Provisional text

JUDGMENT OF THE COURT (Second Chamber)

25 July 2018 (*)

(Appeal — State aid — Article 107(1) TFEU — Tax regime applicable to certain finance lease agreements for the purchase of ships (Spanish tax lease system) — Identification of the beneficiaries of the aid — Condition relating to selectivity — Distortion of competition and effect on trade between Member States — Obligation to state reasons)

In Case C?128/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 February 2016,

European Commission, represented by V. Di Bucci, E. Gippini Fournier and P. N?me?ková, acting as Agents,

appellant,

the other parties to the proceedings being:

Kingdom of Spain, represented by M.A. Sampol Pucurull, acting as Agent,

Lico Leasing SA, established in Madrid (Spain),

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

represented by M. Merola, avvocato, and M. Sánchez, abogado,

applicants at first instance,

Bankia SA, established in Valencia (Spain),

Asociación Española de Banca, established in Madrid,

Unicaja Banco SA, established in Malaga (Spain),

Liberbank SA, established in Madrid,

Banco de Sabadell SA, established in Sabadell (Spain),

Banco Gallego SA, established in Saint-Jacques-de-Compostelle (Spain),

Catalunya Banc SA, established in Barcelona (Spain),

Caixabank SA, established in Barcelona,

Banco Santander SA, established in Santander (Spain),

Santander Investment SA, established in Boadilla del Monte (Spain),

Naviera Bósforo AIE, established in Las Palmas de Gran Canaria (Spain),

Industria de Diseño Textil SA, established in Arteixo (Spain),

Naviera Nebulosa de Omega AIE, established in Las Palmas de Gran Canaria,

Banco Mare Nostrum SA, established in Madrid,

Abanca Corporación Bancaria SA, established in Betanzos (Spain),

Ibercaja Banco SA, established in Zaragoza (Spain),

Banco Grupo Cajatres SAU, established in Zaragoza,

Naviera Bósforo AIE, established in Las Palmas de Gran Canaria,

Joyería Tous SA, established in Lleida (Spain),

Corporación Alimentaria Guissona SA, established in Guissona (Spain),

Naviera Muriola AIE, established in Madrid,

Poal Investments XXI SL, established in San Sebastián de los Reyes (Spain),

Poal Investments XXII SL, established in San Sebastián de los Reyes,

Naviera Cabo Vilaboa C?1658 AIE, established in Madrid,

Naviera Cabo Domaio, C?1659 AIE, established in Madrid,

Caamaño Sistemas Metálicos SL, established in Culleredo (Spain),

Blumaq SA, established in La Vall d'Uixó (Spain),

Grupo Ibérica de Congelados SA, established in Vigo (Spain),

RNB SL, established in La Pobla de Vallbona (Spain),

Inversiones Antaviana SL, established in Paterna (Spain),

Banco de Caja España de Inversiones,Salamanca y Soria SAU, established in Madrid,

Banco de Albacete SA, established in Boadilla del Monte,

Bodegas Muga SL, established in Haro (Spain),

represented by J.L. Buendía Sierra, E. Abad Valdenebro, R. Calvo Salinero and A. Lamadrid de Pablo, abogados,

Aluminios Cortizo SAU, established in Padrón (Spain), represented by A. Beiras Cal, abogado,

interveners in the appeal,

THE COURT (Second Chamber),

composed of M. Ileši?, President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jaraši?nas (Rapporteur), Judges,

Advocate General: M. Bobek,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2018,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 17 December 2015, *Spain and Others* v *Commission* (T?515/13 and T?719/13, 'the judgment under appeal', EU:T:2015:1004), by which the General Court annulled Commission Decision 2014/200/EU of 17 July 2013 on State aid SA.21233 C/11 (ex NN/11, ex CP 137/06) implemented by Spain — Tax scheme applicable to certain finance lease agreements, also known as the Spanish Tax Lease System (OJ 2014 L 144, p. 1,'the decision at issue').

Background to the dispute

2 The background to the dispute, as set out in the judgment under appeal, are summarised below.

3 Following complaints about the fact that the Spanish tax lease system as applied to certain finance lease agreements for the purchase of ships ('the STL system') made it possible for shipping companies to purchase ships built by Spanish shipyards at a 20% to 30% rebate, the Commission initiated the formal examination procedure under Article 108(2) TFEU, by Decision C(2011) 4494 final of 29 June 2011 (OJ 2011 C 276, p. 5).

4 During that procedure, the Commission found that the STL system was used, until the date of that decision, in transactions involving the building by shipyards and the acquisition by maritime shipping companies of sea-going vessels and the financing of those transactions by means of an ad hoc legal and financial structure organised 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) formed by the bank and investors who purchase shares in the EIG. The latter took a lease out on the ship from a leasing company as soon as construction began and in turn leased it to the shipping company under a bareboat charter. The EIG undertook to buy the vessel at the end of the leasing contract while the shipping company undertook to buy it at the end of the bareboat charter. According to the decision at issue, there was a tax planning scheme intended to generate tax benefits for 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 vessel.

5 The Commission found that the STL operations combined five measures provided for in a number of provisions of the Real Decreto Legislativo 4/2004, por el que se aprueba el texto refundido de la Ley del Impuesto sobre Sociedades (Royal Legislative Decree 4/2004 approving the consolidated version of the Law on Corporation Tax) of 5 March 2004 (BOE No 61, of 11

March 2004, p. 10951, ‘the TRLIS’) and of Real Decreto 1777/2004, por el que se aprueba el Reglamento del Impuesto sobre Sociedades (Royal Decree 1777/2004 approving the Regulation on Corporation Tax) of 30 July 2004 (BOE No 189, of 6 August 2004, p. 37072, ‘the RIS’). Those measures were the accelerated depreciation of leased assets under Article 115(6) TRLIS, the discretionary application of early depreciation of leased assets under Articles 48(4) and 115(11) TRLIS and Article 49 RIS, the provisions relating to EIGs, the tonnage tax system under Articles 124 to 128 TRLIS and the provisions of Article 50(3) RIS.

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

7 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 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 administration to that end are taxed, not on the basis of their profits and losses, but on the basis of tonnage. Spanish legislation enables EIGs to be entered in one of those registers, even though they are not shipping companies.

8 Article 125(2) TRLIS made provision for a special procedure for vessels already acquired at the time of entry into the tonnage tax system and used vessels acquired when the undertaking already benefited from that system. Under the normal application of that system, potential capital gains were taxed on entry into the TT system and it was assumed that the taxation of capital gains, even though it was delayed, took place later on when the vessel was sold or dismantled. However, by way of derogation from that provision, Article 50(3) 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, and not used within the meaning of Article 125(2) TRLIS, without taking into consideration whether they had already been depreciated, so 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) TRLIS, that is to say, in relation to leased newly built vessels acquired through STL operations, and — with one exception — from Spanish shipyards.

9 By applying all of 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 of the EIG’s tax transparency, were deductible from the investors’ own revenues pro rata to their shares in the EIG. While that early and accelerated depreciation of the cost of the vessel is usually offset later on 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, in the second stage, as a result of the EIG’s switchover to the tonnage tax system which allowed the full exemption of the capital gains resulting from the sale of the vessel to the shipping company.

10 Whilst 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, the Commission decided that, among those measures, those resulting from Article 115(11) TRLIS, relating to early depreciation of leased assets, from the application of the tonnage tax scheme to non-eligible undertakings, vessels or activities and from Article 50(3) RIS ('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. It declared that the tax measures at issue were incompatible with the internal market, except to the extent that the aid corresponded to a remuneration in conformity with the market for the intermediation of financial investors and that it was channelled to maritime transport companies eligible under the Maritime Guidelines. It decided that the Kingdom of Spain had to put an end to that aid scheme in so far as it is incompatible with the internal market and had to recover the incompatible aid from the EIG investors who benefited from it without those recipients being 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).

The procedure before the General Court and the judgment under appeal

11 By applications lodged at the Registry of the General Court on 25 September and 30 December 2013, first, the Kingdom of Spain and, secondly, Lico Leasing SA and Pequeños y Medianos Astilleros Sociedad de Reconversión SA ('PYMAR') brought an action for the annulment of the decision at issue. The two cases were joined for the purposes of the judgment.

12 In the judgment under appeal, the General Court annulled the decision at issue and ordered the Commission to pay the costs.

Procedure before the Court of Justice and forms of order sought

13 By orders of the President of the Court of Justice of 21 December 2016, Bankia SA and 32 other entities ('Bankia and Others'), and Aluminios Cortizo SAU were granted leave to intervene in support of the form of order sought by Lico Leasing and PYMAR.

14 By its appeal, the Commission claims that the Court of Justice should set aside the judgment under appeal, refer the case back to the General Court and order the applicants at first instance to pay the costs.

15 The Kingdom of Spain contends that the appeal should be dismissed as unfounded and that the Commission should be ordered to pay the costs.

16 Lico Leasing and PYMAR seek the dismissal of the appeal as inadmissible and, in the alternative, as unfounded, and request that the Commission be ordered to pay the costs.

17 Bankia and Others, and Aluminios Cortizo ask the Court of Justice to declare the appeal unfounded and to order the Commission to pay the costs.

The appeal

Admissibility

18 Lico Leasing and PYMAR express doubts as to the admissibility of the appeal which, in their opinion, is based on new claims concerning the identification of the beneficiaries of the economic advantages arising from the tax measures at issue, such as those by which the EIG and the investors formed an economic unit, and which were intended to address inconsistencies in the decision at issue.

19 However, it must be pointed out that those doubts do not relate to an aspect of the appeal which, as such, would affect its admissibility and that the admissibility of the claims at issue, even if they were proven, would affect only some of the arguments advanced by the Commission in support of its appeal concerning the identification of the beneficiaries of the economic advantages arising from the tax measures at issue. The admissibility of those claims will therefore be assessed in this judgment in the examination of the first part of the first ground of appeal.

20 It follows that the plea of inadmissibility raised by Lico Leasing and PYMAR must be rejected.

The first ground of appeal

21 By its first ground of appeal, the Commission submits that errors of law were made in the interpretation and application of Article 107(1) TFEU as regards the terms ‘undertaking’ and ‘selective advantage’.

First part of the first ground of appeal

22 In the first part of its first ground of appeal, the Commission claims, first of all, that the General Court committed an error of law in the identification of the beneficiaries of the aid and in relation to the terms ‘undertaking’, ‘advantage’ and ‘selective measure’. Next, it alleges that the General Court infringed Article 296 TFEU in holding that the decision at issue was, in that respect, vitiated by a failure to state reasons, and indeed by contradictory reasoning. That second complaint will be examined with the second ground of appeal.

– *Arguments of the parties*

23 In support of the first complaint in the first part of its first ground of appeal, the Commission claims that the General Court erred in law by carrying out an artificial assessment of the situation which was submitted to it and by confusing the economic term ‘undertaking’ with the term ‘taxpayer’. In paragraphs 116 to 118 of the judgment under appeal, the General Court wrongly considered that, as a result of the tax transparency of the EIGs, the tax advantages which they had been granted could benefit only their members. It is on the basis of that flawed premiss, which denies the existence of the EIGs, their capacity to benefit from any tax aid and the fact that they carried on an economic activity in a specific sector, that the General Court then based the entire judgment under appeal and stated that the tax measures at issue were general in nature and not selective, because the members of the EIGs could belong to any sector of the economy. The consequence of that reasoning is that any undertaking organised under the legal form of an EIG could benefit from tax advantages without those advantages being classified as ‘State aid’.

24 According to the Commission, the fact that any person may, in principle, be a member of an EIG does not transform in a general way a measure which clearly constitutes a derogation from the reference framework and which is granted only to undertakings active in a specific sector of activity. In the present case, the activity of the EIGs is limited to one sector of activity, that is to

say, financing the acquisition of vessels through leasing contracts, their bareboat chartering and their subsequent sale, and the beneficiaries of the advantages examined in the decision at issue are the EIGs and their members taken together or, in other words, the single entity formed by each EIG and its members.

25 The Kingdom of Spain argues that, contrary to the Commission's claims, the General Court did not interpret the term 'undertaking' or the term 'taxpayer' in the judgment under appeal. The appeal seeks to attribute to the EIGs the role of undertakings exercising a specific activity, even though that role has not been examined in the decision at issue, and it does not give any importance to the fact that the tax transparency involved the transfer of the tax advantages to the members of the EIGs, so that those members thus became the only genuine addressees of the tax measures at issue, as the decision at issue itself demonstrates. Ultimately, by accepting that the EIG is an ancillary instrument in the activity of its members, that it is the initial beneficiary of the tax advantages and that it passes those advantages on to its members who become the final beneficiaries, from whom the Commission has ordered the recovery of the aid, the Commission's arguments lead to the same conclusions as those reached by the General Court.

26 Lico Leasing and PYMAR contend that the General Court did not err in the identification of the beneficiaries of the advantages resulting from the tax measures at issue, which constitutes a question of fact and not of law. In addition, it is undeniable that the EIGs cannot be regarded as the actual beneficiaries of the tax advantages resulting from the tax measures in question. The fact that a measure is applied by the EIGs which conduct a certain type of economic transaction does not mean that that measure is selective in nature, since the selectivity of an advantage, like all the other conditions for the existence of State aid, must be examined by reference to the operators in whose favour the economic advantage occurs. Consequently, in the present case, the condition relating to selectivity, which led to the conclusion that there were tax advantages available to all undertakings, must be examined by reference to the investors.

27 In addition, if the EIGs were regarded as the beneficiaries of those advantages, it would be difficult to identify the sector of economic activity affected. The market for the financing, chartering and sale of vessels, which is specific to the EIGs, does not exist, since the EIGs which participated in the STL system were mere financial instruments.

28 The Commission's argument that the EIGs and the investors constituted an economic unit, apart from the fact that it was presented for the first time at the hearing before the General Court and that it involved the examination of a question of fact, distorts the meaning of the term 'economic unit' which implies an entity's control over a company and the possibility of effectively intervening, directly or indirectly, in the management of that company.

29 Bankia and Others submit, in essence, that the Commission's line of argument that the EIGs are the recipients of the advantages arising from the tax measures at issue is out of time and therefore inadmissible. By that line of argument, the Commission is now seeking to establish the selectivity of those measures by classifying the EIGs as beneficiaries and attributing to them a sectoral activity, even though, first, the EIGs neither received nor transferred a tax advantage, since those measures resulted only in losses for the EIGs, and, secondly, the economic sector in which they operated is not identified.

30 Aluminios Cortizo also submits that an EIG is merely a financial mechanism which cannot have the capacity of a beneficiary of aid and that, since any undertaking may be a member of an EIG, the condition relating to selectivity has not been satisfied with regard to the investors. Those investors do not form part of an economic group, since they are linked to each other only by a contract of association for the construction of a specific asset, and furthermore, there is no buying and selling or leasing activity constituting a market, since the operations carried out in the context

of the STL system result merely from the performance of contractual obligations. The selectivity relied on may be assessed only on the shipbuilding market, which was, however, ruled out by the Commission.

– *Findings of the Court of Justice*

31 Since Lico Leasing and PYMAR dispute the admissibility of the first complaint in the first part of the Commission's first ground of appeal alleging an error of law in the identification of the beneficiaries of the advantages arising from the tax measures at issue on the ground that it is a question of fact, it is true that the assessment of facts and evidence does not constitute, save where the clear sense of the facts and evidence has been distorted, a question of law which is subject, as such, to review by the Court of Justice in the context of an appeal. However, when the General Court has established or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts and the legal conclusions which have been drawn from them (judgments of 6 April 2006, *General Motors* v *Commission*, C?551/03 P, EU:C:2006:229, paragraph 51; of 22 December 2008, *British Aggregates* v *Commission*, C?487/06 P, EU:C:2008:757, paragraph 96, and of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C?66/16 P to C?69/16 P, EU:C:2017:999, paragraph 97).

32 By that complaint, the Commission does not dispute the facts on which the General Court relied, but the inferences which it drew from them, in particular those drawn from the tax transparency of the EIGs, in order to hold that the investors — the members of the EIGs — and not the EIGs themselves, were the beneficiaries of the advantages arising from the tax measures at issue. In doing so, the Commission seeks a review of the General Court's legal classification relating to the beneficiaries of those advantages, which falls within the jurisdiction of the Court of Justice in the context of an appeal. That complaint is therefore admissible.

33 With regard to the Commission's argument that the EIG and its members are part of an economic unit and are the beneficiaries of the advantages arising from the tax measures at issue, which Lico Leasing and PYMAR, and Bankia and Others claim is out of time, it must be pointed out that that argument was advanced before the General Court, as is apparent from paragraphs 167 and 168 of the judgment under appeal. Consequently, the pleas of inadmissibility raised against that argument are unfounded.

34 As regards the substance, it must be recalled that EU competition law and, in particular, the prohibition under Article 107(1) TFEU apply to the activities of undertakings. The term 'undertaking', in this context, covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed. Any activity consisting in offering goods or services on a given market is an economic activity (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C?74/16, EU:C:2017:496, paragraphs 39, 41 and 45 and the case-law cited).

35 According to the settled case-law of the Court of Justice, classification of a national measure as ‘State aid’ for the purposes of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C?140/09, EU:C:2010:335, paragraph 31 and the case-law cited; of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraph 40, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 53).

36 As regards the condition relating to the existence of a selective advantage, in accordance with settled case-law interventions which, in any form whatsoever, are liable to favour undertakings directly or indirectly, or which must be regarded as economic advantages which the recipient undertaking would not have obtained under normal market conditions, are considered to be State aid. Thus, measures which, in various forms, mitigate the charges that are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict meaning of the word, are similar in character and have the same effect are considered to constitute aid (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C?74/16, EU:C:2017:496, paragraphs 65 and 66 and the case-law cited). Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims, but defines them on the basis of their effects, and thus independently of the techniques used (see, to that effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 87, 92 and 93, and of 28 June 2018, *Andres (liquidator in the insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraph 91).

37 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute such aid (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C?106/09 P and C?107/09 P, EU:C:2011:732, paragraphs 72 and 73 and the case-law cited; see, also, judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C?20/15 P and C?21/15 P, EU:C:2016:981, paragraph 56, and of 28 June 2018, *Andres(liquidator in the insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraph 85). Similarly, the term ‘State aid’ does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the overall structure of the system of which they form part (judgments of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C?524/14 P, EU:C:2016:971, paragraph 41, and of 28 June 2018, *Andres(liquidator in the insolvency of Heitkamp BauHolding)* v *Commission*, C?203/16 P, EU:C:2018:505, paragraph 87).

38 In the present case, in upholding the plea, raised by the Kingdom of Spain, and Lico Leasing and PYMAR, that the Commission had infringed Article 107(1) TFEU, in so far as the conditions relating to selectivity, the risk of distortion of competition and the effect on trade had not been fulfilled, since those conditions must be established, in their opinion, only with regard to the advantages obtained by the investors, the General Court, in paragraph 116 of the judgment under appeal, found that, although the EIGs had benefited from the three tax measures referred to in

Article 1 of the decision at issue, it was the members of the EIGs who had benefited from the economic advantages arising from those three measures as a result of the tax transparency of the EIGs, and who were, moreover, referred to in the order for recovery imposed in Article 4(1) of that decision. In paragraph 117 of that judgment, it held that, in the absence of an economic advantage in favour of the EIGs, the Commission was wrong to conclude that they had benefited from State aid within the meaning of Article 107(1) TFEU. Therefore, in paragraph 118 of that judgment, it concluded that, 'since it is the investors, and not the EIGs, that benefited from the tax and economic advantages resulting from the STL system, it is appropriate to examine ... whether the advantages obtained by the investors are selective, are liable to distort competition and affect trade between Member States and whether the [decision at issue] contains a sufficient statement of reasons concerning the analysis of those criteria.'

39 Having recalled in paragraph 164 of the judgment under appeal that the analysis of the advantages arising from the tax measures at issue in the decision at issue was also based on the finding that the STL system favoured certain activities, namely the acquisition of vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, the General Court stated in paragraphs 171 and 176 of that judgment that that finding referred to the activities of the EIGs set up for the purposes of the STL system but did not relate to the industrial or economic activities of the members of the EIGs, who take shares in the EIGs as investors. It concluded in paragraphs 176 and 180 of that judgment that the selectivity of the tax measures at issue could not be established on the basis of that finding.

40 It appears from those considerations that, without calling into question the Commission's description of the STL system in the decision at issue, which is set out in the judgment under appeal and summarised in paragraphs 4 to 9 above, or, in particular, the findings that the tax measures at issue had been granted to the EIGs and had favoured the activities which they carried on, 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.

41 In addition to the fact that it contradicts the finding in paragraph 116 of the judgment under appeal that the EIGs had benefited from the three tax measures referred to in Article 1 of the decision at issue, that conclusion incorrectly applies Article 107(1) TFEU.

42 According to the description of the STL system, the EIGs carried on an economic activity, namely the acquisition of vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, from which it follows that they were undertakings within the meaning of Article 107(1) TFEU and the case-law recalled in paragraph 34 above, and from what the Commission stated in recital 126 of the decision at issue.

43 It was the EIGs which, first, applied to the tax authority, under Article 115(1) TRLIS, for the benefit of early depreciation of leased assets, which they were granted, and, secondly, left the normal corporate taxation system and opted for the tonnage tax system, as applied under Article 50(3) RIS. It was also the EIGs which collected the tax benefits in two stages, as has been stated in paragraph 9 above, by the combination of the tax measures at issue.

44 The resulting economic advantages, according to the facts established in paragraph 5.3.2.6. of the decision at issue, corresponded to the advantages which the EIGs would not have achieved in the same operation by the sole application of general measures, namely the interest saved on the amounts of tax payments deferred by virtue of early depreciation, the amount of tax avoided or interest saved on tax deferred by virtue of the tonnage tax system and the amount of tax avoided on the capital gain made on the sale of the vessel. The STL system therefore involved the use of

public resources in the form of lost tax revenue and unpaid interest, as was found in paragraph 5.3.3. of that decision.

45 It is true that those advantages were transferred in full to the members of the EIGs because, with the EIGs being fiscally transparent as regards the members residing in Spain, the profits or losses made by the EIGs were automatically transferred to their members residing in that Member State pro rata to their shares. Nevertheless, the fact remains that the tax measures at issue were applied to the EIGs and that they were the direct beneficiaries of the advantages arising from those measures. Those advantages, according to recital 157 of the decision at issue, favoured the activity of acquiring vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, carried on by the EIGs.

46 In the light of the case-law referred to in paragraphs 35 to 37 above, it follows that the tax measures at issue were such as to constitute State aid in favour of the EIGs and that therefore, by not acknowledging that the EIGs were beneficiaries of those measures on the ground that those entities were fiscally transparent, the General Court held that they could not be the beneficiaries of State aid solely because of their legal form and the relevant rules on the taxation of profits. Such an exclusion is not in keeping with the case-law set out in paragraphs 34 and 36 above, from which it follows that the classification of a measure as ‘State aid’ cannot depend on the legal status of the undertakings concerned or the techniques used.

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.

48 It follows that the first complaint in the first part of the first ground of appeal is well founded.

Second part of the first ground of appeal

– *Arguments of the parties*

49 In the second part of the first ground of appeal, the Commission alleges that the General Court, in paragraphs 157 to 163 of the judgment under appeal, erred in law in its analysis of the selective advantage resulting from the tax authority’s discretionary power. The General Court based its reasoning on the incorrect premiss that the EIGs could not benefit from a tax advantage and failed to have regard to settled case-law according to which a measure of an apparently general nature becomes selective where the advantage is granted by way of a discretionary procedure.

50 In addition, where it is the discretionary power per se which makes it possible to place certain undertakings in a more favourable situation than that of other undertakings, the General Court carried out an *ex post* assessment and thus confused selectivity based on the discretionary management criterion and de facto selectivity which depends on an examination of the actual behaviour of the authority which grants the advantage. Moreover, the administrative authorisations which made it possible to apply early depreciation and the tonnage tax system were given only to the EIGs engaged in the financing and bareboat chartering of vessels, which placed them in a more favourable situation than that of other undertakings.

51 The Kingdom of Spain submits that the General Court stated that the existence of the tax authority’s discretionary power was not established and that it is a finding of a factual nature which cannot be submitted for review by the Court of Justice. Furthermore, as the General Court also found, that power was very limited since it involved determining, not the beneficiaries, but only the type of assets capable of benefiting from early depreciation. The condition, derived from case-law,

that, in order to classify the selectivity of the advantage at issue, there must be a broad discretion making it possible to determine the beneficiaries and the conditions of the measure granted on the basis of criteria unrelated to the tax system, has not been satisfied. In addition, contrary to what is claimed by the Commission, the General Court did not examine *ex post* the selectivity of the advantages arising from the tax measures at issue instead of relying on the discretionary management criterion of the aid.

52 Lico Leasing and PYMAR submit that the reasoning of the judgment under appeal concerning the discretionary nature of the tax authority's power in the STL mechanism is part of an assessment of the facts. Moreover, they submit that the General Court made an accurate assessment of the selectivity of the advantages arising from the tax measures at issue, by ruling out both selectivity based on the tax authority's discretionary power and de facto selectivity.

53 Similarly, Bankia and Others claim that the General Court did not err in law in finding that there was no *de jure* or de facto selectivity. In their opinion, even if there was sectoral selectivity in the maritime or shipbuilding domain, that selectivity did not concern the investors who are, nevertheless, identified as being the ultimate and sole beneficiaries of the tax measures at issue.

54 Aluminios Cortizo supports the arguments advanced by the Kingdom of Spain, Lico Leasing and PYMAR, and Bankia and Others.

– *Findings of the Court*

55 It must be recalled that, in order to establish the selective nature of a tax advantage, it is not necessary for the competent national authorities to have the discretionary power to grant the benefit of that measure. However, the existence of such a discretion may be such as to enable those authorities to favour certain undertakings or the production of certain goods to the detriment of others and therefore establish the existence of aid, within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 15 July 2004, *Spain* v *Commission*, C?501/00, EU:C:2004:438, paragraph 121). That is so, in particular, where the competent authorities have a discretionary power to determine the beneficiaries and the conditions of the measure granted on the basis of criteria unrelated to the tax system. On the other hand, the application of an authorisation system in which the competent authorities only have a latitude limited by objective criteria which are not unrelated to the tax system established by the legislation in question could not, in principle, be regarded as selective (see, to that effect, judgment of 18 July 2013, *P*, C?6/12, EU:C:2013:525, paragraphs 26 and 27).

56 In the present case, in order to find that the Commission had wrongly considered, in recital 156 of the decision at issue, that the advantages resulting from the STL system as a whole were selective because they were dependent on the discretionary power conferred on the tax authority, the General Court, in paragraph 158 of the judgment under appeal, found that, despite the existence of an authorisation system involving alleged discretionary elements, those advantages remained open under the same conditions to any investor who decided to participate in the transactions within the STL system, aimed at financing ships through the purchase of shareholdings in the EIGs created by the banks.

57 Having stated in paragraph 159 of that judgment that the conditions for authorising early depreciation concerned, *de jure*, only the characteristics of the asset which may be depreciated early, that the Commission had indicated in the decision at issue that the exercise of the discretionary power had led the tax authority to accept the early depreciation only for a specific category of assets and that the advantages at issue had not been refused for any operation under the STL system, the General Court, in paragraphs 160 and 162 of the judgment under appeal, held that, even if it were established, that discretionary power would have resulted, *de jure* and de

facto, only in defining the type of operation capable of benefiting from the tax advantages at issue, that is to say, STL operations to finance vessels, to the exclusion of other assets, and that it remained the case that the possibility of taking part in those transactions and accessing the advantages in question was open to any undertaking. It concluded that the existence of an authorisation system does not mean, in the present case, that the advantages from which the investors benefited may be considered selective.

58 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.

59 The second part of the first ground of appeal must therefore be upheld.

Third part of the first ground of appeal

– *Arguments of the parties*

60 In the third part of the first ground of appeal, the Commission criticises the General Court for having held, in paragraphs 139 to 155 of the judgment under appeal, relying on the judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T?399/11, EU:T:2014:938), and of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939), that the fact that the tax advantages are granted on the basis of investments in a particular asset to the exclusion of other assets or other types of investments does not mean that they are selective vis-à-vis investors, since the operation is available to any undertaking. However, having set aside those judgments in the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981), the Court of Justice rejected that approach. Furthermore, the General Court erred in its analysis of the case-law.

61 According to the Kingdom of Spain, the Commission fails to mention that, although the General Court took into consideration the judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T?399/11, EU:T:2014:938), and of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939), it nevertheless expressly stated that it was giving its ruling in the context of existing case-law and followed established case-law on tax. It follows from that case-law that a tax regime is not selective if it is applicable without distinction to all economic operators. In the present case, the Commission did not identify a category of undertakings benefiting from a derogation or the terms of the comparison between those undertakings and those which could not benefit from it.

62 Lico Leasing and PYMAR argue that, since the tax measures at issue were not selective in that any undertaking without discrimination could invest in the EIGs and benefit from the advantages resulting from those investments, the General Court did not commit an error when it ruled out, for that reason, the selective nature of the advantages obtained by the investors in the context of the STL system. That assessment is not called into question by the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981), because there is no derogation in the STL system favouring certain taxpayers over other taxpayers in a comparable factual and legal situation under the reference tax system or discrimination between different categories of investors, since the STL system is merely a means of tax optimisation accessible to all. In addition, the decision at issue does not contain any reasons

regarding the elements needed to apply the criteria set out in that judgment, in particular the criteria for determining the reference framework.

63 Bankia and Others state that it is apparent from the judgment under appeal that the Commission itself distinguished the present case from the one giving rise to the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981) by stating that the advantages arising from the STL were granted to investors not because they carried out mere investment operations, but because they carried out certain economic activities through the EIGs. In any event, unlike that case, the tax measures at issue do not favour entities in a factual and legal situation comparable to that of other entities, since the Commission has not demonstrated and has not even defined the reference framework.

– *Findings of the Court*

64 It is apparent from paragraphs 130 and 132 of the judgment under appeal that, since the Kingdom of Spain, and Lico Leasing and PYMAR observed before the General Court that the possibility of participating in the structures of the STL system and therefore of obtaining the advantages arising from it was open to any investor operating in all sectors of the economy without any precondition or restriction, so that the advantages obtained by the investors could not be regarded as selective, in particular in the light of the judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T?399/11, EU:T:2014:938), and of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939), the Commission argued that the tax measures at issue were selective vis-à-vis investors, because only the undertakings which made a certain type of investment through an EIG benefited from it, while undertakings which made similar investments as part of other operations could not benefit from it.

65 In order to reject that argument of the Commission, set out in paragraph 144 of the judgment under appeal, the General Court, in paragraphs 139 to 143 of that judgment, referred to the judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T?399/11, EU:T:2014:938), and of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939) and, having stated that, as in the cases which gave rise to those judgments, any operator could benefit from the tax advantages at issue by carrying out a certain type of operation available, on the same terms, to any undertaking, without distinction, it considered that, as in those cases, the fact that the advantages were granted as a result of an investment in a particular asset to the exclusion of other assets or types of investment did not make them selective vis-à-vis the investors, in that the operation was available to any undertaking.

66 Analysing next, in paragraphs 146 to 154 of the judgment under appeal, the judgment of 19 September 2000, *Germany* v *Commission* (C?156/98, EU:C:2000:467) and the case-law of the General Court, it considered, in paragraphs 148 to 150 of the judgment under appeal, that it was clear that, where an advantage is granted, on the same terms, to any undertaking on the basis of a certain type of investment available to any operator, it acquires a general nature with respect to those operators and does not constitute State aid in favour of them. It concluded, in paragraph 155 of that judgment, that the advantages obtained by the investors who participated in the STL operations could not be considered to be selective on the ground that only the undertakings carrying out that particular type of investment through an EIG benefited from it.

67 In that regard, it must be observed that the analysis of the plea made in its defence by the Commission before the General Court is 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.

68 Moreover, in the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981), the Court of Justice held that the reasoning in the judgments of 7 November 2014, *Banco Santander and Santusa* v *Commission* (T?399/11, EU:T:2014:938), and of 7 November 2014, *Autogrill España* v *Commission* (T?219/10, EU:T:2014:939) was based on a misapplication of the condition relating to selectivity laid down in Article 107(1) TFEU. According to that reasoning, the existence of a derogation from or exception to the reference framework identified by the Commission cannot, in itself, establish that the measure at issue favours 'certain undertakings or the production of certain goods' within the meaning of that provision, where that measure is available, a priori, to any undertaking and is directed, not at a particular category of undertakings, which would have been the only undertakings favoured by that measure, but at a category of economic transactions.

69 In paragraph 67 of the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981), the Court recalled that, with regard to a national measure conferring a tax advantage of general application, the condition relating to selectivity is satisfied where the Commission is able to demonstrate that that measure is a derogation from the ordinary or 'normal' tax system applicable in the Member State concerned, thereby introducing, through its actual effects, differences in the treatment of operators, although the operators who qualify for the tax advantage and those who do not are, in the light of the objective pursued by that Member State's tax system, in a comparable factual and legal situation. In paragraphs 70 and 71 of that judgment, the Court stated that the supplementary requirement to identify a particular category of undertakings which are exclusively favoured by the measure in question and which may be distinguished by reason of specific properties, common to them and characteristic of them, cannot be inferred from the case-law of the Court of Justice.

70 In addition, in paragraphs 80 and 81 of the judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C?20/15 P and C?21/15 P, EU:C:2016:981), the Court recalled that the fact that the recipient undertakings belong to various economic sectors is not sufficient to call into question the selective nature of the measure concerned and held that the potentially selective nature of the measure at issue is in no way called into question by the fact that the essential condition for obtaining the tax advantage conferred by that measure is that there should be an economic transaction, more particularly an entirely financial transaction, which is available regardless of the nature of the business of the recipient undertakings.

71 It follows that, by holding, for the purpose of rejecting the plea made in its defence by the Commission, that the advantages obtained by the investors which participated in the STL operations could not be regarded as selective, since those operations were available, on the same terms, to any undertaking, without distinction, without ascertaining whether the Commission had established that the tax measures at issue, by their practical effects, introduced differentiated treatment of operators, where the operators which benefited from the tax advantages and those which were excluded from it, were, in view of the objective pursued by that tax system, in a comparable factual and legal situation, the General Court committed an error of law.

72 Consequently, the third part of the first ground of appeal must be upheld.

The second complaint in the first part of the first ground of appeal and the second ground of appeal

Arguments of the parties

73 In support of the second complaint in the first part of the first ground of appeal, the Commission claims that, in paragraphs 169 to 177 of the judgment under appeal, the General

Court infringed Article 296 TFEU in finding that the decision at issue was vitiated by a failure to state reasons or by contradictory reasoning. The idea of an economic unit formed by the EIG and its members is present throughout the decision at issue, and the reasoning followed by that decision concerning the selectivity of the advantages arising from the tax measures at issue is based on the notion of 'undertaking', within the meaning of Article 107(1) TFEU. Although the General Court accepted that that decision had demonstrated the selectivity of the tax measures at issue, finding that they had favoured certain activities, it then limited its examination to the advantages obtained by the investors by separating the EIGs and their members.

74 The findings of the General Court in paragraph 175 of the judgment under appeal relating to recital 28 of the decision at issue distort its content by attributing to it contradictions that do not exist. That recital, describing the members of the EIGs as 'investors', contains no assessment by the Commission which contradicts any other; it merely reproduces the arguments of certain interested parties and makes a terminological choice which does not change the nature of the EIG.

75 In support of its second ground of appeal, the Commission relies on errors of law concerning the obligation to state reasons and distortion of the decision at issue in paragraphs 198 to 208 of the judgment under appeal. The General Court considered that the particular facts of the case required a higher standard of reasoning in that decision with regard to the risk of distortion of competition and the effect on trade, even though, unlike the case giving rise to the judgment of 30 April 2009, *Commission* v *Italy and Wam* (C?494/06 P, EU:C:2009:272), to which it referred, no new and exceptional circumstance in the present case made such a statement of reasons necessary. In particular, there is no doubt that the effect of the tax measures at issue was a direct reduction of the corporate income tax base, that the EIGs and their members operated on liberalised European markets in which they were in competition with other operators and that the advantages arising from those measures were not of a small amount.

76 The General Court was wrong in finding that the decision at issue was not sufficiently reasoned with regard to the existence of a risk of distortion to the market on which the EIGs operated, since that decision did not explain the reasons why the EIGs formed a single economic unit with their investors. Aside from that, the existence of a distortion of competition on that market is sufficient to establish that that condition for the application of Article 107(1) TFEU has been satisfied.

77 The Kingdom of Spain submits that the Commission sets out its position on the economic unit formed by the EIGs and their members, relied on for the first time before the General Court. That argument runs counter to the very essence of an EIG which is merely an instrument that makes it possible to channel tax advantages. Moreover, although, when referring to the 'EIGs and/or their investors' in the decision at issue, the Commission wanted to indicate that they constituted a single economic unit, it should have provided a sufficient statement of reasons. Similarly, that decision did not explain clearly that the EIGs belong to a particular sector of activity. The General Court is therefore correct in finding that that decision was not sufficiently reasoned.

78 Contrary to what the Commission submits, the General Court did not require, as regards the risk of distortion of competition and the effect on trade, a higher standard of reasoning than that required by the case-law, and the reference to the judgment of 30 April 2009, *Commission* v *Italy and Wam* (C?494/06 P, EU:C:2009:272), in the judgment under appeal is not decisive for the rationale that led to the General Court's conclusion concerning the reasoning of the decision at issue. Nevertheless, there are similarities between the circumstances of the case that gave rise to that judgment and those of the present case. Furthermore, since the Commission did not identify the group or category of undertakings which benefited from the tax measures at issue, the General Court cannot be criticised for having considered that the Commission also failed to fulfil its

obligation to state reasons with regard to the distortion of competition and the effect on trade, since there is a correlation between the selectivity of an advantage and the distortion of competition.

79 Lico Leasing et PYMAR also submit that, assuming that the argument concerning the economic unit formed by the EIGs and their members was included in the decision at issue, that decision is vitiated by a lack of reasoning in that regard, as the General Court stated in the alternative. Similarly, they note that the General Court did not require a higher standard of reasoning with regard to the risk of distortion of competition and the effect on trade, but found that there was no reasoning at all on that point. With regard to a complex case in which the distortion of competition occurred, according to the Commission, at two different levels, an adequate statement of reasons must then be provided, according to Lico Leasing and PYMAR. The assertion in the decision at issue that the beneficiaries of the advantages arising from the tax measures at issue operated in all sectors of the economy and that those advantages strengthened their position on their respective markets is general in nature and does not explain why the SLT system specifically posed a risk of distorting competition and effecting trade between Member States. With regard to the effect on the market for bareboat chartering and the purchase and sale of ships, the decision at issue is vitiated by a number of contradictions and inconsistencies with regard to the activity of the EIGs and, therefore, also with regard to the capacity of the tax measures at issue to distort competition and to affect trade.

80 According to Bankia and Others, the existence of an economic unit formed by the EIGs and their members was raised out of time and is not apparent from the decision at issue, so that the General Court was correct in stating, in the alternative, that the reasoning of that decision was defective. In view of the particular circumstances of the present case, it was, in their opinion, incumbent on the Commission to supply further indications to explain how the advantages retained by the investors, and not by the shipping companies or the shipyards, were liable to distort or threaten to distort competition and affect trade in the markets in which those investors were active.

81 Aluminios Cortizo submits that the Commission did not indicate in the decision at issue the reasons why it did not assess the selectivity of the advantages arising from the tax measures at issue on the shipbuilding market, which was the only market concerned. Moreover, according to Aluminios Cortizo, no distortion of competition could be established, since the investors operated in all sectors of the economy, and such distortion exists only where the measure at issue is selective. Since the decision at issue does not provide any explanation in that regard, the General Court was correct in finding that there was an inadequate statement of reasons for that decision. As regards the EIGs, given that they were only financial instruments derived from the mere implementation of contractual clauses, they did not participate in any market, and so a distortion of the market could not be established at that level either.

Findings of the Court

82 As the General Court recalled in paragraph 185 of the judgment under appeal, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Court of the European Union to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see, inter alia, judgments of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 88, and of 2

December 2009, *Commission* v *Ireland and Others*, C?89/08 P, EU:C:2009:742, paragraph 77).

83 Applied to the classification of a measure as aid, that principle requires a statement of the reasons for which the Commission considers that the measure concerned falls within the scope of Article 107(1) TFEU. Even where the very circumstances in which the aid has been granted show that it is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (judgments of 6 September 2006, *Portugal* v *Commission*, C?88/03, EU:C:2006:511, paragraph 88, and of 30 April 2009, *Commission* v *Italy and Wam*, C?494/06 P, EU:C:2009:272, paragraph 49).

84 With regard to the condition concerning distortion of competition, as recalled by the General Court in paragraph 188 of the judgment under appeal, it is clear from the case-law of the Court of Justice that, in principle, aid intended to release an undertaking from costs which it would normally have to bear in its day-to-day management or normal activities distorts the conditions of competition (judgments of 19 September 2000, *Germany* v *Commission*, C?156/98, EU:C:2000:467, paragraph 30, and of 3 March 2005, *Heiser*, C?172/03, EU:C:2005:130, paragraph 55).

85 As regards the criterion of trade being affected, as the General Court recalled in paragraph 191 of the judgment under appeal, it follows from the case-law of the Court of Justice that the grant of aid by a Member State, in the form of a tax relief, to some of its taxable persons must be regarded as likely to have an effect on trade and, consequently, as fulfilling that criterion, where those taxable persons perform an economic activity in the field of such trade or it is conceivable that they are in competition with operators established in other Member States (judgments of 3 March 2005, *Heiser*, C?172/03, EU:C:2005:130, paragraph 35, and of 30 April 2009, *Commission* v *Italy and Wam*, C?494/06 P, EU:C:2009:272, paragraph 51). Furthermore, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in trade within the European Union, those undertakings must be regarded as affected by that aid (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C?222/04, EU:C:2006:8, paragraph 141).

86 It is also settled case-law that, for the purpose of categorising a national measure as ‘State aid’, it is not necessary to demonstrate that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C?222/04, EU:C:2006:8, paragraph 140 and the case-law cited).

87 In the present case, in paragraphs 169 to 173 of the judgment under appeal, the General Court, when determining whether the Commission’s analysis of the tax measures at issue supported the conclusion that the advantages obtained by the investors, and not by the EIGs, satisfied the condition relating to selectivity, considered that the activities referred to in the decision at issue, which benefited from those measures, that is to say, the acquisition of vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, were carried on by the EIGs created for the purposes of the STL system. It stated that, therefore, if the Commission had considered that the advantages obtained by the investors were selective because the latter carried on those activities, it was incumbent on it to make clear that the EIGs’ activities corresponded to those of their members or, at least, that they could be attributed to them. The General Court stated that the decision at issue did not provide any explanation in that regard and that the Commission had merely concluded that the tax measures at issue conferred a selective advantage on the EIGs and/or their investors without providing any further clarification and without explaining, in particular, why the members of the EIGs could be considered to be

carrying on the economic activities of the EIGs as though they formed a single legal or economic entity.

88 The General Court also stated in paragraph 174 of the judgment under appeal that the assertion in recital 172 of the decision at issue that the investors ‘are active through the EIGs in the markets for bareboat chartering and the acquisition and sale of sea-going vessels’ also seemed to contradict other recitals of that decision.

89 Therefore, the General Court concluded in paragraphs 176 to 177 of the judgment under appeal that the mere finding in recital 157 of the decision at issue that the STL system favoured the activities carried on by the EIGs, could not establish the selectivity of the advantages received by the investors and that, if that decision were to be construed to the effect that investors exercised, through the EIGs created for the purposes of the STL system, the particular activities of those EIGs, that decision would be vitiated by a failure to state reasons, and indeed by contradictory reasoning, on that point.

90 Furthermore, the General Court held in paragraph 208 of the judgment under appeal that the Commission had infringed its duty to state reasons by concluding in paragraphs 171 to 173 of the decision at issue that the tax measures at issue could distort competition and affect trade between Member States. In reaching that conclusion, the General Court, in the first place, in paragraphs 198 to 204 of that judgment, considered in essence that the Commission’s finding that the investors operated in all sectors of the economy and that the advantages enhanced their position on their respective markets lacked sufficient reasoning, because it involved a general assertion capable of being applied to any type of State support, and the Commission did not rely on any specific circumstance which would explain that finding; whereas, in view of the particular circumstances set out in that decision, it was incumbent on the Commission to provide further indications to explain how the advantages obtained by the investors, and not by the shipping companies or the shipyards, were liable to distort or risk distorting competition or to affect trade on the markets on which those investors operated.

91 In the second place, in paragraphs 205 to 207 of the judgment under appeal, the General Court considered that the duty to state reasons was not satisfied either by the finding in recital 172 of the decision at issue that, by means of the operations benefiting from the STL system, the investors operated through the EIGs on the markets for bareboat chartering and the purchase and sale of ships which are open to trade within the European Union, and the Commission did not explain in that decision why the EIGs established for the purposes of the STL system and their members formed a single legal or economic entity, so that the activities of the EIG could be attributed to their members.

92 In that regard, it must be observed that all of those considerations are based on the 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 appropriate to examine whether the advantages which the investors, and not the EIGs, had obtained were selective, whether they were liable to distort competition and affect trade between Member States and whether the decision at issue contained a sufficient statement of reasons concerning the analysis of those criteria. As is apparent from the examination of the first complaint in the first ground of appeal, that premiss is incorrect.

93 In addition, in order to assess whether the decision at issue is sufficiently reasoned with regard to the selectivity of the advantages arising from the tax measures at issue, the distortion of competition and the effect on trade between Member States, it is necessary to examine the content of that decision in its entirety.

94 Describing the tax structure of the STL system in paragraph 2.2 of the decision at issue, the Commission, in recitals 15 to 20 of that decision, indicated that the objective of the STL system was to generate the benefits of certain tax measures in favour of the EIG and the investors participating in it. It explained how, as was set out in paragraph 9 above, the EIG collected the tax benefits in two stages through a combination of the tax measures at issue. In paragraph 5.3.2.6. of the decision at issue, the Commission stated that the resulting economic advantages corresponded to the advantages that the EIGs would not have achieved in the same operation by the sole application of general measures, namely the interest saved on the amounts of tax payments deferred by virtue of early depreciation, the amount of tax avoided or interest saved on tax deferred by virtue of the tonnage tax system and the amount of tax avoided on the capital gain made on the sale of the vessel. It found in paragraph 5.3.3. of that decision that the STL system therefore involved the use of public resources in the form of lost tax revenue and unpaid interest.

95 As regards the shipping companies and the shipyards, the Commission set out, inter alia, in recitals 162 and 167 to 170 of the decision at issue that, in economic terms, a substantial part of the tax advantages collected by the EIGs was transferred to the shipping companies through a price rebate, but that the advantages obtained by those companies and indirectly by the shipyards were not imputable to the State, resulting from a combination of legal transactions between private entities.

96 With regard to the EIGs and the ‘investors’, admittedly the Commission did state in paragraph 28 of the decision at issue that ‘since the EIGs involved in STL operations are regarded as an investment vehicle by their members — rather than as a way of carrying out an activity jointly — this Decision refers to them as investors’, and it did not find in that decision that the EIGs and the investors formed an economic unit.

97 All the same, it is not apparent from that recital or from the decision at issue taken as a whole that the Commission endorsed the argument that the EIGs were mere investment vehicles or that those EIGs which it designated as ‘investors’ were regarded by the Commission as being anything other than members of the EIGs. On the contrary, the Commission stated in recital 126 of the decision at issue that the EIGs at issue were undertakings within the meaning of Article 107 TFEU and, in recital 140, that their tax transparency merely enabled different operators to join and finance or carry out any economic activity. In its analysis of the selectivity of the advantages arising from the tax measures at issue, in paragraph 5.3.2. and in particular in recital 161 of the decision at issue, it described the EIGs as being entities to which the tax measures at issue were granted and as the beneficiaries of those measures, and it stated in recital 157 of that decision that those measures favoured the activity of acquiring vessels through leasing contracts, in particular with a view to their bareboat chartering and subsequent resale, carried on by the EIGs.

98 On a number of occasions, in particular in recitals 16, 17, 28, 29 and 45 of the decision at issue, the Commission referred to the notion of ‘tax transparency’ of the EIGs, the consequence of which was the transfer to their members of all the advantages resulting from the tax measures at issue. Thus, in recital 166 of that decision, it stated that, ‘in the context of STL operations, the State initially transfers its resources to the EIG by financing the selective advantages [and,] by way of tax transparency, the EIG then transfers the State resources to its investors.’

99 In particular, by setting out all of those considerations, the Commission, in its examination of the condition relating to distortion of competition and that of effect on trade in recitals 171 to 173 of the decision at issue, stated that the members of the EIGs operated in all sectors of the economy, particularly in sectors open to trade between Member States, and that, in addition, by means of the operations benefiting from the STL system, they operated through the EIGs on the markets for bareboat chartering and the purchase and sale of ships, which are also open to trade between

Member States, so that the advantages arising from the STL system strengthened their position in their respective markets, thereby distorting or threatening to distort competition. It concluded that the economic advantages which the EIGs and their investors enjoyed could affect trade between Member States and distort competition in the internal market.

100 Apart from the fact that the premiss that the investors operated through the EIGs on the markets for bareboat chartering and the purchase and sale of ships does not contradict recital 28 of the decision at issue, similarly, and contrary to what the General Court stated in paragraph 175 of the judgment under appeal, it does not contradict recital 27 of that decision, according to which the EIGs had a separate legal personality from their members.

101 It appears from those considerations that the Commission provided information in the decision at issue making it possible to understand the reasons why it considered that the advantages arising from the tax measures at issue were of a selective nature and were liable to affect trade between Member States and distort competition, and that, having regard to the particular circumstances of the case, it adequately explained the reasons for that decision, without contradiction in that respect, in keeping with the requirements of Article 296 TFEU, as defined by the case-law set out in paragraphs 82 to 86 above.

102 It follows that the second complaint in the first part of the first ground of appeal and the second ground of appeal must be upheld.

103 Consequently, the judgment under appeal must be set aside.

Referral of the case back to the Court of First Instance

104 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.

105 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.

Costs

106 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

107 In accordance with Article 140(3) of the Rules of Procedure of the Court of Justice, which applies to the procedure on appeal by virtue of Article 184(1) of those rules, Bankia and Others, and Aluminios Cortizo, which have intervened in the appeal, are to bear their own respective costs.

On those grounds, the Court of Justice (Second Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 17 December 2015,** *Spain and Others* **v** *Commission* **(T?515/13 and T?719/13, EU:T:2015:1004);**

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves costs;**

4. Orders Bankia SA, Asociación Española de Banca, Unicaja Banco SA, Liberbank SA, Banco

de Sabadell SA, Banco Gallego SA, Catalunya Banc SA, Caixabank SA, Banco de Santander SA, Santander Investment SA, Naviera Séneca AIE, Industria de Diseño Textil SA, Naviera Nebulosa de Omega AIE, Banco Mare Nostrum SA, Abanca Corporación Bancaria SA, Ibercaja Banco SA, Banco Grupo Cajatres SAU, Naviera Bósforo AIE, Joyería Tous SA, Corporación Alimentaria Guissona SA, Naviera Muriola AIE, Poal Investments XXI SL, Poal Investments XXII SL, Naviera Cabo Vilaboa C?1658 AIE, Naviera Cabo Domaio, C?1659 AIE, Caamaño Sistemas Metálicos SL, Blumaq SA, Grupo Ibérica de Congelados SA, RNB SL, Inversiones Antaviana SL, Banco de Caja España de Inversiones, Salamanca y Soria SAU, Banco de Albacete SA, Bodegas Muga SL and Aluminios Cortizo SAU to bear their own respective costs.

[Signatures]

* Language of the case: Spanish.