Reports of Cases

OPINION OF ADVOCATE GENERAL
PIKAMÄE
delivered on 29 September 2022 [1]

Joined Cases C-649/20 P, C-658/20 P and C-662/20 P

Kingdom of Spain (C-649/20 P),
Lico Leasing SA and
Pequeños y Medianos Astilleros Sociedad de Reconversión SA (C-658/20 P)
v
European Commission (C-649/20 P and C-658/20 P)
and
Caixabank SA
and Others
v
European Commission

(C-662/20 P)

(Appeals – State aid – Article 107(1) TFEU – Aid granted by the Spanish authorities to certain economic interest groupings (EIGs) and their investors – Tax regime applicable to certain finance lease agreements for the purchase of ships (Spanish tax lease system) – Selectivity – Recovery of the aid – Indirect advantage)

1. These joined cases concern the appeals brought by the Kingdom of Spain (Case C-649/20 P), by Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión SA ('PYMAR') (Case C-658/20 P) and by Caixabank SA and Others (Case C-662/20 P) respectively against the judgment of the General Court of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434) ('the judgment under appeal'), by which the General Court dismissed the action brought by the Kingdom of Spain seeking 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 ('the decision at issue'), [2] and the action brought by Lico Leasing and PYMAR seeking annulment of that decision, in the alternative, annulment of the order to recover the State aid and, in the further alternative, annulment of the order to recover the aid in respect of the calculation of the amount of incompatible aid to be recovered.

[1] Original language: French.

[2] OJ 2014 L 114, p. 1.

2. This is the second time that the Court of Justice has been called upon to examine the Spanish tax lease system, which has been the subject matter of a veritable legal saga before the EU Courts since 2013 and is singular in that its implementation depends on the exercise of a broad discretionary power by the tax authority.

3. At the Court's request, this Opinion will focus on the grounds of the appeals which raise highly complex legal questions and are important in terms of applying State aid rules, that is to say, questions relating to the method of analysing selectivity and to how the case-law on indirect advantages should be interpreted in order to determine the amount of the aid to be recovered from its direct beneficiaries.

I. Background to the dispute

4. Following complaints that the Spanish tax lease system as applied to certain finance lease agreements for the purchase of vessels ('the STL system') enabled shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, the European Commission, by Decision C(2011) 4494 final of 29 June 2011,[3] initiated the formal examination procedure under Article 108(2) TFEU.

5. During that procedure, the Commission found that the STL system had been used, until the date of that decision, in transactions that involved shipyards building ships, the acquisition of those ships by shipping companies and the financing of those transactions by means of an ad hoc legal and financial structure put in place by a bank. The STL system involved, for each ship order, a shipping company, a shipyard, a bank, a leasing company, an Economic Interest Grouping (EIG) set up by the bank and investors who purchased shares in the EIG. The EIG leased the ship from a leasing company as soon as construction of the ship began and would then charter it to the shipping company under a bareboat charter. The EIG would undertake to acquire the vessel at the end of the leasing contract while the shipping company would undertake to acquire it at the end of the bareboat charter contract. According to the decision at issue, that tax planning scheme was intended to generate tax benefits for the investors in a tax transparent EIG and transfer part of those benefits to the shipping company in the form of a rebate on the price of the ship.

6. The Commission found that the STL operations combined five measures provided for in a number of provisions of Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the consolidated version of the Law on Corporation Tax) of 5 March 2004 ('the TRLIS')[4] and of Real Decreto 1777/2004, por el que se aprueba el Reglamento del Impuesto sobre Sociedades (Royal Decree 1777/2004 approving the Regulation on Corporation Tax) of 30 July 2004 ('the RIS').[5] Those five measures were (i) the accelerated depreciation of leased assets under Article 115(6) of the TRLIS; (ii) the discretionary application of the early depreciation of leased assets under Article 48(4) and Article 115(11) of the TRLIS and Article 49 of the RIS; (iii) the provisions relating to EIGs; (iv) the tonnage tax system under Articles 124 to 128 of the TRLIS; and (v) the provisions of Article 50(3) of the RIS.

[3] OJ 2011 C 276, p. 5.

[4] BOE No 61 of 11 March 2004, p. 10951.

[5] BOE No 189 of 6 August 2004, p. 37072.

7. Under Article 115(6) of the TRLIS, the accelerated depreciation of the leased asset started on the date on which that asset became operational, that is to say, not before it was delivered to and started being used by the lessee. However, pursuant to Article 115(11) of the TRLIS, the Ministry of Economic Affairs could, on a formal request by the lessee, set an earlier start date for depreciation. Article 115(11) of the TRLIS imposed two general conditions for that early depreciation. The specific conditions applicable to EIGs were set out in Article 48(4) of the TRLIS. The authorisation procedure under Article 115(11) of the TRLIS was set out in Article 49 of the RIS.

8. The tonnage tax system was authorised in 2002 as State aid compatible with the internal market by virtue of the Community guidelines on State aid to maritime transport of 5 July 1997 (OJ 1997 C 205, p. 5), as amended on 17 January 2004 (OJ 2004 C 13, p. 3), by means of Commission Decision C(2002) 582 final of 27 February 2002 concerning State aid N 736/2001 implemented by Spain – Scheme for the tonnage based taxation of shipping companies (OJ 2004 C 38, p. 4). Under that system, undertakings entered in one of the registers of shipping companies which have obtained authorisation from the tax authority to that end are taxed, not on the basis of their profits and losses, but on the basis of tonnage. The Spanish legislation enables EIGs to be entered in one of those registers, even though they are not shipping companies.

9. Article 125(2) of the TRLIS established a special procedure for vessels already acquired at the time of entry into the tonnage tax system and for used vessels acquired when the undertaking was already benefiting from that system. When that system was applied normally, any capital gains were taxed under the tonnage tax system and the taxation of capital gains, even though it was delayed, was assumed to take place when the vessel was sold or dismantled. However, by way of derogation from that provision, Article 50(3) of the RIS provided that, when vessels were acquired through a call option as part of a leasing contract previously approved by the tax authorities, those vessels were deemed to be new rather than used vessels within the meaning of Article 125(2) of the TRLIS, without taking into consideration whether they had already depreciated. This meant that any capital gains were not taxed. That exception, which was not notified to the Commission, was only applied to specific leasing contracts approved by the tax authorities in the context of applications for early depreciation pursuant to Article 115(11) of the TRLIS, that is to say, in relation to newly built vessels that were leased and acquired through STL operations from – with one exception – Spanish shipyards.

10. By applying all those measures, the EIG collected the tax benefits in two stages. In the first stage, early and accelerated depreciation of the leased vessel was applied under the ordinary corporate income tax system, which generated heavy tax losses for the EIG which, because the EIGs are tax transparent, were deductible from the investors' own revenues in proportion to their shares in the EIG. Whereas that early and accelerated depreciation of the cost of the vessel is usually offset subsequently by increased tax payments when the vessel is completely depreciated or when the vessel is sold resulting in a capital gain, the tax savings resulting from the initial losses transferred to the investors were then safeguarded, at the second stage, as a result of the EIG switching to the tonnage tax system, which allowed exemption of the entire capital gain resulting from the sale of the vessel to the shipping company.

11. While it took the view that the STL scheme had to be characterised as a system, the Commission also examined each of the measures in question individually. By the decision at issue, it found that, among those measures, those resulting from Article 115(11) of the TRLIS, relating to the early depreciation of leased assets, those resulting from the application of the tonnage tax scheme to non-eligible undertakings, vessels and activities and those resulting from

Article 50(3) of the RIS ('the tax measures at issue') constituted State aid to the EIGs and their investors, unlawfully put into effect by the Kingdom of Spain since 1 January 2002 in breach of Article 108(3) TFEU. The Commission declared that the tax measures at issue were incompatible with the internal market, except to the extent that the aid corresponded to remuneration in conformity with the market for the intermediation of financial investors and to the extent that it was channelled to maritime transport companies eligible under the Maritime Guidelines. It decided that the Kingdom of Spain was obliged to put an end to that aid scheme in so far as it was incompatible with the internal market and to recover the incompatible aid from the EIG investors who benefited from it, and that those recipients should not be able to transfer the burden of recovery to other persons. 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 Commission Decision 2007/256/EC of 20 December 2006 on the aid scheme implemented by France under Article 39 CA of the General Tax Code – State aid C 46/04 (ex NN 65/04) (OJ 2007 L 112, p. 41).

II. Proceedings prior to the appeal and the judgment under appeal

12. By separate applications lodged at the Registry of the General Court on 25 September and 30 December 2013 the Kingdom of Spain, on the one hand, and Lico Leasing and PYMAR, on the other, brought an action for annulment of the decision at issue. The two cases were joined for the purposes of the judgment.

13. 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 annulled the decision at issue. On appeal lodged by the Commission, the Court of Justice then set aside, by judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591; 'judgment in *Commission* v *Spain and Others*'), the judgment of the General Court, referred the case back to the General Court, reserved the costs and held that the interveners in the appeal should bear their own costs.

14. In its judgment delivered following that referral, the General Court rejected the plea alleging that it had erred in its examination of the selectivity of the STL system by holding, in essence, that the fact that the tax authority had broad discretionary power to authorise early depreciation was sufficient to characterise the STL system as a whole as selective. The General Court also rejected the plea alleging infringement of the principles applicable to recovery as a result of the method used to calculate the incompatible aid, finding that the Commission had not erred when it ordered recovery of all the aid from the EIG investors even though part of the advantage had been transferred to third parties.

15. The General Court then dismissed the actions in their entirety.

III. Forms of order sought and procedure before the Court of Justice

16. By its appeal in Case C-649/20 P, the Kingdom of Spain requests the Court to set aside the judgment under appeal, to rule definitively on the dispute by annulling the decision at issue and to order the Commission to pay the costs.

17. The Commission claims that the Court should dismiss the appeal and order the Kingdom of Spain to pay the costs.

18. By their appeal in Case C-658/20 P, Lico Leasing and PYMAR request the Court to set aside the judgment under appeal, to annul the decision at issue and to order the Commission to pay the costs.

19. Caixabank and others seek the same forms of order.

20. The Commission claims that the Court should dismiss the appeal and order Lico Leasing, PYMAR and Caixabank and others to pay the costs.

21. By their appeal in Case C-662/20 P, Caixabank and others request the Court to set aside the judgment under appeal, to annul the decision at issue, in particular Article 1(1) of that decision and, in the alternative, Article 4(1), and to order the Commission to pay the costs.

22. Decal España SA, which was granted leave to intervene in support of the forms of order sought by Caixabank and others by order of the President of the Court of Justice of 2 August 2021, seeks the same forms of order.

23. The Commission claims that the appeal should be dismissed as inadmissible and, in the alternative, as unfounded, and that Caixabank and others and Decal España should be ordered to pay the costs.

24. By order of the President of the Court of Justice of 26 April 2022, the three cases (C-649/20 P, C-658/20 P and C-662/20 P) were joined for the purposes of the oral procedure and the judgment, in accordance with Article 54 of the Rules of Procedure of the Court of Justice.

25. The Kingdom of Spain, Lico Leasing, Caixabank and others, Decal España and the Commission presented oral argument at the hearing on 15 June 2022.

IV. The appeal

26. As requested by the Court, this Opinion will focus on the ground of appeal concerning the selectivity of the alleged aid (second ground in Case C-649/20 P, first ground in Case C-658/20 P and first ground in Case C-662/20 P) and on determination of the amount of aid to be recovered (fourth ground in Case C-649/20 P, fourth ground in Case C-658/20 P and third ground in Case C-662/20 P).

A. Second ground in Case C-649/20 P, first ground in Case C-658/20 P and first ground in Case C-662/20 P

1. Brief summary of the arguments of the parties

27. The second ground of appeal submitted by the Kingdom of Spain in Case C-649/20 P and the first ground submitted by Lico Leasing and PYMAR in Case C-658/20 P and by Caixabank and others in Case C-662/20 P take issue in several respects with how the selectivity of the STL system was analysed in the judgment under appeal.

2. Admissibility

28. The Commission is of the view that those grounds of appeal are inadmissible since they amount to bringing before the Court of Justice a dispute which is broader in scope than that which came before the General Court, since at no point in their actions at first instance did the appellants allege either that the decision at issue was vitiated by an error because the Commission had failed to examine the selectivity of the STL system using the three-step analysis or that the Commission erred by failing to define the reference framework or to make a comparison with operators in a situation comparable to that of the beneficiaries.

29. In my view that plea of inadmissibility must be rejected.

30. Although it is clear from well-established case-law that the jurisdiction of the Court of Justice in an appeal is limited to review of the findings of law on the pleas debated before the General Court,[6] it is apparent from equally settled case-law that an appellant is entitled, in its appeal, to put forward pleas arising from the judgment under appeal itself and which seek to criticise, in law, its correctness.[7]

31. Even assuming that the pleas at issue had not been considered at first instance, it is clear that, in paragraphs 87 to 102 of the judgment under appeal, the General Court examined whether the Commission had erred in law by declining to carry out a three-step analysis. As I will set out in greater detail in the following section of this Opinion, in that examination the General Court found, in essence, that it needed only to determine whether the tax authority had a discretionary power to authorise early depreciation, since the presence of that power was sufficient to render the STL system as a whole selective. It follows therefore that the grounds of appeal at issue stem from the judgment under appeal.

32. In the light of the foregoing, I suggest that the Court should find the second ground of appeal in Case C-649/20 P, the first ground in Case C-658/20 P and the first ground in Case C-662/20 P to be admissible.

3. Substance

(a) Failure to carry out a three-step analysis

33. It should be recalled, in the first place, that, in paragraph 87 of the judgment under appeal, the General Court found that in the decision at issue the Commission had not conducted the three-step analysis required to classify aid as selective, but had stated that the STL system, considered as a whole, was selective because, first, the tax authority had discretionary powers to grant the compulsory authorisation for early depreciation on the basis of imprecise conditions and, secondly, because the tax authority only authorised STL operations to finance seagoing vessels. In the same paragraph of the judgment under appeal, the General Court then noted that, at the hearing, the Commission stated that the fact that the tax authority had those discretionary powers was in itself sufficient to render the entire STL system selective. It therefore concentrated its analysis of selectivity, in paragraphs 88 to 102 of the judgment under appeal, on that latter legal issue.

6 Judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 55 and the case-law cited).

7 Judgment of 6 October 2021, *Sigma Alimentos Exterior* v *Commission* (C-50/19 P, EU:C:2021:792, paragraph 59 and the case-law cited).

34. As a preliminary remark, it should be noted that Caixabank (supported by Decal España) has criticised that interpretation of the decision at issue; it claims that the General Court accordingly found, in recital 156 of that decision, that the Commission had based the presence of selectivity on alternative lines of reasoning, that is to say, one based on the fact that the tax authority had discretionary powers and the other on the fact that the STL system was sectoral, with the effect that failure to conduct a three-step analysis had no bearing on the existence of those discretionary powers. By contrast, the Commission is alleged to have in fact presented those two factors not as two alternative lines of reasoning but as inseparable parts of a single line of reasoning that led it to find that the STL system was selective in sectoral terms. Caixabank and others therefore argue that, by substituting its own reasoning for that of the decision at issue, the General Court erred in law.

35. I believe that argument stems from an overly formalistic reading of the decision at issue.

36. The use of the terms 'first' and 'secondly' in paragraph 87 of the judgment under appeal does not mean, as Caixabank and others claim, that the General Court considered that the Commission found there to be selectivity on the basis of two alternative lines of argument.

37. On the contrary, that paragraph of the judgment under appeal faithfully reproduces, in essence, the legal reasoning that emerges from recital 156 of the decision at issue, according to which the selectivity of the STL system as a whole depends solely on the presence of discretion on the part of the tax authority hearing a request for authorisation for early depreciation. With reference to that discretionary power, which was based on the vague criteria contained in the rules on which the authority relied when granting authorisation for early depreciation, recital 156 noted that only the EIGs conducting STL system operations to finance seagoing vessels had access to all the tax advantages of the STL system. In consequence, according to the decision at issue, the mere existence of those discretionary powers was sufficient to find that the STL system was selective.

38. It flows from the foregoing that, far from substituting its own reasoning for that of the decision at issue, the General Court, in paragraph 87 of the judgment under appeal, merely availed itself of its discretion in interpreting that decision. [8]

39. The appellants' principal line of argument is that the General Court failed to establish the reference framework or to conduct the three-step analysis prescribed by the Court of Justice, which consists of identifying the ordinary tax system; determining whether the measures concerned are selective because they differentiate between operators in comparable factual and legal situations; and examining whether the Member State has shown that the measure was justified by the nature or scheme of the system of which it forms part.

40. The Kingdom of Spain claims inter alia that the General Court thereby disregarded the judgment in *Commission* v *Spain and Others*, because, in that judgment, the Court of Justice required the General Court to assess the selectivity of the STL system by means of the three-step analysis.

41. I am of the view, as is the Commission, that the Court of Justice did not intend to make that analysis a requirement.

[8] See judgment of 26 March 2020, *Larko* v *Commission* (C-244/18 P, EU:C:2020:238, paragraphs 104 and 105).

42. At the outset, the considerations on which the Kingdom of Spain relies in support of its thesis need to be contextualised. In its judgment in *Commission* v *Spain and Others*, the Court of Justice was responding to the claim that the General Court had wrongly held that tax advantages granted on the basis of investments in a particular asset – to the exclusion of other assets or other investments – were not selective vis-à-vis investors because the operation was available to any undertaking.

43. The Court of Justice stated in that respect, in paragraph 67 of that judgment, that the General Court's analysis was based on the incorrect premiss that the investors, and not the EIGs, could be classified as beneficiaries of the advantages arising from the tax measures at issue and that it was therefore by reference to the investors alone, and not the EIGs, that the condition relating to selectivity had to be examined. The Court of Justice then found, in paragraphs 68 to 71 of that judgment, that the General Court had also incorrectly assessed selectivity by holding that the advantages obtained by the investors which participated in the STL system transactions were not selective because they were available, on the same terms, to all undertakings without distinction. According to the Court of Justice, the General Court should have conducted the three-step analysis apparent from the judgment in *Commission* v *World Duty Free Group and Others*[9] by ascertaining, among other matters, whether the Commission had established that the tax measures at issue, by their practical effects, introduced differences in the treatment of operators where those operators were in a comparable factual and legal situation in view of the objective pursued by the STL system.

44. In my view, it is clear from those paragraphs of the judgment in *Commission* v *Spain and Others* that the three-step analysis was regarded as necessary because the General Court had identified the investors as the beneficiaries of the STL system. That understanding is supported by the fact that the Court of Justice makes a connection between that (incorrect) identification of the beneficiaries and the error of law due to the lack of a three-step analysis, as borne out by use of the term 'moreover' at the beginning of paragraph 68 of the judgment under appeal.

45. It should also be noted that, in paragraph 58 of the judgment in *Commission* v *Spain and Others*, the Court of Justice held that the General Court had erred in law by failing to examine whether the system for authorising early depreciation 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. It seems to me that the Court of Justice intended in that way expressly to invite the General Court to examine that question, and that the General Court fully took up that invitation in paragraphs 88 to 102 of the judgment under appeal.

46. Under those circumstances, the General Court cannot be found to have erred in law in respect of the method used to examine selectivity since it did in fact adhere to the framework for analysis set out in the preceding point.

47. As regards the appellants' more general arguments to the effect that the General Court did not find fault with the decision at issue for not containing a three-step analysis, it should be noted at the outset that the three-step analysis was designed to reveal selectivity concealed by advantageous tax measures that are apparently available to any undertaking. It consists in determining whether the application of such measures of general scope constitutes unjustified discrimination between those undertakings that satisfy the requirements to obtain the advantage and those which do not.

[9] Judgment of 21 December 2016 (C-20/15 P and C-21/15 P, EU:C:2016:981).

48. Under the Spanish legislation establishing the measures comprising the STL system, EIGs could request early depreciation; they could register in the special register of shipping companies – provided they were engaged in an activity involving providing third parties with a vessel under a bareboat charter – and in that way become entitled to pay their taxes under the tonnage tax scheme; lastly, they could enjoy the tax exemption for capital gains arising from the sale of the vessel.

49. It seems to me that the measures at issue can therefore be interpreted as belonging to the category of prima facie general measures. Specifically, it can be argued that those measures had the effect of giving a tax advantage to the EIGs simply because their activities were defined and structured in order to pursue such an advantage. That advantage was therefore in principle available to any economic operator wishing to pursue a tax optimisation strategy, and a three-step analysis therefore becomes necessary in order to determine whether it was selective.

50. I nevertheless believe that, in the present case, the STL system measures cannot be classified as prima facie general measures because the fact that an undertaking satisfied the criteria to be eligible for those measures did not systematically result in it enjoying the tax advantages under them. As has been seen above, those advantages were in fact conferred only subject to the undertakings having previously obtained authorisation for early depreciation, which was granted by the tax authority under broad discretionary powers.

51. Those discretionary powers, governed as they were by vague and completely non-objective criteria, enabled the tax authority to choose the beneficiaries of or the conditions for early depreciation, and therefore, in accordance with the consistent case-law of the Court of Justice,[10] the selectivity criterion can be found to be satisfied.

52. It follows, in my view, that a three-step analysis, including determination of the reference framework in tax matters (or 'normal taxation'), is not justified in the present case. It is only necessary to determine that framework in order to ascertain whether there is a provision that *derogates from* the taxation system applicable to all undertakings within its scope of application. It is clear to me that, where the national legislation gives the tax authority discretionary powers such as those at issue in the cases in the main proceedings, exercise of those powers will necessarily derogate from any and every previously established reference framework.

53. It should be added in that respect that, contrary to the appellants' assertions, the Court of Justice's judgment in *P* does not call for a three-step analysis where the grant of the tax advantage depends on an authorisation by the competent national authority. Although it appears that in that judgment the Court of Justice included its reasoning on discretion in the second step (existence of the derogation) and the third step (justification of a prima facie selective measure),[11] the fact remains that it did not determine the reference framework as a precondition for its analysis, despite doubts expressed by the national court in that respect in its decision to refer.[12]

54. In the light of the foregoing, the appellants' line of argument should be rejected as unfounded.

[10] See judgments of 26 September 1996, *France* v *Commission* (C-241/94, EU:C:1996:353, paragraph 23); of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraph 40); and of 29 June 1999, *DM Transport* (C-256/97, EU:C:1999:332, paragraph 27).

[11] Judgment of 18 July 2013, *P* (C-6/12, EU:C:2013:525; 'judgment in *P*'; paragraphs 22 to 27).

[12] See judgment in *P*, paragraph 13.

(b) Lack of an analysis of how the tax authority exercised its discretionary powers

55. In the second place, the appellants dispute the General Court's findings on the tax authority's discretionary powers to authorise early depreciation. They allege in particular that it failed to examine whether, in practice, those powers of the tax authority gave rise to certain operators being treated more favourably than others in a comparable situation, without justification.

56. At the outset, it is worth summarising the reasoning of the General Court in the relevant paragraphs of the judgment under appeal. In paragraph 88 of that judgment the General Court noted in particular, in the light of the case-law, that the existence of an authorisation system does not in itself imply the existence of a selective measure and that, on the other hand, where the competent authorities have a broad discretion to determine the beneficiaries of the measure or the conditions under which it is granted, the exercise of that discretion must be regarded as favouring certain undertakings or the production of certain goods in comparison with others apparently in a comparable factual and legal situation in the light of the objective pursued.

57. Next, after examining the laws and regulations governing the authorisation system at issue, in paragraphs 89 to 100 of the judgment under appeal, the General Court responded to a number of specific arguments advanced by the parties.

58. It found in particular, as the Commission had observed in the decision at issue, that the system was based on an undertaking obtaining prior authorisation – as opposed to merely notifying the administration – on the basis of vague criteria requiring interpretation by the tax authority, which had not published any guidelines. The General Court then noted that, under those laws and regulations, the tax authority could require all the information and documents it deemed appropriate, including information on the positive implications of the shipbuilding contracts for the economy and jobs in Spain. The General Court also emphasised that the tax authority was able not only to grant or refuse the authorisation, but also to set a different start date for the depreciation from that proposed by the taxpayer, without further clarification. The tax authority therefore had a significant margin of discretion.

59. The General Court lastly held, in paragraph 100 of the judgment under appeal, that the presence of those discretionary factors was such as to favour the beneficiaries over other taxpayers in a comparable factual and legal situation, since other EIGs or other undertakings, engaged in other sectors or having a different form, might not necessarily have benefited from early depreciation under the same conditions. It also stated that, since the provisions it was examining were intrinsically discretionary, it was irrelevant whether or not they were actually applied in a discretionary manner.

60. In contrast to the assertions of the Kingdom of Spain, it should be noted that the General Court did not draw any distinction between *de jure* and de facto selectivity. Far from making such a distinction, it intended simply to clarify that, since the STL system had been found to be selective on the basis of discretionary elements arising from the prior authorisation mechanism laid down by the applicable regulations, it was irrelevant whether or not that mechanism had in practice been applied in a discretionary manner.

61. The appellants vigorously disputed that finding by the General Court, both in their written submissions and at the hearing, on the ground that the mere fact that the legislation conferred discretionary power on the national authority did not mean that an aid scheme such as that in

the present case could, by virtue of the case-law, be assumed to be selective. Any different interpretation would, according to the appellants, be incorrect and would establish a precedent with systemic adverse effects on the law on State aid.

62. It should be noted at this stage that the appellants do not question the analysis according to which the STL system is an aid scheme. Although it is described in that way only rarely in the body of the decision at issue and in the judgment under appeal, since the Commission and the General Court prefer to refer to the STL system as a 'system' comprising various inextricably linked measures, it is clear from the operative part of that decision and from the reasoning followed in the judgment under appeal that it is classified as an aid scheme.

63. That classification must be taken into account in assessing the appellants' line of argument, based on the judgment in *P*, according to which in order, if appropriate, to classify the STL system as selective it is necessary to analyse the practical application of the tax measures comprising it.

64. It is worth briefly calling to mind the context of the case that gave rise to that judgment. The Finnish tax legislation at issue provided that losses sustained by a company were not deductible inter alia if, during the year in which they arose or thereafter, more than half of the company's shares changed ownership otherwise than by way of inheritance or will. The tax authority could nevertheless, following an application, authorise the offsetting of losses, in special circumstances, when it was necessary in order for a company to continue its activities. The 'special circumstances' justifying the grant of such an authorisation to derogate from the rules were listed in a guidance letter published by that authority and included a 'particular impact on employment'.

65. In its judgment, the Court of Justice noted, in essence, that, where the competent authority has a broad discretionary power enabling it to determine the beneficiaries or the conditions under which the financial assistance is granted on the basis of criteria unrelated to the tax system at issue, the exercise of that power must be regarded as favouring certain undertakings or the production of certain goods in comparison with others. It added that the exercise of that latitude is justified where it is limited by objective criteria which are not unrelated to that tax system. [13]

66. Given the diversity of the criteria governing the power of the Finnish tax authority, which were all objective and, with the exception of the criterion relating to a 'particular impact on employment', inherent in the nature of the tax system under examination, the Court of Justice considered it necessary to clarify in its judgment that selectivity presupposes 'not only familiarity with the content of the provisions of relevant law but also requires examination of their scope on the basis of *administrative and judicial practice* and of information relating to the ambit *ratione personae* of those provisions'. [14]

67. That finding has to my mind at the very least been superseded by the judgment in *Commission* v *Fútbol Club Barcelona*. [15]

[13] Judgment in *P*, paragraphs 24 to 27.

[14] Judgment in *P*, paragraph 20. Emphasis added.

[15] Judgment of 4 March 2021, *Commission* v *Fútbol Club Barcelona* (C-362/19 P, EU:C:2021:169; 'judgment in *Commission* v *Fútbol Club Barcelona*'; paragraph 86).

68. In that judgment the Court of Justice held that, in relation to an aid scheme, the Commission must perform its examination in the light of Article 107(1) TFEU, with reference to the time of adoption of the scheme in question and by carrying out an *ex ante* analysis.[16] Specifically, according to the Court of Justice, the Commission must prove that a tax scheme 'is such as to favour its beneficiaries, by ascertaining that the scheme, taken as a whole, is, given its particular characteristics, capable of resulting, at the time of its adoption, in the tax liability being lower than it would have been if the general tax regime had been applied'.[17] The Court stated that the Commission's examination under Article 107(1) TFEU cannot favour Member States which pay aid in breach of Article 108(3) TFEU to the detriment of those which, in accordance with that provision, notify the aid at the planning stage and refrain from implementing it pending the final decision adopted by the Commission. If the Commission was indeed required, in relation to an aid scheme based on a discretionary authorisation, to verify whether a selective advantage had arisen on the basis of an assessment of the tax authority's practice, the Member State concerned would not be able to notify the measures under such a scheme at the planning stage. It would instead have to wait until the scheme was implemented by the tax authority, which would necessarily involve unlawful aid being granted before notification.[18]

69. That being so, requiring the Commission to assess aid schemes *ex post*, as per the interpretation relied on by the appellants, runs counter to that case-law, which seeks to protect one of the fundamental features of the system of control of State aid, that is to say, the notification requirement put in place by the Treaty.[19]

70. It is therefore incorrect to criticise the General Court, as the Kingdom of Spain does in its appeal, for failing to indicate any administrative practice showing that the fact that the tax authority was able to set a different start date for early depreciation specifically benefited the EIGs. In fact, as I stated above, no reference to an administrative practice was necessary because the judgment under appeal established that the tax authority had a broad discretionary power to authorise early depreciation.[20]

71. At the hearing, Caixabank and others submitted that, in contrast to what emerges from the judgment under appeal, an interpretation according to which the mere existence of a broad discretionary power renders an aid scheme selective does not inevitably follow from the judgment in *DM Transport*.[21] On Caixabank's construction of that judgment, the Court of Justice meant simply that the existence of that power *may* render selective a measure which is prima facie general in nature. It should be noted, however, that in the case that gave rise to that judgment, the Court of Justice had left it to the referring court to determine whether the power of the competent national body to grant payment facilities for the social security contributions under Belgian law

16 Judgment in *Commission* v *Fútbol Club Barcelona*, paragraph 86.

17 Judgment in *Commission* v *Fútbol Club Barcelona*, paragraph 87.

18 See judgment in *Commission* v *Fútbol Club Barcelona*, paragraphs 92 and 93.

19 See judgment in *Commission* v *Fútbol Club Barcelona*, paragraphs 90 and 91.

20 Similarly, it is incorrect to criticise the General Court, as the Kingdom of Spain also does, for failing to indicate a regulatory provision proving that the ability of the tax authority to set a different start date for early depreciation specifically benefited the EIGs. As I indicated above, it was not necessary to refer to a regulation to that effect because the legal reasoning followed in the judgment under appeal is not based on the premiss that there is *de jure* selectivity.

21 Judgment of 29 June 1999 (C-256/97, EU:C:1999:332).

was discretionary and, *if it was not*, to determine whether those payment facilities were general or selective in character.[22] To my mind, that finding is sufficient reason to reject the interpretation suggested by Caixabank and others.

72. Lastly, it seems clear to me that, in contrast to the assertions of the Kingdom of Spain in its appeal, interpreting selectivity in the way I propose does not involve any reversal of the burden of proof – in the sense that, were the Court of Justice to uphold that interpretation, the Commission would no longer be required to prove that a tax scheme is selective because of its effects. On the contrary, it is apparent from the interpretation adopted by the General Court in the judgment under appeal that the Commission must prove that the national authority has discretionary power arising from the relevant rules because, according to the case-law, the effects of exercise of that power are necessarily selective.

73. Nor does the case-law cited by Caixabank and others in its appeal, that is to say, the judgments delivered by the General Court and the Court of Justice in *MOL* v *Commission*[23] and those of the General Court in a number of cases on advance tax rulings by certain national tax authorities, in my view support the appellants' position.[24]

74. In relation to *MOL* v *Commission*, whilst admittedly the EU Courts have penalised the absence of a factual analysis of the exercise by national authorities of their discretionary power, in my Opinion in *Ireland* v *Commission* I highlighted the difficulty of transposing the criteria that emerge from that case to other situations, since in order to apply those criteria the legal mechanism examined must be classified as an 'optional provision of national law prescribing the imposition of additional charges', which does not obtain in the present case.[25] In the cases on advanced tax rulings, the General Court found that a factual analysis of exercise of the discretionary power was necessary solely because those rulings were classified as individual measures. As I indicated above, the fact that the STL system is an aid scheme is not at issue in the present case.

75. Under those circumstances, the second line of argument advanced by the appellants should in my view be rejected as unfounded.

(c) Lack of an examination of the selectivity of the STL system as a whole

76. In the third place, the appellants take issue with the General Court for finding the STL system to be selective, in paragraph 101 of the judgment under appeal, after examining only one of its constituent measures, and therefore without analysing the other measures comprising the STL system and the alleged effects of those measures in combination.

22 Judgment of 29 June 1999, *DM Transport* (C-256/97, EU:C:1999:332, paragraphs 27 and 28); according to the Court of Justice, the discretionary power in question must enable that body 'to choose the beneficiaries or the conditions under which the financial assistance is provided'. In that respect, see also judgments of 26 September 1996, *France* v *Commission* (C-241/94, EU:C:1996:353, paragraphs 23 and 24), and of 1 December 1998, *Ecotrade* (C-200/97, EU:C:1998:579, paragraphs 39 and 40).

23 Judgment of 12 November 2013, *MOL* v *Commission* (T-499/10, EU:T:2013:592), confirmed by the judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362).

24 Judgments of 24 September 2019, *Netherlands and Others* v *Commission* (T-760/15 and T-636/16, EU:T:2019:669); of 24 September 2019, *Luxembourg and Fiat Chrysler Finance Europe* v *Commission* (T-755/15 and T-759/15, EU:T:2019:670); and of 15 July 2020, *Ireland and Others* v *Commission* (T-778/16 and T-892/16, EU:T:2020:338).

25 See my Opinion in *Ireland* v *Commission* (C-898/19 P, EU:C:2021:1029, point 192).

77. It should be noted in that regard that in the decision at issue the Commission first examined whether the measures constituting the STL system were selective, and then the selectivity of the STL system as a whole. In recital 156 of that decision, it took the view that the advantage afforded by the system was selective because it was subject to the discretionary powers of the tax authority in the procedure for prior authorisation of early depreciation and because application of other measures constituting the STL system, namely the tonnage tax regime and the non-taxation of capital gains, depended on the prior authorisation by that authority.

78. In paragraph 101 of the judgment under appeal the General Court held that, since one of the measures making it possible to benefit from the STL system as a whole was selective, that is to say, authorisation of the early depreciation, the Commission did not err when it found, in the decision at issue, that the system as a whole was selective.

79. For my part, I fail to see how the General Court's finding, however succinct it may be, lacks rigour and is therefore vitiated by an error of law, as the Kingdom of Spain contends. Given the relationship of dependency – which was identified in the decision at issue and not disputed by the appellant – linking application of the tonnage tax regime and the non-taxation of capital gains to the prior authorisation for early depreciation, the veritable key to unlocking the tax advantages flowing from the STL system, I believe it is clear that the appellants' criticism that selectivity was not examined in terms of the effects produced jointly by the measures constituting the STL system cannot be upheld. It follows that that argument must be rejected as unfounded.

(d) Lack of any examination of the comparability of the situations

80. In the fourth place, the Kingdom of Spain and Caixabank and others assert that the General Court erred in law in paragraph 100 of the judgment under appeal by failing to compare the factual and legal situations of the undertakings granted the benefit of the measure in question with those of the undertakings which were not and that, accordingly, the decision under appeal is vitiated by a failure to state reasons in that respect.

81. It emerges from a combined reading of those arguments that they are based on the premiss that the Commission should have regarded the authorisation for early depreciation as a prima facie general measure, with the effect that it could only be found to be selective following a three-step analysis. Nevertheless, as I have set out in this Opinion, that measure, which governs access to the STL system and to the ensuing tax benefits, gives the tax authority discretion when granting that authorisation. According to the case-law, that characteristic means that the examination of selectivity must be different, concerning solely the extent of the discretionary power of the competent national authority. If that power enables the authority to choose the beneficiaries and the conditions under which that financial assistance is granted, exercise of that power, again according to the case-law, will necessarily favour those beneficiaries compared with any other undertaking in a comparable factual and legal situation, and there is no requirement to identify such favourable treatment or to establish that the situations are effectively comparable, as the Kingdom of Spain as well as Caixabank and others claim there is.

82. It follows that the General Court's finding in paragraph 100 of the judgment under appeal contains no error of law and is not vitiated by any failure to state reasons. The General Court was not obliged to set out why the factual and legal situation of the EIGs, which were subject to the ordinary tax rules relating to depreciation, or that of undertakings engaged in a sector other than shipping was comparable to the situation of the EIGs that benefited from the STL system. The General Court established to the requisite legal standard that the STL system was selective when,

in paragraph 100 of the judgment under appeal, it found that the discretionary factors in the STL system were 'such as to' favour the beneficiaries of the measures at issue over any other taxpayer in a comparable factual and legal situation.

83. Having regard to the foregoing, it is necessary in my view to find those arguments to be unfounded.

(e) Incorrect assessment of the extent of the tax authority's discretionary power and of its justification on the basis of the 'nature or the general scheme of the system'

84. Lastly, the Kingdom of Spain submits that the General Court erred by finding the procedure for authorising early depreciation to be discretionary and that it contained no objective conditions.[26] Since that argument concerns the General Court's assessment of the discretion available to the tax authority when granting that authorisation under the national legislation, there is in my view no doubt that it must be found to be inadmissible. Indeed, it is worth noting that according to consistent case-law, with respect to the assessment, in the context of an appeal, of the General Court's determinations on national law, the Court of Justice has jurisdiction only to determine whether that law was distorted, and that a distortion must be obvious from the documents on the Court's file, without there being any need to carry out a new assessment of the facts and the evidence.[27] However, the Kingdom of Spain has not claimed any such distortion of national law. In particular, it has neither argued nor established that the General Court made findings 'manifestly' at odds with the content of Article 49 of the RIS or that it ascribed to that article a scope that it 'manifestly' does not have in the light of other material in the file.[28]

85. The Kingdom of Spain also criticises the General Court, in essence, for rejecting the argument that the margin of discretion available to the tax authority in the present case was justified 'by the nature or the general scheme of the system', when it stated that the wording of Article 49(6) of the RIS, because it enables the tax authority to set a different start date for the depreciation from that proposed by the taxable person, does not ensure that it is used only in anti-fraud situations.[29]

86. That appellant states in that respect, in essence, that, if the tax authority were not able to set a different date, it would be impossible for the lessee under a finance lease to begin recovering the cost of the asset before it was delivered, thereby distorting the financial symmetry of the operation because the lease terms provided that payments had to be made before the asset was made available to the lessee. I fail to see how that assertion calls into question the findings made by the General Court in paragraph 97 of the judgment under appeal, to the effect that the wording of Article 49(6) of the RIS does not ensure that the article is used *only* in anti-fraud situations. It should be noted in that respect that the General Court also found, in paragraph 94 of the judgment under appeal, that the characteristics of the authorisation system, as they were defined in Article 115(11) and Article 49 of the RIS, did not confine the authority's discretionary power to determining whether conditions laid down for tax purposes had been satisfied. Since it is clearly apparent that this argument is unfounded, I suggest that it should be rejected.

[26] I believe that the appellant is referring to paragraphs 89 to 96 of the judgment under appeal.

[27] See judgments of 9 November 2017, *TV2/Denmark* v *Commission* (C-649/15 P, EU:C:2017:835, paragraphs 49 and 50); of 20 December 2017, *Comunidad Autónoma de Galicia and Retegal* v *Commission* (C-70/16 P, EU:C:2017:1002, paragraph 72); and of 20 September 2018, *Spain* v *Commission* (C-114/17 P, EU:C:2018:753, paragraph 75).

[28] Judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck* (C-524/14 P, EU:C:2016:971, paragraph 21), and of 20 December 2017, *Spain* v *Commission* (C-81/16 P, EU:C:2017:1003, paragraph 43).

[29] The Kingdom of Spain is clearly referring to paragraph 97 of the judgment under appeal.

(f) Conclusion

87. Since all the arguments should be rejected as unfounded, I propose that the Court should reject the second ground of appeal in Case C-649/20 P, the first ground in Case C-658/20 P and first ground in Case C-662/20 P in their entirety.

B. Fourth ground of appeal in Case C-649/20 P, fourth ground in Case C-658/20 P and third ground in Case C-662/20 P

1. Brief summary of the arguments of the parties

88. By the fourth ground of appeal in Case C-649/20 P and Case C-658/20 P and the third ground of appeal in Case C-662/20 P, submitted in the event that none of the preceding grounds is upheld, the appellants claim that, in paragraphs 219 and 220 of the judgment under appeal, the General Court erred when it rejected the plea submitted by Lico Leasing and PYMAR and supported in particular by Caixabank and others, alleging infringement of the principles applicable to recovery, as a result of the method used to calculate the incompatible aid which, according to the appellants, had the result that all the aid was recovered from the EIG investors, whereas they in fact benefited from only 10% to 15% of the advantage arising from the STL system, the remainder of which had been transferred to the shipping companies.

89. Under those grounds, the appellants argue that (i) the General Court disregarded the reasoning of the judgment in *Commission* v *Spain and Others*, taking the view that the investors were direct beneficiaries of the aid; (ii) that recovering all the aid from the EIG investors is contrary to the principle that the recovery of aid does not constitute a penalty; (iii) that the General Court disregarded both the fact that the STL system was a system comprising several measures and the contractual aspects of the system, and that it took into consideration only the tax effects of certain measures instead of having regard solely to the advantage actually obtained by the EIG investors by virtue of the STL system as a whole; and (iv) that, since it was known that by resorting to the STL system the EIG investors were legally bound to transfer 90% of the tax advantage to other operators, the Commission and the General Court were wrong to find that the transfer of the advantage was not attributable to the State on the ground that the advantage was transferred by means of private contracts.

90. The Commission is of the view that the grounds submitted by the Kingdom of Spain and by Lico Leasing and PYMAR are inadmissible because they were not submitted at first instance and, in any event, it refutes all the arguments of the appellants summarised above.

2. Admissibility

91. On the plea of inadmissibility relating to the fourth ground submitted by Lico Leasing and PYMAR in Case C-658/20 P, the Commission argues that, by that ground, the Court of Justice has been asked to hear a case of wider ambit than that which came before the General Court, because in their appeal the appellants are for the first time disputing the identity of the beneficiaries of the aid at issue.

92. That claim is not, in my view, convincing. The two parts into which that ground is divided concern the existence of beneficiaries subsequent to those identified in the decision at issue, purely in order to show that the General Court erred in law by upholding the decision at issue in so far as concerns the recovery of the *entirety* of the aid from the EIG investors. In doing so, Lico Leasing and PYMAR are therefore not disputing the identity of the beneficiaries as established in the decision at issue.

93. With regard to the plea of inadmissibility concerning the Kingdom of Spain's fourth ground of appeal in Case C-649/20 P, the Commission contends that before the General Court the Kingdom of Spain did not rely on any plea questioning the identity of the beneficiaries or claiming that the principles governing recovery preclude an order that all the aid be recovered from the EIG investors. I will merely recall here that, according to now well-established case-law, where the General Court has joined two cases and given a single judgment which answers all the pleas submitted by the parties to the proceedings before the General Court, each of those parties may criticise the reasoning concerning pleas which, before the General Court, were raised only by the applicant in the other case.[30] In the present case, the General Court first joined Cases T-515/13 RENV and T-719/13 RENV and then gave a single judgment in which it ruled on all the pleas submitted by the parties to the proceedings, which means that the Kingdom of Spain is entitled to criticise the reasoning of the General Court on the third plea raised by Lico Leasing and PYMAR in their action at first instance.

94. In the light of the foregoing, I propose that the Court of Justice should find the fourth ground in Case C-658/20 P and the fourth ground in Case C-649/20 P to be admissible.

3. Substance

95. It should be recalled that while Lico Leasing and PYMAR allege an error in law in the response by the General Court to the third plea raised in their application, in paragraphs 219 and 220 of the judgment under appeal, the Kingdom of Spain claims that the response is also vitiated by a failure to state reasons. It seems to me that the Court of Justice must assess compliance with the General Court's obligation to state reasons as a precondition for examining any error in law.

96. By that plea, Lico Leasing and PYMAR had argued that the decision at issue infringed the general principles governing the recovery of State aid because it appeared to order the recovery of all the aid at issue from the investors, whereas part of the advantage was systematically transferred to the shipping companies. In their view, the order for recovery should only have covered the aid from which the investors actually benefited.

97. In paragraphs 219 and 220, the General Court responded as follows to that plea:

'219. Given that the Commission found in the present case that – which is not at issue in these proceedings – the shipping companies were not the beneficiaries of the aid, it follows that the order for recovery related solely and in its entirety to the investors, the sole beneficiaries of the whole of the aid according to the contested decision, on account of the transparency of the EIGs. According to its own reasoning, the contested decision was therefore correct to order recovery of all the aid from the investors, even though they had transferred part of the advantage to other operators, because those other operators were

[30] See, among others, judgment of 14 October 2014, *Buono and Others* v *Commission* (C-12/13 P and C-13/13 P, EU:C:2014:2284, paragraph 52 and the case-law cited).

not regarded as beneficiaries of the aid. According to the contested decision, it was the investors that actually benefited from the aid since the applicable rules did not require them to transfer part of the aid to third parties.

220. The order for recovery cannot therefore be regarded as a penalty on the investors or as a measure distorting competition in favour of their competitors, as Bankia and others claim.'

98. I confess that I have failed to detect in either of those paragraphs any review of the legality of the decision at issue in respect of calculation of the amount of aid to be recovered from the investors, the subject matter of the third plea raised by Lico Leasing and PYMAR before the General Court. It is in fact clear that, although that plea was not seeking to question the identity of the beneficiaries as established in the decision at issue, in order to respond to it, the General Court was obliged to examine whether the part of the tax advantage transferred to the shipping companies could be regarded as an indirect advantage resulting from application of the STL system.

99. Instead, it appears to me clear from reading those paragraphs of the judgment under appeal that when the General Court rejected the plea of Lico Leasing and PYMAR it merely stated that it was not disputed that the shipping companies were not the beneficiaries of the aid in question and recalled the reasoning of the decision at issue on why recovery from the investors alone was justified.

100. It should be added that the General Court was not prevented from carrying out the analysis necessary in accordance with that plea as a result of the findings of the Court of Justice in its judgment in *Commission* v *Spain and Others*. In paragraph 47 of that judgment, the Court of Justice stated that the Commission's decision to order the recovery of the incompatible aid from the EIG investors alone did not affect the conclusion that the General Court had wrongly held that the EIGs could not be the beneficiaries of the tax measures at issue. In the same paragraph the Court of Justice went on to clarify that it was not required to determine the legality of that order for recovery in the appeal before it.

101. The judgment under appeal is therefore, in my view, vitiated by a failure to state reasons.

102. In the light of the foregoing, I propose that the Court of Justice should find that by failing to reply to the third plea in the action brought by Lico Leasing and PYMAR, the General Court infringed its obligation to state reasons. Under those circumstances, the judgment under appeal should be set aside in part.

V. The action before the General Court

103. Under the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded and the Court of Justice quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

104. In my view the state of the proceedings does so permit in the present case since, first, the Court of Justice has all the factual elements necessary to make a decision and, secondly, all the elements of the proceedings were subject to an exchange of arguments before the General Court.

It must also be borne in mind that this veritable legal saga started as long ago as 25 September 2013 and it is therefore vital, in the interests of the litigants, to avoid the case being once again referred back to the General Court.

105. On the first plea in law raised by Lico Leasing and PYMAR before the General Court, as summarised in point 97 of this Opinion, it must be recalled at the outset that the obligation on the Member States to abolish, through recovery, aid considered by the Commission to be incompatible with the single market has as its purpose, according to settled case-law, to restore the situation as it was before the aid was granted. [31]

106. That objective is attained once the aid in question, together, where appropriate, with default interest, has been repaid by the recipient, or, specifically, by the undertakings which actually enjoyed the benefit of it. [32] The foregoing involves determining which undertakings have benefited from the economic effects of the aid being granted.

107. Accordingly, where one undertaking has transferred part of the advantage arising from a State measure to a different entity, the exact amount of the aid to be recovered from that undertaking must be determined in such a manner that it loses only the advantage that it enjoyed over its competitors and that the situation as it was before the aid was paid is restored. Were a greater amount to be recovered, the former competitive position of the aid recipient would be weakened and the recovery would therefore constitute a penalty and in consequence be incompatible with the general principle governing recovery as set out above.

108. In the present case, it is necessary to determine whether the method designed by the Commission in the decision at issue led to the investors having to repay a greater amount than the amount from which they actually benefited as a result of the grant of the aid, since the investors systematically transferred part of that amount to the shipping companies.

109. It should be noted that as a general rule the recovery of aid is limited to the direct benefits of the grant of aid and does not extend to any indirect benefits of that grant. The Court of Justice has nevertheless held, in a line of cases, that an advantage can be conferred on undertakings other than those to which the State resources are directly transferred.

110. Those judgments need to be briefly examined in order to identify the factors on the basis of which an 'indirect advantage' of that kind can be taken into account.

111. In *Germany* v *Commission*, [33] the Court of Justice was required to examine a tax concession scheme, established by the income tax law, under which tax could be offset by any taxpayer that had acquired holdings in capital companies with no more than 250 employees and having both their registered office and their central administration in the new *Länder* or in Berlin (Germany). The Court of Justice held, in essence, that the undertakings referred to in those provisions enjoyed an indirect advantage since the potential acquisition of holdings by investors in those undertakings on conditions which were in tax terms more advantageous had its origin in the waiver by the Member State of tax revenue which it would normally have received. It then added

[31] Judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 89 and the case-law cited).

[32] Judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 90 and the case-law cited.

[33] Judgment of 19 September 2000 (C-156/98, EU:C:2000:467).

that the fact that investors then take independent decisions did not mean that the connection was eliminated 'since, in economic terms, the alteration of the market conditions which [gave] rise to the advantage [was] the consequence of the public authorities' loss of tax revenue'. [34]

112. The judgment in *Netherlands* v *Commission* [35] concerned legislation establishing a subsidy for Dutch operators of service stations located, in particular, along the German border in order to mitigate the disparity between the levels of excise duty levied in the Netherlands and those in Germany. The Court of Justice held that the large oil companies in that way enjoyed an indirect advantage because some exclusive purchasing agreements between those companies and those operators contained 'price management system clauses' which stipulated, in essence, that the oil company bore part of the cost of the forecourt discount granted by the operator in so far as market conditions made an adjustment of those discounts desirable or necessary. According to the Court, that indirect advantage stemmed from the aid granted under the Netherlands legislation inasmuch as that legislation rendered it unnecessary, in practice, to invoke the price management system clauses. [36]

113. In *Mediaset* v *Commission*, the General Court and the Court of Justice found that Italian legislation establishing subsidies for consumers to purchase digital terrestrial decoders conferred an indirect advantage on terrestrial broadcasters because, by creating an incentive for those consumers to switch from the analogue to the digital mode, that legislation limited the costs that those broadcasters would have had to bear in order to develop an audience and therefore enabled them to consolidate their position on the market. [37]

114. I note that, in paragraph 116 of its Notice on the notion of State aid, the Commission took the view that it is clear from the foregoing case-law that, in order to determine whether there is an indirect advantage, 'the foreseeable effects of the measure should be examined from an *ex ante* point of view' and that 'an indirect advantage is present if the measure is designed in such a way as to channel its secondary effects towards identifiable undertakings or groups of undertakings'. [38]

115. While I agree with the Commission's interpretation, I also conclude from that case-law that the presence of an indirect advantage arises from the content of the applicable provisions (*Germany* v *Commission*) or from the content of those provisions in conjunction with the existing factual context (*Netherlands* v *Commission* and *Mediaset* v *Commission*). According to the Court of Justice, those situations alone warrant a finding that the secondary economic effects of the waiver by the Member State of tax revenue which it would normally have received have been channelled towards the indirect beneficiaries of the scheme in question.

116. The foregoing also implies, to my mind, that the fact that the transfer of some or all of the advantage to the indirect beneficiaries is not a legal requirement does not in the slightest mean, in itself, that such a transfer cannot be attributed to the State.

[34] Judgment of 19 September 2000, *Germany* v *Commission*, (C-156/98, EU:C:2000:467, paragraphs 26 and 27).

[35] Judgment of 13 June 2002 (C-382/99, EU:C:2002:363).

[36] Judgment of 13 June 2002, *Netherlands* v *Commission* (C-382/99, EU:C:2002:363, paragraph 62).

[37] Judgments of 15 June 2010, *Mediaset* v *Commission* (T-177/07, EU:T:2010:233, paragraph 62), and of 28 July 2011, *Mediaset* v *Commission* (C-403/10 P, not published, EU:C:2011:533, paragraphs 76 and 77).

[38] Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ 2016 C 262, p. 1).

117. At this stage it is necessary to determine whether the content of the measures constituting the STL system, alone or in the factual context of which it forms part, shows that the STL system is designed so that it channels the secondary effects towards the shipping companies.

118. In order to answer that question it is necessary first of all to consider the unusual configuration of the STL system, which was composed of a series of tax measures whose application depended on the exercise of a discretionary power by the tax authority when granting a prior administrative authorisation, and of a chain of contracts including, ultimately, a contract under which the EIGs would lease a vessel to the shipping companies under a bareboat charter and the shipping companies would undertake to purchase that vessel on expiry of the charter period.

119. That being so, I consider that the contractual structure of the STL system forms part of the existing factual context for the purposes of the case-law examined above. Intervention by the State by granting authorisation for early depreciation, the veritable key to unlocking the tax advantages of the STL system, necessarily comes after that structure being put in place.

120. Were it to be shown that such a contractual structure as a whole, including the contract between the EIGs and the shipping companies, was included in the assessment carried out by the tax authority with a view to potentially granting that authorisation, it would follow that the economic advantage obtained by the shipping companies had its origin in the waiver by the Spanish State of tax revenue owed to it.

121. However, I believe that assessment cannot be carried out without regard for the case-law context in which it occurs. In my view, the case-law on indirect advantages invites us to adopt Cicero's maxim *summum ius summa iniuria* (excessive justice leads to injustice) and to reject any superfluous formalism in order to ensure that the legal interpretation reflects the economic reality. The underlying rationale of that approach is the need to prevent any attempt to circumvent the principles governing the recovery of State aid as set out above.

122. There is undeniably such a risk in the present case. Merely by establishing an aid scheme, such as the STL system, that gives the tax authority discretionary power to choose the beneficiaries and the conditions under which the financial assistance is granted, the Member States could conceal the existence of indirect beneficiaries and thereby prevent some or all of that aid being recovered from those beneficiaries.[39] I note that the administrative practice relating to the authorisation for early depreciation cannot be taken into account in the examination under Article 107 TFEU since by definition it occurs subsequently to adoption of the STL system.[40]

123. To my mind, the foregoing means that the fact that the EIGs have no legal obligation to transfer the advantage to the shipping companies and that the administrative practice relating to the grant of authorisations for early depreciation cannot be taken into consideration should not

[39] I note in that respect that, according to consistent case-law, classification as State aid must not be contingent on the regulatory technique used by the Member States. See, in particular, judgment of 6 October 2021, *World Duty Free Group and Spain* v *Commission* (C-51/19 P and C-64/19 P, EU:C:2021:793, paragraph 95).

[40] It should be noted that, in recitals 135 and 136 of the decision at issue, the Commission emphasised that it appeared from the examples provided by the Spanish authorities that the requests for authorisation filed by EIGs described the whole STL in detail, provided all the relevant contracts and included annexes containing a detailed calculation of the overall tax advantages and of how they would be shared between the shipping company, on the one hand, and the EIGs or their investors, on the other (or the information necessary to perform that calculation).

necessarily preclude a finding that the economic advantage obtained by the shipping companies as a result of the investors in an EIG being paid a purchase price for the vessel including a 20% to 30% discount was attributable to the Spanish State.

124. The need, highlighted above, to prevent circumvention of the principles governing the recovery of State aid suggests that any such interpretation should indeed be rejected, and it should be acknowledged that the link between an indirect advantage and State intervention can be inferred from a body of circumstantial evidence surrounding the adoption and operation of the STL system.

125. First, the Commission itself describes the STL system, in recital 12 of the decision at issue, as 'a tax planning scheme generally organised by a bank in order to generate tax benefits for investors in a tax transparent EIG and *transfer part of these tax benefits to the shipping company in the form of a rebate on the price of the vessel*. The rest of the benefits are kept by the investors in the EIG as remuneration for their investment'. [41] The transfer therefore clearly appears to be an integral part of the STL system and to be one of its objectives, and the part of the tax advantage kept by the EIG investors was clearly conceived as remuneration that was essential to ensuring their participation in the system as intermediaries.

126. Secondly, it should be noted that the Spanish rules leave a margin so that when the tax authority exercises its discretionary power relating to the authorisation for early depreciation, which is essential to unlocking the tax advantages arising from the STL system, it can take into consideration the terms of the contractual relationship between the EIGs and the shipping companies. According to Article 49(4) of the RIS, the Ministry of Economic Affairs finance department responsible for the authorisation procedures could in fact request all the information and documents it considered necessary, which meant that the file submitted to the tax authority could include all the documentation relating to that contractual relationship. It should be emphasised in that respect that the Commission accepted in recital 169 of the decision at issue that, with a view to deciding on the grant of authorisation for early depreciation, the Spanish tax authority assessed the economic impact of the 'overall' transaction.

127. Thirdly, I believe it is necessary to emphasise that the contractual structure was set up at the initiative of the shipping companies, which reached agreement with a shipyard on a vessel to be built in consideration for a purchase price including a rebate corresponding to 85% to 90% of the tax advantage resulting from application of the measures comprising the STL system, and ended once those shipping companies paid that reduced price as part of their contractual relationship with the EIGs. Under those circumstances, it seems to me reasonable to find that the examination carried out by the tax authority for the purposes of granting authorisation for early depreciation did not disregard the contract between the EIGs and the shipping companies, since it would otherwise have ignored the rationale of the contractual structure which was, at the very least, the prerequisite for enjoying the tax advantages arising under the STL system.

128. This being so, since the Commission's assessment is limited to one segment of that contractual structure, it cannot to my mind satisfactorily reflect the economic effects of the STL system. That observation is supported by the fact that, both in its response and at the hearing, the Commission argued that the circumstances of the present case are similar to those of *Commission* v *Aer Lingus and Ryanair Designated Activity*. [42]

[41] Emphasis added.

[42] Judgment of 21 December 2016 (C-164/15 P and C-165/15 P, EU:C:2016:990).

129. In the case which gave rise to that judgment, the Court of Justice was required to assess an Irish tax on airlines. That tax imposed two separate rates: EUR 2 per passenger in the case of a flight to an airport located no more than 300 km from Dublin (Ireland) airport and EUR 10 per passenger in all other cases. The tax could be passed on in the ticket price offered to passengers. In its judgment, the Court held that restitution of the advantage obtained by applying the lower rate required the tax authority to recover from the beneficiary airlines the difference between the amount of the tax that should have been paid for each flight operated and the amount actually paid, and any economic benefit enjoyed by those airlines as a result of 'exploiting' that advantage were irrelevant for the purposes of recovery of the aid. [43] The underlying reason for that conclusion was that any passing on of the advantage in the ticket price offered to passengers was entirely a matter of the commercial choice made by the airlines in receipt of the aid in question.

130. Transposing that outcome to the case at hand would be tantamount to finding that the transfer by the EIG investors to the shipping companies of part of the tax advantage obtained from application of the STL system was the result of a commercial choice by those investors, which had decided to exploit that advantage by offering a sale price for the vessel that included a rebate of approximately 30%. There is no doubt in my mind that such an interpretation is incorrect.

131. Indeed, as the Kingdom of Spain asserted at the hearing, the attractive price at which the EIGs sold vessels to the shipping companies was not the outcome of the EIGs genuinely exercising contractual autonomy, since they were operating in a configuration in which the profitability of the sale of the vessel was predetermined by the contractual structure, in particular by the shipbuilding contract concluded upstream. Those EIGs were therefore merely entrusted with distributing the tax advantage flowing from the STL system so that the shipping companies could benefit from part of that advantage. It is important to note in that respect that when the Commission examined the compatibility of the aid in question in the decision at issue it repeatedly identified the EIGs as intermediaries which transferred part of that advantage to the shipping companies. [44]

132. In the light of the foregoing, I suggest that the Court should find that the part of the tax advantage transferred by the EIGs to the shipping companies under the private contracts between them must be deducted from the amount to be recovered from the EIG investors, and that it should therefore uphold the third plea in law raised before the General Court by Lico Leasing and PYMAR.

VI. Conclusion

133. In the light of the foregoing, I propose that the Court of Justice should set aside the judgment of the General Court of 23 September 2020, *Spain and Others* v *Commission* (T-515/13 RENV and T-719/13 RENV, EU:T:2020:434), in part, on the ground that the General Court failed to discharge its obligation to state reasons in respect of its response to the third plea in law raised by Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión SA, and should annul Commission Decision 2014/200/EU of 17 July 2013 on the aid scheme SA.21233 C/11 (ex NN/11,

[43] Judgment of 21 December 2016, *Commission* v *Aer Lingus and Ryanair Designated Activity* (C-164/15 P and C-165/15 P, EU:C:2016:990, paragraph 92).

[44] See, in particular, recital 203 of the decision at issue.

ex CP 137/06) implemented by Spain – Tax scheme applicable to certain finance lease agreements also known as the Spanish Tax Lease System in part, specifically the order for recovery in so far as concerns calculation of the amount of the incompatible aid to be recovered.