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Subject: State aid SA.34736 (2012/N) – Spain
Early depreciation of certain assets acquired through a financial leasing

Sir,

1. PROCEDURE

- (1) By mail of 29 May 2012, registered on 30 May 2012 under State aid case reference SA.34736 2012/N, Spain notified an amended version of Article 115, paragraph 11 of the Coordinated Text of the Law on Corporate Taxation (*Texto Refundido de la Ley del Impuesto de Sociedades*¹ or TRLIS), which provides for the so-called “*early depreciation of leased assets*”. Spain considers that the notified measure is a general tax measure, and consequently that it does not constitute a State aid measure within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union (TFUE).
- (2) Additional information requested by the Commission during the pre-notification phase was provided by Spain on 6 June 2012. Further additional information was requested by the Commission by letter of 1 August 2012 and provided by Spain on 22 August 2012.
- (3) A meeting took place on 4 September 2012 between the Commission services and the Spanish authorities. By mail of 24 September, Spain submitted a modified version of the notified measure. It submitted additional information by mails of 26 September and 5 October 2012.

¹ Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades.

Excmo. Sr. D. José Manuel García-Margallo y Marfil
Ministro de Asuntos Exteriores y de Cooperación
Plaza de la Provincia 1
E-28012 MADRID

2. DETAILED DESCRIPTION OF THE MEASURE

2.1. EXISTING LEGISLATION

- (4) Article 115 of the Coordinated Text of the Law on Corporate Taxation (*Texto Refundido de la Ley del Impuesto de Sociedades*¹ or TRLIS) regulates the tax treatment of certain finance lease contracts. Article 115, paragraph 11 TRLIS provides for the possibility to anticipate the deduction from the tax base of the leasing costs of certain assets under construction before the asset becomes operational. Article 115, paragraph 11 TRLIS therefore provides for the tax advantage also referred to as “*early depreciation of leased assets*”.
- (5) Article 115, paragraph 11 applies in addition to Article 115, paragraph 6 TRLIS, which allows the deduction of the cost of the leased asset over a period twice or three times shorter than the normal depreciation period. Article 115, paragraph 6 TRLIS provides for the tax advantage referred to as “*accelerated depreciation of leased assets*”.
- (6) Article 115, paragraphs 5 and 6 TRLIS notably specify:

“(…)

5. *In all cases, the financial charges paid to the lessor shall be classed as tax-deductible expenditure.*
6. *The portion of the lease payments paid to recover the cost of the asset shall also be classed as such, unless the contract is for land or other non-depreciable assets. (...)*

The amount deductible in accordance with the above paragraph may not exceed the amount obtained by multiplying the cost of the asset by double the coefficient of maximum straight-line depreciation for the leased asset as set out in official tables. (...) When calculating the aforementioned limit, the date on which the asset became operational shall be taken into account.

For the taxable persons referred to in Chapter XII of Title VII, the straight-line depreciation as set out in official tables shall be doubled and then multiplied by 1.5.

(…)”

- (7) Article 115, paragraph 11 TRLIS currently reads:

“11. The Ministry for Economic Affairs and Finance may determine the date referred to in paragraph 6 in accordance with the procedure laid down by law and taking into account the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic

¹ Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades.

use, provided that determining this date does not affect the calculation of the taxable amount arising from the actual use of the asset or the payments resulting from the transfer of ownership, which must be determined in accordance with either the general tax regime or the special regime provided for in Chapter VIII of Title VII of this Law. (...).”

- (8) As stated in Article 115, paragraph 11 TRLIS, the application of the rule providing for early depreciation of leased assets is currently subject to prior approval by the tax administration.
- (9) Implementing measures to Article 115, paragraph 11 are contained in Article 49 of the Regulation on Corporate Taxation (*Reglamento del Impuesto sobre Sociedades*² or RIS) and related provisions can notably be found in Article 48, paragraph 4 TRLIS and Article 50, paragraph 3 RIS.
- (10) Article 115, paragraph 11 TRLIS imposes two general conditions. First, the determination of the new starting date for accelerated depreciation should take account of "*the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic use*". Pursuant to Article 49 RIS, the tax authorities can only authorise early depreciation from the beginning of the construction period when this construction period lasts 12 months at a minimum, and when the leasing contract provides for anticipated lease payments. Second, "*determining this date (should) not affect the calculation of the taxable amount arising from the actual use of the asset or the payments resulting from the transfer of ownership, which must be determined in accordance with either the general tax regime or the special regime provided for in Chapter VIII of Title VII (TRLIS)*³".
- (11) Pursuant to Article 48, paragraph 4 TRLIS⁴, the assets covered by the early depreciation scheme described in Article 115, paragraph 11 TRLIS must be leased to Economic Interest Groups (EIGs) incorporated under Spanish law which, in turn, sublease the assets to third parties. Furthermore, Article 49 RIS establishes the procedure to be followed when applying for the application of early and accelerated depreciation of leased assets: a formal request must be filed by the EIG with the Ministry of Economic Affairs and Finance at least three months before the end of the tax period to which the application relates. This request must at least contain a description of the leased asset, a proposal for the new starting date for the early depreciation and documented proof of the particular characteristics of the period of contracting or construction⁵ and of the specific characteristics of the asset's use⁶. The

² Real Decreto 1777/2004, de 30 de julio, por el que se aprueba el Reglamento del Impuesto sobre Sociedades.

³ Special tax scheme applicable to mergers, divisions, transfers of assets, exchange of securities and change of business domicile of a European Company (Societas Europaea or SE) or European Cooperative Society (Societas Cooperativa Europaea or SCE) from one Member State of the European Union to another Member State ("*Régimen especial de las fusiones, escisiones, aportaciones de activos, canje de valores y cambio de domicilio social de una sociedad europea o una sociedad cooperativa europea de un estado miembro a otro de la unión europea*").

⁴ Article 48 TRLIS governs the special tax scheme applicable to Economic Interest Groups (EIG).

⁵ Article 49, paragraph 3, b, RIS mentions the following elements to be documented: date of contracting, start and end dates of the period of construction which shall be more than 12 months, proof of the individual nature and technical specifications of the asset.

procedure ends with a reasoned decision within six months of the date on which the application was submitted. However, the Directorate-General for Taxation may request from the taxable person any data, reports, records and proof considered necessary. It may also request from the competent public bodies any technical reports that it deems appropriate, in particular on the particular characteristics of the period of construction of the asset and on the specific characteristics of its use. The request for such reports interrupts the 6 month time-limit for the decision to be made⁷.

- (12) Article 50, paragraph 3 RIS⁸ provides that “(for) the purpose of applying the provisions of Article 125, paragraph 2, TRLIS, vessels will not be regarded as used when they have been acquired through the exercise of the buy option of a financial leasing contract, the fiscal effects of which have been previously authorised by the tax administration.”
- (13) Article 125, paragraph 2 TRLIS contains ring-fencing provisions applicable to the tax treatment of used – and possibly over depreciated – vessels in case of change in their tax treatment⁹:
- (14) Among others, the situation targeted in the ring-fencing measures is likely to happen when the vessel has been depreciated in an early and/or accelerated manner pursuant to Article 115, paragraph 6 and/or 115, paragraph 11 TRLIS and sold shortly after the entry of the EIG (and its vessel) into the tonnage tax scheme. By allowing the application of Article 50, paragraph 3 RIS, the authorisation granted in the context of the current Article 115, paragraph 11 TRLIS renders the ring-fencing measures of Article 125, paragraph 2 TRLIS ineffective.

⁶ Article 49, paragraph 3, c, RIS mentions the following elements: legal and financial reports on the intended use of the asset, specific contractual formulas that will be used, positive and negative financial flows that will occur.

⁷ See article 49, paragraph 4 RIS.

⁸ Approved by Royal Decree 1777/2004 of 30 July 2004.

⁹ “(...) in the case of vessels already owned by the company when it began to apply (the tonnage tax scheme), or of second-hand vessels purchased after the scheme began to be applied, the following procedure will be carried out:

In the first financial year in which the scheme is applied, or in which the second-hand vessels have been acquired, non-distributable reserves equal to the difference between the normal market value and the net accounting value of each of the ships concerned by this rule must be set aside, or this difference must be stated separately in the annual report for each vessel, for each financial year in which ownership of them is retained. (...)

(...)

The amount of the said positive reserve together with the positive difference, at the date of transfer of ownership, between the tax depreciation and the accounting depreciation for the vessel sold will be added to the taxable base referred to in the first paragraph of this article once the sale of the vessel is completed. The same procedure will be applied if the vessel is transferred directly or indirectly by means of an operation eligible for the special scheme in Chapter VIII of Title VII of this Law.”

(15) Other paragraphs of Article 115 TRLIS refer to the definition of financial leasing in Law 26/1988 of 29 July 1988 regulating the activities of credit institutions or impose conditions on the eligible contracts such as minimum length (two years for movable property and 10 years for immovable property or industrial establishments), indication of the portion of the payments that corresponds to the recovery of the cost of the asset¹⁰, and of the financial charges to be paid, the condition that lease payments to recover the cost of the asset shall either remain constant or increase throughout the contract period. Pursuant to Article 115, paragraph 5 TRLIS cited above, the financial charges paid to the lessor shall be classed as tax-deductible expenditure

2.2. THE NOTIFIED MEASURE

(16) The notified measure consists in an amendment to the current wording of Article 115, paragraph 11 TRLIS.

(17) The notified new wording of Article 115, paragraph 11 TRLIS reads as follows:

“11. By writing to the Ministry of Finance and Public Authorities under the terms laid down by regulation, lessees will be able to choose to establish that the time referred to in paragraph 6 corresponds to the time of the effective start of the construction of the asset, provided that the following requirements are met:

a) the assets are tangible and are the subject of a financial leasing agreement in which the contractual fees are largely settled before the completion of the construction of the asset,

b) the construction of these assets will take at least 12 months,

c) the assets meet unique technical and design criteria and could not have been mass produced.”

(18) The other conditions set out in the current version of Article 115 TRLIS will continue to apply.

(19) Early depreciation will be applicable to all kinds of assets financed through financial leasing contracts of at least two years for movable property and 10 years for immovable property. Moreover, the Spanish authorities have confirmed that the measure also applies to assets built outside Spain, namely in other Member States.

(20) The application of Article 115, paragraph 11 TRLIS will be optional and subject only to prior information of the tax administration. The application of the early depreciation rule will no longer be subject to prior authorization.

(21) The Spanish authorities confirmed that as a consequence of the modification of Article 115, paragraph 11 TRLIS, the conditions established by Article 48, paragraph 4 TRLIS and Article 49 RIS will no longer be relevant and will be repealed. They have also indicated that no implementing measure is considered necessary for the application of the new Article 115, paragraph 11 TRLIS.

¹⁰ This value however excludes the value of the purchase option.

- (22) Spain also confirmed that Article 50, paragraph 3 RIS, applicable to vessels eligible to the Spanish tonnage tax¹¹, will be repealed.
- (23) As a consequence of the repeal of Article 50, paragraph 3 RIS, the ring-fencing measure of Article 125, paragraph 2 TRLIS will effectively apply upon the transfer of used and over depreciated vessels from the normal taxation system into the tonnage tax system.

3. ASSESSMENT OF THE MEASURE

- (24) In accordance with Article 107(1) TFEU "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".
- (25) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the notified measure constitutes State aid within the meaning of Article 107(1) TFEU, all the above mentioned conditions need to be fulfilled. Namely, the financial support should be granted by the State and through State resources, favour certain undertakings or the production of certain goods, distort or threaten to distort competition and affect trade between Member States.

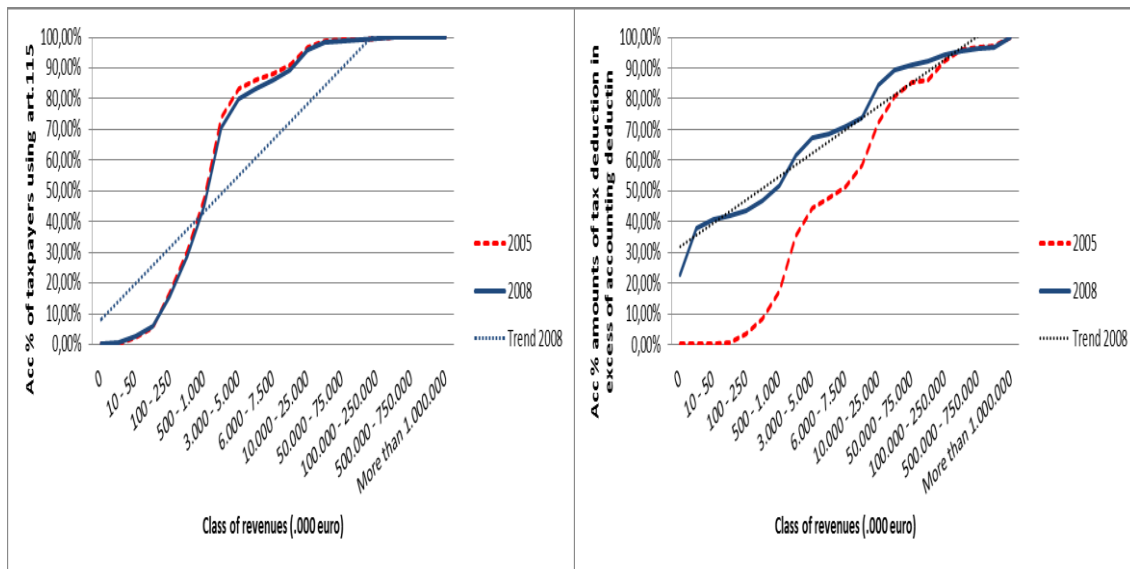
3.1. THE GENERAL CHARACTER OF THE TAX MEASURE AT ISSUE

- (26) The Commission has examined whether or not the tax measure at issue entails advantages accruing exclusively to certain undertakings or to certain sectors of activity¹².
- (27) In the case at hand, the Commission notes that the measure is applicable to all companies which are subject to income tax in Spain without any limitation as to their sector of activity, place of establishment, size, legal status or location of the assets.
- (28) The measure only applies to assets acquired through a financial leasing contract, but this limitation does not introduce an element of selectivity. Indeed, the acquisition of any assets can be financed through financial leasing contracts which are generally accessible to companies of all sectors and sizes.

¹¹ Articles 50 to 52 RIS contain implementing rules for the Spanish tonnage tax.

¹² See judgments of the Court of Justice in cases C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 24, and C-200/97 *Ecotrade v Altiforni e Ferriere di Servola*, [1998] ECR I-07907, paragraphs 40 and 41, and the judgment of the Court of First Instance in Case T-55/99 *CETM v Commission* [2000] ECR II-3207, paragraph 39. See also the *Commission Notice on the application of the State aid rules to measures relating to direct business taxation*, OJEC C 384 of 10.12.1998, p.3.

- (29) The statistics provided by Spain concerning the use of Article 115 TRLIS by Spanish tax payers (see charts below) show that financial leasing is used by companies exhibiting a wide range of taxable revenues (45% of the declared users of Article 115 earn less than 1 million euros, 70% less than 3 million euros) (see left chart). The absolute amount of the tax benefit that can result from the deduction of an extra expense¹³ pursuant to Article 115 TRLIS also varies in accordance with the revenue of the tax payer (see right chart).



Source: Ministry of Economics and Finance

- (30) The Spanish authorities have also confirmed that leasing contracts and Article 115 TRLIS can be used with respect to assets built in (or originating from) other Member States.
- (31) Although the measure is restricted to assets meeting special technical or design requirements which necessitate a construction period of at least 12 months – therefore excluding mass produced assets – and to cases where the leasing contract imposes on the lessee to make substantial advance payments, these restrictions can be considered consistent with the internal logic of the tax system in general.
- (32) In view of the specific characteristics of the assets (tailor-made, long construction period) and of the substantial advance payments foreseen in the financial leasing contracts concerned, the lessee bears a significant part of the financial cost of the asset before it becomes operational. The 12 month construction period required as a minimum is an objective and horizontal condition that appears to ensure that the contract actually involves substantial pre-financing, thereby justifying the early deduction of the cost. That condition therefore appears to be rational and necessary to ensure the smooth functioning of the Spanish tax system and an effective application of the deductions scheme of leasing costs pursuant to the said tax system. It must therefore be considered to form an inherent part of it.

¹³ This extra expense corresponding to the positive difference between the expense deducted for tax purposes pursuant to article 115 and the expense registered in the accounting has to be identified in the beneficiary's tax return.

- (33) Consequently, the Commission considers that the above-mentioned limitations are justified in the light of the nature and general scheme of the Spanish tax system.
- (34) Finally, the Commission would point out that, according to the case-law, even measures which, *prima facie*, apply to undertakings in general may be to a certain extent selective and, accordingly, be regarded as measures designed to favour certain undertakings or the production of certain goods. That is the case, in particular, where the administration called upon to apply a general rule has a discretionary power in so far as it concerns the application of the measure at issue¹⁴.
- (35) The Commission considers however that the proposed modified version of Article 115, paragraph 11 TRLIS lays down conditions that are expressed in sufficiently precise and objective terms so that a discretionary or discriminatory application by the tax administration seems excluded.
- (36) The Commission also observes that the application of the new measure allowing early depreciation is optional and subject only to information to the tax administration, without being subject to prior authorisation. As a consequence, the tax administration will not dispose of any power to discretionarily authorise or reject the application of Article 115, paragraph 11 TRLIS.

4. CONCLUSION

- (37) Because it is not selective, the notified tax measure does not constitute State aid within the meaning of Article 107(1) TFEU.
- (38) In that respect, the Commission notes that the current implementing measures and related measures such as Article 48, paragraph 4 TRLIS and Article 50, paragraph 3 RIS will be repealed and that no new implementing measures are considered necessary, as confirmed by Spain.
- (39) In light of the foregoing assessment, the Commission accordingly finds that the notified measure does not constitute State aid within the meaning of Article 107(1) TFEU.

This conclusion does not affect or prejudice the conclusion that the Commission will draw in its final decision in respect of State aid case SA.21233 concerning the Spanish Tax Lease system and the current wording of Article 115, paragraph 11 TRLIS, as applied in the past. The doubts expressed by the Commission as regards this tax measure were described in the Commission decision of 29 June 2011 to initiate a formal investigation procedure¹⁵.

¹⁴ See the judgments of the Court of Justice in Case C-295/97 *Piaggio SpA v International Factors Italia SpA and Others* [1999] ECR I-3735, paragraph 39, and the case law cited therein.

¹⁵ See OJEU C 276 of 21.09.2011, p.5.

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European Commission
Directorate-General for Competition.
State Aid Registry
J-70 03/225
B-1049 Brussels
Fax No: +32 2 296 12 42

Yours faithfully,

For the Commission

Joaquin ALMUNIA
Vice-President