

**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***(notified under document C(2016) 167)***(Only the Dutch text is authentic)****(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above <sup>(1)</sup> and having regard to their comments,

Whereas:

**1. PROCEDURE**

- (1) In 1997 the Commission departments launched a survey of special tax rules applicable to public undertakings in Member States. In response to the Commission's questionnaire, the Dutch authorities provided information on the Dutch Corporate Income Tax Code (*Wet Venootschapsbelasting 1969* — 'Wet Vpb 1969') by letter of 23 January 1998.
- (2) On 2 July 2004, the Commission departments initiated an own-initiative proceeding, registered under number CP 115/2004, regarding the exemption from corporate tax for Dutch public undertakings laid down in the *Wet Vpb 1969*. They sent requests for information on 9 July 2004, 22 November 2004, 29 June 2006 and 2 July 2007, to which the Dutch authorities replied on 3 September 2004, 4 April 2005, 26 September 2006, 13 December 2006, 22 January 2007 and 27 July 2007.
- (3) By letter of 9 July 2008 ('the Article 17 letter'), the Commission departments launched the cooperation procedure provided for in Article 17(2) of Council Regulation (EC) No 659/1999 <sup>(2)</sup> ('the Procedural Regulation'). They informed the Dutch authorities that they took the preliminary view that the exemption of public undertakings from corporate tax in the *Wet Vpb 1969* seemed to constitute incompatible State aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union ('the TFEU'). They asked the Dutch authorities to submit their comments in accordance with Article 17(2) of the Procedural Regulation.
- (4) In September 2010, after it had sent the Article 17 letter, the Commission received a complaint relating to the corporate tax exemption of public undertakings contained in the *Wet Vpb 1969*. The complaint related to a provincial airport, an entity incorporated as a public limited company (NV), that was allegedly not subject to corporate income tax. The complainant argued that since the legal and factual situation was comparable with the Schiphol case <sup>(3)</sup> the airport should have been included in the list of taxable indirect public undertakings in Article 2 (7) of the *Wet Vpb 1969*. The Commission departments joined the complaint to the case being dealt with under the cooperation procedure.

<sup>(1)</sup> OJ C 280, 22.8.2014, p. 68.

<sup>(2)</sup> Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 83, 27.3.1999, p. 1). With effect from 14 October 2015 Regulation (EC) No 659/1999 was repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9). All the procedural steps taken in this proceeding were taken under Regulation (EC) No 659/1999.

<sup>(3)</sup> See Commission decision of 3 July 2001 in case SA.16035 (ex E 45/2000) (OJ C 37, 11.2.2004, p. 13). The Commission held that the corporate tax exemption for the publicly owned Schiphol Group was existing aid.

## PROPOSAL FOR APPROPRIATE MEASURES

- (5) On 2 May 2013 the Commission adopted a decision proposing appropriate measures pursuant to Article 18 of the Procedural Regulation with the aim of abolishing the corporate tax exemption of public undertakings laid down in Article 2(1)(g), Article 2(3) and Article 2(7) of the *Wet Vpb 1969*, with the aim of ensuring that the corporate tax regime for public undertakings involved in economic activities within the meaning of EU law was the same as that for private undertakings.
- (6) The Dutch authorities were asked to give the Commission their unconditional and unequivocal acceptance of the proposal for appropriate measures in writing, within 1 month, pursuant to Article 19 of the Procedural Regulation.
- (7) In a letter of 24 May 2013, the Dutch authorities informed the Commission that 'Subject to parliamentary approval, the Dutch Government intends to adopt legislation within 18 months to ensure that public undertakings that carry on economic activities will be subject to corporate tax in the same way as private undertakings. This legislation will enter into force in the following tax year at the latest. This means in practice that the legislation will be in force on 1 January 2015 and will take effect on 1 January 2016.'
- (8) The Commission considered that the statement contained in the letter did not constitute an unconditional acceptance, as it stated only a conditional intention to adopt the legislation.
- (9) In a letter of 11 March 2014 the Commission drew attention to the conditional character of the acceptance, and asked the Dutch authorities to inform the Commission departments within 3 weeks from receipt of the letter whether the Netherlands unconditionally and unequivocally accepted the appropriate measures. The Netherlands did not reply to that letter.

## OPENING OF THE FORMAL INVESTIGATION PROCEDURE

- (10) By letter dated 9 July 2014, the Commission informed the Netherlands that it had decided to initiate the procedure laid down in Article 108(2) TFEU with regard to the aid measure ('the decision to initiate the procedure').
- (11) The decision to initiate the procedure was published in the *Official Journal of the European Union* <sup>(4)</sup>. The Commission invited interested parties to submit their comments on the measure.
- (12) After granting an extension of the original deadline on 27 July 2014, the Commission received comments from the Netherlands by letter of 10 September 2014. The Commission also received joint observations from interested parties by letter of 19 September 2014, and forwarded them to the Netherlands for comment by letter dated 3 October 2014. The comments from the Netherlands were received by letter of 3 November 2014.

## LAW MODERNISING THE CORPORATE TAX LIABILITY OF PUBLIC UNDERTAKINGS

- (13) On 14 April 2014 the Dutch authorities launched for public consultation a draft legislative proposal to amend the *Wet Vpb 1969*. The proposal aimed at modernising the corporate tax liability of public undertakings, in order to create a level playing field between public and private undertakings under corporate tax law.
- (14) On 16 September 2014 the legislative proposal was submitted to the Dutch Parliament. The First Chamber approved the proposal on 26 May 2015 and the new law, called *Wet Modernisering Vpb-plicht overheidsondernemingen* ('*Wet Vpb 2015*') was signed into law on 4 June 2015. The new law aims at subjecting public undertakings to corporate tax in the same manner as private undertakings, and applies for the first time to financial years beginning on or after 1 January 2016. The Dutch authorities did not notify the new law to the Commission pursuant to Article 108 TFEU.

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<sup>(4)</sup> See footnote 1.

- (15) However, the Wet Vpb 2015 contains certain exceptions:
- (a) It expressly maintains the exemption from corporate tax for certain public undertakings, notably for six undertakings that operate Dutch public seaports, i.e. Groningen Seaports NV, Havenbedrijf Amsterdam NV, Havenbedrijf Rotterdam NV, Havenschap Moerdijk, NV Port of Den Helder and Zeeland Seaports NV. Bodies whose activities consist mainly of the management, development or operation of a seaport are also exempted. For these Dutch seaports the corporate tax exemption remains in place until a date to be determined by the Dutch authorities by Royal Decree <sup>(5)</sup>.
  - (b) It also exempts entities that conduct teaching or research, provided that certain conditions are met <sup>(6)</sup>.
- (16) The Commission departments had a meeting with the Dutch authorities on 27 August 2015. By letter of 10 September 2015, the Dutch authorities explained the reasons that, in their view, justified a transitional period for making Dutch public seaports liable to corporate tax.
- (17) This Decision does not only address the corporate tax exemption for public undertakings in force at the time of the decision opening the formal investigation procedure, i.e. on 9 July 2014, but also takes into account the amendments made by the Wet Vpb 2015 to the corporate tax exemption for Dutch public undertakings laid down in Article 2(1)(g), Article 2(3) and Article 2(7) of the Wet Vpb 1969. This Decision is without prejudice to the assessment of any other possible amendments to the Wet Vpb 1969, which are outside the scope of this investigation. In particular, this Decision does not assess the exemptions laid down in Article 5 and 6 of the Wet Vpb 1969 or any amendments thereof. This Decision is confined to the exemption of corporate tax for public undertakings contained in Articles 2(1), Article 2(3) and Article 2(7) of the Wet Vpb 1969 <sup>(7)</sup>.

## 2. DESCRIPTION OF THE MEASURE

### 2.1. The Dutch Corporate Tax Law

- (18) Pursuant to the Wet Vpb 1969, corporate entities in the Netherlands are subject to corporate income tax.
- (19) The Wet Vpb 1969, before the amendment of Article 2(1)(g), Article 2(3) and Article 2(7) by the new law, applies a different tax regime to private and public undertakings. Private undertakings are subject to corporate tax under the general regime. Legal persons governed by private law set up to conduct a business, such as public limited companies (NVs) and private limited companies (BVs) are fully liable to corporate tax on their total income. Foundations (*stichtingen*) and associations (*verenigingen*) are subject to corporate tax in so far as they conduct a business (Article 2(1)(e) of the Wet Vpb 1969). The conduct of a business (*het drijven van een onderneming*) is defined in Article 4 of the Wet Vpb 1969 as any activity through which there is competition with other undertakings.
- (20) The Wet Vpb 2015 aims at removing the corporate tax exemption for most public undertakings, under certain conditions. To that end it amends Article 2(1)(g), Article 2(3) and Article 2(7) of the Wet Vpb 1969 so that public undertakings become subject to tax. However, new provisions maintain the corporate tax exemption for seaports and for teaching and research institutions that fulfil certain conditions (see recital 15).

<sup>(5)</sup> Article I D (inserting a new Article 6c), Article II and Article VIII(2) of the Wet Vpb 2015.

<sup>(6)</sup> Article I D (inserting a new Article 6b) of the Wet Vpb 2015. The new Article 6b also contains an exemption for teaching hospitals that pursue activities referred to in Article 1.4(1) of the Higher Education and Scientific Research Act. The objective of this exemption is to create a level playing field between public and private hospitals. It is related to the exemption in Article 5 of the Wet Vpb 1969, which is outside the scope of the present proceeding, and this exemption is consequently not addressed in this Decision. This Decision is without prejudice to the assessment of the exemption for teaching hospitals in the Wet Vpb 2015.

<sup>(7)</sup> See footnote 6 to the appropriate measures decision and footnote 2 to the decision to initiate the procedure.

## 2.2. Exemption for public undertakings under the Wet Vpb 1969

- (21) Public undertakings are subject to special corporate tax rules laid down in Articles 2(1), 2(3) and 2(7) of the Wet Vpb 1969<sup>(8)</sup>.
- (22) The Wet Vpb 1969 distinguishes between direct and indirect public undertakings. A direct public undertaking (*direct overheidsbedrijf*) forms part of a legal person governed by public law (*publiekrechtelijke rechtspersoon*). Examples of direct public undertakings are a municipal property development agency or a municipal waste collection department.
- (23) An indirect public undertaking is an organisation (usually a public or private limited company or a foundation) that is governed by private law but under the control of a public institution. This is the case where (a) the only shareholders in the undertaking are Dutch public institutions or (b) in the case of other private-law entities whose capital is not divided into shares (foundations and associations), the directors can be appointed and dismissed only by public institutions and in the event of liquidation the assets are assigned exclusively to public institutions.
- (24) According to Article 2(1)(g) of the Wet Vpb 1969, undertakings belonging to legal persons governed by public law (*ondernemingen van publiekrechtelijke rechtspersonen*) are subject to corporate tax only if they are listed in Article 2(3). This exhaustive list comprises:
- (a) farms (*landbouwbedrijven*);
  - (b) industrial undertakings (*nijverheidsbedrijven*), unless they exclusively or nearly exclusively supply water<sup>(9)</sup>;
  - (c) mining undertakings;
  - (d) trading undertakings (*handelsbedrijven*) that do not deal exclusively or almost exclusively in real estate or rights related to real estate<sup>(10)</sup>;
  - (e) transport undertakings, with the exception of undertakings dealing exclusively or almost exclusively with the transport of passengers within a municipality;
  - (f) building societies (*bouwkassen*).

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<sup>(8)</sup> Articles 5 and 6 of the Wet Vpb 1969, in combination with the implementing order *Uitvoeringsbesluit Venootschapsbelasting 1971*, exempt from corporate tax certain bodies that pursue a social purpose or are of a non-profit nature or have a limited profit-generation aim. These include hospitals, care for the elderly, funeral services and libraries. As the Commission observed in the Article 17 letter, under EU competition law profit-making is not a criterion to be taken into account when deciding whether or not an entity is an undertaking, and the exemptions in Article 5 and 6 of the Wet Vpb 1969 might in certain cases also constitute State aid. These provisions are however not further examined in this Decision, which is confined to the exemption of corporate tax for public undertakings contained in Article 2(1), Article 2(3) and Article 2(7) of the Wet Vpb 1969.

<sup>(9)</sup> According to the Wet Vpb 1969 the term 'industrial undertakings' (*nijverheidsbedrijven*) includes enterprises that produce, transport or deliver gas, electricity or heat, and enterprises that construct or manage networks for the transport of gas, electricity or heat.

<sup>(10)</sup> This refers to enterprises buying and selling goods rather than generally to enterprises pursuing economic activities within the meaning of the EU rules. The Dutch authorities have confirmed that Article 2(1)(g) of the Wet Vpb 1969 does not apply to the provision of services.

- (25) The list of undertakings in Article 2(3) has remained basically unaltered since the introduction of the Wet Vpb in 1969, which inherited corporate tax rules existing since 1956. In particular, it does not include any public undertakings that provide services. For example, public undertakings active in waste management or catering, municipal credit institutions, ports, airports, and Holland Casino, the foundation that operates casinos, are exempt from corporate tax under Article 2(1)(g) <sup>(11)</sup>.
- (26) Direct and indirect public undertakings are subject to corporate income tax only if they meet the criteria of Article 2(1)(g) in conjunction with Article 2(3) of the Wet Vpb 1969. In other words, both direct and indirect public undertakings are liable to corporate tax only if they are listed in Article 2(3) of the Wet Vpb 1969.
- (27) Apart from the indirect public undertakings listed in Article 2(3), a number of indirect public undertakings have been liable to corporate tax on a case-by-case basis. These undertakings are exhaustively listed in Article 2(7) of the Wet Vpb 1969, and comprise:
- (a) het Nederlands Meetinstituut NV;
  - (b) de NV Nederlands Inkoopcentrum (NIC);
  - (c) de Stichting Exploitatie Nederlandse Staatsloterij;
  - (d) de Koninklijke Nederlandse Munt NV;
  - (e) bodies in which a legal person that owns a distribution undertaking within the scope of the Law on Energy Distribution (*Wet energiedistributie*) is a shareholder, and bodies that together with such a legal person form a group within the meaning of Article 24b of Book 2 of the Civil Code (*Burgerlijk Wetboek*), in so far as the body carries on activities that the shareholding legal person is prevented from carrying on itself by Article 12(1) of the Law on Energy Distribution, unless the body exclusively or nearly exclusively supplies water;
  - (f) bodies having an industrial activity within the meaning of Article 2(3), second indent, of the Wet Vpb 1969, with the exception of bodies that exclusively or nearly exclusively supply water;
  - (g) NOB Holding NV;
  - (h) de NV Luchthaven Schiphol;
  - (i) de NV KLIQ;
  - (j) de NV Bank Nederlandse Gemeenten;
  - (k) de Nederlandse Waterschapsbank NV;
  - (l) Fortis Bank (Nederland) NV;
  - (m) ASR Nederland NV;
  - (n) ABN AMRO Group NV;
  - (o) de Nederlandse Investeringsbank voor Ontwikkelingslanden NV;

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<sup>(11)</sup> A memo to the OECD dated 2002 also lists higher education (the hiring out of halls and meeting rooms and the unfair combination of education and research and commercial activities, e.g. in market research), the contracting out of construction and installation work, provincial and municipal engineering offices, the hiring out of conference and meeting rooms, para-commercialism in municipal buildings, subsidised child care, commercial exploitation of yacht harbours, fire services and recreation and housing associations. See OECD, DAFNE/COMP/WD(2002)54, 19 September 2002, paragraph 7.

(p) Ultra Centrifuge Nederland NV;

(q) SNS REAAL NV;

and any bodies in which the abovementioned undertakings are shareholders and any bodies whose directors are appointed and dismissed by the abovementioned undertakings, with the exception of bodies that exclusively or nearly exclusively supply water.

(28) This list has regularly been modified and certain indirect public undertakings have been added. Otherwise these indirect public undertakings would not have been subject to corporate income tax, as they are not in the list of Article 2(3) of the Wet Vpb 1969. For example, the following companies were added:

(a) NOB Holding NV (1999);

(b) Weerbureau HWS BV (2002);

(c) Luchthaven Schiphol NV (2002) — in response to the Commission decision of 3 July 2001 proposing appropriate measures in case E45/2000;

(d) KLIQ NV (2002);

(e) Bank Nederlands Gemeenten (2005);

(f) Nederlandse Waterschapsbank NV (2005);

(g) ABN AMRO Group NV and SNS REAAL NV, after their nationalisation.

(29) Indirect public undertakings that are not listed in Article 2(7) of the Wet Vpb 1969 and do not fall within Article 2 (3) are not liable to corporate tax. Examples of such undertakings are De Nederlandse Bank NV, Havenbedrijf Rotterdam NV, NV Luchthaven Maastricht, Twinning Holding BV, NV Noordelijke Ontwikkelingsmaatschappij, NV Industriebank LIOF, NV Brabantse Ontwikkelingsmaatschappij, Ontwikkelingsmaatschappij Oost Nederland NV and Holland Casino<sup>(12)</sup>.

### 2.3. Exemption for public undertakings under the Wet Vpb 2015

(30) The Wet Vpb 2015 aims in principle at subjecting public undertakings to corporate tax in the same manner as private undertakings. In particular, it amends Article 2 of the Wet Vpb 1969 in order to make liable to corporate tax legal persons governed by public law that conduct a business and businesses conducted by the State.

(31) However, as already explained in recital 15, the Wet Vpb 2015 contains certain exceptions:

(a) The Wet Vpb 2015 inserts a new Article 6c into the Wet Vpb 1969. The provision expressly maintains the exemption from corporate tax for a number of Dutch public seaports and for bodies whose activities consist mainly of the management, development or operation of a seaport, provided that certain conditions are fulfilled<sup>(13)</sup>.

(b) The Wet Vpb 2015 also inserts a new Article 6b into the Wet Vpb 1969. The provision exempts teaching entities or entities that conduct research, provided the cost of the teaching or research is met from public resources, from legally required university education fees or from the university education fees referred to in Chapter 7, title 3, paragraph 2 of the Higher Education and Scientific Research Act, from tuition fees of the kind referred to in Article 3 of the Tuition and Course Fees Act, from foreign payments which are by their nature and purpose equivalent to university education fees and tuition fees, or from payments by institutions of general interest for which no contractual consideration is sought.

<sup>(12)</sup> See parliamentary document *Belastingplicht overheidsbedrijven — Inventarisatie van de gevolgen van de ondernemingsvariant*, 11 mei 2012, *Kamerstukken II 31213*, nr. 7, pp. 26 and 46.

<sup>(13)</sup> The conditions are the following: (1) their directors are appointed and dismissed, directly or indirectly, exclusively by the named seaport operators, and in the event that they are wound up their assets are to be placed at the disposal exclusively of those operators; (2) all of their shareholders, partners, participants or members, direct or indirect, are from among the named seaport operators.

### 3. COMMENTS FROM INTERESTED PARTIES

- (32) The Commission received a joint submission from six interested parties, namely six Dutch seaports operators: Groningen Seaports NV, Havenbedrijf Amsterdam NV, Havenbedrijf Rotterdam NV, Havenschap Moerdijk, Port of Den Helder NV and Zeeland Seaports NV ('the interested seaports').
- (33) The interested seaports claim that the decision to initiate the procedure is unlawful, since the Netherlands unconditionally accepted the appropriate measures and committed to adopt legislation within 18 months in order to ensure that public undertakings would be subject to corporate tax in the same way as private undertakings. Since the non-acceptance of a Commission proposal for appropriate measures is a precondition for initiating the formal investigation procedure, the decision to initiate the procedure ought not to have been adopted. The interested seaports also claim that by failing to give reasons for its decisions the Commission breached a fundamental principle of Union law codified in Article 41(2) of the Charter of Fundamental Rights of the European Union.
- (34) According to the interested seaports, Dutch seaports are in direct competition with other European seaports, in particular those in the Hamburg-Le Havre range, which benefit from various forms of public support. The fact that the Commission's investigations into the taxation of ports in Europe have been proceeding at different paces and have started at different times entails the risk of granting a competitive advantage to the ports of those Member States which are at an earlier stage of investigation. This is contrary to the principle of equal treatment and the prohibition of discrimination on grounds of nationality. The interested Dutch seaports claim that they are willing to comply with State aid rules, but only on the strict condition that a level playing field applies for all seaports in all European countries.
- (35) The interested seaports claim that all seaports in the Netherlands are subject in the same manner to the current Dutch legislation on corporation tax. Therefore, the exemption from corporate tax applicable to ports does not confer a selective advantage, is not discriminatory and does not distort competition at national level.
- (36) According to the interested seaports, there are significant differences when it comes to the amount of public support granted to the different seaports in the Hamburg-Le Havre range. The tax exemption does not lead to a preferential treatment of the Dutch seaports but, at most, to a slightly less disadvantaged position for the Dutch seaports compared with other European seaports. Therefore, there is no distortion of competition on a European level either by the corporate tax regime that is the subject of this Decision or under the new law.

### 4. COMMENTS FROM THE NETHERLANDS

- (37) The Netherlands submitted comments by letter of 10 September 2014. The Dutch authorities put forward only procedural arguments and did not make comments on the substantive State aid assessment in the decision to initiate the procedure. The Netherlands contends that the Dutch authorities have accepted the appropriate measures in accordance with Article 19(1) of the Procedural Regulation.
- (38) According to the Netherlands, the Procedural Regulation does not expressly require that the appropriate measures be accepted 'unconditionally' and 'unequivocally', and does not exclude a proviso that parliamentary approval has to be secured. Regardless of whether or not such a proviso is mentioned in the letter of acceptance, a government proposal setting out the appropriate measures must be adopted by Parliament. The Dutch authorities refer to Article 4(2) of the Treaty on European Union, which stipulates that the European Union shall respect the fundamental constitutional structures of the Member States.
- (39) According to the Dutch authorities, the Commission could draw the conclusion that the appropriate measures have (de facto) not been accepted only after the government has submitted a draft law to Parliament or when Parliament fails to approve the draft. Only then can there be justification for initiating the formal investigation procedure. The Dutch authorities claim that this was not the case on 9 July 2014.

- (40) In the Dutch authorities' view the Commission did not formally indicate that it did not consider the reply of the Netherlands to be an acceptance of the appropriate measures. The Dutch authorities consider that the letter sent by the Commission on 11 March 2014 is not a formal letter for purposes of the present procedure. It was signed by the Deputy Director-General and addressed to the Deputy Director-General for Taxation in the Dutch Ministry of Finance. It was sent not via the official channel of the Permanent Representation, but by email.
- (41) On the substance, the Dutch authorities observe that in their view the desired European level playing field does not exist at the present time. The Dutch authorities also state that the position of Dutch seaports vis-à-vis those of neighbouring Member States is of the greatest importance.
- (42) The Dutch authorities consider that they have accepted the appropriate measures of 2 May 2013 and that they are in the process of taking the steps necessary. Therefore, the Dutch authorities do not see any reason to respond in substantive terms to the Commission's assessment in the decision to initiate the procedure.
- (43) The observations of the interested parties were sent to the Netherlands on 3 October 2014. The Dutch authorities replied by letter of 3 November 2014. The Dutch authorities share the interested seaports' view that the Netherlands has accepted the appropriate measures. The Dutch authorities also endorse the interested seaports' view that a level playing field for ports in Europe is crucial. According to the Dutch authorities, there is not a level playing field for ports in Europe at the present time. The Dutch authorities did not comment on the interested parties' substantive comments on the State aid assessment.
- (44) By letter dated 10 September 2015 the Netherlands submitted that if the continued corporate tax exemption for the interested seaports were to be considered incompatible State aid, a transitional period for the abolition of the measure would be justified. They argued that it was not possible to make the Dutch public seaports liable to corporate tax by 1 January 2016. They presented three arguments to justify a transitional period.
- (45) First, establishing an initial balance sheet for the interested seaports for tax purposes would be a very complex and lengthy operation. In the balance sheet for accounting purposes assets and liabilities were valued at historical cost, but for tax purposes they were valued at fair market value. Determining the fair market value of assets and liabilities was a difficult and time-consuming exercise. This was because most of the seaports' assets were non-marketable items which were subject to a complex system of property relations and rights of use between different legal entities. The problem of valuation might for example concern assets such as quaysides, roads, waterways, railways, docks, buildings with specific functions or mooring arrangements. The ports currently liable to corporate tax — small-scale marinas or fishing ports — could not be taken as a benchmark, since their activities differed significantly from larger seaports, which were engaged mainly in activities such as freight transhipment or management of infrastructure.
- (46) Second, the Netherlands argued that there was no clear distinction between economic and non-economic activities of ports, and that the Commission should provide further guidance in that respect. It was a difficult task for the Dutch authorities and the seaports to determine which port activities should be classified as economic activities or non-economic activities. In addition, there was no consistent line from the Commission and no certainty at European level as to which port activities were to be considered economic activities and which were to be considered public tasks.
- (47) Third, the Dutch authorities considered that it was essential that the Commission should ensure a level playing field between competing ports. There was no fair competition between European seaports: they requested the Commission to ensure that all ports in Europe were subject to corporate tax, or at least those that competed with Dutch seaports.



- (48) Finally, the Dutch authorities suggested that the date on which the corporate tax exemption for Dutch seaports should cease to operate, by Royal Decree, should be 1 January 2017. The seaports would become liable to corporate tax on the first day of the tax year starting after 1 January 2017. In practice this would mean that Dutch seaports would be liable to corporate tax as of 1 January 2018.

#### 5. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

- (49) Both the Dutch authorities and the interested third parties submit that the Commission was not entitled to open the formal investigation procedure. The Commission does not agree with that view. The Commission was fully entitled, if not indeed obliged, to open the formal investigation procedure, because the Netherlands had not accepted the appropriate measures in accordance with Article 19(1) of the Procedural Regulation and the competition concerns raised in the decision proposing appropriate measures had not been fully removed.
- (50) Given that the Dutch authorities made their acceptance subject to the approval of Parliament, and the letter of the Dutch authorities of 24 May 2013 stated an intention and not a commitment, the letter did not constitute an unconditional and unequivocal acceptance for purposes of Article 19(1) of the Procedural Regulation.
- (51) Article 19(2) of the Procedural Regulation stipulates that where the Member State concerned does not accept the proposed appropriate measures and the Commission, having taking into account the arguments of the Member State concerned, still considers that those measures are necessary, the Commission is to open the formal investigation procedure.
- (52) Moreover, it was clear from the draft legislative proposal that the Netherlands did not intend to abolish the corporate tax exemption for all public undertakings. The Commission consequently had strong indications that the Netherlands would not bring the law fully into line with the State aid rules.
- (53) As regards the argument put forward by the Netherlands that the Commission did not properly inform the Netherlands that it did not consider the reply to be an acceptance within the meaning of Article 19(1) of the Procedural Regulation, the Commission points out that its letter of 11 March 2014 was sent to the competent national authority, was in fact received by that authority, and was discussed between the Commission and the Dutch authorities. The Netherlands was well aware of the Commission's assessment and cannot rely on purely formal arguments as regards the addressee of the letter.
- (54) The Commission initiated the formal investigation because it had concerns that exempting public undertakings involved in economic activities from corporate tax might give them an advantage over other undertakings that were subject to corporate tax in the Netherlands. Public undertakings and private undertakings are in a similar factual and legal situation with reference to the objective of the Dutch corporate tax law, which is to make corporate undertakings subject to tax on their corporate profits.

#### 6. PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU

- (55) Article 107(1) TFEU states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market if it affects trade between Member States.

### 6.1. Undertakings

- (56) According to settled case-law, 'the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed' <sup>(14)</sup>. In order to establish whether an entity constitutes an undertaking, the fact that it does not seek to make a profit is not decisive <sup>(15)</sup>. An economic activity is any activity consisting in offering goods and services on a market. Non-profit entities can also offer goods and services on a market <sup>(16)</sup>.
- (57) It has not been contested by the Dutch authorities that public undertakings, including public ports, may in addition to their usual public authority tasks offer goods and services on the market. The Dutch authorities have acknowledged that public undertakings increasingly carry on economic activities. Furthermore, the interested third parties have expressly acknowledged that port activities have developed in recent years into fully fledged economic activities. Therefore, public undertakings that carry on economic activities can be classified as undertakings within the meaning of Article 107(1) TFEU.
- (58) As regards the exemption for teaching institutions or institutions that conduct research laid down in Article 6(b) of the Wet Vpb, as amended by the Wet Vpb 2015, paragraphs 26 to 28 of the SGEI Communication <sup>(17)</sup> state in that, according to settled case-law, 'public education organised within the national education system, which is funded and supervised by the State, may be considered as a non-economic activity'. The fact that a contribution may be required in the form of tuition or enrolment fees does not alter the non-economic nature of the service. Article 6b of the Wet Vpb clearly requires that the cost of the teaching or research be funded from public resources or tuition fees provided for by law. Therefore, given the non-economic nature of teaching or research services, teaching institutions are not to be classified as undertakings pursuant to Article 107 TFEU.
- (59) As regards research institutions, paragraph 29 of the SGEI Communication states that research carried out in universities and the primary activities of research organisations fall outside the ambit of the State aid rules.

### 6.2. The use of State resources

- (60) According to Article 107(1) TFEU, the measure must be granted by a Member State or through State resources in any form whatsoever. A loss of tax revenue is equivalent to the consumption of State resources in the form of fiscal expenditure.
- (61) As the Court of Justice of the European Union held in *Banco Exterior de España*, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a cash transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, is granted 'through State resources' within the meaning of Article 107(1) TFEU <sup>(18)</sup>.
- (62) The Dutch authorities forgo revenues which constitute State resources by exempting public undertakings engaged in economic activities, including public ports, from corporate taxation. Therefore, the Commission takes the view that the corporate tax exemption for Dutch public undertakings contained in the Wet Vpb 1969 involves a loss of State resources and is consequently granted by the State through State resources. Analogously, the corporate tax exemption for certain Dutch seaports maintained in the Wet Vpb 2015 involves a loss of State resources and therefore it is granted by the State through State resources. This has been contested neither by the Dutch authorities nor by the interested third parties.

<sup>(14)</sup> Judgment of the Court of Justice in *Höfner and Elser v Macroton*, C-41/90, EU:C:1991:161, paragraph 21.

<sup>(15)</sup> Judgment of the Court of Justice in *MOTOE v Elliniko Dimosio*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.

<sup>(16)</sup> Judgments of the Court of Justice in *Van Landewyck and Others v Commission*, 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 21; *FFSA and Others v Ministère de l'Agriculture et de la Pêche*, Case C-244/94, EU:C:1995:392; and *MOTOE*, cited above, EU:C:2008:376, paragraphs 27 and 28.

<sup>(17)</sup> Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

<sup>(18)</sup> Judgment of the Court of Justice in *Banco de Crédito Industrial SA, now Exterior de España SA v Ayuntamiento de Valencia*, C-387/92, EU:C:1994:100, paragraph 14.

### 6.3. The presence of an advantage

- (63) In addition, the measure has to confer a financial advantage on the recipient. The notion of advantage covers not only positive benefits but also interventions which, in various forms, mitigate the charges which are normally included in an undertaking's budget <sup>(19)</sup>.
- (64) The Dutch authorities have not contested that a continued corporate tax exemption for certain public undertakings grants an economic advantage to these undertakings.
- (65) Under the Wet Vpb 1969, public undertakings are in principle exempt from corporate tax, whereas private undertakings are in principle subject to corporate tax. Therefore, public undertakings engaged in economic activities benefit from a clear tax advantage. The Commission points out that the new law (Wet Vpb 2015) expressly maintains the corporate tax exemption for certain Dutch public seaports, which will therefore continue to benefit from the tax advantage. The tax exemption reduces the charges that are normally included in the operating costs of an undertaking carrying on an economic activity. Consequently, it provides an economic advantage to those public undertakings in comparison with undertakings subject to Dutch corporate tax, which do not receive this tax advantage.

### 6.4. Distortion of competition and effect on trade

- (66) Under Article 107(1) TFEU a measure that is to be considered State aid must affect trade between Member States and distort or threaten to distort competition. In the present case, public undertakings that carry on economic activities and that qualify for the tax exemption may be involved in intra-Union trade. Public seaports, which continue to be tax exempted under the Wet Vpb 1969 — even after amendment by the Wet Vpb 2015 — are clearly public undertakings involved in trade between Member States. Consequently, the Wet Vpb 1969, which provides for a tax exemption of public undertakings, necessarily affects trade between Member States and distorts or threatens to distort competition. Similarly, the corporate tax exemption maintained in the Wet Vpb 2015 for the interested seaports affects trade between Member States and distorts or threatens to distort competition.
- (67) According to the interested seaports, there is no distortion of competition at a European level either under the corporate tax regime that is the subject of this Decision nor under the new law. The interested seaports argue that seaports in the Hamburg-Le Havre range receive different types of public support. Therefore, they argue, the tax exemption does not lead to preferential treatment of the Dutch seaports but, at most, to a slightly less disadvantaged position for the Dutch seaports compared with other European seaports.
- (68) The Commission does not agree with the interested third parties' argument. A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared with other undertakings with which it competes <sup>(20)</sup>. It is therefore sufficient that the aid allows the recipient to maintain a stronger competitive position than it would have had if the aid had not been provided. Therefore, the fact that some seaports at European level may receive State aid does not mean that competition is not distorted by a corporate tax exemption for public undertakings in general, and public ports in particular.

### 6.5. Selectivity

- (69) To be considered State aid, a measure must be selective <sup>(21)</sup>, in the sense that it favours certain undertakings or the production of certain goods. According to established case-law <sup>(22)</sup>, the material selectivity of a measure has to be assessed in three stages: first, it is necessary to identify the common or 'normal' arrangement ('system of reference') applicable in the Member State concerned. Second, it is in relation to this common or 'normal' tax regime that it has

<sup>(19)</sup> Judgments of the Court of Justice in *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, 30/59, EU:C:1961:2, and *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke v Finanzlandesdirektion für Kärnten*, C-143/99, EU:C:2001:598, paragraph 38.

<sup>(20)</sup> Judgment of the Court of Justice in *Phillip Morris Holland v Commission*, 730/79, EU:C:1980:209, paragraph 11.

<sup>(21)</sup> Judgment of the Court of Justice in *Italy v Commission*, C-66/02, EU:C:2005:768, paragraph 94.

<sup>(22)</sup> See, inter alia, the judgments of the Court of Justice in *Portugal v Commission*, C-88/03, EU:C:2006:511, paragraph 56, and *Ministero dell'Economia e delle Finanze and Agenzia delle Entrate v Paint Graphos etc.*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49.

to be determined whether any advantage granted by the tax measure at issue may be selective. This has to be done by demonstrating that the measure departs from the ordinary arrangement by differentiating between economic operators which, in the light of the objective pursued by that scheme, are in a comparable factual and legal situation. Third, if there is such a departure, it is necessary to examine whether it results from the nature or general scheme of the taxation system and whether it may be justified by the nature or general scheme of that taxation system. In this context, it is for the Member State to show that the differentiated tax treatment derives directly from the basic or guiding principles of that system <sup>(23)</sup>.

#### *System of reference*

- (70) In the present case, the reference system should be defined as the Dutch system for corporate taxation, as laid down in the Wet Vpb 1969. It follows from that law that according to the normal rules undertakings established in the Netherlands are subject to corporate tax on their profits.
- (71) As regards the corporate tax exemption for the interested seaports contained in the Wet Vpb 2015, the reference system should also be defined as the Dutch system for corporate taxation as laid down in the Wet Vpb 2015. It follows from that law too that, according to the normal rules, undertakings established in the Netherlands are subject to corporate tax on their profits.

#### *Departure from the system of reference*

- (72) Under the Wet Vpb 1969 public undertakings, unlike private undertakings, are in principle exempt from corporate taxation. Public undertakings are liable to tax only if they are listed in Article 2(3) or Article 2(7) of the Wet Vpb 1969.
- (73) The list of undertakings in Article 2(3) of the Wet Vpb 1969 has not changed since 1956. The list does not take account of the fact that since 1956 public undertakings, direct and indirect, have increasingly offered goods and services on the market, in competition with private companies which are liable to corporate tax. In particular, there is a discrepancy between the undertakings that are listed in Article 2(3) of the Wet Vpb 1969, and made liable to tax, and the concept of 'economic activity' in EU law. The current Dutch law allows a substantial number of public undertakings that are involved in economic activities to be tax exempt, while in the light of the objective of the corporate tax law they are in the same factual and legal position as privately owned undertakings.
- (74) The fact that the Dutch authorities have, on a case-by-case basis, decided to make a limited number of indirect public undertakings liable to corporate tax does not remove the selective nature of the present tax arrangements. The Dutch authorities acknowledge that this case-by-case approach does not guarantee that all public undertakings that carry out economic activities will also be liable to corporate tax. The present law clearly favours public undertakings that carry on economic activities and which are not included in the list.
- (75) Hence, a large range of public undertakings that perform an economic activity are corporate tax exempt. The Commission observes that even under the new law this tax exemption will continue in particular for the interested seaports. This is a departure from the general corporate tax system applicable in the Netherlands and grants a selective advantage to public undertakings which carry on economic activities.
- (76) Under the Wet Vpb 2015 public undertakings are in principle subject to corporate tax. However, the law exempts certain public seaports from corporate tax. The Wet Vpb 2015 allows the interested seaports to be tax exempt, although they are in the same factual and legal situation as other privately and publicly-owned undertakings in the light of the objective of the corporate tax law, which is to tax corporations on their profits.

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<sup>(23)</sup> Judgment in *Adria-Wien Pipeline*, cited above, EU:C:2001:598, paragraph 42.

- (77) The Dutch authorities have not contested that the corporate tax exemption grants a selective advantage to public undertakings. However, the interested seaports, which are the beneficiaries of the continuing corporate tax exemption, do contest the existence of a selective advantage. They claim that the current Dutch legislation on corporation tax applies in the same way to all seaports in the Netherlands. Therefore, the exemption from corporate tax applicable to ports does not confer a selective advantage.
- (78) The Commission does not agree with this argument. Selectivity in EU State aid law has to be assessed on the basis of an internal comparison within one Member State, between undertakings that are factually and legally in a similar situation in the light of the objectives of the tax law concerned. Undertakings with corporate income that benefit from a corporate tax exemption, like the interested seaports, clearly enjoy a selective advantage compared with undertakings active in the same sector and in other sectors. In the light of the objective of the corporate tax law, the two groups are in a similar factual and legal situation.
- (79) In the absence of harmonisation of direct taxation, the tax situation of ports in different Member States will always differ to some extent. For example, different corporate tax rates apply in different Member States. It is established case-law that a Member State cannot justify maintaining tax exemptions which constitute State aid by referring to other Member States that may have similar measures in place <sup>(24)</sup>.

*Justification by the rationale of the system*

- (80) Given that the Commission considers that the tax exemption at issue is *prima facie* selective, it will have to determine, in accordance with the case-law of the European courts, whether this exemption can be justified by the nature or general scheme of the system of which it forms part. A measure which constitutes an exception to the application of the general tax system may be justified if the Member State can show that the measure results directly from the basic or guiding principles of its tax system.
- (81) The existence of similar exemptions for public undertakings in other Member States or the absence of a level playing field at European level does not justify a failure to implement the Commission decision proposing appropriate measures as regards public seaports. Under EU State aid law, undertakings that are legally and factually comparable in the light of the objective of the tax system of a Member State should be treated in the same manner within that Member State. The selectivity assessment under EU State aid law is thus based on an internal comparison within one Member State <sup>(25)</sup>. In the absence of EU harmonisation of direct taxation, the tax situations of ports in different Member States will always differ to some extent.
- (82) The Dutch authorities have not provided any arguments that would justify the exemption by reference to the rationale of the Dutch corporate tax system. The Commission has not been able to identify any such justification either. The rationale of the corporate tax system is to tax profits. Treating public undertakings, including public seaports, that are involved in economic activities more favourably than private undertakings does not fit into this rationale.

## 6.6. Conclusion

- (83) Therefore, the Commission concludes that the corporate tax exemption for public undertakings laid down in the Wet Vpb 1969 results in a differential tax treatment between public and private undertakings engaged in economic activities. This differential treatment is imputable to the State and granted through State resources. It gives these

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<sup>(24)</sup> Judgment of the General Court of 1 July 2004 in *Salzgitter v Commission*, T-308/00, EU:T:2004:199, paragraph 42.

<sup>(25)</sup> Judgment in *Salzgitter*, cited above, EU:T:2004:199, paragraph 81.

public undertakings a selective advantage that cannot be justified by the nature and general scheme of the Dutch corporate tax system. Furthermore, the more favourable treatment distorts competition and affects trade between Member States. Therefore, the tax exemption granted to public undertakings constitutes State aid within the meaning of Article 107(1) TFEU <sup>(26)</sup>.

- (84) The Commission acknowledges that the amendments made by the Wet Vpb 2015 remove the corporate tax exemption for most Dutch public undertakings, which were initially not taxed under Article 2(1)(g), Article 2(3) and Article 2(7) of the Wet Vpb 1969, with effect from 1 January 2016. However, the Wet Vpb 2015 maintains the corporate tax exemption for certain public seaports, which are involved in economic activities. This differential treatment is imputable to the State and granted through State resources. It gives these public undertakings a selective advantage that cannot be justified by the nature and general scheme of the Dutch corporate tax system. Furthermore, the more favourable treatment distorts competition and affects trade between Member States. Therefore, the tax exemption granted to the interested seaports constitutes State aid within the meaning of Article 107(1) TFEU.

## 7. COMPATIBILITY

### 7.1. Article 107(2) and (3) TFEU

- (85) Since the scheme under review constitutes State aid within the meaning of Article 107(1) TFEU, it has to be considered whether it is compatible with the internal market under the exceptions laid down in Article 107(2) and (3) TFEU.
- (86) The Dutch authorities have not provided any arguments regarding the applicability of the exceptions described in Article 107(2) and (3) TFEU to the general exemption from corporate tax granted to public undertakings.
- (87) The Commission considers that none of the exceptions in Article 107(2) TFEU apply, as the measure under review is not aimed at any of the objectives listed in this provision. More specifically, the measure under review does not appear to relate to aid having a social character which is granted to individual consumers, or aid to make good the damage caused by natural disasters or exceptional occurrences, or aid granted to the economy of certain parts of the Federal Republic of Germany.
- (88) Article 107(3) TFEU further states that the following may be considered to be compatible with the internal market: (a) aid to promote the development of certain areas; (b) aid for certain important projects of common European interest; (c) aid to develop certain economic activities or areas; (d) aid to promote culture and heritage conservation; and (e) aid specified by a Council decision.
- (89) As to the possible application of the exceptions provided for by Article 107(3)(a)-(e) TFEU, the Commission observes that the tax exemption for Dutch public undertakings is operating aid, and is granted without making a distinction as to the goals pursued by the undertakings in question. Consequently, the Commission considers that generally the exceptions of Article 107(3) TFEU will not apply. Furthermore, the Dutch authorities have not provided information demonstrating that these exceptions are applicable in certain specific cases. As a result of the foregoing, the Commission has come to the conclusion that none of the grounds of Article 107(3) TFEU is applicable.

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<sup>(26)</sup> In 2002, in a similar case concerning a 3-year exemption from corporate tax granted to certain Italian public enterprises set up by local authorities, the Commission adopted a negative decision with recovery (Commission Decision 2003/193/EC of 5 June 2002 on State aid granted by Italy in the form of tax exemptions and subsidised loans to public utilities with a majority public capital holding (OJ L 77, 24.3.2003, p. 21). That decision was upheld by the judgment of the Court of Justice in *A2A formerly ASM Brescia v Commission*, C-318/09 P, EU:C:2011:856.

## 7.2. Article 106(2) TFEU

- (90) In addition to the grounds of Articles 107(2) and (3) TFEU, aid may also be compatible in application of Article 106(2) TFEU where the recipient has been entrusted by the State with the operation of services of general economic interest.
- (91) The Dutch authorities have not provided any information from which it can be concluded that the exemption from corporate tax for (certain) public undertakings may be justified under Article 106(2) TFEU. The Commission observes in this regard that, in any event, in the case at issue the corporate tax exemption for Dutch public undertakings is granted without making a distinction as to the goals pursued by the undertakings in question. Nor have the Dutch authorities provided any information that would make it possible to apply Article 106(2) TFEU to specific cases. Consequently, the Commission has come to the conclusion that Article 106(2) TFEU is not applicable.

## 8. TRANSITIONAL PERIOD FOR THE INTERESTED SEAPORTS

- (92) When the Commission takes a final decision concerning existing State aid and concludes that the aid measure is not compatible with the internal market, the measure must be abolished or altered as quickly as possible. At this stage of the procedure the Member State should not in principle be allowed a transitional period. In any event, there is no exceptional circumstance in the case under review that might justify such a transitional period. The arguments put forward by the Netherlands cannot be regarded as exceptional circumstances.
- (93) As regards the argument that the distinction between economic and non-economic activities is not sufficiently clear for ports, the Commission observes that public undertakings other than ports also have to determine what is an economic activity and what is a public task, and no transitional period has been granted in this connection. In addition, the Commission has already adopted more than 20 decisions on ports, which provide sufficient guidance regarding the circumstances in which port activities are economic activities<sup>(27)</sup>.
- (94) Similarly, the argument about the need to ensure a level playing field at EU level does not justify a transitional period. As explained in recital 82 above, from a State aid perspective, a tax exemption for public ports cannot be justified by the existence of similar measures in some other Member States or the absence of a level playing field at European level. In the absence of EU harmonisation in the field of direct taxation, the tax situation of public ports may present some differences among Member States. Therefore, the implementation of appropriate measures contained in the Commission's decision of 2 May 2013 should not be contingent upon the taxation of public ports in other Member States.
- (95) As regards the argument of the Netherlands that making ports subject to corporate tax might be a complex and lengthy exercise, the Commission observes that the specific characteristics of ports do not seem to be substantially different from those of airports, and that Schiphol airport was made subject to corporate tax 6 months after the adoption of the Commission decision proposing appropriate measures<sup>(28)</sup>. In any event, in so far as the special characteristics of the assets held by ports and the ownership structure of those assets make it complex to establish an initial balance sheet for tax purposes, these issues could be discussed with the tax authorities even after the entities

<sup>(27)</sup> See, for example, Commission Decision of 15 December 2009 in State aid case C 39/2009 (ex N 385/2009) — Latvia — Public financing of port infrastructure in Ventspils Port (OJ C 62, 13.3.2010, p. 7); Commission Decision of 15 June 2011 in State aid case SA.30381 (N 44/2010) — Latvia — Public financing of port infrastructure in Krievu Sala (OJ C 215, 21.7.2011, p. 2); Commission Decision of 22 February 2012 in State aid case SA.30742 (N 137/2010) — Lithuania — Construction of infrastructure for the ferry terminal in Klaipėda (OJ C 121, 26.4.2012, p. 1); Commission Decision of 2 July 2013 in State aid case SA.35418 (2012/N) — Greece — Extension of Piraeus port (OJ C 256, 5.9.2013, p. 2); Commission Decision of 18 September 2013 in State aid case SA.36953 (2013/N) — Spain — Port Authority of Bahía de Cádiz (OJ C 335, 5.9.2013, p. 5); Commission Decision of 18 December 2013 in State aid case SA.37402 — Hungary — The intermodal development of the Freeport of Budapest (OJ C 141, 9.5.2014, p. 5); Commission Decision of 17 October 2012 in State aid case SA.34501 — Germany — Extension of the inland port Königs Wusterhausen/Wildau (OJ C 176, 21.6.2013, p. 1); Commission Decision of 1 October 2014 in State aid case SA.38478 — Hungary — Development of the Győr-Gőnyű Public Port (OJ C 418, 21.11.2014, p. 9). See also Commission Decision of 20 October 2004 in State aid case N 520/2003 — Belgium — Financial support for infrastructure works in Flemish Ports.

<sup>(28)</sup> Commission Decision of 3 July 2001 in State aid case SA.16035 (ex E 45/2000).

have become subject to tax. In addition, given the fact that the next fiscal year for the seaports concerned in the Netherlands begins on 1 January 2017, the seaports will have time to prepare for the new situation. Therefore, the Commission considers that the arguments concerning administrative manageability invoked by the Netherlands do not justify a transitional period for the interested seaports.

#### 9. EXISTING AID

- (96) Having found that the exemption from corporate taxation of public undertakings is incompatible State aid, the Commission has to determine whether the measures constitute new or existing aid.
- (97) An existing aid measure, as defined in Article 1(b) of the Procedural Regulation, would be a measure that was in place prior to the entry into force of the EC Treaty in the Netherlands, or a measure that has previously been authorised, or a measure that is deemed to be existing aid pursuant to Article 15 of the Procedural Regulation, or a measure that was not aid when it was put into effect but became aid due to the evolution of the internal market. Any aid not falling under the definition of existing aid is to be considered new aid pursuant to Article 1(c) of the Procedural Regulation.
- (98) The Dutch authorities have submitted that if the tax exemption for corporate enterprises in the Wet Vpb 1969 is aid it constitutes existing aid.
- (99) The Commission shares this position. It follows from the information provided by the Dutch authorities that the essence of the tax exemption for public enterprises in the Wet Vpb 1969, as laid down in Article 2(1)(g) and Article 2(3) of the Wet Vpb 1969, existed before the entry into force of the EC Treaty in the Netherlands. The Wet Vpb 1969, which was introduced in 1969, took over the provisions already present in the tax code of 1956 (before the entry into force of the EC Treaty), and no new exceptions were created afterwards.
- (100) The Wet Vpb 2015 has removed the corporate tax exemption for public undertakings laid down in Article 2(1)(g), Article 2(3) and Article 2(7) of the Wet Vpb 1969 with effect from 1 January 2016, but has expressly maintained the corporate tax exemption for certain Dutch public seaports. The Commission observes that as regards these public undertakings the new law has not fundamentally modified the existing corporate tax exemption. It has not introduced any new aid components and has not increased the number of beneficiaries. Therefore, the Commission concludes that the continued corporate tax exemption for the interested seaports has retained its nature as existing aid.

#### 10. CONCLUSION

- (101) The corporate tax exemption for certain Dutch public seaports constitutes incompatible State aid.
- (102) The Commission notes that the new law Wet Vpb 2015, amending the Wet Vpb 1969, removed the corporate tax exemption for public undertakings with effect from 1 January 2016.
- (103) The corporate tax exemption has been maintained by the Wet Vpb 2015 for certain Dutch public seaports. This exemption should be removed by the Netherlands within 2 months from the date of notification of this Decision, and the corporate tax scheme thus amended should apply at the latest with effect from the tax year following the adoption of this Decision,

HAS ADOPTED THIS DECISION:

#### *Article 1*

The corporate tax exemption for Groningen Seaports NV, Havenbedrijf Amsterdam NV, Havenbedrijf Rotterdam NV, Havenschap Moerdijk, NV Port of Den Helder and Zeeland Seaports NV, with respect to the economic activities of the interested seaports, constitutes State aid and is incompatible with the internal market.



*Article 2*

The Netherlands shall remove the corporate tax exemption for the seaports referred to in Article 1 within 2 months from the date of notification of this Decision, and the corporate tax scheme thus amended shall apply at the latest with effect from the tax year following the adoption of this Decision.

*Article 3*

The Netherlands shall inform the Commission within 2 months of the date of the notification of this Decision of the measures taken to comply with it.

*Article 4*

This Decision is addressed to the Kingdom of the Netherlands.

Done at Brussels, 21 January 2016.

*For the Commission*

Margrethe VESTAGER

*Member of the Commission*

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