Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

30 April 2019 *

(State aid – Corporate tax exemption scheme implemented by France in favour of its ports – Decision declaring the aid scheme incompatible with the internal market – Existing aid – Concept of economic activity – Obligation to state reasons – Distortions of competition and effect on trade between Member States – Principle of sound administration)

In Case T-747/17,

Union des ports de France – UPF, established in Paris (France), represented by C. Vannini and E. Moraïtou, lawyers,

applicant,

v

European Commission, represented by B. Stromsky and S. Noë, acting as Agents,

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Decision (EU) 2017/2116 of 27 July 2017 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by France – Taxation of ports in France (OJ 2017 L 332, p. 24),

THE GENERAL COURT (Sixth Chamber),

composed of G. Berardis (Rapporteur), President, S. Papasavvas and O. Spineanu-Matei, Judges,

Registrar: L. Ramette, Administrator,

having regard to the written part of the procedure and further to the hearing on 28 November 2018,

gives the following

* Language of the case: French.

Judgment

Background to the dispute

1 In 2013, the European Commission's services sent a questionnaire to all Member States regarding the functioning and tax treatment of their ports in order to obtain a general overview of the situation and to clarify the position of ports with regard to EU State aid rules. Following this, the Commission's services exchanged a number of letters relating to that matter with the French authorities.

2 By letter of 9 July 2014, pursuant to Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC (OJ 1999 L 83, p. 1), the Commission informed the French authorities of its preliminary assessment of the rules on the tax treatment of ports, regarding the possible classification of those rules as State aid and their compatibility with the internal market. At the end of that letter, the Commission expressed the preliminary view that the corporate tax ('CT') exemption for French ports constituted incompatible existing State aid within the meaning of Article 107(1) TFEU and invited the French authorities to submit comments on that preliminary view.

3 The French authorities forwarded their comments by letter of 7 November 2014. A meeting between the Commission and the French authorities was held on 12 December 2014. On 15 January 2015, the latter sent additional comments to the Commission. By letter of 1 June 2015, the Commission replied to that letter stating that, at that stage, it maintained the preliminary view expressed in its letter of 9 July 2014.

4 By letter of 21 January 2016, the Commission confirmed its position and proposed to the French authorities, under Article 108(1) TFEU and Article 22 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), as appropriate measures, the abolition of the CT exemption for ports in respect of the income from their economic activities from the start of the 2017 tax year. The French authorities were requested to state their unconditional and unequivocal opinion on the Commission's proposal within two months, in accordance with Article 23(1) of Regulation 2015/1589.

5 By letter of 11 April 2016, the French authorities sent their comments to the Commission. A meeting between the French authorities and the Commission took place on 27 June 2016.

6 Since the French authorities unconditionally and unequivocally refused the appropriate measures proposed by the Commission, the latter decided to initiate the procedure provided for in Article 108(2) TFEU, pursuant to Article 23(2) of Regulation 2015/1589. The Commission's decision to initiate that procedure was published in the *Official Journal of the European Union* (OJ 2016 C 302, p. 23; 'the decision initiating the procedure'). The Commission invited the French Republic to submit comments on the content of the decision. It also invited interested parties to submit their comments on the measure at issue.

7 The French authorities submitted their comments by letter of 19 September 2016. The Commission received comments from several interested parties, including the applicant, the Union des ports de France – UPF. The Commission forwarded those comments to the French Republic, which was given the opportunity to respond. It received the French Republic's response by letter of 3 November 2016. A meeting between the French authorities and the Commission took place on 16 November 2016.

8 On 27 July 2017, the Commission adopted Decision (EU) 2017/2116 on aid scheme SA.38398 (2016/C, ex 2015/E) implemented by France – Taxation of ports in France (OJ 2017 L 332, p. 24; 'the contested decision').

9 The contested decision was published in the *Official Journal of the European Union* on 14 December 2017. That decision was also notified to the applicant, as an interested party which had submitted comments during the formal investigation procedure, by letter of 6 September 2017.

10 Article 1 of the contested decision reads as follows:

'The exemption from corporate tax in favour of autonomous ports (some of which are now classified as major seaports), maritime chambers of commerce, chambers of commerce and industry managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment, constitutes an existing State aid scheme which is incompatible with the internal market.'

11 According to Article 2 of the contested decision:

'1. France shall remove the corporate tax exemption referred to in Article 1 and subject the entities for which this exemption applies to corporate tax.

2. The measure by which France fulfils its obligations under paragraph 1 shall be adopted before the end of the calendar year running on the date of notification of this Decision. This measure shall apply at the latest to the income from the economic activities generated from the start of the tax year following its adoption.'

Procedure and forms of order sought

12 The applicant brought the present action by application lodged at the Court Registry on 15 November 2017.

13 The applicant claims that the Court should:

– annul the contested decision;

– order the Commission to pay the costs.

14 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

Admissibility

15 The Commission disputes the admissibility of the action. Following the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), the Commission clarified its position at the hearing, stating that although the contested decision was a regulatory act, it entailed implementing measures with regard to the applicant's members, so that they had to show that they were directly and individually concerned by that decision.

16 Next, as regards the individual concern of the applicant's members, the Commission argues that those members belong to an open class of entities eligible for the CT exemption and merely have the status of potential beneficiaries of the scheme at issue. Furthermore, it maintains that the contested decision does not alter the rights acquired by those members since, as a rule, there is no acquired right to the future continuance of a tax scheme. Therefore, they cannot claim to be individually concerned by the contested decision.

17 Finally, the Commission submits that the applicant cannot rely on the tasks entrusted to it by its internal rules to protect and represent its members' interests before the EU Courts in order to prove that its own interests are affected, since that act is not a legal provision of EU law expressly according it a number of procedural rights. It also contends that the applicant's mere participation in the formal investigation procedure in respect of the aid scheme at issue is not such as to confer *locus standi* on it.

18 The applicant disputes those arguments and maintains that its members are directly and individually concerned by the contested decision, with the result that it itself has *locus standi*.

19 In that regard, it must be noted that the fourth paragraph of Article 263 TFEU provides for two situations in which natural or legal persons are accorded standing to institute proceedings against an act not addressed to them. First, such proceedings may be instituted if the act is of direct and individual concern to them. Secondly, such persons may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to them (see judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 44 and the case-law cited).

20 Next, according to the case-law, actions brought by associations such as the applicant are admissible in three situations: where they represent the interests of their members who have standing to bring proceedings; where they are distinguished individually because of the impact on their own interests as associations, in particular because their position as a negotiator has been affected by the measure sought to be annulled; and where a legal provision expressly confers on them a number of rights of a procedural nature (see, to that effect, judgment of 18 March 2010, *Forum 187* v *Commission*, T-189/08, EU:T:2010:99, paragraph 58 and the case-law cited, and order of 26 April 2016, *EGBA and RGA* v *Commission*, T-238/14, not published, EU:T:2016:259, paragraph 50 and the case-law cited).

21 In the instant case, it must be pointed out, as the Commission does, that no legal provision of EU law explicitly confers on the applicant rights of a procedural nature. The mere fact that its internal rules entrust it with the task of defending the common interests of its members and representing them before the EU Courts is not sufficient in that regard (see, to that effect, judgment of 6 July 1995, *AITEC and Others* v *Commission*, T-447/93 to T-449/93, EU:T:1995:130, paragraph 54 and the case-law cited).

22 Furthermore, the applicant's *locus standi* cannot be inferred solely from its participation in the formal investigation procedure as an interested party, even though that may be a relevant factor when assessing the *locus standi* of an undertaking (see, to that effect, judgments of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 56, and of 5 November 2014, *Vtesse Networks* v *Commission*, T-362/10, EU:T:2014:928, paragraph 53).

23 The applicant does not claim, moreover, that its position as a negotiator has been affected by the contested decision, as in the case giving rise to the judgment of 2 February 1988, *Kwekerij van der Kooy and Others* v *Commission* (67/85, 68/85 and 70/85, EU:C:1988:38).

24 It is therefore necessary to consider whether the applicant has *locus standi* in so far as it represents the interests of its members who themselves have standing to bring proceedings, in line with the case-law referred to in paragraph 20 above.

25 According to the case-law, in that situation, an association's ability to bring an action is based on the consideration that an action brought by an association presents procedural advantages, since it obviates the institution of numerous separate actions against the same acts, as the association has substituted itself for one or more of its members whose interests it represents, who could themselves have brought an admissible action (judgments of 6 July 1995, *AITEC and Others* v *Commission*, T-447/93 to T-449/93, EU:T:1995:130, paragraph 60, and of 15 September 2016, *Molinos Río de la Plata and Others* v *Council*, T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraph 35).

26 Therefore, an association may not rely on the fact that it represents the interests of members which have brought their own actions, since they are representing their own interests (see judgment of 15 September 2016, *Molinos Río de la Plata and Others* v *Council*, T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraph 36 and the case-law cited). It follows that the present action cannot be declared admissible on the basis of the representation by the applicant of the Chambre de commerce et d'industrie métropolitaine Bretagne-ouest (port de Brest), since it has brought its own action against the contested decision, in Case T-754/17, *Chambre de commerce et d'industrie métropolitaine Bretagne-ouest (port de Brest)* v *Commission*, there being no need to rule here on the admissibility of the action brought by it (see, to that effect, order of 29 March 2012, *Asociación Española de Banca* v *Commission*, T-236/10, EU:T:2012:176, paragraph 30).

27 By contrast, the applicant can legitimately represent the interests of its members who have not themselves brought their own actions, provided that they have *locus standi*, which must be examined.

28 In the first place, it should be noted that the applicant's members are not the addressees of the contested decision, that decision being addressed to the French Republic.

29 In the second place, since the contested decision applies to objectively determined situations and entails legal effects for a class of persons envisaged in a general and abstract manner, it constitutes a regulatory act (see, to that effect, judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission*, T-220/13, not published, EU:T:2016:484, paragraphs 49 and 52).

30 It is, however, clear that the contested decision cannot produce legal effects vis-à-vis operators that are active in the port sector, such as the applicant's members, without the adoption of implementing measures by the French authorities (see, to that effect, judgment of 26 September 2014, *Royal Scandinavian Casino Århus* v *Commission*, T-615/11, not published, EU:T:2014:838, paragraph 51 and the case-law cited). Article 2 of the contested decision provides that 'France shall remove the corporate tax exemption referred to in Article 1 and subject the entities for which this exemption applies to corporate tax'. If such implementing measures are not adopted, the tax scheme in force, which exempts, among others, autonomous ports and chambers of commerce and industry (CCI) managing port installations from CT, will continue to apply.

31 Moreover, as the Commission pointed out at the hearing, the abolition of the CT exemption, pursuant to the contested decision, will in principle take the form of – from the perspective of the applicant's members – the adoption of tax notices reflecting those changes. Such notices amount to implementing measures in respect of the applicant's members which could, according to the Commission, be challenged before the national courts, which would be able, if necessary, to refer a question to the Court under Article 267 TFEU if they had doubts as to the validity of the contested decision (see, to that effect, judgment of 15 September 2016, *Scuola Elementare Maria Montessori* v *Commission*, T-220/13, not published, EU:T:2016:484, paragraphs 55 and 61).

32 It follows that the contested decision entails implementing measures in respect of the applicant's members, with the result that they must show that they are directly and individually concerned by the contested decision.

33 As regards, first, the direct concern of the applicant's members, which is not disputed here, it should be pointed out that even though the contested decision is addressed to the French authorities, it leaves them no discretion and requires them to abolish the CT exemption enjoyed by entities such as the applicant's members (Article 2(1) of the contested decision) in respect of the income from their economic activities no later than the start of the tax year following its adoption (Article 2(2) of the contested decision). The applicant's members are therefore directly concerned by the contested decision (see, to that effect, judgment of 15 June 1999, *Regione Autonoma Friuli-Venezia Giulia* v *Commission*, T-288/97, EU:T:1999:125, paragraph 32 and the case-law cited).

34 As regards, secondly, the individual concern of the applicant's members, it must be stated, first of all, that they are not named or individually designated by the contested decision. Article 1 of the contested decision is directed, in general terms, at autonomous ports (some of which are now classified as major seaports), maritime chambers of commerce, CCI managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment.

35 According to the case-law, third parties may be individually concerned by a decision addressed to another person only if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (see judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 57 and the case-law cited).

36 As the Commission pointed out at the hearing, the mere possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to those persons as long as that measure is applied in accordance with an objective legal or factual situation defined by the act in question (see judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 58 and the case-law cited).

37 However, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders and that can be the case particularly when the decision alters rights acquired by the individual prior to its adoption (see judgment of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59 and the case-law cited).

38 In that regard, it should be observed, first, that the applicant's members are all seaports or major seaports in France or CCI managing those ports who lawfully benefited from the CT exemption scheme until it was called into question by the Commission following the adoption of the contested decision.

39 Secondly, as the applicant recalled at the hearing, the beneficiaries of the aid scheme at issue in this case are legal persons governed by public law established by decree, whose creation does not fall within the scope of private initiative.

40 Therefore, the applicant's members are part of a closed class of operators which were identifiable when the contested decision was adopted.

41 Contrary to the Commission's arguments at the hearing, that class is unlikely to increase subsequently because, even if another port or CCI were to be created by decree in the future, that body would not be able to rely on the status of actual beneficiary of the existing aid scheme before the adoption of the contested decision, unlike the applicant's members.

42 Thirdly, the situation of the applicant's members must also be distinguished from that of the members of the applicants in the case giving rise to the order of 26 April 2016, *EGBA and RGA* v *Commission* (T-238/14, not published, EU:T:2016:259), cited by the Commission. Unlike the present case, which concerns an existing aid scheme, the decision under challenge in that case was a new aid scheme, concerning a proposal for a parafiscal levy on online horse-race betting designed to fund a public service mission entrusted to racing companies. The members of the applicants, who were all operators in the gambling and betting sector, could therefore only rely on their status as competitors of future beneficiaries of that scheme, since the scheme had not yet been implemented when the decision under challenge was adopted. Therefore, as the Court pointed out in that case, the decision in issue affected the interests of all parties active in the sector of online horse-race betting in France: those which were present on that market before the decision was adopted, those which entered the market after its adoption, and those which would enter that market in the future. The applicants' members were thus part of an indeterminate group of economic operators which could grow in number following the adoption of the decision under challenge. They were not part of a closed class, that is to say, a group which could not be extended after the adoption of the contested measure. Accordingly, the applicants' members were affected by the decision under challenge only in their objective capacity as parties subject to a parafiscal levy, in the same way as every other competitor in the sector at issue (see, to that effect, order of 26 April 2016, *EGBA and RGA* v *Commission*, T-238/14, not published, EU:T:2016:259, paragraphs 66 and 67).

43 In the light of all those considerations, it must be concluded that the applicant's members are individually concerned by the contested decision in the present case, in so far as they are part of a closed class of operators which were identifiable when the contested decision was adopted.

44 Therefore, since the applicant's members have *locus standi* to challenge the contested decision in this case, the applicant also has, on the same basis, *locus standi* for the purposes of the fourth paragraph of Article 263 TFEU, in so far as it represents the interests of its members who have not themselves brought their own action against that decision.

Substance

45 In support of the action, the applicant raises five pleas in law, alleging (i) error of law as to the classification of the tax measure in its entirety as State aid; (ii) error of law regarding the assessment of the economic nature of the activities carried out by French ports; (iii) error of assessment concerning the conditions relating to the distortion of competition and the effect on trade between Member States as regards French ports in general and, more specifically, island ports and overseas ports, and inadequate reasoning in connection with that examination; (iv) error of law in the conduct of the existing aid review procedure and infringement of Article 108(1) and (2) TFEU relating to the 'appropriate measures procedure', combined with the principle of proportionality; and (v) breach of the principle of sound administration.

First plea in law: error of law in so far as the Commission incorrectly classified the CT exemption scheme for French ports in its entirety as State aid

46 The applicant recalls that an entity carrying out both activities relating to the exercise of public powers and economic activities is required to comply with the State aid rules only as regards its economic activities. It submits that the Commission erred in law by failing to state that the classification as aid was limited to the economic activities only of French ports. Accordingly, it asks the Court to annul the contested decision in that respect or, at least, vary the operative part of that decision so as to exclude expressly the non-economic activities carried out by French ports from the obligation to impose CT.

47 The Commission disputes those arguments.

48 In the first place, it must be pointed out that it is clear from the wording of the operative part of the contested decision (see paragraphs 10 and 11 above) that the aid measure is concerned with the exemption from CT for beneficiary entities in respect of the income from their economic activities only. The applicant's first plea is therefore based on a misreading of the operative part of the contested decision.

49 Moreover, since the tax measure at issue applies without distinction to the income of the beneficiary entities irrespective of the nature of their activities, the Commission could logically require the abolition of that scheme as such, in order to ensure that the CT exemption which those entities enjoyed in respect of the income from their economic activities, which had been declared incompatible with the internal market, disappeared.

50 In the second place, it should be borne in mind that the operative part of an act is indissociably linked to the statement of reasons for it, so that when it has to be interpreted, account must be taken of the reasons that led to its adoption (judgments of 15 May 1997, *TWD* v *Commission*, C-355/95 P, EU:C:1997:241, paragraph 21, and of 2 March 2012, *Netherlands* v *Commission*, T-29/10 and T-33/10, EU:T:2012:98, paragraph 146).

51 In recitals 42 to 61 of the contested decision, the Commission sought to demonstrate the extent to which ports exercised, at least in part, economic activities and were therefore undertakings within the meaning of the provisions of the TFEU on competition.

52 In recital 44 of the contested decision, the Commission stated that it did not dispute that ports could be delegated certain public authority or non-economic tasks, such as maritime traffic control and safety or anti-pollution surveillance, or that, in carrying out those tasks, ports were not undertakings within the meaning of Article 107(1) TFEU. The Commission made clear in that regard that the CT exemption at issue here was therefore of a nature to constitute State aid only if it related to income generated by economic activities. On the other hand, according to the Commission, the fact that an entity performs one or more functions of a sovereign State or one or more non-economic activities is not enough to take away the designation of 'undertaking' for all purposes. A port will therefore be regarded as an 'undertaking' if – and to the extent that – it in fact carries out one or more economic activities.

53 Next, in recital 45 of the contested decision, the Commission listed several types of economic activities corresponding to the supply of various services on several markets which French ports may carry out. First, ports supply a general service to ships by providing them with access to port infrastructure in exchange for remuneration. Secondly, some ports provide more particular services to ships, such as piloting, lifting, handling or mooring, also in exchange for remuneration. For piloting and lifting, the remuneration received by the port is generally known as a 'port charge' (droit de port). Thirdly, the ports, for remuneration, make certain infrastructure or certain land available to undertakings which use those areas for their own needs or to supply some of the abovementioned port services to ships.

54 The Commission thus concluded, in recital 61 of the contested decision, that 'the autonomous ports …, maritime chambers of commerce, chambers of commerce and industry managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment, which operate the infrastructure directly or supply services in a port, are, as regards their economic activities … "undertakings" within the meaning of Article 107(1) TFEU'.

55 It is therefore sufficiently clear from the grounds for the contested decision that the beneficiary entities were regarded as undertakings only as regards their economic activities, to which the provisions of the TFEU on State aid apply.

56 In the third place, in so far as the applicant asks the Court to vary the operative part of the contested decision so as to exclude expressly the non-economic activities carried out by French ports from the obligation to impose CT, it should be recalled that, according to settled case-law, it is not for the EU judicature to issue directions to the EU institutions or to substitute itself for those institutions when exercising its powers of review (see judgment of 12 May 2016, *Hamr – Sport* v *Commission*, T-693/14, not published, EU:T:2016:292, paragraph 91 and the case-law cited).

57 In any event, such variation of the operative part of the contested decision would be unfounded since it is based on a misreading of that decision, which requires only that the entities entitled to the exemption at issue be subject to CT in respect of the profits accruing from their economic activities.

58 The first plea must therefore be rejected.

Second plea in law: error of law regarding the assessment of the economic nature of the activities carried out by French ports

59 By this plea, the applicant essentially complains that the Commission failed to conduct a detailed analysis of the ports' activities, in order to determine what types of activities were of an economic or non-economic nature, and also incorrectly classified some activities as economic activities even though they were not.

60 It should be recalled, first of all, that in the case of a decision concerning an aid scheme, as in the present case, the Commission may merely study, in a general and abstract way, the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under that scheme, it constitutes, in principle, State aid for its beneficiaries. Accordingly, the Commission is not required to conduct an analysis of the aid granted in individual cases under such a scheme (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63, and of 26 November 2015, *Navarra de Servicios y Tecnologías* v *Commission*, T-487/13, not published, EU:T:2015:899, paragraph 66).

61 Next, it should be noted, as the Commission did in recital 42 of the contested decision, that according to the case-law, the concept of an undertaking encompasses every 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 (judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraphs 74 and 75; see also, to that effect, judgments of 16 June 1987, *Commission* v *Italy*, 118/85, EU:C:1987:283, paragraph 7, and of 23 April 1991, *Höfner and Elser*, C 41/90, EU:C:1991:161, paragraph 21).

62 In the instant case, the Commission acknowledged, in general terms, that ports can perform both economic and non-economic activities. It thus found that French ports may engage in several types of economic activities, which it listed in recital 45 of the contested decision in particular (see paragraphs 51 to 54 above).

63 The applicant does not call that description into question in any way; it merely claims that some port activities are of a non-economic nature and that the Commission's analysis was not sufficiently detailed in that regard.

64 Moreover, as the Commission pointed out in recital 44 of the contested decision, inter alia, it is not in dispute that ports may be delegated to perform certain public authority or non-economic tasks, such as maritime traffic control and safety or anti-pollution surveillance, or that, in carrying out those tasks, ports are not undertakings within the meaning of Article 107(1) TFEU. On the other hand, the fact that an entity performs one or more functions of a sovereign State or one or more non-economic

activities is not enough to take away the designation of 'undertaking' for all purposes. In order to determine whether the activities in question are those of an undertaking within the meaning of the TFEU, it is necessary to examine the nature of the activities A port will therefore regarded as an 'undertaking' if – and to the extent that – it in fact carries out one or more economic activities (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraphs 74 and 75, and of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 37).

65 The Court has also held that commercial operations and the construction of port or airport infrastructure for such operations constitute economic activities (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 78; of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraphs 40 to 43; and of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, under appeal, EU:T:2018:145, paragraph 78).

66 The Commission was thus right to find, in recital 61 of the contested decision, that 'the autonomous ports …, maritime chambers of commerce, chambers of commerce and industry managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment, which operate the infrastructure directly or supply services in a port, are, as regards their economic activities … "undertakings" within the meaning of Article 107(1) TFEU'.

67 None of the applicant's arguments is capable of calling that finding into question.

68 First, the applicant submits that, concerning port infrastructure in general, the Commission wrongly relied on a distinction between maritime access infrastructure depending on whether it was located inside or outside ports to conclude that the State aid rules applied. The decisive criterion is not the geographical location of the infrastructure, but whether that infrastructure benefits the whole maritime community or, by contrast, solely the economic operation of the port. The applicant claims that the Commission, without stating reasons, departed from the decision initiating the procedure in which it had classified as non-economic activities public investments in maritime access routes, in land transport facilities within the port area and in other maritime infrastructure of benefit to the community as a whole.

69 It is clear that such an argument is ineffective as it does not cast doubt on the Commission's finding in recital 61 of the contested decision, which is based on the fact that ports and other beneficiary entities carry out, at least in part, economic activities, as identified in recital 45 to the contested decision, independently of the location of such activities.

70 In any event, it must be observed that the Commission did not depart, in the contested decision, from its 'usual' approach whereby the construction, maintenance, replacement or upgrading of port access infrastructure are normally considered to be general measures of a non-economic nature if they are made available to all users in a non-discriminatory manner and for no consideration. As the Commission recalled in recital 53 of the contested decision, that refers to the situation in which access to the infrastructure is free of charge, without remuneration, which is not the case here. Therefore, the Commission's analysis in that recital, according to which, unless specific features of the case point to a different condition, access infrastructure located outside ports benefits the maritime community as a whole, while the public funding of access infrastructure located within a port is, in principle, assumed to benefit specifically the operation of the port itself, is not inconsistent with that approach and is therefore not vitiated by any error of law.

71 Secondly, the applicant complains that the Commission departed from the reasons set out in the decision initiating the procedure and from previous cases in which it had found that the construction, maintenance, replacement or upgrading of infrastructure made available to users free of charge and in

a non-discriminatory manner were not economic activities. Consequently, it asserts that the Commission should have excluded a number of specific development operations from the economic activities of ports.

72 It should be pointed out, first of all, that according to settled case-law, the Commission's decision-making practice in other cases does not affect the validity of the contested decision, which falls to be assessed solely having regard to the objective rules of the TFEU (see, to that effect, judgments of 16 July 2014, *Germany* v *Commission*, T-295/12, not published, EU:T:2014:675, paragraph 181, and of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraph 59).

73 Next, in paragraph 21 of the decision initiating the procedure, the Commission found, in the light of the circumstances of the case, that some activities carried out by ports (public investments in maritime access routes (breakwaters, locks, navigable channels, dredging), in land transport facilities within the port area and in other maritime infrastructure of benefit to the community as a whole) did not constitute economic activities, and referred in that connection to paragraph 35 of its decision of 20 October 2004 on State aid N 520/2003 – Belgium – Financial support for infrastructure works in Flemish ports (OJ 2005 C 176, p. 11).

74 Nonetheless, in recital 53 of the contested decision, the Commission explained, in response to the comments of the major seaport of Le Havre (France), which mentioned the decision cited in paragraph 72 above, that its practice had evolved since 2004 alongside the Court's case-law. The Commission also referred to its decision of 30 April 2015 concerning State aid SA.39608 – Seaport extension Wismar (OJ 2015 C 203, p. 1) and to two points of its analytical grid for port infrastructure available on the website of the Directorate-General (DG) for Competition.

75 The aim of initiating the formal investigation procedure is precisely to enable the Commission to obtain all the views it needs in order to be able to adopt a definitive decision on the classification of a measure as State aid (see judgment of 23 October 2002, *Diputación Foral de Guipúzcoa and Others* v *Commission*, T-269/99, T-271/99 and T-272/99, EU:T:2002:258, paragraph 47 and the case-law cited). Therefore, the assessments of the Commission in such a decision are necessarily provisional in nature and seek to determine whether the measure is in the nature of aid and to set out the reasons why its compatibility with the internal market might be doubted (see, to that effect, judgment of 19 May 2015, *Diputación Foral de Bizkaia* v *Commission*, T-397/12, not published, EU:T:2015:291, paragraph 58). It follows that the final decision may differ somewhat from the decision initiating the procedure, without, however, those differences affecting the legality of the final decision (judgments of 4 March 2009, *Italy* v *Commission*, T-424/05, not published, EU:T:2009:49, paragraph 69, and of 19 May 2015, *Diputación Foral de Bizkaia* v *Commission*, T-397/12, not published, EU:T:2015:291, paragraph 59).

76 It is only if the Commission realises, once a decision initiating the formal investigation procedure has been adopted, that that decision is based either on incomplete facts or on an incorrect legal classification of those facts, that it must be able or be required to alter its position by adopting a correction decision or a fresh decision initiating the procedure, to enable the Member State concerned and other interested parties to submit their observations properly (see, to that effect, judgment of 20 September 2011, *Regione autonoma della Sardegna and Others* v *Commission*, T-394/08, T-408/08, T-453/08 and T-454/08, EU:T:2011:493, paragraphs 71 and 72).

77 Only when the Commission changes its reasoning, after the decision initiating the formal investigation procedure, in relation to facts or the legal classification of those facts which prove to be decisive in its assessment as to the existence of aid or its compatibility with the internal market, is it required to correct or broaden the decision initiating the procedure, to enable the Member State concerned and other interested parties to submit their observations properly.

78 However, that is not the case here as regards the Commission's assessments in recital 53 of the contested decision. While those assessments evidence a certain change in the way it addresses whether or not access to port infrastructure in general is of an economic nature, this is not a decisive factor in the Commission's assessment of the existence of aid or the classification of the beneficiary ports in this case as 'undertakings', since it is not disputed that those ports engage in economic activities, which are listed inter alia in recital 45 of the contested decision.

79 Furthermore, those assessments are not fundamentally different from the approach taken by the Commission particularly in paragraph 21 of the decision initiating the procedure. Indeed, as the Commission explained in its pleadings, the criterion it used to distinguish between economic and non-economic activities, as is apparent from recitals 53 and 56 of the contested decision, is whether the infrastructure is available to all users without discrimination and free of charge, as a general measure carried out by the State within the framework of its responsibilities for developing maritime transport. It was only in the interests of simplification that it stated that the criterion of location, depending on whether the infrastructure was located inside or outside the port, made it possible in principle, save in special cases, to determine the economic or non-economic nature of that infrastructure.

80 Thirdly, the applicant submits that since the Commission did not conduct a sufficiently detailed analysis of the nature of each of the activities carried out by French ports, it was unable to determine whether their economic activities were of an ancillary or principal nature, which is a prerequisite for the application of the State aid rules in cases involving infrastructure subject to mixed use, as in the present case.

81 It should be recalled that the fact that, for the exercise of part of its activities, an entity is vested with public powers does not, in itself, prevent it from being classified as an undertaking within the meaning of the Treaty provisions on competition for the remainder of its economic activities (judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 74, and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 25).

82 It is true that, according to the case-law, in so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers (judgments of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 38, and of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 29; see also, to that effect, judgment of 26 March 2009, *SELEX Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraphs 71 to 80).

83 However, there is no threshold below which all of an entity's activities should be regarded as non-economic activities because its economic activities are in the minority. Indeed, according to the case-law, if the economic activity of the entity concerned can be separated from the exercise of its public powers, that entity must be classified as an undertaking for that part of its activities (see, to that effect, judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraphs 44 to 63).

84 In the present case, the applicant has not adduced any evidence to show that the economic activities carried out by ports, as identified by the Commission in recital 45 of the contested decision, namely, in particular, the provision of access to port infrastructure in exchange for remuneration, could not be separated from the public powers of ports, such as maritime traffic control and safety and anti-pollution surveillance. As the Commission pointed out at the hearing, the mere fact that there may be an economic link between those activities, in that the economic activities of ports make it possible to finance all or part of their non-economic activities, is not sufficient for a finding that those activities are inseparable, in terms of the case-law.

85 In so far as the applicant relies on the Communication from the Commission on the framework for State aid for research and development and innovation (OJ 2014 C 198, p. 1), which provides for a threshold of 80% for research infrastructure activities beyond which those activities are deemed to be non-economic in their entirety, suffice it to note, as the Commission did, that this case is in no way concerned with aid for research, development or innovation, with the result that that communication is not applicable.

86 As regards, next, paragraph 207 of the Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU (OJ 2016 C 262, p. 1), that paragraph states that 'if, in cases of mixed use, the infrastructure is used almost exclusively for a non-economic activity, the Commission considers that its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary, that is to say an activity which is directly related to and necessary for the operation of the infrastructure, or intrinsically linked to its main non-economic use'. As the Commission points out, that paragraph therefore refers to the funding of infrastructure that is almost exclusively used for non-economic purposes. In the present case, however, the aid measure at issue is a tax exemption which has no direct link to the funding of infrastructure and applies regardless of the activities – whether economic or not – for which such infrastructure is used.

87 In any event, the economic activities of French ports do not appear to be purely ancillary to their non-economic activities. On the contrary, it is clear from footnote 39 of the contested decision that the respective proportion of port charges and State fees, that is to say most of the income from ports' economic activities, accounted for 55% of the operating costs for the major seaport of Bordeaux. Moreover, at the hearing, the Commission confirmed that those figures were representative of the sector as a whole.

88 The second plea must therefore be rejected.

Third plea in law: essentially, errors of assessment and inadequate statement of reasons as regards the conditions relating to the distortion of competition and the effect on trade between Member States

89 The applicant's principal argument is that the contested decision is vitiated by several errors 'of law' concerning the assessment of the conditions relating to the distortion of competition and the effect on trade between Member States. In the alternative, if the Court finds that the Commission did not commit an error of law, the applicant submits that the decision is vitiated by an inadequate statement of reasons.

90 The Commission disputes those arguments.

91 As a preliminary point, it should be borne in mind that in accordance with the case-law, as regards the conditions relating to the distortion of competition and the effect on trade for the purpose of categorising a national measure as State aid, it is necessary not to establish that the aid at issue 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 (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 65 and the case-law cited).

92 In particular, when aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in trade between Member States, the latter must be regarded as affected by that aid (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 66 and the case-law cited).

93 In that regard, it is not necessary that the beneficiary undertakings themselves be involved in trade between Member States. Where a Member State grants aid to undertakings, internal activity may be maintained or increased as a result, so that the opportunities for undertakings established in other Member States to penetrate the market in that Member State are thereby reduced (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 67 and the case-law cited).

94 Furthermore, according to the case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected. The relatively small amount of aid or the relatively small size of the undertaking which receives it does not as such exclude the possibility that trade between Member States might be affected (see judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 68 and the case-law cited).

95 With regard more specifically to the condition that trade between Member States be affected, it follows from the case-law 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 meeting that condition, 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 (see judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 51 and the case-law cited).

96 With regard to the condition of the distortion of competition, it should be pointed out 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 (see judgment of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 54 and the case-law cited).

97 In the present case, the Commission examined those two conditions in recitals 79 to 93 of the contested decision. Recitals 82 and 83 of the contested decision state, in particular:

‘The tax advantage in favour of the ports concerned frees them from a current charge which they would normally have to bear. It is of a nature to favour them in relation to French ports and foreign ports of the European Union which do not benefit from that advantage. Thus it is liable to affect intra-Community trade and to distort competition.

There is competition in the port sector, and it is exacerbated by the nature and characteristics specific to transport, and especially maritime and inland waterway transport. Even though it may be considered that the ports hold a legal monopoly to offer port services within the port they operate, the transport services they offer are, at least to a certain extent, in competition with those offered by or in other ports and by other providers of transport services both in France and in other Member States.’

98 As regards, in particular, the situation of island and overseas ports, the Commission simply found, in recital 84 of the contested decision, that ‘in so far as other solutions exist[ed] or could exist to transport freight in the overseas regions, the measure c[ould], even for these ports located far from metropolitan France or other European ports, lead to a distortion of competition and have an impact on trade between Member States’. The Commission was nevertheless careful to state, in recital 92 of the contested decision, that it did not exclude the possibility that ‘in the particular case of certain ports – those fulfilling the conditions laid down by its decision-making practice, in particular – the measure at issue may be considered to have no effect on trade’. However, since the aid scheme in issue concerned a general exemption from CT for all the beneficiaries mentioned in the ministerial decisions of 1942 and 1943, the Commission found, in recital 93 of the contested decision, that that measure was, as such, liable to distort competition within the European Union and affect trade between Member States.

99 In the first place, it must be stated that, contrary to what the applicant claims in the alternative, that statement of reasons is sufficient to enable it to understand the reasoning adopted by the Commission and to enable the Court to exercise its power of review.

100 In the second place, it is necessary to examine the applicant's arguments that the contested decision is vitiated by errors of assessment as regards the conditions relating to the distortion of competition and the effect on trade between Member States.

101 In that regard, the applicant submits, first, that the contested decision does not contain any specific evidence substantiating its arguments concerning the effects of the tax measure at issue on trade between Member States and competition. According to the case-law, the effect of a measure or an aid scheme on competition and trade between Member States cannot be merely hypothetical or presumed.

102 As the Commission rightly noted in recital 87 of the contested decision, in the case of an aid scheme which applies to very different ports as to their size, geographical location, type (inland port, seaport) or activities, it is not necessary, in order to establish that the measure examined is State aid, to demonstrate individually that that measure results for each port in a distortion of competition and an effect on trade. In the case of an aid scheme, the Commission may confine itself to studying the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the scheme, the latter gives an appreciable advantage to the beneficiaries in relation to their competitors and is likely to benefit in particular undertakings engaged in trade between Member States. Accordingly, in a decision which concerns such a scheme, the Commission is not required to conduct an analysis of the aid granted in individual cases under the scheme (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63, and of 26 November 2015, *Navarra de Servicios y Tecnologías* v *Commission*, T-487/13, not published, EU:T:2015:899, paragraph 66).

103 It should also be observed that even though, in the light of the case-law cited in paragraph 91 above, the Commission was not required to prove that the aid measure at issue was liable to have a real or foreseeable effect on competition and trade between Member States, as the applicant submits, it is apparent from the contested decision that it is not in dispute that most of the ports concerned, especially the large French ports such as Le Havre, Rouen or Marseilles, are in competition with other ports of the European Union, so that the measure has a real effect on competition and trade between Member States (see recital 88 of the contested decision). With regard also to small ports, particularly those located near border areas, the Commission committed no error of assessment in finding that those ports were subject to actual cross-border competition too (see recital 91 of the contested decision). Such a general examination of the existence of a distortion of competition and an effect on trade between Member States for certain categories of ports is sufficient having regard to the Commission's obligations when it examines an aid scheme (paragraph 102 above).

104 Secondly, the applicant is wrong to maintain that the Commission was required to prove that the tax measure at issue enjoyed by the developers or owners of port infrastructure also conferred an economic advantage on the operators and end-users of that infrastructure.

105 The contested decision clearly identifies the beneficiaries of the aid measure at issue as 'autonomous ports (some of which are now classified as major seaports), maritime chambers of commerce, chambers of commerce and industry managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment' (Article 1 of the contested decision). The Commission was therefore fully entitled to examine whether the conditions relating to the existence of aid, particularly those concerning the distortion of competition and the effect on trade between Member States, were satisfied for those beneficiaries and not for other categories of operators, such as the operators or end-users of port infrastructure. In any event, in so far as the applicant represents

French ports and CCI responsible for their operation, it is difficult to see how a possible failure to state the reasons for the contested decision concerning a possible indirect aid to other categories of operators could affect the validity of that decision vis-à-vis its members.

106 Thirdly, the applicant asserts that even if the tax measure at issue could have had an impact on the level of prices charged by French ports, it is not liable to affect trade between Member States and distort competition since price is not a decisive factor in the attractiveness of ports, such attractiveness being linked to many other factors, for instance the extent and quality of their hinterland connections, their geographical position and the benefits they can bring to the wider logistical system.

107 In that regard, it is sufficient to note, as the Commission does in recital 85 of the contested decision, that it is not disputed that the level of prices charged is one aspect among others of the competitiveness of ports. The fact that other aspects may have a greater or lesser impact on the attractiveness of a port is not therefore capable of calling into question the Commission's finding in that regard. Furthermore, according to the case-law, there is no threshold or percentage below which it may be considered that trade between Member States is not affected (paragraph 94 above). The statistics provided by the applicant concerning the market share of French ports compared to other EU ports are not therefore capable of calling into question the Commission's findings in that regard.

108 Fourthly, according to the applicant, in any event, the conditions relating to the effect on trade between Member States and the distortion of competition are not satisfied as regards island ports and overseas ports. In the case of island ports, it submits that the Commission was required to take account of the particular situation of those ports, in accordance with its Notice on the notion of State aid as referred to in Article 107(1) TFEU, given that one of their main aims is to maintain continuity between metropolitan France and the islands. In the case of overseas ports, the applicant refers to the geographical remoteness of overseas territories in relation to the territory of the European Union and to the fact that those ports do not play a significant role in the EU transport system, as is apparent from the possibility provided for by Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ 2017 L 57, p. 1) to exclude such ports from its scope. In addition, it argues that the Commission was wrong to find, in recital 84 of the contested decision, that the tax measure at issue gave some undertakings an incentive to favour water transport over air transport for the carriage of their goods to overseas regions and thus led to a distortion of competition and an effect on trade between Member States as regards overseas ports.

109 It should be pointed out that the Commission's decision does not concern individual aid covering the specific situation of island ports or overseas ports. Instead, it concerns an aid scheme whose beneficiaries are identified in general terms by the ministerial decisions of 1942 and 1943 as 'autonomous ports (some of which are now classified as major seaports), maritime chambers of commerce, chambers of commerce and industry managing port installations, municipalities which are concessionaires of public equipment owned by the State in the seaports, and undertakings to which they may have entrusted the operation of that equipment' (see Article 1 of the contested decision).

110 In the light of the requirements laid down in the case-law (see paragraphs 91 to 96 and 102 above), the reasoning set out in recitals 82 to 93 of the contested decision is sufficient to establish that the conditions relating to the distortion of competition and the effect on trade are satisfied.

111 Even if the examination of the individual situation of some island or overseas ports were to show that those conditions are not satisfied in respect of them, in the case of an existing aid scheme, as here, that examination must be carried out by the Member State at the stage of recovery of the aid or at a later stage, in accordance with the principle of sincere cooperation between the Commission and the Member State concerned (see, to that effect, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraphs 63 and 125).

112 Consequently, the applicant's arguments relating to the individual situation of island ports and overseas ports must be rejected as ineffective, without it being necessary to rule on the merits of the analysis set out in the last sentence of recital 84 of the contested decision, that analysis being superfluous.

113 In the light of those considerations, the Court finds that the contested decision is sufficiently reasoned and is not vitiated by any error of assessment as regards the conditions relating to the distortion of competition and the effect on trade between Member States.

114 Consequently, the third plea in law must be rejected.

Fourth plea in law: error of law in the conduct of the existing aid review procedure and infringement of Article 108(2) TFEU, combined with the principle of proportionality

115 The applicant claims that the Commission infringed the provisions of Article 108(1) and (3) TFEU, combined with the principle of proportionality.

116 It submits, first of all, that the Commission committed an error of law in the conduct the procedure for reviewing the aid scheme in question. More specifically, the applicant contends that by considering that it was for the French authorities to demonstrate that the tax measure at issue was compatible with the internal market, the Commission acted as if it had received a request for the approval of new State aid, when it was actually dealing with existing State aid, the onus being on the Commission to prove that such aid is incompatible under Article 108(1) and (2) TFEU.

117 Next, in the context of the appropriate measures procedure provided for by Article 22 of Regulation 2015/1589, the applicant asserts that the Commission cannot request the abolition of an existing aid scheme if the mere modification of some of its features is sufficient to cure the identified incompatibility. Therefore, under the principle of proportionality, the abolition of an aid scheme should be contemplated only where the possibility of making amendments to the scheme to bring it into line with the Treaty rules can be completely ruled out. According to the applicant, the Commission should thus have considered whether, by modifying the scheme in question, the exemption could have satisfied the conditions relating to the funding of services of general economic interest (SGEI) and, consequently, have been regarded as compatible with the internal market pursuant to Article 106(2) TFEU.

118 Furthermore, the applicant maintains that the Commission distorted the meaning of Article 93 TFEU by finding that aid authorised on the basis of it had to be related to certain costs and be capped and by limiting the material scope of that provision to investment aid, to the exclusion of operating aid. In support of that argument, it relies on Commission Decision SA.37402 of 18 December 2014 on aid paid to the port of Budapest (Hungary) (OJ 2014 C 141, p. 1) and Commission Communication C(2004) 43 – Community guidelines on State aid to maritime transport (OJ 2004 C 13, p. 3).

119 For the same reasons, the applicant states that the Commission was wrong to reject the application of Article 107(3)(a) and (b) TFEU and Article 349 TFEU on the sole ground that the tax measure is not aimed at the execution of a project of common European interest or at overseas ports.

120 Finally, the applicant submits that the breach of Article 108(1) and (2) TFEU, combined with the principle of proportionality, is all the more obvious because the contested decision was adopted after the entry into force of two regulations on ports, namely Regulation 2017/352 and Commission Regulation 2017/1084 of 14 June 2017 amending Regulation (EU) No 651/2014 as regards aid for port and airport infrastructure, notification thresholds for aid for culture and heritage conservation and for aid for sport and multifunctional recreational infrastructures, and regional operating aid schemes for outermost regions and amending Regulation (EU) No 702/2014 as regards the calculation of eligible

costs (OJ 2017 L 156, p. 1), where the latter provides for an extension of the general block exemption regulation to cover port infrastructure and the possibility of granting operating aid in outermost regions.

121 The Commission disputes those arguments.

122 In the first place, it should be recalled that Article 108(1) TFEU provides that 'the Commission shall, in cooperation with Member States, keep under constant review all systems of aid existing in those States' and 'shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market'. Next, Article 108(2) TFEU provides that 'if, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the internal market having regard to Article 107, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission.'

123 Chapter VI of Regulation 2015/1589 lays down the procedure governing existing aid schemes. Article 21 of Regulation 2015/1589 clarifies, first of all, the cooperation mechanism between the Commission and the Member State concerned provided for by Article 108(1) TFEU. Next, Article 22 of Regulation 2015/1589 makes provision for the type of appropriate measures that the Commission may propose to the Member State where it considers that an existing aid scheme is not, or is no longer, compatible with the internal market. Those measures may include a substantive amendment of the aid scheme at issue or its abolition. Finally, Article 23 of Regulation 2015/1589 explains the legal consequences of a proposal for appropriate measures. It thus provides that where the Member State does not accept the proposed measures and the Commission, having taken into account its arguments, still considers that those measures are necessary, it is to initiate the formal investigation procedure. It also states that the articles relating to the formal investigation procedure and the types of decisions which may be taken by the Commission at the end of that procedure are to apply *mutatis mutandis*.

124 In the light of the wording of those provisions, the view must therefore be taken that the Commission did not reverse the burden of proof or infringe the procedure to be followed when reviewing an existing aid scheme.

125 In the instant case, it should be recalled that the Commission first examined the aid scheme in cooperation with the French authorities, following which – after proposing appropriate measures, which were refused by those authorities – it decided to open the formal investigation procedure, in accordance with Article 23(2) of Regulation 2015/1589 and Article 108(2) TFEU (see paragraphs 2 to 7 above).

126 However, although the provisions referred to in paragraph 122 above establish a cooperation mechanism between the Member State and the Commission at the information stage and the stage of the proposal for appropriate measures, they expressly provide that when the Commission decides to initiate the formal investigation procedure, the provisions governing that procedure, which normally apply to new aid, also apply *mutatis mutandis* to the procedure for existing aid schemes.

127 Therefore, as the Commission points out, there is no reason to draw a distinction, at the stage of the formal investigation procedure, between the procedure applicable to new aid and that applicable to existing aid.

128 A fortiori, there is also no reason to consider that the burden of proof is reversed with regard to the examination of whether an existing aid scheme is compatible with the internal market. As argued by the Commission, the Member State concerned and interested parties are free to challenge the provisional reasoning of the Commission in that respect during the formal investigation procedure.

The Member State and, to a lesser extent, interested parties are generally best placed to determine whether a public interest objective was pursued when the measure at issue was adopted, which would enable that measure to be declared wholly or partly compatible.

129 It is clear that the Commission analysed the different grounds of compatibility put forward during the formal investigation procedure in the contested decision and explained why none of them enabled the measure at issue to be declared to be compatible, even in part, with the internal market.

130 First, Article 93 TFEU provides that 'aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.'

131 In recital 97 of the contested decision, the Commission found that although inland ports played an important role in the development of multimodal transport, not all the investments made by the ports were covered by Article 93 TFEU, which was limited to aid meeting the needs of coordination of transport. According to the Commission, the CT exemption does not constitute investment aid, but operating aid which is not targeted at investment. Nor is the measure targeted at the reimbursement of certain obligations inherent in the concept of a public service, as pointed out. Moreover, the advantage derived from a tax exemption pure and simple is not limited to the amount needed for coordination of transport or for reimbursement for the discharge of certain obligations inherent in the concept of a public service, and therefore does not guarantee compliance with the principle of proportionality. It has no clearly identified incentive effect either, in particular because the exemption is more beneficial to the most profitable ports, which therefore have the most resources – and the least need of incentives. Consequently, according to the Commission, Article 93 TFEU is not applicable.

132 Contrary to what is claimed by the applicant, that reasoning is not vitiated by any manifest error of assessment. The applicant does not explain, in particular, how the CT exemption for ports is intrinsically linked to and necessary for the coordination of transport.

133 The Court has consistently held that the Commission may declare aid compatible only if it can establish that the aid contributes to the attainment of one of the objectives specified in the legal basis relied on in support of its compatibility, objectives which the recipient undertaking would not be able to achieve by using its own resources under normal market conditions. In other words, in order for aid to benefit from one of the derogations provided for in the Treaty, it must not only comply with one of the objectives set out in the Treaty, but must also be necessary for the attainment of those objectives (see, by analogy, judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 180 and the case-law cited).

134 Furthermore, although it is true that neither Article 93 TFEU nor Article 107(3)(c) TFEU distinguishes between operating aid and investment aid, it should be recalled that, according to settled case-law, operating aid, which is intended to preserve the status quo or to release an undertaking from costs it would normally have had to bear in its day-to-day management or normal activities, cannot, in principle, be considered to be compatible with the internal market.

135 Aid which does no more than lower the usual ongoing operating expenditure which undertakings would have had to bear in any event in the course of their normal business cannot be considered to be pursuing a public interest objective for the purposes of Article 93 TFEU or Article 107(3)(c) TFEU. Since such aid would give those undertakings an advantage over their competitors, without this being justified by the attainment of a public interest objective, it cannot be declared compatible with the internal market (judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, under appeal, EU:T:2018:439, paragraph 581; see also, to that effect, judgment of 8 June 1995, *Siemens* v *Commission*, T-459/93, EU:T:1995:100, paragraph 76).

136 In addition, it is pointless for the applicant to invoke the Commission's decision in case SA.37402 of 18 December 2014 on aid paid to the port of Budapest in an attempt to demonstrate that the aid scheme at issue is compatible with the internal market. As the Commission points out, its decision-making practice cannot affect the validity of the contested decision (see paragraph 72 above). In any event, suffice it to note that the aid at issue in that case was aid for investment in port infrastructure, pursuing a clearly established objective, unlike the measure at issue here.

137 As for the Commission's Communication on State aid to maritime transport, that document, as its name suggests, is concerned only with aid for maritime transport, not aid for ports or port infrastructure. Furthermore, the tax measures referred to in that communication do not involve an across-the-board CT exemption, as in the instant case, but the replacement of a certain type of taxation by another type based on tonnage to prevent displacement. The applicant cannot, therefore, derive a general principle from the communication that aid in the form of a tax reduction is compatible with the internal market. That communication demonstrates, at the most, that some operating aid, in the form of tax relief, may, in some exceptional cases, be declared compatible with the internal market, which the Commission does not dispute (see, to that effect, judgment of 12 July 2018, *Austria* v *Commission*, T-356/15, under appeal, EU:T:2018:439, paragraph 583 and the case-law cited).

138 Secondly, as regards Article 107(3)(a) and (b) TFEU and Article 349 TFEU, the Commission examined the applicability of those provisions in recitals 98 to 100 of the contested decision. The applicant does not explain why that reasoning is vitiated by a manifest error of assessment; it merely asserts that Article 349 TFEU was undoubtedly a sufficient legal basis for considering that a tax exemption scheme for overseas ports was compatible with the Treaty.

139 It must be observed, however, that the aid measure at issue does not target overseas ports but rather all ports and beneficiary entities as identified in Article 1 of the contested decision. Furthermore, Article 349 TFEU provides that the EU legislature may adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaty to the regions referred to in that article, given that their structural social and economic situation is compounded by a number of factors the permanence and combination of which severely restrain their development (judgment of 10 September 2009, *Banco Comercial dos Açores* v *Commission*, T-75/03, not published, EU:T:2009:322, paragraph 3). The third paragraph of Article 349 TFEU provides, however, that the Council is to adopt such measures taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies. The applicant does not rely on any provision of secondary legislation indicating that the Council decided to authorise aid in the form of a CT exemption for ports located in overseas territories.

140 To the extent that the applicant invokes Regulation 2017/352, it is sufficient to note, as the Commission did in recital 111 of the contested decision, that that regulation has neither the object nor effect of influencing the action of the Commission based on Articles 107 and 108 TFEU. On the contrary, that regulation, which seeks to establish a framework for the provision of port services and common rules on the financial transparency of ports, states that it must allow 'a fair and effective control of State aid' (recital 6), that it 'should not preclude competent authorities from granting compensation for actions taken in fulfilment of the public service obligations provided that such compensation complies with the applicable State aid rules' (recital 32), and that 'in any event, compliance with State aid rules should be ensured' (recital 43).

141 As for Regulation 2017/1084, which the applicant also relies on, that regulation amends Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty (OJ 2014 L 187, p. 1) by inserting, in particular, Article 56b and Article 56c, which provide for the possibility of exempting certain aid for maritime ports and inland ports. The objective of Regulation No 651/2014, which was adopted on the

basis of Article 108(4) TFEU and Council Regulation (EC) No 994/98 of 7 May 1998 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal State aid (OJ 1998 L 142, p. 1), is to enable Member States to be exempted from their obligation to notify certain categories of aid, subject to conditions. Nonetheless, as the Commission submits, that regulation does not provide for any other situations of compatibility over and above those laid down in the Treaty. Accordingly, since the Commission established, in recitals 95 to 104 of the contested decision, that the measure at issue could not be declared compatible with the internal market, and did so without committing a manifest error of assessment (see above), it could not, a fortiori, declare the measure compatible on the basis of Regulation No 651/2014. In addition, Article 56b and Article 56c of Regulation No 651/2014 lay down a number of conditions relating to, among other things, eligible costs, intensity of the aid and necessity of the aid, but the applicant did not seek to show that those conditions were satisfied here.

142 Consequently, the Court must reject the applicant's complaint alleging failure to take account of the specific features of the procedure for existing aid, reversal of the burden of proof and manifest errors of assessment as regards the analysis of the compatibility of the scheme at issue with the internal market.

143 In the second place, the applicant claims that the Commission infringed the principle of proportionality because it required the absolute abolition of the scheme at issue in the contested decision rather than asking for it to be adapted or declaring it compatible subject to conditions.

144 According to the case-law, the principle of proportionality requires that measures adopted by EU institutions must not exceed what is appropriate and necessary for attaining the objective pursued. Of course, when there is a choice between several appropriate measures, the least onerous measure should be used (see judgment of 17 July 2014, *Westfälisch-Lippischer Sparkassen- und Giroverband* v *Commission*, T-457/09, EU:T:2014:683, paragraph 346 and the case-law cited).

145 In the present case, the Commission contends that since the measure under review was manifestly incompatible with the internal market, it was not suitable for adaptation or for the imposition of conditions which might render it compatible with the internal market. It also submits that any amendment to the aid scheme at issue to make it compatible with the internal market would have been especially complex, as the very nature of the advantage – a CT exemption linked to profits accrued – sits uneasily with the compatibility criteria, in particular the proportionality and transparency of the measure in the light of a defined objective.

146 It should be noted that Article 22 of Regulation 2015/1589 provides that the Commission may propose, by way of appropriate measures, a substantive amendment of the aid scheme at issue, the introduction of a number of procedural requirements, or the abolition of the aid scheme. The possibility of abolishing the aid scheme at issue is therefore explicitly envisaged at the stage of the proposal for appropriate measures, which precedes the formal investigation phase.

147 Furthermore, the possibility for the Commission to require the absolute abolition of an existing aid scheme where it finds, at the end of the formal investigation procedure, that the scheme is not compatible with the internal market, is not subject to any additional requirement as compared with the review of a new aid scheme, having regard to the parallels that may be drawn between those two procedures once the formal investigation procedure has been initiated (see paragraph 127 above).

148 As the applicant claims, however, that possibility must be exercised in accordance with the principle of proportionality, which means that if amendments or adaptations to the scheme at issue are possible and render it compatible with the internal market, the Commission must at the very least explore that option with the Member State concerned at the stage of its proposal for appropriate measures.

149 Nonetheless, it must be pointed out, as the Commission does, that such amendment of the aid scheme at issue, which, moreover, does not seem to have been envisaged by the French Republic, also appears to be difficult or even impossible in this case. Since the measure at issue lays down an unconditional CT exemption for a number of general categories of beneficiaries, without any link to a clearly defined public interest objective, any amendment to that scheme would have resulted in the French Republic notifying another scheme entirely, which was fundamentally different from the existing aid scheme reviewed by the Commission. Thus, among other things, it would have been necessary to limit and restrict the advantage and its amount to the uncovered costs of certain investments or to the offsetting of costs of any SGEI, the nature and extent of which would have to have been defined by categories of port, or for each individual port on a yearly basis, taking account of the financial particularities of some 500 French ports and potentially different rules on compatibility applying to each of them, especially overseas ports.

150 Therefore, contrary to what the applicant claims, it must be held that the Commission did not infringe the principle of proportionality by failing to examine whether, by making a number of amendments to the aid measure at issue, that measure could have satisfied the conditions relating to the funding of SGEIs and been considered to be compatible with the internal market.

151 It is true that, as the applicant submits, in its decisions of 15 December 2009 concerning State aid SA.14175 (ex E 2/2005 and N 642/2009) – Netherlands – *Existing and special project aid to housing corporations* (OJ 2010 C 31, p. 4) and of 30 August 2010 concerning State aid E/2005 – Netherlands – *Existing aid to housing corporations: decision amending paragraphs 22-24 of the Commission Decision of 15 December 2009* (OJ 2010 C 250, p. 1), the Commission proposed to the Dutch authorities not that the existing aid scheme be abolished, but that it be amended to bring it into line with the EU rules on State aid.

152 However, in the decisions mentioned in paragraph 150 above concerning social housing in the Netherlands, the Kingdom of the Netherlands had proposed commitments to address the appropriate measures proposed by the Commission, so as to render the scheme compatible with the internal market. The Commission's final decision was therefore adopted on the basis of Article 19(1) of Regulation 659/1999, which laid down the legal consequences of a Member State's acceptance of the appropriate measures proposed by the Commission.

153 By contrast, in the instant case, since the Member State did not accept the appropriate measures proposed by the Commission or, as the Commission confirmed at the hearing, propose commitments to address the objections raised by those measures, the contested decision was adopted at the end of the formal investigation procedure, in accordance with Article 23(2) of Regulation 2015/1589. No parallel can thus be drawn with the decisions referred to in paragraph 150 above.

154 In the light of all those considerations, the fourth plea in law must be rejected.

Fifth plea in law: breach of the principle of sound administration

155 By this plea, the applicant submits that the contested decision was adopted in breach of the Commission's obligation to be objectively impartial pursuant to the principle of sound administration, guaranteed by Article 41 of the Charter of Fundamental Rights of the European Union. More specifically, it criticises the Commission for its failure to take action in respect of aid schemes enjoyed by some ports in the European Union under the tax legislation in force in other Member States, thus resulting in further distortions of competition in direct contravention of its role as guarantor of the smooth functioning of the internal market.

156 The Commission disputes those arguments.

157 As a preliminary point, it is necessary to examine whether, as the applicant submits, a potential infringement of the principle of sound administration, if established, constitutes an independent defect of legality which is capable, in itself, of leading to the annulment of the contested decision. The primary argument of the Commission is that an infringement of that principle may lead to the annulment of the contested decision only in conjunction with the infringement of another rule of EU law. It refers, in that regard, to paragraph 43 of the judgment of 6 December 2001, *Area Cova and Others* v *Council and Commission* (T-196/99, EU:T:2001:281), from which it is apparent that the principle of sound administration is not among the rules of law intended to confer rights on individuals, the breach of which could be relied on to establish the non-contractual liability of the European Union.

158 It should be noted, however, that the case-law cited by the Commission concerns whether the right to sound administration is a rule of law intended to confer rights on individuals, which is relevant in the context of an action for damages, as mentioned in Article 268 TFEU, but not in the context of an action for annulment under Article 263 TFEU, as in the present case.

159 In its plea alleging infringement of the right to sound administration, the applicant essentially pleads breach of the duty of care and the duty of impartiality.

160 According to the case-law, the duty of care is inherent in the principle of sound administration. It applies generally to the actions of the EU administration in its relations with the public and requires that administration to act with care and caution and to examine, carefully and impartially, all the relevant aspects of the individual case (see in particular, to that effect, judgments of 16 December 2008, *Masdar (UK)* v *Commission*, C-47/07 P, EU:C:2008:726, paragraphs 92 and 93, and of 15 January 2015, *Ziegler and Ziegler Relocation* v *Commission*, T-539/12 and T-150/13, not published, EU:T:2015:15, paragraph 97).

161 Furthermore, under Article 41 of the Charter of Fundamental Rights, every person has the right, inter alia, to have his affairs handled impartially by the institutions of the Union. That requirement of impartiality encompasses, on the one hand, subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and, on the other hand, objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 155 and the case-law cited).

162 However, the Commission's duty of impartiality does not require it, when examining aid schemes in place in several Member States, to conduct those investigations simultaneously or to take binding decisions at the same time for all Member States. In the present case, although it is true that the Commission's press release of 9 July 2014 concerning tax exemptions granted to Dutch public undertakings stated that 'in certain Member States, ports are not subject to corporate tax but to an alternative tax regime that might be more favourable', while 'in other Member States, ports do not actually pay any corporate taxes because they are loss-making', the applicant cannot infer from those general remarks that the Commission infringed the requirement of impartiality by considering, first of all, the Belgian, Dutch and French tax schemes and by adopting negative final decisions in relation to those schemes before examining all of the tax schemes in the other Member States which might also entail State aid.

163 In addition, it should be noted that similar arguments were examined and rejected in the case giving rise to the judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission* (T-160/16, not published, EU:T:2018:317), concerning an action brought by a number of Dutch ports against Commission Decision (EU) 2016/634 of 21 January 2016 on aid measure SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004) implemented by the Netherlands – Corporate tax exemption for public undertakings (OJ 2016 L 113, p. 148).

164 The Court ruled in that case that any breach by a Member State of an obligation under the Treaty, in particular the prohibition laid down in Article 107(1) TFEU, cannot be justified by the fact that other Member States are also failing to fulfil that obligation and the effects of more than one distortion of competition on trade between Member States do not cancel one another out but accumulate and the damaging consequences to the internal market are increased (see judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 97 and the case-law cited).

165 Thus, assuming that other Member States grant State aid to their seaports, it remains the case that the Commission, in the contested decision, by declaring the aid scheme at issue to be incompatible with the internal market and ordering that it be abolished, seeks to restore a level playing field in the port sector and thus fulfils the objectives of the State aid rules (see, by analogy, judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 98).

166 The Court also pointed out that respect for the principle of equal treatment must be reconciled with the principle of legality, which means that a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 116 and the case-law cited).

167 Therefore, the applicant's argument that the Commission infringed the principle of sound administration by initiating State aid proceedings against three Member States only (the French Republic, the Kingdom of Belgium and the Kingdom of the Netherlands), even though it was apparent from the replies to its questionnaire that half of the Member States had admitted having established exclusively for their ports exceptional tax regimes derogating from the ordinary rules of law, must be rejected.

168 In any event, such an argument is ineffective because it does not call into question the lawfulness of the contested decision as such, but rather seeks to highlight a possible failure on the part of the Commission vis-à-vis similar aid schemes also in force in other Member States. As the Commission points out, in such a situation, it is open to the applicant to lodge a complaint with the Commission concerning the aid schemes which continue to exist in other Member States and, in the event of unjustified and protracted inaction by it, bring an action for failure to act as provided for in Article 265 TFEU.

169 Consequently, in the light of all of those considerations, the fifth plea in law must be rejected and the action dismissed in its entirety.

Costs

170 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Union des ports de France – UPF to pay the costs.

Berardis Papasavvas Spineanu-Matei

Delivered in open court in Luxembourg on 30 April 2019.

[Signatures]

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