



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Ninth Chamber)

15 March 2018*

(State aid — Conditions of use of the Puerto Las Nieves port infrastructure by a shipping company — Exclusive use of infrastructures financed by public funds, without a concession contract — Partial exoneration of payment of port dues — Complaint lodged by a competitor — Decision finding no State aid at the end of the preliminary investigation procedure — Serious difficulties in the examination of the measures concerned — Developments in the situation during the administrative procedure — Concept of advantage granted by means of State resources — Errors of assessment of the facts and errors of law — Decision of a national court suspending the effects of a tendering procedure — Requirement of diligent and impartial examination of the complaint)

In Case T-108/16,

Naviera Armas, SA, established in Las Palmas de Gran Canaria (Spain), represented by J. L. Buendía Sierra and Á. Givaja Sanz, lawyers,

applicant,

v

European Commission, represented by A. Bouchagiar, G. Luengo and S. Noë, acting as Agents,

defendant,

supported by

Fred Olsen, SA, established in Santa Cruz de Tenerife (Spain), represented by F. Marín Riaño, lawyer,

intervener,

APPLICATION under Article 263 TFEU for annulment of Commission Decision C(2015) 8655 final of 8 December 2015 concerning State aid SA.36628 (2015/NN) (ex 2013/CP) — Spain — Fred Olsen,

THE GENERAL COURT (Ninth Chamber),

composed of S. Gervasoni, President, L. Madise and R. da Silva Passos (Rapporteur), Judges,

Registrar: J. Palacio González, Principal Administrator,

having regard to the written part of the procedure and further to the hearing on 21 September 2017,

gives the following

* Language of the case: Spanish.

Judgment

Background to the dispute

- 1 The applicant, Naviera Armas, SA, is a shipping company established in the Canary Islands (Spain). It operates commercial ferry routes for the transport of passengers and freight linking the main islands of the archipelago, the archipelago with continental Spain and continental Spain with Morocco. In particular for the present purposes, the applicant operates a ferry route linking the port of Las Palmas de Gran Canaria (Spain) with that of Santa Cruz de Tenerife (Spain).
- 2 As Gran Canaria and Tenerife are the most populated of the Canary Islands, commercial maritime traffic between the two accounts for a substantial portion of the turnover of the shipping companies active in the Canary Islands.

Commercial maritime transport out of Puerto de Las Nieves (Gran Canaria)

- 3 Puerto Las Nieves (Spain) ('Puerto de Las Nieves') is a port situated on the northwest coast of Gran Canaria, across from Tenerife. Previously a fishing port, it was adapted for commercial traffic in the mid-1990s. Since the end of the 1990s, its infrastructure has allowed for docking of fast-ferries.
- 4 The shipping company Fred Olsen, SA, which is one of the applicant's principal competitors, was, in November 1993, the first to apply for authorisation to establish a regular commercial transport link for passengers and freight between the ports of Puerto de Las Nieves and Santa Cruz de Tenerife.
- 5 By decision of 21 December 1994, the Spanish Ministry of Public Works, Transport and the Environment granted an exclusive right to Fred Olsen to operate a cabotage route between those two ports. That authorisation was granted on the basis of the principle prior in tempore, potior in jure.
- 6 Since that time, Fred Olsen has been the sole shipping company operating a route for the commercial transport of passengers and freight between the ports of Puerto de Las Nieves and Santa Cruz de Tenerife. Since 1999, that route has been covered by two fast-ferries that meet halfway through the crossing, with each vessel leaving its port of departure at the same time.
- 7 Fred Olsen's use of the port infrastructure at Puerto de Las Nieves is subject to the payment of several sets of dues provided for by Article 115a of decreto legislativo 1/1994 por el que se aprueba el texto refundido de las disposiciones legales vigentes en materia de tasas y precios públicos de la Comunidad Autónoma de Canarias (Legislative Decree 1/1994 approving the reform on the legal provisions in force on taxes and public prices of the Autonomous Community of the Canary Islands) of 29 July 1994 (BOC No 98 of 10 August 1994, p. 5603). Those dues pertain inter alia to the entry and sojourn of vessels in the port ('the T-1 port dues'), docking ('the T-2 port dues'), passengers ('the T-3 port dues'), freight ('the T-4 port dues') and storage services, premises and buildings ('the T-9 port dues').
- 8 On a number of occasions since 1994, the applicant has applied several times to the Directorate-General for Ports of the Canary Islands (*Dirección General de Puertos* — 'the DGPC') for permission to dock at Puerto de Las Nieves, beginning with conventional ferries and, since the request submitted on 3 July 2013, with a fast-ferry. Until completion of the extension works on the Puerto de Las Nieves port infrastructure in 2014, the DGPC refused each of those requests. Those decisions were, in essence, based on the limited docking capacity at Puerto de Las Nieves and the need to ensure safety of vessel manoeuvres upon entry and within the port.
- 9 The same reasons were given by DGPC for refusing the request submitted in 2004 by another shipping company (Trasmediterránea) for permission to dock at Puerto de Las Nieves using a fast-ferry.

Administrative procedure and developments in the situation during that procedure

- 10 On 26 April 2013, the applicant lodged a complaint with the European Commission alleging, inter alia, that, through various measures relating to Puerto de Las Nieves, the Spanish authorities had granted unlawful State aid to Fred Olsen ('the complaint').
- 11 According to the complaint, that aid resulted from, firstly, the DGPC's decision to grant Fred Olsen the exclusive right to develop commercial maritime transport activities out of Puerto de Las Nieves without having held an open, transparent and non-discriminatory public tendering procedure; secondly, a partial exoneration for Fred Olsen from the payment of certain port charges, being the T-2 and T-9 port dues; and, thirdly, the financing through public funds of infrastructure built for the exclusive use of Fred Olsen in Puerto de las Nieves.
- 12 A non-confidential version of the complaint was sent to the Spanish authorities, who submitted their observations on 4 July 2013. On 20 August 2013 the Spanish authorities sent the Commission additional observations in response to a request for information from the Commission.
- 13 On 22 October 2013, the Commission sent the applicant a letter in which it set out a preliminary assessment stating that the measures in question did not prima facie qualify as State aid within the meaning of Article 107(1) TFEU. The letter addressed to the applicant gave the impression that the Spanish authorities had, on the one hand, provided evidence of proper payment of port dues by Fred Olsen and, on the other, produced a technical report demonstrating the limited capacity at Puerto de Las Nieves. That letter also referred to the Spanish authorities' intention to expand the port infrastructure.
- 14 By letter of 13 December 2013, the applicant challenged that preliminary assessment and underscored the need for the Commission to open a formal investigation procedure under Article 108(2) TFEU. On 18 February 2014, those comments were forwarded by the Commission to the Spanish authorities, who replied on 18 March 2014.
- 15 In October 2014, the Commission learned through the press that a tendering procedure had been organised with a view to granting access to the Puerto de Las Nieves port infrastructure for the purposes of commercial maritime transport. Acting on its own initiative, Fred Olsen submitted observations to the Commission, following which the Commission, by letter of 9 December 2014, requested the Spanish authorities to provide it with certain information and to keep it informed regularly of developments in that tendering procedure. The Spanish authorities replied to that letter on 16 January 2015 and subsequently kept the Commission informed through letters between February and October 2015. Fred Olsen also informed the Commission of developments in the tendering procedure on two occasions in the course of 2015.
- 16 According to the information provided to the Commission, the tendering procedure in question had been published by the DGPC on 14 October 2014, with a view to awarding two batches relating to time slots for commercial traffic at Puerto de Las Nieves. That tendering procedure followed expansion works at the port in 2014 carried out in order to enable two fast-ferries to dock there at the same time. On 24 November 2014, the Board of Directors of DGPC rejected the action brought by Fred Olsen challenging that tendering procedure. By decision of 3 February 2015, it awarded the first batch to Fred Olsen and the second to the applicant, the only two companies to have submitted tenders.
- 17 Fred Olsen challenged the outcome of that tendering procedure before the Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo, Sección Primera de Santa Cruz de Tenerife (High Court of the Canary Islands, Administrative Division, First Section, Santa Cruz de Tenerife, Spain), on the grounds that it infringed the rules on public procurement. In parallel with its

action on the substance, Fred Olsen sought judicial suspension of the tendering procedure. The suspension was granted by order of 27 February 2015 ('the suspension order of 27 February 2015'), upheld by order of the Tribunal Supremo (Supreme Court, Spain) of 7 July 2016.

- 18 By letter of 6 October 2015, the applicant requested the Commission to act within the meaning of Article 265 TFEU. On 28 October 2015, the Commission sent the Spanish authorities a final request for information, to which they replied on 23 November 2015.

The contested decision

- 19 On 8 December 2015, the Commission adopted Decision C(2015) 8655 final concerning State aid SA.36628 (2015/NN) (ex 2013/CP) — Spain — Fred Olsen ('the contested decision').
- 20 In recital 42 of the contested decision, the Commission considered that it was appropriate to begin by examining together the first and third parts of the complaint, as both in essence criticised the advantage accruing to Fred Olsen through its exclusive use of the port infrastructure at Puerto de Las Nieves without any public, transparent and non-discriminatory tendering procedure.
- 21 In that regard the Commission based itself on four grounds, going on to find, in recital 62 of the contested decision, that that exclusive use had not involved a grant of any State aid.
- 22 Firstly, in recital 43 of the contested decision, the Commission observed that both the initial development of Puerto de Las Nieves in order to enable commercial transport and its adaptation in order to be able to accommodate fast-ferries preceded the delivery of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290). The Commission inferred therefrom that the competent authorities could legitimately consider, at the time, that the public financing of the Puerto de Las Nieves port infrastructure did not constitute State aid and accordingly did not need to be notified to the Commission.
- 23 Secondly, in recital 44 of the contested decision, the Commission stated, in essence, that the port infrastructure allowing for commercial transport out of Puerto de Las Nieves had not initially been planned or developed specifically for the benefit of Fred Olsen or any other shipping company.
- 24 Thirdly, the Commission observed, in recital 45 of the contested decision, that the applicant had not alleged that the level of port dues payable for the use of the Puerto de Las Nieves port infrastructure by Fred Olsen involved a grant of State aid. The Commission inferred therefrom that that part of the complaint did not identify any advantage deriving from State resources and that nor could such an advantage result from the mere fact that Fred Olsen was de facto the sole user of the Puerto de Las Nieves port infrastructure.
- 25 Fourthly, in recitals 46 to 61 of the contested decision, the Commission considered whether the situation criticised in the complaint was consistent with its decision-making practice according to which a user of port infrastructure financed through public funds does not receive State aid where, first, the operator of the infrastructure charges that user fees comparable to those charged at other comparable ports and, second, the access to that infrastructure is open and non-discriminatory.
- 26 As regards the first condition, the Commission found that it was met in the present case, in the light of the assurances given by the Kingdom of Spain and not disputed by the applicant, to the effect that the DGPC charged the same port dues at all ports coming within its competence throughout the Canary Islands.

- 27 As regards the second condition, the Commission distinguished between the period prior to 3 July 2013 and the period after that date, when the applicant formally expressed for the first time its interest in operating commercial maritime transport with fast-ferries out of Puerto de Las Nieves.
- 28 As regards the period before 3 July 2013, the Commission found in essence that, since no shipping company had expressed an interest in operating out of that port using fast-ferries, it was permissible to consider that the Spanish authorities had not adopted any measure reserving exclusive use of the port for Fred Olsen or discriminating in any way against other potential users. It emphasised in that regard that the requests for access to the Puerto de Las Nieves port infrastructure put forward previously by Trasmediterránea and the applicant concerned conventional ferries and that the Spanish authorities had established that allowing access to the Puerto de Las Nieves port infrastructure for fast-ferries only was justified on grounds of safety.
- 29 As regards the period after 3 July 2013, the Commission first of all recognised that the DGPC was not in a position to grant the applicant's request for access to the Puerto de Las Nieves port infrastructure for 1 September 2013, due to the short notice. It considered however that, as manager of the Puerto de Las Nieves port infrastructure, the DGPC was bound, as from the time the request was made, to undertake the necessary steps to ensure access to that infrastructure on a non-discriminatory basis for any potential user operating with fast-ferries.
- 30 The Commission further found that, given the tendering procedure launched after the enlargement of the Puerto de Las Nieves port infrastructure in 2014, the DGPC had satisfied that obligation within a reasonable time following the applicant's request for access of 3 July 2013. It stated in that regard in recital 59 of the contested decision that the award of two batches relating to time slots, together with an increase in the capacity to accommodate vehicles on the quay at Puerto de Las Nieves was preferable to a reduction in frequency of loading and unloading by Fred Olsen vessels, given that, firstly, that company was legitimately entitled to expect its conditions of use of the port to be maintained and, secondly, such a reduction would have been of only limited benefit for the competition.
- 31 In recitals 60 to 62 of the contested decision, the Commission concluded that, given that the fees charged for the use of the Puerto de Las Nieves port infrastructure were the same as those charged in comparable ports and that, furthermore, the status quo resulting from the suspension order of 27 February 2015 was temporary, the DGPC had undertaken the necessary steps to ensure open and non-discriminatory access to that port and that accordingly Fred Olsen had not been granted any State aid. It pointed out, however, that that conclusion did not preclude the DGPC from continuing its efforts to enable a second company operating with fast-ferries to offer its transport services out of Puerto de Las Nieves as soon as possible.
- 32 As regards the second part, alleging the partial exoneration from having to pay certain port dues granted to Fred Olsen, the Commission noted, in recital 63 of the contested decision, that the Spanish authorities had confirmed that Fred Olsen had been invoiced all applicable port dues and that they had also demonstrated that Fred Olsen had, at least since 2005, paid all invoices issued to it.
- 33 In recital 66 of the contested decision, the Commission, after restating in essence that it was not its role to decide on how port dues were to be applied, found that it had not been established that Fred Olsen had drawn any advantage whatsoever from the T-9 port dues given that, according to the explanations provided by the Spanish authorities, those dues were calculated in the same manner in all Canary Islands ports coming within the DGPC's competence.
- 34 The Commission also dismissed the line of argument to the effect that the T-2 port dues ought to have been charged to Fred Olsen for the use of mobile ramps for periods of 24 hours and not only for the period during which they were actually being used. It confirmed having received sufficient evidence from the Spanish authorities showing that the DGPC calculated the T-2 port dues in the same way in

all Canary Islands ports coming within its competence. Since it had not been established that Fred Olsen had derived any advantage whatsoever therefrom, the Commission found, in recital 70 of the contested decision, that it was not necessary in the present case to determine whether the other criteria laid down in Article 107(1) TFEU for categorising a measure as State aid were met.

35 In the light of those factors, the Commission went on to conclude, in recital 71 of the contested decision, that the measures in question did not constitute State aid.

Procedure and forms of order sought

36 By application lodged at the Registry of the General Court on 17 March 2016, the applicant brought the present action.

37 By document lodged at the Court's Registry on 16 June 2016, Fred Olsen sought leave to intervene in the present proceedings in support of the Commission.

38 By order of 7 September 2016, the President of the Second Chamber of the Court granted Fred Olsen leave to intervene.

39 The intervener lodged its statement in intervention on 31 October 2016. On 19 December 2016, the applicant lodged its observations on that statement; the Commission informed the Court on 17 November 2016 that it had no observations on that statement.

40 As the composition of the chamber had been altered, the present case was assigned to the Ninth Chamber of the General Court, in which a new Judge-Rapporteur was designated.

41 By way of measure of organisation of the procedure adopted on the basis of Article 90 of its Rules of Procedure, the Court put written questions to the parties for them to answer at the hearing.

42 The applicant claims that the Court should:

- declare the grounds of annulment put forward in the application admissible and well founded and, consequently, annul the contested decision;
- order the Commission to pay the costs.

43 The Commission and the intervener contend that the Court should:

- dismiss the action as unfounded;
- order the applicant to pay the costs.

Law

44 The applicant puts forward a single plea in law in support of its action, alleging failure by the Commission to open the formal investigation procedure provided for in Article 108(2) TFEU, despite the serious difficulties arising in the assessment of the measures criticised in the complaint. That sole plea is based on three series of arguments relating to the duration of the preliminary investigation procedure and the numerous exchanges that took place during that procedure between the Commission and the Kingdom of Spain, manifest errors of assessment of the facts and, lastly, errors of law and an insufficient statement of reasons.

45 After initially reviewing the relevant case-law applicable to the present dispute, it is appropriate to begin by examining the arguments put forward by the applicant in support of its action for annulment referring to serious difficulties arising during the preliminary investigation procedure itself and, secondly, the arguments relating to the content of the contested decision.

Preliminary observations

- 46 According to settled case-law, where the Commission is unable to reach the firm view, following an initial examination in the context of the procedure under Article 108(3) TFEU, that a State aid measure either is not ‘aid’ within the meaning of Article 107(1) TFEU or, if classified as aid, is compatible with the Treaty, or where that procedure has not enabled the Commission to overcome all the difficulties involved in assessing the compatibility of the measure under consideration, the Commission is under a duty to initiate the procedure under Article 108(2) TFEU, without having any discretion in that regard (see judgment of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 113 and the case-law cited; see also, to that effect, judgment of 10 May 2005, *Italy v Commission*, C-400/99, EU:C:2005:275, paragraph 48).
- 47 That obligation is expressly confirmed by the combined provisions of Article 4(4) and Article 13(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) (judgments of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 113, and of 14 September 2016, *Trajektna luka Split v Commission*, T-57/15, not published, EU:T:2016:470, paragraph 59; see also, to that effect, judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission*, T-95/03, EU:T:2006:385, paragraph 134 and the case-law cited), reproduced in essence in Article 4(4) and in Article 15(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), which entered into force on 14 October 2015 and accordingly was applicable on the date on which the contested decision was adopted.
- 48 Furthermore, the concept of serious difficulties, the presence of which obliges the Commission to open the formal investigation procedure, is objective in nature. That investigation must be conducted objectively, focusing on both the circumstances surrounding the adoption of the act being challenged and the assessments on which the Commission based itself, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the internal market (see, to that effect, judgments of 2 April 2009, *Bouygues and Bouygues Télécom v Commission*, C-431/07 P, EU:C:2009:223, paragraph 63; of 18 November 2009, *Scheucher — Fleisch and Others v Commission*, T-375/04, EU:T:2009:445, paragraph 74 and the case-law cited; and of 28 March 2012, *Ryanair v Commission*, T-123/09, EU:T:2012:164, paragraph 77 and the case-law cited).
- 49 It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment (judgments of 27 September 2011, *3F v Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 55, and of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 49 (not published)). A comprehensive judicial review is especially necessary where, as in the present case, the applicant criticises the Commission’s assessment of the very categorisation of the measures in question as State aid, as that concept, as defined in the Treaty, is legal in nature and must be interpreted on the basis of objective factors (judgments of 22 December 2008, *British Aggregates v Commission*, C-487/06 P, EU:C:2008:757, paragraph 111, and of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 47 (not published)).

- 50 It is also apparent from the case-law that if the examination carried out by the Commission during the preliminary investigation procedure is insufficient or incomplete, this constitutes evidence of the existence of serious difficulties (see judgment of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 50 (not published) and the case-law cited).
- 51 The applicant bears the burden of proving the existence of serious difficulties, which it can do on the basis of a consistent body of evidence of both the circumstances and length of the preliminary investigation procedure and the content of the contested decision (judgments of 3 March 2010, *Bundesverband deutscher Banken v Commission*, T-36/06, EU:T:2010:61, paragraph 127, and of 16 September 2013, *Colt Télécommunications France v Commission*, T-79/10, not published, EU:T:2013:463, paragraph 37; see also, to that effect, judgment of 15 March 2001, *Prayon-Rupel v Commission*, T-73/98, EU:T:2001:94, paragraph 49).

The arguments relating to the preliminary investigation procedure

- 52 The applicant begins by referring to the lengthy preliminary investigation procedure and highly frequent exchanges between the Commission and the Kingdom of Spain during that procedure, in order to demonstrate that the examination of the measures in question gave rise to serious difficulties.
- 53 First, the over two years and eight months between the lodging of the complaint and the adoption of the contested decision is excessive, having regard to the maximum of two months allowed for the preliminary investigation procedure laid down in Article 4(5) of Regulation No 659/1999 and, since the repeal of that regulation, Article 4(5) of Regulation 2015/1589. Such a long period of time is indicative of the complexity of the case, especially since the Commission adopted the contested decision only after having been put on formal notice by the applicant.
- 54 Second, the applicant submits, in essence, that the numerous exchanges that took place between the Commission and the Kingdom of Spain, described in the contested decision, far exceeded what should be included in a preliminary investigation in a State aid matter. Such a frequency of exchanges, which can be explained by the lack of cooperation by the Kingdom of Spain, is incomprehensible in the absence of serious difficulties in the examination of the complaint. The difficulties encountered by the Commission in the course of the preliminary investigation procedure are corroborated by the fact that it learned through the press, after the complaint had been lodged, that a tendering procedure was being organised and that, moreover, its finding in the contested decision of there being no State aid was contingent on substantial change to the situation in question and the judicial suspension of the tendering procedure being temporary in nature.
- 55 The Commission itself has recognised in the context of the present proceedings that it had deliberately delayed the adoption of the contested decision pending the outcome of that tendering procedure. This testifies to the fact that, in the Commission's view, opening up access to the Puerto de Las Nieves port infrastructure was essential to the examination of the measures at issue and that, contrary to the Commission's current contentions, the alleged absence of any advantage granted by means of State resources was not considered decisive.
- 56 The Commission's attempt to justify the length of the preliminary investigation procedure using the number of arguments put forward by the applicant, based on a number of provisions of the FEU Treaty, is without foundation. Not only did the Commission decide immediately to deal separately with the part of the complaint alleging infringement of Article 106 TFEU, read in conjunction with Article 102 TFEU, and the part alleging infringement of Article 107(1) TFEU, which is the subject matter of the contested decision, it also decided on 19 July 2013 to take no action on the first part of the complaint, so that it in no way delayed the examination of the measures in question.

- 57 The applicant adds that it expressed its views on the analysis of the criticised measures only once, when it submitted its observations on the Commission's preliminary conclusions, and that, consequently, the delay that arose during the preliminary investigation procedure cannot in any way be attributed to it.
- 58 The Commission, like the intervener, contends that neither the numerous exchanges with the Member State concerned during the preliminary investigation procedure nor the lengthy duration of that procedure necessarily reveal the existence of serious difficulties in the analysis of the measures at issue. The lengthy duration of the preliminary investigation procedure can be explained by the Commission's workload resulting, *inter alia*, from other complaints or repeated requests for information made to the Member State concerned or changes in circumstances.
- 59 In the Commission's submission, firstly, the assessment of the length of the preliminary investigation procedure should take account of the fact that it communicated its preliminary conclusions to the applicant on 22 October 2013 and that they subsequently remained virtually unchanged. Secondly, the situation was in a state of evolution throughout the preliminary investigation procedure, starting from the time of the applicant's request for access to the Puerto de Las Nieves port infrastructure filed on 3 July 2013, and the contested decision was adopted only a few months after the suspension order of 27 February 2015. Thirdly, the length of the procedure can be explained *inter alia* by the multiple bases on which the complaint lodged by the applicant was based, which had to be examined by different units of the Commission. Fourthly, the applicant's numerous reactions in the course of the preliminary investigation procedure multiplied the number of exchanges needed with the Spanish authorities, so that clarification could be obtained about the measures at issue. The high number of the exchanges with the Spanish authorities is principally due to the fact that the Commission, after having learned that a tendering procedure was being organised, took the view that knowledge of the outcome of that procedure would enable it to adopt a more specific and useful decision on the measures in question. The Commission points out however, in essence, that neither that change in circumstances nor the fact that the outcome of the tendering procedure was judicially suspended was liable to influence the finding that the measures in question did not constitute State aid.
- 60 In that regard, it should be noted first of all that, where the disputed State measures have not been notified by the Member State concerned, the Commission is not required to carry out an initial investigation of those measures within a specified period. However, in so far as the Commission has exclusive jurisdiction to assess the compatibility of a State aid measure with the internal market, it is required, in the interests of the sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of complaints reporting the grant of aid incompatible with the internal market. It follows, *inter alia*, that the Commission cannot prolong indefinitely the preliminary investigation of State measures which have been the subject matter of a complaint once it has agreed to initiate such an investigation by requesting information from the Member State concerned, as it has done in the present case (judgments of 10 May 2006, *Air One v Commission*, T-395/04, EU:T:2006:123, paragraph 61; of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission*, T-95/03, EU:T:2006:385, paragraph 121; and of 9 September 2009, *Diputación Foral de Álava and Others v Commission*, T-30/01 to T-32/01 and T-86/02 to T-88/02, EU:T:2009:314, paragraph 260). Indeed, the sole purpose of a preliminary investigation is to allow the Commission to form an initial opinion on the classification of the measures submitted for assessment and their compatibility with the internal market (see judgment of 25 November 2014, *Ryanair v Commission*, T-512/11, not published, EU:T:2014:989, paragraph 68 and the case-law cited).
- 61 Whether or not the duration of a preliminary investigation procedure is reasonable must be determined in relation to the particular circumstances of the case and, in particular, its context, the various procedural stages to be gone through by the Commission, the complexity of the case and its importance for the various parties involved (see judgment of 20 September 2011, *Regione autonoma della Sardegna and Others v Commission*, T-394/08, T-408/08, T-453/08 and T-454/08,

EU:T:2011:493, paragraph 99 and the case-law cited; see also, to that effect, judgments of 27 September 2011, *3F v Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 58 and the case-law cited, and of 16 October 2014, *Portovesme v Commission*, T-291/11, EU:T:2014:896, paragraph 72 and the case-law cited).

- 62 In the present case, the Commission received the applicant's complaint on 26 April 2013 and communicated its preliminary conclusions to the applicant on 22 October of the same year. In so doing, the Commission complied with the rule laid down in paragraph 48 of the Code of Best Practice for the conduct of State aid control procedures (OJ 2009 C 136, p. 13) which provides that 'within 12 months, the Commission will, ... in principle, endeavour to ... send an initial administrative letter to the complainant setting out its preliminary views on non-priority cases' (see, to that effect, judgment of 14 September 2016, *Trajektna luka Split v Commission*, T-57/15, not published, EU:T:2016:470, paragraph 67).
- 63 The contested decision, however, was adopted on 8 December 2015 more than 31 months after receipt of the complaint and over 2 years after the Commission communicated its preliminary conclusions to the applicant.
- 64 Even allowing for the fact that the Commission is free to give different degrees of priority to the complaints lodged with it (see judgment of 4 July 2007, *Bouygues and Bouygues Télécom v Commission*, T-475/04, EU:T:2007:196, paragraph 158 and the case-law cited), the time periods referred to in paragraph 63 above considerably exceeded what could generally be said to be required for an initial examination of the measures criticised in the complaint. In that regard, it has been held that that fact may, along with other factors, justify the conclusion that the Commission encountered serious difficulties of assessment necessitating the initiation of the procedure under Article 108(2) TFEU (see, to that effect, judgments of 10 May 2000, *SIC v Commission*, T-46/97, EU:T:2000:123, paragraph 102; of 27 September 2011, *3F v Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 72; and of 14 September 2016, *Trajektna luka Split v Commission*, T-57/15, not published, EU:T:2016:470, paragraph 62).
- 65 It is appropriate to consider whether the particularly long duration of the preliminary investigation procedure in the present case may have been due in part to objective circumstances unrelated to any serious difficulties encountered in the examination of the measures in question, as the Commission maintains that it was.
- 66 As regards, first of all, the fact that in the complaint the applicant alleged infringement of not only Article 107 TFEU but also of Articles 102 and 106 TFEU, it must be emphasised that the decision to take no action on this last part of the complaint was taken on 19 July 2013. Thus, as rightly pointed out by the applicant, the Commission's treatment of that part of the complaint alleging infringement of Articles 102 and 106 TFEU accordingly did not cause any significant delay in the preliminary investigation of the measures criticised in the complaint as constituting State aid.
- 67 Next, as regards the developments in the situation during the administrative procedure, it should be noted that the applicant did file a request for permission to dock at Puerto de Las Nieves with the DGPC on 3 July 2013, a little more than two months after the complaint was filed with the Commission. As evidenced by recitals 23 to 27 of the contested decision, that request not only gave rise to a refusal decision by the DGPC, but also led the DGPC to consider authorising a second shipping company to operate commercial transport services out of Puerto de Las Nieves and, to that end, undertake works to expand and develop the port and organise a tendering procedure. Objective facts such as these were undeniably liable to lead to a change in the conditions under which the intervener had hitherto been authorised to use the Puerto de Las Nieves port infrastructure. As those conditions were precisely the subject matter of that part of the complaint criticising the grant of State aid to the intervener, the abovementioned developments in the situation amounted to an objective set of facts warranting an extension of the time needed to deal with the complaint.

- 68 The same holds true for the intervener's action challenging the tendering procedure, brought before the Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo, Sección Primera de Santa Cruz de Tenerife (High Court of the Canary Islands, Administrative Division, First Section, Santa Cruz de Tenerife, Spain), and the suspension order of 27 February 2015, since those facts, which came into being after the complaint was filed, had the effect of creating a situation of uncertainty as to whether or not the conditions of the intervener's use of the Puerto de Las Nieves port infrastructure, criticised in the complaint, would be maintained.
- 69 As regards, lastly, the multiple exchanges between the Commission and the Spanish authorities, it must be remembered that the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary investigation procedure and that, in that context, the Commission may have asked for additional information about the measures submitted for its review, cannot in itself be regarded as evidence that the Commission encountered serious difficulties of assessment (see judgment of 27 September 2011, *3F v Commission*, T-30/03 RENV, EU:T:2011:534, paragraph 71 and the case-law cited).
- 70 In that regard, it should be noted that the applicant put forward a detailed challenge of the preliminary assessment in the letter sent to it by the Commission on 22 October 2013, which justified the Commission's seeking to obtain further information from the Spanish authorities.
- 71 Moreover, the developments in the situation in the present case, examined in paragraphs 67 and 68 above, also warranted fresh exchanges with the Kingdom of Spain concerning the conditions of access to the Puerto de Las Nieves port infrastructure for the purposes of commercial transport and, consequently, extending the duration of the preliminary investigation of those conditions, especially since, in the present case, the intervener lodged observations with the Commission on its own initiative after the Commission had sought explanations from the Spanish authorities about the tendering procedure and subsequently, in 2015, twice informed the Commission of developments in that same tendering procedure (see paragraph 15 above).
- 72 It follows from the foregoing that both the procedure as it happened and developments in the situation as well as the resulting additional exchanges between the Commission and the Kingdom of Spain, on the one hand, and between the Commission and the intervener, on the other, are objective facts that warranted extending the duration of the preliminary investigation into the measures identified in the complaint as State aid.
- 73 Consequently, the duration of the preliminary investigation procedure does not in itself reveal serious difficulties that required the Commission to open the formal investigation procedure provided for in Article 108(2) TFEU.
- 74 It is therefore appropriate to examine the other arguments relied on by the applicant in support of its single plea in law, aimed at establishing that the very content of the contested decision, including that part of the decision where developments in the situation subsequent to the lodging of the complaint were examined, provides indicia showing that the examination of the measures at issue gave rise to serious difficulties which ought to have led the Commission to open the formal investigation procedure.

Arguments relating to the content of the contested decision

- 75 It is appropriate to consider together the second and third parts of the single plea in law, by which the applicant, after setting out preliminary observations, argues that the contested decision is vitiated by various manifest errors of assessment of the facts and by errors of law, whilst nevertheless distinguishing between that part of the contested decision focusing on the examination of the conditions of the intervener's exclusive use of the Puerto de Las Nieves port infrastructure (first and

third parts of the complaint) and the part focusing on the examination of the conditions of application of the T-9 port dues to the intervener by virtue of its occupation of the Puerto de Las Nieves port infrastructure (second part of the complaint).

Preliminary observations

- 76 Where, as in the present case, the action is aimed at challenging the merits of a decision finding that there is no State aid at the end of the preliminary investigation procedure, it is for the Court, in accordance with the case-law referred to in paragraphs 48 to 51 above, to assess the indicia found in the content of the contested decision in order to determine whether there are any serious difficulties (see, to that effect, judgment of 7 November 2012, *CBI v Commission*, T-137/10, EU:T:2012:584, paragraph 66 and the case-law cited).
- 77 In the present case, it should first of all be noted that there is nothing in the case file suggesting that the commercial maritime transport services provided by the intervener out of Puerto de Las Nieves include the performance of services of general economic interest. Consequently, the examination of the measures in question cannot be examined by reference to the case-law according to which where a State measure must be regarded as compensation for the services provided by the recipient undertakings in order to discharge public service obligations, so that those undertakings do not enjoy a real financial advantage and the measure thus does not have the effect of putting them in a more favourable competitive position than the undertakings competing with them, such a measure is not caught by Article 107(1) TFEU (judgments of 24 July 2003, *Altmark Trans and Regierungspräsidium Magdeburg*, C-280/00, EU:C:2003:415, paragraph 87, and of 6 April 2017, *Regione autonoma della Sardegna v Commission*, T-219/14, EU:T:2017:266, paragraph 91).
- 78 Next, it should be noted that the intervener's activity in Puerto de Las Nieves that was the subject matter of the complaint which has led to the present proceedings consists in using a port infrastructure in public ownership for commercial purposes. The intervener is therefore indeed an undertaking pursuing an economic activity subject to Article 107(1) TFEU, defined as any activity consisting in offering goods or services on a given market (see judgment of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 22 and the case-law cited).
- 79 Lastly, although no evidence has been adduced before the Court leading to the conclusion that at no time whatsoever since it has been carrying on maritime transport activities out of Puerto de Las Nieves has the intervener enjoyed a concession or any other exclusive right to use the Puerto de Las Nieves port infrastructure for the purposes of commercial transport, it should be noted that, at the time of adoption of the contested decision, the applicant had been the only one since 1994 able to use that infrastructure for that purpose, as requests for docking permission filed by other companies, including the applicant, had all been refused by the DGPC until a tendering procedure had been organised in 2014 and the outcome of that procedure had been suspended by the order of 27 February 2015. This finding, which concerns the use of the Puerto de Las Nieves port infrastructure specifically for the purposes of commercial transport of passengers and freight, is not called into question by the Commission's argument, reiterated at the hearing, to the effect that at no time has the intervener enjoyed exclusive use of the port, which also accommodates fishing and leisure activities.

Examination of the conditions of the intervener's exclusive use of the Puerto de Las Nieves port infrastructure (first and third parts of the complaint)

- 80 The applicant criticises each of the four grounds forming the basis for the finding in the contested decision that the intervener's exclusive use of the Puerto de Las Nieves port infrastructure does not constitute State aid (see paragraphs 21 to 31 above). It is therefore appropriate to examine in turn

each of the parts directed at each of the those grounds, in order to determine whether they shed light on serious difficulties that arose from the examination of the conditions of the intervener's use of the Puerto de Las Nieves port infrastructure.

– *The parts directed at the first ground, relating to the judgment of 12 December 2000, Aéroports de Paris v Commission (T-128/98)*

81 As regards the first ground, in recital 43 of the contested decision, the applicant submits that the Commission erred in finding that the Canary Islands authorities were required to consider the operation of port infrastructures as an economic activity only as from the date of delivery of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290). The EU Court's interpretation of the scope of Article 107(1) TFEU in that judgment was merely of declaratory value and is, moreover, consistent with previous case-law, to the effect that public financing of economic activities is liable to constitute State aid. Consequently, the mere fact that the adaptation of the Puerto de Las Nieves port infrastructure for commercial traffic was carried out before delivery of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), did not relieve the competent authorities of their duty to ensure, at that time, open and non-discriminatory access to the port, in order to prevent its conditions of use from being held to be a grant of State aid. The Commission's reasoning does not in any event provide justification for granting aid to the intervener from the time of delivery of that judgment; it also lacks relevance, since it concerns the classification of infrastructure management as an economic activity and not the use of that infrastructure for commercial purposes, as in the present case.

82 The Commission submits that recital 43 of the contested decision merely noted the age of the Puerto de Las Nieves port infrastructure and its gradual adaptation for the pursuance of economic activities. A distinction must be drawn between the grant of an exclusive concession to a user and a situation, such as that at issue in the present case, where an operator uses only one infrastructure due to its limited capacity. That kind of use can in no way be equated with the grant of an exclusive right. Since the creation and development of the Puerto de Las Nieves port infrastructure preceded delivery of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), the mere fact that the Spanish authorities did not notify those measures relating to that infrastructure did not give rise to any serious difficulty in the course of the preliminary investigation procedure.

83 In that regard, without its even being necessary to rule on the merits of the temporal distinction drawn by the Commission in recital 43 of the contested decision by reference to delivery of the judgment of 12 December 2000, *Aéroports de Paris v Commission* (T-128/98, EU:T:2000:290), suffice it to observe, as rightly pointed out by the applicant, that in the present case the recipient of the measures criticised is not the infrastructure manager, as was the case in the aforementioned judgment, but rather a user of that infrastructure. Consequently, the considerations set out by the Commission concerning that judgment in the contested decision did not preclude the measures at issue from being categorised as State aid and, therefore, do not dispel all possibilities of there being any serious difficulty in the examination of those measures.

– *The parts directed at the second ground, relating to the fact that the Puerto de Las Nieves port infrastructure was neither planned nor developed with a view to benefiting specifically the intervener or any other shipping company*

84 As regards the second ground, in recital 44 of the contested decision, the applicant in essence disputes the finding therein that the Puerto de Las Nieves port infrastructure was neither planned nor developed with a view to benefiting specifically the intervener or any other undertaking at the time of its construction. In so doing, the Commission disregarded the objective nature of the concept of State aid within the meaning of Article 107(1) TFEU. The only matter of consequence is the fact that the intervener benefits from a monopoly in using the port infrastructure in question and, therefore, an

obvious advantage over its competitors. In any event, the Canary Islands authorities' intention to favour the intervener is evident in the present case and is indicative of the existence of the aid of which it is the recipient. The case-law does not allow for the costs of public infrastructures benefiting an individual operator to be borne by the community. As to the principle *prior in tempore, potior in jure*, the applicant submits that it in no way justifies the grant of an exclusive right for the intervener to use the Puerto de Las Nieves port infrastructure. The lack of reference to that principle in the contested decision can be explained by the fact that it is manifestly incompatible with the basic principles of EU law governing State aid, as such a priority is rather an indication of there being a grant of State aid. In that regard, the applicant dismisses the Commission's analogy drawn with the protection offered under EU law to time slot interests legitimately acquired by airlines, as no comparable protection is provided for in the maritime transport sector.

- 85 The Commission submits that, in the light of the information available, there is nothing indicating that the Puerto de Las Nieves port infrastructure was developed in order to benefit the intervener specifically, as the intervener was simply the first to use the port for commercial purposes in 1994 until its maximum capacity was reached. The refusals of the requests filed by other operators can be explained in essence by considerations of safety and not by a wish to reserve the exclusive use of that infrastructure for the intervener. It is apparent from the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9, paragraph 45), that this aspect is relevant for ruling out categorisation as State aid when public infrastructures are made available to economic operators.
- 86 In that regard, it should be borne in mind that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects (judgments of 19 March 2013, *Bouygues and Bouygues Télécom v Commission and Others* and *Commission v France and Others*, C-399/10 P and C-401/10 P, EU:C:2013:175, paragraph 102, and of 30 June 2016, *Belgium v Commission*, C-270/15 P, EU:C:2016:489, paragraph 40). The concept of aid is objective, the test being whether a State measure confers an advantage on one or more particular undertakings (see judgments of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen v Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 180 and the case-law cited, and of 13 September 2010, *Greece and Others v Commission*, T-415/05, T-416/05 and T-423/05, EU:T:2010:386, paragraph 211 and the case-law cited).
- 87 An advantage may thus be granted contrary to Article 107(1) TFEU, even when it was not specifically instituted to benefit a particular undertaking or undertakings.
- 88 In the present case, it follows from the principles set out in paragraphs 86 and 87 above that, even if the finding, set out in recital 44 of the contested decision, to the effect that the Puerto de Las Nieves port infrastructure was not developed in order to benefit the intervener specifically nor awarded to it or any other undertaking whatsoever at the time of its construction were true, that finding does not rule out the possibility that the conditions under which that infrastructure was made available to the intervener for commercial use may have involved a grant of State aid to it.
- 89 That finding is not called into question by paragraph 45 of the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9), referred to in recital 44 of the contested decision and referred to by the Commission in its written pleadings. In the case that gave rise to that judgment, the referring court asked the Court of Justice, in essence, whether the practice of permitting Black Cabs to use bus lanes on public roads during the hours when traffic restrictions with respect to those lanes were operational, in the interests of establishing a safe and efficient transport system, while prohibiting minicabs from using those lanes, except for picking up and setting down their pre-booked passengers, involved a commitment of State resources and conferred on taxis a selective economic advantage for the purposes of Article 107(1) TFEU.

90 The Court of Justice observed, in paragraph 45 of the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9), that it was unequivocally stated in the file before the Court that the bus lanes in London (United Kingdom) were not constructed for the benefit of any specific undertaking or any particular category of undertakings, such as Black Cabs, or the suppliers of bus services, and were not allocated to them after their construction, but that they were constructed as part of the London road network and, primarily, with a view to facilitating public transportation by bus. However, in paragraphs 54 to 61 of the judgment of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9), the Court of Justice called on the court that had referred the questions to it for a preliminary ruling to ascertain whether a selective economic advantage was being conferred on Black Cabs by virtue of the free use of the bus lanes the use of which was prohibited for minicabs. Certain elements of the case file led the Court of Justice to consider that taxis and minicabs were in sufficiently different situations, inter alia in the light of the regulatory obligations imposed on Black Cabs, that the possibility of a selective economic advantage for them could be ruled out. In the present case, however, the applicant's situation and the intervener's situation do not entail such differences, so that the Commission was in any event required to consider whether aspects other than the fact that the Puerto de Las Nieves port infrastructure had not been planned or developed in order to benefit the intervener specifically was such as to rule out the possibility of there being State aid in its favour.

– *The parts directed at the third and fourth grounds, relating to the scope of the applicant's line of argument in the complaint and the criteria for identifying State aid granted to a user of a port infrastructure financed by means of public funds*

- 91 With regards to the third ground, set out in recital 45 of the contested decision, the applicant submits that, contrary to what is stated therein, even if the intervener has paid all fees lawfully owing, its exclusive use of the Puerto de Las Nieves port infrastructure in itself constitutes an advantage granted selectively by means of State resources. It refers to the case-law and the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ 2012 C 8, p. 4), in support of the position that the grant of exclusive rights in respect of State-owned property, without a transparent and non-discriminatory procedure being held, may entail a surrender of State resources and confer an advantage on its recipients. It further submits that, under the Spanish legislation, granting the intervener an exclusive right of use by virtue of a concession presupposed that it had paid fees. The economic value of the right to use the Puerto de Las Nieves port infrastructure, irrespective of the port dues, is evidenced by the fee amounts proposed by both the applicant and the intervener in their responses to the tendering procedure launched by the DGPC in 2014.
- 92 The contested decision is thus vitiated by errors, since the Commission failed to check that the port dues paid by the intervener covered the costs borne by the DGPC and allowed it a reasonable profit, taking into account the market value of the exclusive use of the infrastructure in question.
- 93 The applicant adds, in the reply, that the contested decision identifies a problem of access to the Puerto de Las Nieves port infrastructure for competitors of the intervener, which may be an indicator of there being State aid. Yet the Commission is attempting to rewrite that part of the contested decision by henceforth alleging that the fourth ground examined therein was incidental to the finding that the intervener's exclusive use of the Puerto de Las Nieves port infrastructure could not be analysed as an advantage deriving from State resources. The Commission's consistent decision-making practice shows, however, that in order to avoid an infringement of Article 107(1) TFEU, potential users of port infrastructures must have open and non-discriminatory access to those infrastructures and pay fees comparable to market rates for that access.
- 94 Moreover, contrary to what the Commission suggests, it is not for the complainant to demonstrate that all elements required for there to be State aid are present, as the Commission itself is required to ascertain whether or not the measures comply with Article 107(1) TFEU.

- 95 In any event, the applicant did demonstrate the commitment of State resources in the present case. Thus, firstly, it follows from the case-law that an exclusive concession of public infrastructures to an undertaking is liable to involve a surrender of State resources. Secondly, the intervener enjoyed the right of use of the Puerto de Las Nieves port infrastructure without having to pay fees. In the applicant's submission, a properly-conducted investigation would have enabled the Commission to realise that the grant of a concession through a tendering procedure, in principle required under Article 43 of Ley 14/2003 de Puertos de Canarias (Law No 14/2003 on the Canary Islands ports) of 8 April 2003 (BOC No 85 of 6 May 2003) would have entailed the payment of fees. This is confirmed by the specific technical conditions of the tendering procedure launched by the DGPC in July 2014. Thirdly and lastly, the Commission is incorrect in arguing that the port dues paid by the intervener had been fixed at the market rate on the sole ground that the DGPC applied port dues that were identical and calculated in the same manner in all ports coming within its competence. Although paragraph 227 of the Commission Notice on the notion of State aid as referred to in [Article 107(1) TFEU] (OJ 2016 C 262, p. 1) provides that the assessment on the basis of an operator acting in a market economy may be assessed in the light of the terms and conditions under which the use of comparable infrastructure is granted by comparable private operators in comparable situations, provided such a comparison is possible, in the contested decision the Commission did not examine the fees charged for infrastructures comparable to those of Puerto de Las Nieves or take as a reference the fees charged for the use of private ports. Nor did it carry out an analysis of the cost structure for the Puerto de Las Nieves port infrastructure, so that there was nothing indicating that the port dues paid by the intervener covered the operating expenses and depreciation costs of that infrastructure.
- 96 The Commission submits in essence that, irrespective of any errors of assessment of the facts criticised by the applicant, there is nothing warranting a finding that the intervener's exclusive use of the Puerto de Las Nieves port infrastructure involved its being granted an advantage deriving from State resources. The applicant did not allege in the complaint that the level of port dues owing for that use entailed a grant of State aid, with the result that that part of the complaint did not identify any advantage deriving from State resources. Nor can such an advantage ensue merely because *de facto* the intervener was the only shipping company using the Puerto de Las Nieves port infrastructure.
- 97 The Commission also refers in its written pleadings, first, to paragraphs 113 to 122 of the judgment of 22 January 2013, *Salzgitter v Commission* (T-308/00 RENV, EU:T:2013:30), and, second, to paragraph 137 of the judgment of 9 December 2015, *Greece and Ellinikos Chrysos v Commission* (T-233/11 and T-262/11, EU:T:2015:948), in order to justify its position that, since the applicant did not at any time during the administrative procedure allege that the fees paid by the intervener for the use of the Puerto de Las Nieves port infrastructure were fixed at a level involving State aid, it was not required to conduct such an examination of its own motion in the contested decision.
- 98 In that regard, it should first of all be noted that the passages in the judgments referred to by the Commission and in paragraph 97 above concerned a different issue than the one raised in the present dispute, which is the exchange of information between the Commission and the Member State concerned within a formal investigation procedure provided for in Article 108(2) TFEU and leading to a decision categorising certain advantages granted to an undertaking as State aid incompatible with the internal market.
- 99 On that point, it is settled case-law, of which the judgments referred to by the Commission form a part, that in cases where the formal investigation procedure provided for in Article 108(2) TFEU is opened, it is for the Member State and the potential recipient of the aid to put forward the arguments whereby they seek to show that the planned aid corresponds to the exceptions provided for under the Treaty, since the object of the formal investigation procedure is specifically to ensure that the Commission is fully informed of all the facts of the case (see judgment of 27 September 2012, *Wam Industriale v Commission*, T-303/10, not published, EU:T:2012:505, paragraph 118 and the case-law cited). Moreover, whilst Article 108(2) TFEU requires the Commission to seek comments from

interested parties before it reaches a decision, it does not prevent it from determining, in the absence of such comments, that certain aid is incompatible with the internal market. In particular, it cannot be complained that the Commission failed to take into account matters of fact or of law which could have been submitted to it during the administrative procedure but which were not, since the Commission is under no obligation to consider, of its own motion and on the basis of prediction, what information might have been submitted to it (see judgments of 27 September 2012, *Wam Industriale v Commission*, T-303/10, not published, EU:T:2012:505, paragraph 119 and the case-law cited, and of 28 January 2016, *Austria v Commission*, T-427/12, not published, EU:T:2016:41, paragraph 50 and the case-law cited).

100 That case-law, however, provides enlightenment only with respect to the conduct of the formal investigation procedure in cases involving the question of the compatibility of the aid measures and does not specify the scope of the examination the Commission must carry out during the preliminary investigation procedure in order to classify certain measures as State aid, in particular when it receives a complaint.

101 In that regard, it has been held that the Commission could, in certain circumstances, be required to investigate a complaint by going beyond merely examining the matters of fact and law brought to its knowledge by the complainant. The Commission is required, in the interests of sound administration of the fundamental rules of the Treaty relating to State aid, to conduct a diligent and impartial examination of the complaint which, contrary to the Commission's contentions, may make it necessary to examine elements that were not expressly put forward by the complainant (judgments of 2 April 1998, *Commission v Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 62, and of 17 March 2015, *Pollmeier Massivholz v Commission*, T-89/09, EU:T:2015:153, paragraph 106 (not published); see also, to that effect, judgment of 2 September 2010, *Commission v Scott*, C-290/07 P, EU:C:2010:480, paragraph 90).

102 Thus, it results from both the Commission's diligent and impartial examination of the complaints filed with it and from the scheme of Article 10(1) and (2) of Regulation No 659/1999, reproduced in essence in Article 12(1) and (2) of Regulation 2015/1589, that it is for the Commission, when it has received a complaint alleging infringement of Article 107(1) TFEU and identifying in an unequivocal and reasoned manner the measures giving rise to that infringement, to examine carefully whether those measures may be categorised as State aid, if necessary by seeking out the cooperation of the Member State concerned and taking into consideration elements that were not expressly put forward by the complainant. This is especially necessary where, as the applicant itself observed in essence in the complaint, a complainant does not have the powers of investigation conferred on the Commission by Article 108 TFEU nor, in principle, its investigatory capabilities.

103 In the present case, it is apparent from the case file that the applicant stated inter alia in the complaint that the intervener had been receiving State aid for a number of years by virtue of the terms under which it was authorised to have exclusive use of the Puerto de Las Nieves port infrastructure for commercial purposes, without any tendering procedure and without contributing to the financing of that infrastructure.

104 As regards more specifically the term involving the grant of an advantage, the applicant stated inter alia in the complaint, in essence, that it derived from the 'concession of exclusive rights without use of a transparent and non-discriminatory public tendering procedure for the occupation or use of State-owned port property (or the enjoyment of other special or exclusive rights having economic value), entailing, in practice, an advantage for the recipients, who were favoured as compared to their competitors'. It also stated, after having emphasised that the Puerto de Las Nieves port infrastructure had been financed using public funds, that the Commission's decision-making practice was clear on the point that 'although the sole purpose of the infrastructure was to meet the needs of a private undertaking, it had to take on the financing thereof' and that, in the present case, '[t]he exoneration of those fees therefore had also constituted an advantage for [the intervener]'. It inferred therefrom

that ‘it was obvious that the (State aid) public measures [in question] favored [the intervener], by granting it an advantage through the exoneration from paying for an infrastructure for private use that it ought to have financed itself’.

- 105 As regards, moreover, the criterion of allocation of State resources, the applicant first of all reiterated in the complaint that, in accordance with the case-law and the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, ‘the grant of exclusive rights over State-owned property, without a transparent and non-discriminatory public tendering procedure, could presuppose a manifest surrender of State resources’. It went on to state, *inter alia*, that ‘the entire or partial public financing of infrastructures of any kind whatsoever intended for the private use of a given operator, consistent with its interests and needs, without any objective of general interest, met the criterion of “allocation of State resources”’.
- 106 Lastly, the applicant stated that it was not able to adduce conclusive evidence of the existence and magnitude of the State aid criticised, given that it was either financial information held by State authorities or private financial information about a competitor. It accordingly called on the Commission to make requests for information to the Kingdom of Spain and, where appropriate, to avail itself of coercive mechanisms available to it in order to ensure optimal investigation in the case.
- 107 In the light of the foregoing, the applicant must be said to have stated unequivocally in the complaint that the intervener had received State aid in that, in essence, it had not been required to pay consideration corresponding to the actual economic value of its exclusive right of use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport. It follows that, contrary to the Commission’s contentions, the applicant had identified, with a sufficient degree of precision, in the complaint how it believed that the terms of the intervener’s use of that infrastructure had conferred on it an advantage financed by means of State resources.
- 108 Therefore, the Commission was incorrect in finding, in recital 45 of the contested decision, that the applicant had failed to identify in the complaint an advantage deriving from State resources on the sole ground that it had not attempted therein to question the level of port dues owed by the intervener for the use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport.
- 109 Similarly, given the conclusion set out in paragraph 107 above, the fact that the applicant did not allege during the administrative procedure that the intervener was not paying fees lawfully payable by sole users of port infrastructures in the Canary Islands is completely irrelevant.
- 110 In those circumstances, it was for the Commission, as part of its duty to conduct a diligent and impartial investigation of the complaint lodged with it, to ascertain, by means of the appropriate criteria, whether the intervener had received an advantage deriving from State resources within the meaning of Article 107(1) TFEU, due to the terms of use of the Puerto de Las Nieves port infrastructure granted to it for the purposes of commercial transport since the mid-1990s. As the applicant in essence claimed in the argument set out in paragraph 92 above, the Commission did not ascertain whether the port dues paid by the intervener covered the costs borne by the DGPC whilst allowing it a reasonable profit.
- 111 The Commission submits, however, that the condition requiring that there be an advantage deriving from State resources is not satisfied in the present case, so that in any event the examination of that part of the complaint did not raise any serious difficulty. It submits in that regard, first, that the intervener paid all fees lawfully owing for the use of the Puerto de Las Nieves port infrastructure and, second, that, in accordance with the requirements laid down in Article 41(1) of the Law on the Canary Islands ports, the DGPC had calculated those fees lawfully owing in such a way as to cover costs and depreciation whilst generating a reasonable profit. The fact, underscored by the applicant in its written

pleadings, that the intervener has not been required to pay fees can be explained by the fact that the intervener cannot in any way be regarded as being the holder of an exclusive concession for the Puerto de Las Nieves port infrastructure, but is merely a user of it. The Commission adds, in essence, that the mere fact that a tendering procedure had not been organised does not in itself establish the existence of an advantage deriving from State resources, in particular when the State manages State-owned resources or rare State-owned resources, implying the existence of a physical or temporal limit on the grant of access simultaneously to more than one user.

- 112 In that regard, it must first be remembered that, according to settled case-law, only advantages granted directly or indirectly through State resources or constituting an additional burden for the State are to be considered aid within the meaning of Article 107(1) TFEU (judgment of 12 December 2014, *Banco Privado Português and Massa Insolvente do Banco Privado Português v Commission*, T-487/11, EU:T:2014:1077, paragraph 50; see also, to that effect, judgment of 24 January 1978, *van Tiggele*, 82/77, EU:C:1978:10, paragraphs 24 and 25). Therefore, a State measure which does not involve a direct or indirect transfer of State resources cannot be regarded as State aid for the purposes of Article 107(1) TFEU, even if it satisfies the other conditions laid down in that provision (see judgment of 12 December 2006, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio v Commission*, T-95/03, EU:T:2006:385, paragraph 104 and the case-law cited).
- 113 Moreover, the Commission is free to decide to take no action on a complaint at the end of the preliminary investigation when it is able to rule out *prima facie* categorising the measures in question as State aid after having found that one of the essential conditions for the application of Article 107(1) TFEU is not satisfied (see, to that effect, judgment of 5 April 2006, *Deutsche Bahn v Commission*, T-351/02, EU:T:2006:104, paragraph 104).
- 114 However, in the first place, the mere fact that, due to its particular characteristics, State-owned property can be made available only to a limited number of users or even only a single user, does not by itself rule out the possibility that that may be held to be a selective advantage deriving from State resources, including when that limitation has its origins in considerations of safety.
- 115 The aim of 107(1) TFEU is to prevent trade between Member States from being affected by the advantages conferred by the public authorities, which, in various forms, distort or threaten to distort competition by favouring certain undertakings or the production of certain goods. The definition of aid may accordingly include not only positive benefits, such as subsidies, loans or shareholdings in undertakings, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see judgments of 8 May 2003, *Italy and SIM 2 Multimedia v Commission*, C-328/99 and C-399/00, EU:C:2003:252, paragraph 35 and the case-law cited; of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 33 and the case-law cited; and of 16 July 2015, *BVVG*, C-39/14, EU:C:2015:470, paragraph 26 and the case-law cited).
- 116 Similarly, as observed in paragraph 86 above, it follows from Article 107(1) TFEU that the concept of State aid is an objective one that turns on, *inter alia*, whether or not a State measure confers an advantage on a certain undertaking or undertakings.
- 117 Thus, in order to determine whether a measure constitutes State aid, it must *inter alia* be determined whether the recipient undertaking receives an advantage that it would not have obtained under normal market conditions (judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 60, and of 29 April 1999, *Spain v Commission*, C-342/96, EU:C:1999:210, paragraph 41; see also judgment of 12 June 2014, *Sarc v Commission*, T-488/11, not published, EU:T:2014:497, paragraph 90 and the case-law cited). Thus, according to settled case-law, the supply of goods or services on preferential terms is liable to constitute State aid within the meaning of Article 107(1) TFEU (see judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 59 and the case-law cited; of 1 July

2010, *ThyssenKrupp Acciai Speciali Terni v Commission*, T-62/08, EU:T:2010:268, paragraph 57 and the case-law cited; and of 28 February 2012, *Land Burgenland v Commission*, T-268/08 and T-281/08, EU:T:2012:90, paragraph 47 and the case-law cited).

- 118 The application of the test of a private investor in a market economy entails comparing the way in which the public authorities acted with the way in which a private operator of a comparable size would have acted in the same circumstances. If the State is, in reality, merely acting as any private operator would under normal market conditions (see, to that effect, judgment of 1 October 2015, *Electrabel and Dunamenti Erőmű v Commission*, C-357/14 P, EU:C:2015:642, paragraph 144 and the case-law cited), then there is no advantage attributable to intervention by the State because the recipient could theoretically have derived the same benefits from the mere functioning of the market (see judgment of 30 April 2014, *Tisza Erőmű v Commission*, T-468/08, not published, EU:T:2014:235, paragraph 85 and the case-law cited; see also, to that effect, judgment of 28 February 2012, *Land Burgenland v Commission*, T-268/08 and T-281/08, EU:T:2012:90, paragraph 48 and the case-law cited).
- 119 In the present case, as the Commission confirmed at the hearing in response to a question from the Court, the activity by which the DGPC manages the Puerto de Las Nieves port infrastructure and makes it available to a user shipping company in return for the payment of port dues is indeed an ‘economic’ activity (see, by analogy, in respect of the management of airport infrastructures, judgments of 12 December 2000, *Aéroports de Paris v Commission*, T-128/98, EU:T:2000:290, paragraphs 121 and 125, and of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt v Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 93). Therefore, in such a situation, the Commission had to ascertain whether the DGPC had conferred an advantage on the intervener that it would not have had under normal conditions of competition by applying the test of a private investor acting in a market economy (see, to that effect, judgment of 17 December 2008, *Ryanair v Commission*, T-196/04, EU:T:2008:585, paragraph 85).
- 120 This conclusion is, moreover consistent with paragraph 225 of the Commission Notice on the notion of State aid as referred to in [Article 107(1) TFEU], which states, in essence, that undertakings using State-owned infrastructures are liable to be found to be the recipient of an advantage constituting State aid, unless the terms of use of that infrastructure meet the test of a private operator in a market economy, that is to say, when the infrastructure is made available to them on market conditions. It is also supported by paragraphs 226 and 228 of that same notice, where the Commission states, first, that the existence of such an advantage can nevertheless be ruled out when the fees paid for the use of the infrastructure were fixed using a transparent and non-discriminatory tendering procedure and, second, that the test of a private operator in a market economy may be satisfied for the public financing of infrastructures that are open and not reserved for one or more specific users where those users contribute, from an *ex ante* viewpoint, to the profitability of the project/operator.
- 121 In the second place, the fact, emphasised by the Commission, that the intervener was able to use the Puerto de Las Nieves port infrastructure without any concession contract and was thus not required to pay any fees concerns solely the legal form of which that use was a part and not the question whether the financial terms of that use conferred on the intervener an advantage it would not have had under normal market conditions. Accordingly, given the principles referred to in paragraphs 116 and 117 above, that fact by itself did not rule out the possibility that the terms of the intervener’s use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport conferred on it an advantage financed through State resources. In that context, it is not for the Court to rule on the applicant’s argument to the effect that the intervener’s use of the Puerto de Las Nieves port infrastructure without any concession contract and, therefore, without paying fees, infringes Article 43 of the Law on the Canary Islands ports, as that question is purely one of national law.

- 122 For the same reason, the intervener's argument consisting, in essence, in claiming that the docking permission at Puerto de Las Nieves it has enjoyed for over 20 years and its uninterrupted use of the Puerto de Las Nieves port infrastructure since that time has given rise to a subjective right for those terms of use to continue, cannot be upheld. Even if such a subjective right had come into being under the national law applicable to the situation in question, it would not preclude a finding that those terms of use conferred on the intervener an advantage financed through State resources.
- 123 In the third place, the Commission's argument to the effect that the fact that there was no advantage granted to the intervener through State resources follows from the fact that it paid all fees lawfully owing for the use of the Puerto de Las Nieves port infrastructure, that those fees are identical in all ports coming within the DGCP's competence and that, moreover, under the Law on the Canary Islands ports, they are calculated in such a way as to cover costs and depreciation whilst generating a reasonable profit, must be rejected.
- 124 It follows from the case-law referred to in paragraphs 117 to 119 above that, in the circumstances of the present case, the determination of whether there was an advantage granted to the intervener through State resources in the form of the terms under which it was permitted to use the Puerto de Las Nieves port infrastructure for the purposes of commercial transport presupposed a proper determination by the Commission of whether the port dues paid by the intervener, which may be equated with fees charged for the use of the Puerto de Las Nieves port infrastructure, were at least equivalent in amount to the price a private investor, operating in normal competitive conditions, would have been able to obtain by way of consideration for such use (see, to that effect, judgment of 12 June 2014, *Sarc v Commission*, T-488/11, not published, EU:T:2014:497, paragraph 91 and the case-law cited).
- 125 Neither the fact that the intervener paid all fees lawfully owing and charged to it for the use of the Puerto de Las Nieves port infrastructure, nor the fact, referred to in recitals 47 and 62 of the contested decision, that the DGPC charged the same fees, calculated in the same manner, lawfully owing at all ports coming within its competence, relieved the Commission of its obligation to carry out that specification assessment.
- 126 Similarly, the Commission's argument based on Article 41(1) of the Law on the Canary Islands ports, from which it follows that the fees lawfully owing applicable to users of the Canary Islands ports must be calculated in such a way as to cover costs and depreciation whilst generating a reasonable profit, did not allow it to do away with the specific assessment referred to in paragraph 124 above, which it was obliged to carry out, given its responsibility under Article 108 TFEU to monitor State aid. Such a rule on the amount of fees lawfully owing for the use of the ports in the Canary Islands, laid down in a provision of national law, does not per se suffice to establish that the fees lawfully owing and charged to the intervener by the DGPC for the exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport covered at the very least the consideration that a private operator would have been able to obtain under normal market conditions from a shipping company using that infrastructure on the same terms.
- 127 It has accordingly not been established that the requirement that there be an advantage deriving from State resources was in any event not fulfilled in the present case. Since the Commission failed to conduct the specific analysis referred to in paragraphs 117 and 124 above, it must be concluded that the examination of the first and third parts of the complaint at the time of the preliminary investigation procedure was vitiated by a significant lacuna. Under the case-law cited in paragraph 50 above, that lacuna is an indication that the investigation of the measure questioned under those parts gave rise to some serious difficulty.
- 128 Contrary to what the Commission and the intervener contend, there is nothing in the case file indicating that the applicant enjoyed terms of use similar to those criticised in the complaint in another port of the Canary Islands. In any event, even if that were true, it does not by itself, without

an examination of the factual and legal situation of the shipping companies providing links with Tenerife out of the various ports on the other islands of the Canary Islands group, preclude the terms of the intervener's use of the Puerto de Las Nieves port infrastructure from being categorised as State aid.

- 129 Nor is the conclusion in paragraph 127 above called into question by the Commission's argument put forward in its written pleadings and based on the judgments of 14 January 2015, *Eventech* (C-518/13, EU:C:2015:9), and of 4 July 2007, *Bouygues and Bouygues Télécom v Commission* (T-475/04, EU:T:2007:196), and, at the hearing, on the judgment of 12 June 2014, *Sarc v Commission* (T-488/11, not published, EU:T:2014:497), to the effect that the holding of a tendering procedure is not indispensable for ruling out the presence of State aid in all cases where a Member State manages State-owned resources.
- 130 Suffice it to note in that regard that the viewpoints developed in paragraphs 112 to 128 above are not in any way based on the premiss that the categorisation of an advantage granted to the intervener as State aid within the meaning of Article 107(1) TFEU results from the mere fact that it alone was able to use the Puerto de Las Nieves port infrastructure for the purposes of commercial transport without any tendering procedure organised by the DGPC. Rather, paragraphs 112 to 128 above apply to the present dispute the settled case-law referred to in paragraph 86 above, according to which the test for whether there is State aid turns solely on whether or not a measure financed through State resources confers an advantage on one or more particular undertakings.
- 131 That being so, it should be clarified that since the intervener's exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport since the mid-1990s does not derive from an open and non-discriminatory tendering procedure, but rather from the rule *prior in tempore, potior in jure*, which made it all the more imperative in the present case for the Commission to carry out the specific assessment referred to in paragraph 124 above. It follows therefrom that, until the DGPC organised a tendering procedure in 2014, there had been no competitive procedure to ascertain, under normal market conditions, the economic value of the right for a shipping company to be alone in having exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport and, therefore, what financial consideration it would have been possible for an operator acting under those conditions to obtain for making that infrastructure available.
- 132 Lastly, nor is the conclusion in paragraph 127 above called into question by the Commission's finding in the contested decision, to the effect that the Spanish authorities made the necessary efforts to ensure within a reasonable time that access to the Puerto de Las Nieves port infrastructure was possible on an open and non-discriminatory basis, once the applicant had indicated its interest in being able to dock there using a fast-ferry (fourth ground).
- 133 In that regard, it should be borne in mind once again that the concept of State aid is an objective one that turns on, *inter alia*, whether or not a State measure confers an advantage on a certain undertaking or undertakings (see the case-law cited in paragraph 86 above).
- 134 It follows that the recent efforts by the Spanish authorities referred to by the Commission and which are central to the scheme of the contested decision were not *per se* such as to preclude a finding that the intervener received State aid by virtue of the objective terms under which it was granted an exclusive right over many years to use the Puerto de Las Nieves port infrastructure for the purposes of commercial transport; nor, consequently, did they enable the Commission to rule out the possibility of there being any serious difficulty in the examination of the first and third parts of the complaint.

- 135 In any event, the applicant submits, correctly, that the fourth ground of the contested decision, on which is based the Commission's conclusion that the exclusive use of the Puerto de Las Nieves port infrastructure had not resulted in the grant of State aid (see paragraph 25 above) is vitiated by two errors of assessment.
- 136 Firstly, as the Commission acknowledges in its written pleadings, it was incorrect in finding, in recital 49 of the contested decision, that no competitor company of the intervener had formally shown interest in operating out of Puerto de Las Nieves using fast-ferries until the applicant filed its request on 3 July 2013.
- 137 The material in the case file shows that the application for docking permission at that port, filed a number of years ago, in 2004, by Trasmediterránea, a third-party shipping company, concerned a fast-ferry and not a conventional ferry, as stated in recital 50 of the contested decision. As correctly pointed out by the applicant, the technical features of the vessel for which Trasmediterránea had requested permission are, in terms of total length and cruising speed, very similar to one of the fast-ferries used by the intervener to operate out of Puerto de Las Nieves.
- 138 It follows that around 10 years passed between the application filed in 2004 by Trasmediterránea and the organisation of a tendering procedure by the DGPC in July 2014. In those circumstances and without prejudice to the findings in paragraphs 128, 133 and 134 above, the Commission was accordingly incorrect in finding, in essence, in recital 58 of the contested decision, that the DGPC had undertaken within a reasonable time the necessary steps to ensure open and non-discriminatory access to the Puerto de Las Nieves port infrastructure.
- 139 That error of assessment of the facts is not in any way called into question by the Commission's argument, set out in the rejoinder, to the effect that the analysis in the contested decision concerned only the measures taken by the Spanish authorities as of the time of the request for access filed by the applicant in 2013 and accordingly did not concern the question whether the refusal of the request in 2004 meant that open and non-discriminatory access to the Puerto de Las Nieves port infrastructure was not ensured at that time. Suffice it to note, in that regard, that it is unequivocally clear from recital 50 of the contested decision that the Commission's analysis of the situation in question before 3 July 2013 was based on the incorrect premiss that Trasmediterránea's application filed in 2004 concerned a conventional ferry.
- 140 Secondly, it is clear that the Commission's assessment of the consequences of the suspension order of 27 February 2015 in the contested decision is also vitiated by an error.
- 141 In that regard, it should be noted first of all that, at the time of adoption of the contested decision, the suspension order of 27 February 2015 prevented the DGPC from awarding the first batch of time slots to the intervener and the second batch to the applicant. That suspension, although temporary in nature, accordingly had the effect of maintaining, unchanged, the terms under which the intervener had exclusive use of the Puerto de Las Nieves port infrastructure and by that very fact impeding the access to that infrastructure sought by the applicant for the purposes of commercial transport. The suspension therefore had the effect of maintaining the terms of use of that infrastructure criticised by the applicant in the complaint.
- 142 Moreover, as rightly pointed out by the applicant, the inherently temporary nature of that suspension did not in any way preclude the result of the tendering procedure organised by the DGPC from ultimately being invalidated by the national courts. Such a prospect seemed to be especially probable given that, as confirmed by the reasoning in the suspension order of 27 February 2015, the suspension necessarily presupposed a national court holding that there was a *prima facie* case (*fumus boni juris*) in the proceedings instituted by the intervener as to the merits of the tendering procedure in question.

¹⁴³ In those circumstances and irrespective of even the potential classification of the measures in question as State aid, the Commission was incorrect to focus on the ‘inherently temporary’ nature of the suspension order of 27 February 2015, as it did in recital 61 of the contested decision, in order to conclude in essence that the resulting status quo in the terms of the intervener’s use of the Puerto de Las Nieves port infrastructure did not cast doubt on the DGPC’s efforts to ensure open and non-discriminatory access to that infrastructure. On the contrary, it is an additional indication of serious difficulties arising in the examination of those terms in the light of the prohibition laid down in Article 107(1) TFEU.

¹⁴⁴ That conclusion is not called into question by the Commission’s argument consisting, in essence, in stating that the applicant is free to file a fresh complaint depending on the outcome on the merits of the intervener’s action brought before the Tribunal Superior de Justicia de Canarias, Sala de lo Contencioso-Administrativo, Sección Primera de Santa Cruz de Tenerife (High Court of the Canary Islands, Administrative Division, First Section, Santa Cruz de Tenerife, Spain). Suffice it to state in that regard that whatever that outcome may be, it will have no bearing on the finding in paragraph 141 above, to the effect that, at the time of adoption of the contested decision, the suspension order of 27 February 2015 had the effect of maintaining the terms of the intervener’s use of the Puerto de Las Nieves port infrastructure, which were criticised in the first and third parts of the complaint.

¹⁴⁵ In the light of the foregoing and without its even being necessary to rule on the other arguments put forward by the applicant challenging the Commission’s examination of the terms of the intervener’s exclusive use of the Puerto de Las Nieves port infrastructure, the conclusion must be that the Commission’s failure to carry out a specific examination of whether the port dues paid by the intervener by way of consideration for the exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport corresponded to the consideration that a private investor could have obtained for such use under normal market conditions, together with the particularly protracted preliminary investigation procedure, combined as well with the impediment to implementation of the outcome of the tendering procedure organised by the DGPC in 2014 due to the suspension order of 27 February 2015, were indications that the examination of the exclusive use of the Puerto de Las Nieves port infrastructure in the light of the prohibition laid down in Article 107(1) TFEU gave rise to serious difficulties.

¹⁴⁶ It thus follows from the case-law referred to in paragraphs 46 and 47 above that the Commission, in the presence of those difficulties, was bound to open the formal investigation procedure provided for in Article 108(2) TFEU in order to assess whether the intervener had received State aid by virtue of that exclusive use.

¹⁴⁷ It follows that the single plea in law of the action must be upheld in so far as it is directed at that part of the contested decision where the Commission, without opening the formal investigation procedure, found that the terms of the intervener’s exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport, criticised by the applicant in the first and third parts of the complaint, had not conferred any State aid on the intervener. Therefore, the contested decision must be annulled to that extent.

The Commission’s examination of the T-9 port dues charged to the intervener due to the occupation of the Puerto de Las Nieves port infrastructure (second part of the complaint)

¹⁴⁸ The applicant submits that the Commission did not find that the intervener had received State aid for over 20 years in the form of a partial exoneration from paying the T-9 port dues, entailing a reduction of State resources.

- 149 The applicant submits first of all that, under the applicable rules, the basis for calculating the T-9 port dues ought to have corresponded to the entire port space occupied exclusively by the intervener and not only the surface area occupied by its docking ramps. The intervener in fact occupied all of the Puerto de Las Nieves port infrastructure in public ownership, which area was furthermore closed off, with access controlled by employees of the intervener. The applicant states in that regard that, since the legislation on ports is similar throughout Spanish territory, the Commission could not merely find that the T-9 port dues were charged in the same way at all Canary Islands ports in order to rule out the possibility of there being State aid. In any event, the situation at Puerto de Las Nieves is unique, as it is the only port in the Canary Islands occupied exclusively by a shipping company without a concession and, therefore, without the payment of fees, and the intervener is also the only operator in the Canary Islands to have installed fixed ramps occupying the entire manoeuvring area for the exclusive use of its vessels. That situation is markedly different from, for example, the port of Morro Jable (Spain), where the applicant operates and to which the Commission refers in the context of the present action.
- 150 In the alternative, the applicant disputes the explanation, given by the Spanish authorities during the administrative procedure and accepted by the Commission, to the effect that the surface area occupied by the fixed ramps is already covered by the T-2, T-3 and T-4 dues and should accordingly not be taken into account for the calculation of the T-9 port dues. Firstly, the T-2 port dues are charged only for the surface area of the docking line, which does not include either the manoeuvring area or other service areas on which the intervener's ramps are located. Secondly, it is possible that the intervener's ramps cover part of the manoeuvring area or the service area not covered by the T-3 and T-4 dues, which are charged for the use of the waters of the port and basins, land access, traffic lanes, handling areas, port stations and police services. In its observations on the statement in intervention, the applicant adds that the T-2, T-3 and T-4 dues are payable only between the time when the vessel arrives in port and when the passengers and freight leave it, whereas the T-9 dues are charged for the port space being made available for the amount of time wished by the operator concerned.
- 151 The Commission disputes the applicant's argument. In the first place, it submits that the intervener did pay the T-9 port dues for all areas occupied by it on an exclusive basis and the T-2, T-3 and T-4 dues for the use of grounds and gangways contiguous to the docking line. In the second place, it observes that the applicant itself used the port of Morro Jable on an exclusive basis for over 15 years without having to pay the T-9 port dues for the entire port surface area, but only for the use of certain areas such as offices, warehouses or other facilities requiring private use of ground area. In the third place, the Commission, supported in essence by the intervener, observes that the applicant does not dispute the conclusion in the contested decision to the effect that the T-9 port dues were correctly charged to the intervener, as the use of the port surface area intended for the use of the docking ramps belonging to the intervener was excluded. Any other conclusion would lead to a considerable overlap between those dues and a series of other port dues, thereby giving rise to double taxation. During the administrative procedure, moreover, the Spanish authorities confirmed that the method for calculating T-2, T-3, T-4 and T-9 dues had not involved any surrender of State resources. The intervener adds on this point that the very title of the T-9 port dues ('storage services, premises and buildings') provides an indication that the area occupied by the ramp it uses is not subject to those dues, whilst that space does come within the concept of 'docking works', 'port waters and basins' and 'port waters and basins, quays and jetties, and handling areas' coming within the description, in Legislative Decree No 1/1994, of the taxable events for the purposes of the T-2, T-3 and T-4 port dues. Lastly, the Commission observes that the finding in the contested decision to the effect that it has not been disputed that the T-9 port dues were charged in the same way in all ports coming within the DGCP's competence, including the ports used by a single operator. Given all the information available, the Commission submits that it was correct in inferring from that finding that the intervener had not received any advantage over other shipping companies and, accordingly, concluding that there were no serious difficulties on this point requiring a formal investigation procedure to be initiated.

- 152 It should be noted as a preliminary point that the applicant does not question the finding in recital 63 of the contested decision, to the effect that, since at least 2005, the intervener has paid all dues invoiced to it by the DGPC arising from its use of the Puerto de Las Nieves port infrastructure for the purposes of commercial maritime transport.
- 153 It should also be borne in mind that the second part of the complaint concerned both the T-2 port dues and the T-9 port dues and that those two sets of dues were examined in a separate part of the contested decision, in recitals 63 to 70 thereof (see paragraphs 32 to 34 above). In the present action, however, the applicant challenges that part of the contested decision only in so far as it is directed at the T-9 port dues.
- 154 By its second part of the complaint, the applicant had *inter alia* submitted that the intervener had benefited for many years from a partial exoneration from the T-9 port dues. Thus, it had submitted, in essence, that under Article 115a of Legislative Decree No 1/1994, the intervener ought to have been charged those dues not only for the surface area occupied by its own ramps, but also more broadly for the exclusive occupation of nearly all of the surface area of Puerto de Las Nieves.
- 155 Thus, unlike the first and third parts alleging infringement of Article 107(1) TFEU, this part of the complaint did not allege that the intervener had received an advantage resulting *per se* from the economic value of the use of the Puerto de Las Nieves port infrastructure, but specifically called into question, *inter alia*, the advantage allegedly conferred on the intervener by virtue of an exoneration from part of the T-9 port dues that it would have been charged under the applicable Spanish legislation. In recital 66 of the contested decision, the Commission, after stating in essence that it was not its role to assess how the port dues were applied and in respect of which taxable events, rejected that line of argument on the ground that it was apparent from the explanations given by the Spanish authorities that the T-9 port dues were charged in the same way by the DGPC at all ports coming within its competence. The preliminary investigation thus did not identify any selective advantage for the intervener arising from an alleged partial exoneration from those dues.
- 156 In that regard, it must be borne in mind that classification of a national measure as ‘State aid’ for the purposes of Article 107(1) TFEU requires that all the conditions set out in that provision are fulfilled. First, there must be intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer an advantage on the recipient. Fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).
- 157 So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of ‘State aid’ within the meaning of Article 107(1) TFEU, according to settled case-law the assessment of that condition requires a determination whether, under a particular legal regime, the national measure at issue is such as to favour ‘certain undertakings or the production of certain goods’ over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (see judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited; see also, to that effect, judgment of 14 January 2015, *Eventech*, C-518/13, EU:C:2015:9, paragraph 55 and the case-law cited).
- 158 As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, of constituting State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable

without distinction to all economic operators does not constitute such aid (see judgment of 21 December 2016, *Commission v World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56 and the case-law cited).

- 159 In the present case, in the applicant's submission the measure in question consisted in a partial and individual exoneration for the intervener from the T-9 port dues, since the DGPC did not at any time, since the intervener had been using the Puerto de Las Nieves port infrastructure, charge it the T-9 port dues by taking as the tax base the total or quasi-total surface area of that infrastructure.
- 160 However, none of the arguments put forward by the applicant casts doubt on the Commission's finding in the contested decision consisting, in essence, in stating that the applicant had not produced any evidence showing that the methods for calculating the T-9 port dues charged to the intervener conferred any selective advantage whatsoever on it within the meaning of the case-law referred to in paragraph 157 above.
- 161 First of all, the applicant submits that, since the legislation on ports is similar throughout Spain, the normal territorial scale that should have been used for comparative purposes was that of Spain, not just the Canary Islands. Suffice it to observe in that regard that, by that argument, the applicant is not putting forward any specific information showing that the methods for calculating the T-9 port dues applied to the intervener gave it an advantage over other shipping companies subject to those same dues, thereby placing it in a factual and legal situation comparable to that of the intervener.
- 162 Next, the argument based on the fact that the intervener is the only shipping company in the Canary Islands whose access ramps are affixed to the ground and occupy the entire manoeuvring area and who operates exclusively out of a port without holding a concession for that purpose and alleging that an exoneration from the T-9 port dues is justified only when a concession-holding shipping company pays occupation fees cannot be upheld.
- 163 It is clear that not only is that argument not supported by any evidence, it is also based on a comparison of the intervener's situation in Puerto de Las Nieves with that of shipping companies in a factual and legal situation which, in the light of the T-9 port dues, is not comparable to its own. Nor, therefore, under the case-law referred to in paragraph 157 above, does that argument establish that the methods for calculating the T-9 port dues applied to the intervener gave it any selective advantage over other companies who were thereby placed in a comparable factual and legal situation.
- 164 Lastly, for the same reason, nor can the Court uphold the applicant's argument based on the fact that the situation of shipping companies operating out of other ports in the Canary Islands and coming within the DGPC's competence is not comparable to that of the intervener's use of the Puerto de Las Nieves port infrastructure since those companies pursue their activity in a competitive environment and therefore share the use of State infrastructures such as mobile ramps with other companies, or the argument put forward in the alternative and referred to in paragraph 150 above, by which the applicant disagrees that the occupation of the surface area of the fixed ramps is already covered by the T-2, T-3 and T-4 port dues and should accordingly not be taken into account for the calculation of the T-9 port dues as well.
- 165 In those circumstances, the applicant, who has the burden of proving the presence of serious difficulties (see paragraph 51 above), has accordingly not highlighted any factors demonstrating that the examination of the second part of the complaint alleging infringement of Article 107(1) TFEU gave rise to such difficulties and required the Commission to open a formal investigation procedure.
- 166 Therefore, the action must be dismissed as unfounded in so far as it seeks annulment of that part of the contested decision, which is severable from the part examined in paragraphs 80 to 147 above, in which the Commission, without opening the formal investigation procedure, concluded in essence

that the DGPC's calculation of the T-9 port dues to be charged to the intervener had not per se entailed the grant of State aid to the intervener and, on that ground, rejected the second part of the complaint lodged by the applicant.

Conclusions as to the outcome of the action

¹⁶⁷ In the light of all the foregoing, the action must be upheld in so far as it seeks annulment of that part of the contested decision in which the Commission, without opening the formal investigation procedure provided for in Article 108(2) TFEU, concluded that the terms of the intervener's exclusive use of the Puerto de Las Nieves port infrastructure for the purposes of commercial transport, criticised by the applicant under the first and third parts of the complaint, had not given rise to any State aid for the intervener.

Costs

¹⁶⁸ Under Article 134(3) of the Rules of Procedure, where the parties succeed on some and fail on other heads of claim, the General Court may order that each party is to bear their own costs or allocate the costs amongst the parties. As the action has been successful in part, the Court will make an equitable assessment of the circumstances of the case and hold that the applicant should bear 25% of its own costs, with the rest of its costs being paid by the Commission, and that the Commission and the intervener should bear their own costs.

On those grounds,

THE GENERAL COURT (Ninth Chamber)

hereby:

- 1. Annuls Commission Decision C(2015) 8655 final of 8 December 2015 concerning State aid SA.36628 (2015/NN) (ex 2013/CP) — Spain — Fred Olsen in so far as it is found therein that, at the end of the preliminary investigation procedure, the exclusive use of the Puerto de Las Nieves port infrastructure by Fred Olsen, SA had not entailed any State aid to that company;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders Naviera Armas, SA to bear 25% of its own costs, with the remainder to be paid by the European Commission;**
- 4. Orders the Commission and Fred Olsen to bear their own costs.**

Gervasoni

Madise

da Silva Passos

Delivered in open court in Luxembourg on 15 March 2018.

[Signatures]

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