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Judgment of the Court in Joined Cases C-649/20 P | *Spain v Commission*, C-658/20 P | *Lico Leasing and Pequeños y Medianos Astilleros Sociedad de Reconversión v Commission*, C-662/20 P | *Caixabank and Others v Commission*

### State aid: the Court annuls in part the Commission's decision on the 'Spanish Tax Lease System'

*The recovery of the full amount of the aid referred to was ordered on the basis of an erroneous identification of the recipients*

In 2006, several complaints were made to the European Commission concerning the application of the 'Spanish tax lease system' (the 'STL system') to certain finance lease agreements in so far as that system enabled shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, to the detriment of shipyards in other Member States. According to the Commission, the objective of the STL system was to allow economic interest groupings ('EIGs') and the investors involved in those EIGs to benefit from tax advantages, which they then transferred in part to shipping companies that had purchased a new vessel.

In the contested decision, <sup>1</sup> adopted in July 2013, the Commission took the view that three of the five tax measures comprising the STL system were State aid, within the meaning of Article 107(1) TFEU, which took the form of a selective tax advantage and was partially incompatible with the internal market. Given that the aid at issue had been put into effect since 1 January 2002 in breach of the notification obligation, <sup>2</sup> the Commission ordered the national authorities to recover that aid from the investors, that is to say the members of the EIGs.

In September 2013, the Kingdom of Spain, Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión ('PYMAR') SA brought actions for annulment against the decision at issue. In its judgment *Spain and Others v Commission*, <sup>3</sup> the General Court ruled that the advantage received by the EIG investors was not selective and the reasoning for that decision regarding the criteria relating to distortion of competition and the effect on trade was insufficient. Consequently, it annulled the decision at issue.

Hearing an appeal brought by the Commission against that judgment, the Court set it aside by its judgment in *Commission v Spain and Others* (C-128/16 P) <sup>4</sup> ruling, in particular, that the application of the condition relating to selectivity on which the Commission had based its analysis was erroneous. Nevertheless, it took the view that, since the General Court had not ruled on all the pleas raised before it, the state of the proceedings did not permit it to give final judgment and, consequently, it referred the cases back to the General Court.

<sup>1</sup> Commission Decision 2014/200/EU of 17 July 2013 on State aid SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements, also known as the 'Spanish Tax Lease System' (OJ 2014 L 114, p. 1).

<sup>2</sup> Obligation laid down in Article 108(3) TFEU.

<sup>3</sup> Judgment of 17 December 2015, *Spain and Others v Commission*, [T-515/13 and T-719/13](#) (See also [CP 150/15](#)).

<sup>4</sup> Judgment of 25 July 2018, *Commission v Spain and Others*, [C-128/16 P](#) (See also [CP 115/18](#)).

By its judgment after the referral *Spain and Others v Commission* (the ‘judgment under appeal’), the General Court dismissed the actions brought by the Kingdom of Spain, on the one hand, and Lico Leasing and PYMAR, supported by 34 entities which had been granted leave to intervene for that purpose in Case C-128/16 P (the ‘interveners in the first appeal’), on the other.

In that judgment, the General Court rejected the plea seeking to challenge the selectivity of the STL system by holding, in essence, that the existence of a broad discretion of the tax authority to authorise early depreciation was sufficient to accept that the STL system as a whole was selective. The General Court also rejected the pleas alleging failure to state reasons for the decision at issue, infringement of the principle of equal treatment, infringement of the principles of the protection of legitimate expectations and legal certainty and of the principles applicable to recovery of the aid. As regards that last point, in particular, it found that the Commission had not erred in law in ordering the recovery of all the aid at issue from the EIG investors alone, even though part of the tax advantage obtained had been transferred to third parties, that is to say the shipping companies.

Next, the Kingdom of Spain, Lico Leasing and PYMAR, as well as the interveners in the first appeal, brought three separate appeals against the judgment under appeal, by which they seek to have that judgment set aside and, accordingly, the decision at issue annulled.

By its judgment, **the Court upholds the Kingdom of Spain’s ground of appeal alleging failure to state reasons in the judgment under appeal as far as concerns the recovery of the aid at issue and dismisses the appeals as to the remainder.** Having partially set aside that judgment and **taking the view that it is in a position to give a final ruling on the part of the actions which remain to be examined, the Court rules,** following its review of the case, **that the decision at issue must be annulled in so far as it orders the recovery of all the aid referred to from its recipients on the ground that they were erroneously identified.**

### Findings of the Court

First of all, the Court examines the plea of inadmissibility raised by the Commission against the appeal brought by the interveners in the first appeal, alleging an error of law in granting them the status of intervener in the referral proceedings. In that regard, the Court considers that Article 40 of the Statute of the Court of Justice, respect for the procedural rights guaranteed to interveners by the Rules of Procedure of the General Court and the principle of the proper administration of justice require, in the context of a coherent articulation of the procedures before the Court and the General Court, that an intervener in the appeal automatically enjoy the status of intervener before the General Court, where a case is referred back to that court following the annulment by the Court of Justice of a decision of the General Court. Thus, contrary to the Commission’s claims, the General Court did not err in law by granting such a status to the persons concerned in such circumstances. Consequently, the persons concerned are, as such, entitled to bring an appeal against the judgment under appeal since they are also directly affected by that judgment,<sup>5</sup> because, by dismissing the appeals, that judgment makes them exposed to the risk of having to repay the aid they received. Therefore, their appeal is admissible.

Second, the Court examines the grounds of appeal of which some relate to the analysis of the selectivity of the STL system and others to the obligation to recover aid.

As regards, in the first place, **the assessment of the selectivity condition,** the Court notes from the outset that an advantageous tax measure the granting of which depends on the discretionary powers of the tax authority cannot be considered to be general in nature. It follows that the selectivity of such a measure cannot be assessed on the basis of a method specifically designed to reveal the concealed selectivity of advantageous tax measures of general application.<sup>6</sup> In the present case, **the General Court was asked to rule on the analysis of a measure the**

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<sup>5</sup> That condition is laid down in the second sentence of the second paragraph of Article 56 of the Statute of the Court of Justice.

<sup>6</sup> According to that method, the so-called ‘three-step’ method, the assessment of a measure of a general nature introducing an advantageous tax scheme requires, first of all, identifying the ordinary tax regime, next verifying whether the scheme at issue derogates from the ordinary tax regime, as the reference framework, by treating comparable operators - from a factual and legal point of view - differently and, in that event, lastly

**granting of which depended on the discretionary powers of the competent authorities and it therefore cannot be criticised for having failed to analyse it in accordance with the method valid for tax measures of general application.**

Considering next the criteria relevant for the assessment of an advantageous tax measure granted in a discretionary manner, the Court concurs with the General Court in recalling that **the existence of a system of authorisation does not imply in itself that the measure considered is selective.** Such a classification requires that it be demonstrated that the competent authority has a broad discretion to determine the beneficiaries and the conditions for granting the measure considered, so that the exercise of that discretion must be regarded as **favouring the undertakings or productions benefitting from that measure in comparison with others** which do not benefit from it **but are in a comparable situation in the light of the objective pursued.**

In this case, the Court rules that the General Court was thus correct in finding, in the context of its definitive assessment of national law, misinterpretation of which was not, moreover, alleged, that that law conferred on the tax authority significant discretion to authorise early depreciation, in view of, in particular, the imprecise nature of the criteria applied and the lack of a framework for their interpretation. In that regard, the General Court was not required to examine, in practice, whether the exercise of that de jure discretion had actually led to the unjustified favourable treatment of certain operators by comparison with others in a comparable situation.

Consequently, **the General Court did not err in law by considering, in finding that the measure consisting in early depreciation is selective, that the existence of discretionary factors was such as to favour the beneficiaries over other taxpayers in a comparable situation.** Furthermore, **the General Court was correct in finding that the Commission had not erred by inferring from the selective nature of the early depreciation that the STL system was selective as a whole,** since it is common ground that the other measures at issue comprising the STL system depended on prior authorisation of the early depreciation. **Consequently, the Court rejects all the grounds of appeal relating to the selectivity of the STL system as unfounded.**

In the second place, **as regards the recovery of the illegal aid,** the Court holds that the application of the principles of the protection of legitimate expectations and legal certainty in the judgment under appeal is free from any error of law, except for one error which however had no effect on the assessment of the General Court, and therefore **the complaints raised in that regard must also be rejected.**

In the third place and final place, **the Court rules on a ground alleging failure to state reasons in the judgment under appeal.** In this connection, the Court holds that, **while that judgment appears reasoned to the requisite legal standard as regards the selective nature of the STL system, by contrast, the same is not true as regards the recovery of the aid at issue.**

The Court observes that, to reply to a plea seeking to challenge the recovery order in the decision at issue, in that it orders the recovery of all the aid at issue from the investors where a very significant part of the advantage thus granted was transferred to the shipping companies, **the General Court merely stated that, in the decision at issue, the investors alone had been identified as the recipients of the aid and held that that finding was not at issue in the dispute.** According to the Court, even if the parties concerned had not challenged the identity of the recipients, they – by their plea – nonetheless claimed, implicitly but necessarily, that they were not the only recipients of the aid in question. **Since the General Court failed to reply to that plea, it therefore failed to adjudicate on it which constitutes a breach of the duty to state reasons.**

In those circumstances, **the Court sets aside the judgment under appeal to the extent that it dismissed the actions in so far as they sought annulment of the decision at issue inasmuch as it designated EIGs and their investors as the sole recipients of the aid referred to and the annulment of the provision requiring the Kingdom of Spain to recover all the aid referred to from the EIG investors. The appeals are dismissed as to**

establishing whether such differences may be justified by the nature or general scheme of the system.

**the remainder.**

Third, finding that the part of the actions for annulment which remain to be examined after the partial annulment of the judgment under appeal relating, in this case, to **the validity of the obligation to recover the aid at issue from its recipients**, is such that it permits judicial adjudication, **the Court decides to give a final ruling itself in the matter**. In that regard, it rejects from the outset the grounds and arguments based on infringement of the principles of the protection of legitimate expectations and legal certainty, as well as infringement of the principle of equal treatment, as unfounded, by upholding most of the corresponding pleas in the judgment under appeal.

Considering next, in respect of the examination of the plea which the General failed to rule on, the question of the identification of the recipients of the aid at issue, **the Court recalls that the objective of the obligation to recover aid considered by the Commission to be incompatible with the internal market is to restore the situation as it was before the aid was granted, by depriving its recipients, namely the undertakings who actually benefited from it, of the competitive advantage which it gave them.**

**In this case, it follows from the Commission's own findings that the STL system constituted, as a whole, a tax scheme intended to give an advantage not only to the investors in an EIG, but also to the shipping companies.** Moreover, it is apparent from the information put forward by the Commission that **the allocation of that advantage between the shipping company and the EIG investors was provided for in legally binding agreements, submitted to the tax authority and which the latter took into account in order to authorise, in the exercise of its discretion, early depreciation.** In view of the foregoing, the Court holds that **the Commission erred in law, in the light of the objective pursued by the recovery, by designating EIG investors as the sole recipients of the aid at issue essentially on the ground that the advantage obtained by the shipping companies by virtue of the transfer of part of the tax advantage granted to the EIGs resulted from a combination of legal transactions between private entities which, therefore, was not imputable to the State, even though the EIGs were nonetheless required, under the applicable rules, to transfer to those shipping companies part of the tax advantage obtained.**

**Consequently,** the Court partly annuls the decision at issue, that is to say inasmuch as it designates the EIGs and their investors as the sole beneficiaries of the aid referred to and, consequently, inasmuch as it orders the recovery of all the aid exclusively from the EIG investors.

**NOTE:** An appeal, on a point or points of law only, may be brought before the Court of Justice against a judgment or order of the General Court. In principle, the appeal does not have suspensive effect. If the appeal is admissible and well founded, the Court of Justice sets aside the judgment of the General Court. Where the state of the proceedings so permits, the Court of Justice may itself give final judgment in the case. Otherwise, it refers the case back to the General Court, which is bound by the decision given by the Court of Justice on the appeal.

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