

II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2021/1757

of 4 December 2020

on the aid scheme SA.38399 — 2019/C (ex 2018/E) which Italy implemented —Corporate Taxation of Ports in Italy

(Only the Italian version is authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union (TFEU), 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 ⁽¹⁾ and having regard to their comments,

Whereas:

1. PROCEDURE

- (1) By letter dated 3 July 2013, the Commission sent a comprehensive questionnaire to all Member States in order to collect information on the corporate taxation of ports as well as possible other forms of State support for different types of investment or the operation of ports. The Italian authorities sent their answers to the above-mentioned questionnaire by letter dated 12 September 2013 and by letter dated 1 October 2013. By letters dated 24 January 2014 and 2 September 2014, the Commission requested further information, which was submitted by Italy by letters of 14 February 2014, 11 September 2014 and 29 September 2014. By letter dated 14 November 2014, the Italian authorities submitted further information. By letter of 27 April 2017, the Commission sent an additional request for information to the Italian authorities, to which the latter responded on 24 May 2017.
- (2) By letter dated 30 April 2018, the Commission, in accordance with Article 21 of Council Regulation (EU) 2015/1589 ⁽²⁾ (“the Procedural Regulation”), informed Italy of its preliminary State aid assessment of the provisions concerning the corporate taxation of ports and invited the Italian authorities to present their observations. On 22 May 2018 and 27 June 2018, meetings between the Commission and the Italian authorities were held. By letter dated 3 July 2018, Italy replied to the Commission letter dated 30 April 2018. Further information was provided by Italy by letter dated 10 September 2018.

⁽¹⁾ OJ C 7, 10.1.2020, p. 11.

⁽²⁾ 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. 9-29).

- (3) The Commission proposed appropriate measures on 8 January 2019 pursuant to Article 22 of the Procedural Regulation. The Commission invited Italy to adopt measures that would ensure that Port System Authorities that carry out economic activities are subject to corporate tax in the same manner as other undertakings. Moreover the Commission invited the Italian authorities to inform it in writing and within two months from the receipt of the proposal, that they accept, pursuant to Article 23(1) of the Procedural Regulation, unconditionally, unequivocally and in its entirety the proposal for appropriate measures.
- (4) By letter dated 7 March 2019, Italy formally rejected the Commission proposal. On 2 April 2019 and 7 May 2019, further meetings between the Italian authorities and the Commission took place. In these meetings, Italy reiterated its position.
- (5) As the Italian authorities did not accept the proposal for appropriate measures, the Commission decided, by letter of 15 November 2019, to open the procedure provided for in Article 108(2) of the Treaty, pursuant to Article 23(2) of the Procedural Regulation. The Commission's decision to initiate the procedure was published in the *Official Journal of the European Union* ⁽³⁾. The Commission invited Italy and interested parties to submit comments.
- (6) Italy sent its observations to the Commission by letter dated 4 February 2020.
- (7) The Commission received comments from the following interested parties:
 1. Confetra – Confederazione Generale Italiana dei Trasporti e della Logistica (Italian General Confederation of Transport and Logistics);
 2. Conftrasporto-Confcommercio (Confederation of transport, shipping and logistics associations);
 3. Assoportori (Italian Ports Association);
 4. Federazione Italiana Lavoratori Trasporti FILT-CGIL, Federazione Italiana Trasporti FIT-CISL, Unione Italiana dei Lavoratori dei Trasporti UILTRASPORTI (Italian Federation of Transport Workers, Italian Transport Workers Federation, Italian Union of Transport Workers);
 5. Associazione Nazionale Imprese Portuali ANCIP (National Association of Port Companies).
- (8) The Commission also received observations from the so called International Provisional Representative of the Free Territory of Trieste.
- (9) The Commission transmitted these observations to Italy, giving it the opportunity to comment on them. Italy did not submit any comments.

2. DESCRIPTION OF THE INVESTIGATED MEASURE AND CONTEXT OF THE INVESTIGATION

- (10) Port System Authorities (PSA) in Italy are not subject to corporate income tax (IRES). The corporate income tax exemption for PSA in Italy is the measure tackled by this Decision.

2.1 Organisation and Regulation of Ports in Italy

2.1.1 Law 84/1994 and the establishment of Port System Authorities

- (11) Law 84/1994 ⁽⁴⁾, as amended (“the Law 84/1994”), governs port activities and regulates the tasks and functions of the Port System Authorities, the Maritime Authority, and other undertakings related to ports' activities.
- (12) Ports where PSA are located are labelled as “ports or specific port areas of national and international economic importance” (category II, class I and II ports).

⁽³⁾ Cf. footnote 1.

⁽⁴⁾ Legge 28 gennaio 1994, n. 84 Riordino della legislazione in materia portuale (GU Serie Generale n.28 del 04-02-1994 - Suppl. Ordinario n. 21).

- (13) "Ports or the specific port areas of national and international economic importance" (category II, class I and II), have the following functions:
- (1) Commercial and logistics;
 - (2) Industry and oil;
 - (3) Passenger services, including cruise passengers;
 - (4) Fishing;
 - (5) Tourism and leisure.
- (14) Following the entry into force of Legislative Decree 169/2016, 16 PSA comprising the 57 major ports have been established in Italy. Ports administered by the PSA are listed in Annex A, which forms an integral part of Law 84/1994. Annex A can be amended in order to allow the inclusion of a port, or to transfer a port to a different PSA, subject to conditions.
- (15) According to Law 84/1994, PSA are non-economic public entities of national relevance, bearing a special legal status, and have administrative, organisational, regulatory, budgetary and financial autonomy. They are subject to the supervisory powers of the Minister for Infrastructure and Transport. The approval of their budget and their balance sheet are to be carried out by the Minister for Infrastructure and Transport in agreement with the Minister for Economic Affairs and Finance. The financial management of PSA is subject to audit by the Court of Auditors.
- (16) According to Law 84/1994, PSA are to draw up a strategic planning programme that sets out their development objectives. They are to promote and prepare a planning document for measures to improve energy efficiency and the use of renewable energies in ports.
- (17) According to Law 84/1994, it is the responsibility of the State to carry out major infrastructure works (construction of maritime channels, protective dikes, docks and equipped docks, dredging and deepening of seabeds) in category II (class I and class II) ports. Regions, municipalities or PSA may intervene with their own resources. To cover the costs of the works they carried out, PSA may impose surcharges on the goods loaded or unloaded, or increase the amount of the concession fees.

2.1.2 *The tasks of Port System Authorities and the Maritime Authority*

- (18) In line with Article 6 of Law 84/1994, PSA are to carry out the following tasks:
- (1) Management, programming, coordination, regulation, promotion and control of port operations and services, authorisation and concession activities referred to in Articles 16 (see 2.1.4 below), 17 and 18 (see 2.1.5 below) of Law 84/1994, and other commercial and industrial activities carried out in ports;
 - (2) Ordinary and extraordinary maintenance of the common parts of the port area, including maintenance of the seabed;
 - (3) Attribution and control of the provision of services of general interest, which are not closely linked to the port operations referred to in Article 16 (see 2.1.4 below), to port users;
 - (4) Coordination of administrative activities carried out by public authorities and bodies within the port area;
 - (5) Exclusive administration of the land and the goods of the maritime property, in accordance with the provisions of Law 84/1994 and the Navigation Code;
 - (6) Coordination and promotion of connections with logistics systems outside the port and between ports.
- (19) According to Law 84/1994, the Maritime Authority has the responsibility for the functions of police and security provided for by the Navigation Code and by special laws.

- (20) In line with Article 6 of Law 84/1994, PSA are not allowed to carry out, either directly or through investee companies, port operations ⁽⁵⁾ and closely related activities. Furthermore, PSA cannot exercise the technical-nautical services pilotage, towing, mooring and lighterage.
- (21) A consultative committee is to be set up, made up of five representatives of the employees of the undertakings operating in the port, one representative of the employees of the PSA, and one representative of each of the following categories of undertakings operating in the port: vessel owners; industrial undertakings; companies referred to in Articles 16 (see 2.1.4 below) and 18 (see 2.1.5 below); freight forwarders; seamen and agents; and hauliers operating in the port sector. That committee is to have advisory functions with regard to the granting, suspension or withdrawal of authorisations and concessions.
- (22) PSA establish own territorial offices where the Secretary General of the PSA or his representative is responsible, among other tasks, for the granting of concessions for periods of up to four years and the determination of the relevant concession fees, subject to the opinion of the consultative committee and the management committee.

2.1.3 Financial resources of Port System Authorities

- (23) The revenues of PSA consist of:
- (1) Concession fees referred to in Article 18 of the Law 84/1994 (see 2.1.5 below) for State-owned areas and docks within the port area and within the territorial boundaries;
 - (2) Authorisation fees for port operations referred to in Article 16 of the Law 84/1994 (see 2.1.4 below);
 - (3) Anchorage dues (“*tassa di ancoraggio*”);
 - (4) Dues charged on unloaded and loaded goods (“*tassa portuale*”);
 - (5) Contributions from regions, local authorities and other public bodies;
 - (6) Other revenues.
- (24) According to a report by the Italian Ministry of Infrastructure and Transport, “port fees” (namely dues on goods unloaded and loaded and anchorage dues, i.e. respectively *tassa portuale* and *tassa di ancoraggio*), together with concession fees, were the two main revenue components of Italian ports in 2017, accounting for 53,2% and 27,1% of operating revenues, respectively ⁽⁶⁾.

2.1.4. Port operations (Article 16 of the Law 84/1994)

- (25) Port operations are the loading, unloading, transshipping, storage, general movement of goods and all other items carried out in the port area. Port services are specialist, complementary and ancillary services to the port operations cycle. These services may be identified by the PSA by means of specific rules to be issued by a Decree of the Minister for Transport and Navigation.
- (26) PSA regulate and supervise port operations and port services, and the application of the tariffs made public by each undertaking and regularly report to the Minister for Transport and Navigation.
- (27) The exercise of port operations and port services carried out on own account or by third parties are to be subject to authorisation by the PSA. That authorisation is to cover the carrying out of the port operations or of one or more of the port services, to be identified in the authorisation itself.
- (28) Authorised undertakings are to be registered in separate registers kept by the PSA and be subject to the payment of an annual fee and the provision of a security.

⁽⁵⁾ Port operations are the loading, unloading, transshipping, storage, general movement of goods and all other items carried out in the port area. Port services are specialist, complementary and ancillary services to the port operations cycle. For a definition of port operations see Article 16 of Law 84/1994 and the description in 2.1.4 below.

⁽⁶⁾ Relazione sull'attività delle autorità di sistema portuale, Anno 2017, Ministero delle Infrastrutture e dei Trasporti, published on 16 September 2019 <http://www.mit.gov.it/node/11420>

- (29) For the purpose of issuing the authorisations, the Minister for Transport and Navigation, by decree, is to determine:
- (1) Personal, financial and professional requirements for the operators and applicant undertakings;
 - (2) Criteria, procedures and time limits for the granting, suspension and revocation of the authorisation, as well as the related checks;
 - (3) Parameters for defining the minimum and maximum amounts of the annual fees and the security in relation to the duration and specific features of the authorisation, taking account of the volume of investments and the activities to be carried out.
- (30) The tariffs for the port operations are to be made public by the PSA. Authorised undertakings are to communicate to the PSA the tariffs they intend to charge to the users, as well as any subsequent variation.
- (31) The duration of the authorisation is to be related to the operational programme proposed by the undertaking or, where the approved undertaking is also a concession holder within the meaning of Article 18 of the Law 84/1994 (see 2.1.5 below), is to be identical to the duration of the concession itself. The authorisation may be renewed in conjunction with new operational programmes or following the renewal of the concession.
- (32) The PSA, after consulting the local advisory committee, is to determine the maximum number of permits which will be issued, taking into account the operational requirements and the traffic of the port, in any event ensuring a maximum level of competition in the sector.

2.1.5. Concessions for the land areas and docks (Article 18 of Law 84/1994)

- (33) PSA give land areas and docks within the port area in concession to the undertakings referred to in Article 16 of Law 84/1994 for the purpose of carrying out port operations.
- (34) Concessions are to be entrusted on the basis of suitable forms of advertising laid down by decree of the Minister for Transport and Navigation in agreement with the Minister for Finance. The same decree also indicates:
- (1) The duration of the concession, the supervisory and inspection powers of the authorities issuing concessions, the terms of renewal of the concession and the concession of facilities to a new concessionaire;
 - (2) The minimum concession fees the concessionaires are required to pay.
- (35) In order for concessions to be granted, applicants must:
- (1) Submit a business plan, supported by appropriate guarantees, designed to increase port traffic and productivity;
 - (2) Possess the appropriate technical and organisational tools, also with respect to safety, to meet the needs of a continuous and integrated production and operational cycle for themselves and third parties;
 - (3) Establish a staffing plan that corresponds to the business plan.
- (36) In each port, the concessionaire of a State-owned land area must directly exercise the activity for which the concession has been granted. The concessionaire cannot at the same time be concessionaire of another State area in the same port, unless the activity for which a new concession is required is different from the one covered by the existing concessions in the same State area, and cannot carry out port activities in areas other than those that have been allocated under concession.
- (37) PSA is to carry out annual inspections in order to verify that the requirements at the time of the granting of the concession and the implementation of the investments in the business plan are met.
- (38) In the event of unjustified failure to comply with the obligations assumed by the concessionaire and to meet the objectives set out in the business plan, the PSA is to withdraw the concession.

2.2. The System of Corporate Income Taxation in Italy and the Exemption for PSA

- (39) The Italian income tax is regulated in Presidential Decree 917 of 22 December 1986: *Testo Unico delle Imposte sui Redditi* (Consolidated Tax Act, "TUIR") ⁽⁷⁾. Title II of TUIR lays down the rules for the taxation of corporate income.
- (40) The main elements of the Italian corporate income tax (*Imposta sul reddito sulle società IRES* "IRES") are outlined below. ⁽⁸⁾

2.2.1. Taxable persons (Articles 73 and 74 TUIR)

- (41) Article 73(1) TUIR subjects the following entities to corporate income tax:
- (1) Joint-stock companies and limited partnerships, limited liability companies, cooperative companies and mutual insurance companies, European companies pursuant to Council Regulation (EC) No. 2157/2001 ⁽⁹⁾, and European Cooperative Societies under Council Regulation (CE) No. 1435/2003 ⁽¹⁰⁾, resident in the territory of the State;
 - (2) Public and private entities other than companies, as well as trusts, residing in the State, which have as their exclusive or principal object the exercise of commercial activities;
 - (3) Public and private entities other than companies, trusts that do not have as their exclusive or principal object the exercise of commercial activity as well as undertakings for collective investment of savings, resident in the territory of the State;
 - (4) Companies and institutions of any kind, including trusts, with or without legal personality, not resident in the territory of the State.
- (42) Article 74 TUIR introduces special provisions for State and public bodies and defines activities that are not considered as commercial activities.
- (43) According to Article 74(1) TUIR, State bodies and administrations, including autonomous administrations, and, where they have legal personality, municipalities, consortia of local bodies, associations and bodies administering public property, mountain communities, provinces and regions are not liable for corporate tax. According to Article 74(2) TUIR, the exercise of State functions by public bodies shall not constitute a commercial activity.

2.2.2. Taxable income

- (44) All income derived by companies that carry out commercial activities is considered business income and is subject to IRES (Article 81 TUIR). The taxable base is the worldwide income shown on the profit and loss account prepared for the relevant fiscal year according to company law rules and adjusted according to the tax law provisions concerning business income.
- (45) The corporate income tax treatment of income from real estate assets depends on the type of real estate asset. If the real estate asset is actually and exclusively used to carry out a commercial activity (or, due to its characteristics, can only be used to carry out a commercial activity), the income derived from the real estate asset is considered as business income. Consequently, such income is included in the company's taxable income.

2.2.3. Taxable period

- (46) The taxable period for corporate income tax purposes is the company's fiscal year as determined by law or the articles of association. If the fiscal year is not so determined, or if it is longer than 2 years, the taxable period is the calendar year (Article 76 TUIR).

⁽⁷⁾ Testo Unico delle Imposte sui Redditi (TUIR), D.P.R., 22/12/1986 n° 917, G.U. 31/12/1986.

⁽⁸⁾ The standard tax rate for IRES in 2020 is 24%. The IRES rate has been reduced from 33% in 2004 to 27.5% in 2008 and to 24% in 2018 and 2019.

⁽⁹⁾ Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) (OJ L 294, 10.11.2001, p. 1).

⁽¹⁰⁾ Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) (OJ L 207, 18.8.2003, p. 1).

2.2.4. Rates

- (47) The IRES rate is 24% (Article 77 TUIR) ⁽¹¹⁾.
- (48) Article 1(716) of Law n. 160 of 27 December 2019 introduced a new IRES surtax of 3.5 percentage points on income deriving from activities carried out on the basis of port authorisations and concessions issued pursuant to Articles 16 and 18 of Law 84/1994 ⁽¹²⁾. This is a temporary measure that should apply only to fiscal years 2019 to 2021.

2.2.5. The taxation of Port System Authorities in Italy

- (49) PSA in Italy are not subject to corporate income tax (IRES). The corporate income tax exemption for PSA in Italy is the measure tackled by this Decision. This exemption is in particular based on Article 74 TUIR, as interpreted and applied by the Italian authorities.
- (50) According to Article 74 TUIR, State bodies and administrations, including those with an autonomous organization, even if they have legal personality, municipalities, consortia between local authorities, associations and bodies managing collective property, mountain communities, provinces and regions are not subject to corporate tax.
- (51) In the view of the Italian authorities, PSA are public bodies entrusted solely with administrative functions and are therefore subject to the application of Article 74 TUIR. According to them, Article 73 TUIR, on the contrary, would presuppose that the entity concerned carries out commercial activities, albeit as a secondary activity, and would therefore not be applicable to PSA.
- (52) Articles 73 and 74, as interpreted and applied by the Italian authorities, lead to a situation where PSA in Italy are exempted from corporate income tax, including when it comes to income stemming from the exploitation of the ports infrastructure.

2.3. Grounds for initiating the procedure

- (53) The Commission proposed appropriate measures pursuant to Article 22 of the Procedural Regulation on 8 January 2019 and invited Italy to adopt measures that would ensure that PSA carrying out economic activities are subject to corporate tax in the same manner as other undertakings. However, by letter dated 7 March 2019, Italy formally rejected the Commission proposal and refused to adopt measures that would ensure that PSA carrying out economic activities are subject to corporate tax in the same way as other undertakings.
- (54) Insofar as the Commission still considered that the exemption from corporate income tax benefiting PSA that carry out economic activities constituted an existing State aid scheme and that it had doubts as to the compatibility of that aid scheme with the internal market, it decided to open the procedure provided for in Article 108(2) of the Treaty, pursuant to Article 23(2) of the Rules of Procedure. In this decision, the Commission provisionally concluded that the corporate tax exemption enjoyed by the PSA constitutes existing State aid within the meaning of Article 107(1) TFEU that cannot be considered compatible with the internal market.

⁽¹¹⁾ See footnote 8.

⁽¹²⁾ Legge 27 dicembre 2019, n. 160, Bilancio di previsione dello Stato per l'anno finanziario 2020 e bilancio pluriennale per il triennio 2020-2022, GU Serie Generale n.304 del 30.12.2019 - Suppl. Ordinario n. 45. The surtax is also due for income deriving from activities carried out on the basis of motorway concessions, airport management concessions, and railway concessions.

3. COMMENTS FROM ITALY AND INTERESTED PARTIES

3.1. General comments

- (55) Italy and other interested parties argue that in the absence of Union law on ports and a common concept of port authorities in Union law, Member States have the competence to identify and regulate the nature and functions of the managing bodies of the ports, as evidenced by Regulation (EU) No 2017/352 of the European Parliament and of the Council ⁽¹³⁾.
- (56) They consider that the application to Italy of the principles laid down in decisions adopted by the Commission in specific cases in other Member States is not reasonable. In their view, the situation in Italy is not comparable to other Member States ⁽¹⁴⁾.

3.2. Undertakings/economic activities

3.2.1. Non-economic activities performed in the public interest

- (57) According to Italy and the majority of comments from interested parties, PSA are not undertakings and do not perform economic activities ⁽¹⁵⁾. The Italian legal system requires PSA to be non-economic public bodies of national importance with administrative, organisational, regulatory, budgetary and financial autonomy.
- (58) PSA are supervised by the Ministry of Infrastructure and Transport, the reports on their financial management are subject to audits by the Court of Auditors in the same way as for all bodies that are part of the public administration. They are included in the list drawn up by the Italian Institute of Statistics used to determine the consolidated financial account of the State. PSA are therefore not only in public ownership, but are genuine non-economic public bodies ⁽¹⁶⁾.
- (59) Italy and the majority of interested parties observe that PSA do not carry out port services or technical-nautical services themselves ⁽¹⁷⁾. The regulatory powers for the technical-nautical services pilotage, towing, mooring, and lighterage belong to the Maritime Authority, which is a decentralised structure of the Ministry of Infrastructure and Transport. The rules for the award of such services are laid down in the Italian Navigation Code and implementing regulations. Also, other activities like bunkering and waste collection are not carried out by PSA themselves.
- (60) According to the Italian authorities and the majority of interested parties, PSA ensure, in the public interest, non-discriminatory access to the markets for port services under conditions of free competition and ensure that State property is administered in full transparency and impartially ⁽¹⁸⁾. The activities of PSA identified by Law 84/1994 are guided by the public interest in the proper functioning of the port areas.

⁽¹³⁾ 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 L 57, 3.3.2017, p. 1).

⁽¹⁴⁾ ANCIP (National Association of Port Companies); Confetra (Italian General Confederation of Transport and Logistics)

⁽¹⁵⁾ ANCIP (National Association of Port Companies); Assoport (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics); FILT CGIL, FIT-CISL, UILTRASPORTI (Italian Federation of Transport Workers, Italian Transport Workers Federation, Italian Union of Transport Workers)

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3.2.2. Concessions not carried out for profit

- (61) Italy and several other interested parties consider that the granting of port concessions by the PSA is a regulatory activity aimed at the more productive allocation of port infrastructure in the interest of the port community and the port users. PSA ensure that concessions for the use of the publicly owned port areas are granted to improve the management of the port and of all the activities linked to it. The granting of concessions is in no way carried out for profit. It does not take place in a competitive market ⁽¹⁹⁾.
- (62) Italy and other interested parties indicate that concessionaires are selected through transparent and non-discriminatory procedures ⁽²⁰⁾. Their selection does not necessarily depend upon the highest profitability prospects in the form of higher remuneration for the occupation of the land. The aim is rather to maximise the utility and value of the port areas in the public interest.

3.2.3. Concession fees are not market prices

- (63) Italy and several other interested parties consider that the fees for the granting of concessions and authorisations by the PSA to private undertakings for the commercial use of the basic port infrastructure and the provision of services do not constitute consideration for a service provided or a good offered. In their view, the relevant services cannot be regarded as economic activities ⁽²¹⁾.
- (64) PSA grant concessions based on transparent, competitive and non-discriminatory procedures. The award procedure that leads to the selection of the concessionaire is fully unbundled from the amount of the fee. PSA have an obligation to supervise the concessionaire and to verify that the concessionaire respects the conditions of the concession. They carry out compliance checks and have specific sanctioning powers over the concessionaire, such as the power to revoke a concession in the event of failure to fulfil obligations. PSA do not have direct contractual relationships with ship-owners and vessel operators, only concessionaires do.
- (65) According to comments from Italy and several other interested parties, there is a substantial difference between the granting of State owned property to concessionaires (as in the Italian case) and the leasing of such property ⁽²²⁾. Rights conferred on the concessionaire by PSA are less important than that of a typical lessee in a leasing relationship in traditional landlord port models. This is evidenced by the following specificities of the Italian system:
- (1) The exclusive use of the public property by the concessionaire must not be contrary to the public interest;
 - (2) PSA can at any time revoke concessions for specific reasons linked to the use of the sea or for other reasons of public interest; in such a case the concessionaire will not be entitled to compensation;
 - (3) The collection of fees is carried out by enforcement procedures similar to those of tax debts;
 - (4) Upon the expiry of the concessions, the State-owned property is available to the PSA and any works or improvements made remain property of the State; the concessionaire will not receive any payment or reimbursement for such works and improvements.

⁽¹⁹⁾ Assoportii (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics); Conftrasporto-Confcommercio (Confederation of transport, shipping and logistics associations)

⁽²⁰⁾ Confetra (Italian General Confederation of Transport and Logistics)

⁽²¹⁾ Assoportii (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics); Conftrasporto-Confcommercio (Confederation of transport, shipping and logistics associations); FILT CGIL, FIT-CISL, UILTRASPORTI (Italian Federation of Transport Workers, Italian Transport Workers Federation, Italian Union of Transport Workers)

⁽²²⁾ Confetra (Italian General Confederation of Transport and Logistics)

- (66) As a consequence, according to Italy and several interested parties, the concession fees paid by the concessionaires to the PSA are neither rents nor market prices, as there is no discretion between the negotiating parties. They are established by law and have the characteristics of a tax paid by the concessionaire to the State via the PSA in exchange for the access to the market for port economic activities, in particular to carry out operations and services using the public domain ⁽²³⁾.
- (67) It follows that PSA do not carry out any economic activity, since they are unable to intervene on the main element of any economic transaction carried out on market terms, namely the price of the service ⁽²⁴⁾.
- (68) Some of the interested parties ⁽²⁵⁾ observe that according to the case-law of the European Court of Justice, there is no economic activity where the specific methods of offering certain goods or services are established directly by law and are therefore not based on economic evaluations by the tendering parties ⁽²⁶⁾. The presence of a commercial fee directly set by the undertaking operating the infrastructure would therefore be a condition for its classification as an undertaking ⁽²⁷⁾.

3.2.4. *The economic component of concession fees*

- (69) Italy and some of the interested parties comment that the activities carried out by PSA in the management of the port domain have no bearing on the public domain. This means that even though some elements of the activities of PSA are of an economic nature, this may not lead to the conclusion that PSA are undertakings ⁽²⁸⁾. According to Italy, the case-law of the European Court of Justice rules out that bodies established and regulated for carrying out public and non-economic functions and activities, but at the same time performing certain economic activities, are classified as undertakings ⁽²⁹⁾.
- (70) Italy admits that the fees paid by concessionaires include an economic component. Fees are fixed according to criteria laid down at national level. However, fees also take into account commitments made by the concessionaire in terms of freight volume, type of investments, and traffic volume. Consequently, the base fee may be reduced, for example, when concessionaires make investments for major infrastructure work or carry out extraordinary maintenance of the public goods that fall within the jurisdiction of the PSA.
- (71) In sum, according to the Italian authorities, concession fees are made up both of a fixed and a variable component. The fixed component is proportional to the surface of the areas concerned and takes into account several other parameters (location and level of infrastructure of the areas concerned). The variable component is calculated on the basis of incentive mechanisms to achieve better productivity, a better energy and environmental performance, and the improvement of service levels, in particular with regard to the transport and intermodal integration of the ports. Incentive parameters used in the variable component of concession fees typically take into consideration the volume of traffic, both in terms of vessels, quantities and types of goods, and the development of specific market and service quality indicators (average storage time of goods in the storage areas; the level of efficiency of modal shift operations; the level of energy and environmental efficiency of the entire port cycle; the level of productivity per unit area of the port area covered by the concession).

⁽²³⁾ ANCIP (National Association of Port Companies); Assoporti (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics); Confraspporto-Confcommercio (Confederation of transport, shipping and logistics associations)

⁽²⁴⁾ Confraspporto-Confcommercio (Confederation of transport, shipping and logistics associations)

⁽²⁵⁾ ANCIP (National Association of Port Companies)

⁽²⁶⁾ Judgment of the Court of Justice of 17 February 1993, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, Joined cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 18.

⁽²⁷⁾ Judgment of the Court of Justice of 17 February 1993, *Christian Poucet v Assurances Générales de France and Caisse Mutuelle Régionale du Languedoc-Roussillon*, Joined cases C-159/91 and C-160/91, ECLI:EU:C:1993:63, paragraph 18. Judgment of the Court of 24 October 2002, *Aéroports de Paris v Commission of the European Communities*, C-82/01 P, ECLI:EU:C:2002:617, paragraph 78.

⁽²⁸⁾ ANCIP (National Association of Port Companies)

⁽²⁹⁾ Judgment of the Court of 19 January 1994, *SAT Fluggesellschaft mbH v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7. Judgment of the Court of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, ECLI:EU:C:2009:191.

- (72) The concession fee (fixed and variable component) therefore on the one hand covers the remuneration component of the port management and the use of the port property as basic infrastructure, which is non-economic in nature, and on the other hand covers the operation and use of the public property allowing the concessionaires to carry out their activities.
- (73) Italy considers that the distinction between the non-economic (fixed component) and the economic (variable component) part of the concession fee is indirectly confirmed by Regulation (EU) 2017/352. That Regulation establishes that port infrastructure charges may be differentiated in accordance with the port's economic strategy and land planning policy in order to promote a more efficient use of the port infrastructure ⁽³⁰⁾.
- (74) Italy also considers that when assessing the nature of concession fees, account must be taken of the activities carried out by PSA as public bodies managing public property. Case-law gives guidance to the effect that, in so far as a public body carries out an economic activity, which can be separated from the exercise of its public powers, it acts as an undertaking in respect of such an activity. However, where that economic activity is inseparable from the exercise of its public powers, the activities carried out by that body remain as a whole connected with the exercise of those powers ⁽³¹⁾.
- (75) In the case of PSA, activities which might have an economic significance in the management of the port property and which may be relevant in the determination of the concession fee are, in any event, inseparable from the public activities entrusted by law to the PSA, such as the control and management of the port property and the planning of all activities through the use of the port areas. Concession fees levied by PSA should therefore not be considered as corporate income.
- (76) Italy acknowledges that the variable component of the concession fee is of an economic nature, and that this would in theory justify its inclusion in the assessment base for a potential taxation of the income of an undertaking.
- (77) However, in its view, the incentive parameters of the variable component of the concession fees have the effect that the resulting amounts of the fee are progressively reduced when concessionaires achieve the economic objectives. According to Italy, this leads to an overall reduction in the concession fee itself. As a result, the proceeds of PSA are entirely or almost entirely made up of the fixed component, which is limited to remunerating the management and the regulatory activities of the PSA. Therefore, in Italy's view, PSA do not carry out any economic activity.

3.3. State resources

- (78) According to the comments received by some of the interested parties, the exclusion of PSA from the obligation to pay corporate income tax would not entail any loss of tax revenue, as PSA are part of the State. There would therefore be no consumption of State resources in the form of fiscal or budgetary expenditures. ⁽³²⁾
- (79) Some of the interested parties also observe that the amounts paid by the PSA to the State in case of taxation of the income of PSA would divert resources from the PSA, which would then not be available to carry out the institutional mission of PSA. The State would then be expected to increase its contributions to PSA.

⁽³⁰⁾ Article 13(4) of Regulation (EU) 2017/352.

⁽³¹⁾ Judgment of the Court of 12 July 2012, *Compass-Datenbank*, C-138/11, ECLI:EU:C:2012:449, paragraph 38. Judgment of the General Court of 12 September 2013, *Germany v Commission*, T-347/09, ECLI:EU:T:2013:418, paragraph 29. Judgment of the Court of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07 P, ECLI:EU:C:2009:191, paragraphs 71 to 80.

⁽³²⁾ ANCIPI (National Association of Port Companies); Assoport (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics); FILT CGIL, FIT-CISL, UILTRASPORTI (Italian Federation of Transport Workers, Italian Transport Workers Federation, Italian Union of Transport Workers)

3.4. Selectivity

- (80) With regard to the corporate income tax (IRES) exemption for PSA, Italy and most of the interested parties comment that the classification of PSA in the category of non-economic public bodies in the Italian Consolidated Tax Act TUIR necessarily entails their exemption from corporate income tax ⁽³³⁾. This would not be an exception to the system or a specific measure in favour of the PSA, since it is perfectly consistent with the principles of the Italian tax system ⁽³⁴⁾.
- (81) The tax system laid down in the Italian TUIR is also perfectly consistent with the nature and the functions attributed to PSA, since they are public bodies entrusted solely with administrative functions and therefore subject to the application of Article 74 TUIR. Article 73 TUIR, on the contrary, presupposes that the entity concerned carries out commercial activities, albeit as a secondary activity, and would therefore not be applicable to PSA ⁽³⁵⁾.

3.5. Distortion of competition and effect on trade

- (82) One interested party considers that the measure has no effect on trade and competition, as there are no private ports in Italy ⁽³⁶⁾. PSA do not need to incentivise potential concessionaires by offering low or reduced concession fees, as the demand for access to port areas is in any way higher than the supply of available areas.
- (83) Some interested parties also comment that ports do not compete with other transport service providers, as the various transport infrastructures serve different goods and traffic markets and are not substitutable.

4. ASSESSMENT

4.1. Existence of State aid under Article 107(1) of the Treaty

- (84) Under Article 107(1) of the Treaty, 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 where it affects trade between Member States.

4.1.1. *The presence of undertakings*

4.1.1.1. The concept of undertaking

- (85) According to the 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 ⁽³⁷⁾. The fact that an entity does not seek to make profit is not decisive to establish if it is an undertaking or not ⁽³⁸⁾. The fact that it is publicly owned is not decisive, either.

⁽³³⁾ ANCIP (National Association of Port Companies); Confetra (Italian General Confederation of Transport and Logistics)

⁽³⁴⁾ Italy cites Judgment of the Court of 21 December 2016, *Commission v World Duty Free Group*, C-20/15 P, ECLI:EU:C:2016:981, paragraph 58.

⁽³⁵⁾ ANCIP (National Association of Port Companies); Assoport (Italian Ports Association); Confetra (Italian General Confederation of Transport and Logistics)

⁽³⁶⁾ Confetra (Italian General Confederation of Transport and Logistics)

⁽³⁷⁾ Judgment of the Court of 23 April 1991, *Klaus Höfner and Fritz Elser v Macrotron GmbH*, C-41/90, ECLI:EU:C:1991:161, paragraph 21.

⁽³⁸⁾ Judgment of the Court of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraphs 27 and 28.

- (86) As clarified by the Union courts, any activity consisting in offering goods and services on a given market, that is, services normally provided for remuneration, is an economic activity. The essential characteristic of remuneration lies in the fact that it is consideration for the service in question ⁽³⁹⁾. Also non-profit entities can offer goods and services on a market ⁽⁴⁰⁾.
- (87) When it comes to the construction and exploitation of public infrastructure, the Union courts have clarified that it is the future use of the infrastructure, i.e. its economic exploitation or not, that determines whether the funding of the construction of such infrastructure falls within the scope of Union State aid rules or not ⁽⁴¹⁾. It is recognised that the commercial exploitation and the construction of port or airport infrastructure for such commercial exploitation constitute economic activities ⁽⁴²⁾.
- (88) In accordance with this case-law, the Commission concluded in a series of decisions that the construction and commercial exploitation of port infrastructures constitute economic activities ⁽⁴³⁾. For example, the commercial exploitation of a port or airport terminal by making it available to users against the payment of a fee constitutes an economic activity ⁽⁴⁴⁾. Consequently, public funding of a port infrastructure favours an economic activity and is in principle subject to State aid rules ⁽⁴⁵⁾.
- (89) Conversely, investment for infrastructure that is necessary to perform activities that fall under the responsibility of the State in the exercise of its public powers is not subject to State aid control ⁽⁴⁶⁾. Only infrastructures that form part of the essential functions of the State are non-economic in nature.

4.1.1.2. PSA carry out economic and non-economic activities

- (90) Italy and the majority of interested parties claim that PSA are non-economic public bodies of national importance with administrative, organisational, regulatory, budgetary and financial autonomy. In their view, PSA do not perform economic activities and are not undertakings.

⁽³⁹⁾ Judgment of the Court of 6 November 2018, *Scuola Elementare Maria Montessori v Commission*, Joined cases C-622/16 P to C-624/16 P, ECLI:EU:C:2018:873, paragraph 104 and the case-law cited therein.

⁽⁴⁰⁾ Judgment of the Court of 29 October 1980, *Van Landewyck v Commission*, Joined Cases 209 to 215 and 218/78, ECLI:EU:C:1980:248, paragraph 88. Judgment of the Court of 16 November 1995, *FFSA and Others v Ministère de l'Agriculture and de la Pêche*, C-244/94, ECLI:EU:C:1995:392, paragraph 21. Judgment of the Court of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraphs 27 and 28. See also the Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, paragraph 9.

⁽⁴¹⁾ Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Others v Commission and Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, Joined cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 95, confirmed by Judgment of the Court of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11, ECLI:EU:C:2012:821, paragraphs 42 to 44.

⁽⁴²⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 47.

⁽⁴³⁾ Commission Decision of 15 December 2009 on State aid N 385/2009, Public financing of port infrastructure in Ventspils Port (OJ C 72, 20.03.2010, recitals 53 to 58). Commission Decision of 15 June 2011 on State aid N 44/2010, Public financing of port infrastructure in Krievu Sala (OJ C 215, 21.7.2011, p. 21, recitals 60 to 68). Commission Decision of 22 February 2012 on State aid SA.30742 (N/2010), Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda (OJ C 121, 26.4.2012, p. 1, recitals 45 to 47).

⁽⁴⁴⁾ Commission Decision of 18 September 2013 on State Aid SA.36953 (2013/N), Port Authority of Bahía de Cádiz (OJ C 335, 16.11.2013, p. 1, recital 29).

⁽⁴⁵⁾ Commission Decision of 27 March 2014 on State aid SA.38302, Port of Salerno (OJ C 156, 23.5.2014, recitals 32 to 36). Commission Decision of 22 February 2012 on State aid SA.30742 (N/2010), Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda (OJ C 121, 26.4.2012, p. 1, recital 45 to 47). Commission Decision of 2 July 2013 on State Aid SA.35418 (2012/N), Extension of Piraeus Port, (OJ C 256, 5.9.2013, p.2, recitals 21 and 22). Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, point 215, p. 47).

⁽⁴⁶⁾ Examples for such non-economic activities are: (a) Maritime traffic control; (b) Firefighting; (c) Police; (d) Customs. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, point 215, p. 47).

- (91) The Commission considers that the classification of PSA as non-economic public bodies under Italian law is not sufficient to conclude that they are not undertakings. In order to determine whether the activities performed by PSA are those of an undertaking within the meaning of the Treaty, it is necessary to establish the nature of their activities ⁽⁴⁷⁾.
- (92) Based on the description of the activities of PSA (see sections 2.1.2 to 2.1.5), the Commission considers that the granting of access to ports against remuneration (anchorage dues and dues on goods loaded and unloaded), the granting of authorisations against remuneration to perform port operations, and the granting of concessions against remuneration constitute economic activities. Therefore, the Commission concludes that PSA perform both non-economic and economic activities.
- (93) The Commission does not dispute that PSA may be entrusted with the exercise of certain public powers which are of a non-economic nature (such as maritime traffic control and safety or anti-pollution surveillance, carried out on their own or in conjunction with other public bodies such as the Maritime Authority) ⁽⁴⁸⁾. In carrying out these activities, they are not undertakings within the meaning of Article 107(1) of the Treaty.
- (94) However, the fact that when PSA carry out some of their activities, they exercise powers of a public authority, does not, in itself, prevent them from being classified as undertakings ⁽⁴⁹⁾.
- (95) PSA also carry out economic activities. They provide a general service to the users of the ports (ship-owners and vessel operators) by giving access to port infrastructure to ships in return for remuneration commonly referred to as port fees (namely dues on goods unloaded and loaded and anchorage dues). By granting authorisations and concessions for remuneration, they make certain infrastructure or land available to undertakings which use those areas for their own purposes or to provide ship-owners and vessel operators with services.
- (96) Italy and several other interested parties claim that PSA do not have direct contractual relationships with ship-owners and vessel operators (only concessionaires do). Nevertheless, the Commission is of the opinion that the fact that concessionaires use certain port land and infrastructure to offer services to ship-owners and vessel operators does not exclude that certain activities carried out by PSA, such as to rent the port land and infrastructure to those third-party undertakings, are also of an economic nature ⁽⁵⁰⁾.
- (97) This position is consistent with the position adopted by the Commission in several cases involving State aid to Italian PSA ⁽⁵¹⁾. Moreover, in the cases concerning the corporate income tax exemption for ports in Belgium and France, the Commission also made clear that the renting out of public domain against remuneration constitutes an economic activity ⁽⁵²⁾. The General Court confirmed this position ⁽⁵³⁾.

⁽⁴⁷⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 54.

⁽⁴⁸⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, point 17, p. 5).

⁽⁴⁹⁾ Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 64. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraphs 53 and 54.

⁽⁵⁰⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 48.

⁽⁵¹⁾ Commission Decision of 19 December 2012 on State aid SA.34940, Port of Augusta (OJ C 077, 17.3.2013, recitals 42 and 43). Commission Decision of 27 March 2014 on State aid SA.38302, Investment Aid to the Port of Salerno (OJ C 156, 23.5.2014, recitals 33 to 36). Commission Decision of 19 June 2015 on State aid SA.39542, Dredging and disposal of dredged materials in the Port of Taranto (OJ C 259, 7.8.2015, recitals 38 to 41). Commission Decision of 28 June 2016 on State aid SA.36112, Port Authority of Naples and Cantieri del Mediterraneo S.p.A. (OJ C 369, 7.10.2016, recitals 44 to 47).

⁽⁵²⁾ Commission Decision of 27 July 2017 on State aid SA.38393, Ports taxation in Belgium (OJ L 332, 14.12.2017, paragraph 62). Commission Decision of 27 July 2017 on State aid SA.38398, Ports taxation in France (OJ L 332, 14.12.2017, paragraph 55).

⁽⁵³⁾ Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 65 and 66. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 47. The judgments were not appealed.

- (98) In sum, a PSA will be regarded as an undertaking if - and in so far as - it actually carries out one or more economic activities ⁽⁵⁴⁾. PSA grant access to port infrastructure to ship-owners and vessel operators in return for remuneration (namely dues on goods unloaded and loaded and anchorage dues). They grant authorisations for port operations against remuneration (authorisation fees), and they rent out public domain against remuneration (concession fees). These activities qualify as economic activities. The Commission therefore considers that PSA are undertakings in relation to the economic activities they carry out.

4.1.1.3. Absence of profit motive not sufficient to rule out classification as undertaking

- (99) Italy and several interested parties claim that PSA do not pursue a commercial logic and do not seek profit maximisation. In this respect, the Commission wishes to emphasise that the fact that goods or services are offered on a non-profit-seeking basis does not prevent the entity which carries out those operations on the market from being classified as an undertaking. ⁽⁵⁵⁾
- (100) The Commission notes that neither Italy nor the interested parties claim that the fees charged by PSA are merely symbolic or are unrelated to the cost of the services provided. The Commission also observes that port fees (namely dues on goods unloaded and loaded and anchorage dues) and authorisation and concession fees constitute the largest share of revenue of PSA. According to a report by the Italian Ministry of Infrastructure and Transport, in 2017, port fees (fees on goods unloaded and loaded and anchorage fees) and concession fees accounted for 53,2% and 27,1% of revenues of PSA, respectively ⁽⁵⁶⁾.

4.1.1.4. The setting of fees by law does not exclude the existence of an economic activity

- (101) Italy and several interested parties claim that the fees for concessions and authorisations granted by the PSA to private undertakings for the commercial use of the basic port infrastructure and the provision of port operations and services do not constitute consideration for a service provided or a good offered (see 3.2.3).
- (102) Italy claims that concession fees are established by law. PSA would therefore not carry out economic activities, because they are unable to intervene in the main element of any economic transaction carried out on market terms, namely the price of the service.
- (103) To begin with, the Commission wishes to recall that according to the case-law, services which are capable of being characterised as economic activities are those which are normally provided against remuneration. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the benefit in question ⁽⁵⁷⁾. The existence of remuneration therefore constitutes a determinant factor in order to establish the existence of an economic activity ⁽⁵⁸⁾.

⁽⁵⁴⁾ Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 64 and the case-law cited.

⁽⁵⁵⁾ Judgment of the Court of 1 July 2008, *MOTOE*, C-49/07, ECLI:EU:C:2008:376, paragraph 27. Judgment of the Court of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C 74/16, ECLI:EU:C:2017:496, paragraph 46. Judgment of the General Court of 12 September 2013, *Germany v Commission*, T-347/09, ECLI:EU:T:2013:418, paragraph 48. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 80.

⁽⁵⁶⁾ Relazione sull'attività delle autorità di sistema portuale, Anno 2017, Ministero delle Infrastrutture e dei Trasporti, published on 16 September 2019 <http://www.mit.gov.it/node/11420>

⁽⁵⁷⁾ Judgment of the Court of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C 74/16, ECLI:EU:C:2017:496, paragraph 47 and the case-law cited. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 75.

⁽⁵⁸⁾ Judgment of the Court of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11, ECLI:EU:C:2012:821, paragraph 40. Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Others v Commission and Mitteldeutsche Flughafen and Flughafen Leipzig/Halle v Commission*, Joined cases T-443/08 and T-455/08, ECLI:EU:T:2011:117, paragraph 93. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 76.

- (104) The provision of services against remuneration established by law is not in itself sufficient to prevent the activity in question from being classified as an economic activity ⁽⁵⁹⁾.
- (105) The Commission therefore considers that the argument that concession fees are established by law is not sufficient to conclude that PSA do not carry out economic activities. The Commission also notes that the law only sets minimum fees for concessions, leaving PSA room to influence fees in line with their business strategies. In any event, even if it were true that concession fees are entirely set by law, it would be irrelevant, as PSA make certain infrastructure or land available to undertakings against remuneration, which is considered as an economic activity.
- (106) The Commission consequently concludes that the granting of concessions against remuneration should be qualified as economic activity.

4.1.1.5. Economic incentives

- (107) The Commission notes that the setting of fees by law does not exclude that the fees are set at least partly on the basis of an economic rationale. In the case at hand, numerous public and private stakeholders (national and regional authorities, PSA and other public bodies, undertakings providing port services and port operations, trade unions) are consulted before the fees for concessions and the authorisation fees for port operations are fixed at national level. The same is true for port fees (dues for goods loaded and unloaded and anchorage dues).
- (108) The Commission considers that the corporate tax exemption granted to PSA allows PSA to apply lower fees. The level of fees is an important element of the commercial policy implemented by ports to encourage ship-owners and vessel operators to use the infrastructure of the port and companies to install themselves in order to develop their production or service activities there ⁽⁶⁰⁾.
- (109) Also, in the case of concessions, only one part of the concession fee (minimum fee) is fixed at national level. This part of the fee is the fixed component of the concession fee. The variable component of the concession fee allows PSA to pursue their own business strategies according to the specific market circumstances.
- (110) Indeed, concession fees are made up of a fixed and a variable component. The fixed component is generally proportional to the surface of the areas concerned by the concession and takes account of several other parameters (location, level of infrastructure of the areas concerned). The variable component includes economic incentive mechanisms to achieve higher productivity, a better energy and environmental performance, and the improvement of service levels, in particular with regard to the transport and intermodal integration of the ports.
- (111) Italy acknowledges that the variable component of the concession fees is economic in nature and would hence justify to be taken into account in the assessment base for a potential taxation of the income of the PSA. However, when concessionaires achieve the economic objectives set, the corresponding amount of the fee would be progressively reduced and would lead to a reduction of the overall concession fee. As a result, according to the Italian authorities, the revenues of PSA from concessions are in practice almost entirely made up of the fixed component, which is limited to remunerating the management and the regulatory activities of the PSA. Because Italy considers that the fixed component of the concession fees is a remuneration for non-economic activities, it concludes that PSA do not carry out any economic activity.
- (112) However, the Commission notes that neither Italy nor any of the interested parties have presented any evidence to support their claim that the variable component of the fee leads to a reduction of the overall concession fee.

⁽⁵⁹⁾ Judgment of the General Court of 12 September 2013, *Germany v Commission*, T-347/09, ECLI:EU:T:2013:418, paragraph 30 and the case law cited. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 78.

⁽⁶⁰⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 81.

- (113) More importantly, it is not disputed that the concession fees are set in a way that reflects the value of the service rendered (scope, location, and level of infrastructure). Neither are the concession fees merely symbolic.
- (114) The Commission therefore concludes that the fact that the variable component of concession fees might reduce the overall revenue from concession fees when concessionaires achieve the economic objectives in the concession contract, is not sufficient to exclude that PSA carry out economic activities. The Commission also considers that the fact that revenues from concession fees may also finance certain non-economic activities does not alter the fact that the fees are received in return for a service, namely access to the port infrastructure ⁽⁶¹⁾.

4.1.1.6. Fees are no taxes

- (115) Italy and several interested parties also claim that the fees payable to PSA have the characteristics of a tax paid by the concessionaire to the State via the PSA.
- (116) The Commission takes the view that this argument is not relevant for determining whether PSA carry out an economic activity as national qualifications alone cannot be used to circumvent application of common Union rules. Services which are capable of being characterised as economic activities are those which are normally provided against remuneration ⁽⁶²⁾. The fees received by PSA constitute remuneration paid by users for the provision of specific services in return. As the General Court already noted in the case of the Spanish ports, where the ports also argued that port dues are taxes, port fees are fees charged for the use of port infrastructure ⁽⁶³⁾.

4.1.1.7. Economic activities of PSA are not ancillary activities

- (117) Italy is of the opinion that the economic activities carried out by PSA when managing the ports are marginal and are insufficient to qualify PSA as undertakings. The case-law of the Court of Justice would rule out that bodies established and regulated for carrying out public and non-economic functions and activities, but at the same time carrying out certain economic activities, are classified as undertakings ⁽⁶⁴⁾.
- (118) Italy also considers that activities which might have an economic significance for the management of the port property and which may be relevant in the determination of the concession fees are inseparable from the public activities entrusted by law to the PSA, such as the control and management of the port property. According to Italy, the fees levied by PSA should therefore not be considered as corporate income.
- (119) The Commission wishes to recall that the fact that an entity enjoys, in the exercise of part of its activities, public authority powers does not, in itself, prevent it from being classified as an undertaking for the purposes of Union competition law for its economic activities ⁽⁶⁵⁾.
- (120) According to the case-law, in so far as a public entity carries out an economic activity which may be separated from the exercise of its prerogatives as a public authority, that entity, as regards that activity, acts as an undertaking. On the other hand, if that economic activity is inseparable from the exercise of its prerogatives as a public authority, all the activities carried out by that entity remain activities connected with the exercise of those prerogatives ⁽⁶⁶⁾.

⁽⁶¹⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 82.

⁽⁶²⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 75.

⁽⁶³⁾ Judgment of the General Court of 15 March 2018, *Naviera Armas v Commission*, T-108/16, ECLI:EU:T:2018:145, paragraph 124.

⁽⁶⁴⁾ Judgment of the Court of 19 January 1994, *SAT Fluggesellschaft v Eurocontrol*, C-364/92, ECLI:EU:C:1994:7. Judgment of the Court of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07, ECLI:EU:C:2009:191.

⁽⁶⁵⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 85 and the case law cited.

⁽⁶⁶⁾ Judgment of the Court of 12 July 2012, *Compass-Datenbank*, C 138/11, ECLI:EU:C:2012:449, paragraph 38. Judgment of the General Court of 12 September 2013, *Germany v Commission*, T-347/09, ECLI:EU:T:2013:418, paragraph 29. Judgment of the Court of 26 March 2009, *Selex Sistemi Integrati v Commission*, C-113/07, ECLI:EU:C:2009:191, paragraphs 71 to 80. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 86. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 82.

- (121) The Commission notes that neither Italy nor any of the interested parties have come up with evidence to show that the economic activities carried out by the ports are inseparable from their prerogatives as a public authority. The mere possibility of an economic link between those activities, in that the economic activities of the ports make it possible to finance, in whole or in part, their non-economic activities, is not sufficient to establish that those activities are inseparable within the meaning of the case-law ⁽⁶⁷⁾.
- (122) The Commission also notes that in the present case, the economic activities of PSA are not made compulsory by their non-economic activities in the public interest and that, in their absence, the non-economic activities are not necessarily deprived of their usefulness ⁽⁶⁸⁾.
- (123) The Commission also observes that neither Italy nor the interested parties have demonstrated that the economic activities of the ports are ancillary to their non-economic activities carried out / exercised in the public interest. ⁽⁶⁹⁾ On the contrary, port fees (namely dues on goods unloaded and loaded and anchorage fees) and concession fees represent the majority of the operative revenues of PSA, as the related activities constitute the core business of PSA ⁽⁷⁰⁾.
- (124) The Commission therefore concludes that the economic activities of PSA are not inseparable from their non-economic activities carried out / exercised in the public interest, within the meaning of the case-law ⁽⁷¹⁾. As a consequence, the Commission takes the view that PSA should be regarded as undertakings if - and in so far as - they actually carry out one or more economic activities ⁽⁷²⁾.

4.1.1.8. Legal monopoly not sufficient to consider activities of PSA as non-economic

- (125) Italy and several interested parties claim that PSA have no competitors and that there is no market in which they would operate. In the absence of a market on which to offer their services, PSA could not be regarded as undertakings. Some of the interested parties also indicate that the management of ports is different from the management of airports.
- (126) In this regard, the Commission notes that an entity which enjoys a legal monopoly may very well offer goods and services on a market and therefore be an undertaking within the meaning of Article 107 of the Treaty. The concept of economic activity is an objective one, which results from facts, in particular from the existence of a market for the services concerned ⁽⁷³⁾.

⁽⁶⁷⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 87. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 84.

⁽⁶⁸⁾ Judgment of the Court of 12 July 2012, *Compass-Datenbank*, C 138/11, ECLI:EU:C:2012:449, paragraph 41. Judgment of the General Court of 12 September 2013, *Germany v Commission*, T-347/09, ECLI:EU:T:2013:418, paragraph 41. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 89. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 82.

⁽⁶⁹⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 90. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 87.

⁽⁷⁰⁾ Relazione sull'attività delle autorità di sistema portuale, Anno 2017, Ministero delle Infrastrutture e dei Trasporti, published on 16 September 2019 <http://www.mit.gov.it/node/11420>.

⁽⁷¹⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 89. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 84.

⁽⁷²⁾ Judgment of the Court of 12 July 2012, *Compass-Datenbank*, C 138/11, ECLI:EU:C:2012:449, paragraph 37. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 64.

⁽⁷³⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 56.

- (127) The Commission also recalls that the Union Courts held that the provision of airport facilities to airlines, subject to the payment of a fee, constitutes an economic activity ⁽⁷⁴⁾. The Commission considers that there is no fundamental difference between the granting of airport infrastructure access in exchange for airport charges and the granting of access to the port infrastructure in exchange for port rights ⁽⁷⁵⁾, especially because airports also have a legal monopoly similar to the one enjoyed by the Italian PSA. PSA themselves operate the port infrastructure when they give access to the port infrastructure to ship-owners and vessel operators or rent it in return for remuneration ⁽⁷⁶⁾.
- (128) The Commission therefore concludes that the arguments presented by Italy and some of the interested parties are not sufficient to consider that the activities carried out by PSA are non-economic.

4.1.1.9. Conclusion

- (129) In the light of the above, the Commission concludes that PSA carry out economic activities and in relation to these, they qualify as undertakings within the meaning of Article 107(1) of the Treaty.

4.1.2. *The use of State resources and imputability to the State*

- (130) To qualify as State aid, Article 107(1) of the Treaty requires that the measure be granted by a Member State or through State resources in any form whatsoever. In the case at hand, the exemption from corporate tax is in particular based on Article 74 of TUIR, as interpreted and applied by the Italian authorities (see (50) to (52)). According to Article 74 TUIR, State bodies and administrations, and other territorial bodies, such as for example regions and municipalities, are not liable for corporate tax. In the view of the Italian authorities, PSA are public bodies entrusted solely with administrative functions and are therefore subject to the application of Article 74 TUIR. The measure is therefore imputable to the State.
- (131) Also, a loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.
- (132) Indeed, as held by the Union Courts, 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, fulfils the notion of State resources within the meaning of Article 107(1) of the Treaty ⁽⁷⁷⁾.
- (133) Hence, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities forego revenue, which constitutes State resources. The Commission therefore takes the view that the measure at issue involves a loss of State resources and is therefore granted through State resources.
- (134) As to the argument put forward by some interested parties that the exclusion of PSA from the obligation to pay corporate income tax would not entail any loss of tax revenue, as PSA are part of the State, it is recalled that the Union legal order is neutral with regard to the system of property ownership ⁽⁷⁸⁾ and does not in any way prejudice the right of Member States to act as economic operators. At the same time, when public authorities directly or indirectly carry out economic transactions in any form, they are subject to Union State aid rules ⁽⁷⁹⁾. In line with a

⁽⁷⁴⁾ Judgment of the Court of 24 October 2002, *Aéroports de Paris v Commission*, C-82/01 P, ECLI:EU:C:2002:617, paragraph 78. Judgment of the Court of First Instance of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, ECLI:EU:T:2000:290, paragraph 121.

⁽⁷⁵⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 71. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 65.

⁽⁷⁶⁾ Judgment of the Court of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, C-288/11, ECLI:EU:C:2012:821. Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 72.

⁽⁷⁷⁾ Judgment of the Court of 15 March 1994, *Banco Exterior de España v Ayuntamiento de Valencia*, C-387/92, ECLI:EU:C:1994:100, paragraph 14.

⁽⁷⁸⁾ Article 345 of the Treaty provides that “The Treaties shall in no way prejudice the rules in Member States governing the system of property ownership”.

⁽⁷⁹⁾ See, for instance, Judgment of the Court of Justice of 10 July 1986, *Belgium v Commission*, 40/85, ECLI:EU:C:1986:305, paragraph 12.

well-established case law, a distinction must therefore be drawn between the obligations which the State assumes as owner of a company and its obligations as public authority ⁽⁸⁰⁾. This means that the revenues that the State can draw from its ownership of a public company cannot be taken into account when it comes to assessing whether a tax advantage granted to it affects State resources. Moreover, neither Italy nor any interested party have put forward any argument to demonstrate that the tax advantage related with the exemption of PSA from corporate tax would be limited to the amount necessary to finance the institutional tasks of PSA.

4.1.3. Advantage

- (135) To qualify as State aid a measure also 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 normally borne by an undertaking ⁽⁸¹⁾.
- (136) Under the present measure, PSA are exempt from corporate income tax while other undertakings are in principle subject to corporate income tax. The tax exemption reduces the charges that are normally included in the operating costs of an undertaking carrying out economic activities. It provides an economic advantage to PSA in comparison to other undertakings, which could not benefit from such a tax advantage, although they perform economic activities. It follows that the measure involves an advantage for PSA.
- (137) The Commission notes that the Italian authorities do not claim that PSA are entrusted with public service obligations and that the tax exemption would compensate PSA for costs incurred in performing public service obligations. The Commission also does not consider the criteria of the “Altmark judgment” to be met ⁽⁸²⁾, as PSA are not required to discharge public service obligations that have been clearly defined. Furthermore, the measure at issue, which links the amount of aid to the profit made, is not related to or limited to the net costs of a public service task. Nor does it derive from a mandate given to the beneficiaries of the measure to carry out such a task.
- (138) Hence, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage. The Commission therefore concludes that the measure at issue provides an advantage to PSA.

4.1.4. Distortion of competition and effect on trade

- (139) Under Article 107(1) of the Treaty, to be qualified as aid a measure must affect intra-Union trade and distort, or threaten to distort competition.

4.1.4.1. Existence of competition and competitive markets

- (140) The Commission recalls first of all that, in the context of the public consultation of interested parties on the draft Regulation in the ports sector, all stakeholders stressed the need for a stable and fair level playing field for competition between ports in the Union ⁽⁸³⁾.
- (141) It is true that, in certain Member States, the operation of basic port infrastructure is legally reserved to certain entities. In that regard, operators from other Member States cannot operate basic port infrastructure in these Member States, so that that specific market can, at least to a certain extent, be seen as not liberalised or open to competition. However, this specific market is not the only market on which an advantage to port authorities could distort competition ⁽⁸⁴⁾.

⁽⁸⁰⁾ Judgement of the Court of 14 September 1994, *Spain v. Commission*, Joined cases C-278/92, C-279/92 and C-280/92, ECLI:EU:C:1994:325, paragraph 22.

⁽⁸¹⁾ Judgment of the Court of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, Case 30/59, ECLI:EU:C:1961:2, paragraph 19. Judgment of the Court of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, ECLI:EU:C:2001:598, paragraph 38.

⁽⁸²⁾ Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, C-280/00, ECLI:EU:C:2003:415.

⁽⁸³⁾ See point 2.1 of the proposal for a Regulation on port services. Also see Communication from the Commission on a European Ports Policy, COM/2007/0616 final, point II.4.2.

⁽⁸⁴⁾ See opinion of Advocate General Wahl in Judgment of the Court of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2018:712, paragraph 66: “... the Court has, however, already held that such an absence of liberalisation does not necessarily exclude the possibility that the State aid is liable to affect trade between Member States and is capable of distorting or threatening to distort competition.” See also the Judgment of the Court of 23 January 2019, *Fallimento Traghetti del Mediterraneo*, C-387/17, ECLI:EU:C:2019:51, paragraph 38 and following.

- (142) Firstly, logistics and transport companies willing to transport goods can use different ways to do so, involving the use of other (foreign or domestic) ports managed by other port authorities or even no port at all. Ports from different Member States can share the same hinterland so that port authorities compete to provide transport services to operators willing to serve that hinterland. This can for example be the case for port operators in the North West of Italy and in the South of France. The services offered by PSA (granting access to ports) are thus, at least to a certain extent, in competition with those offered by other port authorities and by other providers of transport services in Italy and other Member States. More generally, the Commission notes that, as ports are to a large extent involved in the international transport of goods and passengers, any advantage to Italian PSA is also by nature liable to affect competition and intra-Union trade.
- (143) In that regard, the fact that PSA are the only entities entitled to operate their own port infrastructure (and offer access to port infrastructure) does not put into question the existence of a broader competitive market, where transport services (access to port infrastructure) provided by PSA are in competition with services offered by other transport operators established in Italy and by other ports or transport providers in other Member States⁽⁸⁵⁾. Users of port infrastructure are free to use other ports (in Italy or abroad) and other ways of transport, so that PSA provide services in competition with other operators in the broad market of transport services and in the narrower market of port services (other Union ports grant access to the Union market and thus to Italy, sometimes in combination with road, rail or waterway)⁽⁸⁶⁾.
- (144) Also, concessionaires willing to provide port services can do so in other ports managed by other port authorities. PSA compete to attract these operators (concessionaires carrying out port services). The level of fees charged by the PSA in exchange for land and infrastructure (port equipment) being made available to concessionaires also plays a role in the choice made by concessionaires to establish themselves in one port rather than another⁽⁸⁷⁾. The existence of competition and cross-border effects in this market is acknowledged by the case-law⁽⁸⁸⁾.
- (145) Moreover, undertakings willing to establish themselves close to a port can also settle outside the port (and not necessarily on land owned or managed by port authorities), so that PSA are in competition with other operators renting out land outside ports.
- (146) In conclusion, the Commission considers that PSA may compete with one another and with other ports in Europe and that the tax exemption for PSA is therefore also likely to affect competition and trade between Member States.

4.1.4.2. Distortion of competition

- (147) 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 to other undertakings with which it competes⁽⁸⁹⁾. A distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a sector where there is, or could be, competition⁽⁹⁰⁾. Public support is

⁽⁸⁵⁾ In that regard the conditions laid down in paragraph 188 of the Commission Notice on the notion of State aid are not fulfilled. Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union (OJ C 262, 19.7.2016, p. 1–50).

⁽⁸⁶⁾ "Port competition can also involve rivalry among port authorities in view of offering the best facilities (both material and non-material) to all actors involved in the supply chains of the various trades (e.g. stevedoring companies, shipping companies, shippers and multimodal operators)." Notteboom T., de Langen P. (2015) Container Port Competition in Europe. In: Lee CY., Meng Q. (eds) Handbook of Ocean Container Transport Logistics. International Series in Operations Research & Management Science, vol 220.

⁽⁸⁷⁾ "On port authority level, the battle is mainly focused on offering the best basic infrastructural (docks, quays) and 'infostructural' (IT) facilities, the best logistic/distribution facilities and the lowest port user costs." Notteboom T., de Langen P. (2015) Container Port Competition in Europe. In: Lee CY., Meng Q. (eds) Handbook of Ocean Container Transport Logistics. International Series in Operations Research & Management Science, vol 220.

⁽⁸⁸⁾ Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraph 99. Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 103.

⁽⁸⁹⁾ Judgment of the Court of 17 September 1980, *Philip Morris Holland BV v Commission of the European Communities*, Case 730/79, ECLI:EU:C:1980:209, paragraph 11. Judgment of the Court of First Instance of 15 June 2000, *Alzetta and Others v Commission*, Joined cases T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to 607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, ECLI:EU:T:2000:151, paragraph 80.

⁽⁹⁰⁾ Judgment of the Court of 24 July 2003, *Altmark Trans GmbH and Regierungspräsidium Magdeburg*, C-280/00, ECLI:EU:C:2003:415, paragraphs 78 and 79.

liable to distort competition even if it does not help the recipient undertaking expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had, if the aid had not been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations ⁽⁹¹⁾.

- (148) As the measure at issue constitutes an aid scheme, which applies to PSA of different size, geographical location, and activities, it is not necessary to demonstrate individually that that measure results for each PSA in a distortion of competition and an effect on trade in order to establish that the measure examined is State aid ⁽⁹²⁾.
- (149) The corporate tax exemption grants an advantage to the PSA, which is liable to improve their competitive position. In particular, the price of services provided by PSA (authorisation and concession fees, dues on goods unloaded and loaded, and anchorage dues) is one of the factors influencing the relative competitiveness of different ports in Europe ⁽⁹³⁾.
- (150) Italy has argued that PSA only have limited influence on the setting of the fees for their activities. However, the criteria for determining authorisation and concession fees established by public decree only define the minimum fee and therefore leave a margin of discretion for the PSA to set the level of their fees (see 4.1.1.5). In any event, even the existence of fees exclusively fixed at central level – without any margin of discretion for individual PSA to influence the level of the fees fixed centrally – would not rule out a distortion of competition because undertakings can also compete on non-price parameters (quality of service, etc.) and because the advantage conferred to PSA by the tax exemption at stake can also help them to reinforce the quality of their offer and to attract ship-owners and vessel operators.
- (151) Hence, the Commission concludes that by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage that has the potential to affect competition. The Commission therefore takes the view that the measure at issue distorts or threatens to distort competition.

4.1.4.3. Effect on trade

- (152) Public support to undertakings only constitutes State aid under Article 107(1) of the Treaty insofar as it affects trade between Member States. It is not necessary to establish that the aid has an actual effect on trade between Member States but only that the aid is liable to affect such trade ⁽⁹⁴⁾. In particular, the Union courts have ruled that where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-Union trade, the latter must be regarded as affected by the aid ⁽⁹⁵⁾.
- (153) This case-law can be applied in the present case as the corporate tax exemption strengthens the position of PSA. This allows the latter to lower their fees and make the port infrastructure they manage more attractive for ship-owners and vessel operators, especially from other Member States.

⁽⁹¹⁾ Judgment of the Court of 3 March 2005, *Heiser*, C-172/03, ECLI:EU:C:2005:130, paragraph 55.

⁽⁹²⁾ Judgment of the General Court of 30 April 2019, *UPF v Commission*, T-747/17, ECLI:EU:T:2019:271, paragraph 102.

⁽⁹³⁾ The price of transport services provided by the ports often represents a large share of the total transport cost. See Europe's Seaports 2030: challenges ahead, European Commission memo of 23 May 2013: *'The costs and quality of port services are a major factor for European business. Port costs may account for a significant part of the total costs in the logistics chain. Handling cargo, port dues and port nautical services can account for between 40%-60% of the total door-to-door logistic costs for business using short sea shipping to transport goods.'* (underscored by the Commission). Cf. footnote 72.

⁽⁹⁴⁾ Judgment of the Court of 14 January 2015, *Eventech*, C-518/13, ECLI:EU:C:2015:9, paragraph 65. Judgment of the Court of 8 May 2013, *Libert and Others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 76.

⁽⁹⁵⁾ Judgment of the Court of 14 January 2015, *Eventech*, C-518/13, ECLI:EU:C:2015:9, paragraph 66. Judgment of the Court of 8 May 2013, *Libert and Others*, Joined Cases C-197/11 and C-203/11, ECLI:EU:C:2013:288, paragraph 77. Judgment of the Court of First Instance of 4 April 2001, *Regione autonoma Friuli-Venezia Giulia v Commission*, T-288/97, ECLI:EU:T:2001:115, paragraph 41.

- (154) In the present case, Italian ports are involved in intra-Union trade so that an advantage to the concerned PSA affects intra-Union trade. Italian ports are actively involved in intra-Union trade and several Italian ports are among the most important Union-wide ports in terms of container traffic and cargo tonnage. On the basis of publicly available information, it appears that among the top 15 container ports in Europe in 2019, there are two Italian ports, namely Genoa and Gioia Tauro. ⁽⁹⁶⁾
- (155) By relieving those PSA of a tax liability they would otherwise have had to bear and which competing undertakings have to carry, the exemption from corporate income tax frees up financial resources for those undertakings to invest in their business operations, which in turn affects the conditions under which they can offer their products and services on the market, thereby distorting competition in the internal market. Consequently, the tax exemption of PSA affects intra-Union trade.
- (156) As to the argument made by Italy that the majority of Italian ports are far from competing, even potentially, within European markets, but are mainly in competition with ports in Northern Africa, the Commission notes that the Italian authorities have not put forward any element to substantiate this view. ⁽⁹⁷⁾
- (157) Therefore, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage that has the potential to affect intra-Union trade.

4.1.5. Selectivity of the measure

- (158) To be considered State aid, a measure must be selective ⁽⁹⁸⁾, in the sense that it must favour only certain undertakings or the production of certain goods. According to established case-law ⁽⁹⁹⁾, the assessment of the material selectivity of a tax measure consists of three stages: first it is necessary to identify and examine the common or “normal” regime (“reference framework”) applicable in the Member State concerned. Second, it is in relation to this common or “normal” tax regime that it is necessary to assess and determine if any advantage granted by the tax measure at issue may be selective. This has to be done by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators that, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Third, if such derogation exists, it is necessary to examine whether it results from the nature or general scheme of the taxation system of which it forms part and could hence be justified by the nature or logic of the 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 ⁽¹⁰⁰⁾.

4.1.5.1. Reference framework

- (159) To assess the selectivity of a tax measure, it is necessary to begin by defining the appropriate reference framework and then determining whether the measure in question gives rise to discrimination under that framework. A reference framework is composed of a consistent set of rules that generally apply - on the basis of objective criteria - to all undertakings falling within its scope as defined by its objective.

⁽⁹⁶⁾ Top 15 container ports in Europe in 2019: TEU volumes and growth rates. T. Notteboom, 21.2.2020. <https://www.porteconomics.eu/2020/02/21/top-15-container-ports-in-europe-in-2019-teu-volumes-and-growth-rates>.

⁽⁹⁷⁾ Publicly available information demonstrates that PSA in Italy are in competition with ports in other Mediterranean countries like Spain, France, Malta and Greece. Ministero delle Infrastrutture e dei Trasporti, Piano Strategico Nazionale della Portualità e della Logistica (2014) https://mit.gov.it/mit/mop_all.php?p_id=23291, pages 23, 91 and 152. Panaro, Buonfanti, Murgia, Ripoli, Porti e Mediterraneo, Assoporti e SRM (2011) https://www.assoporti.it/media/3047/porti_e_mediterraneo_def.pdf, page 3. Arianna Buonfanti, Lo shipping e la portualità nel Mediterraneo: opportunità e sfide per l'Italia, Rivista di Economia e Politica dei Trasporti (2013), n° 3, articolo 1, ISSN 2282-6599, page 6 and page 12.

⁽⁹⁸⁾ Judgment of the Court of 15 December 2005, *Italy v. Commission*, C-66/02, ECLI:EU:C:2005:768, paragraph 94.

⁽⁹⁹⁾ Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union, OJ C 262, 19.7.2016, paragraph 128.

⁽¹⁰⁰⁾ Judgment of the Court of 6 September 2006, *Portugal v. Commission*, C-88/03, ECLI:EU:C:2006:511, paragraph 81.

- (160) In the present case, the Commission considers the reference framework to be the Italian system for corporate income tax, as laid down in the Italian Consolidated Tax Act TUIR (see 38-43) including the definition of taxable persons and taxable income, which results from Article 72 in combination with Article 73 TUIR.
- (161) Article 72 TUIR sets the principle that corporate income tax applies to all income in cash or in kind.
- (162) Article 73(1) TUIR subjects to corporate income tax all types of companies, including mutual insurance companies, as well as cooperatives, public and private entities other than companies, and trusts whether they have as exclusive or principal object the exercise of commercial activities or not.
- (163) Article 75 sets the principle that corporate tax shall be levied on the total net income and that different rules apply for the definition of the taxable income on the one hand for companies and public or private entities that have as exclusive or principal purpose the pursuit of commercial activities (Articles 81 to 141 TUIR) ⁽¹⁰¹⁾ and on the other hand for public or private entities that do not have as exclusive or principal purpose the pursuit of a commercial activity (Articles 143 to 150 TUIR) ⁽¹⁰²⁾. Articles 76 and 77 define respectively the tax rate and the taxable period for corporate income tax.
- (164) It results from the above that corporate tax rules applicable in Italy subject to corporate income tax as a matter of principle all types of income generated by companies (Article 73(1) a)) or by public or private entities other than companies (Article 73(1)(b) and (c)), including when the relevant entities do not have as their exclusive or principal object the exercise of commercial activity.

4.1.5.2. Derogation

- (165) Article 74 TUIR lays down rules applicable specifically to the State and public bodies. That provision identifies also the activities that are not considered as commercial activities.
- (166) According to Article 74 TUIR, State bodies and administrations, including those with an autonomous organization, even if they have legal personality, municipalities, consortia between local authorities, associations and bodies managing collective property, mountain communities, provinces and regions are not subject to corporate tax. The Italian authorities consider PSA as bodies administering public property. Therefore, Article 74 TUIR, as interpreted and applied by the Italian authorities, leads to a situation where PSA in Italy are exempted from corporate income tax, including when it comes to income stemming from the exploitation of the PSA infrastructure.
- (167) Where a measure favours certain undertakings or the production of certain goods which are in a comparable legal and factual situation in the light of the objective of the reference system, the measure is *prima facie* selective. In the case at hand, PSA and other legal entities are in a comparable legal and factual situation, in the light of the objective of IRES, which is to tax income of companies and other legal entities whether or not their sole or main purpose is the exercise of commercial activities. Therefore, Article 74 TUIR, as interpreted and applied by the Italian authorities, favours PSA over other legal entities subject to IRES in the light of its objective.
- (168) According to the Italian authorities, the exemption from corporate income tax of PSA does not derogate from the general principles of the Italian corporate tax system, but rather follows its logic, namely that non-commercial activities are generally not subject to corporate tax. This would imply that all activities of PSA are non-commercial activities. However, the Commission notes that Article 73 subjects to corporate tax all public and private entities, including when they do not have as an exclusive or principal purpose the pursuit of commercial activities. It is by derogation to this principle that Article 74 TUIR exempts from corporate income tax the State and other public bodies.

⁽¹⁰¹⁾ Article 81 TUIR includes all income “from whatever source” in the taxable income of companies and entities with the pursuit of commercial activities as exclusive or principal purpose.

⁽¹⁰²⁾ Article 143 TUIR clarifies that the taxable income for entities which do not have as exclusive or principal purpose the pursuit of commercial activities consists of “income from land, capital, business and other assets, wherever produced and whatever its purpose, with the exception of income exempt from tax and income subject to withholding tax or substitute tax”.

- (169) The Italian authorities also consider that PSA do not fall under Article 73 TUIR, but rather under Article 74 TUIR. According to the Italian authorities, Article 74 TUIR foresees that public bodies entrusted solely with administrative functions (see recitals (51) and (52)) are not liable to corporate tax. In the view of the Italian authorities, Article 74 TUIR therefore cannot be interpreted as a derogation from Article 73 TUIR. Instead, Article 73 and Article 74 TUIR have different and parallel scopes. According to the Italian authorities, they establish two different ordinary tax regimes applicable to specific categories of entities, defined in a general and abstract manner, that are not in a comparable factual and legal situation. Therefore, Italy claims that the corporate income tax exemption is not selective, as Article 74 TUIR applies to PSA as well as to the State, to various public bodies and to other entities belonging to the public administration on the basis of objective, general and abstract criteria. All these entities covered by Article 74 TUIR would be in the same factual and legal situation.
- (170) The Commission notes that Article 74 exempts the State and other public bodies from corporate tax to the extent that their activities relate to the exercise of functions of public authority. Conversely, the commercial activities of these bodies are in principle subject to corporate tax. If Article 74 TUIR – or its interpretation by the administration – were such as to result in the non-payment of corporate tax by PSA in all cases (including when they perform activities considered as economic under State aid rules), this would introduce a discrimination between undertakings engaging in economic activities within the meaning of Article 107 TFEU. In that case, Article 74 TUIR as interpreted by the Italian authorities would give rise to advantages to a specific category of undertakings⁽¹⁰³⁾, namely PSA, while they are in a comparable legal and factual situation to other undertakings (when it comes to the income they draw from their economic activities)⁽¹⁰⁴⁾.
- (171) Indeed, the Commission considers that PSA are not guided by specific “operating principles which clearly distinguish them from other economic operators” subject to corporate tax⁽¹⁰⁵⁾. In particular, the fact that PSA do not pursue a profit-making activity is insufficient to consider that they are in a different situation to other operators subject to corporate tax⁽¹⁰⁶⁾. None of the arguments invoked by Italy to demonstrate that PSA are not undertakings and not engaged in economic activities (see 3.2) is relevant and consistent with regard to the objective of the corporate tax system, which is to tax the income of companies and other legal entities⁽¹⁰⁷⁾.
- (172) Therefore, even if Article 74 TUIR constituted the legal basis for non-payment of corporate tax by the PSA, this tax exemption would be *prima facie* selective with respect to the economic activities of the PSA⁽¹⁰⁸⁾.

4.1.5.3. Justification by the logic of the system

- (173) 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 Union Courts, whether this exemption is justified by the nature or general scheme of the system of which it forms part. Thus, a measure which constitutes an exception to the application of the general tax system may be justified where the Member State concerned can show that the measure results directly from the basic or guiding principles of its tax system.

⁽¹⁰³⁾ Judgment of the Court of 15 November 2011, *Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, Joined cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraphs 101 to 104; Judgment of the General Court of 20 September 2019, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven v Commission*, T-696/17, ECLI:EU:T:2019:652, paragraphs 132 to 133 and 194 to 195.

⁽¹⁰⁴⁾ Judgment of the Court of 8 September 2011, *Paint Graphos and Others*, Joined cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 54; Judgment of the General Court of 20 September 2019, *Port autonome du Centre and de l'Ouest and Others v Commission*, T-673/17, ECLI:EU:T:2019:643, paragraph 178.

⁽¹⁰⁵⁾ Judgment of the Court of 8 September 2011, *Paint Graphos and Others*, Joined cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 55.

⁽¹⁰⁶⁾ Judgment of the Court of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, ECLI:EU:C:2006:8, paragraph 123.

⁽¹⁰⁷⁾ Judgment of the Court of 8 September 2011, *Paint Graphos and Others*, Joined cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 54; Judgment of the General Court of 20 September 2019, *Port autonome du Centre and de l'Ouest and Others v Commission*, T-673/17, ECLI:EU:T:2019:643, paragraph 178 to 180.

⁽¹⁰⁸⁾ Judgment of the Court of 15 November 2011, *Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, Joined cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 101; Judgment of the General Court of 20 September 2019, *Port autonome du Centre and de l'Ouest and Others v Commission*, T-673/17, ECLI:EU:T:2019:643, paragraphs 191.

- (174) No such arguments have been provided by the Italian authorities nor by the interested parties. The Commission has also not been able to identify such justification. Hence, the Commission considers the measure as not being justified by the logic of the tax system. The Commission thus concludes that the measure is selective.

4.1.5.4. Conclusion

- (175) Therefore, the Commission concludes that the corporate tax exemption of Italian PSA derogates without valid justification from the principle of the Italian corporate tax system according to which corporate tax applies to all types of income generated by companies or by public or private entities other than companies. Even if it were considered that it is in line with the Italian corporate tax system that PSA are exempted from corporate tax, because according to the Italian authorities they exclusively fulfil public functions, this would amount to a situation where 'certain' undertakings or the production of 'certain' goods is favoured within the meaning of Article 107 TFEU ⁽¹⁰⁹⁾. Therefore, the Commission concludes that the non-subjection of economic activities of PSA to corporate income tax involves a selective advantage.
- (176) Furthermore, the Commission concludes that such more favourable treatment granted by the State to undertakings and imputable to the State is capable of distorting the competition and affect intra-Union trade. Therefore, the Commission concludes that the tax exemption granted to PSA constitutes State aid within the meaning of Article 107(1) of the Treaty ⁽¹¹⁰⁾.

5. COMPATIBILITY

- (177) State aid measures can be considered compatible with the internal market on the basis of the exceptions laid down in Article 93, Article 106(2), Article 107(2) and Article 107(3) of the Treaty.

5.1. Article 93 of the Treaty

- (178) Article 93 of the Treaty lays down that aids which "meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service" can be declared compatible with the internal market.
- (179) The Commission notes first of all that in the case at hand, there are no indications that the aid finances measures which meet the needs of coordination of transport. On the contrary, the aid consists in a corporate tax exemption that is not related to any particular investment and is totally unrelated to the needs of coordination of transport. Nor is the measure targeted at the reimbursement of public service obligations.
- (180) Consequently, the Commission considers that the measure cannot be regarded as compatible under Article 93 of the Treaty.

5.2. Article 107(2) and Article 107(3) of the Treaty

- (181) Since the measure under review constitutes State aid within the meaning of Article 107(1) of the Treaty, it should be examined whether it is compatible with the internal market under the exceptions laid down in Article 107(2) and 107(3) of the Treaty.
- (182) The Italian authorities have provided no arguments regarding the applicability of the exceptions described in Article 107(2) or 107(3) of the Treaty to the exemption from corporate income tax granted to PSA.

⁽¹⁰⁹⁾ Judgment of the Court of 15 November 2011, *Commission and Kingdom of Spain v Government of Gibraltar and United Kingdom of Great Britain and Northern Ireland*, Joined cases C-106/09 P and C-107/09 P, ECLI:EU:C:2011:732, paragraph 101.

⁽¹¹⁰⁾ In a similar case, concerning a three-year exemption from corporate tax granted to certain Italian public enterprises set up by local authorities, the Commission adopted a negative decision with recovery in 2002, which was confirmed by Judgment of the Court of 21 December 2011, *A2A v Commission*, C-318/09 P, ECLI:EU:C:2011:856.

- (183) The Commission considers that none of the exceptions under Article 107(2) of the Treaty 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 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.
- (184) Article 107(3) of the Treaty states that: (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 may be found compatible with the internal market.
- (185) Article 107(3)(a) of the Treaty authorises aid, which promotes the economic development of areas, where the standard of living is abnormally low or where there is serious underemployment. This exception is not applicable.
- (186) Moreover, the measure does not promote the execution of an important project of common European interest nor does it remedy a serious disturbance in the economy of Italy, as provided by Article 107(3)(b) of the Treaty.
- (187) In addition, the measure does not aim at promoting culture and heritage conservation, as provided by Article 107(3)(d) of the Treaty.
- (188) Under Article 107(3)(c) of the Treaty aid granted to facilitate the development of certain economic activities or certain economic areas could be declared compatible insofar as it would not adversely affect trading conditions to an extent contrary to the common interest. However, the available information does not indicate that the tax advantage granted is related to specific investments eligible to receive aid under the Union rules and guidelines.
- (189) On the contrary, the Commission considers that the measure constitutes a reduction of charges that should normally be borne by PSA in the ordinary course of their business, and could therefore be considered as operating aid. Generally such aid is not considered compatible with the internal market to the extent that it is neither limited in time, nor necessary or proportionate to finance costs related to serving a well identified objective of European interest.
- (190) Consequently, the Commission considers that the exceptions of Article 107(3) of the Treaty do not apply.
- (191) As a result of the foregoing, the Commission considers that the measure cannot be considered compatible with the internal market on the basis of Article 107(2) and 107(3) of the Treaty.

5.3. Article 106(2) of the Treaty

- (192) Where the recipient of aid has been entrusted by the State with the operation of services of general economic interest ("SGEI"), the aid may also be compatible in application of Article 106(2) of the Treaty.
- (193) However, the Italian authorities have not provided any information from which it can be concluded that the exemption from corporate income tax for PSA could be justified under Article 106(2) of the Treaty. The measure at issue, which links the amount of aid to the taxable profit of the entities, is not related to or limited to the net costs of a public service task. Nor does it derive from a mandate given to the beneficiaries of the measure to carry out such a task. Consequently, the Commission considers that the measure cannot be regarded as public service compensation compatible with the internal market and is not compatible on the basis of Article 106(2) of the Treaty.

6. CONCLUSION

- (194) In light of the foregoing, the Commission considers that the exemption from corporate income tax of PSA in Italy cannot be considered compatible with the internal market.

7. EXISTING AID

- (195) Existing aid, as defined in Article 1(b) of the Procedural Regulation, would be either a measure that was in place before the entry into force of the Treaty in Italy, a measure that has been authorised, a measure that is deemed existing aid pursuant to Article 17 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 common market. Any aid not falling under the definition of existing aid would be considered new aid pursuant to Article 1(c) of the Procedural Regulation.
- (196) The corporate tax exemption for the Italian PSA is based on Article 74 TUIR as interpreted and applied by the Italian authorities.
- (197) The Italian authorities have confirmed that the tax regime applicable to the PSA prior to 1958 was exactly the same as it is today. In particular, they have confirmed that port authorities have never been subject to corporate tax. Moreover, there is no element available to the Commission that would contradict this.
- (198) The Commission therefore considers that it constitutes existing aid in line with Article 1(b) (i) of the Procedural Regulation.

8. CONCLUSION

- (199) The corporate tax exemption for the Italian PSA constitutes an existing State aid scheme which is incompatible with the internal market.
- (200) It is therefore appropriate for the Italian authorities to put an end to the aid scheme, by abolishing the corporate tax exemption for the Italian PSA. This measure should be adopted within 2 months of the date of notification of this Decision and should apply at the latest to the income from economic activities generated from the start of the fiscal year following the adoption of this measure and at the latest in 2022,

HAS ADOPTED THIS DECISION:

Article 1

The corporate tax exemption in favour of Port System Authorities constitutes an existing aid scheme which is incompatible with the internal market.

Article 2

Italy shall remove the corporate tax exemption referred to in Article 1. The measure by which Italy fulfils its obligations shall be adopted within 2 months of the date of notification of this Decision. This measure shall apply as of the start of the fiscal year following its adoption and at the latest in 2022.

Article 3

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

Article 4

This decision is addressed to the Italian Republic.

Done at Brussels, 4 December 2020.

For the Commission
Margrethe VESTAGER
Member of the Commission
