IV

(Acts adopted before 1 December 2009 under the EC Treaty, the EU Treaty and the Euratom Treaty)

COMMISSION DECISION

of 28 October 2009

on the tax amortisation of financial goodwill for foreign shareholding acquisitions C 45/07 (ex NN 51/07, ex CP 9/07) implemented by Spain

(notified under document C(2009) 8107)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2011/5/EC)

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 [1] pursuant to the provisions cited above and having regard to their comments,

Whereas:

I. PROCEDURE

(1) By written questions addressed to the Commission (Nos E-4431/05, E-4772/05 and E-5800/06) several MEPs indicated that Spain had enacted a special scheme allegedly providing an unfair tax incentive for Spanish companies that acquired 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, hereinafter TRLIS) [2].

(2) By written question No P-5509/06, Mr David Martin MEP complained to the Commission about the hostile takeover bid by the Spanish energy producer Iberdrola involving purchasing shares of the UK energy generator and distributor, ScottishPower. According to Mr Martin, Iberdrola had unfairly benefited from State aid in the form of a tax incentive for the acquisition. Mr Martin asked the Commission to examine 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 (hereinafter the Merger Regulation) [3]. By Decision dated 26 March 2007 (Case No COMP/M.4517 — *Iberdrola/ScottishPower*, SG-Greffe(2007) D/201696) [4], the Commission decided not to oppose the notified operation and to declare it compatible with the common market under Article 6(1)(b) of the Merger Regulation.

(3) By letters 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 as regards its possible classification 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 replied 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 constituted State aid and was incompatible with the common market. The complainant asked for his identity not to be divulged.

(6) By Decision of 10 October 2007 (hereinafter the initiating Decision), the Commission initiated the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the tax amortisation of financial goodwill provided for by Article 12(5) TRLIS, because it appeared to fulfil all the conditions for being considered State aid under Article 87(1) of the Treaty. The Commission informed Spain that it had decided to initiate the procedure laid down in Article 88(2) of the Treaty. The Decision to initiate the procedure was published in the *Official Journal of the European Union* [5], inviting interested parties to submit their comments.

[1] OJ C 311, 21.12.2007, p. 21.
[2] Published in the Spanish *Official State Gazette* of 11 March 2004.
[3] OJ L 24, 29.1.2004, p. 1.
[4] See: http://ec.europa.eu/comm/competition/mergers/cases/decisions/m4517_20070326_20310_en.pdf
[5] See footnote 1.

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

(8) Between 18 January and 16 June 2008, the Commission received comments on the initiating Decision from 32 interested parties. The interested parties that did not ask to remain anonymous are listed in the Annex to this Decision.

(9) By letters dated 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 comments to the Spanish authorities, in order to give them the opportunity to react. By letters dated 30 June 2008 (A/12911) and 22 April 2009 (A/9531), the Spanish authorities gave their reactions to the interested parties' comments.

(10) On 18 February 2008, 12 May and 8 June 2009, technical meetings took place between the Spanish authorities and Commission representatives to clarify, inter alia, certain aspects of the application of the scheme in question and the interpretation of the Spanish legislation relevant to the case.

(11) On 7 April 2008, a meeting was held between representatives of the Commission and Banco de Santander SA; on 16 April 2008 a meeting took place between Commission representatives and the law firm J & A Garrigues SL representing several interested parties; on 2 July 2008 a meeting took place between Commission representatives and Altadis SA; on 12 February 2009, a meeting took place between Commission representatives and Telefónica SA.

(12) On 14 July 2008, the Spanish authorities submitted further information regarding the measure at issue, in particular data extracted from 2006 tax returns, which provided a general overview of the taxpayers benefiting from the measure at issue.

(13) By e-mail dated 16 June 2009, the Spanish authorities provided additional elements arguing that Spanish companies still faced a number of obstacles to cross-border mergers in the Community.

II. **DETAILED DESCRIPTION OF THE MEASURE**

(14) The measure in question involves tax amortisation of the financial goodwill resulting from the acquisition of a significant shareholding in a foreign target company.

(15) The measure is governed by Article 12(5) TRLIS. In particular, Article 2(5) of Act 24/2001 of 27 December 2001 amended the Spanish Corporate Tax Act No 43/1995 of 27 December 1995, by introducing Article 12(5). Royal Legislative Decree No 4/2004 of 5 March 2004 consolidated the amendments made until then to the Spanish Corporate Tax Act in a recast version.

(16) The Commission is aware that the Spanish legislation has evolved since the date of the initiating Decision ([6]). None the less, the Commission considers that the latest amendments are unlikely to affect or alter the misgivings expressed in the initiating Decision. For the sake of consistency, the Commission will refer in this Decision to the numbering of the Spanish legislation as given in the initiating Decision, even though it may have undergone amendments. Any new legal provision will be clearly identified as such.

(17) Article 12(5) TRLIS, which is part of Article 12 'Value adjustments: loss of value of assets', 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, for up to 20 years following the acquisition.

(18) Goodwill is understood to represent the value of a well-respected business name, good customer relations, employee skills, and other such factors that are 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 constituting the business is termed 'goodwill' and must be booked as a separate intangible asset as soon as the acquiring company takes control of the target company ([8]).

(19) Under Spanish tax policy principles, with the exception of the measure in question, goodwill can only be amortised following a business combination that arises either as a result of acquisition or contribution of the assets held by independent companies or following a merger or de-merger operation.

([6]) Act No 4/2008 of 23 December 2008, which brought in amendments to several tax law provisions.
([7]) See Articles 46 and 39 of the 1885 Commercial Code.
([8]) Result of the implementation of Act No 16/2007 of 4 July 2007 on the reform and adaptation of company law in the field of accounting for its international harmonisation in line with European Union legislation.

(20) 'Financial goodwill', as used in the Spanish tax system, is the goodwill that would have been booked if the shareholding company and the target company had merged. The concept of financial goodwill under Article 12(5) TRLIS therefore introduces into the field of share acquisitions a notion that is 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 amortisation of financial goodwill is dependent on meeting the following requirements, as set by reference to Article 21 TRLIS:

(a) the direct or indirect holding in the foreign company must be at least 5 % and must be held for an uninterrupted period of at least 1 year ([9]);

(b) the foreign company must be liable for a similar tax to that applicable in Spain. This condition is presumed to be met if the country of residence of the target company has signed a tax convention with Spain to avoid international double taxation and prevent tax evasion ([10]);

(c) the revenue of the foreign company must mainly derive from business activities carried out abroad. This condition is met when at least 85 % of the income of the target company:

(i) is not included in the taxable base under Spanish international tax transparency rules and is taxed as benefits received in Spain ([11]). Income is specifically considered to meet these requirements when it derives from the following activities:

— wholesale trade, when the goods are made available to the purchasers in the country or territory of residence of the target company or in any country or territory other than Spain,

— services provided to clients that do not have their tax domicile in Spain,

— financial services provided to clients that do not have their tax domicile in Spain,

— insurance services relating to risks not located in Spain;

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

(22) In addition to the contested measure, it is worth briefly describing the following TRLIS provisions to which this Decision will refer:

(a) Article 11(4) of the TRLIS ([13]) (Article 11 is entitled 'Value adjustments: amortisation' and is contained in Chapter IV of the TRLIS, which defines the tax base) provides for a minimum of 20 years' amortisation of the goodwill deriving from an acquisition under the following conditions: (i) the goodwill results from an acquisition for value; (ii) the seller is unrelated to the acquiring company. The amendments made to this provision subsequent to the initiating Decision and brought in by Act No 16/2007 of 4 July 2007, also clarified that if condition (ii) was not met, the price paid used for calculating the goodwill will be the price paid for the share acquired by a related company to the unrelated seller and also required that (iii) a similar amount has been allocated to an indivisible reserve.

(b) Article 12(3) TRLIS, which is contained in Chapter IV TRLIS, permits partial deduction for depreciation of domestic and foreign shareholdings, which are not listed on a secondary market, up to the difference between the theoretical accounting value at the beginning and the end of the tax year. The measure at issue can be applied in conjunction with this Article of the TRLIS ([14]).

(c) Article 89(3) TRLIS (Article 89 is entitled 'Holdings in the capital of the transferring entity and the acquiring entity'), is contained in Chapter VII, Section VIII on the 'Special system for mergers, divisions, transfers of assets and exchanges'. Article 89(3) TRLIS provides for the amortisation of goodwill arising from business restructuring. Under this provision, the following conditions must 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 must be proven that the goodwill has been taxed and charged to the seller (iii) the seller is not linked to the purchaser. If condition (iii) is not met, the amount deducted must correspond to an irreversible depreciation of the intangible assets.

([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.
([13]) Under the current legislation, this provision is numbered as Article 12(6) TRLIS.
([14]) As explicitly stated in the second paragraph of Article 12(5): 'The deduction of this difference shall be compatible, where appropriate, with the provisions referred to in paragraph 3 of this Article'.

(d) Article 21 TRLIS, entitled 'Exemption to avoid international double taxation on dividends and income from foreign sources arising from the transfer of securities representing the equity of entities not resident in Spain', is contained in Chapter IV TRLIS. Article 21 lays down the conditions under which dividends and incomes from a foreign company are tax exempt when received by a company which is tax domiciled in Spain.

(e) Article 22 TRLIS, entitled 'Exemption of certain income obtained abroad via a permanent establishment', is contained in Chapter IV TRLIS. Article 22 TRLIS lays down the conditions under which income generated abroad by a permanent establishment not situated in Spain is tax exempt.

(23) For the purposes of this Decision:

(a) 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.

(b) 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.

(c) 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 target company.

(d) Target company shall mean a company not resident in Spain, whose income fulfils the conditions described under recital 21(c) and in which a shareholding is acquired by a company resident in Spain.

(e) Intra-Community acquisitions shall mean shareholding acquisitions, which meet 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 has its registered office, central administration or principal place of business within the Community.

(f) Extra-Community acquisitions shall mean shareholding acquisitions, which meet 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 does not have its registered office, central administration or principal place of business within the Community.

III. **REASONS FOR INITIATING THE PROCEDURE**

(24) In the initiating Decision, the Commission opened the formal investigation procedure laid down in Article 88(2) of the Treaty in respect of the measure in question because it appeared to fulfil all the conditions for being considered State aid under Article 87(1) of the Treaty. The Commission also had doubts as to whether the measure at issue 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 measure in question departed from the ordinary scope of the Spanish corporate tax system, which is the tax system of reference. The Commission also held that the tax amortisation of the financial goodwill resulting 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 amortisation was available only to a specific category of undertakings, namely undertakings which acquire certain shareholdings, amounting to at least 5 % of the share capital of a target company, and only in respect of foreign target companies subject to the criteria under Article 21(1) TRLIS. The Commission also underlined that in accordance with the case-law of the Court of Justice of the European Communities, a tax reduction favouring only exports of national products constitutes State aid ([15]). The 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 measure at issue, which departed from the general rules of the Spanish accounting and tax systems could not be justified by reasons linked to technicalities of the tax system. Indeed, goodwill can only be deducted in the case of a business combination or transfer of assets, except under the provisions of the measure at issue. The Commission also considered that it was disproportionate for the measure in question to claim to attain the neutrality objectives pursued by the Spanish system because it is limited solely to the acquisition of significant shareholdings in foreign companies.

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

(28) In addition, the Commission considered that the measure at issue implied the use of State resources as it involved foregoing tax revenue by the Spanish Treasury. Finally, the measure could distort competition in the European business acquisition market by providing a selective economic advantage to Spanish companies engaged in the acquisition of a significant shareholding in foreign companies. Nor did the Commission find any grounds for considering the measure compatible with the common market.

(29) The Commission therefore concluded that the measure in question could constitute incompatible State aid. This being the case, recovery should take place according to Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty. The Commission accordingly invited the 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 the second sentence of Article 14(1) of the above Council Regulation.

IV. COMMENTS FROM THE SPANISH AUTHORITIES AND INTERESTED THIRD PARTIES

(30) The Commission received comments from the Spanish authorities ([16]) and from 32 interested third parties ([17]), eight of which were associations.

(31) In short, the Spanish authorities consider that Article 12(5) TRLIS constitutes a general measure and not an exception to the Spanish tax system since this provision allows the amortisation of an intangible asset, which applies to any taxpayer who acquires a significant shareholding in a foreign company. In the light of Commission practice and the relevant case-law, the Spanish authorities conclude that the contested measures cannot be considered State aid within the meaning of Article 87 of the Treaty. In addition, the Spanish authorities consider that a different conclusion would be contrary to the principle of legal certainty. The Spanish authorities also contest the competence of the Commission to challenge this general measure as they consider that the Commission cannot use State aid rules as the basis for harmonising tax issues.

(32) In general, 30 interested third parties (hereinafter the 30 interested parties) support the views of the Spanish authorities, whereas another two 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 30 interested parties will be presented together with the position of the Spanish authorities, while the arguments of the two parties will be described separately.

A. Comments from the Spanish authorities and the 30 interested parties

(33) As an opening comment, the Spanish authorities stress that direct taxation falls within the competence of the Member States. Therefore, the Commission's action in this field should comply with the subsidiarity principle in Article 5 of the Treaty. Moreover, the Spanish authorities recall that Articles 3 and 58(1)(a) of the Treaty allow Member States to establish different tax systems according to the location of the investment or the tax residence of the taxpayer, without this being considered a restriction on the free movement of capital.

(34) The 30 interested parties also maintain that a negative Commission decision would breach the principle of national fiscal autonomy laid down in the Treaty, as well as Article 56 of the Treaty, which prohibits restrictions on the free movement of capital.

A.1. *The measure at issue does not constitute State aid*

(35) The Spanish authorities and the 30 interested parties consider that the measure at issue does not to constitute State aid within the meaning of Article 87(1) of the Treaty since: (i) it does not confer an economic advantage; (ii) it does not favour certain undertakings; and (iii) it does not distort or threaten to distort competition between Member States. In line with the logic of the Spanish tax system, they maintain that the measure at issue should be considered a general measure that applies indiscriminately to any type of company and activity.

A.1.1. The measure at issue does not confer an economic advantage

(36) Contrary to the Commission's position as expressed in the initiating Decision, the Spanish authorities maintain that Article 12(5) TRLIS does not constitute an exception to the Spanish corporate tax system since: (i) the Spanish accounting system is not an appropriate point of reference to substantiate the existence of an exception to the tax system; and (ii) even if it were, the characterisation of financial goodwill as a depreciable asset over time has historically been a general feature of the Spanish accounting and corporate tax systems.

([16]) See recital 7.
([17]) See recital 8.

(37) Firstly, because of the lack of harmonisation of accounting rules, the accounting result cannot serve as a reference point for establishing the exceptional nature of the measure at issue. Indeed, in Spain, the tax base is calculated on the basis of the accounting result, adjusted according to tax rules. Therefore, in the case at hand, accounting considerations cannot, in Spain's view, serve as a reference point for a tax measure.

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

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

(40) Fourthly, the Commission incorrectly refers to Articles 11(4) and 89(3) TRLIS to establish the existence of an advantage. In the initiating Decision, the Commission states that neither a business combination nor takeover of the target company is necessary to benefit from Article 12(5) TRLIS. This statement reflects a misunderstanding of the Spanish tax system since these two Articles do not prevent a group of companies that jointly acquires control of a target company from deducting a corresponding fraction of the goodwill resulting from the operation. Hence, application of these two Articles does not require individual control of the target company in order to benefit from the measure at issue. In this context, it would be inappropriate to consider that Article 12(5) TRLIS offers more favourable treatment than Articles 11(4) or 89(3) TRLIS as regards the controlling position of the beneficiaries. Finally, it should be noted that the 5 % shareholding criterion is consistent with the conditions laid down in Article 89(3) TRLIS and also with Commission guidelines and practice ([20]).

(41) The Spanish authorities point out that the Commission also incorrectly refers to Article 12(3) TRLIS to establish an alleged advantage under Article 12(5) TRLIS: Article 12(3) applies to situations of depreciation in case of an objective loss recorded by the target company, whereas Article 12(5) TRLIS complements this provision and reflects the loss of value attributable to 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) explicitly states that amortisation rules do not imply State aid. Since the current amortisation coefficient for financial goodwill over a minimum of 20 years is the same as the amortisation coefficient for goodwill, the rule does not constitute an exception to the general tax system.

(43) Finally, the 30 interested parties also consider that if the measure at issue constituted an advantage, the ultimate beneficiaries would be the target company's shareholders since they would receive the price paid by the acquiring company benefitting from the measure at issue.

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

(44) Firstly, Spain maintains that Article 12(5) TRLIS is a general measure since it is open to any Spanish company whatever its activity, sector, size, form or other characteristics. The only condition for the taxpayer to be able to benefit from the measure at issue is to be tax resident in Spain. The fact that not all taxpayers benefit from the measure in question does not make it selective. Therefore, Article 12(5) TRLIS is neither *de facto* nor *de jure* selective within the meaning of Article 87(1) of the Treaty. Accordingly, by letter dated 14 July 2008 ([22]), the Spanish authorities provided data extracted from the 2006 Spanish tax returns which show that all types of companies (SMEs and large undertakings), as well as companies active in different economic sectors, had benefited from the measure at issue. The Spanish authorities also stress that in a recent judgment ([23]), the Court of First Instance indicated that a limited number of beneficiaries is not sufficient in itself to establish the selectivity of the measure since that group can actually represent all of the undertakings in a particular legal and factual situation. In particular, the Spanish authorities stress that the measure at issue bears similarities with a recent case ([24]) that the Commission considered to be a general measure and they therefore request the same treatment.

([18]) The Spanish authorities referred to Article 194 of Royal Decree 1564/1989 of 22 December 1989.

([19]) The Spanish authorities referred to ICAC (Institute of Accounting and Auditing) Resolution No 3, BOICAC, 27.11.1996.

([20]) See the Commission Decision of 22 September 2004, N 354/04, Irish Company Holding Regime (OJ C 131, 28.5.2005, p. 10).

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

([22]) See recital 12.

([23]) See the judgment of the Court of First Instance in Case T-233/04 *Netherlands* v *Commission* [2008] ECR, II-591.

([24]) See the Commission Decision of 14 February 2008, N 480/07, Reduction in revenue from certain intangible assets (OJ C 80, 1.4.2008, p. 1).

(45) Secondly, according to the Spanish authorities and the 30 interested parties, in its initiating Decision the Commission mixed up the concept of selectivity and the objective conditions of the measure at issue which refer only to certain transactions (i.e. shareholding in a foreign target company). Indeed, the Commission alleges that Article 12(5) TRLIS is selective since the same treatment is not granted to comparable investments in Spanish companies. However, the Commission fails to recognise that the selectivity criterion is not determined by the fact that the beneficiary of the measure at issue is a group of companies or a multinational company that has a share in a target company. The fact that a measure benefits only companies that comply with the objective criterion laid down in the measure at issue does not in itself make it selective. The selectivity criterion implies that subjective restrictions should be imposed on the beneficiary of the measure at issue. The selectivity criterion created for this procedure is inconsistent with previous Commission practice and too vague and broad. Taking this concept further would lead to the erroneous conclusion that most tax deductible expenses fall within the scope of Article 87(1) of the Treaty.

(46) The Spanish authorities add that the fact of limiting the amortisation of financial goodwill to that resulting from the acquisition of a significant shareholding in a target company is not sufficient to remove the general character of the measure at issue, since it applies indiscriminately to any company that is tax resident in Spain with no further requirements. In line with the case-law of the European Court of Justice ([25]), a measure which benefits all undertakings in national territory, without distinction, cannot therefore constitute State aid.

(47) Thirdly, as regards the 5 % threshold, this level does not set a minimum amount to be invested and therefore the measure at issue does not benefit only large undertakings. As for the fact that there is no requirement for the seller to pay capital gains in order for the measure at issue to apply, the Spanish authorities consider this to be irrelevant since control of income received abroad by a seller who is not liable for tax in Spain lies outside their field of competence. Lastly, limiting the scope of a measure — for fiscal technical reasons — to shareholding acquisitions in target companies is consistent with the situation resulting from the implementation of various Community Directives. For example, as a result of 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 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 may differ according to whether the payment is made to a domestic or a foreign company.

(48) Fourthly, the introduction of the measure at issue is in any case justified by the principle of neutrality, which underlies all Spanish tax legislation. This principle implies that the tax treatment of an investment should be neutral irrespective of the instruments used, whether transfer of assets, business combination or share acquisition. Therefore, the tax amortisation of an investment should be identical whatever the instrument used to carry out the acquisition in question. The final aim of the measure at issue, in this broader perspective, is to ensure the free movement of capital by avoiding discriminatory tax treatment between transactions with target companies and purely domestic transactions. Given that acquisitions of significant shareholdings in domestic companies could lead to a business combination of the acquiring and the acquired companies with no legal or fiscal barriers, the goodwill that would ensue for tax purposes as a result of the combination could be amortised ([28]). However, goodwill of cross-border operations cannot arise because harmonisation at Community level is not complete or — even worse — because there is no harmonisation outside the Community. According to the Spanish authorities ([29]), the Spanish tax system provides for different tax schemes, as in the case of shareholding acquisitions in foreign companies compared with acquisitions in Spanish companies (impossible to undertake merger operations, risk assumption, etc.), in order to achieve the tax neutrality sought by the Spanish domestic legislation and Community law itself and also in order to ensure that the Spanish tax system is consistent and efficient. Although 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 different Member States ([30]) (hereinafter the Cross-border Taxation Directive) has removed tax 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 Cross-border Mergers Directive) ([32]) has not yet been transposed into national law. In practice, this situation makes business combinations between companies from different Member States impossible. Therefore, the aim of

([25]) See the judgment of the Court of Justice in Case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365.

([26]) OJ L 157, 26.6.2003, p. 49.

([27]) OJ L 7, 13.1.2004, p. 41.

([28]) Pursuant to Article 89(3) TRLIS.

([29]) See the Spanish authorities' letter of 5 December 2007 to the Commission, p. 35, as referred to in recital 7.

([30]) OJ L 225, 20.8.1990, 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 Member States had to apply Directive 2005/56/EC by 15 December 2007.

the measure at issue is to remove the negative impact of these barriers, for whose existence Spain is not answerable ([33]). Consequently, limiting the scope of the measure at issue to cross-border acquisitions is necessary to enforce the neutrality principle. In this way, still according to the Spanish authorities, the Spanish tax system treats differently taxpayers who are in different situations ([34]), thereby ensuring that the Spanish tax system is neutral as required by the Spanish tax system itself and the Treaty. In particular, on 16 June 2009 the Spanish authorities acknowledged that although the Cross-border Mergers Directive had a positive impact, European companies would still face a number of obstacles ([35]) to cross-border mergers because of non-harmonisation of national legislation (rights of minority shareholders, rights of creditors, trademark issues, wider regulatory aspects including labour law, general political and strategic considerations).

(49) To conclude, the contested measure is designed to remove the tax barriers that the Spanish tax system generates in investment decisions by penalising share acquisitions in foreign companies as opposed to acquisitions in domestic companies. The measure at issue guarantees the same tax treatment for both types of acquisition (direct acquisitions of assets and indirect acquisitions by purchasing shareholdings): goodwill arising from both of them (direct goodwill and financial goodwill) can 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 thus ensure that taxpayers can opt to invest at local or cross-border level without being affected by these barriers. Article 12(5) TRLIS basically restores fair conditions of competition by eliminating the adverse impacts of the barriers.

A.1.3. The measure at issue neither distorts competition nor affects Community trade

(50) The Spanish authorities state that the Commission has not established to the requisite legal standard that Article 12(5) TRLIS restricts 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 this were the case, the amortisation of financial goodwill does not per se affect the competitive position of Spanish undertakings.

(51) First, the Commission qualified the measure at issue as an anti-competitive advantage on the grounds that Article 12(5) allows Spanish taxpayers to obtain a premium for the acquisition of significant shareholdings in a target company. However, the Commission did not carry out any benchmarking study on the economic circumstances of Spanish and international companies.

(52) Second, since the measure at issue is open to any Spanish company with no restrictions, it cannot distort competition. Indeed, any company in the same situation as a beneficiary of the measure at issue can benefit from the measure, thus reducing its tax burden, which would cancel any competitive advantage that might derive from it. In addition, a lower rate of taxation in a Member State that can increase the competitive edge of local companies should not come under State aid rules as long as it is of a general nature.

(53) Finally, the Commission has already examined many Spanish cross-border operations under the Merger Regulation ([36]) that could have benefited from the measure at issue. Yet the Commission did not raise any concerns about potential distortions of competition in any of these cases.

(54) The Commission's allegations are not only far removed from reality but also out of touch with the investment situation of Spanish companies. The measure at issue neither distorts competition nor adversely affects intra-Community trading conditions to an extent contrary to the common interest.

(55) In a non-harmonised market, as a result of competition between tax systems, identical operations have a different fiscal impact depending on where traders are resident. This situation distorts competition even if the national measures at stake are general measures. In other words, this distortion is not the result of State aid but of a lack of harmonisation. If the Commission's reasoning were followed through, it would have to open formal investigations into hundreds of national measures, which would create a situation of legal uncertainty that is highly detrimental to foreign investment.

([33]) See the recitals to 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), and the opinion of the Economic and Social Committee of 28 April 2004, COM(2003) 703 final — 2003/2077(COD).

([34]) As stated on page 8 of the Spanish authorities' letter of 30 June 2008 — see recital 9 above.

([35]) With reference to the Commission's assessment of the implementation of Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids (OJ L 142, 30.4.2004, p. 12).

([36]) See the Commission Decisions of 10 June 2005, Cesky Telecom; of 10 January 2005, O_2; of 23 May 2006, Quebec, GIC, BAA; of 15 September 2004, Abbey National; and of 26 March 2007, ScottishPower, available at http://ec.europa.eu/competition/mergers/cases/

A.2. *Compatibility*

(56) Even if the Commission considers that Article 12(5) TRLIS constitutes State aid within the meaning of Article 87(1) of the Treaty, this provision is compatible with Article 87(3) of the Treaty 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 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 is the difficulty (or virtual impossibility) of carrying out cross-border business combinations. The effect of Article 12(5) TRLIS is to promote the creation of pan-European undertakings, by putting domestic and cross-border acquisitions on the same footing.

(58) Therefore, for the Spanish authorities, Article 12(5) TRLIS is compatible with the common market since, in the absence of European tax harmonisation, it achieves the objective of breaking down barriers to cross-border investment in a proportionate manner. The measure at issue is effectively aimed at removing the adverse impact of barriers to cross-border business combinations and aligning the tax treatment of cross-border and local business combinations in order to ensure that the decisions taken as regards such operations are based not on fiscal considerations but exclusively on economic considerations.

A.3. *Legitimate expectations and legal certainty*

(59) Finally, and in the event that the Commission declares that Article 12(5) TRLIS constitutes State aid incompatible with the common market, the Commission must acknowledge 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 exceptional amortisation of the financial goodwill corresponding to acquisitions made before the date of publication of the final decision.

([37]) State aid action plan — Less and better targeted State aid: a roadmap for State aid reform 2005-2009, COM(2005) 107 final (OJ L 1, 4.1.2003, p. 1).

(60) Firstly, the Commission seems to recognise, in the initiating Decision, the probable existence of legitimate expectations. Therefore, in line with the case-law of the Court of First Instance ([38]), this statement constitutes a clear indication of the existence of legitimate expectations. Since the initiating Decision does not prejudge the outcome of the formal investigation, legitimate expectations should be recognised for all the operations that took place before the date of publication of the final decision.

(61) Secondly, in its answers to written questions from MEPs ([39]), the Commission stated that Article 12(5) TRLIS does not constitute State aid. This statement constitutes a clear position from the Commission which offers obvious legitimate expectations to the Spanish authorities and the beneficiaries of the measure at issue.

(62) Thirdly, in line with the conclusion reached by the Commission in similar cases ([40]), the Commission has provided a set of indirect evidence that Article 12(5) TRLIS does not constitute State aid. In view of these Decisions, a prudent undertaking would not have been able to predict that the Commission could take an opposite position.

(63) Finally, the measure at issue should continue to apply to all operations prior to the publication date of a negative decision until amortisation of the financial goodwill is completed. The measure at issue corresponds to a right to deduct a given amount, determined at the moment of the acquisition, whose deduction is spread over the following 20 years. Moreover, because of the position taken by the Commission in similar cases ([41]), it is justified to assume that the legitimate expectations should remain until the date of publication of the final decision.

B. **Comments from the two parties**

(64) According to the two parties, Article 12(5) TRLIS constitutes State aid. They maintain that there are no legitimate expectations in the case at hand and therefore call on the Commission to order recovery of any unlawful aid granted.

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

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

([40]) For example, the Commission Decision of 30 July 2004 in case N 354/04, Irish Company Holding Regime (OJ C 131, 28.5.2005, p. 11) and the Commission Decision of 13 July 2006 in case C4/07 (ex N 465/06), Groepsrentebox (OJ C 66, 22.3.2007, p. 30).

([41]) See Commission Decision No 2001/168/ECSC of 31 October 2000 on Spain's corporation tax laws (OJ L 60, 1.3.2001, p. 57).

B.1. *The measure at issue constitutes State aid*

B.1.1. The measure at issue confers an economic advantage

(65) According to the two parties, Article 12(5) TRLIS is exceptional in nature because the Spanish tax system, with the exception of this provision, does not allow any amortisation of financial goodwill but only a deduction in the case of an impairment test. Until the introduction of Article 12(5) TRLIS the Spanish corporate tax legislation did not allow the amortisation of shareholdings regardless of whether or not there had actually been an impairment. They stress that Article 12(5) TRLIS is probably unique in the European context as no other Member State has a similar system for cross-border transactions not involving the acquisition of controlling shares.

(66) Under the Spanish tax system, goodwill can be amortised only if there is a business combination — the sole exception is the measure at issue, which allows amortisation in an exceptional case: if a minority shareholding is acquired in a target company. This diverges from the general tax system since amortisation is possible not only without there being a business combination but also in cases where the purchaser does not even acquire control of the foreign target company. Article 12(5) TRLIS thus confers a benefit on certain Spanish companies vis-à-vis (a) other Spanish companies that operate only at national level; and (b) other Community operators that compete internationally with the Spanish beneficiaries of the measure at issue.

(67) From an economic point of view, the Spanish authorities are not only providing an interest-free loan that will be drawn over a period of 20 years (interest-free tax deferral), but also effectively leaving the repayment date of the interest-free loan to the discretion of the borrower — if indeed the loan is repaid. If the investor does not transfer the significant shareholding, the effect is the same as cancellation of the debt by the Spanish authorities. In this case, the measure turns into a permanent tax exemption.

(68) One of the two parties estimates that, as a result of the measure at issue, Spanish acquirers, for instance in the banking sector, are able to pay some 7 % more than they would otherwise be able to. However, it also recognises that as the offer price is a combination of various additional elements, the measure at issue is not the only factor, although probably one of the most decisive factors behind the aggressiveness of Spanish bidders benefiting from the measure at issue. This party considers also that the measure provides a definite advantage to Spanish bidders in international auctions.

B.1.2. The measure at issue favours certain undertakings or the production of certain goods

(69) There is a clear parallel between the case at hand and the circumstances which led to the Court judgment of 15 July 2004 ([42]). Despite the arguments put forward by the Spanish authorities that the measure at issue in the latter case is not selective because Article 37 TRLIS applies to all Spanish undertakings that invest 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. This same reasoning can be applied to Article 12(5) TRLIS. The selectivity of Article 12(5) TRLIS is therefore due to the fact that only companies acquiring shareholdings in foreign companies are eligible for this provision.

(70) Furthermore, only enterprises of a certain size and financial strength with multinational operations can benefit from Article 12(5) TRLIS. Although the company's balance sheet discloses the book values of assets, it is unlikely that it also reflects the tacit market values of assets. Therefore, in practice, only operators with a controlling interest in target companies have sufficient access to a company's records to ascertain the tacit market value of the company's assets. Consequently, the 5 % threshold favours companies that perform multinational operations.

(71) Moreover, only a Spanish operator with existing business in Spain has a Spanish tax base and can benefit from the depreciation. Therefore, only companies resident in Spain with a significant Spanish tax base can in practice benefit from it, since the potential benefit is linked to the size of the Spanish operation rather than of the acquisition. Although Article 12(5) TRLIS is drafted to apply to all operators established in Spain, in practice only a limited and identifiable number of companies with a Spanish tax base, which make foreign acquisitions in the relevant tax year and have a sizeable tax base against which to offset the financial goodwill deduction, can benefit from the application of the measure on an annual basis. As a result, the measure at issue in fact gives a different tax treatment even to Spanish operators in the same position of making acquisitions abroad.

([42]) Judgment of the Court of Justice in Case C 501/00 *Spain* v *Commission* [2004] ECR I-6717.

(72) The two parties consider that they have not been able to identify any objective or horizontal criterion or condition that justifies the measure at issue. On the contrary, they are of the view that the basic intention of the measure is to give a benefit to certain Spanish operators. In addition, if the measure at issue is inherent to the Spanish tax system, foreign shareholdings acquired prior to that date should also qualify for the measure, which is not the case since the tax relief is granted only for shareholdings acquired after 1 January 2002.

(73) Accordingly, and in the light of Commission policy ([43]), the measure at issue must be considered selective.

B.1.3. The measure at issue distorts competition and affects Community trade

(74) The measure at issue is clearly discriminatory as it gives Spanish operators a clear fiscal and monetary benefit that foreign operators are not able to enjoy. In a situation of an auction or other competitive procedure for the acquisition of a company, such an advantage makes a significant difference.

(75) Takeover bids usually presuppose the payment of a premium over the share price of the target company that would almost always result in financial goodwill. On several occasions, the financial press has reported on large acquisitions by Spanish companies and the respective tax benefits accruing from the Spanish tax rules on the amortisation of financial goodwill. For one of those acquisitions by an investment bank, the tax benefit resulting from Article 12(5) TRLIS was estimated to be EUR 1,7 billion, or 6,5 % of the offer price. Another report indicated that the Spanish acquirer had been able to bid about 15 % more than non-Spanish competitors.

(76) The measure at issue also seems to favour certain export activities (export aid for foreign share acquisitions) of Spanish companies, which is at odds with established Commission policy ([44]) in this area.

B.1.4. The measure at issue affects State resources

(77) The measure at issue is of benefit to undertakings that meet certain requirements and enables them to reduce their tax base and thereby the amount of tax that would normally be due in a given year if this provision did not exist. It therefore provides the beneficiary with a financial advantage, the cost of which is directly borne by the budget of the Member State concerned.

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

([44]) See Commission Decision 82/364/EEC of 17 May 1982 concerning the subsidising of interest rates on credits for exports from France to Greece after the accession of that country to the European Economic Community (OJ L 159, 10.6.1982, p. 44), in particular part IV, which refers to Cases 6/69 and 11/69 *Commission* v *France*.

V. **REACTION FROM SPAIN TO COMMENTS FROM THIRD PARTIES**

(78) The Spanish authorities point out that the vast majority of third parties' comments support their point of view. Only two parties consider that the measure at issue constitutes State aid, whereas all the others conclude that Article 12(5) TRLIS does not constitute State aid within the meaning of Article 87(1) of the Treaty. Otherwise, fewer economic operators would have submitted comments. In addition, the wide range of activities and size of the interested third parties demonstrates the general nature of the measure at issue.

(79) Regarding the exceptional nature of the measure at issue, the Spanish authorities reject this qualification by recalling the common feature of goodwill and financial goodwill amortisation according to Spanish accounting rules ([45]). In addition, the deduction of goodwill amortisation constitutes the general rule of the Spanish corporate tax system in accordance with the provisions laid down in Articles 11(4) and 89(3) TRLIS. Article 12(5) TRLIS follows the same logic. It is incorrect to present Article 12(3) TRLIS as the general rule for amortisation of financial goodwill since this Article refers to the deduction of shareholdings in non-listed entities. This provision is related to the depreciation of the theoretical accounting value and not to financial goodwill. Article 12(3) and 12(5) TRLIS are two complementary general rules: the first refers to the depreciation attributed to the losses generated by the target company, whereas the second refers to the deduction only of the part of the depreciation attributable to the depreciation of financial goodwill. Finally, the fact that no other Member State has a measure similar to the measure at issue is irrelevant since tax systems are not harmonised within the European Union.

(80) Regarding the selective nature of the measure at issue, the parallels drawn with the Court judgment of 15 July 2004 ([46]) are incorrect since in that case the Commission had clearly defined the profile of the beneficiary, whereas in the present case this could not be done. Indeed, Article 12(5) TRLIS does not require any link between the shareholding acquisition and the export of goods and services. Therefore the measure at issue does not have the effect of increasing exports of Spanish goods or services. The fact that this non-selective measure is not available for domestic operations does not affect its general nature.

([45]) See ICAC Resolution No 3 of November 1996, BOICAC 27.

([46]) See footnote 42.

In fact, the final objective of the measure at issue is the same as that of the Cross-border Tax Directive, which is to ensure that investment decisions are based on economic rather than tax considerations. Therefore, since it is possible to carry out business combinations with domestic acquisitions and not with cross-border acquisitions, treating domestic operations and cross-border operations differently is not only legally justified but also necessary in order to guarantee the neutrality of the tax system.

(81) Regarding the alleged distorting features of the measure at issue, the Spanish authorities point out that any tax relief that reduces the operating costs of a company increases the competitive edge of the beneficiary. However, this statement is irrelevant since the measure at issue is a general measure. The different tax rates applied across the Member States, which impact on the competitiveness of their resident companies, do not fall under State aid rules. In addition, the measure at issue has not been shown to affect trade between Member States. Moreover, the consequence of amortising financial goodwill is not necessarily to increase the price offered by a competitor.

(82) As regards 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 for domestic and cross-border operations that fosters the development of pan-European companies.

VI. **ASSESSMENT OF THE SCHEME**

(83) In order to ascertain whether a measure constitutes aid, the Commission must assess whether the measure at issue fulfils the conditions of Article 87(1) of the 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 below whether the measure at issue constitutes State aid.

A. **Selectivity and advantage inherent in the measure**

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

(85) The Commission Notice [47] states 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 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) of the Treaty does not distinguish between the causes and 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 of improving their competitiveness, fall within the scope of Article 87(1) of the Treaty [51].

(88) The concept of State aid does not, however, apply 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'.

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[47] See footnote 21.

[48] See the judgment of the Court of Justice in Case C-143/99 *Adria-Wien*, see footnote 25, paragraph 41; judgment of the Court of Justice in Case C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraph 68; judgment of the Court of Justice in Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40; and the judgment of the Court of Justice in Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54.

[49] See the judgment of the Court of Justice in Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 54.

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

[51] See, for example, the judgment of the Court of Justice in Case C-66/02 *Italy* v *Commission* [2005] ECR I-10901, paragraph 101. See also the Commission Decision of 8 July 2009 on the Groepsrentebox scheme (C 4/07, ex N 465/06), not yet published in the Official Journal, in particular recitals 75 et seq.

[52] See footnote 21.

(89) As explained in more detail in the following section, the Commission considers that the measure at issue is selective in that it only favours certain groups of undertakings that carry out certain investments abroad and that this specific character is not justified by the nature of the scheme, regardless of whether the reference system is defined as the rules on the tax treatment of financial goodwill under the Spanish tax system (see recitals 92 to 114) or as the tax treatment of goodwill deriving from an economic interest taken in a company resident in a country other than Spain (see recitals 115 to 119). The Commission considers that the measure at issue should be assessed in the light of the general provisions of the corporate tax system as applicable to situations in which the emergence of goodwill leads to a fiscal benefit (see recitals 35 to 55), 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 recitals 56 to 58), the Commission concludes that the measure at issue would still constitute a State aid measure essentially due to the different factual and legal conditions required for the different scenarios to benefit from the provisions on the goodwill that arises from an economic interest acquired in a company resident in a country other than Spain.

(91) Under this alternative scenario, the measure at issue is too imprecise and arbitrary as it does not set any conditions, such as the existence of specific, legally circumscribed situations which would justify different tax treatment. Consequently, situations which have not been demonstrated to be sufficiently different to justify a selective exception from general goodwill rules end up benefiting from the measure at issue. Hence the Commission considers that the measure at issue consists of tax relief for specific types of costs and covers a broad category of transactions in a discriminatory manner, which cannot be justified by objective differences between taxpayers and it therefore results in a distortion of competition ([53]).

A.1. *Tax treatment of financial goodwill under the Spanish tax system as regards intra-Community acquisitions*

A.1.1. Reference system

(92) In the initiating Decision, the Commission considered that the appropriate reference system is the Spanish corporate tax system, in particular the rules on the tax treatment of financial goodwill contained in the Spanish tax system. This approach is in line with previous Commission practice and the case-law of the European Courts, which consider the ordinary corporate tax system as the reference system ([54]). The Spanish authorities' comments stress that the constraints on cross-border business combinations place taxpayers that buy shareholdings in domestic companies in a different legal and factual situation from those that buy shareholdings in foreign companies. According to the Spanish authorities, the reason for this situation is the existence of barriers which, following shareholdings acquisitions, do not allow Spanish investors to carry out cross-border combinations, whereas this can be done in a national context.

(93) First, as regards the existence of these alleged barriers, it should be stressed that the Spanish authorities and the 30 interested parties did not provide detailed information on the existence of such barriers and confined themselves, even in their latest submissions, to general and unsubstantiated allegations, highlighting general features such as differences arising from non-implementation of the Company Law Directive, differences concerning minority shareholders' rights, creditors' rights, labour law, the national trademark, and general political or commercial considerations. If unsubstantiated and general elements such as these could be taken into account for determining the scope of Article 87 of the Treaty, the notion of aid would run the risk of becoming largely arbitrary. Furthermore, these subjective statements are neither developed nor justified. In addition, the Spanish authorities also cite the Commission Report on the implementation of the Directive on Takeover Bids ([55]) but did not explain the link between the barriers to takeovers and the alleged barriers to cross-border business combinations.

(94) Second, as regards the nature of these alleged barriers, the Spanish authorities and the 30 parties did not explicitly identify any fiscal barrier in the common market. Since 1 January 1992, the date when Member States had to implement the Cross-border Tax Directive, tax barriers to cross-border business combinations have been removed. The tax treatment of business combinations, whether in the context of domestic or cross-border operations, is therefore considered to be harmonised. As regards non-tax barriers and in particular company law barriers attributable to the target company's country of residence, the Commission considers that since 8 October 2004, the date when Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company

([53]) See footnote 52, Decision on the Groepsrentebox scheme, in particular recitals 83 et seq.

([54]) See, inter alia, the judgment of the Court of First Instance in Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933, paragraph 82.

([55]) See document SEC(2007) 268 of 21 February 2007.

with regard to the involvement of employees ([56]), together with Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) ([57]) or, at the latest, since the date of transposal ([58]) of the Cross-border Mergers Directive, obstacles to business combinations have been eliminated within the common market. Therefore the company law treatment of business combinations is, at least as from 15 December 2007, the same for domestic and cross-border operations. The preamble to Spanish Act No 3/2009 of 3 April 2009 on structural modifications of companies ([59]), which transposes the Company Law Directive, confirms this analysis when stating that '… the Spanish practice was already familiar with cross-border mergers between companies subject to the laws of different Member States …'. The Commission has not been notified by the Spanish authorities or the 30 interested parties of any other substantiated barrier that could justify different legal treatment as in the case of the measure at issue. Although the Spanish authorities provided a list of problems ([60]) connected with constraints on cross-border business combinations on 16 June 2009, this document does not contain substantiated information or relevant factual elements that justify the discriminatory aspects of the measure at issue.

(95) Third, the Commission observes that, in line with the case-law of the Court of Justice ([61]), if the Member States do not treat cross-border business combinations in similar terms to domestic business combinations, this may constitute an infringement of the obligations arising from the Treaty. In effect, 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 of the Treaty, 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 interest' ([62]). Moreover, it should be recalled that the discretion conferred on the Commission in the application of Article 87(3) of the Treaty does not permit it to authorise Member States to derogate from provisions of Community law other than those relating to the application of Article 87(1) of the Treaty ([63]).

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

A.1.2. Existence of an exemption from that reference system

(97) Under the Spanish tax system, the tax base is calculated from the accounting statement, to which adjustments are then made by applying specific tax rules. As a preliminary remark and on a subsidiary basis, the Commission notes that the measure at issue 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 those of the acquiring company. 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 to exist ([65]), for instance, if the parent company holds the majority of the voting rights of the subsidiary company. None the less, the measure at issue does not require any such type of control and applies as from a 5 % level of shareholding. Finally, the Commission also notes that as of 1 January 2005 ([66]), in line with accounting rules, financial goodwill can no longer be amortised by any company. In effect, in this connection the 30 interested parties refer to provisions ([67]) that are no longer in force under the current Spanish accounting system. As a result of Act No 16/2007 of 4 July 2007 reforming and adapting commercial law in the field of accounting for the purposes of international accounting harmonisation under EU legislation, as well as Royal Decree 1514/2007 of 16 November 2007 on the General Accounting Plan, from an accounting point of view, neither the amortisation of goodwill nor financial goodwill is allowed any more. These amendments to Spanish accounting law are in line with Regulation (EC) No 1606/2002 of the European Parliament and of the

([56]) OJ L 294, 10.11.2001, p. 22, Directive which entered into force on 10 November 2001.
([57]) OJ L 294, 10.11.2001, p. 1, Regulation which entered into force on 8 October 2004.
([58]) 15 December 2007, pursuant to Article 19 of the Company Law Directive.
([59]) Available at http://noticias.juridicas.com/base_datos/Vacatio/l3-2009.html
([60]) Non-implementation of the Cross-border Mergers Directive, minority shareholders' rights, creditors' rights, labour law, national trademark, local partners, regulatory system, economic synergies, political, strategic and commercial considerations.
([61]) Judgment of the Court of Justice in Case C-411/03 *SEVIC Systems* ECR I-10805, paragraphs 23-31.
([62]) Judgment in Case C-411/03 *SEVIC Systems*, cited above, paragraph 23.
([63]) Judgment of the Court of First Instance in Case T-184/97 *BP Chemicals Ltd* v *Commission* ECR II-3145, paragraph 55; see also the judgment of the Court of Justice in Cases C-134/91 and C-135/91 *Kerafina*, paragraph 20 and the judgment of the Court of Justice in Case C-225/91 *Matra SA* v *Commission*, paragraph 41.
([64]) Pursuant to Article 42 of the 1885 Commercial Code.
([65]) See Article 42(1) of the 1885 Commercial Code.
([66]) Companies that have 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, pursuant to Article 4 of the Directive.
([67]) Article 194 of Royal Decree 1564/1989 of 22 December 1989 approving the revised Law on Public Limited Liability Companies.

Council of 19 July 2002 on the application of international accounting standards ([68]). Therefore, in the light of these considerations, the measure at issue constitutes a departure from the ordinary accounting rules applicable in Spain.

(98) That being said, because of the fiscal nature of the measure at issue, the existence of an exception must be assessed in comparison to the reference tax system, and not merely on an accounting basis. In this context, the Commission notes that the Spanish tax system has never permitted the amortisation of financial goodwill, except under Article 12(5) TRLIS. In particular, no such amortisation is possible for domestic transactions. This is demonstrated by the following factors:

(99) For Spanish tax purposes, goodwill can only be booked separately following a business combination ([69]), which materialises either in case of acquisition or transfer of the assets that make up 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 that make up the business acquired or held by the combined company. When the acquisition of the business of a company is made by way of the acquisition of its shares, as in the case of the measure at issue, goodwill can only arise if the acquiring company combines subsequently with the acquired company, over which it will then have control.

(100) However, under the measure at issue, neither control nor the combination of the two businesses is necessary. The mere acquisition of a minimum 5 % shareholding in a foreign company is sufficient. Thus, by allowing financial goodwill, which is the goodwill that would have been booked if the companies had combined, to appear separately — even without there being a business combination — constitutes a derogation from the reference system. It must be stressed that the derogation is not due to the length of the period during which financial goodwill is amortised compared with the period that applies to traditional goodwill ([70]) but to the different treatment received by domestic and cross-border transactions. The measure at issue 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 measure at issue derogates from the reference system. As will be demonstrated in recitals 128 to 138, the Commission considers that neither the Spanish authorities nor the 30 interested parties have put forward sufficiently convincing arguments to alter this conclusion.

([68]) OJ L 243, 11.9.2002, p. 1.
([69]) Pursuant to Article 89(3) TRLIS.
([70]) Pursuant to Article 11(4) TRLIS.

A.1.3. Existence of an advantage

(101) Under Article 12(5) TRLIS, part of the financial goodwill deriving from the acquisition of shareholdings in foreign companies can be deducted from the tax base by way of derogation from the reference system. Therefore, by reducing the tax burden of the beneficiary, Article 12(5) TRLIS provides them with an economic advantage. It takes the form of a reduction in the tax to which the companies concerned would otherwise be liable. 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 amortisation that is deductible throughout the amortisation period following the acquisition. It is therefore contingent on the company tax rate in the corresponding years and the discount interest rate applicable.

(103) If the acquired shareholdings are resold, part of this advantage would be recouped via capital gains tax. In effect, by allowing the amortisation of financial goodwill, if the foreign shareholding in question is resold, the amount deducted would lead to an increase in the capital gains charged at the time of sale. However, in the event of these uncertain circumstances, the advantage would not disappear completely since taxation at a later stage does not take the liquidity cost into account. As rightly pointed out by the two parties, from an economic point of view, the amount of the advantage is at least similar to that of an interest-free credit line that allows up to twenty annual withdrawals of a 20th of the financial goodwill for as long as the shareholdings are held on the taxpayer's books.

(104) Taking a hypothetical example, already mentioned by the Commission in the initiating Decision, a shareholding acquired in 2002 would yield an advantage corresponding to 20,6 % of the amount of financial goodwill, assuming a discount interest rate of 5 % ([71]) and considering the existing structure of corporate tax rates until 2022 as currently set by Act No 35/2006 ([72]). The third parties have not contested these figures. If the acquired shareholdings were resold, the advantage would correspond to the interest that would have been charged to the taxpayer for a credit line with the characteristics described in the previous recital.

([71]) In accordance with the TRLIS as amended by Act 35/2006, the corporate tax rate used for the calculation was 35 % from 2002 to 2006, 32,5 % in 2007 and 30 % thereafter.
([72]) Eighth additional provision, Act 35/2006 of 28 November on Personal Income Tax and partial amendment of the Laws on Corporate Tax and on Income Tax for Non-Residents and Tax on Personal Net Wealth, *Official State Gazette* No 285, 29.11.2006.

(105) Lastly, the Commission cannot accept the views of the Spanish authorities and the 30 interested parties that the final beneficiary of the measure at issue would be the seller of the foreign shareholding since it would receive 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 measure at issue. Third, in the hypothetical situation that an economic advantage were transferred to the seller, as a result of the measure at issue the acquirer would increase its acquisition price, which is of the upmost importance in the case of a competitive acquisition transaction.

(106) Therefore, the Commission must conclude that, in any event, the measure at issue 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]), measures introducing a differentiation between undertakings do not constitute State aid where that differentiation arises from the nature or the overall structure of the system of charges of which they are part. This justification based on the nature or overall structure of the tax 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 measure at issue would be to eliminate double taxation. The scheme does not in fact establish any conditions for proving 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 amortising 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 over a foreign seller carrying out operations abroad, the Commission notes that this condition is required for the application of other Spanish tax provisions ([75]) but not for the measure at issue.

(109) Secondly, the contested measure does not 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 that holds a significant shareholding for whose acquisition financial goodwill was paid. In fact, the contested measure creates no relation between the dividends received and the deduction enjoyed as a result of the measure. On the contrary, the dividends received from a significant shareholding 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 connection, the amortisation of financial goodwill results in an additional advantage in respect of the acquisition of significant shareholdings in foreign companies.

(110) Thirdly, the Spanish authorities have not demonstrated that the measure at issue 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 measure at issue. On the contrary, Article 12(3) TRLIS permits partial deductions for depreciation of equity shareholdings in domestic and foreign entities which are not listed on a secondary market for impairments occurring between the beginning and the end of the tax year. The measure at issue which, for the beneficiaries, is compatible with Article 12(3) TRLIS ([76]), provides for further deductions over and above the decrease in the theoretical accounting value linked to impairment.

(111) Fourthly, the Commission notes that the financial goodwill deriving from the acquisition of Spanish shareholdings cannot be amortised whereas the financial goodwill of foreign companies can be amortised under certain conditions. Different tax treatment of the financial goodwill of foreign as opposed to domestic companies is a differentiation introduced by the measure at issue which is neither necessary nor proportionate in terms of the logic of the tax system. In fact, the Commission considers that it is disproportionate for the scheme at hand to impose substantially different nominal and effective taxation on companies in comparable situations just because some of them are involved in investment opportunities abroad.

([73]) See Case C-88/03 *Portugal* v *Commission*, paragraph 81, cited in footnote 49; see the judgment of the Court of First Instance in Case T-227/01 *Territorio foral de Álava and others*, not yet published, paragraph 179; and the judgment of the Court of First Instance in Case T-230/01 *Territorio foral de Álava and others*, not yet published, paragraph 190.

([74]) Pursuant to Article 89(3)(a)(1) TRLIS.

([75]) See Articles 89, 21 and 22 TRLIS.

([76]) As explicitly stated in the second subparagraph of Article 12(5): 'the deduction of this difference (i.e. Article 12(5) TRLIS) will be compatible, where appropriate, with the impairment losses referred to in paragraph 3 of this Article'.

(112) Finally, the Spanish authorities also argue that the measure at issue is justified by the neutrality principle that must be applied in the corporate tax context ([77]). Indeed, the explanatory memorandum to the Corporate Tax Act ([78]) in force when the measure at issue was introduced made clear reference to this principle. In this connection, the Commission notes that the 'competitiveness principle' ([79]) invoked by the Spanish authorities, who expressly refer to 'an increase in exports', also drives this reform. In this context, it should be recalled that according to previous Commission Decisions ([80]), it is disproportionate to grant a different effective taxation to companies in comparable situations just because they are involved in export-related activities or pursue investment opportunities abroad. In addition, the Commission recalls that as the Court stated ([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 measure at issue. Indeed, as also highlighted by the two parties, the fact that the acquisition of a 5 % minority shareholding benefits from the measure at issue demonstrates that the measure would include certain situations that bear no real similarity. In this way 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 therefore considers that the neutrality principle cannot be invoked to justify the measure at issue.

(114) In the light of recitals 107 to 113, the Commission concludes that the selective advantage character of the tax scheme in question is not justified by the nature of the tax system. Therefore, the contested measure must be considered to include a discriminatory element, in the form of a limitation regarding the country in which the transaction benefiting from the tax advantage takes place ([82]) — and this discrimination is not justified by the logic of the Spanish tax system.

([77]) See, in particular, recital 48.

([78]) Corporate Tax Act 43/1995, which was repealed by Royal Legislative Decree 4/2004.

([79]) Defined by the Spanish authorities in the explanatory memorandum to Act 43/1995, as 'The competitiveness principle requires the corporate tax system to support and be consistent with the economic policy measures to enhance competitiveness …, and it also requires incentives to make businesses more international and thereby give rise to an increase in exports, to comply with this principle'.

([80]) See, inter alia, the Commission Decision of 22 March 2006 on direct tax incentives in favour of export-related investments OJ C 302, 14.12.2007, p. 3, recital 51.

([81]) See paragraph 127 of the judgment cited in footnote 42.

([82]) See the Commission Decision of 8 July 2009 in case C-2/07, Groepsrentebox, not yet published in the Official Journal, in particular recital 107.

A.2. *Additional reasoning: analysis of the measure at issue 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 measure at issue is to avoid a difference of tax treatment between, on the one hand, an acquisition immediately followed by a 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 because some obstacles would make it more difficult to perform a cross-border business combination than a local one ([83]). As a result of these barriers, Spanish taxpayers investing abroad would be placed, legally and factually, in a different situation from those investing in Spain. Indeed, the Spanish authorities state that ([84]): 'In summary, the mere differential nature of certain tax measures does not necessarily imply that they are State aid, since these measures also need to be examined to see whether they are necessary or functional as regards the efficiency of the tax system, as stated in the Commission Notice. Hence the Spanish tax system envisages different tax schemes for objectively different situations, as is the case for acquisitions of shareholdings in foreign companies as against acquisitions in Spanish companies (impossible to perform merger operations, risk management, etc.) with a view to achieving the tax neutrality imposed by Spanish domestic legislation and by Community law itself, and ensuring that the logic of the Spanish tax system is consistent and efficient'.

(116) According to the Spanish authorities, providing a specific fiscal treatment for cross-border shareholding acquisitions would be necessary to ensure the neutrality of the Spanish tax system and to avoid Spanish shareholding acquisitions being treated more favourably. Therefore, the Spanish authorities and the 30 interested parties consider that the correct reference framework for the assessment of the measure at issue would be the tax treatment of the goodwill for foreign acquisitions.

(117) Although the Commission considers that under the present procedure the Spanish authorities and the 30 interested parties have provided insufficient evidence to justify different tax treatment of Spanish shareholding transactions and transactions between companies established in the Community (as described in recitals 92 to 96), the Commission cannot a priori completely exclude this differentiation as regards transactions concerning third countries. Indeed, outside the Community, legal barriers to cross-border business combinations may persist, which would place cross-border transactions in a different legal and factual situation from intra-Community transactions. As a result, extra-Community

([83]) See the e-mail of 16 June 2009 from the Spanish authorities cited in recital 13.

([84]) See, in particular, page 6 of the Spanish authorities' letter of 22 April 2009 (A-9531), cited in recital 9.

acquisitions that could have led to the tax amortisation of goodwill — as in the case of a majority shareholding — may be excluded from this tax advantage because it is impossible to perform business combinations. Amortisation of financial goodwill for these transactions, which fall outside the Community factual and legal framework, may be necessary to ensure tax neutrality.

(118) As the measure at issue now stands, it allows the tax amortisation of financial goodwill to arise separately, including in cases where the beneficiary acquires a 5 % shareholding, and therefore the measure at issue could constitute a derogation from the reference system, even if this were defined as in recital 117.

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

B. **Presence of State resources**

(120) The measure involves the use of State resources as it implies foregoing tax revenue for the amount corresponding to the reduced tax liability of the companies taxable in Spain that acquire a significant shareholding in foreign companies, for a period of minimum 20 years following the acquisition.

(121) The foregoing of tax revenue 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 from a tax reduction or to postpone payment of tax normally due amounts to State aid. From a budgetary point of view and in line with the case-law of the Court ([85]) and the Commission Notice ([86]), the measure at issue leads to a loss of tax revenue for the State, as a resulting of the reduction in the tax base, which is equivalent to the use of State resources.

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

([85]) See the judgment of the Court of Justice in Case C-222/04 *Cassa di Risparmio di Firenze and others* [2006] EC I-289.

([86]) See footnote 21. In particular, see points 9 and 10 of the Commission Notice.

C. **Distortion of competition and trade between Member States**

(123) According to the case-law of the Court ([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 measure at issue 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 case-law of the Court ([89]), the mere fact of owning controlling shareholdings in a target company and exercising that control by involving itself directly or indirectly in the management of it, must be regarded as taking part in the economic activity carried on by the controlled undertaking.

(125) Second, the measure at issue is liable to distort competition, most clearly among European competitors, by providing a tax reduction to Spanish companies that acquire a significant shareholding in target companies. This analysis is confirmed by the fact that several companies complained or intervened after the initiating Decision to state that the measure at issue provided a significant advantage fuelling the merger appetite of Spanish companies, in particular in the context of auctions. These interventions confirm at least that a series of non-Spanish companies consider that their position on the market is affected by the measure at issue, irrespective of the correctness of their detailed submissions as regards the existence of aid.

([87]) See footnote 42, paragraphs 139 to 143.

([88]) Judgment of the Court of First Instance in Case T-214/95 *Vlaams Gewest* v *Commission* [1998] ECR II-717.

([89]) See the judgment of the Court of Justice in Case C-222/04 already cited in footnote 85.

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

D. **The Commission's reaction to the comments received**

(127) Before concluding on the classification 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 the sections concerning the assessment of the scheme (recitals 83 et seq).

D.1. *Reaction to the data extracted from the 2006 tax returns and to the comments about the judgment of the Court of Justice in Case C-501/00*

(128) As regards the data extracted by the Spanish authorities from the 2006 tax returns in order to demonstrate that the measure at issue is not selective ([90]), the Commission underlines the general lack of precision of the information submitted. First, the data give the distribution of beneficiaries by category (activity, turnover), but do not indicate whether the beneficiaries concerned represent a small or large part of each of the categories concerned. Secondly, although statistics based on the size of the turnover of the beneficiaries could be an interesting indicator in order to demonstrate that the measure at issue applies to all companies in Spain, it must be underlined that the measure at issue is related to the acquisitions of shareholdings. This type of investment does not necessarily generate significant turnover, which implies, for example, that holding companies may be included as SMEs in the data in question. Therefore, for the data to be considered 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 consolidate their tax base with other Spanish taxpayers. Thirdly, the data also appear unrepresentative because they contain no indication of the level of shareholdings acquired (majority or only minority shareholdings) by the beneficiaries. Finally, the data received do not provide any indication making it possible to determine whether the conditions of the 2003 Commission Recommendation on SMEs are fulfilled ([91]). Therefore the Commission considers that its conclusion that the contested aid measure is selective due to the very characteristics of the legislation in question has not been challenged by the partial and unrepresentative data provided by the Spanish authorities.

([90]) See recital 12.
([91]) OJ L 124, 20.5.2003, p. 36.

(129) None the less, even if the arguments presented by the Spanish authorities had been complemented by additional evidence, this would not remove the selective nature of the measure at issue as only certain undertakings do benefit from the measure, also in line with the Court of Justice's judgment in case C-501/00 *Spain* v *Commission* ([92]). Indeed, as regards the Spanish authorities' classification of the measure as a general measure ([93]) because it is open to any undertaking resident in Spain, it is worth recalling this judgment of the Court. That case also concerned an exception to Spanish corporate tax, more specifically a measure entitled 'deduction for export activities'. The Spanish authorities contended before the Court that the scheme was open to any undertaking with its tax domicile 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 measure at issue' ([94]). The Commission considers that also in the case at hand, 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 measure at issue intends to promote international trade and the consolidation of companies, without proving that such a measure is justified by the logic of the systemIn the light of the above, the Commission confirms its analysis that the measure at issue is selective.

D.2. *Reaction to the comments on Commission practice*

(131) As regards the reference made to alleged innovative interpretation of the concept 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 recital 92. Nor does the approach in this particular case depart from

([92]) See footnote 42.
([93]) See, in particular, recitals 31 and 44.
([94]) See, in particular, paragraph 120 of the judgment.
([95]) See footnote 42, paragraph 124.

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 tax incentives in favour of R & D ([98]). In the case at hand, the contested measure does not pursue a similar objective. Moreover, unlike the present case, the Spanish measure at stake in this previous Decision did not make any distinction between national and international transactions.

(132) Finally, as regards the derogation from 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 entirely consistent with the reasoning developed in this Decision. Following harmonisation within the Community, cross-border operations within the Community and within each Member State 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) of the 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) of the 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 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 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 case-law prior to the entry into force of Article 58(1)(a) of the Treaty, national tax provisions which establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were 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 of 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) of the Treaty, the Court has examined 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 constitute an obstacle to their raising capital in the Member State concerned, the Court consistently 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) of the Treaty ([105]).

([96]) See footnote 24 and recital 44.
([97]) See the Commission Decision of 14 February 2008, case N 480/07, already cited in footnote 24.
([98]) SEC(2006) 1515, COM(2006) 728 final, section 1.2.
([99]) See recital 47.
([100]) See paragraph 123 of the judgment of the Court of Justice in Case C-501/00, cited in footnote 42.
([101]) See the judgment of the Court of Justice in Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; the judgment of the Court of Justice in Case C-264/96 *ICI* v *Colmer (HMIT)* [1998] ECR I-4695, paragraph 19; and the judgment of the Court of Justice in Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19.
([102]) See, in particular, the judgment of the Court of Justice in Case C-279/93 *Schumacker* [1995] ECR I-225.
([103]) See the judgments of the Court of Justice in Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.
([104]) See the judgment of the Court of Justice in Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 39; judgment of the Court of Justice in Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41; and the judgment of the Court of Justice in Case C-35/98 *Verkooijen*, already cited; paragraph 48.
([105]) See the judgment of the Court of Justice in Case C-315/02 *Lenz* [2004] ECR I-7063; judgment of the Court of Justice in Case C-319/02 *Manninen* [2004] ECR I-7477.

(137) In any case, it must be borne in mind that Article 58(3) of the 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 another Member State are, for the reasons highlighted above, in an objectively 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 classification of the contested measure**

(139) In view of all the above considerations, the Commission considers that the measure at issue, to the extent that it applies to intra-Community acquisitions, fulfils all the conditions laid down in Article 87(1) of the Treaty and should thus be regarded as State aid.

F. **Compatibility**

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

(141) In the course of the procedure, the Spanish authorities and the 30 interested parties presented their arguments to demonstrate that the exemptions provided for in Article 87(3)(c) of the Treaty would apply in the case in question ([107]). The two parties considered that none of the provisions of Article 87(2) or Article 87(3) of the Treaty applied in the case at hand.

(142) The exemptions in Article 87(2) of the Treaty, 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 exemption 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 is its purpose to promote culture and heritage conservation as provided for in Article 87(3)(d).

(145) Finally, the measure at issue must 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 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 measure at issue does not fall under any of the frameworks or guidelines that 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 30 interested 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 the alleged general difficulties in carrying out cross-border mergers cannot be considered 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 the transaction are realised — can a market failure be considered to exist.

([106]) See the judgment of the Court of Justice in Case C-35/98 *Verkooijen*, already cited, paragraph 44.

([107]) See recital 56 et seq.

([108]) See other examples of previous Commission practice, such as Decision 2004/76/EC of 13 May 2003 on the aid scheme implemented by France for headquarters and logistics centres, OJ L 23, 28.1.2004, p. 1, recital 73; see also, for similar reasoning, Commission Decision 2003/515/EC of 17 February 2003 on the State aid implemented by the Netherlands for international financing activities, OJ L 180, 18.7.2003, p. 52, recital 105; Commission Decision 2004/77/EC of 24 June 2003 on the aid scheme implemented by Belgium — Tax ruling system for United States foreign sales corporations, OJ L 23, 28.1.2004, p. 14, recital 70.

([109]) See footnote 37.

(148) The Commission does not dispute that the costs involved in some transactions may well be higher than those in other transactions. However, since these costs are real costs that accurately reflect the nature of the projects being considered — i.e. 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 take these costs fully 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 transactions, which should be fully taken into account by market participants in order to achieve efficient outcomes.

(150) For a market failure to be present, essentially there would have to be externalities (positive spillovers) 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 recalled that, when assessing whether 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 formalised a three-step 'balancing test'. The first two steps address the positive effects of the State aid and the third addresses the negative effects and the resulting balancing of the positive and negative effects. The balancing test is structured as follows:

(a) assessing whether the aid is aimed at a specific objective of common interest (e.g. growth, employment, cohesion, environment or energy security);

(b) assessing whether the aid is well-designed to deliver the objective of common interest, i.e. whether the proposed aid addresses the market failure or other objective. For assessing this, it must be checked whether:

(i) State aid is an appropriate policy instrument;

(ii) there is an incentive effect, namely if the aid changes the behaviour of undertakings;

(iii) the measure is proportional, i.e. if the same change in behaviour could be obtained with less aid;

(c) 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 can indeed be regarded as being in the common interest. Despite the alleged aim of fostering single market integration, in the present case the objective pursued by the aid is not clearly 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 specific 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 achieving the objective of common interest, which it would not carry out without the aid or would carry out in a limited or different way. The Spanish authorities and the 30 interested parties did not present any specific arguments demonstrating the likelihood that this incentive effect would be produced.

(154) The third question addresses the negative effects of State aid. Even if it is well-designed to address an objective of common interest, aid granted to a particular undertaking or economic sector may lead to serious distortions of competition and trade between Member States. In this respect, the 30 interested parties consider that the aid scheme does not have an impact on the competitive situation of companies liable to corporate tax in Spain, since the financial effect of Article 12(5) would be negligible. However, as already indicated above in recitals 101 et seq., 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 this case the Spanish authorities and the 30 interested parties did not demonstrate the existence of a specific 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 embarking on the evaluation of the potential and actual negative effects of the measure at issue. In any case, even assuming that the positive effect of the measure is to promote cross-border transactions by eliminating 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 the analysis in accordance with Article 87(3)(c) in particular, the tax advantages granted under the measure at issue 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 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 be considered compatible with the common market, as it neither facilitates the development of any activities or economic areas nor is it limited in time, degressive or proportionate to what is necessary to remedy 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 question, to the extent that it applies to intra-Community acquisitions, is incompatible with the common market.

G. **Recovery of the aid**

(158) The measure at issue 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-Community 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) No 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 possible. No arguments raised by the Spanish authorities or by the 30 interested parties justified a general departure from this basic principle.

(160) Nevertheless, Article 14(1) of Regulation (EC) No 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 Commission practice have established that an order to recover aid infringes a general principle of Community law where, as a result of the Commission's actions, the beneficiary of a measure has legitimate expectations that the aid has been granted in accordance with Community law ([112]).

(161) In its judgment in the *Forum 187* case ([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 30 interested 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 30 interested parties consider that the principle of legitimate expectation implies that the Commission can ask for recovery neither of the deductions already realised nor all outstanding deductions, up to the 20-year period established by the TRLIS.

([110]) See the judgment of the Court of First Instance in Case T-211/05 *Italy* v *Commission*, not yet reported, paragraph 173; see also the judgment of the Court of First Instance in Case T-459/93 *Siemens* v *Commission* [1995] ECR II-1675, paragraph 48.

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

([112]) See the Decisions referred to in footnote 108.

([113]) Judgment of the Court of Justice in Cases C-182/03 and C-217/03 *Forum 187 ASBL* [2006] ECR I-5479, paragraph 147; See judgment of the Court of Justice in Case C-506/03 *Germany* v *Commission*, not yet reported, paragraph 58; and judgment of the Court of Justice in Case C-265/85 *Van den Bergh en Jurgens BV* v *Commission* [1987] ECR 1155, paragraph 44.

(163) As regards the alleged similarity of the aid scheme to other measures, which have been considered not to constitute State aid, the Commission considers that the aid scheme is substantially different from the measures assessed by the Commission in its Decision of 1984 concerning Belgian coordination centres ([114]). The measure at issue has a different scope since it does not concern intra-group activities, as in the case of the Belgian coordination centres. Moreover, the measure at issue 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 January 2002 until the date of publication of the initiating Decision in the Official Journal on 21 December 2007; and (b) the period following the publication of the initiating Decision in the Official Journal.

(165) With reference to the first period, the Commission acknowledges its replies to the parliamentary questions by Mr Erik Mejier and Ms Sharon Bowles regarding the possible State aid nature of the measure at issue. More precisely, in reply to the parliamentary question by Mr Erik Meijer MEP, on 19 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 17 February 2006, in reply to the parliamentary question by Ms Sharon Bowles MEP, 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 statements to Parliament, the Commission provided specific, unconditional and consistent assurances of a nature such that the beneficiaries of the measure at issue entertained justified hopes that the goodwill amortisation scheme was lawful, in the sense that it did not fall within the scope of 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 amortisation 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 followed in this case. As the notion of State aid is objective ([118]) and the Commission does not have any discretionary power as regards its interpretation — unlike what happens when assessing compatibility — any precise and unconditional statement on the Commission's behalf to the effect that a national measure is not to be considered State aid will naturally be understood as meaning 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, under the State aid rules, to recovery of advantages it had obtained under the goodwill amortisation scheme arising from transactions entered into before the Commission statements could have concluded thereafter that such uncertainty was unfounded, 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 entrepreneur could reasonably expect the Commission subsequently not to impose any recovery ([120]) as regards measures which it had itself previously classified, in a statement to another Community institution, as not constituting aid, irrespective of when the transaction benefiting from the aid measure was concluded.

(167) Accordingly, the Commission concludes that the beneficiaries of the contested measure had a legitimate expectation that the aid would not be recovered and hence it is not requiring recovery of the fiscal aid granted to those

([114]) Commission Decision SG(84) D/6421 of 16 May 1984.
([115]) Written Question E-4431/05.
([116]) Written Question E-4772/05.
([117]) On the principle of legitimate expectation, see the judgment of the Court of Justice in *Van den Bergh en Jurgens BV* v *Commission*, already cited, paragraph 44; judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL* v *Commission* [2006] ECR I-5479, paragraph 147; and judgment of the Court of First Instance in Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59.
([118]) Judgment of the Court of Justice in Case C-487/06 P *British Aggregates* v *Commission*, paragraphs 111-114 and 185 and 186; judgment of the Court of First Instance in Case T-98/00 *Linde* v *Commission*, paragraph 33.
([119]) i.e. it is not necessary to demonstrate that the individual or undertaking engaged in activities which it might not otherwise have done, in reliance on the assurance in question.
([120]) See, by analogy, the Commission Decision of 17 February 2003 on Belgian coordination centres (2003/757/EC) and the Commission Decision of 20 December 2006, GIE Fiscaux (C 46/2004).

beneficiaries in the context of any shareholdings held by a Spanish acquiring company, directly or indirectly in a foreign company before the date of publication ([121]) in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 88(2) of the Treaty, which could have then benefited from the measure at issue. Indeed, as of the date of the opening of the formal investigation and in line with its practice ([122]), the Commission considers that any diligent trader should have taken into account the doubts it expressed as regards the compatibility of the measure at issue.

(168) The Commission also considers that those beneficiaries should continue to enjoy the benefits of the measure at issue until the end of the amortisation period established by the measure. 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 measure at issue. Therefore, in line with previous case-law of the Court of Justice and Commission practice ([123]), in the absence of an over-riding public interest ([124]), the Commission considers that the beneficiaries should be allowed to continue enjoying the benefits of the measure at issue, over the entire amortisation period provided for by Article 12(5) TRLIS.

(169) Moreover, the Commission considers that a reasonable transition period should be envisaged for companies which had already acquired, in a long-term perspective, rights in foreign companies and which had not held those rights for an uninterrupted period of at least 1 year on the date of the publication of the initiating Decision. The Commission therefore considers that companies who fulfilled all other relevant conditions of Article 12(5) TRLIS (see recital 21) by 21 December 2007, apart from the condition that they hold their shareholdings for an uninterrupted period of at least 1 year, should also benefit from legitimate expectations, if they held those rights for an uninterrupted period of at least 1 year by 21 December 2008.

(170) On the other hand, in cases where the Spanish acquiring company did not hold the rights directly or indirectly until after 21 December 2007, any incompatible aid will be recovered from this beneficiary unless, firstly, before 21 December 2007 an irrevocable obligation was entered into by a Spanish acquiring company to hold such rights; secondly, the contract contained a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and, thirdly, the operation had been notified before 21 December 2007. In fact, after the publication of the initiating Decision in the Official Journal, it cannot be argued that a prudent trader could not have foreseen the adoption of a Community measure that could 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 recitals 167 and 169 of this Decision. The Commission also considers that the measure at issue does not constitute aid if, at the time the beneficiaries enjoyed its benefits, all the conditions laid down in legislation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the tax deduction was enjoyed were met.

(171) In the light of the above considerations, in a given year, for a given beneficiary, the precise amount of the aid corresponds to the net discounted value of the tax burden reduction granted by the amortisation under 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 granted by the application of Article 12(5) TRLIS for rights in foreign companies that do not fulfil the conditions described in recitals 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, as amended by Regulation (EC) No 271/2008.

(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 that were carried out in the period prior to publication of the initiating 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

([121]) See footnote 1.

([122]) See, inter alia, Commission Decision 2007/375/EC 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 147, 8.6.2007, p. 29) and the Commission Decision of 24 June 2003 on the aid scheme implemented by Belgium, already cited, recital 79.

([123]) See Commission Decision 2003/755/EC 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 the judgment of the Court of Justice in Joined Cases C-182/03 and C-217/03 *Forum 187 ASBL*, paragraphs 162 and 163.

([124]) See the judgment in the *Forum 187* case, already cited, paragraph 149; see also the judgment of the Court of Justice in Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraph 44.

the Court in the *Unicredito* judgment ([125]), these hypothetical considerations cannot be taken into account for the purposes of calculating aid.

VII. **CONCLUSION**

(175) The Commission considers that, in the light of the above-mentioned case-law and the specificities of the case, Article 12(5) TRLIS constitutes a State aid scheme within the meaning of Article 87(1) of the Treaty to the extent that it applies to intra-Community acquisitions. The Commission also finds that the measure at issue, having been implemented in breach of Article 88(3) of the Treaty, constitutes an unlawful aid scheme to the extent that it applies to intra-Community acquisitions. However, given the presence of legitimate expectations until the publication date of the initiating Decision, the Commission exceptionally waives recovery for any tax benefits deriving from the application of the aid scheme for aid linked to shareholdings held directly or indirectly by a Spanish acquiring company in a foreign company before the date of publication in the *Official Journal of the European Union* of the Commission Decision to initiate the formal investigation procedure under Article 88(2), except where, firstly, before 21 December 2007 an irrevocable obligation has been entered into by a Spanish acquiring company to hold such rights; secondly, the contract contained 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 had been notified before 21 December 2007.

(176) The Commission maintains the procedure initiated on 10 October 2007 open as regards extra-Community operations in view of new elements that the Spanish authorities have undertaken to provide,

HAS ADOPTED THIS DECISION:

Article 1

1. The aid scheme implemented by Spain under Article 12(5) of Royal Legislative Decree No 4/2004 of 5 March 2004, consolidating the amendments made to the Spanish Corporate Tax Act, unlawfully put into effect by the Kingdom of Spain in breach of Article 88(3) of the Treaty is incompatible with the common market as regards aid granted to beneficiaries in respect of intra-Community acquisitions.

2. None the less, tax reductions enjoyed by the beneficiaries in respect of intra-Community acquisitions, by virtue of 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 uninterrupted period of at least 1 year, can continue to apply for the entire amortisation period established by the aid scheme.

3. Tax reductions enjoyed by beneficiaries in respect of intra-Community acquisitions, by virtue of Article 12(5) TRLIS which are related to an irrevocable obligation entered into before 21 December 2007 to hold such rights where the contract contains a suspensive condition linked to the fact that the operation at issue is subject to the mandatory approval of a regulatory authority and where the decision and the operation has been notified before 21 December 2007, can continue to apply for the entire amortisation period established by the aid scheme for the part of the rights held as of the date when the suspensive condition is lifted.

Article 2

The tax reduction granted by the scheme referred to in Article 1 does not constitute aid provided that at the time it was granted it fulfilled the conditions laid down by legislation adopted pursuant to Article 2 of Regulation (EC) No 994/98 and applicable at the time the aid was granted.

Article 3

The tax reduction granted by the scheme referred to in Article 1 which, at the time it was granted, fulfilled the conditions laid down by legislation adopted pursuant to Article 1 of Regulation (EC) No 994/98 or by any other aid scheme then in force, is compatible with the common market, up to maximum aid intensities applicable to that type of aid.

Article 4

1. Spain shall recover the incompatible aid corresponding to the tax reduction under the scheme referred to in Article 1(1) from the beneficiaries whose rights in foreign companies, acquired in the context of intra-Community acquisitions, do not fulfil the conditions described in Article 1(2).

2. The sums to be recovered shall bear interest from the date on which they were made available to the beneficiary 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, as amended by Regulation (EC) No 271/2008.

4. Spain shall cancel any 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 reduction attached to rights in foreign companies fulfilling the conditions described in Article 1(2).

([125]) Judgment of the Court of Justice in Case C-148/04 *Unicredito Italiano Spa* v *Agenzia delle Entrate* [ECR] 2005 I-11137, paragraphs 117 to 119.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. Spain shall ensure that this Decision is implemented within 4 months of the date of notification of this Decision.

Article 6

1. Within 2 months of notification of this Decision, 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. 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, upon request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information about the amounts of aid and interest already recovered from the beneficiaries.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 28 October 2009.

For the Commission

Neelie KROES

Member of the Commission

ANNEX

List of the interested parties that submitted comments on the initiating Decision and have not asked to remain anonymous

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) SA

Banco Santander SA

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 SA,

Iberdrola SA

Norvarem SA

Prosegur Compañía de Seguridad SA

Sociedad General de Aguas de Barcelona SA (Grupo AGBAR)

Telefónica SA