



Euro Tax Flash from KPMG's EU Tax Centre



[Background](#)

[The CJEU decision](#)

[EU Tax Centre comment](#)

CJEU decision in the State aid case relating to Spanish 'tax lease' arrangement

[Spain – CJEU – State aid – Spanish tax lease – Selectivity – Distortion of competition](#)

On July 25, 2018, the Court of Justice of the European Union (CJEU) published its decision on the 'Spanish tax lease system' (STLS) case (C-128/16 P). The STLS was a shipbuilding financing agreement (that is no longer in force), which included Spanish tax relief for the investors that provided the finance. The CJEU decided that the STLS may be liable to constitute illegal State aid and referred the case back to the General Court.

Background

The STLS consisted of the financing, by means of a legal and financial structure, of the building of sea-going vessels by shipyards (sellers) and their acquisition by maritime shipping companies (buyers). The financing arrangement that was typically coordinated by banks, involved intermediary vehicles known as Economic Interest Groups (EIGs) in which external investors participated. The arrangement generated Spanish tax benefits that, because the EIGs were transparent entities for Spanish tax purposes, accrued to the members of the EIGs.

By decision of July 17, 2013, the Commission took the view that certain tax measures associated with the STLS constituted illegal state aid and were partially incompatible with the internal market. The Commission considered that the beneficiaries of the State aid were both the EIGs and, because of the EIGs' transparency, also their members. The decision required the State aid to be repaid by the members of the EIGs.

Following several appeals by Spain and certain alleged beneficiaries of the scheme, the General Court of the Court of Justice of the EU (EGC) annulled the decision of the European Commission on December 17, 2015 (Joined Case [T-515/13](#) and [T-719/13](#) Spain and Others v Commission). Since the EIGs were transparent entities, the EGC considered that only the investors, and not the EIGs themselves, benefited from the economic (tax) advantages

resulting from the STLS. As a consequence, the EIGs could not be the beneficiaries of State aid. In addition, the EGC held that the economic advantages that the members of the EIGs benefited from were open, under the same conditions, to any market operator without distinction and, therefore, could not be considered as a selective measure.

This judgment was appealed by the European Commission in February 2016.

The CJEU decision

The CJEU first recalled the conditions that have to be cumulatively met for a national measure to be qualified as State aid, i.e. (1) there must be an intervention through State resources, which (2) is liable to affect trade between Member States, (3) confers a selective advantage on the recipient, and (4) distort or threaten to distort competition.

Siding with the argumentation developed by the Commission, the CJEU considered that the implementation of the STLS implies the use of public resources, through lost tax revenues and unpaid interest. It also acknowledged that the economic advantages resulting from the incriminated tax measures were favoring the activities carried on specifically by the EIGs, i.e. acquiring vessels through leasing contracts. As a consequence, the STLS was liable to confer a selective advantage to the EIGs, by placing them in a more favorable position than other taxpayers. In this respect, the CJEU underlined that although those economic advantages were transferred to the members of the EIGs as fully transparent entities, the latter remained the direct beneficiaries of those measures. Therefore, the Court decided that the STLS was such as to constitute State aid in favor of the EIGs and that this conclusion was not put in question by the Commission's decision to recover the aid solely from the EIGs investors.

With regards to the selective nature of the STLS in particular, the Court further inferred that such condition has to be examined by reference to the EIGs and not to their investors alone. In this respect, it follows from settled case law that the selectivity criteria is satisfied, if it can be evidenced that a tax measure constitutes a derogation from the "normal" tax system, by introducing a difference in treatment between operators who are in a comparable factual and legal situation. By failing to perform such analysis, the EGC committed an error of law.

Finally the CJEU considered that the Commission provided in the contested decision sufficient information regarding the reason why it decided that the advantages arising from the tax measures were selective and may have an impact on trade between Member States and distort competition.

Considering that the state of the proceedings did not allow them to give a final decision in the matter, the Court decided to set aside the judgment of the EGC and referred the case back to the EGC.

EU Tax Centre comment

Although it remains to be seen how the EGC will finally decide on this case, in particular as regards the selective character of the STLS at the level of the EIGs, the CJEU seems to consider that the tax measures at stake are indeed liable to constitute illegal State aid under EU law. This is a rather negative decision for the Spanish taxpayers that have made use of the STLS tax benefits, albeit a welcome clarification of the fact that the EIGs rather than the investors alone should be considered as the beneficiaries of the aid.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



Robert van der Jagt

Chairman, KPMG's EU Tax Centre and
Partner,
Meijburg & Co

kpmg.com/socialmedia



[Privacy](#) | [Legal](#)

You have received this message from KPMG's EU Tax Centre. If you wish to unsubscribe, please send an Email to eutax@kpmg.com.

If you have any questions, please send an email to eutax@kpmg.com

You have received this message from KPMG International Cooperative in collaboration with the EU Tax Centre. Its content should be viewed only as a general guide and should not be relied on without consulting your local KPMG tax adviser for the specific application of a country's tax rules to your own situation. The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavor to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.

To unsubscribe from the Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox (eutax@kpmg.com) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands

© 2018 KPMG International Cooperative ("KPMG International"), a Swiss entity. Member firms of the KPMG network of independent firms are affiliated with KPMG International. KPMG International provides no client services. No member firm has any authority to obligate or bind KPMG International or any other member firm vis-à-vis third parties, nor does KPMG International have any such authority to obligate or bind any member firm. All rights reserved. The KPMG name and logo are registered trademarks or trademarks of KPMG International.