

COMMISSION DECISION (EU) 2015/667**of 4 February 2015****on State aid SA.14551 (2013/C) implemented by France resulting from the change to the conditions for aid granted to time charterers under the tonnage tax scheme***(notified under document number C(2015) 434)***(Only the French text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular the first subparagraph of Article 108(2) thereof,

Having regard to the Agreement on the European Economic Area, and in particular Article 62(1)(a) thereof,

Having called on interested parties to submit their comments pursuant to those articles ⁽¹⁾, and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 6 November 2013, the Commission informed France of its decision to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) on the aid granted to time charterers under the tonnage tax scheme. The Commission's decision to initiate the procedure (the 'opening decision') was published in the *Official Journal of the European Union* ⁽²⁾. The Commission called on interested parties to submit their comments on the aid in question.
- (2) The French authorities sent their comments and their replies to the questions set out in the opening decision by letters dated 28 April, 14 May and 28 November 2014. A meeting with the French authorities was held on 20 October 2014 in Brussels.
- (3) The third parties (Armateurs de France and the European Community Shipowners' Association, ECSA) submitted comments within the deadlines provided for in the opening decision. By letter dated 20 March 2014, the Commission forwarded these comments to the French authorities. By letter dated 28 April 2014, France took note of the comments by the third parties.

2. FACTS

- (4) The French tonnage tax scheme, as authorised by the Commission in 2003 on the basis of the 1997 Community guidelines on State aid to maritime transport (the '1997 Guidelines') ⁽³⁾, did not impose any general condition relating to the flag of vessels in the fleet operated by the shipowners benefiting from the scheme.
- (5) However, eligibility under the scheme for activities engaged in by time-chartered vessels ⁽⁴⁾ was subject to a specific limitation concerning the percentage of net tonnage of the fleet accounted for by non-Community-flagged vessels. Under recital 35 of Commission Decision C(2003) 1476fin of 13 May 2003 authorising the French tonnage tax scheme ⁽⁵⁾, the activities engaged in by time-chartered vessels not flying the flag of a Member State of the European Union were eligible only up to 75 % of the net tonnage of the fleet operated by the company. Furthermore, recital 36 of that Decision laid down that the limit did not apply to vessels flying the flag of a Member State where their strategic and commercial management was necessarily carried out from the territory of a Member State.

⁽¹⁾ OJ C 380, 28.12.2013, p. 29.

⁽²⁾ See footnote 1.

⁽³⁾ OJ C 205, 5.7.1997, p. 5.

⁽⁴⁾ A time charter is a contract under which the shipowner provides a fitted-out, equipped vessel with a full crew to the charterer for a period of time specified by the charter agreement, in return for a charge. The charterer carries out the commercial management of the vessel, while the shipowner retains responsibility for nautical management.

⁽⁵⁾ Commission Decision of 13 May 2003 on State aid N 737/02 on the French scheme imposing a lump sum on the basis of tonnage for the benefit of shipping companies (OJ C 38, 12.2.2004, p. 5).

- (6) Following the adoption of the 2004 Community guidelines on State aid to maritime transport (the '2004 Guidelines') ⁽⁶⁾, by the Finance (Amendment) Act for 2005 (Law No 2005-1720 of 30 December 2005), France introduced a general rule on the flag flown and abolished the specific rule applying to time-chartered vessels.
- (7) The general thrust of the measure is described as follows in administrative instruction 4-H-3-08, published in the *Bulletin officiel des impôts* (BOI) No 41 of 11 April 2008:

'Article 47 of the Finance (Amendment) Act for 2005 (Law No 2005-1720 of 30 December 2005) brought the optional tonnage tax scheme laid down in Article 209-0 B of the General Tax Code (*code général des impôts*) into line with the new Community guidelines on State aid to maritime transport published in the *Official Journal of the European Union* on 17 January 2004.

Eligibility under the scheme is now conditional on the shipping companies which have opted into the scheme undertaking to maintain or increase the share of their fleet flying the flag of a Member State of the European Community during the period of application of the scheme ...'

- (8) With regard to the eligibility of time-chartered vessels, administrative instruction 4-H-3-08 stipulates that:

'... the condition in the last paragraph of Article 209-0 B(I) [of the General Tax Code] excluding time-chartered vessels flying the flag of a State which is not a member of the European Community from eligibility under the scheme if they account for more than 75 % of the net tonnage of the fleet concerned is deleted.' ⁽⁷⁾

'Time-chartered merchant ships flying the flag of a State which is not a member of the European Community are therefore eligible for the tonnage tax scheme, even if they account for more than 75 % of the net tonnage of the fleet operated by the company.

In other words, eligible time-chartered vessels flying the flag of a State which is not a member of the European Community qualify for the tonnage tax scheme without restriction, provided that the commitment set out above is complied with ...' ⁽⁸⁾

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (9) In the opening decision, the Commission doubted whether the change to the tonnage tax scheme introduced in 2005 was compatible with the internal market.
- (10) The Commission considered that the removal of the limit concerning the eligibility of activities engaged in by time-chartered vessels not flying the flag of a Member State was a measure introducing new aid, since it was not in line with Decision C(2003) 1476fin authorising the French tonnage tax scheme and France had not notified it to the Commission.

⁽⁶⁾ OJ C 13, 17.1.2004, p. 3. See point 3.1, seventh paragraph.

⁽⁷⁾ No 1, fourth paragraph, of administrative instruction 4-H-3-08.

⁽⁸⁾ No 22, second and third paragraphs, of administrative instruction 4-H-3-08. 'The commitment set out above' is the commitment by the shipping companies to maintain or increase the share of their fleet flying the flag of a Member State of the European Community during the period of application of the scheme.

- (11) The Commission took the view that continuing to apply a limit on the eligibility of activities engaged in by time-chartered ships not flying the flag of a Member State was justified in terms of achieving the objectives of the 1997 and 2004 Community Guidelines.

4. COMMENTS AND COMMITMENTS BY FRANCE

- (12) First of all, the French authorities confirmed that the wording of Article 209-0 B of the General Tax Code resulting from Article 19 of the Finance (Amendment) Act for 2002 (Law No 2002-1576 of 30 December 2002) made the application of the tonnage tax scheme conditional on compliance with an upper eligibility threshold of 75 % of the net tonnage of the fleet operated by the company for time-chartered vessels not flying the flag of a Member State of the European Community ⁽⁹⁾. This share was approved by the Commission in recital 35 of Decision C(2003) 1476fin ⁽¹⁰⁾.
- (13) The detailed data gathered by the French Directorate for Tax Law confirm that the percentage of non-Community flagged time-chartered vessels in relation to the total tonnage operated by the company is complied with by each company and for every year since the company opted for the scheme. The companies listed in the summary tables sent to the Commission represent not only all the member companies of the Armateurs de France association having opted for the tonnage tax scheme ⁽¹¹⁾, but also the vessels of the shipping companies operating public ferry services ⁽¹²⁾. The remaining 15 % belongs to companies which have not opted for the tonnage tax scheme and which are not members of any shipowners' grouping (mainly SNCM and CMN). The data provided show that, from the introduction of tonnage tax in 2003 until 2014, no beneficiary exceeded the threshold in question. The highest share recently recorded was 41 %, which is well below the threshold authorised in 2003.
- (14) In none of the companies in question did the share exceed the threshold of 75 % during a year covered by the opt-in to the tonnage tax scheme.
- (15) Furthermore, all the current beneficiaries operate at least 25 % of the net tonnage of their fleet under the flag of a Member State of the Union or of a State that is party to the EEA Agreement (hereinafter: 'European flag'). Since the beneficiaries of the scheme are under an obligation to maintain or increase the share of their fleet under the European flag, no more than 75 % of the net tonnage of their fleet could ever comprise time-chartered vessels not flying the European flag. Accordingly, they will always comply with the conditions of Decision C(2003) 1476fin.
- (16) However, in their exchanges with the Commission, the French authorities acknowledged that French legislation as it stands does not lay down any legal obligations ensuring that the beneficiary companies operating time-chartered vessels will always make a sufficient contribution to the objectives of the 2004 Guidelines. In particular, for new entrants, there are no specific fleet obligations, in terms of either flag or minimum own shipping activities.
- (17) To remedy this situation, the French authorities have given a commitment that, with effect from the 2015 tax year ⁽¹³⁾, the tonnage tax scheme option will apply only on condition that the company operates at least 25 % of the net tonnage of its fleet under the European flag, and that it undertakes to maintain or increase this share during the 10 years that the option is valid. In the case of a tax-integrated group, this commitment will be assessed by reference to the total net tonnage of all the companies in the tax group.

5. COMMENTS BY THIRD PARTIES

5.1. Comments by Armateurs de France

- (18) Armateurs de France (AdF) is the trade association representing shipping and maritime services companies.

⁽⁹⁾ The third paragraph of Article 209-0 B(I) of the General Tax Code specifies that 'time-chartered vessels not flying the flag of a Member State of the European Community may not qualify for the scheme if they account for more than 75 % of the net tonnage of the fleet operated by the company'.

⁽¹⁰⁾ Recital 35 of Decision C(2003) 1476fin: 'Therefore, activities engaged in by time-chartered vessels not flying the flag of a Member State of the European Community may qualify for the scheme imposing flat-rate taxation on the basis of tonnage only if they account for a maximum of 75 % of the net tonnage of the fleet operated by the company'.

⁽¹¹⁾ Members of the Armateurs de France association account for 80 % of the tonnage operated by French shipowners.

⁽¹²⁾ The latter account for 5 % of the total tonnage of French shipowners.

⁽¹³⁾ The French tonnage tax scheme laid down by Article 209-0 B of the General Tax Code was amended by Article 75 of the Second Finance (Amendment) Act for 2014 (Law No 2014-1655 of 29 December 2014). The new condition will apply to companies which exercise the option in relation to a financial year closed after 27 November 2014.

- (19) AdF points out that the original French system notified by France was approved by the Commission in 2003 on the basis of the 1997 Guidelines.
- (20) The 2003 French scheme provided that the activities engaged in by time-chartered vessels flying the flag of a third country were eligible only up to 75 % of the net tonnage of the fleet. In other words, it was agreed that the percentage of non-Community-flagged time-chartered vessels should not exceed 75 % of the total tonnage operated by the company.
- (21) In 2004, after France had notified the scheme, the 1997 Guidelines were replaced and clarified. The 2004 Guidelines have similar objectives, in particular 'encouraging the flagging or re-flagging to Member States' registers' and 'maintaining and improving maritime know-how and protecting and promoting employment for European seafarers'.
- (22) It is with the aim of complying with the new guidelines that France decided to substitute a new criterion for the 75 % threshold. The new criterion, which consists in 'maintaining or ... increasing the level of the fleet flying the flag of a Member State', offered a greater guarantee in terms of maintaining and promoting Community jobs than the limitation applicable to non-Community-flagged time-chartered vessels.
- (23) Since the French rules simply repeat the wording of the 2004 Guidelines, no incompatibility could therefore be suspected. Accordingly, this raises the principles of legal certainty and legitimate expectation.
- (24) Given the formal investigation under way, the members of Armateurs de France have checked whether the 75 % threshold was complied with from the outset and throughout the period since 2003.
- (25) This check revealed that the percentage, year on year and company by company, of non-Community-flagged time-chartered vessels in relation to the total tonnage operated does not exceed the initial share of 75 % authorised in 2003, despite the change to the French rules. The obligation to maintain or increase the Community-flagged fleet has led in practice to the same result as the former criterion and may therefore be considered sufficiently virtuous in itself.
- (26) The French criteria as they exist today, in particular that of 'maintaining or ... increasing the level of the fleet flying the flag of a Member State', are fully in line with the objectives set by the 2004 Guidelines.

5.2. Comments by the European Community Shipowners' Association (ECSA)

- (27) First, ECSA stresses that time chartering is one of the key mechanisms at the disposal of shipping companies. The commercial and operational management of the vessel is assigned to the charterer for an agreed period of time, while leaving ownership and the remaining management of the vessel in the hands of the shipowner. This provides shipping companies with a degree of flexibility to accommodate their customers' needs optimally and hence to secure their position globally. The flexibility created by time-chartering has enabled European shipping companies to gain market share at a fairly rapid pace.
- (28) The most important factor in the shipping sector is direct employment ashore associated with the commercial and operational management of vessels and, indirectly, the retention and attraction of shipping companies. Over recent decades, European shipowners have a proven track record of excellent management and operational abilities. High-level employment and skills have thus been developed and maintained in European companies by chartering tonnage, regardless of flag.
- (29) ECSA is of the view that the changes that France made to its tonnage tax regime in 2005 met the objectives of the 2004 Guidelines. Insisting on formally reintroducing the restriction for non-EU-flagged time-chartered vessels would deprive European shipping companies of the flexibility necessary to meet their customers' demands adequately and optimally and to secure their market position globally.

- (30) However, if the Commission were to insist on shipping companies owning and operating a certain percentage of merchant vessels in order to qualify for tonnage tax, ECSA believes that the Commission should allow European shipping companies to operate up to 10 dwt ⁽¹⁴⁾ chartered tonnage for every 1 dwt owned or bareboat-chartered-in tonnage under tonnage tax schemes. Application of the above proportion must not be subject to criteria such as the Community registry.
- (31) In conclusion, the Community guidelines should remain a flexible framework. They must enable Member States to adopt appropriate measures in support of their fleet in accordance with their specific needs, provided that the contribution to the objectives of the Guidelines is assured. ECSA believes that the European shipping companies that operate vessels on a time-charter basis do meet these aims as well, whether or not the vessels fly the flag of a Member State.

6. COMMENTS BY FRANCE ON THE COMMENTS BY INTERESTED PARTIES

- (32) By letter dated 28 April 2014, France took note of the comments by the third parties.

7. ASSESSMENT OF THE MEASURES

7.1. Existence of aid within the meaning of Article 107(1) TFEU

- (33) Decision C(2003) 1476fin recognised the French tonnage tax scheme as an aid scheme.
- (34) The reasons that led the Commission to conclude that the tonnage tax scheme did constitute state aid within the meaning of Article 107(1) TFEU remain valid. In particular, the tonnage tax scheme is an optional scheme that derogates from the rules applicable to the calculation of corporation tax by conferring on certain companies — shipping companies — the economic advantage linked to a reduced tax base, which as a rule results in lower taxation of their income. Shipping companies engage in their activities in markets subject to intense international competition, so the advantages linked to tonnage tax are likely to lead to distortions of competition and affect trade between States party to the EEA Agreement.
- (35) The removal of the limitation concerning the eligibility of the activities carried out on non-EU-flagged time-chartered vessels is a measure introducing new aid implemented without prior notification to the Commission, contrary to Article 108(3) TFEU. It is new aid because it does not comply with Decision C(2003) 1476fin authorising the French tonnage tax scheme and France has not notified it to the Commission. Contrary to AdF's assertions ⁽¹⁵⁾, the removal of this limitation cannot be considered an appropriate measure amending the French tonnage tax scheme to comply with the 2004 Guidelines ⁽¹⁶⁾, because the removal is incompatible with the objectives of the 2004 Guidelines, as explained in section 7.2 of this Decision. Accordingly, the removal of the limitation concerning the eligibility of activities engaged in on non-EU-flagged time-chartered vessels cannot be part of existing aid within the meaning of point 13 of the 2004 Guidelines ⁽¹⁷⁾.

7.2. Compatibility with the internal market pursuant to Article 107(3) TFEU

- (36) The conditions for the application of Article 107(3)(c) TFEU in the field of maritime transport were clarified in the 2004 Guidelines. The compatibility of the measure which is the subject of this Decision must therefore be assessed on the basis of the 2004 Guidelines.
- (37) The 2004 Guidelines, like the 1997 Guidelines, do not provide for an explicit restriction on the inclusion of time-chartered vessels in tonnage tax schemes. None the less, in previous decisions ⁽¹⁸⁾, the Commission has still considered that time-charterers qualifying for a tonnage tax scheme must contribute either to the objective of

⁽¹⁴⁾ Deadweight tonnage.

⁽¹⁵⁾ See recitals (21) to (23) of this Decision.

⁽¹⁶⁾ See point 13 of the 2004 Guidelines.

⁽¹⁷⁾ Contrary to the criterion of 'maintaining or ... increasing the level of the fleet flying the flag of a Member State', which was implemented to comply with the 2004 Guidelines.

⁽¹⁸⁾ See, for example, the initial decision C(2003) 1476fin and Commission Decision 2009/626/EC of 25 February 2009 on the Aid Scheme C 2/08 (ex N 572/07) on the amendment to the maritime tonnage tax system which Ireland is planning to implement (OJ L 228, 1.9.2009, p. 20). See also the opening decision, recitals 24 to 26.

flagging to Member States' registers or to the objective of maintaining and improving maritime know-how by carrying out the nautical management of a certain percentage of their fleet. No company may benefit from a tonnage tax scheme without contributing to the key objectives of the 2004 Guidelines.

- (38) In the light of the statistical data provided by the French authorities, the Commission notes that, despite the fact that the limitations applicable to time-chartered vessels were removed in 2005, the beneficiaries of the French tonnage tax scheme made a sufficient contribution to the above objectives because the percentage of non-Community-flagged time-chartered vessels does not exceed 41 % of the total tonnage operated by the beneficiary companies. This result has been achieved either by a high rate of EU/EEA-flagged vessels, or by the nautical management of a certain percentage of the fleet (or a combination of the two).
- (39) Furthermore, the Commission notes that, according to the French authorities, all the current beneficiaries operate at least 25 % of the net tonnage of their fleet under a European flag. The Commission also notes that the good performance of the French shipping sector in terms of the use of European flags is also confirmed by external studies, for example the study published by Oxford Economics in 2014, *The economic value of the EU shipping industry*. According to this study, the percentage of tonnage under the French flag is well above 25 % of the tonnage in operation ⁽¹⁹⁾. Since the beneficiaries of the scheme are under an obligation to maintain or increase the level of their fleet under a European flag, it is not possible for more than 75 % of the net tonnage of their fleet to be composed of time-chartered vessels not flying a European flag.
- (40) However, the Commission must point out that the French legislation as it stands does not lay down any legal obligations ensuring that the beneficiary companies operating time-chartered vessels will always make a sufficient contribution to the objectives of the 2004 Guidelines. In particular, there are no specific fleet obligations for new entrants, in terms either of the flag or of their own minimum nautical management.
- (41) On this basis, the Commission concludes that the French legislation as it stands does not contain the necessary guarantees and cannot, therefore, be considered compatible with the 2004 Guidelines.
- (42) In this context, the Commission notes the commitment by France to remedy the situation by introducing as a condition for opting into the flat-rate tax scheme the obligation for the company to operate a minimum percentage of vessels under a European flag. This percentage will be set at 25 % of the net tonnage of the fleet from the 2015 tax year and must be complied with throughout the 10 years covered by the option for tonnage tax.
- (43) This condition is as strict as the condition set out in the initial decision C(2003) 1476fin authorising the French tonnage tax scheme. Given the objectives of the 2004 Guidelines, in particular the need for the beneficiaries to contribute either to the objective of flagging to Member States' registers or to the objective of maintaining and improving maritime know-how by carrying out the nautical management of a certain percentage of their fleet, the Commission considers that the commitment by France is sufficient. Through this commitment, new entrants to the tonnage tax scheme also contribute to the objective of flagging to Member States' registers.

7.3. Conclusion

- (44) The Commission finds that in 2005, in breach of Article 108(3) TFEU, France unlawfully implemented the amendment to the French legislation on tonnage tax in relation to time-chartered vessels.
- (45) This amendment is incompatible with the TFEU in that it does not ensure that new entrants to the tonnage tax scheme make a sufficient contribution to the objectives of the 2004 Guidelines because they do not have a legal obligation in terms of fleet flagging or in terms of their own minimum shipping activities.
- (46) As agreed with the French authorities, the existing formal rules must be adjusted to ensure that, in future, only companies with at least 25 % of their tonnage flying a European flag may enter the tonnage tax scheme. The beneficiaries of the tonnage tax scheme will therefore contribute to the objectives of the 2004 Guidelines, even though their entire fleet is time-chartered.

⁽¹⁹⁾ See, for example, Figures 2.3d and 2.4b in the study (<http://www.oxfordeconomics.com/my-oxford/projects/272456>).

- (47) Since all the current beneficiaries already comply with the above threshold and already have the obligation to maintain or increase the percentage of their fleet flying a European flag, there is no need to recover the aid,

HAS ADOPTED THIS DECISION:

Article 1

The amendment to the tonnage tax scheme implemented unlawfully by France in 2005, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market in relation to the rules applicable to time-chartered vessels.

Article 2

France shall amend the legislation applicable to the tonnage tax scheme with effect from the 2015 tax year in accordance with the commitment that it has given, under which the beneficiaries of the tonnage tax scheme, on entering the scheme, must have at least 25 % of their fleet under the flag of a Member State of the Union or of a State party to the EEA Agreement, and subsequently maintain or increase this proportion.

Article 3

France shall inform the Commission of the adoption of the legislative amendments referred to in Article 2.

Article 4

This Decision is addressed to the French Republic.

Done at Brussels, 4 February 2015.

For the Commission
Margrethe VESTAGER
Member of the Commission
