

The State of the Union Address: A summary of the achievements of the von der Leyen Commission

SOTEU's main messages for businesses

One of the most eagerly awaited moments of the start of the “school year” in Brussels is the State of the Union Address (better known as “SOTEU”). On 13 September 2023, President von der Leyen delivered the aforementioned State of the Union Address; a summary of the achievements of her term in office.

From a business perspective, the following messages are worth highlighting:

- a) **The European Green Deal:** Ursula von der Leyen reaffirmed her commitment to the objectives of the **European Green Deal**; the **EU Climate Targets 2030 and 2050**; the **European Climate Law**; and the **Green Deal Industrial Plan**. Accordingly, starting in September, the European Commission will initiate dialogues with all industry sectors to help them redefine their business model in relation to the industry's decarbonisation targets (**Net Zero Industry Act**).
- b) **The European Union's economy, social policy and global competitiveness:** On this issue, the President of the Commission highlighted the three most important challenges facing the European economy.
 - First, **the challenges of the labour market**. Specifically, the fact that 74% of SMEs in the EU face a lack of qualified personnel and the major problems of unemployment, work/life balance and the lack of training that hinder European competitiveness. In this respect, she announced the convening of a new Social Partners Summit for 2024.
 - Second, **persistently high inflation**. In this respect, she referred to the European Central Bank's difficult task of keeping inflation under control; a task which does not depend exclusively on the ECB's activity, and which is generally of vital importance to the EU economy, due to the link between inflation and the setting of interest rates by the ECB, as a mechanism to fight inflation.
 - Third, **the streamlining of procedures for doing business**. She stressed the importance of simplifying administrative procedures, especially for SMEs, and announced two relevant initiatives in this regard: (i) the appointment of an EU representative for SMEs by 2024; and (ii) the formulation of a legislative proposal in October 2023 aimed at reducing the reporting requirements for EU companies. In addition, she announced that within the framework of the proposed EU budget review, the Commission will propose the creation of the Strategic Technologies for Europe Platform (“STEP”) to attract, mobilise and direct EU funds to invest in areas such as microelectronics, quantum computing, artificial intelligence, biotechnology and clean technology; in our view, this is a great opportunity for EU companies to access funding.
- c) **The Digital transition and the development of artificial intelligence (“AI”).** Regarding this issue, the President welcomed the fact that the 20% investment target for digital projects in the EU Recovery Plan (**NextGenerationEU**) had been significantly exceeded. She also highlighted the “historic” achievement of the **Digital Markets Act** (the “DMA”) and the **Digital Services Act** (the DSA”); although in this regard, it should be noted that under the DMA, companies designated as gatekeepers are not required to comply with their obligations under the DMA until at least March 2024 (in the case of companies in relation to which a market investigation has been opened due to an appeal against the designation decision, the deadline for complying with the obligations under the DMA will be August 2024).

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Analysis

There are no major messages or relevant developments beyond the announcement of an anti-subsidy investigation into electric vehicles from China, and the need to simplify administrative burdens for companies.

Concerning the development of AI, the President of the Commission stressed the need to develop an exemplary regulatory framework at the global level, based on three pillars: (i) “guardrails”, the existence of protective barriers; (ii) a clear system of governance; and (iii) the development of guidelines for innovation in this area. In this regard, she welcomed the Commission’s achievement in presenting its [proposal for an EU Artificial Intelligence Act](#); although it will be necessary to wait for [the legislative process for this proposal](#) to be completed in order to fully understand how the regulation of this area of the digital world affects the lives of EU citizens and businesses.

- d) Relations with China.** The President of the Commission made several references to the Asian giant throughout her speech, specifically to: (i) China’s restrictions on the export of gallium and germanium (essential for the manufacture of semiconductors and solar panels) and the consequent convening, at the end of 2023, of the first meeting of the Critical Raw Materials Club; and (ii) the [opening of an “anti-subsidy” investigation into electric vehicles from China](#), although the exact nature of which is not known, nor are the companies against which it has been directed.

FURTHER INFORMATION

- [European Commission–State of the Union speech: Transcript and associated documentation.](#)
- [The relevant NextGenerationEU legislation – Regulation \(EU\) 2020/2094 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis.](#)

Most relevant decisions and legislative proposals of the European Commission in the month of September

The Designation of Gatekeepers, the BEFIT package and the fight against late payments

September has brought important regulatory developments. In particular, we would like to highlight the following milestones:

- i) **The Designation of Gatekeepers:** On 5 September, the European Commission, under the DMA, designated six entities as gatekeepers: Alphabet (Google), Amazon, Apple, ByteDance (owner of TikTok), Facebook (Meta) and Microsoft and twenty-two core platform services ("CPS"). The designated platforms must comply with the obligations under the DMA, which aims to ensure that users have free access to CPS.

Under the DMA, when certain thresholds are met, entities that meet them are presumed to be gatekeepers. Such a presumption can be rebutted, as Microsoft and Apple did in relation to some of their core platform services; forcing the Commission to open an investigation to carry out an in-depth analysis and identify the CPS where the thresholds are met, and to reject gatekeeper status in others. In the case of Apple, the Commission has yet to investigate whether it should be designated as a gatekeeper for a CPS where it does not meet the thresholds.

- ii) **The Proposal for a Regulation on combating late payment in commercial transactions:** As its name suggests, this is a proposal aimed at combating late payment in commercial transactions. Therefore, it is intended to apply to payments made in transactions between businesses, or between businesses and public authorities (in situations where the public authorities are the debtors), and which result in the delivery of goods or the provision of services for remuneration.

The Regulation includes the supply of goods or services, the design and execution of public works and construction and civil engineering works within the concept of "commercial transactions".

The Regulation also excludes from its scope all payments: (i) for transactions with consumers; (ii) made as compensation for damages, including payments from insurance companies; and (iii) resulting from obligations that can be cancelled, postponed or waived under or in relation to insolvency or restructuring proceedings, including those restructuring proceedings described in [Directive \(EU\) 2019/1023 \(the Restructuring and Insolvency Directive\)](#).

- iii) **The BEFIT package:** This is a legislative package presented by the European Commission on 12 September with the aim of introducing a single set of rules to make it easier to determine the tax base of groups of companies operating in the EU, simplifying their administrative burden and significantly reducing the compliance costs for SMEs operating in the internal market.

The proposal, adopted on the basis of the [Communication from the European Commission of 18 May 2021 to the European Parliament and the Council—Business Taxation for the 21st Century \[COM \(2021\) 251 final\]](#); and entitled "Business in Europe: Framework for Income Taxation" ("BEFIT"), consists of:

- **The Proposal for a Council Directive on Business in Europe: Framework for Income Taxation (BEFIT).** Among other things, it sets out the rules applicable to determine the groups of businesses to which the Directive may apply ("BEFIT groups"); as well as the rules necessary to calculate the aggregate tax base of the members of each BEFIT group.

REGULATORY DEVELOPMENTS

**Most relevant
decisions and
legislative proposals
of the European
Commission in the
month of September**

- **The Proposal for a Council Directive on transfer pricing.** It lays down rules to harmonise Member States' transfer pricing rules (the prices for cross-border transactions within a multinational enterprise group) and to ensure that the arm's length principle is complied with; this means that associated enterprises transact with each other as if they were independent third parties, reflecting the result that would have been obtained if the parties were independent of each other and the transaction had been carried out on an "arm's length" basis.
- **The Proposal for a Council Directive establishing a Head Office Tax system for micro, small and medium sized enterprises.** It lays down the necessary rules for computing the taxable result of permanent establishments of SMEs which fulfil the "Head Office Taxation rules" described in the Directive itself, with the aim of simplifying the obligations in case of transnational activity in order to improve the competitiveness of enterprises.

FURTHER INFORMATION

- [European Commission—Official website on the Digital Markets Act.](#)
- [Proposal for a Regulation of the European Parliament and of the Council on combating late payment in commercial transactions \[COM \(2023\) 533\].](#)
- [Proposal for a Council Directive on Business in Europe: Framework for Income Taxation \(BEFIT\) \[COM \(2023\) 532 final\].](#)
- [Proposal for a Council Directive on transfer pricing \[COM \(2023\) 529 final\].](#)
- [Proposal for a Council Directive establishing a Head Office Tax system for micro, small and medium-sized enterprises, and amending Directive 2011/16/EU \[COM \(2023\) 528 final\].](#)

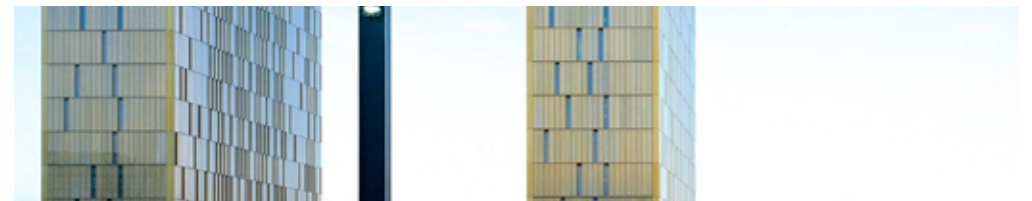
The goodwill saga

The General Court rules in favour of Spanish companies and Spain

On 27 September 2023, the General Court of the European Union issued a judgment in nine separate proceedings annulling the so-called “third decision” of the European Commission, in which it declared that the tax amortisation scheme for financial goodwill for direct and indirect acquisitions of foreign shareholdings established by Spain in 2002 to promote the internationalisation of its companies was State aid that was incompatible with the internal market.

These judgments leave no doubt as to the flaws of the decision, which was annulled not only due to errors of law but also due to a breach of the principles of legal certainty and legitimate expectations, which is exceptional in the Court of Justice of the European Union. The following reasonings should be highlighted:

- i) The initial (now final) decisions examined Article 12(5) of the Corporate Income Tax Act (“Ley del Impuesto de Sociedades” in Spanish) regime as a whole, including both direct and indirect acquisitions.
- ii) The European Commission erred in its understanding of the corporate tax assessment system under Spanish law. In particular, the Court noted that the interpretation of the Directorate General of Taxes (“Dirección General de Tributos” in Spanish) is only binding on the administration, leaving companies free to challenge the interpretation before national courts.
- iii) There is no definitive interpretation in national law concerning the application of Article 12.5 of the Corporate Income Tax Act because it is under appeal before the Supreme Court.
- iv) The Commission could not overturn the earlier decisions, as they were not based on incorrect information, and there was no ground for finding them unlawful. The General Court therefore considered the decision to be contrary to the principle of legal certainty.
- v) The Commission infringed the principle of legitimate expectations of the businesses on the basis of the answers given by the Commission to certain parliamentary questions. The General Court concluded that the Commission gave precise and unconditional assurances, with the result that the businesses acted as reasonably prudent, discriminating and diligent economic operators who could rely on the legitimate expectations of the first two decisions.
- vi) Finally, the General Court noted that it is for the Spanish courts to determine whether, under Spanish law, each transaction falls within the scope of Article 12(5) of the Corporate Income Tax Act.





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CJEU JUDGMENTS

The goodwill saga



Analysis

This is a highly relevant judgment in that it once again annuls a Commission decision on State aid on the grounds of misinterpretation of national law, and because it is a rare occasion on which the Court has upheld an appeal on the grounds of legitimate expectations. It now remains to be seen whether the Commission will appeal.

Specifically, the following judgments are concerned:

- Judgment of the General Court of 27 September 2023, [Case T-826/14](#), *España v Commission*.
- Judgment of the General Court of 27 September 2023, [Joined Cases T-12/15, T-158/15 and T-258/15](#), *Banco Santander and Santusa v Commission*; *Abertis Infraestructuras and Abertis Telecom Satélites v Commission* and *Axa Mediterranean v Commission*.
- Judgment of the General Court of 27 September 2023, [Joined Cases T-252/15 y T-257/15](#), *Ferrovial and Others v Commission* and *Arcelormittal Spain Holding v Commission*.
- Judgment of the General Court of 27 September 2023, [Case T-253/15](#), *Sociedad General de Aguas de Barcelona v Commission*.
- Judgment of the General Court of 27 September 2023, [Joined Cases T-256/15 and T-260/15](#), *Telefónica v Commission* and *Iberdrola v Commission*.



FURTHER INFORMATION

Court of Justice of the European Union – Press release N^o.148/2023, 27 September 2023.