Commission Decision (EU) 2015/314 of 15 October 2014 on the State aid SA.35550 (13/C) (ex 13/NN) (ex 12/CP) implemented by Spain Scheme for the tax amortisation of financial goodwill for foreign shareholding acquisitions (notified under document C(2014) 7280) (Only the Spanish text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2015/314

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(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

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

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

Whereas:

1. PROCEDURE

(1) On 28 October 2009, the Commission adopted a negative decision with recovery concerning aid granted to beneficiaries of a Spanish scheme allowing tax deductions in connection with the acquisition of shareholdings in non-resident companies (hereinafter 'the First Decision')[(2)]. That decision was limited to acquisitions within the Union and the Commission maintained the procedure open for acquisitions outside of the Union since the Spanish authorities undertook to provide new details concerning the alleged obstacles to cross-border mergers outside the Union.

(2) On 12 January 2011, the Commission adopted a negative decision with recovery, concerning the aid granted to beneficiaries on the basis of the contested legislation when making extra-EU acquisitions (hereinafter 'the Second Decision')[(3)].

(3) However, the Commission decided to limit the scope of the recovery obligation contained in the First and in the Second Decision due to the existence of legitimate expectations.

(4) By e-mail of 12 April 2012, the Spanish authorities informed the Commission that on 21 March 2012 the Spanish authorities adopted a new binding administrative interpretation[(4)] ('consulta vinculante') of the aid scheme concerned, to be applied also to transactions that took place prior to that date.

(5) By letter of 4 July 2012, in the context of the recovery procedure of the Second Decision, the Commission asked the Spanish authorities to clarify a number of issues concerning the new administrative interpretation. Spain submitted its comments on 5 September 2012.

(6) In October 2012, with reference to this new administrative interpretation, the Commission registered a new ex-officio case[(5)] in its State aid Registry.

(7) By letter of 29 October 2012, the Commission sent a request for information to Spain. The Spanish authorities provided the requested information on 5 December 2012. On 12 December 2012 a technical meeting took place between the Commission and the Spanish authorities. Following that meeting, on 19 December 2012 the Commission sent another letter to Spain in the context of the recovery procedure, presenting also its doubts on the legitimacy of the new administrative interpretation. Spain submitted its comments on 14 February 2013.

(8) On 26 April 2013, the Commission sent a letter to the Spanish authorities, urging them to review the new administrative interpretation of the aid scheme in the light of State aid rules. On 31 May 2013, the Spanish authorities replied to the Commission's letter.

(9) By letter of 21 June 2013, the Commission services informed the Spanish authorities that the Commission was considering issuing an injunction, requiring the suspension of any unlawful aid granted under the new administrative interpretation, and invited them to submit their comments thereof. On 26 June 2013, Spain requested an extension of the deadline originally set by the Commission, which was refused on the same day. Spain submitted its comments on the suspension injunction by letter of 1 July 2013.

(10) As the amended scheme had not been notified pursuant to Article 108(3) of the Treaty and has already been applied before receiving the preliminary approval of the Commission under Article 107 of the Treaty, the measure was registered in the Commission's State aid Registry as non-notified aid under number SA. 35550 (13/NN).

(11) By letter dated 17 July 2013, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

(12) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union*[6]. The Commission invited interested parties to submit their comments.

(13) The Commission received comments from the Spanish authorities and five interested parties. The Commission forwarded the comments of the interested third parties to Spain, which was given the opportunity to react. Its comments were received by letter dated 25 November 2013 and 20 December 2013.

(14) By letter of 26 March 2014, the Commission sent a request for information to Spain. The Spanish authorities provided the requested information on 7 May 2014.

2. DESCRIPTION OF THE MEASURE

2.1. Introduction

(a) *Article 12(5) TRLIS*

(15) The legal base of the aid scheme concerned is contained in the Spanish Corporate Tax Law (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'), in particular in Article 12(5) read in conjunction with Article 21 thereof.

(16) Article 12(5) TRLIS, which entered into force on 1 January 2002, introduced the possibility for a Spanish resident company to deduct from the corporate tax base the financial goodwill arising from the acquisition of shareholdings in a non-resident company whose income is eligible for the tax exemption provided in Article 21 TRLIS (previous Article 20(bis) LIS).

(17) Financial goodwill is defined by Article 12(5) TRLIS as the part of the difference between the purchase price of the shareholding and its book value on the date of the acquisition that has not been booked under the goods and rights of the non-resident company. That part of the difference would be deductible from the tax base, up to the annual maximum of one twentieth of its value. This is without prejudice of the applicable accounting rules.

(b) *The criteria of Article 21 TRLIS*

(18) Article 21 TRLIS lays down the requirements that the income of the non-resident company should meet so the resident company can apply the deduction of Article 12(5) TRLIS:

(a) The percentage of shareholding — direct or indirect — in the equity of the non-resident company must be at least 5 %. In addition, the shareholding must be owned by the resident company for at least one uninterrupted year[7];

(b) The non-resident company has to be subject to a foreign tax similar to corporate tax. 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, which contains a clause on exchange of information[8];

(c) The profits should stem from business activities carried out abroad. Such a condition is met when at least 85 % of the income meets the following criteria[9]:

(i) The revenues of the non-resident company are obtained abroad and cannot be included in the tax base due to the application of international fiscal transparency rules. In particular, the revenues are considered to meet this requirement if they derive from the following activities:

— Wholesale trade when the goods are made available to the purchasers in the country or territory of residence of the non-resident company or in any country or territory other than Spain, as long as the operations are carried out by the non-resident company;

— Services provided in the territory where the non-resident company has its tax domicile, as long as the operations are carried out by the non-resident company;

— Financial services provided to clients that do not have their tax domicile in Spain, as long as the operations are carried out by the non-resident company;

— Insurance services relating to risks located in a territory or country other than Spain, as long as the insurance services are carried out by the non-resident company.

(ii) Dividends or shares on profits in non-resident companies deriving from indirect shareholdings that meet the requirements contained in Article 21(1)(a) TRLIS. In addition, capital gains resulting from the transmission of shareholdings in non-resident companies as long as they comply with the requirements of Article 21(2) TRLIS.

(19) It is worth noting that although Article 12(5) cross refers to Article 21 TRLIS, the latter is originally conceived to lay down the conditions for exempting from corporate tax dividends and income of foreign origin that derive from the acquisition of shareholdings in non-resident companies with the aim to avoid double international taxation[10].

(c) *The notion of financial goodwill*

(20) Financial goodwill is a fiscal concept which was introduced by the Spanish legislator in Article 12(5) TRLIS and which is linked to the accounting notion of goodwill.

(21) Goodwill is an intangible asset that represents the value of a well-represented business name, good customer relations, employee skills and other such

factors expected to translate into greater than apparent earnings in the future. From an accounting point of view, goodwill is calculated as the difference between the purchase price of a company minus the book value of its net worth.

(22) According to the information submitted by the Spanish authorities, if the price paid for a shareholding in a company exceeds its book value, this can be due to two different reasons: (1) to the intrinsic added value of the assets of the company; (2) to an overprice paid due to an expectation of obtaining higher revenues in the future. The latter category corresponds to the financial goodwill.

(23) According to Article 12(5) TRLIS, the part of the difference between the purchase price of a shareholding and its book value on the date of the acquisition should be booked under the goods and rights of the non-resident company pursuant to the criteria laid down in Royal Decree 1815/1991 on consolidation of accounts. Financial goodwill is the part of that difference that has not been booked under the goods and rights of the non-resident company. The financial goodwill can be deducted from the tax base, up to a maximum of one twentieth of its value per year.

(24) Therefore, in order to determine the amount of financial goodwill that can be deducted from the tax base, it is necessary to apply the following steps:

(i) To calculate of the difference between the purchase price and the book value of the shareholding of the non-resident company on the date of the acquisition, The book value should reflect the share of equity that corresponds to the shareholding and its book value.

(ii) To book that difference under the goods and rights of the non-resident company according to the criteria established in Royal Decree 1815/1991 on consolidated accounts.

(iii) The amount (of that difference) that could not be booked under the goods and rights of the non-resident company is the financial goodwill. It can be deducted from the tax base up to one twentieth per year.

(d) *The notion of direct and indirect acquisitions*

(25) A direct acquisition is considered to be the purchase by a company of shareholdings in the equity of a company. An indirect acquisition is the purchase by a company of shareholdings in the equity of a company at second or ulterior levels as a consequence of a previous direct acquisition. Therefore, the acquiring company indirectly acquires shareholdings in the companies situated at second or ulterior levels.

(26) However, in the light of the information provided by the Spanish authorities and the third interested parties, the Commission notes that the controversy in the present case boils down to the indirect acquisition of shareholdings

as a consequence of a direct acquisition of shareholdings in a non-resident holding company. Indeed, holdings are companies whose main business aim is to own the shares of other operating companies. Holdings do not carry out an economic activity as such and therefore, they cannot generate goodwill (and consequently, no financial goodwill). Goodwill is generated at subsequent levels by operating companies that do carry out an economic activity. Hence, the matter at stake in the present case is to determine whether indirectly acquired shareholdings through a direct acquisition of a shareholding in a non-resident holding can benefit from the deduction of Article 12(5) TRLIS.

2.2. **Modifications in the wording of Article 12(5) TRLIS**

(27) Article 12 is entitled 'Value adjustments: loss of value of assets'. Its paragraph 5 entered into force on 1 January 2002. It was introduced in the Spanish Corporate Tax Law 43/1995 of 27 December by Article 2(5) of Law 24/2001 of 27 December[(11)]. Subsequently, Article 12(5) TRLIS was incorporated in the Royal Legislative Decree 4/2004 of 5 March, which laid down a consolidated version of the Spanish Corporate Tax Law[(12)].

(28) Article 12(5) TRLIS has been amended several times since its introduction in the Spanish Corporate Tax Law. The initial draft of Article 12(5) TRLIS introduced by Law 24/2001 established that the difference between the purchase price of the shareholding and its book value at the time of the acquisition shall be attributed to the goods and rights of the non-resident company, according to the criteria laid down in Royal Decree 1815/1991 of 20 December on Consolidation of Accounts. In 2007, the reference made to the 'Royal Decree 1815/1991 of 20 December on the Consolidation of Accounts' was substituted by a reference to 'the method of global integration established in Article 46 of the Code of Commerce and other implementing rules'.

(29) According to the Spanish authorities, this amendment was a result of the adoption of Law 16/2007 of 4 July on the Reform and Adaption of Accounting Rules for their Harmonization with EU Law[(13)]. The adoption of Law 16/2007 triggered a number of modifications in several Laws and provisions, such as Article 12(5) TRLIS. Given that Royal Decree 1815/1991 had to be derogated and updated due to the amendments in the accountancy legislation, reference was made to the Code of Commerce, a law of higher ranking. The Spanish authorities explained that the abovementioned amendment is purely a technical modification: it did not alter the consolidation rules nor influenced the way the financial goodwill is calculated. The Spanish authorities state that the method of global integration has always been used to calculate the financial goodwill and that this accounting principle was contained both in Royal Decree 1815/1991 and in Article 46 of the Spanish Code of Commerce.

(30) Following the adoption of the First and Second Decisions, Spain added a new paragraph to Article 12(5) TRLIS in order to comply with these two

Commission Decisions. Although Article 12(5) TRLIS had been declared illegal and incompatible aid, it was not formally abolished since it could still be applied by beneficiaries that had legitimate expectations that the aid that had been granted would not be recovered and for which the transition period was recognised in the First and Second Decisions.

(31) Spain introduced a third indent to Article 12(5) TRLIS that stated that the deduction of the financial goodwill shall not apply to the acquisitions of shareholdings in non-resident EU companies carried out from 21 December 2007 onwards (without prejudice to Article 1(3) of Commission Decision of 28 October 2009 and to Article 1 (3) of Commission Decision of 12 January 2011 for acquisitions where an irrevocable obligation was entered into before 21 December 2007). However, with regard to the acquisition of majority shareholdings in entities resident in extra-EU countries acquired between 21 December 2007 and 21 May 2011 (date of publication in the Official Journal of the Second Decision), the deductions might be applied if it is proven that there are explicit legal obstacles to cross-border business combinations within the meaning of Article 1(4) and (5) of the Second Commission Decision of 12 January 2011.

2.3. **The administrative interpretation of Article 12(5) TRLIS**

(32) The main legal provision, Article 12(5) TRLIS, does not mention whether the deduction of financial goodwill could be applied to direct or indirect acquisitions of shareholdings. However, Article 21 TRLIS refers to direct and indirect shareholdings when listing the criteria that the income of the non-resident company should meet so the resident company can apply the deduction of Article 12(5) TRLIS.

2.3.1. *The initial administrative interpretation*

(33) During the course of the administrative procedure that led to the adoption of the opening decision of 2007, the Spanish authorities explained to the Commission that consistent administrative practice of the Spanish tax administration (Dirección General de Tributos, hereafter 'DGT') as well the jurisprudence of the Economic and Administrative Court (Tribunal Económico y Administrativo Central, hereafter 'TEAC') only allowed for the deduction of financial goodwill that arose from direct acquisitions of shareholdings[(14)]. The reasons put forward by the Spanish authorities were the following:

(a) Article 12(5) TRLIS is a method for depreciating an investment, depreciation that affects directly the tax base. The management of the deduction requires control of the investment and such a control can only be exercised through a direct acquisition of shareholdings in operating companies located at first level.

(b) The requirements laid down in Article 21 TRLIS of carrying out an economic activity abroad by the non-resident company and being subject to tax similar to corporate tax have their rationale in anti-abuse tax rules.

(c) Furthermore, Article 12(5) TRLIS is limited to acquisitions carried out in the first level given that Article 21 TRLIS only requires for the application of the deduction of Article 12(5) TRLIS the acquisition of at least a 5 % of the shares in the equity of the non-resident company. This percentage neither implies consolidation with the non-resident company located at first level nor consolidation with subsidiaries of the non-resident company situated at second or ulterior levels. It is only after consolidation that goodwill could arise at second or ulterior levels.

(d) Moreover, the tax Administration needs to monitor the application of the deduction of the financial goodwill. This control can only be done through the Spanish resident company. Indeed, the Spanish tax administration can easily monitor if the shareholdings are located at the first level because the shareholdings are part of the assets of the Spanish resident company. It would be more difficult for the Spanish tax administration to monitor the goodwill arising in non-resident companies located at subsequent levels because the shareholdings are booked under the assets of the non-resident companies, which are not under the obligation to be subject to the control of the Spanish tax administration.

(34) In the course of the formal investigation procedure that led to the adoption of the present decision, the Spanish authorities were required to provide a list of the administrative interpretations (consultas) of the tax administration that related to the application of Article 12(5) TRLIS. The Spanish authorities provided[(15)] a copy of administrative interpretations 1490-02 of 4 October 2002 and V0391-05 of 10 March 2005[(16)]. These administrative interpretations confirm that since the adoption of Article 12(5) TRLIS the DGT explicitly excluded indirect acquisitions of shareholdings that result from the direct acquisition of shareholdings of a holding from the application of Article 12(5) TRLIS.

(35) The Spanish authorities were also required to provide a list of the TEAC's jurisprudence that referred to the application of Article 12(5) TRLIS. The Spanish authorities provided[(17)] a copy of four Resolutions from the TEAC[(18)] that confirmed the exclusion of indirect acquisitions of shareholdings that result from a direct acquisition of shareholdings of a holding company from the scope of application of Article 12(5) TRLIS. The reasoning that underpinned the exclusion of indirect acquisitions from the application of Article 12(5) TRLIS, which was laid down in the DGT's *consultas* and TEAC resolutions, can be summarised as follows:

(a) One of the requirements of Article 12(5) TRLIS is that the goodwill arising from the difference between the purchase price of the shareholdings and their

book value should be attributed to the assets of the non-resident acquired company.

(b) Goodwill generates in operating companies. Indeed, as a result of the performance of an economic activity, an intangible asset is generated deriving from the client portfolio, geographic location, know-how, human resources, prestige etc. In the end, this results into a higher purchase price than the one accounted as book value. Therefore, financial goodwill can only arise due to the direct acquisition of an operating company resulting from the difference between the purchase price and book value, as long as this difference is not attributable to the tacit added value generated by the assets of the company.

(c) In order to determine the amount of financial goodwill (the difference between the purchase price and book value not attributable to the non-resident company's net worth), it is necessary to apply the following three steps: (1) to calculate the difference between the purchase price of the shareholding and its book value. The book value should reflect the share of equity that corresponds to the stake that the resident company has in the non-resident company; (2) the difference between the two abovementioned values should be assigned to the assets of the non-resident company up to the limit of the market value of the asset in question according to the criteria established in the accounting consolidation rules[19]; (3) the amount that remains is the financial goodwill that can be deducted from the tax base up to a maximum limit of one twentieth per year.

(d) Holdings are entities whose main business aim is to own shares of other operating entities. Therefore, holdings do not carry out a business or economic activity as such. According to Article 12(5) TRLIS, if a company resident in Spain acquires a shareholding in a non-resident holding company (whose main activity is the possession of shares and management of assets of other operating companies) the difference between the purchase price and the book value of the equity of the holding should be booked as an asset of the holding company up to the limit of the market value of the asset in question. As the assets of a holding are the shareholdings in non-resident operating companies, the market value of its assets equates to the purchase price of the shares and therefore, no financial goodwill would arise. Under this interpretation, financial goodwill can only arise due to a direct acquisition of an operating company resulting from the difference between the purchase price and book value, as long as this difference is directly attributable to the intrinsic added value generated by the goods and rights of the acquired company.

(36) The consistent administrative practice of the Spanish authorities that allowed the deduction of the financial goodwill arising exclusively from direct acquisitions of shareholdings of operating companies continued to be in place even after the adoption of the First and Second Decision[20].

2.3.2. *The new administrative interpretation*

(37) On 21 March 2012, following a request for a tax opinion by a Spanish company, the DGT adopted the binding interpretation V0608-12[(21)], which establishes that Article 12(5) TRLIS would allow the deduction of financial goodwill not only from direct acquisitions of shareholdings of operating companies, but also from indirect acquisition of shareholdings resulting from a previous direct acquisition of shareholdings of a holding company.

(38) In the abovementioned *consulta vinculante*, the DGT acknowledged a departure from its initial interpretation of Article 12(5) TRLIS with regard to its application to indirect acquisition of shareholdings. As a result, the DGT modified the criterion on which it had based its previous responses to questions raised by Spanish companies on that issue.

(39) In addition, the TEAC in a Resolution of 26 June 2012[(22)] aligned with the position adopted by the DGT with regard to the application of Article 12(5) TRLIS to indirect acquisitions of shareholdings. Although the Resolution related to another matter and the incumbent was another company than the one of the abovementioned 'consulta vinculante' of the DGT of 21 March 2012, the TEAC acknowledged a departure from its previous doctrine by extending the application of the deduction of the financial goodwill to indirect acquisitions of shareholdings that result from a direct acquisition of a holding.

(40) The TEAC also acknowledges a departure from its previous doctrine. According to the TEAC, its previous doctrine was underpinned by the obligation contained in Article 15 of the Royal Decree 1777/2004 of 30 July on the Implementing Regulation of the Spanish Corporate Tax Law which exclusively referred to the directly acquired company. However, given the controversy around the interpretation of Article 12(5) TRLIS and the two Decisions adopted by the European Commission led the TEAC to reconsider its previous doctrine. In essence, the reasons put forward by the DGT and TEAC can be summarised as follows:

(a) First, the DGT and TEAC refer to Article 21(1)(c) TRLIS in order to argue that indirect acquisitions can also benefit from the deduction of Article 12(5) TRLIS. According to the DGT and the TEAC, the requirement of carrying out an economic activity can be met when the operating company is also in second or ulterior levels. In particular, the DGT and the TEAC refer to Article 21(1)(c) 2º TRLIS where it is explicitly stated that dividends deriving from direct or indirect shareholdings will also be covered by the provision. The DGT and the TEAC conclude that the fact that the operating company is situated at a second or ulterior level should not be an obstacle for the application of the deduction of Article 12(5) TRLIS.

(b) Second, the DGT and the TEAC refer to the rationale of the provision: given that Article 12(5) TRLIS aims at fostering the internationalisation and foreign investment of Spanish companies, it would go against the spirit of the provision to exclude from the application of Article 12(5) TRLIS investments

made by Spanish companies in non-resident holdings. Moreover, the DGT and TEAC claim that the economic reality shows that the acquisition of shareholdings in non-resident companies is often carried out through the acquisition of a holding company. The fact that an investment is carried out via the acquisition of shares of a holding is an exogenous circumstance that does not depend on the company that acquires the holding, but on how the market is structured. The presence of intermediate companies like holdings should not be an obstacle for carrying out investments nor should it discriminate between different types of acquisitions.

(c) Third, the DGT and the TEAC argue that constant references were made both to direct and indirect acquisitions in the wording of the First and Second Commission Decisions. The DGT and TEAC infer from the wording of the two decisions that the European Commission accepts the deduction of the financial goodwill both for direct and indirect acquisitions of shareholdings.

(d) Fourth, the DGT also acknowledges that this interpretation is done in spite of the obligation to provide information contained in Article 15 of the Implementing Regulation of the Corporate Tax Law. Article 15 of the Regulation exclusively requires providing information on the acquisition of the directly acquired company in order to be able to apply Article 12(5) TRLIS. If this deduction were also applicable to indirect acquisitions, it would have been logical to include indirect acquisitions as well, for the sake of a better transparency. However, this should not be deterrent for a wide interpretation of Article 12(5) TRLIS.

(e) Finally, in order to apply the deduction to indirect acquisitions it is necessary to turn the indirect shareholding into a direct shareholding via a previous merger operation. It would be against the principle of fiscal neutrality to treat differently from a fiscal point of view an acquisition that leads to a business combination and an acquisition of shareholdings that does not result into a business combination. The DGT and TEAC conclude that the deduction should also be possible in different shareholding levels. For that matter, it is necessary to prove by means of a consolidated balance sheet or any other legal means that a part of the purchase price of the shareholding corresponds to the financial goodwill existing in an 'indirectly' acquired shareholding of an operating company.

(41) The two TEAC Resolutions 00/2842/2009 and 00/4871/2009 were appealed before the Audiencia Nacional, a Spanish specialised High Court. The Audiencia Nacional in its judgement of 6 February 2014[(23)] did not uphold the new administrative interpretation and confirmed the initial criteria used by the DGT and TEAC, whereby indirect shareholding acquisitions that result from a direct shareholding acquisition of a holding company are excluded from the application of Article 12(5) TRLIS. In its judgment, the Audiencia Nacional considers that goodwill, and therefore financial goodwill, can only generate in operating companies that carry out an economic activity. Holdings

are companies whose main aim is to own shares of other operating companies. Given that holdings do not carry out an economic activity, they cannot generate goodwill (and therefore, financial goodwill).

3. REASONS FOR OPENING THE PROCEDURE

(42) By letter dated 17 July 2013 the Commission informed the Spanish authorities that it had decided to initiate the procedure laid down in Article 108(2) TFEU with regard to the effects of the new administrative interpretation of Article 12(5) TRLIS which was introduced by the Spanish authorities after the adoption of the First and Second Decision.

(43) In its decision to open the formal procedure the Commission considered that this new administrative interpretation appears to enlarge the scope of the application of the measure which was the subject of the Commission's investigation in the First and Second decision, since the measure would now be applicable not only to financial goodwill arising from direct acquisitions of shareholdings in foreign companies but also to financial goodwill arising from indirect acquisitions.

(44) The Commission concluded on a preliminary basis that the new administrative interpretation had enlarged the scope of application of a scheme already declared illegal and incompatible aid, without being notified to the Commission, and thus constituted unlawful aid. The Commission expressed doubts as to whether the aid could be considered compatible with the internal market.

(45) The Commission considered on a preliminary basis that the aid should be recovered and that the legitimate expectations recognised in the First and Second Decision cannot be extended (retroactively) to situations (indirect acquisitions) which were, following the consistent administrative practice by the Spanish authorities, not covered by the scope of application of the contested measure at the time of the First and Second Decision.

(46) The Commission decided to issue a suspension injunction in accordance with Article 11(1) of Council Regulation (EC) No 659/1999[(24)] requiring the Spanish authorities to suspend any aid pending a final decision by the Commission.

(47) The decision to initiate proceedings was published in the *Official Journal of the European Union*[(25)]. The Commission invited the Spanish authorities and interested parties to comment.

4. POSITION OF THE SPANISH AUTHORITIES AND INTERESTED PARTIES

(48) The Commission received comments from the Spanish authorities and five interested third parties, namely Telefónica, Iberdrola, Santander, Abertis and Axa. All interested parties supported the Spanish authorities' position.

(49) Neither the Spanish authorities nor the interested parties share the Commission's view that the new administrative interpretation amounts to new aid and they consider that legitimate expectations would be applicable also with regard to indirect shareholding acquisitions that result from a direct shareholding acquisition of a holding company.

A. NEW AID CHARACTER OF THE MEASURE

(50) According to the Spanish authorities and the five interested parties, the new administrative interpretation does not constitute new aid for the following reasons:

4.1. **The initial administrative interpretation is not final and is not a relevant and systematic administrative practice**

(51) The Spanish authorities referred to the initial administrative interpretation of the DGT, contained in *consultas* 1490-02 of 4 October 2002 and V0391-05 of 10 March 2005, which allowed for the deduction of financial goodwill with regard to direct acquisitions of shareholdings in non-resident operating companies, as long as the income generated by the non-resident company complied with the conditions established in Article 21 TRLIS. The Spanish authorities explained that the reasoning behind their original administrative interpretation of Article 12(5) TRLIS, as reflected in the two *consultas* concerned, is that no goodwill can arise in the individual accounts of a holding.

(52) The Spanish authorities and the interested parties argue that the administrative interpretation is not a relevant administrative practice. The administrative interpretations of the DGT are not a source of Law and are binding for neither the Courts nor the citizens; they exclusively bind the tax administration. This binding character means that the tax administration is obliged to use the same criteria if there is an identity of facts and circumstances among taxpayers. Moreover, the Spanish authorities explained that *consulta* 1490-02 is not binding for the tax administration and merely has an informative character towards third parties. *Consulta* V0391-05 is binding towards the tax administration. In the event that there is discrepancy with regard to the criteria established in the administrative interpretation, the taxpayer could appeal before the competent courts. Therefore, the national courts are not bound by the criteria laid down in the administrative interpretation.

(53) According to the Spanish authorities, the Commission is mistaken when stating in the Opening decision that ‘the new interpretation of the Finance Ministry was confirmed by a Resolution of the TEAC of 26 June 2012’. The DGT and TEAC are independent institutions: the DGT is part of the Administration and the TEAC has been qualified as a Court by the European Court of Justice[(26)]. The TEAC reviews the application of the tax law and lays down the doctrine and criteria to be applied by the rest of the Administration. The interested third parties claim that the TEAC is not a Court, but an entity

integrated within the tax administration, dependent upon the Ministry of Finance. They also argue that the TEAC's doctrine is not part of the legal order. Although its doctrine binds the tax administration, it is subject to the control of subsequent court instances.

(54) The Spanish authorities and third interested parties claim that the administrative interpretation, and the criteria contained therein, are not final and can always be subject to modifications, as long as these justifications can be objectively justified. In that respect, the Spanish authorities refer to Article 89 of the General Tax Law 58/2003 of 17 December, which lays down the legal effects of the tax interpretations:

(a) The response to a request for the interpretation of fiscal provisions will have binding effects for the tax Administration.

(b) As long as the jurisprudence or the law applicable to the case is not modified, the criteria contained in the tax interpretation will be applied to the incumbent.

(c) The tax administration in charge of tax enforcement should apply the criteria contained in the tax interpretations as long as there is an identity of facts and circumstances between the incumbent and the addressee of the administrative tax interpretation.

(55) Furthermore, the third interested parties claim that the initial administrative interpretation cannot be defined as a consolidated practice of the tax administration. According to some of the third interested parties, it only consists of four administrative interpretations and one Resolution of the TEAC[27]. Moreover, according to some of the interested third parties, even before the DGT consulta and the TEAC resolution of 2012, the administrative interpretation was progressively modified by a resolution of the TEAC 1 of June 2010 and a judgment of the Audiencia Nacional of 13 October 2011. The issue analysed in the TEAC resolution and the Audiencia Nacional judgement related to the application of Article 12(5) TRLIS to intra-group acquisition of shareholdings. The judgement of the Audiencia Nacional of 13 October 2011 was upheld by the Spanish Supreme Court in a judgment of 24 June 2013.

(56) The Spanish authorities also state that the requests made by the companies about the deduction of financial goodwill for indirect acquisitions of shareholdings were not systematically denied, as indicated by the Commission in the Opening decision of 2013. There was not a systematic denial because the tax collection system does not require the incumbent to request the application of Article 12(5) TRLIS. The tax collection system for corporate tax is based on a 'self-assessment' system (autoliquidación), whereby the incumbent has to go through all the tax operations, such as the interpretation of the law, qualification of the tax operations and calculation of the final tax amount due. The tax authority does not intervene in that process. However, the 'self-assessment' tax operations can be checked and monitored by the tax administration, which eventually will determine the final tax assessment.

(57) The Spanish authorities and the interested third parties state that, despite of the initial administrative interpretation of the DGT, Spanish companies were applying the deduction of the financial goodwill to indirect acquisitions of shareholdings. According to the Spanish authorities, those taxpayers who believed that they had the right to apply Article 12(5) TRLIS to indirect acquisitions, did apply it. The existence of a different interpretation by the DGT was not an impediment for its application: on the one hand, those taxpayers that were not subject to a tax inspection confirmed *de facto* their criteria after the deadline of prescription four years; on the other hand, those taxpayers that were subject to a tax inspection were able to appeal the criteria established by the DGT in subsequent instances.

4.2. **The new administrative interpretation does not constitute a substantial modification of the scope of application of Article 12(5) TRLIS**

(58) Both the Spanish authorities and the interested third parties allege that Article 12(5) TRLIS has not undergone substantial modifications and that the administrative interpretation of the scope of a provision cannot be considered a modification of the aid. The fact that the administrative interpretation has been modified by the DGT does not affect the scope of application of Article 12(5) TRLIS.

(59) The Spanish authorities and interested third parties argue that the scope of application has not been modified by the new administrative interpretation because Article 12(5) TRLIS already cross-referred to Article 21 TRLIS, which mentioned in its paragraph 1(a) direct and indirect acquisitions of at least 5 % shareholdings. Such a requirement has not been altered since the introduction of Article 12(5) TRLIS to the Spanish Corporate Tax Law.

(a) *Method of calculation of financial goodwill*

(60) One of the interested parties contests the statement made by the Commission in the Opening decision that a number of situations that were not originally covered by the measure have come within the scope of Article 12(5) TRLIS. The interested party considers that acquisitions of shareholdings of holding companies have always met the eligibility criteria of this measure and that the controversy of the application of Article 12(5) TRLIS boils down to the discrepancy in the calculation method to be applied. The interested third party believes that the understanding of this issue is key to the present case.

(61) The interested party claims that the accounting consolidation rules justified a radically different interpretation than the one initially adopted by the DGT and TEAC. According to accounting consolidation rules, financial goodwill must be calculated by applying the integrated consolidation method, which requires that the assets and liabilities of all dependent companies owned by a given entity be treated as if they were the assets and liabilities of a single entity. Under this principle, the holding company's stake in the operating subsidiary

is eliminated and the value of that stake is replaced in the holding balance sheet by the market value of the assets and liabilities of the operating company. Consequently, once the assets get incorporated into the holding company's assets, a reserve is booked in the consolidated balance sheet of the holding company for an amount equal to the difference between the market value of the operating subsidiary's assets and their book value. Thus, the difference between the price paid for the shareholding of the holding company and the net worth of the holding company after having fully consolidated the assets of its operating subsidiary is booked as financial goodwill pertaining to the holding company.

(62) Under this calculation method, the assets of the holding and operating companies would be treated as if they were assets of one single company. Therefore, the holding company would be able to deduct the financial goodwill pursuant to Article 12(5) TRLIS.

(b) *Reasons that justify the departure from the previous administrative interpretation*

(63) The Spanish authorities and the interested third parties also acknowledge that the DGT and TEAC departed from their previous practice according to which it was only possible to apply Article 12(5) TRLIS to direct acquisitions of shareholdings of operating companies.

(64) The Spanish authorities explained that the DGT and the TEAC justified their departure from their previous administrative interpretation with the following reasons:

(a) First, Article 12(5) TRLIS was conceived as part of a set of measures that aimed at fostering the economic growth and the internationalisation of Spanish companies. This measure had the purpose of fostering Spanish investment abroad. Thus, it would go against the spirit of the provision to exclude from the application of Article 12(5) TRLIS investments made by Spanish companies in non-resident holdings.

(b) Second, Article 12(5) TRLIS refers to Article 21 TRLIS where explicit reference is made to direct and indirect acquisitions of shareholdings. Therefore, it should be understood that Article 12(5) TRLIS covers indirect shareholding acquisitions of non-resident companies through a direct shareholding acquisition of a non-resident holding company as long as the conditions of Article 21 TRLIS are met.

(c) Third, the two Commission Decisions of 2009 and 2011 relating to the amortisation of the financial goodwill refer both to direct and indirect acquisitions of shareholdings.

(d) Fourth, in order to apply the deduction to indirect acquisitions it is necessary to turn the indirect shareholding into a direct shareholding via a previous merger operation. Given the difficulties of constituting foreign business

combinations, it would be against the principle of fiscal neutrality to treat differently from a fiscal point of view an acquisition that leads to a business combination and an acquisition of shareholdings that does not result into a business combination. Moreover, the fact that an investment is carried out via the acquisition of shares of a holding is an exogenous circumstance that does not depend on the company that acquires the holding, but rather on how the market is structured.

(c) *References to indirect acquisitions in the First and Second decisions, parliamentary questions and press release of the Opening Decision of 2007*

(65) The Spanish authorities and the interested third parties allege that the new administrative interpretation, as laid down in the binding administrative interpretation V0608-12 of 21 March 2012 and the Resolution from the TEAC of 26 June 2012, is coherent with the First and Second Decisions. This is reflected in two aspects:

(a) First, the two Commission decisions refer to direct and indirect acquisitions in several occasions. Both decisions declare illegal aid the deductibility of the financial goodwill both for direct and indirect acquisition of shareholdings. The Spanish authorities and interested parties quote a number of paragraphs of the First and Second Decisions where reference is made to direct and indirect acquisitions, namely paragraphs 21, 167, 170 and 175 of the First Decision and Article 1 of the First and Second Decisions.

(b) Second, it seemed that the Commission did not consider the administrative interpretation to be relevant since it was not mentioned in the wording of neither the First nor the Second Decision.

(66) In addition, the Spanish authorities note that the Commission services sent a service letter on 26 March 2007, before the opening of the formal investigation procedure, indicating that the administrative interpretation of Article 12(5) TRLIS seemed to be too restrictive.

(67) The Spanish authorities allege that the tax administration and the DGT complied with the principle of consistent interpretation with EU Law, the principle of direct effect and primacy of EU Law when adopting the administrative interpretation V0608-12 of 21 March and the TEAC resolution of 26 June 2012. Indeed, national authorities, judges or the administration should always apply national law in conformity with EU Law and are bound by the principle of loyal cooperation laid down in Article 4 of the TFEU.

(68) Given that the decisions adopted by the European Commission have a binding character for its addressee, the DGT and the TEAC had to modify its administrative criteria regarding the interpretation of Article 12(5) TRLIS. Therefore, the administrative interpretation and the TEAC resolution were fully coherent with the wording and the scope of the two Commission decisions, being not subject to recovery the financial goodwill resulting from

direct and indirect acquisitions and that were carried out during the period where the Commission acknowledged the existence of legitimate expectations for the beneficiaries and that met the specific conditions contained in the First and Second Decisions.

(69) The Spanish authorities and the interested third parties allege that the Commission arrives to the wrong conclusion when applying to the present case the jurisprudence of the *Kahla* judgement[28] and the *Namur-Les Assurances de Credit* judgement[29] of the Court of Justice. The *Kahla* judgement states that any complementary information requested by the Commission with the aim to clarify the scope of application of an aid measure is part of the notified aid regime. According to the Spanish authorities, even though the Commission was already aware of the administrative interpretation that excluded the application of Article 12(5) TRLIS to indirect acquisitions, the Commission refer to it neither in the First nor in the Second decision. Moreover, in spite of being aware of the administrative interpretation, the Commission mentioned direct and indirect acquisitions in both decisions. The interested parties claim that they were never aware of the communication between the Commission and the Spanish authorities, whereby it was stated that in practice financial goodwill could only be applicable with regard to a direct acquisition of shareholdings.

(70) In the judgement *Namur — Les Assurances* the Court lays down that only the modifications that introduce substantial changes in an aid regime are subject to further notification. According to the Spanish authorities, there is neither a modification of an existing aid measure nor a new aid if the legal provisions that originally contained the aid measure as well as its limits and modalities have not been modified. Therefore, it can be inferred from the Court judgement that since the legal provisions at issue — Article 12(5) TRLIS and Article 21(1)(a) TRLIS —, their modalities and limits have not been modified, the new interpretation cannot qualify as new aid.

(71) Furthermore, the Spanish authorities and the interested third parties allege that the Commission acknowledged in the First and Second Decisions that the parliamentary questions addressed by some Members of the European Parliament triggered the opening of the formal investigation procedure. These parliamentary questions referred mostly to indirect acquisitions, that is, acquisitions of shareholdings in a non-resident holding company, which at the same time held shareholdings in non-resident operating companies. Examples of these acquisitions were the acquisition of O2 by Telefónica, Scottish Power Ltd by Iberdrola and the Abbey National Bank by Banco Santander. Therefore, the Commission was aware that Article 12(5) TRLIS also covered indirect acquisitions.

(72) In addition, the Spanish authorities and the interested third parties claim that the press release whereby the Commission informed about the opening of the formal investigation procedure in 2007 referred to the parliamentary

questions that quoted some of these transactions, notably the acquisition of O2 by Telefónica, the acquisition of Scottish Power Ltd by Iberdrola and the offers of Sacyr, Abertis and Cintra for a concession of highways in France. Moreover, Iberdrola, claims that the Commission authorised the merger[30] between Iberdrola and Scottish Power, and for that reason, the Commission must have been aware that Iberdrola acquired shares of a holding with operating subsidiaries.

(d) *Principles of equal treatment, non-discrimination and fiscal neutrality*

(73) The Spanish authorities and some of the interested third parties consider that the principle of equal treatment and no discrimination requires comparable factual situations not to be treated in a different manner and different factual situations not to be treated in the same way, unless such differential treatment can be objectively justified.

(74) The Spanish authorities and some of the interested third parties allege that the indirect shareholding acquisition of non-resident operating companies that result from a previous direct shareholding acquisition of a holding company is comparable to a direct acquisition of shareholdings in an operating company. Therefore, the conclusions reached in the First and Second Decisions should be applicable both to direct and indirect acquisitions. This would mean that the administrative interpretation that covers indirect acquisitions should also be declared illegal and incompatible aid and, automatically, the Commission should acknowledge the existence of legitimate expectations with regard to indirect acquisitions of shareholdings carried out between 1 January 2002 and 21 December 2007 (21 May 2011) pursuant to the conditions laid down in Article 1 of the First and Second Decisions.

(75) The interested third parties also refer to the principle of fiscal neutrality. The principle of fiscal neutrality requires the same equal treatment for an investment, regardless of the means to carry out the investment. In the case of indirect acquisition of shareholdings, financial goodwill can only arise from indirect acquisitions of shareholdings if the indirect acquisition turns into a direct one through a merger operation whereby the resident company acquires the non-resident company. Given the difficulties of international business combinations, it should not be necessary to carry out a merger operation with a non-resident operating company for the financial goodwill to arise. For the same reason, it should not be necessary to carry out a multilevel merger operation between the parent company and the non-resident holding company, which at the same time merged with its subsidiary operating company. Therefore, it would follow under the logic of the fiscal neutrality principle that Article 12(5) TRLIS covers both direct and indirect acquisitions.

(e) *The new administrative interpretation has no retroactive effects*

(76) The Spanish authorities and the interested third parties also contest the statement contained in the Opening decision of 2013 relating to the

retroactive effects of the administrative interpretation. According to the Spanish authorities, retroactivity exists only with regard to legal provisions or legal acts that trigger legal effects on third parties. According to the Spanish Supreme Court, an administrative interpretation such as a tax opinion is not a legal act, but a mere procedural act. Tax opinions cannot be appealed by the incumbent and their purpose is purely informative. Since they cannot trigger legal effects, they cannot have a retroactive effect. The interested third parties agree that there is not a retroactive application of the measure. First, the tax interpretations are submitted by the taxpayer for those taxes that have not been assessed and levied yet. Second, many tax payers disregarded the initial criteria contained in the administrative interpretation and applied the deduction of financial goodwill contained in Article 12(5) TRLIS to indirect acquisitions of shareholdings.

B. LEGITIMATE EXPECTATIONS, LEGAL CERTAINTY AND PRINCIPLE OF ESTOPPEL

(77) According to the Spanish authorities, in the event that the Commission determines that the new administrative interpretation relating to Article 12(5) TRLIS is unlawful new aid, the same conclusions reached in Article 1 of the First and Second Decisions with regard to legitimate expectations should also be applicable to indirect acquisitions of shareholdings.

(78) The Spanish authorities invoke Article 14(1) of Regulation (EC) No 659/1999 — whereby the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law — to claim the absence of recovery of the aid in the present case due to the existence of legitimate expectations.

(79) According to the Spanish authorities and interested parties, the following Commission acts underpinned the creation of legitimate expectations for the beneficiaries of the aid:

(a) The Commission has generated new legitimate expectations for the operators who carried out indirect acquisitions of shareholdings, and which meet the conditions laid down in the two Commission decisions, due to the constant references to indirect acquisitions both in the First and Second Decisions. Indeed, the recognition of legitimate expectations in the First Decision (paragraphs 164 to 167) and in the Second Decision (paragraphs 190 to 193) referred both to direct and indirect acquisitions.

(b) The answers given by the Commission to the written parliamentary questions of the MEPs M Erik Mejier, Ms Sharon Bowles and David Martín[31] about whether the measure in question was to be qualified as aid, explicitly referred to the acquisition of O2 by Telefónica, the bids of Abertis, Cintra and Sacyr with regard to French Highways and the acquisition of Scottish Power by Iberdrola. It is acknowledged in the First and Second Decisions that the answers to these parliamentary questions created legitimate expectations.

The Spanish authorities and the third interested parties believe that not only these answers did not expressly limit the application of Article 12(5) TRLIS to direct acquisitions, but also it was presumable that they would relate to indirect acquisitions given the structure of the acquired groups of companies. In particular, the Spanish authorities and the interested third parties recall the merger between Scottish Power and Iberdrola, which was approved by the Commission. Consequently, the Spanish authorities and interested third parties believe that the Commission was aware, based on the information provided to DG Competition services that the latter acquisition was an indirect acquisition of shareholding in a non-resident company that results from a previous acquisition of a holding company. Therefore, from the answers given to the MEP's, a prudent and diligent economic operator could not infer that they only referred to direct acquisitions of shareholdings.

(80) According to the Spanish authorities, the existence of a previous restrictive administrative interpretation of Article 12(5) TRLIS does not affect the legitimate expectations of those beneficiaries that carried out indirect acquisitions of shareholdings. This is due to the fact that Article 12(5) TRLIS is a clear provision, contains a reference to the rules for consolidation of accounts and aims at fostering Spanish investment abroad as long as there is some influence in the activity of the acquired company and that it is engaged in economic activities.

(81) According to the interested third parties, the internal discussions between the Commission and the Spanish authorities in the context of the formal investigation procedure do not alter the legitimate expectations towards the beneficiaries of an aid measure. These internal discussions could trigger legal effects against third parties if they were to be reflected in the wording of the decisions.

(82) The interested third parties allege that the Commission has breached the principle of estoppel, according to which the Commission cannot go against its own acts or measures. The Commission referred constantly in the First and Second Decisions to indirect acquisitions. Therefore, the Commission should not alter the initial guarantee conferred in that legal measure arguing that there is a modification in the interpretation of the provision by the tax administration.

(83) The interested third parties also argue that the Commission is in breach of the principle of legal certainty. Not only the Commission refers repeatedly to direct and indirect acquisitions, but also it does not refer to the administrative interpretation of Article 12(5) TRLIS in the wording of the two decisions. The interested third parties believe that from the wording of the decisions, a diligent and prudent operator would have believed that indirect acquisitions were covered by the scope of application of Article 12(5) TRLIS.

5. COMMENTS FROM SPAIN ON THIRD-PARTY COMMENTS

(84) The Spanish authorities note that all the interested third parties share the same point of view and support the arguments submitted in the Spanish authorities' observations.

(85) The Spanish authorities reiterate that the new administrative interpretation of the DGT contained in the *consulta* V0608/12 of 21 March 2012 and the TEAC Resolution of 26 June 2012 does not constitute new aid. Neither the replies to the tax opinions nor the resolutions of the TEAC produce legal effects.

(86) The judgement adopted by the Spanish Supreme Court of 24 June 2013 demonstrates that the calculation of the financial goodwill should be done taking into account the consolidated account rules, irrespective of whether the non-resident acquired companies present consolidated or individual accounts. Although the subject matter of this judgement was not whether Article 12(5) TRLIS applies to direct or indirect acquisitions, the fact that reference should be made to the accounting rules means that there should be a similar treatment for direct and indirect acquisitions for the purpose of Article 12(5) TRLIS.

(87) The five interested parties state in their observations that they have deducted the financial goodwill with regard to indirect acquisitions in their corporate tax assessments. Therefore, the new administrative interpretation has not affected the scope of application of Article 12(5) TRLIS.

(88) The Commission acknowledged the existence of legitimate expectations in the First and Second Decisions due to the replies give to written parliamentary questions of Mr. Erik Mejier and Ms Sharon Bowles. The replies do not suggest that they were limited to direct acquisitions. On the contrary, the replies to these parliamentary questions referred to specific indirect acquisitions.

(89) In addition, the principle of legitimate expectations has the aim to protect the beneficiaries of an alleged State aid, not the Member State. Therefore, the beneficiaries of the aid are the ones who should assess whether the measures adopted by the Commission (and never the Member State) could trigger the existence of legitimate expectations.

(90) By opening the present investigation procedure, the Commission intends to revise their own measures, infringing the principles of legal certainty and the estoppel.

(91) The Spanish authorities remind the Commission that the aid character of Article 12(5) TRLIS is not final, being subject to review by the Court of Justice of the European Union.

6. ASSESSMENT OF THE MEASURE

(92) In its First and Second Decision, the Commission concluded that Article 12(5) TRLIS constituted an unlawful and incompatible scheme both as regards intra-EU and extra-EU acquisitions. In particular, the Commission established

that the measure at issue, allowing Spanish companies to deduct the financial goodwill arising from acquisitions of a shareholding of at least 5 % in a foreign company, constituted a selective advantage, which was not justified by the logic of the tax system. Furthermore, the measure was not found to be compatible with the internal market[32]. The Commission refers to the reasoning followed by these Decisions to show that the measure at stake constituted illegal incompatible State aid.

(93) The Spanish authorities did not bring actions for annulment against either the First or against the Second Decision. However, there is abundant litigation pending before the General Court brought about by third parties[33].

(94) The present decision deals exclusively with the effects of the new administrative interpretation of Article 12(5) TRLIS, which was introduced by the Spanish authorities after the adoption of the First and the Second Decision.

A. NEW AID CHARACTER OF THE MEASURE

(95) The aim of the First and Second Decisions was to assess the compatibility with the internal market of a Spanish scheme as it was presented by the Spanish authorities during the administrative procedure that led to the adoption of the First and Second Decision. The First and Second Decisions declared unlawful and incompatible the scheme (Article 12.5 TRLIS) '*unlawfully applied by Spain*'[34].

(96) It is settled case law that the scope of a decision must be determined not only by reference to the actual wording of that decision, but also by taking into account the aid scheme as described by the Member State[35]. In *Kahla Thüringen*, the Court held that a request for additional information of the Commission that aims at clarifying the scope of application of an aid scheme, and the reply given by the Member States to that request, must be considered an indivisible part to the aid scheme[36].

(97) The Spanish authorities had explained in a letter of 4 June 2007[37] that the relevant administrative practice only allowed the deduction of the financial goodwill for direct shareholding acquisitions in operating companies.

(98) This practice is also evidenced by the consistent administrative interpretations of the DGT and the TEAC in place since 2002 until 2012. Irrespective of the wording of the relevant provisions of the TRLIS, at the moment of the adoption of the First and Second Decisions, the DGT and the TEAC were consistently systematically applying Article 12(5) TRLIS only to direct shareholding acquisitions of operating companies. This interpretation had been in place since 1 January 2002, when Article 12(5) TRLIS first entered into force.

(99) Moreover, the new administrative interpretation of Article 12(5) TRLIS introduced by the Spanish authorities in March 2012 has enlarged the scope of application of Article 12(5) TRLIS since the measure would now be

applicable not only to financial goodwill arising from direct acquisitions of shareholdings of non-resident companies, but also to the financial goodwill arising from indirect acquisitions of shareholdings of non-resident companies through the acquisition of shareholdings of a holding company.

(100) It is important to point out that the matter at stake is not to determine whether the aid might qualify as existing aid. Indeed, the First and Second Decisions already concluded that the measures examined (Article 12(5) TRLIS as implemented by the Spanish authorities) constituted unlawful and incompatible aid. Therefore, the new administrative interpretation could not in any case constitute existing aid. By contrast, what is relevant in the present case is whether the scope of application of the First and Second Decisions also covered indirect shareholdings that result from a previous acquisition of a holding.

(101) The Commission considers that none of the arguments presented by the Spanish authorities and the interested third parties demonstrate that the measure does not constitute new aid due to the reasons explained below.

6.1. **The initial administrative interpretation is not final and is not a relevant and systematic administrative practice**

(102) In order to support their view that the measure would not amount to new aid, the Spanish authorities and interested third parties claim in substance that the previous administrative interpretation was not final, could always be subject to appeal before the courts and was not a consistent practice.

(103) These arguments are irrelevant for the purposes of this decision. Indeed, the Commission, in the First and the Second Decisions, has examined a State aid scheme as implemented by the Spanish authorities. The circumstance that the regime could be modified or altered (either by the administration or by the courts) at some point in the future, has no bearing on the scope of the investigation and thus of the Decisions.

(104) In any case, the arguments of the Spanish authorities have to be rejected for the following additional reasons:

(105) As regards the argument that the initial administrative interpretation was not a relevant and consolidated practice of the tax administration, the Commission notes that all the DGT's *consultas* and resolutions from the TEAC provided by the Spanish authorities evidence a systematic and consistent approach when excluding from the scope of Article 12(5) TRLIS indirect acquisitions of shareholdings that result from a direct acquisition of shareholdings of a holding company.

(106) The Spanish authorities and the interested third parties also allege that the initial administrative interpretation is not a relevant and final administrative practice given that it is not a source of law and can always be subject to appeal before the competent courts.

(107) The Commission considers that the fact that the administrative interpretation and the resolutions of the TEAC can be appealed in subsequent judiciary instances does not imply that these consultas — and especially the resolutions of the TEAC — do not have legal effects for the incumbent. As laid down in Article 89 of the General Tax Law 58/2003 of 17 December, the responses given in the context of a request for a tax opinion have binding effects for the tax Administration. This means that the tax administration is obliged to use the same criteria when there is an identity of facts and circumstances between the taxpayers. Therefore, a diligent and prudent operator would expect from the tax administration a consistent approach in situations where there is identity of facts and circumstances between taxpayers.

(108) The Spanish authorities and some of the interested third parties claim that the initial administrative interpretation is not a consistent administrative practice since the criteria contained in an administrative interpretation can always be subject to further modifications. However, as explained by the Spanish authorities, Article 89 of Law 58/2003 requires having a consistent application of the criteria contained in an administrative interpretation insofar as the jurisprudence or the applicable Law does not modify it. The Commission notes that all the DGT *consultas* and TEAC resolutions evidence that for the period 2002-12 there was a consistent practice, which was neither modified by the Law nor by the jurisprudence.

(109) The Spanish authorities and some of the interested third parties claim that the administrative interpretation was progressively modified by a resolution of the TEAC of June 2010 and a judgement of the Audiencia Nacional of 13 October 2011[(38)], which was subsequently upheld by the Spanish Supreme Court in a judgement of 24 June 2013[(39)]. The Commission considers that the abovementioned judgements do not evidence a modification in the fiscal treatment of indirect acquisitions of shareholdings in the context of Article 12(5) TRLIS. The TEAC resolution, the judgments of the Audiencia Nacional and the Spanish Supreme Court related to intra-group acquisitions of shareholdings, which is a different matter from the one at stake. Both judgements do not refer explicitly to the matter of indirect shareholding acquisitions and do not enter in the discussion on the existence of financial goodwill as such, since the existence of the financial goodwill was already assessed by the Court *a quo* and fell out of the scope of the appeal. In this respect, the administrative practice of the Spanish tax authorities in the recovery procedure has been to look first at the indirect or direct character of the acquisitions — irrespective of whether they are intra-group acquisitions — in order to determine if they lead or not to fiscal benefits.

(110) The Spanish authorities and the interested third parties also contest the Commission's statement in the opening decision of 17 July 2013 that the deductions of financial goodwill that related to indirect acquisitions contained in the tax declarations were systematically denied. The Spanish authorities and

interested third parties claim that the deduction could not be systematically denied given that the Spanish tax collection system is based on a 'self-assessment system' (the so-called *autoliquidación*).

(111) The Commission holds the view that the existence of a self-assessment tax collection system does not remove the new aid character of the measure. Indeed, the fact that the Spanish tax collection system is based on a 'self-assessment' system does not guarantee the correctness, and eventually legality, of each of the tax operations carried out by the incumbent. The tax administration has the power to check and monitor the self-assessment tax operations executed by the tax payers. In fact, as the Spanish authorities indicated, if a tax payer that had deducted the financial goodwill arising from indirect acquisitions was subject to a tax inspection, the tax administration, which is bound by the obligation to apply the same criteria when facing situations where there is identity of facts and circumstances between taxpayers, would have not accepted the deduction of the financial goodwill contained in the company's tax declaration. Therefore, the existence of a 'self-assessment' tax system does not contradict the Commission's view that the requests made by the companies relating to the deduction of financial goodwill in the context of indirect shareholding acquisitions were systematically denied.

(112) Moreover, the fact that some tax payers disregarded the existing administrative interpretation deducting the financial goodwill for indirect shareholding acquisitions is irrelevant for the purpose of this analysis. Pursuant to Article 89 of Law 58/2003, the tax administration is obliged to use the criteria contained in the tax interpretations when there is an identity of facts and circumstances between tax payers. Therefore, the tax payers that deducted the financial goodwill for indirect acquisitions and that were subsequently subject to a tax inspection would have to correct their tax declarations.

(113) In conclusion, the *consultas* of the DGT and the resolutions of TEAC confirm that at the time of the First and Second Decision, and even after their adoption (until March 2012), the consistent administrative practice of the Spanish authorities was to apply the tax scheme concerned only to direct acquisitions of shareholdings of non-resident operating companies whereas all tax deductions for indirect acquisitions of shareholdings that resulted from a direct acquisition of shareholdings of a holding company were systematically refused. Moreover, the Commission considers that the self-assessment nature of the Spanish tax collection system does not change the fact that the new administrative interpretation has enlarged the scope of application of Article 12(5) TRLIS.

6.2. **The new administrative interpretation does not constitute a substantial modification of the scope of application of Article 12(5) TRLIS**

(114) Both the Spanish authorities and the interested third parties allege that Article 12(5) TRLIS has not undergone substantial modifications and that the administrative interpretation of the scope of a provision cannot be considered a substantial modification of the aid. Moreover, the fact that the administrative interpretation has been modified by the DGT and the TEAC does not affect the scope of application of Article 12(5) TRLIS.

(115) Nevertheless, there is no doubt that an extension of the scope of the fiscal advantage (which may entail the granting of billions of euros of State aid) to indirect acquisitions of shareholdings constitutes a substantial modification of the scope of application of the regime[(40)].

(116) Indeed, there has been a modification in the calculation method of financial goodwill, which has been re-designed to allow the deduction of the financial goodwill arising from indirect acquisitions of shareholdings of non-resident companies through the direct acquisition of shareholdings of a holding company. This modification of the calculation method has clearly enlarged the scope of application of Article 12(5) TRLIS.

6.2.1. *Method of calculation of financial goodwill*

(117) The *consultas* from the DGT and the TEAC jurisprudence provided by the Spanish authorities to the Commission during the administrative and the formal investigation procedure evidence that since the adoption of Article 12(5) TRLIS in 2002 until 2012 there was a consistent administrative practice that excluded from the scope of application of Article 12(5) TRLIS indirect acquisitions of shareholdings that result from a direct acquisition of shareholdings of a holding company. Basically, the DGT doctrine and the TEAC jurisprudence substantiated their initial interpretation based on the following reasoning:

(118) Goodwill is an intangible asset that arises when one company acquires another and equates to the difference between the purchase price and the book value of its net assets. Indeed, as a result of carrying out an economic activity, an intangible asset is generated due to the client portfolio, know-how, human resources, geographic location and prestige of the company, which results into a higher purchase price than the one established as book value. Therefore, goodwill can only arise due to a direct acquisition of an operating company, that is, a company that genuinely carries out an economic activity. Conversely, goodwill cannot arise from a holding company, whose main aim is to own the shares of subsidiary operating companies[(41)].

(119) If the price paid for a shareholding of a company exceeds its book value, it might be due to two different reasons: (1) to the intrinsic value of the assets and rights of the company; or (2) to an overprice paid due to an expectation of obtaining higher revenues in the future. The latter category corresponds to the financial goodwill[(42)].

(120) The DGT and the TEAC applied the following four-step approach in order to calculate the amount of financial goodwill, that is, the difference between the purchase price and the book value of the shareholding not attributable to the non-resident company's net worth:

(a) To calculate the difference between the purchase price of the shareholding and its book value;

(b) The book value should reflect the share of equity that corresponds to the shareholding that the resident company has in the non-resident company;

(c) The difference between the purchase price of the shareholding and its book value should be attributed to the assets of the non-resident company up to the limit of the market value of the asset in question according to the criteria established in the accounting consolidation rules[43];

(d) The amount that remains is the financial goodwill, which can be deducted from the tax base up to a maximum annual limit of one twentieth of its value.

(121) According to this calculation method, if a company resident in Spain acquires a shareholding in a non-resident holding company — whose main activity is the possession of shares and management of assets of other operating companies — the difference between the purchase price and the book value of the net worth of the holding should be booked as an asset of the holding company up to the limit of the market value of the asset in question. As the assets of the holding are the shareholdings in non-resident subsidiary operating companies, the market value of its assets equates to the purchase price of the shares and therefore, no financial goodwill could arise. Under this interpretation financial goodwill can only arise due to a direct acquisition of an operating company.

(122) The administrative interpretation of the DGT of 21 March 2012 and the subsequent TEAC resolution of 26 June 2012 extended the scope of application of Article 12(5) TRLIS to indirect acquisitions of shareholdings that result from a direct acquisition of shareholdings of a holding company. According to the Spanish authorities and one interested party, the following calculation method of financial goodwill should apply:

(123) In the case of indirect acquisition of shareholdings that result from a direct acquisition of shareholdings of a holding company, it is necessary to do a consolidation exercise so it can be possible to bring the goodwill generated at second and ulterior levels to the level of the holding company. This is done by eliminating the investment-equity between the acquiring and the acquired company. For that purpose, the investment-equity elimination process should be done in different stages according to Article 30 of the Royal Decree 1815/1991:

(a) First, it shall be eliminated the investment-equity at the level of the company that has no direct shareholding in the equity of other company. The shareholding that the holding has in the subsidiary operating company is eliminated and the value of that shareholding is replaced in the holding's balance sheet with the market value of the assets of the subsidiary operating company. A reserve of consolidation arises in the balance sheet of the holding company which amounts to the difference between the market value of the assets of the operating company and their book value.

(b) Second, the elimination of the investment-equity should also be carried out at subsequent stages, taking into account for the calculation of the value of the equity the reserves of consolidation that arose in earlier stages.

(124) The financial goodwill is the part of the difference between the purchase price of the shareholding and the new value of the holding's equity after consolidation that cannot be attributed to the assets of the holding. By applying this calculation method, the assets and liabilities of all subsidiary companies owned by a holding company are treated as though they were the assets and liabilities of a single company.

(125) Thus, the new calculation method contained in the DGT and TEAC resolutions of 2012 requires a previous simulation[(44)] of a consolidation exercise in order to be able to bring the assets of the non-resident operating company (the one generating goodwill) to the level of the holding company following the steps contained in Article 30 of Royal Decree 1815/1991. It is after this simulation of a consolidation process that the difference between the purchase price of the shareholding and its book value can be attributed to the assets and rights of the non-resident holding. The difference that remains would be the financial goodwill to be deducted from the tax base. Hence, this calculation method avoids the offsetting between the purchase price and the market value of the holding's assets (shares) which led to no financial goodwill arising at the level of the holding.

(126) The controversy about the calculation of financial goodwill boils down to the reference that Article 12(5) TRLIS makes to the consolidation rules. Indeed, the reference does not specify which are the specific consolidation accounting rules or provisions that should be applied in order to calculate the final amount of financial goodwill:

'The difference between the purchase price of the shareholding and its book value on the date of the acquisitions should be booked under the assets and rights of the non-resident company in line with the criteria laid down in Royal Decree 1815/1991 on consolidation of accounts rules.' [Emphasis added]

(127) The TEAC clarified in its previous resolutions that the reference to the consolidation accounting rules was exclusively made with the purpose of booking the difference between the purchase price and the book value of the

shareholding under the assets and rights of the non-resident company[45] and that Article 12(5) TRLIS does not require to actually consolidate accounts. In a resolution of the TEAC of 3 November 2011, it is stated that 'the reference that Article 12(5) TRLIS makes to RD 1815/1991 (consolidation accounting rules) has the only purpose to attribute the difference between the purchase price of the shareholding and its book value to the assets and rights of the non-resident company.'

(128) In particular, in the case of acquisition of shareholdings of a holding company, the debate focuses on how to determine which book value should be taken into account for the purposes of calculating the amount of financial goodwill: the book value that results from the consolidated accounts or the book value that results from the individual accounts. Indeed, the choice can lead to a very different result: on the one hand, if reference is made to the book value contained in the individual accounts, financial goodwill would not arise in the case of an acquisition of shareholdings of a holding company; on the other hand, if reference is made to the book value contained in the consolidated accounts, then the financial goodwill would arise at the level of the holding company.

(129) It can be inferred from the resolutions of the TEAC that several taxpayers already requested the deduction of the financial goodwill arising from indirectly acquired shareholdings located at second or ulterior levels by urging the tax administration to consider the reference values contained in the consolidated accounts of the group, instead of the ones contained in the individual accounts. However, the Commission notes that the DGT and the TEAC consistently held in their administrative interpretation and resolutions before 2012 that the book value to be taken into account should be the one contained in the individual accounts.

(130) In particular, the TEAC initially argued that fiscal consolidation and accounting consolidation are not equivalent, nor is the notion of consolidated group for fiscal purposes and for accounting purposes[46]. As a way of example, it refers to how the Spanish corporate tax law does not take into account the profits of the group contained in the consolidated financial statements, but the aggregated individual profit contained in the individual financial statements. This is because the aim pursued by the accounting rules and the fiscal rules is in the end different: whereas the aim of the consolidated financial statements is to inform about the economic and financial situation of a group; from a fiscal point of view it is important to determine the economic capacity of the group to be taxed[47]. To consider the consolidated financial statements might lead to distortions in the calculation of the tax base. For instance, it might happen that the investment was undertaken when the company was not part of a group; or the other way around, it might also happen that the investment is still reflected in the consolidated statements even after the company was no longer part of the group. Therefore, even though Article

12(5) TRLIS does not explicitly exclude to take into account the book value reflected on the consolidated statements, the book value that it refers to should be the one contained in the individual accounts of the acquired non-resident company, otherwise the provision would have explicitly made a reference to the accounting rules like it is the case in other fiscal provisions of the Spanish corporate tax law.

(131) The Commission is of the opinion that the calculation method of financial goodwill that underpinned the administrative interpretations is an inherent part of Article 12(5) TRLIS, which defines its scope of application and its legal effects. Indeed, Article 12(5) TRLIS is in itself a calculation method for the financial goodwill: it specifies which steps have to be followed in order to obtain the amount that constitutes financial goodwill. It is obvious that a modification or alteration in this calculation method, which entails a substantial modification of the tax advantage resulting from that provision, might have a direct impact on the legal effects of the provision.

(132) The initial calculation method used consistently by the DGT and the TEAC concluded that the book value to be taken into account should be the one reflected in the individual accounts of the non-resident acquired company. Therefore, no goodwill (and consequently, no financial goodwill) could arise in the context of an indirect acquisition of shareholdings that result from a direct acquisition of shareholdings of non-resident holding companies. The initial administrative practice only allowed for the deduction of the financial goodwill arising from the direct acquisition of shareholdings of operating companies.

(133) The new calculation method contained in the DGT's administrative interpretation and the TEAC Resolution of 2012 stretches the initial boundaries of Article 12(5) TRLIS by allowing the deduction of financial goodwill also in the context of indirect acquisition of shareholdings that result from a direct acquisition of shareholdings of a holding, with the result that companies that at the time of the First and Second Decision were not supposed to apply the measure to indirect acquisitions, can now claim deductions for those acquisitions.

(134) Moreover, the Commission notes that, by allowing to bring the goodwill generated at second or ulterior levels to the level of the holding company, one of the premises of Article 12(5) TRLIS is not complied with, which is the generation of goodwill that results from an acquisition of shareholding of a non-resident company by a Spanish resident company. Indeed, the goodwill in this case would be generated at second or ulterior levels where the two companies are non-resident in Spain. [*Emphasis added*]

(135) In conclusion, although the wording of Article 12(5) TRLIS and 21 TRLIS has not been modified, the Commission considers that the new administrative interpretation of Article 12(5) TRLIS, which is based on the abovementioned

new calculation method, constitutes a substantial change in the scheme since it enlarges the initial scope of application of the provision by allowing the deduction of financial goodwill also for indirect shareholding acquisitions that result from a direct acquisition of shareholdings of a holding.

6.2.2. *Reasons provided by the Spanish authorities and interested third parties that would justify the departure from the previous administrative interpretation*

(136) The Spanish authorities and interested third parties have acknowledged[48] that, until the modification of the administrative interpretation in 2012, the deduction of Article 12(5) TRLIS was in practice only applicable to direct acquisitions of shareholdings of non-resident companies. The Spanish authorities and interested third parties have presented a number of reasons in order to justify the modification of the administrative practice relating to the implementation of Article 12(5) TRLIS.

(137) However, these alleged reasons are beside the point. Indeed, the reasons why the State aid regime has been modified in 2012 cannot in any way alter the scope of the investigation of the Commission and thus the scope of application of the First and Second Decisions that were adopted in 2009 and 2011 respectively.

(138) Moreover, the reasons initially invoked by the Spanish authorities when explaining the scope of application of the measure during the administrative proceeding that led to the opening decision of 2007, as well as the ones contained in the initial administrative interpretations of the DGT and TEAC resolutions, contrast with the ones invoked during the present formal investigation procedure for claiming the no aid character of the new administrative interpretation.

(139) In the alternative, the reasons by the Spanish authorities and the interested third parties in any case do not warrant a departure from the previous administrative interpretation.

(a) *The rationale of Article 12(5) TRLIS: fostering the internationalisation of Spanish companies*

(140) As indicated in the observations of the Spanish authorities, both the DGT and the TEAC when justifying the change in their administrative interpretation refer to the rationale of Article 12(5) TRLIS. The objective of the latter provision is to foster the internationalisation and the investment of Spanish companies abroad. The exclusion of indirect acquisitions would not be in line with that objective.

(141) The differential tax treatment between domestic and foreign shareholding acquisitions provided in Article 12(5) TRLIS — whose objective is to foster the internationalisation and the investment of Spanish companies abroad — was declared unlawful and incompatible aid with the internal market in the First and Second decisions. The Commission considers that a change

in the administrative practice cannot be justified by the rationale — the internationalisation of Spanish companies — of a provision (Article 12(5) TRLIS), which has been already declared unlawful and incompatible aid with the internal market in the First and Second Decision.

(b) *References to indirect acquisition in the First and Second Decisions, parliamentary questions and press release of the Opening Decision of 2007*

(142) One of the arguments invoked by the Spanish authorities and the interested third parties to contest that the new administrative interpretation of Article 12(5) TRLIS constitutes new aid is that the wording of the First and Second Commission Decision refers to both direct and indirect acquisition of shareholdings. Therefore, they consider the new administrative interpretation to be in line with the two Commission decisions.

(143) The Commission does not agree that these references would remove the new aid character of the measure. The references made in the First and Second Decision to direct and indirect acquisitions of shareholdings are due to the cross-reference that Article 12(5) TRLIS makes to Article 21 TRLIS, which explicitly states that the percentage of shareholding — direct or indirect — in the equity of the non-resident company must be at least 5 %. It is not the task of the Commission to determine in the First and Second decision how a provision of the Spanish corporate tax law should be implemented, but rather to assess whether the provision constitutes State aid, taking into account the way it is implemented by the Member State concerned at the moment of the notification.

(144) Moreover, it is worth noting that during the formal investigation procedure that led to the adoption of the First and Second Decision, the investigation focused on whether Article 12(5) TRLIS constituted State aid or not, and this assessment did not require examining whether both direct or indirect acquisitions were covered by Article 12(5) TRLIS. The debate on whether indirect acquisitions of shareholdings were covered emerged in the context of the recovery procedure when the Spanish authorities informed the Commission about the modification of the previous administrative practice. The fact that the Commission, at a very early stage, before the formal investigation procedure, in a service letter of 26 March 2007, submitted some questions as regards the scope of Article 12(5) TRLIS, is irrelevant for the present analysis. What matters in the present case is to determine how the Spanish authorities were implementing Article 12(5) TRLIS at the moment of the adoption of the First and Second Decisions.

(145) In the matter at stake it is worth recalling again the Court's jurisprudence laid down in the *Kahla* judgement[49], which states that the scope of a decision must be determined not only by reference to the actual wording of that decision, but also by taking into account the aid scheme as described by the Member State concerned. In that respect, the Spanish authorities, in a letter of 4 June

2007, clarified that the scope of Article 12(5) TRLIS only covered direct acquisitions of shareholdings in non-resident companies. The absence of an explicit reference to this letter in the First and Second decision does not alter the fact that Article 12(5) TRLIS, since its adoption, was implemented excluding from its scope of application indirect acquisitions of shareholdings.

(146) Furthermore, it follows from the jurisprudence of the Court laid down in the *Kahla* judgement that in the context of the adoption of the new administrative interpretation, the Spanish authorities were already aware of the information contained in the letter sent to the Commission, where it was stated that only direct acquisition of shareholdings could benefit from the deduction of Article 12(5) TRLIS. The Spanish authorities should have ensured that the decision be implemented in accordance with the information that they had already provided to the Commission services[(50)].

(147) The Commission considers that the scope of the First and Second decision is not only determined by the wording of the decision, but also by taking into account all the information submitted by the Spanish authorities that aimed to describe how the aid scheme was implemented at the time the two Decisions were adopted.

(148) The question whether interested third parties were aware or not of the communications between the Spanish authorities and the Commission is completely irrelevant as regards whether the new administrative practice constitutes new aid. Although there is no modification of the wording of the legal provision at stake — Article 12(5) TRLIS read in conjunction with Article 21 TRLIS — the Commission considers that the limits and modalities of the provision have been modified. Indeed, the new administrative interpretation enlarges the initial scope of application of Article 12(5) TRLIS, by allowing the deduction of the financial goodwill in the case of indirect shareholding acquisition through a direct shareholding acquisition of a holding company. This situation was not initially contemplated by the previous administrative interpretation, which only allowed the deduction of financial goodwill from direct acquisition of shareholdings of operating companies.

(149) The Court laid down in the judgement *Namur — Les Assurances*[(51)] that only the modifications that introduce substantial changes in an aid regime are subject to further notification as new aid. The Commission believes that the new administrative interpretation constitutes a substantial change of the aid regime analysed by the Commission in the First and Second Decisions given that the limitations and modalities of interpretation of Article 12(5) TRLIS have been extended to situations that were not initially covered by the scope of application of the provision. Moreover, it is worth noting that the matter at stake is not to determine whether the aid might qualify as existing or new aid. Indeed, the First and Second Decision already concluded that Article 12(5) TRLIS constituted unlawful and incompatible aid. However, what is relevant

in the present case is to determine whether the scope of application of the First and Second Decisions also covered indirect shareholdings that result from a previous acquisition of a holding in order to determine the existence of aid, its compatibility and the existence of legitimate expectations.

(150) In addition, the Spanish authorities and the interested third parties argue that the measure would not be new aid since a number of acquisitions that took place before the opening of the procedure in 2007 were indirect acquisitions of shareholdings that resulted from a direct acquisition of shareholdings of a holding company. The Spanish authorities and the interested third parties claim that the references to these acquisitions contained in the press release of the opening procedure of 2007 and the answers given by the Commission to written parliamentary questions demonstrate that the Commission was aware of the indirect nature of these acquisitions.

(151) Although the acquisitions to which reference is made in the replies to the written parliamentary questions or the press release of the opening decision of 2007 might have involved indirect acquisitions, the Commission could not have known — at least for the vast majority of the operations — which was the corporate structure of the companies that were being acquired, that is, whether the acquired companies were operating companies or holding companies. As already pointed out in paragraph 128, the matter at stake focused on whether Article 12(5) TRLIS constituted unlawful State aid due to the differential tax treatment between domestic and foreign acquisitions of shareholdings, and therefore, there was no need to look at the corporate structure of the acquired non-resident company. Indeed, the distinction between direct and indirect acquisitions was not deemed relevant for the purposes of the assessment required in the First and Second Decision. In the end, such a distinction would have not changed the final State aid assessment of the measure, which was that in the Commission declared the measure selective because of its intrinsic features, i.e. not allowing the amortisation of financial goodwill in Spanish-Spanish transactions.

(152) In particular, with regard to the Iberdrola/Scottish Power merger operation notified to the Commission[(52)], it should be noted that the Commission had clearly indicated in paragraph 42 of the merger decision that, for the purposes of that decision, it was neither necessary nor appropriate to determine if Article 12(5) TRLIS constituted State aid. In any case, the replies given by the Commission to the written parliamentary questions predated the starting point of the examination of the regime[(53)]. Therefore, at the time of the replies, the Commission could not and did not have a view on the matter[(54)].

(153) In conclusion, what is relevant for the purposes of the State aid assessment is how the measure was implemented by the Member State concerned. In that respect, Spain explained that the scope of application of Article 12(5) TRLIS was limited to direct acquisitions. This is also confirmed by the existence of a consistent and relevant administrative practice, which remained in place until

2012. In this respect, the Commission observes that, as outlined by the Court, the Commission analyses the regime as it is applied. In the present case, it cannot be contested that the consistent administrative practice did not allow the deduction of financial goodwill related to indirect acquisitions.

(c) *The cross-reference to Article 21 TRLIS*

(154) Another argument invoked by the Spanish authorities[55] is that Article 12(5) TRLIS refers to Article 21.1c) 2º where it is explicitly stated that dividends deriving from direct or indirect shareholdings will also be covered by the provision. Therefore, the fact that the operating company is located at a second or ulterior level should not be an obstacle for the application of the deduction of Article 12(5) TRLIS. However, as explained by the Spanish authorities during the administrative procedure that led to the adoption of the opening decision of 2007, one of the reasons to exclude indirect acquisitions from the scope of Article 12(5) TRLIS is that Article 21 TRLIS also requires that the non-resident company carries out an economic activity abroad and that it is subject to a tax similar to corporate tax. This provision has its rationale in anti-abuse tax rules in order to avoid that companies based in tax havens or territories with nil taxation would qualify for the deduction. Given that holdings do not carry out an economic activity as such, they were excluded from the scope of Article 12(5) TRLIS.

(155) The DGT and the TEAC in their initial administrative interpretations and resolutions explained that goodwill (and therefore financial goodwill) could not generate at the level of a holding because holdings do not carry out an economic activity, according to the requirements established in Article 21 TRLIS. Therefore, no financial goodwill could arise at the level of the holding company. However, the DGT and the TEAC reviewed their previous interpretation in 2012 claiming that the requirement of carrying out an economic activity can be met when the operating company is in the first level or in second or ulterior levels.

(156) Although Article 21 TRLIS makes an explicit reference to indirect and direct acquisitions, it is also a fact that Article 21(c) TRLIS requires that the profits stem from business activities carried out abroad. As the Audiencia Nacional[56] has acknowledged in its judgement of 6 February 2014, this is clearly not the case if the non-resident target company is a holding, whose main business purpose is the possession of shares of other operating companies.

(157) It is worth noting that Article 21 TRLIS is originally conceived to lay down the conditions for exempting from corporate tax dividends and income of foreign origin that derive from the acquisition of shareholdings in non-resident companies with the aim to avoid double international taxation. Article 12(5) only cross refers to that provision in order to analyse whether the income from the non-resident acquired company meets these criteria so the acquiring company is able to deduct the financial goodwill arising from that operation.

Therefore, the extrapolation of the criteria laid down in Article 21 TRLIS should be done with the caveat that the latter provision has the purpose of identifying the conditions for exempting dividends and income of foreign origin.

(158) As stated by the Spanish authorities in their letter of 4 June 2007, the tax Administration needs to monitor the application of the depreciation of the financial goodwill. This control can only be done through the Spanish resident company where the Spanish tax administration can easily monitor the deduction because the shareholdings are part of the assets of the Spanish resident company. It would be more difficult for the Spanish tax administration to monitor the goodwill arising in non-resident companies located at subsequent levels, where the shareholdings are booked under the assets of the non-resident companies that are not under the obligation to report to the Spanish tax administration.

(159) Indeed, this need to monitor the implementation of the deduction that results from an investment is reflected in the obligation contained in Article 15 of the Regulation implementing the Corporate Tax Law (RD1777/2004), which only requires providing information on the acquisition of the directly acquired company in order to be able to apply Article 12(5) TRLIS. If this deduction had meant to be also applicable to indirect acquisitions, it would have been logic to have included indirect acquisitions as well. The Commission understands that by limiting the information obligation to direct acquisitions, the legislator excluded on purpose indirect acquisitions of shareholdings from the scope of Article 12(5) TRLIS. This is confirmed also by the DGT, which acknowledges a departure from its previous doctrine in spite of the obligation to provide information contained in Article 15 of the Regulation RD1777/2004.

(160) Moreover, what is relevant for the purpose of the present State aid assessment is how the measure was implemented by the Member State in question. In that respect, Spain had explained to the Commission that the Spanish tax authorities only allowed the deduction of financial goodwill deriving from direct shareholding acquisitions due in part to the reasoning that Article 21 TRLIS clearly requires carrying out an economic activity in order to benefit from the application of Article 12(5) TRLIS. This condition is only met in operating companies, given that holding companies do not carry out any genuine economic activity. Therefore, given the explanations provided by Spain on the implementation of the provision, the Commission considered, at the time of the adoption of the First and Second decisions, that the scope of application of Article 12(5) TRLIS was limited to direct acquisitions of shareholdings of operating companies, fact which was also confirmed by the existence of a consistent and relevant administrative practice, which remained in place until 2012.

(161) The Commission considers that, despite the references made in Article 21 c) 2º TRLIS to direct and indirect acquisitions, the consistent administrative practice of the DGT which was also corroborated by the TEAC indicates that indirect acquisitions of shareholdings were excluded from the scope of Article 12(5) TRLIS. This was due to the fact that holdings do not carry out an economic activity according to Article 21 c) TRLIS, which requires that profits stem from business activities carried out abroad. To reconsider this position, by alleging that Article 21 TRLIS makes a reference to indirect acquisition in its paragraph c) 2º, the Spanish authorities are enlarging the scope of Article 12(5) TRLIS by covering situations that at the time of the First and Second decisions were not covered.

(d) *Principle of equal treatment, no discrimination and fiscal neutrality*

(162) The Spanish authorities and some of the interested third parties claim that indirect acquisitions of shareholdings of non-resident companies that result from an acquisition of shareholdings of a holding are comparable to direct acquisitions of shareholdings of operating companies. For that reason, and in order to guarantee the principle of equal treatment and non-discrimination, the conclusions reached in the First and Second decision should be applicable both to direct and indirect acquisitions of shareholdings.

(163) The interested third parties also claim that according to the principle of fiscal neutrality, the same equal treatment should be granted to an investment carried out as a direct acquisition of shareholdings of operating companies and as an indirect acquisition of shareholdings via a holding company. In particular, interested third parties claim that given the difficulties of international business combinations, it should not be necessary to carry out a merger operation (only situation where financial goodwill could arise from indirect acquisition of shareholdings) or multilevel merger operations.

(164) To begin with, it is to be recalled that the principles of equal treatment, no discrimination and fiscal neutrality are irrelevant as regards the scope of the First and Second Decisions, and namely whether they also cover indirect acquisitions.

(165) In any case, the Commission notes that it follows from the initial approach contained in the administrative interpretations of the DGT and resolutions of the TEAC before 2012 that direct and indirect acquisitions of shareholdings that result from a previous acquisition of a holding company were not comparable for the purpose of Article 12(5) TRLIS.

(166) The rationale that underpinned the differential treatment in the initial administrative interpretation was that one of the premises of Article 12(5) TRLIS was not complied with in the case of acquisition of shareholdings of a holding and the subsequent indirect acquisition of shareholdings in the subsidiary operating companies. Indeed, the fiscal notion of financial

goodwill is intertwined with the accounting notion of goodwill. There is goodwill when the price paid for a company exceeds the book value of its equity. This difference might be due to two different reasons: (1) to the intrinsic value of the assets and rights of the company; or (2) to an overprice paid due to a greater than apparent expectation of obtaining higher revenues in the future. The latter category corresponds to the financial goodwill. Goodwill, and consequently financial goodwill, can only arise in operating companies as they carry out an economic activity. Holdings, whose main business aim is to own the shares of subsidiary operating companies, do not carry out a genuine economic activity and therefore cannot generate goodwill. This is also demonstrated by the calculation method used in the initial administrative interpretations, which is an intrinsic part of Article 12(5) TRLIS. According to this calculation method, the market value of the assets of the holding (shares of non-resident subsidiary operating companies) equates to the purchase price of the shareholding and therefore, no financial goodwill could arise. The fact that there is an offsetting between the purchase price and the market value of the holding's assets (shares) is due to an intrinsic characteristic of a holding company, namely that its assets are shares of other subsidiary operating companies.

(167) The Spanish authorities explained[57], in the context of the administrative procedure that led to the opening decision of 2007, that Article 12(5) TRLIS only requires the acquisition of a 5 % shareholding in the equity of the non-resident company, a percentage of shareholding which does not imply consolidation neither with the non-resident company nor with subsequent subsidiary companies. It is only after consolidation of the holding and its subsidiary operating companies with the acquiring parent company that goodwill could arise in the consolidated financial statements.

(168) With regard to the debate of whether considering the values contained in the consolidated or in the individual accounts, the TEAC had consistently argued that the reference values to be taken into account for the calculation of financial goodwill are the ones established in the individual accounts. The TEAC consistently held that the aim of the fiscal and accounting rules is different and that to consider the information contained in the consolidated financial statements for fiscal purposes might lead to distortions in the interpretation of Article 12(5) TRLIS.

(169) Moreover, the Spanish authorities also explained that Article 12(5) is a method for depreciating an investment whose management requires monitoring by the tax administration. The control of the depreciation can only be done through the Spanish resident company because the shareholdings, located at first level, are part of the assets of the Spanish resident company. It would be more difficult for the tax administration to control the financial goodwill arising in non-resident companies located at second or ulterior levels. Indeed, in this case the shareholdings are booked under the assets of non-resident

companies, which are not under the obligation to report before the Spanish tax administration.

(170) According to the case-law of the Court, the general principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified[58].

(171) The Commission notes that the exclusion of indirect acquisitions from the scope of Article 12(5) TRLIS, as established in the initial administrative interpretations, does not seem to be the result of arbitrary reasons, but seemed to be justified by the intrinsic nature and logic of the provision as well as the manageability of the tax.

(172) The Commission wishes to stress that it is irrelevant for the purposes of the present State aid assessment to determine whether the previous initial administrative interpretation leads to discrimination between direct and indirect acquisitions or is in breach of the principle of fiscal neutrality. As already established before, it is not the task of the Commission to determine in a decision how a national provision should be implemented. The Commission is bound to assess whether the provision in question constitutes State aid, taking into account the way it is implemented by the national authorities at the time of their notification. In the present case, there is clearly a departure from the previous administrative interpretation, which enlarges the scope of Article 12(5) TRLIS by including situations that were not initially contemplated by the initial administrative interpretation.

(e) *Retroactivity of the measure*

(173) The Spanish authorities and the interested third parties contest the retroactive character of the administrative interpretation. The Spanish authorities referred to their earlier explanations[59] that for those acquisitions carried out until 21 December 2007 and whose financial goodwill is subject to revision, the amount of the financial goodwill arising from indirect (and direct) acquisitions will be deducted from the tax base. With regard to those acquisitions carried out after 21 December 2007, the deduction of the financial goodwill arising from both direct and indirect acquisitions will not be accepted.

(174) The Spanish authorities explained that, according to Article 120 of the General Tax Law 58/2003 of 17 December, those companies that consider that the tax declaration has adversely affected their legitimate interests could claim the rectification of the tax declaration according to the applicable procedure. The procedure is laid down in Articles 126 to 129 of Royal Decree 1065/2007 of 27 July[60]. Basically, a company might request the rectification of its tax declaration once it has submitted it and before the tax administration has adopted the final tax assessment (*liquidación definitiva*), or in its absence, before the prescription deadline that the tax administration has to determine the tax amount to be collected. According to Articles 66 and 67 of the LGT,

the deadline to request the rectification of the tax declaration is four years from the final deadline for submitting the tax declaration.

(175) The Spanish authorities acknowledged that the companies that carried out indirect acquisitions of shareholdings in non-resident companies until 21 December 2007 and that did not include the deduction of the financial goodwill arising from indirect acquisitions could now rectify their tax declarations in order to deduct the financial goodwill arising from them. In the case of companies that included in their past tax declarations the deduction of the financial goodwill arising from indirect acquisitions and which had already been subject to the assessment of the tax administration, will not be able to request the rectification of the tax declarations already submitted; however, given that the deduction is spread out over 20 years, it does not preclude these companies from deducting the financial goodwill in future tax declarations.

(176) To begin with, whether the new administrative measure has retroactive effect or not has no legal consequence as to the scope of the First and Second Decisions, and namely whether they also cover indirect acquisitions.

(177) In any case, the new administrative interpretation has legal retroactive effects. Indeed the new administrative interpretation of 21 March 2012 can be applied to acquisitions that were carried out before that date.

6.3. **Compatibility of the aid**

(178) Having preliminarily established that the scheme at issue involves State aid within the meaning of Article 107(1) of the TFEU, it is necessary to consider whether the amended scheme can be found to be compatible with the internal market pursuant Article 107(2) and (3) of the TFEU. The Spanish authorities did not present any argument in this respect.

(179) The Commission considers that the new administrative interpretation of Article 12(5) TRLIS cannot be considered compatible with the internal market. In this respect, the Commission considers that the same reasoning followed in the First and Second Decision applies. Therefore, the Commission refers to paragraphs 140 and following of the First Decision and to paragraphs 166 and following of the Second Decision.

(180) In particular, as regards the application of Article 107(3)(c), the tax deductions granted under Article 12(5) TRLIS are not related to investment, job creation or specific projects. The tax deductions relieve the undertakings of charges normally borne by those undertakings, and must therefore be considered as operating aid. As a general rule, operating aid does not fall within the scope of Article 107(3)(c) since it distorts competition in the sectors in which it is granted. The aid cannot be considered compatible with the internal market, as it does neither facilitate the development of any activities or economic areas nor it is limited in time, digressive or proportionate to what is necessary to

remedy that specific economic situation in the areas concerned. In conclusion, the Commission does not consider the measure compatible with the internal market.

B. LEGITIMATE EXPECTATIONS, LEGAL CERTAINTY, PRINCIPLE OF ESTOPPEL AND RECOVERY OF THE AID

6.4. **Principles of estoppel and legal certainty**

(181) The Commission considers that there is no reason to depart from the considerations expressed in the Opening Decision. Indeed, the Commission did neither violate the estoppel principle nor the legal certainty principle.

(182) The 'consulta vinculante' of 21 March 2012, which introduced the new administrative interpretation, is the result of a choice made by the Spanish authorities. This administrative act, which gave rise to a situation of new aid illegally granted without having been previously notified to the Commission, is an act of the Spanish authorities and not an act of the Commission. Therefore, the estoppel principle is irrelevant.

(183) As regards the alleged violation of the legal certainty principle, the Commission reminds that, according to the ECJ case-law, the scope of a State aid decision must be determined not only by reference to the actual wording of that decision but also by taking account of the aid scheme as described and concretely applied by the Member State concerned[(61)].

(184) In this respect, if a violation of this principle may be found, the Commission considers that it was Spain that would have infringed the legal certainty principle. Moreover, the Commission believes that the creation of legal uncertainty, if any, would stem from the imprecise and unclear character of the wording of certain provisions of the scheme.

6.5. **Recovery of the aid**

(185) The contested measure has been implemented without having been notified in advance to the Commission in accordance with Article 108(3) of the Treaty. Therefore, the measure constitutes unlawful aid.

(186) Where unlawfully granted State aid is found to be incompatible with the internal market, the consequence of such a finding is that the aid should be recovered from the recipients pursuant to Article 14 of Regulation (EC) No 659/1999. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible. The amount to be recovered should be such as to eliminate the economic advantage given to the beneficiaries.

(187) No arguments raised by the Spanish authorities or by the thirty parties justified a general departure from this basic principle. Spain should therefore be required to recover the incompatible aid.

(188) For a given year and a given beneficiary, the value of the aid corresponds to the tax reduction provided by the application of Article 12(5) TRLIS for indirect acquisitions of shareholdings of non-resident operating companies that result from previous acquisitions of shareholdings of holding companies.

6.6. **Legitimate expectations**

(189) The Spanish authorities and the interested parties argue that the legitimate expectations recognised in the First and Second Decision should also apply to indirect acquisitions of shareholdings that result from a direct acquisition of shareholdings of a holding company. In this regard, they claim that legitimate expectations should be recognised due to the references made to indirect acquisitions in the wording of the First and Second Decisions, the replies to written parliamentary questions and the acquisitions mentioned in the press release of the 2007 opening Decision.

(190) The Commission does not agree with the arguments presented by the Spanish authorities and interested third parties and considers that the legitimate expectations that were recognised in the First and Second Decision cannot be extended to situations (indirect acquisitions of shareholdings that result from the acquisition of shareholdings of a holding company), which were not covered by the scope of application of the measure at the time of the adoption of these Decisions. Indeed, legitimate expectations can be based only on factual elements known at the moment of the adoption of a decision and not on future events, such as the introduction of a new administrative interpretation.

(191) In accordance with settled case-law[(62)], the right to rely on the principle of protection of legitimate expectations applies to any individual in a situation in which an institution of the European Union, by giving that person precise assurance, has led him to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information.

(192) The absence of explicit restrictions in the aid scheme in question cannot be deemed to constitute a precise, unconditional and consistent statement made by the Commission to the undertakings concerned with regard to the application of the measure also to indirect acquisitions of shareholdings that result from the direct acquisition of shareholdings of a holding company. Therefore, the absence of those explicit restrictions cannot create legitimate expectations for the undertakings concerned that the measure could be lawfully applied also to indirect acquisitions.[(63)]

(193) Even if it had been the case that the references made to indirect acquisitions in the First and Second decisions could have created an expectation for the undertakings concerned, it is necessary to consider whether the expectation reached on that basis is a legitimate one[(64)]. The Commission is of the

opinion that the undertakings that carried out indirect acquisitions cannot plead a legitimate expectation that the indirect shareholding acquisitions were covered by Article 12(5) TRLIS, given that these undertakings were well aware of the administrative practice of the tax administration and the TEAC that was in place until 2012. These undertakings were aware that the tax scheme communicated to the Commission — Article 12(5) TRLIS — was implemented at that time excluding from its scope indirect shareholding acquisitions that result from a direct shareholding acquisition of a holding company.

(194) The Spanish authorities allege that the existence of a restrictive administrative interpretation does not diminish the legitimate expectations that the operators that carried out indirect acquisitions of shareholdings through a direct acquisition of shareholdings of a holding company might have had on the validity of Article 12(5) TRLIS. This is because: (1) Article 12(5) TRLIS is a clear provision; (2) it expressly refers to Article 21 TRLIS, which mentions direct and indirect acquisitions; (3) it contains a express reference to the consolidated accounting rules; (4) it aims at fostering the international investment of Spanish companies.

(195) The Commission does not agree with the abovementioned statement. Article 12(5) TRLIS has proven to be an unclear provision because of the undetermined reference to the consolidation accounting rules and the imprecise extrapolation to the criteria contained in Article 21 TRLIS. Indeed, Article 21 is initially conceived for laying down the conditions for exempting dividends and income of foreign origin. The reference of Article 21 to indirect acquisitions contrasts with the requirement of carrying an economic activity by the directly acquired company. Moreover, legitimate expectations cannot be founded on the rationale of an aid scheme, Article 12(5) TRLIS, which had already been declared unlawful and incompatible aid in the First and Second Decisions due to the differential tax treatment between foreign acquisitions and domestic acquisitions carried out by companies resident in Spain. The Commission believes that the imprecise and unclear character of the provision led to a controversy in its interpretation. In fact, this controversy is evidenced in most of the *consultas* of the DGT and TEAC resolutions. Therefore, the Spanish authorities cannot claim that, despite the restrictive administrative interpretation, Article 12(5) TRLIS could have created legitimate expectations for those undertakings that carried out indirect acquisitions of shareholdings.

(196) As regards more specifically the acquisition of Scottishpower by Iberdrola, the Commission observes that the merger decision (COMP M.4517) clearly indicated that it was neither necessary nor appropriate to determine if Article 12(5) TRLIS constituted State aid (see paragraph 42 of the decision) for the purposes of the merger decision.

(197) With reference to the allegations of Spain and of the interested third parties, according to which the replies to the written parliamentary questions created

legitimate expectations for the beneficiaries of the aid, the Commission observes that the written parliamentary questions did not focus on the differentiation between direct and indirect acquisition, but questioned whether the scheme provided for in Article 12(5) TRLIS might constitute State aid. Therefore, it could not be inferred from the replies given by the Commission to the written parliamentary questions that both direct and indirect acquisitions would have been covered.

(198) As regards the allegation according to which the First and Second decisions would create new legitimate expectations, since they both make reference to indirect acquisitions, the Commission recalls that those references were exclusively made because the national legal provisions mention both direct and indirect acquisition. More precisely, Article 12(5) TRLIS cross-refers to Article 21 TRLIS, which requires that at least 5 % of the shareholdings of the non-resident company must be held directly or indirectly by the Spanish company for an interrupted period of one year. The fact that the Spanish authorities were applying Article 12(5) TRLIS only to direct acquisitions is not contested neither by Spain nor by the interested third parties. As already indicated above, the Commission is therefore entitled to rely on the explanations provided by the Member State concerned and therefore it could legitimately assume that the regime was applied as the Member State had indicated.

(199) Moreover, the Commission considers that even though the communication between the Spanish authorities and the Commission — whereby it was explained that in practice it could only be deducted the financial goodwill arising from direct shareholding acquisitions of operating companies — is not reflected in the wording of the decisions, it does not create legitimate expectations for the beneficiaries of the aid that indirect acquisitions were also covered by Article 12(5) TRLIS. The beneficiaries of the aid were already aware of the consistent and systematic administrative practice that excluded indirect shareholdings acquisitions through the shareholding acquisition of a holding from the scope of application of Article 12(5) TRLIS and which had been in place until 2012.

(200) In conclusion, the legitimate expectations recognised in the First and Second Decisions cannot be extended to situations that were not covered by the scope of application of the contested measure at the time of the First and Second Decisions.

7. CONCLUSIONS

(201) In light of the above, the Commission considers that the new administrative interpretation, which has enlarged the scope of the application of a scheme already declared illegal and incompatible aid without being notified to the Commission, constitutes unlawful incompatible aid in the meaning of Article 1 of Regulation (EC) No 659/1999.

(202) The Commission does not consider the measure compatible with the internal market pursuant Article 107(2) and (3) of the Treaty.

(203) The aid should be recovered from the recipients pursuant to Article 14 of Regulation (EC) No 659/1999,

HAS ADOPTED THIS DECISION:

Article 1

The new administrative interpretation adopted by the Kingdom of Spain that extend the scope of application Article 12 (5) of the Real Legislative Decree 4/2004 of 5 March 2004, consolidating the amendments made to the Spanish Company Tax Act in order to cover indirect shareholding acquisitions of non-resident companies through a direct shareholding acquisition of non-resident holding companies, and which has been unlawfully put into effect by the Kingdom of Spain in breach of Article 108(3) of the Treaty, is incompatible with the internal market.

Article 2

Individual aid granted under the scheme referred to in Article 1 does not constitute aid if, at the time it is granted, it fulfils the conditions laid down by the regulation adopted pursuant to Article 2 of Council Regulation (EC) No 994/98[(65)] which is applicable at the time the aid is granted.

Article 3

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

Article 4

1 The Kingdom of Spain shall put an end to the aid scheme referred to in Article 1, as regards aid granted to beneficiaries when carrying out indirect acquisitions of shareholdings of non-resident companies through a direct acquisition of shareholdings of holding companies, to the extent that it is incompatible with the common market.

2 The Kingdom of Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the beneficiaries.

3 The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

4 The interests shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004[(66)].

5 The Kingdom of Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

Article 5

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

2 The Kingdom of Spain shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 6

1 Within two months following notification of this Decision, the Kingdom of Spain shall submit the following information:

a the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

b the total amount (principal and recovery interests) to be recovered from each beneficiary;

c a detailed description of the measures already taken and planned to comply with this Decision;

d documents demonstrating that the beneficiaries have been ordered to repay the aid.

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

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 15 October 2014.

For the Commission

Joaquín ALMUNIA

Vice-President

(**1**) OJ C 258, 7.9.2013, p. 8.

(**2**) OJ L 7, 11.1.2011, p. 48.

(**3**) OJ L 135, 21.5.2011, p. 1.

(**4**) See Consulta vinculante V0608-12 of 21 March 2012.

(**5**) SA 35550 (12/CP).

(**6**) See footnote 1.

(**7**) See Article 21(1)(a) TRLIS.

(**8**) See Article 21(1)(b) TRLIS.

(**9**) See Article 21(1)(c) TRLIS.

(**10**) 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 Title IV TRLIS.

(**11**) Law 4/2001 of 27 December 2001 on Administrative, Fiscal and Social Order measures.

(**12**) Royal Legislative Decree 4/2004 of 5 March, on the Consolidated version of the Spanish Corporate Tax Law.

(**13**) Law 16/2007 of 4 July 2007 on the reform and adaption of accounting rules for their international harmonization with EU accounting rules.

(**14**) See letter of 4 June 2007 sent by Spain in reply to a request for information of 26 March 2007.

(**15**) See letter from the Spanish authorities of 7 May 2014 in response to a request for information of 26 March 2014.

(**16**) According to the information provided by some of interested third parties there are other administrative interpretations that relate to Article 12(5) TRLIS, namely consultas vinculantes V316-05 and V2245-06.

(**17**) See footnote 15.

(**18**) Resolution 00/2842/2009; Resolution 00/4872/2009 and joint resolutions, Resolution 00/5337/2009 and joint resolution; Resolution 00/3637/2010 and joint resolution.

(**19**) Articles 23 and 24 of 1815/1991.

(**20**) See TEAC Resolution of 3 November 2011; R.G. 2842-09.

(**21**) See also the *Consulta vinculante* CV5615-12 of 25 October 2012, which follows the same line of reasoning.

(**22**) TEAC Resolution of 26 June 2012; R.G.:00/3637/2010 and R.G.: 00/1439/2011.

(**23**) See judgement of the Audiencia Nacional; appeal 125/2011; 6 February 2014.

(**24**) Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 83, 27.3.1999, p. 1).

(**25**) See footnote 1.

(**26**) See joint cases C-110/98 and C-147/98 'Galbalfrisa and others'.

(**27**) Consultas 1490-02, V0391-05, V1316-05 and V2245-06; TEAC Resolution of 17 September 2011 N^{o} 4871-09.

(**28**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission*.

(**29**) See Judgement C-44/93 of 9 August 1994, *Namur — Les assurances du credit* v *Commission*.

(**30**) Merger COMP M.4517 — Iberdrola/Scottish Power.

(**31**) Written questions E-4431/05 and E-4772/05.

(**32**) See paragraphs 83 and following of the First Decision and paragraphs 96 and following of the Second Decision.

(**33**) Decision C45/07 of 28 October 2009 gave rise to abundant litigation. In particular, the judgement of the General Court of 8 March 2012, *Iberdrola* v *Commission*, T 211/10; the orders of the General Court of 21 March 2012, *BBVA* v *Commission*, T-225/10; *Telefónica* v *Commission*, T-228/10; *Ebro/Puleva* v *Commission*, T-234/10 and *Modelo Continente* v *Commission* T-174/11; and order of 29 March 2012, *AEB* v *Commission* T-236/10. The judgement of the European Court of Justice of 19 December 2013*Telefónica* v *Commission* C 274/12P. It is still pending before the General Court the cases T 207/10 *Deutsche Telekom* v *Commission*. T 219/10 *Autogrill* v *Commission* and T-227/10 *Banco Santander* v *Commission*. Decision C-45/07 of 12 January 2011 gave also rise to abundant litigation. In particular, the orders of the General Court of 5 June 2012, *Ibedrola* v *Commission*, T-431/1, order of 13 December of 2012, *Cementos Molins* v *Commission*, T-424/11; order of 10 June 2013, *Barloworld* v *Commission*, T-459/11; the order of 9 September 2013 for cases *BBVA* v *Commission*, T-429/11; *Telefónica* v *Commission*, T-430/11; *Altadis* v *Commission* T-400/11; and Telefónica v Commission T430/11. It is still pending before the General Court the cases *Sigma* v *Commission*, T-239/11; *Banco Santander* v *Commission*, T-399/11; *Axa* v *Commission* T-405/11; and *Prosegur* v *Commission*, T-406/11. The following appeals are pending before the Court of Justice: *BBVA* v *Commission*, C-587/13P; and *Telefónica* v *Commission* C-588/13P.

(**34**) It is also clear that the question of legitimate expectations covered by the First and Second Decisions is limited to the scope of the measures which are qualified as illegal incompatible aid by these two decisions. Indeed, the purpose of the recognition of legitimate expectations by a decision is not and cannot be an extension of the scope of the illegal incompatible aid, which has been examined, but only a limitation of its recovery.

(**35**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission,* p. 44 and following; See also Judgement C-138/09 *Todaro Nunziatina* [2010[paragraph 31.

(**36**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission*, p. 45.

(**37**) See letter of 4 June 2007, in response of a request for information of the Commission of 26 March 2007.

(**38**) See Judgement of the Audiencia Nacional of 13 October 2011; Appeal number 432/2008.

(**39**) See Judgement of the Spanish Supreme Court of 24 June 2013; RJ/2013/5335.

(**40**) It should also be stressed that, with the new interpretation, the DGT and the TEAC acknowledged a departure from their initial interpretation of Article 12(5) TRLIS, as regards the new possibility of applying it to indirect acquisitions of shareholdings (see section 2.3.2 above).

(**41**) See TEAC resolution of 3 November 2011; R.G.: 2842-09.

(**42**) See TEAC resolution of 26 June 2012 R.G: 3637/2010 and 1439/2011.

(**43**) According to the TEAC Articles 23 and 24 Royal Decree 1815/1991.

(**44**) The Commission refers to a simulation of a consolidation exercise, given that one of the requirements of Article 21 TRLIS is the acquisition of at least 5 % shareholding. This percentage does not imply consolidation with the acquiring company.

(**45**) See TEAC resolution R.G. 2842-09 of 3 November 2011.

(**46**) See TEAC resolution of 17 February 2011; R.G. 4871-09, 4872-09, 4873-09 and 4874-09.

(**47**) See judgement of the Spanish Supreme Court of 24 June 2013; RJ/2013/5335.

(**48**) See letter of 4 June 2007 sent by the Spain in reply to a request for information of 26 March 2007.

(**49**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission*, p. 44; See also Judgement C-138/09 *Todaro Nunziatina* [2010] paragraph 31.

(**50**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission*, p. 44.

(**51**) See Judgement C-44/93 of 9 August 1994, *Namur — Les assurances du credit* v *Commission*.

(**52**) COMP M.4517, paragraph 42.

(**53**) The Spanish authorities communicated to the Commission that Article 12(5) TRLIS was applied only to direct acquisitions by letter of 4 June 2007.

(**54**) Moreover, it is worth noting that the replies to the written parliamentary questions did not make any explicit differentiation between direct and indirect acquisitions.

(**55**) See letter of 4 June 2007 sent by the Spain in reply to a request for information of 26 March 2007.

(**56**) See judgement of the Audiencia Nacional; appeal 125/2011; 6 February 2014.

(**57**) See letter of 4 June 2007 sent by the Spain in reply to a request for information of 26 March 2007.

(**58**) Joined Cases 66/79, 127/79 and 128/79, *Salumi and others*, [1980] ECR-1237, p. 14; Case C-14/01 *Niemann* [2003] ECR I-2279, p. 49.

(**59**) Letter of 4 December 2012.

(**60**) Real Decreto 1065/2007, de 27 de julio, por el que se aprueba el Reglamento General de las actuaciones y los procedimientos de gestión e inspección tributaria y de desarrollo de las normas comunes de los procedimientos de aplicación de los tributos.

(**61**) See case C-537/08 P, Kahla Thüringen Porzellan GmbH, paragraphs 40 and following.

(**62**) Judgement of the Court of Justice of 22.6.2006; case C-182/03 and C-217/03, Forum 187 ASBL [2006] ECR I-5479, par. 147.

(**63**) See Judgement C-537/08P of 16 December 2010, *Kahla Thüringen Porzellan GmbH* v *Commission*, p. 44.

(**64**) Judgement of the Court of Justice of 22.6.2006; case C-182/03 and C-217/03, Forum 187 ASBL [2006] ECR I-5479, par. 159.

(**65**) Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ L 142, 14.5.1998, p. 1).

(**66**) Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (OJ L 140, 30.4.2004, p. 1).

Changes to legislation:
There are currently no known outstanding effects for the Commission Decision (EU) 2015/314.