



Reports of Cases

Case T-747/17

Union des Ports de France — UPF
v
European Commission

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)

1. *Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision declaring aid scheme incompatible with the internal market and ordering that it be abolished — Action brought by a trade association set up to protect and represent its members — Admissibility — Conditions — Action brought at the same time by the members — Inadmissibility of the association's action (Art. 263, fourth para., TFEU)*

(see paragraphs 20-26)

2. *Action for annulment — Natural or legal persons — Measures of direct and individual concern to them — Commission decision declaring aid scheme incompatible with the internal market and ordering that it be abolished — Action brought by a trade association set up to protect and represent member undertakings which were identifiable when the decision was adopted and form part of a limited class of economic operators — Admissibility (Art. 263, fourth para., TFEU)*

(see paragraphs 27, 33-43)

3. *State aid — Concept — Tax exemption scheme on income from the economic activities of operators active in the port sector — Included (Art. 107(1) TFEU)*

(see paragraphs 48-57)

4. *Competition — EU rules — Addressees — Undertakings — Concept — Operators active in the port sector vested with public powers — Exercise of economic activities separable from the exercise of public powers — Included*

(Art. 107(1) TFEU)

(see paragraphs 61-70, 80-87)

5. *State aid — Examination by the Commission — Decision to initiate the formal investigation procedure laid down in Article 108(2) TFEU — Change to the Commission’s position at the end of the procedure — Difference between the decision initiating the procedure and the final decision — Admissibility — Conditions — No change to the facts or legal classification of those facts on which the decision initiating the procedure was based*
(Art. 108(2) TFEU)

(see paragraphs 75-79)

6. *State aid — Existing aid and new aid — Examination by the Commission — Preliminary review and main review — Existing aid scheme — Member State’s refusal of appropriate measures proposed by the Commission during the preliminary review — Commission decision to initiate the formal investigation procedure — Reversal of the burden of proof with regard to the compatibility of the scheme with the internal market — Absence*
(Art. 108 TFEU; Council Regulation 2015/1589, Arts 21, 22 and 23)

(see paragraphs 122-128)

7. *State aid — Prohibition — Derogations — Aid capable of benefiting from the derogation laid down in Article 107(3)(c) TFEU — Aid meeting the needs of coordination of transport within the meaning of Article 93 TFEU — Operating aid — Exclusion — Exceptions*
(Arts 93 and 107(3)(c) TFEU; Commission Communication 2004/C 13/03)

(see paragraphs 131-137)

8. *State aid — Examination by the Commission — Existing aid scheme — Commission’s discretion — Principle of sound administration — Obligation of diligence and impartiality — Scope — Obligation to initiate State aid proceedings against similar schemes in force in other Member States — Absence*
(Art. 108(2) TFEU; Charter of Fundamental Rights of the European Union, Art. 41)

(see paragraphs 157-165)

Résumé

In its judgment in *UPF v Commission* (T-747/17), delivered on 30 April 2019, the General Court dismissed as unfounded the action for annulment brought by the Union des ports de France (UPF) against the decision of the European Commission of 27 July 2017¹ declaring that the corporate tax exemption scheme implemented by France in favour of its ports is incompatible with the internal

¹ 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 contested decision’.

market, under the provisions of the Treaty relating to existing State aid,² and requiring that it be abolished for the future.

Adopted following a survey conducted in 2013 in all the Member States in order to obtain an overview of the functioning and tax treatment of their ports, the contested decision declares that the measure exempting operators active in the port sector from corporate tax constitutes an existing State aid scheme that is incompatible with the internal market. Accordingly, the decision orders that measure to be abolished and the income from the economic activities of the scheme's beneficiaries to be subject to corporate tax from the start of the tax year following the date of its adoption.

The General Court finds, first of all, that although the contested decision cannot produce legal effects in respect of the aid scheme's beneficiaries without the adoption of implementing measures by the French authorities, UPF, as a trade association set up to protect and represent its members, nevertheless has *locus standi* to bring proceedings against the contested decision, provided that its members have not themselves brought their own action. It notes, in that regard, that the members of UPF are all seaports or major seaports in France or chambers of commerce managing those ports who lawfully benefited from the exemption scheme. Furthermore, since those members are legal persons governed by public law established by decree whose creation does not fall within the scope of private initiative, they form part of a closed class of operators which were identifiable at the time when the contested decision was adopted, and can rely on the status of actual beneficiaries of the existing aid scheme.

The General Court finds, however, that the contested decision is not vitiated by any error of law and rejects all of the complaints put forward by UPF, inter alia those alleging errors committed by the Commission in its assessment of the economic nature of the activities of French ports and of their classification as undertakings. It states, in that regard, that it is clear from the contested decision that it relates only to income from the economic activities of the beneficiaries of the exemption and that it is only in respect of those activities that the beneficiaries were regarded as undertakings. It also considers as well founded the assessment that the activities carried out by French ports, apart from those carried out in the performance of public authority tasks, such as maritime traffic control and safety or anti-pollution surveillance, are economic in nature. 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 for the remainder of its economic activities. Moreover, if the economic activity of an entity can be separated from the exercise of its public powers, that entity must be classified as an undertaking for that part of its activities.

The General Court also holds that the Commission did not err in its assessment of the conditions relating to the distortion of competition and the effect on trade. It notes in particular that, even if the individual situation of some island or overseas ports were to show that those conditions are not satisfied, that examination must, in the case of an aid scheme, 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 that Member State and the Commission.

The General Court also finds that the Commission did not err in the conduct of the existing aid review procedure by requiring the French authorities to demonstrate that the tax exemption measure was compatible with the internal market. It points out, in that regard, that there is no reason either to draw a distinction, at the stage of the formal investigation procedure, between

² Article 107(1) TFEU.

the procedure applicable to new aid and that applicable to existing aid, or 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.

Finally, the General Court holds that the Commission did not infringe the principle of sound administration by initiating proceedings against only three Member States, whilst not initiating proceedings against Member States covered by its 2013 survey which admitted having established exclusively for their ports exceptional tax regimes derogating from the ordinary rules of law. It states, *inter alia*, that the Commission's duty of impartiality does not require it to conduct investigations simultaneously or to take binding decisions in State aid proceedings. Furthermore, no breach by a Member State of an obligation under the Treaty can be justified by the fact that other Member States are also failing to fulfil that obligation.