The General Court of the European Union concluded that the Spanish tax lease constitutes unlawful State aid

Today, the General Court issued its judgment in the joined cases T-515/13 RENV and T-719/13 RENV concluding that the so-called "Spanish tax lease" scheme qualifies as a State aid.

In summary, the Spanish tax lease scheme envisaged that an Economic Interest Grouping (EIG) takes a lease on a ship from a leasing company as soon as the construction of such ship begins. At the same time, the EIG leases the ship to a shipping company under a bareboat charter. At the end of the leasing contract, the EIG buys the ship from the leasing company and sells it on to the shipping company. According to the European Commission, the scheme secured a tax benefit that was partly enjoyed by the EIG (and its investors) and partly passed on to the shipping company by way of a rebate on the purchase price of the ship. This is because: (i) under the Spanish legislation, the EIG could apply to benefit from an early and accelerated depreciation on the leased ship. Thanks to the application of the early and accelerated depreciation, the EIG would accumulate significant tax losses that, because of the tax transparency of the EIG, were used by the investors of the EIG; (ii) before selling the ship to the shipping company, the EIG would opt for the tonnage tax regime. Under such regime, capital gains from the sale of ships are not subject to income tax and, therefore, no tax is paid upon the sale of the ship to the shipping company even though the tax basis of such ship has been essentially eroded due to the application of the early and accelerated depreciation.

In its judgment of 17 December 2015, *Spain and Others v Commission* (T-515/13 and T-719/13), the General Court annulled the decision of the European Commission 2014/200/EU of 17 July 2013 by which the Commission concluded that the Spanish tax lease was an unlawful State aid. However, in its judgment of 25 July 2018 (C-128/16 P), the Court of Justice of the European Union ("Court of Justice") set aside the judgment of the General Court and remanded the case back to it. According to the Court of Justice, the General Court was wrong in concluding that, even though the EIGs were the beneficiaries of the Spanish tax measures that secured the tax benefits at stake (early and accelerated depreciation and tonnage tax regime), they did not receive an advantage because, being tax transparent entities, the benefits stemming from the application of such tax measures were enjoyed by the investors of the EIGs. Consequently, the General Court was also wrong in concluding that no State aid was at stake since the investors of the EIGs did not receive any selective advantage. According to the Court of Justice, the EIGs carried on an economic activity consisting of the acquisition of vessels through leasing contracts with a view to their bareboat chartering and subsequent resale and, therefore, were to be regarded as undertakings within the meaning of State aid legislation. The General Court should have therefore analysed whether the EIGs received a State aid and not whether a State aid had been granted to their investors.

In today's judgment, the General Court reversed its 2015 decision and concluded that the Spanish tax lease system as a whole must be considered an unlawful State aid regime that granted a selective advantage to EIGs in the form of an early and accelerated depreciation. Particularly, the General Court pointed out that the early and accelerated depreciation allowed the EIG to start the depreciation of the ship before it started to use it, thus derogating from the ordinary depreciation regime. The application of such regime was subject to a prior authorization of the Spanish tax authorities. According to the Court, since no clear provisions existed on the criteria that the tax authorities had to follow in order to provide such authorization, the tax authorities were given considerable scope for discretion. The General Court concluded that, given the existence of such wide discretion, the EIGs that benefitted from the regime could have received a selective advantage not granted to other EIGs or other entities in comparable legal and factual circumstances. The Court also took the view that, in the light of *the de iure* discretionary nature of the measure, it was not necessary to ascertain that the measure had also been *de facto* discriminatory and, therefore, it did not matter whether all the EIGs active in the shipping sector actually benefitted from the favorable regime.

For further information: **Maisto e Associati**

Milan
Piazza F. Meda 5
20121
T: +39.02.776931

Rome
Piazza d'Aracoeli 1
00186
T: +39.06.45441410

London
2, Throgmorton Avenue
EC2N 2DG
T: +44.207.3740299