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Advocate General's Opinion in Joined Cases C-649/20 P | Spain v Commission – C-658/20 P | Lico Leasing and Pequeños y Medianos Astilleros Sociedad de Reconversión v Commission – C-662/20 P | Caixabank and Others v Commission

Advocate General Pikamäe proposes that the judgment of the General Court and the Commission's decision on the 'Spanish tax leasing scheme' should be partially annulled

In 2006, the European Commission received a number of complaints concerning the application of 'the Spanish Tax Lease System' ('the STL system') to certain finance lease agreements in so far as it allowed shipping companies to benefit from a 20 to 30% price reduction when purchasing ships built by Spanish shipyards. According to the Commission, the objective of the STL system was first to generate a tax advantage for the economic interest groupings (EIGs) and investors who purchased shares therein, who then transferred part of those advantages to the shipping companies that purchased a new vessel.

In a decision [1] adopted in July 2013, the Commission found that certain tax measures of which the STL system was comprised, including the discretionary application of early depreciation of leased assets, as well as the STL system as a whole, constituted State aid [2] in the form of a selective tax advantage which was partly incompatible with the internal market. In so far as the aid scheme had been implemented since 1 January 2002 in breach of the notification requirement, [3] the Commission ordered the national authorities to recover the aid from the investors, that is to say, the members of the EIGs.

In September 2013, Spain, Lico Leasing, SA and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA (hereinafter 'PYMAR') brought actions for annulment of the Commission's decision. In its judgment of 17 December 2015, *Spain and Others* v *Commission*, [4] the General Court of the European Union annulled that decision, considering, in particular, that the existence of a discretionary power conferred on the tax administration was not sufficient to render the advantages resulting from the STL system as a whole selective, as those advantages were available under the same conditions to any investor who decided to take part in transactions under the STL system. The Court of Justice, on appeal brought by the Commission, set aside, in its judgment of 25 July 2018, *Commission* v *Spain and Others*, [5] the judgment of the General Court. In particular, the Court of Justice held that the General Court had erred in law in that it had based its analysis of the selective nature of the tax measures on the erroneous premiss that

[1] Commission Decision 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).
[2] Within the meaning of Article 107(1) TFEU.

[3] Laid down in Article 108(3) TFEU.
[4] T-515/13 and T-719/13 (see Press release 150/15).

[5] C-128/16 P (see Press release 115/18).

investors and not EIGs were the beneficiaries of the tax benefits. Noting that the General Court had not ruled on all the pleas in law raised before it, the Court of Justice found that the state of the proceedings did not enable it to give final judgment and, accordingly, referred the case back to the General Court.

By its judgment of 23 September 2020, *Spain and Others* v *Commission*, the General Court dismissed the actions brought by the appellants. [6] (PR 116/20) Spain, Lico Leasing, SA, PYMAR and Caixabank SA and others brought appeals before the Court of Justice against that judgment.

In his Opinion delivered today, Advocate General Pritt Pikamäe takes the view, first, that **the method used by the General Court to examine the selectivity of the STL system was correct**. **The grant of those tax benefits under the STL system was conditional on companies obtaining prior authorisation for early depreciation**, which was granted by the tax authorities under a **wide discretionary power.** That discretionary power, framed by vague and non-objective criteria, **allowed the tax administration to determine the beneficiaries of early depreciation or the conditions of such depreciation, which makes it possible to consider that the selectivity criterion is satisfied.**

However, as regards **the method of calculating the incompatible aid**, the Advocate General is of the opinion that **the judgment of the General Court is vitiated by a failure to state reasons, as a result of which it must be partially annulled.** According to Mr Pikamäe, instead of examining the question whether the part of the tax advantage transferred to the shipping companies could be regarded as an indirect advantage resulting from the application of the STL system, the General Court confined itself to finding that it was not disputed that the shipping companies were not the beneficiaries of the aid in question, and to reiterating the reasoning of the Commission decision on why recovery from the investors alone was justified.

In the interest of the individuals concerned, the Advocate General then proposes that the Court give final judgment in the matter by refraining from referring the case again to the General Court. He therefore attempts to determine whether the method of calculating the amount of aid to be recovered, as devised by the Commission in its decision, would result in investors being required to repay an amount greater than that which they actually received as a result of the grant of the aid, since part of that amount has been systematically transferred by those investors to the shipping companies.

Mr Pikamäe notes that recovery of the aid must restore the situation as it was prior to the grant of the aid. As a result, where an undertaking has **transferred** part of the advantage resulting from a State measure to another entity, it is necessary to **quantify precisely the aid to be recovered** from that undertaking, so that the latter loses only the advantage which it has enjoyed over its competitors. Recovery of a higher amount would weaken the previous competitive position of the beneficiary of the aid and would thus constitute a penalty.

The Advocate General points out that the Court has already held that an advantage may be granted to undertakings other than those to which State resources are directly transferred. He therefore examines whether the STL system is designed to direct its secondary effects towards shipping companies. The Advocate General observes that **the mere establishment of an aid scheme conferring on tax authorities a discretion as to the choice of beneficiaries and the conditions under which the aid is granted, such as the STL system, could enable Member States to 'conceal' the existence of indirect beneficiaries and thus prevent some or all of that aid from being recovered from those beneficiaries**. After examining a set of factors surrounding the adoption and operation of the STL system, from which it is possible to infer the **link between an indirect advantage and the State intervention, the Advocate General** suggests that the Court should declare that the part of the tax advantage transferred by the EIGs to the shipping companies under the private contracts concluded between them must be deducted from the amount to be recovered from the EIG investors. He therefore also **suggests that the Court annul in part the Commission decision and, more specifically, the recovery order as regards the calculation of the amount of incompatible aid to be recovered.**

[6] T-515/13 RENV and T-719/13 RENV (see Press release 116/20).

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

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.

The full text of the Opinion is published on the CURIA website on the day of delivery.

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