

## EUROPEAN COMMISSION

Brussels, 29-06-2011

C(2011) 4494 final

<p>In the published version of this decision, some information has been omitted, pursuant to articles 24 and 25 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus [...].</p>	<p>PUBLIC VERSION</p> <p>This document is made available for information purposes only.</p>
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**Subject: State aid case SA.21233 C/2011(ex NN/2011, ex CP137/2006) – Spain  
Tax regime applicable to certain finance lease agreements also known  
as the Spanish Tax lease System**

Madam,

The Commission wishes to inform Spain that, having examined the information supplied by your authorities on the measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

### 1. PROCEDURE

- (1) Since May 2006, two national federations of shipyards and one individual shipyard have filed complaints with the Commission about a Spanish tax regime applicable to shipping companies which allegedly resulted in the loss of shipbuilding contracts from their members to Spanish shipyards. On 13 July 2010, shipbuilding associations of 7 European countries signed a petition against the so called "Spanish tax lease System". At least one shipping company supported these complaints. In August 2010, a Member of the European Parliament asked a question on the same topic<sup>1</sup>.
- (2) By letters of 15 September 2006, 30 January 2007, 6 November 2007, 3 March 2008, the Commission sent Spain requests for additional information. Spain

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<sup>1</sup> See Parliamentary question E-5819/2010 answered on 31/08/2010.

answered by letters of 16 October 2006, 23 and 27 February 2007, 11 January 2008, 27 March 2008. In a meeting that took place on 29 April 2008, the Commission requested additional information which Spain provided by letter of 17 June 2008. The Commission requested further additional information by letters of 23 September 2008, 11 January 2010 and 25 Mai 2010. Spain answered by letters of 24 October 2008, 10 March 2010 and 26 July 2010.

- (3) According to the complaints, the so-called Spanish Tax Lease (hereinafter STL) is a tax construction that would enable shipping companies to buy sea-going vessels from Spanish shipyards with a rebate of 20-30% (hereinafter "the STL rebate") compared to prices charged by their competitors, in particular by EEA shipyards. This would create competition problems on shipbuilding and maritime transport markets.

## **2. DESCRIPTION OF THE MEASURE**

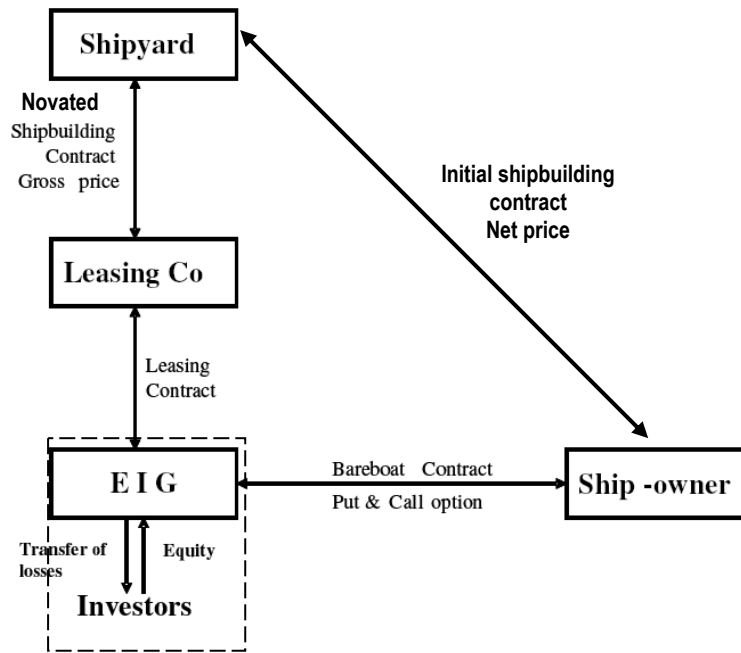
- (4) The STL is used in the context of transactions between (maritime) shipping companies (buyers) and shipyards (sellers) involving the construction and acquisition of sea-going vessels.
- (5) On request of the Commission, the Spanish authorities have confirmed that the STL has been used in 273 shipbuilding and acquisition transactions from 1 January 2002 up to 30 June 2010, for a total value of Euro [...]\*. The scheme has continued to apply. Buyers are shipping companies from all over Europe and beyond. Bar one exception (1 contract for Euro [...]) all transactions involved Spanish shipyards.
- (6) The STL relies on
  - an ad-hoc legal and financial structure organised by a bank and interposed between the shipping company and the shipyard, respectively the buyer and the seller of a vessel.
  - a complex network of contracts between the different parties to the transaction and
  - the combined use of several Spanish tax measures.

### **2.1. THE STL – THE LEGAL AND FINANCIAL STRUCTURE**

- (7) In order to obtain the discounted price (after deduction of the STL rebate), a shipping company must accept not to buy the vessel directly from the shipyard, but from a Economic Interest Group incorporated under Spanish law (EIG) set up by a bank.
- (8) The STL structure is a tax planning construction organised by a bank in order to generate tax benefits at the level of the tax transparent EIG and transfer part of these tax benefits to the shipping company and possibly to other parties involved in the form of a rebate on the price of the vessel, the rest of the benefits being kept by the investors in the EIG. Beyond the EIG, the STL also involves other intermediaries such as notably a bank and a leasing company (see chart below).

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\* covered by professional secrecy obligation



## 2.2. THE STL – THE CONTRACTUAL SET UP

- (9) According to the examples provided by Spain<sup>2</sup>, the transactions which take place can broadly be summarized as follows<sup>3</sup>:
- The shipping company and the shipyard sign a shipbuilding contract (initial shipbuilding contract) for an agreed net price, i.e. after deduction of the STL rebate. They also agree on instalment payments spread over the construction period (in general 1 to 3 years). The shipyard requests a bank (the arranging bank) to organise the STL structure and contracts.
  - The arranging bank sets up an Economic Interest Group (EIG) and sells shares to interested investors. Typically, these investors are big Spanish taxpayers who invest in the EIG with a view to reducing their tax base. In general, these investors do not carry out any shipping activities.
  - A leasing company hired by the arranging bank signs a new shipbuilding contract (through a *novation*<sup>4</sup> agreement) with the shipyard for the appropriate gross price, i.e. the real sales price due to the shipyard before deduction of the STL rebate. The instalment payments according to this contract are similar to those in the original shipbuilding contract, plus one extra instalment corresponding to the STL rebate (difference between the gross and the net prices). The tables below compare the features of the two shipbuilding contracts (initial and novated) in one of the examples provided by Spain. In particular the

<sup>2</sup> By letter of 26 July 2010

<sup>3</sup> This description would seem to correspond to the most typical patterns. Variations exist.

<sup>4</sup> In contract law and business law, *novation* is the act of either replacing an obligation to perform with a new obligation, or replacing a party to an agreement with a new party. In the present case, the buyer in the initial shipbuilding contract (the shipping company) is replaced by the leasing company and certain conditions of the buyer's obligations (notably the price and payment schedule) are modified.

extra (9<sup>th</sup>) instalment in the novated contract corresponds to the leasing option exercise price which is equal to the STL rebate, i.e. the part of the price which is paid to the shipyard, not by the shipping company but by parts of the tax benefits generated by the EIG.

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Shipbuilding contract 1 (initial) Shipbuilding company / Shipyard		
Instalment	Date	Payment
1 <sup>st</sup> instalment	15/4/200x	3.559.916
2 <sup>nd</sup> instalment	1/9/200x	3.559.916
3 <sup>rd</sup> instalment	31/10/200x	8.899.791
4 <sup>th</sup> instalment	30/1/200x+1	3.559.916
5 <sup>th</sup> instalment	31/3/200x+1	5.339.875
6 <sup>th</sup> instalment	30/4/200x+1	3.559.916
7 <sup>th</sup> instalment	30/6/200x+1	3.559.916
8 <sup>th</sup> instalment	30/9/200x+1	3.559.916
<b>Net price</b>		<b>35.599.163</b>
<b>Delivery date</b>	<b>30/9/200x+1</b>	

Shipbuilding contract 2 (novated) Leasing company/shipyard		
Instalment	Date	Payment
1 <sup>st</sup> instalment	15/4/200x	4.368.988
2 <sup>nd</sup> instalment	1/9/200x	2.750.844
3 <sup>rd</sup> instalment	31/10/200x	8.899.791
4 <sup>th</sup> instalment	30/1/200x+1	3.559.916
5 <sup>th</sup> instalment	31/3/200x+1	5.339.875
6 <sup>th</sup> instalment	30/4/200x+1	3.559.916
7 <sup>th</sup> instalment	30/6/200x+1	3.559.916
8 <sup>th</sup> instalment	30/10/200x+1	3.559.916
9 <sup>th</sup> instalment	30/10/200x+1	14.400.837
<b>Net price</b>		<b>50.000.000</b>
<b>Delivery date</b>	<b>30/10/200x+1</b>	

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- d. The EIG leases the vessel from the leasing company over a short period (3-4 years) and based on the agreed gross price. By contract, the EIG commits to buy the vessel from the leasing company at the end of the period (leasing option). The amounts of lease instalments are high but the option exercise price is small compared to the expected residual value of the vessel at the time the option is to be exercised (example: 70% instalments / 30% exercise price).
- e. The shipping company and the EIG sign a bareboat charter<sup>5</sup> (similar to a leasing contract) over a short period and based on the agreed net price. By contract, the shipping company commits to buy the vessel from the EIG at the end of the period (bareboat charter option). Contrary to the leasing mentioned above, the amounts of periodical lease instalments (charter hire) are small and the option exercise price is high (example 10% instalments / 90% exercise price).
- f. However, although not specified in the bareboat charter, it seems that, in practice, the shipping company pays the instalment payments according to the schedule agreed with the shipyard in the initial shipbuilding contract. These payments are not made to the EIG directly, but to an intermediary entity (for instance a Special Purpose Vehicle set up by the bank) which then arranges the payments to the EIG according to the schedule contained in the bareboat charter.
- g. As a consequence, the EIG cannot cover the payments cashed out to the leasing company according to the leasing contract with the payments cashed in according to the bareboat charter, until the final option exercise price is paid to the EIG. The EIG must therefore compensate the discrepancy between the cash outflows and the cash inflows by a cash facility (a loan) provided by the bank.

<sup>5</sup> A bareboat charter is an arrangement for the chartering or hiring of a ship, whereby no crew or provisions are included as part of the agreement; instead, the company which rent the vessel from the owner is responsible for taking care of this.

- h. A framework agreement is signed by the parties involved to make sure they all agree on the whole organisation and functioning of the STL structure.

- (10) In practice, the EIG leases the vessel from a leasing company, from the date its construction starts. When the construction is complete, the EIG charts out the vessel to the shipping company, on a bareboat basis and the shipping company can start using the vessel. In any case, the EIG commits to buy the vessel at the end of the leasing contract and the shipping company commits to buy the vessel at the end of the bareboat charter contract, by way of reciprocal buy and sell option contracts<sup>6</sup>. The exercise date of the option set by the leasing contract is set a few weeks before the exercise date of the option set by the bareboat charter. Both options are exercised after the entry of the EIG under the Tonnage Tax system (for a more detailed description, see paragraph (18) below).

### **2.3. THE STL – THE TAX SET UP**

- (11) The purpose of the STL organisation described above is to accumulate the benefits of certain tax measures into the EIG and to pass these benefits on to the EIG investors and to the shipping company.

#### **2.3.1. Accumulating the tax benefits into the EIG**

- (12) The collection of the tax benefits by the EIG takes place in two stages. (1) Early and accelerated depreciation of the vessel according to normal corporate tax rules and (2) write-off of tax liabilities and exemption of the capital gain<sup>7</sup> under the alternative tonnage tax rules.

##### ***First stage: Early and accelerated depreciation***

- (13) Two legal provisions enable the EIG to deduct the full price of the vessel from its tax base over a short period (3-4 years, by and large the duration of the leasing contract) through the joint effects of early and accelerated depreciation<sup>8</sup>. The vessel's depreciation – for tax purposes – proceeds faster than its real wear and tear. The deduction of depreciation cost from the taxable revenues is anticipated and concentrated on the first years of usage. This early and accelerated depreciation creates the following advantages to the EIG:
- (14) The fast depreciation artificially increases depreciation costs in the first years and leads to a loss for the EIG. However, the EIG is tax transparent and the profits made / losses incurred by the EIG are directly passed on to its shareholders. In the present case, the investors can therefore directly offset the EIG's substantial losses against their own (sizeable) taxable revenues, reduce their tax base and save tax accordingly.

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<sup>6</sup> Buy and call options contracts are also signed by the leasing company and the shipping company.

<sup>7</sup> The difference between the sales price and the accounting value of the ship. The accounting value of the ship is the initial price paid less the amounts deducted (expense) to account for its depreciation. In the present case, the ship would be completely – or almost completely – depreciated before the EIG switches to the TT, i.e. its accounting value would be zero – or close to zero.

<sup>8</sup> Accelerated: Article 115, paragraphs 6 of the Spanish Corporate Tax Law (LIS); Early: Article 115, paragraphs 11 LIS.

- (15) The fast depreciation for tax purpose also artificially decreases the tax value of the vessel compared to its market or usage value. The vessel is over-depreciated. It thereby creates tax deferrals<sup>9</sup> or so-called *hidden tax liabilities*<sup>10</sup>. In fact, under the application of normal tax rules, the tax avoided in the first years through earlier depreciation is in principle compensated by lower (or no) depreciation cost in the subsequent years. And if the owner sells the vessel, the compensation takes place because the (increased) capital gain is taxed. However, as explained below this is not happening in the present case.

### ***Second stage – Exemption of the capital gain***

- (16) When the cost of the vessel is (almost) fully deducted through early and accelerated depreciation, the EIG switches from the normal corporate tax system to the so-called *Tonnage Tax* (TT) system, an alternative tax system available to shipping companies, and sells the vessel to the eventual buyer.
- (17) Under the TT, the corporate tax base is calculated according to the tonnage of the fleet operated by the company, not, as under normal corporate tax rules, according to the difference between revenues and expenses.
- (18) In terms of timing, the switch to TT happens after full depreciation the vessel but before the bareboat charter option is exercised on behalf of the shipping company in such a way that the substantial bareboat charter option exercise price (90% of total price) is paid to the EIG under the TT rules. The capital gain – resulting from the early and accelerated depreciation achieved under normal corporate tax rules – is exempted from corporate tax, because the EIG is now under TT, and the EIG saves a substantial amount of tax. In effect, it escapes the payment of the hidden tax liabilities.
- (19) The eventual exemption of the capital gain does not automatically result from the switch to the TT system, which is necessary but not sufficient. Indeed, the TT – as authorised by the Commission<sup>11</sup> – provides for ring-fencing measures meant to avoid windfall benefits and possible abuses which apply to *used vessels*<sup>12</sup> transferred to the TT system. In the present case however, vessels acquired by the EIGs by exercising the option of leasing contracts authorised by the tax authorities are deemed to be new<sup>13</sup>, not used. As a consequence, the transitional ring-fencing measures authorised by the Commission together with the TT do not apply and the capital gain subsequently made by the EIG on the sale of the vessel to the shipping company is fully tax exempted.

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<sup>9</sup> In this case, tax is deferred without interest.

<sup>10</sup> The anticipation – for tax purposes - of the deduction of the depreciation cost (by early and accelerated depreciation) is equivalent to a deferral of the payment of the tax. The tax that is not perceived in the first years when depreciation cost is increased is considered as a liability for tax to be paid later when full depreciation is achieved – also called differed tax.

<sup>11</sup> Commission decision C(2002)582fin of 27.02.2002 in case N 736/2001, as modified by decision N 528/2003.

<sup>12</sup> According to art 125, paragraph 2 LIS, used vessels are those vessels already owned by the Shipping company on entry into the special TT scheme or second-hand vessels acquired when already under the TT scheme.

<sup>13</sup> By virtue of article 50, paragraph 2 of the RIS (see detailed description below)

### 2.3.2. Passing on the tax benefits from the EIG to the final beneficiaries

- (20) To sum up, the EIG accumulates benefits from the early and accelerated depreciation under normal tax rules, switches to TT and achieves full exemption of the capital gain resulting from the sale to the shipping company.
- (21) According to the complainants, and to the examples<sup>14</sup> provided by the Spanish authorities, the joint effect of the tax measures used in the STL enables the EIG and its investors to achieve a tax gain of approximately 30% of the initial gross price of the vessel. This tax gain is partially (10-15%) passed on to the investors in the EIG and partially (85-90%) to the shipping company who buys the vessel (by a 20% to 30% price reduction).
- (22) As explained above, the EIG – as used in the STL structure – is the initial beneficiary of the tax benefits. It is in fact an intermediary entity where tax benefits are generated, then passed on or shared with other beneficiaries. However, the STL only functions if the EIG's shareholders are profitable Spanish taxpayers, able to offset the substantial losses incurred by the EIG against sufficient profits of their own. These shareholders do not need to be familiar with the shipping industry. They invest in an EIG against a return, i.e. the tax avoided.
- (23) The other main beneficiaries of the STL are the shipping companies. Indeed, in the example summarised below, the overall tax gain achieved by the EIG is Euro [14] Million (28% of the vessel gross value). 87% of that advantage is transferred to the shipping company. Indeed, the vessel – worth Euro [50] million – is acquired by the shipping company for Euro [37.9] million, i.e. with a rebate of 24%. The investors in the EIG keep the remaining 13% of the tax advantage (Euro [1.9] Million) for themselves.

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#### Calculation of the overall tax benefit of the structure

NPV of the ship - price paid by leasing co to shipyard (1)	50.000.000
<b>NPV of the total tax gain (2)</b>	<b>13.986.561</b>
<b>Tax gain in % (3)=(2)/(1)</b>	<b>28,0%</b>

#### Calculation of tax benefit passed to the shipping company

NPV of the ship - payments by leasing co to shipyard (1)	50.000.000
NPV of the ship - price paid by shipping company (4)	37.892.404
NPV of tax gain passed over to shipping company (5)=(1)-(4)	<b>12.107.596</b>
NPV of the total tax gain (6)=(2)	<b>13.986.561</b>
Tax gain passed over to shipping company in % (7)=(5)/(6)	<b>86,6%</b>
<b>Tax gain kept by EIG/Investors (8)=(6)-(5)</b>	<b>1.878.965</b>
<b>Tax gain kept by EIG/Investors in % (9)=(8)/(6)</b>	<b>13,4%</b>

#### Calculation of the benefit paid to the shipping company

NPV of the ship - price paid by leasing co to shipyard (1)	50.000.000
NPV of the ship - price paid by shipping company (4)	37.892.404
Advantage to the shipping company (10)=(1)-(4)	<b>12.107.596</b>
<b>Advantage in % of ship value (11)=(10)/(1)</b>	<b>24,2%</b>

Source: Theoretical example based on calculations attached to a request filed to the administration for authorisation of early amortisation.

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<sup>14</sup> This information included 3 actual examples of requests filed by EIGs with the tax administration pursuant to article 115, paragraph 11 LIS, and the contracts and other annexes attached to the said requests.

- (24) It appears that the main objective of the STL is to enable shipping companies to buy vessels at a discount. The largest part of the tax benefits accumulated in the EIG directly serves that purpose.
- (25) At this stage, the Commission would also identify the following possible other beneficiaries in addition to the EIGs, the investors in the EIGs and the shipping companies: shipyards selling vessels, arranging banks, leasing companies and all the intermediaries involved in the STL structures selling their services.

## **2.4. THE STL – THE INDIVIDUAL TAX MEASURES**

- (26) As already mentioned, the STL is a system that relies on several individual tax measures applied and linked together in an orderly and organised STL structure and that thereby generates a tax benefit. This section describes these measures. Some of these individual tax measures may also be applied outside the STL system independently from each other.

### **2.4.1. Accelerated depreciation<sup>15</sup> of leased assets**

- (27) Pursuant to Spanish accounting law, the cost related to the use of an asset should not be influenced by the method chosen for its financing. As a consequence, leased assets should be entered on the balance sheet and depreciated according to the same methods as the same non leased asset. The financial side<sup>16</sup> of the leasing is treated separately, as a loan.
- (28) However, the tax treatment of leasing transaction is different. Chapter XIII of Royal Decree 4/2004 of 5 March 2004 approving the consolidated text of the Law on corporate tax (LIS) and article 49 of Royal Decree 1777/2004 of 30 July 2004 approving the Regulation on corporate tax (RIS)<sup>17</sup> concern the tax treatment of certain finance lease contracts. These provisions apply to all leasing contracts with a minimum duration of two years if they relate to movable property and 10 years if they relate to immovable property or industrial establishments.
- (29) Concerning the instalments paid by the *lessee* to the *lessor*, article 115 LIS distinguishes the financial charges (interest) paid from the portion of the payments that allows the lessor to recover the cost of the asset, excluding the value of the purchase option. In all cases, the former shall be classed as tax-deductible expenditure. The latter shall also be classed as tax-deductible expenditure but within certain limits: the amount deducted may not exceed the amount obtained by multiplying the cost of the asset by double the official coefficient of maximum

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<sup>15</sup> In this decision, *depreciation* indistinctly refers to the deduction of the depreciation cost by the owner of an asset or to the deduction by the lessee of payments corresponding to the recovery by the lessor of the cost of the asset. Accordingly, accelerated depreciation of leased assets refers to the possibility for lessees to deduct these payments within the limits of twice or 3 times the straight-line depreciation.

<sup>16</sup> The payment of instalments including the reimbursement of the cost of the asset, excluding the value of the purchase option, and interest due.

<sup>17</sup> Respectively published in the Spanish Governmental Gazette (BOE) of 11 March 2004 and 6 August 2004.



straight-line depreciation for the type of asset. For SMEs<sup>18</sup>, the official straight-line depreciation rate shall be multiplied by 3. In the case of vessels, the normal straight-line depreciation takes place – for tax purposes – over 10 years (10% per year). The maximum accelerated depreciation is 5 years (20% per year) or, for SMEs, 3 <sup>1/3</sup> years (30% per year).

- (30) According to the Spanish authorities, the Spanish tax law is in principle based on the actual costs recorded in the taxpayers' accounts. According to article 115, paragraph 7 LIS, the deduction for tax purposes of the amounts referred to above shall not be conditional upon the entry of the amounts in the profit and loss account. In other words, the tax treatment of leasing operations is different from their accounting treatment. The tax deduction is available independently of the accounting treatment applied to the lease contract in accordance with the relevant EU and Spanish law translating International Accounting Standards<sup>19</sup>.

#### 2.4.2. Early depreciation of leased assets

- (31) By virtue of article 115, paragraph 6 LIS, the accelerated depreciation of the leased asset starts on the date on which the asset became operational, i.e. not before the leased asset is delivered to and starts being used by the lessee. However, pursuant to article 115, paragraph 11 LIS<sup>20</sup>, the Ministry for Economic Affairs and Finance may, upon formal request by the lessee, determine an earlier starting date for depreciation. In principle, this provision applies to all leased assets eligible for accelerated depreciation, under certain conditions.
- (32) In fact, article 115, paragraph 11 LIS appears to impose 2 general conditions. First, the new starting date should be determined account being taken of "*the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic use*". According to article 49 RIS, the tax authorities would only authorise early depreciation from the beginning of the construction period when this construction period is over 12 months, and 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 LIS*".

<sup>18</sup> Article 108 LIS stipulates that companies with turnover of less than €8million can benefit from favourable taxation rules; if the company files a consolidated tax return, the turnover refers to the entire group.

<sup>19</sup> See International Accounting Standard (IAS) n°17 applicable to lease contracts that provide that leased assets should be capitalised by the lessee and depreciated according to the same rules as owned assets. IAS 17 is applicable in the EU pursuant to *Commission Regulation (CE) 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council*. According to the information available, the Spanish General Accounting Plan also implements IAS 17, with the exception of micro undertakings.

<sup>20</sup> Copied from the preceding art.128 (11) of Ley 43/1995 as introduced by Ley 24/2001 and applicable from 2002. **Early depreciation** means the anticipation of the date when depreciation can start. In the present case, provided they receive the necessary tax authorisation, tax payers can start accelerated depreciation during the construction of the ship, so before the ship is delivered to the taxpayer / starts being used by the taxpayer.

- (33) According to article 48, paragraph 4 LIS, the assets covered by the early amortisation scheme described in article 115, paragraph 11 LIS will be leased to EIGs incorporated under Spanish law which, in turn, have to sublease the assets to third parties. Furthermore, article 49 RIS establishes the procedure to be followed when applying for the early (accelerated) depreciation of leased assets.
- (34) In practice, the Spanish authorities confirmed during the meeting of 24 January 2011 that based on authorisations issued so far, the conditions of article 115, paragraph 11 LIS were deemed fulfilled only in case of the acquisition of vessels involving the switch from the normal taxation regime to the tonnage tax<sup>21</sup> and the subsequent transfer of the ownership of the vessel to the shipping company through the exercise of an option of a bareboat charter.
- (35) Based on the examples provided by the Spanish authorities, it appears that the requests filed by EIGs to the tax administration for early depreciation describe the whole STL organisation in details and provide all the relevant contracts (notably shipbuilding contract, leasing contract, bareboat charter, option contracts, debt assumption and release agreement...). In the examples provided, the requests also feature additional annexes: (1) a detailed description of how the overall tax benefits will be shared between the shipping company, on the one hand, and the EIG/its investors on the other hand and (2) a notice by the shipyard, setting out the economic and social benefit expected from the shipbuilding contract. According to complainants, these documents are indispensable elements required by the tax administration in the context of the authorisation process.

#### **2.4.3. The Economic interest Groupings (EIGs)**

- (36) As mentioned before, EIGs incorporated under Spanish law have a legal personality separate from their members. They are transparent, however, from a tax perspective. In other words, for tax purposes, profits / losses made by EIGs are directly attributed to their members on a pro rata basis. The present decisions refers to the members of the EIGs as the investors.
- (37) The EIGs' tax transparency results in the possibility to pass on the substantial losses incurred by the EIG through early and accelerated depreciation directly to the investors who can offset these losses against profits of their own and reduce the tax due.
- (38) Despite being tax transparent, the EIG can be recognised under Spanish law as a *Small and Medium sized Enterprise*<sup>22</sup>. As a consequence, such SME EIGs can apply the increased (3 times instead of 2) rate of accelerated depreciation provided for in article 115 LIS. The EIGs can also opt for the alternative Tonnage tax system provided for by article 124-128 LIS (see below).

#### **2.4.4. The Tonnage tax**

- (39) The Spanish tonnage tax legislation applies since 2002. The relevant provisions regulating the TT are contained in Chapter XVII, articles 124 to 128 LIS. The

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<sup>21</sup> Letters from the Spanish authorities of 27 March 2008, 10 March 2010 and 27 July 2010 where the authorisations issued till end-June 2010 were summarised.

<sup>22</sup> Article 108 LIS stipulates that companies with turnover of less than €8million can benefit from favourable taxation rules.

Commission authorised<sup>23</sup> the Spanish TT as compatible State aid on the basis of the *Community guidelines on State aid to maritime transport*<sup>24</sup> (hereafter the *Maritime Guidelines*).

- (40) Spain also adopted implementing measures<sup>25</sup> contained in Title VI – articles 50 to 52 RIS. The Commission notes that the exception contained in article 50, paragraph 3 RIS was not notified to, nor authorised by the Commission.
- (41) As in other Member States, the Spanish TT is optional and requires a prior authorisation from the tax authorities, valid for ten years. TT only applies to revenues of eligible shipping activities. Revenues of non shipping – or non eligible – activities are subject to normal tax rules.
- (42) EIGs involved in the STL can enter one of the registers of shipping companies<sup>26</sup>, because according to the Spanish authorities, their activities include the operation of their own and chartered vessels. As a consequence, despite not performing any maritime transport or shipping activity, those EIGs are eligible to the Spanish TT. The Commission notes that this possibility was never notified to, nor authorised by the Commission.
- (43) The tax base for eligible shipping activities is calculated according to gross tonnage:

Net registered tonnage	Daily amount per 100 tonnes (Euro)
From 0 to 1 000	0.90
From 1 001 to 10 000	0.70
From 10 001 to 25 000	0.40
Over 25 001	0.20

- (44) Once the alternative tonnage tax base is calculated, the normal corporate tax rate applies to this base.
- (45) According to article 125, paragraph 2, first indent LIS the tonnage tax base is deemed to include all revenues from (eligible) shipping activities at sea including, notably, exceptional capital gains realised when vessels – acquired new under TT – are subsequently sold under TT. Conversely, under normal corporate tax rules where the tax base is determined as the difference between revenues and expenses, when vessels are acquired and subsequently sold, these exceptional capital gains are taxable revenues and are thus taxed.
- (46) In the case of vessels already owned by the company when it begins to apply TT, or of second-hand (hereinafter *used* vessels) vessels purchased after TT begins to be applied, a special procedure<sup>27</sup> applies whereby, taxation of certain amounts takes place if and when the vessel is subsequently sold.:
  - 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

<sup>23</sup> Commission decision C(2002)582fin of 27.02.2002 in case N 736/2001, as modified by decision N 528/2003.

<sup>24</sup> See OJ C 13 of 17.1.2004

<sup>25</sup> The Commission notes that, contrary to the rules set out in article 124-128 LIS approved by the Commission, the exception contained in article 50, paragraph 3 was neither notified to, nor authorised by the Commission.

<sup>26</sup> Referred to in Law No 27/1992 of 24 November 1992 on National Ports and the Merchant Navy.

<sup>27</sup> See article 125, paragraph 2 LIS

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.

- (47) Thus under a normal application of the TT system, capital gains are taxed. Under the STL however, this taxation does not take place because the vessels concerned are deemed to be new, not used.

#### **2.4.5. Article 50, paragraph 3 RIS**

- (48) In the case of the authorised STL transactions, the Commission observes that the EIGs can leave the normal profit taxation system to join the TT system without settling the hidden tax liability resulting from the early and accelerated depreciation, neither immediately on entry into TT nor subsequently when the vessel is sold or disposed of.
- (49) Indeed, as an exception to the rule set out in article 125, paragraph 2 LIS, article 50, paragraph 3 RIS<sup>28</sup> provides that when vessels are acquired through the exercise of a call option in the context of a leasing contract previously approved by the tax authorities, these vessels are deemed to be new<sup>29</sup> – not used – without consideration whether it was already either operated or depreciated. As mentioned in section 2.4.2 Early depreciation of leased assets, it appears that this exception was only applied for specific leasing contracts approved by the tax authorities in the context of requests for application of early depreciation pursuant to article 115, paragraph 11 LIS, i.e. in relation to leased new built sea-going vessels acquired through Spanish tax lease transactions, and – bar one exception – from Spanish shipyards.
- (50) In the present case, the vessel is deemed to be acquired new by the EIG as of the date the leasing option is exercised, i.e. after the EIG's entry into the TT system. The first consequence of that exception is that the application of the procedure set out in article 125, paragraph 2 LIS is avoided. The EIG does not need to establish a non distributable reserve and neither the positive difference between the price paid by the shipping company and the accounting value of the vessel in the EIG's books<sup>30</sup>, nor the positive difference between the accounting value and the tax value of the vessel<sup>31</sup> are taxed. The second consequence is that the revenues from the sale to the shipping company (the substantial bareboat charter option exercise price) is deemed

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<sup>28</sup> As mentioned above, the implementing measures contained in the RIS were neither notified nor authorised by the Commission.

<sup>29</sup> Article 50(3) RIS. It should be noted that such exemption is granted only for those EIGs which have already been granted authorisation for early amortisation by the Tax Authority.

<sup>30</sup> On the date of entry into TT

<sup>31</sup> On the date the ownership of the vessel is transferred to the shipping company

to originate from a vessel bought and sold under TT and to be included in the TT tax base on the basis of article 125, paragraph 2, first indent LIS.

### **3. ASSESSMENT**

#### **3.1. EXISTENCE OF AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU**

- (51) In this preliminary assessment, the Commission analyses whether the following parties involved in the STL system appear to be direct or indirect beneficiaries of aid:
- The EIGs and their investors
  - The shipping companies
  - The shipyards
  - The leasing companies, banks and other intermediaries
- (52) According to 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".
- (53) 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 abovementioned 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.
- (54) The Commission has carried out its assessment at two different levels:
- At the level of the STL system as a whole: as mentioned before, the STL is an organised system. It relies on the organisation of a specific legal and financial structure, on the joint or successive application of a number of specific tax measures. Some of these measures necessitate a tax authorisation that was only granted in the context of STL transactions and on the basis of the notification by the applicant (the EIG) of the whole STL structure.
  - At the level of the individual measures involved, where the Commission considers that the measure may constitute State aid independently of its use in the STL.

### 3.1.1. Economic advantage

#### *The STL as a whole*

- (55) As mentioned above, the benefits of early and accelerated depreciation (article 115 LIS), taken in isolation, are temporary and confer an advantage equivalent to a tax deferral. Hidden tax liabilities resulting from early and accelerated depreciation progressively disappear over time as the shipping company continues to operate the fully depreciated vessel. If the vessel is sold, hidden tax liabilities disappear as the capital gain is taxed.
- (56) In the STL, hidden tax liabilities are written off when they reach their maximum and become a permanent advantage by the effect of a switch to the TT where capital gains are exempted (article 125, paragraph 2 first indent LIS). The write off does not result from an explicit rule but rather from the absence of general settlement rules applicable to hidden tax liabilities and from the assumption that vessels acquired through authorised leasing contracts are new (article 50, paragraph 3 RIS). This last rule renders the existing ring-fencing measures authorised by the Commission as part of the notified TT (article 125, paragraph 2 LIS) ineffective. As stated above, this rule was never notified to the Commission.
- (57) The effect of the STL as a whole, i.e. the joint effect of the tax measures described above enables the EIG and its investors to achieve a tax gain of approximately 30% of the initial gross price of the vessel. According to the complainants and on the basis of the examples provided by the Spanish authorities, this tax gain is then partially (85-90%) passed on to the shipping company who acquires the vessel by a price rebate of between 20% and 30% of the gross sales price. The remaining 10-15% of the tax gain is allegedly kept by the investors in the EIG as a return on their investment. Based on the information provided by the Spanish authorities, the Commission is, however, not in a position to assess whether and to what extent the tax gain is also passed on to shipyards, leasing companies, banks and other intermediaries involved in the functioning of the system.
- (58) Based on the information provided by the Spanish authorities, the Commission is also not in a position to assess whether, by way of the necessary prior assent of the Spanish tax authorities, the scheme is not de facto limited to Spanish banks, Spanish intermediaries and Spanish shipyards, thereby providing an advantage to such operators, which may constitute State aid.
- (59) The Commission therefore invites all interested parties to provide any relevant information on these questions, and has at this stage doubts on these points.

#### *The individual measures*

- (60) As explained in 2.3.1 *Accumulating the tax benefits into the EIG*, in the context of the STL, early<sup>32</sup> and accelerated<sup>33</sup> depreciation of leased assets confer on the beneficiaries an economic advantage in the form of a tax deferral without interest. The amount of tax deferred and the duration of the deferral should be calculated with reference to the depreciation scheme normally and generally available to all

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<sup>32</sup> Article 115, paragraph 11 LIS

<sup>33</sup> Article 115, paragraph 6 LIS

taxpayers, when it is consistent with the agreed international accounting rules, as transposed into EU law, and reflects the average expected lifetime of the asset class concerned. Without prejudice to further investigation, the Commission does not take position at this stage on the possible aid character of early and accelerated depreciation of leased assets outside the scope of the STL.

- (61) The Spanish TT as such (strictly limited to the provisions of articles 124-128 LIS) will not be assessed in the context of the present decision. Indeed, this measure was assessed and authorised by the Commission in 2002 as compatible State aid pursuant to the *Maritime Guidelines*.
- (62) However, as explained in section 2.4.5 above, article 50, paragraph 3 RIS assumes that vessels acquired through the exercise of a leasing option are new, not used, as of the date of exercise of the option, if the leasing contract has been previously approved by the tax authorities. This measure applies whether or not the vessel was indeed operated or depreciated before the option exercise date and allows the beneficiary company to enter used and over depreciated vessels into the TT system and to by-pass the application of the ring-fencing measures of article 125, paragraph 2 LIS. As these ring-fencing measures provide for the deferred taxation of the capital gain<sup>34</sup> at the time the vessel concerned is sold, article 50, paragraph 3 RIS provides an economic advantage in the amount of the tax avoided on the capital gain on the day the vessel is actually sold. Similarly, the fact that EIGs involved in the STL can enter one of the registers of shipping companies despite not performing any maritime transport or shipping activity, and be eligible to the favourable Spanish TT system would confer an economic advantage on them.

### 3.1.2. Selectivity

- (63) According to settled case-law, "*Article 107, paragraph 1 of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity*"<sup>35</sup>
- (64) As mentioned above, it seems that the STL was exclusively used in transactions involving shipping companies (as opposed to companies from other sectors<sup>36</sup>) buying newly built sea-going vessels eligible under TT<sup>37</sup> (as opposed to other vessels or other assets<sup>38</sup>) from – bar one exception - Spanish shipyards (as opposed

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<sup>34</sup> In fact, the amount of capital gain taxed on the day the vessel is sold is made of two elements as described in paragraph 46 above.

<sup>35</sup> Judgement by the ECJ of 3.03.2005 in case C-172/03 Heiser, paragraph 40 (Rec. 2005 p. I-1627).

<sup>36</sup> Some of the individual tax measures involved in the STL might also confer advantages to certain companies (other sectors, SMEs). However, the magnitude of such advantages (hence their distortive effect) is not comparable to that achieved in the maritime transport sector through the full-fledged STL structure which is only attractive if the EIG can avoid capital gain taxation. This is only possible through a switch to the TT.

<sup>37</sup> Ships certificated for navigation at sea.

<sup>38</sup> For instance, second-hand sea-going vessels, non TT eligible sea-going vessels, other vessels or other assets, new or second-hand.

to shipyards established elsewhere in the EEA<sup>39</sup>). All these deals involve leasing companies and wealthy and profitable Spanish<sup>40</sup> tax-payers participating as investors in specialised Spanish EIGs established in the context of ad hoc STL structures organised by Spanish banks.

- (65) The Commission observes that this description points to prima facie elements of selectivity in favour of certain activities - maritime shipping, shipbuilding, leasing, financial advice and intermediation - or certain undertakings - certain maritime shipping companies, certain EIGs, certain investors, certain shipyards, certain leasing companies and certain banks involved in STL transactions. The Commission also observes that, de facto, all shipyards involved but one, are Spanish shipyards and all the arranging banks seem to be Spanish banks.
- (66) In the following assessment, the Commission will show that each of the individual tax measures that are necessary for the system are selective, taken on their own. In addition, as all the individual tax measures involved in the STL are necessary to generate the overall targeted tax benefits<sup>41</sup>, the Commission considers at this stage that the selectivity observed in the individual measures also renders the system as a whole selective.
- (67) First, the accelerated depreciation is necessary to create high deductible expenses for the investors (high tax savings) and generate high tax liabilities for the EIG over a short period of time. When the tax liabilities are at their maximum, the EIG will switch to TT.
- (68) Second, starting from the end, the STL system only yields the intended benefits if the taxation of the capital gain is avoided when the ownership of the asset is transferred to the final user. After the accelerated depreciation, the seller must switch to an alternative tax system where capital gains are exempted, before transferring the ownership to the end-user. According to the information available, this exemption of the capital gain would seem to be possible only if the seller is under the TT. This seems to limit the scope of the STL to assets and companies eligible to the TT, i.e. eligible sea-going vessels, eligible specialised EIGs and eligible shipping companies. On the supply side, the measure would equally be limited, for the same reason, to shipyards able to build such eligible sea-going vessels.
- (69) However, not only should the seller be under the TT on the date the asset is transferred, but it should be able to switch to TT without the application of the ring-fencing measures of article 125, paragraph 2 LIS. This is only possible if the vessel is deemed to be acquired new after the switch to TT by virtue of article 50, paragraph 3 RIS, which, in turn, selectively applies to used vessels acquired through the exercise of the option of a leasing contract of which the fiscal effects have been previously authorised by the tax administration.

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<sup>39</sup> According to the information provided by the Spanish authorities, 21 Spanish shipyards benefited from the regime and one French shipyard. [...]

<sup>40</sup> As confirmed by article 48 LIS, the EIG is tax transparent with respect to its Spanish resident investors only.

<sup>41</sup> And thereby attract investors for the EIGs, buyers for the vessels, economically justify the set up of the whole STL organisation.



- (70) According to the information available, early depreciation – i.e. the fixing of an earlier starting date for (accelerated) depreciation of leased assets pursuant to article 115, paragraph 11 LIS – seems to be the only circumstance where such leasing contract is authorised by the tax administration. To sum up, without the tax authorisation granted by the tax authorities, the effects of the leasing contract would not be previously authorised by the tax administration, the vessel acquired through a leasing option would not be deemed new pursuant to article 50, paragraph 3 RIS, the ring fencing measures of article 125, paragraph 2 LIS would apply and the capital gain resulting from accelerated depreciation of leased assets would be taxed.
- (71) Early depreciation introduces selectivity into the STL because additional conditions are imposed by article 115, paragraph 11 LIS and article 48, paragraph 4 LIS<sup>42</sup>, because the wording of these conditions require interpretation and because the application of the measure is subject to the requirement of prior authorisation by the tax administration of all the fiscal effects of the leasing contract. According to the Spanish authorities, the authorisation procedure only aims at verifying that the conditions imposed by the law are complied with. They also confirmed that the tax administration has not published any administrative rules or explanation with respect to the application of the relevant legislation. The Commission observes at this stage that the conditions imposed by the law are expressed in rather vague and that necessitate an interpretation. Moreover, the procedure organised by the law<sup>43</sup> confers important discretionary powers on the tax administration, to interpret and possibly impose additional conditions. As mentioned in the *Commission notice on the application of the State aid rules to measures relating to direct business taxation (hereafter "the Notice on fiscal aid")*<sup>44</sup>, the Court of Justice acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria<sup>45 46</sup>.
- (72) The advantages transferred by the EIGs to the beneficiary shipping companies appear to be selective because only shipping companies buying newly built sea-going vessels eligible to the (Spanish) tonnage tax through a STL structure can benefit from the price rebate. The Commission considers at this stage that additional selectivity exists between shipping companies because all shipping companies interested in the acquisition of a new built sea-going vessel eligible to the (Spanish) tonnage tax would not, in practice, find a Spanish bank that accepts to organise an appropriate STL structure for the transaction. In that respect, the Commission has received informal reports concerning situations where shipping companies (and the shipyard associated in the intended shipbuilding transaction) did not find a bank – i.e. the banks refused – to organise the STL structure and had to renounce to the transaction. In most of the cases, the refusal is allegedly explained by the fact that the vessel was to be built by a non Spanish shipyard, but refusals were also reported

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<sup>42</sup> For instance, the bareboat charter contract between the EIG and the shipping company would seem to result from the interpretation of one of the conditions imposed by article 48 LIS and to be subject to the review and authorisation of the tax administration.

<sup>43</sup> Article 49 RIS

<sup>44</sup> OJ C 384 of 10.12.98

<sup>45</sup> Above mentioned notice, section on Discretionary administrative practices, points 21 and 22.

<sup>46</sup> Case C-241/94 France v. Commission (Kimberly Clark Sopalin), Rec. 1996 p. I-4551

when a vessel was to be built by a Spanish shipyard. The price offered by the Spanish shipyards being dependent on the STL, the transaction concerned did not take place.

- (73) According to complainants, informal contacts take place between the tax administration and the arranging banks in the context of the filing of the requests pursuant to article 115, paragraph 11, LIS (pre-filing contacts). These contacts would allegedly be responsible for the refusal by Spanish banks to arrange appropriate STL structures in certain circumstance, among others when the vessel is intended to be built outside Spain. No legal rule de jure prevents the financing of vessels built in non Spanish shipyards but despite the publication of a ruling clarifying this point<sup>47</sup>, only one small contract involves a French shipyard. As this contract concerns a vessel built on behalf of a Spanish shipping and shipbuilding group, the Commission doubts that this can even be considered as an exception. The Commission has doubts that the quasi-absence of contracts involving foreign ships can be explained by pure commercial considerations from the banks involved<sup>48</sup>. The advantage granted to the shipping companies would therefore seem to be further selective in favour of those companies investing in vessels built in Spain.
- (74) As for EIGs, only certain specialised EIGs, the object of which includes the operation of vessels and duly registered in Spain as shipping companies, which invest in vessels eligible to TT through a leasing contract duly authorised by the tax administration and which rent/lease these vessels to third party users, can benefit from the scheme. In this respect, the Commission notes that EIGs are allowed under Spanish law to register as shipping companies<sup>49</sup> – hence to benefit from TT – despite not performing any maritime transport activities or technically and commercially managing sea-going vessels. This appears as an additional element of selectivity in favour of those EIGs that are only lessors of vessels<sup>50</sup>. Moreover, in order to benefit from the increased maximum acceleration rate of depreciation (3 times instead of twice the normal straight-line depreciation rate), the EIG should be a SME. The STL also appears to be selective with respect to investors in the EIGs as, to benefit from the effects of the STL, the investors must be profitable Spanish tax payers and invest in certain specialised EIGs only. Investors in other types of EIGs or in EIGs investing in other types of vessels or assets, or under conditions which would not be authorised by the tax administration do not benefit from the same advantages.
- (75) Finally, the Commission considers, at this stage, that the elements of selectivity identified in the measures used in the STL, all of which are necessary to the performance of the STL system, appear to accumulate and to lead to a general selectivity of the STL system as a whole in favour of certain companies, in particular certain EIGs, certain investors, certain shipping companies, certain intermediaries and certain shipyards.
- (76) As mentioned in the Notice on fiscal aid, *"the differential nature of some measures does not necessarily mean that they must be considered to be State aid. This is the*

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<sup>47</sup> Consulta V2290-08 of 1.12.2008  
(<http://petete.meh.es/Scripts/know3.exe/tributos/CONSUVIN/texto.htm?Consulta=CONSULTA&Pos=7263>)

<sup>48</sup> Nor from non Spanish shipyards, nor from shipping companies

<sup>49</sup> Article 124(1) Real Decreto Legislativo 4/2004

<sup>50</sup> Law No 27/1992 of 24 November 1992 on State Ports and the Merchant Navy

*case with measures whose economic rationale makes them necessary to the functioning and effectiveness of the tax system. However, it is up to the Member State to provide such justification."*<sup>51</sup> At this stage, the Commission considers that the elements of selectivity identified above are not *justified by the nature and general scheme* of the Spanish tax system. Among others, neither the limitation of early and accelerated depreciation to leased assets, nor the selective assumption that vessels are new when acquired through a leasing, even less a previously authorised leasing, nor the conditions set by article 115, paragraph 11 LIS, nor the discretionary powers granted to the tax administration in the authorisation of article 115, 11 LIS – and, in effect, in the authorisation of the whole STL construction – appear to be justified at this stage by the nature and general scheme of the tax system. In any event, according to the case law of the Court, the burden of proof for such a justification rests on the Spanish authorities, which have not provided any elements in this regard.

### **3.1.3. Transfer of State resources and imputability to the state**

- (77) The STL system as a whole involves the definitive loss of tax revenue equivalent to the consumption of State resources in the form of fiscal expenditures. In each of the STL transactions, this is the case for the interest foregone on the tax deferral resulting from the early and accelerated depreciation of leased assets. It is also the case of the amount of tax foregone in the absence of settlement of the hidden tax liabilities when the EIG switches from the normal corporate tax system to the TT and of the amount of tax foregone in the absence of taxation of the capital gain made on the day the ownership of the vessel is transferred to the shipping company.
- (78) The State resources financing the selective advantages accrued to the EIG are transferred to the EIG's investors by way of tax transparency, but part of these resources is transferred to the end-user shipping company by way of a price rebate.
- (79) The transfer of State resources – to the EIGs and from the EIGs to investors and shipping companies – derives from the application of the Spanish tax law and from tax authorisations granted by the Spanish tax administration. Based on the examples provided by the Spanish authorities, it seems that all requests submitted to the tax administration for the authorisation of early depreciation, provide a calculation of the overall tax advantage generated by the STL construction and how this tax advantage is shared between the shipping company and the investors in the EIG. According to complainants, the tax administration would indeed review and intervene in the determination of the sharing of the tax gain between the shipping company on the one hand, and the EIG and its investors on the other hand.
- (80) These authorisations were granted for the application of individual measures such as the early (accelerated) depreciation of the vessel leased by each EIG or the switch of the EIG to the TT. Moreover, based on the examples provided by the Spanish authorities, it appears that the requests for authorisation concerning the application of these two individual measure authorisations were granted to the overall STL transaction
- (81) Hence, it is clearly imputable to the Spanish State.

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<sup>51</sup> See paragraphs 23-27, Commission notice on the application of the State aid rules to measures relating to direct business taxation, OJ C 384 of 10.12.98, p.3

#### **3.1.4. Distortion of competition and effect on trade**

- (82) When aid granted by a Member State strengthens the position of an undertaking compared to other undertakings competing in intra-Union trade, the latter must be regarded as affected by that aid<sup>52</sup>. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition<sup>53</sup> and to trade between Member States. In the present case, the beneficiaries operate in competition with other undertakings from the maritime transport sector, shipbuilding sector, leasing or banking sectors in the EU and the EEA, which are very competitive on a worldwide scale. As for investors, i.e. members of the EIGs, they are possibly active in all sectors of the economy. The Commission also considers that rebates of 20-30% off the gross price of vessels are likely to introduce severe distortions of competition between shipping companies. Indeed, the acquisition of such long-lived capital assets with important rebates is likely to significantly reduce the operating costs of the beneficiaries strengthening their position in a durable manner. Therefore, the measure under scrutiny is liable to affect EU trade and distort competition in the internal market.

#### **3.1.5. Conclusion on the existence of aid**

- (83) Based on the above, the Commission concludes at this stage that the STL as a whole constitutes State aid pursuant to Article 107(1) TFEU, and that the aid may be granted to: the EIGs involved in STL transactions; their Spanish resident investors; the shipping companies; and possibly the leasing companies; the banks and other intermediaries involved in the functioning of the system as well as the shipyards.

#### **3.2. NEW / UNLAWFUL / EXISTING AID**

- (84) At this stage, the Commission considers that the STL as a whole constitutes unlawful aid as the system started in 2002 and was not previously approved by the Commission.
- (85) In the context of the STL, the main part of the advantage results from the absence of taxation of hidden tax liabilities in the context of the switch to TT and from the absence of taxation of the capital gain realised when the ownership of the vessel is transferred to the shipping company. As mentioned above, the Spanish TT system (article 124-128 LIS) was notified and approved by the Commission, but the TT scheme, as such, is not the subject of doubts as expressed by the Commission in the present decision. The absence of taxation of the hidden tax liabilities on the one hand, of the eventual capital gain on the other hand, results from measures<sup>54</sup> which were not notified to or approved by the Commission in the context of the TT and which, on the contrary, prevent the correct functioning of ring-fencing measures of article 125, paragraph 2 LIS approved by the Commission when it authorised the TT scheme in 2002. These measures would therefore constitute new aid.

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<sup>52</sup> See, in particular, Case 730/79 Philip Morris v Commission [1980] ECR 2671, paragraph 11; Case C-53/00 Ferring [2001] ECR I-9067, paragraph 21; Case C-372/97 Italy v Commission, [2004] ECR I-3679, paragraph 44 .

<sup>53</sup> Case T-214/95 Het Vlaamse Gewest v Commission [1998] ECR II-717.

<sup>54</sup> Notably article 50, paragraph 3 LIS

- (86) The Commission also notes that the application of TT to companies (like EIGs in the STL) which only lease vessels appears to result from the assumption, specific to Spain, whereby undertakings operating their vessels by transferring their use to third-parties are deemed to be eligible for registration in the Spanish shipping companies registers. The Commission has not endorsed this assumption. On the contrary, just as the maritime guidelines, the Commission decision of 2002 clearly authorises aid to maritime shipping activities only, hence to maritime transport of persons and goods<sup>55</sup>, not to leasing of vessels. Also in its decision<sup>56</sup> concerning the French *GIE fiscaux*, the Commission considered that the EIGs and the investors were not eligible transport operators for the purpose of the application of the Maritime Guidelines. Therefore the Commission consider that this measure constitutes new aid.
- (87) At this stage, the Commission concludes that the aid granted through the STL system constitutes unlawful aid as defined by article 1 under (f) of Council Regulation (EC) No 659/1999<sup>57</sup>. To the extent they grant or contribute to grant aid, the Commission also draws the preliminary conclusion that, in the absence of any prior authorisation by the Commission, the other measures mentioned in the present decision would also constitute unlawful measures. This applies in particular to – but is not limited to – article 115, paragraph 11 LIS and article 49 RIS (early depreciation), article 48, paragraph 4 LIS, article 50, paragraph 3 RIS.
- (88) On the contrary, the Commission notes that according to the Spanish authorities, the measure described above as accelerated depreciation, to the extent that it qualifies as State aid, would constitute existing aid. Indeed the possibility of accelerated depreciation was apparently first included in Royal Decree law 15/1977 of 25 February 1977, on tax, financial and public investment measures. The later modification of the measure appears to have only limited the extent to which depreciation can be accelerated. For this reason the Commission concludes at this stage that it is not necessary to assess this measure within the context of this decision.

### 3.3. COMPATIBILITY

- (89) In principle, State aid as defined by to article 107, paragraph 1 TFEU is prohibited. However, article 107, paragraphs 2 provides that certain types of aid are compatible and paragraph 3 that certain types of aid can be declared compatible by the Commission.
- (90) At this stage, the Commission considers that the only framework for compatibility that would possibly apply to the aid measures identified above is article 107, paragraph 3, c) TFEU together with the Maritime Guidelines. So far, the Spanish authorities have neither invoked the application of any other provision of article 107,

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<sup>55</sup> Point 3.3.5. of the decision includes inter alia the following "the fiscal advantage granted through the Tonnage Tax is restricted to maritime shipping activities", and refers to the " exclusive use of the Tonnage Tax for maritime transport of persons and goods".

<sup>56</sup> State aid C 46/2004, Commission decision of 20.12.2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code, OJ L 112 of 30.4.2007, p.43

<sup>57</sup> Council regulation 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty (now Article 108 TFEU), OJ L83 of 27.03.1999, p 1-

paragraphs 2 and 3 TFEU nor the application of any other State aid framework adopted on the basis of article 107, paragraph 3, under c) TFEU.

### **3.3.1. Aid to the EIG and its investors**

- (91) As mentioned above, the Commission considers that the EIGs and their investors are not eligible transport operators for the purpose of the application of the Maritime Guidelines. However, as in the above-mentioned decision about the French GIE fiscaux, the Commission considers at this stage that the compatibility of the aid to the EIGs and their investors could be envisaged in the proportion of compatible aid channelled to the shipping companies (see below).

### **3.3.2. Aid to the shipping companies**

- (92) Article 11 of the Maritime guidelines sets a limit to aid to eligible shipping companies. Aid should not go beyond full corporate tax exemption and full exemption in social and similar charges for seafarers for activities eligible for TT.
- (93) In practice however, the Commission has doubts that, in each of the STL transactions, the full amount of aid granted to the beneficiary shipping companies (the STL price rebate) can be fully – and in certain cases even partially – accommodated within the ceiling of article 11. For Spanish resident shipping companies, the ceiling will depend on the level of corporate tax and social charges paid. This amount is likely to be small if the concerned companies benefit from the Spanish TT and from reductions in social charges. For non Spanish resident companies, it is questionable whether the ceiling is at all applicable. Indeed, to the extent that companies established abroad do not pay Spanish corporate tax or Spanish social charges, the ceiling of article 11 of the Maritime Guidelines would appear to be zero.
- (94) In addition, the Commission has doubts that all shipping companies that benefited from the STL scheme were eligible to the Maritime guidelines and complied all requirements and limitations imposed by the Guidelines. In addition, non-EU/EEA companies which benefited from the STL would not be eligible to any benefit under the Guidelines.

### **3.3.3. Aid to shipyards, leasing companies, banks and other intermediaries**

- (95) The Commission considers at this stage that aid to the shipyards would not be compatible with the Framework on State aid to shipbuilding<sup>58</sup>. As regards leasing companies, banks and other possible intermediaries, the Commission considers it would follow the same approach to compatibility as for the financial investors in the EIGs, i.e. compatibility of the aid in the proportion of compatible aid (art. 11 of the Maritime Guidelines) channelled to the shipping companies.

## **3.4. INCOMPATIBILITY DUE TO THE VIOLATION OF ARTICLE 34 AND 56 TFEU**

- (96) Should the assessment of the information received in the formal investigation procedure lead to the conclusion that the scheme is, by way of the necessary prior assent of the tax authorities, limited to Spanish banks and/or other intermediaries

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<sup>58</sup> OJ C 317 of 30.12.2003, p.11

and/or shipyards, this would constitute a violation of the rules on the free movement of goods and the freedom to provide services. At this stage, the Commission sees no possible justification for such a violation.

- (97) According to the case law of the Court, any aid that at the same time violates internal market rules is for that reason alone incompatible with the internal market.

#### **4. RECOVERY**

- (98) Article 14 of Council Regulation (EC) No 659/1999, provides that all unlawful aid may be recovered from the recipients.
- (99) However, article 14 of the said Regulation also provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of European law. At this stage, the Commission is not aware of any breach to a general principle of European law which would prevent the Commission to request the recovery of possibly unlawful aid.

In the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Spain to submit its comments and to provide all such information as may help to assess the measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Spain that Article 108(3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Spain that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission  
Directorate-General Competition  
State aid registry  
B-1049 Brussels  
Fax: +32 2 296 12 42

Yours faithfully,  
For the Commission

*Joaquin Almunia*  
Vice-president