



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

23 September 2020*

(State aid – Aid granted by the Spanish authorities to certain economic interest groupings (EIGs) and their investors – Tax provisions applicable to certain finance lease agreements for the acquisition of vessels (Spanish Tax Lease System) – Decision declaring the aid incompatible in part with the internal market and ordering its partial recovery – Selectivity – Obligation to state reasons – Recovery of aid – Equal treatment – Legitimate expectations – Legal certainty)

In Cases T-515/13 RENV and T-719/13 RENV,

Kingdom of Spain, represented by S. Centeno Huerta, acting as Agent,

applicant in Case T-515/13 RENV,

Lico Leasing, SA, established in Madrid (Spain),

Pequeños y Medianos Astilleros Sociedad de Reconversión, SA, established in Madrid,

represented by M. Merola and M. Sánchez, lawyers,

applicants in Case T-719/13 RENV,

supported by

Bankia, SA, established in Valencia (Spain), and the other interveners whose names are listed in the annex,¹ all represented by J. Buendía Sierra, E. Abad Valdenebro, R. Calvo Salinero and A. Lamadrid de Pablo, lawyers,

interveners in Case T-719/13 RENV,

v

European Commission, represented by V. Di Bucci, É. Gippini Fournier and P. Němečková, acting as Agents,

defendant,

* Language of the case: Spanish.

¹ The list of the other interveners is annexed only to the version notified to the parties.

APPLICATION made under Article 263 TFEU for annulment of 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),

THE GENERAL COURT (Eighth Chamber, Extended Composition)

composed of A.M. Collins (Rapporteur), President, C. Iliopoulos, R. Barents, J. Passer and G. De Baere, Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written phase of the procedure and further to the hearing on 24 October 2019,

gives the following

Judgment

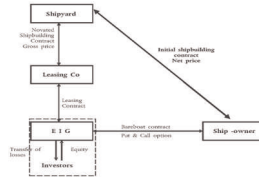
Background to the dispute

- 1 From May 2006, the European Commission received several complaints against the ‘Spanish Tax Lease System’ (‘the STL system’). In particular, two national federations of shipyards and one individual shipyard complained of the fact that the system enabled shipping companies to buy ships built by Spanish shipyards at a 20 to 30% rebate.
- 2 Following numerous requests for information sent by the Commission to the Spanish authorities and meetings between those parties, the Commission initiated the formal investigation procedure under Article 108(2) TFEU, by Decision C(2011) 4494 final of 29 June 2011 (OJ 2011 C 276, p. 5; ‘the decision to initiate the formal investigation procedure’).
- 3 On 17 July 2013, the Commission adopted Decision 2014/200/EU 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; ‘the contested decision’). By that decision, the Commission considered that certain tax measures constituting the STL system ‘constitute[d] State aid’ within the meaning of Article 107(1) TFEU, unlawfully put into effect by the Kingdom of Spain since 1 January 2002 in breach of Article 108(3) TFEU. Those measures were considered to be incompatible in part with the internal market. Recovery was ordered, on certain conditions, solely from the investors who had benefited from the advantages in question, without the possibility for those investors to transfer the burden of recovery to other persons.

Legal and financial structure of the STL system

- 4 It is apparent from the contested decision that the STL system involved a number of players for each ship construction order, namely a shipping company, a shipyard, a leasing company, a bank, an Economic Interest Grouping (EIG) set up by the bank and investors who purchased shares in the EIG.

- 5 According to the Commission, the STL structure was a tax planning scheme (represented in the following diagram) generally organised by a bank in order to create tax benefits for investors in a tax-transparent EIG and transfer part of those tax benefits to the shipping company in the form of a rebate on the price of the vessel. The rest of the benefits were kept by the investors in the EIG as remuneration for their investment.



- 6 In the context of the STL system, the actors referred to in paragraphs 4 and 5 above would enter into a number of contracts whose essential features, as they emerge from the contested decision and the decision to initiate the formal investigation procedure, are set out below.

Initial shipbuilding contract

- 7 The shipping company intending to acquire a vessel would agree with a shipyard on the ship to be built and on a purchase price which incorporated the rebate ('the net price'). The shipyard would ask a bank to organise the arrangements for the STL system.

New shipbuilding contract (novation)

- 8 The bank would bring in a leasing company, which, through a novation agreement, took the place of the shipping company and entered into a new contract with the shipyard for the purchase of a vessel for a price not including the rebate ('the gross price').

Formation of an EIG by the bank and call for investors

- 9 The bank would set up an EIG and sell shares to investors, which were typically big Spanish taxpayers who invested in the EIG in order to reduce their tax base and which were not, in general, active in shipping.

Leasing contract

- 10 The leasing company leased the vessel to the EIG, with a call option for a period of three or four years on the basis of the gross price. The EIG committed in advance to exercise the option to buy the vessel at the end of that period. The contract provided for payment of very high lease instalments to the leasing company, which gave rise to significant losses for the EIG. Conversely, the purchase price for the option was low.

Bareboat charter with call option

- 11 The EIG, in turn, would lease the vessel for a short period to the shipping company under a bareboat charter (that is to say, an arrangement for the chartering of a ship which includes neither crew nor provisions, for which the charterer is responsible). The shipping company would undertake at the outset to buy the vessel from the EIG at the end of the charter period, on the basis of the net price. Unlike the leasing agreement referred to in paragraph 10 above, the lease payments provided for in the bareboat charter were low. Conversely, the price for exercising the call option was high. The date for the exercise of the call option would be set for a few weeks after the date on which the EIG purchased the vessel from the leasing company.
- 12 It is therefore apparent from the legal structure of the STL system that, in the context of the sale of a vessel by a shipyard to a shipping company, the bank interposed two intermediaries, namely a leasing company and an EIG. The EIG undertook, in the context of a leasing agreement, to purchase the vessel at the gross price, which was passed on to the shipping company by the leasing company. Conversely, when it resold the vessel to the shipping company, in the context of a bareboat contract with a call option, it received only the net price, which took into account the rebate granted to the shipping company at the outset.

Tax structure of the STL

- 13 According to the contested decision, the purpose of the STL system was to generate the benefits of certain tax measures in favour of EIGs and the investors participating in them, which then passed on part of those benefits to shipping companies buying a new vessel.
- 14 The contested decision states that the combined effect of the tax measures used enabled the EIG and its investors to achieve a tax gain of approximately 30% of the initial gross price of the vessel. That tax gain, which initially accrued to the EIG and its investors, was kept in part (around 10 to 15%) by the investors and the remainder (85 to 90%) was passed on to the shipping company, which ultimately became the owner of the vessel, with a 20 to 30% reduction in the initial gross price.
- 15 According to the Commission, STL operations combined different individual – yet interrelated – tax measures in order to generate a tax benefit. Those measures were provided for in a number of provisions of Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the consolidated version of the Law on Corporation Tax) of 5 March 2004 (BOE No 61 of 11 March 2004, p. 10951; ‘the Law on Corporation Tax’) and of Real Decreto 1777/2004, por el que se aprueba el Reglamento del Impuesto sobre Sociedades (Royal Decree 1777/2004 approving the Regulation on Corporation Tax) of 30 July 2004 (BOE No 189 of 6 August 2004, p. 28377; ‘the Regulation on Corporation Tax’). The process involved the following five measures, described in recitals 21 to 42 of the contested decision: accelerated depreciation of leased assets (measure 1); discretionary application of early depreciation of leased assets (measure 2); EIGs (measure 3); the tonnage tax system (measure 4); and Article 50(3) of the Regulation on Corporation Tax (measure 5).
- 16 In particular, in relation to measure 2, it should be noted that, under Article 115(6) of the Law on Corporation Tax, the accelerated depreciation of the leased asset started on the date on which the asset became operational, that is to say, not before the asset was delivered to and started being used by the lessee. However, pursuant to Article 115(11) of the Law on Corporation Tax, the

Ministry of Economic Affairs could set the start date for the depreciation, having regard to the specific characteristics of the contracting period and the specific nature of the economic use of the asset. The procedure for applying for authorisation was detailed in Article 49 of the Regulation on Corporation Tax. Since, according to the applicable rules, the start date for accelerated depreciation could be set at a date before the asset became operational, the contested decision refers to ‘early’ depreciation.

The Commission’s assessment

- 17 The Commission took the view that the fact that the STL system was composed of various measures that were not all included in the Spanish tax legislation did not mean that it could not be regarded as a system, since the different tax measures used in the STL system were linked together *de jure* or *de facto*.
- 18 In any event, the Commission did not only analyse the measures as a system; it also assessed them individually. According to the Commission, those approaches were complementary and led to consistent conclusions.
- 19 According to recital 126 of the contested decision, all parties involved in STL operations were undertakings within the meaning of Article 107(1) TFEU, since their activities consisted in offering goods and services in a market. More precisely, shipyards built vessels; leasing companies offered financing facilities; EIGs chartered out and sold vessels; investors offered goods and services on a wide range of markets, unless they were individuals not exercising any economic activity, in which case they were not covered by the decision; shipping companies offered maritime transport services; and banks offered intermediation and financing services.
- 20 The Commission found that the discretionary application of early depreciation (measure 2), the tonnage tax system (measure 4) and Article 50(3) of the Regulation on Corporation Tax (measure 5) conferred selective advantages on a number of undertakings.
- 21 Specifically, in relation to the discretionary application of early depreciation of leased assets (measure 2), the Commission stated that, under the general Spanish tax legislation on depreciation, the cost of an asset had, in principle, to be spread over its economic life, that is to say, from the moment it was used for an economic activity. In leasing operations, Article 115(6) of the Law on Corporation Tax allowed accelerated depreciation, in principle, from the date on which the asset became operational. However, Article 115(11) of the Law on Corporation Tax allowed accelerated depreciation to begin before use of the asset began, giving rise to early depreciation. According to the contested decision, that possibility was an exception to the general rule set out in Article 115(6) of that law and was subject to discretionary authorisation by the Spanish authorities, thereby making it selective. According to the Commission, the criteria for granting the authorisation were vague and required interpretation from the tax administration, which had not published any guidelines in that respect. The Commission also considered that the wording of Article 49 of the Regulation on Corporation Tax confirmed that the measure was selective. The Commission found furthermore that the Kingdom of Spain had not demonstrated the need for a prior authorisation system, as opposed to merely an *ex post* verification of clear and objective criteria, as existed, for example, for ordinary depreciation.
- 22 Moreover, the Commission found that when the STL system was considered as a whole it was selective, because the advantage was subject to the discretionary powers conferred on the tax administration by the compulsory prior authorisation procedure, and because the applicable

conditions were vague. There was also sectoral selectivity, because the tax administration would only authorise STL system operations in order to finance sea-going vessels. According to the Commission, the fact that all shipping companies, including companies established in other Member States, potentially had access to STL financing operations did not alter the conclusion that the scheme favoured certain activities, namely the acquisition of sea-going vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale.

- 23 According to the contested decision, the advantage accrued to the EIG and, by transparency, to its investors. Indeed, the EIG was the legal entity that applied all the tax measures and, where applicable, filed requests for authorisation with the tax administration. From a tax perspective, the EIG was a tax-transparent entity and its taxable revenues or deductible expenses were automatically transferred to the investors.
- 24 The Commission also found that, in an operation under the STL system, in economic terms, a substantial part of the tax advantage obtained by the EIG was transferred to the shipping company through a price rebate, subject to the considerations relating to imputability discussed below. Although the contested decision acknowledged that other participants in STL transactions, such as shipyards, leasing companies and other intermediaries, benefited indirectly from that advantage, the Commission considered that the advantage initially obtained by the EIG and its investors was not transferred to those other participants.
- 25 According to the contested decision, in view of the loss of tax revenue resulting from the STL system, there was a transfer of State resources to the EIG which, by way of tax transparency, transferred those resources to its investors.
- 26 The Commission found that the selective advantage conferred on EIGs and their investors was clearly imputable to the Kingdom of Spain, since it derived from the tax rules and the authorisations granted by the tax administration, in particular authorisations to apply early depreciation, and from the tonnage tax system. By contrast, according to the contested decision, that was not so in relation to the shipping companies or, a fortiori, the shipyards or intermediaries, since the applicable rules did not oblige the EIGs to transfer part of the tax advantage to those operators, notwithstanding the fact that the Commission conceded that requests for authorisation submitted to the tax administration generally included details of how the tax advantage was shared between the EIG's investors and the shipping company.
- 27 According to the contested decision, the advantage in question threatened to distort competition and affect trade between Member States. In particular, the Commission noted that the investors, that is to say, the members of the EIGs, were active in all sectors of the economy, in particular in sectors open to intra-EU trade. In addition, via the operations under the STL system, they were active through the EIG in the markets for bareboat chartering and the acquisition and sale of sea-going vessels, which were open to intra-EU trade.
- 28 In the context of analysing whether the aid was compatible with the internal market, the Commission took the view that, although the Community guidelines on State aid to maritime transport of 5 July 1997 (OJ 1997 C 205, p. 5), as amended on 17 January 2004 (OJ 2004 C 13, p. 3; 'the maritime guidelines') were not strictly applicable in the present case, they could be applied by analogy to determine what amount of the aid received by the EIGs or their investors, could be compatible. Above that amount, according to the Commission, the aid was incompatible with the internal market.

- 29 Lastly, the Commission dismissed arguments according to which the principles of equal treatment and protection of legitimate expectations precluded recovery of the aid. Conversely, it found that the principle of legal certainty did prevent the recovery of the aid between the entry into force of the STL system in 2002 and 30 April 2007, the date of publication in the *Official Journal of the European Union* of its Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code – State aid C 46/04 (ex NN 65/04) (OJ 2007 L 112, p. 41; ‘the decision on the French *GIE fiscaux*’).
- 30 Furthermore, the contested decision concluded that any contractual clause under which the shipyards were required to compensate the other parties if the expected tax advantages could not ultimately be obtained would be contrary to the rules on State aid, which required the aid to be recovered from the actual beneficiary.

Earlier proceedings before the General Court and the Court of Justice

Earlier proceedings before the General Court

- 31 By application lodged at the Registry of the General Court on 25 September 2013, the Kingdom of Spain brought an action for annulment against the contested decision, which was registered as Case T-515/13.
- 32 By application lodged at the Registry of the General Court on 30 December 2013, Lico Leasing, SA (‘Lico’) and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA (‘PYMAR’) brought an action for annulment against the contested decision, which was registered as Case T-719/13. Lico and PYMAR are companies engaged in leasing operations (Lico) and support for the activities of small and medium-sized shipyards (PYMAR).
- 33 Several other actions were also brought against the contested decision.
- 34 The Commission claimed that the actions should be dismissed as unfounded, and also expressed reservations as to whether Lico and PYMAR had standing to bring proceedings in Case T-719/13.
- 35 The parties in Cases T-515/13 and T-719/13 presented oral argument and answered the questions put to them by the Court at the hearings on 9 and 10 June 2015 respectively.
- 36 By order adopted on 17 December 2015, the President of the Seventh Chamber of the General Court joined Cases T-515/13 and T-719/13 for the purposes of final judgment, in application of Article 68 of the Rules of Procedure of the General Court.
- 37 By judgment of 17 December 2015, *Spain and Others v Commission* (T-515/13 and T-719/13, EU:T:2015:1004; ‘the initial judgment’), the Court found Lico and PYMAR’s action to be admissible. On the merits, the Court upheld the actions brought by the applicants on the basis of the plea in law alleging breach of Article 107(1) TFEU and Article 296 TFEU, and annulled the contested decision. The Court also held that it was not necessary to adjudicate on the other pleas and arguments advanced in the two actions.

Earlier proceedings before the Court of Justice

- 38 By application lodged at the Registry of the Court of Justice on 29 February 2016, the Commission brought an appeal against the initial judgment, which was registered as Case C-128/16 P. It advanced two grounds of appeal, alleging errors of law by the General Court in its interpretation and application of Article 107(1) TFEU, in relation to the concepts of ‘undertaking’ and ‘selective advantage’, and of Article 296 TFEU.
- 39 The other actions against the contested decision, which were still pending before the General Court, were stayed until final judgment in Case C-128/16 P.
- 40 By orders of 21 December 2016, *Commission v Spain and Others* (C-128/16 P, not published, EU:C:2016:1006), and of 21 December 2016, *Commission v Spain and Others* (C-128/16 P, not published, EU:C:2016:1007), Bankia, SA and 32 other entities (‘Bankia and others’) and Aluminios Cortizo, SAU were granted leave to intervene in support of the forms of order sought by Lico and PYMAR.
- 41 By judgment of 25 July 2018, *Commission v Spain and Others* (C-128/16 P, EU:C:2018:591; ‘the judgment on appeal’), the Court of Justice set aside the initial judgment.
- 42 First, the Court of Justice found that the General Court had incorrectly interpreted and applied Article 107(1) TFEU. In that regard, the Court of Justice stated that, according to the General Court, the EIGs could not be the beneficiaries of State aid 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 those measures. The Court of Justice found, however, that the EIGs carried on an economic activity, namely the acquisition of sea-going vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, from which it followed that they were undertakings within the meaning of Article 107(1) TFEU, as found in the contested decision.
- 43 Although the tax advantages obtained by the EIGs were automatically transferred in full to their members, the Court of Justice emphasised that the tax measures at issue were applied to the EIGs, which were the direct beneficiaries of the advantages arising from those measures. Those advantages favoured their activity of acquiring sea-going vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale. There was therefore a transfer to the EIGs of public resources in the form of lost tax revenue. According to the Court of Justice, the measures at issue were therefore such as to constitute State aid in favour of the EIGs. That finding was not affected by the Commission’s decision to order the recovery of the incompatible aid from the EIG investors alone, the legality of which was not examined by the Court of Justice in the judgment on appeal. In the light of the foregoing, the Court of Justice upheld the Commission’s first complaint.
- 44 Secondly, the Court of Justice held that the General Court had erred in finding that the STL mechanism was not selective on account of the advantage resulting from the exercise of the tax authority’s discretionary power to authorise the system, in particular early depreciation, as the possibility of taking part in those transactions and accessing the advantages in question was open to any undertaking, which meant, according to the General Court, that the investors had not benefited from a selective advantage. According to the Court of Justice, the General Court’s reasoning was 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 and that it

was therefore by reference to the investors, and not the EIGs, that the condition relating to selectivity had to be examined. The General Court therefore erred in law by failing to examine whether the system for authorising early depreciation conferred on the tax administration a discretionary power such as to favour the activities carried on by the EIGs involved in the STL system. Accordingly, the Court of Justice upheld the second complaint submitted by the Commission.

- 45 Thirdly, relying on the judgment of 21 December 2016, *Commission v World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), the Court of Justice held that the General Court erred in law when it found that the advantages obtained by the investors which participated in the STL operations could not be selective since those operations were available to any undertaking, without distinction, without ascertaining whether the Commission had established that the tax measures 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. The Court of Justice therefore upheld the third complaint submitted by the Commission.
- 46 Fourthly, the Court of Justice noted that all the findings set out by the General Court in relation to the obligation to state reasons were based on the flawed premiss that only the investors, and not the EIGs, could be regarded as the beneficiaries of the advantages deriving from the tax measures at issue and that it was therefore appropriate to examine whether the advantages which the investors, and not the EIGs, had obtained were selective, whether they were liable to distort competition and affect trade between Member States and whether the contested decision contained a sufficient statement of reasons concerning the analysis of those criteria. According to the Court of Justice, in the contested decision the Commission provided information making it possible to understand the reasons why it considered that the advantages deriving from the tax measures at issue were selective and were liable to affect trade between Member States and distort competition, and did adequately explain the reasons for that decision without contradiction in that respect, in keeping with the requirements of Article 296 TFEU. The Court of Justice therefore upheld the Commission's last complaint.
- 47 After finding that the state of the proceedings did not enable it to give final judgment, because the General Court had examined only some of the pleas in law put forward by the Kingdom of Spain, Lico and PYMAR, the Court of Justice referred Cases T-515/13 and T-719/13 back to the General Court to rule on those cases, and reserved costs, with the exception of the costs relating to the interventions.

Procedure and forms of order sought by the parties

- 48 Pursuant to the judgment on appeal, Cases T-515/13 RENV and T-719/13 RENV were assigned to the Eighth Chamber of the General Court.
- 49 On 5 October 2018, the Kingdom of Spain and the Commission lodged written observations in Case T-515/13 RENV, pursuant to Article 217(1) of the Rules of Procedure.
- 50 By orders of 21 September and 8 October 2018, the President of the Eighth Chamber of the General Court granted the requests for confidential treatment submitted by Lico and PYMAR in relation to Bankia and others and Aluminios Cortizo respectively in Case T-719/13 RENV.

- 51 Aluminios Cortizo, on 28 September 2018, and Lico, PYMAR, the Commission and Bankia and others, on 5 October 2018, lodged written observations in Case T-719/13 RENV, under Article 217(1) of the Rules of Procedure.
- 52 On a proposal from the Eighth Chamber, the General Court, pursuant to Article 28 of the Rules of Procedure, assigned the case to a Chamber sitting in extended composition.
- 53 On a proposal from the Judge-Rapporteur, the General Court commenced the oral phase of the proceedings and, as a measure of organisation of procedure under Article 89 of the Rules of Procedure, invited the parties to answer a number of written questions. Among other issues, the Court invited the parties to submit their observations on the possible inclusion in the case file of an annex to each of two actions brought against the contested decision, which contained a series of press articles. The parties replied within the time limits given. In the light of the observations of the parties, the Court decided not to include those annexes in the case file in the present cases.
- 54 By decision of the President of the Eighth Chamber of the General Court of 12 September 2019, after hearing the parties, Cases T-515/13 RENV and T-719/13 RENV were joined for the purpose of the oral part of the procedure and final judgment.
- 55 At the hearing on 24 October 2019, the parties presented oral argument and their replies to the oral questions put by the Court.
- 56 In Case T-515/13 RENV, the Kingdom of Spain claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.
- 57 In Case T-515/13 RENV, the Commission claims that the Court should:
- dismiss the action;
 - order the Kingdom of Spain to pay the costs.
- 58 In Case T-719/13 RENV, Lico and PYMAR claim that the Court should:
- annul the contested decision;
 - in the alternative, annul the order for recovery;
 - in the further alternative, annul the point in the order for recovery concerning the calculation of the amount of incompatible aid to be recovered;
 - order the Commission to pay the costs.
- 59 In Case T-719/13 RENV, the Commission claims that the Court should:
- dismiss the action;
 - order Lico and PYMAR to pay the costs.

- 60 In Case T-719/13 RENV, Bankia and others claim that the Court should:
- annul the contested decision;
 - in the alternative, annul the order for recovery;
 - in the further alternative, annul the point in the order for recovery concerning the calculation of the amount of incompatible aid to be recovered.
- 61 In Case T-719/13 RENV, Aluminios Cortizo claims that the Court should:
- annul the contested decision;
 - order the Commission to pay the costs.

Law

The intervention of Bankia and others and Aluminios Cortizo

- 62 As a preliminary point, it should be noted that, in its observations on the future conduct of the proceedings in Case T-719/13 RENV, the Commission disputes that Bankia and others and Aluminios Cortizo are entitled to file written observations or to have status as interveners in the proceedings referred back to the General Court, on several grounds. First of all, such entitlement would be contrary to the wording of Article 217(1) of the Rules of Procedure. Next, it would amount in practice to allowing intervention, in first-instance proceedings, of parties that cannot be given leave to intervene because they have brought actions that are still pending. Further, according to the Commission, the present situation can be distinguished from that which gave rise to the judgment of 23 March 1993, *Gill v Commission* (T-43/89, EU:T:1993:24), in which the General Court gave a party which had intervened only in the appeal proceedings leave to intervene at the stage of the proceedings referred back to the General Court, because the Court of Justice had not ruled on its costs. The Commission observes that, in the present case, the Court of Justice did rule on the costs of Bankia and others and Aluminios Cortizo in the judgment on appeal. Lastly, the Commission contends that the present case may be distinguished from a situation in which a party lodges an application for leave to intervene but the General Court rules on the case without making a decision on that application. In those circumstances, following any referral of the case back to the General Court, the Commission is of the view that the applications for leave to intervene remain in force and that it is for the General Court to rule on them (see, to that effect, order of 2 September 2014, *Stichting Woonpunt and Others v Commission*, T-203/10 RENV, not published, EU:T:2014:792, paragraph 47).
- 63 Bankia and others contend that a party that has been given leave to intervene in an appeal before the Court of Justice automatically retains status as an intervener in the proceedings following the referral of the case back to the General Court.
- 64 It must be recalled that, irrespective of the circumstances which gave rise to the judgments to which the Commission refers, Cases T-515/13 and T-719/13 were selected as test cases from among the actions brought against the contested decision, and gave rise to the initial judgment.

In that context, Bankia and others and Aluminios Cortizo were not heard as interveners before the General Court, but were given leave to intervene before the Court of Justice in the appeals brought against the initial judgment.

- 65 Since the Court of Justice referred the cases back to the General Court to rule on a number of pleas which raise legal issues of interest to Bankia and others and Aluminios Cortizo, the General Court is of the view that, in the present case, it is in the interests of the sound administration of justice to give the interveners before the Court of Justice leave to intervene in the proceedings referred back to the General Court in order to ensure that the dispute being heard by the General Court is properly dealt with in the proceedings pending before the Court and to promote the continuation of the debate, with all the more reason since the proceedings were stayed in the other actions brought against the contested decision, by orders of 21 November 2018 of the President of the Eighth Chamber of the General Court, to which the Commission raised no objection. Moreover, contrary to the Commission's assertion, the wording of Article 217(1) of the Rules of Procedure is not necessarily an obstacle to that intervention, since it does not define 'the parties to the proceedings before the General Court'. Specifically, that article does not preclude the interveners before the Court of Justice from acquiring status, as such, as 'parties to the proceedings before the General Court' in the context of a case that has been referred back to the General Court. The Commission's objections to Bankia and others and Aluminios Cortizo being given leave to intervene should therefore be dismissed.

Substance

- 66 As a preliminary point, it must be observed, in the light of the judgment on appeal, that it is incumbent upon the General Court to rule, in the present proceedings following the referral of the case back to it, on all the pleas for annulment raised by the Kingdom of Spain, Lico and PYMAR, bound by the points of law on which the Court of Justice adjudicated relating to the beneficiaries of the advantage and, whether the advantage was selective within the meaning of Article 107(1) TFEU, as well as the statement of reasons of the contested decision.
- 67 The Kingdom of Spain raises four pleas in law in support of the action in Case T-515/13 RENV. The first plea alleges that the contested decision infringes Article 107(1) TFEU by finding that there was State aid. In the alternative, the Kingdom of Spain raises three pleas in support of the head of claim seeking annulment of the order for recovery, alleging breach of the principle of equal treatment, the principle of the protection of legitimate expectations and the principle of legal certainty.
- 68 In their action, Lico and PYMAR raise three pleas, alleging that the contested decision infringes Article 107(1) and Article 296 TFEU by finding that there was State aid (first plea), breaches the principles of the protection of legitimate expectations and legal certainty, in so far as concerns the order for recovery (second plea), and breaches the general principles applicable to the recovery of aid on account of the method used in the contested decision to calculate the amount of the incompatible aid (third plea).

Infringement of Article 107(1) TFEU

- 69 Under its first plea, in the light of the judgment on appeal, the Kingdom of Spain asserts that one of the conditions for the existence of State aid has not been satisfied because, irrespective of whether the STL system is considered as a whole or whether the measures are considered individually, there was no selectivity, whatever the analytical method used.
- 70 In relation to the method based on general availability, the Kingdom of Spain argues that, according to the case-law, the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59). The Kingdom of Spain states that the case-law contains examples in which a tax advantage applicable solely to assets acquired under a leasing contract has been found to be a general measure (judgment of 9 December 2014, *Netherlands Maritime Technology Association v Commission*, T-140/13, not published, EU:T:2014:1029).
- 71 As regards the method based on a reference system, the Kingdom of Spain submits that the Commission should at the outset have identified the ordinary tax regime and then demonstrated that the measure at issue was an exception to that regime applicable to economic operators in a comparable legal and factual situation. The Kingdom of Spain asserts in that respect that the Commission did not even identify the reference system in the present case. In any event, according to the Kingdom of Spain, there is no selectivity in the light of a reference system.
- 72 As regards infringement of Article 107(1) TFEU, having regard to the judgment on appeal, Lico and PYMAR argue that a three-step analysis is necessary in order to classify a tax measure as selective: first, the ordinary tax regime of the Member State must be identified and analysed in order to determine a reference system; secondly, it is necessary to determine whether the measure is selective by verifying whether it derogates from the ordinary regime by differentiating between operators who are in a comparable legal and factual situation; thirdly, it is appropriate to examine whether the Member State in question has established that the measure was justified by the nature or overall structure of the system of which it formed part. It is therefore necessary to examine whether the Commission satisfied those requirements in relation to the EIGs. According to Lico and PYMAR, whether through the prism of an individual examination of the measures or an overview of the STL system, the Commission failed to analyse the reference system, the purported derogation from the reference system, operators who were in a comparable factual and legal situation, any differentiation between those operators or the lack of any justification based on the objective pursued by the tax regime.
- 73 First of all, Lico and PYMAR contend that what was merely a tax optimisation strategy chosen by taxpayers could not as such be considered to be State aid. The reduction in tax was in fact achieved as a result of private operators deciding to act in conjunction and to apply the tax rules efficiently. According to Lico and PYMAR, undertakings' tax optimisation strategies are not State aid unless they derive from derogations established in the national legal order or arising from the practice of the tax administration and which discriminate between operators who are, in the light of the objective pursued by the reference tax regime, in the same factual and legal situation.

- 74 Lico and PYMAR submit, inter alia, that on an individual analysis of the measures, all persons subject to corporation tax, rather than only EIGs, could depreciate leasing contracts early. Lico and PYMAR also observed that the measure applied to all assets that satisfied certain objective conditions. Furthermore, according to those parties, although the measure was subject to authorisation, authorisation was granted on the basis of non-discriminatory objective criteria.
- 75 Lico and PYMAR maintain that, with regard to the assessment of the measures assessed as a whole, although the combination of measures that the Commission refers to as the STL system applied only to vessels, but not to other assets, that does not mean that the STL system was selective. Lico and PYMAR state that, according to the case-law, a measure which benefits only one economic sector or some of the undertakings in that sector is not necessarily selective (judgment of 21 December 2016, *Commission v Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 58). Accordingly, in contrast to the Commission's assertion, it was not sufficient that the measures at issue favoured the acquisition of sea-going vessels through leasing contracts with a view to their bareboat chartering and subsequent resale.
- 76 Lico and PYMAR also argue that the contested decision did not demonstrate to the requisite legal standard that the aid purportedly granted distorted competition and affected trade between Member States. Specifically, Lico and PYMAR argue that, given that the EIGs were merely financial intermediaries that did not perform any genuine activity in the maritime transport sector, they could not be said to be engaged in the market for the acquisition and sale of sea-going vessels with a view to their bareboat chartering. The aid therefore could not distort competition and affect trade between Member States in respect of that market.
- 77 In their observations on the future conduct of the proceedings in Case T-719/13 RENV, Bankia and others, first, dispute that the measures were selective – because the administration had discretionary power to authorise the STL system – on the ground that, according to those parties, that power was subject to objective criteria. They also assert that those were the same criteria that the Commission had found to be 'objective' when it held that the 'new STL system' was not selective, after examining it in its decision C(2012) 8252 final of 20 November 2012, State aid SA.34736 (2012/N) – Spain – Early depreciation of assets acquired through a financial leasing (OJ 2012 C 384, p. 2; 'the decision on the new STL system'). According to those parties, that view is confirmed by the judgment of 9 December 2014, *Netherlands Maritime Technology Association v Commission* (T-140/13, not published, EU:T:2014:1029). They add that, since the tax administration has never refused a request for authorisation, there is no practical difference between the authorisation in the original STL system and the notification required under the new STL system.
- 78 Secondly, Bankia and others argue that, in the light of the judgment on appeal, selectivity should be examined in relation to, first, the EIGs and, secondly, other undertakings in a similar factual and legal situation, in the light of the objective pursued by the legislature. Mindful of the principles set out in the judgment of 21 December 2016, *Commission v World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981), Bankia and others maintain that the Commission has at no time demonstrated that the measures differentiated between economic operators in a comparable factual and legal situation. The contested decision in fact merely states that the measures were selective from a sectoral point of view, for the sole reason that the beneficiaries were engaged in a particular field of activity, that is to say, the acquisition of sea-going vessels by means of leasing contracts and the bareboat chartering and resale of those vessels. However, the contested decision does not define the reference system and does not identify the objective pursued by the regime.

- 79 The Commission claims that the arguments concerning infringement of Article 107(1) TFEU should be dismissed. It believes the measures were selective, both when the STL system is considered as a whole and when the measures are considered individually.
- 80 According to settled case-law, classification of a national measure as ‘State aid’ within the meaning of Article 107(1) TFEU requires all the following conditions to be fulfilled: first, there must be an intervention by the State or through State resources; secondly, the intervention must be liable to affect trade between Member States; thirdly, it must confer a selective advantage on the recipient; fourthly, it must distort or threaten to distort competition (judgment on appeal, paragraph 35 and the case-law cited).
- 81 As regards the condition relating to the existence of a selective advantage, interventions which, in any form whatsoever, are liable to favour undertakings directly or indirectly, or which must be regarded as economic advantages which the recipient undertaking would not have obtained under normal market conditions, are considered to be State aid. Thus, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect, are considered to constitute aid. Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see judgment on appeal, paragraph 36 and the case-law cited).
- 82 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers, is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid. Similarly, the term ‘State aid’ does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective where that differentiation arises from the nature or the overall structure of the system of which they form part (see judgment on appeal, paragraph 37 and the case-law cited).
- 83 In that connection, in order to classify a national tax measure as ‘selective’, the Commission must, first, identify the ordinary or ‘normal’ tax system applicable in the Member State concerned, and, secondly, demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation. Thirdly, the concept of ‘State aid’ does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, *a priori* selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 57 and 58).
- 84 It should also be noted that the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59).

- 85 It is in the light of those considerations that the matter of whether the STL system is selective in relation to EIGs must be examined in the present case.
- 86 As regards the selectivity of the STL system as a whole, it should be noted that the Kingdom of Spain, Lico and PYMAR argue that the Commission failed both to identify the reference system and to demonstrate that the STL system derogated from the ordinary regime in a manner which differentiated between operators in a comparable factual and legal situation.
- 87 Indeed, the contested decision does not, at least explicitly, conduct the three-step analysis referred to in paragraph 83 above. However, in recital 156 of the contested decision, the Commission finds that the STL system, considered as a whole, was selective because, first, the tax administration had discretionary powers to grant the compulsory authorisation for early depreciation on the basis of imprecise conditions and, secondly, because the tax administration would only authorise STL operations to finance sea-going vessels. At the hearing, the Commission stated that the fact that the tax administration had discretionary powers to grant authorisation was in itself sufficient to make the entire STL system selective.
- 88 In relation to the discretionary powers of the tax administration, it should be recalled that the mere existence of a system of authorisation does not imply that a measure is selective. That is the case where the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent in the nature of the tax regime (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraphs 23 and 24). In contrast, a degree of latitude which enables the competent authority to adjust the financial assistance having regard to a number of considerations such as the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided cannot be considered to be general in nature (see, to that effect, judgments of 26 September 1996, *France v Commission*, C-241/94, EU:C:1996:353, paragraph 23, and of 29 June 1999, *DM Transport*, C-256/97, EU:C:1999:332, paragraph 27). Accordingly, if the competent authorities have a broad discretion to determine the beneficiaries and the conditions of the measure granted, the exercise of that discretion must then be regarded as favouring certain undertakings or the production of certain goods in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 27; judgment on appeal, paragraph 55; and judgment of 20 September 2019, *Port autonome du Centre et de l'Ouest and Others v Commission*, T-673/17, not published, EU:T:2019:643, paragraph 188). In addition, even where the aid scheme has been implemented by means of individual decisions involving a discretionary power, the Commission is not thereby required to carry out an examination on a case-by-case basis of the decisions granting aid, and in each case assess whether the conditions for the application of Article 107(1) TFEU are satisfied (judgment of 28 November 2008, *Hotel Cipriani and Others v Commission*, T-254/00, T-270/00 and T-277/00, EU:T:2008:537, paragraph 97).
- 89 In the present case, as the Commission observes, it is clear from Article 115 of the Law on Corporation Tax and Article 49 of the Regulation on Corporation Tax that the system at issue was based on obtaining prior authorisation – as opposed to merely notifying the administration – on the basis of vague criteria requiring interpretation by the tax administration, which had not published any guidelines.
- 90 First, according to Article 115(6) of the Law on Corporation Tax, the deductible amount is determined 'having regard to the time from which the asset becomes operational'.

91 However, Article 115(11) of the Law on Corporation Tax provides as follows:

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

92 Article 49 of the Regulation on Corporation Tax established the applicable procedure. That article provided in particular that the procedure commenced when the taxpayer submitted an application, which had to contain at least the following information: particulars of the asset, the date before the asset became operational from which the deductions were requested, evidence relating to the specific characteristics of the contracting or construction period for the asset and evidence of the specific nature of its economic use. The finance department responsible for those procedures within the Ministry of Economic Affairs could request all necessary information and documents. Once the procedure was completed, the finance department could accept or dismiss the application or determine that the early depreciation would commence on a date other than that proposed by the taxpayer.

93 It follows from the foregoing that Article 115(11) of the Law on Corporation Tax introduced vague criteria which could not be regarded as objective, as the Commission correctly indicated in recital 133 of the contested decision. Specifically, it emerges from Article 115(11) of the Law on Corporation Tax that the tax administration could set the start date for the depreciation having regard to the ‘specific characteristics of the contracting ... period’ or the ‘specific nature of the economic use of the asset’, that is to say, inherently vague criteria whose interpretation gave the tax administration a significant margin of discretion, as the Commission highlighted in recital 133 of the contested decision.

94 As can be seen from recital 136 of the contested decision, Article 49 of the Regulation on Corporation Tax also conferred important discretionary powers on the tax administration. First, the tax administration’s ability to require all the information and documents it deemed appropriate, together with the vagueness of the criteria, which gave the tax administration important discretionary powers as regards the type of information and documents it could require, explained why the application dossiers contained documents detailing the positive implications of the shipbuilding contracts for the economy and jobs in Spain. As the Commission observed in recital 136 of the contested decision, those factors were not obviously relevant to satisfaction of the criteria under Article 115(11) of the Law on Corporation Tax. Secondly, as the Commission highlighted in its written submissions, it follows from Article 49 of the Regulation on Corporation Tax that the tax administration was able not only to grant or refuse the authorisation, but also to set a different start date for the depreciation from that proposed by the taxpayer, without further clarification.

95 Moreover, the existence of the prior authorisation mechanism, instead of an *ex post* verification based on objective criteria, combined with the vagueness of the criteria laid down, made the system even more discretionary, as the Commission correctly observed in recital 133 of the contested decision.

96 Although the Kingdom of Spain argued at the hearing that the tax administration had no discretion in relation to verification of the conditions laid down in Article 115 of the Law on Corporation Tax and Article 49 of the Regulation on Corporation Tax, that thesis does not stand up when those provisions are examined, as can be seen from paragraphs 89 to 95 above.

- 97 In addition, Lico and PYMAR asserted, at the hearing, that the sole purpose of Article 49(6) of the Regulation on Corporation Tax was to prevent fraud, by ensuring that an asset was not depreciated before it was built. It should be noted in that respect that, according to recital 133 of the contested decision, the Kingdom of Spain did not demonstrate during the administrative procedure that the wording of Article 49 of the Regulation on Corporation Tax and the conditions it imposed were necessary to avoid abuse. Contrary to the assertions of Lico and PYMAR, it is sufficient to note that the wording of Article 49(6) of the Regulation on Corporation Tax, in so far as it allows the tax administration to set a different start date for the depreciation from that proposed by the taxpayer, without further clarification, does not ensure that it is used only in anti-fraud situations.
- 98 Bankia and others' argument that the criteria at issue are identical to those which the Commission found to be objective in the decision on the new STL system, must also be dismissed. In contrast to Bankia and others' assertion, it is clear from the decision on the new STL system that the Kingdom of Spain has significantly modified the regime at issue. In particular, the notified measures included significant amendments to Article 115(11) of the Law on Corporation Tax and the repeal of Article 49 of the Regulation on Corporation Tax. By means of the new wording of Article 115(11) of the Law on Corporation Tax the Kingdom of Spain sought to set up a system of notification by the taxpayer, instead of a prior authorisation system, under which the taxpayer could elect for the early depreciation to commence on the start date of construction of the asset, provided that three cumulative conditions were satisfied: first, the regular instalment payments under the leasing contract had to be made largely before construction of the asset was completed; secondly, the construction period was required to be at least 12 months; and, thirdly, the assets were not mass produced. In the light of those considerations, the Commission concluded, in recitals 34 to 36 of the decision on the new STL system, that the new system no longer conferred discretionary power on the tax administration. The characteristics of that new system described above are clearly very different from those of the system examined in the contested decision.
- 99 Further, contrary to what Bankia and others suggest, that finding is confirmed by the judgment of 9 December 2014, *Netherlands Maritime Technology Association v Commission* (T-140/13, not published, EU:T:2014:1029), on the new STL system. That judgment in fact confirms that the new version of Article 115(11) of the Law on Corporation Tax differs significantly from the version of that article in force in the situation under analysis (see, to that effect, judgment of 9 December 2014, *Netherlands Maritime Technology Association v Commission*, T-140/13, not published, EU:T:2014:1029, paragraphs 81 to 83 and 93). Bankia and others' argument is therefore untenable.
- 100 It can be seen from the foregoing that the presence of those discretionary factors was such as to favour the beneficiaries over other taxpayers in a comparable factual and legal situation. Specifically, it can be seen from those discretionary factors that other EIGs might not have benefited from the early depreciation under the same conditions. Similarly, because of those discretionary factors, other undertakings in a comparable factual and legal situation but engaged in other sectors or having a different form might not necessarily have benefited under the same circumstances. Since the provisions referred to in paragraph 89 above were discretionary as a matter of law, it is irrelevant whether or not they were actually applied in a discretionary manner, a point disputed by the Kingdom of Spain, Lico and PYMAR when they argue that in practice the authorisation was granted to all the EIGs engaged in the sector in question that applied for it.

- 101 As the Commission contends, since one of the measures making it possible to benefit from the STL system as a whole was selective, that is to say, authorisation of the early depreciation, it did not err when it found, in the contested decision, that the system as a whole was selective.
- 102 In the light of the foregoing, the plea alleging infringement of Article 107(1) TFEU in relation to the selectivity of the measures must be dismissed, and it is not necessary to examine the other arguments submitted by the Kingdom of Spain, Lico and PYMAR on that issue.
- 103 Since Lico and PYMAR's arguments concerning the conditions for there to be a risk of distorting competition and affecting trade between Member States can be interpreted as seeking to challenge the merits of the Commission's findings, it should be noted that, in recital 172 of the contested decision, the Commission found that the EIGs were engaged in the market for the acquisition and sale of sea-going vessels, in particular with a view to their bareboat chartering, which was open to intra-EU trade. Further, also according to recital 172, the EIG investors were active in all sectors of the economy, including in the sectors open to intra-EU trade. Recital 172 also adds that the advantages flowing from the STL system strengthened 'their position in their respective markets', thereby distorting or threatening to distort competition.
- 104 In order to classify a national measure as State aid it is necessary to examine whether the aid is liable to affect trade between Member States and to distort competition. In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, the latter must be regarded as affected by that aid (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraphs 140 and 141).
- 105 According to paragraph 42 of the judgment on appeal, it was correctly held in the contested decision that the EIGs were engaged in the market for the acquisition and sale of sea-going vessels, in particular with a view to their bareboat chartering. Although the discussion of that matter in the contested decision is succinct, it should be noted that the market in question is undeniably open to intra-EU trade, as confirmed by the existence of customers in other Member States, which is apparent, for example, from Annex 4 to the application in Case T-719/13, concerning a vessel ordered by a shipping company established in another State in the European Economic Area (EEA). It must therefore be held that the requirement that the aid affected trade between Member States is satisfied in the present case.
- 106 As regards the risk of distorting competition, it is undeniable that, given the large amount that it could represent, a 20 to 30% reduction in the price of a vessel threatened at least to distort competition in the market for the acquisition and sale of sea-going vessels, in particular with a view to their bareboat chartering, in which the EIGs were engaged.
- 107 Lico and PYMAR's arguments that there was no risk of the measures distorting competition and affecting intra-EU trade must, therefore, be dismissed.
- 108 In the light of the foregoing, therefore, the plea alleging infringement of Article 107(1) TFEU must be dismissed.

Breach of the duty to state reasons

- 109 Both in its written submissions at first instance in Case T-515/13 and in its observations pursuant to the judgment on appeal, the Kingdom of Spain claims that the contested decision does not discharge the obligation to state reasons, in particular for the alleged selectivity of the measures and the distortion of competition.
- 110 Lico and PYMAR, likewise, in their written submissions at first instance in Case T-719/13 and also in their observations pursuant to the judgment on appeal, contend that the contested decision should be annulled on account of several defects in the statement of reasons.
- 111 First, Lico and PYMAR allege a failure to state reasons for the finding that aid was granted to the EIGs but not to the shipping companies even though for both this was a matter of transactions between private operators. They claim that the contested decision does not explain why the advantage which the EIGs obtained in return for intermediation in the STL system is State aid, given that the EIGs were merely sharing the advantage obtained by the shipping companies, which is not considered to be aid.
- 112 Secondly, they argue that the contested decision is vitiated by a defective statement of reasons concerning why the order for recovery is aimed at the EIG investors whereas the aid beneficiaries were the EIGs. Lico and PYMAR note in that respect that the Court of Justice did not uphold the Commission's claim on appeal that the EIGs and the investors allegedly formed an economic unit.
- 113 Lico and PYMAR also allege that the order for recovery fails to state reasons why it is for the whole of the tax advantage granted to the investors whereas the contested decision itself acknowledges that part of that advantage had been transferred to the shipping companies.
- 114 Furthermore, Lico and PYMAR argue that it is overly contrived to devise a fictitious scenario by calculating what proportion of the advantage obtained by the shipping company would be compatible if it were State aid, in order to consider the advantage obtained by the EIGs to be compatible. The Commission is also contradicting itself, they claim, by applying the maritime guidelines, even *mutatis mutandis*, to the EIGs whilst at the same time regarding them as being merely financial intermediaries rather than as carrying on a maritime transport activity.
- 115 As can be seen from their observations pursuant to the judgment on appeal, Bankia and others believe the contested decision to be vitiated by defective reasoning regarding the selectivity of the measures. In their view, the contested decision did not even attempt to demonstrate that the measures at issue, through their actual effects, introduce differences in the treatment of operators which are, in the light of the objective pursued by the tax system at issue, in a comparable factual and legal situation, as the judgment on appeal requires.
- 116 It can be seen from Aluminios Cortizo's observations pursuant to the judgment on appeal that it endorses the plea alleging that the contested decision contains an insufficient statement of reasons as regards, inter alia, the fact that the order for recovery of all the aid is aimed exclusively at the investors, whereas the contested decision acknowledges that between 85 and 90% of the advantage was channelled to the shipping companies. Aluminios Cortizo adds that the statement of reasons of the contested decision is also insufficient as regards the finding that it was impossible to quantify the advantage allegedly granted to the shipyards.

- 117 The Commission argues that the claims of the Kingdom of Spain, Lico and PYMAR and the intervenors Bankia and others and Aluminios Cortizo should be dismissed.
- 118 Under the second paragraph of Article 296 TFEU, legal acts are to state the reasons on which they are based. Further, according to Article 41(2)(c) of the Charter of Fundamental Rights of the European Union, the right to sound administration includes the obligation of the administration to give reasons for its decisions.
- 119 According to consistent case-law, the scope of the obligation to state reasons depends on the nature of the act at issue and the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure so as to enable the Courts of the European Union to review the legality of the measure and allow the persons concerned to ascertain the reasons for the measure, so that they can defend their rights and ascertain whether or not the decision is well founded (see judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 278 and the case-law cited).
- 120 It is not necessary for the statement of reasons to specify all the relevant matters of fact or of law, since the question whether the statement of reasons for a measure satisfies the requirements of the second paragraph of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 279).
- 121 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 280).
- 122 Further, it should be noted that, according to consistent case-law, the fact that a statement of reasons is lacking or inadequate, hindering the review of legality referred to in paragraph 119 above, constitutes a matter of public interest which may, and even must, be raised by the EU Court of its own motion (see judgment of 20 February 1997, *Commission v Daffix*, C-166/95 P, EU:C:1997:73, paragraph 24 and the case-law cited).
- 123 It is in the light of those considerations that the plea advanced by the Kingdom of Spain, Lico and PYMAR must be examined.
- 124 It is appropriate to recall that, in paragraph 101 of the judgment on appeal, the Court of Justice held that in the contested decision the Commission had provided information making it possible to understand the reasons why it considered that the advantages arising from the tax measures at issue were selective and were liable to affect trade between Member States and distort competition, and had, in the light of the specific circumstances of the present case, adequately explained the reasons for that decision without contradiction in that respect, in keeping with the requirements of Article 296 TFEU as set out in the case-law.
- 125 Notwithstanding the foregoing, the Kingdom of Spain, Lico and PYMAR and the intervenors submit that the contested decision is vitiated by a series of defects in the statement of reasons which have not yet been examined by the EU judicature.

- 126 First, as regards selectivity, it is alleged that the Commission failed to identify the reference system for the purposes of analysing the selectivity of the tax measures at issue, in accordance with the case-law cited in paragraph 83 above. It is sufficient to note in that respect that, in recital 156 in conjunction with recitals 132 to 139 of the contested decision, the Commission does explain to the requisite legal standard why the STL system is selective, in the light in particular of the discretionary powers of the tax administration to grant authorisation for early depreciation on the basis of vague criteria, as set out in paragraphs 88 to 102 above.
- 127 Secondly, as regards the alleged lack of reasons given for the finding that aid was granted to the EIGs but not to the shipping companies, irrespective of the merits of that assessment it is sufficient to note that the Commission did explain, in recitals 169 and 170 of the contested decision, that that finding was based on the conclusion that the aid to the EIGs, granted in the form of tax advantages, was directly imputable to the State and that under the applicable rules the EIGs were not obliged to transfer part of the advantage to the shipping companies.
- 128 Thirdly, in respect of the purported failure to state reasons regarding the fact that the order for recovery was aimed at the EIG investors, whereas the aid beneficiaries were the EIGs themselves, it can be seen from recital 161 of the contested decision that the Commission found that the advantage accrued to the EIGs and, by transparency, to their investors. According to that recital, from a tax perspective, the EIGs are tax transparent and their deductible expenses are therefore automatically transferred to their investors.
- 129 Moreover, subject to assessment of whether the order for recovery is well founded in so far as it recovers all the aid from the investors despite the finding that between 85 and 90% of the advantage had been transferred to the shipping companies, it should be noted that, according to recitals 169 and 170 of the contested decision, that decision follows from the finding that the applicable rules did not oblige the EIGs and the investors to transfer part of the advantage to other operators such as the shipping companies.
- 130 In respect of the allegation that application of the maritime guidelines to the EIGs was artificial or contradictory, it is sufficient to note that it is stated in recital 201 of the contested decision that it was appropriate to apply the maritime guidelines by analogy, and the obligation to state reasons is thereby satisfied.
- 131 Fourthly, Aluminios Cortizo's argument – that insufficient reasons are stated for the assertion in footnote 102 of the contested decision (corresponding to footnote 101 in the version published in the *Official Journal of the European Union*), that it was impossible to quantify the advantage purportedly granted to the shipyards – is based on a misreading of the contested decision. It can in fact be seen from recitals 169 and 170 of the contested decision that, although the Commission found that no aid had been granted to the shipyards, that was because the applicable rules did not oblige the EIGs to transfer part of the advantage to the shipyards, rather than because it was impossible to quantify the advantage granted to the shipyards. In the footnote in question, the Commission merely stated that the shipyards were therefore not recipients of aid, that it was impossible to quantify an economic flow to their benefit and that, accordingly, it was not necessary to assess whether the aid was compatible in the light of the rules applicable to the shipbuilding sector.

- 132 In the light of the foregoing, the plea relating to a failure to state reasons must be dismissed as unfounded in its entirety, and it is unnecessary to rule on the objections raised by the Commission regarding the standing of Lico and PYMAR to dispute part of the statement of reasons of the contested decision (see, to that effect, judgment of 11 July 2014, *DTS Distribuidora de Televisión Digital v Commission*, T-533/10, EU:T:2014:629, paragraph 170).

Breach of the principle of equal treatment

- 133 In the plea in law alleging breach of the principle of equal treatment, made in its application in Case T-515/13, the Kingdom of Spain asserts that the Commission did not order the recovery of aid in two earlier similar cases, that is to say, in the decision of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company ('BAI' or 'Brittany Ferries') (OJ 2002 L 12, p. 33; 'the *Brittany Ferries* decision') and in the decision on the French *GIE fiscaux*.
- 134 The Kingdom of Spain observes that the Commission indicated in the contested decision that the French *GIE fiscaux* scheme was comparable to the STL system because 'they shared a series of essential characteristics and had similar effects'. The only differences identified were that the French scheme contained an express exemption whereas the Spanish system was the outcome of applying various provisions; that the French Republic had informed the Commission before applying the system even though it had not notified it; and that the Commission had not yet made a ruling on that type of scheme. According to that party, those purported differences are however irrelevant.
- 135 First, the Kingdom of Spain takes the view that the existence of an express exemption in the decision on the French *GIE fiscaux* cannot be a determining factor because the Spanish exemption is based in essence on the tonnage taxation regime laid down by the Law on Corporation Tax, which cannot be derogated from and cannot be amended by a lower ranking provision such as Article 50(3) of the Regulation on Corporation Tax.
- 136 Secondly, the fact that the French authorities had drawn the Commission's attention to the *GIE fiscaux* system is in its view irrelevant, since the letter informing the Commission of that mechanism did not amount to a notification. The Kingdom of Spain also notes that it too sent letters to clarify certain matters following a complaint made to the Commission.
- 137 Thirdly, the Kingdom of Spain argues that it is also irrelevant that, at the time it initiated formal investigation into the STL system, the Commission had already ruled on the French *GIE fiscaux*, in view of the differences between the two systems. Accordingly, since the uncertainty caused by the Commission, in particular that resulting from the *Brittany Ferries* decision, continued to exist, the Kingdom of Spain argues that, under the principle of equal treatment, the recovery of the aid should not have been ordered.
- 138 The Commission claims that the Kingdom of Spain's arguments should be dismissed.
- 139 According to the case-law, the general principle of equal treatment, as a general principle of EU law, requires that comparable situations must not be treated differently and different situations must not be treated in the same way unless such treatment is objectively justified (judgment of 8 April 2014, *ABN Amro Group v Commission*, T-319/11, EU:T:2014:186, paragraph 110).

Moreover, the burden of proving that the situations are comparable falls on the party claiming that they are (see, to that effect, judgment of 8 April 2014, *ABN Amro Group v Commission*, T-319/11, EU:T:2014:186, paragraph 114).

- 140 First, the Kingdom of Spain's argument relating to the *Brittany Ferries* decision consists solely of referring to that decision, without for that reason explaining in detail why the situations at issue are purportedly comparable. It can also be seen from recital 251 of the contested decision and from recital 193 of the *Brittany Ferries* decision that the Commission stated in the *Brittany Ferries* decision that the relevant tax advantages arising from the setting up of EIGs were general measures and were therefore not State aid. Contrary to what the Kingdom of Spain is suggesting, therefore, the Commission did not decline to order the recovery of the aid in the *Brittany Ferries* decision but ordered recovery in the present case. In actual fact, the Commission reached different conclusions, finding that the tax advantages resulting from the EIGs did not constitute State aid in the *Brittany Ferries* decision whereas the STL system did constitute State aid according to the contested decision.
- 141 It must be recalled in that regard that, according to the case-law, an applicant cannot rely, in support of its argument, on an earlier decision-making practice by the Commission, even assuming such a practice to be established, if it is contrary to a correct interpretation of the provisions of the Treaty (see, to that effect, judgments of 30 September 2003, *Freistaat Sachsen and Others v Commission*, C-57/00 P and C-61/00 P, EU:C:2003:510, paragraphs 52 and 53, and of 12 September 2013, *Germany v Commission*, T-347/09, not published, EU:T:2013:418, paragraph 51). Accordingly, irrespective of the differences between the systems at issue in the *Brittany Ferries* decision and the contested decision, it should in any event be found that the Kingdom of Spain cannot rely on any change in the Commission's practice in support of this plea.
- 142 Secondly, it should be noted that, according to recital 214 of the contested decision, the French *GIE fiscaux* scheme can be regarded as comparable to the STL in a number of respects, including because there was intermediation by a tax-transparent EIG and investors between the builder of an asset and its buyer, conclusion of a leasing contract, accelerated and early depreciation of the asset by the EIG, and the capital gain resulting from the sale of the asset was exempted from corporate tax, and the EIG and its investors transferred part of the benefits to the buyer of the asset. However, the Commission added, in recitals 214 and 215 of the contested decision, that there were also a number of differences, that is to say, the fact that, in the French *GIE fiscaux* scheme, the exemption of capital gains was explicit whereas in the STL system that exemption was the result of the joint application of several provisions; the fact that the French Republic had informed the Commission of the scheme even though it had not notified it; and the fact that, when it made the contested decision, the Commission had already ruled on a similar regime, namely the French *GIE fiscaux* scheme
- 143 It should be noted that the Kingdom of Spain's line of argument is somewhat contradictory inasmuch as, on the one hand, it disputes that the alleged differences between the French *GIE fiscaux* scheme and the STL system exist or are significant and, on the other, it states that the Commission could not rely on the fact that, at the time it adopted the contested decision, it had already ruled on a similar regime, that is to say, the French *GIE fiscaux* scheme because those systems were too different.
- 144 It is sufficient to bear in mind in that respect that, since there were significant similarities between the French *GIE fiscaux* scheme and the STL system, which were identified in recital 214 of the contested decision, the Commission limited the recovery obligation in both the decision on the

French *GIE fiscaux* and the present case, on account of, inter alia, the uncertainties created by its *Brittany Ferries* decision, which potentially suggested that measures of that kind were not State aid because they were general measures. From that point of view, therefore, it should be found that there was no difference in treatment between the situation relating to the French *GIE fiscaux* and the STL system.

- 145 Admittedly, whereas in the decision on the French *GIE fiscaux*, the recovery obligation started only from the date on which the decision to initiate the formal investigation procedure was published, in the present case the Commission imposed that obligation from the date on which its own decision on the French *GIE fiscaux* was published (prior to the decision to open the formal investigation procedure which led to the adoption of the contested decision). However, that difference in treatment is objectively justified by the fact that the uncertainty resulting from the *Brittany Ferries* decision, which was the reason for the partial non-recovery, ceased to exist once the decision on the French *GIE fiscaux* was published, as the Commission is correct to assert and as will be expounded more fully in paragraphs 191 to 206 below.
- 146 It follows from the foregoing that the argument according to which the principle of equal treatment was breached as a result of the decision on the French *GIE fiscaux* must therefore be dismissed.
- 147 Therefore, that plea must be dismissed as unfounded.

Breach of the principle of the protection of legitimate expectations

- 148 In Case T-515/13 the Kingdom of Spain submits a plea in law alleging breach of the principle of the protection of legitimate expectations, seeking annulment of the order for recovery of the aid for the period up to publication of the decision to initiate the formal investigation procedure, that is to say, 21 September 2011, whereas the contested decision ordered recovery from publication of the decision on the French *GIE fiscaux*, that is to say 30 April 2007.
- 149 The Kingdom of Spain refers to a series of factors which in its view gave rise to those legitimate expectations, namely the *Brittany Ferries* decision; the decision on the French *GIE fiscaux*; the Commission's request for information from the Spanish authorities of 21 December 2001; Commission Decision 2005/122/EC 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 2005 L 39, p. 48; 'the Netherlands shipyards decision'); a letter from the Commissioner in charge of the Directorate-General (DG) for Competition of 9 March 2009; Commission Notice on the application of State aid rules to measures related to direct business taxation (OJ 1998 C 384, p. 3); and Commission Decision C(2002) 582 final of 27 February 2002 concerning State aid N 736/2001 – Scheme for the tonnage based taxation of shipping companies (Tonnage tax) (OJ 2004 C 38, p. 5). It also argues that this was the first time that the Commission examined together a series of separate measures which the national legislature had not designed as a regime. Lastly, the Kingdom of Spain disputes that the adoption of the decision on the French *GIE fiscaux* ended its legitimate expectations that the Spanish measures were not State aid, on the ground that the two regimes were very different.
- 150 In their application in Case T-719/13, Lico and PYMAR also submitted a plea in law alleging breach of the principle of the protection of legitimate expectations, seeking annulment of the order for the recovery of aid.

- 151 First, Lico and PYMAR rely, inter alia, on the Netherlands shipyards decision and the letter from the Commissioner in charge of DG Competition of 9 March 2009 as the acts which allegedly created a legitimate expectation.
- 152 Secondly, Lico and PYMAR also argue that the operators could not have foreseen the change in the Commission's pattern of conduct, because the letter from the Commissioner in charge of DG Competition stated that the Commission had already analysed the STL system and was not envisaging any additional measures. Moreover, in the *Brittany Ferries* decision the Commission found that a scheme similar to the STL system was not State aid.
- 153 Thirdly, Lico and PYMAR state that the contested decision does not identify any overriding Union interest such as to outweigh the interests of the affected operators.
- 154 The Commission submits that there was no breach of the principle of the protection of legitimate expectations.
- 155 It should be recalled first of all that a legitimate expectation that aid granted is lawful cannot, barring exceptional circumstances, be entertained unless it has been granted in compliance with the procedure laid down in Article 108 TFEU (judgment of 13 June 2013, *HGA and Others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 134).
- 156 According to the case-law, therefore, a recipient of aid which is granted unlawfully, because it was not notified, is not precluded from relying on exceptional circumstances on the basis of which it legitimately assumed the aid to be lawful, in order to oppose repayment of the aid (judgment of 9 September 2009, *Diputación Foral de Álava and Others v Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 282).
- 157 It is clear from the case-law that the principle of the protection of legitimate expectations can be relied upon where three conditions are satisfied.
- 158 First the right to rely on the principle of the protection of legitimate expectations applies to any individual in a situation in which an EU institution, by giving that person precise assurances, has led him or her to entertain well-founded expectations. Such assurances, in whatever form they are given, constitute precise, unconditional and consistent information (judgment of 16 December 2010, *Kahla Thüringen Porzellan v Commission*, C-537/08 P, EU:C:2010:769, paragraph 63). Moreover, those assurances must originate from authorised and reliable sources. Furthermore, only assurances that comply with the applicable rules can give rise to a legitimate expectation (judgment of 23 February 2006, *Cementbouw Handel & Industrie v Commission*, T-282/02, EU:T:2006:64, paragraph 77).
- 159 Secondly, if a prudent and alert economic operator could have foreseen the adoption of an EU measure likely to affect his or her interests, he or she cannot plead that principle if the measure is adopted (judgments of 22 June 2006, *Belgium and Forum 187 v Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 147, and of 14 October 2010, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 71).
- 160 Thirdly, where the EU institutions have created a situation liable to give rise to a legitimate expectation for an individual, that expectation may nevertheless be disregarded where the institution at issue demonstrates an overriding public interest that takes precedence over the private interest concerned (see, to that effect, judgments of 26 June 1990, *Sofrimport v*

Commission, C-152/88, EU:C:1990:259, paragraphs 16 and 19; of 17 July 1997, *Affish*, C-183/95, EU:C:1997:373, paragraph 57; and of 22 June 2006, *Belgium and Forum 187 v Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 164).

- 161 Those are the considerations in the light of which the present case must be examined.
- 162 In respect of the first condition, it is worth noting that, in recitals 219 to 245 of the contested decision, the Commission examined a series of factors identified by the Kingdom of Spain, Lico and PYMAR and concluded that they did not give rise to any legitimate expectation whatsoever. It is therefore necessary to verify whether those factors amount to precise, unconditional and consistent assurances.
- 163 First, it should be noted that the *Brittany Ferries* decision and the decision on the French *GIE fiscaux* cannot be considered to offer precise, unconditional and consistent assurances because they do not mention the STL system, either directly or indirectly.
- 164 Secondly, the argument based on the Commission's request for information from the Spanish authorities on 21 December 2001 must be dismissed because that request and any subsequent inaction by the Commission for a given period do not amount to precise, unconditional and consistent assurances that the STL system was lawful. It is clear from recital 222 of the contested decision, in that request for information the Commission merely sought additional information about the possible existence of a tax leasing scheme applicable to vessels in Spain so that it could examine that scheme in the light of the State aid rules. Nor can the Commission's subsequent inaction amount to precise, unconditional and consistent assurances, in the light of the contents of the response from the Spanish authorities. That response was at the very least ambiguous in so far as the Spanish authorities stated that there was no tax leasing scheme other than that which had already been approved by the Commission in an earlier decision.
- 165 Thirdly, the argument based on the Commission Notice on the application of State aid rules to measures related to direct business taxation (see paragraph 149 above), which states that the rules on depreciation and loss carry-overs do not constitute State aid where they apply without distinction to all firms and to the production of all goods, cannot be grounds for a legitimate expectation since, as stated in recital 242 of the contested decision, the STL system was not applicable to all firms or to the production of all goods.
- 166 Fourthly, Commission Decision C(2002) 582 final of 27 February 2002 concerning tonnage-based taxation (see paragraph 149 above), which had found that scheme to be compatible, could not give rise to a legitimate expectation because it related to the operation of vessels owned or leased by the operators, not to financial activities relating to bareboat chartering such as those in the present case, as recital 245 of the contested decision correctly makes clear.
- 167 Fifthly, even if that is the first time that the Commission has examined together a series of separate measures which the national legislature did not design as a regime, which the Commission in fact disputes, neither the Kingdom of Spain nor the economic operators can claim on that basis alone that there were precise, unconditional and consistent assurances that the STL system was not State aid. As the Commission correctly stated in recitals 238 and 239 of the contested decision, that fact alone does not prevent the Commission from carrying out a global assessment of the measures, with all the more reason since it also examined the measures individually.

- 168 Sixthly, it must be observed that the Netherlands shipyards decision does not contain precise, unconditional and consistent assurances that the STL system was lawful. In the Netherlands shipyards decision, the Commission did not in fact state precisely, unconditionally and consistently that, after carrying out a full in-depth analysis, it had reached the conclusion that the STL system was not State aid. First, as indicated in recital 224 of the contested decision, the subject of the Netherlands shipyards decision was not the STL system, but a Dutch scheme. It therefore referred to the Spanish measures only incidentally. Secondly, as can be seen from recital 225 of the contested decision, the Spanish measures that the Netherlands was intending to match were not the STL system but alleged interest subsidies benefiting Spanish shipyards.
- 169 Seventhly, the letter of 9 March 2009 from the Commissioner in charge of DG Competition was sent in response to the Minister for Trade and Industry of the Kingdom of Norway who, after suggesting that the STL system was a State aid scheme benefiting the Spanish shipyards, had requested information about the actions being envisaged by the Commission. In her reply, the Commissioner in charge of DG Competition stated that the Commission had examined the matter and that, since the system was open on a non-discriminatory basis to the acquisition of vessels built by shipyards in other Member States, it did not envisage adopting any further measures ‘at that stage’.
- 170 As Lico and PYMAR correctly state, it must be observed that the argument in recital 233 of the contested decision to the effect that the letter in question was not a formal act of the Commission, is not conclusive.
- 171 As Lico and PYMAR observe, it has been held that whether the statements of an official are attributable to the authority depended in particular on how those statements may have been perceived by the persons to whom they were addressed. The decisive factor for the statements of an official to be attributed to the authority is whether the persons to whom those statements are addressed can reasonably suppose, in the given context, that they are positions taken by the official with the authority of his or her office. It is necessary to assess, in particular, whether the official has authority generally within the sector in question; whether he or she sends out his or her statements in writing under the official letterhead of the competent department; whether he or she gives television interviews on his or her department’s premises; whether he or she does not indicate that his or her statements are personal or that they differ from the official position of the competent department; and whether departments of the competent authority do not take the necessary steps as soon as possible to dispel the impression on the part of the persons to whom the official’s statements are addressed that they are official positions taken by the authority (see by analogy, judgment of 17 April 2007, *AGM-COS.MET*, C-470/03, EU:C:2007:213, paragraphs 56 to 58).
- 172 It is therefore conceivable that a letter sent by the most high ranking official in the Commission’s Competition Directorate, in that capacity, as can be seen both from the letterhead and from the signature, to the Minister for Trade and Industry of the Kingdom of Norway, that is to say, the competition authority in that country, might in principle give rise to a legitimate expectation on the part of the economic operators in relation to how the STL system was being assessed in the light of the State aid rules.
- 173 Nor is it conclusive that the letter in question was not addressed to the economic operators who are seeking to rely upon it, provided its content was conveyed to them. It appears that in the present case the economic operators participating in the STL system had been aware of the contents of that letter since 2009, as can be seen from a letter sent by a Norwegian shipping

company to a Spanish shipyard in April 2009 and a letter sent by the Spanish Ministry of Industry which states that it had informed all the operators concerned of the letter in question at their periodic meetings.

- 174 Nevertheless, for the letter from the Commissioner in charge of DG Competition to actually give rise to a legitimate expectation, the content of that letter must also provide precise, unconditional and consistent assurances. As correctly found in recitals 235 and 236 of the contested decision, however, it did not in fact do so. It must be observed that the letter in question does not state precisely, unconditionally and consistently that, after carrying out a full in-depth analysis, the Commission reached the conclusion that the STL system was not State aid. Since the letter from the Norwegian authorities referred to the concerns of shipyards in that country, the Commissioner's letter merely stated that the STL system did not appear to discriminate against shipyards from other Member States. The letter added that no further measures were envisaged 'at that stage', thereby signalling that that position might change if new information was put forward. The Kingdom of Spain, Lico and PYMAR therefore cannot base any legitimate expectation whatsoever on that letter.
- 175 In view of the foregoing considerations relating to the first of the three cumulative conditions for the principle of the protection of legitimate expectations to have been breached, it is not necessary to examine the other conditions.
- 176 In the light of the foregoing, the plea alleging breach of principle of the protection of legitimate expectations must be dismissed as unfounded.

Breach of the principle of legal certainty

- 177 In its application in Case T-515/13, the Kingdom of Spain submits a plea in law alleging breach of the principle of legal certainty in support of its head of claim seeking annulment of the order for recovery of the aid for the period up to publication of the decision to initiate the formal investigation procedure, whereas the contested decision ordered recovery from publication of the decision on the French *GIE fiscaux*.
- 178 First, the Kingdom of Spain claims that a series of factors gave rise to legal uncertainty concerning whether the STL system was lawful. In particular, the *Brittany Ferries* decision meant that the economic operators could justifiably regard the tax advantages at issue to be general measures. In addition, the letter of 9 March 2009 from the Commissioner in charge of DG Competition to the Norwegian authorities increased the legal uncertainty. According to the Kingdom of Spain that letter stated explicitly that the Commission was aware that the regime existed and, on analysis, found that it presented no problem in terms of the State aid rules. That letter therefore gave the operators participating in the STL system reason to believe that the system was lawful. The Kingdom of Spain also observes that the content of the letter was widely reported in the press at the time.
- 179 Secondly, the Kingdom of Spain highlights that the Commission took no action for a longer than reasonable period of time even though it was aware that the STL system existed. Given that awareness, the fact that shipyards in other Member States only submitted complaints in 2006 is, in that party's view, irrelevant. The Kingdom of Spain therefore believes that it is inappropriate to seek recovery of the aid before the decision to initiate the formal investigation procedure was published in the *Official Journal of the European Union* on 21 September 2011.

- 180 In their application in Case T-719/13, Lico and PYMAR claim that the order for the recovery of the aid granted breaches the principle of legal certainty.
- 181 First, Lico and PYMAR refer in particular to the *Brittany Ferries* decision as one of the elements allegedly giving rise to legal uncertainty.
- 182 Lico and PYMAR submit, in contrast to the Commission, that the decision on the French *GIE fiscaux* did not end that legal uncertainty, because there were in their view significant differences between the French scheme and the STL system. First, the French scheme derived from one provision of the French General Tax Code whereas the STL system was based on the combined application of several provisions. Moreover, in the French scheme, it was mandatory for part of the advantage to be transferred to the shipping company whereas, in the STL system, the transfer resulted from private agreements between the parties. In addition, the Commission found that the French scheme was aid to transport whereas it held that the present case concerned aid to investors. In view of those differences, Lico and PYMAR argue that the economic operators could not foresee that the Commission's findings on the French scheme should be extrapolated to the STL system. In addition, the decision on the French *GIE fiscaux* did not explicitly state that the content of the *Brittany Ferries* decision was erroneous or that the Commission had adopted a different position.
- 183 Lico and PYMAR argue that other factors contributed to creating legal uncertainty, that is to say, the Netherlands shipyards decision and the letter of 9 March 2009 from the Commissioner in charge of DG Competition.
- 184 Lico and PYMAR contend that it can be inferred from the Netherlands shipyards decision that the Commission was aware of the STL system and that, on the basis of the information received, the Commission was of the view that the scheme was not State aid incompatible with the internal market. Accordingly, if the Court does not find that decision to have reinforced a legitimate expectation, Lico and PYMAR maintain that it did at the very least increase the uncertainty regarding whether the STL system was lawful. Indeed, given that the Commission has a duty to conduct a diligent and impartial investigation, statements such as those in the Netherlands shipyards decision, which was published, could easily have given the impression that the STL system was lawful.
- 185 Lico and PYMAR also claim that, even if the Court does not find that the letter from the Commissioner in charge of DG Competition could have founded a legitimate expectation, it should be found at the very least to have increased the ambiguity surrounding the lawfulness of the STL system. Lico and PYMAR draw attention to the context in which that letter was sent. Specifically, they note that the Spanish authorities and Commission staff had exchanges and held meetings about the STL system in 2008. According to Lico and PYMAR, it was agreed during those exchanges that the STL system would not be regarded as State aid if the Spanish authorities adopted a binding opinion clarifying that the STL system was applicable to vessels built in any shipyard in the EEA. Moreover, the Spanish authorities apparently sent a draft opinion to the Commission, which reviewed it and suggested drafting amendments, which were incorporated in the final version. The Commission staff apparently stated that the content of the binding opinion was 'perfect'. That, for Lico and PYMAR, is the context in which the Commissioner in charge of DG Competition's letter was sent in 2009.

- 186 Secondly, Lico and PYMAR contend that the Commission had been aware of the STL system since its implementation, as demonstrated by the requests for information sent to the Spanish authorities from 2001. In addition, approval of the measures comprising the STL system was published in the *Boletín Oficial del Estado* (Spanish Official Gazette) and widely disseminated in the press. The Commission was nevertheless inactive – and did not initiate a formal investigation procedure – for nearly 10 years, which Lico and PYMAR claim was an excessive period of time. They also state that it is contradictory to decline to recover the aid granted between 2002 and 2006 because to do so would breach the principle of legal certainty, whilst claiming that the same period cannot be taken into account when examining whether the Commission was inactive for too long. In any event, even assuming that it is appropriate to examine whether the Commission acted within a reasonable period only from 2006, Lico and PYMAR believe it should be found that it did not, by analogy with the judgment of 24 November 1987, *RSV v Commission* (223/85, EU:C:1987:502), in which the Commission took 26 months to adopt its decision. They note moreover that, even if the STL system was as similar to the scheme addressed in the decision on the French *GIE fiscaux* as the Commission claims, which it was not, the five-year period that elapsed before the decision to initiate the formal investigation procedure in the present case was clearly too long. In the light of the foregoing, Lico and PYMAR are of the view that the legal uncertainty continued until the decision to initiate the formal investigation procedure was published in 2011.
- 187 In their observations on the future conduct of the proceedings in Case T-719/13 RENV, Bankia and others argue, contrary to what the Commission appears to be suggesting, that any breach of the principle of the protection of legitimate expectations exists independently of a breach of the principle of legal certainty. According to those parties, a breach of the principle of legal certainty was ongoing until the contested decision was published in the *Official Journal of the European Union*.
- 188 Bankia and others also note that the letter from the Commissioner in charge of DG Competition was later than the decision on the French *GIE fiscaux*. Therefore, that decision could not have ended the legal uncertainty.
- 189 Lastly, Bankia and others are of the view that, even if the circumstances of the French *GIE fiscaux* were as similar to those of the present case as the Commission claims, the five-year period that elapsed between the decision on the French *GIE fiscaux* and the decision to initiate the formal investigation procedure was too long.
- 190 The Commission claims that the arguments of the Kingdom of Spain, Lico and PYMAR should be dismissed.
- 191 By that plea, the Kingdom of Spain, Lico and PYMAR allege breach of the principle of legal certainty, seeking annulment of the order for recovery in respect of the entire period up to publication of the decision to initiate the formal investigation procedure, that is to say, 21 September 2011, whereas the contested decision ordered recovery from publication of the decision on the French *GIE fiscaux*, that is to say 30 April 2007.
- 192 As a preliminary point, it should be recalled that the forms of order sought by an intervener may only seek to support or to have dismissed the forms of order sought by one of the main parties to the proceedings and the intervener therefore cannot alter the subject matter of the proceedings in any way (see, to that effect, order of 6 February 1995, *Auditel v Commission*, T-66/94, EU:T:1995:20, paragraph 27). In the present case, Bankia and others are seeking annulment of

the order for recovery also for the period between 21 September 2011, the date on which the decision to initiate the formal investigation procedure was published, and 16 April 2014, the date on which the contested decision was published in the *Official Journal of the European Union*, whilst Lico and PYMAR are seeking annulment of the order for recovery only up to publication, on 21 September 2011, of the decision to initiate the formal investigation procedure. The application for annulment of the order for recovery in respect of that additional period, submitted by Bankia and others, therefore exceeds the scope of the action brought by Lico and PYMAR and must be dismissed as inadmissible.

- 193 It is clear from the case-law that the logical consequence of a finding that aid is unlawful is to remove it by means of recovery in order to restore the situation previously obtaining. It is only in exceptional circumstances that it would be inappropriate to order repayment of the aid (judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraphs 33 and 35). In specific terms, according to the case-law a recipient of aid which is granted unlawfully, because it was not notified, is not precluded from relying on exceptional circumstances, such as breach of the principle of legal certainty, in order to oppose repayment of the aid (see, to that effect, judgment of 22 April 2008, *Commission v Salzgitter*, C-408/04 P, EU:C:2008:236, paragraphs 106 and 107).
- 194 Moreover, the principle of legal certainty requires that EU legislation must be certain and its application foreseeable by those subject to it (judgment of 14 October 2010, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 77), so that they may know without ambiguity what are their rights and obligations and may take steps accordingly (judgment of 22 February 1989, *Commission v France and United Kingdom*, 92/87 and 93/87, EU:C:1989:77, paragraph 22). That requirement for legal certainty must be upheld all the more strictly in the case of rules liable to have financial consequences, in order that the person concerned may know precisely the extent of the obligations which they impose on him or her (see judgment of 21 September 2017, *Eurofast v Commission*, T-87/16, not published, EU:T:2017:641, paragraph 97 and the case-law cited).
- 195 It must be observed that actions seeking to defeat the obligation to recover State aid on the grounds of a breach of the principle of legal certainty are only upheld in very exceptional circumstances. One of the rare examples of an action of that kind being upheld is the case which gave rise to the judgment of 1 July 2004, *Salzgitter v Commission* (T-308/00, EU:T:2004:199). That judgment was set aside on appeal by the judgment of 22 April 2008, *Commission v Salzgitter* (C-408/04 P, EU:C:2008:236), and, after the Court of Justice had referred the case back to the General Court, the General Court ultimately found in the judgment of 22 January 2013, *Salzgitter v Commission* (T-308/00 RENV, EU:T:2013:30), that the conditions to establish a breach of the principle of legal certainty had not been satisfied.
- 196 It emerges from the case-law that a series of factors must be examined in order to ascertain whether the principle of legal certainty has been breached, including the lack of clarity of the applicable legal regime (see, to that effect, judgment of 14 October 2010, *Nuova Agricast and Cofra v Commission*, C-67/09 P, EU:C:2010:607, paragraph 77) and/or lengthy inaction by the Commission without valid justification (see, to that effect, judgments of 24 November 1987, *RSV v Commission*, 223/85, EU:C:1987:502, paragraphs 14 and 15, and of 22 April 2008, *Commission v Salzgitter*, C-408/04 P, EU:C:2008:236, paragraphs 106 and 107). As regards that latter factor, it should be remembered that the Commission is required to act within a reasonable time in procedures for examining State aid and that it is not allowed to persist in refraining from taking action during the preliminary examination phase. Moreover, the reasonableness of the period

taken up by proceedings is to be appraised in the light of the circumstances specific to each case, such as its complexity and the conduct of the parties (judgment of 13 June 2013, *HGA and Others v Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraphs 81 and 82).

- 197 It is therefore necessary to determine whether any such exceptional circumstances precluding the order for recovery exist in the present case.
- 198 It must be recalled that the Commission concedes, in recitals 251, 261 and 262 of the contested decision, that the principle of legal certainty precluded recovery of the aid up to publication of the decision on the French *GIE fiscaux*. The Commission does not dispute that the *Brittany Ferries* decision, made in 2001, may have led economic operators to believe that the tax advantages at issue were general measures and therefore not State aid. Nevertheless, it argues that such legal uncertainty was dispelled when the decision on the French *GIE fiscaux* was published, on 30 April 2007. Any factors prior to that date relied on by the parties, such as the Commission's alleged inaction after the 2001 request for information or the Netherlands shipyards decision in 2004, are therefore irrelevant to determining the merits of the plea under analysis.
- 199 As regards the effects of publication of the decision on the French *GIE fiscaux* in April 2007, the Commission was quite correct to find that this decision had ended any legal uncertainty since it should have caused any prudent and alert economic operator to realise that a regime similar to the STL system could be State aid. It should be emphasised here that the decision on the French *GIE fiscaux* shows that a system for the construction of sea-going vessels and the transfer of those vessels to shipping companies, through EIGs and using leasing contracts, which gave rise to a number of tax advantages, could amount to a State aid scheme. Whilst admittedly the scheme at issue in the decision on the French *GIE fiscaux* was not identical to the STL system, there is nothing to suggest that the differences between them were more marked than those between the STL system and the scheme at issue in the *Brittany Ferries* decision, which the Kingdom of Spain, Lico and PYMAR have adduced in support of this plea.
- 200 Furthermore, the circumstances subsequent to publication of the decision on the French *GIE fiscaux* and invoked by the Kingdom of Spain, Lico and PYMAR do not mean that publication of that decision could not have ended the legal uncertainty, as the Commission correctly argues.
- 201 First, as can be seen from recital 257 of the contested decision, in view of the considerations set out in paragraph 174 above, the letter of 9 March 2009 from the Commissioner in charge of DG Competition could not have contributed to creating or maintaining legal uncertainty. That letter in fact merely states that the STL system did not discriminate against shipyards in other Member States, adding that the Commission did not envisage further measures 'at that stage'.
- 202 Secondly, irrespective of whether the Commission's alleged lengthy period of inaction after publication of the decision on the French *GIE fiscaux* is simply one of several factors establishing the existence of a breach of the principle of legal certainty or is a cumulative prerequisite, as the Commission claims, it should in any event be observed that in the present case the Commission was not inactive for an unreasonable period.

- 203 Given that the analysis must be limited to the period after publication of the decision on the French *GIE fiscaux* in April 2007, because the Commission has acknowledged that there was legal uncertainty before that date, it should be noted that the decision to initiate the formal investigation procedure in the present case was published in September 2011, that is to say, nearly four and a half years later.
- 204 It can be seen from recitals 259 and 261 of the contested decision that, of the eight requests for information that the Commission sent to the Spanish authorities, six were sent during the period referred to in paragraph 203 above, and that the measures at issue were complex, which is indisputable. On those grounds, in view of the circumstances obtaining, therefore, the Commission cannot be criticised for remaining inactive without valid justification for an unreasonable period.
- 205 In the judgment of 24 November 1987, *RSV v Commission* (223/85, EU:C:1987:502, paragraphs 12 and 14), which Lico and PYMAR rely on in support of their claim, and in which an unjustified period of 26 months was found to be excessive, the exceptional circumstances of the case played a decisive role in the approach taken by the Court of Justice, and that approach therefore cannot simply be transposed to other situations. Specifically, the aid which gave rise to the judgment of 24 November 1987, *RSV v Commission* (223/85, EU:C:1987:502) had been formally notified to the Commission, albeit late, after it had been paid. Furthermore, it related to additional costs associated with aid previously authorised by the Commission. Lastly, assessing the compatibility of the aid did not call for in-depth research (judgment of 13 December 2018, *Comune di Milano v Commission*, T-167/13, pending appeal, EU:T:2018:940, paragraph 158). All those exceptional circumstances are therefore clearly distinguishable from the circumstances that gave rise to the present case, in which the aid at issue was not notified at any time, the Commission sent several requests for information to the Spanish authorities during the period in question and the measures were appreciably complex. Accordingly, Lico and PYMAR cannot reasonably rely on the approach adopted in that judgment.
- 206 In the light of the foregoing, the plea alleging breach of the principle of legal certainty must be dismissed as unfounded.

Breach of the principles applicable to recovery as a result of the method of calculating the amount of incompatible aid

- 207 In their application in Case T-719/13, Lico and PYMAR submit a plea in the alternative alleging breach of the principles applicable to the recovery of aid as a result of the method of calculating the amount of the incompatible aid to be recovered. According to those parties, the contested decision could lead to recovery being required of a higher amount than the aid from which the investors actually benefited.
- 208 According to Lico and PYMAR the wording of the method for calculating the amount of aid is confused and ambiguous. Specifically, they criticise the contested decision for apparently ordering the recovery of all the aid from the investors even though part of the tax advantage was transferred to the shipping companies. They argue that the part of the aid actually transferred to other operators should be excluded from the order for recovery, even though the applicable rules did not require part of the aid to be transferred.

- 209 Lico and PYMAR submit that the amount of the economic advantage received by a beneficiary is not in all cases necessarily equivalent to the amount of the State resources used, even though that is often the case.
- 210 Moreover, recovery of a sum higher than the aid actually retained by the investors would disadvantage those investors compared with their competitors, instead of restoring the situation which existed before the aid was granted.
- 211 In their observations on the future conduct of the proceedings in Case T-719/13 RENV, Bankia and others argue that the order for recovery is unlawful inasmuch as it requires recovery of all the aid from the investors, whereas they kept only 10 to 15% of the advantage. Bankia and others note that recovery is not intended to impose a penalty, but to remove the distortion of competition created by granting the aid. To recover a sum greater than the advantage actually obtained would therefore distort competition in favour of the beneficiaries' competitors.
- 212 Bankia and others also note that, in the contested decision, the Commission acknowledged that the EIGs and the investors acted as intermediaries who transferred the advantage to the shipping companies. Moreover, the Commission also conceded that the details of the share-out of the advantage had been communicated to the Spanish authorities in advance, at the time of the application for authorisation of early depreciation. In addition, prior signature of the contract establishing the details of the share-out between the parties was a precondition for accessing the STL system.
- 213 Bankia and others add that the contested decision is contradictory, to the extent that the Commission found that no State aid had been granted to the shipping companies because the transfer of the advantage was the result of private agreements, whilst holding at the same time that the clauses in those private agreements were invalid where they allowed the investors to recover the advantage from the actual recipients, including the shipyards.
- 214 In its observations on the future conduct of the proceedings in Case T-719/13 RENV, Aluminios Cortizo argues that the contested decision is contradictory because the Commission ordered recovery of all the aid from the investors, whilst it also acknowledged that 85 to 90% of the advantage was transferred to the shipping companies.
- 215 Aluminios Cortizo also notes that it can be seen from a draft of the contested decision that the Commission envisaged ordering recovery of the aid from the shipping companies.
- 216 The Commission disputes those arguments.
- 217 According to the case-law, the logical consequence of a finding that aid is unlawful is to recover it in order to restore the status quo ante. That purpose is achieved once the aid in question, together where appropriate with default interest, has been repaid by the recipient or, in other words, by the undertakings which actually benefited from it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored. Consequently, the main purpose of the repayment of unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage afforded by the unlawful aid (judgment of 29 April 2004, *Germany v Commission*, C-277/00, EU:C:2004:238, paragraphs 74 to 76; see also to that effect, judgment of 21 March 1991, *Italy v Commission*, C-303/88, EU:C:1991:136, paragraph 57).

- 218 In this plea, Lico and PYMAR, supported by Bankia and others and Aluminios Cortizo, argue in essence that the contested decision should not order recovery of all the aid from the investors, whereas 85 to 90% of the advantage was systematically transferred to the shipping companies, as the contested decision acknowledges.
- 219 Given that the Commission found in the present case that – which is not at issue in these proceedings – the shipping companies were not the beneficiaries of the aid, it follows that the order for recovery related solely and in its entirety to the investors, the sole beneficiaries of the whole of the aid according to the contested decision, on account of the transparency of the EIGs. According to its own reasoning, the contested decision was therefore correct to order recovery of all the aid from the investors, even though they had transferred part of the advantage to other operators, because those other operators were not regarded as beneficiaries of the aid. According to the contested decision, it was the investors that actually benefited from the aid since the applicable rules did not require them to transfer part of the aid to third parties.
- 220 The order for recovery cannot therefore be regarded as a penalty on the investors or as a measure distorting competition in favour of their competitors, as Bankia and others claim.
- 221 In the light of the foregoing, this plea and, therefore, the action in its entirety, must be dismissed as unfounded.

Costs

- 222 In the initial judgment, the Commission was ordered to pay the costs. In the judgment on appeal, the Court of Justice reserved the costs relating to the main parties. It is therefore for the General Court, in the present judgment, to decide on all the costs of the various proceedings, in accordance with Article 219 of the Rules of Procedure.
- 223 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.
- 224 Since the Kingdom of Spain was unsuccessful in Case T-515/13 RENV, it should be ordered to pay the costs, including those incurred in the initial proceedings before the General Court and in the proceedings before the Court of Justice, as applied for by the Commission.
- 225 Since Lico and PYMAR were unsuccessful in Case T-719/13 RENV, they must be ordered to pay the costs, including those incurred in the initial proceedings before the General Court and in the proceedings before the Court of Justice, as applied for by the Commission.
- 226 Under Article 134(3) of the Rules of Procedure, the General Court may order an intervener other than those referred to in paragraphs 1 and 2 to bear its own costs. In the present case, Bankia and others and Aluminios Cortizo should be ordered to bear their own costs relating to the proceedings after the case was referred back to the General Court.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

- 1. Dismisses the actions;**
- 2. Orders the Kingdom of Spain to bear its own costs and those incurred by the European Commission before the Court of Justice in Case C-128/16 P and before the General Court in Cases T-515/13 and T-515/13 RENV;**
- 3. Orders Lico Leasing, SA and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA to bear their own costs and those incurred by the Commission before the Court of Justice in Case C-128/16 P and before the General Court in Cases T-719/13 and T-719/13 RENV;**
- 4. Orders Bankia, SA and the other interveners identified in the annex and Aluminios Cortizo, SAU to bear their own costs in the proceedings after the case was referred back to the General Court.**

Collins

Iliopoulos

Barents

Passer

De Baere

Delivered in open court in Luxembourg on 23 September 2020.

[Signatures]