II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION

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

(notified under document C(2013) 4426)

(Only the Spanish text is authentic)

(Text with EEA relevance)

(2014/200/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above ([1]) and having regard to their comments,

Whereas:

1. **PROCEDURE**

(1) According to several complaints registered with the Commission since May 2006, the Spanish scheme applicable to shipping companies since 2002 (Spanish Tax Lease System) allowed maritime transport companies to buy ships in Spain at a 20-30 % rebate. In particular, two national federations of shipyards and one individual shipyard complained that this scheme resulted in the loss of shipbuilding contracts from their members to Spanish shipyards. On 13 July 2010, shipbuilding associations of seven European countries together signed a petition against the so-called Spanish Tax Lease system (hereinafter 'STL'). At least one shipping company supported these complaints. In August 2010, a Member of the European Parliament asked a question on the same topic ([2]).

(2) By letters of 15 September 2006, 30 January 2007, 6 November 2007 and 3 March 2008, the Commission sent Spain requests for information. Spain answered by letters of 16 October 2006, 23 and 27 February 2007, and 11 January and 27 March 2008. At a meeting held on 29 April 2008, the Commission requested additional information which Spain provided by letter of 17 June 2008. The Commission requested further additional information by letter of 23 September 2008, which Spain provided by letter of 24 October 2008.

(3) Following new information from complainants, the Commission requested further additional information by letters of 11 January and 25 May 2010. Spain answered by letters of 10 March and 26 July 2010. A meeting with the Spanish authorities took place on 24 January 2011.

([1]) OJ C 276, 21.9.2011, p. 5.
([2]) See Parliamentary Question E-5819/2010, answered on 31.8.2010.

(4) By letter dated 29 June 2011, the Commission informed Spain that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union in respect of the aid.

(5) By letter dated 2 August 2011, Spain commented on the decision to open formal proceedings.

(6) The Commission decision to initiate the formal investigation procedure (hereinafter 'Decision C(2011) 4494 final') was published in the *Official Journal of the European Union* ([3]). The Commission invited interested parties to submit their comments on the measures.

(7) The Commission received comments from several interested parties. By letters of 23 February, 7 March, 11 July and 29 October 2012, and 12 and 25 February and 22 April 2013, it forwarded them to Spain, which was given the opportunity to react. Its comments were received by letters dated 30 April, 24 May, 9 and 23 July and 14 November 2012, and 25 February, 12 March and 21 May 2013. Spain also submitted additional observations by letters of 3 and 9 October 2012. At their request, the Commission had meetings with Pequeños y Medianos Astilleros en Reconversión (PYMAR) ([4]) on 13 November 2012 and 4 February 2013, and with the Spanish authorities on 6 March 2013.

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

(8) The Spanish Tax Lease system is used in transactions involving the building by shipyards (sellers) and the acquisition by maritime shipping companies (buyers) of sea-going vessels and the financing of these transactions by means of an ad hoc legal and financial structure.

(9) The STL system is based on:

— an ad hoc legal and financial structure organised by a bank and interposed between the shipping company and the shipyard, respectively the buyer and the seller of a vessel,

— a complex network of contracts between the different parties,

— the application of several Spanish tax measures.

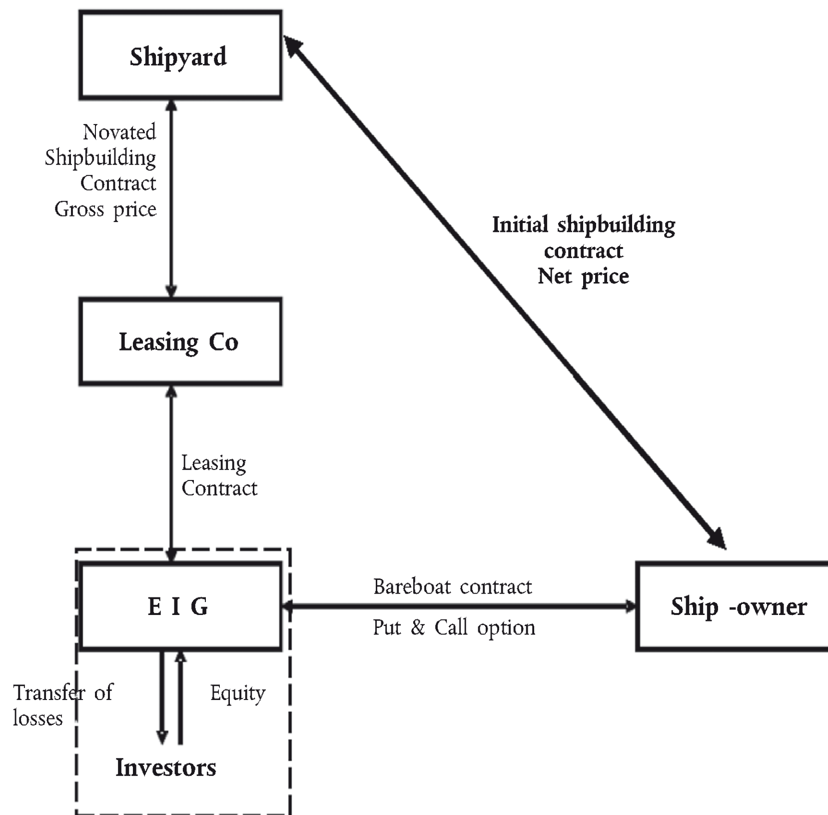
(10) At the Commission's request, the Spanish authorities have confirmed that the STL was used in 273 shipbuilding and acquisition transactions between 1 January 2002 and 30 June 2010, for a total value of EUR 8 727 997 332. The scheme continued to apply until 29 June 2011, when the formal investigation procedure was initiated. Buyers are shipping companies from all over Europe and beyond. All but one of the transactions (a contract for EUR 6 148 969) involved Spanish shipyards.

2.1. THE STL — LEGAL AND FINANCIAL STRUCTURE

(11) As stated, an STL operation allows a shipowner to have a new vessel built with a 20-30 % rebate on the price charged by the shipyard. In order to obtain the discounted price (after deducting the rebate), a shipping company must agree not to buy the vessel directly from the shipyard but from an economic interest grouping (EIG) incorporated under Spanish law and set up by a bank.

(12) The STL structure is a tax planning scheme generally organised by a bank in order to generate tax benefits for investors in a tax transparent EIG and transfer part of these tax benefits to the shipping company in the form of a rebate on the price of the vessel. The rest of the benefits are kept by the investors in the EIG as remuneration for their investment. In addition to the EIG, an STL operation also involves other intermediaries, such as a bank and a leasing company (see chart below).

([3]) See footnote 1.
([4]) Spanish association of small and medium-sized shipyards.



(13) In practice, the EIG leases the vessel from a leasing company from the date that it starts to be built. Once it has been built, the EIG charters out the vessel to the shipping company, on a bareboat basis, and the shipping company starts operating the vessel. In any case, the EIG undertakes to buy the vessel at the end of the leasing contract and the shipping company undertakes to buy the vessel at the end of the bareboat charter contract, by means of reciprocal buy and sell option contracts ([5]). The date of exercising the options established by the leasing contract is set a few weeks before the exercise date of the option set by the bareboat charter. Both options are exercised once the EIG comes under the tonnage tax system (for a more detailed description, see Section 2.2.4 Measure 4: Tonnage tax). A framework agreement is signed by the parties involved to make sure that they all agree on the organisation and functioning of the STL structure.

(14) The transactions that take place between the different participants in the STL operation have been described in more detail in Decision C(2011) 4494 final (Section 2.2) ([6]) on the basis of the examples provided by Spain ([7]).

2.2. THE STL — TAX ASPECTS

(15) The purpose of the STL scheme described in Section 2.1 above is first to generate the benefits of certain tax measures in favour of the EIG and the investors participating in it, which will then pass on part of those benefits to the shipping company that acquires a new vessel.

(16) The EIG collects the tax benefits in two stages under two different sets of tax rules. In the first stage, early and accelerated depreciation of the leased vessel is applied within the 'normal' corporate income tax system. This generates heavy tax losses for the EIG. Because of the EIG's tax transparency, these tax losses are deductible from the investors' own revenues pro rata to their shares in the EIG.

([5]) The leasing company and the shipping company also sign buy (or call) and sell (or put) options contracts.
([6]) See footnote 3.
([7]) By letter of 26 July 2010.

(17) In normal circumstances, the tax savings made by this early and accelerated depreciation of the cost of the vessel should be offset later on by increased tax payments either when the vessel is completely depreciated and no more depreciation costs can be deducted or when the vessel is sold and a capital gain results from the sale [8]. Because of the EIG's tax transparency, its increased profits in later years would normally be added to the investors' own revenues and would be liable to tax.

(18) However, in an STL operation, the EIGs do not keep the vessels after full depreciation is achieved. In the second stage, the tax savings resulting from the initial losses transferred to the investors are then safeguarded as a result of the EIG's switchover to the tonnage tax (TT) system of income taxation and the full exemption of the capital gains resulting from the sale of the vessel — shortly after switching to the new system — to the shipping company [9]. For further details about these two stages, see Decision C(2011) 4494 final (Section 2.3.1).

(19) According to information available to the Commission [10], the combined effect of the tax measures used in the STL enables the EIG and its investors to achieve a tax gain of approximately 30 % of the initial gross price of the vessel. Part of this tax gain — initially collected by the EIG/its investors — is kept by the investors (10-15 %) and part of it is passed on to the shipping company (85-90 %), which in the end becomes the owner of the vessel, with a 20 % to 30 % reduction in the initial gross price of the vessel.

(20) As already stated, STL operations combine different individual — yet interrelated — tax measures in order to generate a tax benefit. The section below briefly describes these measures. For a more detailed description, see Decision C(2011) 4494 final (Section 2.4).

2.2.1. **Measure 1 — Accelerated depreciation** [11] **of leased assets (Article 115(6) TRLIS)**

(21) In Spain, the tax treatment of a leasing transaction is different from its accounting treatment. Chapter XIII of Royal Legislative Decree 4/2004 of 5 March 2004 approving the consolidated version of the Law on Corporate Tax (TRLIS) [12] and Article 49 of Royal Decree 1777/2004 of 30 July 2004 approving the Regulation on Corporate Tax (RIS) [13], apply to finance leasing contracts with a minimum duration of two years if they relate to movable property and 10 years if they relate to immovable property or industrial establishments.

[8] A capital gain would normally result from the sale of an asset which has been over-depreciated due to early and accelerated depreciation because the residual tax value of the asset is likely to be substantially lower than its sale price.

[9] The difference between the sale price and the tax value of the ship. The tax value of the ship is the initial price paid less the amounts deducted (expenses) to take account of its depreciation. In the case at hand, the ship would be completely — or almost completely — depreciated before the EIG switches to the TT, i.e. its accounting value would be zero or close to zero.

[10] This includes information provided by Spain: three actual examples of requests filed by EIGs with the tax administration pursuant to Article 115(11) of the consolidated version of the Law on Corporate Tax (*Texto Refundido de la Ley del Impuesto sobre Sociedades* — TRLIS), and the contracts and other annexes attached to those requests.

[11] In this Decision, 'depreciation' refers without distinction to the deduction of the depreciation cost by the owner of an asset and to the deduction by the lessee of payments made in respect of the recovery by the lessor of the cost of the asset. Accordingly, accelerated depreciation of leased assets refers to the possibility for lessees to deduct these payments within the limits of twice or three times the straight-line depreciation rate.

[12] Royal Legislative Decree 4/2004 of 5 March 2004 approving the consolidated version of the Law on Corporate Tax published in the Spanish Official Gazette (BOE) of 11 March 2004.

[13] Royal Decree 1777/2004 of 30 July 2004 approving the Regulation on Corporate Tax, published in the Spanish Official Gazette (BOE) of 6 August 2004.

(22) For tax purposes only, the portion of the payments that allows the lessor to recover the cost of the asset ([14]) is considered tax-deductible expenditure within certain limits, namely: the amount deducted may not exceed the amount obtained by multiplying the cost of the asset by twice or three times the official coefficient of maximum straight-line depreciation for the type of asset.

(23) In the case of vessels, the normal straight-line depreciation is spread — for tax purposes — over 10 years (10 % per year). The maximum accelerated depreciation rate for leased assets ranges between 20 % and 30 % per year (from 40 to 60 months). Under Spanish law, owners of vessels can also depreciate according to the declining balance method ([15]) or the sum-of-the-years-digit method (SYD) ([16]).

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

(24) Under Article 115(6) TRLIS, the accelerated depreciation of the leased asset starts on the date on which the asset becomes operational, i.e. not before the asset is delivered to and starts being used by the lessee. However, pursuant to Article 115(11) TRLIS ([17]), the Ministry of Economic Affairs and Finance may, upon formal request by the lessee, determine an earlier starting date for depreciation. In principle, this provision applies, under certain conditions, to all leased assets covered by a leasing contract and eligible for accelerated depreciation.

(25) In fact, Article 115(11) TRLIS imposes two general conditions. First, the new starting date should be determined taking account of 'the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic use'. Pursuant to Article 49 RIS, the tax authorities only authorise early depreciation from the beginning of the construction period when this construction period is over 12 months, and the leasing contract provides for anticipated lease payments. Second, 'determining this date (should) not affect the calculation of the taxable amount arising from the actual use of the asset or the payments resulting from the transfer of ownership, which must be determined in accordance with either the general tax regime or the special regime provided for in Chapter VIII of Title VII TRLIS'.

(26) According to Article 48(4) TRLIS ([18]), the assets covered by the early depreciation scheme described in Article 115(1) TRLIS will be leased to EIGs registered in Spain, which, in turn, will sublease them to third parties. Furthermore, Article 49 RIS establishes the procedure to be followed when filing an application for the early depreciation of leased assets.

2.2.3. **Measure 3: Economic interest groupings (EIGs)**

(27) As already stated, Spanish EIGs have a separate legal personality from that of their members. As a result, EIGs can file an application both for the early depreciation measure and for the alternative tonnage taxation scheme provided for by Articles 124-128 TRLIS (see Section 2.2.4.) if they meet the eligibility requirements under Spanish law, even if none of their members is a shipping company.

(28) However, from a tax perspective, EIGs are transparent with respect to their Spanish resident shareholders. In other words, for tax purposes, profits (or losses) made by EIGs are directly attributed to their Spanish resident members

([14]) Excluding the value of the purchase option.

([15]) Each year, a constant percentage is applied to the residual value of the asset as at the end of the previous tax exercise (residual value = acquisition value less depreciation booked in the past). Instead of spreading the cost of the asset evenly over a certain period, this system results in declining depreciation charges in each successive period.

([16]) If an asset is to be depreciated over five years, the SYD is 15 (=1+2+3+4+5) and the depreciation cost is 5/15 of the acquisition value in year 1, 4/15 in year 2, and so on until 1/15 in year 5.

([17]) Copied from the earlier Article 128(11) of Law 43/1995 as introduced by Law 24/2001 and applicable from 2002. 'Early depreciation' means bringing forward the date when depreciation can start. In the case at hand, provided they receive the necessary tax authorisation, taxpayers can start accelerated depreciation during the building of the ship, i.e. before the ship is delivered to the taxable person or before it starts being used by the taxable person.

([18]) Article 48 TRLIS governs the special tax arrangements applicable to economic interest groupings. See Section 2.2.3 Measure 3: Economic interest groupings (EIGs)

on a pro rata basis. Since the EIGs involved in STL operations are regarded as an investment vehicle by their members — rather than as a way of carrying out an activity jointly — this Decision refers to them as investors.

(29) EIGs' tax transparency means that the substantial losses incurred by the EIG through early and accelerated depreciation can be passed on directly to the investors, who can offset these losses against profits of their own and reduce the tax due.

2.2.4. **Measure 4: Tonnage tax system (Articles 124 to 128 TRLIS)**

(30) The Spanish TT legislation has applied since 2002. It provides for an alternative calculation of the taxable profits of shipping companies in respect of their eligible transport activities, based on tonnage operated rather than the difference between revenue and expenditure.

(31) The Commission authorised [19] the Spanish TT scheme as compatible State aid on the basis of the Community Guidelines on State aid to maritime transport [20] (hereinafter 'the Maritime Guidelines'). The provisions governing the TT scheme are contained in Chapter XVII, Articles 124 to 128 TRLIS.

(32) Spain also adopted implementing measures contained in Title VI, Articles 50 to 52 of the RIS. The Commission notes that, contrary to the rules set out in Articles 124-128 TRLIS, which were notified to and approved by the Commission, these implementing measures — and in particular the exception contained in Article 50(3) RIS (see Section 2.2.5) — were not notified to or authorised by the Commission.

(33) As in other Member States, joining the Spanish TT scheme is optional and requires prior authorisation from the tax authorities, valid for 10 years. Revenues from non-shipping — or non-eligible — activities are subject to normal income tax rules.

(34) Under Spanish law, EIGs involved in the STL can be entered in one of the registers of shipping companies [21] because, according to the Spanish authorities, their activities include the operation of their own and chartered vessels. The concept of operating a vessel would therefore include making a vessel available to a third party under a bareboat charter.

(35) The tax base for eligible shipping activities is calculated according to gross tonnage:

Net registered tonnage	Daily amount per 100 tonnes (EUR)
From 0 to 1 000	0,90
From 1 001 to 10 000	0,70
From 10 001 to 25 000	0,40
Over 25 001	0,20

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

(37) Pursuant to the first indent of Article 125(2) TRLIS, the TT taxable base is deemed to include all revenues from (eligible) shipping activities on the high seas including, in particular, the capital gains realised when vessels — acquired new by an undertaking benefiting from the TT system — are subsequently sold while the undertaking

[19] Commission Decision C(2002) 582 final of 27.2.2002 in Case N 736/2001, as amended by Decision N 528/2003.
[20] OJ C 13, 17.1.2004, p. 3.
[21] Referred to in Law No 27/1992 of 24.11.1992 on National Ports and the Merchant Navy.

remains under the TT system. Conversely, under normal corporate income tax rules, since the tax base is determined as the difference between revenue and expenditure, when vessels are acquired by an undertaking and subsequently sold with a capital gain, these exceptional capital gains constitute taxable revenue and will thus increase the taxable base on which corporate tax will be levied.

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

(38) Special rules apply where a vessel — which is no longer new — and the taxation of its revenue are transferred from the normal corporate tax system to the TT system. In the case of vessels already owned by an undertaking when it joins the TT system, or of second-hand vessels (hereinafter 'used' vessels) purchased when an undertaking already benefits from the TT system, a special procedure provided for in Article 125(2) TRLIS [22] applies. Under this procedure, the taxation of certain amounts takes place under normal corporate tax arrangements only when the vessel is subsequently sold:

- In the first financial year in which the TT system is applied, or in which the used vessels have been acquired, non-distributable reserves equal to the difference between the normal market value and the net accounting value of each of the ships concerned by this rule must be set aside, or this difference must be stated separately in the annual report for each vessel, for each financial year in which ownership of them is retained.
- The amount of the said positive reserve together with the positive difference, at the date of transfer of ownership, between the tax depreciation and the accounting depreciation for the vessel sold will be added to the TT taxable base referred to in Article 125(1) TRLIS once the sale of the vessel is completed.

(39) Thus, under normal application of the Spanish TT system, as approved by the Commission, potential capital gains are taxed on entry into the TT system and it is assumed that the taxation of capital gains, even though it is delayed, takes place later on when the vessel is sold or dismantled. As explained in Section 2.2.5, under the STL system, this taxation is not deferred but completely avoided because the vessels concerned are deemed to be new, not used. Hence, the special procedure does not apply.

2.2.5. **Measure 5: Article 50(3) RIS**

(40) In the case of the authorised STL transactions, the Commission observes that the EIGs can leave the normal corporate income taxation system to join the TT system without settling the hidden tax liability resulting from the early and accelerated depreciation either upon entry into the TT system or subsequently when the vessel is sold or dismantled.

(41) Indeed, by way of exception from the rule set out in Article 125(2) TRLIS, Article 50(3) RIS [23] states that when vessels are acquired through a call option as part of a leasing contract previously approved by the tax authorities, those vessels are deemed to be new [24] — not used — without taking into consideration whether they have already been operated or depreciated — as of the date the leasing option is exercised, i.e. after the EIG's switch to the TT system. According to the information available to the Commission, this exception was only applied to specific leasing contracts approved by the tax authorities in the context of applications for early depreciation pursuant to Article 115(11) TRLIS (see Section 2.2.2 above, Measure 2: Discretionary application of early depreciation of leased assets) i.e. in relation to leased newly built sea-going vessels acquired through STL operations, and — with one exception — from Spanish shipyards.

(42) In such cases, the vessel is deemed to have been acquired new by the EIG on the date the leasing option was exercised, i.e. after the EIG's entry into the TT system. The first consequence of the exception provided for in Article 50(3) RIS is that the application of the rules set out in Article 125(2) TRLIS is avoided. The EIG does not need to establish a non-distributable reserve and neither the positive difference between the price paid by the

[22] See Article 125(2) TRLIS.

[23] Introduced by Royal Decree 252/2003 of 28.2.2003, Spanish Official Gazette (BOE) No 62, 13.3.2003.

[24] Article 50(3) RIS. It should be noted that this exemption is granted only to EIGs that have already been granted authorisation for early depreciation by the tax authorities.

shipping company and the accounting value of the vessel in the EIG's books [25], nor the positive difference between the accounting value and the tax value of the vessel [26] is taxed. The second consequence is that the revenue from the sale to the shipping company (the substantial bareboat charter option exercise price) is deemed to originate from a vessel bought and sold by an undertaking benefiting from the TT system and will be included in the TT taxable base pursuant to the first indent of Article 125(2) TRLIS.

3. REASONS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

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

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

— The accelerated depreciation of leased assets (measure No 1) could constitute State aid, but would constitute existing aid in any case because it was implemented before accession. Consequently, the formal investigation procedure was not opened in respect of this measure.

— The early depreciation of leased assets (measure No 2) could constitute State aid as it provides a selective advantage in view of the vague conditions established by the Spanish legislation and the discretionary powers exercised by the Spanish tax administration in interpreting these conditions. This measure, which came into force in 2002 [27], was regarded as unlawful and possibly incompatible State aid.

— The EIG status (measure No 3) was not identified as potential State aid. The formal investigation procedure was not opened in respect of this measure.

— The TT system (measure No 4) was authorised by the Commission as compatible State aid in 2002. The compatibility of the TT system as approved was not questioned in Decision C(2011) 4494 final. By virtue of the authorisation granted by the Commission, this measure should in any case be regarded as existing aid.

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

— The Commission questioned the possibility given to certain undertakings, such as the EIGs involved in STL operations, of benefiting from the TT system where their activities are limited to renting or leasing out vessels on a bareboat basis. The Commission considered that these undertakings were not active in the sector of maritime transport of goods or passengers as defined in Council Regulation (EEC) No 4055/86 [28] and in Council Regulation (EEC) No 3577/92 [29], but rather in the sector of financial investment and the renting or leasing of goods. The Commission noted that their eligibility for the Spanish TT system was never notified to or authorised by the Commission.

— The tax exemption for capital gains (measure No 5) resulting from the implementing measures of the TT system (Article 50(3) RIS) and presented by the Spanish authorities as part of the authorised TT system was regarded as an additional measure falling outside the scope of the authorisation granted by the Commission in 2002. This measure was also regarded as unlawful and possibly incompatible aid.

[25] On the date of transfer to TT.

[26] On the date the ownership of the vessel is transferred to the shipping company.

[27] See footnote 17.

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

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

(45) The potential recipients of the aid were identified as:

— the EIGs as the primary recipients of the tax advantages,

— the members/investors in the EIGs which benefit from the tax advantages based on the EIGs' transparency,

— the shipping companies which receive part of the tax advantages in the form of a rebate on the price of the ship,

— possibly the shipyards, the banks involved, the leasing companies and other intermediaries.

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

4. COMMENTS FROM SPAIN AND FROM INTERESTED PARTIES

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

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

— procedural aspects,

— the general approach: assessment of the STL as a scheme as against assessment of the individual measures forming part of the STL,

— whether the individual measures amount to State aid (presence of an advantage, state resources, imputability to the State, effect on competition and trade) and whether some of them constitute existing aid,

— identification of the aid recipients,

— compatibility of possible State aid,

— obstacles to recovery of the aid (equal treatment, legitimate expectations, legal certainty).

4.1. PROCEDURE

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

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

4.2. ASSESSMENT OF THE STL AS A SCHEME/ASSESSMENT OF INDIVIDUAL MEASURES

4.2.1. **Complainants**

(51) Holland Shipbuilding considers that the STL should be viewed as a single system because it is an organised system which deliberately exploits different tax measures to produce an economic advantage which is far greater than the total advantage that could be gained from applying the different measures separately and because the measures are interdependent. The use of the TT system allows EIGs to make the temporary tax advantage generated by early and accelerated depreciation permanent. The vague conditions imposed on the application of early depreciation and their interpretation by the Spanish authorities confer discretionary powers on the tax administration. This is borne out by the fact that, in practice, the authorisation is only granted if the switch is made from the normal corporate taxation system to the TT system.

(52) Danish Maritime and […] (*) [30] also regard the STL as a whole as a State aid scheme that — regardless of who the recipients are — clearly gives an economic advantage to certain undertakings.

4.2.2. **Spain and the participants in tax lease transactions**

(53) However, Spain and the undertakings identified by the Commission as potential recipients of aid (shipping companies, banks, investors in EIGs, shipyards involved in STL operations) challenge this global approach.

(54) They consider that the STL is not enshrined as such in the Spanish tax legislation, that STL operations are private agreements (leasing, bareboat charter, EIG) concluded by private parties that are free to choose the cheapest way to finance an asset and use the contractual and tax arrangements available to them. They also maintain that Spain should not be held responsible for advantages acquired by taxpayers in a move to reduce their tax burden. Moreover, the tax legislation does not require the use of all the measures mentioned by the Commission in Decision C(2011) 4494 final.

(55) The Asociación Española de Banca (the Spanish Banking Association — AEB) considers that it is the first time that the Commission has identified State aid in a combination of legal transactions between private entities rather than in a legal provision.

(56) Rather than a system, the AEB considers that there are two different schemes (the depreciation scheme and the TT) which can clearly be split and treated separately, regardless of whether they are used separately or jointly.

(57) In addition, the AEB considers that the Commission failed to identify a general system of reference before identifying a selective advantage. According to the AEB, there are very many ways of financing the acquisition of an asset using different combinations of legal instruments and tax measures and the Commission should compare all these alternative situations. Concluding that the STL confers a selective advantage on certain companies would therefore be artificial, especially if the Commission uses as a reference the most costly way — from a tax point of view — to finance an investment thereby ignoring all the incentive measures available to investors.

(58) Consequently, the STL does not confer a selective advantage. This is borne out in particular by the fact that the Commission identifies several potential recipients which do not correspond to economic sectors. Referring to the Commission Notice on the application of the State aid rules to measures relating to direct business taxation [31] (hereinafter 'the Commission Notice on business taxation') and to the Commission Decision concerning the Dutch *Groepsrentebox* [32], the AEB considers that it cannot be concluded that the measure is selective because it is of more benefit to members of EIGs investing in sea-going vessels rather than in other assets.

(59) As the STL consists solely of private parties using general tax measures in the context of private agreements, there are no state resources involved.

(60) According to the AEB, there is no effect on competition and trade between Member States because the main recipients identified by the Commission are shipping companies and the measure is available to all shipping companies from Europe and elsewhere in the world.

(61) In their comments, these third parties describe the STL as a series of unrelated measures (individual approach) and make no further comments about the STL as a whole.

(*) Business secret/confidential information

[30] […]

[31] OJ C 384, 10.12.1998, p. 3. See paragraph 14.

[32] See Commission Decision 2009/809/EC of 8 July 2009 in Case C 4/07, the Netherlands, *Groepsrentebox*.

4.3. OBSERVATIONS RELATED TO THE ASSESSMENT OF THE INDIVIDUAL MEASURES

4.3.1. **Accelerated depreciation (Article 115(6) TRLIS [33]) — Measure 1**

(62) According to Spain and certain third parties, this measure is generally applicable to all types of assets and all sectors. The different tax and accounting treatment of leasing fees does not entail any de facto selectivity, which is borne out by the diversity of the sectors applying this measure. In addition, the Spanish corporate tax system allows alternative arrangements for accelerated depreciation. The AEB states that straight-line depreciation cannot be regarded as the (sole) reference for establishing the existence of an advantage because other methods of depreciation are generally allowed. Article 11 TRLIS and Articles 1-5 RIS provide for the possibility of applying degressive methods such as the declining balance [34] or the sum-of-the-year-digit (SYD) methods [35] as well as the possibility of depreciating an asset according to a specific plan agreed with the tax administration [36]. The AEB cites as an example that the declining balance method would be applicable at a rate 2,5 times higher than the applicable straight-line depreciation rate, i.e. 25 %.

4.3.2. **Discretionary application of early depreciation (Article 115(11) TRLIS, Article 48(4) TRLIS and Article 49 RIS) — Measure 2**

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

(64) The AEB insists that the possibility of anticipating the start of the depreciation period is a general measure that is also provided for in Article 11(1)(d) TRLIS and in Article 5 RIS, which define the general rules applicable to depreciation. These provisions allow the tax administration to approve a specific depreciation plan presented and justified by the taxable person, including for assets under construction.

(65) The sole aim of prior authorisation of early depreciation and the procedure followed by the tax administration is to check that the operation is real and that the objective criteria laid down in the legislation are met. In particular, it must be ensured in advance that: there is a lease agreement whose start date is prior to the commissioning or delivery of the asset; when the request is made it is indicated that payments for the recovery of the cost of the asset are deductible; the contract is for the acquisition of an asset requiring a long contractual/construction period in line with the operating conditions of the asset; the asset construction contract is signed, and that an indication is given of the specific contractual conditions governing use of the asset.

(66) Besides the general conditions set out in Article 49 RIS, an additional condition is imposed by Article 48(4) TRLIS when the applicant is an EIG. The authorisation does not depend on the application of other measures or the submission of additional documents. Finally, the absence of any discretion in the procedure is illustrated by the fact that no application filed with the tax administration has ever been rejected. In that respect, the AEB considers that the Commission should investigate more closely the reasons why financing operations are not carried out. If, as maintained by the Commission on the basis of informal information, some shipping companies were unable to find a bank to organise the operation, this has more to do with the fact that the parties could not agree on certain elements of the operations, such as the price. The AEB formally denies that any of its members participated in any meeting or informal contact with the Spanish authorities. In fact, the situation is not the same as that described in the Commission Decision on the French *GIE fiscaux* [37], where the condition that the operation should represent a

[33] TRLIS: consolidated version of the Law on Corporate Tax.
[34] See footnote 15.
[35] See footnote 16.
[36] See Article 11(1)(d) TRLIS and Article 5 RIS.
[37] State aid C 46/2004, Commission decision of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 43).

significant economic and social interest was found to be imprecise and left to the discretion of the tax authorities. On the contrary, the AEB denies that any of the conditions specified by Article 49 RIS is imprecise and open to interpretation

(67) As a consequence, early depreciation — in the same way as accelerated depreciation — is generally applicable to all types of assets and all sectors. It is a general measure.

(68) As it is a method of applying accelerated depreciation, if it considered to be aid, it should be regarded as existing aid.

4.3.3. **The tax transparency of economic interest groupings (Article 48 TRLIS) — Measure 3**

(69) According to the AEB, the transparency of EIGs is consistent with the logic of the Spanish tax system. This transparency allows several investors to make a joint investment which none of them would undertake on its own and yet to apply — because of this transparency and in respect of their share in the investment — the tax treatment that would have applied had they invested on their own. Hence there is no advantage linked to the application of EIG status. Moreover, this status does not entail any sectoral limitations. Any Spanish taxpayer can be a member of an EIG. It is therefore not selective.

4.3.4. **The TT system (Articles 124 to 128 TRLIS) — Measure 4**

(70) As the Commission stated in Decision C(2011) 4494 final that it had authorised the Spanish TT system in 2002 as aid compatible with the Maritime Guidelines ([38]), the Spanish authorities and the third parties focus their comments on the scope of the 2002 approval and on the specific issues of whether financial EIGs ([39]) involved in STL operations should benefit from the TT scheme.

(71) As to the question whether financial EIGs ([39]) involved in STL operations — which do not operate vessels but invest in them and charter them out as part of financial investments — should benefit from the TT system, Spain maintains that the companies operate vessels by chartering them out and have therefore been listed in Spanish shipping registers (as shipping companies) since the entry into force of Article 1 of Royal Decree 1027/1989 ([40]) of 28 July 1989, repeated in Article 9 of Law 27/1992 of 24 November 1992. As the Commission has authorised the application of the TT system to all companies listed in the Spanish shipping registers ([41]), this authorisation includes companies that own vessels and rent or lease them out to third parties. If that measure is regarded as State aid, it should therefore be considered existing aid.

4.3.5. **Article 50(3) RIS — Measure 5**

(72) Spain, PYMAR and some banks argue that Article 50(3) RIS only contains implementing measures intended to provide legal certainty. They maintain that, in accordance with the principles of the Spanish legal system, substantive elements of a tax measure must always be governed by law and that this provision — which is contained in a Royal Decree — does not introduce anything new but only clarifies the scope of Article 125(2) TRLIS. It does not depart from the law or create additional benefits. The non-taxation of capital gains already formed part of the scheme authorised by the Commission and therefore, if it constitutes aid, it should be regarded as existing aid.

([38]) See footnote 20.

([39]) The Commission does not consider the application of the tonnage tax to EIGs to be a problem in so far as they actually operate vessels to provide maritime transport services and meet the conditions laid down in the Maritime Guidelines.

([40]) 'This provision applies to all ships, boats and naval structures whatever their origin, tonnage or purpose. It also applies to all the maritime companies that operate ships … whether they are owners thereof or operate them under a leasing agreement, chartering agreement or any other formula allowed by law'.

([41]) See Commission Decision C(2002)582 final of 27 February 2002, Section 2.4. Recipients: Recipients of the Tonnage Tax scheme can be maritime companies registered under Spanish law, whose activity includes the operation of owned and chartered ships.'

(73) Furthermore, Spain and the alleged recipients maintain that it is logical to consider the vessel to be 'new' since no one used it before the leaseholder, and the exercise of the option is agreed when the leasing contract is signed ([42]). The AEB states that normally an asset is considered to be new when it is acquired via the option of a leasing contract.

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

(74) According to the complainants, a tax deduction implies a transfer of state resources in the form of a loss of tax revenue. The STL/tax measures are imputable to the State because all the measures are contained in Spanish law. Moreover, the STL relies on an authorisation that is granted by the tax authorities. Even if these authorisations relate to individual measures, it is clear that, in practice, the authorisations are granted to the overall STL transactions. This is borne out by the fact that the request for early depreciation filed with the tax administration describes in detail the construction and the distribution of the tax advantage between EIG or the investors and the shipping company as well as a notice from the shipyard setting out the expected social and economic benefits from the arrangement. There is no reason why these documents would systematically be provided if they were not in fact a precondition for approval.

(75) The shipping companies, on the other hand, argue that the discount given by the shipyard or the EIG on the initial price is not imputable to the State because it results from private contractual relationships between the EIG and the shipping company involved in the operation.

4.5. OBSERVATIONS RELATED TO THE DISTORTION OF COMPETITION AND THE EFFECTS ON TRADE

(76) […] considers that the size of the advantages concerned (EUR 14 million in the example given in Decision C(2011) 4494 final) undoubtedly affects the recipients' market position and therefore creates substantial distortions in markets characterised by a high level of competition. The scheme provides a great advantage to Spanish shipyards which can promote their ships at a price — lower than that of other European shipyards — which includes the benefits under the STL. […] refers to statistics from the Spanish Ministry for Industry showing that over time the Spanish shipyards have served more and more shipowners from abroad.

(77) As for the shipping companies, […] considers that buying ships from Spanish shipyards at a much lower price enables them to save millions of euros on a substantial part of their fixed costs. As it is spread over the duration of the recovery of the cost of the ships, this advantage gives them a competitive edge over other shipping operators and therefore distorts competition for many years.

(78) As already stated, shipowners argue that all shipping companies have access to the conditions offered by Spanish shipyards and can therefore benefit from any price rebates that Spanish shipyards might offer. They also argue that they have paid a fair market price and have not benefited from any economic advantage. Consequently, the acquisition of vessels from Spanish shipyards is unlikely to reduce their operating costs significantly or to strengthen their position in a durable manner, as stated by the Commission in Decision C(2011) 4494 final.

4.6. OBSERVATIONS RELATED TO THE IDENTIFICATION OF THE RECIPIENTS OF AID

(79) According to the AEB, EIGs cannot be recipients of aid. Because of their tax transparency, it is the investors who have to pay the tax resulting from the EIGs' commercial activity. Hence EIGs cannot enjoy any economic advantage resulting from a tax reduction. In addition, any Spanish taxpayer can be an investor — a member — of an EIG.

([42]) See, in particular, the letter dated 2 August 2011 from the Spanish authorities in response to Commission Decision C(2011) 4494 final, section 3.2.3.2. Alleged new State aid: paragraph 9 of Article 50(3) RIS, '… the concept of "used" in the scope of Corporate Tax applies to those elements that have been used by a third party other than the taxable person himself who seeks the application of a specific provision.'

(80) On the other hand, a number of shipping companies consider that the EIGs are the only possible recipients of aid. Shipowners cannot be recipients of aid because they are not Spanish taxpayers. Moreover, they argue that the Commission wrongly assumed — without giving any explanation — that the tax benefits would be transferred from the EIG to the shipping company through a price rebate. In fact, the price is fixed as a result of a commercial decision taken by the private owner of an asset.

(81) Shipowners argue that shipping companies from all over the world generally acquire vessels from shipyards from different countries, including, if they so wish, Spanish shipyards. All shipping companies can therefore benefit from any price rebates that Spanish shipyards are able to offer.

(82) Several shipowners argue that if the STL constitutes State aid, they are not the recipients of this aid. Two reasons are given: first, the way the STL structure functions shows that there is coordination between the EIG and the shipyard, which constitutes a single centre of interest and fixes the sales price; second, companies operating tugboats and salvage vessels give examples of offers received from shipyards outside Spain to build similar tugs. Those offers are in the same price range or even cheaper than those of the Spanish shipyards eventually selected. They argue that consequently they have paid a fair market price and have not benefited from any economic advantage within the meaning of Article 107(1) TFEU. If the STL were to offer an economic advantage, the recipients would be the shipyards involved in STL operations and not the shipping companies.

(83) Holland Shipbuilding considers that the recipients of aid are the EIGs and their investors, as well as the shipping companies, but also the Spanish shipyards because there is a substantial difference between the price paid by the shipowner and the price received by the shipyard, which is above the market price. According to a national shipbuilding association, the scheme was designed to benefit the shipyards. It would be incorrect to conclude that STL is of benefit to the shipping companies. The reduction in the building price does not necessarily imply an advantage for the purchaser of the ship. Moreover, Spanish shipyards can only offer this advantage to buyers that use the STL. The STL constitutes unlawful aid to shipbuilding that is damaging to national shipbuilders that are in direct competition with Spanish ones.

(84) PYMAR considers that the Commission did not give sufficient grounds in Decision C(2011) 4494 final as to why it identifies shipyards as potential recipients of State aid. It also points out that in the decisions in the *GIE Fiscaux, Brittany Ferries, Air Caraïbes* or *Le Levant* ([43]) cases concerning similar tax schemes, the Commission did not identify the producer of the asset as a recipient of State aid.

4.7. OBSERVATIONS RELATED TO THE CLASSIFICATION AS EXISTING OR UNLAWFUL AID

(85) As mentioned in Section 4.3 above, Spain and certain third parties consider that there are only two measures involved: first, the provisions of Article 115 TRLIS concerning the deduction of the cost of an asset acquired via a financial leasing contract. Spain adopted these provisions before it joined the EU. Therefore, if this measure constitutes aid, it is existing aid as stated by the Commission in Decision C(2011) 4494 final, and Article 115(11) TRLIS, which allows the administration to set the starting point for the deduction, is only a means of implementing Article 115. Second, the TT system enshrined in Articles 124 to 128 TRLIS was approved by the Commission in 2002 and is therefore also existing aid. The implementing provisions — in particular Article 50(3) RIS — do not alter the rules enshrined in the law and are therefore covered by the Commission authorisation.

4.8. OBSERVATIONS RELATED TO THE COMPATIBILITY OF AID

(86) The Spanish authorities and the alleged recipients argue that the aid is compatible on the basis of the TT system approved in 2002 because it covers 'maritime companies registered under Spanish law ([44]), whose activity includes the operation of owned and chartered ships'. As Article 50(3) RIS only implements the TT system, it is also covered by the 2002 Decision.

([43]) Commission Decisions of 20.12.2006 in Case C 46/04 *GIE Fiscaux*; 8.5.2001 in Case C 31/98 *Brittany Ferries*; 16.12.2003 in Case N 474/03 *Air Caraïbes* and 20.5.2008 in Case C 74/99 *Le Levant*.

([44]) Reference is made to Spanish Law 27/92. Recipients can thus be companies which have their head office in Spain or companies established in the EU with secondary establishments in Spain.

(87) The third parties also argue that any aid would be compatible with the Maritime Guidelines, which also *include the operation of owned and chartered ships* and this aid would remain within the aid ceiling imposed by these Guidelines.

(88) The Asociación de Ingenieros Navales y Oceánicos de España (Spanish Association of Naval Architects and Marine Engineers) considers that the compatibility of any aid should be analysed in the global competitive context rather than focus on the internal market since shipyards in non-EU countries receive support that is not subject to competition rules, as is the case in the EU.

(89) By contrast, […] considers that the scheme cannot be regarded as compatible aid at all, not even — as stated in Decision C(2011) 4494 final — under the Maritime Guidelines. Indeed, it considers, first, that Spain will not be able to prove that all ships built were eligible to benefit from these Guidelines and, second, that the aid can only reduce to zero the amount of tax due by the beneficiary in the country that adopts the scheme. Therefore, non-Spanish shipowners would not benefit from the scheme and the tax paid by Spanish shipowners is likely to be limited since they benefit from the TT system and a reduction in social charges.

4.9. OBSERVATIONS RELATED TO RECOVERY

(90) Both the Spanish authorities and the potential recipients maintain that recovery should be ruled out because that would breach fundamental principles of EU law ([45]) such as equal treatment, the protection of legitimate expectations or legal certainty.

4.9.1. **Equal treatment**

(91) PYMAR argues that similar fiscal measures were investigated in two other cases (*Brittany Ferries* ([46]), and *GIE Fiscaux*) where no recovery was ordered. If the Commission concluded that aid existed, this aid should be deemed compatible up to the limit set in Chapter 11 of the Maritime Guidelines and, for the amount in excess of that limit, the protection of legal certainty should, as in the French case, prevent the Commission from requiring the recovery. […] argues that because no aid was recovered from the French operators, recovering aid from Spanish operators in a very similar case would put the latter at a competitive disadvantage and breach the principle of equal treatment.

(92) Spain and PYMAR invoke a number of decisions where the Commission has already decided to refrain from recovery because of public statements by the Commission or one of its members. Reference is made to the decisions on Belgian coordination centres, Luxembourg 1929 holding companies and other coordination centres and intragroup activities of multinational companies ([47]), Spanish Goodwill ([48]), an Italian case of aid to large firms in difficulty ([49]) and two fisheries cases ([50]) (Shetland and Orkney Islands).

([45]) See Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

([46]) Commission Decision of 8.5.2001 in Case C 31/98 (OJ L 12, 15.1.2002, p. 33).

([47]) Coordination Centres (DE), Coordination Centres and Finance Companies (LU), Vizcaya Coordination Centres (ES), Headquarters and International Treasury Pools (FR), Foreign Income (IE), International Financing Activities (NL).

([48]) Commission Decision of 12 January 2011 in the case concerning tax amortization of financial goodwill for foreign shareholding acquisitions (C 45/07, OJ L 135, 21.5.2011, p. 1).

([49]) Commission Decision of 16 May 2000 on the aid scheme implemented by Italy to assist large firms in difficulty (OJ L 79, 17.3.2001, p. 29).

([50]) Commission Decision of 3 June 2003, C87/2001 Orkney Islands Council track-record scheme (OJ L 211, 21.8.2003, p. 49) and Commission Decision of 3 June 2003 on loans for the purchase of fishing quotas in the Shetland Islands (OJ L 211, 21.8.2003, p. 63).

4.9.2. **Legitimate expectations/legal certainty**

(93) According to Spain [51] and certain third parties involved in STL operations, the following elements led the parties to these operations to believe that the tax measures used in them did not constitute State aid:

(1) the statement by the Commission in the 2001 *Brittany Ferries* decision [52] to the effect that a similar scheme to the STL — the French *GIE Fiscaux* — was a general measure;

(2) the publication of the draft measures (early depreciation and TT system) in the Official Gazette of the Spanish Parliament on 10 October 2001 [53];

(3) a 2001 Commission letter requesting information from Spain in the context of an investigation about several alleged aid measures, including a tax leasing system, in favour of shipbuilding;

(4) a 2004 Commission Decision [54] rejecting the award of aid to Dutch shipyards to compensate for aid allegedly offered to Spanish shipyards competing for the same shipbuilding contracts;

(5) the 2006 Decision in the French *GIE Fiscaux* [55] case;

(6) a 2009 letter from Commissioner Kroes [56] — at the time in charge of competition — to the Norwegian Minister for Trade and Industry in response to a complaint that the Spanish tax lease scheme would favour Spanish shipyards;

(7) the time that elapsed between the publication of the draft measures in 2001, the start of the scheme in 2002 or the first complaints received by the Commission in 2006 and the opening of the proceedings in June 2011. Such a long time period allegedly corroborated the belief that there were not enough elements to proceed;

(8) a diligent economic operator could not have foreseen the possible existence of State aid in the combination of different schemes that were either a long-established feature of national taxation (accelerated depreciation of leased assets, EIG status) or had been previously approved by the Commission (TT system);

(9) the statements concerning the absence of aid in measures concerning depreciation methods in the Commission notice on business taxation [57].

4.9.2.1. *The 2001 Commission Decision in the Brittany Ferries case (BAI)*

(94) In recital 193 of that Decision, the Commission stated that: '… with regard to economic interest groupings and the tax advantages they may confer, the Commission considers that they constitute a general measure, given that they are common in France, can be set up in all sectors of economic activity and come under common law.'

[51] In particular, the letter of 2 August 2011.
[52] Commission Decision of 8 May 2001 concerning State aid implemented by France in favour of the Bretagne Angleterre Irlande company ('BAI' or 'Brittany Ferries') (OJ L 12, 15.1.2002, p. 33).
[53] See Official Gazette of the Spanish Parliament, Congress of Deputies, VII Legislature, Series A: Draft laws, No 50-1, 10 October 2001, pp 22-25 (http://www.congreso.es).
[54] State aid Case C 66/2003, Commission Decision of 30 June 2004 on the State aid which the Netherlands is planning to implement in favour of four shipyards to support six shipbuilding contracts (OJ L 39, 11.2.2005, p. 48).
[55] State aid C 46/2004, Commission Decision of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 43).
[56] Letter dated 9.3.2009.
[57] See, in particular, paragraph 13.

(95) The Decision was published in the Official Journal on 15 January 2002. In the 2006 Decision on the French *GIE Fiscaux*, the Commission considered that: 'While it is true that the scheme at issue in that case was that in force before 1998, it must nevertheless be observed that that fact was not made clear in the grounds for the Decision and that that circumstance may have helped to mislead recipients under the scheme here at issue.'

(96) Spain ([58]) and some third parties argued that this statement had either created a situation of legal uncertainty as to the lawfulness of the STL — which is very similar in its construction and effects — or had given rise to legitimate expectations that the STL did not constitute State aid.

4.9.2.2. *The publication of the draft measures in the Official Gazette of the Spanish Parliament*

(97) According to PYMAR, the Commission became aware of the existence of the STL system when its constituent measures (discretionary application of early depreciation of leased assets and the TT system) were published as part of the same draft law in the Official Gazette of the Spanish Parliament on 10 October 2001. Following this, shipyards started to include the benefits of these measures in their bids for new shipbuilding projects, without awaiting the entry into force of the measures, in order to move forward in the negotiation and implementation of the first STL structures.

4.9.2.3. *The 2001 request for information about the Spanish tax leasing scheme*

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

'It has come to the attention of the Commission that a number of measures seem to exist that reduce the cost of buying ships from Spanish shipyards. In particular the Commission has been provided information that the following measures are available:

…

3. A tax-leasing system, whereby ships built in Spain can be used to reduce taxes through the use of SPVs (special purpose vehicles). The gain from this combination appears to be transferred to the shipowner through a lower price or through reduced leasing costs. Could Spain please provide all relevant information that allows it to evaluate this issue'.

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

4.9.2.4. *The 2004 Decision concerning the Dutch notification*

(100) On 9 September 2002, the Dutch authorities notified a 'matching aid' that they intended to award Dutch shipyards with a view to matching aid allegedly offered by Spain ([59]). At the end of a formal investigation ([60]), the Commission concluded in its final Decision ([61]) that 'the Spanish authorities hav[ing] clearly denied that the aid would ever be available' it did not have 'sufficient proof of the alleged Spanish aid' ([62]) and declared the notified aid incompatible with the internal market.

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

([58]) See the letter of 2.8.2011.
([59]) Notifications registered under Case Nos N 601 to N 606/2002.
([60]) See letter dated 11 November 2003, OJ C 11, 15.1.2004, p. 5.
([61]) See Decision C(2004) 2213, OJ L 39, 11.2.2005, p. 48.
([62]) See recital 24 of Decision C(2004) 2213.

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

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

(103) In addition, PYMAR invokes a number of Commission decisions where the similarity of a measure with a measure previously approved by the Commission was a factor that justified the legitimate expectations of operators. In particular, PYMAR recalls that no recovery was ordered in cases ([63]) such as Foreign Income (Ireland), International Financing Activities (the Netherlands), Coordination Centres and Finance Companies (Luxembourg), Coordination Centres in Vizcaya (Spain), Control and Coordination Centres (Germany), Central Corporate Treasuries and Headquarters and Logistics Centres (France), Tax Ruling for US Foreign Sales Corporations (Belgium) and Gibraltar Qualifying Companies (UK), because those schemes were very similar to the Belgian Coordination Centres schemes which had been previously approved by the Commission.

4.9.2.6. *The 2009 letter sent by Commissioner Kroes*

(104) In response to a letter from the Norwegian authorities complaining about alleged discrimination against Norwegian shipyards in connection with the Spanish tax lease system, Commissioner Kroes replied that DG Competition: '[had] already investigated the matter' and that at its request, Spain had issued a public statement in the form of an answer of the tax administration to a question from a taxpayer ([64]) — a tax ruling — confirming that the measure was not restricted to Spanish shipyards and could also be used for the acquisition of ships produced in other Member States. The letter concluded that, in view of that clarification, no further action was considered necessary.

(105) According to PYMAR, on 2 April 2009 a Norwegian shipowner shared the content of Commissioner Kroes's letter with a Spanish shipyard with which it was involved in STL operations. PYMAR also submitted a letter of 13 September 2012 from Gerencia del Sector de la Construcción Naval ([65]) (GSN) testifying that, back in 2009, it knew about the content of Commissioner Kroes's letter and had shared it with entities participating in STL operations and with PYMAR in the course of their regular meetings.

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

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

4.9.2.8. *A diligent economic operator could not have foreseen the possible existence of State aid in the combination of several measures*

(107) According to PYMAR and other third parties, this is the first time that the Commission has considered that the joint application of several measures constitutes State aid — something which normally prudent operators could not have foreseen.

([63]) See Decision of 17.2.2003, OJ L 204, 13.8.2003, p. 51 (IE); Decision of 17.2.2003, OJ L 180, 18.7.2003, p. 52 (NL); two Decisions of 16.10.2002, OJ L 153, 20.6.2003, p. 40 and OJ L 170, 9.7.2003, p. 20 (LU); Decision of 22.8.2002, OJ L 31, 6.2.2003, p. 26 (ES); Decision of 5.9.2002, OJ L 177, 16.7.2003, p. 17 (DE); Decision of 11.12.2002, OJ L 330, 18.12.2003, p. 23 and Decision of 13.5.2003, OJ L 23, 28.1.2004, p. 1 (FR); Decision of 24.6.2003, OJ L 23, 28.1.2004, p. 14 (BE); and Decision of 30.3.2004, OJ L 29, 2.2.2005, p. 24 (UK).

([64]) Spain published the tax ruling on 1 December 2008: http://petete.meh.es/Scripts/know3.exe/tributos/CONSUVIN/texto.htm?Consulta=CONSULTA&Pos=7262 (last consulted on 19.6.2013).

([65]) *La Gerencia Naval* (http://www.gernaval.org/) a public enterprise, according to its statute, approved by Royal Decree 3451/2000 of 22 December 2000 (BOE, 11.1.2001).

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

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

4.9.3. **Considerations relevant for State aid recovery**

(109) From the moment the Commission became aware of the existence of the STL, its actions and also the time elapsed have created legitimate expectations that there was no aid and consequently that the aid granted for operations carried out previously would not be recovered. Hence the Commission should refrain from ordering recovery of the aid for all the operations.

(110) Similarly, the letter from Commissioner Kroes in 2009 confirms that the scheme had been analysed by the Commission. All parties involved in tax lease operations (shipping companies, EIGs, banks and intermediaries, etc.) could have legitimate expectations that the Commission would have discovered any aid in the system and that, because no further investigations were planned, no aid was involved.

(111) PYMAR also refers to decisions in which the Commission acknowledged that actions by EU institutions (Court of Justice, Commission, etc.) could generate legitimate expectations that aid awarded in the past would not be recovered, which would prevent the Commission from ordering recovery including when the aid was granted prior to the action that gave rise to legitimate expectations. They refer to decisions in the Spanish goodwill case, the Belgian coordination centres case, an Austrian energy tax rebate case and an Italian case of aid to large firms in difficulty ([66]).

4.9.4. **Contractual clauses**

(112) The Spanish authorities and PYMAR state that any aid identified by the Commission in favour of shipping companies or EIGs and investors would in any case affect the shipyards, which would receive claims to reimburse the EIGs or their investors or investing companies by virtue of the contractual relationships between the different participants in the STL operations. Indeed, according to PYMAR, some clauses in the contracts require the shipyards to compensate the investors and shipping companies, in particular, in the event of a change to the legislation — including tax legislation — affecting the operation.

5. ASSESSMENT

5.1. PROCEDURE

(113) The Commission considers that the procedure followed has neither breached Spain's rights of defence nor any third party's right to be heard. On the contrary, the decision to open formal proceedings is the initial formal step that the Commission must take pursuant to Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty ([67]) (hereinafter 'Regulation (EC) No 659/1999') if, after a preliminary investigation, it has doubts about the compatibility of a State aid measure with the internal market (Articles 13 and Article 4(4) of Regulation (EC) No 659/1999). The purpose of the decision to open proceedings is precisely to summarise the relevant issues of fact and law, make a preliminary assessment as to the aid character of the measure, set out the doubts as to its compatibility with the internal market and call upon the Member State concerned and other interested parties to submit comments (Article 6 of Regulation (EC) No 659/1999).

(114) Moreover, the Commission did not open the formal investigation procedure in respect of the accelerated depreciation of leased assets (Article 115(6) TRLIS) since it has indicated that if the measure constituted State aid, it could in any event be regarded as existing aid. It did not raise doubts about the TT system, at least to the

([66]) Commission Decision of 12.1.2011 in Case C-45/2007, recital 192 (OJ L 135, 21.5.2011, p. 1); Commission Decision of 13.11.2007 in Case C-15/2002, recital 85 (OJ L 90, 2.4.2008, p. 7); Commission Decision of 9.3.2004 in Case C-33/2003, recitals 47, 48 and 66 (OJ L 190, 22.7.2005, p. 13); and Commission Decision of 16.5.2000 in Case C-68/1999, recital 73 (OJ L 79, 17.3.2001, p. 29).

([67]) OJ L 83, 27.3.1999, p. 1.

extent that it had been notified and authorised by the Commission (Articles 124 to 128 TRLIS) because this measure was also regarded as existing aid. These two measure are only mentioned and described in Decision C(2011) 4494 final because they are important elements of the STL and are linked to the measures subject to the formal investigation (Articles 115(11) and 48(4) TRLIS and Article 49 RIS, as well as Article 50(3) RIS and the application of the TT system to non-transport activities).

(115) The Commission considers that Articles 115(11) and 48(4) TRLIS and Article 49 RIS, as well as Article 50(3) RIS and the application of the TT system to non-transport activities can be separated from the other measures mentioned in the previous recital (i.e. Article 115(6) TRLIS and Articles 124 to 128 TRLIS) and do not constitute existing aid pursuant to Article 1(b) of Regulation (EC) No 659/1999, since those measures were introduced in 2002 and 2003, after Spain's accession to the EU, and put into effect without prior authorisation by the Commission. Therefore, in respect of those measures, the Commission has rightly followed the procedure applicable to unlawful aid (Articles 1(f), 13 and 4(4) of Regulation (EC) No 659/1999).

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

(116) The fact that the STL system is composed of various measures that are not all enshrined in the Spanish tax legislation is not sufficient to prevent the Commission from describing and assessing it as a system. Indeed, as explained in Decision C(2011) 4494 final, the Commission considers that the different tax measures used in the STL operations were linked together *de jure* or *de facto*. *De jure*, the discretionary application of early depreciation of leased assets (Article 115(11) TRLIS) corresponds to an early application of the accelerated depreciation of leased assets (Article 115(6) TRLIS). Similarly, Article 50(3) RIS establishes an exception to a special procedure applicable in the context of the TT system. *De jure*, Article 50(3) RIS only concerns ves0sels eligible for the TT system and leasing contracts authorised by the tax administration. *De facto*, leasing contracts were only regarded as authorised by the tax administration in the context of authorisations granted for early depreciation of leased assets. *De jure*, early depreciation can be envisaged for a wide range of assets possibly acquired via a leasing contract. However, the conditions for early depreciation are subject to interpretation and were *de facto* only considered to be met — and authorisations were only delivered — with respect to vessels eligible for the TT system.

(117) In addition, the Commission notes that two of the three main measures involved in the STL (discretionary application of early depreciation and rules on eligibility for the TT system) entered into force on the same date (1 January 2002) under the same law.

(118) The Commission also notes that, when arguing about legitimate expectations and equal treatment, the same third parties that challenge the Commission's global approach present the STL system as being very similar to the French *GIE Fiscaux* scheme. The fact that all the features of the French measure were included in one legal provision necessarily implied a global assessment. In that respect, the fact that the different elements of the STL are spread among different legal provisions that are *de facto* linked together would not — as such — warrant a different approach.

(119) For those reasons, the Commission considers that it is necessary to describe the Spanish Tax Lease as a system of connected tax measures and to assess their effects in their reciprocal context, taking into account, in particular, the *de facto* relationships introduced — or approved — by the State.

(120) In any case, the Commission does not rely exclusively on a global approach. In parallel to a global approach, the Commission also analysed the individual measures that make up the STL. The Commission considers that the two approaches are complementary and lead to consistent conclusions. Individual assessment is necessary to determine which part of the economic advantages generated by the STL system results from general measures and which from selective measures. Individual assessment also allows the Commission to determine, where necessary, which part of the aid is compatible with the internal market and which part should be recovered.

(121) This dual approach, which was already followed in Decision C(2011) 4494 final, enables the Commission to define a reference system for each of the individual measures and for the STL system as a whole, in order to identify selective advantages that constitute State aid. For every STL operation, the counterfactual situation against which the presence of aid will be assessed is the operation itself, with the same contractual provisions but carried out without the measures identified as State aid. In this respect, an alternative operation with actual different arrangements — contractual and financial — would not constitute a proper counterfactual situation.

(122) Economic operators are free to structure their asset financing operations as they wish and use for that purpose the general tax measures which they consider the most suitable. However, inasmuch as these operations entail the application of selective tax measures, which are subject to State aid control, the undertakings involved in these transactions are potential recipients of State aid. On the one hand, the fact that several sectors or categories of undertakings are identified as potential recipients is not an indication that the STL system is a general measure ([68]). On the other hand, the fact that the system is used to finance the acquisition, bareboat chartering and resale of sea-going vessels can be seen as a clear indication that the measure is selective from a sectoral point of view.

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

(123) According to Article 107(1) TFEU, 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

(124) State aid rules apply only to aid granted to undertakings involved in economic activities. Furthermore, the criteria laid down in Article 107(1) TFEU are cumulative. Therefore, the measures under assessment constitute State aid within the meaning of the Treaty if all the above-mentioned conditions are fulfilled. Basically, the financial support should:

— be granted by the State and through state resources,

— favour certain undertakings or the production of certain goods,

— distort or threaten to distort competition, and

— affect trade between Member States.

(125) The Commission has carried out its assessment at two different levels:

— At the level of the individual measures involved, where the Commission considers whether each measure constitutes State aid irrespective of its use in the STL.

— At the level of the STL system as a whole: as already stated, the STL relies on a combination of these measures which are *de jure* or *de facto* connected to one other.

5.3.1. **Undertakings within the meaning of Article 107 TFEU**

(126) The Commission considers that all parties involved in STL operations are undertakings within the meaning of Article 107(1) TFEU — and this is not contested by Spain ([69]) or any third-party — since their activities consist in

([68]) See Case C-75/97 *Belgium* v *Commission* (Maribel bis/ter) [1999] ECR I-3671, paragraph 32.

([69]) See, in particular, the letter dated 2 August 2011 from the Spanish authorities in response to Commission Decision C(2011) 4494 final, Section 3.2.2. Transparency arrangements applicable to EIG, first paragraph: 'In accordance with Article 1 of Law 12/1991 of 29 April 1991 on Economic Interest Groupings … these entities have legal personality, are of a commercial nature and have the capacity to engage in economic activities.'

offering goods and services in a market ([70]). More precisely, shipyards offer newly built vessels or construction, repair and renovation services; leasing companies offer financing facilities; EIGs charter out and sell vessels; investors offer goods and services on a wide range of markets, except if they are individuals not exercising any economic activity, in which case they are not covered by this Decision; shipping companies offer maritime transport services; organising banks offer intermediation and financing services and other intermediaries provide intermediation or consulting services.

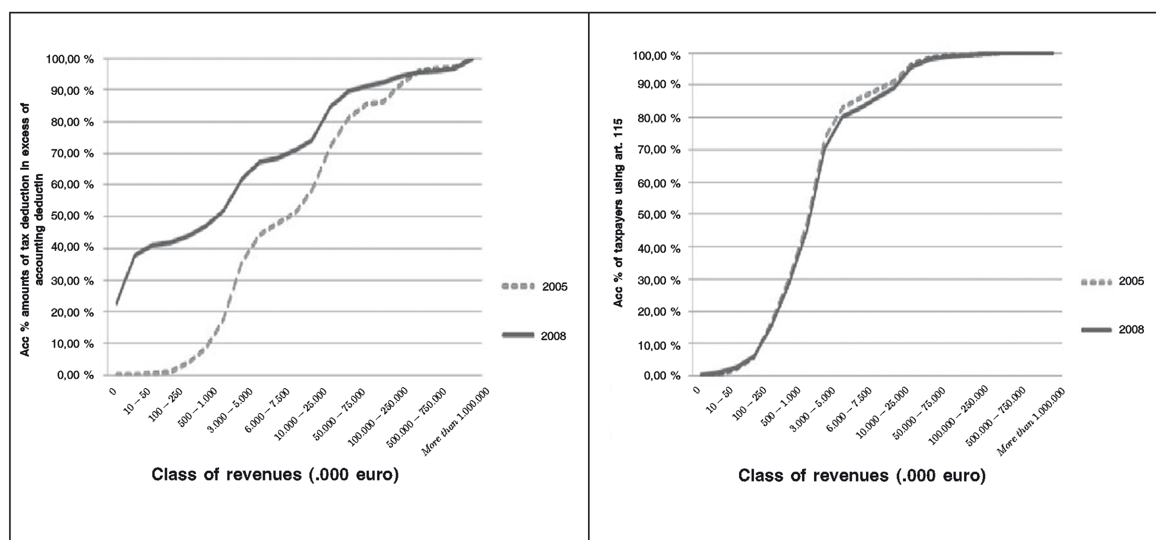
5.3.2. **Existence of a selective advantage**

(127) According to settled case-law: 'Article 107(1) of the Treaty requires it to be determined whether, under a particular statutory scheme, a State measure is such as to favour 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued by the scheme in question, are in a comparable legal and factual situation. If it is, the measure concerned fulfils the condition of selectivity.' ([71])

5.3.2.1. *Accelerated depreciation (Article 115(6) TRLIS) — Measure 1*

(128) In Decision C(2011) 4494 final, the Commission said that, if the measure constituted aid, it would be existing aid and it did not conduct an assessment. As a result of the formal investigation, the Commission has now come to the conclusion that this measure, taken in isolation, does not constitute State aid because it does not favour certain undertakings or the production of certain goods. The Commission notes that the measure is applicable to all companies which are subject to income tax in Spain without any limitation as to their sector of activity, place of establishment, size, legal status or location of the assets. It also applies without exception to all goods that are subject to depreciation.

(129) Moreover, the limitation to leased assets does not constitute an element of selectivity as the acquisition of any assets can be financed through financial leasing contracts which are generally accessible to companies of all sectors and sizes. There is no indication that the recipients of the measure are *de facto* concentrated in certain sectors or types of production. The statistics provided by Spain concerning the use of Article 115 TRLIS by Spanish taxpayers (see graphs below) confirm that financial leasing is used by companies exhibiting a wide range of taxable revenues (45 % of the declared users of Article 115 earn less than EUR 1 million and 70 % less than EUR 3 million) (see left-hand chart). The absolute amount of the tax advantage that can result from the deduction of an extra expense ([72]) pursuant to Article 115 TRLIS also varies according to the taxpayer's revenue (see right-hand chart).



Source: Ministry for Economic Affairs and Finance

([70]) See Case 118/85 *Commission* v *Italy* [1987] ECR 2599, paragraph 7; Case C-35/96 *Commission* v *Italy* [1998] ECR I-3851, paragraph 36; Joined Cases C-180/98 to C-184/98 *Pavlov and Others* [2000] ECR I-6451, paragraph 75.

([71]) See Case C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40.

([72]) This extra expense corresponding to the positive difference between the expense deducted for tax purposes pursuant to Article 115 and the expense registered in the accounting must be identified in the beneficiary's tax return.

(130) The Spanish authorities have also confirmed that leasing contracts and Article 115 TRLIS can be used with respect to assets built (or originating) in other Member States. Finally, the Commission notes that the conditions of application of Article 115(6) TRLIS are clear, objective and neutral and that no prior authorisation is necessary for it to apply. As a consequence, the tax administration does not have the power to authorise or reject at its own discretion the application of that measure ([73]).

(131) The Commission therefore concludes that the accelerated depreciation of leased assets (Article 115(6) TRLIS) as such does not confer a selective advantage on the EIGs in STL operations.

5.3.2.2. *Discretionary application of early depreciation (Article 115(11) Article 48(4)TRLIS and Article 49 RIS) — Measure 2*

(132) The rules on depreciation in Spanish tax legislation (Article 11 TRLIS) generally provide that the cost of an asset should be spread over its economic life — hence from the moment it is used for an economic activity. According to Article 115(6) TRLIS, accelerated depreciation of leased assets should take account of the date on which the asset became operational. Since it allows accelerated depreciation to begin before the asset starts being used, Article 115(11) TRLIS confers an economic advantage.

(133) This possibility is an exception to the general rule set out in Article 115(6) and is subject to discretionary authorisation by the Spanish authorities; this measure is therefore at first sight selective. Contrary to what Spain and some third parties allege, the criteria for granting the authorisation are not clear and objective, and even if they were clear and objective this would not be sufficient to rule out their selective nature ([74]). The Commission notes that the criteria set out in Article 115(11) TRLIS are vague and require interpretation from the tax administration which has not published any administrative rules or explanations in this respect. The discretionary application of early depreciation on the basis of vague criteria introduces selectivity into the STL system, even if the discretionary powers are not exercised in an arbitrary manner ([75]). In addition, the Commission notes that Spain did not convincingly explain why all the conditions imposed by Article 48(4) TRLIS and Article 49 RIS are necessary to avoid abuses. For example, the specific characteristics of the economic use of the asset ([76]) must be demonstrated, as well as the absence of effect on the taxable amount arising from the use of the asset or transfer of ownership ([77]). No justification was presented for these limitations, which introduce further elements of selectivity. Nor did Spain demonstrate why a prior authorisation is necessary. Ensuring the reality of a leasing operation, for instance, appears as important for allowing the normal deduction of the leasing/depreciation costs of an asset or for applying accelerated depreciation as it is for the early application of this depreciation. However, the first measures are not subject to prior authorisation and, as is the case for those measures, an *ex-post* verification of the clear and objective criteria applicable to the early depreciation of leased assets would appear to suffice.

(134) In Decision C(2011) 4494 final, according to the Commission the Spanish authorities had confirmed at a meeting that, based on the authorisations issued, the conditions of Article 115(11) TRLIS were only deemed to be met in the case of acquisitions of vessels that had switched from the normal corporate taxation regime to the TT system ([78]) and the subsequent transfer of ownership of the vessel to the shipping company through the

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([73]) See Case C-295/97 *Piaggio* [1999] ECR I-3735, paragraph 39, and the case-law cited.

([74]) See Joined Cases T-92/00 and T-103/00 *Diputación Foral de Álava* v *Commission* [2002] ECR II-1385, paragraph 58.

([75]) *Ibid*, paragraph 35.

([76]) Article 115(11) TRLIS: 'The Ministry … may determine the date referred to in paragraph 6 … taking into account the specific characteristics of the contracting or construction period for the asset and the specific nature of its economic use, provided that determining this date does not affect the calculation of the taxable amount arising from the actual use of the asset or the payments resulting from the transfer of ownership, which must be determined in accordance with either the general tax regime or the special regime …' (our underlining).

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

([78]) Letters from the Spanish authorities of 27 March 2008, 10 March 2010 and 27 July 2010 in which the authorisations issued until the end of June 2010 were summarised.

exercise of an option in the context of a bareboat charter. Spain has denied [79] having made such a statement but acknowledged that there were difficulties of interpretation [80]. The Commission notes that no evidence was provided establishing that authorisations for applying early depreciation have been granted in other circumstances [81].

(135) On the basis of the examples provided by the Spanish authorities, it appears that the requests for early depreciation filed by EIGs with the tax administration describe in detail the whole STL organisation and provide all the relevant contracts (in particular, shipbuilding contract, leasing contract, bareboat charter, option contracts, debt assumption and release agreement). According to Spain, these elements are necessary to check compliance with the conditions imposed by Articles 115(11) and Article 48(4) TRLIS and Article 49 RIS.

(136) However, the Commission notes that the procedure set out in the implementing regulations [82] confers important discretionary powers on the tax administration to interpret the legal requirements and possibly impose additional conditions. In particular, the administration is allowed to require any additional information they may deem relevant for the assessment [83]. In this respect, the Commission also notes that in some of the examples provided, the requests filed by the applicants also featured additional annexes which are not necessary to demonstrate compliance with the conditions imposed by Articles 115(11) and 48(4) TRLIS and Article 49 RIS: (1) a detailed calculation of the overall tax advantages and how they will be shared between the shipping company, on the one hand, and the EIG or its investors on the other hand, and (2) a statement by the shipyard, detailing the economic and social benefits expected from the shipbuilding contract. According to some complainants, these documents are required by the tax administration in the context of the authorisation process. According to Spain, these elements were provided by the applicants (EIGs) on their own initiative. These documents indicate, in particular, that the importance of a shipbuilding contract for the Spanish economy is taken into account, as well as the overall tax advantage generated by the STL operation.

(137) The Commission concludes that the compulsory prior authorisation procedure, the necessary interpretation of the vague conditions of Articles 115(11) and 48(4) TRLIS and Article 49 RIS, and the possibility for the tax administration to request any additional document or information are clear evidence that the tax administration enjoys wide discretionary powers in the exercise of its task of authorising STL operations.

(138) As mentioned in the Commission Notice on the application of the State aid rules to measures relating to direct business taxation (hereinafter 'the Notice on fiscal aid') [84], the Court of Justice acknowledges that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria [85] [86].

(139) The Commission therefore considers that the discretionary application of early depreciation of leased assets by application of Articles 115(11) and Article 48(4) TRLIS and Article 49 RIS confers a selective advantage on the EIGs involved in STL operations and on their investors.

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(79) 'The Spanish authorities deny having confirmed "in practice", as stated in paragraph 34 of the Commission Decision, that only assets that subsequently came under the tonnage scheme could come under the provisions of Article 115(11) TRLIS.'

(80) The Spanish authorities simply pointed to the difficulty of interpretation introduced by the requirement, laid down by the legislator, of making the application of early depreciation subject to the absence of effects on the calculation of the tax base derived from the effective use of the asset and on the revenue derived from its transfer.

(81) The bareboat charter contract between the EIG and the shipping company would seem to result from the interpretation of one of the conditions imposed by Article 48 TRLIS and to be subject to the review and authorisation of the tax administration.

(82) In particular Article 49 RIS.

(83) Article 49(4) RIS: 'The Directorate-General for Taxation may request from the taxable person any data, reports, records and proof considered necessary.'

(84) OJ C 384, 10.12.1998.

(85) See Notice on fiscal aid, section on discretionary administrative practices, points 21 and 22.

(86) Case C-241/94 *France* v *Commission* (Kimberly Clark Sopalin) [1996] ECR I-4551.

5.3.2.3. *The tax transparency of economic interest groupings (Article 48 TRLIS) — Measure 3*

(140) The Commission considers that the tax transparent status of EIGs enshrined in Articles 48 and 49 TRLIS merely enables different operators to join and finance any investment or carry out any economic activity. As a consequence, that measure does not confer any selective advantage on the EIGs or their members.

5.3.2.4. *The tonnage tax system (Articles 124 to 128 TRLIS) — Measure 4*

(141) As explained in Section 2.2.4 above, the TT system constitutes an existing State aid scheme, approved by Commission Decision C(2002)582 final of 27 February 2002. It includes the rules under Article 125(2) TRLIS concerning the treatment of hidden tax liabilities and capital gains in the context of a transfer to the TT system of used or second-hand assets previously subject to the general tax system.

(142) Indeed, as explained in recital 17 above, under normal circumstances — i.e. when a company stays within the general corporate tax system rather than switching to the TT system — the tax advantage resulting from early or accelerated depreciation of assets in the first years (increasing hidden tax liabilities) is offset to a large extent in the subsequent years (decreasing hidden tax liabilities) or upon sale or dismantling of the asset (taxation of capital gain). Over the whole period, this process results in the deferral of the payment of certain amounts of tax. Because the tax paid under the TT system does not depend on the difference between revenue and expenditure, a switch to the TT system in the middle of the period implies that hidden tax liabilities are not settled.

(143) Compared with what would happen in the context of the general tax system, the deferral under the TT system of the settlement of hidden tax liabilities as permitted by Article 125(2) TRLIS confers an additional selective economic advantage on the companies that switch to the TT system, as against those that stay within the general tax system.

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

5.3.2.5. *Article 50(3) RIS — Measure 5*

(145) Compared with what was authorised as part of the notified TT scheme, Article 50(3) RIS provides a further advantage: by establishing an exception to the normal application of Article 125(2) TRLIS, certain sea-going vessels that would normally be regarded as used or second-hand are deemed to be new on transfer to the TT system. Consequently, the settlement of hidden tax liabilities — normally deferred until sale or dismantling of the asset pursuant to Article 125(2) TRLIS — is definitely cancelled. This cancellation constitutes an economic advantage.

(146) The economic advantage conferred by Article 50(3) RIS is selective because it is not available to all assets. It is not even available to all vessels subject to the TT scheme and to Article 125(2) TRLIS. In fact, this advantage is only available on condition that the vessel is acquired through a financial leasing contract previously authorised by the tax administration. As already mentioned, the Spanish authorities have confirmed that the tax administration only considered this condition actually to be fulfilled if a financial leasing contract had been authorised in the context of an application for early depreciation pursuant to Article 115(11) TRLIS. Neither Spain nor any third party has referred to other circumstances that would allow a leasing contract to be previously authorised by the tax administration. As mentioned in Section 5.3.2.2 above, these authorisations were granted in the context of substantial discretionary powers exercised by the tax administration and in practice only in relation to newly built sea-going vessels.

(147) Contrary to the argument put forward by Spain and certain third parties, Article 50(3) RIS does not merely provide a clarification to the special procedure notified, or to the concept of 'used vessel'. By considering that a leased vessel is still new on the date that the call option is exercised by the lessee, provided that the leasing

contract was previously approved by the tax administration, it departs from the special procedure ([87]) enshrined in Article 125(2) TRLIS. This selectively introduces an additional advantage by preventing the taxation of the subsequent capital gain.

(148) The Commission considers that the award of this additional selective advantage — be it by reference to the general tax scheme or even by reference to the normal application of the alternative TT system and Article 125(2) TRLIS as authorised by the Commission — cannot be justified by the nature and general scheme of the Spanish tax system.

(149) Indeed, the Commission has authorised Article 125(2) TRLIS as a special procedure that was supposed to prevent abuse of Article 125(1), i.e. to prevent operators from transferring used and over-depreciated vessels to the TT system for the sole purpose of selling them with a substantial capital gain that would be exempted under the TT scheme. The Commission notes in that respect that the STL operations feature EIGs which lease — then briefly own — one single vessel which they do not operate themselves and switch to the TT scheme for the very limited period of time necessary to exercise the option of the leasing contract and transfer the ownership of their only vessel to the shipping company. These operations do not appear to be in line with the objectives of the TT system as envisaged in the Maritime Guidelines.

(150) As a consequence, the Commission does not agree that it is logical to consider a vessel to be 'new' on the date on which the option is exercised because no one has used it before the leaseholder, or because the exercise of the option had already been agreed when the leasing contract was signed.

(151) As for the first part of this argument, the Commission notes that the special procedure also applies to vessels transferred by one operator from the normal tax system to the TT system, i.e. without any change in ownership and without any third party using it.

(152) As for the second part, the fact that the option is already agreed has nothing to do with determining whether the vessel is new. The Commission did not receive any explanation as to why such a vessel should be regarded as new — irrespective of who is the owner — on the day the option is exercised. Nor did it receive any convincing explanation as to why this hypothesis would only be reasonable if the leasing contract was previously approved by the tax administration.

(153) In that respect, the Commission notes that the capital gain would not be tax exempt if Article 50(3) RIS only clarified that leased vessels are considered to be new on the day the leasing contract is signed, without taking into consideration the date on which the option is exercised. In that case, the EIG should be regarded as the owner of the vessel prior to its transfer to the TT system, the vessel would be regarded as used or second-hand on entry to the TT system and Article 125(2) TRLIS would apply, leading to the deferred settlement of the hidden tax liabilities or the taxation of the capital gain when the vessel is sold or dismantled.

(154) The Commission therefore considers that Article 50(3) RIS confers a selective advantage on undertakings that acquire vessels through financial leasing contracts previously authorised by the tax administration and, in particular, on the EIGs or their investors involved in STL operations.

([87]) See Commission Decision C(2002) 582 final of 27 February 2002, Section 2.12.1 Capital allowances: 'Capital gains accrued before the entry into the Tonnage Tax scheme are subject to full taxation under the normal rules for the corporation tax when the ship is sold. In order to ensure this provision, the beneficiary has to set a reserve equal to the difference between the normal market value and the net accounting value of each of the ships, thus reflecting the capital gains of the ship entering this scheme. This reserve is subject to full taxation in case of transfer of ownership. Furthermore, in order to prevent fiscal circumvention when switching to the new scheme, the eventual positive difference between the fiscal depreciation and the accounting one is also fully taxed at normal rates when the ship is sold, so to avoid that lower than fiscal accounting depreciation transforms itself in a lower nominal capital gain, thus partly eluding full tax payment for capital gains.' (our underlining)

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

(155) The amount of the economic advantage resulting from the STL as a whole corresponds to the advantage that the EIG would not have achieved in the same financing operation by the sole application of general measures. In practice, this advantage corresponds to the sum of the advantages reaped by the EIG by applying the above-mentioned selective measures, namely:

— the interest saved on the amounts of tax payment deferred by virtue of early depreciation (Articles 115(11) and 48(4) TRLIS and Article 49 RIS),

— the amount of tax avoided or interest saved on tax deferred by virtue of the TT scheme (Article 128 TRLIS), given that the EIG was not eligible for the TT scheme,

— the amount of tax avoided on the capital gain made on the sale of the vessel by virtue of Article 50(3) RIS.

(156) Looking at the STL as a whole, the advantage is selective because it was subject to the discretionary powers conferred on the tax administration by the compulsory prior authorisation procedure and by the imprecise wording of the conditions applicable to early depreciation. Since other measures applicable only to maritime transport activities eligible under the Maritime Guidelines — in particular Article 50(3) TRLIS — are dependent on that prior authorisation, the whole STL system is selective. As a result, the tax administration would only authorise STL operations to finance sea-going vessels (sectoral selectivity). As confirmed by the statistics provided by Spain, all the 273 STL operations organised until June 2010 concern sea-going vessels.

(157) In that respect, the fact that all shipping companies, including companies established in other Member States, potentially have access to STL financing operations does not alter the conclusion that the scheme favours certain activities, namely the acquisition of sea-going vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale.

(158) European shipyards complained on several occasions that they did not have access to Spanish banks' financing for STL.

(159) In its Decision to open the formal investigation procedure the Commission observed that all but one of the vessels admitted to STL were built in Spanish shipyards. The Commission expressed doubts ([88]) that such an outcome could reasonably be explained in the context of operations resulting only from the free choice of economic operators in a free and competitive market.

(160) However, in the absence of any evidence that applications related to the acquisition of non-Spanish vessels were rejected, the Commission cannot establish that STL was *de facto* limited to the acquisition of Spanish vessels. In addition, the Commission notes that by a binding notice in response to a question by a prospective investor, dated 1 December 2008, the Spanish tax administration expressly confirmed that STL applies to ships built in other Member States of the EU ([89]). Under these circumstances, the Commission concludes that the STL entails no further element of selectivity to the benefit of Spanish shipyards and no discrimination based on the place of establishment of the shipyard.

(161) The Commission considers that the advantage accrues to the EIG and, by transparency, to its investors. Indeed, the EIG is the legal entity that applies all the tax measures and, where applicable, files requests for authorisations with the tax administration. For instance, it is not disputed that requests for the application of early depreciation or TT were filed on behalf of the EIG. From a tax perspective, the EIG is a tax-transparent entity and its taxable revenues or deductible expenses are automatically transferred to the investors.

([88]) See recital 73 of Commission Decision C(2011) 4494 final.
([89]) See http://petete.meh.es/scripts/know3.exe/tributos/CONSUVIN/texto.htm?NDoc=12728&Consulta=buques&Pos=230

(162) In an STL operation, in economic terms, a substantial part of the tax advantage collected by the EIG is transferred to the shipping company through a price rebate. The annexes attached to certain files when EIGs request prior authorisation for early depreciation (see recital 168 below) confirm that the operators involved in STL operations consider that the tax benefits resulting from the operation are shared between EIGs or their investors and the shipping companies. However, the question of the imputability to the State of this advantage will be discussed in the next section.

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

5.3.3. **Transfer of state resources and imputability to the State**

State resources

(164) The selective advantages for the EIGs and their members identified in measures 2, 4 and 5 above (see Sections 5.3.2.2, 5.3.2.4 and 5.3.2.5) result from the application of tax law provisions.

(165) For each of the STL transactions, the use of state resources results in interest foregone on the tax deferral resulting from the early depreciation of leased assets, tax foregone in the absence of settlement of the hidden tax liabilities when the EIG switches from the normal corporate tax system to the TT schemes, and tax foregone in the absence of taxation of the capital gain made when the ownership of the vessel is transferred to the shipping company. The STL system as a whole involves the definitive loss of tax revenue equivalent to the consumption of state resources in the form of fiscal expenditures and interest foregone.

(166) In the context of STL operations, the State initially transfers its resources to the EIG by financing the selective advantages. By way of tax transparency, the EIG then transfers the state resources to its investors.

Imputability

(167) The measures at issue derive from the application of Spanish tax law and from tax authorisations granted by the Spanish tax administration for the application of both the early depreciation and the TT scheme. These authorisations were granted for the application of individual measures such as the early (accelerated) depreciation of the vessel leased by each EIG or the switch of the EIG to the TT. Moreover, based on the examples provided by the Spanish authorities, the authorisation process was indispensable for the financing operation to go through.

(168) According to the complainants, the tax administration would review and intervene in the share-out of the tax gain between the shipping company, on the one hand, and the EIG and its investors, on the other. Based on the examples provided by the Spanish authorities, it appears that, indeed, requests submitted to the tax administration for the authorisation of early depreciation generally include a calculation of the overall tax advantage generated by the STL structure and how this tax advantage is shared between the shipping company and the investors in the EIG, or, in any event, contain the necessary elements for doing this calculation.

(169) However, all the economic consequences of granting the tax advantage to the EIGs result from a combination of legal transactions between private entities. The applicable rules do not oblige the EIGs to transfer part of the tax advantage to the shipping companies and, even less so, to the shipyards or to the intermediaries. It is true that the tax administration enjoys wide discretion and, in that context, it assesses the economic impact of the overall transaction, but this is not enough to establish that it is the Spanish authorities that decide on the transfer of part of the advantage to the shipping companies or the amount of this transfer. This situation is different from that

examined in the *Air Caraïbes* or in the French *GIE Fiscaux* decisions, where there was a legal obligation for the investors to transfer at least 60 % or two thirds of the advantage to the users and the French authorities verified that each transaction complied with that requirement.

(170) Hence the selective advantages were granted through state resources. They are clearly imputable to the Spanish State since they are of benefit to the EIGs and their investors. However, this is not the case with the advantages enjoyed by the shipping companies and *a fortiori* the indirect advantages flowing to the shipyards and the intermediaries.

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

(171) Finally, this advantage threatens to distort competition and to affect trade between Member States. When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, the latter must be regarded as affected by that aid ([90]). It is sufficient that the recipient of the aid competes with other undertakings on markets open to competition ([91]) and to trade between Member States.

(172) In the case at hand, the investors, i.e. the members of the EIGs, are active in different sectors of the economy, in particular in sectors open to intra-EU trade. In addition, via the operations benefiting from STL they are active through the EIGs in the markets for bareboat chartering and the acquisition and sale of sea-going-vessels, which are open to intra-EU trade. The advantages flowing from the STL strengthen their position in their respective markets, thereby distorting or threatening to distort competition.

(173) The economic advantage received by the EIGs and their investors benefiting from the measures under scrutiny is therefore liable to affect trade between the Member States and distort competition in the internal market.

5.4. EXISTING OR UNLAWFUL AID

(174) Article 1(b) of Regulation (EC) No 659/1999 ([92]) sets out different situations where aid is regarded as existing aid. According to submissions received in the case at issue, existing aid would be (i) aid which existed prior to the entry into force of the Treaty in Spain or (ii) aid previously approved by the Commission.

The tonnage tax constitutes existing aid, but its application to revenues obtained from bareboat chartering constitutes new aid

(175) Among the measures qualifying as State aid ([93]), the Commission considers that only the legal provisions of the TT system (Articles 124 to 128 TRLIS, Measure 4) constitute an existing State aid scheme because it was approved by the Commission in 2002.

(176) However, the Commission considers that the EIGs involved in tax lease operations do not meet all the conditions to be eligible for the Spanish TT.

(177) The Commission authorised the Spanish TT as compatible aid on the basis of the Maritime Guidelines, which apply only to undertakings carrying on genuine maritime transport activities ([94]) either with their own vessels or with chartered vessels. By way of exception, the TT can apply to activities that the Guidelines regard as ancillary or assimilated to maritime transport. For instance, under certain conditions, ship management, dredging or towing

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

([91]) Case T-214/95 *Het Vlaamse Gewest* v *Commission* [1998] ECR II-717.

([92]) OJ L 83, 27.3.1999, p. 1.

([93]) As explained in Sections 5.3.2.1 and 5.3.2.3, the Commission does not regard the provisions of Articles 115(6) (Accelerated depreciation) and 48 TRLIS (EIG legal status) as State aid.

([94]) See Maritime Guidelines, Section 3.1 Fiscal Treatment of shipowning companies, paragraph 12: 'These guidelines apply only to maritime transport.'

activities may qualify for aid [95]. By contrast, the mere ownership of a vessel, its acquisition through financial leasing or its renting or chartering out to third parties, without assuming full responsibility for the vessel's operation, cannot be regarded as a qualifying activity. Obviously, the beneficiary of the TT system should be the one carrying on the qualifying transport activity with the qualifying vessel.

(178) It is true that, by way of exception, bareboat chartering activities have previously been allowed by the Commission as part of certain notified TT schemes, but only on a temporary basis and under specific circumstances related to overcapacity [96]. Under those conditions, the core activity of the concerned undertakings remains maritime transport and the revenues from bareboat chartering-out activities can be regarded as ancillary to that core activity. This tolerance is fully in line with objectives of the Maritime Guidelines: 'maintaining and improving maritime know-how and protecting and promoting employment for European seafarers' and 'contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets' [97].

(179) In line with the Maritime Guidelines, Commission Decision C(2002) 582 final of 27 February 2002 authorising the Spanish TT system explicitly mentions that only maritime transport activities qualify for the TT [98]. Indeed, Section 2.4. 'Recipients' provides that: 'Recipients of the Tonnage Tax scheme can be maritime companies registered under Spanish law, <u>whose activity includes the operation of</u> owned and chartered <u>ships</u>' (our underlining) and its Section 2.5. 'Qualifying activities/ships' provides that: 'The Tonnage Tax scheme only covers income from seagoing ships operated in maritime transport activities. <u>Qualifying activities are targeted to include only maritime transport</u>' (our underlining).

(180) From the wording of the 2002 Commission Decision, adopted on the basis of the Maritime Guidelines, it follows that undertakings identified as shipowners under Spanish law may benefit from the TT system provided that they carry on their qualifying maritime transport activities — and within the limits of these.

(181) The Commission considers that the activity carried on by the EIGs involved in STL operations cannot be regarded as a transport activity. When it switches to the TT system the EIG leases in a single vessel from a leasing company and charters it out to a third-party shipowner on a bareboat basis. If the third-party shipowner operates the vessel to provide maritime transport services, it can be eligible for the TT. However, the EIG only puts a vessel at the disposal of a third-party shipping company that operates it. The EIG is therefore an intermediary providing rental or leasing services, not transport services.

(182) The EIGs involved in STL operations usually charter out the only vessel that they own or lease in, which therefore represents the whole of their fleet. In such circumstances, the EIG does not bear any risk or responsibility in terms of technical, crew or even commercial management of the vessel. It is a pure intermediary and the revenues from bareboat chartering out cannot be regarded as ancillary to a maritime transport activity.

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

[96] See Commission Decision of 11 December 2002 in Case N 504/02, Ireland, Introduction of a tonnage tax, recital 28; Commission Decision of 20.12.2011 in SA.30515, Finland, Amendments to the tonnage taxation aid scheme, recital 10.

[97] See Maritime Guidelines, point 2.2 General objectives of revised State aid guidelines.

[98] See Section 2.4 Recipients: 'Recipients of the Tonnage Tax scheme can be maritime companies registered under Spanish law whose activity includes the operation of owned and chartered ships' and Section 2.5 Qualifying activities/ships: 'The Tonnage Tax scheme only covers income from seagoing ships operated in maritime transport activities. Qualifying activities are targeted to include only maritime transport'.

(183) In addition, EIGs stay within the TT system for a short period of time, i.e. the two weeks needed to exercise the option of the leasing contract and for the shipowner to exercise the option associated with the charter contract. Allowing this type of activities under the TT system does not appear to increase in any lasting way the tonnage under the flag of — or controlled by — EEA countries. For the same reasons, the EIGs involved in STL operations do not appear to contribute to the objective of 'maintaining … maritime know-how and protecting … employment for European seafarers' or to the 'consolidation of the maritime cluster'.

(184) In conclusion, the approval that follows from the 2002 Decision does not imply that the activity of undertakings such as the EIGs involved in STL can be considered a maritime transport activity.

(185) Therefore, the Commission considers that including undertakings such as the EIGs involved in STL [99] operations under the TT scheme leads to the award of new aid, either through the calculation of the taxable revenue as a function of the tonnage operated or the possibility of postponing the settlement of hidden tax liabilities until the vessel is either sold or dismantled, pursuant to Article 125(2) TRLIS.

The other measures constitute new aid

(186) Early depreciation of leased assets (Articles 115(11) and 48(4) TRLIS and Article 49 RIS, Measure 2) is not existing aid because it was introduced in 2002, i.e. after Spain joined the EU in 1986 and was never notified to the Commission or approved by it. Furthermore, the effect of this measure can be clearly separated from the effect of accelerated depreciation. This measure constitutes unlawful aid.

(187) Similarly, Article 50(3) RIS, which allowed the exemption of capital gains on vessels acquired in the context of previously authorised leasing contracts (Measure 5) entered into force in 2002 without prior notification or approval by the Commission.

(188) The Commission considers that the approval granted in 2002 does not cover the implementing measures and, in particular, Article 50(3) RIS because it introduces an exception to the special procedure applicable to used vessels pursuant to Article 125(2) TRLIS, which means an additional advantage. This exception should have been notified together with the legal provisions approved by the Commission, but it was not.

(189) The application of Article 125(2) TRLIS does not appear to require any further definition or clarification. It would normally trigger the taxation of the capital gain made by a lessor on the transfer of a vessel to the lessee (shipping company). If Spain considered that a clarification was necessary, this should have been done upon notification.

(190) Consequently, the implementing measures and, in particular, Article 50(3) RIS also constitute unlawful aid.

5.5. COMPATIBILITY WITH THE INTERNAL MARKET

(191) The Commission concludes that the following measures constitute State aid, on an individual basis and in the context of the STL:

— Early depreciation of assets acquired through a financial leasing contract (Articles 115(11) and 48(4) TRLIS and Article 49 RIS),

— TT scheme as regards the eligibility of bareboat chartering activities,

— Article 50(3) RIS.

[99] It should be noted that EIGs, like other forms of undertakings, can in principle enter the TT scheme if they carry on eligible activities.

(192) In principle, State aid as defined by Article 107(1) TFEU is prohibited. However, Article 107(2) provides that certain types of aid are compatible and Article 107(3) that certain types of aid or aid to certain recipients can be declared compatible by the Commission. Depending on the category of recipients, specific rules such as the Maritime Guidelines ([100]) or the Shipbuilding Framework ([101]) could apply.

(193) Neither the Spanish authorities nor the third parties identified as recipients in this decision have invoked the application of any other provision of Article 107(2) and (3) TFEU or the application of any other State aid framework adopted on the basis of Article 107(3)(c) TFEU.

5.5.1. **Application of the Maritime Guidelines**

Eligibility of revenues of bareboat chartering out to the TT

(194) As stated in recital 71 above, the Spanish authorities and certain third parties consider that chartering out is covered by the 2002 Decision authorising the Spanish TT scheme because it refers to the operation of owned and chartered ships.

(195) The Commission does not agree with this interpretation of the 2002 Decision. Both the Maritime Guidelines and the 2002 Decision make it clear that the TT should apply only to maritime transport activities ([102]). As a rule, revenues from other activities outside transport — even when carried out by a maritime transport company — cannot be taxed according to the TT system ([103]) unless by explicit exception and under certain conditions (ancillary activities, dredging, towage).

(196) In this context, 'the operation of owned and chartered ships' mentioned as an eligible activity in the 2002 Decision only covers the 'operation' of vessels that are either owned or chartered on a bareboat basis and operated — in the case of both owned and chartered ships — by a maritime transport company.

(197) As already mentioned in Section 5.3.2.4, the financial EIGs involved in STL financing operations do not operate vessels themselves and do not provide any maritime transport service. They are financial intermediaries involved in the collective financing of an asset. They do not intervene in the strategic, technical, crew or even commercial management of the vessel they charter out and they do not bear any risk or responsibility for the provision of maritime transport services.

(198) In addition, the Commission notes that the EIGs involved in STL operations charter out their sole vessel with both a buy (or 'call') option which, from the outset, the shipping company undertakes to exercise and a sell (or 'put') option which the EIG can exercise. This is equivalent to a delayed — yet definitive — transfer of ownership of the whole of the EIG's fleet. Consequently, the EIG is not in the same situation as shipowners that are suffering from temporary overcapacity and, in search of some flexibility, charter out part of their fleet to third-party operators for a limited period of time (see recital 178 above).

(199) For all these reasons, the Commission considers that the EIGs involved in STL operations are neither eligible for the Spanish Tonnage Tax system as authorised by the Commission nor covered by the provisions of the Maritime Guidelines.

([100]) Community guidelines on State aid to maritime transport, OJ C 205, 5.7.1997, p. 5 (applicable until 16.1.2004), OJ C 13, 17.1.2004, p. 3 (applicable from 17.1.2004).

([101]) Framework on State aid to shipbuilding, OJ C 317, 30.12.2003, p. 11. However, given that the shipyards are not recipients or the aid and it is impossible to quantify an economic flow to their benefit, it is not necessary to assess the aid under this Framework.

([102]) See Maritime Guidelines, Section 2.1 Scope of revised State aid Guidelines, first paragraph: 'These guidelines cover any aid granted by Member States or through State resources in favour of maritime transport' and Section 3.1 Fiscal Treatment of shipowning companies, 12th paragraph: 'These guidelines apply only to maritime transport.'

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

(200) However, the Commission considers that, in view of the general character of leasing operations, the EIGs involved in STL operations and their investors act as intermediaries which channel to other recipients (shipping companies) an advantage that pursues an objective of common interest.

Eligibility of EIGs and/or their investors as intermediaries

(201) In line with the approach adopted in the Decision of 20 December 2006 concerning the French *GIE fiscaux* ([104]), the Commission takes the view that, when it represents a fair remuneration for their intermediation in the transfer to the shipping companies of an advantage that pursues an objective of common interest, the aid retained by the EIG or its investors would be found compatible in the same proportion. It is true that, in this case, there is no legal obligation for the EIGs to transfer part of the aid received to the shipping companies. However, in the exercise of its discretion when assessing the compatibility of the measure under Article 107(3)(c) TFEU, the Commission considers it appropriate to take into account the favourable effects of the measure for the maritime sector and to apply *mutatis mutandis* the provisions of the Maritime Guidelines — normally applicable to aid measures — to the advantage transferred to the shipping company. Therefore, if the application of the Maritime Guidelines to a shipping company involved in a specific STL operation results in a ratio of compatible advantage over a total advantage of x%, the same percentage of the aid retained by the EIG or its investors is compatible.

Advantage for the end-user shipping companies

(202) Since the advantage is of benefit to the shipping companies, Article 107(3)(c) TFEU together with the Maritime Guidelines ([105]) is the only relevant framework to assess its compatibility.

(203) The Commission considers that the shipping companies do not benefit from State aid within the meaning of Article 107(1) TFEU. Nevertheless, in order to identify the amount of compatible aid at the level of EIGs — as intermediaries channelling to shipping companies an advantage that pursues an objective of common interest — the Commission considers that the Maritime Guidelines should be applied *mutatis mutandis* to the advantage transferred by the EIG to the shipping company in order to determine: (1) the amount of the aid initially received by the EIG and transferred to the shipping company that would have been compatible if the amount transferred constituted State aid to the shipping company; (2) the proportion of that compatible advantage in the total advantage transferred to the shipping company; and (3) the amount of aid that should be deemed compatible as remuneration of the EIGs for their intermediation.

(204) The Maritime Guidelines describe different categories of State aid and the conditions under which aid can be authorised by the Commission. In particular, the Guidelines make it clear that they apply only to maritime transport activities and a limited number of ancillary or assimilated activities.

(205) When an end-user shipping company provides maritime transport services (or assimilated activities) and meets all the conditions of the Guidelines, an advantage received by this company and which constitutes aid would be compatible with the internal market.

(206) Pursuant to the Maritime Guidelines, aid can be granted through different categories of measures. One of the main conditions imposed by Article 10 of the 1997 Guidelines and Article 11 of the 2004 Maritime Guidelines is an overall aid ceiling, i.e. a maximum amount of State aid that an undertaking can be granted which can be deemed compatible with the internal market ([106]).

([104]) State aid C 46/2004, Commission Decision of 20.12.2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code (OJ L 112, 30.4.2007, p. 43).

([105]) As indicated above, Spain invoked the 2002 Commission Decision authorising the Spanish Tonnage Tax as a basis for compatibility. In fact, the conclusion that the TT is compatible with the internal market is based on the Maritimes Guidelines.

([106]) This ceiling applies only to certain categories of aid identified by the Guidelines: fiscal and social measures to improve competitiveness, crew relief, investment aid and regional aid.

(207) Under the 1997 Guidelines, the aid ceiling corresponds to 'a reduction to zero of taxation and social charges of seafarers and of corporate taxation of shipping activities'. Under the 2004 Guidelines, the ceiling corresponds to a reduction to zero of taxation and social charges of seafarers and a tax reduction by application of a TT scheme. However, the 2004 Guidelines also state that 'the total amount of aid granted … should not exceed the total amount of taxes and social contributions collected from shipping activities and seafarers.'

(208) Regarding the application of the aid ceiling to specific beneficiary shipowners, the Commission considers that it should be envisaged at EEA level. This means that the ceiling should take due account of the corporate tax and the social charges paid by the recipients in other EEA Member States. This approach is consistent with the *FagorBrandt* case-law ([107]) which confirmed that the assessment of a State aid measure should take due account of the cumulative effect of possible aid awarded in different Member States.

(209) As the case at hand concerns aid awarded to the EIGs in respect of the acquisition — by a shipowner — of a long-term asset, the Commission agrees with the Spanish authorities that the advantage received by the shipping company should be spread over the asset's normal depreciation period (10 years from a tax point of view) and compared to the total amount of taxes and social charges paid over the same period.

(210) In accordance with the ceiling, all advantages granted in excess of the total amount of income tax and social charges of seafarers and corporate taxation of shipping activities must be regarded as incompatible with the Treaty.

5.6. RECOVERY

(211) Article 14 of Regulation (EC) No 659/1999 provides that, where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary. Through recovery of the aid, the competitive position that existed before it was granted is restored as far as is possible.

(212) However, Article 14 of the Regulation also provides that the Commission shall not require recovery of the aid if this would be contrary to a general principle of Community law. This section examines whether the general principles of equal treatment, protection of legitimate expectations or legal certainty prevent the Commission from ordering the recovery of all or part of the aid granted in the past.

5.6.1. **Equal treatment**

(213) The principle of equal treatment and non-discrimination requires that comparable situations are not treated differently and that different situations are not treated equally unless such treatment is objectively justified ([108]).

(214) The French *GIE Fiscaux* scheme is indeed comparable to the STL in a number of respects. It requires the intermediation of a tax transparent EIG or investors between the builder of a long-term asset and the buyer to which the EIG leases or charters the asset. The EIG applies accelerated and early depreciation to the asset and the capital gain resulting from the sale of the asset is exempted from corporate tax. The EIG or its investors return a substantial part of the benefits resulting from the tax measures to the buyer of the asset (for instance, a shipping company) through a reduction of the rent or the buy option price. However, the French scheme featured an explicit exemption of capital gains whereas, in the STL, this exemption results from the joint application of the TT system and Article 50(3) RIS to the EIG.

([107]) See Joined Cases T-115/09 and T-116/09 *Electrolux AB and Whirlpool Europe BV* v *Commission*.
([108]) See Case C-110/03 *Belgium* v *Commission*, paragraph 71 and the case-law cited.

(215) The Commission also notes that the legal context and procedural history of the French and Spanish cases are different and that the Commission refrained from ordering the recovery for part of the period under assessment in its 2006 final decision on the *GIE Fiscaux* for reasons related to the specific procedural history of that case. In particular, France had not formally notified the scheme to the Commission but had informed it before implementing the scheme. The Commission also observes that, when it initiated the formal investigation procedure with respect to the *GIE Fiscaux*, it had never before ruled on a similar case. On the contrary, when it initiated the formal investigation with respect to the STL, the Commission had already ruled that a similar scheme — precisely the French *GIE Fiscaux* — was a State aid scheme. Since the legal and factual context of the *GIE Fiscaux* differs from that of the STL, the Commission considers that different treatment could be justified. However, as the Commission will explain in Section 5.6.3 below, reasons relating to the principle of legal certainty led the Commission to refrain from ordering recovery in this case until the date of publication of the Decision concerning the French *GIE Fiscaux*.

(216) The Commission further considers that, in the cases mentioned in recital 92 above, the application of the principle of legitimate expectations to similar measures was justified in respect of circumstances specific to each case. For the Spanish Goodwill case, a reply to an MEP had clearly qualified the scheme as a general measure. For the coordination centres and intragroup activities of multinational companies [109], the Commission found that legitimate expectations existed on the basis not only of the prior authorisation of the Belgian Coordination Centres as a general measure in 1984 and 1987 but also of the answer given by the Commission to a Parliamentary Question [110]. This stated that a broad range of tax measures — 'rules governing taxation of the European headquarters of multinational groups, designed to avoid double taxation' — 'fell outside the scope of the State aid rules'. Moreover, all those schemes had been implemented after the reply to the Parliamentary Question was given. In the Gibraltar Qualifying Companies case, the existence of legitimate expectations relied on the fact that the measure was modelled on another measure in the same Member State — the Exempt Companies scheme — which constituted existing aid. Similarly, the Orkney and Shetland measures were modelled on each other.

(217) With regard to the STL, the Commission therefore considers that the general principle of equal treatment is met if, taking into account the specific circumstances of the scheme, the principles of protection of legitimate expectations and legal certainty (see sections 5.6.2 and 5.6.3 below) are respected.

5.6.2. **Legitimate expectations**

(218) Legitimate expectations would result from an action by the Commission that provided precise, unconditional and consistent assurances [111] of such a nature as to give rise to hopes — that are justified [112] — on the part of the authorities or beneficiaries under a scheme that it was lawful [113]. According to the case-law, no legitimate expectations can in principle be recognised in the absence of a proper notification [114], [115], unless exceptional circumstances are identified [116].

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[109] Coordination Centres (DE); Coordination Centres and Finance Companies (LU); Vizcaya Coordination Centres (ES); Headquarters and International Treasury Pools (FR); Foreign Income (IE); International Financing Activities (NL).

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

[111] Case C 167/06 P *Komninou and others* v *Commission*, paragraph 63, and Case C-537/08 P *Kahla Thüringen Porzellan* v *Commission* [2010] ECR I-12917, paragraph 63.

[112] Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187* v *Commission* [2006] ECR I 5479, paragraph 147; Case C-167/06 P *Komninou and Others* v *Commission* [2007] ECR I-141, paragraph 63; Case T-107/02 *GE Betz* v *OHIM — Atofina Chemicals* (BIOMATE), [2004] ECR II-1845, paragraph 80, and the case-law cited.

[113] Case C-289/81, *Mavridis* v *Parliament* [1983] ECR 1731; Case T-290/97, *Mehibas Dordtselaan BV* v *Commission* [2000] ECR II-15, paragraph 59. See also Case 265/85 [1987] ECR 1155, paragraph 44 and Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-153, paragraph 26.

[114] Under Article 108(3) TFEU, Member States have an obligation to notify new aid measures to the Commission and to seek its approval before implementing the measure. Chapter II of the Procedural Regulation (OJ L 83, 27.3.1999) lays down detailed rules for the application of Article 107 to notified aid.

[115] See Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava* v *Commission*, [2004] ECR I-10609, paragraphs 44-45 and 52.

[116] See Joined Cases T-427/04 and T-17/05 *France* v *Commission* (France Télécom) [2009] ECR II-4315, paragraph 263.

5.6.2.1. *The 2001 Commission Decision in Brittany Ferries (BAI)*

(219) The Commission observes that Spain failed to notify the STL to the Commission and that the statement made in its 2001 Decision concerned a different scheme — the predecessor scheme of the one assessed in the *GIE Fiscaux* Decision — and made an explicit reference to the legal system of another Member State. As a consequence, the Commission considers that this statement does not constitute exceptional circumstances and is not sufficient to justify the acknowledgement of legitimate expectations in favour of Spain and third-party operators involved in STL operations. This conclusion is consistent with the approach adopted in the 2006 Commission Decision concerning the *GIE Fiscaux* where the Commission did not identify any element demonstrating the existence of legitimate expectations ([117]).

5.6.2.2. *The publication of the draft measures in the Official Gazette of the Spanish Parliament*

(220) The publication of draft measures in the Official Gazette of a Member State's Parliament does not meet the requirement of formal notification and stand-still imposed by this provision of the Treaty. The Commission notes that the early depreciation measure was implemented 21 months after the publication of Regulation (EC) No 659/1999 without prior notification and at the same time as the TT scheme, which was properly notified to — and authorised by — the Commission in accordance with the provisions of the Treaty and the abovementioned Regulation.

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

(221) The Commission considers that this letter is not liable to have created any justified hopes concerning the STL or the individual measures involved in STL operations.

(222) In accordance with Article 10(1) and (2) of Regulation (EC) No 659/1999, the Commission analysed the information it had in its possession regarding alleged unlawful aid and, on 21 December 2001, requested information from the Member State. In the first place, the Commission notes that a request for information is not a public document. Second, contrary to what PYMAR claims, this request shows that the Commission did not have the necessary information to identify and assess the alleged unlawful aid. As such, even if it had been made public, it could not have created any legitimate expectation that the scheme did not constitute aid. Third, and most importantly, by letters of 28 January 2002 and 28 May 2002 the Spanish authorities categorically denied that any tax measure was available in support of the acquisition of ships for contracts signed after 31 December 2000.

5.6.2.4. *The 2004 Decision concerning the Dutch notification* ([118])

(223) The Commission considers that the 2004 Decision could not have created justified hopes in respect of the STL or the individual measures involved in STL operations for the following reasons:

(224) First, the subject of the Commission investigation in this case was not a Spanish measure but a scheme notified by the Dutch Government intended to compensate Dutch shipyards or allow them to match offers made in 2000 ([119]) by Spanish shipyards which allegedly benefited from State aid granted by Spain with respect to six specific shipbuilding contracts. Consequently, the purpose of the 2004 Commission Decision was to provide an assessment of the aid notified by the Netherlands and not of any aid allegedly awarded by Spain.

(225) Second, the Spanish measure that the Netherlands intended to match was neither the STL nor any of its components. As mentioned in the 2003 Decision to open the formal proceedings in that case, the Dutch authorities clearly invoked aid in the form of interest subsidies on credits allegedly awarded to shipowners under Spanish Royal Decree 442/94 ([120]). Moreover, the Commission notes that both the early depreciation of leased

([117]) See recital 187 of that Decision.

([118]) Commission Decision of 30 June 2004 on the State aid which the Netherlands is planning to implement in favour of four shipyards to support six shipbuilding contracts.

([119]) See Table 2 in recital 9 of Commission Decision of 11 November 2003, OJ C 11, 15.1.2004, p. 7.

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

assets and the Spanish TT scheme only entered into force on 1 January 2002. A draft of those measures was only published in the Official Gazette of the Spanish Parliament on 10 October 2001. Therefore, they could not have been used to finance shipbuilding contracts in 2000.

(226) Third, even if the operators had imagined that the Spanish measure that was intended to be matched was the STL — which is not the case — the statements made in the 2004 Decision could not create any legitimate expectations. Indeed, the Commission stated that it did not have 'sufficient proof of the alleged Spanish aid' because Spain had indicated that the aid under Royal Decree 442/94 would no longer be available after 31 December 2000. After that date, the aid would no longer be authorised under the Shipbuilding Regulation ([121]). However, the subject of the Commission investigation was the Dutch matching aid, not the alleged Spanish aid and the main doubt raised by the Commission in the decision to open proceedings concerned the possibility under the Framework on State aid to shipbuilding ([122]) of matching aid — once it had been proven — awarded by another Member State, and not by a non-EU State.

(227) The absence of proof of the alleged aid came as a secondary argument in the doubts expressed by the Commission. After asking Spain for clarifications based on the information provided by the Netherlands, the Commission could only record the Spanish denial that aid was granted ([123]) (pursuant to Spanish Royal Decree 442/94) and conclude that the Netherlands had failed to provide sufficient proof of the Spanish aid to be matched. The lack of proof of State aid does not amount to proof of the non-existence of State aid in (any) Spanish measure. On the contrary, the Commission had already clarified in the decision to open proceedings that it had 'not been able to establish that Spain had illegally granted the alleged aid, but the Commission continues to keep the EU shipbuilding market, and potential State aid violations, under review ([124]).' Had they considered in good faith that the Spanish aid that the Netherlands intended to match was the STL, the actual or potential recipients of the STL should have been alerted by the fact that Spain had denied its existence rather than pleaded its compatibility.

5.6.2.5. *The 2006 Decision in the French GIE Fiscaux case*

(228) The Commission considers that neither its decision to open the formal proceedings in the French *GIE Fiscaux* in 2004 nor its 2006 final decision concluding that the scheme was partly incompatible aid can possibly have created any legitimate expectations, as argued by PYMAR.

(229) Indeed, aid measures must be notified to the Commission. In the absence of a notification, only exceptional circumstances can lead the Member State and operators legitimately to expect that a measure does not constitute aid. However, if the notification and approval procedure was not respected, it cannot legitimately be expected that a measure which amounts to State aid is compatible with the internal market.

(230) On the contrary, in the French *GIE Fiscaux* Decision of 20 December 2006, the Commission clearly expressed its position that the French tax lease scheme conferred State aid. The fact that the STL was a tax lease scheme similar to the French scheme should have alerted Spain and the recipients to the likelihood that the STL could constitute State aid. Therefore, any legitimate expectations that existed before publication in the *Official Journal of the European Union* on 30 April 2007 of the Decision concerning the French scheme would have ceased being legitimate from that date.

(231) Similarly, the mere fact that the incompatible aid was not recovered in the French case is insufficient to create legitimate expectations that incompatible aid possibly identified in the Spanish case would not be recovered. Indeed, if there were any reasons to prevent the Commission from requesting the Member State to recover the aid, these would have to be found in the specific circumstances of the case.

([121]) OJ L 202, 18.7.1998, p. 1.
([122]) OJ C 317, 30.12.2003, p. 11.
([123]) See recital 24 of the abovementioned final Decision of 30 June 2004: 'In State aid proceedings the Commission has to, in the last analysis, rely on the statements of the Member State supposed to (have) grant(ed) the aid.'
([124]) See recital 14 of the abovementioned Commission Decision of 11 November 2003.

5.6.2.6. *The 2009 letter sent by Commissioner Kroes*

(232) The Commission considers that the letter sent by Commissioner Kroes could not have created any justified hopes concerning the STL or the individual measures involved in STL operations for the following reasons:

(233) First of all, this letter is not a formal act representing the position of the Commission — i.e. the College of Commissioners — as would be a formal Commission Decision or the answer to a Parliamentary Question. In her one-page letter, Commissioner Kroes replied, in the context of a bilateral exchange, to a one-page letter sent by Ms Brustad, Norwegian Minister for Trade and Industry. The content of this letter was not made public by the Commission.

(234) The Commission notes that the letter from the Norwegian shipowner — mentioned in recital 105 above — is addressed to a single Spanish shipyard with which the shipowner is doing business and that the testimony, dated 2012, comes from Gerencia del Sector Naval, a government body. The Commission also notes that neither the Spanish authorities — who knew that the investigation was ongoing — nor the operators considering STL operations asked the Commission to clarify the position expressed in Commissioner Kroes's letter.

(235) Second, and more importantly, even if that letter was made public in 2009, it did not provide specific, unconditional and concordant assurances that the STL was lawful. Indeed, the answer given by Commissioner Kroes focuses on alleged discriminations between shipyards established in different EEA countries. The conclusion of the letter that no further action was envisaged 'at that stage' was clearly linked to the recent publication of a statement clarifying that the STL could be used for the acquisition of ships produced in other European countries, which directly addressed the concerns expressed by Ms Brustad. In any event, the letter did not even mention, and even less took any position regarding, the presence of State aid at the level of the EIG or its investors. As regards shipping companies, shipyards and intermediaries, the Commission considers that they are not recipients of the aid, so that the issue of legitimate expectations does not arise.

(236) The Commission therefore considers that the letter did not in any case provide precise, unconditional and consistent assurances liable to create legitimate expectations that the scheme did not contain State aid to the benefit of the EIG or its investors.

(237) As the Commission did not identify the existence of legitimate expectations on the basis of the letter, the question whether such legitimate expectations would cover the period before the letter is of no relevance whatsoever.

5.6.2.7. *A diligent economic operator could not have foreseen the possible existence of State aid in the joint application of several measures*

(238) As the individual measures constitute State aid (except for the accelerated depreciation of leased assets), the fact that economic operators could not foresee that their combination could also be regarded as State aid is irrelevant and does not justify the existence of legitimate expectations or the breach of any other fundamental principle of EU law.

(239) On the contrary, several third parties among the operators involved in STL operations have argued that the 2006 Decision in the French *GIE Fiscaux* case had given them legitimate expectations because the measure was very similar to the STL. The fact that all the features of the French measure were included in one legal provision necessarily implies a global assessment. In that respect, the fact that the different elements of the STL were included in different measures — *de facto* linked and used together — to produce similar effects should not guarantee a different approach and does not rule out a global assessment.

(240) In any case, the Commission considers that both the early depreciation of leased assets and the tax exemption — pursuant to Article 50(3) RIS — of the capital gains realised under the TT constitute State aid in each case. In the absence of any notification of these provisions, operators could only have legitimate expectations that they were lawful in exceptional circumstances that have not been demonstrated.

5.6.2.8. *The statements concerning depreciation methods in the Commission Notice on direct business taxation* ([125])

(241) The Commission notes that the wording of the Notice did not provide any grounds for operators to harbour legitimate expectations that the STL was lawful. First, the provisions invoked refer only to depreciation methods so that legitimate expectations, if any, could only cover the early depreciation of leased assets.

(242) Second, the Notice cannot be interpreted in such a way that any measure related to depreciation falls outside the scope of State aid rules. Indeed, recital 13 of the Notice states that depreciation rules and rules on loss carry-overs do not constitute aid provided that they apply without distinction to all firms and to the production of all goods. The STL is not applicable to all firms or to the production of all goods.

(243) Moreover, recital 22 of the same Notice clarifies that the level of discretion enjoyed by the tax administration and the room for manoeuvre which it enjoys support the presumption that there is State aid involved. As explained in Section 2.2.2 above, the application of early depreciation is subject to conditions — the wording of which requires interpretation — and prior authorisation by the tax administration. Before granting the authorisation the administration can request additional documents from the applicant or information from other administrations. The fact that additional documents were present in all the application files available to the Commission suggests that they were — explicitly or implicitly — requested by the administration or that the applicants knew that they were necessary to obtain the authorisation. As a consequence, the administration enjoyed wide discretionary powers in the application of this measure.

(244) Consequently, in view of the characteristics of the scheme, the wording of the Notice could not give rise to uncertainty, even less to legitimate expectations as far as the aid character of the early depreciation is concerned.

5.6.2.9. *Eligibility of the revenues from bareboat chartering for the tonnage tax scheme*

(245) The authorisation granted by Commission Decision C(2002) 582 final of 27 February 2002 refers to 'companies registered under Spanish law, whose activity includes the operation of owned and chartered ships'. However, the Commission considers that this sentence cannot create any legitimate expectations that entities whose activities exclusively consist of chartering out one vessel on a bareboat basis would be eligible for the TT scheme. Indeed, as explained in recitals 179 and 180 above, the 2002 Decision is clear that the TT scheme should apply exclusively with respect to qualifying vessels and qualifying maritime transport activities.

5.6.3. **Legal certainty**

(246) Legal certainty is a fundamental requirement of European law designed to ensure the foreseeability of legal situations and relationships governed by it. According to the case-law, the requirement of legal certainty prevents the Commission from indefinitely delaying the exercise of its powers and it does not imply action by the institution concerned ([126]). However, until now two cumulative elements have been required for that principle to be breached:

— the existence of a body of elements creating a situation of uncertainty concerning the regularity of the measure,

— a prolonged lack of action on the part of the Commission, in spite of its awareness of the aid.

([125]) See Commission Notice on the application of State aid rules to measures related to direct business taxation, OJ C 384, 10.12.1998, p. 3.

([126]) See Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano* v *Commission* [2002] ECR I-7869, paragraph 140.

(247) The French *GIE Fiscaux* Decision and the *Salzgitter* judgment ([127]) are the only two occasions where the Commission and the Court of First Instance, respectively, considered that violation of the principle of legal certainty can prevent recovery even if there are no legitimate expectations. However, the judgment in *Salzgitter* was set aside by the Court of Justice precisely regarding the application of the principle of legal certainty to the case ([128]).

5.6.3.1. *Elements that have created a situation of uncertainty concerning the regularity of the measure*

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

(249) The key measures that form part of the STL system were implemented between 2002 ([129]) and 2003, i.e. before the Commission decided that the French system constituted State aid.

(250) In view of the similarity of the STL and the *GIE Fiscaux*, it is therefore possible — as argued by the Spanish authorities and certain third parties — that events invoked in favour of the protection of legal certainty for the French system have also created a situation of uncertainty concerning the regularity of the STL.

(251) On this point, the Commission concludes that this situation of uncertainty could indeed have been created by the Commission's statement in its 2001 *Brittany Ferries* Decision ([130]), to the effect that certain tax advantages were a general measure. As explained in recital 192 of the *GIE Fiscaux* Decision, this statement did not specify that it referred to the predecessor scheme of *GIE Fiscaux*, which may have misled the recipients of that scheme and of a similar scheme, such as STL.

(252) As for the other elements invoked by Spain and third parties, the Commission has analysed whether the elements invoked to support the existence of legitimate expectations (see Section 5.6.1) could have created a situation of uncertainty.

(253) First, Member States have an obligation under the Treaty to notify the Commission of their plans to grant new aid. The publication of the draft measures in the Official Gazette of the Spanish Parliament cannot be regarded as a notification to the Commission and the absence of reaction by the Commission cannot have contributed to creating a situation of uncertainty.

(254) Second, the 2001 request for information concerning a tax leasing measure shows that the Commission reacted to allegations of aid made by a complainant. This request was addressed to Spain and in its replies Spain strongly denied the existence of such measures. The request was not made public by the Commission but if, for any reason, future recipients of the STL happened to find out about this request for information at the time they intended to participate in the scheme, it should have alerted them to the fact that a complaint had been filed with the Commission, which considered that the measures of this scheme could constitute State aid. A request for information would also indicate that the Commission did not have sufficient knowledge of the measure to assess it and would not lead to the conclusion that the Commission approved the measure. Moreover, as this request was sent before the entry into force of the measures making up the STL, Spain could have notified all the elements of the scheme in order to obtaining legal certainty. Alternatively, recipients should have asked Spain — or the Commission — about the notification of the scheme by Spain or its approval by the Commission.

([127]) See Case T-308/00 *Salzgitter* v *Commission* [2004] ECR II-1933.
([128]) Case C-408/04P *Commission* v *Salzgitter* [2008] ECR I-2767.
([129]) In practice, the first STL operations appear to have been arranged as of July 2002.
([130]) OJ L 12, 15.1.2002, p. 33.

Consequently, neither Spain nor the operators could argue that this request or — in view of the answer given — the absence of follow-up action from the Commission has contributed to creating a situation of uncertainty.

(255) Third, as to the 2004 Decision concerning the Dutch compensation measure, the Commission points out that compensation for a different measure from the STL cannot have created a situation of uncertainty with respect to the STL. The fact that a precise description of the alleged Spanish aid in public documents was only provided in the Dutch version of the decision to open the formal investigation procedure is not sufficient to conclude that readers could assume that it concerned the STL. Indeed, a translation of the Dutch decision or an inquiry to the Commission could easily have clarified that the alleged Spanish aid involved interest-rate subsidies on the basis of Royal Decree 442/1994. In addition, the Commission merely mentioned the fact that Spain had denied the existence of the alleged Spanish aid and that the Netherlands had failed to bring sufficient proof. As mentioned in that Decision, the Commission can only trust the Member State and cannot be held responsible for the uncertainty, if any, that the absence of follow-up action on its part could have caused. The Commission therefore finds that the 2004 Decision could not have contributed to a situation of uncertainty regarding the lawfulness of the STL.

(256) Fourth, the Commission considers that the situation of uncertainty created with respect to the lawfulness of the STL as a result of the statement made in the 2001 Commission Decision concerning Brittany Ferries stopped on the date of publication of the Commission Decision on the French *GIE Fiscaux*. That Decision made it clear that the Commission regarded the French tax lease scheme as State aid and should have alerted Spain and the beneficiaries of the STL to the fact that the scheme could constitute State aid. As a result, it cannot possibly have created — or contributed to — a situation of uncertainty in that respect.

(257) Fifth, for the reasons set out in Section 5.6.2.6 above, the Commission considers that the letter sent by Commissioner Kroes in 2009 did not create or contribute to creating a situation of uncertainty.

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

(258) The Commission considers that the time elapsed in the investigation of the STL before initiating the formal investigation procedure should be calculated from 2006 when the Commission received the complaints from European shipyards. Indeed, for the reasons set out above, neither the publication of the draft measures in the Spanish Official Gazette, nor the allegations received by the Commission in 2001 and explicitly denied by Spain in 2002 support the view that the Commission has unduly delayed the exercise of its investigative powers. Nor does the 2004 final Decision in Case C-66/2003, which concerned the matching of a different alleged State aid measure, support this opinion.

(259) The time that elapsed between the first complaint in 2006 and the opening of the formal procedure in 2011 does not appear excessive given the number of tax measures involved, the complexity of tax lease operations and the lack of transparency concerning these lease operations. In addition, the Commission sent eight formal requests for information between September 2006 and May 2010 ([131]) and was regularly in contact with the Spanish authorities.

(260) Furthermore, it was only in October 2010 that the Commission received a new complaint containing a key element for the assessment of the scheme, namely a comprehensive study by tax experts, describing the functioning of the scheme and its effects. Consequently, the time elapsed in the investigation of the STL does not appear sufficient to invoke legal certainty.

(261) In view of the complexity of the measures at hand, the Commission cannot rule out that legal uncertainty may have been created by the 2001 Decision on Brittany Ferries, as alleged by Spain and the recipients, regarding the

([131]) Eight requests for information were sent to Spain on the following dates: 15.9.2006, 30.1.2007, 6.11.2007, 5.2.2008, 3.3.2008, 23.9.2008, 11.1.2010, 12.5.2010.

classification of the STL as aid. But this can only have been the case until the publication in the Official Journal on 30 April 2007 of the Commission Decision on the French *GIE Fiscaux*, where the Commission established that that scheme constituted State aid.

(262) As a consequence, the Commission concludes that it should not order the recovery of aid resulting from STL operations in respect of which the aid was granted between the entry into force of the STL in 2002 and 30 April 2007.

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

(263) The Commission has assessed different tax measures which constitute State aid schemes. It is not the purpose of this Decision to establish the precise amounts of aid received by each beneficiary in each of the STL operations. However, the Commission considers that the following methodology should be followed by the Member State in order to determine, on a case-by-case basis, the recipients of aid and the amount of incompatible aid to be recovered from them. This methodology can be further refined in cooperation with the Spanish authorities, in particular in order to establish the actual amount of the tax advantage enjoyed by the investors, in the light of their individual tax situation.

(264) Step 1: Calculation of the total tax advantage generated by the operation: This is the net present value (NPV) of the tax advantages actually obtained by the EIG or its investors (i.e. before the deduction of the part of those advantages transferred to the shipping company through a price rebate). The NPV should be calculated on the starting date of depreciation — early depreciation as authorised by the tax authorities — and the discount rates used for the purpose of that calculation should be based on market realities. The Commission suggests that, by default, Spain can use calculations provided by EIGs to the tax administration when applying for the early depreciation (see recital 168 above). In principle, the tax advantage is considered granted on the date when the taxes are due by the EIG or its investors.

(265) Step 2: Calculation of the tax advantage generated by the general tax measures applied to the operation: This is the NPV — calculated in the same way as for step 1 — of the amount of the tax advantages that the EIG or its investors would have obtained in a reference situation in which only the accelerated depreciation measure would have been used from the moment the vessel started to be operated and the operation taxed according to normal corporate tax rules. In this scenario, the capital gain on the sale of the vessel to the shipping company would have been subject, on the date the option is exercised by the shipping company, to the corporate tax generally applicable to corporate profits. In principle, the tax advantage is considered to be obtained on the date when the taxes are due by the EIG or its investors.

(266) Step 3: Calculation of the tax advantage equivalent to State aid: as the Commission considers accelerated depreciation to be a general measure, the amount of the advantage corresponding to that measure (i.e. the deferred payment of certain amounts of tax) does not constitute State aid. The difference between the amounts obtained in Step 1 and Step 2 should correspond to the aid that the EIG and its investors have received as recipients of the tax measures in question, i.e. the NPV of the total advantage derived from the use of early depreciation, the TT scheme (for which EIGs were not eligible) and the tax exemption of the capital gains achieved through Article 50(3) RIS. In principle, the tax advantage is deemed to be obtained on the date when the taxes are due by the EIG or its investors.

(267) Step 4: Calculation of the amount of compatible aid: first, the aid received by the EIG or its investors as calculated in step 3 is compatible inasmuch as it corresponds to the advantage transferred to the shipping company which would have been compatible if it had been considered State aid to the shipping company. The percentage of the aid transferred to the shipping company must be determined on the basis of a calculation similar to those submitted by the EIGs in their application to the tax administration (see recital 136 above), and allowing a remuneration in conformity with the market for the intermediation. As explained in recitals 202 to 210 above, part of the advantage transferred to the shipping company can be regarded as compatible if the shipping company, the vessel concerned and its transport activities are eligible under the Maritime Guidelines. The amount compatible should be determined in compliance with Chapter 11 of the Guidelines and taking due account of all aid already granted to that shipping company in the EEA. In particular, the amounts of aid granted in Spain must be added to

those granted in the company's country of establishment (if it is an EEA member). The amount of aid exceeding the ceiling, or not proven to be compatible under Chapter 11 of the Maritime Guidelines, is to be regarded as incompatible.

(268) As the ceiling in Chapter 11 of the Maritime Guidelines is calculated on an annual basis and the advantage received by the shipping company relates to a long-term asset, the Commission agrees that, for the application of that ceiling, the advantage resulting for the shipping company from the STL operation can be spread over the normal depreciation period (10 years) of the vessel concerned.

(269) Second, inasmuch as it corresponds to a remuneration in conformity with the market for the intermediation of financial investors in the transfer of a compatible advantage to the shipping companies, this remuneration will also be regarded as compatible or incompatible aid in the same proportion as the advantage channelled to the shipping company (see recital 201 above).

5.6.5. **Contractual clauses**

(270) As mentioned above, PYMAR has informed the Commission about certain clauses contained in certain contracts between the investors, the shipping companies and the shipyards. Under such clauses, the shipyards would be required to compensate the other parties if the expected tax advantages cannot be obtained.

(271) In its final negative decision with partial recovery concerning the French *GIE fiscaux* case ([132]), which bears considerable similarities with the case at hand, the Commission noted that: 'the fact that the legal and tax-related risks incurred by the members of EIGs may, in some cases, have been contractually passed on to the users of the assets cannot negate the principle that the Commission's purpose in demanding, where appropriate, the recovery of unlawful aid is to deprive the various recipients of the advantage they have enjoyed in their respective markets compared with their competitors and to restore the status quo that existed before the aid was granted'. The Commission concluded that: 'the achievement of that purpose cannot depend … on contractual stipulations agreed upon by the aid recipients'.

(272) According to well-established case-law, the obligation on a State to abolish aid regarded by the Commission as being incompatible with the internal market has as its purpose to re-establish the previously existing situation ([133]). According to another formula, the main objective pursued in recovering unlawfully paid State aid is to eliminate the distortion of competition caused by the competitive advantage which such aid affords ([134]). By repaying the aid, the beneficiary forfeits the advantage which it had over its competitors in the market, and the situation prior to payment of the aid is restored ([135]).

(273) In order to achieve that result, the Commission must have the power to order that recovery takes place from the actual recipients, so that it can fulfil the function of re-establishing the competitive situation in the market(s) where the distortion has occurred. To that effect, the Commission must be able to identify clearly the undertakings that are obliged to repay the unlawful aid that it declares incompatible. This objective would, however, be permanently frustrated if private parties were able, by contractual stipulations, to alter the effects of recovery decisions adopted by the Commission. That possibility, if available, could be used by economic operators enjoying substantial bargaining power to protect themselves from recovery decisions, thereby depriving State aid control of its practical consequences.

(274) By way of comparison, in its recent *Residex* judgment ([136]), the Court of Justice declared that it is for the national court, taking account of all the particular features of the case, to identify the beneficiary or, as the case may be, the recipients of a guarantee constituting State aid and to effect recovery of the total amount of the aid in question. In addition, irrespective of who the beneficiary of the aid may be, and given that the objective of the measures that the national courts are bound to take in the event of infringement of Article 108(3) TFEU is, essentially, to restore the competitive situation existing prior to the payment of the aid in question, those courts must ensure that the

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([132]) See recital 196 of the Decision.
([133]) See, in particular, Case C-348/93 *Commission* v *Italy* [1995] ECR I-673, paragraph 26.
([134]) Case C-277/00 *Germany* v *Commission* [2004] ECR I-3925, paragraph 76.
([135]) Case C-350/93 *Commission* v *Italy* [1995] ECR I-699, paragraph 22.
([136]) Judgment of 8 December 2011 in Case C-275/10, *Residex Capital IV*, not yet published, paragraphs 43-45.

measures which they take with regard to the validity of the above-mentioned acts make it possible for such an objective to be achieved. This shows that, when it is necessary to remedy the distortion caused by the aid, national courts may intervene and declare that contracts are invalid, even to the detriment of parties that are not recipients of the aid — in this case the lenders whose claims were assisted by the state guarantee. The same reasoning applies *a fortiori* to the Commission when it orders that the aid be effectively recovered from the recipients. In this respect, it should be stressed that the Commission is called upon to take a final decision on the aid measure, rather than ensuring, as national courts must do, that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) TFEU has been infringed.

(275) It follows that contractual clauses sheltering the recipients of the aid from recovery of illegal and incompatible aid, by transferring the legal and economic risks of such recovery to other persons, are contrary to the very essence of the system of State aid control established by the Treaty. Such a system is essential for accomplishing the tasks entrusted to the Community and, in particular, for the functioning of the internal market and therefore constitutes a set of rules of public policy ([137]). Therefore, private parties cannot depart from it by contractual stipulations.

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

6. **CONCLUSION**

The Commission concludes that:

— Pursuant to the Maritime Guidelines and the Decision of 27 February 2002 authorising the Spanish TT system, activities which exclusively consist of leasing, chartering or renting out vessels do not constitute transport services. Consequently, those activities are in principle not eligible for the Spanish TT scheme as authorised by the Commission.

— Articles 115(11) and 48(4) TRLIS and Article 49 RIS (early depreciation of leased assets), the application of the TT system to non-eligible EIGs as well as Article 50(3) RIS constitute State aid within the meaning of Article 107(1) TFEU.

— Those measures are not existing aid within the meaning of Article 1(b) of Regulation (EC) No 659/1999 as they were neither notified nor otherwise authorised by the Commission.

— Spain has unlawfully implemented the aid in question in breach of Article 108(3) of the Treaty on the Functioning of the European Union.

— It follows that the so-called Spanish Tax Lease system, involving the joint use of Articles 115(11) and 48(4) TRLIS and Article 49 RIS (early depreciation of leased assets), the application of the TT system to non-eligible EIGs as well as the use of Article 50(3) RIS, is unlawful.

— Aid to the EIG or its investors can be regarded as compatible with the internal market inasmuch as it corresponds to a remuneration in conformity with the market for the intermediation of financial investors and it is channelled to maritime transport companies that are eligible under the Maritime Guidelines in compliance with the conditions laid down in those Guidelines. This implies, in particular, that the total amount transferred to the shipping companies does not exceed the ceiling imposed by Chapter 11 of the Guidelines.

([137]) See, by analogy, Case C-126/97 *Eco Swiss China Time* [1999] ECR I-3055, paragraphs 36-41.

— The part of the aid which exceeds the amount of compatible aid should be recovered from the recipients, i.e. EIGs and their investors without the possibility for such recipients to transfer the burden of recovery to other persons.

— The Commission should not order the recovery of aid resulting from STL operations in respect of which the aid was granted between the entry into force of the STL in 2002 and 30 April 2007, the date of publication of the Decision concerning Case C-46/2004 *France GIE Fiscaux* (see recital 261 above).

— Beyond that date, ordering the recovery would not breach the general principles of protection of legitimate expectations and legal certainty enshrined in European Union law,

HAS ADOPTED THIS DECISION:

Article 1

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

Article 2

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

Article 3

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

Article 4

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

2. The sums to be recovered shall bear interest from the date on which they were made available to the recipients until their actual recovery.

3. The interest shall be calculated on a compound basis in accordance with Chapter V of Commission Regulation (EC) No 794/2004 ([138]) and Commission Regulation (EC) No 271/2008 ([139]) amending Regulation (EC) No 794/2004.

4. Spain shall cancel all outstanding payments of aid under the scheme referred to in Article 1 with effect from the date of adoption of this Decision.

Article 5

1. Recovery of the aid granted under the scheme referred to in Article 1 shall be immediate and effective.

2. Spain shall ensure that this Decision is implemented within four months of the date of notification of this Decision.

([138]) OJ L 140, 30.4.2004, p. 1.
([139]) OJ L 82, 25.3.2008, p. 1.

Article 6

1. Within two months of notification of this Decision, Spain shall submit the following information:

(a) the list of recipients that have received aid under the scheme referred to in Article 1 and the total amount of aid received by each of them under the scheme;

(b) the total amount (principal and recovery interest) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating that the recipients have been ordered to repay the aid.

2. Spain shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted under the scheme referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision. It shall also provide detailed information concerning the amounts of aid and recovery interest already recovered from the recipients.

Article 7

This Decision is addressed to the Kingdom of Spain.

Done at Brussels, 17 July 2013.

For the Commission
Joaquín ALMUNIA
Vice-President

ANNEX

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

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

(*) Million of national currency.