



EUROPEAN COMMISSION

Brussels, 11.7.2012
C(2012) 4217 final

PUBLIC VERSION

WORKING LANGUAGE

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**Subject: State aid SA.28876 (2012/C) (ex 2011/N) (ex CP 202/2009) –
Greece
Container Terminal Port of Piraeus & Cosco Pacific Limited**

Sir,

The Commission wishes to inform Greece that, having examined the information supplied by your authorities on the aid/measure referred to above, it has decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union.

1. PROCEDURE

- (1) By letter of 30 April 2009¹, the Prefect of Piraeus lodged a complaint with the Commission alleging that the Greek State granted unlawful State aid to the new concession holder of a part of the Port of Piraeus, the *Piraeus Container Terminal S.A.* ("PCT"), a subsidiary of special purpose of COSCO Pacific Limited ("COSCO"). The alleged aid was granted in the form of tax exemptions and favourable provisions inserted in the concession agreement after the tender.
- (2) On 7 May 2009 the Federation of Greek Port workers sent a letter² informing the Commission on the alleged tax advantages that the Greek State granted to PCT. By letter of 31 August 2009, the Federation of Greek Port workers confirmed that its' initial letter should be treated as a complaint and alleged that aid was granted in the form of tax advantages but also in the form of favourable provisions inserted in the concession agreement.

¹ Registered by the Commission on 6 May 2009.

² Registered by the Commission on 13 May 2009.

- (3) By letter of 23 September 2009³, the International Dockworkers Council filed a complaint with a detailed description of the measures that allegedly constitute State aid.
- (4) By letter of 14 October 2009 the Commission requested information from Greece on the alleged State aid measures. By letter of 12 November 2009 the Greek authorities asked for a delay extension on which the Commission agreed in its letter of 18 November 2009. The Commission sent a reminder concerning this request on 3 February 2010 and on 23 February 2010 the Greek authorities responded to this request for information.
- (5) On 5 May 2010 the Commission services met the representatives of the Greek authorities to discuss additional clarifications.
- (6) The Commission requested additional information from the Greek authorities by letter dated 27 October 2010. The Greek authorities asked for a delay extension by letter dated 18 November 2011 that the Commission accepted by letter of 2 December 2011. The Greek authorities responded to this request for information on 8 February 2011.

2. BACKGROUND

2.1. The Piraeus Port Authority S.A.

- (7) The company, Piraeus Port Authority S.A. or Οργανισμός Λιμένος Πειραιώς ("PPA") was established by law 2688/1999, through conversion of a body governed by public law, Piraeus Port Authority created in 1930, into a public utility company.
- (8) On 13 February 2002 a 40 year concession agreement was signed between the Greek State and PPA. This agreement was ratified by law 3654/2008. According to this agreement, PPA has the exclusive right of use and exploitation of land, building and infrastructure of the port land zone of the Port of Piraeus⁴. In particular, the concession agreement provides for the right of PPA to sub-contract the operation of part of the port to a third party against payment⁵.

2.2. The Port of Piraeus

- (9) The Port of Piraeus is divided into two areas: the commercial port and the passenger port. The commercial port has 3 terminals; the container terminal, the cargo terminal and the automobile terminal.
- (10) The container terminal has two piers. PPA decided to expand the infrastructure of the container terminal with the extension of Pier I, the upgrade of equipment of Pier II and the construction of Pier III.

³ Registered by the Commission the same day.

⁴ See Article 1.1 of the concession agreement concerning its scope, and Section 3 on the right of use and exploitation.

⁵ See Article 3.1.iii of the concession agreement.

2.3. The concession agreement between PPA and PCT

- (11) With the purpose of conceding Piers II and III, PPA conducted a European public tender⁶ for port management services. In this tender PPA received two applications from COSCO and from a consortium of companies consisting of Hutchinson Port Holdings L.T.D., Hutchinson Ports Investments S.A.R.L., Alapis Joint Stock Company S.A. and Lyd S.A.
- (12) The call for tenders provided for appeal procedures. However, no appeal was submitted to the judicial authorities concerning the tendering procedure or the final result by any of the participants. In addition, the procedure and the draft agreement were checked and approved by the Greek Court of Auditors.
- (13) In November 2008 PPA signed with PCT a concession agreement through which PPA conceded to PCT the exploitation and exclusive use to of the so-called "New Container Terminal (NCT)", comprising of the existing Pier II, to be upgraded, the new Pier III, to be constructed, and the area adjacent thereto, as well as the use of the adjacent berthing manoeuvre sea area, which allows the safe mooring and service of ships.
- (14) According to the concession agreement PCT has the obligation to upgrade the existing Pier II, construct the new Pier III and provide the whole range of port services related to the operation of the container terminal. Furthermore, the concession holder will finance entirely at its own expenses all upgrades of Pier II as well as the construction and operation of Pier III. Therefore, the tender as well as the concession agreement foresaw that the concession holder will not receive any public money for its investments.
- (15) In addition, the concession holder assumes all (commercial) risks in respect of the upgrades and construction of the necessary infrastructure. It also undertakes a number of obligations in respect of ensuring a guaranteed capacity of the New Container Terminal.
- (16) The concession agreement between PPA and PCT was ratified by Law 3755/2009 ("the Law"). Article 1 of the Law incorporates the concession agreement as it was signed, while article 2 sets out specific tax exemptions for PCT and article 3 provides for the possibility that PCT's investments related to the concession agreement benefit a specific protective regime of foreign investments set out in legislative decree 2687/1953.

2.4. The complaints received

- (17) The first complaint filed by the then Prefect of Piraeus, concerned the specific tax measures that were included within article 2 of the Law, but also the prohibition of compulsory expropriation on PCT's assets including for claims that the State may have against it.

⁶ Published in the Official Journal. Reference 2008/S 20-026332 from 30.01.2008, amended with Reference 2008/S 54-072476 from 18/03/2008, extending the deadline for submission of tenders until 19.5.2008.

- (18) The complaint filed by the Federation of Greek Port workers concerned the same fiscal measures and prohibition. However, it also made reference to the possibility granted to PCT to apply for the protective regime established by legislative decree 2687/1953, as set out in article 3 of the Law, but also to two differentiated provisions that were included in the final concession agreement.
- (19) Finally the International Dockworkers Council's complaint reiterates all these measures and refers to a list of provisions that either were not initially included in the draft agreement attached to the contract notice, or were differentiated compared to the latter.
- (20) All complainants argued that all these provisions entail selective advantages in favour of PCT that constitute State aid.

2.5. Description of the alleged State aid measures

- (21) The alleged State aid measures refer to the following sets of measures:
- i. advantageous provisions included in the concession agreement although not foreseen in the tender;
 - ii. tax exemptions and other advantages, including the special protective regime for foreign investments and exemption from forced expropriation.

2.5.1. Differences between the concession agreement and the contract notice

- (22) The complainants made reference to a long list of provisions of the concession agreement that allegedly constitute State aid. These provisions are the following:
1. The concession agreement gives PPA the right to terminate the agreement if PCT abandons the operation and exploitation of the container terminal for a continuous period of 15 days⁷, whereas the contract notice stipulated a continuous period of 5 days⁸.
 2. PPA undertakes not to create a new container terminal or to provide stevedoring services elsewhere in the Port of Piraeus, except for Pier I⁹, for the duration of the agreement¹⁰, although such obligation was not foreseen in the contract notice.
 3. The amicable settlement and/or dispute resolution procedure shall be used for the resolution of disputes at any case of partial interruption of

⁷ Section 21.2.1 of the concession agreement.

⁸ Article 30.5 of the contract notice.

⁹ Article 9.2 of the concession agreement.

¹⁰ i.e. 30 years.

the operation and exploitation of the container terminal by PCT¹¹, although this was not set out in the contract notice.

4. PCT has to implement the pricing policy of PPA during the period in which the container terminal is operated with the staff of PPA. This obligation ceases to apply when PPA commences full operation of Pier I, and not later than 1 June 2010¹². However in the contract notice this obligation was foreseen under a longer period of time.
5. Neither the contract notice nor the concession agreement include any term providing for immediate and undamaged substitution of the State in the rights of PPA in the event of a termination of the concession agreement of PPA with the State¹³ before its agreed expiry.
6. If the concession agreement is not ratified by the parliament within 8 months from its signature, the parties have the right to inform that they no longer wish the concession agreement¹⁴. However, the contract notice referred to automatic invalidity of the concession agreement in case the parliament has not ratified it within 4 months¹⁵.
7. The modalities of delivery of the container terminal to PCT provide for the imposition of penalties on PPA in the event of delay¹⁶, although this was not foreseen in the contract notice.
8. Article 6 of the contract notice, which specifies the results of the commencement of the concession, has not been included in the concession agreement.
9. The possibility to extend the duration of the concession in case of force majeure¹⁷ was not included in the contract notice.
10. PCT will pay the other contracting party 1/12 of the amount of the annual guaranteed consideration not later than the seventh working day of each month, whereas the contract notice referred to the "fifth" working day of each month.
11. PCT will submit a Detailed Statement of Variable Consideration Settlement to PPA not later than three months after the end of each annual accounting period¹⁸, whereas the contract notice foresaw 1 month deadline¹⁹. At the same time PCT will draw up and submit non

¹¹ Article 4.7.2. of the concession agreement refers to Article 33.2 of the same agreement that concerns amicable settlement and dispute resolution.

¹² Article 7.1. of the concession agreement.

¹³ The concession agreement between the State and PPA (ratified by law 2654/2008, OJ A 3.4.2008) included such provision.

¹⁴ Article 3.1 of the concession agreement.

¹⁵ Article 5.1 of the contract notice.

¹⁶ As laid down in Article 3.2 of the concession agreement.

¹⁷ Article 3.3 (1) of the concession agreement.

¹⁸ Article 5.3 (b) of the concession agreement.

¹⁹ Article 7.2 of the contract notice.

audited semi-annual accounts by 31 August each year²⁰, although under the contract notice this deadline referred to the 31st of July²¹.

12. According to the contract notice, whenever PPA wishes to further examine the financial information submitted to it by PCT, the latter will grant access to its records and accounts to an independent accountant appointed by PPA and will collaborate with it for this purpose²². However, the concession agreement restricts the right to access to the financial information mentioned in the provisions of the contract²³.
13. PPA has to carry out the maintenance of the operational depths of the piers ceded to PCT in combination with the safety and maintenance of the pier walls at its own expenses during the period of the concession in accordance with the indications of PCT and at a mutually agreed time²⁴, although such obligation was not included in the contract notice.
14. PCT has to operate the container terminal with PPA's staff and implement the collective agreements and regulations as in force for a period of six months from the entry into force of the agreement, with the right of extension for another two months²⁵, although the period foreseen in the contract notice was twelve months plus six respectively²⁶.
15. PCT shall provide training for the staff before the expiry of the agreement, for a period of one year²⁷ instead of two years foreseen in the contract notice²⁸.
16. The minimum guaranteed capacity targets set out in the concession agreement²⁹ are substantially lower than those established within the contract notice³⁰.
17. Differentiations between the concession agreement³¹ and the contract notice³² concerning the right of PPA to terminate the agreement in case the penalties imposed to PCT exceed certain level.

²⁰ Article 5.5 (c) of the contract notice.

²¹ Article 7.6 of the contract notice.

²² Article 7.8 of the contract notice.

²³ Article 5.5(e) of the concession agreement.

²⁴ Article 9(h) of the concession agreement.

²⁵ Article 10.1.(m) of the concession agreement.

²⁶ Article 12.1 (h) of the contract notice.

²⁷ Article 10.1. (o) of the concession agreement.

²⁸ Article 12.1.(j) of the contract notice.

²⁹ Article 14.1 of the concession agreement.

³⁰ Article 19.1 of the contract notice.

³¹ Article 18.2.2 of the concession agreement.

³² Article 22.1.4 of the contract notice.

18. PPA may be imposed a penalty in case of non-delivery of the oil pier for the commencement of construction of Pier III³³, although such penalty was not foreseen in the contract notice.
 19. The concession agreement did not include a ground foreseen by the contract notice³⁴ for its termination by PPA.
 20. The concession agreement included an additional condition as termination ground that PPA may invoke against PCT³⁵, namely that of infringement of the agreement by PCT³⁶.
 21. The concession agreement sets out the grounds for delay not due to PCT³⁷, which, when in place, allow for extension of the timetable and of the duration of the agreement, although this was not foreseen in the contract notice.
 22. The definition of "any strike called by lawfully recognized trade unions" as an event of "force majeure"³⁸, although this was not foreseen in the contract notice.
 23. The inspection of the installations at the end of the concession will be conducted 12 months before the expiry of the concession agreement³⁹, although this deadline corresponded to 24 months before this expiry according to the contract notice⁴⁰.
 24. PCT may negotiate the restructuring of its' insurance status for risks in order to take into account changed circumstances⁴¹, although this was not foreseen in the contract notice.
- (23) According to the complainants all these provisions constitute State aid as they confer advantages to PCT, although they were not foreseen in the tender documents.

³³ Article 18.4. of the concession agreement.

³⁴ Article 30.6. of the contract notice includes the following ground: "*In case of continuous failure of the Special Purpose Company to fulfil its obligations to operate the Dock II and provide services to the users of the new container terminal (Dock III) according to the common practices and the provisions of the agreement*".

³⁵ Article 21.1.1 of the concession agreement.

³⁶ "*Provided that the infringement has an essentially negative effect on the project or on the operation of the south container terminal in accordance with the terms of this agreement to the degree that further performance of this agreement on the basis of good faith and commercial usage is rendered oppressive for PPA*".

³⁷ Article 25.1. of the concession agreement.

³⁸ Article 26.1. of the concession agreement.

³⁹ Article 20.1 of the concession agreement.

⁴⁰ Article 33.1 of the contract notice.

⁴¹ Article 28.6 of the concession agreement.

2.5.2. *Tax exemptions and other advantages*

(24) The complainants further refer to several tax measures that were included in article 2 of the Law ratifying the concession agreement. In particular the alleged State aid fiscal measures consist in the following:

1. Exemption from income tax imposed on interest accrued which is earned up until the date of the commencement of operation of pier III, as this is defined in article 12 of the concession contract⁴²;
2. Refund of VAT credit balance during every tax period irrespective of the stage of completion of the contract object. The object of the construction works and any supply of goods, works, services and ancillary works related to this purpose are considered as a "single investment good. Refund of VAT within a period of 60 days from the period of the submission of the relevant application; interest running from the first day following the 60th day instead of 6 months⁴³;
3. Loss carry forward without any temporal limitation⁴⁴;
4. Choice among three different types of depreciation of the investment costs related to the reconstruction of Pier II and the construction of Pier III⁴⁵;
5. Exemption for corporate income tax for goods, works and services provided to PCT outside Greece by companies or joint ventures installed outside Greece, on the condition that there is a bilateral fiscal agreement of avoidance of double taxation between Greece and the countries of registration⁴⁶;
6. Exemption from stamp duties on the loan agreements and any ancillary agreement for the financing of the work⁴⁷;
7. Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom⁴⁸;
8. Exemption from stamp duties for any compensation paid by PPA to PCT under the Concession contract, which is outside the scope of the VAT code⁴⁹;

⁴² Article 2§1 of the Law.

⁴³ Article 2§4 of the Law.

⁴⁴ Article 2§5 of the Law.

⁴⁵ Article 2§6 of the Law.

⁴⁶ Article 2§7 of the Law.

⁴⁷ Article 2§8 of the Law.

⁴⁸ Article 2§9 of the Law.

⁴⁹ Article 2§10 of the Law.

9. Protection under the special protective regime for foreign investments⁵⁰.
10. Exemption from the general rules of forced expropriation in case of debts towards the State.

3. ARGUMENTS RAISED BY THE GREEK AUTHORITIES

- (25) The Greek authorities argue that all the above mentioned measures do not constitute State aid.

3.1. Concerning the differences between the concession agreement and the contract notice

- (26) Concerning the differentiated provisions of the concession agreement, they argue that none of the changes identified between the concession agreement and the contract notice entailed an economic advantage that PCT would not have under normal market conditions. They recall that the concession contract was the result of a genuine open, transparent and non-discriminatory tender procedure, as this was confirmed by the relevant decision of the Greek Court of Auditors⁵¹. Therefore it was fully in line with the TFEU principles.
- (27) Furthermore, they argue that it was clear for all bidders that negotiations would take place with the successful bidder in order to finalise the terms of the contract. As far as the negotiations are concerned:
 - the changes did not modify the scope and the characteristics of the project so as to go beyond what was specified in the tender documents;
 - the extent of the negotiations was reasonable and normal within the context of such concession agreement;
 - many of the changes derived from factors which would have had an impact not only on the bids of the preferred bidder, but also on the bids of the non-preferred bidders if those bids had remained in the competition;
 - other changes were not so substantial, individually or collectively, as to be likely to have attracted prospective tenderers which did not consider tendering following publication of the contract notice;
 - the changes have not materially affected the substantial elements of the contract notice.
- (28) Furthermore, they argue that there is a clear rationale for each change and that the negotiation with the other bidder would obviously or would have been very likely to have resulted in the same changes and they provide the rationale

⁵⁰ Article 3 of the Law.

⁵¹ Decision 274/2008 of the Court of Auditors of 11 November 2008 concerning the draft concession agreement between PPA and PCT.

behind each one of these changes. Within this context, they present an analysis for each one of the said provisions in order to prove that no State aid is involved.

3.2. Concerning the tax exemptions and other advantages

- (29) The Greek authorities argue that all the tax advantages involved in the said provisions do not constitute State aid measures, as they are an inherent part of the Greek tax system.

Absence of selectivity and/or justification by the logic of the tax system

- (30) On the basis case law⁵², the Greek authorities argue that the correct system of reference in the case at hand includes all undertakings engaging in large infrastructure projects and public/private partnerships. According to their allegations, such undertakings are objectively in a clearly different legal and factual situation when compared with other undertakings engaged in other types of activity.

- (31) They argue that this type of projects have special characteristics, in particular the following:

- The long-term nature of the contracts (e.g. 30-year concession period in the present case);
- The need for very significant up-front investment;
- The need to secure (often external/third party) funding;
- The uncertain nature of financial returns, bearing in mind in particular the up-front investment often needed, the "new" nature of many projects, the limited time horizons, the difficulty in predicting market trends and the high degree of risk involved,
- The general public interest in the creation/promotion of the use of new public infrastructure and by extension new private sector commercial activities, thus the privatisation of formerly public services;
- The strong public interest in the successful and profitable completion of the project (in particular in view of the need to avoid to the greatest possible extent any burden for the tax payer and to maximise returns for the State, as appropriate).

- (32) On this basis, they argue that the crucial issue of infrastructure development can legitimately be treated separately within a taxation system, as the situation of big infrastructure project operators differs both in law and in fact from other companies. According to their argumentation, EU legislation recognises the

⁵² Case C-88/03, Portugal v. Commission, [2006] ECR I-7115, para 56.

special nature of infrastructure projects and the fact that they may need different tax treatment. . They also recall that it is generally accepted that investment in infrastructure which benefits undertakings generally, rather than one or more specific undertakings, is regarded as a general measure.

- (33) In view of the above, companies engaged in large infrastructure projects must be treated differently in tax terms from other projects, financial arrangements and commercial activities. Therefore, the alleged measures should be considered as a specific application of the normal rules, forming an inherent part of the general system of taxation and not giving rise to State aid in the sense of Article 107(1) TFEU.
- (34) Moreover, they indicate that the relevant provisions of law 3755/2009 do not introduce special measures which apply exclusively to PCT, as similar provisions have been adopted in relation to all concession contracts related to large public infrastructure projects in the last 15 years as well as in the Greek legislation relevant to Public Private Partnerships⁵³.
- (35) Therefore, according to them, the measures in favour of PCT are an inherent part of the general tax system in Greece aiming at facilitating and supporting the successful implementation of large public infrastructure/privatisation projects and thus they do not entail a selective advantage to PCT which would constitute State aid in the sense of Article 107(1) TFEU.
- (36) To support their argumentation they provide a list of laws having ratified most big public infrastructure concession projects in Greece, where similar tax advantages were included. On this basis they argue that the tax exemptions in favour of PCT constitute general measures aimed at supporting public infrastructure projects and thus they do not constitute State aid.
- (37) Further to this, they provided a list of similar provisions that were included in the concession contracts of big infrastructure projects in Greece, on which the Commission adopted positive decisions⁵⁴. According to them, as the Commission in these decisions concluded that no State aid was involved, the same conclusion should also be reached in the case at hand.
- (38) Finally, they argue that given that similar measures were adopted as regards all large public infrastructure concession projects in Greece at least over the last 15 years, they were known and open to all economic operators interested in participating in the tender for the concession agreement at stake. As a result the same tax provisions would have been adopted independently of the successful tenderer.

⁵³ Law 3755/2009.

⁵⁴ Commission decisions on cases NN 27/1996 – Spata International Airport (Law 2338/1995), NN 143/1997 – Rio-Antirrio bridge (Law 2395/1996), N 462/1999 – Attiki Odos (Law 2445/1996), N 508/2007 – Ionia Odos (Law 3555/2007), N 45/2008 – Elefsina-Tsakona Motorway (Law 3621/2007), N 566/2007 – Korinthos-Tripoli-Kalamata Motorway and Lefktra Sparti section (Law 3559/2007), N 565/2007 – Central Greece Motorway (Law 3597/2007), N 633/2007 Maliakos-Klidi section of Patra-Athens-Thessaloniki-Evzonas Motorway (Law 3605/2007), N 134/2007 Thessaloniki Underwater Tunnel (Law 3535/2007).

3.3. Concerning the protection under the special protective regime for foreign investments

- (39) The Greek authorities argue that the special protective regime for foreign investments is a general measure that applies to all undertakings that satisfy objective criteria for its application. They also argue that this regime aims at ensuring the economic development of Greece, something that has been recognised within the Greek Constitution but also within Protocol 3 of the Accession Treaty of Greece.

3.4. Concerning the compatibility of the alleged State aid measures

- (40) The Greek authorities argue that in case the Commission finds that State aid is involved, such aid should be considered compatible with the internal market on the basis of Article 107(3)(a) and 107(3)(c), in view of the importance of the relevant investments, infrastructure and services for the economic development of Greece and, in particular, for the development and modernisation of the sea container transport sector.
- (41) The investment project at stake aims at developing Piraeus Port as modern sea container terminal in the Eastern Mediterranean Sea. In particular, the project aims at providing the Piraeus port with a modern and improved infrastructure and equipment which will enhance its performance and its ability to handle sea container traffic more efficiently. The investments that will be implemented through the concession agreement are of key importance in order to guarantee high quality and efficient provision of port management services to a number of new generation freight ships at the same time under modern international standards.
- (42) Further to the significance of the project for the economic development of Greece, it also reflects the Commission's objectives in relation to the EU transport policy. In this context they recall that the Commission has put emphasis on the importance of ports for economic development and security of supplies for the European citizens and the industrial sector.
- (43) Furthermore, they argue that the effects of the implementation of the project on intra- EU competition and trading conditions will not outweigh the benefits related to the economic development of Greece. To support this, they recall that the principal competitors of the Piraeus Port are situated in non-EU countries in the Eastern Mediterranean Sea⁵⁵. The only EU ports that might have been considered as competitors of the Piraeus port in the Eastern Mediterranean Sea are the Black Sea ports of Costanza in Romania and Varna in Bulgaria and the Adriatic Sea ports of Italy and Slovenia. However, the Black sea ports are not competing with the Piraeus port due to their location beyond the Bosphorus straits. In a similar vein, competition between Piraeus port and the Adriatic ports in Italy and Slovenia has historically been considered to be insignificant and these ports may not therefore be considered as competitors.

⁵⁵ Like Egypt, Haifa in Israel, Istanbul in Turkey and Lattakia in Syria.

- (44) Finally they argue that the amount of any aid considered as involved in the alleged State aid measures would be minimal compared to the scale of the project and private sector investment required.

4. PRELIMINARY ASSESSMENT ON THE EXISTENCE OF AID

4.1. Preliminary remarks: the scope of the current decision

- (45) By decision dated 14 July 2009 the Commission initiated the formal investigation procedure as regards State aid for infrastructure development in favour of PPA notified to the Commission on 25 February 2008 and 28 March 2008⁵⁶. In that decision the Commission reached the preliminary conclusion that there was no State aid provided to PCT, as far as the notified measures were concerned and did not pronounce itself on the existence of any other possible State aid granted to the concession holder outside the scope of the notified measures⁵⁷. The notified measures in that decision did not concern the measures currently under assessment. Therefore, the Commission's preliminary conclusions in the current decision do not affect its findings on different measures in favour of PCT and mainly PPA as assessed in former decisions⁵⁸.

4.2. Existence of State aid

- (46) The criteria laid down in Article 107(1) TFEU are cumulative. Therefore, in order to determine whether the measures at stake constitute State aid within the meaning of Article 107(1) TFEU, all the following conditions have to be met. Namely, the measure has to:
- a) be granted through State resources;
 - b) confer an economic advantage to undertakings;
 - c) the advantage is selective; and
 - d) distorts or threatens to distort competition and affects trade between Member States.

⁵⁶ Commission decision on State aid C 21/09 (ex N 105/08, ex N 168/08 and ex N 169/08) – Port Infrastructure – Public financing of infrastructure and equipment at the port of Piraeus, OJ C 245, 13.10.2009, p. 2. The procedure opened by this decision was closed with two Commission decisions: Commission decision of 18.12.2009 concerning part of case C 21/09 (ex N 168/08), not yet published, and Commission decision of 20.12.2010 closing the procedure concerning part of case C 21/09 (ex N 169/08) on the acquisition of equipment put at the disposal of the concession holder (COSCO) and PPA due to withdrawal by Greece, not yet published.

⁵⁷ See point 109 of that decision.

⁵⁸ See footnote 56.

4.2.1. Notion of undertaking

- (47) According to settled case law, an undertaking is an entity engaging in an economic activity regardless of its legal status and the way in which it is financed⁵⁹. In addition, any activity consisting in offering goods and/or services in a given market is an economic activity⁶⁰.
- (48) The Commission has already considered that the construction and operation of some types of infrastructure can be considered as an economic activity⁶¹. Moreover according to settled case law⁶², the provision of infrastructure facilities to third parties against remuneration constitutes an economic activity.
- (49) As PCT will upgrade the existing Pier II, construct the new Pier III and provide the whole range of port services related to the operation of the container terminal, it can be considered as an undertaking for the purposes of State aid rules. Thus PCT is subject to State aid rules.

4.2.2. Existence of State aid in respect of the differences between the concession agreement and the contract notice

Assessment of the existence of advantage

- (50) According to constant case law, in order to determine whether a State measure constitutes State aid, it is necessary to establish whether the recipient undertaking receives an economic advantage which it would not have obtained under normal market conditions⁶³.
- (51) The Commission notes that the concession agreement under examination relates to the supply of works and services. PPA has conducted an open procedure in order to select the bidder with whom it would enter in negotiations.
- (52) According to the information provided by the Greek authorities, the open tender procedure was launched via an international contract notice that was published on 30 January 2008 in the Official Journal of the European Union⁶⁴. The contract notice indicated that the procedure would take place in two phases. The first phase would include the publication of the contract notice, the submission of the tenders and the preselection of the valid offers. The

⁵⁹ Joined cases C-180/98 to C-184/98, Pavlov and others, [2000] ECR I-6451.

⁶⁰ Cases 118/85 *Commission v Italy* [1987] ECR 2599, paragraph 7, C-35/96 *Commission v Italy* [1998] ECR I-3851, paragraph 36, joint cases C-180/98 to C-184/98, *Rec.2000, p.I-6451*.

⁶¹ Decisions of the Commission in the following State aid cases: N 44/2010 – Public financing of port infrastructure in Krievu Sala, OJ C 215 of 21.07.2011, p. 21, paras 60-68; C 39/2009 – Public financing of port infrastructure in Ventpils Port, OJ C 62, of 20.03.2010, p. 7, paras 53-58, N 60/2006 – Port of Rotterdam, OJ C 196 of 24.08.2007, p. 1, paras 42-52; N 520/2003 Flemish ports, OJ C 176 of 16.07.2005, p. 12, paras 34-54.

⁶² See *inter alia* judgment of 24 October 2002, case C-82/01P Aéroport de Paris, ECR 2002, I-9297, as well as judgment of 24 March 2011 in Joint Cases T-455/08 Flughafen Leipzig-Halle GmbH and Mitteldeutsche Flughafen AG c/ Commission and case T-443/08 Freistaat Sachsen and Land Sachsen-Anhalt v. Commission, not yet published.

⁶³ Joint cases T-116/01 and T-118/01, paragraph 112, and the case law cited therein.

⁶⁴ For reference see footnote 6.

second phase would include the opening of the technical tender offers, the selection of the temporary successful tenderer, the award notice, the negotiations with the temporary successful tenderer and the signature of the concession agreement.

- (53) Furthermore, the contract notice set out all the selection criteria relevant to the tenderers and the offers. The contract notice and the contract attached to it determined all the elements of the concession object and agreement, all the selection criteria, but also indicated that negotiations would take place in order to define the conditions of the concession agreement. In particular, it was specified that these negotiations would mainly concern the analysis and the elaboration of the terms of the commitments the concessionaire would undertake and would in no way overturn the conditions of the tender and the economic offer of the temporary successful tenderer. It was further specified that the negotiations could only concern the terms of the agreement that would not have an impact, directly or indirectly, on the economic terms and the compensation of the said offer⁶⁵.
- (54) Therefore it can be reasonably concluded that any potential tenderer had sufficient knowledge of the nature of the project and the concession agreement, but also of the procedure that would be followed and the perimeter within which the negotiations would take place.
- (55) Furthermore, the Commission notes that the award took place on the basis of the highest guaranteed consideration that the tenderers would offer to PPA for the exploitation of the two Piers. According to the information provided by the Greek authorities, COSCO was the successful tenderer, as it offered the highest Net Present Value of the minimum guaranteed consideration.

- The differentiated provisions as a result of the negotiation

Inherent in negotiated procedures

- (56) The complainants have argued that the modifications of the contract terms that took place after the awarding act granted a selective advantage to PCT that constitutes State aid. It is therefore necessary to examine whether the modifications of the contract terms that took place after the awarding act, would have caused discrimination or unequal treatment between actual and potential tenderers and have granted a substantial additional advantage to PCT. In the present case, it cannot be stated that the modifications entered after the selection of the successful tenderer have caused discrimination. Indeed such conclusion would overlook the possibility, particularly relevant in a negotiating context, that a contracting entity may include in the concession agreement specifications and terms in order to further elaborate the technical and operational elements. As already stated above⁶⁶, the Commission notes that all tenderers knew in advance that changes could have been introduced following the outcome of negotiations. Therefore, it cannot be concluded automatically that the differentiated provisions entail an advantage. This is all

⁶⁵ See paragraphs 152 and 153 of the contract notice.

⁶⁶ See paragraphs 53-55 of this decision.

the more important in connection with particularly complex and long term concession agreements on infrastructure projects which are negotiated, as the one under examination.

Economic assessment of the differentiated provisions

(57) The Greek authorities have provided an analysis of all the modifications introduced and they have grouped them in different categories in order to demonstrate that they constitute permissible changes but also and mainly that they do not entail an additional economic advantage for PCT. According to them, those changes were agreed in order to improve the initial planning of the project, to increase its functionality and to deal with issues that could not be taken into account already at the time of the contract notice.

(58) The Commission notes that it is necessary to assess whether the negotiations of the contract terms after the selection of the preferred bidder have caused discrimination or unequal treatment of competitors and if those negotiations have resulted in changing the overall economic balance of the contract in favour of the contractor compared to the terms of the initial contract⁶⁷. In those scenarios it could be concluded that the modifications of the contract terms that took place after the awarding act granted an additional economic advantage to PCT. Therefore the modifications due to the negotiation procedure may be grouped in the following categories:

- i Those that can reasonably be considered as not materially improving the value of the contract for the preferred tenderer relative to how the contract stood at the point where the preferred tenderer was selected, i.e. for instance:
 - changes in the value of the contract that are marginal in scale in relation to the overall value of the contract;
 - changes assessed as measures to create outcomes intended in the original contract documents
- ii Those that entail such degrees of increase that would be reasonable in the context of such concession agreements of a long duration awarded under a negotiated procedure.

(59) The Commission has examined the differentiated provisions on the basis of this case law and practice and has concluded that they do not entail an advantage in favour of PCT, as they fall within the following categories:

- i. *Differentiated provisions that do not entail any advantage in favour of PCT – technical issues:*

⁶⁷ See Commission decision in case N 264/2002, London Underground PPP, OJ C 309 of 12.12.2002, p. 15. See also the Courts' case law relevant to public procurement law: judgments in cases C-250/07, Commission v. Hellenic Republic, paragraph 52, C-454/06, Presstext, paragraph 34.

- Amicable settlement and resolution of disputes in case of partial interruption of the operation and exploitation of the container terminal by PCT.
- (60) This exact provision was not included in the contract notice. However the contract notice already foresees in general the settlement of disputes through recourse to the arbitration procedure⁶⁸. Therefore it can be concluded that this provision is included simply for clarification purposes and it does not entail any additional economic advantage for PCT.
- 9 month instead of 4 month period for the ratification of the concession agreement and its entry into force – possibility to renounce to the agreement in case of non-ratification instead of automatic invalidity.
- (61) The Commission notes that the fact that the concession agreement allows for a longer period for the ratification of the agreement does not entail an advantage for PCT, as it only allows the re-evaluation of the timeframe required for the completion of the necessary legal formalities for the entry into force of the concession agreement.
- Absence of the provision relevant to the results of the commencement of the concession
- (62) The Commission notes that the results of the commencement of the concession⁶⁹, have been included in other parts of the concession agreement⁷⁰. Thus this drafting change does not entail any additional advantage in favour of PCT, but only consists in a technicality within the context of drafting concession agreements.
- Possibility to extend the duration of the concession in case of force majeure.
- (63) The Commission notes that the extension of the duration of the concession in case of force majeure is a standard term that may be introduced in such type of agreements. Moreover the Greek authorities argue that in case of force majeure the concession agreement discontinues and as a result its total duration is reduced at the expense of PCT that will still be required to pay the fixed annual consideration I and II to PPA under any circumstances⁷¹. Therefore even in case this extension could be considered as an economic advantage for PCT, this advantage is counterbalanced by the fact that PCT will still be obliged to pay the fixed annual considerations to PPA even during the force majeure period.

⁶⁸ See articles 40 and 41 of the contract notice.

⁶⁹ i.e. the delivery of immovable property of the installations to PCT, the exclusive responsibility of PCT to maintain the installations and the delivery of Piers II and III by PCT to PPA at full operation and capacity in case the contract is terminated.

⁷⁰ See Articles 2.2, 8 and 10.

⁷¹ See Article 4.7.1 of the concession agreement.

- Extension of the deadline for the submission of the analytical statement of variable consideration discharge, from one month at the end of each annual accounting period to three months.
- (64) The Greek authorities argue that these modifications aim at matching the relevant timetable requirements for the communication of the financial results of listed companies such as PPA. At any case, it seems unlikely that the offer of the bidder would have changed and the result of the procedure would have been different, if these time limits had been set within the contract notice. Therefore it can be concluded that these modifications do not entail a selective advantage in favour of PCT.
- Restriction of the right of information of PPA to files and accounts of PCT.
- (65) The provision refers clearly to modalities of the audit of PCT records and accounts. Therefore it can be considered that it does not entail any economic advantage for PCT.
- Neither the notice nor the concession agreement include any term providing for immediate and undamaged substitution of the State in the rights of PPA in the event of a termination of the concession agreement of PPA with the State⁷² before its agreed expiry.
- (66) The complainants argue that this omission infringes Article 4.3. of the Concession Contract between PPA and the State. This article foresees that PPA has to return automatically to the Greek State everything the State initially conceded to it, in case the concession contract between PPA and the Greek State is terminated. The same obligation is also foreseen for third parties to which PPA may have conceded parts of the port, as PCT. According to the same article, third parties will not have this return obligation only in case the concession agreement of the third parties, like the one under examination, will have foreseen that the State would substitute PPA in its rights resulting from the concession. The fact that such provision was not included in the final concession agreement has as a consequence that everything that was conceded to PCT will return automatically to the State, in case the concession contract between PPA and the Greek State is terminated.
- (67) The Commission notes that this is an issue of national law, does not entail any advantage for PCT and is of no relevance to State aid rules.
- The inspection of the installations at the end of the concession 12 and not 24 months before the expiry of the concession agreement
- (68) The Commission notes that this provision does not entail an economic advantage for PCT and could have been inserted in the contract irrespective of the preferred tenderer. Therefore it does not entail an advantage for PCT.

⁷² Concession contract between the State and PPA ratified by law 2654/2008, OJ A 3.4.2008.

ii. *Differentiated provisions of the concession agreement that do not materially improve the value of the contract:*

- Obligation of PPA not to create a new container terminal or to provide stevedoring services elsewhere in the Port of Piraeus, except for Pier I for the whole duration of the concession

(69) This provision seems to constitute a restriction that was not set out in the tender documents. However the Greek authorities argue that the Master Plan related to the harbour Complex of PPA⁷³ does not foresee the development of another container terminal. Thus the provision at stake only clarifies that PPA may not, in its sole discretion, modify this Master Plan, and, instead provides for the possibility of a written contract between PPA and PCT to re-examine the land use planning conditions whenever increased demand so requires. Furthermore, there is no restriction on the development of Pier I, the only Pier for which PPA remains responsible after the concession agreement. Finally this Master Plan was already known to the tenderers at the moment of the submission of their offers and the latter were based on the assumption that PPA will limit its activities within Pier I. On the basis of this argumentation the Commission can conclude that this provision has not changed but just clarified the conditions under which the tenderers submitted their offers and in this sense it has not materially improved the value of the contract.

- Termination of the concession agreement by PPA if PCT abandons the operation and exploitation of the container terminal for a continuous period of 15, and not 5 days.

(70) Such specifications are often subject matter of negotiations before signing such agreements. The prolongation of the period may be considered reasonable in the context of such negotiations, without materially increasing the value of the concession agreement.

- Obligation of PCT to implement the pricing policy of PPA during the period in which the container terminal is operated with PPA's staff.

(71) The complainants argue that the time limitation referring to 1 June 2010 was not included in the contract notice. Moreover, the notice required the contractor to implement the pricing policy of PPA only during the period of operation of the south container terminal with PPA's personnel, and set the above-mentioned period at 12 plus 6 months. However, the concession agreement refers to a period of 6 plus 2 months but also imposes the deadline of 1st June 2010.

(72) The Commission notes that, according to the Greek authorities, the pricing policy imposed to PCT is related to its obligation to use the personnel of PPA until the time PPA starts operating Pier I. During this time PCT will have to pay PPA's personnel according to the relevant collective agreements in force, plus 15%, that will normally result in higher costs than the market ones. The

⁷³ The Strategic Plan of the development of the port.

use of PPA's personnel for the beginning of the concession was considered as necessary for the normal operation of the whole terminal during this first concession period. The additional period of 6 (then changed to 2) months that may be imposed by PPA to PCT seems to have the purpose of ensuring the normal functioning of the whole terminal, in case both parties consider it necessary. Once PPA will operate fully Pier I, it will use its personnel in Pier I and PCT will be able to hire the personnel it needs in normal market terms, or negotiate with PPA the possible hiring of its personnel.

- (73) The Commission notes that following the time limitation within the concession contract, it seems that PCT will be alleviated from salaries and charges that it would normally have to bear according to the initial terms of the tender, on the basis of which it submitted its offer. However, as the Greek authorities argue, the time limitation included in the concession agreement relates to the fact that the concession agreement was signed later than initially planned and that the concession started later than initially planned. Therefore at the time the concession agreement was signed, it was estimated that Pier I would operate on 1 July 2010 at the latest. Given that PPA would need all its personnel after the completion of works in Pier I, that indeed started operating on 1 June 2010, it can be considered that the time differentiation included in the contract could be justified by the time that elapsed between the initial planning and the commencement of the concession period⁷⁴. Since PCT was installed in the container terminal on 1st January 2010, the 6 month period until the commencement of operation of Pier I, i.e. 1 June 2010, corresponds to what was included in the final concession agreement. Therefore, this modification does not materially improve the value of the contract and would have been inserted in the final concession agreement independently of the successful tenderer.
- (74) Furthermore, the complainants argue that the concession agreement does not define further how the pricing policy is to be determined afterwards by PCT and this would allow absolute discretion to PCT. However this was already known to all tenderers from the contract notice and at any case the imposition of a pricing policy would go against the purpose of the whole project, i.e. the opening of the port to competition.
- Extension of the deadline for the payment of the annual guaranteed consideration from the 5th to the 7th working day of each month.
- (75) The extension of the deadline from 5 to 7 working days could be considered as entailing an economic advantage for PCT if compared with the contract notice, as it consists in a 2 days' deferral on the payment of its financial obligations towards PPA. The Greek authorities argue that this is due to banking practice and control procedures that do not allow for payments by the original proposed

⁷⁴ See in that sense judgment in case C-337/98, *Commission v. France*, paragraph 51: "*It cannot be ruled out that in a negotiated procedure, which, by its nature, may extend over a long period of time, the parties might take account of technological developments which take place while the negotiations are under way, without that being regarded each time as a renegotiation of the essential terms of the contract justifying the application of new rules of law*".

deadline. At any case, apart the fact that such advantage is of little or no significance, it seems unlikely that the offer of the other tenderer would have changed and that the result of the tender procedure would be different, had the deadline of the 7th day been inserted in the contract notice. Therefore the modification does not materially improve the value of the contract.

- Obligation of PPA to carry out the maintenance of the operational depths of the piers ceded to PCT at its own expenses during the period of the concession in accordance with the indications of PCT and at a mutually agreed time.

(76) The Greek authorities argue that according to the Greek legal framework PPA is responsible for the collection of port fees. Due to their nature as contributory fees they have to be linked to the provision of berth maintenance services on behalf of the State or the public legal entity that is competent for the collection of these fees. Such fees cannot be collected by the concessionaire, i.e. PCT in this case, but only by PPA. Although the contract notice did not refer to the obligation of PPA to carry out these maintenance works, it indicated its legal obligation to collect the port fees⁷⁵.

(77) The Commission notes that this modification could be considered as entailing an advantage in favour of PCT. However, as PPA's obligation is set out in the national legal order and therefore it was known to all potential tenderer, PPA would have to conduct those maintenance works independently of the selected tenderer. Therefore, the modification cannot be considered as materially improving the value of the concession agreement.

- Reduction of the time-period during which PCT would have to use PPA's personnel and apply the relevant collective agreements

(78) As regards the limitation of the time period, the Commission refers back to its assessment in paragraphs 73 to 74 (cf. pricing policy).

(79) As regards the application of collective agreements and regulations, the Commission notes that the said provision indeed allows PCT to negotiate specific terms and conditions of the agreement on the use of PPA's employees. However, it sets out the same minimum salary⁷⁶ that was also indicated in the contract notice. Therefore PCT would still have the obligation to pay the minimum guaranteed salaries for the time period it would use PPA's workers. In this sense it would not obtain an economic advantage through this provision. Therefore this provision cannot be considered as materially improving the value of the concession agreement in favour of PCT.

- Substantially lower minimum guaranteed capacity targets

⁷⁵ See article 9 of the contract notice.

⁷⁶ PCT would have to pay equals the labour costs applicable to PPA (i.e. as provided for by collective agreements and labour law) plus 15% and VAT.

- (80) Indeed, Article 19(1) of the notice stated that the minimum guaranteed capacity should not be less than 700 000 TEU⁷⁷ annually during any phase of works, and that a minimum guaranteed capacity of 3 700 000 TEU should be reached in 2015. By contrast, Article 14 of the concession agreement provides for a minimum guaranteed capacity of 300 000 TEU in the first year, namely in 2009, and for capacity to reach 2 750 000 TEU in 2015.
- (81) The Commission notes that as the guaranteed capacities set out in the final agreement for Years 4, 5 and 6 are much higher than the 700 TEU standard guaranteed capacities set out in the contract notice, the average guaranteed capacity during the 6 first years is much higher than the one set out in the contract notice. At the same time the total guaranteed capacity is also much higher. Therefore the provision at stake cannot be reasonably considered as improving the value of the contract for PCT.
- Additional conditions⁷⁸ on the termination ground related to the infringement of the concession agreement by PCT
- (82) The Greek authorities argue that these additional conditions only serve clarification purposes and do not modify the termination grounds under article 30 of the contract notice. They rather expressly incorporate the general civil law principle that is provided by article 281 of the Greek Civil Code which precludes the abusive exercise of any rights, including the exercise of the right of termination of any contract and is therefore set for clarification purposes only. Therefore it may be considered as a reasonable modification in the context of contracts that are concluded under the negotiation procedure.
- Specification of reasons for delay not due to PCT that allow for the extension of the timetable and the duration of the contract
- (83) This specification may not be considered as entailing an advantage for PCT, as it is common practice to define within a concession contract such reasons for the protection of the interests of the concessionaire, in order for it not to be penalised in case a delay is not due to its inaction or fault. The "*events of excusable delay*" set out in the concession agreement⁷⁹ seem to be the reasonable outcome of the negotiations between PPA and PCT that would not have influenced the result of the tender. Furthermore, in such cases PCT may ask for the extension of the timetable and the agreement with some limitations⁸⁰. This seems to be the reasonable outcome of the existence of the said definitions. At the same time, as the Greek authorities indicate, in such a case PPA will continue receiving the fixed annual considerations I and II from

⁷⁷ TEU stands for "Twenty-foot equivalent units"; it refers to the capacity of the container terminal.

⁷⁸ "*Breach of the provisions of the present agreement by the Special Purpose Company if this breach affects materially this Project or the operation of the NCT according to the provisions of the present Agreement, to such an extent that the continued performance of this Agreement to be onerous for PPA SA taking into account the principle of good faith and the generally acceptable trade practices*".

⁷⁹ See article 25.1 of the concession agreement.

⁸⁰ See article 25.2 of the concession agreement.

PPA⁸¹. Therefore the modification at stake may not be considered as materially improving the value of the contract as this was initially estimated in the contract notice.

- Definition of "*any strike called by lawfully recognized trade unions*" as an event of "force majeure"

(84) The Greek authorities argue that article 39 of the contract notice provides an indicative list of force majeure events including two definitions. They also argue that the said force majeure event would have been included in the final concession agreement regardless of the identity of the tenderer. Indeed it can be considered that it is common practice to further specify during the negotiation stage the events that could possibly create several impediments in the implementation of the concession agreement without the concessionaire being responsible for them. On the basis of this argumentation the Commission considers that such a definition of a force majeure event could have been inserted in the contract irrespective of the chosen tenderer.

iii *Differentiated provisions that entail a reasonable increase in the value of the contract in the context of such negotiations:*

- Imposition of penalties on PPA in case it delays the delivery of the container terminal to PCT.

(85) The Greek authorities argue that the delivery of the container terminal to PCT is a necessary precondition for the smooth functioning of PCT's activity. In case PPA delays the delivery of the container terminal and no such penalties are foreseen, PCT would be penalised, as even without being its fault, its works would be delayed and it would have to pay penalties itself according to the contract. Moreover, it is common practice to negotiate such clauses in public contracts. Therefore the possible advantage that PCT could draw from the penalties it would be able to impose to PPA, can be considered as reasonable in the context of such agreements.

- 1 year instead of 2 year obligation for PCT to provide training for PPA's staff before the expiry of the concession agreement

(86) The Commission notes that this provision could be considered as entailing an advantage to PCT, as it would not bear the costs of the training for 1 year, as it was initially foreseen. However, the Greek authorities argue that this modification was asked by PPA in the context of the negotiations. At the same time, PPA re-evaluated the training needs for its staff at the end of the concession agreement and considered that a one year training period would be sufficient. In view of this argumentation, it can be concluded that the modification in question entails a moderate increase in the value of the contract in the context of such negotiations, which seems to be marginal in view of the total value of the concession agreement.

⁸¹ See article 4.7.1 of the concession agreement.

- Differentiations concerning the right of PPA to terminate the agreement in case the penalties imposed to PCT exceed certain level.
- (87) The Greek authorities argue that the change is favourable for PPA. According to the contract notice⁸² the maximum amount of penalties PPA may oblige PCT to pay are capped at 5% of the estimated investment costs. This 5% is also foreseen as the point of reference that triggers the right of PPA to terminate unilaterally the concession agreement. This means that according to the contract notice PPA could unilaterally terminate the contract, once the maximum allowable amount of penalties would be reached. The same logic lies also behind the relevant provisions of the concession agreement. According to the concession agreement, the penalties that PPA may ask from PCT are not capped⁸³. Therefore PPA has the right to ask for penalties from PCT without being limited by any amount. At the same time the provision under examination gives the right to PPA to unilaterally terminate the contract once the maximum amount of the penalties to be paid by PCT reach the amounts mentioned in the letters of Guarantee provided as good performance for Pier II upgrade operations and East Part of Pier III⁸⁴. In practice this means that PPA will have the right and not the obligation to terminate the contract once the amount of penalties reaches 20% of the estimated investment costs.
- (88) In practice through this provision, the penalties have been maximised in favour of PPA to reach at its discretion 20% of the estimated investment cost of the Piers, or even more, in case it decides not to terminate the contract, whereas the maximum penalties foreseen in the contract notice were capped at 5% of the estimated investment costs. Thus the restriction of PPA's right to ask for the termination of the contract is counterbalanced by the possibility that it has managed to obtain to maximise its benefit in the case of imposition of penalties. Therefore this outcome from negotiations can be considered as not substantially altering the economic balance of the contract.
- Penalty on PPA in case of non-delivery of the oil pier for the commencement of construction of Pier III⁸⁵
- (89) The Commission notes that the reasoning applied in paragraph 85 is also applicable here.
- Absence of one specific ground for termination of the concession agreement on behalf of PPA.
- (90) The Greek authorities argue the modification at stake may be considered as included in other articles of the concession agreement⁸⁶, as it provides for termination grounds equivalent to the ones foreseen in the contract notice.

⁸² See Article 22.2. of the contract notice.

⁸³ See Article 18.2.1 of the concession agreement.

⁸⁴ As foreseen in Article 17 of the concession agreement.

⁸⁵ *"In case of continuous failure of the Special Purpose Company to fulfil its obligations to operate Pier II and provide services to the users of the new container terminal (Pier III) according to the common practices and the provisions of this agreement"*.

⁸⁶ i.e. article 21.1 read in combination with article 10 of the concession agreement.

The Commission has examined the said provisions and considers that this is indeed the case. Therefore this is a technical modification that does not alter the economic balance of the contract.

- Possibility for PCT to negotiate the restructuring of its' insurance status for risks in order to take into account changed circumstances

(91) The Greek authorities argue that this term was included in the concession agreement for clarification purposes, as in the event of a change in circumstances in the international insurance market during the concession period, the rescheduling of the insurance contracts would be ipso facto imposed in any event. The provision expressly incorporates the general civil law principle regarding changes of circumstances allowing for a modification of any contract. At the same time such rescheduling can only take place after PPA has agreed to it. Furthermore, in any event, PPA is entitled to review the insurance contracts and has the right to reasonably refuse its consent. Therefore, although this possibility could possibly entail an advantage for PCT, it is counterbalanced by its justifications, but also the safeguards set out in the concession agreement. Consequently, this modification may be considered as reasonable increase in the context of such negotiations.

Conclusion on the existence of an advantage in favour of PCT

- (92) The Commission considers that the provisions under assessment have not changed the scope and characteristics of the concession agreement compared to what was published in the Official Journal notices, nor do they influence the economic terms of the concession as it was initially planned, in a way that would grant to PCT any additional economic advantage which would constitute State aid⁸⁷.
- (93) Therefore, it can be concluded that the provisions under assessment do not entail any advantage for PCT. As the conditions of article 107(1) TFEU are cumulative, the absence of advantage excludes the existence of State aid in favour of PCT. Therefore it is not necessary to examine the other conditions of article 107(1) TFEU.

4.2.3. *Concerning the tax exemptions and other advantages*

State resources

- (94) According to article 107(1) TFEU, an alleged State aid measure should be granted by a Member State or through State resources. By allowing PCT to enjoy a more favourable tax treatment, the Greek State foregoes State resources that it would have obtained if it had not enacted the alleged advantageous fiscal provisions. Hence the measures at issue involve a loss of State resources and they can be considered as granted through State resources.

Selective advantage

⁸⁷ This assessment is without prejudice to the analysis under EU public procurement rules.

- (95) The measure should confer an advantage to the beneficiary. According to settled case law, the notion of aid encompasses not only positive benefits, but also measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without being subsidies in the strict meaning of the word, are similar in character and have the same effect⁸⁸.
- (96) Concerning the condition of selectivity, the Commission recalls that Article 107(1) TFEU requires the assessment of whether under a particular tax regime, a national measure is such as to favour "certain undertakings or the production of certain goods" in comparison with others which, in the light of the objective pursued by that regime, are in a comparable legal and factual situation⁸⁹. Hence, the Commission has to assess the material selectivity of the measure in three stages⁹⁰.
- (97) First it is necessary to identify the common or "normal" regime under the tax system applicable ("system of reference"). Secondly, it has to be assessed whether the measure at stake derogates from the system of reference by granting an advantage to certain undertaking(s). In order to do that, it is necessary to establish whether the measure differentiates between economic operators who are in a comparable legal and factual situation in the light of the objective pursued by that regime⁹¹.
- (98) If such derogation is established, i.e. if the measure in question is prima facie selective, in a third stage, it has to be examined whether the differentiation results from the nature or the general scheme of the tax system of which it forms part and could hence be justified. In this context, according to the Court's case law and the Commission Notice on the application of State aid rules to measures relating to direct business taxation⁹², the Member State has to show whether the differentiation derives directly from the basic or guiding principles of that system.
- (99) The Commission will assess the notion of selective advantage for each specific provision below.

⁸⁸ Cases C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 38; C-387/92 *Banco Exterior de España* [1994] ECR I-877, paragraph 13; and Case C-200/97 *Ecotrade* [1998] ECR I-7907, paragraph 34.

⁸⁹ Cases C-143/99 *Adria-Wien Pipeline* [2001] ECR I-8365, paragraph 41; C-308/01 *GIL Insurance and Others* [2004] ECR I-4777, paragraph 68; C-172/03 *Heiser* [2005] ECR I-1627, paragraph 40.

⁹⁰ Commission Notice on the application of State aid rules to measures relating to direct business taxation, OJ C 384, 10.12.1998, p. 3, paragraph 16.

⁹¹ See, Cases C-143/99 *Adria-Wien*, paragraph 41, Case C-308/01 *GIL Insurance* [2004] ECR I-4777, paragraph 68, C-172/03, *Heiser* [2005] ECR I-1627, paragraph 40, C-88/03, *Portugal v. Commission* [2006] ECR I-7115, paragraph 54, T-233/04, *Netherlands v. Commission*, paragraph 86.

⁹² OJ C384 of 10.12.1998, p. 3.

4.2.3.1. Exemption from income tax imposed on interest accrued until the date of the commencement⁹³ of operation of pier III⁹⁴

System of reference

- (100) Concerning the specific measure at stake, the system of reference is the Greek corporate income tax system, in particular the taxation of companies on profits including those resulting from accrued interests.
- (101) Under the Greek income tax system, all profits of S.A., including those in the form of interest, are taxed at a percentage of 25%⁹⁵ and the remaining amount of profits after tax may be either distributed to shareholders, accumulated as reserves or incorporated/converted into equity capital through a capital increase. Once the amount of profits after tax is distributed to shareholders or incorporated/converted into equity capital, it is taxed again at the same rate of 25%.

Derogation from the system of reference

- (102) The "accrued interests"⁹⁶ constitute a part of PCT's gross taxable income and would normally be subject to taxation. PCT is exempted from income tax on accrued interest until the commencement of the operation of Pier III⁹⁷, a treatment that deviates from the system of reference, mainly the income tax on accrued interests under the Greek income tax code ("GITC"). Therefore it can be concluded that this measure entails an advantage in favour of PCT. PCT may be considered as being in a comparable legal and factual situation with all S.A that are taxed on their profits under the generally applicable framework. Therefore it can be concluded that it has been granted a selective advantage.
- (103) The Greek authorities argue that PCT has to maintain significant cash deposits in order to finance the investments required during the construction phase and the period prior to the commencement of Pier III and that this exemption aims at facilitating these investments in public infrastructure. In this sense they consider that PCT is in a legal and factual comparable situation to all companies undertaking large investments in infrastructure.

⁹³ Or until 31 October 2015 at the latest.

⁹⁴ Article 2, paragraph 1 of law 3755/2009.

⁹⁵ Articles 105§1 in combination with article 10§1 of the Greek income tax code.

⁹⁶ According to the Greek authorities, the term "accrued interest" is used to describe the accounting method used to calculate the accumulation of interest, whereby interest accrues depending on cash flow dates and the amounts involved. In other words, "accrued interest" is the interest on a specific amount over a specific period of time (irrespective of whether the said interest is owing or due). According to the Greek authorities PCT normally expects to collect such interest in cash deposits with credit institutions.

⁹⁷ The tax exemption on accrued interests will apply for a period of time that may vary, depending on early or later completion of the works, but that has a definite end. According to article 12 of the concession contract, the commencement of the operation of pier III should be effected 48 months after the date of commencement of the construction and at any case not later than 31/10/2015

- (104) The Commission acknowledges that companies that undertake big investments in infrastructure need significant cash deposits during the construction phase. However, the policy objective of facilitating companies engaged in big infrastructure projects during the phase of construction cannot be considered as an objective inherent to a fiscal regime on the basis of which the comparable legal and factual situation of companies can be determined.
- (105) It is established case law 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 effects⁹⁸. Furthermore, the European Court has established that the objective pursued by State measures is not sufficient to exclude those measures outright from classification as aid⁹⁹. Therefore the policy objective the Greek authorities refer to cannot justify the exclusion of selective measures, but might only be taken into account in the compatibility assessment of a State aid measure¹⁰⁰.
- (106) Furthermore, the Greek authorities argue that income in the form of accrued interest will be subject to tax at the standard corporate income tax rate applicable when PCT will distribute its profits or convert them into equity capital. Since this income will ultimately be subject to tax, this tax exemption is no more than a deferral of tax payment. Furthermore they indicate that it is not clear at this stage whether this tax deferral will involve an advantage for PCT. If PCT records losses up to 31 October 2015, i.e. the time limit of application of this exemption, this tax exemption has no practical value, as PCT would not pay taxes due to its overall losses. If however PCT records profits before 31 October 2015, such profits will be subject to general corporate income tax once they are distributed or capitalised. In such a case the advantage involved in the tax deferral would not concern the corresponding amount of tax on interest but the financial benefit arising from the deferral, which would be likely to be negligible. They also argue that as PCT requires constant access to capital, it holds its cash deposits in bank accounts that offer little or even zero interest. As a result they argue that the interests earned by PCT from its deposits amounted to just EUR 24.500 for 2009 and EUR 35.716 for 2010, without providing any specific calculations or data on how these amounts came up. Finally they only provide an example based on theoretical figures in order to prove that the advantage at stake would be negligible. In view of the above, they argue that the tax exemption at stake does not entail an advantage for PCT.
- (107) The Commission notes that it derives from the relevant provisions of the GITC¹⁰¹ that profits are taxed once they are generated, and the remaining part after tax is taxed for a second time once distributed and/or capitalised.

⁹⁸ Cases 173/73, *Italy v. Commission* [1974] ECR 709, paragraph 13; C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraph 79; C-241/94 *France v Commission*, paragraph 20; Case C-75/97 *Belgium v Commission*, paragraph 25; C-409/00 *Spain v Commission*, paragraph 46.

⁹⁹ See inter alia cases C-487/06 P, *British Aggregates v. Commission* [2008] I-10505; C-241/94 *France v Commission* [1996] ECR I-4551, paragraph 21; C-342/96 *Spain v Commission* [1999] ECR I-2459, paragraph 23; C-75/97 *Belgium v Commission*, paragraph 25.

¹⁰⁰ See in that respect the finding of the Court in the above mentioned case C-487/06 P, paragraph 92.

¹⁰¹ See paragraph 111 of this decision.

Therefore the provision under examination seems to allow that profits from accrued interests are taxed only once, although they would have been taxed twice according to the general applicable framework.

- (108) Furthermore, the Commission notes that even in the case where the Greek authorities would prove that the exemption under examination only constitutes a tax deferral, this deferral constitutes a selective advantage at any case. Furthermore the Greek authorities do not provide concrete estimates in order to prove that this advantage would be negligible. On the contrary they state that relevant calculations are not feasible, as the significant amounts PCT is obliged in practice to hold in cash deposits and the interest rate applicable cannot be defined in advance and they only provide theoretical calculations.
- (109) Finally even if the Greek authorities had proven that the advantage at stake is negligible, this does not mean that the advantage is not selective, but that it could be considered as *de minimis* aid, if properly calculated and respecting the conditions established in the "de minimis" Regulation No 1998/2006¹⁰².

Justification by the logic of the tax system

- (110) The Greek authorities argue in the first place that the tax exemption on accrued interests is based directly on a general provision of the GITC¹⁰³ that includes amongst certain types of tax exempted income, "incomes exempted by virtue of a contract ratified by law". They argue that as the Greek legislator consistently uses this general exemption in order to introduce tax exemptions applying specifically to all large public infrastructure projects undertaken in Greece, the provision under examination does not introduce a special tax exemption. On the contrary, it forms part of a general scheme based upon the general tax system that aims at facilitating and supporting the implementation of large public infrastructure or investment projects. Therefore, the exemption at stake is in line with the concept underpinning the Greek taxation system, which foresees that tax exemptions may be justified on the grounds of special circumstances.
- (111) It derives from the EU courts case law that treating economic agents on a discretionary basis may mean that the individual application of a general measure takes on the features of a selective measure, in particular where exercise of the discretionary power goes beyond the simple management of tax revenue by reference to objective criteria¹⁰⁴.
- (112) In view of this case law, it can be concluded that the alleged "general" provision seems to allow full discretion to the legislator to exempt any income from taxation, in practical terms after the State has negotiated and concluded any kind of contract with any taxable person. Therefore in practice this "general" provision allows for exemptions which are not within the logic of

¹⁰² Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid, OJ L 379, 28.12.2006, p. 5.

¹⁰³ i.e. article 103 §1 ib).

¹⁰⁴ Case C-241/94, France v. Commission (Kimberly Clark) [1996], ECR I-4451. See also paragraph 21 of the Fiscal Notice.

the general taxation system, but within the logic of favouring the specific company with which a contract may be negotiated and concluded each time. Therefore, the alleged "general" provision of the GITC may not be considered as forming part of the logic of the income tax system. In conclusion, the mere existence of this general clause may not prejudice the assessment of the selective character of measures adopted under the aegis of this clause.

- (113) Furthermore, the Greek authorities refer to the exact same tax exemption of accrued interests that is included in the general law on PPPs and other laws that ratified big infrastructure concession contracts¹⁰⁵ in Greece. Indeed this kind of exemption seems to have been provided by the Greek State in this type of contracts, in order to foster the economic position of the investors and therefore improve the financial situation of the contracted works, but also in order to reduce the loan needs related to the related projects. The Greek authorities argue that as in all big infrastructure projects, PCT will need to maintain cash deposits in order to finance investments required during the period of the construction phase and the period prior to the commencement of Pier III operation; therefore the tax exemption at stake aims at facilitating these investments. Consequently they argue that the tax exemption is part of a general measure which applies in respect of all large public infrastructure projects and therefore does not constitute State aid.
- (114) Finally the Greek authorities argue that the specific characteristics of large infrastructure projects became even more important in the context of the credit crunch provoked by the current financial crisis that was developed between the attribution of the concession agreement and the its' ratification by law 3755/2009.
- (115) The Commission considers that the argumentation of the Greek authorities cannot be accepted in the context of the selectivity analysis. First of all it has to be noted that a distinction must be made between the objectives attributed to a particular tax system which are extrinsic to it¹⁰⁶ and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives¹⁰⁷. The objectives of the relevant system are irrelevant for the analysis of the selective character of a measure. What matters is whether the apparent exception is actually in line with the internal logic of the tax system.
- (116) On the basis of this case law, economic policy considerations as the ones indicated by the Greek authorities cannot be considered as inherent in the logic of a tax system and therefore they cannot justify a selective measure. In the current case the Greek authorities refer to the higher risk related to investments in big infrastructure projects and the economic crisis to justify the differential tax treatment. However it is not demonstrated why these objectives would be

¹⁰⁵ Article 25 of the concession contract on the construction of the Athens Airport, article 36.1.1 of the Ionia Odos concession contract, article 36.1.1. of the concession contract of Elefsina-Korinthos etc, article 62.1 of the Attiki odos concession contract etc.

¹⁰⁶ For instance, social, regional, industrial or economic policy objectives.

¹⁰⁷ See paragraph 26 of the Fiscal Notice and case C-88/03, Portugal v. Commission, ECR [2006] I-7115, paragraph 81.

intrinsic to the tax system and not external to it, let alone the fact that the economic crisis is a contingent temporary circumstance. As presented, these considerations could be taken into account in the context of the compatibility assessment of State aid measures, but cannot exclude the State aid character of a measure.

- (117) Hence, at this stage, the Commission considers that the Greek authorities have failed to establish that the differential treatment introduced for PCT is justified by the logic of the tax system. Therefore the Commission has doubts that the measure in question derives directly from the basic principles of the tax system and therefore it considers that it is selective.

4.2.3.2. Refund of VAT credit balance irrespective of the stage of completion of the contract object – "single investment good" – VAT refund within 60 days from application; interests due to delay¹⁰⁸

System of reference

- (118) Concerning these measures, the system of reference is the Greek VAT system on VAT credit refund. According to the VAT tax system, a taxable person is entitled to deduct input VAT that is directly linked to the realisation of acts that are taxable¹⁰⁹. According to paragraph 3 of article 30 of the VAT code, the right to this deduction is generated at the time the VAT is generated¹¹⁰, i.e. for instance the goods are delivered or the services are provided. Pursuant to article 16§1 of the Code, when the delivered good has to be put together or installed, the delivery is considered done at the time of the completion of the works. The deduction is granted for the part of goods and services that are indeed used for the realisation of acts that are subject to the tax.
- (119) Furthermore, VAT credit resulting from the deduction of input VAT and output VAT in a given tax period is not refunded but is carried forward to the next tax period¹¹¹.
- (120) The VAT credit may be refunded and not carried forward to the next tax period only under the exceptions set out in article 34 of the VAT Code. One of these exceptions concerns VAT that has been imposed on "investment goods", as they are defined in the VAT Code¹¹², i.e. "*tangible goods, owned by the company and put by it on continuous exploitation, as well as the buildings and other kind of constructions that are constructed by the taxable company on estate property that does not belong to it, but of which it has the use on the basis of any legal relation, for a period of at least 9 years...Reparation and maintenance costs are not included in the value of the investment good*".

¹⁰⁸ Article 2, paragraphs 2 and 3 of law 3755/2009.

¹⁰⁹ Article 30 of the VAT Code.

¹¹⁰ As foreseen in articles 16, 17 and 18 of the code.

¹¹¹ Article 32§3.

¹¹² Article 33§4.

- (121) According to Article 5 of Ministerial decision 16/2004, in the foreseen exceptional cases, VAT credit may be refunded as follows: a) for the 1st VAT refund application, within 2 months from the application date; b) for the subsequent VAT refund applications above 6 000 euros: (i) 90% refunded within 1 month from the application date and ii) the remaining 10% within 2 months from the application date; c) for subsequent VAT refund applications of less than 6 000 euros, the entire VAT amount within 1 month from the application date.
- (122) Finally according to the generally applicable framework, the interest computation on tax or unduly paid amounts refund starts 6 months after the first day of the month following the fiscal declaration of the taxable person¹¹³. Nevertheless, according to the Greek authorities the Greek administrative courts have considered that this provision is not in conformity with the constitutional principle of equality of taxpayers¹¹⁴. Therefore they have set aside this provision by considering that the interest should be computed from the day the taxable person has filed an appeal against the tax authority's decision not to refund the claimed VAT credit¹¹⁵.

Derogation from the system of reference

- Concerning the refund of VAT credit irrespective of the stage of completion of the contract object
- (123) According to Article 2, paragraph 3 of Law 3755/2009, PCT is entitled to VAT credit refund regardless of the degree of completion of the construction project or individual structures or parts thereof. As according to the general applicable framework, PCT would have the right to VAT refund only when the construction project would be completed, or at the time the goods and/or services are delivered, the provision at stake entails an advantage in favour of PCT, as due to it PCT will have right to VAT refund at an earlier stage.
- (124) Moreover, the same article foresees that for the purpose of the VAT code, the construction project foreseen in the concession agreement and any supply of goods, works, services and ancillary works related to the construction shall be considered as "single investment project". This provision states therefore that for the purposes of the concession agreement, the notion of "investment good" foreseen in the VAT code shall include all activities related to the object of the concession agreement, i.e. not only the "tangible goods" constructed but also all provision of goods, works and services that are related or ancillary to the concession agreement object. The Greek authorities argue that in light of articles 34 and 33§4 of the VAT code relevant to the "investment good", the

¹¹³ Article 38§2 of law 1473/1984.

¹¹⁴ Judgments 1948/1992 and 3035/1992 of the Conseil d'Etat, as well as 222/2009, 223/2009 and 2141/2009 of the Administrative Court of Athens. This interpretation was based on the article 21 of regulatory decree 26-6/10-7/1944 (code of the State court's proceedings) according to which "the legally normal interest and the interest on late payments...starts from the moment the legal action is notified to the State".

¹¹⁵ According to the Code of fiscal legal procedure the taxable person may file an appeal within 20 days following the day the act is notified to it.

provision under examination does not foresee a preferential treatment for PCT, as the VAT refund is related to the "investment good" of the concession agreement.

- (125) The Commission notes that the said provision seems to include a broad definition of the notion of "investment good" which is specific for PCT. In practice this definition seems to have as a consequence that PCT will have the right to be refunded for VAT credit in respect of all works, services and goods related to the contract, although according to the general applicable rules this possibility would only exist for tangible goods and not for services, works, repair and maintenance costs. Moreover, as according to the Greek VAT Code, VAT credit may be refunded and not carried forward only in certain cases, as in the case of a "single investment", PCT is granted in advance access to cash that under the normally applicable rules, would normally consist in a credit that would be carried forward to the next fiscal period to be compensated. This definition seems to confer a selective advantage to PCT, as according to the generally applicable rules PCT would have the right to VAT credit refund, once it would have completed the construction of the concession agreement object¹¹⁶ and not in respect of all goods, works and services as well as ancillary works involved in the investment project.
- (126) The Greek authorities argue that the definition of "single investment good" for PCT is merely intended to clarify the application of the general definition set out in the GITC, in accordance with the general principles governing the VAT system, especially the principle of equality. As PCT has undertaken considerable investments that would include separate actions and stages and types of expenditure on goods and services, if each of these costs were treated separately, PCT would be treated differently for the purposes of the VAT regime from any undertaking investing in order to engage in an economic activity. According to them, in light of the specific characteristics of the concession agreement, the measure under examination has as a purpose to treat each element of the investment costs as a single business unit for the VAT purposes. To support their argumentation, the Greek authorities make reference to the INZO case law¹¹⁷, according to which the economic activities in the sense of the VAT directive "...may consist in several consecutive transactions and preparatory acts..."¹¹⁸
- (127) The Commission notes that the case law mentioned refers to the right to deduct VAT for transactions subject to VAT that are related to the economic activity of the taxable person and not to the right for a refund. The Commission has no doubts regarding the right of PCT to deduct the VAT it has paid. However it has doubts concerning the right of PCT to get a VAT credit refund. According to article 183 of the VAT directive, "... *Where, for a*

¹¹⁶ According to article 16 of the Code, when the delivered good has to be put together or installed, the delivery is considered done at the time of the completion of the works. At the same time, pursuant article 30§1, 2nd sentence, "especially in respect of "investment goods", the right of deduction is definitely decided at the time the goods start being used".

¹¹⁷ Case C-110/97, *Intercommunale voor Zeewaterontziltling (INZO)*, [1997] ECR – I 870.

¹¹⁸ Paragraph 15 of judgment in case C-110/94.

given tax period, the amount of deductions exceeds the amount of VAT due, the Member States may, in accordance with conditions which they shall determine, either make a refund or carry the excess forward to the following period." Therefore in view of the Greek VAT code provisions explained above, PCT is entitled to VAT credit refund, although under normal rules this would not be the case¹¹⁹ and the argumentation put forward by the Greek authorities does not bring any clarity to this issue.

- Concerning the 60 days' period for the VAT refund:

(128) According to Article 2, paragraph 4 of Law 3755/2009, PCT shall be refunded the VAT credit balance no later than 60 days from the date on which the relevant claim has been filed. The two month deadline for the VAT credit seems to correspond to the normal application of the VAT rules, as under the relevant provisions the maximum period within which the VAT claimed by PCT should be refunded is indeed two months. Therefore it can be concluded that this provision does not confer an additional advantage to PCT.

- Concerning the computation of interests from the 1st day after the expiry of the 60 day deadline:

(129) The concession contract/law under examination grants PCT the right to interests from VAT credit against the State arising automatically once the 60 day deadline expires, without having to follow the procedural or temporal requirements set out by the general applicable framework related to the VAT credit refund, i.e. at an earlier stage than for other companies. Therefore it can be considered as entailing an additional selective advantage for PCT.

(130) The Greek authorities confirm that there is no legal act applicable across all the sectors of the economy under which the Greek State is under the obligation to pay arrear interests, due to the delay in payment of the VAT refund, as of the first day after the expiry of the 60 day period from submission of the VAT refund application. However they argue that there is no legislative provision or principle preventing the Greek State from paying such interest from the 60th day onwards where payment is justified by the specific circumstances and is consistent with the general concept and principles of the Greek tax system and the Greek Constitution.

(131) This argument does not seem to be relevant, as for the purposes of the selectivity analysis it is the generally applicable legal framework that is relevant and not the absence of prohibition of setting a different rule.

(132) The Greek authorities further refer to the EU case law on VAT¹²⁰ in order to argue that the refund of VAT credit balance constitutes the refund of resources of the taxable person and not State resources. Therefore, the delay by the State in refunding VAT credit balance and the timing of the computation of interest

¹¹⁹ See paragraphs 118 to 121 of this decision.

¹²⁰ Cases T-68/03, Olympic Airways v. Commission, [2007] ECT II-2911, paragraph 361, C-25/07 Alicja Sosnowska v. Dyrektor Izby Skarbowej [2008] ECR I-5129.

on the relevant VAT credit balance should not be considered as involving an undue advantage to the taxable person involved.

- (133) The Commission considers that the computation of interests in respect of the delay in the payment of the VAT refund implies State resources, as the State will have to pay more interests than what it should normally pay in case of delay according to the generally applicable framework¹²¹.
- (134) The Greek authorities argue that as regards VAT refund there are no other companies in the same situation as the private investors of major public infrastructure projects entailing an important financial risk. The shorter deadline for the computation of interests in this case is designed to apply the concept and basic principles of the Greek tax system to these specific projects, in order to ensure that application of the standard rule to different situations does not result in a discriminatory treatment of the companies responsible for such projects. These companies are obliged to invest significant amounts of money during a period of time which may cover several years, during which they are paid little or no income on VAT and, as such, they are entitled to large VAT refunds from the Greek state¹²².
- (135) The Commission considers that this argumentation reinforces the finding that the specific measure constitutes a derogation from the normal system of reference. At the same time and for the reasons explained above in paragraphs 115 to 1117 of this decision, this argumentation does not seem convincing, as for the purposes of the selectivity assessment, the objective of the promotion of big infrastructure projects cannot be considered as an inherent objective of the national taxation system.
- (136) Concerning the interest rate applicable for the computation of interests according to the provision under examination, the Greek authorities indicate that it is the generally applicable one¹²³, as it applies to all types of tax refund payable to any taxable person in Greece. This is indeed the case. Therefore it can be concluded that there is no additional advantage in relation to the interest rate applied in favour of PCT claims.

Justification by the logic of the tax system

- Concerning the refund of VAT credit irrespective of the stage of completion of the contract object

- (137) The Greek authorities argue that the application of the principles of neutrality and equality justify the differentiated treatment of "investment goods" under the VAT regime. The "investment goods" require significant funding and any delay in VAT credit refund would increase the financial risk to the taxable person, in breach of the principle of neutrality of VAT. As such under the

¹²¹ cf. paragraph 122 of this decision.

¹²² The Greek authorities indicated that PCT was refunded EUR 9.835.416,99 in VAT from the Greek State for the period from 1 January to 30 September 2010 alone.

¹²³ This interest rate is equal to the interest rate applicable to three month bonds issued by the Greek State.

general VAT rules, a different deadline is provided for VAT refunds for "investment goods" compared with the deadline for common expenses, for which the VAT credit is transferred and offset against VAT payable in subsequent VAT periods.

- (138) The Commission notes that it may be true that the said principles justify the differentiated treatment of "investment goods". However, this does not justify why the definition of the "investment good" should be different specifically for PCT.
- (139) The Greek authorities refer further to the fact that all concession contracts of major public infrastructure include similar provisions. According to them the shorter deadlines for the calculation of late payment interests is related to the fact that the VAT refunds that are likely to be claimed are expected to be significant and the inability to receive interest from late payments could cause material cash flow difficulties. Therefore, according to them these shorter time limits aim at addressing such requirements.
- (140) On the basis of the above, they argue that these provisions should be considered as compliant with the case law of the Greek tax Courts and as an inherent part of the general tax system, aiming at facilitating and supporting the successful implementation of big infrastructure projects in Greece.
- (141) This may be true in the case of big infrastructure projects. However, as already stated above, it cannot justify the selective character of the measure in question, but possibly constitute a justification for the compatibility of such a measure.
- Concerning the computation of interests from the 1st day after the expiry of the 60 day deadline:
- (142) The Greek authorities argue that the Greek Conseil d'Etat has held that the calculation of interests on refundable VAT does not confer any kind of advantage on the interested taxable person and is consistent with the principle of neutrality which governs the VAT regime and is inherent with the concept of that regime. However, they do not make reference to any specific decision in this respect.
- (143) Furthermore they refer to the Sosnowska judgment¹²⁴ arguing that a delay in refunding VAT credit balance constitutes a financial encumbrance/risk to the taxable person and that if the deadline for refunding VAT is extremely long, the taxable person bears the VAT burden, something that is not in compliance with the neutrality principle of the VAT regime. That is the reason why the State is under the obligation to "compensate" the taxable person for the financial risks sustained from the late VAT refund. According to the Greek authorities, the computation of interest in such cases is intended to provide this compensation. As such, based on the principles of neutrality and equality,

¹²⁴ Case C-25/07, Alicja Sosnowska v Dyrektor Izby Skarbowej we Wrocławiu Ośrodek Zamiejscowy w Wałbrzychu [ECR] 2008, p. I-5129, paragraphs 14-17.

VAT refunds need to attract interest with due regard for the taxable person's circumstances. Moreover, in their view, given the specific characteristics of the VAT refund, the application of a different deadline is not automatically inconsistent with the general rule.

- (144) Furthermore, the Greek authorities refer to case law of the Greek Conseil d'Etat which states that the computation of interests runs from the date on which the application for a VAT refund is submitted to the competent court, in order to argue that the 6 month deadline is in practice not applicable, in order to argue that the measure in favour of PCT is in line with the constitutional principle of equality that underlines the Greek tax system.
- (145) Therefore, they consider that the said provision is consistent with the concept and general principles governing the common VAT system. In essence, the 60 day deadline reflects recent case-law of the Greek tax courts and the application of the principles of equality and neutrality under the Greek law and the TFEU.
- (146) The Commission notes in that respect that the argumentation on the general VAT neutrality principle may very well justify the imposition of interests in case of delay of the VAT refund. However this does not justify why a differentiated rule should be applied in the specific case of PCT contrary to other companies. Therefore this argumentation is not convincing.
- (147) The Commission moreover does not question that the 6 month deadline is not applied in practice, in view of the case law mentioned. However this does not mean that the specific treatment awarded to PCT in that respect is in line with the said equality principle. On the contrary, although for all the other companies the computation of interests starts after they have appealed the decision of the tax authority on the VAT refund, for PCT the computation of interests starts automatically, i.e. at an earlier stage and without any administrative burden or expenses.

4.2.3.3. Loss carry forward without temporal limitation (article 2§5).

System of reference

- (148) According to the general applicable framework¹²⁵, the losses of one year for commercial activities and activities of a liberal profession may be carried forward for up to a maximum period of 5 years. The GITC does not foresee any exception in respect of this rule.

Derogation from the system of reference

- (149) According to Article 2 paragraph 5 of the Law, PCT may carry forward its losses without any limitation in time. This measure grants a clear selective advantage to PCT as it deviates from the generally applicable rule that has no

¹²⁵ Article 105§11 in combination with article 4§3 GITC.

exceptions under the GITC. Due to this provision PCT will be able to carry forward its losses to any time it will be more appropriate for its interests, mainly once the balance between its investment costs and its taxable income will change, i.e. when it will have high profits, in order to avoid paying taxes that it would normally pay in the absence of the benefit of this exception.

- (150) The Greek authorities argue that this provision is an inherent part of taxation rules related to concession contracts, as in such cases there is a high risk for the investments made and the initial imbalance between expenses and revenues and the uncertainty as to whether such imbalance will be remedied through profits at a later stage needs to be addressed through this measure. In this respect, undertakings responsible for big infrastructure projects are in a different situation from ordinary undertakings. Thus the nature of such projects is such that the five year period is simply not enough for contractors to fully benefit from the right to carry tax losses forward that the Greek tax system seeks to grant to all taxable persons.
- (151) Moreover, they refer to the financial and economic crisis that followed the selection of PCT in order to demonstrate the risk and uncertainty inherent in long terms concession agreement of this type. Should the 5 year rule be applicable for PCT, the tax losses carried forward could end up with a distorted result to the detriment of PCT and to the performance of the concession contract and the competition of this award. As the Greek State has chosen to implement the investment project at stake through private operators and not finance it with its own means, the concessioner assumes the maximum possible share of the risk inherent in such investments in order to reduce at the minimum the public resources needed. This measure has as a purpose the financing of the investment through the most efficient way, i.e. the tax revenues.
- (152) Furthermore they argue that for the same reasons a similar deviation has also been adopted by the Greek legislator for most large public infrastructure projects in recent years. Thus the measure in question should be considered as a general measure of economic policy, inherent in the logic of the Greek tax system with regard to the requirements of the performance of complex concession contracts for big infrastructure projects, which it aims to facilitate.
- (153) The Commission has doubts that this derogation from the general rule is inherent in the logic of the Greek tax system. As already explained above in paragraphs 106 to 107, economic policy considerations cannot be the objective of the tax system in view of which the different factual and legal situation of undertakings may be considered. Moreover, the risk that a concession holder undertakes is inherent in the logic of the concession agreement. Therefore if the concession holder is alleviated from a part of the risk, the balance on which the tender was based may be vitiated. The tender relevant to the concession at stake, specified that the concession holder would take over all the investment costs of the project. Therefore the Commission has doubts that the financing of part of the investment through tax revenues could be considered as the logic of the Greek tax system.

Justification by the logic of the tax system

- (154) In view of the argumentation of the Greek authorities, the Commission has doubts that the measure can be considered as justified by the logic of the system. The same reasoning as mentioned above in paragraphs 119 to 120 applies here.

4.2.3.4. Choice among three depreciation methods

System of reference

- (155) Concerning this measure, the general system of reference is the generally applicable rule foreseen for the depreciation of assets and in particular the depreciation rules applicable in the case of concession agreements.
- (156) The GITC foresees the general rule that companies are entitled to deduct from their income the depreciation costs of their assets using the "fixed straight line method"¹²⁶ of depreciation¹²⁷. According to article 1 paragraph 2 of presidential decree 299/2003¹²⁸ companies are obliged to depreciate their fixed assets every year with the depreciation rates set out in this decree, independently if they make profits or losses during the depreciation period. Consequently if the depreciation is conducted with rates that are bigger than the ones foreseen in the presidential decree, they are not taken into account for tax purposes.
- (157) Especially start-up companies are entitled during the first 3 fiscal years following the fiscal period within which they started their business operation, either not to undertake the depreciation of their assets, or to depreciate their assets with the 50% of the valid depreciation rate, on the condition that the chosen depreciation rate will not be changed from one fiscal year to the other.
- (158) Costs related to improvements and supplements on leased immovable property are depreciated in equal tranches over the period of the leasing, provided that the applicable depreciation rate is not lower than the rate set out in presidential decree 299/2003¹²⁹.
- (159) Especially in respect of concession contracts, reserves for recovery of assets that will return to the State or third parties¹³⁰ after a certain period of time on

¹²⁶ With the fixed straight line method, depreciation is calculated on the basis of a fixed rate on the initial acquisition value or of the readjusted acquisition value plus the value of improvements or additional parts.

¹²⁷ Article 31.1.f) of the GITC.

¹²⁸ PD 299/2003: "Definition of highest and lowest depreciation rates". This decree sets out the range between the highest and the lowest depreciation rate per category of fixed assets. Taxable companies may choose any depreciation rate within this range. Once a company has chosen a depreciation rate within this range, it is obliged to complete the depreciation by applying the same rate on all assets of the same category which have been acquired by the company during the same fiscal period. For assets of the same category acquired in different fiscal periods, companies are entitled to use a different depreciation rate, but in any case it is mandatory to complete the depreciation procedure with the initial depreciation rate applied to all assets of the same category acquired in the same fiscal period.

¹²⁹ Article 31.1.l) of the GITC.

¹³⁰ This kind of "reserves" does not constitute real asset of the company but depreciations of the fixed assets that will be returned to the State or to 3rd parties.

the basis of a contract are deductible from gross revenues¹³¹. According to ministerial decision 100/2005¹³², reserves for recovery of assets that will be returned to the State or to third parties without compensation, are formed every year and for as many years as the work concession lasts. This reserve is deducted from gross revenue and is not formed out of the profits of the company. The company is not entitled to calculate the depreciations on the basis of presidential decree 299/2003, which is generally applicable, due to this specific provision, but also due to the fact that the work constructed by the company for exploitation does not belong to the company but to the State or the 3rd party. The deduction at stake is calculated independently of the existence of profits.

Derogation from the system of reference

(160) Article 2§6 of the Law under examination, provides to PCT the choice between 3 different methods of depreciation:

- a. Fixed straight line method during the whole concession period.
- b. Depreciation of the works' construction costs within 10 years from the moment of the completion of the works by yearly equal amounts¹³³. In case PCT wishes to depreciate such costs within a longer period, it may do so, but then it would have to notify this to the tax authority within one month from the end of the fiscal year during which the work has been completed.
- c. Depreciation of any amount up to 100% of its construction costs in each 5 years from the commencement of the commercial exploitation of the work¹³⁴. For all the subsequent years, it may depreciate up to 50% of the non-depreciated construction costs of completed works irrespective of the time of completion. In case PCT wishes to use this method, it has to declare its intention to the competent tax authority at any time within 6 years after the commencement of the concession.

(161) PCT has been given the possibility to choose between the standard generally applicable depreciation method and two other depreciation methods that seem to be applied in other concession contracts in Greece. Already the fact that it has the absolute discretion to choose between these different kinds of

¹³¹ Article 31.1.g) GITC.

¹³² YA 100/2005 (YA 1003821/10037/B0012, OJ B 80 of 2005): Deductible costs from gross revenues of companies on the basis of administrative solutions and the case law.

¹³³ Method set out by law 1914/1990 for BOT projects. According to article 9§8 of law 2052/1992, works that are executed with total or partial funding provided by 3rds, the depreciation of the construction costs and of the interests on loans and credits during the construction period, that are considered as construction costs, is conducted according to the same method.

¹³⁴ Method of depreciation for airport constructing companies set out by article 26 paragraph 8 of law 2093/1992.

depreciation will allow it to estimate the most advantageous fiscal treatment it can have at the time its income will become taxable. Therefore, PCT may enjoy a selective advantage through this provision, as this treatment derogates from the generally applicable rules.

- (162) The Greek authorities argue that the provisions related to depreciation allow some degree of flexibility in relation to the level of the investment costs and the financial performance. According to the general rules, companies are allowed to choose a depreciation rate within a predefined range that will determine the length of the depreciation period and new companies are allowed to undertake a limited depreciation of their assets during the first three years of operation, which is usually a period of significant investment costs and low taxable income. Therefore they argue that Greek legislation allows a certain degree of flexibility in relation to the rate of depreciation of assets and thus the financial benefit they can derive from depreciation, in connection with the level of their investment costs and their financial performance.
- (163) The Commission does not question that the Greek legislation allows a certain degree of flexibility in the depreciation of fixed assets. However, the generally applicable rule of the fixed straight line method for concession contracts, i.e. for companies that are in the same legal and factual situation, is clearly foreseen in the law and the "flexibility" related to the range of depreciation rates is not generally applicable to costs of concession contracts, but to other types of investment costs.
- (164) The Greek authorities also argue that the two additional depreciation methods that are available to PCT do not change the cost of the full depreciation, i.e. the total depreciated amount, but only the period during which the depreciation may take place. According to their allegations the result from using a depreciation method in terms of corresponding tax benefit depends on the financial model used by PCT and various unknown variables, such as the depreciation rate selected, future changes in corporate tax rates and future profits or losses. In light of these unknown variables, the facility to choose between 3 methods cannot be considered as conferring a selective advantage to PCT.
- (165) The Commission considers that PCT is in a position to examine the different variables and choose the depreciation method that would entail the most favourable tax treatment. Any company like PCT knows the financial model it uses, the choice of the depreciation method determines the depreciation rate that will be used and the combination of this measure with the other tax measures available to PCT, as for instance the fiscal loss carry forward without any temporal limitation, may help PCT choose the most favourable option at its sole discretion.
- (166) The Greek authorities further argue that the provision under examination helped to eliminate a gap in the general Greek tax system regarding the depreciation of assets used in the operation of a container port terminal, such as those that will be used by PCT for the purposes of the concession agreement. Article 34 of Law 2937/2001 lays down specific depreciation rates that PPA and the Thessaloniki Port shall use under the fixed straight line

depreciation method, for the specific types of port asset that they use. The Greek authorities argue that these rates are not applicable to PCT. According to the Greek authorities, if PCT opted to apply the straight line method and was allowed to use these depreciation rates, the period of depreciation would exceed the concession period. On the other hand, if PCT were obliged to apply the straight line method with different depreciation rates than the ones applied for PPA and the Thessaloniki Port, it would be disadvantaged compared to these operators.

- (167) The Commission has doubts that this argumentation shows that PCT was not granted a selective advantage. First of all, the law defining specific depreciation rates for PPA and Thessaloniki Port refers to the straight line depreciation method and not to other types of depreciations. This finding reinforces the argument that the provision under examination entails a selective advantage for PCT. Moreover, the fact that the said law determines the depreciation rates for the port assets of these two companies does not mean that there is a gap in respect of PCT. As the generally applicable rule, according also to the submissions of the Greek authorities, is the fixed straight line method for the whole duration of the concession, no such gap exists. Moreover, the Greek authorities do not explain how the discretion granted to PCT would remedy the supposed discrimination resulting from the specific depreciation rates applicable for PPA and the Thessaloniki Port. At any case, the Greek authorities do not explain why the provision in favour of PCT does not derogate from the generally applicable rule, i.e. the straight line fixed method for the whole concession period.

Justification by the logic of the tax system

- (168) The Greek authorities argue that the Greek legislation strikes a right balance between the requirements of a reasonable tax system and an appropriate degree of flexibility regarding depreciation of assets that can stimulate investments and economic development. To support this argumentation, they refer to similar alternative depreciation methods set out for other big infrastructure concessions in the past. Therefore according to the Greek taxation system the successful completion of big public infrastructure projects undertaken by private contractors on the basis of concession agreements requires an even greater flexibility and availability of alternative depreciation systems.
- (169) However, this argumentation does not seem convincing in view of the general rule applicable to all concession agreements. Furthermore, the consideration related to the successful completion of large infrastructure projects put forward cannot justify a selective fiscal treatment, but can only be taken into account at the compatibility assessment of the measure, as already stated¹³⁵.
- (170) Paragraph 24 of the Commission notice on fiscal aid states that calculation of asset depreciation methods may be inherent in the tax systems to which they belong. At the same time some conditions may be justified by objective

¹³⁵ See paragraph 104 of this decision.

differences between tax payers. This seems to be already the case under the generally applicable rule for concessions.

- (171) Moreover, according to the notice, if the tax authority has discretionary freedom to set different depreciation methods, firm by firm, sector by sector, there is a presumption of aid. In the case at hand PCT was granted already by the Law the full discretion to choose the depreciation method for its assets. Here the discretionary element is not found at the level of the tax administration but at the level of the beneficiary itself. In this sense, the discriminatory character of the measure favouring PCT reinforces the finding that there is a presumption of aid. As the possibility of justifying a measure on the basis of the nature and general scheme of the system relates to considerations that do not fit with its discretionary application, the Commission has doubts that the measure under examination can be justified by the logic of the tax system.

4.2.3.5. Exemption for corporate income tax for goods, works and services provided to PCT outside Greece

System of reference

- (172) Concerning this measure, the tax system of reference consists in the taxation of foreign companies in Greece for profits deriving from a source situated in Greece. The GITC¹³⁶ foresees that foreign companies operating under any form, as well as any kind of foreign organisation that aim at the acquisition of financial profits, the net income or profit of which derives from a source situated in Greece, as well as the net profit deriving from their permanent establishment in Greece, are subject to tax. According to the case law of the Greek Conseil d'Etat¹³⁷, a foreign company may be taxed on its profit deriving from a source situated in Greece, irrespective of the State in which the company is established. Consequently, in the absence of bilateral agreements of avoidance of double taxation, income or profits deriving from a source in Greece are taxable in Greece.
- (173) Furthermore, according to article 13§8 GITC, foreign companies and organisations that undertake in Greece the compilation of studies and projects or the implementation of research of technical, financial or scientific nature in general, whether these studies are elaborated in Greece or in a foreign country, or the supervision of the implementation of technical works implemented by third parties in Greece, or the provision of consultancy services to the contractor implementing in Greece technical works, are taxed with a percentage of 25% (in the form of a withholding tax) on their total gross pay. This tax is withheld from the remuneration of the foreign company and is paid to the tax authorities directly by the client of the foreign companies.
- (174) It results from these provisions, that there may be cases where foreign companies may be taxed under the GITC even when they provide specific

¹³⁶ Article 99§1, d) of the GITC.

¹³⁷ Cases 842/1984 and 1834/2000.

kinds of services outside Greece, as long as the source of their income is situated in Greece. Concerning the nature of such services, in their response the Greek authorities refer to rights, IT services, expertise, consultancy and administrative services that can be provided to PCT outside Greece. Such services could possibly be considered as falling within the ambit of article 13§8 of the GITC.

Derogation from the system of reference

- (175) The provision under examination foresees that companies having their corporate seat outside Greece are not subject to corporate income tax in Greece for goods, works or services that they provide to PCT outside Greece, provided that a bilateral agreement for the avoidance of double taxation has been entered into force between Greece and the country of registration of such companies or joint ventures.
- (176) Given that according to the generally applicable framework, foreign companies may be taxed for profits they generate from a source in Greece, it seems that this provision entails a selective advantage in favour of the foreign companies that may provide goods, works or services to PCT outside Greece. The same provision entails an indirect selective advantage for PCT, as it will enable it to buy services, goods or works at a lower price than the price it would normally pay in the absence of the tax exemption.
- (177) The Greek authorities argue that pursuant to articles 99 and 100 GITC, foreign companies or joint ventures are subject to taxation only when they are established in Greece or in relation to income earned in Greece. They further argue that according to the GITC, no withholding tax is due in Greece in the case of services that have been provided outside Greece.
- (178) However, it seems that according to the generally applicable framework there are cases where foreign companies may be taxed under the GITC even when they provide specific kinds of services outside Greece, as long as the source of their income is situated in Greece¹³⁸. Therefore it seems that foreign companies providing goods, works or services to PCT may enjoy a selective advantage if compared with other foreign companies providing goods, works or services to other companies in Greece. The same reasoning is also valid in respect of PCT. On this basis, the argumentation of the Greek authorities does not seem convincing in that respect.

Justification by the logic of the tax system

- (179) The Greek authorities argue that pursuant to most of the bilateral conventions entered into by Greece and other States for the avoidance of double taxation, business profits of foreign companies, including profits from the sale of goods or the provision of services, are taxed only in the State of residence of the foreign company. It seems indeed that Greece signs in most cases the standard OECD agreements, under which foreign companies that are not permanently

¹³⁸ See paragraphs 172 and 174 of this decision.

established in the State where their profits are generated, are taxed exclusively in the State of their establishment¹³⁹.

- (180) On this basis and given that the provision under examination sets as a precondition the existence of a bilateral agreement on avoidance of double taxation, the relevant selective advantage in favour of the foreign companies and PCT may be considered as justified by the nature or general scheme of the taxation system. Therefore the Commission can conclude that this measure does not constitute State aid.

4.2.3.6. Exemption from stamp duties on the loan agreements and any ancillary agreement for the financing of the investment project (article 2§8)

System of reference

- (181) Concerning this measure, the system of reference consists in the stamp duty regime applicable for loan, credit and ancillary agreements in Greece.
- (182) According to the generally applicable legislation, stamp duties are imposed on the written form of several acts of civil and commercial law, therefore including loan, credit and ancillary agreements. According to the presidential decree on stamp duties¹⁴⁰, stamp duties are collected in relation to a specific document setting out a transaction in writing. The stamp duty is related to the act itself; therefore it is up to the parties to agree on the party liable to pay it. However, in practice this means that for loan, credit and ancillary agreements, the borrower is mainly liable to pay the relevant stamp duties, as the creditor has the power to impose such payment. The introduction of the VAT as a general expenditure tax by law 1642/1986 in the Greek legal order had as a consequence the replacement of several stamp duties and turnover taxes by VAT.
- (183) According to article 16 of law 1676/1986 and article 36 of law 3220/2004 are exempted from stamp duties the loan and credit agreements, as well as their ancillary agreements that are provided by Greek and foreign banks in Greece or that have a link to Greece¹⁴¹.

Derogation from the system of reference

- (184) As according to the generally applicable framework, loan, credit and ancillary agreements with companies other than banks are subject to stamp duties, PCT would normally have to pay stamp duties for this kind of acts. However, on the basis of the provision under examination, PCT has been alleviated from stamp duties it would normally have to pay for this type of acts. In this way, PCT would enjoy a selective advantage in comparison to other undertakings in a comparable legal and factual situation, i.e. undertakings that conclude loans in

¹³⁹ Theodoros Fortsakis, Fiscal law, Ant. N. Sakkoulas Editions 2008, p. 411-412.

¹⁴⁰ Presidential decree of 28-7-1931, OJ A 239 1931, as modified especially by law 2873/2000.

¹⁴¹ e.g. they are concluded and/or executed in Greece, they create obligations which are executable in Greece, they involve collaterals in Greece etc.

order to finance their investments and have to pay stamp duties and negotiate the terms of their loans under normal rules.

- (185) The Greek authorities do not question that these loan transactions are exempted from the generally applicable framework. However, they argue that this exemption provides PCT with greater flexibility regarding the funding required for the performance of its concession obligations without any additional cost, in case such flexibility is deemed necessary. Therefore this measure should be considered as part of a general measure inherent in the Greek tax system, which aims at facilitating the funding of big infrastructure projects.
- (186) However, as already stated above for the other measures, this flexibility cannot be considered as a valid objective against which undertakings may be considered as being in a comparable legal and factual situation.

Justification by the logic of the tax system

- (187) The Greek authorities argue that since PPA is also entitled to the same stamp duty exemptions¹⁴², the award to PCT of the same exemption aims at guaranteeing equal treatment and conditions of fair competition between PPA and PCT in the Piraeus Port.
- (188) The Commission notes that the fact that PPA may enjoy stamp duty exemptions¹⁴³ does not mean that PCT is entitled to have the same type of exemptions or that this measure is justified by the logic of the tax system. Indeed no company should enjoy any advantage granted through State resources that may not be justified by the logic of the relevant tax system. Therefore the Commission has doubts that this stamp duty exemption can be considered as justified by the nature of the applicable system.
- (189) The Greek authorities furthermore stated that there is no legal text providing for the Greek State to exempt loan agreements entered into in order to finance investment plans in various sectors of the economy from stamp duty or other charges and taxes. On the contrary, they provided a list of examples of old laws having granted similar exemptions from stamp duties to companies that made big investments in Greece before 1981¹⁴⁴. However, given that economic policy considerations may not validly justify selective measures, this argumentation reinforces the doubts the Commission has in respect of the justification of this measure.

¹⁴² Pursuant to Article 2§2 of law 2688/1999 in conjunction with Article 3 of law 1559/1950.

¹⁴³ The Commission's assessment in the current decision is without prejudice to the position it may take regarding these provisions concerning PPA.

¹⁴⁴ a) Article 18(3) of legislative decree 3560/1956 ratifying the contract between the Greek State and Aristotle Onassis which resulted in the establishment of Olympic Airways SA; b) article 17(3) of legislative decree 2593/1956 ratifying the contract between the Greek State and Stavros Niarchos which resulted in the establishment of Hellenic Shipyards SA; c) article 19(1) of legislative decree 4110/1960 ratifying the contract establishing the aluminium industry in Greece; d) article 7(1) of law 4171/1961 setting out general measures to support the economic development in Greece and e) article 8(1) of legislative decree 1211/1972 ratifying the contract between the Greek State and Petrola/ Stratis Andreadis establishing the third oil refinery in Greece.

4.2.3.7. Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom (article 2§9).

- (190) The Greek authorities have not provided any specific information on the generally applicable framework in reference to this measure. In particular they do not mention the specific taxes, contributions and other rights that are applicable in general and in particular regarding this type of contracts.
- (191) However, they refer to article 23§3 of Law 1731/1987, according to which the contracts between banks that are legally operating in Greece, under which are transferred rights or obligations, that derive from loans or credits, are exempted from any tax, stamp duty or any contribution in favour of the State or any 3rd party. The same exemption is foreseen for contracts on settlement of due loan liabilities or bank credits or special credit institutions to anyone, as long as such provision is foreseen by the monetary authorities.
- (192) Moreover the Greek authorities provide the same argumentation as the one in relevance to stamp duties above, in order to argue that no State aid is involved.
- (193) On the basis of the information available the Commission is not in a position to conduct a proper assessment of the measure at stake. Therefore it invites the Greek authorities to provide information on the generally applicable framework within which this measure has to be assessed, as well as any other argumentation relevant for the selectivity assessment of the measure. In particular, the Commission would need to have proper information on the taxes, contributions and rights in favour of the State or third parties that are imposed for acts of civil or commercial law and in particular as the contracts under this measure. The assessment of the specific measure in reference to the general applicable framework is also necessary.

4.2.3.8. Exemption from stamp duties for any compensation paid by PPA to PCT under the concession agreement, which is outside the scope of the VAT code (article 2§10).

System of reference

- (194) Concerning this measure, the system of reference is the stamp duty regime applicable in acts of civil or commercial law in Greece. The rules governing this regime are already mentioned in paragraphs 181 to 183 of this decision. According to stamp duty rules, stamp duties are imposed in relation to the legal documents to which they are attached and not the specific taxable persons that sign these documents. Moreover pursuant to the generally applicable law as interpreted and enforced by the competent Greek tax

authorities, the payment of compensation falls outside the scope of VAT and is therefore subject to stamp duty¹⁴⁵.

- (195) The Greek authorities indicated that according to the provisions of the Greek Stamp Duty Code, compensation paid in Greece due to damages is subject to stamp duty at a 3.6% rate. The payment of compensation pursuant to an indemnity clause included in a contract is subject to stamp duty at a 2.4% rate.

Derogation from the system of reference

- (196) In view of these provisions that impose a stamp duty on the legal documents and not specifically to the parties of the transaction and given that PPA is already exempted from stamp duty by law¹⁴⁶, each time a compensation payment will be subject to stamp duty, PCT would be obliged to pay it under the generally applicable rules. Thus the exemption at stake has the effect of exempting PCT from the obligation to pay stamp duties in such cases, clearly entailing a selective advantage for PCT.
- (197) The Greek authorities argue that this provision merely confirms the relevant provision concerning PPA. However, the fact that PPA may be exempted from stamp duty does not necessarily mean that such exemption in favour of PCT does not constitute a selective advantage.
- (198) In their second submission, the Greek authorities refer to a ministerial circular 44/1987¹⁴⁷, in order to argue that according to the generally applicable rules, if there is a link between payment of compensation and a contract subject to VAT, the compensation will be subject to VAT and exempt from stamp duty. Consequently any compensation paid in relation to the concession contract that is subject to VAT, is also exempted from stamp duty. Following this line of reasoning they argue that this provision is not a specific provision for PCT, but reiterates for PCT the regime that applies under the generally applicable rules. Therefore it constitutes a general measure.
- (199) However this finding contradicts their statement in their first submission that according to the prevailing interpretation of the relevant provisions of the Greek VAT code, the payment of compensation does not fall within the meaning of the provision of services against consideration and thus falls outside the scope of VAT and, instead, is subject to stamp duty. Moreover within the Greek national order an administrative circular cannot modify nor

¹⁴⁵ Under article 57§1 (b) of law 1642/1986, transactions falling within the scope of VAT are exempt from stamp duty. Under article 2 of the Greek VAT Code (Law 2859/2000 replacing Law 1642/1986), VAT applies to the supply of goods and services where such supply is effected for the payment of consideration. According to the prevailing interpretation of these provisions, the payment of compensation does not fall within the meaning of the provision of services against remuneration and thus falls outside the scope of VAT and instead is subject to stamp duty.

¹⁴⁶ Pursuant to Article 2 of Law 2688/1999, in conjunction with Article 362 of Law 1559/1950. The Commission's position in this decision is without prejudice to any position it may take in the future regarding this provision.

¹⁴⁷ Ministerial circular 44/1987: Implementation of the provisions of imposition of stamp duties to various contracts and acts.

contradict a law. Therefore the Commission has doubts that this argumentation can be retained in order to exclude the selective character of this measure.

Justification by the logic of the tax system

- (200) Furthermore, the Greek authorities argue that this exemption has been considered necessary to this type of concession agreements in order to raise the uncertainty arising from the possibility that material sums may be required to be paid by the concessioners in the form of stamp duty, in particular as a result of contractual indemnity clauses requiring the State or the State entity concerned to pay damages to the concessioner. Thus this exemption aims at offsetting to some extent the uncertainty concerning the successful completion and operation of big infrastructure projects over a long period of time.
- (201) As already stated above, economic policy considerations cannot serve as a basis for the justification of a selective measure.
- (202) Moreover, the Greek authorities argue that the Greek legislation has exempted the payment of compensation from stamp duties where this was justified by specific circumstances and the general logic of the tax system. For this they provide an example referring to such exemption for compensations paid by insurance companies¹⁴⁸. However the fact that such exemption exists for such type of contracts does not explain why the exemption in favour of PCT would be justified by the nature and/or logic of the tax system.
- (203) Furthermore, the Greek authorities argue that the measure was designed to ensure that PCT is not treated differently from any other undertaking in Greece which negotiates with its counterparties as to which party is liable for stamp. Given that in practice it is usually the debtor the one who becomes liable to pay, normally PPA would be liable to pay the stamp duties. However as PPA is exempted by law from such payment, the measure in question ensures that PCTs treatment is in compliance with the stamp duty general principles and that PCT is not subject to discriminatory treatment. However, as already pointed out above in paragraph 188 of this decision the fact that PPA may be exempted from stamp duties does not mean that such exemption in favour of PCT is justified by the nature of the tax system.

4.2.4. *Following PCT's application, protection provided for in legislative decree 2687/1953 for the investment of the concession contract (article 3).*

Description of the legislative decree and the measures that it may involve

a. Procedure

- (204) Legislative decree 2687/1953 allows the Greek administration to grant a specific favourable regime to any company that imports foreign capital in order to make "productive investments". In order for the company to benefit

¹⁴⁸ Article 20 of Law 3091/2002.

from this regime, it has to apply to the Ministry of National Economy. A specific committee created by the said decree issues an opinion after assessing:

- whether the investment is "productive", i.e. if it aims at the development of the national production or if it contributes to the economic development of the country;
- whether it concerns foreign capital, including any nature of capital, i.e. foreign currency, machinery and materials, inventions, technical methods, as well as trademarks;
- the "usefulness" of the import of foreign capital; on this specific point the decree does not include any definition or criteria that have to be fulfilled, thus granting a discretion to the national administration.

(205) Following this opinion the responsible Minister, depending on the importance of the investment, proposes an irrevocable presidential decree or adopts a ministerial decision approving the import of foreign capital under specific conditions decided therein and granting an irrevocable favourable regime¹⁴⁹.

(206) According to the legislative decree, the assets of companies that are created or significantly increased¹⁵⁰ with foreign capital under this decree are exempted from any forced expropriation in favour of the State, as well as from any requisition of their assets¹⁵¹. Finally¹⁵² there is a specific provision establishing the principle of no retroactive imposition of tax for all companies covered by the legislative decree.

b. Privileges that may be granted

(207) The presidential decree/ministerial decision that may be adopted for a specific company grants the following fiscal "facilities"¹⁵³:

- a freeze on the tax rate applied on profits for a period not exceeding 10 years or application of a lower tax rate¹⁵⁴;
- reduction or exemption from custom duties or charges on imports of machinery etc., for a period not exceeding 10 years;

¹⁴⁹ This specific regime may only be modified in case the company, to which it is allowed, agrees to.

¹⁵⁰ According to Article 9 paragraph 2 of the presidential decree, this increase is meant as exceeding half of the amount corresponding to the total assets of those companies or above 1 million US dollars.

¹⁵¹ Unless requisition is aimed at covering the needs of the armed forces in times of war and only for as long as the conflict lasts and subject to fair compensation.

¹⁵² The decree also foresees other privileges/conditions for the companies covered: i) specific conditions for the repatriation of loans or share capital permission for the repatriation of loans or share capital (up to 10% of the imported capital annually); a cumulative remittance of profits (up to 12%, net of tax, on the imported and non-repatriated capital annually); and a remittance of interest (up to 10% annually) and permission for the transfer out of Greece of foreign exchange needed for lease payments concerning machinery or other forms of capital leased from abroad), (ii) the recruitment of foreign nationals as technical and administrative personnel and permission for exporting the amount of their remuneration in foreign exchange; and permission to keep company accounts with entries in a foreign currency

¹⁵³ Articles 8 and 11 of the legislative decree.

¹⁵⁴ An adjustment may also be foreseen in case of reduction of the normally applicable limitations.

- lower tax rate or exemption from any tax imposed by local authorities or port authorities for a period not exceeding 10 years;
- reduction or exemption from any charges and royalties of any kind in connection with the registration of mortgages or the creation of a pledge as security for the imported capital or for the conclusion of any contract related thereto;
- prohibition of export restrictions or taxes;
- prohibition of the retroactive imposition of tax;
- exemption from forced expropriation in favour of the State of assets of the beneficiary company;
- prohibition of the requisition of assets of the undertakings under protection;
- recruitment of foreign nationals as technical and administrative personnel and permission for exporting the mount of their remuneration in foreign exchange;
- permission for the repatriation of loans or share capital (up to 10% of the annual imported capital); a cumulative export of profits (up to 12% without tax, of the imported and repatriated annual capital); export of interests (up to 10% annually)¹⁵⁵.

System of reference

(208) As the protection provided under legislative decree 2687/1953 may vary depending on the measures that are decided each time in respect of each specific undertaking that falls within such "protection", the general system of reference may include each time the different tax measures from which the beneficiary will be exempted.

Derogation from the system of reference

(209) Article 3 of Law 3755/2009 allows PCT to apply for the protective regime foreseen under the described legislative decree. This provision has as a consequence that several selective advantages may be granted to PCT upon its request by the Greek administration. As the presidential decree seems to allow full discretion to the administration to establish the conditions, as well as the advantages concerned, it seems clear that PCT may enjoy several selective advantages through the implementation of this provision.

¹⁵⁵ This measure is not foreseen in the presidential decree, but the Greek authorities mentioned it in the list of measures that have been provided in the past through this special regime.

- (210) The Greek authorities argue that the regime established by legislative decree 2687/1953 is a general measure aimed at ensuring the economic development of Greece and applying to all undertakings meeting the objective criteria for its application¹⁵⁶. Thus it is not a selective measure that could be considered as conferring a selective advantage to PCT.
- (211) However, as already indicated above¹⁵⁷ the fact that a measure may have an economic policy objective does not mean that it is not selective, but that it may be considered compatible with the internal market, if certain conditions are complied with¹⁵⁸. Moreover it is established case law that even if a tax measure determines its scope on the basis of objective criteria, it can nevertheless be selective¹⁵⁹.
- (212) The Greek authorities also mention that Protocol 3 attached to the accession Treaty of Greece¹⁶⁰, refers to this decree. However, it only relates to customs duties and does not seem to allow any new measures of exemption granted after 1 January 1979¹⁶¹, as the authorities imply in their submission.
- (213) The Greek authorities also refer to an answer¹⁶² Commissioner Tajani gave in respect of article 3 of Law 3755/2009 in order to argue that it is compatible with EU law. However, this reference is not exact. It is true that Commissioner Tajani mentioned that the protection provided under legislative decree 2687/1953 does not raise particular concerns as far as the rules on free movement of capital and foreign investment are concerned. However in the same reply Commissioner Tajani indicated that "*the question whether Articles 2 and 3 of Law 3755/2009... contain State aid elements and, if so, whether such elements are compatible with the common market have not been examined...In this respect the Commission will request further information from the Greek authorities in order to be able to assess whether the provisions of Articles 2 and 3 of Law 3855/2009 are compatible with the Community rules on state aid...*" Thus it was clear from Commissioner Tajani's answer

¹⁵⁶ This decision is without prejudice to the position the Commission may take in respect of the legislative decree itself in the context of another procedure.

¹⁵⁷ See paragraphs 115 to 117 of this decision.

¹⁵⁸ Case C-487/06 P, British Aggregates [2008] ECR I-10515, paragraph 92.

¹⁵⁹ Cases T-445/05, Associazione italiana del risparmio gestito, [2009] ECR – II-00289, paragraph 152, T-424/05, Italy v. Commission, [2009] ECR - II-00023, paragraph 126, and joint cases T-127/99, T-129/99 and T-148/99, Territorio Historico de Alava, [2002] ECR - II-01275, paragraphs 156, 157 and 163.

¹⁶⁰ OJ L 291 of 19 November 1979.

¹⁶¹ "Provisions relating to the alignment of duties in the Hellenic Customs tariff upon the duties in the Common Customs tariff shall not prevent the Hellenic Republic from maintaining measures of exemption granted before 1 January 1979 pursuant to: i) law No 4171/61 (General measures to aid development of the country's economy) ii) decree Law No 2687/53 (Investment and protection of foreign capital) iii) law No 289/76 (Incentives with a view to promoting the development of frontier regions and governing all pertinent questions), until the expiry of the agreements concluded by the Hellenic Government with those persons benefiting from these measure."

¹⁶² <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=P-2009-3870&language=LV>.

that the Commission had not at that time assessed this measure under State aid rules¹⁶³.

- (214) Moreover the Greek authorities argue that the State does not have any discretion in terms of granting or refusing this type of "protection", once the conditions for the grant of this "protection" are met.
- (215) However, a 1962 legislative decree¹⁶⁴ interpreting the one of 1953, establishes that the administration has the full discretion to regulate any other issue that is related to the investment in any way it sees fit for the accomplishment of the purpose of the presidential decree, i.e. the attraction of foreign capital, as long as these issues do not run counter its provisions. Therefore, contrary to what the Greek authorities argue, it can be concluded that the administration has full discretion to establish new conditions, as well as "facilities" that may render such investments more attractive for companies. Therefore it seems that the regime for which PCT may apply due to this provision is at the discretion of the Greek authorities. At any case, already the fact that this regime is foreseen for specific types of investments and in particular in the case at hand, in favour of PCT, already indicates that it is a regime that the Greek State may provide at its own discretion.
- (216) Moreover, even in the case where the regime provided under the legislative decree was considered as a general measure, its individual application may take the feature of a selective advantage¹⁶⁵, given that every decision of the Greek administration may depart from the general tax rules to the benefit of PCT. According to the Fiscal Notice, such finding leads to a presumption of State aid and must be analysed in detail. On this basis the Commission has doubts that the provision in question does not entail a selective advantage in favour of PCT.

Justification by the logic of the tax system

- (217) The Greek authorities argue that the specific regime under this decree aimed at attracting foreign capital and facilitating the reconstruction of the country following the Second World War and the civil war in the 1940s'. Given its importance for Greece's economic development, Article 107 of the Greek Constitution expressly recognises that it prevails ordinary laws. Indeed this was done in order to ensure that investors of foreign capital are protected against the constant modifications of Greek tax law that are not favourable for foreign investments. However the same purpose of this protective regime which is the development of the Greek economy cannot justify the selective character of the measure, but can only be taken into account within the compatibility assessment.

¹⁶³ At any case the reply of a Commissioner cannot be considered as the official position of the European Commission as adopted by the College of Commissioners.

¹⁶⁴ Article 5§3 of Legislative decree 4256/1962, FEK A168.

¹⁶⁵ See paragraphs 21 and 22 of the Commission Fiscal Notice.

- (218) The Commission also notes that since this measure seems to be granted on a discretionary basis, it cannot be justified by the nature or general scheme of the tax system¹⁶⁶.

4.2.5. *Exemption from the general rules of forced expropriation*

- (219) The Commission notes that the Greek authorities provided no information in respect of this alleged measure. Therefore it invites the Greek authorities to indicate whether this allegation is correct, the considerations lying behind this measure, whether there are other undertakings in the same legal and factual situation that enjoy the same advantage, but also whether this measure may be justified by the nature of the Greek system and why.

4.2.6. *Comparison of the above mentioned State aid measures with similar provisions in other contracts of big infrastructure projects*

- (220) As already mentioned above, the main argumentation of the Greek authorities in respect of all the above mentioned State aid measures for their justification refers to the necessity to foster the economic position of companies that undertake big infrastructure projects in Greece due to their risky situation during the investment period. To support their argumentation they refer to similar provisions that can be found in most of the big infrastructure projects in Greece during the last twenty years.
- (221) The Greek authorities further refer to a number of Commission decisions that considered that no State aid was involved in the financing of big infrastructure concession contracts that include similar fiscal exemptions. However, most of those decisions do not refer to the tax exemptions in favour of the concessioners (let alone the fact that they are justified by the logic of the fiscal system)¹⁶⁷ and merely assess whether or not the tender procedure was sufficiently open, non-discriminatory and based on the lowest price. Therefore those tax exemptions cannot be considered as concerned by the Commission's assessment. The fact that the Commission received the relevant concession contracts that referred to several tax exemptions during the notification does not mean that the Commission examined them from the State aid viewpoint or has pronounced itself on those specific measures. According to the Court's case law, the Commission should clearly and expressly take a position on measures in order for the beneficiaries to consider that these measures do not entail State aid. The silence of the Commission does not mean that these measures were approved¹⁶⁸.

¹⁶⁶ See paragraphs 24 and 27 of the Commission Fiscal Notice.

¹⁶⁷ See Commission decisions in cases N 508/2007 Ionia Odos, N 45/2008 – Motorway Elefsina-Korinthos-Patras-Pirgos-Tsakona, N 566/2007 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/2007 Central Greece Motorway, N 633/2007 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzonia Motorway concession contract, N 134/2007 Thessaloniki Submerged Tunnel concession contract.

¹⁶⁸ Joint cases T-427/04 *France v. Commission* and T-17/05 *France Telecom v. Commission*, ECR [2009] II-0435, paragraphs 264-266, C-474-09 P to c-476/09 P, Territorio Historico de Vizcaya, not yet published, paragraph 70.

- (222) In some other cases¹⁶⁹ the Commission concluded that the fiscal measures were part of the remuneration of the concessionaire which had been determined in the context of an open and non-discriminatory procedure, whilst in another case¹⁷⁰ the Commission concluded that the activities benefitting from aid were not economic or had not been liberalised yet. Finally the Thessaloniki Submerged Tunnel case¹⁷¹ does not seem relevant as the tax measures were not included in the assessment and at any case the successful bidder refrained from taking advantage of the option, included in the tender documents, to benefit from operational subsidies.
- (223) Moreover, all the Commission decisions to which the Greek authorities refer, concern concession contracts under which the investment projects were funded both by the State and the concessioner. On the contrary concerning the investment project PCT undertaken in the current case, the concessioner was supposed to undertake exclusively and solely the whole funding with no State or public participation. The contract notice as well as the concession agreement state explicitly that the concessioner will provide exclusively itself the financing of the investments for the whole construction work. Therefore, the tax exemptions in the present case cannot be considered as part of the remuneration of the concession holder.
- (224) Additionally the tax exemptions in favour of PCT were introduced in the law that ratified the concession agreement and not in the concession agreement itself. The Greek authorities argue that this was done due to the fact that PPA which was the party to the concession agreement has no competence to grant tax exemptions, so they could only be inserted within the Law. Although this may be true, it does not change the fact that this specific concession was intended to be financed solely by the successful bidder/concessioner.
- (225) The Greek authorities further argue that even if the contract notice did not refer to the tax exemptions, this practice is well known to big infrastructure companies in Greece, so the bidders always take it into account in order to formulate their offers in this kind of procedures. As evidence to this they provided a request of the Ministry of maritime transport to the Ministry of Economic Affairs to assent on the grant of a special treatment concerning the VAT refund for PCT, but also for the successful bidder of the Port of Thessaloniki at the time, i.e. Hutchinson, the other bidder of the tender related to the container terminal of the Port of Piraeus. This request was not part of the tender procedure but was only made after the selection of PCT and during the time PCT was negotiating the contract with the State and PPA.
- (226) The Commission notes that the evidence provided by the Greek authorities reinforces the finding that the bidders have not taken the specific advantages into account when they made their offer, but also that the nature, the extent

¹⁶⁹ See Commission decisions in cases N 462/99 Attiki Odos and NN 143/1997 Rion Antirion Motorway Bridge.

¹⁷⁰ See Commission decision in case NN 27/1996 Spata International Airport.

¹⁷¹ See Commission decision in case N 134/2007 Thessaloniki Submerged Tunnel concession contract.

and the duration of the granted exemptions in the end were the outcome of negotiations that took place after the tender procedure. Therefore, the Commission has doubts that the specific tax exemptions were taken into account at the moment of the submission of the offers, as they could differ depending on the negotiations after the tender procedure. Therefore the Greek authorities are invited to provide information as to how the bidders have supposedly taken into account the specific advantages at the submission of their offers, in order to prove their allegations.

- (227) Finally the circumstance that some of those tax exemptions or similar exemptions were included in previous transactions on which the Commission adopted a decision does not seem to be relevant for demonstrating that those measures are justified by the logic of the fiscal system.
- (228) Hence, the Commission has doubts that the measures examined above (with the exception of measure in paragraph 4.2.3.5.) derive directly from the basic principles of the Greek tax system and they are justified by the nature and general scheme of the tax system.

Distortion of competition and affectation of trade

- (229) Having established that the measures described above seem to entail selective advantages in favour of PCT, the Commission must now assess whether these advantages may distort competition and affect trade between Member States.
- (230) The Commission notes that there can be competition between port service providers, especially between major hubs which serve large geographical areas. Already when PCT took over the concession agreement, the Port of Piraeus had substantial capacity (1.6 M TEUs¹⁷²) and was considered as potentially competing with other EU ports¹⁷³. According to the concession agreement, Piers II and III of the Container Terminal that are foreseen to be exploited by PCT will reach a very important capacity (up to 3.7 M TEUs) up to 2015¹⁷⁴. Through the concession agreement the Greek State has opened the port services market to competition. At the same time due to the concession agreement PCT has become a very important port operator and is foreseen to become the leading container terminal in Greece and East Mediterranean region. Therefore it is clear that it competes with other EU ports and will increase its position in the market in the next years. Furthermore the privatisation foreseen for the Port of Piraeus and other Ports in Greece is foreseen to attract other EU operators in Greece.
- (231) When aid granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in the internal market, the latter must be regarded as affected by that aid. In accordance with settled case law¹⁷⁵, for a measure to distort or threaten to distort competition, it

¹⁷² See footnote 78.

¹⁷³ For example the Port of Thessaloniki, the Port of Constanta in Romania, the Port of Koper in Slovenia and a number of ports in Italy may be considered as direct competitors of PPA and PCT.

¹⁷⁴ Piraeus Container Terminal S.A.

¹⁷⁵ Case T-214/95 *Het Vlaamse Gewest v Commission* [1998] ECR II-717.

is sufficient that the recipient of the aid competes with other undertakings on markets open to competition. Hence it seems that the selective tax advantages granted to PCT under examination will distort or threaten to distort competition and affect trade between Member States.

Conclusion

(232) For the reasons set out above the Commission takes the preliminary view that all the tax advantages granted to PCT constitute State aid within the meaning of Article 107 (1) TFEU with the exception of exemption for corporate income tax for goods, works and services provide to PCT outside Greece (see section 4.2.3.5 above), for which the Commission concludes that it does not constitute state aid.

5. ASSESSMENT OF THE COMPATIBILITY OF THE AID

(233) In so far as the measures specified above in favour of PCT constitute State aid, their compatibility must be assessed on the basis of the exceptions laid down in Article 107(2) and 107(3) TFEU. The Greek authorities argue that all State aid measures are compatible with the internal market on the basis of Articles 107(3)(a) and 107(3)(c), given the importance of the relevant investments, infrastructure and services for the economic development of Greece and, in particular, the development and modernisation of this sea container transport sector. According to them, the conditions of both these articles are fulfilled.

(234) First of all, they provide argumentation in respect of the concession project in order to argue that it is indeed a project that will contribute to the economic development of Greece. In particular they refer to the location of the port of Piraeus in the greater Athens metropolitan area, where more than half of Greek population is concentrated. Given its location within such a large metropolitan area, at the point of convergence of three continents and near the major shipping routes in the Mediterranean Sea, the port of Piraeus has developed as the largest port in Greece and one of the biggest and most important ports in economic terms in the Mediterranean. The concession project aims at developing Piraeus port as a modern sea container terminal in the Eastern Mediterranean Sea. In particular, the project aims at providing Piraeus Port with a modern and improved infrastructure and equipment which will enhance its performance and its ability to handle sea container traffic more efficiently.

(235) The current infrastructure at the port of Piraeus imposes limitations on access to new generation freight ships and the number of freight ships, which can be serviced at any single moment and generally the conditions under which it operates are not similar to comparable international container ports. Therefore, the investments provided for in the concession agreement are of key importance in order to guarantee high quality and efficient provision of port management services to a number of new generation freight ships at the same time under modern international standards. The increase in the storage will also substantially improve the Piraeus port capacity. Under the concession agreement it is expected that the capacity will increase from at least 300.000

TEU¹⁷⁶ during the first year of the concession period to at least 3.700.000 TEUs after the eight year of the concession period.

- (236) Second, they argue that the project reflects the Commission's objectives in relation to Community policy. For this they make reference to several Commission Communications¹⁷⁷. Thus the implementation of the project will render the port of Piraeus a modern sea container port, which will promote economic growth and the competitiveness of the Greek economy and Greece's overall development.
- (237) Third, they argue that the implementation of the project will not have any undue effect on intra-EU trade and competition which would outweigh the benefits to the economic development of Greece. In particular, the principal competitors of the Piraeus port are ports situated in non-EU countries in the Eastern Mediterranean Sea (e.g. Alexandria in Egypt, Haifa in Israel, Istanbul in Turkey and Lattakia in Syria). The only EU ports which might have been considered as competitors of the Piraeus Port in the Eastern Mediterranean Sea are the Black Sea ports of Costanza in Romania and Varna in Bulgaria and the Adriatic Sea Ports of Italy and Slovenia. However, the Black Sea ports are not competing with the Piraeus port and the Adriatic ports in Italy and Slovenia have historically been considered as insignificant; therefore these ports may not be considered as competitors.
- (238) Finally, they argue that the amount of the aid involved in the provisions under examination would be minimal compared to the scale of the project and the private sector investments required. According to them, it would not be possible to identify any benefit involved in the tax measures set out in Law 3755/2009 and by extension to quantify any such benefit. In any event such benefit would be de minimis.
- (239) As a result the award of such aid would not affect competition and trade to an extent contrary to the common interest and which would outweigh the benefits to the economic and sectoral development in Greece.
- (240) The Commission notes that the argumentation provided by the Greek authorities in respect of the compatibility of the measures is very general and insufficient.

Compatibility on the basis of article 107(3)(a) TFEU

- (241) First of all they provide no argumentation as to why direct application of Article 107(3)(a) TFEU is appropriate. The Commission notes that the conditions of compatibility deriving from this article have been interpreted and developed by the Commission in its Guidelines on national regional aid for

¹⁷⁶ See footnote 78.

¹⁷⁷ Commission Communication COM(2001) 370 final, White Paper on European Transport Policy for 2010: time to decide, Commission Communication "Keep Europe moving – Sustainable mobility for our continent – Mid-term review of the European Commission's 2001 Transport White Paper" (2006), Commission Communication COM (2002) 54 final .

2007-2013¹⁷⁸ and the Greek authorities have provided no argumentation in relation to these conditions. Therefore, the Commission has doubts whether the aid measures under examination may be considered compatible on the basis of article 107(3)(a) TFEU.

Compatibility on the basis of article 107(3)(c) TFEU

- (242) The Commission notes that the argumentation provided by the Greek authorities is also insufficient as regards the direct application of article 107(3)(c) TFEU.
- (243) It is true that the investment project at stake is significant for the economic development of Greece and it reflects the Commission's objectives in relation to Community transport policy. However, the Greek authorities do not provide any argumentation in respect of the necessity and the proportionality of the State aid measures in order to attain these objectives.
- (244) In particular, they do not prove why PCT would have not undertaken the investment project without the grant of these measures. As PCT was already selected through a tender procedure under which it undertook to cover all the costs of the investment project through its own means, it seems doubtful that the aid measures were necessary for the implementation of the project. On the basis of the available information it seems that PCT would at any case undertake the project even if the fiscal advantages were not granted to it. Moreover, the Commission has the preliminary view that any aid to PCT would constitute operating aid, relieving it from costs that it would normally have to bear and would thus be forbidden by the Treaty rules on State aid.
- (245) Furthermore the Greek authorities do not provide any concrete ex ante calculations of the specific advantages in order to prove why these specific measures would be considered as proportional and appropriate.
- (246) The Commission therefore invites the Greek authorities to provide concrete and specific argumentation why they consider that these aid measures may be considered compatible with the Treaty.

Conclusion

- (247) In light of the above considerations, the State aid measures identified above do not seem to fall within the scope of the derogations set out in Article 107(3)(a) and 107(3)(c) TFEU. Therefore the Commission doubts that at this stage that the measures at stake may be regarded as compatible with the internal market.

6. DECISION

The Commission has accordingly decided that the differences between the concession agreement and the contract notice do not constitute State aid. The fiscal measure related to the exemption from corporate income tax for goods, works and services provided to PCT outside Greece does not constitute State aid either.

¹⁷⁸ OJ C 54 of 4.3.2006, p. 13.

Concerning all the other aforementioned measures, in the light of the foregoing considerations, the Commission, acting under the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union, requests Greece to submit its comments and to provide all such information as may help to assess the aid measures, within one month of the date of receipt of this letter. It requests your authorities to forward a copy of this letter to the potential recipient of the aid immediately.

The Commission wishes to remind Greece that Article 108 (3) of the Treaty on the Functioning of the European Union has suspensory effect, and would draw your attention to Article 14 of Council Regulation (EC) No 659/1999, which provides that all unlawful aid may be recovered from the recipient.

The Commission warns Greece that it will inform interested parties by publishing this letter and a meaningful summary of it in the *Official Journal of the European Union*. It will also inform interested parties in the EFTA countries which are signatories to the EEA Agreement, by publication of a notice in the EEA Supplement to the *Official Journal of the European Union* and will inform the EFTA Surveillance Authority by sending a copy of this letter. All such interested parties will be invited to submit their comments within one month of the date of such publication.

If this letter contains confidential information which should not be published, please inform the Commission within fifteen working days of the date of receipt. If the Commission does not receive a reasoned request by that deadline, you will be deemed to agree to publication of the full text of this letter. Your request specifying the relevant information should be sent by registered letter or fax to:

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Yours faithfully,
For the Commission

Joaquín Almunia
Vice-President