

## Judgment of the Court of Justice of the European Union on July 25, 2018. Back on the naval tax lease regime\*

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**ABSTRACT:** The judgment of the Grand Chamber of the European Union Court of Justice of July 25, 2016 on the tax lease nullifies the judgment of the General Court of 2015. The Grand Chamber argues that there is a lack of motivation. In addition, the Court questions that investors are the unique possible State aids beneficiaries and not the Economic Interest Groups or the shipping companies.

**KEY WORDS:** *tax lease*, State aid, Tonnage Tax, European Union Law, European Justice Court, bareboat charter.

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### 1. Introduction

On 25th of July of 2018, the Grand Chamber of the Court of Justice of the European Union (hereinafter, ECJ) published the sentence C-128/16 P Commission/Spain, concerning the so-called naval tax lease. The sentence

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solved the appeal brought by the European Commission against the previous judgement of the General Court of 17th December 2015, nullifying the Commission's Decision on aids to the naval sector. It addressed the decision of 17 July 2013 dictated, after hearing to the parties, by the College of Commissioners of the European Commission concerning the state aid SA. 21233 C/2011 (ex NN/2011, ex CP 137/2006). The decision ended a procedure initiated as a result of a complaint made to the European Commission by an association of Dutch shipyards and another of Danish shipyards. This Decision was published in the Official Journal of the European Union on 16 April 2014.

When it comes to resolve the aforementioned complaint, the Commission understood that it should carry out an individualized analysis, which led it to go in depth in the various advantages of the tax lease regime. Consequently, the Commission proceeded to declare the tax lease scheme partially inconsistent with the European Union rules on state aids, distinguishing what were considered to be illegal aids from those that were esteemed as compatible. Although we will see in detail in what this figure of tax lease consists and how it is formalized through a Economic Interest Grouping (EIG). We advance that this structure included five advantageous tax measures: early amortization before the asset (the vessel) enters into service, the accelerated amortization once the asset entered into service, the non-encumbrance of the surplus value in the transmission of the ship at the time of its sale to a shipping company (which neutralized the reversal of the amortization), the special tonnage taxation regime and the fiscal transparency of the EIG's, that results a transfer of advantages to shipping companies and investors<sup>2</sup>.

Among these measures, as we shall see, the Commission considered state aids three of them: the anticipated amortization, the non-encumbrance of the surplus value and the application of the tonnage regime. The illegality of them would be based on the infringement of Article 108.3 of the Treaty of

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Functioning of the European Union since Spain had not notified that scheme to the European Commission to obtain its authorization.

The Decision was appealed in front of the General Court and it was annulled because, from the subjective point of view, the selectivity criteria concurs, and the resolution suffered of insufficient motivation. In this regard, the General Court recalls that, due to the fiscal transparency of the EIG, the tax measures applied to the latter could only benefit its members, that is to say, investors. Then the economic advantage of which they benefited was not selective, from the moment that any company in any sector could invest in the aforementioned EIG. Therefore, the Judgement of the General court, nullifying the decision of the Commission questioned its qualification as a state aid.

The sentence of the Grand Chamber that we will comment on, of 25 July 2018, voided this mentioned resolution of the General Court who had questioned the decision of the Commission.

Before confronting the content of the judgement, it should be briefly recalled the European Commission's position on illegal state aids. Later we will do a succinct description of the fiscal structure questioned, called *Tax Lease*. Thirdly, we will summarize the procedural *Iter* that resulted in the appeal currently resolved by the ECJ. Finally, we will mention the content and the doctrine of the court of Luxembourg concerning state aids in relation to the item covered by this resolution.

## **2. State aids and the doctrine of the European Commission**

We should remember briefly that the concept of "state aid" in the European context is regulated in the article 107 paragraph 1 of the Treaty on Functioning of the European Union (former article 87 of the Treaty of the European Constitution), which defines them as "aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the

production of certain goods shall". These aids will be banned "in so far as it affects trade between Member States"<sup>3</sup>.

They are, therefore, four fundamental characteristics of a measure to become a state aid. First, conferring an advantage to the recipient that frees it from a tax burden that under normal conditions it should bear<sup>4</sup>. As the classic ruling of the ECJ pointed out (*Gezamenlijke Steenkolenmijnen In Limburg/Haute Autorité of the ECSC*) of 23 February 1961 – As. 30/59<sup>5</sup> – , it is a state aid "also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking (...)".

Secondly, the aid should affect competition. It is understood that an aid has or may have an impact on competition and trade between Member States if the beneficiary of the same develops any kind of economic activity and operates in a market where there are trade exchanges between the Member States, independently from the legal nature of that beneficiary<sup>6</sup>. It must also influence the intra-community commercial relations and therefore the beneficiary must be a company<sup>7</sup>

Thirdly, and it is the most outstanding note, the measure should be selective. That is, it should be a specific advantage for certain sectors or

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<sup>3</sup>.This precept covers a broad conception of state aid that has coined the jurisprudence of the Court of Justice from classical resolutions such as the ruling *Banco Exterior de España*, of 15 March 1994 (C-387/92), which said that aid is not only a "positive benefit", such as subsidies, but any intervention that "mitigates the charges" of a company, including tax benefits.

<sup>4</sup>.-It is common to find in the doctrine a symmetrical treatment of fiscal advantage and selectivity; See MORENO GONZÁLEZ, S., "Recent trends in community jurisprudence on tax-related state aid", *Civitas, REDF*, n° 132, 2006, p. 832. When we refer to *Free from the tax burden*, what we are trying to do is to recognise exemptions, deferrals, moratoriums, types of differential levies, reductions in Social security contributions, tax credits and non-subjective assumptions; Vid. PÉREZ BERNABEU, B., *State aid in community jurisprudence. Concept and Treatment*, Tirant Lo Blanch, Valencia, 2008, p. 146.

<sup>5</sup> .-POCAR, F., *Comentario Breve ai Trattati dell Comunita e dell'Unione Europea*, Cedam, Padova, 2001, p. 457

<sup>6</sup>.- RODRÍGUEZ CURIEL, J.W., "Compatibilidad con el mercado común de las Ayudas de Estado a empresas públicas (artículo 92,3 del Tratado de la CEE)", *Revista de Administraciones Públicas*, n° 122, mayo-agosto, 1990, p. 423.

<sup>7</sup>.- For the Court of Justice of the European Union are not companies, among others, Social security systems based on solidarity or public organized education.

activities and suppose an exception, *iure* or *de facto*, in the application of the general taxation scheme. Selectivity is, without a doubt, the most important feature of state aids. This means that the measures qualified as state aids are those that are not general, then they are not applied to the generality of companies but only to a group of them that meet a set of established requirements by the State in question (e.g., selectivity depending on the sector or geographic area).

On the contrary, these measures are not selective when potentially all companies can access on a par status. This has been recalled by the Court of the European Union in *Case Autogrill Spain* (T-219/10) and *Banco Santander and Santusa Holding* (T-399/11)- November 7, 2014-, where it says that selectivity cannot be derived only from the finding of an exception to a general or "normal" tax regime (paragraphs 45 and 49<sup>8</sup>).

A measure is considered as general if all stakeholders may have an equal access and it is not reduced by the discretion of the applicator administration of it, nor by other factors. In this way they do not constitute state aids, if they are applied equally to all companies and sectors of production: (a) measures of pure fiscal technique, such as the fixing of tax rates, depreciation rules, amortization, deferment of losses, rules to avoid double taxation or tax evasion, and (b) measures aimed at achieving general economic policy objectives by reducing the tax burden linked to certain production costs, such as research and development, environment, training and employment. As the study of the Instituto de Estudios Fiscales says about the adaptation of regulation of the tax system to Community law "the fact that some companies benefit more than others of certain tax measures does not necessarily imply that these measures constitute state

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<sup>8</sup> About the selectivity of the measure in Spanish doctrine see: MARTÍN LÓPEZ, J., *Competencia Fiscal perjudicial y ayudas de Estado en la Unión Europea*, Tirant Lo Blanch, Valencia, 2006, p. 339; VILLAR EZCURRA, M., "El control de ayudas de Estado y la competencia fiscal desleal", *Manual de Fiscalidad Internacional*, Vol. II, Instituto de Estudios Fiscales, 2007, p. 2099; DE JUAN CASADEVALL, J., *Ayudas de Estado e Imposición Directa en la Unión Europea*, Thomson Reuters Aranzadi, Cizur Menor, 2011, p. 140.

aids. It is logical that measures aimed at environmental, as an example, favor only the companies that carry out such investments... " <sup>9</sup>.

Finally, it should be an attributable measure to the State, that is, affecting public resources. These aids may proceed from any authority of the state in question, whether national, regional or local, directly or through a public institution. They can be granted directly by a public body or through a public intermediary or even private<sup>10</sup>. The transfer of resources can cover a wide variety of forms: subsidies, reduction of interest rates, credit guarantees, tax benefits... However, the Court of Justice of the European Union admits that the Commission can investigate a regime of aid although the funds to finance it do not come from the public purse. For example, in the sentence *Georgsmarienhütte GmbH*, of 25 July 2018, on aid to renewable energies in Germany, it is understood that there may be a state aid even though such aids are financed by the clients of the electrical companies (as. C-135/16) <sup>11</sup>.

On a general basis, State aids are "incompatible with the internal market" (art. 107.1 of the Treaty on the functioning of the European Union). Nonetheless, this same precept establishes two categories of aid compatible with internal market. On the one hand, there are measures, which despite distorting competition and affecting trade, are declared compatible with the internal market (simple compatible measures). It includes aids having a social character, granted to individual consumers, provided that such aid is granted without discrimination; aids to make good the damage caused by

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<sup>9</sup>.- COMISIÓN DE ESTUDIOS PARA LA ADAPTACIÓN DEL DERECHO TRIBUTARIO AL COMUNITARIO, *La adaptación de la regulación del Derecho Tributario general al ordenamiento comunitario*, Secretaría de Estado de Hacienda, Instituto de Estudios Fiscales, Madrid, septiembre, 2011, pag. 236.

<sup>10</sup>.- DE JUAN CASADEVALL, J., *Ayudas de Estado e Imposición Directa en la Unión Europea*, op. cit., p. 241.

<sup>11</sup>.- On the contrary, the Court concluded in the Case *Preussen Electra* (C-379/98), sentence of 13 March 2001, that is not state aid the obligation imposed on supplying companies to acquire electricity produced in wind installations at a price higher than the market value, when the cost of incurring is financed with their own resources by such companies and other distribution companies.

natural disasters or exceptional occurrences; and aid granted to the economy of certain areas (East Germany).

Secondly, they are compatible with the internal market those aids exempt of the obligation of notification and authorization imposed by the Treaty on the functioning of the European Union. In particular, those referred to in the Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid Text with EEA relevance (*de minimis* aid) and the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance (exemption by category).

We have to add to the traditional accepted aids (aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the outermost regions, to promote the execution of an important project of common European interest, to remedy a serious disturbance in the economy of a Member State; to facilitate the development of certain economic activities or of certain economic areas, to promote culture and heritage conservation) some innovation aids (technological clusters), aids designed to repair the damage caused by certain natural disasters, social aid for transport in favor of residents in remote regions, aid for broadband infrastructure, aid to culture and conservation of the patrimony, aids to multifunctional sports and recreational infrastructures and aid for local infrastructures.

Finally, underline that the declaration of selectivity of a measure implies the order of recovery. This decision will only be reviewable before Community bodies (Case Scott, of October 5, 2006, C-232/05). In addition, the state's refusal or its negligence in the recovery of aid it is attacked by the Commission by submitting a non-compliance appeal to the same Court

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### **3. The called *tax lease***

"Tax lease" term makes reference to a complex business called in technical jargon, Sistema Español de Arrendamiento Fiscal (Spanish System of Tax Leasing, SEAF hereafter). It treated about negotiated and fiscal structures designed ad hoc with the intermediation of a financial entity. That entity mediates between shipowner or a shipping company, which expects to acquire a ship and a shipyard that it will construct and sell. The final goal of the measure was not other than to foment the workload of the Spanish shipyards against the ferocious competence of the ships factories of the Southeast Asia. In fact, this special regime was used in 273 operations

between 1st of January of 2002 and 30th of June of 2010, for a total upright of more than 8 billion euros.

Thus, through the SEAF, the shipowner (most times domiciled abroad, especially in Norway or Denmark) try to acquire a ship. Obviously, what he did was using the business envisaged for it in the legal system. That is, it concluded the signing of a construction contract for a vessel and later the transmission of the same for a shipyard for a net price, with stepped payments, during a period (normally, between one and three years). However, it was a formal acquisition. And this because, immediately after, a leasing company intervened that was subrogated in the position of the shipowner for a gross price. The construction contract of the ship was subjectively novated, and the leasing company became the owner of the right to acquire the boat.

Thereupon, the leasing company concluded a financial leasing of the boat to a Economic Interest Grouping (EIG), provided by Ley 12/1992. The EIG signed a financial leasing contract with a purchase option for a period of normally three or four years, with the consequent periodic payment of the leasing fees. In the EIG participated investors proceeding of the most diverse sectors of the Spanish industrial business (financing sector, textile, aluminium, feeding, distribution...), who, through the intermediation of the financing entity, had acquired shares of the EIG. The most characteristic of those investing companies was that all of them had positive tax bases in the CIT and they desired to neutralize them in order to reduce their taxation. The EIG, as a financial renter, deducted the fees paid as recovery of the cost of the good, with the consequent effect of accelerated amortization. And such deductions are transferred to the participants in the EIG, given the tax transparency regime that applies to them.

During this period, the EIG transfer the vessel to the shipowner by a *bareboat charter* as defined by the United Nations Convention on Conditions for Registration of Ships (UNCTAD) of Geneva, on 7th February of 1986. The formula is a renting contract of a vessel for a determined time, in virtue of which the renter has the possession and the plenty control of the vessel, including the right of designing the captain and the crew for the renting

period. The duration of the contract is brief and it would include the commitment of the ownership of buying the boat at the ending of it.

Once the vessel was amortized, the EIG opts, the first of January of the exercise in what the last fee of the financing renting finished, for the taxation on the special regime of the tonnage (tonnage tax), actually prevised in articles 113 to 117 of Ley 27/2014 of Spanish CIT (articles 124 to 128 of the previous CIT Law). It is a the objective estimation system of the tax base in CIT for shipping companies with registered vessel in Spain or in other country of the European Union. The taxes are not paid for the real benefits, on the contrary tax base is calculated applying an encumbrance scale to the number of recorded tonnes.

In sum, the EIG acquired ships through leasing agreements with the shipyards to operate them with bareboat charter, and then resell them to the shipowners. In this way, the shipowner ended up taking charge of the ownership of the ship, but not acquiring it from the shipyard but from the EIG<sup>13</sup>.

Thus, the EIG enjoyed the accelerated amortization as a result of the deductibility of the lease payments. This accelerated amortization was applied in advance, before the ship was finished and entered into service. This generated large losses which were transferred to investors as a consequence of the application of the tax transparency regime of the EIG according to articles 115, 6 and 11 of the Spanish CIT.

Once the purchase option was exercised by the EIG, the ship was transferred to the shipowner. Previously, the EIG had chosen the special regime of objective estimation by tonnage, the "tonnage tax". The ship was acquired by the shipping company, at that time there was a transfer of advantages to it. In that moment, the surplus value that the EIG should face and that would neutralize the deferral effect caused by the early

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13.- REY SÁNCHEZ, M. "*Tonnage Tax*: El nuevo sistema de estimación objetiva para entidades navieras en el Impuesto de Sociedades", in *Jurisprudencia Tributaria Aranzadi*, nº 15/2003, p. 7.

amortization, was mitigated by the taxation of the shipping company in the aforementioned objective regime<sup>14</sup>.

The objective determination of the tax base meant that no tax was paid for the gain, which meant in practice, an exemption from it, provided that there was (as it happened) a specific authorization from the DGT (Spanish General Direction of Taxes). It is necessary to remember that they were authorized, not only tax lease operations in which Spanish EIG were involved, but also operations with other countries of the European Union. And even when the ships were materially built in any other State of the European Union (which, incidentally, dissipated the suspicions of selectivity of the measure).

In sum, the structure contained five fiscal measures of advantageous character. Some applicable to the leasing contract (accelerated amortization and the anticipated amortization of determined goods), to the EIG (fiscal transparency) and the maritime activities (special regimen of the taxation per tonnage), and the non-taxation of the gain, which more than an advantage, was a derived effect of the application of the tonnage regime.

After processing a formal investigation file, the Commission, by decision of July 17 2013, declared the structured partially incompatible with the internal market. For the Commission, three of the five examined fiscal measures constituted state aid to the EIG and its investors, illegally executed by Spain since January 1 of 2002. In the following epigraph, we will analyse the catalogued measures as incompatible state aids.

For respect to the principle of legal security, the Commission only required recovery of the aid granted to certain operations. The decision of the Commission considered that the investors were the only benefited, understanding that they were who applied the fiscal benefits in their CIT. Although here was the first element of discrepancy, since there were

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14.- It happened even though the regime of tonnage contained specific pathways to tax the profit derived from the sale of the vessel (art. 125.2 of the previous CIT Law if it was a used ship). In the SEAF they are not applied because according to Art. 50.3 of CIT Reglamento through Real Decreto 1793/2008, of 3 November, which excluded from the condition of used ship those acquired through purchase on a financial lease option, if it had previously been authorized by the Administration.

arguments to understand that the shipowners or shipping companies also benefited, who could acquire the vessels with an average reduction of a 25%. Consequently, the decision of 2013, also considered that the illegal normative had to be modified, ordering the recuperation of the aid on behalf of the investors.

#### **4. Content of the decision that partially declares as State Aid the tax lease regime**

As it was mentioned above, the tax lease structures included five fiscal advantages which should be remembered.

Firstly, the accelerated amortization once the asset entered into service, that is the result of the application of the deducibility regime of the correspondent fees to the recuperation of the cost of the asset, with the limit of the double of the percentage that corresponds according to tables (triple if it is a reduced dimension entity). Measure in article 115,6 of Spanish CIT then in effect.

Secondly, the anticipated accelerated amortization, that is, before the asset (the vessel) comes into service (article 115.11 of Spanish CIT). It allowed that certain assets with a manufacturing period of more than six months, which were not elaborated in series and of a singular nature, had an accelerated amortization derived from the deduction of the leasing fees applied from the beginning of the construction, that is, before the entry into operation of the asset. To this end, it was necessary a positive resolution of Spanish Ministry of Economy and Finance

Thirdly, the fiscal transparency of the EIG, which transferred the advantages to shipowners and investors. These were transparent entities, so they were not taxed and their benefits were imputed to their partners, who integrated them into their taxable bases.

Fourthly, the special regime of taxation per tonnage or "tonnage tax". This is a regime of objective estimation voluntary applied to entities which develop maritime transport activities. Through this regime, such entities are not taxed by the general regime (difference between income and expenditure) but by an objective system, in which a percentage is applied according to the tonnage of the vessel. What is questioned is not the regime itself, but

the fact that can be applied to situations such as the one in the tax lease, in particular, to companies that exclusively dedicate themselves bareboat charter. And this because these companies do not perform a real shipping activity, as they carry out the transfer of risk through the bareboat charter to the tenant.

In fifth and last place, the non-taxation of the gain in the transmission of the ship at the time of its sale to a shipping company. This is a consequence of what was established in article 50.3 of CIT *Reglamento*. It was stipulated that if an company included in the tonnage regime a ship whose property had already been previously owned, it should create at that time be an unavailable reserve for the difference between the market value of the vessel and its net accounting value. The taxation is deferred until the ship is transmitted, for the amount of the mentioned reserve plus the difference between the tax depreciation and the accounting value of the ship. This taxation reversed the amortization, avoiding the possible circumvention consisting of transmitting the ship for a value greater than its fiscal value. But the mentioned art. 50.3 of CIT *Reglamento* included an exception to this rule. This exception was that of ships acquired through the option of purchase of a financial leasing contract, which had been the subject of a prior administrative authorization. In other words, there was an express exception to this taxation of the gain for ships purchased in leasing and with the authorization of the administration, which was what happened in the *tax lease* contracts.

The Decision of 17 July 2013 declared certain aspects of the tax lease regime state Aid incompatible with the European Union Law. In particular, the application of the accelerated amortization in advance, the application of the tonnage regime to the EIG that did not carry out maritime transport activities and the non-taxation of the gain in the transmission of the ship at the time of sale to a shipping company. In addition, the decision declared beneficiaries of such aid to the financiers of the operations or investors, leaving to the margin shipowners and shipyards.

As can be seen, for the Commission three of the five fiscal measures examined constituted state aid to the EIG and the investors. The resolution

of the Commission dissected the various tax measures contained in the tax lease regime, in order to determine whether each one of them individually considered fulfill the requirements of state aid contained in article 107.1 of TFEU.

We will see below the specific content of this Commission decision.

#### ***4.1. Advantages that constitute state aid: accelerated amortization, not taxation of the gain and application of the tonnage regime***

For the Commission's decision it constitutes a fiscal advantage, firstly, the possibility of applying on the part of the EIG an accelerated amortization in advance since the moment the construction of the ship begins, it means, before the asset begins to be exploited. This accelerated amortization operated on the basis of the existence of a prior authorization of the Spanish tax Administration. This is because the possibility of accelerated amortization had been confirmed by a multitude of resolutions and binding consultations of Spanish Tax Direction. It would be a measure that is deviated from the general rule that presides over the practice of amortizations, because the deduction of the depreciation, in the general regime, only proceeds once the asset is in operation. Moreover, for the Commission, the requirement of a previous administrative authorization assumed that the access to the regime was granted in a position of great discretion. All this conformed to this measure as selective.

Secondly, the Commission also considered prohibited State's aid the measure of the non-taxation of the gain in the transmission of the ship at the time of its sale to a shipping company. As we said, this effect was produced by the application of article 50.3 of CIT *Reglamento*, which provided for an exception for acquired ships in leasing and with the authorization of the administration. The effect of this tax advantage is not only that a surplus value is not taxed. Not taxing the gain neutralizes the reversal of the depreciation for the exploitation by the shipowner of the regime of tonnage. The reason why this measure is considered state aid is because it was only applied in practice to such operations and under a specific administrative authorization, therefore it was considered selective.

Furthermore, for the Commission, this exception had not been notified to the EU authorities at the time of the communication of the willingness to apply the tonnage regime. This meant that it was an exclusive selective advantage for companies acquiring ships by leasing.

Finally, the application of the tonnage tax system to the EIG instead of the general scheme of CIT constitutes a fiscal advantage that determines the concurrence of a state aid. The Commission understands that this is also an advantage and therefore a state aid. The Commission takes into account at this point the Community guidelines on state aid for Maritime Transport (Commission communication C (2004) 43). The Commission considers that such guidelines, which declares admissible certain helps to shipping companies, are not applicable to the EIG's participants in the tax lease. This is because they were not maritime companies that undertake maritime transport activities, but ship-owners. The possibility of these EIGs being in the tonnage regime is a state aid, which would have no protection in the Community guidelines for state aid to maritime transport.

***4.2. Advantages that do not constitute state aid and which are considered compatible: amortization after the entry into operation of the ship and transfer of the advantages to shipowners and investors***

On the contrary, it is considered compatible with the internal market, since it does not constitute a selective advantage, the accelerated amortization once the asset enters into service, to the extent that it is applicable to all companies and all assets that are susceptible of investment. The reason is obvious; the amortization once the asset comes into operation is the common rule. We are therefore facing a general fiscal measure, which excludes its possible selective nature and therefore the condition of aid in the meaning of the Treaty. Therefore, neither the financial leasing scheme nor the tax depreciation granted constitute state aid. And this is because they do not give a selective advantage to the EIGs participants of the tax lease, since any fixed asset may be subject to the ordinary depreciation

regime, with exceptions (as happens with the land and terrain) that are also in the ordinary regime of amortizations.

Secondly, it is considered compatible with the internal market, by virtue of article 107.3 of TFUE, the transfer of advantages to shipping companies, arguing that it has contributed, in some measure, to the realization of the objectives of common interest pursued by the guidelines on state aid to maritime transport. Since the lowering is granted by the EIG and is not attributable to the State, the Commission considers that it does not constitute a state aid for the shipping company. In fact, the objective an autonomous concept of aid requires that it is granted by the State or through public funds. On the other hand, this transfer is the result of the attribution of positive or negative bases, characteristic of the fiscal transparency regime, which applies to the EIG. And it applies to all the assumptions of economic interest grouping. We do not faced then a selective advantage for investors or for EIGs, in the opinion of the Commission.

#### ***4.3. Beneficiaries, recovery order and principle of legitimate trust.***

Any Commission decision on state aid should order its recovery and identify the one obligated to return it, on the basis that this condition will preferably fall into the actual beneficiary.

By virtue of the foregoing, the decision considers beneficiaries of the aid the EIGs, and, by application of their own fiscal transparency regime, the investors when they have economic activity. The exclusion of the other operators is concluded after an analysis of the objective regulation. It is ruled out that the shipyards are beneficiaries in so far as it is not accredited that the tax lease only applies to ships built in Spain, so the required selectivity does not concur. Nor would shipowners be beneficiaries of the aid, because the advantageous rules are not intended to give them the corresponding benefits. If shipping companies enjoy benefits because they have been transferred by the EIG, it has no relevance for the Commission since the EIG would only be a private agreement. And a private pact could not determine the beneficiary of a state aid. At the same time it is pointed

out that investors, declared beneficiaries, could not transfer the burden of restitution of aid to third parties.

The investors would be the only beneficiaries because the advantages that they obtain provoke a distortion of the trade, while allowing the EIGs and such investors to reduce their tax burden. This leads to these investors being able to compete in an advantageous situation in the sectors to which they belong. We have already said that these investors came from the most varied economic activities (banks, textile companies, aluminum...). Through the tax benefit derived from the tax leasing these companies operated with advantage over their competitors.

As a result of the foregoing, the decision includes a recovery order under article 14.1 of Regulation 659/1999. This precept requires in cases of illegal aid that the Commission orders the state to recover the benefits of illegal aid, unless such recovery is contrary to a general principle of EU Law (such as those of legal certainty, legitimate trust and proportionality). For this part, article 14.3 of that Regulation provides that the recovery "shall be effected without delay and in accordance with the procedures under the national law of the Member State concerned, provided that they allow the immediate and effective execution of the Commission's decision".

The recipients of the decision are the states, but the recovery order will obviously run on those declared by the decision as beneficiaries of the aid which, in the present case and as we have said, are the investors. Spanish State, and, in particular, the tax administration, should calculate the amount of the aid to be returned, discounting the part of the aid that was admitted and liquidating the corresponding interest of delay.

However, the Commission's decision assesses aspects relating to the principle of legal certainty in order to delimit the scope of the return order. Then, the limitation date of the return order, by express consideration of the principle of legal certainty, is set from the "*ad effect*" which was the publication of the Commission's decision on the French GIE in the Official Journal of the European Union, what took place on April 30, 2007<sup>15</sup>

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<sup>15</sup> CALVO, R.-PASTORIZA VÁZQUEZ, S.-" Últimos expedientes españoles en materia de ayudas de Estado fiscales. El tax lease y el fondo de comercio financiero en adquisición de

For the Commission, given the similarities between the French *GIE* and the *tax lease*, after the publication of the decision on the *GIE* the uncertainty is dissipated, and it ceases to be any possible protected confidence, since any diligent economic operator would doubt since then of the legality of the tax lease. According to reiterated jurisprudence of the ECJ -among others, the judgement of 16 December 2010, *Kahla Thüringen Porzellan /Commission*, Case C-537/08- in order to such principle of protection of legitimate confidence to apply it is necessary that the competent authorities of the European Union have given the interested parties unconditional, concordant and specific guarantees, which emanated from authoritative and reliable sources<sup>16</sup>. Therefore, are not considered to meet these requirements other actions, particularly the letter of Commissioner Neelie Kroes of March 2009, confirming the validity of the tax lease<sup>17</sup>

On the contrary, the delay in adopting the resolution has not been considered as a possible cause for the generation of protected confidence. Thus, the judgement of the ECJ of 24 November 1987, *RSV/Commission* (223/85, paragraph 17) arranged that, in certain circumstances, the delay of the Commission in deciding that aid is illegal and must be abolished and recovered by the Member State may lead to the beneficiaries of such aid having sufficient legitimate confidence to prevent the order of restitution. In

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holdings", *Op. cit.*, pag. 2. The decision does not mention whether that date should be taken into account only for the purposes of aid based on the resolutions of the Spanish Tax Direction prior to that date, or whether it takes into account the effects of the application of the aid granted. The latter has been the interpretation given by the ECJ in case C-129/12 *Magdeburger Mühlenwerke GmbH*.

<sup>16</sup> PÉREZ BERNABEU, B., *Ayudas de Estado en la jurisprudencia comunitaria. Concepto y tratamiento*, *op. cit.*, p. 160

<sup>17</sup> The letter in question must have legal relevance to generate a legitimate protected confidence. It was a response to the Norwegian Minister of Industry, Sylvia Brustad, who had expressed suspicions about the alleged distortions of competition that could generate *tax lease* Spanish. For the Commissioner, there was no evidence of discriminatory treatment. "el Tribunal recuerda que las empresas beneficiarias de una ayuda sólo pueden, en principio, depositar una confianza legítima en la validez de la ayuda cuando ésta se conceda con observancia del procedimiento que prevé dicho artículo, y, por otra parte, en circunstancias normales, todo agente económico diligente debe poder comprobar si ha sido observado dicho procedimiento". URIOL EGIDO, C., "STJCE 15.12.2005, As. C-148/04: Ayudas de Estado", *Comentarios de Jurisprudencia Comunitaria, Crónica Tributaria*, nº 131, 2009, p. 270.

the present case, the Commission's investigation was initiated in 2006 and concluded on 17 July 2013, so we understand that such delay could have been invoked as an exceptional circumstance that could have justified legitimate confidence and have served to oppose the return. However, ECJ requires that such exceptional circumstances must be credited in a reliable way, restricting its application – for all the judgment of the General Court: (fifth room) of 1 July 2010, Case T-62/08-.

#### **4.4. Calculation of the amount to be recovered**

Perhaps, this is one of the more complex issues relating to the implementation of the decision of the Commission of July 17, 2013.

In order to establish the amount to be returned by each beneficiary, first of all, it is necessary to calculate the tax advantage generated by each specific operation. To this end, a mathematical concept is used, the net present value (NPV) of the tax advantages obtained by the EIGs or its investors. The calculation is carried out before the deduction of the part of those advantages transferred to the shipping company through a discount on the price. Remember that the acquisition by the shipping company was done with a reduction in the price of the ship, and that discount was a way to transfer the benefit of the operation to the shipping companies. This NPV was determined taking into consideration the date of commencement of the anticipated amortization authorized by the tax authorities and the discount percentages used.

Secondly, it requires a calculation of the tax advantage that would be directly attributable to the tax measures of general scope applied to the operation, that is to say, to measures which were not declared state aid and which therefore should not be returned. It would have to calculate a NPV, but taking into account the amount of tax advantages that the EIG or its investors would have obtained in a situation where only accelerated amortization had been used from the moment the ship had started to be exploited. That is, if the general scheme had been applied, so that the capital gains obtained with the sale of the ship to the shipping company

would have been taxed by the CIT on the date the latter made the option effective.

Third, it would proceed the calculating of the tax advantage equivalent to the state aid. Such an advantage would be determined by difference between the two NPV calculated in the terms exposed. This calculation would allow a first approximation of the amount of illegal aid received by the EIG and its investors as beneficiaries.

Finally, it is necessary to determine quantitatively the compatible aid, setting the amount of the transferred advantage that would have been classified as compatible if the shipping company had been considered a beneficiary. In other words, it is necessary to determine the percentage of the aid transferred to the shipping company on the basis of a calculation similar to the presented by the EIG in its application to the tax administration. It must also take into account a market remuneration for the intermediation which must not be recovered either.

From the total amount resulting from the calculation of the advantage transferred to the shipping company we must determine the amount that would be compatible if the maritime guidelines were applied to the company, the vessel concerned and the transport activities. The compatible amount must be determined in accordance with Chapter 11 of the guidelines, taking into account all the 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 or received in the country of establishment of the company, if it is a state of the EEA

The above shows the complexity of the calculation that was made by the Spanish Tax Administration. Once the calculation was carried out, each investor was notified of the result, with the opening of the subsequent voluntary payment period. The decision establishes that the beneficiaries (the EIGs and the participating companies, i.e., the investors) cannot transfer to third parties (for example, the shipyards, or the financial institutions) the obligation to reimburse the aid, even under existing contracts signed by the parties in tax lease operations. And that because, through the assumption of economic responsibility by the shipyards, the

economic burden of the return could be transferred of to a subject that is not the material beneficiary.

The act by which the amount of the recoverable aid to each beneficiary was communicated has a nature of liquidation and was recurred in most cases. In fact, the procedure of determining the aid to be returned is a procedure of tax regularization. Such a procedure should be qualified for Recovery of state aid that has been Title VII, by Law 34/2015, of 21 September. Although, as LÓPEZ GÓMEZ says, before initiating the aforementioned procedures, it would be invoke a procedure for revoking the resolutions of the Directorate-General for taxes that authorized the application of the early amortisation and the regime of Tonnage, Because, as this author points out, "the decision of the European Commission is a title directed against the Member State, not against the beneficiary of aid, which has done nothing but apply the legislation in force"<sup>18</sup>

#### ***4.5. Other consequences of the Commission decision of 17 July 2013.***

In addition of the state aid statement and the return order, the decision of 17 July 2013 has other consequences. First of all, forces Spain in putting an immediate end to the regime declared as state aid. In order to fulfil this mandate, Spain approved the Disposición Final Quinta del Real Decreto-ley 11/2013 de 2 de Agosto, applied to those structures that subsist on that date without having dissolved or without having produced the sale of the ship to the acquirer.

This Disposición Final introduced, with effect from 4 August 2013, the Disposición Transitoria cuadragésimo segunda del Texto Refundido de la Ley del Impuesto sobre Sociedades (CIT Law). In general terms, this provision states that, if in relation to a ship, there was a party pending advanced amortization, such amortization would no longer be possible, and the general regime should be applied. Depreciation was therefore differed until

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<sup>18</sup> LÓPEZ GÓMEZ, A.-GARCÍA NOVOA, C., " Reflexiones sobre el tax lease. A propósito de la Jornada desarrollada en Santiago de Compostela ", Asociación Española de Asesores Fiscales, March 3, 2014, pp. 7 and 8.

the boat was put into operation. It was also set the inability to apply the tonnage regime, applying only the general regime to the EIGs. This implied the need to revert the positive adjustments for early amortization, and what is more relevant, assumed that when the shipowner acquired the ship, the EIG computed the surplus value. Such surplus value would be charged by investors in their respective taxable bases and would be subject to taxation. In any case, the then-existing article 115.11 of CIT had already been amended to eliminate any possible state aid. The modification took place through Ley 16/2012, de 27 de diciembre, por la que se adoptaban diversas medidas tributarias dirigidas a la consolidación de las finanzas públicas y al impulso de la actividad económica.

The amendment, which came into force on 1 January 2013, corrected a large part of the shortcomings of those who suffered the current regime. Specifically, the generic references to the peculiarity of the good, to the singularity of its economic use or the non-use for calculating the taxable base were suppressed from article 115.11 (present article 106.8 of CIT Law 27/2014). Then, the current regime let the amortization since the beginning of the construction, in the case of assets acquired by leasing (not only ships) and when the quotas are satisfied before the end of the construction. In addition, that their manufacturing period be at least one year, and that they are uniquely designed assets. In the line of eliminating discretionary aspects, the prior authorization has been removed to be replaced by a communication and it is accepted the possibility of the good being manufactured outside of Spain. It was abolished the third section of Article 50 of Reglamento del Impuesto sobre Sociedades (article 52 in nowadays Real Decreto 634/2015, de 10 de julio) then there is no longer and exception establishing a special regime for used vessels accessing the special tonnage taxation regime.

Firstly, it is required that those who begin under the tonnage regime undertake nautical management activities, proving that it is an entity that actually carries out a maritime transport activity. This would make it possible to fulfil the requirements of the Community guidelines on state aid to maritime transport. So, when an EIG is constituted and chooses the

tonnage regime, it must be owned by a shipowner, who will be required to manage the operation of the ship through the EIG. By decision of 20 November 2012, confirmed later by the Court of Justice of the European Union, the Commission stated that the new regime did not constitute state aid.

Secondly, the majority of the contracts through which the EIGs were formed, and which developed the collaboration between investors and shipyards for the construction of ships, included a clause by which the shipyard took the responsibility in the case that the administration or the courts question the tax aid.

This is a typical example of a clause on tax issues, contained in a private contract. Doctrine and jurisprudence has repeatedly pronounced on the admissibility of this type of clauses. From the point of view of private law, the existence of possible agreements between individuals does not affect the setting of the tax, because as long as such agreements have their origin in a private obligation they are indifferent to tax law. In fact, the *tax reality* may be a circumstance to take into account in the strictly private field, but from the perspective of tax law, it will be useless in the configuration of the tax and, therefore, will become unenforceable to the public treasury<sup>19</sup>. However these pacts are admissible from the point of view of the private law, where it plays the autonomy of the will – In this regard, we can check the ruling of the Spanish National Court (Audiencia Nacional) of 21 October 1997, accepting the "tax-free donations"<sup>20</sup>–. There is no an express prohibition of these pacts in the private ordering, they are just strangers to the tax field

There is therefore no difficulty in accepting these private pacts as admissible from a legal point of view. Tax matters, even if it is part of the

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<sup>19</sup> HINOJOSA TORRALBO, J.J., "Eficacia de los pactos privados sobre las obligaciones tributarias en la adquisición de inmuebles", *Tribuna Fiscal*, nº 55, 1995, p. 46. Also, ALBIÑANA GARCIA-QUINTANA, C., "Los pactos privados en las obligaciones tributarias", *Tapia*, 1988, nº 43, pp. 9 and on; RODRIGO FERNÁNDEZ, J., "Las cláusulas de asunción de impuestos" en *Estudios sobre Tributación Bancaria*, Civitas, Madrid, 1985, p. 637 and on.

<sup>20</sup> IBÁÑEZ GARCIA, I., "Las donaciones libres de impuestos. Comentario a la Resolución del TEAC de 7 de septiembre de 1994", *Jurisprudencia Tributaria*, 1994, III, pp.1229-1231

so-called Economic public Order, is not away from the autonomy of the will nor it is forbidden that a tax circumstance conditions the effectiveness of a business. Therefore, they were valid pacts, and as such, they could be invoked before the corresponding civil courts. Thus, in the strictly private sphere, these pacts legitimized civil actions of the investors obliged to return the aid against the shipyards. And this, despite the fact that the decision insisted that it was not possible to transfer the obligation to reimburse to third parties.

In short, The Commission's decision not only orders to recover past aid granted, but also avoid the application of the regime to the future, generating that investors that continue with these structures must pay the CIT on the surplus value for the sale of the ship. But it does not prevent investors from being able to claim against shipyards in civil courts in accordance with valid private pacts.

#### **5. The resolution of the action for annulment of December 17, 2015 by the General Court of the Union**

The decision of the Commission could be object of action for annulment, given the wide possibilities that article 173 TFEU attributes to this revision instrument. There is no doubt that Commission decisions are appealable before the General Court, in terms of article 256 TFEU, since, according to this principle, the General Court is competent to hear and determine actions or proceedings of legal entities and individuals against decisions of the European institutions and its organs and bodies which are targeted or which could affect them directly and individually; and against regulatory acts which concern them and which do not include enforcement action or against the inaction of those institutions, bodies and agencies.

One of the most controversial issues which arose at the time was that of who would be entitled to bring this action for annulment. As stated LÓPEZ GÓMEZ, the decision was notified to Spain on July 18, 2013, only one day after it was known. This notice made to the Kingdom of Spain recipient of the decision and placed it in the position of appealing under article 263 TFEU, which legitimizes to appeal to "any natural or legal person(...)" against

an act addressed to that person or which is of direct and individual concern to them”<sup>21</sup>

According to it, was obvious and not debatable the legitimization of the Kingdom of Spain, that made it effective with the presentation of the action for annulment in considering that the decision violated article 107 TFEU, as that would not be a selective aid since it did not “distorts or threatens to distort competition ” and did not “affects trade between Member States”. distorts or threatens to distort competition. Secondly, the Kingdom of Spain requested in the aforementioned appeal to stop the recovery of the aid, as long as it is understood that the Commission's decision violated the principles of legal certainty, legitimate expectation and equality of treatment.

On the other hand, since the moment when the proceedings for infringement against the Kingdom of Spain was opened (June 29, 2011) there were many individuals (shipyards and investors) who took part in the process themselves and which were also reported in different dates of the decision, prior to its general release. Here comes the question of whether these particular were also entitled to present action for annulment.

It should be recalled that, according to article 263 TFEU, individuals have legitimacy for the appeals in three different cases: in case of acts of which they are recipients, facing acts that incumbent on them directly and individually (ECJ, of 15 July 1963, Plaumann, 25/92) and in case of regulatory acts that directly affect them and which do not include enforcement measures.

Firstly, it was necessary to determine whether this decision was a regulatory for the action for annulment, because once it is determined as a regulatory act, the legitimization of individuals depend on such act affecting them directly, and in addition, that it does not contain enforcement measures. Thus, whenever individuals prove that the act affects them directly (in the broad terms of the Sentence of the Court of 15 July 1963, Plaumann,

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<sup>21</sup> LÓPEZ GÓMEZ, A.-GARCÍA NOVOA, C., “Reflexiones sobre el *tax lease*. A propósito de la Jornada desarrollada en Santiago de Compostela”, *op. cit.*, pag. 7.

25/92), we will have to determine if it has regulatory nature for the purposes of set if the concurrence of implementing measures should be excluded.

There is no doubt that the decision of the Commission of July 17, 2013 would be a regulatory, for not being adopted following a legislative procedure. According to the doctrine of the judgments of the ECJ of 25 October 2011, *Microban International and Microban (Europe) / Commission* (T-262/10, Rec. p. II-0000), in the ORDER of the General Court on June 4, 2012, *Eurofer v Commission* (T-381/11, Rec. p. II-0000) or in the judgment of 3 October 2013, *Inuit Tapiriit Kanatami and others / Parliament and Council*, C-583/11 P., are understood to be regulatory acts general non-legislative acts, term which is defined from a formal point. Would be non-legislative acts in this perspective those who had not followed the legislative procedure of article 289 of TFEU, circumstance of the decision commented here.

If we are facing a regulatory act, the legitimization, as we said, will depend on whether the decision directly affects the appellant and if it has a legitimate interest in the exercise of the action and it does not include implementing measures.

This second requirement was the most controversial, because it seemed obvious that the decision of the Commission of 17 July 2013, included in its articles 4 and 5 an implementing measure, when it established that Spain would have to recover immediately and effectively the aids declared incompatible with European law. Are implementing measures, in accordance with number 36 of the judgment in appeal of the Court of Justice of 19 December 2013 EU case C-274/12 P - *Telefónica v Commission*, "the measures for giving effect to the decision as to incompatibility – including in particular the measure consisting of rejection of an application for grant of the tax advantage at issue"

In short, the decision does not to include implementing measures it should not incorporate "*national measures taken to implement [it] until recovery of the aid granted under the scheme [at issue] has been completed*". *The very existence of those recovery measures, which constitute implementing*

*measures, justifies the contested decision's being regarded as an act entailing implementing measures"*(*Judgment of The General Court, T-221/10, 8 March 2012*).

It seemed that this requirement was not in the Decision of the Commission in 2013 and, therefore, individuals affected by the recovery order of the aid could not appeal against the decision of the Commission before the General Court. Instead, they would have to do it through the internal channels and against the concrete implementing measures of the recovery decision. That is, they would have to appeal against the specific tax settlement where the recovery order is precised before the Spanish Economic-Administrative Courts and through the contentious administrative proceedings. They may request a preliminary ruling before the Court of Justice of the European Union.

However, the stance of the Community bodies was favorable to the legitimation of individuals, opting for a *pro actione* interpretation. Thus, it was understood that when article 263 TFEU, said "Any natural or legal person may (...) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures" it was setting a first course of legitimation of preferential application. It would be saying that those who are not direct recipients of the resolution, but who are affected directly and individually or indirectly, may appeal too. Therefore, even though the decision of the Commission of July 17, 2013 contains implementing measures, an individual that non-recipient would be entitled to appeal if the decision affects him directly and individually.

According to the case-law of the ECJ a decision will affect a particular by reason of their individuality or their special position (judgment of 15 June 1963 *Plauman v Commission*). Therefore, the effective beneficiaries of an individual aid granted under an aid scheme would have the status of individually affected, (judgments of 2 February 1988, *Van der Kooy v Commission* (67/85, 68/85 and 70/85, Rec. p. 219), paragraph 15) , and on

December 7, 1993, *Federmineraria and others / Commission* (C-6/92, Rec. p. I-6357).

Then, this circumstance obviously concurr in investors qualified as beneficiaries of the aid in the decision and condemned to its recovery. Investors in the tax lease raised an action for annulment and the Commission, in its reply admitted the legitimacy, saying that in the joined cases the claimants are investors in EIG who seem to have benefited from the aid"<sup>22</sup>.

According to the Commission's position, the General Court consider that should not be refused the right of the affected to raise an action for annulment against the decision of the Commission for including implementation measures. This way, 19 actions for annulment were lodged that the Commission, on 28 January 2014, ordered to be treated by the same agents on a coetaneous and coordinated manner, as long as they were closely interrelated. These were appeals of different private investors who had participated in tax lease structures and who have submitted observations to the Commission, in concept of interested parties<sup>23</sup>.

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22.- Especially important has been the admission of the legitimization by the Commission in the case of *Aluminios Cortizo*. The Commission, in reply to the appeal by this inventor said on April 7, 2014, that according to art. 263 TFEU any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures. It is recalled that the Court of Justice has declared that being directly concern requires, on the one hand, that the contested measure produce effects directly in the legal situation of the individual and, on the other hand, that there is no space for a discretionary evaluation from the recipients of such measure responsible for its implementation, "being purely automatic and resulting from EU law alone, without the application of any other intermediate rules". With respect to the individual affected, we should mention the repeated jurisprudence according to which "persons other than those to whom a decision is adressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtye of these factors distinguishes them individually just as in the case of the person adressed" (judgment of 15 June 1963 *Plauman v Commission*). In this sense, when it comes to a decision of the Commission in the field of State aid, in its judgment *Italy and Sardegna Lines v. Commission* the ECJ stated that a claimant id directly concerned as "an actual beneficiary of individual aid granted under that scheme, the recovery of which has been ordered by the Commission".

23.- In addition, certain private bodies supporting the validity of the Decision (generally representing the sector of shipbuilding), have requested to intervene in the respective processes as adjuvants, on the basis of article 40 of the Statute of the Court of Justice of the

At that time it was questioned whether it was legally defensible to request, as precautionary measure, the suspension of the execution of the decision. Different arguments in favor of this possibility were handled (that is could lead to irreparable damage, the rule of *fumus boni iuris*...). However, the application of article 278 TFEU prevailed, which establishes the principle of the non-suspensive effect of the appeal. In addition, the Commission itself in its Commission notice on the enforcement of State aid law by national courts, on April 9, 2009, set out the need to apply recovery decisions even when there were pending appeals

Under this, the General Court (which, remember, is a Court of first instance) overruled in its judgment of 17 December 2015 the decision of the Commission of July 17, 2013, estimating the appeal pledged by the Kingdom of Spain, suspending resolution of individual investor appeals as a result of the reaction of the Commission.

The main argument of the General Court to proceed with such cancellation was based on the conclusion that the EIG could not be the beneficiaries of State aid on the sole ground that, due to the fiscal transparency of these groups, were the investors, and not the EIG, who benefited from the fiscal and economic benefits derived from such measures. The General Court ratified this way the thesis that the selectivity of State aid in the tax lease required to conclude that only investors could be considered as beneficiaries.

## **6. The content of the judgment of the Grand Chamber of July 25, 2018 (As. C-128/16P)**

At the end of all this journey, we have the recent judgement of the ECJ, judgment on appeal by the Grand Chamber. The ruling overrules the previous judgment of the General Court of December 17, 2015.

The main contribution of the sentence refers to the determination of the beneficiaries of State aid. For the sentence it is wrong to consider that only

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European Union and in articles 115 and 116 of the Rules of procedure of the General Court of the Union European.

investors are the beneficiaries of the aid and not the EIGs, as these are transparent entities. For the Court, the tax effect, as it may be the fact that were the investors who gain a tax advantage, should not be considered. What must be addressed is who are the natural recipients of these illegal measures. This status of beneficiaries is not altered as a result of the application of a fiscal regime that transferred the economic effect to third parties. In short, for the Grand Chamber, the EIGs may also be beneficiaries, since its fiscal transparency regime does not preclude that they should be considered as companies for the purposes of State aid. This is because they developed an economic activity in the market.

The affirmation of the Grand Chamber is completely logical. The aid refers to a specific economic field, which is the shipbuilding industry. The alteration to competition occurs in the construction of boats sector. Investors, on the other hand, belong to the most diverse economic sectors. They are financial institutions, textile companies, food industry or manufacturing of aluminum companies. None of these sectors experienced some alteration to the competition as a result of the tax lease. These operators are simple investors who seek a fiscal and economic profitability of a tax measure, apparently backed by the tax administration.

Therefore, the Grand Chamber understands that the General Court committed an error of assessment the selectivity of the aid. This is because he has conceived them from the wrong perspective that the only beneficiaries of these are investors. The Grand Chamber on the contrary understands that this is an erroneous premise. The previously exposed circumstance that the aid beneficiaries belong to different economic sectors does not, by itself, the possible selectivity of the aid, if it is an exception to a common system and allows some operators and not others, to benefit from it. But it is necessary that the Commission shows that such measures treat operators, who are in a comparable situation in relation to the aims pursued by the regulation, differently.

The General Court has not proceeded to assess whether the Commission had accredited whether the controversial tax measures established a different treatment between operators when the operators benefited from

the tax advantages and those which were excluded were in a comparable legal and factual situation in relation to the aim pursued by the tax system. On the other hand, it constitutes an error of law of the General Court circumventing this analysis and considering that the advantages obtained by investors who participated in the operations could not be considered selective because any Company could participate in them in the same conditions, without distinction<sup>24</sup>

Therefore, and contrary to what the General Court understood, the EIGs can be direct beneficiaries of the aid.

In addition, for the Grand Chamber, the Commission has not insisted enough on the importance of the discretionality of the regime contained in article 115.11 of Spanish CIT at that time (the possibility of the accelerated depreciation before the entry into operation) for the selectivity of the measure. In particular, paragraph 58 of the judgment says: "in failing to examine whether the system for authorising early depreciation, as provided for in Article 48(4) and in Article 115(11) TRLIS, and Article 49 RIS, conferred on the tax authority a discretionary power such as to favour the activities carried on by the EIGs involved in the STL system or having the effect of favouring such activities, the General Court erred in law."

A second line of argument of the Grand Chamber for questioning the judgment of the General Court of 2015 is the poor motivation of the decision of the Commission. Above all, the insufficient motivation of the circumstance of investors belonging to different economic sectors. It required to specify with detail why the tax advantages distort competition since investors competed in different markets (financial, textile, aluminium...) and none did in the shipbuilding industry. In second place it should have motivated why investors and the EIGs were considered a single

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24.- According to par. 58 of the sentence of the ECJ, C-128/16 P, on 25 July 2018 on the taxlease: "It must be pointed out that those considerations are based on the incorrect premiss that only the investors, and not the EIGs, could be regarded as the beneficiaries of the advantages arising from the tax measures at issue and that it was therefore by reference to the investors, and not the EIGs, that the condition relating to selectivity had to be examined. Therefore, in failing to examine whether the system for authorising early depreciation, as provided for in Article 48(4) and in Article 115(11) TRLIS, and Article 49 RIS, conferred on the tax authority a discretionary power such as to favour the activities carried on by the EIGs involved in the STL system or having the effect of favouring such activities, the General Court erred in law.

entity acting in the area of chartering bareboat and sale and purchase of ships, when they were legally distinct entities.

For the Grand Chamber, assuming that the beneficiaries are investors, leads the General Court not to reason properly the explained conditions. In particular, on paragraph 40 of the judgment the General Court concluded that "the EIGs could not be the beneficiaries of State aid solely on the ground that, as a result of the tax transparency of those groupings, it was the investors, and not the EIGs, who had benefited from the tax and economic advantages resulting from those measures ". But in its claim for not solving the merits of the case, the Gran Chamber insists on the matter of the lack of motivation. Consequently, it adds in paragraph 47 "That conclusion is not affected by the Commission's decision to order the recovery of the incompatible aid from the EIG investors alone, the legality of which is not to be determined by the Court of Justice in the present appeal".

Thus, for the Gran Chamber, the reasoning of the judgment of 2015 has not enough weight to undermine the conclusions of the Commission in its Decision of 2013 about the EIGs as beneficiaries. In particular, the Commission had argued that EIGs should be considered beneficiaries because they were target of the aid and had made a substantive economic activity in relation to contracts for the acquisition of ships and bareboat charter. It is rejected then by the Gran Chamber that the EIGs might remain outside the scope of the beneficiaries for its dubious instrumental consideration of mere investment vehicles, condition that they would hardly have. The Commission also said convincingly, according to the Gran Chamber, that aid could affect trade between States. In response, the motivation of the judgment of the General Court of 2015 is flimsy and lacks the strength sufficient to vitiate the arguments of the Commission; this is how the cassation judgements sees it.

## **7. Consequences of the judgment of the Grand Chamber of July 25, 2018**

As we have said, the Grand Chamber does not resolve on the merits. The consequence of its resolution is synthesized in paragraphs 104 and 105 of the judgment. Paragraph 104 points out that "According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment". And the paragraph 105 states that, "In the present case, since the General Court examined only some of the pleas in law put forward by the parties, the Court of Justice considers that the state of the proceedings does not permit it to give final judgment. The case must therefore be referred back to the General Court". For this reason, the Grand Chamber in the judgment of 25 July 2018, resolves to return the matter to the General Court.

Therefore, it is the General Court the one that, in the near future, has to rule again on the arguments alleged by the parties in the appeal. And also on certain grounds for appeal referred to the existence of legitimate confidence, which were included in the original claims but which were not addressed in the judgment. It is required a new ruling on the issues on which the Grand Chamber of the ECJ demands a greater argumentation. In our view, it will be essential that the resolution of the General Court to explain why free competition and trade between States is disrupted if investors belong to different economic sectors. Also, why, given these circumstances, it is considered that the only beneficiaries of the aid are them and not the EIGs. Especially when the EIGs are the natural target of the measures found to be illegal.

The judgment of the Grand Chamber does not question the consideration as State aid of the measures classified as such by the Commission. In this sense, it can be said that the verdict reinforces the arguments of the Commission. The resolution affects the determination of who are beneficiaries, therefore it will affect the aid recovery procedure, insofar as the restitution of the them has not been performed yet.

But, we should not forget that the sentence refers to the lease which was abolished. In its place, as we said, a new regime was approved since 2013, which eliminates the objections which the Commission had formulated from the perspective of the law of the European Union. In addition, the new regime, which has the support of the Commission, will not be affected by the judgment to which we are referring. It leads to affirm the limited scope of the decision of the Grand Chamber of the ECJ of July 25 2018, since those entities that are benefiting today from the new tax lease will not be affected by the ruling.

The main effect of this judgment of the Grand Chamber is to give the possibility of a new ruling of the General Court that can override the obligation of recovering the aid exclusively in charge of investors. A period of waiting is opened, it may be surely long.

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