Reports of Cases

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

21 February 2024*

(State aid – Aid granted by the Spanish authorities in favour of certain economic interest groupings (EIGs) and their investors – Tax scheme applicable to certain finance lease agreements for the purchase of ships (Spanish tax lease system) – Decision declaring the aid partly incompatible with the internal market and ordering its partial recovery – Partial disappearance of the subject matter of the dispute – No need to adjudicate in part – New aid – Recovery – Contractual clauses protecting the beneficiaries against the recovery of unlawful State aid incompatible with the internal market – Division of powers between the Commission and the national authorities)

In Joined Cases T-29/14 and T-31/14,

**Telefónica Gestión Integral de Edificios y Servicios, SL**, formerly Taetel, SL, established at Madrid (Spain), represented by E. Navarro Varona, P. Vidal Martínez, J. López-Quiroga Teijero, G. Canalejo Lasarte and A. Pérez Hernández, lawyers,

applicant in Case T-29/14,

**Banco Santander, SA**, formerly Banco Popular Español, SA, established at Madrid, represented by E. Abad Valdenebro, R. Calvo Salinero and A. Lamadrid de Pablo, lawyers,

applicant in Case T-31/14,

v

**European Commission**, represented by J. Carpi Badía and P. Němečková, acting as Agents, and by M. Segura Catalán, lawyer,

defendant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of A. Kornezov, President, G. De Baere, D. Petrlík, K. Kecsmár and S. Kingston (Rapporteur), Judges,

Registrar: P. Nuñez Ruiz, administrator,

* Language of the case: Spanish.

having regard to the written part of the procedure, in particular:

– the order of 18 March 2014 joining Cases T-29/14 and T-31/14 for the purposes of the written and oral phases of the proceedings and the decision bringing the proceedings to an end,

– the decision of 2 March 2016 to stay the proceedings pending the decision closing the proceedings in the case which gave rise to the judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591),

– the decision of 21 November 2018 to stay the proceedings until the decisions terminating the proceedings in Cases T-515/13 RENV and T-719/13 RENV have become *res judicata*,

– the decision of 20 April 2021 to resume the procedure,

– the decision of 12 April 2022 to stay the proceedings until the decision to terminate the proceedings in the cases which gave rise to the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60),

– the measure of organisation of procedure of 22 February 2023 inviting the parties to state their views on the consequences to be drawn from the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), for the handling of cases,

– the reply of the applicant in Case T-29/14 of 16 March 2023 asking the General Court to rule on the pleas in law not determined in the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), and that of the applicant in Case T-31/14 of 16 March 2023 stating, in essence, that it would not oppose a finding by the General Court of its own motion that the action has become devoid of purpose and that there is no longer any need to adjudicate on it pursuant to Article 131(1) of the Rules of Procedure of the General Court,

– the Commission's reply of 16 March 2023, according to which, in essence, all the questions raised in the present actions have been decided in the actions concerned by the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P), and the actions must be dismissed as unfounded, save as regards the fourth pleas in law, on which there will be no further need to adjudicate once the Commission has adopted the measures necessary to comply with that judgment,

– the measure of organisation of procedure of 26 May 2023 inviting the applicant in Case T-31/14, first, to comply with the requirements of Article 130(2) if it intends to request the General Court to declare that there are no longer any grounds to adjudicate in that case and, secondly, to specify whether, in the event that the General Court considers that there are grounds to adjudicate, that request should be understood as an application for discontinuance,

– the reply of the applicant in Case T-31/14 of 9 June 2023 stating, in essence, that it does not intend to ask the General Court to declare that there is no longer any need to adjudicate, or to withdraw its action,

further to the hearing on 16 November 2023,

gives the following

## Judgment

1 By their actions based on Article 263 TFEU, the applicants, Telefónica Gestión Integral de Edificios y Servicios, SL, formerly Taetel, SL, and Banco Santander, SA, formerly Banco Popular Español, SA, seek annulment of Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System (OJ 2014 L 114, p. 1; 'the contested decision').

## Background to the dispute

### *The contested decision*

2 Following complaints that the Spanish tax lease system as applied to certain finance lease agreements for the purchase of ships ('the STL system') allowed shipping companies to acquire ships built by Spanish shipyards at prices reduced by 20-30%, the European Commission initiated the formal investigation procedure provided for in Article 108(2) TFEU by Decision C(2011) 4494 final of 29 June 2011 (OJ 2011 C 276, p. 5; 'the decision to open the formal investigation procedure').

3 In the course of the formal investigation procedure, the Commission found that the STL system had been used, up to the date of adoption of its decision referred to in paragraph 2 above, for transactions consisting in the construction of ships by shipyards and their acquisition by shipping companies and in the financing of those transactions through an ad hoc legal and financial structure set up by a bank. For each ship order, the STL system involved a shipping company, a shipyard, a bank, a hire-purchase company and an economic interest grouping (EIG) formed by the bank and investors acquiring stakes in the EIG. The latter leased the vessel from a hire-purchase company from the start of its construction, then leased it to a shipping company under a bareboat charter. That EIG undertook to purchase that vessel at the end of the hire-purchase contract, while the shipping company undertook to purchase it at the end of the bareboat charter contract. According to the contested decision, that was a tax arrangement designed to generate tax advantages for investors grouped together in a 'tax transparent' EIG in the sense that the profits and losses recorded by the EIG were automatically transferred to investors resident in Spain in proportion to their shareholding in the EIG, and to transfer part of those profits to a shipping company in the form of a discount on the price of that vessel.

4 The Commission found that the transactions carried out under the STL system combined five measures provided for in various provisions of Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004, approving the recast text of the Law on corporation tax) of 5 March 2004 (BOE No 61 of 11 March 2004, p. 10951; 'the Law on corporation tax'), and Real Decreto 1777/2004, por el que se aprueba el Reglamento del Impuesto sobre Sociedades (Royal Decree 1777/2004, approving the Regulation on corporation tax) of 30 July 2004 (BOE No 189 of 6 August 2004, p. 28377; 'the Regulation on corporation tax'). Those five measures were the accelerated depreciation of leased assets provided for in Article 115(6) of that law, the discretionary application of early depreciation

resulting from Article 48(4), Article 115(11) of that law and Article 49 of that regulation, the provisions relating to EIGs, the tonnage tax scheme provided for in Articles 124 to 128 of that law and the provisions of Article 50(3) of that regulation.

5 Under Article 115(6) of the Law on corporation tax, accelerated depreciation began on the date on which the leased asset became operational, namely not before the asset was delivered to the lessee and the lessee began to use it. However, Article 115(11) of that law provided that the Spanish Ministry of the Economy and Finance could, at the formal request of the lessee, set an earlier date for the start of the depreciation in question. That article imposed two general conditions for early depreciation. The specific conditions applicable to EIGs were set out in Article 48(4) of that law. The authorisation procedure provided for in Article 115(11) of that law was detailed in Article 49 of the Regulation on corporation tax.

6 The tonnage tax scheme was authorised as State aid compatible with the internal market pursuant to the Community guidelines on State aid to maritime transport of 5 July 1997 (OJ 1997 C 205, p. 5), as amended by Commission Communication C(2004) 43 (OJ 2004 C 13, p. 3) ('the Maritime Guidelines'), by Commission Decision C(2002) 582 final of 27 February 2002 on State aid N 736/2001 implemented by Spain – Scheme for the tonnage based taxation of shipping companies (OJ 2004 C 38, p. 4), as amended by Commission Decision C(2004) 1931 final of 2 June 2004 on State aid N 528/2003 implemented by Spain – Amendment of the tonnage tax scheme for maritime transport companies (OJ 2005 C 77, p. 29). Under that scheme, companies entered in one of the registers of shipping companies and which have obtained authorisation from the tax authorities for this purpose are taxed not on the basis of their profits and losses, but on the basis of their tonnage. Spanish legislation allows EIGs to be entered in one of those registers, even though they are not shipping companies.

7 Article 125(2) of the Law on corporation tax provided for a special procedure for vessels already acquired at the time of the changeover to the tonnage tax scheme and for used vessels acquired when the company was already benefiting from that scheme. Under the normal application of that scheme, any capital gains were taxed upon entry into that scheme and it was assumed that capital gains taxation, albeit delayed, took place when the vessel was sold or dismantled. However, by way of derogation from that provision, Article 50(3) of the Regulation on corporation tax provided that, where ships were purchased by way of a call option under a leasing agreement approved in advance by the tax authorities, they were deemed to be new and not used ships, within the meaning of Article 125(2) of that law, irrespective of whether or not they had already been depreciated, so that any capital gains were not taxed. That derogation, which had not been notified to the Commission, was applied only to specific leasing contracts approved by the tax authorities in the context of the application of early depreciation under Article 115(11) of that law, namely for recently built and leased vessels purchased by means of STL system operations from, with one exception, Spanish shipyards.

8 According to the contested decision, by applying all those measures, the EIG received the tax benefits in two stages. In a first stage, early and accelerated depreciation of the cost of the leased vessel was applied under the normal corporation tax regime, resulting in substantial losses for the EIG which, because of the tax transparency of EIGs, could be deducted from the investors' own income in proportion to their shareholding in the EIG. While that early and accelerated depreciation was normally subsequently offset by the increase in tax payable when the vessel was fully depreciated or when it was sold, generating a capital gain, the tax saving resulting from the transfer of the initial losses to the investors was retained, in a second phase, as a result of the

EIG's switchover to the tonnage tax scheme, which allowed total exemption of the profits capital gains thanks to the fact that the same EIG came under the tonnage tax scheme, which allowed total exemption of the capital gains resulting from the sale of the vessel to the shipping company.

9 While considering that the STL scheme should be described as a 'system', the Commission also analysed each of the measures at issue individually. In the contested decision, it decided that, among those measures, those resulting from Article 115(11) of the Law on corporation tax relating to early depreciation, from the application of the tonnage tax scheme to ineligible undertakings, vessels or activities and Article 50(3) of the Regulation on corporation tax constituted State aid to EIGs and their investors unlawfully put into effect by the Kingdom of Spain from 1 January 2002, in breach of Article 108(3) TFEU. It declared that the tax measures in question were incompatible with the internal market, except in so far as the aid corresponded to a market remuneration for the intermediation of financial investors and was transferred to maritime transport undertakings eligible under the Maritime Guidelines. It decided that the Kingdom of Spain should put an end to the application of that aid scheme in so far as it was incompatible with the internal market and should recover the incompatible aid from the EIG investors which had benefited from it, without those recipients being able to transfer the burden of recovering that aid to other persons.

10 However, the Commission decided that no recovery would take place in respect of aid granted as part of financing operations in respect of which the competent national authorities had undertaken to grant the benefit of the measures by a legally binding act adopted before 30 April 2007, the date of publication in the *Official Journal of the European Union* of its Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code – State aid C 46/04 (ex NN 65/2004) (OJ 2007 L 112, p. 41).

***The other actions brought against the contested decision***

11 By judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), the General Court upheld two further actions brought, against the contested decision, by the Kingdom of Spain and by Lico Leasing, SA and Pequeños y Medianos Astilleros Sociedad de Reconversión, SA ('PYMAR'), on the basis of the plea in law alleging infringement of Article 107(1) TFEU and Article 296 TFEU, and annulled the contested decision.

12 By judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591), the Court set aside the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), and referred Cases T-515/13 and T-719/13 back to the General Court.

13 By judgment of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434), the General Court dismissed the actions.

14 By judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court partially set aside the judgment of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434) and, giving final judgment in the two actions concerned, annulled in part the contested decision.

15 In its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court first dismissed the appeals as regards the applicants' arguments concerning the alleged lack of selectivity of the STL system. It also dismissed the

appeals as regards the pleas in law relating to the application of the principles of the protection of legitimate expectations and legal certainty, while noting an error of law committed by the General Court which had no bearing on its assessment. Lastly, it upheld the Kingdom of Spain's plea in law alleging a failure to state reasons in the judgment of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434), as regards the recovery of the aid at issue. It held that, by confining itself to finding that the applicants had not challenged the designation of beneficiaries made in the contested decision and by referring to the logic and content of that decision, when it was to be inferred from the plea in law raised that those parties were arguing, implicitly but necessarily, that they had not been the sole beneficiaries of the aid at issue, a large part of which had been transferred to the shipping companies, the General Court had failed to reply to that plea in law. It concluded that the General Court had breached the duty to state reasons and set aside the judgment of the General Court in that regard.

16 Ruling definitively on the dispute, the Court upheld the plea in law raised by Lico Leasing and PYMAR in which those parties argued that the EIG investors had not been the only recipients of the aid at issue, a large part of which had been transferred to the shipping companies. It therefore annulled Article 1 of the contested decision inasmuch as it designated the EIGs and their investors as the sole recipients of the aid referred to in that decision, and annulled Article 4(1) of that decision in so far as it ordered the Kingdom of Spain to recover in full the amount of the aid at issue from the EIG investors who had benefited from it.

## Forms of order sought by the parties

17 The applicants claim, in essence, that the General Court should:

– annul the contested decision in so far as it finds the existence of State aid and orders that such aid be recovered from the EIG investors;

– in the alternative, annul the order for recovery of the aid from the EIG investors in Article 4(1) of that decision, in so far as it infringes the principles of legal certainty and the protection of legitimate expectations;

– in the further alternative, annul Article 2 of that decision and declare that the method of calculating the alleged advantage, which the EIG investors must repay, does not comply with the law;

– declare that Article 4(1) of that decision does not exist or annul that provision in part, in so far as it prohibits 'transferring the burden of recovery to other persons';

– order the Commission to pay the costs.

18 The applicant in Case T-29/14 further claims, in the alternative to its first head of claim, that the General Court should annul Articles 1 and 2 and Article 4(1) of the contested decision in so far as they identify the EIG investors as the beneficiaries who must repay the alleged aid.

19 The Commission contends that the General Court should:

– dismiss the action;

– principally, order the applicants to pay the costs and, in the alternative, declare that they are to bear, in addition to all their own costs, three quarters of the costs incurred by the Commission.

**Law**

20 In support of their action, the applicants each put forward five pleas in law:

– the first, alleging infringement of Article 107(1) TFEU, in that the contested decision finds the existence of State aid;

– the second, alleging infringement of Article 107 TFEU, in that the Commission wrongly considered that certain tax measures making up the STL system, considered individually, constituted new State aid;

– the third, alleging breach of the principles of legal certainty and the protection of legitimate expectations;

– the fourth, alleging, in essence, infringement of Articles 107 and 108 TFEU, of the obligation to state reasons and of the principle of proportionality as regards the identification of the beneficiaries and the method of recovery of the aid;

– the fifth, alleging infringement of Article 108 TFEU, Article 14 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), Article 3(6) TEU and Articles 16 and 17 of the Charter of Fundamental Rights of the European Union ('the Charter'), in that Article 4(1) of the contested decision prohibits 'transferring the burden of recovery to other persons'.

21 In its response to the measure of organisation of procedure of the General Court on the consequences to be drawn from the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), for the treatment of the actions, the applicant in Case T-29/14 stated that it would dispense with the first and third pleas in law. In its response to the measure of organisation of procedure adopted by the General Court on 28 September 2023, the applicant in Case T-31/14 stated that it would dispense with the same pleas in law if the General Court considered that the action had retained its purpose and that there was reason to give judgment. At the hearing, it also indicated that it had abandoned the second part of the fourth plea in law.

***The disappearance in part of the purpose of the dispute***

22 According to settled case-law, the purpose of the dispute, as determined by the application initiating the proceedings, must endure, as must the interest in bringing the action, until the judicial decision is delivered, failing which there must be no need to adjudicate, which presupposes that the result of the action is likely to be of benefit to the party which brought it (see judgment of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 42 and the case-law cited, and order of 14 January 2014, *Miettinen* v *Council*, T-303/13, not published, EU:T:2014:48, paragraph 16 and the case-law cited).

23 Thus, in the context of an action brought under Article 263 TFEU, it has been held that the annulment of the contested decision in the course of proceedings rendered devoid of purpose the action as regards the claims seeking annulment of that decision (see, to that effect, judgments of 29 April 2004, *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraph 37, and of 19 October 2005, *CDA Datenträger Albrechts* v *Commission*, T-324/00, EU:T:2005:364, paragraphs 116 and 117).

24 By annulling the contested measure, the applicant obtains the only result which its action can bring and there is therefore no longer any matter for decision of the European Union judicature (see, to that effect, order of 8 March 1993, *Lezzi Pietro* v *Commission*, C-123/92, EU:C:1993:87, paragraph 10).

25 The same applies where the partial annulment of the contested measure has given the applicant the result which it sought in part of its action, so that there is no longer any need to adjudicate on that part (see, to that effect, judgment of 29 April 2004, *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraphs 37 and 38).

26 Furthermore, the absolute authority enjoyed by a judgment of an EU Court setting aside a judgment attaches both to the operative part of the judgment and to the grounds which constitute its necessary support (see judgment of 29 April 2004, *Italy* v *Commission*, C-372/97, EU:C:2004:234, paragraph 36 and the case-law cited).

27 In the present case, it should be noted that, in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court annulled the contested decision only in part. As noted in paragraph 16 above, it annulled Article 1 of the contested decision, in so far as it designated the EIGs and their investors as the sole recipients of the aid referred to in that decision, and Article 4(1), in so far as it ordered the Kingdom of Spain to recover the full amount of the aid at issue from the EIG investors which had benefited from it.

28 In paragraphs 138 and 139 of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court stated that the Commission had erred in law as regards the identification of the recipients of the aid at issue, since the EIGs were required, under legally binding contracts concluded with the shipping companies and submitted to the tax authorities, to transfer to the shipping companies part of the tax advantage obtained.

29 In their actions, the applicants, who succeeded undertakings which had made investments in EIGs in the context of the STL system, claim, in the first part of their fourth pleas in law, that the Commission erred in that it classified, in the contested decision, the EIGs and the investors as the sole recipients of the aid and in that it decided that the entire amount of the aid was to be recovered from them, even though other undertakings which participated in operations under the STL system, such as shipyards and shipping companies, were also beneficiaries of that scheme and also took advantage of it. The applicant in Case T-29/14 also submits, in the context of that part, that the contested decision is insufficiently reasoned as regards the identification of the beneficiaries of the STL system.

30 Thus, by the first part of the fourth pleas in law, the applicants claim, in essence, that the General Court should annul Article 1 and Article 4(1) of the contested decision in so far as they designate the EIGs and their investors as the sole recipients of the STL system and in so far as they order the Kingdom of Spain to recover the full amount of the aid at issue from those investors.

31 As pointed out in paragraphs 16 and 27 above, Article 1 and Article 4(1) of the contested decision were annulled in part, in that respect, by the Court.

32 It follows that the partial annulment of the contested decision by the Court gave the applicants the result which they sought by part of their action, namely the disappearance of that aspect of the decision from the European Union legal order (see, to that effect, order of 16 September 2014, *Justice & Environment* v *Commission*, T-405/10, not published, EU:T:2014:821, paragraph 20 and the case-law cited).

33 Even supposing that the complaints referred to in paragraph 29 above were well founded in law, they would not lead to annulment of the contested decision going beyond that pronounced by the Court in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60). In particular, the claim, if well founded, that other undertakings which participated in operations under the STL system, such as in particular the shipyards, must also be regarded as forming part of the circle of recipients of the STL system and of the undertakings covered by the recovery order, would lead to the annulment of Article 1 of the contested decision, in so far as it designates the EIGs and their investors as the sole recipients of the aid at issue, and of Article 4(1) of that decision, in so far as it orders the Kingdom of Spain to recover the full amount of the aid at issue from the EIG investors which benefited from it. However, as pointed out in paragraphs 16, 27 and 31 above, those articles were annulled in part, to that extent, by the Court in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

34 The present actions must therefore be regarded as having become devoid of purpose to that extent.

35 Furthermore, with regard to the applicants' argument challenging the exclusion of the shipyards from the STL system beneficiaries and from the undertakings covered by the recovery order, it may be noted that the applicants have not shown that such an argument, assuming it were well founded, was likely to confer on them a benefit going beyond that which they derive from the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

36 According to the applicants, the EIGs retained only 10 to 15% of the advantages resulting from the transactions carried out under the STL system, the greater part of the advantages obtained as a result of those transactions, namely 85 to 90% of the financial and tax savings resulting from each transaction, being transferred to third parties. They state that those third parties are the shipping companies according to the contested decision, but that, in reality, the real beneficiaries of the STL system are the shipyards, and more specifically the Spanish shipyards.

37 In paragraph 138 of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court found that EIGs 'were obliged, under the rules of the law applicable to the contracts concluded with the shipping companies, to transfer part of the tax advantage obtained to those companies'. In paragraph 131 of that judgment, it noted that, in recital 11 of the contested decision, the Commission had stated that an STL operation allowed a shipping company to have a new vessel built with a 20% to 30% rebate on the price charged by the shipyard and that, in recital 12 of that decision, the Commission had considered that the STL was 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 those tax benefits to that shipping company in the form of a rebate on the price of the vessel, the

rest of the benefits being kept by the investors. In paragraph 132 of that judgment, it also noted that, in recital 162 of that decision, the Commission had indicated that, in economic terms, a substantial part of the tax advantage collected by the EIG was transferred to the shipping company in the form of a price rebate.

38 In that regard, it is apparent from recital 19 of the contested decision that the 'tax gain of approximately 30% of the initial gross price of the vessel … – initially collected by the EIG/its investors – [was] kept by the investors (10-15%) and part of it [was] passed on to the shipping company (85-90%) which in the end [became] the owner of the vessel, with a 20% to 30% reduction in the initial gross price of the vessel'.

39 In those circumstances, and even if the Court had not been seised, in the cases which gave rise to the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), of the question whether the shipyards should also be regarded as recipients of the STL system, so that it did not have the opportunity to rule on that question, it should be noted that there is nothing in the applicants' arguments to indicate that the amount of the advantage enjoyed by the investors, namely in the order of 10 to 15% of the advantages resulting from the transactions carried out under the STL system, and which they must repay to the Kingdom of Spain, would be different if the shipyards were also considered to be beneficiaries of the STL system. As the applicant in Case T-29/14 admitted at the hearing, the part of the advantage which the EIGs retained under the STL system does not vary according to whether the other beneficiaries of the STL system include only the shipping companies or both the shipping companies and the shipyards.

40 It must therefore be concluded that the applicants have not, in any event, shown that they had an interest in raising the first part of the fourth pleas in law in so far as it seeks to challenge the exclusion of the shipyards from the recipients of the STL system.

41 By the second part of their fourth pleas in law, the applicants next challenge the method described in recitals 263 to 269 of the contested decision for calculating the amount to be repaid by the investors. In particular, they submit that the Commission erred in not taking into account, in that method, the 'sunk' investments made by them. According to them, in ordering recovery, the Commission should have taken into account the loss-making investments made by the EIG investors in order to generate the tax advantage, which investments were specific charges inherent in that advantage. In that part, the applicants also submit that the Commission should have deducted the amounts of the advantages which the EIG investors transferred to third parties under the STL system.

42 In that regard, it should be noted that, in recitals 263 to 269, the contested decision contains a section entitled 'Determining the amounts to be recovered', in which the Commission sets out a four-stage method which it considers that the Kingdom of Spain must apply in order to determine, in each case, the amount of incompatible aid to be recovered from the beneficiaries. The Commission specifies that that method may be subject to significant adjustment, in particular with a view to determining the real amount of the tax advantage enjoyed by the investors, taking into account their individual tax situation.

43 Those four stages are as follows:

– first, calculate the total tax benefit generated by the transaction [or net present value (NPV) of the tax benefits received by the EIG or its investors, namely before deducting the part of these benefits transferred to the shipping company by way of a price rebate];

– secondly, to calculate the tax advantage generated by the general tax measures applied to the operation (namely the NPV – calculated in the same way as in the first stage – of the amount of the tax advantages that the EIG or its investors would have obtained in a reference situation in which only accelerated depreciation would have been used from the moment the vessel started to be operated and the operation taxed according to the normal corporation corporate tax rules);

– thirdly, to calculate the tax advantage equivalent to State aid, namely the difference between the amounts obtained at the end of the first and second stages;

– fourthly, to calculate the amount of aid resulting from the calculation of the third stage which is compatible (namely the advantage transferred to the shipping company which is compatible in accordance with Chapter 11 of the Maritime Guidelines, the Commission having considered, in recital 202 et seq. of the contested decision, that part of the advantage transferred to the shipping company could be considered compatible if that company, the vessel in question and the transport activities were eligible under the Maritime Guidelines, as indicated in paragraph 9 above).

44 As the applicant in Case T-29/14, in essence, admitted at the hearing, the applicants' argument challenging the method described in recitals 263 to 269 of the contested decision, and in particular the failure to deduct 'sunk' investments and, in general, amounts which have been transferred to third parties, is based on the premiss that the recovery of the unlawful and incompatible aid will follow that method.

45 However, following the partial annulment of Articles 1 and 4(1) of the contested decision, the EIGs and their investors are no longer considered to be the sole recipients of the STL system and the investors are no longer considered to be the only undertakings from which the Kingdom of Spain must be ordered to recover the aid. Accordingly, the method described in recitals 263 to 269 of the contested decision, in so far as it is based on the now erroneous premiss that the entire advantage must be recovered from the EIG investors alone, has become obsolete following the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

46 In particular, a significant part of the advantage might have to be repaid by other beneficiaries of the STL system. The method described in recitals 263 to 269 of the contested decision is based on a different premiss, which the Court held to be incorrect in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60) and according to which the entire incompatible advantage must be returned by the EIG investors. Thus, for example, in the third stage of that method, which concerns the 'calculation of the tax advantage equivalent to State aid' (recital 266 of that decision), it is stated that 'the aid that the EIG and its investors have received as recipients of the tax measures in question' corresponds to 'the [net present value] of the total advantage derived from the use of early depreciation, the [tonnage tax] scheme … and the tax exemption of the capital gains achieved'.

47 Accordingly, by virtue of Article 266 TFEU, which requires it to draw the consequences of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Commission must, inter alia, completely re-examine the method of calculating the amounts to be recovered. The Commission also indicated, in its response to a measure of organisation of procedure adopted by the General Court on 25 May 2023 and at the hearing, that the recovery order should be adapted to ensure compliance with the judgment.

48 It follows that, as the applicants admitted at the hearing, the actions have lost their purpose in so far as they seek to challenge the method described in recitals 263 to 269 of the contested decision, the applicant in Case T-31/14 having, moreover, waived the complaints which it had raised in that regard, as indicated in paragraph 21 above.

49 Having regard to all the foregoing considerations, it must be held that the present actions have become devoid of purpose in so far as they seek to challenge, first, the identification of the recipients of the STL system and of the undertakings covered by the recovery order and the statement of reasons in the contested decision in that regard and, secondly, the method described in recitals 263 to 269 of the contested decision.

50 By contrast, it is still necessary to rule on the applicants' heads of claim in so far as they seek annulment of parts of the contested decision which were not annulled by the Court in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

51 Certain heads of claim put forward by the applicants seek annulment of the contested decision going beyond that resulting from the judgment of the Court of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60). Accordingly, the applicants each asked the General Court, in particular in the first head of claim of their application, to annul that decision in so far as it found that there was State aid and ordered that that aid be recovered from the EIG investors; in the second head of claim of their application, to annul the order for recovery of the aid from the EIG investors in so far as it infringes the principles of legal certainty and the protection of legitimate expectations and; in the fourth head of claim, to annul Article 4(1) of that decision in so far as it prohibits the transfer of the burden of recovery to other persons. In addition, the applicant in Case T-29/14 seeks the annulment of Articles 1 and 2 and Article 4(1) of that decision in so far as they identify the investors as the beneficiaries who must repay the aid.

52 As regards the pleas in law raised in support of the heads of claim referred to in paragraph 51 above, it should be noted at the outset, as indicated in paragraph 21 above, that the applicants have each waived the first and third pleas in law of their action.

53 It follows that it is necessary to rule on that part of the actions in which the applicants rely, in the context of the second pleas in law, on an infringement of Article 107 TFEU in so far as the Commission wrongly considered that certain tax measures making up the STL system, considered individually, constituted new State aid and, in the context of the fifth pleas in law, on an infringement of Article 108 TFEU, Article 14 of Regulation No 659/1999, Article 3(6) TEU and Articles 16 and 17 of the Charter, in that Article 4(1) of the contested decision prohibits 'transfer[ring] the burden of recovery to other persons'.

54 Indeed, if the second and fifth pleas in law were upheld, they would be capable of leading to the annulment of parts of the contested decision which were not annulled by the Court in the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

55 In that regard, contrary to what the applicant argued in Case T-31/14, the identification of the EIGs and their investors as recipients of the STL system and the order for recovery of the aid from them, contained in the contested decision, were not annulled in their entirety by the Court, with the result that the actions lost their object in their entirety.

56 The claim of the applicant in Case T-31/14 is based on an erroneous interpretation of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

57 By judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), as noted in paragraph 16 above, the Court annulled only part of the contested decision, namely only Article 1 thereof 'as it designates the [EIGs] and their investors as the sole recipients of the aid referred to in that decision' (point 3 of the operative part of that judgment) and Article 4(1) thereof 'inasmuch as it orders the Kingdom of Spain to recover in full the amount of the aid referred to in that decision from the [EIG investors] which benefited from it' (point 4 of that operative part).

58 By contrast, the identification of the EIGs and investors as recipients of the STL system and the obligation on the Kingdom of Spain to recover the aid, or part of it, at least from the latter were not annulled by the Court.

59 The logical consequence of a finding that aid is unlawful is its removal by way of recovery in order to restore the previous situation (see judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 33 and the case-law cited).

60 In the judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591, paragraph 46), the Court held that the Commission had rightly considered that EIGs were recipients of the STL system. Furthermore, in the actions giving rise to the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the arguments of the applicants in those cases seeking to show that the STL system did not constitute State aid within the meaning of Article 107(1) TFEU for the benefit of the EIGs and their investors were rejected. In addition, the Court did not accept the parties' arguments to the effect that recovery from the EIG investors was contrary to the principles of the protection of legitimate expectations and legal certainty.

61 Thus, following the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the contested decision remains valid in so far as it declares unlawful and incompatible with the internal market the aid which benefits at the very least the EIGs and their investors, and requires the Kingdom of Spain to recover that aid, or part of it, from the latter. Moreover, the fact that, for the purposes of calculating the amounts to be recovered, the method described in recitals 263 to 269 of the contested decision must be amended in the light of that judgment does not alter the fact that the obligation to recover remains in force as such.

62 It follows from the foregoing that there is no longer any need to adjudicate on the actions in so far as they seek annulment of Article 1 of the contested decision in so far as it designates the EIGs and their investors as the sole recipients of the aid referred to in that decision and of Article 4(1) of that decision in so far as it orders the Kingdom of Spain to recover the full amount of the aid referred to in that decision from the EIG investors which benefited from it.

***The substance***

*The second pleas in law, alleging incorrect classification of the tax measures constituting the STL system, taken individually, as new aid*

63 By the second pleas in law, the applicants submit that the Commission erred in law in its analysis of the various tax measures making up the STL system, taken individually.

64 First, the applicants submit that the early depreciation scheme is general in scope and does not constitute a selective measure or confer any economic advantage, so that it should not be classified as State aid.

65 Secondly, as regards the application of the tonnage tax scheme to EIGs and of Article 50(3) of the Regulation on corporation tax, the applicants submit, in essence, that those measures are not selective and that they had already been authorised by the Commission in Decision C(2004) 1931, so that, if those measures were to be regarded as State aid, they would constitute existing aid.

66 The Commission disputes the applicants' arguments.

67 In that regard, it should be noted that the applicants' arguments challenging the classification of certain tax measures making up the STL system as new aid, their selective nature and the existence of an advantage are based, in reality, on the premiss that those measures should be assessed separately, in the light of Article 107 TFEU, and not by taking account of the STL system as a whole.

68 That premiss is incorrect. As the Commission stated in recital 116 of the contested decision, the various tax measures making up the STL system were linked in law, in essence, because early depreciation was subject to authorisation by the tax authorities, on which, moreover, the application of Article 50(3) of the Regulation on corporation tax establishing an exception to the tonnage tax scheme depended. They were, in addition, linked in fact, because the administrative authorisation for early depreciation was granted only in the context of hire-purchase contracts for ships eligible for that scheme, which were therefore able to benefit from the rule laid down in Article 50(3) of that regulation.

69 It is because of the existence of such a link between the tax measures making up the STL system that the General Court held, in paragraph 101 of the judgment of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434), that, given that one of the measures making it possible to benefit from the STL system as a whole was selective, that is to say, authorisation of early depreciation, the Commission had not erred in considering, in the contested decision, that the system was selective as a whole, a conclusion which was confirmed by the Court in paragraphs 71 and 72 of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

70 Furthermore, the need to assess the STL system as a whole as an aid scheme was implicitly confirmed by the Court in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60). In paragraph 137 of that judgment, the Court, in concluding that the Commission had erred in law as regards the designation of the recipients of the aid at issue and, consequently, as regards its recovery, relied in particular on the fact that the Commission had considered that the STL system as a whole constituted an aid scheme arising from the application of Spanish tax legislation and the authorisations granted by the Spanish tax authorities and intended, regardless of the legal procedures relied on, to give an advantage in particular for EIGs and shipping companies.

71 It follows that, in so far as all of the applicants' arguments are based on the erroneous premiss that each of the three tax measures making up the STL system referred to in paragraphs 64 and 65 above must be analysed individually in the light of Article 107 TFEU and not by assessing the STL system as a whole, they must be rejected as manifestly unfounded.

72 Thus, in order to reply more specifically to the complaints raised by the applicants, in the first place, with regard to the complaints challenging the selectivity of certain tax measures making up the STL system, in particular the application of the early depreciation scheme, the application of the tonnage tax scheme to EIGs and Article 50(3) of the Regulation on corporation tax, the Court confirmed, in paragraphs 57 to 74 of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the General Court's assessment that the existence of the discretionary aspects of the STL system was such as to favour the recipients over other taxable persons in a comparable factual and legal situation, and confirmed that the early depreciation was thus selective. In addition, it held that the General Court was entitled to conclude that the Commission had not erred in considering that the early depreciation made the STL system selective as a whole.

73 In those circumstances, the applicants' complaints that the Commission wrongly considered that the early depreciation scheme, the application of the tonnage tax scheme to EIGs and Article 50(3) of the Regulation on corporation tax, taken individually as tax measures making up the STL system, were selective, must be rejected.

74 In the second place, as regards the applicants' complaints concerning the Commission's conclusion that the early depreciation scheme confers an economic advantage on the beneficiaries of the STL system, it should be noted that, in the contested decision, the Commission described the advantages granted to the EIGs and the investors who were members of them as consisting of:

– the fact that accelerated depreciation could begin before the asset was put into use, in accordance with Article 115(11) of the Law on corporation tax (recital 132 of the contested decision);

– the application of the tonnage tax scheme to EIGs (recital 142 of that decision);

– the derogation from the ordinary application of Article 125(2) of that law, under which certain sea-going vessels which would normally be considered to be used or second-hand are considered to be new at the time of their transfer to that scheme, with the result that the payment of implicit tax liabilities is definitively cancelled (recital 145 of that decision).

75 As pointed out in paragraph 70 above, in paragraph 137 of the judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60), the Court, in concluding that the Commission had erred in law as regards the designation of the recipients of the aid at issue, noted that the STL system as a whole constituted an aid scheme arising from the application of Spanish tax legislation and the authorisations granted by the Spanish tax authorities, and intended to give an advantage in particular for EIGs and shipping companies.

76 It follows that the applicants' argument that early depreciation does not confer an economic advantage must be rejected as manifestly unfounded, since it is based on the erroneous premiss that that tax measure must be analysed individually in the light of Article 107 TFEU, and not by assessing the STL system as a whole.

77 In the third place, as regards the applicants' complaints alleging the absence of new aid, it should be noted at the outset that, although the Commission established, in recital 238 of the contested decision, that 'the individual measures constitute[d] State aid (except for the accelerated depreciation of leased assets)', the fact remains that, as noted in paragraph 68 above, the STL system was analysed in conjunction with the tonnage tax scheme and that it was the STL system operation as a whole that was considered to be unlawful State aid and partially incompatible with the internal market, and that that approach was validated by the Court, as recalled in paragraph 70 above.

78 As the applicants confirmed at the hearing, they do not dispute that the STL system as a system was neither notified to the Commission nor authorised by it in a previous decision and that that scheme, assessed as a whole, cannot therefore be classified as existing aid. Moreover, it is common ground that at least one of the tax measures making up the STL system, in particular the early depreciation, taken individually, was not notified to the Commission and was not approved by it in a previous decision.

79 It follows that, contrary to what the applicants claim, the Commission was not required to have recourse to the procedure applicable to existing aid schemes when it examined the STL system in the contested decision.

80 In those circumstances, the second pleas in law must be rejected as unfounded, without it being necessary to respond to the applicants' arguments concerning the selective nature, the existence of an advantage or the classification as new aid of the tax measures at issue, taken individually.

*The fifth pleas in law, relating to the contractual clauses protecting the beneficiaries against the recovery of unlawful and incompatible State aid*

81 The fifth pleas in law allege infringement of Article 108(3) TFEU, Article 14 of Regulation No 659/1999, Article 3(6) TEU and the freedom to conduct a business and the right to property enshrined in Articles 16 and 17 of the Charter.

82 In particular, the applicants claim that Article 4(1) of the contested decision, according to which the Kingdom of Spain must recover the aid from the beneficiaries 'without the possibility for [the latter] to transfer the burden of recovery to other persons', wrongly provides that the contractual clauses under which the investors could claim, in particular from the shipyards, the amounts which they had to repay to the State ('the indemnification clauses') are void.

83 According to the applicants, the Commission does not have the power, in State aid control procedures, to consider, as it did in recital 275 of the contested decision, that indemnification clauses concluded between private individuals are contrary to the very essence of the State aid control system. It cannot prohibit economic flows or compensation arrangements between individuals which do not affect the State or its resources.

84 The Commission disputes the applicants' arguments.

85 First of all, with regard to the principle of conferral of powers, it should be recalled that, in accordance with Article 5(2) TEU, the European Union shall act only within the limits of the powers conferred upon it by the Member States in the Treaties in order to attain the objectives set out in those treaties. By virtue of Article 4(1) TEU and Article 5(2) TEU, any competence not conferred on the European Union in the Treaties is to remain with the Member States.

86 As regards the principles governing the roles of the Commission and the national authorities in relation to State aid, it should be noted that, in accordance with Article 108 TFEU and Article 14(1) of Regulation No 659/1999, applicable *ratione temporis* to the facts of the present case, the Commission is competent not only to assess the compatibility of State aid with the internal market, but also to order the recovery of aid which is unlawful and incompatible with the internal market. In particular, pursuant to Article 14(1) of that regulation, the Commission may, in the event of a negative decision on unlawful aid, decide that the Member State concerned 'shall take all necessary measures to recover the aid from the beneficiary'. While the recovery order must be implemented by the national authorities in accordance with the procedures laid down by national law, it should be borne in mind that the procedural autonomy of the Member States is limited in particular by the principle of the effectiveness of EU law, as is apparent, in essence, from Article 14(3) of that regulation.

87 Thus, a Member State to which a decision requiring it to recover unlawful aid has been addressed is required, under Article 288 TFEU, to take all appropriate measures to ensure that that decision is implemented. It must achieve the actual recovery of the sums owed in order to eliminate the distortion of competition caused by the competitive advantage procured by the unlawful aid (see judgment of 24 January 2013, *Commission* v *Spain*, C-529/09, EU:C:2013:31, paragraph 91 and the case-law cited).

88 The obligation on the Member State concerned to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has as its purpose, according to the settled case-law of the Court, the restoration of the situation as it was before the aid was granted. That objective is attained once the aid in question, together, where appropriate, with default interest, has been repaid by the recipient, or, in other words, by the undertakings which actually enjoyed the benefit of it. By repaying the aid, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (see judgment of 2 February 2023, *Spain and Others* v *Commission*, C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 130 and the case-law cited).

89 In addition, the application of the EU's State aid rules is based on an obligation of cooperation in good faith between the national courts, on the one hand, and the Commission and the European Union Courts, on the other, in the context of which each acts on the basis of the role assigned to it by the Treaty on the Functioning of the European Union. In the context of that cooperation, national courts must take all the necessary measures, whether general or specific, to ensure fulfilment of the obligations under European Union law and refrain from those which may

jeopardise the attainment of the objectives of the Treaty, as follows from Article 4(3) TEU (see judgment of 13 February 2014, *Mediaset*, C-69/13, EU:C:2014:71, paragraph 29 and the case-law cited).

90 Thus, in the context of supervising the Member States' compliance with their obligations under Articles 107 and 108 of the Treaty, the national courts and the Commission fulfil complementary and separate roles. Whilst assessment of the compatibility of aid measures with the common market falls within the exclusive competence of the Commission, subject to review by the Court, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aids to the Commission pursuant to Article 108(3) of the Treaty is infringed (see judgment of 21 October 2003, *van Calster and Others*, C-261/01 and C-262/01, EU:C:2003:571, paragraphs 74 and 75 and the case-law cited).

91 It is in the light of those principles that the fifth pleas in law must be examined.

92 As a preliminary point, it should be noted that the specification in Article 4(1) of the contested decision that the Kingdom of Spain must recover the aid from the beneficiaries 'without the possibility for [the latter] to transfer the burden of recovery to other persons' is drafted in broad terms and is not expressly limited in its wording to the indemnification clauses analysed by the Commission in recitals 270 to 276 of that decision.

93 However, according to settled case-law, the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (see judgments of 26 March 2020, *Hungeod and Others*, C-496/18 and C-497/18, EU:C:2020:240, paragraph 69 and the case-law cited, and of 17 September 2007, *Microsoft* v *Commission*, T-201/04, EU:T:2007:289, paragraph 1258 and the case-law cited).

94 In addition, it is a general principle of interpretation that an act of the European Union must be interpreted, as far as possible, in a way which does not affect its validity and in conformity with primary law as a whole (see judgment of 31 January 2013, *McDonagh*, C-12/11, EU:C:2013:43, paragraph 44 and the case-law cited).

95 It follows that, in the present case, Article 4(1) of the contested decision must be read in the light of recitals 270 to 276 of that decision.

96 In that regard, it is true that, in recital 270 of the contested decision, the Commission refers generally to 'the existence of certain clauses in contracts between the investors, the shipping companies and the shipyards', according to which 'the shipyards would be required to compensate the other parties if the expected tax advantages cannot be obtained'. It should be noted that, in that decision, the Commission did not specifically identify those clauses and did not cite their wording. In addition, as the Commission, in essence, admitted at the hearing, it should be noted that those clauses do not specifically refer to the possibility of the recovery of unlawful or incompatible State aid, but, more generally, to the consequences of the possibility that the competent authorities do not approve the tax benefits deriving from the STL system, or that, following their approval, their validity is called into question.

97 However, in recital 271 et seq. of the contested decision, the Commission proceeds, in a more precise manner, to identify the specific aspects of the indemnification clauses which it considers to be problematic in the context of the recovery of unlawful aid incompatible with the internal

market. Thus, in recitals 272 to 274 of that decision, it states that the objective of recovery, which is to restore the situation as it was before the aid was granted and in particular to eliminate the distortion of competition caused by the competitive advantage conferred by the unlawful aid and incompatible with the internal market, would be permanently frustrated if private-sector operators were able, by means of contractual clauses, to alter the effects of the recovery decisions adopted by the Commission. In recital 275 of that decision, the Commission considers that contractual clauses which shelter aid recipients from the recovery of unlawful and incompatible aid by transferring the legal and economic risks of recovery to other persons are contrary to the very essence of the system of State aid control, which constitutes a set of rules of public policy.

98 Consequently, and notwithstanding its broad wording, the specification made in Article 4(1) of the contested decision must be understood as referring only to indemnification clauses in so far as they may be interpreted as protecting the beneficiaries of unlawful and incompatible aid against its recovery.

99 Next, it should be noted that, contrary to what the applicants submit, the specification made in Article 4(1) of the contested decision does not imply that the Commission decided that the indemnification clauses would be null and void, such jurisdiction falling, where appropriate, to the national courts.

100 The specification made in Article 4(1) of the contested decision must be understood as merely seeking to clarify the scope of the recovery obligation incumbent, in accordance with the case-law referred to in paragraphs 87 and 88 above, on the Kingdom of Spain.

101 In particular, the indemnification clauses, in so far as they can be interpreted in the sense indicated in paragraph 98 above, could prevent the Member State in question from complying with its obligation to recover unlawful and incompatible aid from the recipients who actually enjoyed the benefit of it. As a result of those clauses, the recipients would avoid the burden of recovery, which would not allow the situation as it was before the aid was granted to be restored. As the Commission rightly points out, such a situation would be liable to undermine the effectiveness of the system of State aid control established by the Treaty. It is therefore for the Kingdom of Spain, including the national courts, to ensure that the obligation to recover the aid from the recipients or, in other words, from the undertakings which actually enjoyed the benefit of it, in accordance with the case-law referred to in paragraph 88 above, is fully complied with.

102 Thus, the specification made in Article 4(1) of the contested decision does not mean that the Commission exceeded the power conferred on it by Article 14(1) of Regulation No 659/1999. While it is true that recovery is effected in accordance with the procedures laid down by the national law of the Member State concerned, pursuant to Article 14(3) of that regulation, the fact remains that the latter provision requires that those procedures allow the immediate and effective execution of the Commission's decision. Consequently, there is nothing to prevent the Commission from specifying, in that decision, that the Kingdom of Spain must ensure that the recipients repay the amounts of aid the benefit of which which they have actually enjoyed, without the possibility to transfer the burden of recovering those amounts to another party to the contract.

103 In the present case, that conclusion is all the more justified since, as the Commission confirmed at the hearing, the indemnification clauses were provided for in framework contracts concluded between the various participants in the STL system. Those framework contracts formed part of the set of legally binding contracts which, as the Court pointed out in its judgment of

2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraph 138), were submitted to the tax authorities and were taken into account by them in authorising early depreciation. In paragraph 137 of that judgment, the Court confirmed that the STL system should be assessed as a whole, including not only the relevant Spanish tax legislation, but also the authorisations granted by the Spanish tax authorities and, thus, those legally binding contracts.

104 In those circumstances, since, in assessing the compatibility of the STL system with the State aid rules, the Commission's attention was drawn to the existence of the indemnification clauses provided for in the contracts which were submitted to the tax authorities and which those authorities took into account in authorising the early depreciation, it did not exceed its powers by pointing out, in essence, that the Kingdom of Spain had to recover the aid from the recipients thereof, without those recipients being able, on the basis of the indemnification clauses, to transfer the burden of recovery to another party to the contract, in accordance with the case-law referred to in paragraph 88 above.

105 In the light of all the foregoing considerations, the applicants' arguments that the Commission exceeded its powers by including the specification made in Article 4(1) of the contested decision must be rejected.

106 None of the applicants' other arguments call into question the legality of that specification.

107 First, the applicants allege a lack of coherence on account of the fact that, in the contested decision, the Commission interfered in private contracts by prohibiting economic flows arising from indemnification clauses concluded between private individuals, while exempting the shipyards and shipping companies from any obligation to repay, on the ground that the advantages obtained resulted from a private law relationship between those entities.

108 In that regard, it should be noted that, following the judgment of the Court of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60, paragraphs 137 and 138), such a possible contradiction has, in any event, disappeared, since, in that judgment and as indicated in paragraph 103 above, the Court confirmed that the Commission was required, in assessing the STL system as a whole, to take account of the contracts submitted to the tax authorities and taken into account by them in authorising early depreciation. That argument cannot therefore, in view of that judgment, succeed.

109 Secondly, according to the applicants, by prohibiting the indemnification clauses, the contested decision contradicts the Court's case-law and the decision-making practice of the Commission, which has raised no objection to agreements between sellers and purchasers addressing the consequences, as between private parties, of the possible recovery of unlawful aid.

110 However, contrary to what the applicants claim, there is nothing in the Court's case-law to prevent the Commission, when ordering the recovery of aid which is unlawful and incompatible with the internal market, from specifying that the Member State concerned must recover it from its recipients, without those recipients being able, on the basis of indemnification clauses such as those in the present case, to transfer the burden of recovery to another party to a contract, despite the possible consequences of that specification for contracts concluded between private parties.

111 On the contrary, in the judgment of 8 December 2011, *Residex Capital IV* (C-275/10, EU:C:2011:814), cited in recital 274 of the contested decision, the Court emphasised that the obligation to recover unlawfully paid State aid required that the beneficiary forfeit the advantage which it enjoyed on the market over its competitors and that the situation prior to the payment of the aid be restored (see paragraph 34 of that judgment). In addition, the Court held that, in order to remedy the distortion of competition caused by the aid, the national courts could intervene and declare contracts void, even to the detriment of parties who were not recipients of the aid. In the present case, however, the specification made in Article 4(1) of the contested decision merely reminds the Kingdom of Spain of its obligation to recover the aid from the recipients of that aid so that the situation as it was before the aid was granted may be restored. Contrary to the applicants' submissions, the fact that, unlike the present case, the case which led to the abovementioned judgment concerns aid in the form of a State guarantee and the powers of the national courts to declare private contracts void is irrelevant in that regard. As pointed out in paragraph 99 above, the specification made in Article 4(1) of the contested decision does not mean that the Commission decided that the indemnification clauses would be null and void.

112 Furthermore, in so far as the applicants submit that the contested decision contradicts certain earlier decisions of the Commission, even supposing that to be the case, it must be borne in mind that, according to settled case-law, the Commission's decision-making practice in other cases cannot affect the legality of a decision, which can be assessed only in the light of the objective rules of the Treaty (see, to that effect, judgment of 19 October 2022, *Ighoga Region 10 and Others* v *Commission*, T-582/20, not published, EU:T:2022:648, paragraph 215 and the case-law cited).

113 Thirdly, according to the applicants, the specification made in Article 4(1) of the contested decision also infringes the freedom to conduct a business, enshrined in Article 16 of the Charter. In addition, they claim that that clarification unfairly deprives the EIG investors of the right to indemnification which they enjoy in particular in relation to the shipyards, thereby resulting in the expropriation of their private rights, in breach of the right to property enshrined in Article 17 of the Charter.

114 In that regard, it should be noted that, under Article 16 of the Charter, freedom to conduct a business is recognised in accordance with EU law and national laws and practices.

115 The protection afforded by that article covers the freedom to exercise an economic or commercial activity, freedom of contract and free competition (see judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 82 and the case-law cited).

116 According to settled case-law, the freedom to conduct a business is not absolute. It may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest (see judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 83 and the case-law cited).

117 Under Article 17(1) of the Charter, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions and no one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest (judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 84).

118 In that regard, it should be borne in mind that the right to property guaranteed by that provision is not absolute and that its exercise may be subject to restrictions justified by objectives of general interest pursued by the European Union that do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference impairing the very substance of the right guaranteed (see judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 85 and the case-law cited).

119 Furthermore, it should also be borne in mind that, in accordance with Article 52(1) of the Charter, limitations may be imposed on the exercise of the rights and freedoms recognised by the Charter, such as the freedom to conduct a business and the right to property, as long as those limitations are provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others (judgment of 16 July 2020, *Adusbef and Others*, C-686/18, EU:C:2020:567, paragraph 86).

120 In the present case, even assuming that the specification made in Article 4(1) of the contested decision is regarded as restricting the freedom to conduct a business and the right to property, it must first be noted that that restriction derives in particular from the recovery obligation, provided for in Article 108(2) TFEU and Article 14(1) of Regulation No 659/1999, such that it is provided for by law.

121 As regards the condition relating to respect for the essential content of the freedom to conduct a business and the right to property, the applicants do not dispute that the specification made in Article 4(1) of the contested decision does not affect that essential content.

122 Next, that specification pursues an objective of general interest. As explained in paragraphs 101 and 102 above, its purpose is to ensure that the indemnification clauses do not compromise the recovery obligation incumbent on the Kingdom of Spain and, more generally, to guarantee the effectiveness of the system of State aid control established by the Treaty.

123 Furthermore, the applicants have not submitted any evidence to the General Court suggesting that, having regard to that objective, the specification made in Article 4(1) of the contested decision constitutes a disproportionate or intolerable interference with the very substance of the freedom to conduct a business or the right to property.

124 Finally, as regards the necessary nature of the specification made in Article 4(1) of the contested decision, the applicants do not put forward any evidence to suggest that, in making that specification, the Commission exceeded the limits of what is necessary to achieve the objectives pursued, as noted in paragraph 122 above, such as, in particular, that of restoring the situation as it was before the aid was granted and the repayment of the aid at issue by the recipients. Moreover, as the General Court held in paragraph 102 above, Article 4(1) of that decision merely specifies the scope of the recovery obligation incumbent on the Kingdom of Spain.

125 In the light of the foregoing, the fifth pleas in law must be rejected as unfounded.

126 It must be concluded that the actions have lost their purpose in part and must be regarded as being, for the remainder, unfounded.

**Costs**

127 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

128 Moreover, according to Article 137 of the Rules of Procedure, where a case does not proceed to judgment the costs are to be in the discretion of the General Court.

129 In the present case, it was found that part of the dispute had lost its purpose. The partial disappearance of the purpose of the dispute is the consequence of an error of law committed by the Commission which was also raised by the applicants in the present actions and which led to the partial annulment of the contested decision by the Court in its judgment of 2 February 2023, *Spain and Others* v *Commission* (C-649/20 P, C-658/20 P and C-662/20 P, EU:C:2023:60).

130 By contrast, the applicants have been unsuccessful in relation to that part of the dispute in respect of which there is still a need to adjudicate.

131 In those circumstances, the General Court decides to order each party to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Rules that there is no longer any need to adjudicate on the actions in so far as they are directed against Article 1 of Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements, also known as the 'Spanish Tax Lease System', inasmuch as it designates the economic interest groupings and their investors as the sole recipients of the aid referred to in that decision, and Article 4(1) of that decision, inasmuch as it orders the Kingdom of Spain to recover in full the amount of the aid referred to in that decision from the economic interest groupings' investors which benefited from it;**

2. **Dismisses the actions as to the remainder;**

3. **Orders each party to bear its own costs.**

Kornezov De Baere Petrlík

Kecsmár Kingston

Delivered in open court in Luxembourg on 21 February 2024.

[Signatures]