



EUROPEAN COMMISSION

Brussels, 17.7.2013

C(2013) 4426 final

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**COMMISSION DECISION**

**of**

**ON THE AID SCHEME**

SA.21233 C/2011 (ex NN/2011, ex CP 137/2006)

**implemented by Spain**

Tax regime applicable to certain finance lease agreements  
also known as the Spanish Tax lease System

(Only the Spanish version is authentic)

(Text with EEA relevance)

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**THE EUROPEAN COMMISSION,**

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above<sup>1</sup> and having regard to their comments,

Whereas:

**1 PROCEDURE**

- (1) According to several complaints registered by the Commission since May 2006, the Spanish scheme applicable to shipping companies since 2002 allowed maritime transport companies to buy ships in Spain at a 20%-30% rebate. In particular, two national federations of shipyards and one individual shipyard complained that this scheme resulted in the loss of shipbuilding contracts from their members to Spanish shipyards. On 13 July 2010, shipbuilding associations of 7 European countries together signed a petition against the so-called Spanish Tax Lease (STL) 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>2</sup>.

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<sup>1</sup> See OJ C 276 of 21.09.2011, p.5.

<sup>2</sup> See Parliamentary question E-5819/2010 answered on 31/08/2010.

- (2) By letters of 15 September 2006, 30 January 2007, 6 November 2007, 3 March 2008, the Commission sent Spain requests for information. Spain answered by letters of 16 October 2006, 23 and 27 February 2007, 11 January and 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 letter of 23 September 2008 which Spain provided by letter of 24 October 2008.
- (3) Following the reception of new information from complainants, the Commission requested further additional information by letters of 11 January and 25 May 2010. Spain answered by letters of 10 March and 26 July 2010. A meeting with the Spanish authorities took place on 24 January 2011.
- (4) By letter dated 29 June 2011, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.
- (5) By letter dated 2 August 2011, Spain commented on the decision to open formal proceedings.
- (6) The Commission decision to initiate the formal investigation procedure (hereinafter Decision C(2011) 4494 final) was published in the *Official Journal of the European Union*<sup>3</sup>. The Commission invited interested parties to submit their comments on the measures.
- (7) The Commission received comments from interested parties. By letters of 23 February, 7 March, 11 July, 29 October 2012, 12 and 25 February and 22 April 2013, it forwarded them to Spain, which was given the opportunity to react; its comments were received by letters dated 30 April, 24 May, 9 and 23 July, 14 November 2012, 25 February, 12 March and 21 May 2013. Spain also submitted additional observations by letter of 3 and 9 October 2012. At their request, the Commission met with Pequeños y Medianos Astilleros en Reconversión (PYMAR)<sup>4</sup> on 13 November 2012 and 4 February 2013, and with the Spanish authorities on 6 March 2013.

## **2 DESCRIPTION OF THE SPANISH TAX LEASE SYSTEM**

- (8) The Spanish Tax Lease system is used in the context of transactions involving the construction by shipyards (sellers) and acquisition by maritime shipping companies (buyers) of sea-going vessels as well as the financing of such transactions through an ad hoc legal and financial structure.
- (9) The STL system 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.

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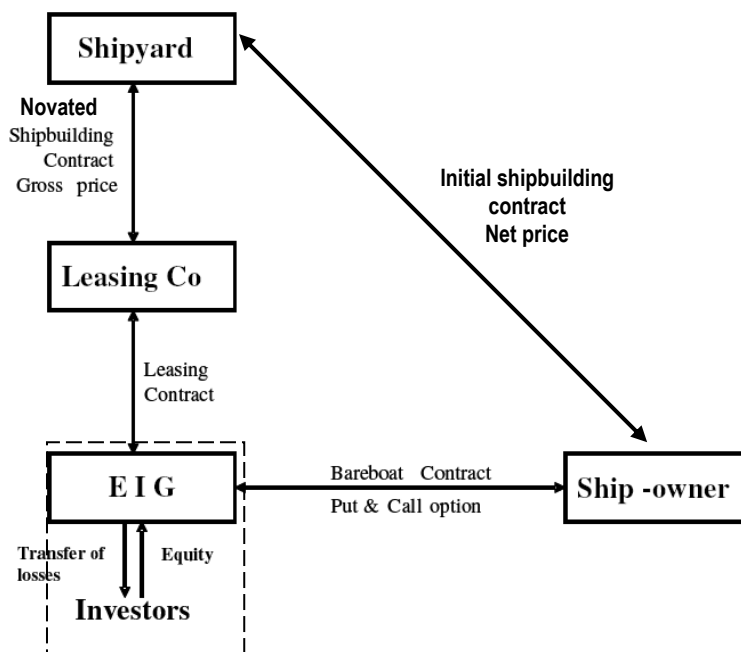
<sup>3</sup> Cf. footnote 1

<sup>4</sup> A Spanish association of small and medium-sized shipyards.

- (10) At the 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 8.727.997.332. The scheme has continued to apply until 29 June 2011, when the formal investigation procedure was initiated. Buyers are shipping companies from all over Europe and beyond. Bar one exception (1 contract for Euro 6.148.969), all transactions involved Spanish shipyards.

## 2.1 THE STL – THE LEGAL AND FINANCIAL STRUCTURE

- (11) As mentioned, a STL operation allows a shipowner to have a new vessel built at a 20%-30% rebate on the price charged by the shipyard. In order to obtain the discounted price (after deduction of the rebate), a shipping company must accept not to buy the vessel directly from the shipyard, but from an Economic Interest Grouping (EIG) incorporated under Spanish law and set up by a bank.
- (12) The STL structure is a tax planning construction generally organised by a bank in order to generate tax benefits at the level of the investors in a tax transparent EIG and to transfer part of these tax benefits to the shipping company 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 as a remuneration for their investment. Beyond the EIG, a STL operation also involves other intermediaries such as notably a bank and a leasing company (see chart below).



- (13) In practice, the EIG leases the vessel from a leasing company, from the date its construction starts. When the construction is complete, the EIG charters out the vessel to the shipping company, on a bareboat basis, and the shipping company starts operating 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>5</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 below 2.2.4 Measure 4: The Tonnage Tax). A framework agreement is signed by the parties involved to make sure they all agree on the legal arrangements and on the functioning of the STL structure.

- (14) The transactions which take place between the different participants in the STL operation have been described in more detail in Decision C(2011) 4494 final (section 2.2)<sup>6</sup> on the basis of the examples provided by Spain<sup>7</sup>.

## **2.2 THE STL – THE TAX ASPECTS**

- (15) The purpose of the STL organisation described in Section 2.1 above is first to generate the benefits of certain tax measures in favour of the EIG and of the investors participating in the EIG, which will then pass part of those benefits to the shipping company acquiring a new vessel.
- (16) The collection of the tax benefits by the EIG takes place in two steps under two different sets of tax rules. In a first step, early and accelerated depreciation of the leased vessel is applied within the “normal” corporate income tax system. This generates heavy tax losses for the EIG. By virtue of the EIG’s tax transparency, these tax losses are deductible from the investors’ own revenues in proportion of their shares in the EIG.
- (17) In normal circumstances, the tax savings permitted by this early and accelerated deduction of the cost of the vessel should be compensated later on by increased tax payments either when the vessel is completely depreciated and no more depreciation cost can be deducted or when the vessel is sold and a capital gain results from the sale<sup>8</sup>. By virtue of the EIG’s tax transparency, the EIG’s increased profits in the later years would normally be added to the investors’ own revenues and submitted to tax.
- (18) However, in a STL operation, vessels are not kept by the EIGs after the full depreciation is achieved. In a second step, the tax savings resulting from the initial losses transferred to the investors are then safeguarded by a switch of the EIG to the tonnage tax (TT) system of income taxation and the full exemption of the capital gain resulting from the sale – shortly after the switch – to the shipping company<sup>9</sup>. For further details about these two stages, see Decision C(2011) 4494 final (Section 2.3.1).

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<sup>5</sup> Buy (or call) and sell (or put) options contracts are also signed by the leasing company and the shipping company.

<sup>6</sup> See footnote 3

<sup>7</sup> By letter of 26 July 2010

<sup>8</sup> Indeed a capital gain would normally result from the sale of an asset which has been over-depreciated by virtue of early and accelerated depreciation because its residual tax value of the asset is likely to be substantially lower than its sale price,

<sup>9</sup> The difference between the sale price and the tax value of the ship. The tax 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.

- (19) According to information available to the Commission<sup>10</sup>, 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 – initially collected by the EIG / its investors – is partially (10-15%) kept by the investors and partially (85-90%) passed on to the shipping company which in the end becomes the owner of the vessel through a 20% to 30% reduction on the initial gross price of the vessel.
- (20) As already mentioned, STL operations combine different individual – yet related – tax measures in order to generate a tax benefit. The section below briefly describes these measures. For a more detailed description, see Decision C(2011) 4494 final (Section 2.4).

### **2.2.1 Measure 1 - Accelerated depreciation<sup>11</sup> of leased assets (art. 115.6 TRLIS)**

- (21) In Spain, the tax treatment of a leasing transaction is different from its accounting treatment. Chapter XIII of *Royal Decree 4/2004 of 5 March 2004 approving the consolidated text of the Law on corporate tax (TRLIS)*<sup>12</sup> and article 49 of *Royal Decree 1777/2004 of 30 July 2004 approving the Regulation on corporate tax (RIS)*<sup>13</sup> apply to leasing contracts with a minimum duration of two years if they relate to movable property and of 10 years if they relate to immovable property or industrial establishments.
- (22) For tax purposes only, the portion of the payments that allows the lessor to recover the cost of the asset<sup>14</sup> shall be classed as tax-deductible expenditure within certain limits: the amount deducted may not exceed the amount obtained by multiplying the cost of the asset by twice or three times the official coefficient of maximum straight-line depreciation for the type of asset.
- (23) In the case of vessels, the normal straight-line depreciation takes place – for tax purposes – at a rate of 10% per year (10 years). The maximum accelerated depreciation rate for leased assets ranges between 20% and 30% per year (3 1/3 years to 5 years). Under Spanish law, owners of vessels can also depreciate according to the declining balance method<sup>15</sup> or the sum-of-the-years-digit method (SYD)<sup>16</sup>.

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<sup>10</sup> This information includes information provided by Spain: 3 actual examples of requests filed by EIGs with the tax administration pursuant to article 115, paragraph 11 of the Law on Corporate Tax (*Texto Refundido de la Ley del Impuesto sobre Sociedades* or TRLIS), and the contracts and other annexes attached to the said requests.

<sup>11</sup> In the present 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 made in respect of 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 rate.

<sup>12</sup> Real Decreto Legislativo 4/2004, de 5 de marzo, por el que se aprueba el Texto Refundido de la Ley del Impuesto sobre Sociedades published in the Spanish Governmental Gazette (BOE) of 11 March 2004.

<sup>13</sup> Real Decreto 1777/2004, de 30 de julio, por el que se aprueba el Reglamento del Impuesto sobre Sociedades published in the Spanish Official Journal (BOE) of 6 August 2004.

<sup>14</sup> Excluding the value of the purchase option.

<sup>15</sup> Each year, a constant percentage is applied to the residual value of the asset as at the end of the previous tax exercise (residual value = acquisition value less depreciation booked in the past).

### **2.2.2 Measure 2: Discretionary application of early depreciation of leased assets (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS)**

- (24) By virtue of article 115, paragraph 6 TRLIS, the accelerated depreciation of the leased asset starts on the date on which the asset becomes operational, i.e. not before the asset is delivered to and starts being used by the lessee. However, pursuant to article 115, paragraph 11 TRLIS<sup>17</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.
- (25) In fact, article 115, paragraph 11 TRLIS imposes two 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*". Pursuant 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 TRLIS*".
- (26) According to article 48, paragraph 4 TRLIS<sup>18</sup>, the assets covered by the early depreciation scheme described in article 115, paragraph 11 TRLIS 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 filing an application for the early depreciation of leased assets.

### **2.2.3 Measure 3: The Economic Interest Groupings (EIGs)**

- (27) As mentioned before, EIGs incorporated under Spanish law have a legal personality separate from that of their members. As a result, the EIG can file an application for both application of the early depreciation measure and for joining the alternative TT system of taxation provided for by articles 124-128 TRLIS (see section 2.2.4. below), if the EIG meets the conditions required for that purpose under Spanish law, even though none of its members is a shipping company.

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Instead of spreading the cost of the asset evenly over a certain period, this system results in declining depreciation charges each successive period.

<sup>16</sup> If an asset is to be depreciated over 5 years, the so-called SYD is 15 (=1+2+3+4+5) and the depreciation cost is 5/15 of the acquisition value in year 1, 4/15 in year 2, ... 1/15 in year 5..

<sup>17</sup> Copied from the preceding Article 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.

<sup>18</sup> Article 48 TRLIS regulate the special tax regime applicable to Economic Interest Groupings. See 2.2.3 Measure 3: The Economic Interest Groupings (EIGs)

- (28) However, from a tax perspective, EIGs are transparent with respect to their Spanish resident shareholders. In other words, for tax purposes, profits (or losses) made by EIGs are directly attributed to their Spanish resident members in proportion to their shareholding. Because the EIGs involved in STL operations are regarded as an investment vehicle by their members – rather than as a way to jointly carry out an operational activity – this decision refers to the members of the EIGs as investors.
- (29) 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 on these profits.

#### **2.2.4 Measure 4: The Tonnage Tax system of taxation (Articles 124 to 128 TRLIS)**

- (30) The Spanish TT legislation applies since 2002. It provides an alternative calculation of the taxable profits of eligible maritime companies in respect of eligible transport activities, based on tonnage operated rather than on the difference between revenues and expenses.
- (31) The Commission authorised<sup>19</sup> the Spanish TT as compatible State aid on the basis of the *Community guidelines on State aid to maritime transport*<sup>20</sup> (hereinafter the *Maritime Guidelines*). The relevant provisions regulating the TT are contained in Chapter XVII, articles 124 to 128 TRLIS.
- (32) Spain also adopted implementing measures contained in Title VI, articles 50 to 52 of the RIS. The Commission notes that, contrary to the rules set out in article 124-128 TRLIS, which were notified to and approved by the Commission, these implementing measures – and in particular the exception contained in article 50, paragraph 3 RIS (see section 2.2.5 below) – were not notified to, nor authorised by the Commission.
- (33) As in other Member States, joining the Spanish TT system of taxation is optional and requires a prior authorisation from the tax authorities, valid for ten years. Revenues from non-shipping – or non-eligible – activities are subject to normal income tax rules.
- (34) Under the Spanish law, EIGs involved in the STL can enter one of the registers of shipping companies<sup>21</sup> because, according to the Spanish authorities, their activities include the operation of their own and chartered vessels. The concept of operation of a vessel would therefore include putting a vessel at the disposal of a third-party under a bareboat charter.
- (35) The tax base for eligible shipping activities is calculated according to gross tonnage:

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<sup>19</sup> Commission Decision C(2002)582fin of 27.02.2002 in case N 736/2001, as amended by decision N 528/2003.

<sup>20</sup> OJ C 13 of 17.1.2004, p. 3.

<sup>21</sup> Referred to in Law No 27/1992 of 24 November 1992 on National Ports and the Merchant Navy.



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

(36) Once the alternative taxable base is calculated according to the gross tonnage operated by the shipping company, the normal corporate tax rate applies to this base.

(37) Pursuant to article 125, paragraph 2, first indent TRLIS the TT taxable base is deemed to include all revenues from (eligible) shipping activities at sea including, notably, exceptional capital gains realised when vessels – acquired new by an undertaking benefitting from the TT system – are subsequently sold while the undertaking remains under the TT system. Conversely, under normal corporate income tax rules, since the tax base is determined as the difference between revenues and expenses, when vessels are acquired by an undertaking and subsequently sold with a capital gain, these exceptional capital gains constitute taxable revenues and will thus increase the taxable base on which corporate tax will be levied.

*Tax treatment of capital gains in the context of the transfer of vessels to the TT system*

(38) Special rules apply where a vessel – which is not new anymore – and the taxation of its revenues are transferred from the normal corporate tax system to the TT system. In the case of vessels already owned by the an undertaking when it joins the TT system, or of second-hand (or used) vessels purchased when an undertaking already benefits from the TT system, the ring-fencing rules provided in Article 125(2) TRLIS<sup>22</sup> apply. Pursuant to those rules, the taxation of certain amounts takes place under normal corporate tax if and when the vessel is subsequently sold :

- In the first financial year in which the TT system 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 TT taxable base referred to in Article 125, paragraph 1 TRLIS once the sale of the vessel is completed.

(39) Thus, under the Spanish TT system as approved by the Commission, potential capital gains are earmarked for future taxation on entry into the TT system and, even though it is delayed, taxation of capital gains is supposed to take place later on when the vessel is sold or dismantled. As explained in section 2.2.5 below, in the context of the STL system, this taxation is not deferred but completely avoided because the vessels concerned are deemed to be new, not used. Hence, the ring-fencing measure does not apply.

<sup>22</sup> See article 125, paragraph 2 TRLIS

### 2.2.5 Measure 5: Article 50, paragraph 3 RIS

- (40) In the case of the authorised STL transactions, the Commission observes that the EIGs can leave the normal corporate income taxation system to join the TT system without either settling the hidden tax liability resulting from the early and accelerated depreciation immediately on entry into the TT system or subsequently when the vessel is sold or dismantled.
- (41) Indeed, as an exception to the ring-fencing rules set out in article 125, paragraph 2 TRLIS, article 50, paragraph 3 RIS<sup>23</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, those vessels are deemed to be new<sup>24</sup> – not used – without taking into consideration whether they were already operated – and/or depreciated – as of the date the leasing option is lifted, i.e. after the EIG's entry into the TT system. According to the information available to the Commission, this exception was only applied for specific leasing contracts approved by the tax authorities in the context of applications for early depreciation pursuant to article 115, paragraph 11 TRLIS (see section 2.2.2 above Measure 2: Discretionary application of early depreciation of leased assets) i.e. in relation to leased newly built sea-going vessels acquired through STL operations, and – bar one exception – from Spanish shipyards.
- (42) In such cases, the vessel is deemed to be acquired new by the EIG as of the date the leasing option is lifted, i.e. after the EIG's entry into the TT system. As a first consequence of the exception provided in Article 50(3) RIS, the application of the rules set out in article 125, paragraph 2 TRLIS 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>25</sup>, nor the positive difference between the accounting value and the tax value of the vessel<sup>26</sup> are taxed. The second consequence is that the revenues from the sale to the shipping company (the substantial bareboat charter option exercise price) are deemed to originate from a vessel bought and sold by an undertaking benefitting from the TT system and will be included in the TT taxable base pursuant to article 125, paragraph 2, first indent TRLIS.

### 3 REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (43) In a first step, the Commission took the view that the Spanish Tax Lease system, in spite of the application of different tax measures, should be analysed as one single system (global approach) because the different measures could only be used jointly – *de jure* or *de facto* – and concluded that it constituted State aid.

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<sup>23</sup> Introduced by Royal Decree 252/2003 of 28 February 2003, Spanish Governmental gazette (BOE) n°62 of 13 March 2003.

<sup>24</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 depreciation by the Tax Authority.

<sup>25</sup> On the date of entry into TT

<sup>26</sup> On the date the ownership of the vessel is transferred to the shipping company

(44) In a second step, the individual measures were assessed separately (individual approach) and the Commission concluded at that stage as follows:

- the accelerated depreciation of leased assets (measure n°1) could constitute State aid, but would constitute existing aid in any case because it was implemented before accession. As a consequence, the formal investigation procedure was not opened in respect of this measure.
- the early depreciation of leased assets (measure n°2) could constitute State aid as it provided an advantage that would be selective in view of the vague conditions established by Spanish regulation and the discretionary powers exercised by the Spanish tax administration in interpreting these conditions. Entered into force in 2002<sup>27</sup>, this measure was regarded as illegal and possibly incompatible State aid.
- the EIG status (measure n°3) was not identified as potential State aid. The formal investigation procedure was not opened in respect of this measure.
- the TT system (measure n°4) was authorised by the Commission as compatible State aid in 2002. The compatibility of the TT system as approved was not questioned in Decision C(2011) 4494 final. By virtue of the authorisation granted by the Commission, this measure should in any case be regarded as existing aid.

However, the Commission questioned two aspects related to the TT system:

- the Commission questioned the possibility given to certain undertakings, such as the EIGs involved in STL operations, of benefitting from the TT system where their activities are limited to renting or leasing out vessel(s) on a bareboat basis. The Commission considered that such undertakings are not active in the maritime transport of goods or passengers as defined in Regulation (EEC) No 4055/86<sup>28</sup> and in Regulation (EEC) No 3577/92<sup>29</sup>, but rather in financial investment and renting or leasing of goods. The Commission noted that their eligibility to the Spanish TT system was never notified to, nor authorised by the Commission.
- the tax exemption of capital gains (measure n°5) resulting from the implementing measures of the TT system (article 50, paragraph 3 RIS) and presented by the Spanish authorities as a part of the authorised TT system was regarded as an additional measure falling outside the scope of the authorisation granted by the Commission in 2002. This measure was also regarded as illegal and possibly incompatible aid.

(45) The potential beneficiaries of aid were identified as:

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<sup>27</sup> See footnote 17

<sup>28</sup> Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1).

<sup>29</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ L 364, 12.12.1992, p. 7).

- the EIGs as the primary beneficiaries of the tax advantages;
- the members / investors in the EIGs which benefit from the tax advantages by virtue of the EIGs' transparency;
- the shipping companies which receive part of the tax advantages in the form of a rebate on the price of the ship;
- possibly the shipyards, the arranging banks, the leasing companies and other intermediaries.

(46) The Commission considered that the aid did not appear to be compatible with the internal market.

#### **4 COMMENTS FROM SPAIN AND FROM INTERESTED PARTIES**

(47) Observations were received from the Spanish authorities and from 41 third parties including public authorities, sectorial associations and individual undertakings either involved in STL operations or competitors of those involved, such as foreign shipyards or shipbuilding associations.

(48) The observations address the following aspects of the assessment made by the Commission in Decision C(2011) 4494 final:

- procedural aspects
- the general approach: assessment of the STL as a scheme vs. assessment of the individual measures making part of the STL
- whether the individual measures amount to State aid (presence of an advantage, state resources, *imputability* to the State, effect on competition and trade) and whether some of them constitute existing aid.
- the identification of the aid beneficiaries
- the compatibility of possible State aid
- obstacles to aid recovery (equal treatment, legitimate expectations, legal certainty)

##### **4.1 PROCEDURE**

(49) Spain considers that the Commission initiated the formal investigation procedure without duly checking its main conclusions with the Spanish authorities. As a consequence, the Spanish State's right of defence and the adversarial principle essential to any administrative procedure has been violated.

(50) According to a number of third-parties, the Commission should have used the existing aid procedure, because if they constitute aid, the 2 tax measures involved (depreciation rules for leased assets and the TT system) would all be existing aid.

##### **4.2 ASSESSMENT OF THE STL AS A SCHEME / ASSESSMENT OF INDIVIDUAL MEASURES**

###### **4.2.1 Complainants**

(51) *Holland Shipbuilding* considers that the STL should be viewed as a single system because it is an organised system which deliberately exploits different tax measures to

produce an economic advantage which is far greater than the total advantage that could be gained from applying the different measures independently and because the measures are dependent from each other. Indeed, the use of the TT allows EIGs to make permanent the temporary tax advantage generated by early and accelerated depreciation. The vague conditions imposed on the application of early depreciation and their interpretation by the Spanish authorities confer discretionary powers to the tax administration. This is confirmed by the fact that the authorisation is only granted in practice if a switch is made from the normal corporate taxation system to the TT system.

- (52) *Danish Maritime* and [...] <sup>30</sup> also regard the STL as a whole as a State aid scheme that – regardless of the discussion about beneficiaries – clearly confers an economic advantage to certain undertakings.

#### 4.2.2 Spain and participants in tax lease transactions

- (53) On the contrary, this global approach is challenged by Spain and by undertakings identified by the Commission as potential beneficiaries of aid (shipping companies, banks, investors in EIGs, shipyards involved in STL operations).
- (54) They consider that the STL is not enshrined as such in the Spanish Tax code, that STL operations are private agreements (leasing, bareboat charter, EIG) contracted by private parties which are free to choose the cheapest way to finance an asset and use the contractual and fiscal arrangements available to them and that Spain should not be held responsible for advantages acquired by tax payers in a move to optimize the tax due. Moreover, the tax code does not impose the use of all measures mentioned by the Commission in Decision C(2011) 4494 final altogether.
- (55) *Asociación Española de Banca (AEB)* considers that it is the first time ever that the Commission identifies State aid in a combination of legal transactions between private entities rather than in a legal provision.
- (56) Rather than a system, *AEB* considers that there are two different schemes (the depreciation scheme and the TT) which can clearly be severed and treated separately, independently of whether they are used separately or in conjunction.
- (57) In addition, the *AEB* considers that the Commission failed to identify a general system of reference before identifying a selective advantage. According to *AEB*, there are an infinite number of ways to finance the acquisition of an asset using different combinations of legal instruments and tax measures and the Commission should compare all these alternative situations. Concluding that the STL confers a selective advantage to certain companies would therefore be artificial, especially if the Commission retained as reference the most costly way – from a tax point of view – to finance an investment thereby ignoring all the incentive measures available to the investors.
- (58) As a consequence, the STL does not confer a selective advantage. This is notably confirmed by the fact that the Commission identifies several potential beneficiaries which do not correspond to sectors of the economy. Referring to the *Commission notice on the application of State aid rules to corporate tax measures*<sup>31</sup> (hereinafter

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\* Business secret / confidential information

<sup>30</sup> [...]

<sup>31</sup> OJ C 384 of 10.12.98, p.3. See paragraph 14.

the "Commission notice on business taxation") and to the Commission decision concerning the Dutch *Groepsrentebox*<sup>32</sup>, *AEB* considers that it cannot be concluded that the measure is selective because it benefits more the investors of EIGs investing in sea-going vessels rather than in other assets.

- (59) As the STL system only consists in the use by private parties of general tax measures, in the context of private agreements, there are no State resources involved.
- (60) According to *AEB*, there is no effect on competition and trade between Member States because the main beneficiaries identified by the Commission are shipping companies and the measure is available to all shipping companies from Europe and beyond.
- (61) In their comments, those third-parties describe the so-called STL as a series of unrelated individual measures (individual approach) and do not further comment about the STL as a whole.

### **4.3 OBSERVATIONS RELATED TO THE ASSESSMENT OF THE INDIVIDUAL MEASURES**

#### **4.3.1 Accelerated depreciation (Article 115, paragraph 6 TRLIS<sup>33</sup>) - measure 1**

- (62) According to Spain and certain third-parties, this measure is generally applicable to all types of assets and to all sectors. The differential tax and accounting treatment of leasing fees does not entail any de facto selectivity as is demonstrated by the heterogeneity of the sectors applying this measure. In addition, the Spanish corporate tax system allows different alternative modalities for accelerated depreciation. *AEB* mentions that the straight-line depreciation cannot be regarded as the (single) reference to establish the existence of an advantage because other methods of depreciation are generally allowed. Article 11 TRLIS and article 1-5 RIS provide for the possibility to apply degressive methods such as the declining balance<sup>34</sup> or the sum-of-the-year-digit (SYD) methods<sup>35</sup> as well as the possibility to depreciate an asset according to a specific plan agreed with the tax administration<sup>36</sup>. As an example, *AEB* mentions that the declining balance method would be applicable at a rate of 2.5 times the applicable straight-line depreciation rate, i.e. 25%.

#### **4.3.2 Discretionary application of early depreciation (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS) - measure 2**

- (63) It is argued that the early depreciation is just a modality of accelerated depreciation which only provides that accelerated depreciation can, under certain conditions, start before the date the asset is delivered to and operated by the final user. If the deduction of the amounts paid during the construction of the asset were not possible, this would de facto imply an anticipation of taxation. Early depreciation only restores neutrality and the correspondence between the financial flow and the tax treatment.

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<sup>32</sup> See Commission Decision 2009/809/CE of 8 July 2009 in C 4/07, The Netherlands, *Groepsrentebox*.

<sup>33</sup> TRLIS: texto refundido de la Ley del Impuesto sobre Sociedades

<sup>34</sup> See footnote 15

<sup>35</sup> See footnote 16

<sup>36</sup> See Article 11, paragraph 1, d) TRLIS and article 5 RIS.

- (64) *AEB* insists that the possibility to anticipate the starting point of the depreciation period is a general measure also provided in Article 11, paragraph 1, d) TRLIS and in article 5 RIS which define the general rules applicable to depreciation. These provisions notably allow the tax administration to agree on a specific depreciation plan presented and justified by the tax payer, including for assets under construction.
- (65) The prior authorisation of early depreciation and the procedure followed by the tax administration only aim at verifying that the operation is real and that the objective criteria laid down in the legislation are met. In particular, it must be verified in advance that there is a lease agreement which has a start date prior to the commissioning or delivery of the asset, that it is indicated, at the moment of the request, that instalments for the recovery of the cost of the asset are deductible, that said contract is associated with the acquisition of an asset that requires a prolonged period of contracting and construction in line with the operating conditions of this asset, that the asset construction contract is signed, and that the specific contractual formulae to be used for the operation of the asset are indicated.
- (66) On top of the general conditions set out in Article 49 RIS, an additional condition is imposed by Article 48, paragraph 4 TRLIS when the applicant is an EIG. The authorisation does not depend on the application of other measures or on the provision of additional documents. Finally, the absence of any discretion in the procedure is illustrated by the fact that no application filed with the tax administration was ever rejected. In that respect, *AEB* considers that the Commission should investigate more seriously about the reasons why financing operations do not take place. If, as asserted by the Commission on the basis of informal information, certain shipping companies were not able to find a bank to organise the operation, it is rather because the parties did not agree on certain elements of the operations such as the price. *AEB* formally denies that any of its members participated in any meeting or informal contact with the Spanish authorities. In fact, the situation is not the same as the one described in the Commission decision concerning the French GIE Fiscaux<sup>37</sup>, where the condition that the operation should represent a significant economic and social interest was found to be imprecise and left to the discretion of the tax authorities. On the contrary, *AEB* denies that any of the conditions specified by Article 49 RIS is imprecise and subject to interpretation
- (67) As a consequence, early depreciation – in the same way as accelerated depreciation – is generally applicable to all types of assets and to all sectors. It is a general measure.
- (68) As it is a modality of application of accelerated depreciation, if it is aid, it should be regarded as existing aid.

### **4.3.3 The tax transparent status of Economic Interest Groupings (Article 48 TRLIS) – measure 3**

- (69) *AEB* mentions that the transparency of EIGs is within the logic of the Spanish tax system. This status allows different investors to make a joint investment which none of them would undertake on its own and yet apply – by transparency and in respect of their share in the investment – the tax treatment that would have applied had they invested on their own. Hence there is no advantage linked to the application of the

<sup>37</sup> State aid C 46/2004, Commission decision of 20 December 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

EIG status. Moreover, this status does not entail any sectorial limitations. Any Spanish taxpayers can be a member in an EIG. It is therefore not selective.

#### **4.3.4 The TT system (Articles 124 to 128 TRLIS) – measure 4**

- (70) As the Commission mentioned in Decision C(2011) 4494 final that it had authorised the Spanish TT system in 2002 as aid compatible with the Maritime Guidelines<sup>38</sup>, the Spanish authorities as well as third-parties concentrate their comments on the scope of the 2002 approval and on the specific issues whether financial EIGs<sup>39</sup> involved in STL operations should benefit from TT
- (71) As to the issue whether financial EIGs<sup>40</sup> involved in STL operations - which do not operate vessels but invest in them and charter them out as part of financial investments – should benefit from the TT system, Spain holds that companies are considered to operate vessels by chartering them out and are therefore registered in Spanish shipping registers (empresas navieras) since the entry into force of article 1 of Royal decree 1027/1989<sup>41</sup> of 28 July 1989, repeated in article 9 of Law 27/1992 of 24 November 1992. As the Commission has authorised the application of the TT to all companies registered in Spanish shipping registers<sup>42</sup>, this includes companies owning vessels and renting/leasing them out to third parties. If that measure is regarded as State aid, it should therefore be considered as existing aid.

#### **4.3.5 Article 50, paragraph 3 RIS – measure 5**

- (72) Spain, *PYMAR* and a few banks argue that article 50, paragraph 3 RIS only features implementing measures intended to provide legal certainty. They hold that, in accordance with the principle under the Spanish legal system, substantive elements of a tax measure shall always be governed by law and that this provision – which is contained in a Royal Decree – does not introduce anything new but only clarifies the scope of article 125, paragraph 2 TRLIS. It does neither derogate from the Law nor create additional benefits. In fact, the absence of taxation of the capital gain already made part of the scheme authorised by the Commission and, if aid, it should therefore be regarded as existing aid.
- (73) Furthermore, Spain and the alleged beneficiaries maintain that it is logical to consider the vessel as "new" since no third parties ever used it before the leaseholder, and the

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<sup>38</sup> See footnote 20.

<sup>39</sup> The Commission does not see an issue with the application of the tonnage tax to EIGs insofar as they actually operate vessels to provide maritime transport services and meet the conditions laid down in the Maritime guidelines.

<sup>40</sup> The Commission does not see an issue with the application of the tonnage tax to EIGs insofar as they actually operate vessels to provide maritime transport services and meet the conditions laid down in the Maritime guidelines.

<sup>41</sup> “*La presente disposición se aplica a todos los buques, embarcaciones y artefactos navales cualquiera que sea su procedencia, tonelaje o actividad. Asimismo se aplica a todas las empresas marítimas que exploten buques (...) tanto si son titulares de los mismos, como si los explotan, en virtud de un contrato de arrendamiento, fletamento o cualquier otra fórmula aceptada en la legislación vigente*”.

<sup>42</sup> See Commission Decision C(2002)582 final of 27 February 2002, section 2.4. Beneficiario(s): “*Podrán acogerse a este régimen tributario especial las entidades navieras inscritas en alguno de los registros de empresas navieras referidos en la legislación española, cuya actividad comprenda la explotación de buques propios o arrendados.*”



lifting of the option is already agreed when the leasing contract is signed<sup>43</sup>. *AEB* signals that considering as new an asset acquired via the option of a leasing contract is commonly accepted.

#### **4.4 OBSERVATIONS RELATED TO THE TRANSFER OF STATE RESOURCES AND THE IMPUTABILITY OF THE MEASURES TO THE STATE**

- (74) According to the complainants, a tax deduction implies a transfer of State resources in the form of a loss of tax revenue. The STL / the tax measures are imputable to the State because all measures are contained in Spanish law. Moreover, the STL relies on an authorisation which is granted by the tax authorities. Even if these authorisations relate to individual measures, it is clear that, in practice, the authorisations are granted to the overall STL transactions. This is evidenced by the fact that the request for early depreciation filed with the Tax administration will in practice describe in detail the construction, the allocation of the tax benefit between EIG and/or its investors and the shipping company as well as a notice from the shipyard setting out the expected social and economic benefit from the arrangement. There is no reason why such documents would systematically be provided if it were not de facto a precondition for approval.
- (75) Shipping companies on the other hand argue that the rebate made by the shipyard / the EIG on the initial price is not imputable to the State because it results from private contractual relationships between the EIG and the shipping company involved in the operation.

#### **4.5 OBSERVATIONS RELATED TO THE DISTORTION OF COMPETITION AND THE EFFECT ON TRADE**

- (76) [...] considers that the size of the advantages concerned (14 million in the example given in Decision C(2011) 4494 final) undoubtedly affect the beneficiaries' market position and therefore create substantial market distortions on markets characterized by a high level of competition. The scheme provides a great advantage to Spanish shipyards who can promote their ships at a price – lower than other European shipyards – that includes the benefit under the STL. [...] refers to statistics from the Spanish Ministry of Industry showing that over time the Spanish shipyards have served more and more ship-owners from abroad.
- (77) As for shipowners, [...] considers that buying ships from Spanish shipyards at a much lower price makes them save millions of Euros on a substantial part of their fixed costs. As it is spread over the duration of the recoupment of the cost of the ships, this advantage gives them a competitive advantage over other shipping operators and therefore distorts competition for many years.
- (78) As mentioned before, shipowners argue that all shipping companies can access the conditions offered by Spanish shipyards and therefore enjoy possible price rebates, if any, that Spanish shipyards are able to offer. Moreover, those shipowners argue that they have paid a fair market price and have not benefitted from any economic

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<sup>43</sup> See notably letter dated 2 August 2011 from the Spanish authorities in response to Commission Decision C(2011) 4494 final, section 3.2.3.2. Presunta nueva ayuda de Estado: Artículo 50, apartado 3, del RIS, 9<sup>th</sup> paragraph: "(...) *el concepto de "usado", en el ámbito del Impuesto sobre Sociedades se utiliza para aquellos elementos que han sido utilizados por un tercero distinto del propio sujeto pasivo que pretende la aplicación de una normal específica.*"

advantage As a consequence, the acquisition of vessels from Spanish shipyards is not likely to significantly reduce their operating costs or to strengthen their position in a durable manner, as stated by the Commission in Decision C(2011) 4494 final.

#### **4.6 OBSERVATIONS RELATED TO THE IDENTIFICATION OF THE BENEFICIARIES OF AID**

- (79) According to *AEB*, EIGs cannot be beneficiaries of aid. Indeed, by virtue of their tax transparency, it is the investors who have to pay the tax resulting from the EIG's commercial activity. Hence EIGs cannot enjoy any economic advantage resulting from a tax reduction. In addition, any Spanish taxpayer can be an investor – a member – in an EIG.
- (80) On the contrary, a number of shipping companies consider that the EIGs are the only possible beneficiaries of aid. Shipowners cannot be beneficiaries of aid because they are not Spanish tax payers. Moreover, they argue that the Commission wrongly assumed – without giving any explanation – that the tax benefits would be transferred from the EIG to the shipping company through a price rebate. In fact, the price is fixed as a result of commercial decision made by the private owner of an asset.
- (81) Shipowners argue that shipping companies from all over the world generally acquire vessels from various shipyards around the globe including, if they so wish, from Spanish shipyards. All shipping companies can therefore enjoy possible price rebates, if any, that Spanish shipyards are able to offer.
- (82) Several shipowners argue that if the STL amounts to State aid, they are not the beneficiaries of such aid. Two reasons are invoked: first, the way the STL structure functions shows that coordination takes place between the EIG and the shipyard, which constitute a single centre of interest and fixes the sales price; second, companies operating tugboats and salvage vessels give examples of offers received from shipyards outside Spain for the construction of similar tugs. Those offers are in the same price range or even cheaper than that of the Spanish shipyards eventually selected. As a consequence, they argue that they have paid a fair market price and have not benefitted from any economic advantage within the meaning of article 107(1) TFUE. In case the STL provided for an economic advantage, the shipyards – not the shipping companies – involved in STL operations would be the beneficiaries.
- (83) *Holland Shipbuilding* considers that the beneficiaries of aid are the EIG and/or its investors as well as the shipping companies but also the Spanish shipyards because there is a substantial difference between the price paid by the shipowner and the price received by the shipyard which is the above market price. According to a national shipbuilding association, the scheme is designed to benefit the shipyards. It would be misleading to view the STL as support to shipowners. The cheaper price of construction does not necessarily entail an advantage to the purchaser of the ship. Moreover, the advantage can only be offered by Spanish shipyards to any buyer using the STL. The STL constitutes unlawful aid to shipbuilding that is causing harm to national shipbuilders in direct competition with Spanish ones.
- (84) *PYMAR* considers that the Commission has not provided an adequate motivation in Decision C(2011) 4494 final as to the identification of shipyards as potential beneficiaries of State aid. Moreover, they point out that the Commission did not

identify the producer of the asset as beneficiaries of state aid in decisions in *GIE Fiscaux*, *Brittany ferries*, *Air Caraïbes* or *Le Levant*<sup>44</sup> concerning similar tax schemes.

#### 4.7 OBSERVATIONS RELATED TO THE CHARACTER OF EXISTING OR ILLEGAL AID

- (85) As mentioned in Section 4.3 above, Spain and certain third-parties consider that there are only 2 measures involved: first, the provisions of Article 115 TRLIS concerning the deduction of the cost of an asset acquired via a financial leasing contract. These provisions were introduced in Spanish law before Spain joined the EU. Therefore, if it is aid, this measure is existing aid as mentioned by the Commission in Decision C(2011) 4494 final and Article 115, paragraph 11 TRLIS which allows the administration to set the starting point for the deduction, is only a modality of implementation of article 115. Second, the TT system enshrined in Articles 124 to 128 TRLIS was approved by the Commission in 2002. Therefore, it is also existing aid. The implementing rules – notably Article 50, paragraph 3 RIS – do not modify the rules enshrined in the law and are therefore covered by the Commission authorization.

#### 4.8 OBSERVATIONS RELATED TO THE COMPATIBILITY OF AID

- (86) Spanish authorities and alleged beneficiaries argue that the aid is compatible on the basis **of the TT system approved in 2002** because it covers "*maritime companies registered under Spanish law*<sup>45</sup>, whose activity include the operation of owned and chartered ships". As Article 50, paragraph 3 RIS only implements the TT system, it is also covered by the 2002 decision.
- (87) Third parties also argue that any aid would be compatible with the Maritime Guidelines, which also *include the operation of owned and chartered ships* and this aid would stay within the aid ceiling imposed by the Guidelines.
- (88) *Asociación de Ingenieros Navales y Oceánicos de España* considers that the compatibility of any aid should be analysed in the global competitive context rather than focus on the internal market as shipyards in non EU countries receive support which is not subject to competition rules as within the EU.
- (89) On the contrary, [...] considers that the scheme cannot be regarded as compatible aid at all, not even – as contemplated in Decision C(2011) 4494 final – under the Maritime Guidelines. Indeed, they consider, first, that Spain will not be able to prove that all ships constructed were eligible to the benefit of these Guidelines and, second, that the aid can only reduce the amount of tax due by the beneficiary in the country that installs the scheme to zero. Therefore non Spanish shipowners should not benefit from the scheme and the tax paid by Spanish shipowners is likely to be limited since they benefit from the TT system and from a reduction of social charges.

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<sup>44</sup> Commission Decision of 20.12.2006 in C 46/04 *GIE Fiscaux*, of 8.5.2001 in C 31/98 *Brittany Ferries*, of 16.12.2003 in N 474/03 *Air Caraïbes* and of 20.5.2008 in C 74/99 *Le Levant*.

<sup>45</sup> Reference is made to the Spanish Law 27/92. Recipients can thus be companies which have their main seat in Spain or secondary establishment in Spain of companies established in the EU.

## 4.9 OBSERVATIONS RELATED TO RECOVERY

- (90) Both the Spanish authorities and potential beneficiaries hold that recovery should be ruled out because that would breach fundamental principles of EU law<sup>46</sup> such as equal treatment, the protection of legitimate expectations or of legal certainty.

### 4.9.1 Equal treatment

- (91) *PYMAR* argues that similar fiscal measures were investigated in two other cases (*Brittany Ferries*<sup>47</sup>, and *GIE Fiscaux*) where no recovery was ordered. If the Commission concluded to the existence of aid, such aid should be regarded as compatible up to the limit defined in Chapter 11 of the Maritime Guidelines and, for the amount in excess of that limit, the protection of legal certainty should, as in the French case, prevent the Commission from requiring the recovery. [...] argues that because no aid was recovered from the French operators, recovering aid from Spanish operators in a very similar case would put the latter at a competitive disadvantage and breach the principle of equal treatment.
- (92) Spain and *PYMAR* invoke a number of decisions where the Commission already renounced to any recovery because of public declarations by the Commission or by one of its members. Decisions concerning Belgian coordination centres, Luxembourg 1929 holding companies and other coordination centres and intragroup activities of multinational companies<sup>48</sup>, the Spanish Goodwill<sup>49</sup>, an Italian case of aid to large firms in difficulty<sup>50</sup> as well as two fishery cases<sup>51</sup> (Shetland Island and Orkney Island) are mentioned.

### 4.9.2 Legitimate expectations / legal certainty

- (93) According to Spain<sup>52</sup> and to certain third-parties involved in STL operations, the following elements led parties to STL operations to believe that the tax measures used in STL operations did not constitute State aid:
- (1) the statement made by the Commission in the 2001 *Brittany Ferries* decision<sup>53</sup> that a scheme similar to the STL – the French *GIE fiscaux* – was a general measure.

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<sup>46</sup> See Article 14(1) 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.

<sup>47</sup> Commission Decision of 8.05.01 in case C 31/98, OJ L 012 of 15.01.2002 p.33 – 69

<sup>48</sup> Coordination centres (DE), Coordination centres and Finance companies (LU), Bizcaye Coordination Centres (ES), Headquarters and International Treasury Pools (FR), Foreign Income (IE), International Financing Activities (NL).

<sup>49</sup> Commission Decision of 12 January 2011 in the so-called Spanish Goodwill case (C 45/07, J.O. L 135 of 21.05.2011, p.1)

<sup>50</sup> Commission Decision of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty (OJ L 79 of 17.3.2001, p.29).

<sup>51</sup> Commission Decision of 3 June 2003, C87/2001 Orkney Islands Council track Record scheme (OJ L 211 of 21.8.2003, p.49) and Commission Decision of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands ((OJ L 211 of 21.8.2003, p.63).

<sup>52</sup> In particular, letter of 2 August 2011.

<sup>53</sup> Commission Decision of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company ("BAI" or "Brittany Ferries") in OJ L 12, 15.1.2002, p. 33.

- (2) the publication of the draft measures (early depreciation and TT) in the Spanish General Courts Official Journal on 10 October 2001<sup>54</sup>.
- (3) a 2001 Commission letter requesting information from Spain in the context of an investigation about several alleged aid measures, including a tax leasing system, in favour of shipbuilding.
- (4) a 2004 Commission decision<sup>55</sup> rejecting the award of aid to Dutch shipyards to compensate for aid allegedly offered to Spanish shipyards in competition for the same shipbuilding contracts.
- (5) the 2006 decision in the French GIE Fiscaux<sup>56</sup> case
- (6) a 2009 letter by Commissioner Kroes<sup>57</sup> – then in charge of competition – to the Norwegian Minister responsible for Trade and Industry in response to a complaint that the Spanish Tax lease would favour Spanish shipyards.
- (7) the time elapsed between the publication of the draft measures in 2001, the start of the scheme in 2002 or the first complaints received by the Commission in 2006 and the opening of the proceedings in June 2011. Such a long time lapse allegedly corroborated the belief that there were not enough elements to proceed.
- (8) an alert economic operator could not have foreseen the possible existence of a State Aid in the combination of different regimes that are either of long national tax tradition (accelerated depreciation of leased assets, EIG status) or that have been previously approved by the Commission (TT).
- (9) the statements concerning the absence of aid in measures relative to depreciation methods in the Commission notice on business taxation<sup>58</sup>

#### **4.9.2.1 The 2001 Commission Decision in Brittany Ferries (BAI)**

- (94) In recital 193 of that Decision, the Commission stated that: "*(...) with regard to economic interest groupings and the tax advantages they may confer, the Commission considers that they constitute a general measure, given that they are common in France, can be set up in all sectors of economic activity and come under common law.*"
- (95) The Decision was published in the OJ on 15 January 2002. In the 2006 decision concerning the French GIE Fiscaux, the Commission considered that: "*While it is true that the scheme at issue in that case was that in force before 1998, it must nevertheless be observed that that fact was not made clear in the grounds for the Decision and that that circumstance may have helped to mislead beneficiaries under the scheme here at issue.*"

<sup>54</sup> See Boletín Oficial de las Cortes Generales, Congreso de los Diputados, VII Legislatura, Serie A: Proyectos de Ley, núm. 50-1, 10 de octubre de 2001, p.22 to 25 (<http://www.congreso.es>).

<sup>55</sup> State aid Case C 66/2003, Commission decision of 30 June 2004 on the State aid which the Netherlands is planning to implement in favour of four shipyards to support six shipbuilding contracts (OJ L39 of 11.2.2005, p.48)

<sup>56</sup> State aid C 46/2004, Commission Decision of 20 December 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> Letter dated 9.03.09.

<sup>58</sup> See, in particular, paragraph 13

- (96) Spain<sup>59</sup> as well as third-parties argued that this statement had either created a situation of legal uncertainty as to the lawfulness of the STL – very similar in its construction and effects – or the legitimate expectations that the STL did not amount to State aid either.

#### **4.9.2.2 The publication of the draft measures in the Spanish General Courts Official Journal (*Boletín Oficial de las Cortes Generales*).**

- (97) According to *PYMAR*, the Commission learned about the existence of the STL system when the measures composing it (the discretionary application of early depreciation of leased assets and the TT system) were published as part of the same draft law in the Spanish General Courts Official Journal on 10 October 2001. As a consequence, shipyards started to include the benefits of those measures in their offers for new shipbuilding projects, without awaiting the entry into force of the measures, in order to move forward in the negotiation and implementation of the first STL structures.

#### **4.9.2.3 The 2001 request for information about a Spanish tax leasing scheme**

- (98) *PYMAR* refers to a letter sent by the Commission services on 21 December 2001 following a complaint about several State measures allegedly reducing the cost of ships bought from Spanish shipyards. In that letter, the Commission notably requested information about a tax leasing system:

*"Según los datos de que dispone la Comisión, existirían distintas medidas que reducen el coste de la compra de buques a los astilleros españoles. En especial, la Comisión ha recibido información sobre las siguientes medidas:*

*(...)*

*3. Un régimen fiscal (tax-leasing) por el que los buques construidos en España pueden utilizarse para reducir impuestos a través del uso de SPVs (Special Purpose Vehicles). El beneficio de esta combinación parece transferirse al comprador mediante la reducción del precio o de los costes de arrendamiento financiero. Les rogamos faciliten cualquier información que permita evaluar este punto."*

- (99) According to *PYMAR*, this letter indicates that the Commission had information and was aware of the existence of the tax lease and that it has investigated the matter in 2001 already without taking any action, which has created the legitimate expectation that the Spanish measure did not constitute aid.

#### **4.9.2.4 The 2004 Decision concerning the Dutch notification**

- (100) On 9 September 2002, the Dutch authorities notified a "matching aid" they intended to award Dutch shipyards with a view to matching aid allegedly offered by Spain<sup>60</sup>. At the end of a formal investigation<sup>61</sup>, the Commission concluded in its final Decision<sup>62</sup> that *"the Spanish authorities hav(ing) clearly denied that the aid would ever be*

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<sup>59</sup> See letter of 2.08.11.

<sup>60</sup> Notifications registered under case numbers N 601 to N 606/2002.

<sup>61</sup> See letter dated 11 November 2003, OJ C 11, 15.1.2004, p.5

<sup>62</sup> See Decision C(2004) 2213, OJ L 39 of 11.02.2005, p.48

available” it did not have "*sufficient proof of the alleged Spanish aid*"<sup>63</sup> and declared the notified aid incompatible with the internal market.

- (101) According to *PYMAR*, because the STL was in force before The Netherlands notified the aid in 2002, the 2004 Commission decision would have created the legitimate expectation that the STL system did not constitute aid.

#### **4.9.2.5 The 2006 Decision in the French GIE Fiscaux case**

- (102) According to *PYMAR*, the French scheme GIE Fiscaux is very similar to the STL system. As a consequence, the 2006 decision in the French case gave rise to the legitimate expectations of operators that (1) the STL system would be considered compatible with the internal market within the limits of Chapter 11 of the Maritime Guidelines and (2) that due to the procedural similarities of both cases, the recovery of the State aid exceeding the ceiling of Chapter 11 of the Guidelines would not be required.

- (103) In addition, *PYMAR* invokes a number of Commission decisions where the similarity of a measure with a measure previously approved by the Commission was a factor justifying the legitimate expectations of operators. In particular, *PYMAR* recalls that no recovery was ordered in cases<sup>64</sup> such as the Foreign Income (Ireland), International Financing Activities (The Netherlands), Coordination centres and Finance Companies (Luxembourg), Coordination centres in Vizcaya (Spain), Control and coordination centres (Germany), Central Corporate treasuries and Headquarters and logistic centres (France), Tax ruling for US Foreign Sales Corporations (Belgium) and Gibraltar Qualifying Companies (UK), because those schemes were very similar to the Belgian Coordination centres schemes which had been previously approved by the Commission.

#### **4.9.2.6 The 2009 letter sent by Commissioner Kroes**

- (104) In response to a letter from the Norwegian authorities complaining about an alleged discrimination of Norwegian shipyards in connection with the Spanish tax lease system, Commissioner Kroes replied that DG Competition "*(had) already investigated the matter*" and that following its request, Spain had issued a public statement in the form of an answer of the tax administration to a question from a tax payer<sup>65</sup> – a tax ruling – confirming that the measure was not restricted to Spanish shipyards and could also be used for the acquisition of ships produced in other Member States. The letter concluded that, in view of that clarification, no further action was considered necessary.

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<sup>63</sup> See Recital 24 of Decision C(2004) 2213

<sup>64</sup> See Decision of 17.02.2003 in OJ L 204 of 13.8.2003, p.51 (IE), Decision of 17.02.2003 in OJ L 180 of 18.7.2003, p.52 (NL), Two decisions of 16.10.2002 in OJ L 153 of 20.6.2003, p.40 and OJ L 170, of 9.07.2003, p.20 (LU), Decision of 22.08.2002 in OJ L 31 of 6.2.2003, p.26 (ES), Decision of 5.09.2002 in OJ L 177 of 16.7.2003, p.17 (DE), Decision of 11.12.2002 in OJ L 330 of 18.12.2003, p.23 and Decision of 13.05.2003 in OJ L 23 of 28.1.2004, p.1 (FR), Decision of 24.06.2003 in OJ L 23 of 28.1.2004, p.14 (BE) and Decision of 30.03.2004 in OJ L 29 of 2.2.2005, p.24 (UK).

<sup>65</sup> Spain published the tax ruling on 1 December 2008:  
<http://petete.meh.es/Scripts/know3.exe/tributos/CONSUVIN/texto.htm?Consulta=CONSULTA&Pos=7262> (last consulted on 19/06/2013).

- (105) According to *PYMAR*, on 2 April 2009, a Norwegian shipowner shared the content of Commissioner Kroes' letter with a Spanish shipyard with which it was involved in STL operations. *PYMAR* also submitted a letter of 13 September 2012 from *Gerencia del Sector de la Construcción Naval*<sup>66</sup> (GSN) testifying that, back in 2009, it knew about the content of Commissioner Kroes' letter and had shared it with entities participating in STL operations and with *PYMAR* in the course of their regular meetings.

#### ***4.9.2.7 Time elapsed between the complaint and the opening of procedure***

- (106) According to *PYMAR*, 9 years have elapsed between the moment the Commission became aware of the scheme in December 2001 / the start of the scheme in 2002 (5 years from the first complaints received by the Commission in 2006) and the opening of the proceedings in June 2011. The time elapsed without an action from the Commission corroborated the belief that there were not enough elements to proceed.

#### ***4.9.2.8 An alert economic operator could not have foreseen the possible existence of State Aid in the joint application of several measures***

- (107) According to *PYMAR* and certain other third-parties, it is the first time that the Commission finds State aid in the joint application of several measures, which normally prudent operators could not expect.

#### ***4.9.2.9 The statements concerning depreciation methods in the Commission Notice on business taxation***

- (108) *PYMAR* argues that according to Article 13 of the Commission Notice on business taxation, measures of a purely technical nature such as depreciation rules do not constitute State aid. On that basis, operators have legitimately considered that the early depreciation measure did not constitute State aid.

### **4.9.3 Consequence for recovery**

- (109) From the moment the Commission was aware of the existence of the STL, its actions as well as the time elapsed have created legitimate expectations that there was no aid and as a consequence also the legitimate expectation that no aid would be recovered with respect to operations realised in the past. Hence, the Commission should refrain from ordering recovery for all operations.
- (110) Similarly, the 2009 letter sent by Commissioner Kroes confirms that the scheme has been analysed by the Commission. All parties involved in tax lease operations (shipping companies, EIGs, banks and intermediaries, ...) could legitimately expect that the Commission would have identified any aid in the system and because no further investigation was envisaged that no aid was involved.
- (111) *PYMAR* also refers to decisions in which the Commission acknowledged that actions by EU jurisdictions (Court, Commission, etc) could generate legitimate expectations that aid awarded in the past would not be recovered and prevent the Commission from ordering recovery including when the aid was granted before the action that caused

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66 La Gerencia Naval (<http://www.gernaval.org/>) es una Entidad Pública Empresarial, según su Estatuto, aprobado por el Real Decreto 3451/2000, de 22 de diciembre (B.O.E. del 11.01.2001).



legitimate expectations took place. They refer to decisions in the Spanish Goodwill case, the Belgian Coordination centres case, an Austrian energy tax rebate case and an Italian case of aid to large firms in difficulty<sup>67</sup>.

#### **4.9.4 Contractual clauses**

- (112) Spain as well as *PYMAR* mention that any aid that the Commission would identify in favour of shipping companies and/or EIGs and investors would in any case affect the shipyards who could receive claims to reimburse the EIG and/or its investors and/or the shipping companies by virtue of the contractual relationships between the different participants in the STL operations. Indeed, according to *PYMAR*, clauses inserted in those contracts require the shipyards to indemnify investors and/or shipping companies notably in case of a change of law – including tax law – affecting the operation.

### **5 ASSESSMENT**

#### **5.1 PROCEDURE**

- (113) The Commission considers that the procedure followed has neither breached the rights of defence of Spain nor the right to be heard of any third-party. On the contrary, the decision to open formal proceedings is the initial formal step that the Commission must take pursuant to the *Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty*<sup>68</sup> (hereinafter "Regulation 659/99") if, after a preliminary investigation, it has doubts about the compatibility of a State aid measure with the internal market (Articles 13 and Article 4.4 of Regulation 659/99). The purpose of the decision to open proceedings is precisely to summarise the relevant issues of fact and law, to make a preliminary assessment as to the aid character of the measure, to set out the doubts as to its compatibility with the internal market and to call upon the Member State concerned and upon other interested parties to submit comments (Article 6 of Regulation 659/99).
- (114) Moreover, the Commission did not open the formal investigation procedure in respect of the accelerated depreciation of leased assets (Article 115, paragraph 6 TRLIS) since it has indicated that if the measure were to involve State aid, it could in any event be regarded as existing aid. It did not raise doubts either with respect to the TT system, at least to the extent that it had been notified and authorised by the Commission (Articles 124 to 128 TRLIS) because this measure was also regarded as existing aid. These two measure are only mentioned and described in Decision C(2011) 4494 final because they are important elements of the STL and are linked to those measures subject to the formal investigation (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS, as well as Article 50, paragraph 3 RIS and the application of the TT system to non-transport activities).

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<sup>67</sup> Commission Decision of 12.01.2011 in case C-45/2007, recital 192, OJ L 135 of 21.05.2011, p.1; Commission decision of 13.11.2007 in case C-15/2002, recital 85, OJ L 90 of 2.4.2008, p.7; Commission Decision of 9.03.2004 in case C-33/2003, recital 47, 48 and 66, OJ L 190 of 22.07.2005, p.13 and Commission decision of 16.05.2000 in case C-68/1999, recital 73, OJ L 79 of 17.03.2001, p.29.

<sup>68</sup> See OJ L 83 of 27 March 1999, p.1

- (115) The Commission considers that Article 115, paragraph 11 TRLIS, Article 48 paragraph 4 TRLIS and Article 49 RIS, as well as Article 50, paragraph 3 RIS and the application of the TT system to non-transport activities are severable from the other measures mentioned in the previous recital (i. e., Article 115, paragraph 6 TRLIS and Articles 124 to 128 TRLIS) and do not constitute existing aid pursuant to Article 1(b) of Regulation 659/99, since those measures were introduced in 2002 and 2003, after Spain's accession to the EU, and put into effect without prior authorisation by the Commission. Therefore, the Commission rightly followed in respect of those measures the procedure applicable to unlawful aid (Articles 1 (f), 13 and 4(4) of Regulation 659/99).

## 5.2 ASSESSMENT OF THE STL AS A SYSTEM/ ASSESSMENT OF INDIVIDUAL MEASURES

- (116) The fact that the STL system is composed of various measures which are not all enshrined in the Spanish tax code is not sufficient to prevent the Commission from describing and assessing it as a system. Indeed, as explained in Decision C(2011) 4494 final, the Commission considers that the different tax measures used in the STL operations were linked together *de jure* or *de facto*. *De jure*, the discretionary application of early depreciation of leased assets (Article 115(11) TRLIS) corresponds to an anticipated application of the accelerated depreciation of leased assets (article 115, paragraph 6 TRLIS). Similarly, Article 50, paragraph 3 RIS establishes an exception to a specific ring-fencing rule applicable in the context of the TT system. *De jure*, Article 50, paragraph 3 RIS only concerns vessels eligible to the TT system and leasing contracts authorised by the tax administration. *De facto*, leasing contracts were only regarded as authorised by the tax administration in the context of authorisations granted for early depreciation of leased assets. *De jure*, early depreciation can be envisaged for a wide range of assets possibly acquired via a leasing contract. However, the conditions for early depreciation are subject to interpretation and were *de facto* only considered to be met – and authorisations were only delivered – with respect to vessels eligible to the TT system.
- (117) In addition, the Commission notes that two of the three main measures involved in the STL (discretionary application of early depreciation and rules on eligibility for the TT system) entered into force on the same date (1 January 2002) pursuant to the same law.
- (118) The Commission also notes that when arguing about legitimate expectations and equal treatment, the same third-parties who challenge the Commission's global approach present the STL system as being very similar to the French *GIE Fiscaux* scheme. The fact that all the features of the French measure were included in one legal provision necessarily implied a global assessment. In that respect, the fact that the different elements of the STL are scattered throughout different legal provisions that *de facto* are linked together would not – as such - warrant a different approach.
- (119) For those reasons, the Commission considers that it is necessary to describe the Spanish Tax Lease as a system of connected tax measures and to assess their effects in the context of each other, taking notably into account *de facto* relationships introduced by – or by the approval of – the State.
- (120) In any case, the Commission does not rely exclusively on a global approach. In parallel to a global approach, the Commission also analysed the individual measures involved in the STL. Indeed, the Commission considers that the two approaches are complementary and lead to consistent conclusions. The individual assessment is

notably necessary to determine which part of the economic advantages generated by the STL system results from general measures or from selective measures. The individual assessment also allows the Commission to determine, where necessary, which part of the aid is compatible with the internal market and which part should be recovered.

- (121) This two-leg approach already followed in Decision C(2011) 4494 final, enables the Commission to define a system of reference in respect of each of the individual measures and in respect of the STL system as a whole, in order to identify selective advantages that constitute State aid. For every STL operation, the counterfactual against which the presence of aid will be assessed is the same operation, featuring the same legal arrangements but realised without the measures identified as State aid. In that respect, an alternative operation featuring different factual – contractual and financial – arrangements would not constitute a proper counterfactual.
- (122) Economic operators are free to structure their asset financing operations as they wish and use for that purpose the general tax measures which they consider the most suitable. However, to the extent those operations entail the application of selective tax measures, which are subject to State aid control, the undertakings involved in such transactions are potential beneficiaries of State aid. On the one hand, the fact that several sectors or categories of undertakings are identified as potential beneficiaries is not an indication that the STL system is a general measure<sup>69</sup>. On the other hand, the fact that the system is used to finance the acquisition, the bareboat chartering and the resale of sea-going vessels can be seen as a clear indication that the measure is selective from a sectorial point of view.

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

- (123) 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*".
- (124) State aid rules only apply to aid granted to undertakings involved in economic activities. On top of that, the criteria laid down in Article 107, paragraph 1 TFEU are cumulative. Therefore, the measures under assessment constitute State aid within the meaning of the Treaty if all the above mentioned conditions are 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.
- (125) The Commission has carried out its assessment at two different levels:

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<sup>69</sup> Judgment of the Court of justice of 17 June 1999 in case C-75/97 *Belgium v Commission* (Maribel bis/ter), ECR 1999 p. I-3671, recital 32.

- At the level of the individual measures involved, where the Commission considers whether each measure constitutes State aid independently of its use in the STL.
- At the level of the STL system as a whole: as mentioned before, the STL relies on a combination of these measures which are connected – *de jure* or *de facto* – to each other.

### 5.3.1 Undertakings within the meaning of Article 107 TFEU

(126) The Commission considers – and it is neither contested by Spain<sup>70</sup> nor any third-party – that all parties involved in STL operations are undertakings within the meaning of Article 107(1) TFEU as their activities consist in offering goods and services on a market<sup>71</sup>. More precisely, shipyards offer new built vessels or construction, repair and renovation services, leasing companies offer financing facilities; EIGs charter out and sell vessels; investors offer goods and services on a wide range of markets, except if they are individuals not exercising any economic activity, in which case they are not covered by this decision; shipping companies offer maritime transport services, organizing banks offer intermediating and financing services and other intermediaries provide intermediating or consulting services.

### 5.3.2 Existence of a selective advantage

(127) 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>72</sup>

#### 5.3.2.1 Accelerated depreciation (Article 115(6) TRLIS) – measure 1

(128) In Decision C(2011) 4494 final, the Commission mentioned that, if it constitutes aid, this measure would constitute existing aid and no assessment was made. As a result of the formal investigation, the Commission has now come to the conclusion that this measure, taken in isolation, does not constitute State aid because it does not favour certain undertakings or the production of certain goods. Indeed, 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,

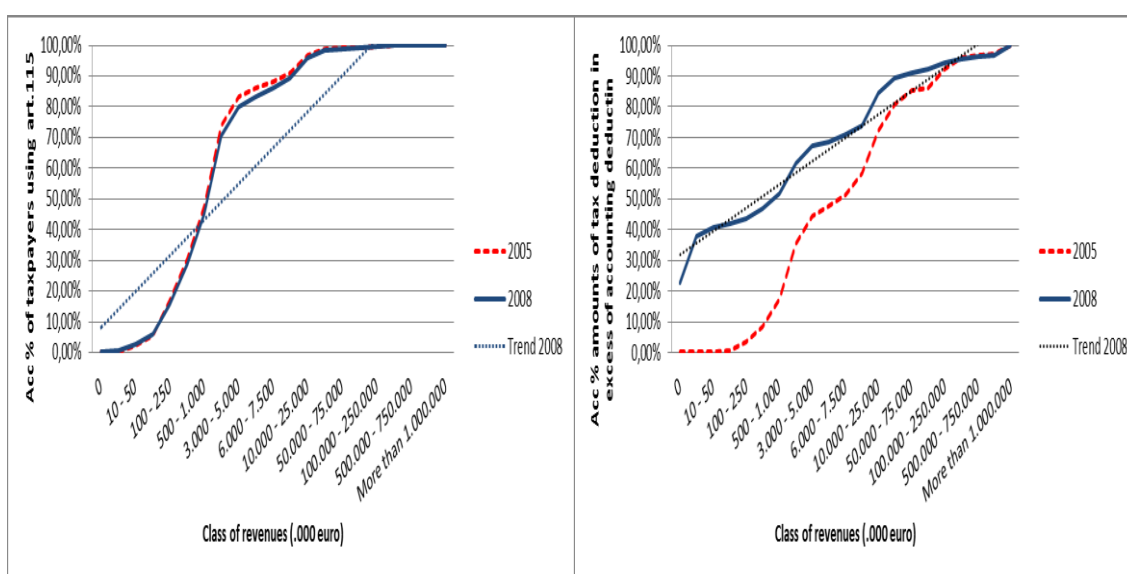
<sup>70</sup> See notably letter dated 2 August 2011 from the Spanish authorities in response to Commission Decision C(2011) 4494 final, section 3.2.2. regimen de transparencia aplicable a las AIE, first paragraph: "*Siguiendo lo dispuesto en el artículo 1 de la ley 12/1991, de 29 de abril, de Agrupaciones de Interés Económico (...), dichas entidades tienen personalidad jurídica propia, carácter mercantil y capacidad para desarrollar actividades económicas.*"

<sup>71</sup> See judgment of the Court of Justice in case 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7; judgment of 18 June 1998 in case C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36; judgment of 12 September 2000 in joined cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

<sup>72</sup> See judgment of the Court of Justice of 3.03.2005 in case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40.

legal status or location of the assets. It also applies without exception to all goods that are susceptible of depreciation.

- (129) Moreover, the limitation to leased assets does not constitute an element of selectivity as the acquisition of any assets can be financed through financial leasing contracts which are generally accessible to companies of all sectors and sizes. There is no indication that the beneficiaries of the measure are *de facto* concentrated in certain sectors or productions. The statistics provided by Spain concerning the use of Article 115 TRLIS by Spanish tax payers (see charts below) confirm 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 expense<sup>73</sup> 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

- (130) 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. Finally, the Commission notes that the conditions of application of Article 115, paragraph 6 TRLIS are clear, objective and neutral and that no prior authorisation is necessary for it to apply. As a consequence, the tax administration does not dispose of any power to discretionarily authorise or reject the application of that measure<sup>74</sup>.
- (131) The Commission therefore concludes that the accelerated depreciation of leased assets (Article 115(6) TRLIS) on its own does not confer a selective advantage to the EIGs in STL operations

<sup>73</sup> 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.

<sup>74</sup> See the judgment of the Court of Justice in Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39, and the case law cited therein.

**5.3.2.2 Discretionary application of early depreciation (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS) – measure 2**

- (132) The rules for depreciation in the Spanish tax law (Article 11 TRLIS) usually provide that the cost of an asset should be spread over its economic life, hence from the moment it is used for the purpose of the economic activity. According to Article 115, paragraph 6 TRLIS, accelerated depreciation of leased assets should take account of the date on which the asset became operational. Since it allows accelerated depreciation to begin before the asset starts being operated, Article 115, paragraph 11 TRLIS confers an economic advantage.
- (133) This possibility is a derogation from the general rule set out in paragraph 6 of the same article and is subject to discretionary authorisation by Spanish authorities; this measure is therefore *prima facie* selective. Contrary to what Spain and some third-parties allege, the criteria for granting the authorization are not clear and objective, and even if they were clear and objective this would not be sufficient to rule out their selective nature<sup>75</sup>. The Commission notes that the criteria set out in Article 115, paragraph 11 TRLIS are vague and require interpretation from the tax administration which has not published any administrative rules or explanations in this respect. The discretionary application of early depreciation on the basis of vague criteria introduces selectivity into the STL system, even if the discretionary powers are not exercised in an arbitrary manner<sup>76</sup>. In addition, the Commission notes that Spain did not convincingly explain why all the conditions imposed by Article 48, paragraph 4 TRLIS and Article 49 RIS would be necessary to avoid abuses. For example, the specific characteristics of the economic use of the asset<sup>77</sup> should be demonstrated, as well as the absence of effect on the taxable amount arising from the use of the asset or transfer of ownership<sup>78</sup>. No justification was presented for these limitations, which introduce further elements of selectivity. Spain did not demonstrate either why a prior authorisation would be necessary. Ensuring the reality of a leasing operation, for instance, appears as important for allowing the normal deduction of lease / depreciation costs of an asset or for the application of accelerated depreciation as it is for the anticipation of such deduction. However, the former measures are not subject to prior authorisation and, as for those measures, an ex post verification of clear and objective criteria applicable to early depreciation of leased assets would appear to suffice.

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<sup>75</sup> Judgment of the Court of First Instance of 6 March 2002 in joined cases T-92/00 and T-103/00 *Diputación Foral de Álava v Commission* [2002] ECR II-1385, paragraph 58.

<sup>76</sup> *Ibidem*, paragraph 35.

<sup>77</sup> Art. 115, paragraph 11 TRLIS: "*The Ministry (...) may determine the date referred to in paragraph 6 (...) taking into account the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic 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 (...)*" (Stress added).

<sup>78</sup> Article 49, paragraph 3 c) RIS: "*The application shall at least contain the following information: c) Proof of the specific characteristics of the asset's use. The legal and financial reports on the intended use of the asset purchased through a financial lease agreement shall be provided, indicating the specific contractual formulas that will be used and the positive and negative financial flows that will occur.*"

- (134) In Decision C(2011) 4494 final, the Commission mentioned the fact that the Spanish authorities had confirmed in a meeting, based on authorisations issued, that the conditions of Article 115, paragraph 11 TRLIS were only deemed fulfilled in the case of acquisitions of vessels involving the switch from the normal corporate taxation regime to the TT system<sup>79</sup> and the subsequent transfer of the ownership of the vessel to the shipping company through the lifting of an option in the context of a bareboat charter. Spain has denied<sup>80</sup> to have made such statement but acknowledged interpretive difficulties<sup>81</sup>. The Commission notes that no evidence was provided establishing that authorisations for applying early depreciation have been granted in other circumstances.<sup>82</sup>
- (135) On the basis of 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 a detailed manner and provide all the relevant contracts (notably shipbuilding contract, leasing contract, bareboat charter, option contracts, debt assumption and release agreement). According to Spain, these elements are necessary to control that the conditions imposed by Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS are respected.
- (136) However, the Commission notes that the procedure set out in implementing regulations<sup>83</sup> confers important discretionary powers on the tax administration to interpret the legal requirements and possibly impose additional conditions. In particular, the administration is allowed to require any additional information they may deem relevant for the assessment<sup>84</sup>. In this respect, the Commission also notes that in certain of the examples provided, the requests filed by the applicants also featured additional annexes which are not necessary to demonstrate that the conditions imposed by Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS are respected: (1) a detailed calculation of the overall tax benefits and how they will be shared between the shipping company, on the one hand, and the EIG and/or its investors on the other hand and (2) a statement by the shipyard, detailing the economic and social benefits expected from the shipbuilding contract. According to some complainants, these documents are required by the tax administration in the context of the authorisation process. According to Spain, these elements were provided by the applicants (EIGs) on their own initiative. These documents notably indicate that the importance of a shipbuilding contract for the Spanish economy is taken into account, as well as the overall tax benefit generated by the STL operation.

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<sup>79</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>80</sup> "(...) las autoridades españolas niegan haber confirmado "en la práctica", como se afirma en el párrafo (34) de la Decisión de la Comisión, que sólo los activos acogidos posteriormente al régimen de tonelaje serían susceptibles de acogerse a los dispuesto en el art. 115.11 del TRLIS."

<sup>81</sup> "Las autoridades españolas se limitaron a poner de manifiesto la dificultad interpretativa que introducía el requisito, previsto por el legislador, de supeditar la aplicación de la amortización anticipada a la ausencia de efectos en el cálculo de la base imponible derivada de la utilización efectiva del bien así como en las rentas derivadas de su transmisión."

<sup>82</sup> 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 TRLIS and to be subject to the review and authorisation of the tax administration.

<sup>83</sup> In particular Article 49 RIS.

<sup>84</sup> Article 49, paragraph 4 RIS: "The Directorate-General for Taxation may request from the taxable person any data, reports, records and proof considered necessary."

- (137) The Commission concludes that the compulsory prior authorisation procedure, the necessary interpretation of the vague conditions of Article 115, paragraph 11 TRLIS Article 48, paragraph 4 TRLIS and Article 49 RIS, the possibility for the tax administration to request any additional document or information are clear evidence that the tax administration enjoys large discretionary powers in the exercise of its duty to authorise STL operations.
- (138) 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>85</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>86 87</sup>.
- (139) The Commission therefore considers that the discretionary application of early depreciation of leased assets by application of Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS confers a selective advantage to the EIGs involved in STL operations and their investors.

### **5.3.2.3 The tax status of Economic Interest Groupings (Articles 48 and 49 TRLIS) – measure 3**

- (140) The Commission considers that the tax transparent status of EIGs enshrined in Articles 48 and 49 TRLIS merely enables different operators to join and finance any investment or carry out any economic activity. As a consequence, that measure does neither confer any selective advantage to the EIGs nor to their members.

### **5.3.2.4 The tonnage tax system (Articles 124 to 128 TRLIS) – measure 4**

- (141) As explained in Section 2.2.4 above, the TT system constitutes an existing State aid scheme, approved by Commission Decision C(2002)582fin of 27 February 2002. It includes the rules provided in Article 125, paragraph 2 TRLIS concerning the treatment of hidden tax liabilities and capital gains in the context of a transfer of used or second-hand assets previously subject to the general tax system to the TT system.
- (142) Indeed, as explained in Recital (17) above, under normal circumstances – i.e. when a company stays within the general corporate tax system rather than switch to the alternative TT system – the tax advantage resulting from early / accelerated depreciation of assets in the first years (increasing hidden tax liabilities) is compensated to a large extent in the subsequent years (decreasing hidden tax liabilities) or upon sale or dismantling of the asset (taxation of capital gain). Over the whole period, this process results in the deferment of the payment of certain amounts of tax. Because the tax paid in the TT does not depend on the difference between profits and expenses, a switch to the TT in the middle of the period implies that hidden tax liabilities are not settled.
- (143) Compared to what would happen in the context of the general tax system, the further deferment under TT of the compensation of hidden tax liabilities as permitted by

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<sup>85</sup> OJ C 384 of 10.12.98

<sup>86</sup> See *Notice on fiscal aid* section on Discretionary administrative practices, points 21 and 22.

<sup>87</sup> Case C-241/94 *France v. Commission* (Kimberly Clark Sopalin), Rec. 1996 p. I-4551



Article 125, paragraph 2 TRLIS confers an additional selective economic advantage to those companies that switch to the TT, in comparison to those who stay within the general tax system.

- (144) As explained below, in section 5.4., the TT system as approved by the Commission does not extend to the tax treatment of revenues obtained from bareboat chartering out, which therefore do not constitute existing aid, but new aid.

### **5.3.2.5 Article 50, paragraph 3 RIS – measure 5**

- (145) Compared to what was authorised as part of the notified TT scheme, Article 50, paragraph 3 RIS provides a further advantage: by way of derogation from the normal application of Article 125, paragraph 2 TRLIS, certain sea-going vessels that would normally be regarded as used or second-hand upon their transfer into the TT system are deemed to be new. Consequently, the settlement of hidden tax liabilities – normally deferred until sale or dismantling of the asset pursuant to Article 125, paragraph 2 TRLIS – is definitely cancelled. This cancellation constitutes an economic advantage.
- (146) The economic advantage conferred by Article 50, paragraph 3 RIS is selective because it is not available in respect of all assets. It is not even available to all vessels subject to the TT and Article 125, paragraph 2 TRLIS. In fact, this advantage is only available under the condition that the vessel is acquired through a financial leasing contract previously authorised by the tax administration. As already mentioned, the Spanish authorities have confirmed that this condition was *de facto* only regarded by the tax administration as fulfilled when a financial leasing contract had been authorised in the context of an application for early depreciation pursuant to article 115, paragraph 11 TRLIS. Neither Spain nor any third-party has referred to other circumstances that would allow a leasing contract to be previously authorized by the tax administration. As mentioned in section 5.3.2.2 above, such authorisations were granted in the context of substantial discretionary powers exercised by the tax administration and *de facto* only in relation to newly built sea-going vessels.
- (147) Contrary to the argument made by Spain and certain third-parties, Article 50, paragraph 3 RIS does not merely introduce a clarification to the ring-fencing rules notified, nor to the concept of "used vessel". By considering that a leased vessel is still new on the date the call option is exercised by the lessee, subject to the condition that the leasing contract was previously approved by the tax administration, it derogates to this ring-fencing rule<sup>88</sup> enshrined in Article 125, paragraph 2 TRLIS. This selectively

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<sup>88</sup> See Commission Decision C(2002)582final of 27 February 2002, Section 2.12.1. Desgravaciones por amortización: "*Las plusvalías obtenidas antes de la entrada en vigor del impuesto de tonelaje están sujetas a tributación ordinaria de acuerdo con las normas generales del impuesto de sociedades aplicables en el momento de enajenación del buque. Para garantizar el cumplimiento de esta disposición se establece la obligación de constituir una reserva indisponible equivalente a la diferencia entre el valor normal de mercado y el valor neto contable de cada buque, es decir, a la plusvalía atribuible a los buques en el momento de acogerse al régimen. Esta reserva deberá tributar en caso de que se transfiera la propiedad del buque. Además, con objeto de evitar una utilización indebida de la normativa, la eventual diferencia positiva entre la depreciación fiscal y la contable también tributa de acuerdo con las normas generales en el momento de la enajenación del buque, evitando así que una depreciación contable eventualmente menor que la fiscal se traduzca en una menor plusvalía y, por tanto, que pueda eludirse parcialmente la tributación plena de las plusvalías.*" (stress added)

introduces an additional advantage by preventing the taxation of the subsequent capital gain.

- (148) The Commission considers that the award of this additional selective advantage – be it by reference to the general tax scheme or even by reference to the normal application of the alternative TT system and Article 125, paragraph 2 TRLIS as authorised by the Commission – cannot be justified by the nature and general scheme of the Spanish tax system.
- (149) Indeed, the Commission has authorised Article 125, paragraph 2 TRLIS as a ring-fencing measure supposed to prevent abuse of Article 125, paragraph 1, i.e. to avoid that operators transfer used and over depreciated vessels to the TT system with the only purpose to sell them with a substantial capital gain that would be exempted under the TT. The Commission notes in that respect that the STL operations feature EIGs which lease – then briefly own – one single vessel which they do not operate themselves and switch to the TT for the very limited period of time necessary to lift the option of the leasing contract and transfer the ownership of their only vessel to the shipping company. Such operations do not appear to be in line with the objectives of the TT system as envisaged in the Maritime Guidelines.
- (150) As a consequence, the Commission does not agree that it is logical to consider a vessel as "new" on the date the option is lifted because no third parties ever used it before the leaseholder, or because the lifting of the option is already agreed when the leasing contract is signed.
- (151) As for the first part of this argument, the Commission notes that the ring-fencing rule also applies to vessels transferred by one operator from the normal tax system to the TT system, i.e. without any change in the ownership and without any third party using it.
- (152) As for the second part, the fact that the option is already agreed has nothing to do with determining whether the vessel is new. The Commission did not receive any explanation why such vessel should be regarded as new – irrespective of who is the owner –on the day the option is lifted. It did not receive either any convincing explanation why this fiction would only be sensible when the leasing contract concerned was previously approved by the tax administration.
- (153) In that respect, the Commission notes that the capital gain would not be tax exempted if Article 50, paragraph 3 RIS only clarified that leased vessel are considered as new as on the day the leasing contract is signed without any consideration to the date upon which the option is lifted. In that case, the EIG should be regarded as the owner of the vessel prior to its transfer into the TT system, the vessel would be regarded as used or second-hand on entry into the TT system and Article 125, paragraph 2 TRLIS would apply, leading to the deferred settlement of the hidden tax liabilities / to the taxation of the capital gain when the vessel is sold or dismantled.
- (154) The Commission therefore considers that Article 50, paragraph 3 RIS confers a selective advantage to undertakings acquiring vessels through financial leasing contracts previously authorised by the tax administration and in particular to the EIGs and/or their investors involved in STL operations.

**5.3.2.6 Selective advantage resulting from the STL as a whole. Beneficiaries of the advantage**

- (155) The amount of the economic advantage resulting from the STL as a whole corresponds to the advantage that the EIG would not have achieved in the same financing operation by the sole application of general measures. In practice, this advantage corresponds to the sum of the advantages reaped by the EIG by application of the selective measures identified above, i.e.
- the interest saved on the amounts of tax payment deferred by virtue of the early depreciation (Article 115, paragraph 11 TRLIS, 48, paragraph 4 TRLIS and Article 49 RIS);
  - the amount of tax avoided or of interest saved on tax deferred by virtue of the TT (Articles 128 TRLIS), given that the EIG was not eligible to the TT;
  - the amount of tax avoided on the capital gain made on the sale of the vessel by virtue of Article 50, paragraph 3 RIS.
- (156) Looking at the STL as a whole, the advantage is selective because it was subject to the discretionary powers conferred on it – by the compulsory prior authorisation procedure and by the imprecise wording of the conditions applicable to early depreciation. Other measures applicable only to maritime transport activities eligible under the Maritime Guidelines – in particular Article 50, paragraph 3 TRLIS – being dependent on that prior authorisation, the whole STL system is selective. As a consequence, the tax administration would only authorise STL operations to finance sea-going vessels (sectorial selectivity). As confirmed by the statistics provided by Spain, all of the 273 STL operations organized until June 2010 concern sea-going vessels.
- (157) In that respect, the fact that all shipping companies, including companies established in other Member States, potentially have access to STL financing operations does not affect the conclusion that the STL favours certain activities, namely the acquisition of sea-going vessels through leasing contracts, in particular in the view of bareboat chartering them out and later reselling them.
- (158) European shipyards complained on several occasions that they could not access to STL financing by Spanish banks.
- (159) In its decision to open the formal investigation procedure the Commission observed that all but one vessel admitted to STL were built in Spanish shipyards. The Commission expressed doubts<sup>89</sup> that such an outcome could reasonably be explained in the context of operations resulting only from the free choice of economic operators on a free and competitive market.
- (160) However, in the absence of any evidence concerning the rejection of applications related to the acquisition of non-Spanish vessels, the Commission cannot establish that STL was *de facto* limited to the acquisition of Spanish vessels. In addition, the Commission notes that by a binding notice in response to a question by a prospective investor, dated 1 December 2008, the Spanish Tax Administration expressly

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<sup>89</sup> See Recital 73 of Commission Decision C(2011) 4494 final.

confirmed that STL applies to ships built in other Member States of the EU.<sup>90</sup> Under these circumstances, the Commission concludes that the STL entails no further element of selectivity to the benefit of Spanish shipyards and no discrimination based on the place of establishment of the shipyard.

- (161) The Commission considers that the advantage accrues to the EIG and by transparency to its investors. Indeed, the EIG is the legal entity that applies all the tax measures and, where applicable, the one that files requests for authorisations with the tax authorities. For instance, it is not disputed that requests for the application of early depreciation or TT were filed on behalf of the EIGs. From a tax perspective, the EIG is a tax transparent entity and its taxable revenues or deductible expenses are automatically transferred to the investors.
- (162) In a STL operation, it appears that, in economic terms, a substantial part of the tax advantage collected by the EIG is transferred to the shipping company through a price rebate. The annexes attached to certain application files when EIGs' request the prior authorisation for early depreciation (see recital (168) below) confirm that the operators involved in STL operations consider that the tax benefits resulting from the operation are shared between EIGs and/or their investors and the shipping companies. However, the question of the imputability to the State of such an advantage will be discussed in the next section.

(163) Whereas other participants in STL transactions such as shipyards, leasing companies and other intermediaries benefit from an indirect effect of that advantage, the Commission considers that the advantage initially collected by the EIG / investors is not transferred to them.

### **5.3.3 Transfer of State resources and imputability to the State**

#### ***State resources***

- (164) The selective advantages for the EIGs and their members identified in measures 2, 4 and 5 above (see Sections 5.3.2.2, 5.3.2.4 and 5.3.2.5 above) result from the application of tax law provisions.
- (165) For each of the STL transactions, the consumption of State resources translates in interest foregone on the tax deferral resulting from the early depreciation of leased assets, in 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 in tax foregone in the absence of taxation of the capital gain made when the ownership of the vessel is transferred to the shipping company. 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 and interest foregone.
- (166) In the context of STL operations, the State resources financing the selective advantages are initially transferred by the State to the EIG. By way of tax transparency, the State resources are then transferred by the EIG to its investors.

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<sup>90</sup> See <http://petete.meh.es/scripts/know3.exe/tributos/CONSUVIN/texto.htm?NDoc=12728&Consulta=buques&Pos=230>

### ***Imputability***

- (167) The measures at stake derive from the application of the Spanish tax law and from tax authorisations granted by the Spanish tax administration for the application of both the early depreciation and the TT. 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, the authorisation process was indispensable for the financing operation to go through.
- (168) According to the complainants, the tax administration would 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. Based on the examples provided by the Spanish authorities, it appears that, indeed, requests submitted to the tax administration for the authorisation of early depreciation generally 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, or in any event contain the necessary elements for making such a calculation.
- (169) However, all the economic consequences beyond the grant of the tax advantage to the EIGs result from a combination of legal transactions between private entities. Indeed, the applicable rules do not oblige the EIGs to transfer part of the tax advantage to the maritime companies, even less to the shipyards or to the intermediaries. It is true that the tax administration enjoys a wide discretion and that, in that context, it assesses the economic impact of the overall transaction, but this does not suffice to establish that the transfer of part of the advantage to the maritime companies or the amount of such transfer is decided by the Spanish authorities. Such a situation must be distinguished from the situation examined in the *Air Caraïbes* or in the French *GIE Fiscaux* decisions, where there was a legal obligation for the investors to transfer at least 60% or, respectively, two thirds of the advantage to the users and the French authorities verified that each transaction complied with that requirement.
- (170) Hence, the selective advantages were granted through State resources. They are clearly imputable to the Spanish State as far as they benefit the EIGs and their investors. However, this is not the case for the advantages flowing to the maritime companies and *a fortiori* for the indirect advantages flowing to the shipyards and to the intermediaries.

### **5.3.4 Distortion of competition and effect on trade**

- (171) Finally, this advantage threatens to distort competition and to affect trade between Member States. 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>91</sup>. It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition<sup>92</sup> and to trade between Member States.

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<sup>91</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>92</sup> Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

- (172) In the present case, the investors, i.e. the members of the EIGs are active in different sectors of the economy, in particular in sectors open to intra-EU trade. In addition, by the operations benefitting from STL they are active through the EIGs on the markets of bareboat chartering and of the acquisition and sale of sea-going-vessels, which are open to intra-EU trade. The advantages flowing from STL strengthen their position on their respective markets, thereby distorting or threatening to distort competition.
- (173) Therefore, the economic advantage received by the EIGs and their investors benefitting from the measures under scrutiny are therefore liable to affect trade between the Member States and distort competition in the internal market.

#### 5.4 EXISTING OR ILLEGAL AID

- (174) Article 1, (b) 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*<sup>93</sup> (hereafter "*Regulation 659/1999*") defines different situations where aid is regarded as existing aid. According to submissions received in the present case, existing aid would be (i) aid which existed prior to the entry into force of the Treaty in Spain or (ii) aid previously approved by the Commission.

#### ***The Tonnage tax constitutes existing aid, but its application to revenues obtained from bareboat chartering out constitutes new aid***

- (175) Amongst the measures qualified as State aid<sup>94</sup>, the Commission considers that only the legal provisions of the TT system (Articles 124 to 128 TRLIS, measure 4) constitute an existing State aid scheme because it was approved by the Commission in 2002.
- (176) However, the Commission considers that the EIGs involved in Tax Lease operations do not meet all the conditions to be eligible to the Spanish TT.
- (177) Indeed, the Spanish TT was authorised by the Commission as compatible aid on the basis of the Maritime Guidelines, which only apply to undertakings carrying out genuine maritime transport activities<sup>95</sup> either with vessels of their own or with vessels chartered in. By exception, the TT can apply to activities that the Guidelines regard as ancillary or assimilate to maritime transport. For instance, under certain conditions, ship management, dredging or towing activities may qualify for aid<sup>96</sup>. By contrast, the mere ownership of a vessel, its acquisition through a financial leasing or its renting/chartering out to third parties, without assuming the full responsibility for the vessel's operation cannot be regarded as a qualifying activity. Obviously, the

<sup>93</sup> See OJ L 83 of 27.3.1999, p.1.

<sup>94</sup> As explained in Sections 5.3.2.1 and 5.3.2.3, the Commission does not regard the provisions of article 115, paragraph 6 TRLIS (Accelerated depreciation), respectively Article 48 TRLIS (EIG status) as State aid.

<sup>95</sup> See Maritime Guidelines, Section 3.1 Fiscal Treatment of shipowning companies, 12th paragraph: "*These guidelines apply only to maritime transport.*"

<sup>96</sup> See Maritime Guidelines, Section 3.1 Fiscal Treatment of shipowning companies, 11<sup>th</sup>, 12<sup>th</sup> and 16<sup>th</sup> paragraphs: "*Ship management companies may qualify for aid only in respect of vessels for which they have been assigned the entire crew and technical management. (...) to be eligible, ship managers have to assume from the owner the full responsibility for the vessel's operation as well as take over from the owner all the duties and responsibilities imposed by the ISM code*"; "*The Commission can accept that the towing at sea of other vessels, oil platforms, etc. falls under that definition.*" and "*Dredging activities are in principle not eligible for aid to maritime transport. However, fiscal arrangement for companies (such as tonnage tax) may be applied to those dredgers whose activities consist in 'maritime transport' (...).*"

beneficiary of the TT system should be the one carrying out the qualifying transport activity with the qualifying vessel.

- (178) It is true that, exceptionally, *bareboat chartering out* activities have previously been allowed by the Commission as part of certain notified TT schemes but only on a temporary basis and under specific circumstances related to overcapacity<sup>97</sup>. Under those conditions, the core activity of the concerned undertakings remains maritime transport and the revenues from bareboat chartering out activities can be regarded as ancillary to that core activity. This tolerance is fully in line with objectives of the Maritime Guidelines: "*maintaining and improving maritime know how and protecting and promoting employment for European seafarers*" and "*contributing to the consolidation of the Maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets*".<sup>98</sup>
- (179) In line with the Maritime Guidelines, the Commission Decision C(2002)582 final of 27 February 2002 authorizing the Spanish TT system explicitly mentions that only maritime transport activities qualify for the TT<sup>99</sup>. Indeed, its Section 2.4. *Beneficiaries* provides that "*Podrán acogerse a este régimen tributario especial las entidades navieras inscritas en alguno de los registros de empresas navieras referidos en la legislación española, cuya actividad comprenda la explotación de buques propios o arrendados*" (emphasis added) and its Section 2.5. *Qualifying activities / vessels* provides that "*El régimen tributario en función del tonelaje es aplicable únicamente a los buques utilizados en actividades de transporte marítimo. Las actividades cualificadas incluyen únicamente las de transporte marítimo*" (emphasis added).
- (180) From the wording of the 2002 Commission Decision, adopted on the basis of the Maritime Guidelines, it flows that undertakings identified as shipowners under Spanish Law may benefit from the TT provided they carry out – and within the limits of – their qualifying maritime transport activities.
- (181) The Commission considers that the activity carried out by the EIGs involved in STL operations cannot be regarded as a transport activity. Indeed, at the time it enters the TT system the EIG would lease in one single vessel from a leasing company and charter it out to a third-party shipowner on a bareboat basis. If the third-party shipowner exploits the vessel to provide maritime transport services, it might be eligible to the TT. By contrast, the EIG only puts a vessel at the disposal of a third-party shipping company that exploits it. The EIG is therefore an intermediary providing rental or leasing services, not transport services.
- (182) The EIGs involved in STL operations usually charter out the only vessel they own or lease in, which hence represents 100% of their fleet. In such circumstances, the EIG does not bear any risk or responsibility in the technical, crew or even commercial

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<sup>97</sup> See Commission Decision of 11 December 2002 in case N 504/02, Ireland, Introduction of a tonnage tax, Recital 28; Commission Decision of 20.12.2011 in SA.30515, Finland., Amendments to the tonnage taxation aid scheme., Recital 10.

<sup>98</sup> See Maritime Guidelines, Heading 2.2. *General objectives of revised State aid guidelines*

<sup>99</sup> See, section 2.4. *Beneficiario(s)*: "*Podrán acogerse a este régimen tributario especial las entidades navieras inscritas en alguno de los registros de empresas navieras referidos en la legislación española, cuya actividad comprenda la explotación de buques propios o arrendados.*" and 2.5. *Actividades / buques cualificados*: "*El régimen tributario en función del tonelaje es aplicable únicamente a los buques utilizados en actividades de transporte marítimo. Las actividades cualificadas incluyen únicamente las de transporte marítimo*".

management of the vessel. It is a pure intermediary and the revenues from bareboat chartering out cannot be regarded as ancillary to a maritime transport activity.

- (183) In addition, EIGs stay within the TT system for a short period of time, i.e. a couple of weeks necessary for them to lift the option of the leasing contract and for the shipowner to lift the option associated to the charter contract. Allowing this type of activities under the TT system does not appear to increase in any durable way the tonnage under the flag of – or controlled from – EEA countries. For the same reasons, the EIGs involved in STL operations do not appear to contribute to the objective of "*maintaining (...) maritime know how and protecting (...) employment for European seafarers*" or to the "*consolidation of the Maritime cluster*".
- (184) In conclusion, considering the activity of undertakings such as the EIGs involved in STL as a maritime transport activity is not covered by the approval flowing from the 2002 Decision.
- (185) Therefore, the Commission considers that the submission to the TT of undertakings such as the EIGs involved in STL<sup>100</sup> operations leads to the award of new aid, be it through the calculation of the taxable revenue as a function of the tonnage operated or through the possibility to postpone the settlement of hidden tax liabilities by virtue of Article 125, paragraph 2 TRLIS up until the vessel is either sold or dismantled.

***The other measures constitute new aid***

- (186) Early depreciation of leased assets (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS, measure 2) is not existing aid because it was introduced in 2002, i.e. after Spain joined the EU in 1986 and was never notified to nor otherwise approved by the Commission. Moreover, the effect of this measure is clearly severable from the effect of accelerated depreciation. This measure constitutes illegal aid.
- (187) Similarly, Article 50, paragraph 3 RIS that permitted the exemption of capital gains on vessels acquired in the context of previously authorised leasing contracts (measure 5) entered into force in 2002 without prior notification or approval by the Commission.
- (188) Indeed, the Commission considers that the approval granted in 2002 does not cover the implementing measures and in particular Article 50, paragraph 3 RIS because it introduces an exception to the ring-fencing rules applicable to used vessels pursuant to Article 125, paragraph 2 TRLIS which corresponds to an additional advantage. This exception should have been notified together with the legal provisions approved by the Commission but was not.
- (189) In fact, the application of Article 125, paragraph 2 TRLIS did not appear to necessitate any further definition or clarification. It would normally trigger the taxation of the capital gain made by a lessor on the transfer of a vessel to the lessee (shipping company). If Spain considered that a clarification was necessary, such clarification should have been made upon notification.
- (190) Consequently, the implementing measures and in particular Article 50, paragraph 3 RIS also constitute illegal aid.

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<sup>100</sup> It is reminded that EIGs as other forms of undertakings are in principle eligible to the TT if they carry out eligible activities.



## 5.5 COMPATIBILITY WITH THE INTERNAL MARKET

- (191) The Commission concludes that the following measures constitute State aid, on an individual basis and in the context of the STL:
- Early depreciation of assets acquired through a financial leasing (Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS)
  - TT as far as the eligibility of pure activities of bareboat chartering out is concerned
  - Article 50, paragraph 3 RIS
- (192) In principle, State aid as defined by 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 or aid to certain beneficiaries can be declared compatible by the Commission. Depending on the category of beneficiaries, specific rules such as the Maritime Guidelines<sup>101</sup> or the Shipbuilding Framework<sup>102</sup> could apply.
- (193) Neither the Spanish authorities nor third-parties identified as beneficiaries in the present decision have invoked the application of any other provision of article 107, paragraphs 2 and 3 TFEU nor the application of any other State aid framework adopted on the basis of article 107, paragraph 3, c) TFEU.

### 5.5.1 Application of the Maritime Guidelines

#### ***Eligibility of revenues of bareboat chartering out to the TT***

- (194) As mentioned in recital (71) above, the Spanish authorities and certain third parties consider that chartering out is covered by the 2002 decision authorizing the Spanish TT because it refers to *the operation of owned and chartered ships*.
- (195) The Commission does not agree with that interpretation of the 2002 decision. Indeed, both the Maritime Guidelines and the 2002 decision make it clear that the TT should only apply to maritime transport activities<sup>103</sup>. As a rule, revenues from other activities outside transport – even when carried out by a maritime transport company – cannot be taxed according to the TT system<sup>104</sup> or by explicit exception and under conditions (ancillary activities, dredging, towage).

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<sup>101</sup> *Community guidelines on State aid to maritime transport*, OJ C 205 of 5.7.1997, p.5. (applicable until 16.1.2004) OJ C 13 of 17.1.2004, p.3 (applicable from 17.1.2004).

<sup>102</sup> Framework on State aid to shipbuilding, OJ C 317 of 30.12.2003, p.11. However, given that the shipyards are not beneficiaries or the aid, and that it is impossible to quantify an economic flow to their benefit, it is not necessary to assess the aid under this Framework.

<sup>103</sup> See Maritime Guidelines, Section 2.1 *Scope of revised State aid Guidelines*, first paragraph: "*These guidelines cover any aid granted by Member States or through State resources in favour of maritime transport*" and Section 3.1 *Fiscal Treatment of shipowning companies*, 12th paragraph: "*These guidelines apply only to maritime transport.*"

<sup>104</sup> See Maritime Guidelines, Section 3.1 *Fiscal treatment of shipowning companies*, last paragraph: "*the fiscal advantages mentioned above must be restricted to shipping activities; hence, in cases where a shipowning company is also engaged in other commercial activities, transparent accounting will be required in order to prevent 'spill-over' into non-shipping activities.*"

- (196) In this context, *the operation of owned and chartered ships* mentioned as an eligible activity in the 2002 decision only covers the "operation" of vessels that are either owned or chartered in on a bareboat basis and - both for owned and chartered ships - operated by a maritime transport company.
- (197) As already mentioned in Section 5.3.2.4 , the financial EIGs involved in STL financing operations do not operate vessels themselves and do not provide any maritime transport service. They are financial intermediaries involved in the collective financing of an asset. They are not active in the strategic, technical, crew or even commercial management of the vessel they charter out and they do not bear any risk or take responsibility for the provision of maritime transport services.
- (198) In addition, the Commission notes that the EIGs involved in STL operations charter their only vessel out with both a buy (or "call") option which the shipping company commits itself from the outset to exercise and a sell (or "put") option which the EIG can exercise. This is equivalent to a delayed – yet definitive – transfer of ownership of 100% of the EIG's fleet. Consequently, the EIG is not in the same situation as those shipowners suffering from temporary overcapacity which, in search for some flexibility, charter out a part of their fleet to third-party operators for a limited period of time (see Recital (178) above).
- (199) For all those reasons, the Commission considers that the EIGs involved in STL operations are neither eligible to the Spanish Tonnage Tax system as authorized by the Commission, nor to the provisions of the Maritime Guidelines.
- (200) However, the Commission considers that in view of the general character of leasing operations, the EIGs involved in STL operations and their investors act as intermediaries which channel to other beneficiaries (shipping companies) an advantage that pursues an objective of common interest.

***Eligibility of EIG and/or their investors as intermediaries***

- (201) Consistently with the approach adopted in decision of 20 December 2006 concerning the French *GIE fiscaux*<sup>105</sup>, the Commission takes the view that, to the extent it represents a fair remuneration for their intermediation in the transfer to the shipping companies an advantage that pursues an objective of common interest, the aid retained by the EIG and/or its investors would be found compatible in the same proportion. It is true that, in this case, there is no legal obligation for the EIGs to transfer part of the aid received to the shipping companies. However, in the exercise of its discretion in assessing the compatibility of the measure under Article 107(3)(c) TFEU, the Commission considers it appropriate to take into account the favourable effects of the measure for the maritime sector and to apply *mutatis mutandis* the provisions of the Maritime Guidelines – normally applicable to aid measures – to the advantage transferred to the shipping company. Therefore, if the application of the Maritime Guidelines to a shipping company involved in a specific STL operation results in a ratio compatible advantage/total advantage of x%, the same percentage of the aid retained by the EIG and/or its investors is compatible.

***Advantage for the end-user shipping companies***

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<sup>105</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

- (202) Insofar as the advantage benefits shipping companies, article 107, paragraph 3, c) TFEU together with the Maritime Guidelines<sup>106</sup> is the only relevant framework to assess its compatibility.
- (203) The Commission considers that the shipping companies do not benefit from State aid within the meaning of Article 107(1) TFEU. Nevertheless, in order to identify the amount of compatible aid at the level of EIGs – as intermediaries channelling to shipping companies an advantage that pursues an objective of common interest – the Commission considers that the Maritime Guidelines should be applied *mutatis mutandis* to the advantage transferred by the EIG to the shipping company to determine (1) the amount of the aid initially received by the EIG and transferred to the shipping company that would have been compatible, had the amount transferred constituted State aid to the shipping company, (2) the proportion of such compatible advantage in the total advantage transferred to the shipping company and (3) the amount of aid that should be deemed compatible as a remuneration of the EIGs for its intermediation.
- (204) The Maritime Guidelines describe different categories of State aid and the conditions under which aid can be authorised by the Commission. In particular, the Guidelines make it clear that they only apply to maritime transport activities as well as to a limited number of ancillary or assimilated activities.
- (205) To the extent that an end-user shipping company provides maritime transport services (or assimilated activities) and meets all the conditions imposed by the Guidelines, an advantage received by this company that would constitute aid would be compatible with the internal market.
- (206) Pursuant to the Maritime Guidelines, aid can be granted through different categories of measures. One of the important conditions imposed by Article 10 of the 1997 Guidelines and Article 11 of the 2004 Maritime Guidelines is an overall aid ceiling, i.e. a maximum amount of State aid an undertaking can be granted which can be deemed compatible with the internal market<sup>107</sup>.
- (207) Under the 1997 Guidelines, the aid ceiling corresponds to "*a reduction to zero of taxation and social charges of seafarers and of corporate taxation of shipping activities*". Under the 2004 Guidelines, the ceiling correspond to *a reduction to zero of taxation and social charges of seafarers and a tax reduction by application of a TT scheme*. However, the 2004 Guidelines also mention that "*the total amount of aid granted (...) should not exceed the total amount of taxes and social contribution collected from shipping activities and seafarers.*"
- (208) Regarding the application of the aid ceiling to specific beneficiary shipowners, the Commission considers that it should be envisaged at EEA level. This means that the ceiling should take due account of the corporate tax and/or social charges paid by the beneficiaries in other EEA Member States. This approach is consistent with the *FagorBrandt* case-law<sup>108</sup> that confirmed that the assessment of a State aid measure

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<sup>106</sup> As indicated above, Spain invoked the 2002 Commission decision authorising the Spanish Tonnage Tax as a basis for compatibility. In fact, the conclusion that the TT is compatible with the internal market is based on the Maritimes Guidelines.

<sup>107</sup> This ceiling only applies to certain categories of aid identified by the Guidelines: fiscal and social measures to improve competitiveness, crew relief, investment aid and regional aid.

<sup>108</sup> See Judgment of 14 February 2012 in joined cases T-115/09 and T-116/09 *Electrolux AB and Whirlpool Europe BV v. Commission*,

should take due account of the cumulative effect of possible aid awarded in different Member States.

- (209) As the present case concerns aid awarded to the EIGs in respect of the acquisition – by a shipowner – of a long-term asset, the Commission agrees with the Spanish authorities that the advantage received by the shipping company should be spread over the asset's normal depreciation period (10 years from a tax point of view) and compared to the total amount of taxes and social charges paid over the same period.
- (210) In accordance with the ceiling, all advantages in excess of the total amount of income tax and social charges of seafarers and of corporate taxation of shipping activities shall be regarded as incompatible with the Treaty.

## **5.6 RECOVERY**

- (211) Article 14 of Council Regulation (EC) No 659/1999<sup>109</sup>, provides that where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiaries. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible.
- (212) 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. This section examines whether the general principles of equal treatment, protection of legitimate expectations or of legal certainty prevent the Commission from ordering the recovery of – all or part of – the aid granted in the past.

### **5.6.1 Equal treatment**

- (213) The principle of equal treatment and non-discrimination requires that comparable situations are not treated differently and that different situations are not treated equally unless such treatment is objectively justified<sup>110</sup>.
- (214) The French GIE Fiscaux scheme is indeed comparable to the STL in a number of characteristics. It requires the intermediation of a tax transparent EIG / its investors between the builder of a long-term asset and the buyer to which the EIG leases/charters the asset. The EIG depreciates the asset in an accelerated and anticipated manner and the capital gain resulting from the sale of the asset is exempted from corporate tax. A substantial part of the benefits resulting from the tax measures are retroceded by the EIG / its investors to the buyer of the asset (for instance, a shipping company) through a reduction of the rent or of the option price. However, the French scheme featured an explicit exemption of capital gains whereas, in the STL, such exemption results from the joint application of the TT and Article 50, paragraph 3 RIS to the EIG.
- (215) The Commission also notes that the legal context and procedural history of the French and Spanish cases are different and that the Commission renounced to order the recovery for part of the period under assessment in its 2006 final decision concerning

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<sup>109</sup> OJ L 83, 27.3.1999, p. 1.

<sup>110</sup> See Judgement of the Court of Justice of 14 April 2005 in Case C-110/03 *Belgium v Commission*, paragraph 71 and case-law cited therein.

the GIE Fiscaux for reasons related to the specific procedural history of that case. In particular, France had not formally notified the scheme to the Commission but had informed it before implementing the scheme. The Commission also observes that when it initiated the formal investigation procedure with respect to the GIE Fiscaux, it had not ruled on a similar case before. On the contrary, when it initiated the formal investigation with respect to the STL, the Commission had already ruled that a similar scheme – the French GIE Fiscaux precisely – was a State aid scheme. To the extent that the legal and factual context of the GIE Fiscaux differs from that of the STL, the Commission considers that a different treatment might be justified. However, as the Commission will explain in Section 5.6.3 below, reasons relating to the principle of legal certainty lead the Commission to refrain from ordering recovery in this case until the date of publication of the Decision concerning the French GIE Fiscaux.

- (216) The Commission further considers that, in the cases mentioned in recital (92) above, the application of the principle of legitimate expectations to similar measures was justified in respect of circumstances specific to each case. For the Spanish Goodwill, a reply to a MEP had clearly qualified the scheme as a general measure. For the coordination centres and intragroup activities of multinational companies<sup>111</sup>, the Commission found that legitimate expectations existed not only on the basis of the prior authorisation of the Belgian Coordination Centres as a general measure in 1984 and 1987 but also on the answer given by the Commission to a MEP question<sup>112</sup> which stated that a broad range of tax measures – "*rules governing taxation of the European headquarters of multinational groups, designed to avoid double taxation*" – "*fell outside the scope of the State aid rules*". Moreover, all those schemes had been implemented after the answer to the MEP question was given. In the Gibraltar Qualifying Companies case, the existence of legitimate expectations relied on the fact that the measure concerned was modelled on another measure in the same Member State – the Exempt Companies scheme - which constituted existing aid. Similarly, the Orkney and Shetland measures were modelled on each other.
- (217) With regards to the STL, the Commission therefore considers that the general principle of equal treatment is respected if, considering circumstances specific to the STL, the principles of protection of legitimate expectations and of legal certainty (see sections 5.6.2 and 5.6.3 below) are respected.

## 5.6.2 Legitimate expectations

- (218) *Legitimate expectations* would result from an action from the Commission that has provided specific, unconditional and concordant assurances<sup>113</sup> of such a nature as to give rise to hopes – that are justified<sup>114</sup> – on the part of the authorities and/or

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<sup>111</sup> Coordination centres (DE), Coordination centres and Finance companies (LU), Vizcaya Coordination Centres (ES), Headquarters and International Treasury Pools (FR), Foreign Income (IE), International Financing Activities (NL).

<sup>112</sup> Answer given on 12 July 1990 to Written Question No 1735/90 from Mr G. de Vries to the Commission (OJ C 63, 11.3.1991, p. 37).

<sup>113</sup> Judgment of 25 October 2007 in Case C 167/06 P *Kominou and others v Commission*, paragraph 63, and Case C-537/08 P *Kahla Thüringen Porzellan v Commission* [2010] ECR I-12917, paragraph 63

<sup>114</sup> See judgments in Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 v Commission* [2006] ECR I 5479, paragraph 147, Judgment of 25 October 2007 in Case C-167/06 P *Kominou and Others v Commission* [2007] ECR I-141, paragraph 63, Judgment of 30 June 2004, in case T-

beneficiaries under a scheme that the scheme was lawful<sup>115</sup>. According to the case-law, no legitimate expectations can in principle be recognized in the absence of a proper notification<sup>116,117</sup>, unless exceptional circumstances are identified<sup>118</sup>.

#### **5.6.2.1 The 2001 Commission decision in Brittany Ferries (BAI)**

- (219) The Commission observes that Spain failed to notify the STL to the Commission and that the statement made in its 2001 decision concerned a different scheme – the predecessor scheme of the one assessed in the GIE Fiscaux decision – and made an explicit reference to the legal system of another Member State. As a consequence, the Commission considers that such statement does not constitute exceptional circumstances and is not sufficient to justify the acknowledgement of legitimate expectations in favour of Spain and third-party operators involved in STL operations. This conclusion is consistent with the approach adopted in the 2006 Commission decision concerning the GIE Fiscaux where the Commission did not identify any element demonstrating the existence of legitimate expectations<sup>119</sup>.

#### **5.6.2.2 The publication of the draft measures in the Spanish General Courts Official Journal**

- (220) The publication of draft measures in the General Courts Official Journal of a Member State does not meet the requirement of formal notification and stand-still imposed by this provision of the Treaty. The Commission notes that the early depreciation measure was implemented 21 months after the publication of the Procedural Regulation 659/1999 without prior notification and at the same time as the TT regime which was properly notified to – and authorised by – the Commission in accordance with the provisions of the Treaty and the Procedural Regulation.

#### **5.6.2.3 The 2001 request for information about a tax leasing scheme**

- (221) The Commission considers that this letter is not liable to have created any justified hopes concerning the STL or the individual measures involved in STL operations.
- (222) In accordance with Article 10, paragraph 1 and 2, of the Procedural regulation, the Commission analysed the information it had in its possession regarding *alleged* unlawful aid and, on 21 December 2001, requested information from the Member State. In the first place, the Commission notes that a request for information is not a

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107/02 *GE Betz v OHIM - Atofina Chemicals* (BIOMATE), [2004] ECR II-1845, paragraph 80, and the case-law cited).

<sup>115</sup> Case C-289/81, *Mavridis v Parliament*, [1983] ECR 1731, Case T-290/97, *Mehibas Dordtselaan BV v Commission* [2000] ECR II-15, paragraph 59. See also Case 265/85 [1987] ECR 01155, paragraph 44, and Case C-152/88 *Sofrimport v Commission* [1990] ECR I-153, paragraph 26.

<sup>116</sup> Pursuant to Article 108, paragraph 3 TFEU, Member States have an obligation to notify new aid measures to the Commission and to seek its approval before implementing the measure. Chapter II of the Procedural Regulation (OJEC of 27 March 1999) lays down a detailed procedure regarding the application of article 107 to notified aid.

<sup>117</sup> See Judgement of the Court of Justice of 11 November 2004 in joined cases C-183/02 P and C-187/02 P *Demasa and Territorio Histórico de Álava v Commission*, [2004] ECR I-10609, paragraphs 44-45 and 52.

<sup>118</sup> See Judgment of the General Court of 30 November 2009 in joined cases T-427/04 and T-17/05, *France v Commission* (France Télécom) [2009] ECR II-4315, paragraph 263.

<sup>119</sup> See recital 187 of that decision.

public document. Second: contrary to what *PYMAR* alleges, this request shows that the Commission did not have the information necessary to identify and assess the alleged unlawful aid. As such, even if it had been made public, it is not liable to create any legitimate expectation that the scheme did not constitute aid. Third, and most importantly, by letters of 28 January 2002 and 28 May 2002 the Spanish authorities categorically denied that any tax measure was available in support of acquisition of ships for contracts signed after 31 December 2000.

#### **5.6.2.4 The 2004 Decision concerning the Dutch notification<sup>120</sup>**

- (223) The Commission considers that this decision is not liable to have created any justified hopes concerning the STL or the individual measures involved in STL operations for the following reasons:
- (224) First, the subject of the Commission investigation in this case was not any Spanish measure but a scheme notified by the Dutch government intended to compensate Dutch shipyards or allow them to match offers made in 2000<sup>121</sup> by Spanish shipyards which allegedly benefitted from State aid granted by Spain with respect to 6 specific shipbuilding contracts. As a consequence, it was the purpose of the 2004 Commission decision to provide an assessment of the aid notified by the Netherlands, not of any aid allegedly awarded by Spain.
- (225) Second, the Spanish measure that the Netherlands intended to match was neither the STL nor any of its components. As mentioned in the 2003 decision to open the formal proceedings in that case, the Dutch authorities clearly invoked aid in the form of interest subsidies on credits allegedly awarded to shipowners pursuant to Spanish Royal Decree 442/94<sup>122</sup>. Moreover, the Commission notes that both the early depreciation of leased assets and the Spanish TT only entered into force on 1 January 2002. A draft of those measures was only published in the Spanish Official Journal on 10 October 2001. As a consequence, they could not have been used to finance shipbuilding contracts in 2000.
- (226) Third, even if *quod non*, third-party operators had imagined that the Spanish measure intended to be matched was the STL, the statements made in the 2004 decision are not liable to create any legitimate expectations. Indeed, the Commission stated that it did not have "*sufficient proof of the alleged Spanish aid*" because Spain indicated that the operating aid available under Royal Decree 442/94 would no longer be available after 31 December 2000 after which date operating aid would no longer be authorised under the 1998 *Shipbuilding Regulation*<sup>123</sup>. However, the subject of the Commission investigation was the Dutch matching aid, not the alleged Spanish aid and the main doubt raised by the Commission in the decision to open proceedings concerned the

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<sup>120</sup> Commission Decision of 30 June 2004 on the State aid which the Netherlands is planning to implement in favour of four shipyards to support six shipbuilding contracts

<sup>121</sup> See Table 2 in recital 9 of Commission Decision of 11 November 2003, OJEU C 11 of 15.1.2004, p.7.

<sup>122</sup> See recital 8 of the abovementioned Commission Decision of 11 November 2003: ("*The purpose of the notified aid is to match the interest subsidies allegedly offered by Spain. The Netherlands allege that (...) prices quoted by the Spanish yards included interest subsidies for export financing supported by the Spanish authorities, on the basis of the Spanish Royal Decree (RD) 442/94*").

<sup>123</sup> See OJ L 202, 18.07.98, p. 1

possibility under the *Framework on state aid to shipbuilding*<sup>124</sup> to match aid – be it demonstrated – awarded by another Member State, not by a non-member State.

- (227) As a matter of fact, the absence of proof of the alleged aid came as a secondary argument in the doubts expressed by the Commission. After asking questions to Spain, based on information provided by The Netherlands, the Commission could only record the Spanish denial that aid was granted<sup>125</sup> (pursuant to Spanish Royal Decree 442/94) and conclude that The Netherlands had failed to provide sufficient proof of the Spanish aid to be matched. The absence of proof of State aid does not amount to the proof of the absence of State aid in (whichever) Spanish measure. On the contrary, the Commission clarified already in the decision to open proceedings that it had “*not been able to establish that Spain had illegally granted the alleged aid, but the Commission continues to keep the EU shipbuilding market, and potential state aid violations, under review*”<sup>126</sup>.” Had they considered in good faith that the Spanish aid the Netherlands intended to match was the STL, actual or potential beneficiaries of the STL should have been alerted by the fact that Spain had denied its existence rather than pleaded its compatibility.

#### **5.6.2.5 The 2006 decision in the French GIE Fiscaux case**

- (228) The Commission considers that neither its decision to open the formal proceedings in the French GIE Fiscaux in 2004 nor its 2006 final decision concluding that the scheme was partly incompatible aid can possibly have created any legitimate expectations as argued by *PYMAR*.
- (229) Indeed, aid measures must be notified to the Commission. In the absence of a notification, only exceptional circumstances can lead the Member State and operators to legitimately expect that a measure does not constitute aid. However, if the notification and approval procedure was not respected, it cannot legitimately be expected that a measure which amounts to State aid is compatible with the internal market.
- (230) On the contrary, in the French GIE Fiscaux decision of 20 december 2006, the Commission clearly expressed its position that the French tax lease scheme conferred State aid. Knowing that the STL was a tax lease scheme similar to the French scheme, this should have alerted Spain and the beneficiaries that the STL could constitute State aid. As a consequence, any legitimate expectations possibly existing before the publication in the Official Journal of the European Union on 30 April 2007 of the Decision concerning the French scheme would stop being legitimate after that date.
- (231) Similarly, the mere absence of recovery of the incompatible aid in the French case is insufficient to have created legitimate expectations that incompatible aid possibly identified in the Spanish case would not be recovered. Indeed, reasons liable to prevent the Commission from requesting the Member State to recover the aid, if any, should be found in circumstances that are specific to the case.

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<sup>124</sup> See OJ C 317, 30.12.2003, p.11

<sup>125</sup> See recital 24 of the abovementioned final decision of 30 June 2004 (“*In State aid proceedings the Commission has to, in the last analysis, rely on the statements of the Member State supposed to (have) grant(ed) the aid.*”)

<sup>126</sup> See recital 14 of the abovementioned Commission Decision of 11 November 2003.



#### **5.6.2.6 The 2009 letter sent by Commissioner Kroes**

- (232) The Commission considers that the letter sent by Commissioner Kroes is not liable to have created any justified hopes concerning the STL or the individual measures involved in STL operations for the following reasons:
- (233) First of all, this letter is not a formal act representing the position of the Commission – i.e. the College of Commissioners – as would be a formal Commission decision or the answer to a Parliamentary question. In her single page letter, Commissioner Kroes replied, in the context of a bilateral exchange, to a single page letter sent by Mrs Brustad, Norwegian minister responsible for Trade and Industry. The content of this letter was not made public by the Commission.
- (234) The Commission notes that the letter from the Norwegian shipowner – mentioned in Recital (105) above – is addressed to one single Spanish shipyard with which the shipowner is doing business and that the testimony, dated 2012, comes from *Gerencia del Sector Naval* a government body. The Commission also notes that neither the Spanish authorities – who knew that the investigation was going on – nor the operators considering STL operations have asked the Commission to clarify the position expressed in Commissioner Kroes' letter.
- (235) Second, and more importantly, even if that letter was made public in 2009, it did not provide specific, unconditional and concordant assurances that the STL was lawful. Indeed, the answer given by Commissioner Kroes focusses on alleged discriminations between shipyards established in different EEA countries. The conclusion of the letter that no further action was envisaged "*at that stage*" was clearly linked to the recent publication of a statement clarifying that the STL could be used for the acquisition of ships produced in other European countries, which directly addressed the concerns expressed by Ms Brustad. In any event, the letter did not even mention, even less took any position regarding the presence of State aid at the level of EIG and/or their investors. Concerning shipping companies, shipyards and intermediaries, the Commission finds that they are not beneficiaries of the aid, so that the issue of legitimate expectations does not arise.
- (236) The Commission therefore considers that the letter did not, in any case, provide specific, unconditional and concordant assurances liable to create legitimate expectations that the scheme did not contain State aid to the benefit of EIG and/or their investors.
- (237) As the Commission did not identify the existence of legitimate expectations on the basis of the letter, the question whether such legitimate expectations would cover the period before the letter is of no relevance whatsoever.

#### **5.6.2.7 An alert economic operator could not have foreseen the possible existence of a State Aid in the joint application of several measures**

- (238) As the individual measures constitute State aid (except the accelerated depreciation of leased asset), the fact that economic operators could not foresee that their combination would also be regarded as State aid is irrelevant and does not justify the existence of legitimate expectations or the breach of any other fundamental principle of EU law.
- (239) On the contrary, several third-parties among the operators involved in STL operations have argued that the 2006 decision in the French GIE Fiscaux case had given them legitimate expectations because the measure was very similar to the STL. The fact

that all the features of the French measure were included in one legal provision necessarily implies a global assessment. In that respect, the fact that the different elements of the STL were included in different measures – de facto linked and used together – to produce similar effects should not warrant a different approach and exclude a global assessment.

- (240) In any case, the Commission considers that the early depreciation of leased assets on the one hand and the tax exemption – pursuant to Article 50, paragraph 3 RIS – of the capital gain realized under the TT both constitute State aid on an individual basis. In the absence of any notification for these provisions, operators would only have legitimate expectations that they were lawful in exceptional circumstances which have not been demonstrated.

#### **5.6.2.8 The statements concerning depreciation methods in the Commission notice on direct business taxation<sup>127</sup>**

- (241) The Commission notes that the wording of the Notice did not provide any ground to operators to create legitimate expectations that the STL was lawful. First, the provisions invoked only concern depreciation methods so that legitimate expectations, if any, could only cover early depreciation of leased assets.
- (242) Second, the Notice cannot be interpreted in such a way that any measure related to depreciation escapes the scope of State aid rules. Indeed, recital 13 of the Notice foresees that depreciation rules and rules on loss carry-overs do not constitute aid provided that they apply without distinction to all firms and to the production of all goods. The STL is not applicable to all firms and to the production of all goods.
- (243) Moreover, recital 22 of the same Notice clarifies that the level of discretion enjoyed by the tax administration and the room for manoeuvre which it enjoys support the presumption that there is state aid involved. As explained in Section 2.2.2 above the application of early depreciation is subject to conditions – the wording of which necessitates interpretation – and prior authorisation by the tax administration. Before granting the authorization the administration can request additional documents for the applicant or information from other administrations. The fact that additional documents were present in all the application files available to the Commission suggests that they were – explicitly or implicitly – requested by the administration or that the applicants knew that they were necessary to obtain the authorisation. As a consequence, the administration enjoyed high discretionary powers in the application of this measure.
- (244) Consequently, in view of the characteristics of the scheme, the wording of the Notice could not give rise to uncertainty, even less to legitimate expectations, as far as the aid character of the early depreciation is concerned.

#### **5.6.2.9 Eligibility of revenues of bareboat chartering out to the Tonnage tax**

- (245) The authorisation granted by Commission Decision C(2002)582fin of 27 February 2002 refers to "*companies registered under Spanish law, whose activity include the*

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<sup>127</sup> See Commission Notice on the application of State aid rules to measures related to direct business taxation, OJ C-384 of 10.12.98, p.3

*operation of owned and chartered ships*". However, the Commission considers that this sentence was not liable to create any legitimate expectations that entities whose activities exclusively consist in chartering one vessel out on a bareboat basis would be eligible to the TT. Indeed, as explained in recitals (179) and (180) above, the 2002 decision is clear that the TT should exclusively apply with respect to qualifying vessels and with respect to qualifying maritime transport activities.

### 5.6.3 Legal certainty

(246) *Legal certainty* is a fundamental requirement of European law designed to ensure the foreseeability of legal situations and relationships governed by European law. According to the case law, the requirement of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers and it does not suppose an action from the institution concerned<sup>128</sup>. However, two cumulative elements have been required so far for a violation of that principle to occur:

- The existence of a body of elements creating a situation of uncertainty concerning the regularity of the measure.
- A prolonged lack of action on the part of the Commission, in spite of its awareness of the aid.

(247) The abovementioned French *GIE Fiscaux* decision and the *Salzgitter* judgment<sup>129</sup> represent the only two occasions in which it has been considered by the Commission and the Court of First Instance, respectively, that a violation of the principle of legal certainty can prevent recovery even if there are no legitimate expectations. However, the judgment in *Salzgitter* was set aside by Court of justice precisely concerning the application of the principle of legal certainty in the case in question.<sup>130</sup>

#### 5.6.3.1 Elements having created a situation of uncertainty concerning the regularity of the measure

(248) The STL and the French *GIE Fiscaux* share a number of key characteristics and have very similar effects (see Section 5.6.1 Equal treatment). Both are used in the financing of long-term investment assets. They feature tax-transparent EIGs that depreciate the assets and transfer their ownership to their final user through some type of leasing contract. In both cases, the depreciation is anticipated/accelerated and the capital gain made by the EIG is tax exempted. In both cases, the economic advantage resulting from the anticipation/acceleration of depreciation and from the exemption of capital gains is shared between the investors in the EIGs and the final user of the asset (through a price rebate), although there are important differences as to the State intervention in this respect.

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<sup>128</sup> See Judgment of the Court of justice in joined cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* [2002] ECR I-7869, paragraph 140.

<sup>129</sup> See Judgment of the Court of First Instance in case T-308/00 *Salzgitter v Commission* [2004] ECR II-1933..

<sup>130</sup> Judgment of the Court of Justice of 22 April 2008 in case C-408/04 P *Commission v Salzgitter* [2008] ECR I-2767.

- (249) The key measures making part of the STL system were implemented between 2002<sup>131</sup> and 2003, i.e. before the Commission decided that the French system constituted State aid.
- (250) In view of the similarity of the STL and the GIE Fiscaux, it is therefore possible – as argued by the Spanish authorities and certain third-parties – that events invoked in favour of the protection of legal certainty for the French system have also created a situation of uncertainty concerning the regularity of the STL.
- (251) In that respect, the Commission concludes that such a situation of uncertainty could indeed have been created by the statement made by the Commission in its 2001 *Brittany Ferries* decision<sup>132</sup> that certain tax advantages were a general measure. As explained in recital 192 of the GIE Fiscaux decision, this statement did not specify that it referred to the predecessor scheme of GIE Fiscaux, which may have misled the beneficiaries of that scheme and of a similar scheme such as STL.
- (252) As concerns the other elements invoked by Spain and third-parties, the Commission has analysed whether the elements invoked to support the existence of legitimate expectations (see section 5.6.1 ) could have created a situation of uncertainty.
- (253) First, Member States have an obligation under the treaty to notify to the Commission their plans to grant new aid. The publication of the draft measures in the Spanish General Courts Official Journal cannot be regarded as a notification to the Commission and the absence of reaction by the Commission cannot have participated in the creation of a situation of uncertainty.
- (254) Second, the 2001 request for information concerning a tax leasing measure shows that the Commission has reacted to allegations of aid made by a complainant. This request was addressed to Spain and in its replies Spain forcefully denied the existence of such measures. The request was not made public by the Commission but if, for any reason, certain future beneficiaries of the Spanish Tax Lease happened to know about this request for information at the time they intended to participate in STL operations, it should have been a warning that a complaint was filed with the Commission which regarded Spanish tax leasing measures as possible State aid. A request for information would also indicate that the Commission did not have sufficient knowledge of the measure to assess it and would not lead to the conclusion that the Commission approves the measure. Moreover, as this request was sent before the entry into force of the measures composing the STL, Spain could have notified all the elements of the scheme with a view to obtaining legal certainty. Alternatively, beneficiaries should have inquired with Spain – or with the Commission – about the notification by Spain / approval by the Commission of the scheme. As a consequence, neither Spain nor operators could argue that this request or – in view of the answer given – the absence of follow up action from the Commission has contributed to create a situation of uncertainty.
- (255) Third, as to the 2004 decision concerning the Dutch compensation measure, the Commission reminds that the compensation related to a different measure than the STL cannot have created a situation of uncertainty with respect to the STL. The fact that a precise description of the alleged Spanish aid in public documents was only provided in the Dutch version of the decision to open the formal investigation

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<sup>131</sup> In practice, the first STL operations appear to have been arranged as from July 2002.

<sup>132</sup> OJ L 12 of 15.1.2002, p.33.

procedure is not sufficient to conclude that readers could assume that it was the STL. Indeed, a translation of the Dutch decision or a contact with the Commission could easily have clarified that the alleged Spanish aid was interest subsidies on the basis of Royal Decree 442/1994. In addition, the Commission merely mentioned the fact that Spain had denied the existence of the alleged Spanish aid and that The Netherlands had failed to bring sufficient proof. As mentioned in that decision, the Commission can only trust the Member State and cannot be held responsible for uncertainty, if any, that the absence of follow up action on its part could have caused. The Commission therefore finds that the 2004 decision was not liable to contribute to a situation of uncertainty regarding the lawfulness of the STL.

- (256) Fourth, the Commission considers that the situation of uncertainty created with respect to the lawfulness of the STL as a result of the statement made in the 2001 Commission decision concerning Brittany Ferries stopped on the date of publication of the Commission decision concerning the French GIE Fiscaux. Indeed, that decision made it clear that the Commission regarded the French tax lease scheme as State aid and should have alerted Spain and the beneficiaries that the STL would likely constitute State aid. As a result, it cannot possibly have created – or contributed to – a situation of uncertainty in that respect.
- (257) Fifth, for the reasons exposed above at Section 5.6.2.6 above, the Commission considers that the letter sent in 2009 by Commissioner Kroes did not create nor contributed to create a situation of uncertainty.

### ***5.6.3.2 Time elapsed between the complaint and the opening of procedure***

- (258) The Commission considers that the time elapsed in the investigation of the STL before the Commission opened the formal investigation procedure should be calculated from 2006 when the Commission received the complaints from European shipyards. Indeed, for the reasons set out above, neither the publication of the draft measures in the Spanish General Courts Official Journal, nor the allegations received by the Commission in 2001 and explicitly denied by Spain in 2002 support the view that the Commission has unduly delayed the exercise of its investigation powers. Neither does the 2004 final decision in case C 66/2003 which concerned the matching of a different alleged State aid measure.
- (259) The time elapsed between the first complaint in 2006 and the opening of the formal procedure in 2011 does not appear excessive given the number of tax measures involved, the complexity of tax lease operations and the lack of transparency concerning those lease operations. In addition, the Commission sent 8 formal requests for information between September 2006 and May 2010<sup>133</sup> and was regularly in contact with the Spanish Authorities.
- (260) Furthermore, it is only in October 2010 that the Commission received a new complaint containing an important element for the assessment of the scheme, namely a comprehensive study by tax experts, describing the functioning of the scheme and its effects. Consequently, the time elapsed in the investigation of the STL does not appear sufficient to be invoked in favour of legal certainty.

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<sup>133</sup> Eight (8) requests for information were sent to Spain on 15/09/2006, 30/01/2007, 6/11/2007, 5/02/2008, 3/03/2008, 23/09/2008, 11/01/2010, 12/05/2010.

- (261) In view of the complexity of the measures at hand, the Commission cannot exclude that there may have been legal uncertainty, as alleged by Spain and the beneficiaries, created by the 2001 decision concerning Brittany Ferries regarding the aid qualification of the STL, but only until the publication in the OJ on 30 April 2007 of the Commission decision concerning the French GIE Fiscaux, where the Commission established that such scheme constituted State aid.
- (262) As a consequence, the Commission concludes that it should not order the recovery of aid resulting from STL operations in respect of which the aid was granted between the entry into force of the STL in 2002 and 30 April 2007.

#### **5.6.4 Determining the amounts to be recovered**

- (263) The Commission has made the assessment of different tax measures which constitute State aid schemes. It is not the purpose of the present decision to establish the precise amounts of aid received by each beneficiary in each of the STL operations. However, the Commission considers that the following methodology should be followed by the Member State in order to determine, on a case-by-case basis, the beneficiaries of aid and the amount of incompatible aid to be recovered from them. This methodology can be further refined in cooperation with the Spanish authorities, in particular in order to establish the actual amount of the tax advantage enjoyed by the investors, in the light of their individual tax situation.
- (264) **Step 1: Calculation of the total tax advantage generated by the operation:** This is the Net Present Value (NPV) of the amounts of tax benefits actually obtained by the EIG and/or its investors (i.e. before the deduction of the part of those benefits transferred to the shipping company through a price rebate). The NPV should be calculated on the starting date of depreciation - early depreciation as authorised by the tax authorities and the discount rates used for the purpose of that calculation should be based on market realities. The Commission suggests that, by default, Spain can use calculations provided by EIGs to the tax administration when applying for the early depreciation (see recital (168) above). In principle, the tax advantage is considered granted on the date when the taxes are due by the EIG and/or its investors.
- (265) **Step 2: Calculation of the tax advantage generated by the general tax measures applied to the operation:** This is the NPV – calculated as at the same date as for step 1 – of the amounts of tax benefits that the EIG and/or its investors would have obtained in a reference situation where only the accelerated depreciation measure would have been used from the moment the vessel started to be operated and the operation taxed according to normal corporate tax rules. In this scenario, the capital gain on the sale of the vessel to the shipping company would have been subject, on the date the option is lifted by the shipping company, to corporate tax pursuant to the rules of taxation generally applicable to corporate revenues. In principle, the tax advantage is considered granted on the date when the taxes are due by the EIG and/or its investors.
- (266) **Step 3: Calculation of the tax advantage tantamount to State aid:** as the accelerated depreciation is regarded by the Commission as a general measure, the amount of the advantage corresponding to that measure (i.e. the deferred payment of certain amounts of tax) is not State aid. The difference between the amounts obtained in Step 1 and Step 2 should correspond to the aid that the EIG and its investors, as beneficiaries of the tax measures at stake, have received, i.e. the NPV of the total advantage derived from the use of early depreciation, the TT (whereas EIGs were not

eligible) and the tax exemption of the capital gain achieved through Article 50, paragraph 3 RIS. In principle, the tax advantage is considered granted on the date when the taxes are due by the EIG and/or its investors.

- (267) **Step 4: Calculation of the amount of compatible aid:** first, the aid received by the EIG and/or its investors as calculated in step 3 is compatible to the extent it corresponds to the advantage transferred to the shipping company that – had it been considered as State aid to the shipping company – would have been compatible. The percentage of the aid transferred to the shipping company must be determined on the basis of a calculation similar to the ones submitted by the EIGs in their application to the tax administration (see Recital (136) above), and by allowing a market conform remuneration for the intermediation. As explained in Recitals (202) to (210) above, part of the advantage transferred to the shipping company can be regarded as compatible if the shipping company, the vessel concerned and its transport activities are eligible to the Maritime Guidelines. The amount compatible should be determined in compliance with Chapter 11 of the Guidelines and taking due account of all aid already granted to that shipping company in the EEA. In particular, the amounts of aid granted in Spain shall be cumulated to those granted in the company’s country of establishment (if it is an EEA member). The amount of aid exceeding the ceiling, or not proven to be compatible under Chapter 11 of the Maritime Guidelines, shall be regarded as incompatible.
- (268) As the ceiling in Chapter 11 of the Maritime Guidelines is calculated on an annual basis and the advantage received by the shipping company relates to a long-term asset, the Commission agrees that, for the application of that ceiling, the advantage resulting for the shipping company from the STL operation can be spread over the normal depreciation period (10 years) of the vessel concerned.
- (269) Second, to the extent it correspond to a market conform remuneration for the intermediation of financial investors in the transfer of a compatible advantage to the shipping companies, this remuneration shall also be regarded as compatible or incompatible aid in the same proportion as the advantage channelled to the shipping company (see Recital (201) above).

#### 5.6.5 Contractual clauses

- (270) As mentioned above, PYMAR has informed the Commission about certain clauses contained in certain contracts between the investors, the shipping companies and the shipyards. Under such clauses, the shipyards would be obliged to indemnify the other parties if the tax benefits envisaged cannot be obtained.
- (271) In its final negative decision with partial recovery concerning the French GIE fiscaux case,<sup>134</sup> which presented considerable similarities with the present case, the Commission noted that *“the fact that the legal and tax-related risks incurred by the members of EIGs may, in some cases, have been contractually passed on to the users of the assets cannot negate the principle that the Commission’s purpose in demanding, where appropriate, the recovery of unlawful aid is to deprive the various recipients of the advantage they have enjoyed in their respective markets compared with their competitors and to restore the status quo that existed before the aid was*

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<sup>134</sup> See recital 196 of that decision.

*granted*". The Commission concluded that "*the achievement of that purpose cannot depend ... on contractual stipulations agreed upon by the aid recipients*".

- (272) Indeed, according to well-established case-law, the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market has as its purpose to re-establish the previously existing situation.<sup>135</sup> According to another formula, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords.<sup>136</sup> By repaying the aid, the beneficiary forfeits the advantage which it had over its competitors on the market, and the situation prior to payment of the aid is restored.<sup>137</sup>
- (273) In order to achieve such a result, the Commission must necessarily have the power to order that recovery takes place from the actual beneficiaries, so that it can fulfill the function of reestablishing the competitive situation in the market(s) where the distortion has taken place. To that effect, the Commission must be able to identify in a definitive way the undertakings that are obliged to repay the unlawful aid that it declares incompatible. On the contrary, such an objective would be irretrievably frustrated if private parties were able, by contractual stipulations, to alter the effects of recovery decisions adopted by the Commission. Such a possibility, if available, could be used by economic operators enjoying substantial bargaining power to obtain a shelter from recovery decisions, thereby depriving State aid control of its practical consequences.
- (274) By way of comparison, in its recent *Residex* judgment<sup>138</sup>, the Court has declared that it is for the national court, taking account of all the particular features of the case, to identify the beneficiary or, as the case may be, the beneficiaries of a guarantee constituting State aid and to effect recovery of the total amount of the aid in question. In addition, irrespective of who the beneficiary of the aid may be, and given that the objective of the measures that the national courts are bound to take in the event of infringement of Article 108(3) TFEU is, essentially, to restore the competitive situation existing prior to the payment of the aid in question, those courts must ensure that the measures which they take with regard to the validity of the abovementioned acts make it possible for such an objective to be achieved. This shows that, when it is necessary to remedy the distortion provoked by the aid, national courts may intervene and declare that contracts are invalid, even to the detriment of parties that are not beneficiaries of the aid, in that case the lenders whose claims were assisted by the State guarantee. The same reasoning applies *a fortiori* to the Commission, when it orders that the aid is effectively recovered from the beneficiaries. In this respect, one should underline that the Commission is called upon to take a final decision on the aid measure, rather than ensuring, as national courts must do, that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) TFEU has been infringed.
- (275) It follows that contractual clauses sheltering the beneficiaries of the aid from recovery of illegal and incompatible aid, by transferring the legal and economic risks of such recovery on other subjects, are contrary to the very essence of the system of State aid

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<sup>135</sup> See, in particular, Case C-348/93 *Commission v Italy* [1995] ECR I-673, paragraph 26.

<sup>136</sup> Case C-277/00 *Germany v Commission* [2004] ECR I-3925, paragraph 76.

<sup>137</sup> Case C-350/93 *Commission v Italy* [1995] ECR I-699, paragraph 22.

<sup>138</sup> Case C-275/10, judgment of 8 December 2011 *Residex Capital IV*, nyr, paragraphs 43-45.



control established by the Treaty. Such a system is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market and therefore constitutes a set of rules of public policy.<sup>139</sup> Therefore, private parties cannot derogate from it by contractual stipulations.

- (276) This is all the more true in the situation under scrutiny in the STL system, where some of the shipyards are controlled by the State. To the extent that public shipyards have stipulated the contractual clauses sheltering the beneficiaries from the recovery of aid, their behaviour would prevent the recovery of aid of unlawful and incompatible State aid from fulfilling its function. In addition, the behaviour of State-controlled operators trying to shelter their contractual counterparts from recovery may put considerable pressure on their private competitors who may be induced to accept similar clauses in their contracts, thereby leading to a generalized protection of beneficiaries from recovery.

## 6 CONCLUSION

The Commission concludes that

- pursuant to the Maritime Guidelines and to the Decision of 27 February 2002 authorizing the Spanish TT system, activities which exclusively consist in leasing/chartering/renting out vessels do not consist in offering transport services. As a consequence, those activities are in principle not eligible to the Spanish TT as authorised by the Commission.
- Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS (early depreciation of leased assets), the application of the TT system to non-eligible EIGs as well as Article 50, paragraph 3 RIS constitute State aid within the meaning of Article 107, paragraph 1, TFEU.
- those measures are not existing aid within the meaning of article 1, b) of Regulation 659/99 as they were neither notified nor otherwise authorized by the Commission.
- Spain has unlawfully implemented the aid in question in breach of Article 108, paragraph 3, of the Treaty on the Functioning of the European Union.
- it follows that the so-called Spanish Tax Lease featuring the joint use of Article 115, paragraph 11 TRLIS, Article 48, paragraph 4 TRLIS and Article 49 RIS (early depreciation of leased assets), the application of the TT system to non-eligible EIGs as well as the use of Article 50, paragraph 3 RIS is unlawful;
- aid to the EIG / its investors can be regarded as compatible with the internal market to the extent it corresponds to a market conform remuneration for the intermediation of financial investors and to the extent it is channelled to maritime transport companies eligible to the Maritime Guidelines and in compliance with the conditions imposed in the said Guidelines. This implies in particular that the total amount transferred to the shipping companies does not exceed the ceiling imposed by Chapter 11 of the Guidelines;

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<sup>139</sup> See, by analogy, Case C-126/97 *Eco Swiss China Time* [1999] ECR I-3055, paragraphs 36-41.

- the part of the aid which exceeds the amount of compatible aid should be recovered from the beneficiaries, i.e. EIGs and their investors without the possibility for such beneficiaries to transfer the burden of recovery on other subjects;
- the Commission should not order the recovery of aid resulting from STL operations in respect of which the aid was granted between the entry into force of the STL in 2002 and 30 April 2007, date of publication of the decision concerning case C-46/2004 France GIE Fiscaux (see recital (261) above);
- beyond that date, ordering the recovery would not breach the general principles of European Union law of protection of legitimate expectations and of legal certainty.

## **HAS ADOPTED THIS DECISION:**

### **Article 1**

The measures resulting from Article 115, paragraph 11 TRLIS (early depreciation of leased assets), from the application of the Tonnage tax to non-eligible undertakings, vessels or activities and from Article 50, paragraph 3 RIS constitute State aid to the EIGs and to their investors, unlawfully put into effect by Spain since 1 January 2002 in breach of Article 108, paragraph 3 of the Treaty on the Functioning of the European Union.

### **Article 2**

The State aid measures mentioned in Article 1 are incompatible with the internal market, except to the extent that it corresponds to a market conform remuneration for the intermediation of financial investors and that it is channelled to maritime transport companies eligible to the Maritime Guidelines and in compliance with the conditions imposed in the said Guidelines.

### **Article 3**

Spain shall put an end to the aid scheme referred to in Article 1 to the extent that it is incompatible with the common market.

### **Article 4**

1. Spain shall recover the incompatible aid granted under the scheme referred to in Article 1 from the EIG investors that have benefited from it, without the possibility for such beneficiaries to transfer the burden of recovery on other subjects. However, no recovery shall take place in respect of aid granted as part of financing operations concerning which the competent national authorities have undertaken to grant the benefit of the measures by a legally binding act adopted before 30 April 2007.

2. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
3. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.
4. Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this decision.

#### **Article 5**

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.
2. Spain shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

#### **Article 6**

1. Within two months following notification of this Decision, Spain shall submit the following information:
  - (a) the list of beneficiaries that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme ;
  - (b) the total amount (principal and recovery interests) to be recovered from each beneficiary ;
  - (c) a detailed description of the measures already taken and planned to comply with this Decision;
  - (d) documents demonstrating that the beneficiaries have been ordered to repay the aid.
2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the beneficiaries

#### **Article 7**

This Decision is addressed to the Kingdom of Spain.

Done at Brussels,

For the Commission

*Joaquin Almunia*

Vice-president

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Notice

If the decision 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 the decision. 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

**Information about the amounts of aid received, to be recovered and already recovered**

Identity of the beneficiary	Total amount of aid received under the scheme (°)	Total amount of aid to be recovered (°) (Principal)	Total amount already reimbursed (°)	
			Principal	Recovery interest

(°) Million of national currency