perceive a higher price. First, there is no mechanism guaranteeing that the advantage is passed on in full to the seller. Second, the acquisition price results from a series of different elements, not just from the contested measure. Third, in the hypothetical situation that an economic advantage would be transferred to the seller, the contested measure results in the acquirer increasing its acquisition price which is of upmost importance in case of competitive acquisition operation.

(106) Therefore, the Commission concludes that, in any event, the contested measure provides an advantage at the moment of the acquisition of foreign shareholdings.

A.1.4. Justification of the measure by the logic of the Spanish tax system

(107) The Commission considers that, under the settled case law of the Court[73], the measures introducing a differentiation between undertakings when that differentiation arises from the nature and overall structure of the system of charges of which they form part do not constitute State aid. This justification based on the nature or overall structure of the tax

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[71] As stated in TRLIS modified by the Law 35/2006, the standard corporate tax rate used for the calculation has been 35% from 2002 to 2006, 32,5% in 2007, 30% onward.

[72] Disposición adicional octava, Ley 35/2006, de 28 noviembre, del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no Residentes y sobre el Patrimonio, B.O.E. Nº 285, 29/11/2006

[73] See case C-88/03, *Portugal v. Commission*, paragraph 81 see footnote 49 here above, See judgement of the Court of First Instance of 9.9.2009, case T-227/01, *Territorio foral de Alava and others*, not yet published, paragraph 179 and judgement of the Court of First instance of 9.9.2009, case T-230/01, *Territorio foral de Alava and others*, not yet published, paragraph 190.

system reflects the consistency of a specific tax measure with the internal logic of the tax system in general.

(108) In this regard, the Commission considers, firstly, that the Spanish authorities have not demonstrated that the effect of the contested measure would be to eliminate double taxation. The scheme in fact does not provide any condition to prove that the seller has been effectively taxed on the gain derived from the transfer of the shareholding, even though such a condition is imposed for amortizing the goodwill arising from a business combination[74]. It should be underlined that although the Spanish authorities claim not to be competent to exercise control on a foreign seller realising operations abroad, the Commission notes that such condition is required for the application of other Spanish tax provisions[75] but not for the contested measure.

(109) Secondly, the contested measure does not either constitute a mechanism to avoid double taxation of future dividends that would be taxed upon realisation of future profits and should not be taxed twice when distributed to the company holding a significant shareholding for the acquisition of which financial goodwill was paid. Indeed the contested measure creates no relation between the dividends perceived and the deduction enjoyed owing to the contested measure. To the contrary, the dividends received from a significant shareholding in a foreign company already benefit from both the exemption provided for by Article 21 TRLIS and the direct tax neutrality provided for by Article 32 TRLIS to avoid international double taxation. In this respect, the amortization of the financial goodwill results in an additional advantage with respect to the acquisition of significant shareholdings in foreign companies.

(110) Thirdly, the Spanish authorities have not demonstrated that the contested measure would be an extension of the impairment rules which presuppose that there is objective evidence of losses based on a detailed and objective calculation that is not required by the contested measure. To the contrary, Article 12(3) TRLIS permits partial write downs of domestic and foreign shareholdings which are not traded on a secondary market for impairments occurring between the beginning and the end of any tax period. The contested measure – which is, for beneficiaries, compatible with Article 12(3) TRLIS[76] - provides for further deductions beyond the decrease of the theoretical accounting value linked to impairment.

(111) Fifthly, the Commission notes that the financial goodwill deriving from the acquisition of domestic shareholdings cannot be amortized whereas the amortization of financial goodwill of foreign companies is amortized under certain conditions. A different tax treatment of the financial goodwill of foreign company over domestic ones is a differentiation made by the contested measure which is neither necessary nor proportionate in the light of the logic of the tax system. Indeed, the Commission considers that it is disproportionate for the scheme at hand to impose substantially different nominal and effective taxation on companies being in comparable situations just because some of them are involved in investment opportunities abroad.

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74 In application of Article 89(3)(a)(1) TRLIS.

75 See Article 89 TRLIS, Article 21 TRLIS, Article 22 TRLIS.

76 As explicitly stated in the second alinea of Article 12(5) stating that "The deduction of this difference (i.e. Article 12(5) TRLIS) will be compatible, if it were, with the deduction to which refers point 3 of this article."

(112) Finally, the Spanish authorities also argue that the contested measure is justified by the neutrality principle to be applied in the area of company tax[77]. Indeed, the statement of reasons of the tax company law[78] in force when the contested measure was introduced would clearly refer to this principle. In this respect, the Commission notes that the "*competitiveness principle*"[79] invoked by the Spanish authorities, which expressly refers to "*an increase of exports*" also drives this reform. In this context, it should be recalled that according to previous Commission's decisions[80], it is disproportionate to grant a different effective taxation to companies being in comparable situations just because some of them are involved in export related activities or pursue investment opportunities abroad. In addition, the Commission recalls that accordingly the Court stated that[81] "*[...]whilst the principles of equal tax treatment and equal tax burden certainly form part of the basis of the Spanish tax system, they do not require that taxpayers in different situations be accorded the same treatment. [...]* ".

(113) In the light of the above, the Commission considers that the neutrality principle cannot justify the contested measure. Indeed, as highlighted also by the Two Parties, the fact that the acquisition of 5 % minority shareholdings benefits from the contested measure demonstrates that the contested measure would include certain situations which bear no significant similarity. In this manner it could be said that, under the reference system, situations which are both factually and legally different are treated in an identical manner. The Commission considers therefore that the neutrality principle cannot be invoked to justify the contested measure.

(114) Given the above considerations, the Commission concludes that the selective advantage character of the tax scheme in review is not justified by the nature of the tax system. Therefore, the contested measure is to be considered as including a discriminating element, in the form of a limitation regarding the country in which the transaction benefiting from a tax advantage is to take place[82], discrimination which is not justified by the logic of the Spanish tax system.

A.2. Complementary reasoning: Analysis of the contested measure under a reference system consisting of the treatment of goodwill in transactions with third countries

(115) The Spanish authorities have explained that the objective of the contested measure is to avoid a difference of tax treatment between, on the one hand, an acquisition followed by an outright business combination and, on the other hand, a share acquisition without business combination. On this basis, the scope of the contested scheme would be limited to the acquisition of significant shareholdings in a company non-resident in Spain

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77 See in particular point (48) above.

78 Tax Company Law 43/1995 which was derogated by Real legislative decree 4/2004.

79 Defined by the Spanish authorities in the statement of reasons of the Law 43/1995, as "The competitiveness principle looks for the corporate tax system to support and be consistent with the economical policy initiative in the field of competitiveness. […], and the incentive for the internationalisation of the company as long as this leads to <u>an increase of the export</u> derive from this principle."

80 See, inter alia, Commission Decision 22.3.2006 on direct tax incentives in favour of export related investments OJ C 302, 14.12.07, p.3, par. 51.

81 See paragraph 127 of the judgement mentioned in footnote 42 above.

82 See in this sense, decision of the Commission of 8 July 2009, case C-2/2007, *Groepsrentebox*(, not yet published in the Official Journal, in particular point 107.

because some obstacles would make it more difficult to perform a cross-border business combination as compared to a local one[83]. As a consequence of the existence of these barriers, Spanish taxpayers investing abroad would be placed, legally and factually, in a different situation than the ones investing domestically. Indeed, the Spanish authorities state that[84]: "*In summary, the mere differential treatment of tax measures does not lead necessarily to the qualification of the measure as State aid, since this situation can be due to measures which are necessary for the efficiency of the tax system as described in the Notice. Therefore, the fact that the tax system treats differently situations objectively different, as it is the case for acquisitions of shareholding in non resident company or in domestic company (impossibility to realize business combination, risk management, …) aimed at achieving tax neutrality as imposed by the proper Spanish tax system and the Community Law, as well as ensuring a consistent and efficient logic of the Spanish tax system.*"

(116) Providing a specific fiscal treatment for cross border shareholding acquisitions would, according to these authorities, be necessary to ensure the neutrality of the Spanish tax system, and avoid domestic shareholding acquisitions to be treated more favourably. Therefore, the Spanish authorities' and Thirty parties' consider that the correct reference framework for the assessment of the contested measure would be the tax treatment of the goodwill for foreign acquisitions.

(117) Although the Commission considers that the Spanish authorities and the Thirty Parties have, in the context of the present procedure, provided insufficient elements justifying a differentiated tax treatment of Spanish shareholding transactions and transactions between companies established within the European Union (as described in section A.1.1. above), the Commission cannot completely exclude *a priori* such a differentiation as regards transactions concerning third countries. Indeed, outside the EU, legal barriers to cross border business combinations may persist, which would place cross border transactions in a different legal and factual situation from transactions within the EU. As a result, extra-EU acquisitions which should have led to the possibility of goodwill amortization - this is the case for transactions including a majority shareholding - may be prevented from this fiscal opportunity out of their inability to make a business combination. Amortization of financial goodwill for these transactions, which are in a different legal and factual situation from intra-EU transactions, may be deemed necessary to ensure tax neutrality.

(118) As the contested measure now stands, it allows the financial goodwill to arise separately and be amortized also in cases where the beneficiary acquires a minority 5% shareholding and therefore the contested measure could constitute an exception from the system of reference, even if it were defined as in (117) above.

(119) In this context, the Commission maintains the procedure, as initiated by the Opening decision of 10 October 2007, open for Extra-EU acquisitions in light of new elements which the Spanish authorities have committed to provide as regards the obstacles to cross border mergers outside the EU. The procedure as opened on 10 October 2007 is therefore still ongoing for Extra-EU acquisitions.

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[83] See the Spanish authorities email dated 16 June 2009 mentioned in point (13) here above.

[84] See in particular the Spanish authorities letter dated 22 April 2009 (A-9531), page 6 mentioned in point (9) here above.

B. PRESENCE OF STATE RESOURCES

(120) The measure implies the use of State resources by foregoing tax revenues for the amount corresponding to the reduced tax liability of the companies taxable in Spain acquiring a significant shareholding in foreign companies, for a period of minimum 20 years following the acquisition.

(121) The foregoing of tax revenues mitigates the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect. Likewise, a measure allowing certain undertakings to benefit of a tax reduction or to postpone payment of tax normally due amounts to State aid. From a budget point of view and in line with the Court's case law[85] and the Commission Notice[86], the contested measure leads to a loss of tax revenue for the State, resulting from the reduction in the tax base, which is equivalent to consumption of State resources.

(122) For these reasons, the Commission considers that the contested measure involves State resources being used.

C. DISTORTION OF COMPETITION AND TRADE BETWEEN MEMBER STATES

(123) According to the Court's case law[87], " [...] *for the purpose of categorising a national measure as prohibited State aid, it is necessary, not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by that aid. [...] In addition, it not necessary that the beneficiary undertaking itself be involved in intra-Community trade. Aid granted by a Member State to an undertaking may help to maintain or increase domestic activity, with the result that undertakings established in other Member States have less chance of penetrating the market of the Member State concerned.* " Moreover, under settled case law of the Court[88], for a measure to distort competition it is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. The Commission considers that the conditions set out in the case law are fulfilled for the following reasons.

(124) First, the contested measure provides an advantage in terms of financing and therefore, it strengthens the position of the economic unit that can be formed by the beneficiary and the Target company. In that regard and in line with the Court's case law[89], the mere fact of owning controlling shareholdings in a participated company and exercising that control by involving itself directly or indirectly in the management thereof, must be

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85 See judgement of the Court of Justice of 10.1.2006, case C-222/04, *Cassa di Risparmio di Firenze and others* [2006] ERC, I-289.

86 See footnote (21) here above. In particular, see point 9 and 10 of the Commission Notice.

87 See footnote 42 points 139 – 143.

88 Judgement of the Court of First Instance, case T-214/95, *Vlaams Gewest v. Commission*, [1998] ECR II-717.

89 See the judgement of the Court in case C 222/04 already cited in footnote 85 above.

regarded as taking part in the economic activity carried on by the controlled undertaking.

(125) Second, the contested measure is liable to distort competition, most prominently amongst European competitors, by providing a tax reduction to Spanish companies engaged in acquisition of a significant shareholding in Target companies. This analysis is confirmed by the fact that several companies have complained and / or intervened after the Opening decision to state that the contested measure provided a significant advantage fuelling the merger appetite of Spanish companies, in particular in the context of auction processes. These interventions confirm at least that a series of non Spanish companies consider that their position on the market is affected by the contested measure, irrespective of the correctness of their detailed submissions as regards the existence of aid.

(126) Therefore the Commission concludes that the contested measure is liable to affect trade between Member States and distort competition, most prominently in the internal market, by potentially improving the operating conditions of the beneficiaries being directly engaged in economic activities, which are liable to pay tax in Spain.

D. COMMISSION REACTION TO THE COMMENTS RECEIVED

(127) Before concluding on the qualification of the measure, the Commission considers it appropriate to analyse in more detail certain arguments raised by the Spanish authorities and by third parties, which have not yet been explicitly or implicitly addressed in paragraphs concerning the assessment of the scheme (points (83) and following).

D.1. Reaction to the data extracted from the 2006 tax returns and to the comments about Court judgement C-501/00

(128) As regards the data extracted by the Spanish authorities from the 2006 tax returns in order to demonstrate the absence of selectivity of the contested measure[90], the Commission underlines the general lack of precision of the information submitted. First, the data presents the distribution of beneficiaries per classes (class of activity, class of turnover), but does not indicate whether the beneficiaries concerned represent a small or important part of each of the classes concerned. Secondly, although statistics based on the importance of the turnover of the beneficiaries could be an interesting indicator in order to demonstrate that the contested measure applies to all companies in Spain, it must be underlined that the contested measure is related to the acquisitions of shareholdings. Such an investment does not necessarily generate significant turnover, implying that holding companies for instance may be included as SMEs under the data concerned. Therefore, for the data to be considered as relevant, it would be necessary to take into account additional indicators, such as the total balance sheet figures, as well as whether the beneficiaries can tax consolidate their tax base with other Spanish taxpayers. Thirdly, the data also appear unrepresentative because they contain no indication on the level of shareholdings acquired (control or only minority shareholdings) by the beneficiaries. Finally, the data received do not provide any indication allowing to determine whether the conditions of the 2003 SME

[90] See point (12) above.

Recommendation of the Commission[91] are fulfilled. Therefore the Commission considers that its demonstration that the contested aid measure is selective due to the sole characteristics of the legislation at stake is not undermined by the partial and unrepresentative data provided by the Spanish authorities.

(129) Nonetheless, even if the arguments presented by the Spanish authorities had been complemented by additional evidence, this would not remove the selective feature of the contested measure as only certain undertakings do benefit from the measure also in the meaning of the Court judgment in case C-501/00 *Spain v Commission*[92]. Indeed, as regards the qualification of the measure as general measure[93] by the Spanish authorities for being opened to any undertakings resident in Spain, it is worth recalling this judgment of the Court. That case also concerned an exception to the Spanish company tax, more particularly a measure entitled "Deduction for export activities". The Spanish authorities contended before the Court that the scheme was open to any undertaking tax resident in Spain. However, the Court considered that the tax deduction could "*benefit only one category of undertaking, namely undertakings which have export activities and make certain investments referred to by the contested measure*"[94]. The Commission considers that also in the present case, the contested measure aims at favouring the export of capital out of Spain, in order to strengthen the position of Spanish companies abroad, thereby improving the competitiveness of the beneficiaries of the scheme.

(130) In this respect it is noteworthy that according to the Court of Justice, "*in order to justify the contested measures with respect to the nature or the structure of the tax system of which those measures form part, it is not sufficient to state that they are intended to promote international trade. It is true that such a purpose is an economic objective but it has not been shown that that purpose corresponds to the overall logic of the tax system. [...] The fact that the contested measures pursue a commercial or industry policy objective, such as the promotion of international trade by supporting foreign investment, is thus not sufficient to take them outside the classification of 'aid' within the meaning of Article 4(c) CS.* "[95]. In the present case, the Spanish authorities have simply declared that the contested measure intends to promote international trade and the consolidation of companies, without proving that such a measure is justified by the logic of the system. In the light of the above, the Commission confirms its analysis that the contested measure is selective.

D.2. Reaction to the comments on Commission practice

(131) As regards the reference made to alleged innovative interpretation of the notion of selectivity in the present case, it should first be underlined that this approach is fully in line with the Commission's decision making practice and the case law of the Court as described in point (92). The approach in this particular case does not either depart from the Commission decision N 480/2007[96] to which the Spanish authorities refer. Indeed, this decision took into account the specific nature of the objective pursued by referring[97] to the Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee - Towards a more effective use of

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[91] OJ L 124 of 20.5.2003, p. 36.
[92] See footnote 42 above.
[93] See in particular points (31) and (44) above.
[94] See in particular paragraph 120 of the judgment.
[95] See footnote 42 above, paragraph 124.
[96] See footnote 24 and point (44) above
[97] See Commission decision of 14.02.2008, case N 480/07 already cited in footnote 24 above.

tax incentives in favour of R&D[98]. In the case at hand, the objective pursued by the contested measure does not follow such a similar objective. Moreover, unlike the present case, the Spanish measure at stake in this precedent decision did not make any distinction between national and international transactions.

(132) Finally, as regards the derogation to the corporate tax system resulting from the implementation of directives[99], such as the Parents-subsidiary directive or the Cross-border Interest and Royalty payments directive, the Commission considers that the situation resulting from the implementation of these directives is fully consistent with the reasoning developed in the present decision. Indeed, resulting from the harmonisation within the European Union, cross border operations within the European Union and within each Member States should be considered to be in a comparable legal and factual situation. In addition, the Commission would like to underline that the Court of First Instance stated that[100]: "*as Community law stands at present, direct taxation falls within the competence of the Member States, although it is settled case-law that they must exercise that competence consistently with Community law (see, in particular, Case C-391/97 Gschwind [1999] ECR I-5451, paragraph 20) and therefore avoid taking, in that context, any measures capable of constituting State aid incompatible with the common market.*"

D.3. Reaction to the comments on Article 58(1)(a) EC Treaty

(133) Firstly, as already pointed out before, it must be borne in mind that, although direct taxation falls within competence of Member States, they must none the less exercise that competence consistently with Community law[101], including the provisions of the Treaty on State aid. In other words, Article 58(1)(a) EC Treaty should be interpreted in a manner compatible with the Treaty rules on State aid including those granting control competencies to the Commission in that area.

(134) Moreover, Article 58 of the EC Treaty, as invoked by the Spanish authorities, must be read together with Article 56 of the EC Treaty, which prohibits restrictions on the movement of capital between Member States. In fact, Article 58(1) of the EC Treaty provides that "*the provisions of Article 56 shall be without prejudice to the right of Member States: (a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested*".

(135) The possibility granted to the Member States by Article 58(1)(a) of the Treaty, of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested, has already been upheld by the Court. According to that case-law before the entry into force of Article 58(1)(a) of the Treaty, national tax provisions which established certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were

98 SEC (2006) 1515, COM/2006/0728 final, section 1.2.

99 See point (47) above.

100 See paragraph 123 of the judgment of the Court of Justice in case C-501/00, cited in footnote 42.

101 See judgment of the Court of Justice of 11.8.1995, case C-80/94, *Wielockx* [1995] ECR I-2493, paragraph 16; judgment of the Court of Justice of 11.12.1997, case C-264/96, *ICI* v *Colmer (HMIT)* [1998] ECR I-4695, paragraph 19; and judgment of the Court of Justice of 29.4.1999, case C-311/97, *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19

not objectively comparable[102] or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system[103]. In any case, objectives of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty[104].

(136) Also as regards the period after the entry into force of Article 58(1)(a) EC Treaty, the Court has inquired into the possible presence of objectively comparable situations, which could justify a legislation restricting the free movement of capital. With reference to certain tax legislations, which had the effect of deterring taxpayers living in a Member State from investing their capital in companies established in another Member State and which also produced a restrictive effect in relation to companies established in other Member States, in that they constituted an obstacle to their raising capital in the Member State concerned, the Court constantly held that such legislations could not be justified by an objective difference in situation of such a kind as to justify a difference in tax treatment, in accordance with Article 58(1)(a) EC Treaty[105].

(137) In any case, it must be borne in mind that Article 58(3) EC Treaty states specifically that the national provisions referred to by Article 58(1)(a) are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments[106].

(138) In the light of the above, the Commission considers that in the present case domestic share acquisitions and share acquisitions of companies established in other Member State are, for the reasons highlighted above, in an objective comparable situation and that there are no overriding reasons of general interest which could justify a different treatment of taxpayers with regard to the place where their capital is invested.

E. Conclusion on the qualification of the contested measure

(139) Due to all the above considerations, the Commission considers that the contested measure, to the extent that it applies to Intra-EU acquisitions, fulfils all conditions laid down in Article 87 (1) EC and should thus be qualified as State aid.

F. Compatibility

(140) As stated in the Opening decision, the Commission considers that the aid scheme in question does not qualify for any of the derogations laid down in Article 87(2) and (3) of the Treaty.

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[102] See, in particular, judgment of the Court of Justice of 14.2.1995, case C-279/93, *Schumacker* [1995] ECR I-225

[103] See judgment of the Court of Justice of 28.1.1992, case C-204/90, *Bachmann* v *Belgian State* [1992] ECR I-249 and judgment of the Court of Justice of 28.1.1992, case C-300/90, *Commission* v *Belgium* [1992] ECR I-305

[104] See judgment of the Court of Justice of 28.4.1998, case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 39, and judgment of the Court of Justice of 28.4.1998, case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41, judgment of the Court of Justice of 6.6.2000, case C-35/98, *Verkooijen*, cited above, par. 48

[105] See judgment of the Court of Justice of 15.7.2004, case C-315/02, *Lenz* [2004] ECR I-7063; judgment of the Court of Justice of 7.9.2004, case C-319/02, *Manninen* [2004] ECR I-7477

[106] See judgment of the Court of Justice of 6.6.2000, case C-35/98, *Verkooijen* [2000] ECR I-4071, par. 44.

(141) In the course of the procedure, the Spanish authorities and the Thirty Parties presented their arguments to indicate that the derogations provided for in Article 87(3)(c) of the EC Treaty would apply in the present case[107]. The Two Parties considered that none of the provisions of Article 87(2) or Article 87(3) of the EC Treaty apply in the present case.

(142) The derogations in Article 87(2) EC, concerning aid of a social character granted to individual consumers, aid to make good the damage caused by natural disasters or exceptional occurrences and aid granted to certain areas of the Federal Republic of Germany, do not apply in this case.

(143) Nor does the derogation provided for in Article 87(3)(a) apply, which authorises aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment because the measure is not conditional on realising any type of activity in specific regions[108].

(144) In the same way, the contested measure adopted in 2001, cannot be regarded as promoting the execution of a project of common European interest or remedying a serious disturbance in the economy of Spain, as provided for in Article 87(3)(b). Nor does it have as its object the promotion of culture and heritage conservation as provided for in Article 87(3)(d).

(145) Finally, the contested measure shall be examined in the light of Article 87(3)(c), which provides for the authorisation of aid to facilitate the development of certain economic activities or of certain economic areas, where such an aid does not adversely affect trading conditions to an extent that is contrary to the common interest. In this respect, it should first be noted that the contested measure does not fall under any of the frameworks or guidelines, which define the conditions to consider certain types of aid compatible with the common market.

(146) As regards the arguments raised by the Spanish authorities and by the Thirty Parties based on the State Aid Action Plan of 2005[109], where they consider that certain measures can be compatible if they essentially respond to a market failure, the Commission observes that alleged general difficulties in carrying out cross-border mergers cannot be considered as a market failure.

(147) The fact that a specific company may not be capable of undertaking a certain project or transaction without aid does not necessarily mean that there is a market failure. Only where market forces would not in themselves be able to reach an efficient outcome - i.e. where not all potential gains from trade are realised - can a market failure be considered to exist.

(148) The Commission does not dispute that the costs involved in some transactions may well be higher than those involved in other transactions. However, to the extent that these costs are real costs accurately reflecting the nature of the projects being considered - e.g.

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[107] See point (56) and following.

[108] See, inter alia, for precedent Commission's practice Commission Decision of 13.5.2003, 2004/76/EC,*aid scheme implemented by France for headquarters and logistic centres*, , OJ L 23, 28.1.2004, p. 1 par 73; see also, for a similar reasoning, Commission decision of 17.2.2003, 2003/515/EC, *State aid implemented by Netherlands for international financing activities*, OJ L 180,18.7.2003, p. 52 par. 105; Commission Decision of 24.6.2003, 2004/77/EC, *aid scheme implemented by Belgium – tax ruling system for US foreign sales corporations*, OJ L 23, 28.1.2004, p. 14, par. 70.

[109] See footnote 37

costs relating to their different geographic location or the different legal environment in which they are to take place - it is efficient for the companies to fully take these costs into account when making their decisions. On the contrary, inefficient outcomes would arise if these real costs were ignored or, indeed, compensated by state aid. The same type of real cost differences also arise when comparing different transactions within the same country as well as when comparing cross border transactions, and the existence of these differences does not mean that inefficient market outcomes would arise.

(149) The examples provided by the Spanish authorities of alleged increased costs for conducting international transactions compared to national transactions are all related to real costs of conducting transitions, which should be fully taken into account by market participants in order for efficient outcomes to arise.

(150) For a market failure to be present there would notably have to be externalities (positive spillovers) being generated by the transactions or significant incomplete or asymmetric information leading to otherwise efficient transactions not being carried out. While these may be, theoretically, present in certain transactions, both international and national (e.g. in the context of joint R&D programmes), they cannot be considered inherently present in all international transactions, let alone in transactions of the type in question. In this respect, the Commission considers that the claim relating to market failures cannot be accepted.

(151) Moreover it should be remembered that when assessing whether an aid can be deemed compatible with the common market, the Commission balances the positive impact of the measure in reaching an objective of common interest against its potentially negative side effects, such as distortion of trade and competition. The State Aid Action Plan, building on existing practice, has formalized a "balancing test", which operates in three steps. The first two steps address the positive effects of the State aid and the third addresses the negative effects and resulting balancing of the positive and negative effects. The balancing test is structured as follows:

> 1) assessing if the aid is aimed at a well-defined objective of common interest (such as: growth, employment, cohesion, environment, energy security);
>
> 2) assessing if the aid is well designed to deliver the objective of common interest that is to say, if the proposed aid addresses the market failure or other objective. For assessing this, it must be verified if:
>
> a) State aid is an appropriate policy instrument;
>
> b) there is an incentive effect, namely if the aid changes the behavior of undertakings;
>
> c) the measure is proportional, namely if the same change in behavior could be obtained with less aid.
>
> 3) assessing if the distortions of competition and effect on trade are limited, so that the overall balance is positive.

(152) It is first necessary to assess whether the objective pursued by the aid is indeed one that can be regarded as being in the common interest. Notwithstanding the alleged intention to favour the Single market integration, in the present case the objective pursued by the aid is not clearly well defined as it goes beyond market integration, by promoting the expansion of Spanish companies in the European market in particular.

(153) The second step requires assessing whether the aid is properly designed to reach the well-defined objective of common interest. More precisely, state aid must change the behaviour of a beneficiary undertaking in such a way that it engages in activities that contribute to the achievement of a public-interest objective, that it would not carry out without the aid or which it would carry out in a restricted or different manner. The Spanish authorities and Thirty Parties did not present any specific argument demonstrating the likelihood that such incentive effect criterion would be fulfilled.

(154) The third question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, an aid given to a particular undertaking or economic sector may lead to serious distortions of competition and of trade between Member States. In this respect, the Thirty Parties consider that the aid scheme does not have an impact on the competitive situation of companies subject to corporate tax in Spain, since the financial effect of Article 12(5) would be negligible. However, as already indicated above in paragraphs (101) and following, there are serious indications that, the effect of Article 12(5) is far from negligible. Moreover, since the aid scheme is applicable only to foreign transactions, it clearly has the effect of focusing the distortions of competition on foreign markets.

(155) The last step in the compatibility analysis is to evaluate whether the positive effects of the aid, if any, outweigh its negative effects. As indicated above, in the present case, the Spanish authorities and Thirty parties did not demonstrate the existence of a well defined objective leading to clear positive effects. They consider, in general terms, that Article 12(5) TRLIS fulfils the Community objective of promoting cross-border transactions, without entering into the evaluation of the potential and actual negative effects of the contested measure. In any case, even considering that the positive effect of the measure would be the promotion of cross-border transactions by means of the elimination of barriers in such transactions, the Commission considers that the positive effects of the measure do not outweigh its negative effects, in particular because the measure's scope is imprecise and indiscriminate.

(156) In conclusion, the Commission considers that, as regards in particular the analysis under article 87(3) c), the tax advantages granted under the contested measure are not related to investment, job creation or specific projects. They simply relieve the undertakings concerned of charges normally borne by those undertakings and must therefore be considered as operating aid. As a general rule, operating aid does not fall within the scope of Article 87 (3) c) since it distorts competition in the sectors in which it is granted and is at the same time incapable, by its very nature, of achieving any of the objectives laid down in that provision[110]. In line with the standard practice of the Commission, such aid cannot not be considered compatible with the common market, as it does neither facilitate the development of any activities or economic areas nor it is limited in time, digressive or proportionate to what is necessary to remedy to a specific economic handicap of the areas concerned. The result of the "balancing test" confirms this analysis.

(157) In the light of the above, it must be concluded that the aid scheme in review, to the extent that it applies to Intra-EU acquisitions, is incompatible with the common market.

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[110] See judgement of the Court of First instance of 4.9. 2009, case T-211/05, *Italy v. Commission*, not published yet, par. 173; see also judgement of the Court of First instance of 8.6.1995, case T-459/93, *Siemens v. Commission* [1995] ECR II-1675, par. 48.

G. RECOVERY

(158) The contested measure has been implemented without having been notified in advance to the Commission in accordance with Article 88(3) of the Treaty. Therefore, the measure, to the extent that it applies to Intra-EU acquisitions, constitutes unlawful aid.

(159) Where unlawfully granted State aid is found to be incompatible with the common market, the consequence of such a finding is that the aid should be recovered from the recipients pursuant to Article 14 of Council Regulation (EC) n. 659/1999 of 22 March 1999, laying down detailed rules for the application of Article 93 of the EC Treaty[111]. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible. No arguments raised by the Spanish authorities or by the Thirty Parties justified a general departure from this basic principle.

(160) Nevertheless, Article 14(1) of Regulation (EC) n. 659/1999 provides that "*the Commission shall not require recovery of the aid if this would be contrary to a general principle of community law*". The case-law of the Court of Justice and the Commission's own decision-making practice have established that where, as a result of the Commission's actions, legitimate expectations exist on the part of the beneficiary of a measure that the aid has been granted in accordance with Community law, then an order to recover the aid would infringe a general principle of Community law[112].

(161) In its judgement in *Forum 187*[113], the Court stated that "*the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where a Community authority has caused him to entertain expectations which are justified. However, a person may not plead infringement of the principle unless he has been given precise assurances by the administration. Similarly, if a prudent and alert economic operator could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted*".

(162) The Spanish authorities and the Thirty parties have essentially invoked the existence of legitimate expectations, based firstly, on certain Commission's replies to written parliamentary questions and, secondly, on the alleged similarity of the aid scheme with earlier measures, which have been declared compatible by the Commission. Thirdly, the Spanish authorities and the Thirty parties consider that the principle of legitimate expectations implies that the Commission can neither ask for recovery of the deductions already realised , nor ask for recovery of all outstanding deductions, up to the 20-year period indicated by the TRLIS.

(163) As regards the alleged similarity of the aid scheme with other measures, which have been considered not to constitute state aid, the Commission considers that the aid scheme is substantially different from the measures which have been assessed by the

[111] OJ L 83, 27.3.1999, p. 1.

[112] See, *inter alia*, Commission Decision 2003/515/EC on the State aid implemented by the Netherlands for international financing activities (OJ 2003 L 180, p. 52); Commission Decision 2004/76/EC on the aid scheme implemented by France for headquarters and logistics centres (OJ 2004 L 23, p. 1); Commission Decision 2004/77/EC no the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations (OJ L 23/2004, p. 14).

[113] Judgment of the Court of Justice of 22.6.2006, case C-182/03 and C-217/03, *Forum 187 ASBL* [2006] ECR I-5479, par. 147; see also judgment of the Court of Justice of 26.11.2005, case C-506/03, *Germany v. Commission*, unpublished, par. 58 and judgement of the Court of Justice of 11.3.1987, case C-265/85, *Van den Bergh en Jurgens BV v. Commission* [1987] ECR 1155, paragraph 44.

Commission in its decision of 1984 concerning the "Belgian coordination centres"[114]. The contested measure has a different field of application in that it does not concern intra-group activities, as in the case of the "Belgian coordination centres". Moreover, the contested measure has a different structure, which renders it selective, most notably because it only applies to transactions linked to foreign countries.

(164) As regards the impact of the Commission's declarations on legitimate expectations of the beneficiaries, the Commission considers that a distinction should be drawn between two periods: a) the period starting from the entry into force of the measure on 1.1.2002 until the date of publication of the Opening decision in the Official Journal on 21.12.2007; b) the period following the publication of the Opening decision in the Official Journal.

(165) With reference to the first period, the Commission acknowledges its answers to the parliamentary questions of Mr. Erik Mejier and Mrs. Sharon Bowles, regarding the possible nature of State aid of the contested measure. More precisely, in reply to the parliamentary question of the MEP Mr. Erik Meijer, on 19th January 2006 a Commissioner answered on behalf of the Commission as follows: "*The Commission cannot confirm whether the high bids by Spanish companies are due to Spain's tax legislation enabling undertakings to write off goodwill more quickly than their French or Italian counterparts. The Commission can confirm, however, that such national legislations do not fall within the scope of application of state aid rules, because they rather constitute general depreciation rules applicable to all undertakings in Spain*"[115]. On 17th February 2006, in reply to the parliamentary question of the MEP Mrs. Sharon Bowles, a Commissioner answered, on behalf of the Commission, as follows: "*According to the information currently in its possession, it would however appear to the Commission that the Spanish(tax) rules related to the write off of 'goodwill' are applicable to all undertakings in Spain independently from their sizes, sectors, legal forms or if they are privately or publicly owned because they constitute general depreciation rules. Therefore, they do not appear to fall within the scope of application of the state aid rules*"[116].

(166) By these declarations made to the European Parliament, the Commission has provided specific, unconditional and concordant assurances of such a nature as to give raise to justified hopes on the part of the beneficiaries under the contested measure at issue that the goodwill amortization scheme was lawful, in the sense that it did not fall within the scope of the State aid rules,[117] and that any advantages derived from it could not, therefore, be subject to subsequent recovery proceedings. Although these declarations did not amount to a formal Commission decision establishing that the amortization scheme did not constitute State aid, their effect was equivalent from the point of view of the creation of a legitimate expectation, especially in view of the fact that the applicable procedures ensuring the respect of the collegiality principle had been respected in the

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[114] Commission Decision SG(84) D/6421 of 16.5.1984

[115] Written Question E-4431/05

[116] Written Question E-4772/05

[117] See, on the principle of legitimate expectation, the judgements of the Court of Justice, *Van den Bergh en Jurgens v. Commission*, cit., par. 44; judgment of the Court of Justice, cases 182/03 and C-217/03, *Forum 187 ASBL v. Commission* [2006] ECR I-5479, paragraph 147; judgement of the Court of First Instance ,Case T-290/97, *Mehibas Dordtselaan v. Commission* [2000] ECR II15, paragraph 59.

present case. As the notion of state aid is an objective one[118] and the Commission does not have any discretionary power as regards its interpretation – contrary to a compatibility analysis - any precise and unconditional statement on behalf of the Commission to the effect that a national measure is not to be qualified as state aid will naturally be understood as confirming that the measure was "non-aid" from the outset (i.e. also before the statement in question). Any undertaking which had previously been uncertain as to whether or not it would in future be liable to recovery under the State aid rules of advantages it had obtained under the goodwill amortization scheme arising from transactions entered into before the Commission declarations could have concluded thereafter that such uncertainty was groundless, as it could not be expected to demonstrate greater diligence than the Commission in this respect. In these specific circumstances, and bearing in mind that Community law does not require the demonstration of a causal link between the assurances given by a Community institution and the behaviour by citizens or undertakings to which such assurances relate,[119] any diligent businessperson could reasonably expect the Commission not to subsequently impose any recovery[120] as regards measures which it had itself previously qualified, in a declaration to another Community institution, as not constituting aid, irrespective of when the transaction benefiting from the aid measure was entered into.

(167) Accordingly, the Commission concludes that beneficiaries of the contested measure had a legitimate expectation that the aid would not be recovered and hence is not requiring recovery for fiscal aid granted to those beneficiaries in the context of any shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company before the date of the publication[121] in the Official Journal of the European Union of the Commission's decision to initiate the formal investigation procedure under Article 88(2) of the Treaty that could have then benefited from the contested measure. Indeed, from the date of the opening of the formal investigation and in line with its practice[122], the Commission considers that any diligent business man should have taken into account the doubts it expressed as regards the compatibility of the contested measure.

(168) The Commission also considers that those beneficiaries should continue to enjoy the benefits of the contested measure until the end of amortisation period that it provides. The Commission acknowledges that the operations were planned and investments were made in the reasonable and legitimate expectation of a certain degree of continuity in the economic conditions, including the contested measure. Therefore, in line with the

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118 Judgment of the Court of 22 December 2008, British Aggregates/Commission, C-487/06 P, points 111-114 and 185-186; Judgement of the Court of First Instance of 17.10.2002, case T-98/00, Linde v. Commission, par. 33.

119 That is, it is not necessary to demonstrate that the citizen or undertaking engaged in subsequent actions which it might not otherwise have done, in reliance on the assurance in question.

120 See, by analogy Commission decision of 17 February 2003 on the Belgian Coordination centres (2003/757/EC) and Decision of the Commission of 20 December 2006, GIE Fiscaux (C46/2004).

121 OJ C 311, 21.12.2007, p. 21.

122 See, *inter alia*, Commission Decision of 7 February 2007 concerning the exemption from excise duty on mineral oils used as fuel for alumina production in Gardanne, in the Shannon region and in Sardinia implemented by France, Ireland and Italy (OJ L 190/13, 8.6.2007, p. 55) and Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium – Tax ruling system for United States foreign sales corporations (OJ L 23/14, 28.1.2004, p. 79.

precedent case-law of the Court of Justice and the Commission's practice[123], in the absence of an overriding public interest[124], the Commission considers that the beneficiaries should be allowed to continue enjoying the benefits of the contested measure, over the entire amortisation period provided by Article 12(5)TRLIS.

(169) Moreover, the Commission considers that a reasonable transition period should be foreseen in order to allow companies who had already acquired, in a longer term perspective, rights on foreign companies, without already holding those rights for an uninterrupted period of at least one year on the date of the publication of the Opening decision. The Commission therefore considers that companies who fulfilled all other relevant conditions of Article 12(5) TRLIS (see above point 21) by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least one year, should be considered also to benefit from legitimate expectations, if they held those rights for an uninterrupted period of at least one year at the latest on 21 December 2008.

(170) By contrast, for cases where the rights are held directly or indirectly by a Spanish acquiring company only after 21 December 2007 any incompatible aid will be recovered from its recipient except when ,firstly, an irrevocable obligation has been entered into, before 21 December 2007, by a Spanish acquiring company, to hold such rights and, secondly, the contract contains a suspensive condition linked to the fact that the operation at stake is subject to the mandatory approval of a regulatory authority and, thirdly, the operation has been notified before 21 December 2007. In fact, for the period following the publication of the Opening decision in the Official Journal, it cannot be argued that a prudent trader could not have foreseen the adoption of a Community measure likely to affect his interests like the present decision. In the light of the above, the Commission concludes that the recovery shall take place with respect to all cases not covered by paragraphs (167) and (169) of the present decision. The Commission also considers that the contested measure does not constitute aid if, at the time beneficiaries enjoyed its benefits, all the conditions laid down by a regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 which is applicable at the time the tax reduction is enjoyed are fulfilled.

(171) In the light of the above considerations, on a given year, for a given beneficiary, the precise amount of the aid corresponds to the net discounted value of the tax burden reduction provided by the amortization provided by Article 12(5) TRLIS. It is therefore contingent on the company tax rate in the years concerned and on the discount interest rate applicable.

(172) For a given year and a given beneficiary, the nominal value of the aid corresponds to the tax reduction provided by the application of Article 12(5) TRLIS for rights on foreign companies that do not fulfil the conditions described in points (167) and (169).

(173) The discounted value is calculated by applying the interest rate to the nominal value, in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

[123] See Commission Decision of 17 February 2003 on the aid scheme implemented by Belgium for coordination centres established in Belgium (OJ L 282, 30.10.2003, p. 25), and judgment of the Court of Justice of 22.6.2006, Case C- 182/03 and C-217/03, *Forum 187 ASBL* [2006] ECR, paragraph 162 and 163

[124] See the judgement in Forum 187, cited above in footnote 131, paragraph 149; see also the judgement of the Court of Justice of 14.5.1975, case 74/74, *CNTA v. Commission* [1975], ECR 533, paragraph 44.

(174) When calculating the tax burden of beneficiaries in the absence of the unlawful aid measure, the Spanish authorities must base themselves on the transactions, which were carried out in the period predating the publication of the Opening Decision in the Official Journal, as indicated above. It is not possible to argue that, had these illegal advantages not existed, the beneficiaries would have structured their transactions differently in order to reduce their tax burden. As clearly stated by the Court in the *Unicredito* judgement[125], in fact, such hypothetical considerations cannot be taken into account for the purposes of aid calculation.

VII. CONCLUSION

(175) The Commission considers that, in the light of the above-mentioned case law and of the specificities of the case, Article 12(5) TRLIS constitutes an aid scheme within the meaning of Article 87(1) EC Treaty to the extent that it applies to Intra-EU acquisitions. The Commission also finds that the contested measure having been implemented in breach of Article 88(3) EC Treaty constitutes an unlawful aid scheme to the extent that it applies to Intra-EU acquisitions. Nonetheless, given the presence of legitimate expectations until the publication date of the Opening decision, the Commission exceptionally waives recovery for any tax benefits deriving from the application of the aid scheme for aid linked to shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company before the date of the publication in the Official Journal of the European Union of the Commission's decision to initiate the formal investigation procedure under Article 88(2), except when ,firstly, an irrevocable obligation has been entered into, before 21 December 2007, by a Spanish acquiring company, to hold such rights and, secondly, the contract contains a suspensive condition linked to the fact that the operation at stake is subject to the mandatory approval of a regulatory authority the decision and, thirdly, the operation has been notified before 21 December 2007..

(176) The Commission maintains the procedure initiated on 10 October 2007 as regards Extra-EU operations open in light of new elements which the Spanish authorities have committed themselves to provide.

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme which has been implemented by the Kingdom of Spain in application of Article 12(5) of the Real Legislative Decree 4/2004 of 5 March 2004, consolidating the amendments made to the Spanish Company Tax Act, unlawfully put into effect by the Kingdom of Spain in breach of Article 88(3) of the EC Treaty is incompatible with the common market as regards aid granted to beneficiaries when realising Intra-EU acquisitions.
2. Nonetheless, tax reductions enjoyed by beneficiaries, when realising Intra-EU acquisitions, owing to Article 12(5) TRLIS 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

[125] Judgement of the Court of Justice of 15.12.2005 case C-148/04, *Unicredito Italiano Spa v. Agenzia delle Entrate* [ECR] 2005, I-11137, par. 117-119.

uninterrupted period of at least one year, can continue to be implemented over the entire amortisation period provided by the aid scheme.

3. Tax reductions enjoyed by beneficiaries, when realising Intra-EU acquisitions, owing to Article 12(5) TRLIS which are related to an irrevocable obligation entered into, before 21 December 2007, to hold such rights when the contract contains a suspensive condition linked to the fact that the operation at stake is subject to the mandatory approval of a regulatory authority and the operation has been notified before 21 December 2007, can continue to be implemented over the entire amortisation period provided by the aid scheme for the part of the rights held as of the date of the lifting of the suspensive condition.

Article 2

Tax reduction enjoyed owing to the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by a regulation adopted pursuant to Article 2 of Regulation (EC) No 994/98 which is applicable at the time the aid is granted.

Article 3

Tax reduction enjoyed owing to the scheme referred to in Article 1 which, at the time it is granted, fulfils the conditions laid down by a Regulation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other approved aid scheme is compatible with the common market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. The Kingdom of Spain shall recover the incompatible aid corresponding to tax reduction provided under the scheme referred to in Article 1(1) from the beneficiaries whose rights on foreign companies, acquired in the context of Intra-EU acquisition, does not fulfil the conditions described in Article 1(2).
2. The sums to be recovered shall bear interest from the date on which the tax base of the beneficiaries was reduced until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
4. The Kingdom of Spain shall cancel all outstanding tax reduction provided under the scheme referred to in Article 1(1) with effect from the date of adoption of this decision, except for the one attached to rights on foreign companies fulfilling the conditions described in Article 1(2).

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. The Kingdom of Spain shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1. Within two months following notification of this Decision, The Kingdom of Spain shall submit the following information:
   - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme ;
   - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary ;

(c) a detailed description of the measures already taken and planned to comply with this Decision;
(d) documents demonstrating that the beneficiaries have been ordered to repay the aid.

2. The Kingdom of Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries

Article 7

This Decision is addressed to The Kingdom of Spain.
Done at Brussels,

For the Commission

Neelie KROES
Member of the Commission

Notice

If the decision contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission
Directorate-General for Competition
State Aid Greffe
Rue de la Loi/Wetstraat, 200
B-1049 Brussels
Fax No: +32.2.296 12 42

Annex 1: List of the interested third parties having presented comments to the Opening decision that have not requested to be treated anonymously

Abertis Infraestructuras SA
Acerinox SA
Aeropuerto de Belfast SA.
Altadis SA, Fomento de Construcciones y Contratas SA
Amey UK Ltd
Applus Servicios Tecnológicos SL
Asociación Española de Banca (AEB)
Asociación Española de la Industria Eléctrica (UNESA)
Asociación de Empresas Constructoras de Ámbito Nacional (SEOPAN)
Asociación de Marcas Renombradas Españolas
Asociación Española de Asesores Fiscales
Amadeus IT Group SA
Banco Bilbao Vizcaya Argentaria (BBVA)
Banco Santander
Club de Exportadores e Inversores Españoles
Compañía de distribución integral Logista SA
Confederacion Española de Organizaciones Empresariales
Confederacion Española de la Pequeña y Mediana Empresa (CEPYME)
Ebro Puleva SA
Ferrovial Servicios SA
Hewlett-Packard Española SL
La Caixa, Iberdrola
Norvarem SA
Prosegur Compañía de Seguridad SA
Sociedad General de Aguas de Barcelona SA (Grupo AGBAR)
Telefónica SA