Court of Justice of the European Union
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Press and Information

Judgment in Case C-128/16 P
Commission v Spain and others

The Court of Justice sets aside the judgment of the General Court on the 'Spanish tax lease system'

The General Court had annulled the Commission's decision that that system constituted State aid

From May 2006, the Commission received a number of complaints against what has been called the 'Spanish tax lease system' ('the STL system'). The complaints were that that system allowed maritime shipping companies to benefit from a 20-30% price reduction when purchasing ships constructed by Spanish shipyards, to the detriment of the shipyards of other Member States.

The STLS was based on an ad hoc legal and financial structure organised by a bank, which acted as an intermediary between a maritime shipping company (buyer) and a shipyard (seller). When a ship was sold, the bank interposed a leasing company and an economic interest company (EIG) set up by the bank. The latter sold to investors shares in the EIG which took a lease out on the ship from a leasing company as soon as construction began and in turn leased it to the shipping company under a bareboat charter. The aim of the arrangement was to generate tax advantages for the investors in the EIG and to transfer part of those advantages (between 85% and 90%) to the maritime shipping company in the form of a rebate on the price of the vessel, the investors retaining the other advantages as a return on their investment (between 10% and 15%). The advantages derived from five fiscal measures applicable to finance leases (accelerated depreciation and — with authorisation — early depreciation of certain goods), to EIGs (fiscal transparency) and to maritime shipping activities (special regime of tonnage taxation).

By decision of 17 July 2013,[1] the Commission took the view that three of the five fiscal measures under examination constituted illegal State aid to the EIGs and their investors and had been unlawfully implemented by Spain since 1 January 2002.[2] The aid was declared partially incompatible with the internal market. In compliance with the principle of legal certainty, the Commission ordered the recovery of the aid only in the case of certain transactions. Recovery was ordered only from investors without their being able to transfer the burden of recovery to other persons.

Spain, Lico Leasing (a financial institution having invested in a certain number of EIGs which participated in the STL system) and Pequeños y Medianos Astilleros Sociedad de Reconversión (a company that co-operates with small and medium-sized shipyards in order to enable them appropriately to achieve their industrial objectives) applied to the General Court to annul the Commission's decision.[3] By judgment of 17 December 2015,[4] the General Court annulled the

[1] Commission Decision No 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain — Tax scheme applicable to certain finance lease agreements also known as the 'Spanish Tax Lease System' (OJ 2014, L 114, p.1) (see Commission IP-13-706).

[2] Certain tax provisions applicable to the STL system were amended by Spain in 2012 before the adoption of the Commission's decision of 17 July 2013. On account of those amendments, the Commission found that the new rules did not constitute State aid in its Decision of 20 November 2012 relating to State aid SA 34736 (12/N) concerning the implementation by the Kingdom of Spain of a tax regime allowing early depreciation of assets acquired via finance-lease agreements (OJ 2012 C 384, p. 1) (see IP-12-1241). The General Court dismissed an action against that decision in its judgment of 9 December 2014, Netherlands Maritime Technology Association v Commission (T-140/13). That judgment was the subject of an appeal which was dismissed by the Court of Justice (Case C-100/15 P, Netherlands Maritime Technology Association v Commission).

[3] There are 63 other actions pending before the General Court against that decision of the Commission.

Commission's decision. The Commission then applied to the Court of Justice to set aside the judgment of the General Court.[5]

By today's judgment, **the Court of Justice set aside the General Court's judgment. The case is thus referred back to the General Court.**

The Court states, first of all, that the General Court incorrectly applied Article 107(1) TFEU on prohibited State aid. The General Court concluded that the EIGs could not be the beneficiaries of State aid solely on the ground that, as a result of the tax transparency of those groupings, it was the investors, and not the EIGs, who had benefited from the tax and economic advantages resulting from the measures at issue. In view of the fact that the EIGs carried on an economic activity, they were undertakings within the meaning of Article 107(1) TFEU. It was the EIGs which, first, applied to the tax authority for the benefit of early depreciation of leased assets, which they were granted, and, secondly, left the normal corporate taxation system and opted for the tonnage tax system. It was also the EIGs which collected the tax benefits in two stages by the combination of the tax measures at issue. It is true that the resulting economic advantages were transferred in full to the members of the EIGs, but the fact remains that the tax measures at issue were applied to the EIGs and that they were the direct beneficiaries of the advantages arising from those measures. Those advantages favoured the activity of acquiring vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, carried on by the EIGs. The General Court, in holding that the EIGs could not be the beneficiaries of State aid solely because of their legal form and the relevant rules on the taxation of profits, failed to take into account the case-law that the classification of a measure as 'State aid' cannot depend on the legal status of the undertakings concerned or the techniques used.

The Court of Justice states that the General Court's analysis in its judgment is based on the incorrect premiss that only the investors, and not the EIGs, could be regarded as the beneficiaries of the advantages arising from the tax measures at issue. Consequently, the condition relating to selectivity was incorrectly examined by reference to the investors, and not the EIGs. Furthermore, in its examination of that condition, the General Court also relied on two judgments which it had pronounced on 7 November 2014 (Cases Banco Santander and Santusa v Commission and Autogrill España v Commission)[6] and which were subsequently set aside by the Court of Justice in a judgment of 21 December 2016.[7] The General Court thus committed an error of law by holding that the advantages obtained by the investors participating in the STL operations could not be regarded as selective, since those operations were available, on the same terms, to any undertaking, without distinction, without ascertaining whether the Commission had established that the tax measures at issue, by their practical effects, introduced differentiated treatment of operators, where the operators which benefited from the tax advantages and those which were excluded from it, were, in view of the objective pursued by that tax system, in a comparable factual and legal situation.

Finally, the Court of Justice declares that, contrary to what the General Court concluded, the Commission's decision is not vitiated by a failure to state reasons or by contradictory reasoning.

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

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[4] Joined Cases: T-515/13 Spain v Commission,and Lico Leasing, SA and T-719/13 Pequeños y Medianos Astilleros Sociedad de Reconversión SA v Commission see Press Release No.150/15.

[5] A total of 34 Spanish shipping companies, businesses and credit institutions intervened in the appeal.

[6] Cases: T-399/11 Banco Santander and Santusa v Commission T-219/10 Autogrill España v Commission see also Press Release No. 145/14.

[7] Joined Cases C-20/15 P and C-21/15 P Commission v World Duty Free Group and Others, see also Press Release No.139/16. The cases were referred back to the General Court.

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