EUROPEAN
COMMISSION

Brussels, 19.12.2017
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COMMISSION DECISION

of 19.12.2017

ON STATE AID
SA.33829 (2012/C)
Maltese tonnage tax scheme and other State measures in favour of shipping companies and their shareholders

(Text with EEA relevance)

(Only the English version is authentic)

In the published version of this decision, some information has been omitted, pursuant to articles 30 and 31 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, concerning non-disclosure of information covered by professional secrecy. The omissions are shown thus […]		PUBLIC VERSION This document is made available for information purposes only.

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THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above[1], and having regard to their comments,

Whereas:

1. PROCEDURE

(1) Based on a complaint received by an interested party in October 2011 the Commission entered in discussion with the Maltese authorities on the Maltese tonnage tax scheme and further tax measures. Following written and oral discussions with the Maltese authorities between November 2011 and June 2012, the Commission informed Malta by letter dated 26 July 2012 that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union („TFEU“) on possible illegal aid measures applied by Malta in favour of shipping companies and their shareholders ("the opening decision")[2].

(2) In the opening decision the Commission invited interested parties to submit their comments on the measures set out in the opening decision in recitals 3 to 30.

(3) The Commission received comments from six interested parties: European Community Shipowners' Association; Malta Maritime Law Association; Norwegian Shipowners' Association; Malta Chamber of Commerce, Enterprise and Industry; Malta International Shipping Council; Super Yachts Industry Network – Malta. The

[1] OJ C 216, 21.7.2012, p. 45.
[2] OJ C 289, 25.9.2012, p. 49.

Commission also received comments from a German shipping sector employee wishing to remain anonymous.

(4) The comments were forwarded to Malta, which was given the opportunity to react; its comments were received by letter dated 15 December 2012.

(5) Malta submitted further observations by letters of 15 October 2012, 21 December 2012, 27 February 2013, 31 October 2013, 25 March 2014 and 24 December 2015.

(6) By letter dated 9 December 2016, Malta waived its right under Article 342 TFEU in conjunction with Article 3 of Regulation (EEC) No 1 determining the languages to be used by the European Economic Community[3] to have this Decision adopted in Maltese and agreed that this Decision be adopted in English.

2. DESCRIPTION OF THE MEASURES

(7) This Decision relates to the following measures:

(a) the tonnage tax scheme and specifically:

- (i) the vessels eligible for tonnage tax;
- (ii) specific types of income and activities of tonnage tax ships[4] subject to tonnage tax, tonnage tax scheme, including the extension of the tonnage tax to non-core shipping activities;
- (iii) the level of tonnage tax;
- (iv) the flag link requirement;
- (v) ring-fencing measures;

(b) the exemption from taxation of capital gains arising from the sale or transfer of ships;

(c) the exemption from taxation of capital gains in relation to shares in shipping companies;

(d) the exemption from taxation of dividends in relation to shares in shipping companies,

(e) the exemption from taxation of interest or other income in relation to financing of shipping companies or tonnage tax ships,

(f) the exemption from certain duties on documents and transfers.

[3] OJ 17, 6.10.1958, p. 358.

[4] "Tonnage tax ships" under the Maltese legislation are ships whose activities make them eligible for the tonnage tax scheme, see section 4.2.1.1 of this Decision.

2.1. The tonnage tax scheme

2.1.1. General principles - Eligible vessels, income and activities

(8) Under the Merchant Shipping Act[5], as specifically supplemented and amended by the Merchant Shipping Taxation Regulations[6] ("the Taxation Regulations"), income derived by a licensed shipping organisation from shipping activities may be exempted from income tax under the Income Tax Act[7], provided that all relevant registration fees and tonnage taxes[8] are duly paid. The option to pay tonnage tax relates to income arising from the operation of a tonnage tax ship[9].

(9) A shipping organisation is defined, in the Merchant Shipping Act[10], as organisation having its principal objects as one or more of the following activities provided they are licensed to do so:

"(a) the ownership, operation (under charter or otherwise), administration and management of a ship or ships registered as a Maltese ship in terms of this Act and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(b) the ownership, operation (under charter or otherwise), administration and management of a ship or ships registered under the flag of another state and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(c) the holding of shares or other equity interests in entities, whether Maltese or otherwise, established for any of the purposes stated in this article and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(d) the raising of capital through loans, the issue of guarantees or the issue of securities by the company when the purpose of such activity is to achieve the objects stated in this article for the shipping organisation itself or for other shipping organisations within the same group; [...]

(e) the carrying on of such other activities within the maritime sector which the Minister may, on the advice of the Authority, from time to time prescribe by regulations as qualifying for the above purpose."

(10) The tonnage tax scheme covers the income arising from shipping activities[11]. The Taxation Regulations require account separation to be ensured in respect of shipping and non-shipping activities[12]. "Shipping Activities" are defined as "*the international*

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5 Chapter 234, the Merchant Shipping Act, Malta Government Gazette, Supplement of 6 April 1973, ("Merchant Shipping Act").

6 Chapter 234.43, the Merchant Shipping (Taxation and Other Matters relating to Shipping Organisations) Regulations, Malta Government Gazette nr. 17,574 of 30 April 2004.

7 Chapter 123, Income Tax Act, Malta Government Gazette, 1 January 1949 ("Income Tax Act").

8 „Tonnage taxes" in the broader sense refer to duties any ship is liable to pay, in particular to the registration fee. It is important to note that, whilst all seagoing vessels registered in Malta pay tonnage tax as a registration fee, not all such vessels are then eligible for exemption from income tax. Vessels within the tonnage tax scheme which are eligible for tonnage taxation while being exempted from income tax are referred to by Malta as "tonnage tax ships".

9 For the definition of „tonnage tax ship" see footnote 4.

10 Article 84(Z) (1) of the Merchant Shipping Act.

11 Article 3(1) (a) of the Taxation Regulations.

12 Article 3(4) of the Taxation Regulations.

carriage of goods or passengers by sea or the provision of other services to or by a ship as may be ancillary thereto or associated therewith including the ownership, chartering or any other operation of a ship engaged in all or any of the above activities or as otherwise may be prescribed."[13]

(11) Article 85(1) of the Merchant Shipping Act sets out the requirements for a ship to qualify as "tonnage tax ship" and hence to benefit from the tonnage tax scheme: „Tonnage tax ship" means „*either a ship declared to be a tonnage tax ship by the Minister in terms of Article 85A of this Act or a Community ship of not less than 1000 net tons which is owned entirely, chartered, managed, administered or operated by a shipping organisation*". Article 85A(1) of the Merchant Shipping Act allows for any ship, including those below 1000 net tons[14], to be declared a „tonnage tax ship", therefore eligible for the tonnage tax scheme. The current wording specifies that this may be done "*irrespective of operations or trade in which engaged*", and on such conditions as the responsible Minister „*may deem appropriate*".

(12) Income derived from shipping activities of a licensed shipping organisation is exempt from income tax under the Income Tax Act[15].

(13) Summarized, vessels within the tonnage tax scheme ("tonnage tax ships") which are eligible for tonnage taxation while being exempted from income tax are vessels which are "*owned entirely, chartered, managed, administered or operated by a shipping organisation*"[16] and which are engaged in shipping activities[17].

(14) Furthermore, the following is exempt from taxation under the Income Tax Act: any income, profits or gains of a licensed shipping organisation derived from the sale or other transfer of a tonnage tax ship or from the disposal of any rights to acquire a ship which, when delivered or completed, would qualify as a tonnage tax ship[18].

2.1.2. Specific types of income and activities eligible to tonnage tax

2.1.2.1. Bareboat chartering out

(15) Under the Maltese legislation all revenue from bareboat chartering out is eligible for tonnage taxation, without any limitations.

2.1.2.2. Time/voyage chartering

(16) Because of the wide definition of „shipping organisation"[19] in combination with the wide definition of "shipping activities"[20] in the Maltese legislation it may be interpreted that the profits of pure commercial managers of ships without any responsibility for crew or technical management (that is to say, companies which enter into transportation contracts and rely on other companies to deliver the service, through time or voyage chartering) are eligible for tonnage tax.

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13 Article 85 of the Merchant Shipping Act.
14 See recital 7 of the opening decision.
15 Article 3(1)(a) of the Taxation Regulations.
16 Article 85(1) of the Merchant Shipping Act.
17 See recital 10.
18 Article 3(1)(b) of the Taxation Regulations.
19 See recital 9.
20 See recital 10.

(17) The use of time chartered vessels is subject to the flag link requirements set out in recital (24). However, there is currently no explicit rule as to minimum EEA flagging requirement for new entrants into the tonnage tax scheme.

(18) On 6 January 2012 the Registrar General of Shipping issued internal rules on the eligibility for the application of the Maltese tonnage tax scheme ("2012 Rules on Internal Procedure")[21]. Those include restrictions on time-chartering and similar activities as a percentage of the total tonnage of the fleet. The same internal procedure allows for derogations of up to three years:

> *"At the time of opting into the tonnage tax scheme, the total net tonnage of the ships chartered-in and included in the tonnage taxation scheme does not exceed 80% of the total net tonnage of all ships chartered-in and operated by the qualifying charterer and any other organisation forming part of the same group. Chartered-in ship means a ship taken on a time charter or on a voyage charter or on a contract of affreightment basis. Ships operated means ships owned or bareboat chartered-in. This percentage can reach 90% provided that every chartered-in ship flies a Community flag or is entirely managed (crew and technical) from the territory of the EU/EEA. Following the entry into the system, the charterer may increase the percentage net tonnage chartered-in from the above mentioned maximum, provided that this excess does not occur for more than three consecutive tax periods".*

2.1.2.3. Ancillary revenues

(19) In relation to carriage of cargo and passengers, the 2012 Rules on Internal Procedure give some details as to which "ancillary activities" would normally be considered by the Maltese authorities to be covered by the definition of "shipping activities". It is specified that in general "*All activities which are substantially connected to and form a normal part of the ship operating service being offered in the course of the operation of qualifying ships should qualify for the tonnage tax regime"*. In particular, the following activities are in that regard specified:

(a) In relation to the carriage of passengers by sea (cruise ships), all hotel, catering, entertainment and retailing activities on board a qualifying ship, provided that these services are performed as ancillary activities to the activity of carriage of passengers by sea by that ship and are all consumed or used on board that ship;

(b) the operation of office facilities in connection with shipping activities subject to tonnage tax;

(c) the operation of ticketing facilities and passenger terminals in connection with shipping activities subject to tonnage tax[22];

(d) the provision of excursions for passengers of a qualifying ship operated by the company, where any cabin for the passenger remains available for his exclusive use;

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21 Merchant Shipping Notice, Internal procedure, Transport Malta, Merchant Shipping Directorate, issued by the Registrar General of Shipping and Seamen on 6 January 2012.

22 The revenues covered are the sale of tickets related to maritime transport or combined transport with a maritime part. The relevant costs covered by the tonnage tax are the costs of operating ticketing offices and ticketing at the terminal.

(e) any interest or similar return earned on working capital where such interest/return is used for the purposes of financing the licensed shipping organisation or its shipping activities and/or the acquisition and maintenance of a tonnage tax ship.

(20) According to Malta, the activity described in point (a) of recital (19), and in particular consumption or use on board, is interpreted to cover all receipts from goods and services sold to the *passengers still maintaining a cabin on-board* as long as the revenues of the ship mainly stem from the traditional shipping revenues.

2.1.3. The level of the tonnage tax

(21) Malta charges an annual tonnage tax in the form of a lump sum[23]:

Table 1

Ship of Net Tonnage (Net Tons)		Annual tonnage tax
0	2,500	€1000
2,500	8,000	€1000 plus 40 cents for every NT in excess of 2,500 NT
8,000	10,000	€3,200 plus 19 cents for every NT in excess of 8,000 NT
10,000	15,000	€3,580 plus 14 cents for every NT in excess of 10,000 NT
15,000	20,000	€4,280 plus 12 cents for every NT in excess of 15,000 NT
20,000	30,000	€4,880 plus 9 cents for every NT in excess of 20,000 NT
30,000	50,000	€5,780 plus 7 cents for every NT in excess of 30,000 NT
Exceeding 50,000		€7,180 plus 5 cents for every NT in excess of 50,000 NT

(22) The standard rate is adjusted depending on the age of the ship. The standard rate is only applied to ships that are 10-15 years old. Ships older than 15 years are subject to a surcharge up to a maximum of 50%. For ships aged 0-5 years a reduction of 30% applies, for those aged 5-10 years the reduction is 15%[24].

(23) The First Schedule to the Merchant Shipping Act states that "The Minister may, under such conditions as he may deem appropriate, exempt any ship or any class *of ships from the payment of all or part of the fees payable in terms of these regulations*."

2.1.4. The flag link requirement

(24) Pursuant to Article 85A(2) of the Merchant Shipping Act, a non-Community flagged ship can be declared a 'tonnage tax ship' where:[25]

(a) the licensed shipping organisation owns, manages or operates at least 60% of its total tonnage under a Community flag; or

(b) the percentage of the licensed shipping organisation's total tonnage which is Community-flagged immediately after the shipping organisation begins to

[23] See First schedule Part B of the Merchant Shipping Act.

[24] The precise reductions and increases are set out in the First Schedule Part C of the Merchant Shipping Act.

[25] As clarified by Malta, the term "Community flagged" in Maltese legislation covers both EU and EEA flagged vessels.

operate the ship is not less than the percentage of the shipping organisation's total tonnage which was Community-flagged on the reference date[26] or, in the case of ship managers, one year from the date the ship manager started his business (if this is later than the reference date); or

(c) the percentage of Community-flagged tonnage of the beneficiary company has not decreased over a period of three years or such lesser period in which the tonnage tax beneficiary was in existence.

(25) Where the requirements of points (b) or (c) are not fulfilled, the non-Community-flagged ship can still be entered into the tonnage tax scheme if the beneficiary commits to increasing or at least maintaining under the flag of one of the Member States the share of tonnage that was being operated under such flags on the reference date.

2.1.5. Ring-fencing measures

(26) The general anti-abuse provisions of Maltese tax law, which provide that schemes aimed at artificially lowering the tax amounts should be disregarded, apply also in respect of the tonnage tax scheme[27].

(27) Switching between the tonnage taxation scheme and the general corporate income taxation system for the purposes of optimising the tax bill is limited by the fact that the decision to leave the tonnage taxation scheme is irrevocable[28].

(28) In respect of any year for which tonnage tax is applied, separate accounts must be kept clearly distinguishing the payments and receipts by the shipping organisation concerned in respect of shipping activities and receipts in respect of any other business[29].

2.1.6. Exemption from taxation of capital gains arising from the sale or transfer of ships

(29) Capital gains arising from the sale or transfer of tonnage tax ships and similar operations are exempt from taxation[30]. There are no limitations on this exemption.

2.1.7. Exemption from taxation of dividends in relation to shares in shipping companies

(30) Article 3 (1) a) of the Taxation Regulations stipulates that "no further tax under the Income Tax Act shall be charged or payable on the income to the extent that such income is derived from shipping activities of a licensed shipping organisation", provided that all relevant fees and taxes have been duly paid by the shipping organisation. This tax exemption applies throughout the whole chain of ownership[31].

(31) As regards the general system of income taxation, the treatment of dividends for shareholders is governed by Article 68 of the Income Tax Act, which provides:

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26 As provided in Articles 2 and 3 of the Taxation Regulations, the reference dates are respectively 17 January 2004 for shipping organisations and 11 June 2009 for ship managers (in accordance with chapters 3 and 12 of the Community Guidelines on State aid to Maritime Transport, OJ C13, 17.01.2004, p. 3, "the Maritime Guidelines" and chapter 5 of the Commission Communication providing guidance on State aid to ship management companies, OJ C132, 11.6.2009, p. 6).

27 Article 51 of the Income Tax Act.

28 Regulation 6 of the Taxation Regulations.

29 Article 3(4) of the Taxation Regulations.

30 Article 3(1)(b) of the Taxation Regulations.

31 Article 3(1)(b) of the Taxation Regulations.

"68. (1) (a) Any person who is not resident in Malta or any individual who is resident in Malta and who is in receipt of a dividend paid out of profits allocated to any of the taxed accounts other than the final tax account shall not be obliged to disclose the existence of such dividend in any return made pursuant to the provisions of the Income Tax Acts.

(b) No person shall be charged to further tax under this Act in respect of the income referred to in paragraph (a).

(c) Any dividends paid out of profits allocated to the final tax account shall not be charged to further tax and shall not form part of the chargeable income of any person and no person may claim a credit or refund in respect of any tax directly or indirectly paid on such profits …"

(32) The practical effect of Article 68 of the Income Tax Act is that profits when distributed as dividends are not subject to further tax at shareholder level. It is to be noted that there is also no obligation on recipients to disclose such dividends.

1.1.1. Exemption from taxation of capital gains in relation to shares in shipping companies

(33) Organisations holding equity interests in shipping organisations and shareholders do not pay income tax on capital gains arising from the transfer of those equity interests, provided that the company in which the equity interest is held limits its activities to shipping activities[32]. That exemption applies throughout the whole chain of ownership[33].

(34) The Income Tax Act imposes tax on certain capital gains. These are exhaustively specified in Article 5(1) of the Income Tax Act and include in principle those arising from transactions in immoveable property, securities and partnerships. Taxable capital gains are aggregated with taxpayers' other income and are charged at a flat rate of 35% for companies.

(35) Article 12(1)(c)(ii) of the Income Tax Act provides a tax exemption for persons not resident in Malta. Specifically any gains or profits accruing to or derived by any person not resident in Malta on a transfer of any shares or securities in a company, which is not a property company, are exempt from the tax, provided that the beneficial owner of the gain is a person not resident in Malta and that person is not owned or controlled by an individual or individuals who are ordinarily resident in Malta.

2.1.9. Exemption from taxation of interest or other income payable in relation to financing of shipping companies or tonnage tax ships

(36) The Merchant Shipping Act sets out that besides the ownership, operation, administration and management of a ship or ships registered in Malta or under the flag of another state and the carrying on of all ancillary financial, security and commercial activities in connection therewith[34] an organisation shall qualify as a shipping organisation if its principal object is – and provided a licence is obtained from the Director-General of Shipping – "*the raising of capital through loans, the issue of guarantees or the issue of securities for the shipping organisation itself or*

[32] Article 3(1)(c) of the Taxation Regulations.
[33] Article 3 (3) of the Taxation Regulations.
[34] Article 84Z (1)(a) to (c) of the Merchant Shipping Act.

for other shipping organisations within the same group"[35]*, or "for the carrying on of such other activities within the maritime sector which the Minister may, on the advice of the Authority, from time to time prescribe by regulations as qualifying for the above purpose."*[36]

(37) Article 3 (2) of the Taxation Regulations sets out that no tax under the Income Tax Act shall be payable on interest or other income payable in relation to financing of the operations of licensed shipping organisations set out in Article 84Z (1) of the Merchant Shipping Act or the financing of a tonnage tax ship. According to that provision this exemption is applicable only to licenced banks, credit or financial institutions which are resident in Malta and is granted only upon explicit request to the competent authorities.

(38) Loans and guarantees from financial institutions to shipowners as well as to operators, managers or administrators of ships might therefore potentially be exempted from income taxation under the Income Tax Act on the profits arising from the relevant activities[37].

(39) The Maltese authorities have confirmed that since the accession of Malta to the European Union no licence was granted for any organisation other than those active in *the ownership, operation (under charter or otherwise), administration and management of a ship or ships* and that no bank, credit or financial institution within the meaning of Article 84Z (1) of the Merchant Shipping Act has availed itself of such a benefit.

2.1.10. Exemption from duty on documents and transfers

(40) The Duty on Documents and Transfers Act[38] applies to transfers of marketable securities, immovable property, auction sales and insurance policies. Marketable securities are defined as "a holding of share capital in any company and documents representing the same company "[39].

(41) The Taxation Regulations[40] express that no duty will be payable on i) the registration of a tonnage tax ship under the Merchant Shipping Act; ii) the issue or allotment of any security or interest of a licensed shipping organisation; iii) the purchase, transfer, assignment of any security or interest of any licensed shipping organisation; iv) the sale or transfer of a tonnage tax ship; v) the registration, transfer or discharge of any mortgage or other charge over or in relation to any ship or shipping organisation; vi) the assignment of any rights and interests, or assumption of obligations in respect of any ship.

(42) The Duty on Documents and Transfers Act[41] levies a duty on transactions on securities of two euros for every one hundred euros of the amount or value of the consideration or the real value of the marketable security, whichever is the higher.

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35 Article 84Z (1)(d) of the Merchant Shipping Act.

36 Article 84Z (1)(e) of the Merchant Shipping Act.

37 Article 84Z (1)(d) of the Merchant Shipping Act and Article 3(2) of the Taxation Regulations.

38 The Duty on Documents and Transfers Act, Chapter 364, Malta Government Gazette, 25 November 1992.

39 Article 2 of the Duty on Documents and Transfers Act.

40 Article 5 of the Taxation Regulations.

41 Article 42(1) of the Duty on Documents and Transfers Act

(43) However, no duty is applicable to transactions involving securities of a company in which more than half the ordinary share capital, voting rights and rights to profits are held by persons who are not resident in Malta and are not owned or controlled directly or indirectly by persons resident in Malta, provided the company has the majority of its business interests outside Malta[42].

(44) Also exempt from charges generally are transfers made on an intra-group basis in the context of group restructuring exercises[43]. There are a significant number of other exemptions mostly focused on various legal persons with significant international interests but also in other circumstances such as for collective investment entities.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(45) The opening decision raised doubts regarding the compatibility of the measures described in sections 2.1 to 2.8 with the internal market and in particular with the Maritime Guidelines[44].

(46) On the tonnage tax measures the Commission had the following doubts:

(a) The Maritime Guidelines limit the application of tonnage tax to ships used for purposes of maritime transport, which is defined as *'the transport of goods and persons by sea'*[45]. However, that definition did not seem to be reflected in the Merchant Shipping Act. Moreover, the Maltese scheme gives the Minister discretion to depart from the broad requirements set out in the Merchant Shipping Act. The Commission considered that profits from ships not involved in maritime transport activities should not be eligible for tonnage tax. In this context, the Commission considered that fishing vessels, pontoons, barges, yachts, cruise vessels, pontoons and oil rigs appeared to be eligible under the Maltese tonnage tax scheme but doubted that this was justifiable.

(b) The absence of clear provisions on service/support vessels, tugboats and dredgers gave rise to further doubts on the part of the Commission whether compliance with the rules set out in the Maritime Guidelines is ensured.

(c) Concerning capital gains from the sale of ships, the Commission has doubts as to whether exempt transactions were limited to ships bought and sold by shipping companies while under tonnage taxation.

(d) The Commission considered that the absence of clear limitations on the eligibility of ancillary activities may lead to the granting of incompatible aid, particularly in case of the sale of certain goods on board of cruise vessels.

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42 Article 47(3) and 47(4) of the Duty on Documents and Transfers Act.

43 Article 42(1)(b) of the Duty on Documents and Transfers Act.

44 Commission Communication C(2004) 43 — Community Guidelines on State aid to maritime transport, OJ C13, 17.01.2004, p. 3.

45 The Maritime Guidelines explicitly refer to the definition of maritime transport in Council Regulation 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries (OJ L 378, 31.12.1986, p. 1) and Council Regulation 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (OJ L 364, 12.12.1992, p. 7).

(e) As to ships clearly involved in eligible activities, the Commission considered that tax benefits should not be extended to all market operators involved in some way with those ships. Ship lessors without any maritime transport activity of their own should not benefit from tonnage tax. Additionally, the Commission had doubts about the unrestricted eligibility of time charterers and similar companies to benefit from tonnage tax.

(f) The Commission expressed doubts as to whether, in all cases, the level of taxation was in line with what the Commission had accepted in the past for other Member States.

(g) The Commission expressed doubts as to whether the flag link requirements as well as ring-fencing measures were adequate.

(h) The Commission questioned the tax treatment of dividends from shares in shipping companies.

(i) The Commission also questioned the compatibility with the internal market of the exemption from taxation of capital gains relating to shares in shipping companies.

(j) The Commission questioned the compatibility with the internal market of the exemptions from the Duty on Documents and Transfers Act relating to ships. Those exemptions appear to potentially benefit economic operators which are not necessarily genuine shipping companies (notably shareholders).

(k) Finally, the Commission considered that exemption from income taxation of profits from the sales of ships and from financing shipping companies was not in line with the Maritime Guidelines.

4. OBSERVATIONS AND COMMITMENTS BY MALTA

4.1. Introduction

(47) Malta stresses that it has always implemented the tonnage tax with the aim of respecting fair competition and the Maritime Guidelines.

(48) In practice, the Maltese scheme has always been limited to vessels recognised by the Commission as eligible for tonnage taxation (essentially, vessels engaged in the international carriage of goods and passengers). Ancillary services such as financing and brokerage have not benefitted from the tonnage tax.

(49) At the end of December 2015, the registered gross tonnage under the Maltese flag was 66.2 million (over 3000 vessels). The fleet flying the Maltese flag is a fundamental component of the maritime activity of Malta and has a vital bearing on the economic viability of its maritime industry as a whole, particularly when considering its position as a small island on the periphery of the Union and the multiplier effect it generates in the Maltese economy.

(50) This should be compared with 462 ships under the Maltese tonnage tax scheme with a total tonnage of 10.4 million gross tons at the end of 2015.

(51) Those ships that benefit from the Maltese tonnage tax scheme fly the Maltese flag except for two ships that fly the Norwegian flag. None of the ships in question are

operated under bareboat chartering out to third parties or time/voyage-chartering arrangements.

(52) Ships operated commercially within Maltese territorial waters do not benefit from the Maltese tonnage tax scheme. These are mainly engaged in port operations such as bunkering operations, conveyance and tourist cruises and employ many of the Maltese seafarers.

(53) There is a distinction to be made between ships that are operated commercially in the transportation of tourists/cargo in Maltese territorial waters and ships engaged in the international trade. It is only the latter that are eligible under the Maltese tonnage tax scheme.

4.2. The tonnage tax scheme

4.2.1. Vessels eligible for tonnage taxation

4.2.1.1. General observations

(54) According to the First Schedule to the Merchant Shipping Act, tonnage tax is payable in respect of all vessels registered in Malta, including fishing vessels and pleasure yachts.

(55) However, Malta stresses that not all types of vessels are eligible as "tonnage tax ships" which benefit from the tonnage tax scheme. This is the case, for example, of fishing vessels and pleasure yachts. Nor is the licensed shipping organisation that owns, operates or manages such vessels entitled to benefit from the tonnage tax scheme on profits that the said licensed shipping organisation derives from such vessels.

(56) Vessels that are not engaged in shipping activities, such as fishing vessels and pleasure yachts, are required to pay income tax in Malta on their chargeable income in addition to registration fees and annual fees based on tonnage payable pursuant to the Merchant Shipping Act. The latter fees and taxes are also referred to in Malta as "tonnage tax", however only what Malta has referred to in the past as "tonnage tax ships" are required only to pay the tonnage tax under the tonnage tax scheme in lieu of income tax under the Income Tax Act.

(57) The Taxation Regulations provide an exemption from income tax only in respect of income derived from "shipping activities". The 2012 Rules on Internal Procedure list a number of vessels which are not eligible for tonnage taxation in exemption of regular income taxation, since the income derived from those vessels does not qualify as income from 'shipping activities'. In particular fishing vessels, pleasure yachts, fixed offshore installations including oil rigs that are not used for maritime transport, non-ocean-going tugs, non-self-propelled floating cranes, and vessels the main purpose of which is to provide gambling and/or casinos do not benefit. Also mobile platforms and pontoons do not qualify for exemptions from regular income taxation. All those vessels simply pay a registration fee and an annual fee based on their tonnage, which is referred to as "tonnage taxation" or "tonnage tax" but which does not exempt them from regular income taxation.

(58) Malta submits that in the future, the registration fee and the annual fee payable by fishing vessels and similar non-qualifying vessels will no longer be called "tonnage tax" to avoid misunderstandings.

(59) The discretion of the responsible Minister to accept ships below 1,000 net tons does not mean that vessels which are not involved in shipping activities could be covered

by the tonnage tax. The discretion does not eliminate the need for the vessel to be involved in the international carriage of goods or passengers.

(60) For the sake of clarity Article 85A(1) of the Merchant Shipping Act will be reformulated to read: "The Minister may with the concurrence of the Minister responsible for finance and subject to such conditions as would be deemed appropriate in line with these Regulations, declare to be a tonnage tax ship, a ship of any net tonnage, which is engaged in shipping activities".)".

(61) Only the categories of ships mentioned in Table 2 have ever been accepted as eligible for tonnage taxation in Malta (with parallel exemption from regular income taxation). Also the composition of the fleet in 2015 is shown in Table 2.

Table 2

Type of ship	Total number of tonnage taxed ships (December 2015)
barge	7
bulk carrier	113
car carrier	5
cement carrier	2
commercial yacht[46]	29
container	12
general cargo	120
passenger	24
roll-on/roll-off (ro/ro)	5
support vessel[47]	3
tanker	155
tug	2
TOTAL	**477**

(62) Malta has confirmed that 100% of the ships benefiting from exemptions from regular income taxation (the "Maltese tonnage taxed fleet") is EU/EEA-flagged/registered[48] and that no non-EU/EEA-flagged ship has ever been part of the tonnage taxed fleet since 2004.

(63) In terms of tonnage, the Maltese tonnage taxed fleet amounted to approximately 10.4 million gross tons at the end of 2015 which is less than 20% of ships registered in Malta.

(64) Malta submitted a commitment to continue to limit the vessels which are eligible for the tonnage tax scheme to those involved in the international carriage of goods or passengers by sea and certain other shipping activities as have been previously

[46] Yachts of 15 metres in overall length and that do not carry cargo and do not carry more than 12 passengers, not used for pleasure purposes. These are governed by the Commercial Yacht Code issued by the Malta Transport Centre's Merchant Shipping Directorate; http://www.transport.gov.mt/superyacht-registration/commercial-yacht-code.

[47] The support vessels can be divided into two types according to the operations they perform: i) supply vessels used for the transportation of supplies and equipment to assist the offshore installations and ii) conveyance vessels used for the transportation of crew to and from the offshore installations or combinations of both categories.

[48] Bareboat chartered vessels are registered in Malta but may fly another flag. The only ships not flagged to Malta benefitting from tonnage tax are flagged EU/EEA.

approved by the Commission as eligible under the Maritime Guidelines for tonnage tax purposes on application by other Member States.

(65) Malta will furthermore specify that only genuine shipping organisations will be able to benefit from tonnage taxation under the scheme, specifically organisations which have assumed risks and responsibilities related (i) to the operation of a ship that carries out maritime transport as defined in the Maritime Guidelines[49] (such as responsibilities related to technical management and crewing) or (ii) to the carrying out of maritime transport as defined in the Maritime Guidelines (including with vessels chartered in with crew under certain conditions[50]).

4.2.1.2. Application of tonnage tax to barges

(66) Barges which are not engaged in the "international transport of goods" are not eligible for the Maltese tonnage tax system irrespective of whether they are self-propelled or otherwise. Barges that are designed and normally used for navigation in open seas and that are also engaged in international maritime transport may qualify for the Maltese tonnage tax scheme. This is deemed necessary for cargo that cannot be transported by conventional vessels.

(67) The energy industry uses barges to transport components such as anchors, pipes, and chains that cannot be transported on conventional ships. Modules for new platforms for drilling and production and drill rigs are also barge-transported. Other barges carry equipment for laying pipe lines in deep water or very high-capacity cranes and derricks. Non-propelled barges are also used to supply power stations with coal.

4.2.1.3. Application of tonnage tax to cruise vessels

(68) Cruise (passenger) ships qualify for the Maltese tonnage tax scheme. Malta stressed that Cyprus, Denmark France, Germany, Ireland, Italy, the Netherlands, Norway and the United Kingdom consider cruise ships to be qualifying ships, provided that such ships are not mainly used for gambling/casino or similar non-shipping purposes.

(69) The sector is highly beneficial for the Union maritime cluster and yields a lot of added value to a considerable number of Member States. The industry is subject to aggressive international competition and employs a substantial number of skilled and expert personnel.

4.2.1.4. Application of tonnage tax to commercial yachts

(70) Commercial yachts used in the international transport of passengers may qualify for the tonnage tax scheme, provided they are registered as commercial yachts in Malta. They must be engaged in the commercial carriage of up to 12 passengers[51] and must comply with a set of rigorous safety and operational standards. Yachts that are certified as commercial yachts are considered equivalent to small passenger ships as they are able to sail in international waters. The Malta Commercial Yacht Code[52] sets the technical standards which those commercial yachts must meet to qualify as tonnage tax ships. Those standards are equivalent to those regulating the construction

[49] Section 2 of the Maritime Guidelines.

[50] See recital (100) to (101).

[51] Any vessel carrying more than 12 passengers is defined as a passenger ship in accordance with the International Convention for the Safety of Life at Sea (SOLAS Convention) and thus is required to comply with the requirements and standards provided in the applicable international conventions.

[52] Commercial Yacht Code issued by the Malta Transport Centre's Merchant Shipping Directorate; http://www.transport.gov.mt/superyacht-registration/commercial-yacht-code.

and operation of merchant ships which are contained in international conventions such as SOLAS and MARPOL[53]. The rest of the eligibility criteria applicable for commercial yachts are the same as for other types of vessels.

(71) Owners of these commercial yachts enter into third-party management agreements with yacht management companies. The Taxation Regulations allow both owners and managers to be eligible under the tonnage tax scheme. To date there were no instances where both the owner and the manager of a commercial yacht registered under the Merchant Shipping Act have benefitted from the scheme.

(72) The international commercial yachting industry is very competitive and yachts registered in the Union/EEA, are facing increased competition from operators of commercial yachts established outside the EEA. Third countries provide corporate tax incentives to register yachts there.

4.2.1.5. Application of tonnage tax to towage and dredging vessels

(73) Where a licensed shipping organisation derives income from towage vessels which are tonnage tax ships, the organisation is only entitled to the tonnage tax scheme in respect of that income which it derives from "shipping activities". Towage services within harbours are excluded from the tonnage tax scheme. Tugs are only eligible when it is confirmed that the majority of their operational time is spent in the international carriage of goods, respecting the 50% threshold set out in the Maritime Guidelines[54].

(74) The 2012 Rules on Internal Procedure exclude non-ocean going tugs from the tonnage tax scheme and make clear that that those ships not prescribed are not simply eligible for the tonnage tax scheme but must meet the requirements contained in the Taxation Regulations. The new draft Merchant Shipping Taxation Regulations will state expressly that for tugboats or dredgers to be eligible, they must be registered in an EU/EEA register. Whilst this was not previously spelled out clearly, the latter requirement has always been respected.

(75) Malta committed to transpose the exact wording of the Maritime Guidelines as regards towing and dredging activities into the relevant texts.

4.2.1.6. Application of tonnage tax to service vessels

(76) Malta explained that only a few service/support vessels have been covered by the tonnage tax scheme. Those have been multipurpose/break-bulk vessels[55].

(77) Malta argues that service/support vessels are subject to the same operational and regulatory framework as vessels that perform maritime transport (within the meaning of the Maritime Guidelines), in terms of:

> (a) technical requirements, including all relevant international instruments and regulations governing ship structure, safety, and protection of the environment, as well as classification rules;

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53 The Commercial Yacht Code has been notified to the International Maritime Organisation as an equivalent arrangement to the international conventions.

54 Section 3.1 of the Maritime Guidelines.

55 Multipurpose and break-bulk vessels are engaged in maritime transport as defined in the Maritime Guidelines. Break-bulk vessels transport goods that must be loaded individually and not in intermodal containers.

(b) manning: these ships are manned in compliance with international legislation that also applies to merchant vessels, in particular the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers of the International Maritime Organisation (STCW convention) and the Maritime Labour Convention of the International Labour Organisation; seafarers employed on board these vessels are subject to the same training requirements and to the same working and living conditions as those employed on board traditional merchant vessels;

(c) legal environment: ship owners operating these vessels are subject to the same legal constraints as regards security, liability in case of accident or pollution, and competition rules.

(78) Service vessels are confronted with competition from international competitors, with competitors benefiting from lower wages for crews, lower taxes, reduced maintenance programmes, etc.

(79) Furthermore, service vessels contribute to the fulfilment of the objectives of the Maritime Guidelines as other (merchant) vessels do. They contribute to the development of the maritime cluster and have a positive impact on employment and on maritime knowhow in the Union.

(80) Malta has given a commitment to limit the eligible vessels to those involved in international carriage of goods or passengers by sea in accordance with the Maritime Guidelines.

(81) Malta noted that the Commission has already accepted cable-laying, pipe-laying, research and crane vessels as eligible for tonnage taxation[56].

4.2.2. Income eligible for tonnage taxation

4.2.2.1. Eligibility of ancillary services provided in the context of maritime transport

(82) The term "ancillary activities" referred to in the definition of "shipping activities," contained in Article 85(1) of the Taxation Regulations, has always been interpreted as requiring the existence of a strict link between the international transport of goods and passengers and the ancillary activity. Whether a particular activity is considered ancillary is examined on a case by case basis.

(83) In determining whether an activity is ancillary account is taken of the Commentary to Article 8 of the OECD's Model Tax Convention ("the Commentary"), including paragraph 4.2 of the Commentary that states that, in the context of international transport, income derived from ancillary operations is income derived from activities which "make a minor contribution relative to [the operation of ships in international traffic] and are so closely related to such operation that they should not be regarded as a separate business or source of income of the enterprise".

(84) Malta stresses that passenger transport normally includes a variety of complementary services which are included in the ticket price. These services include the provision of sleeping accommodation and catering and also other services which form part of the passenger's expectation during the same journey such as embarkation and

[56] See e.g. recital 47 of Commission decision of 27 April 2010 in case N 714/2009, the Netherlands - Extension of the tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels, OJ C 158, 18/6/2010, p. 2.

disembarkation services. Passengers of large passenger ships would also expect to have a cinema, spa, hairdresser and similar services. Such services and local excursion services are to be considered ancillary activities to the shipping activity provided the relevant service represents a bought-in service at arm's-length conditions. Malta also stressed that it is a legal requirement that the shops on board cruise ships are closed while the ships are at port.

(85) Ticket sales are the primary source of revenues for cruise ships' operators and on-board earnings are an ancillary but key component for the sustainability of the passenger carrying activity. Industry reports estimate that the majority of cruise ship revenues (60% or more) are derived from ticket sales.

(86) The 2012 Rules on Internal Procedure specifically exclude from the tonnage tax scheme "vessels the main purpose of which is to provide goods or services normally provided on land (e.g. floating hotel, supermarket or restaurant)" and floating or cruising casinos. Of the 26 passenger ships that have benefitted from the tonnage tax scheme 17 do not have a casino service or sell luxury goods.

(87) Malta submitted a commitment that upon the entry into force of the new Merchant Shipping Taxation Rules a number of activities that may be in competition with land-based companies and that are therefore not eligible for the tonnage tax scheme will be explicitly excluded. Those activities will include the sale on board of goods or services not customarily provided to passengers, for example, cars, domestic appliances or livestock or ship-based holidays where the ship remains moored and there is no sea transportation element.

(88) Furthermore, Malta has given a commitment to cap revenues from ancillary activities at a maximum of 50% of the gross revenues for each ship. Verification of compliance by the tax authorities will be carried out at the level of each ship within a group.

(89) The capped ancillary activities that can benefit from tonnage tax will include:

"(a) the carriage of passengers or cargo otherwise than on board a tonnage tax ship operated by the licensed shipping organisation, where

(i) there is a single contract with the customer for a journey which includes a voyage on the tonnage tax ship; and

(ii) the transport for the remainder of the journey is purchased or obtained by the licensed shipping organisation by provision which would have been made as between independent enterprises;

(b) sales and facilities which are normally provided to customers by seagoing passenger ships, including:

(i) the sale of alcoholic beverages, perfume and tobacco;

(ii) the exchange of amounts of different currencies for personal expenditure;

(iii) health and beauty and spa and wellness services;

(c) administrative and insurance services which are directly related to the carriage of passengers or cargo, including under a single journey contract which includes a voyage on the tonnage tax ship;

(d) the provision of holidays, sold to the customer under a single contract, where

(i) part of the holiday is a voyage on a tonnage tax ship operated by the licensed shipping organisation, and the remaining part is land-based ("the land-based part");

(ii) the land-based part is purchased or obtained by the licensed shipping organisation by arm's length provision;

(e) the loading and unloading of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, and the provision by the licensed shipping organisation of facilities used exclusively for those purposes;

(f) the consolidation or breaking of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, immediately before or after the voyage, where the activity is not haulage-related;

(g) the temporary placement of cargo carried on a tonnage tax ship operated by the licensed shipping organisation, on or at the dockside, where the activity is not part of a long-term storage operation;

(h) the rental or provision to customers of containers for goods to be carried on a tonnage tax ship operated by the licensed shipping organisation;

(i) the provision of excursions for passengers of a tonnage tax ship operated by the licensed shipping organisation, where any cabin for the passenger remains available for exclusive use;"

(90) Furthermore, the following ancillary revenues will be covered by the capped:

(a) advertising and marketing, if these correspond to the sale of advertising space on board tonnage tax ships; and

(b) betting or gambling facilities normally offered to customers by seagoing passenger ships for on-board entertainment, and the sale to passengers on seagoing ships of luxury goods of a kind normally offered to such passengers, provided that the turnover from such activities amounts to less than 25% of the gross revenues of the tonnage taxed ship.

(91) According to the 2012 Rules on Internal Procedure non ship-specific ancillary activities, which are currently subject to tonnage tax in Malta, comprise i) the operation of ticketing facilities and passenger terminals in connection with shipping activities subject to tonnage tax; ii) any interest or return earned on working capital, where the interest/return is used for the purposes of financing the licensed shipping organisation or its shipping activities; iii) and/or the acquisition and maintenance of a tonnage tax ship. Those activities will in the future legislation continue to benefit from tonnage tax under the heading "Other ancillary activities recognised as eligible for tonnage tax purposes by the European Commission", as long as it will not lead to overall gross revenue from ancillary revenues (both ship-specific and other) exceeding 50% of tonnage taxed revenues of a beneficiary company.

(92) From a review covering the period 2004-2016 by the Registrar-General of Shipping and Seamen it resulted that all those which benefited from the tonnage tax scheme

had respected the 50% ceiling, in terms of the gross revenue as far as the ancillary activities are concerned. Particular attention was paid to cruise ships given the significance of this revenue. Checks carried out, per vessel, on the companies benefiting from tonnage tax, demonstrated that revenues from ancillary activities were well below the 50% limit. Malta has subsequently confirmed that a 50% threshold has been observed since May 2004 in respect of ancillary revenues. Malta stressed that the profits of any sub-contractors have never been eligible for tonnage tax.

4.2.2.2. Application of tonnage tax to entities chartering out eligible vessels on a bareboat basis

(93) Malta argues that, in contrast to financial lessors, owners of ships which charter their ships out on a bareboat basis are not extraneous to the shipping industry and carry a certain level of responsibility for their vessels.

(94) When the ship is exclusively involved in eligible activities and operated by the owner of the ship, the entire income from the ship is subject to tonnage tax. In this context, Malta considers that the same principle should be followed when the relevant income is shared between the owner of the ship and the operator, provided the necessary conditions (including the payment of tonnage tax by each party) are satisfied. Malta argues a too strict approach on this matter may lead to ship owners flagging out their ships outside the Union and higher ship rent rates for Union shipping companies.

(95) No bareboat chartered out ships which were accepted in the past under the tonnage tax scheme were ships bareboat chartered out to third parties, as demonstrated by the overview covering the period 2004-2016 submitted to the Commission services.

(96) Bareboat chartered out ships form approximately 10% of ships falling under the Maltese tonnage taxation scheme. The charters were intra-group[57].

(97) To ensure that *de jure* there is no possibility in the future for pure ship lessors (including those leasing small yachts to natural persons[58] to benefit from the tonnage tax scheme Malta has provided a commitment to limit the eligibility of bareboat chartering out transactions to:

(a) intra-group transactions[59];

(b) transactions of genuine shipping companies with third parties due to short-term over-capacity where the term of the charter does not exceed three years and provided that net tonnage chartered out on bareboat charter basis to third parties is below 50% of the total tonnage of the tonnage tax company/group; the term ‘short-term over-capacity’ refers solely to ships acquired by the licensed shipping organisation for the purposes of carrying out its own shipping activities and does not include any ships specifically acquired for the purposes of chartering out on a bareboat basis.

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57 A group is defined as two or more shipping companies which are owned and controlled, directly or indirectly, to more than fifty per cent by the same persons as well as in all control situations (independently of ownership percentage) as defined in Article 1 of Council Directive 83/349 of 13 June 1983 on consolidated accounts, OJ L 193, 18.07.1983, p. 1, and IFRS 10 “Consolidated Statements”.

58 Small yachts which do not correspond the definition referred to in footnote 51.

59 See footnote 57.

4.2.2.3. Application of tonnage tax to transport services provided with ships rented from other companies with crew (time/voyage chartering)

(98) Malta has confirmed that since 2004 no tonnage tax beneficiary in Malta has engaged in time chartering or similar activities.

(99) Malta stressed, however, that the very nature of shipping calls for a possibility of flexible and swift decision-making from ship owners to adapt to developments on the market. Malta stressed that the Maritime Guidelines do not provide a limitation on the maximum tonnage which an organisation is able to charter in with crew in order to be entitled to the aid allowed under the Maritime Guidelines.

(100) A time chartered fleet is subject to the general flag link requirements of the Maltese law. The flag link requirement applies to the entire tonnage taxed fleet[60]. All time/voyage chartered ships that have been accepted under the Maltese tonnage tax scheme since May 2004 are EEA-flagged.

(101) Malta clarified that it would require new entrants to have at least 25% of their tonnage-taxed fleet under EEA flags, in line with the approach approved by the Commission in the French tonnage tax case[61].

4.2.3. Application of the flag link rule

(102) It is only since 2010 that the Taxation Regulations allow also non-EEA/EU registered vessels to be covered by the tonnage taxation subject to the conditions described in recital 27. Therefore the vast majority of the Maltese tonnage taxed fleet (90%) is EEA/EU flagged.

(103) Malta has provided a commitment to require that any new entrant has at least a 25% share of EEA-flagged vessels in the tonnage taxed fleet it operates[62] which it will have to maintain or increase in accordance with section 3.1 of the Maritime Guidelines. Under this commitment the share of the EEA-flagged fleet of tonnage tax beneficiaries must not decrease on average over a period of three years. A derogation from this obligation will be granted only when 60% of the tonnage taxed fleet[63] that the beneficiary company operates is EEA-flagged. A check will be done whenever a vessel is added or taken out of a tonnage tax fleet.

(104) Malta has also submitted a commitment that the entire strategic and commercial management must take place within the EEA.

(105) Vessels which are not commercially and strategically managed from the EEA, will be accepted under the tonnage tax scheme only if flying an EEA flag, except for vessels bareboat chartered out, under conditions respecting certain limitations[64].

4.2.4. Tonnage tax rates

(106) Malta stressed that its tonnage tax scheme is based on a similar principle as the Cypriot tonnage tax scheme approved by the Commission in 2010. Malta charges an

60 Except for bareboat chartered out ships.

61 Commission decision of 29.04.2015 in case SA.14551, OJ L 110 of 29.04.2015, recital 46.

62 Including chartered in vessels (with crew or on a bareboat basis) but excluding vessels bareboat chartered out.

63 Including chartered in vessels (with crew or on a bareboat basis) but excluding vessels bareboat chartered out.

64 See commitment 4 in the Annex to this decision.

annual tonnage tax in the form of a lump sum depending on the tonnage of the vessel.

(107) The rates of tonnage tax payable in Malta vary according to the net tonnage of the vessel as well as age. Table 3 provides a comparison of the level of tonnage tax payable in Malta in relation to the Cypriot and Polish tonnage tax schemes approved by the Commission.

(108) Malta stresses that if one were to consider the change in tax payable as determined solely by the tonnage of the vessel[65], the estimated annual tonnage tax payable in Malta would be very similar to that payable in Cyprus and Poland:

Table 3

Net Tonnage	Malta	Cyprus	Poland
2,500	1,000	830	711
8,000	3,200	2,537	2,046
10,000	3,580	3,158	2,531
15,000	4,280	4,161	3,225
20,000	4,880	5,165	3,918
25,000	5,330	6,169	4,473
30,000	5,780	6,808	4,820
40,000	6,480	8,086	5,513
50,000	7,180	8,816	6,207
60,000	7,680	9,546	6,900

(109) Malta furthermore stresses that the tonnage tax calculation shown for Poland in table 3 assumes that the vessels will be operational for 365 days in a year. Vessels under the Polish tonnage tax scheme not operational for the full year are entitled to a pro-rata reduction. In Cyprus where the vessel is laid-up for a period of at least three months, the amount of tonnage tax payable in respect of such vessel is reduced by 25%.

(110) Malta provides a reduction from the standard tonnage tax rate where the vessel is less than 10 years old. At the same time, Malta increases the tonnage tax payable when the vessel is 15 years old or more. The purpose of this rule is to encourage shipowners and operators to register younger (and therefore more efficient and environmentally-friendly) vessels and discourage them from registering older vessels. Since newer vessels are in general likely to be safer, more secure, more efficient and more environmentally friendly than older vessels, such a rule is considered to support the first objective listed in section 2.2 of the Maritime Guidelines, that is, "*improving a safe, efficient, secure and environment friendly maritime transport*". This also contributes towards the 2020 targets on the mitigation of greenhouse gas emissions adopted by the EU.

(111) Malta argued that the increase in the tonnage tax rate when the vessel becomes older should be taken into account when considering the rate overall. However, in any event, given the reductions applied in Poland and Cyprus relating to the non-operation of vessels, even with the reduction applied in Malta the rates are comparable. For purposes of proper comparison Malta submitted that where a vessel

[65] Standard tax rate which applies to ships in the most common age category (10-15 years).

was in operation 75% in Poland the comparison between Malta and Poland would look as set out in table 4:

Table 4

Net Tonnage	Poland	Malta (vessel 0-5y)	Malta (vessel 5-10y)
2,500	533.25	700	850
8,000	1,535	2,240	2,720
10,000	1,898	2,506	3,043
15,000	2,419	2,996	3,638
20,000	2,939	3,416	4,148
25,000	3,355	3,731	4,530
30,000	3,615	4,046	4,913
40,000	4,135	4,536	5,508
50,000	4,655	5,026	6,103
60,000	5,175	5,376	6,528

(112) With regard to the discretion of the Minister to "[…] under such conditions as he may deem appropriate, exempt any ship or any class of ships from the payment of all or part of the fees payable in terms of these regulations" Malta explained that this rule applies solely to annual and registration fees, also called tonnage taxes, and only to ensure flexibility in cases involving humanitarian and philanthropic situations. This rule has never been applied.

(113) As to reductions on the account of tonnage tax paid in another State, Malta explained that the purpose of the relevant rule is prevention of the double taxation. An entity that has been subjected to tonnage tax in respect of a vessel in another country should not then be made to pay again the full tonnage tax in Malta. The system of relief from double tonnage taxation that is granted by Malta is based on the ordinary credit method that applies also in the context of income taxes. Malta pointed to previous statements of the Commission on the matter consistent with this approach[66].

(114) The double taxation relief is limited to the lower of the actual tonnage tax incurred in respect of the vessel outside Malta or 75% of the Maltese tonnage tax that would be payable before the granting of any credit. Relief is only granted for tonnage tax paid in respect of the same vessel by the same licensed shipping organisation in another Member State.

4.2.5. Ring-fencing measures

(115) Malta maintains that the ring-fencing measures contained in the Taxation Regulations effectively dissuade abuses and prevent spill-overs into non-eligible activities.

(116) The Taxation Regulations impose the obligation on a licensed shipping organisation to maintain separate accounts that distinguish income and gains derived from shipping activities from other sources of income. In addition, a licensed shipping organisation is also obliged to prepare financial statements that are in accordance with International Financial Reporting Standards endorsed by the Union and submit them to audits by a certified public accountant.

[66] Commission Communication, "Towards an Internal Market without Tax Obstacles", COM (2001)582 final, 23.10.2001 and Commission Communication "Co-ordinating Member-States' direct tax systems in the Internal Market", COM (2006)823 final, 19.12.2006.

(117) Failure to maintain separate accounts will automatically disqualify a shipping organisation from benefitting from any of the tax exemptions.

(118) A licensed shipping organisation has an obligation to register with the Minister responsible for Finance, if it wishes to benefit from the tonnage tax system.

(119) A licensed shipping organisation that derives benefits from the tonnage tax system is required to submit an annual income tax return that clearly shows the split between eligible and non-eligible income. In situations where the entire income of a licensed shipping organisation falls within the scope of the tonnage tax system, in lieu of a tax return the said organisation has the option to submit a declaration which must be submitted by a qualified person that is independent of the licensed shipping organisation being either a certified public accountant and auditor or a person holding the warrant of advocate. Severe penalties exist in case of false declarations or gross negligence of such duties.

(120) Losses from activities subject to income tax cannot be set off against tonnage tax liability.

(121) A shipping organisation cannot decide whether to opt in or out of the Maltese tonnage tax system depending on whether it has taxable profits or losses. Unless the licensed shipping organisation elects otherwise, it falls within the scope of the tonnage tax scheme. Where the organisation opts out this decision is irrevocable[67].

(122) No Maltese shipping organisation may have part of its ships under the tonnage tax scheme and part under the income tax scheme.[68]

(123) Article 51 of the Income Tax Act contains wide ranging anti-abuse provisions intended to counter artificial arrangements and schemes aimed at obtaining any unjustified tax advantage. This general anti-abuse rule follows the Commission Recommendation of 6 December 2012 on Aggressive Tax Planning[69]. The anti-abuse measures are supported by severe penalties that are imposed in case of breaches. Thus, in such cases, apart from payment of the unpaid tax, interest is imposed at the rate of 0.54% per month (i.e. 6.48% per annum), together with additional penalties at the rate of up to 1.5% per month (i.e. 18% per annum) on such unpaid tax.

(124) The rules on deductibility of expenses contained in the Income Tax Act require the existence of a direct link between an expense and the income it produces. Article 14(1) of the Income Tax Act only allows an expense to be deductible if the expense is "wholly and exclusively incurred in the production of the income". It is therefore not possible to claim deductions for expenses incurred in generating exempt profits (including tonnage taxed profits) against other types of taxable income.

(125) All licensed shipping organisations are required to maintain proper and sufficient records of its income and expenditure to enable the respective income and allowable deductions to be readily ascertained.

(126) Malta submitted a commitment to require beneficiaries of tonnage tax to submit mandatory annual compliance declarations for all controllable parameters such as type of vessel, activities performed with the vessel, net tonnage, days in use, flag, types of operation and compliance with the aid ceiling.

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67 Article 6 of the Taxation Regulations.

68 Article 6 of the Taxation Regulations.

69 OJ L 338, 12.12.2012, p. 41.

4.3. Tax treatment of dividends in relation to shares in shipping companies

(127) Malta explained the operation of the general Maltese tax system. Under this system dividends paid to shareholders by Maltese companies do not incur liability to declare the dividend[70] and pay taxation[71]. This system applies without exception to all sectors.

4.4. Exemption from taxation of capital gains from the sale or transfer of ships

(128) Malta refers to the relevant Maltese legislation which requires that a ship be a tonnage tax ship in order for it to take advantage of the tax exemption[72].

(129) Malta furthermore explains that only ship sales and transactions related to tonnage tax ships bought and sold by shipping companies while under tonnage taxation have ever benefitted from the tax exemption in the past. Furthermore, in Malta the decision to leave the tonnage tax regime is irrevocable.

4.5. Exemption from taxation of capital gains in relation to shares in shipping companies

(130) Malta submitted that in order to ensure the competitiveness and attractiveness of European registers compared to those of third countries shipowners (i.e. shareholders) should be able to enjoy the fruits of the shipping activities carried out.

(131) Under Article 12(1)(c)(ii) of the Income Tax Act any gains or profits accruing to or derived by any person not resident in Malta on a transfer of any shares or securities in a company, which is not a property company, are exempt from the tax, provided that the beneficial owner of the gain is a person not resident in Malta and such person is not owned and controlled by an individual or individuals who are ordinarily resident in Malta. Additionally a participation exemption applies under Article 12(1)(u)(1) of the Income Tax Act which stipulates that any income or gains derived by a company registered in Malta from a participating holding or from the transfer of such holding is exempt from the tax.

(132) The double taxation agreements entered into by Malta, in line with the provisions of Article 13(5) of the OECD Model Tax Convention, allocate the right to tax such capital gains to the country of residence of the person. Malta has double taxation treaties with all EEA Member States.

(133) The only share transfer transaction involving a Maltese shareholder since Malta's accession to the Union was a transaction which took place in 2006. This transaction related to the transfer of shares in […]. The benefit of the relevant tax exemption was well below the de minimis threshold[73], involving a maximum - theoretical - aid amount of below EUR 1.400 given the sales price, even counted together with the benefit of the related exemption from the duty as regards transaction with ships. The shareholder received no further aid in the relevant period and has also not benefitted from tonnage tax[74].

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70 Article 68(1) a of the Income Tax Act.

71 Article 68(1) b of the Income Tax Act.

72 Article 3(1)b) and (4) of the Taxation Regulations.

73 Commission Regulation (EU) No 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p 1.

74 Shipping companies active only in Maltese territorial waters cannot benefit from tonnage tax, see recital 52.

(134) All share transactions carried out otherwise since 2004 would have benefited from the exemption from capital gains tax for non-residents, enshrined in Article 12(1)(c)(ii) of the Income Tax Act.

(135) Malta provided a commitment to remove the current sector-specific exemption from taxation of capital gains stemming from the sale of shares in shipping companies for Maltese residents.

4.6. Exemption from taxation of interest of other income in relation to financing of shipping companies or tonnage tax ships

(136) Article 3(2) of the Taxation Regulations provides that, "no tax under that Act [the Income Tax Act] shall be payable by any person on interest or other income payable to him in relation to any financing of the operations […] of licensed shipping organisations, or the financing of any tonnage tax ship [...]. This exemption is not granted automatically but upon request. Malta has confirmed that no enterprise has ever been granted such an exemption. The Maltese authorities have confirmed that such exemption has never been granted including since the accession of Malta to the European Union and that "no company has availed itself of such benefit".

(137) Malta has given a commitment to delete Article 3(2) of the Taxation Regulations.

4.7. Absence of duty as regards transactions with ships

(138) Malta submitted that the provisions contained in the Taxation Regulations providing that no duty shall be charged as regards certain transactions with ships[75] are of an informative nature. They do not provide any benefit to shipping companies as such transactions with ships are not subject to a duty under the Duty on Documents and Transfers Act, since duty is in general only chargeable on transfers of marketable securities, immovable property, auction sales and insurance policies.

4.8. Exemption from duty on documents and transfers

(139) Similarly as in the case of capital gains from the sale of shares, Malta explained the exemption from duty[76] set out in Article 5 of Taxation Regulations did not have a significant impact in the period since 2004 given the shareholder structure of the companies subject to the tonnage tax and the general exemptions existing under the Duty on Documents and Transfers Act.

(140) Based on Article 47(3)d and 47(4) of the Duty on Documents and Transfers Act, no duty is applicable on transactions involving securities of a company in which more than half the ordinary share capital, voting rights and rights to profits are held by persons who are not resident in Malta and are not owned or controlled directly or indirectly by persons resident in Malta, provided the company has the majority of its business interests outside Malta. Transfers made on an intra-group basis in the context of group restructuring exercises, between companies which are majority owned and controlled by the same shareholders, benefit from an exemption under Article 42(1)(b) of that Act.

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75 Article 5 of the Taxation Regulations sets out that no duty is payable on the registration or transfer of tonnage tax ships; the assignment of rights over ships; and the registration of mortgages or other charges, see also recitals 40 ff.

76 The exemption covers in particular the duty on the registration of tonnage tax ships and of mortgages and the transfer of shares, see recital 41.

(141) Malta has confirmed that only one transaction not covered by the general exemption from duty mentioned in recital 140 has taken place since 2004, involving shares owned by a Maltese shareholder. This transaction did not- in terms of tax benefit - exceed the *de minimis* threshold, even after adding the benefit of exemption from the capital gains taxation[77].

(142) Malta, has submitted a commitment to remove the exemption set out in Article 5 of the Taxation Regulations in respect of Maltese residents.

4.9. Entry into force of the commitments

(143) Malta committed that the new rules that would render the measures of this Decision compatible with the internal market will come into force within three months of the date of this Decision. From the moment of adoption of this Decision and until the entry into force of the commitments, Malta gave a commitment to continue to administer the tonnage tax scheme and the other measures forming the object of this Decision in a way that does not lead to payment of incompatible aid that would then need to be recovered from the beneficiaries.

4.10. Legitimate expectations, legal certainty, existing aid status

(144) Malta has submitted that the scheme should be treated as existing aid and that there is a legitimate expectation to that effect on the part of Malta and shipping organisations.

(145) Malta's tonnage tax scheme and accompanying measures were established in 1973. In this respect Malta submitted the relevant parts of the Merchant Shipping Act of 1973 in its original version[78] and in particular Articles 85 and 86, which define exempt ships and the income exempt from income tax.

(146) Malta submits these aid measures were subjected to the pre-accession screening process. Competition issues related to transport, including tonnage tax, were explicitly included under the Transport chapter during accession negotiations. Malta highlights that its tonnage tax scheme was not flagged as problematic by the Commission at the time. Malta asserts, by reference to correspondence, that the information it provided about this scheme proved satisfactory to the Commission. Malta refers specifically to the meeting of the Accession Conference of Malta to the EU held on 26 October 2001 where its notes reflect it was agreed to recommend the provisional closure of the negotiations on the transport Chapter. Malta asserts that, like those shipping organisations that have benefitted from the tonnage tax scheme, it has always understood and believed that the scheme was fully in line with the Maritime Guidelines.

(147) The relevant Maltese legislation, the Merchant Shipping Act and the Taxation Regulations, were communicated to the Commission before 31 August 2004 as required by the Accession Act[79]. The tonnage tax scheme was communicated to the

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[77] See recital 133.

[78] As amended by Act XXIV of 1986 and adding Article 85A authorising the responsible minister to accept as "exempted" ships also ships under 1000 net tons.

[79] Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded ("Accession Act"), OJ L 236, 23.9.2003, p. 33–988.

Commission in document CONF-M 51/00 of 19 October 2000 as supplemented by document CONF-M 65/01 of 18 September 2001.

(148) The relevant legislation did not change between the date of accession and 1 May 2007. The national provisions were amended only in 2010 to transpose the principles introduced by the Communication from the Commission providing guidance on State aid to ship-management companies ("the Ship-management Guidelines)[80].

(149) Malta reminded the Commission that the tonnage tax scheme was not mentioned among the schemes needing to be adjusted when the three-year period granted by the Accession Treaty for amending existing aid measures was about to expire and that it therefore considered the scheme existing aid. In its letter of 24 April 2007 the Commission mentioned only two aid measures: Public Service Obligation – Gozo Channel Co Ltd and Public Service Obligation Sea Malta Co Ltd.

5. COMMENTS FROM THIRD PARTIES

(150) As mentioned at recital (3) comments were received from six interested parties and a German shipping sector employee wishing to remain anonymous. These are summarised in recitals (151) to (177)

5.1. Vessels eligible for tonnage taxation

(151) The European Community Shipowners' Association ("ECSA") agreed with the Commission's initial assessment that fishing vessels, oil rigs and non-commercial leisure yachts should not be eligible for tonnage tax.

5.2. Application of tonnage tax to barges

(152) The Malta International Shipping Council stressed that non-propelled barge carry cargo while the towing vessel ensures that the cargo reaches its destination. This was therefore one single operation and each ship had to be eligible for tonnage taxation.

5.3. Application of tonnage tax to cruise vessels

(153) The Malta International Shipping Council stressed that operation of cruise ships is synonymous with the carriage of passengers.

(154) The ECSA submitted that the primary purpose of cruise ships is maritime transport even if used for leisure. ECSA also stressed cruise ships are subject to the same control and regulation as other large ocean-going vessels and their seafarers must meet the same certification requirements. They are also subject to the same flag and port state control and the same international conventions as all other vessels travelling internationally. The cruise industry has contributed significantly towards achieving the objectives of the Maritime Guidelines. The cruise industry faces competitiveness constraints from outside the Union. To the extent that a Contracting Party to the EEA Agreement or a Member State imposes taxes (or other costs) that are not imposed by other countries, the Member State can anticipate a movement of vessels to flag to another state where the overall cost is lower.

5.4. Application of tonnage tax to commercial yachts

(155) Malta International Shipping Council, Malta Chamber of Commerce, Enterprise and Industry as well as Super Yachts Industry Network - Malta stressed that commercial

[80] OJ C 132, 11.6.2009, p. 6.

yachts are active in the transportation of passengers where a great deal of international competition exists with offshore centres to attract the business of setting up ownership companies and registering commercial yachts.

5.5. Application of tonnage tax to service vessels

(156) The ECSA insisted that there should not be a definitive and exclusive list of eligible vessel-types. It submitted there is no real difference between "service" and "transport" activities, all being commercial shipping activities. It welcomed recognition by the Commission of the eligibility of some service ships (for example, cable-layers) for state aid.

5.6. Income eligible for tonnage taxation

5.6.1. Taxation of capital gains from the sale of tonnage tax ships

(157) The ECSA submitted that profits derived from buying and selling assets related to the normal operations of a ship operator should only be excluded from tonnage tax where a company has no other activities than buying and selling shipping assets. In that case, the company itself cannot be regarded as performing shipping services.

(158) The ECSA argued capital gains from ship sales should also be covered by tonnage tax for ships acquired before entry into the tonnage tax scheme, whereby tonnage tax schemes should include fair and equitable transitional arrangements taking account of any fiscal claim accrued in the period before applying the tonnage tax.

5.6.2. Application of tonnage tax to ancillary services provided in the context maritime transport

(159) According to the ECSA ancillary activities should be a normal part of the shipping service being offered by a shipping organisation. They argue there is no need to define "ancillary activities" for the purpose of the application of the Maritime Guidelines but to leave it to Member States to make their own detailed interpretation under the monitoring of the Commission.

(160) The ECSA agree with the Commission that services offered by financial institutions to shipping companies which happen to be in tonnage tax – such as loans and guarantees – should not be regarded as eligible "ancillary activities".

(161) If the sole business of a company is the operation of qualifying ships, then the whole profit from the ship-operating business should fall inside the ring-fence as long as the business activities accord with custom and practice for the sector.

(162) The ECSA noted many companies charge for their services on an inclusive basis and the broad approach would allow them to avoid the requirement to make arbitrary calculations for the purposes of apportioning profits. The ECSA stressed that the broad approach is supported by the OECD's Model Tax Convention.

(163) The ECSA submitted that separately charged services are a necessary and normal element in the economic operation of most passenger shipping services. Without them the shipping activity would be unattractive to customers and not viable for shipping companies, therefore they should qualify for tonnage tax.

(164) As regards cruise operations, the transport package consists also of a variety of services offered during the trip which form part of the passenger's expectations. The ECSA submitted these include communication services, bars, currency exchange, shore excursions, shopping, health & beauty, and entertainment. In some cases, like shore excursions, these ancillary activities are a service bought-in by the cruise line –

they are normally “packaged” by local agents who sell to the cruise line – and therefore they should be included as an eligible activity.

(165) The ECSA recognises the principle of avoiding unfair competition with on-shore domestic businesses, noting that using ships primarily as floating supermarkets, casinos, or static hotels would not be acceptable.

(166) The Malta International Shipping Council made similar representations about cruise and passenger packages.

5.6.3. Application of tonnage tax to entities chartering out eligible vessels on a bareboat basis

(167) The ECSA argued Member States should decide whether any restrictions should be introduced, taking into account, for example, how the national shipping industry and maritime cluster are organised.

(168) The Norwegian Shipowners' Association explained that bareboat chartering is a common arrangement for shipping companies. However, only a small percentage of the shipping companies' total tonnage is usually chartered out on bareboat term. There are few companies which only own ships that are bareboat chartered out. If income from bareboat chartering out is not fully tax exempt, EEA based vessel owners would not be able to provide competitive charter rates. Furthermore, companies servicing the oil- and gas industry operating on foreign shelves will usually separate the vessel ownership and operational activities in order to be competitive in the operating state. Often bareboat chartering out is the only possibility for entering protected foreign markets. Also, when the charterer is an oil-related company, the charterer often has its own in-house crewing and technical ship-management services organisation, which the charterer wishes to employ. There are also territories where the risk related to crew cost and availability, cost and timely access to ship repairs and other necessities for running the ship are deemed unacceptable and therefore bareboat chartering out arrangements are preferred.

(169) The Norwegian Shipowners' Association argue that allowing tonnage taxed companies to bareboat charter ships out, will not lead to an increase of State aid to the shipping industry[81]. The tax exempted shipping income is merely split between the ship owning company, which charter the ship out, and the company operating the ship (for the ship operating company the tax exempted income is reduced with the bareboat hire, which is tax exempted income for the ship owning company).

(170) Malta International Shipping Council submitted that ship owning and ship operating must be treated as a whole. Ship owning and ship operating activities can be carried out by the same organisation. At other times different entities focus on one activity. The different entities all have costs and responsibilities including that of seeing that the primary operation is run safely and efficiently. It is stressed that Maltese law and international law place heavy obligations and responsibilities on the owner of the ship even when it is bareboat chartered out. Therefore, if a ship chartered out is engaged in the international carriage of goods and passengers both the owner and the charterer should be included in the tonnage tax scheme.

[81] Compared to the scenario when ship-owning and ship-operating function are performed by the same organisation.

5.6.4. Application of tonnage tax to leasing of ships with crew (time/voyage chartering)

(171) The ECSA stressed that the chartering activity creates direct and indirect employment for a lot of shipping professionals across Europe and a flexible approach contributes to keeping shipping companies' head offices within the EU.

(172) Concerning some of the Commission's decisions which requested a minimum share of own shipping activity for time charterers to benefit from tonnage taxation, the ECSA considered that this requirement should be loosened.

(173) According to the Norwegian Shipowners' Association, for commercial reasons, most shipping companies are represented in a number of maritime hubs across the world, and should an international shipping organisation have a strategy of increasing the share of time-chartered vessels in its fleet, it can do so regardless of any limitations in the European tonnage tax schemes. It will simply do so through a non-EEA resident subsidiary.

5.7. Flag-link rule

(174) The ECSA considered that, essentially, the Maritime Guidelines contain a pragmatic degree of flexibility regarding the use of Member States' flags and this should not be further tightened.

5.8. Ring-fencing rules

(175) The ECSA stressed that tonnage tax schemes need to provide a clear definition of qualifying activities.

(176) A ship operator may bring within ring-fence the activity of "buying in" services from other businesses but not the profits from carrying out other businesses. This arm's length principle is commonly used in the administration of tax and is known as a requirement for transfer-pricing. For example: if a ship operator provides land services such as road transport or hotel accommodation as part of a package, any mark-up it charges on the services above an arm's length cost should fall within tonnage tax. Thus if the services are provided at market rates by a third party, whatever profit the operator makes will fall inside the ring-fence. However, if the services are provided from within the ship operator's group, they will be subject to transfer-pricing and profits from the business of road transport or hotels will be excluded from tonnage tax – only the computed mark-up on such group services will qualify for tonnage tax.

5.9. Exemption from taxation of profits from financing shipping companies

(177) The ECSA agreed with the Commission, that services offered by financial institutions to shipping companies which come under the tonnage tax scheme – such as loans and guarantees – should not be regarded as 'eligible' or 'ancillary' activities.

6. COMMENTS FROM MALTA ON THIRD PARTY COMMENTS

(178) Malta believes that, from the majority of submissions received, it clearly emerges that there is a general satisfaction with the application of the Maritime Guidelines in Malta. Malta noted the stakeholders did not raise objections and supported the current arrangements.

7. ASSESSMENT OF THE AID

7.1. Existence of aid

(179) According to Article 107(1) TFEU, "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain* undertakings *or the provision of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market".*

(180) Accordingly, for a support measure to be considered aid within the meaning of Article 107(1) TFEU it must meet the following conditions cumulatively: (i) it must be financed by the State through State resources and the measure must be imputable to the State; (ii) it must confer a selective advantage on its recipient by favouring certain undertakings or the production of certain goods; (iii) it must distort or threaten to distort competition and (iv) it must have the potential to affect trade between Member States.

(181) In the following the Commission will assess whether the i) tonnage tax scheme, ii) the exemption from taxation of capital gains arising from the sale or transfer of ships, iii) the exemption from taxation of capital gains in relation to shares in shipping companies, iv) the exemption from taxation of dividends in relation to shares in shipping companies, v) the exemption from taxation of interest or other income in relation to financing of shipping companies or tonnage tax ships, vi) the exemption from certain duties on documents and transfers, (hereinafter collectively referred to as "the national measures"), satisfy the criteria mentioned in recital 180 and consequently constitute State aid.

State resources, imputability and advantage

(182) The Commission notes that the national measures concern exemptions from usual taxes and levies normally payable to the Maltese State. The tonnage tax scheme grants a tax reduction compared to the income tax normally payable on corporate income under the Income Tax Act. The exemption from taxation of dividends and capital gains in relation to shares in shipping companies and of capital gains relating to the sale of transfer of ships and of interest or other income in relation to financing of shipping companies or tonnage tax ships, consist in exemptions – relating to the Income Tax Act - granted by the Merchant Shipping Act and the Taxation Regulations. Likewise, the exemption from certain duties on documents and transfers stipulated by the Duty on Documents and Transfers Act is granted by the Merchant Shipping Act and the Taxation Regulations. The exemption from payment of fees at ministerial discretion is also an exemption from usual taxes and levies normally payable to the Maltese State.

(183) The Commission notes that a loss of tax revenue for the State is equivalent to consumption of State resources in the form of fiscal expenditure. By allowing a reduction or exemption from taxes and duties under the Merchant Shipping Act, Malta foregoes revenue which constitutes State resources. Hence, the tax reduction and exemptions and the exemption from duties is granted through State resources. Those measures have been put into effect in the form of State regulation (the Merchant Shipping Act which is a parliamentary act and the Taxation Regulations which Malta considers subsidiary legislation implementing the Merchant Shipping Act). Since those fiscal measures are therefore granted by the Maltese authorities the measures are imputable to the State.

(184) For a measure to constitute State aid the measure must confer a financial advantage to the recipients. The Commission notes that the national measures consist in an exemption from taxes and duties which confers an advantage to the beneficiary within the meaning of Article 107(1) TFEU.

(185) The Commission therefore concludes that

i) the tonnage tax under the tonnage tax scheme,

ii) the exemption from payment of fees at ministerial discretion,

iii) the exemption from taxation of capital gains arising from the sale or transfer of ships,

iv) the exemption from taxation of capital gains in relation to shares in shipping companies,

v) the exemption from taxation of dividends in relation to shares in shipping companies,

vi) the exemption from taxation of interest or other income in relation to financing of shipping companies or tonnage tax ships,

vii) the exemption from certain duties on documents and transfers

are granted from State resources and imputable to the State and confer an advantage to the beneficiaries.

(186) In the following the further elements necessary for a measure to constitute State aid, namely the selective nature of the measure, its potential to distort competition and effect trade, are assessed separately for each measure.

7.1.1. The tonnage tax scheme

Selective advantage

(187) For a measure to constitute State aid it must be selective in as much it favours certain undertakings or the production of certain goods according to Article 107(1) TFEU. Concerning the interpretation of the condition of selectivity, it is settled case law that a measure can be regarded as selective if it is *"intended partially to exempt those undertakings from the financial charges arising from the normal application of the general system of compulsory contributions imposed by law."*[82] A measure is therefore considered to be selective if it constitutes a departure from the normal application of the general tax framework.

(188) For purposes of the assessment, the Court of Justice has emerged with a three-step analysis[83]. First, the system of reference must be identified. Second, it should be determined whether a given measure constitutes a derogation from that system insofar as it differentiates between economic operators who, in light of the objectives intrinsic to the system, are in a comparable factual and legal situation. Assessing

82 Case 173/73 Italian Republic v. Commission of the European Communities [1974] ECR 709, paragraph 3.

83 See for instance Judgment of 18 December 2008, Government of Gibraltar / Commission (T-211/04 and T-215/04, ECR 2008 p. II-3745, T-211/04 and T-215/04, paragraphs 143-144.

whether a derogation exists is the key element of this part of the test and allows a conclusion to be drawn as to whether the measure is *prima facie* selective. If the measure in question does not constitute a derogation from the reference system, it is not selective. However, if it does (and therefore is *prima facie* selective), it needs to be established, in the third step of the test, whether the derogation is justified by the nature or the general scheme of the (reference) system[84]. If a *prima facie* selective measure is justified by the nature and general scheme of the system, it will not be considered selective and will thus fall outside the scope of Article 107(1) TFEU[85].

(189) Undertakings in Malta are subject to taxation at 35% under the Income Tax Act[86]. Shipping organisations which have opted for the tonnage tax scheme are exempted from taxation under the Income Tax Act as regards income generated from shipping activities and pay a lump sum instead. The Commission notes that the tonnage tax scheme described in section 2.1 or a comparable scheme is not available to all sectors or undertakings and is therefore *prima facie* selective. The tonnage tax enables the beneficiaries to save on their tax expenses. This derogation is not justified by the nature of the general system but is put in place with the specific objective of benefitting and promoting certain activities.

(190) In view of the above, the Commission concludes that the tonnage tax scheme confers a selective economic advantage.

Distortion of competition and effect on trade

(191) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes[87]. For all practical purposes, a distortion of competition within the meaning of Article 107 TFEU is thus assumed as soon as the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition[88]. Where financial aid by a State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid[89].

(192) Shipping activities are essentially carried out on a worldwide market. In addition, the markets for both maritime cabotage routes and maritime services are fully liberalised[90]. Thus, services provided by shipping companies benefiting from the tonnage tax scheme are open to competition within Member States, between Member

84 See for instance, Judgment of the Court of Justice of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, ECLI:EU:C:2011:551, paragraph 62; Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, ECLI:EU:C:2001:598, paragraph 42.

85 See for instance Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, ECLI:EU:C:2011:550, paragraph 49 et seq.; Judgment of the Court of Justice of 29 April 2004, *GIL Insurance*, C-308/01, ECLI:EU:C:2004:252, paragraph 60 et seq.

86 Article 56(6) of the Income Tax Act.

87 Case 730/79 *Phillip Morris* [1980] ECR 267, para. 11; Joined cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, para. 80.

88 Joined Cases T-298/07, T-312/97 etc. *Alzetta* [2000] ECR II-2325, paras 141-147.

89 Case T-288/97 *Friulia Venezia Giulia* [2001] ECR II-1619, para. 41.

90 As from1 January 1993: Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), OJ L 364 of 12.12.1992, p. 7; Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, OJ L 378, 31.12.1986, p. 1.

States and between Member States and third countries. Consequently, the scheme threatens to distort competition and could affect trade between Member States.

Conclusion

(193) In view of the above, the Commission considers that the tonnage tax constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.2. Exemption from payment of fees at ministerial discretion

(194) The current legislation does not adequately restrict the use of the discretion of the Minister to exempt ships from the payment of fees under the Taxation Regulations discussed in recital (23) and (112). It is not drafted precisely enough to restrict the reduction to the intended non-economic activities with a humanitarian or philanthropic purpose.

(195) The same considerations as set out in recitals (187) ff on selective advantage and in (191) ff on competition distortions and effect on trade apply also to the measures which potentially can be granted at the Minister's discretion.

Conclusion

(196) The Commission therefore concludes that the possibility to exempt further vessels at the Minister's discretion constitutes State aid within the meaning of Article 107(1) of the Treaty.

7.1.3. Exemption from tax on capital gains from the sale of ships

(197) Article 5 (1) a) of the Income Tax Act imposes a tax burden on capital gains derived from the transfer of capital assets. Article 3 (1) of the Taxation Regulations provides for an exemption from capital gains from the sale and transfer of tonnage tax ships.

Selective advantage

(198) As mentioned in recital (187), a measure is considered to be selective if it constitutes a departure from the normal application of the general tax framework. Article 3 (1) of the Taxation Regulations provides for an exemption from tax on capital gains from the sale of ships, while in the general tax framework Article 5(1) of the Income Tax Act imposes a tax burden on capital gains derived from the transfer of capital assets which amounts in principle to 35%. Shipping organisations which have opted for the tonnage tax scheme are exempted from taxation under the Income Tax Act as regards capital gains from the sale of tonnage tax ships. The Commission notes that such exemption is not available to all sectors or undertakings and is therefore *prima facie* selective. The tax exemption enables the beneficiaries to save on their tax expenses. This derogation is not justified by the nature of the general system but is put in place with the specific objective of benefitting and promoting certain activities.

(199) In view of the above, the Commission considers that the exemption from tax on capital gains from the sale of ships constitutes a selective advantage within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(200) As set out in recital (191) where financial aid by a State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid[91].

(201) As set out in more detail in recital (192) shipping activities are essentially carried out on a worldwide market. Thus, services provided by shipping companies benefiting from the capital gains tax exemption are open to competition between Member States. Consequently, the measure threatens to distort competition and could affect trade between Member States.

Conclusion

(202) In view of the above, the Commission considers that the exemption from tax on capital gains from the sale of ships constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.4. Exemption from taxation of dividends in relation to shares in shipping companies

Selective advantage

(203) The system of reference should be defined as being the general taxation system for dividends. Article 68 of the Income Tax Act provides that no person whether resident or non-resident in Malta shall be charged to tax on income from dividends. Furthermore, Article 68 sets out that nobody is obliged to declare dividend income in the tax return. The Maltese authorities have confirmed that, in essence, the general tax rate for dividends received by any kind of shareholder in Malta is zero. With respect to shareholders of shipping organisations, Article 3 (1) a) of the Taxation Regulations stipulates that "*no further tax under the Income Tax Act shall be charged or payable on the income […] derived from shipping activities of a licensed shipping organisation*", provided that all relevant fees and taxes have been duly paid by the shipping organisation. Therefore, both shareholders in a non-shipping company and in a shipping organisation having received a dividend from a company have no tax payable on the dividend. The tax exemption from dividends tax in relation to shares in shipping companies therefore constitutes a general measure which is not selective in nature.

Conclusion

(204) Based on the foregoing assessment, the exemption from dividend tax is not selective and, therefore, does not constitute State aid within the meaning of Article 107(1) TFEU.

7.1.5. The exemption from taxation of interest or other income payable in relation to financing of shipping or tonnage tax ships

Selective advantage

(205) The Commission notes that Article 84Z (1) of the Merchant Shipping Act provides for a wide variety of activities[92] which qualify an organisation as shipping organisation. Article 3(2) of the Merchant Shipping Act provides that no tax under the Income Tax Act is payable by financial institutions on interest or other income in relation to any financing of the activities by a licensed shipping organisation listed in Article 84Z (1) of the Merchant Shipping Act or the financing of a tonnage tax ship.

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91 Case T-288/97 *Friulia Venezia Giulia* [2001] ECR II-1619, para. 41.

92 See recital (34) of this Decision.

(206) As mentioned in recital (187), a measure is considered to be selective if it constitutes a departure from the normal application of the general tax framework. Article 3 (2) of the Taxation Regulations provides for an exemption from taxation of interest or other income payable in relation to financing of the operations of licensed shipping organisations set out in Article 84Z (1) of the Merchant Shipping Act or the financing of a tonnage tax ship, while in the general tax framework Article 4(1) of the Income Tax Act imposes a tax burden in the form of a flat rate of 35% on interest income derived from financing activities like the granting of loans and guarantees. Hence, financial institutions are exempted from income tax with regard to income derived from the financing of broadly defined activities of licensed shipping organisations and from financing tonnage tax ships.

(207) The Commission notes that such exemption is not available to financial institutions with regard to the financing of companies other than licensed shipping organisations. The exemption is therefore *prima facie* selective as it favours financial institutions which are active in financing the shipping sector. The tax exemption enables the beneficiaries to save on their tax expenses.

(208) The Commission does not consider that there is any objective in the nature of the general scheme of Maltese income taxation which could justify the derogation in question but that the measure is put in place with the specific objective of benefitting and promoting certain activities.

(209) In view of the above, the Commission considers that the exemption from taxation of interest or other income payable in relation to financing of the operations of licensed shipping organisations or to financing of tonnage tax ships constitutes a selective advantage within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(210) Financial services are essentially carried out on a European market where financial institutions are competing against each other. Thus, services provided by financial institutions benefiting from the tax exemption are open to competition between Member States.

(211) Where financial aid by a State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the measure[93]. Consequently, the measure threatens to distort competition and could affect trade between Member States.

Conclusion

(212) For the above reasons, the Commission concludes that the exemption from taxation of interest or other income payable in relation to financing of shipping or tonnage tax ships constitutes State aid within the meaning of Article 107(1) TFEU.

[93] Case T-288/97 *Friulia Venezia Giulia* [2001] ECR II-1619, para. 41.

7.1.6. Exemption from taxation of capital gains relating to shares in shipping companies

Selective advantage

(213) As mentioned in recital (187), a measure is considered to be selective if it constitutes a departure from the normal application of the general tax framework. Capital gains on shares for residents of Malta would normally be subject to a 35% income taxation under the Income Tax Act[94]. However, the Taxation Regulations contain a tax exemption in favour of capital gains relating to shares in shipping companies[95]. The Commission notes that such exemption is not available to all sectors or undertakings and is therefore *prima facie* selective. The exemption constitutes a derogation from the general tax system since Maltese residents having gains or profit derived on a transfer of shipping companies are in a comparable legal and factual situation as Maltese residents having gains or profit derived on a transfer of any other companies in the light of the objective of the tax system, i.e. taxing any gains or profits on a transfer of any shares or securities.

(214) Malta did not put forward any argument as to whether the measure could be justified by the logic of the tax system. The Commission does not consider that there is any objective in the nature and general scheme of Maltese income taxation which could justify the derogation in question and, therefore concludes that the exemption from tax on capital gains from the sale of shares in shipping companies to the benefit of Maltese residents is selective within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(215) As set out in recital (191) where financial aid by a State strengthens the position of an undertaking as compared with other undertakings competing in intra-Community trade, the latter must be regarded as affected by the aid.

(216) In the present case, Maltese residents holding shares in shipping companies are exposed to competition and trade between Member States. Investments activities are carried out on a worldwide market. Moreover, as set out in more detail in recital (192) shipping activities are essentially carried out on a worldwide market. Consequently, the tax measure under review affects trade in the Union and has the potential to distort competition between Member States.

Conclusion

(217) In view of the above, the Commission considers that the exemption from tax on capital gains from the sale of shares in shipping companies constitutes State aid within the meaning of Article 107(1) TFEU.

7.1.7. Exemption from the duty on documents and transfers

Selectivity

(218) The Duty on Documents and Transfers Act applies a duty to transfers of *inter alia* marketable securities.[96] As set out in recital (41), Article 5 of the Taxation

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94 Article 5(1) (a) ii of the Income Tax Act. On the other hand, Article 12(1)(c)(ii) of the Income Tax Act, which exempts from income tax any gains or profits accruing to or derived by any person not resident in Malta on a transfer of any shares or securities in a company, is not relevant in the present selectivity assessment, since it does not form part of the general rule for residents of Malta.

95 Article 3(1) c of the Merchant Shipping Taxation Regulations.

96 See recital 40. On the other hand, it is not relevant for the present selectivity assessment that there is no duty applicable on transactions with securities of a company with more than half the ordinary share

Regulations provides for exemptions as regards transactions related to marketable securities relating to shipping organisations.

(219) As mentioned in recital (187), a measure is considered to be selective if it constitutes a departure from the normal application of the general tax framework. Article 5 of the Taxation Regulations constitutes a derogation from the general system since entities undertaking transactions in securities in relation to shipping are in a comparable legal and factual situation as entities undertaking these transactions in relation to any other sector.

(220) The Commission notes that such exemption is not available in other sectors. The exemption is therefore *prima facie* selective as it favours transactions in the shipping sector. The exemption enables the beneficiaries to save on their expenses.

(221) Malta did not put forward any argument as to whether the measure could be justified by the logic of the system. The Commission does not consider that there is any objective in the nature and general scheme of Maltese system on duties which could justify the derogation in question.

(222) In view of the above, the Commission considers that the exemption from the duty on documents and transfers grants a selective advantage within the meaning of Article 107(1) TFEU.

Distortion of competition and effect on trade

(223) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertaking.

(224) As mentioned at recital (192), shipping is a liberalised sector, with competition both within the EU and worldwide. This measure therefore threatens to distort competition and could affect trade between Member States.

Conclusion

(225) The measure therefore constitutes State aid within the meaning of Article 107(1) TFEU.

7.2. Compatibility of the aid

Legal basis for assessment

(226) Pursuant to Article 107(3)(c) TFEU, aid to facilitate the development of certain activities may be considered compatible with the internal market, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, and thus provides a possible basis for an exemption from the general prohibition of State aid. The Commission considers Article 107(3)(c) TFEU to be the appropriate legal basis applicable to the Maltese tonnage tax scheme.

(227) In accordance with settled case-law, in the application of Article 107(3) TFEU the Commission enjoys wide discretion, the exercise of which involves complex economic and social assessments which must be made in a Community context. In adopting rules of conduct and announcing by publishing them that they will apply to the cases to which they relate, the Commission imposes a limit on the exercise of its

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capital, voting rights and rights to profits held by persons who are not resident in Malta, since this does not form part of this general rule.

aforementioned discretion and cannot depart from those rules under pain of being found, where appropriate, to be in breach of general principles of law, such as equal treatment or the protection of legitimate expectations. Therefore, in the specific area of State aid, the Commission is bound by the Guidelines and notices that it issues, to the extent that they do not depart from the rules in the Treaty[97]. In accordance with that settled case-law, the Commission will apply the Maritime Guidelines in the present case. The Maritime Guidelines determine the conditions under which a scheme to support a Member State's maritime transport sector is considered compatible with the internal market.

(228) Section 2.2 of the Maritime Guidelines states the specific objectives in the Community maritime interest that may be supported with schemes as in particular:

- improving a safe, efficient, secure and environment friendly maritime transport,
- encouraging the flagging or re-flagging to Member States' registers,
- contributing to the consolidation of the maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets,
- maintaining and improving maritime know-how and protecting and promoting employment for European seafarers.

7.2.1. The tonnage tax scheme

7.2.1.1. Vessels eligible for tonnage tax

(229) In accordance with section 2 of the Maritime Guidelines, their scope covers "maritime transport". In order to comply with the Maritime Guidelines, national aid measures must be limited to ships used for the purpose of maritime transport as defined therein by reference to Regulation 4055/86 and Regulation 3577/92. [98]

(230) Regulation 4055/86 defines "maritime transport" as the carriage of passengers or goods by sea between any port of a Member State and any port or off-shore installation of another Member State or of a third country.

(231) Regulation 3577/92 defines "maritime transport" as the carriage of passengers or goods by sea between ports situated on the mainland or the main territory of a Member State (*mainland cabotage*) or the carriage of passengers or goods by sea between any port in a Member State and installations or structures situated on the continental shelf of that Member State (*off-shore supply services*) or the carriage of passengers or goods by sea between ports on the mainland and an island of the Member State or between ports situated on the islands of the Member State (*island cabotage*).

(232) The Commission has also decided that certain activities, even if they do not fall, or only partially fall, within the definition of maritime transport, can be subject by analogy with maritime transport to the provisions of Section 3.1 of the Maritime

[97] See inter alia Case C-464/09 P *Holland Malt v Commission* EU:C:2010:733, paras 46-47.

[98] See footnote 45.

Guidelines. This is the case for rescue and marine assistance vessels[99] and for cable-laying, pipeline-laying, crane and research vessels[100], given that they require similarly qualified staff and are similarly exposed to international competition.

(233) In its opening decision the Commission presumed that fishing vessels, pontoons, barges, yachts, cruise vessels, pontoons and oil rigs were covered by the Maltese tonnage tax but doubted if it this was justifiable given the definition of maritime transport[101].

(234) Malta has clarified that, whilst all vessels registered in Malta pay a fee called "tonnage tax", only those ships involved in "shipping activities" according to the Taxation Regulations are exempt from normal income taxation and benefit from treatment as “tonnage tax ships”.

(235) The Commission had doubts on the compatibility of the definition of eligible shipping activities, which included also activities "*as otherwise may be prescribed."*[102]

(236) According to Malta, the reason for the inclusion of the phrase "*or as otherwise may be prescribed"* was to provide the competent authority with the appropriate legislative flexibility in the event that it becomes possible for certain new and emergent activities to be included within the definition of "shipping activities" (e.g. due to developments of the industry or legislation at Union level). Malta has confirmed that no regulations, rules, orders or instructions were ever issued that sought to expand the definition of shipping activities.

(237) In addition the Commission notes that based on the explanations provided by Malta the provision enshrined in Article 85A(1) of the Merchant Shipping Act empowering the responsible Minister to accept under the tonnage tax scheme vessels below the threshold of 1000 minimum net tonnage[103] did not eliminate the requirement for the vessel to be involved in the international carriage of goods or passengers. The Commission, however, also notes that the discretion of the Minister to accept under the tonnage tax scheme vessels below the threshold of 1000 minimum net tonnage is not based on any objective criteria. Therefore, the Commission welcomes the fact that Malta has given the commitment set out in the Annex in point 18.

(238) The Commission concludes that the wording of the Maltese legislation seems to have left room to include by ministerial act under the tonnage tax scheme activities which go beyond the definition of maritime transport. Therefore, that aspect of the Maltese tonnage tax scheme is incompatible with the Maritime Guidelines.

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99 Commission decision of 13 April 2015 in case SA.38085 (2013/N) concerning the prolongation of the Italian tonnage tax scheme (including its application to vessels providing rescue at sea and marine assistance on the high seas), recital 54, OJ C 406, 4.11.2016, p. 1.

100 See in particular Commission decision of 13 January 2009 in case SA C 22/2007 as regards the extension to dredging and cable-laying activities of the regime exempting maritime transport companies from the payment of the income tax and social contributions of seafarers in Denmark, recitals 65-72, OJ L 119, 15.5.2009, p. 23; Commission decision of 27.4.2010 in case N 714/2009, Intégration des transports de la pose de câbles, pose de canalisations, navires de grues et navires de recherche sous le régime de la "tonnage tax", recital 44, OJ C 158, 18.6.2010, p. 1; Commission decision of 27.04.2010 in case SA. N 714/2009, The Netherlands – Extension of the tonnage tax scheme to cable layers, pipeline layers, research vessels and crane vessels, recitals 37 to 46, OJ C 158, 18.6.2010, p. 2.

101 See recital 50 of the opening decision.

102 See recital 6 of the opening decision and recital 10 of this Decision.

103 See recital 7 of the opening decision and recital 11 of this Decision.

Eligibility of non-propelled barges

(239) In the opening decision the Commission questioned the eligibility of non-propelled barges, due to the fact that they do not carry out transport activities themselves but depend on other vessels to tow them[104].

(240) After having heard the observations of the Maltese authorities and third parties, the Commission remains of the view that non-propelled barges, because they do not carry out transport activities themselves but depend on other vessels to tow them, are not involved in maritime transport. The vessel providing the propulsion may be described as engaged in maritime transport but the activity of the barge is not.

(241) The Commission concludes that accepting barges for tonnage tax goes beyond the definition of maritime transport. Therefore, that aspect of the Maltese tonnage tax scheme is incompatible with the Maritime Guidelines.

Eligibility of cruise ships and of commercial yachts

(242) Concerning commercial yachts, in the opening decision[105] the Commission was concerned that they were mostly used for local trips (often leisure trips) and doubted to what extent such ships could be covered by a tonnage tax scheme.

(243) The eligibility of commercial yachts and cruise ships should be assessed in the light of the Communication from the Commission on the interpretation of Council Regulation 3577/92[106]. Chapter 3.3 of this Communication confirms that cruise services fall within the scope of Regulation 3577/92 and Council Regulation 4055/86 as constituting maritime transport. Indeed, cruise ships carry passengers by sea between ports, and thus perform maritime transport activities. Therefore the Commission considers that cruise ships are eligible for tonnage taxation provided that the majority of their revenues stem from core shipping revenues. Limitations on ancillary services related to shipping activities are discussed below in recitals (266) to (274).

(244) Transport services provided by commercial yachts fall under the definition of maritime transport, provided that they involve the transport of goods and/or persons by sea between ports, as well as between a port and an off-shore installation/structure. Therefore, the Commission considers that commercial yachts carrying out maritime transport for remuneration are eligible for tonnage taxation.

Eligibility of towage and dredging vessels

(245) In the opening decision the Commission raised doubts whether towage and dredging vessels were accepted under the Maltese tonnage tax scheme in compliance with the strict conditions fixed by the Maritime Guidelines[107].

(246) According to the Maritime Guidelines "*fiscal arrangements for companies (such as tonnage tax) may be applied to those dredgers* whose *activity consists in 'maritime transport' for more than 50% of their annual operational time and only in respect of such transport activities*". In the case of dredging, maritime transport is defined by Section 3.1 of the Maritime Guidelines as "*the transport at deep sea of extracted materials"* and excludes *"extractions or dredging as such"*. In line with the

104 See recital 50 of the opening decision.
105 Recital (50) of the opening decision.
106 Communication of 22.4.2014, COM(2014) 232 final.
107 See recital (46) of the opening decision.

Commission's decision making practice[108], the eligible part of the dredger's activities includes sailing between the port and the extraction site, sailing between different places of extraction, sailing between the place of extraction and the place where the extracted materials are to be unloaded, unloading of extracted material, sailing between the place of unloading and the port. By contrast, dredging and sailing while dredging is not considered as maritime transport activity.

(247) As to tugboats, the Maritime Guidelines clearly indicate that "*towage activities which are carried out inter alia in ports, or assisting a self*-propelled *vessel to reach port do not constitute maritime transport"*. In addition, the Maritime Guidelines foresee that towage is covered by their scope only if more than 50% of the towage activity effectively carried out by a tug during a given year constitutes maritime transport (this would *inter alia* include towing barges between ports or between a port and an off-shore installation/structure or towing of vessels which due to a technical failure cannot sail on their own).

(248) Malta has not had formal explicit legislation with regard to the 50% requirement of maritime transport for towage and dredging activity explained in recitals (246) and (247). The Commission considers that the Maltese legislation seems to have left room to apply tonnage tax to revenues generated from dredgers and tugboats without restriction. The Commission, therefore, considers that the national measures currently in force in Malta for towage and dredging are not in line with the conditions set out in the Maritime Guidelines.

Eligibility of service and support vessels and other vessels

(249) In the opening decision the Commission enquired what was meant by service/support vessels covered by the Maltese tonnage tax scheme and on which basis[109].

(250) The Commission was initially of the view that the Maltese scheme potentially permitted the coverage of a wide variety of service/support vessels under the tonnage tax scheme.

(251) The Commission enquired as to whether cable repair vessels, diving support vessels, oil well stimulation vessels, pilot vessels, survey vessels, hydrographical surveying and construction vessels providing off shore services and mobile platforms had benefitted and indicated that the Commission did not have sufficient information in order to determine whether the admissibility of such vessels/structures could comply with the Maritime Guidelines. Malta has clarified that these vessels had not been subject to tonnage tax.

(252) The Commission accepts that certain analogous activities, even if they do not fall within the strict definition of maritime transport, can be subject to the provisions of the Maritime Guidelines. This is the case for the operation of vessels specialised in servicing off-shore activities or performing installation and maintaining activities (e.g. cable-laying, pipe-laying, research and crane vessels) [110] or vessels providing

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[108] See in particular Commission decision of 13.01.2009 in case C 22/2007 extending the scope of the Danish tonnage tax to cable laying vessels, recitals 79-80, OJ L119 of 14.05.2009.

[109] See recital 51 of the opening decision.

[110] See recital (231) of this Decision.

rescue at sea and marine assistance on the high seas, provided they require similarly qualified staff and are similarly exposed to international competition.[111]

(253) With respect to the future, Malta has clarified that it seeks to apply tonnage tax to cable-laying, pipe-laying, crane and research vessels in line with Commission practice described in recital (252). Malta has committed to explicitly reflect this in its legislation.[112] Therefore, based on that future legislation tonnage tax will be applied to cable-laying, pipe-laying, crane and research vessels in a manner compatible with the Maritime Guidelines applied by analogy.

(254) As regards the current application of the Maltese tonnage tax scheme to "service/support vessels", Malta has shown that the activities covered under that term concern the carriage of goods and/or persons by sea between ports or between a port and an off-shore installation/structure, and thus constitute maritime transport.[113] Therefore, those vessels are within the scope of the Maritime Guidelines.

Eligibility of fishing vessels

(255) In the opening decision[114] the Commission had doubts whether fishing vessels were covered by the tonnage tax scheme.

(256) The Commission considers that the primary purpose of fishing vessels is not the transport of goods and persons by sea between ports or between a port and an offshore installation/structure, as required by the Maritime Guidelines. Moreover, fishing vessels do not present the particular characteristics of certain service vessels, which would allow the Commission to accept their inclusion in tonnage taxation in application of the Maritime Guidelines by analogy.[115]

(257) Therefore the Commission considers that the inclusion of fishing vessels in the tonnage tax scheme is not compatible with the internal market.

Eligibility of oil rigs

(258) The Commission re-iterates the position expressed in its opening decision in the Belgian tonnage tax case[116], notably that the Maritime Guidelines do not cover exploitation of natural resources at sea.

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111 When assessing whether new vessel types can benefit from tonnage tax, the Commission considers whether there is a risk that the companies operating relevant service vessels could relocate their on-shore activities outside the EU for the purpose of finding more accommodating fiscal climates and subsequently re-flag those vessels under flags of third countries. The Commission may consider applying by analogy the Maritime Guidelines to companies operating service vessels if the following conditions are fulfilled. Those companies must operate in a global market and face similar challenges, in terms of global competition and relocation of on-shore activities, to those of the EU maritime transport sector. The activities of the relevant service vessels must be subject to the same legal environment as EU maritime transport in the fields of labour protection, technical requirements and safety. The activities must require qualified and trained seafarers, with similar qualifications as those working on board traditional maritime transport vessels. Seafarers on board service vessels should be governed by the same labour law and social framework as other seafarers. Service vessels must be sea-going vessels and they must be obliged to undergo the same technical and safety controls as vessels dedicated to maritime transport.

112 See point 2 of Annex to the present Decision.

113 See in particular section 0 and footnote 47 of this Decision.

114 See recital 50 of the opening decision.

115 See recital (252) of the present Decision.

116 Commission decision of 19.03.2003, recitals 65-72, OJ C 145 of 21.06.2013, p. 1.

(259) Therefore, the Commission concludes that coverage by the tonnage tax scheme of oil rigs is not in line with the Maritime Guidelines.

7.2.1.2. Income of tonnage tax ships subject to tonnage tax

Revenues from bareboat chartering out

(260) In the opening decision the Commission[117] questioned the lack of legal restrictions as regards revenues from bareboat chartering.

(261) The Commission considers that, although bareboat chartering out is a legitimate economic activity, as a general rule, it should not be eligible to preferential tax treatment. In previous decisions[118], the Commission considered that pure ship lessors cannot be deemed to provide maritime transport services and, consequently, should not benefit from a tonnage tax regime.

(262) The Commission considers that the above principle should apply not only for bareboat chartering out contracts concluded with shipping companies, but also with final users in the sector of recreational vessels. The treatment of bareboat chartering out should not vary depending on the type of the charterer, since the key requirement under the Maritime Guidelines is that the beneficiary provides maritime transport services as defined in the relevant Council regulations.

(263) However, the situation is different in the context of *intra-group* contracts. Intra-group bareboat chartering out transactions can be compatible with the internal market under the Maritime Guidelines, since the beneficiary as a group performs the activity of maritime transport but through an intra-group leasing structure. Whether the beneficiary of tonnage taxation wishes to have: (i) one legal entity that does both maritime transport and owns the vessel, or (ii) two legal entities, one performing maritime transport and another one owning the vessel and leasing it to the former (e.g. for financing reasons) should, as a rule, not make any difference for the purpose of the Maritime Guidelines. In this respect, the Commission notes that intra-group bareboat chartering out transactions were unconditionally accepted in the Commission decision on the Irish tonnage tax[119]. The Commission notes that intra-group bareboat chartering is in line with the Maritime Guidelines, as the objective of "*maintaining and improving maritime know how and protecting and promoting employment for European seafarers*" and "*contributing to the consolidation of the Maritime cluster established in the Member States while maintaining an overall competitive fleet on world markets*" remains safeguarded.

(264) Apart from intra-group transactions, the Commission can accept a certain flexibility in favour of genuine shipping companies and assimilated companies[120]. provided all of the following conditions are fulfilled:[121]

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117 See recital 58 of the opening decision.

118 See in particular Commission decision of 17.07.2013 in the Spanish tax lease case SA.21233, OJ L 114 of 16.04.2014; Commission decision of 20.12.2011 in the Finnish tonnage tax case N448/2010, recital 32, OJ C 220 of 25.07.2012, p. 1; Commission decision of 1 April 2015 in the Croatian tonnage tax case SA. 37912, recitals 86f, OJ C 142 of 22 April 2016, p. 6.

119 Commission decision of 11.12.2002 in case N 504/02, OJ C 15 of 22.01.2003, p. 5, recitals (17) to (24).

120 E.g. companies operating cable laying, pipe-laying, crane and research vessels, as well as vessels providing rescue at sea and marine assistance on the high seas.

121 See *inter alia* Commission decision in the Finnish tonnage tax case, recital 32; the Irish tonnage tax case, recital 28, and the Croatian tonnage tax case, recital 86 and footnote 23.

(a) bare-boat chartering out activities must be related to temporary excess capacity for a period of up to three years;

(b) bareboat chartering out activities must be restricted to a maximum period of three years;

(c) temporary excess capacity must be related to the beneficiary shipping organisation's own shipping services, i.e. excess capacity specifically acquired (bought or chartered) for chartering-out purposes is ineligible for tonnage taxation; and

(d) the proportion of bareboat chartered-out capacity may not exceed a maximum percentage of the shipping organisation's fleet under the tonnage tax scheme, which can reach at most 50%. The Commission considers that, if more than 50% of the fleet of the tonnage tax beneficiary is bareboat chartered out, such activity would not be classified as "ancillary activity". On the other hand, a lower maximum threshold would not be appropriate, as it could discriminate against small operators.

(265) As the applicable legislation in Malta does not exclude pure ship lessors from the tonnage tax scheme, that legislation is not compatible with the Maritime Guidelines.

Cruise ships and ancillary revenues

(266) In the opening decision[122], the Commission noted that operators of cruise ships offered casino, spa, entertainment and other services. It suspected that such services may constitute the main activity and source of profits of cruise ships. Consequently, the Commission doubted to what extent cruise ships could be covered by a tonnage tax scheme.

(267) Furthermore, the Commission noted in the opening decision[123] that the Maltese legal acts did not provide any precise guidance as to what types of activities could be covered under the tonnage tax as ancillary activities. Clear limitations are however necessary to ensure that beneficiaries of tonnage taxation remain genuine maritime transportation service providers.

(268) In the Cypriot tonnage tax case[124] the Commission considered that in relation to the carriage of passengers by sea, also *"all hotel, catering,* entertainment *and retailing* act*ivities on board of a qualifying ship"* are eligible, "*provided that these services are performed as ancillary* act*ivities to the* act*ivity of carriage of passengers by sea by that ship and are all consumed or used on board that ship"*. In the UK tonnage tax case[125], the Commission considered eligible also "*services or facilities offered, which are additional to the core activities, but which are part of the total package offered to customers, provided that these would be unlikely to yield a profit if the normal tax rules were applied.*" In the Belgian tonnage tax case[126] the Commission prohibited revenues from the sale of products not intended for consumption on board such as

122 See recital 50 of the opening decision.
123 See recital 63 of the opening decision.
124 Commission decision of 24.03.2010 in case SA. 30338, recital 26, OJ C 144 of 03.06.2010, p. 28.
125 Commission decision of 12.07.2000 in case SA. 15810, OJ C 258 of 09.09.2000, p. 3.
126 Commission decision of 30.06.2004 in case C20/2003, recital 47, OJ L 150 of 10.06.2005, p. 1.

luxury goods[127] and from gambling and casinos, as well as revenue from land-based excursions[128] to benefit from tonnage taxation.

(269) The Commission also refers to its decision in the Finnish tonnage tax case[129] and the Lithuanian tonnage tax case[130] where it accepted port terminal operations such as passenger embarkation/disembarkation services and cargo loading/unloading services as well as administrative and insurance activities that are closely associated with the transport of passengers or goods can be covered by the tonnage taxation. Furthermore, in its decision in the Belgian tonnage tax case the Commission accepted that revenue from short-term investment of operating capital results from normal financial management and may therefore be subject to tonnage taxation if such revenue relates to the shipping organisation's normal working capital in connection with the pursuit of eligible activities[131].

(270) In view of the above mentioned decision practice and recognising that it would be counterproductive to establish a definite list of services which may be covered by tonnage taxation as ancillary services, the Commission considers that some limitations are necessary to ensure that beneficiaries of tonnage taxation remain genuine maritime transportation service providers. The principle is that revenues from eligible ships should mainly be constituted by the core shipping revenues.

(271) Core revenues are revenues from ticket sales or fees for cargo transportation and, in case of passenger transportation, letting of cabins in the context of maritime voyage and sale of food and drinks for immediate consumption on board. Ancillary revenues are other types of revenues which are frequently provided on board (especially in passenger transport) and which do not threaten to excessively distort competition with land-based providers, who are taxed according to the general rules of taxation. Examples of ancillary services would be the rental of advertising billboards on-board; the sale of goods and the provision of services customarily offered on passenger ships, including spa, hairdresser services, gambling and other entertainment services; the renting out of ship premises to shop and services' operators; the intermediation in provision of local excursions etc. The Commission considers that core revenues should always cover more than 50% of the vessel's total (core and ancillary) gross revenues.

(272) In the same vein, distortions of competition with land-based services should be limited. This inter alia requires that e.g. land-based services, such as local excursions or road part transportation included in the overall service package, should be bought-in either from unrelated companies or at arm's length price from the same group's entities, which are subject to usual income taxation.

(273) Similarly, the conclusion of contracts non-customary for the maritime transport sector, such as acquisition of cars, livestock, property, should not be covered by tonnage taxation. Such revenues are entirely unrelated to maritime transport and thus should never be eligible for tonnage taxation, neither as core nor as ancillary revenues.

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127 Except for alcohol, tobacco and perfumes.

128 Bought-in services.

129 Supra footnote 118, recitals 9 and 31.

130 Commission decision of 24.04.2017 in case SA. 45764, recital 9, OJ C 219 of 07.07.2017, p. 4.

131 Supra footnote 116, recitals 139 to 141.

(274) Since the Maltese tonnage tax scheme lacks clear provisions on the scope of ancillary activities and the extent to which they can benefit from tonnage tax, it does not provide guarantees that ancillary revenues are accepted for tonnage taxation only for genuine shipping companies. Therefore, that aspect of the Maltese tonnage tax scheme is incompatible with the Maritime Guidelines.

7.2.1.3. The level of tonnage tax

(275) Section 3.1, penultimate paragraph, of the Maritime Guidelines stipulates that, in order to keep an equitable balance of tonnage tax rates, the Commission will only approve schemes giving rise to a tax-load for the same tonnage fairly in line with the schemes already approved.

(276) The Commission notes that the method of calculation of the Maltese tonnage tax rate differs from the one applied by the majority of the Member States. Most of the Member States establish the so-called ”notional profit“ for the different categories of ships based on their tonnage, on which they then apply the national corporate tax. The Commission accepts the possibility to use different methodologies for calculating the tonnage tax provided that the final tax burden for a given ship does not fall below what has been accepted by the Commission so far.

(277) The tonnage tax rates applicable in Malta compared to those applicable in other Member States (in euros) are set out at recitals (106) to (114). The Commission notes that the ultimate level of taxation for Malta companies equals the average rate applied in the rest of the Union.

(278) The Maltese scheme includes a reduction on the rate for ships younger than ten years old. Malta has asserted that this is to incentivise the usage of more efficient and environmentally friendly ships in accordance with the aims of section 2.2 Maritime Guidelines. The Maltese tonnage tax scheme institutes higher rates for ships over 15 years old.

(279) The figures provided by Malta for comparison with tonnage tax rates applied in other Member States take only the typical rate as set out in the Merchant Shipping Act unadjusted for the age of the ship which is not sufficient to compare directly as the figures provided by Malta also assume a high number of days of inactivity and repair to describe the rates in the other Member States. However looking at the lowest rate payable in Malta, for a new ship, the reduced rates payable would still exceed those set by Poland for any vessel in use for 359 days a year (98%) or less.

(280) The Commission notes that the reduction of up to 75% and the possibility for reduction/exemption upon discretion by the Minister referred to in recitals (71) to (73) of the opening decision does not relate to the tonnage tax under the scheme but to the (misleading) term of tonnage tax which is due when registering a vessel. Malta's commitment to amend the tonnage tax legislation to avoid ambiguous use of the term 'tonnage tax' will make this clear in the future.

(281) Based on the information provided by the Maltese authorities concerning the applicable tonnage tax rates and the calculations carried out by the Commission, it appears that the tonnage tax rates in Malta are not lower than what has been accepted by the Commission so far. The Commission therefore concludes that the tonnage tax rate in Malta complies with the provisions of section 3.1 of the Maritime Guidelines.

7.2.1.4. The flag link requirement

(282) In the opening decision, the Commission considered that the flag link requirements as laid down in the Maltese legislation were weaker than required by the Maritime Guidelines[132].

(283) According to section 3.1. of the Maritime guidelines, ship owners who register some of their ships outside the EEA can still benefit from an EEA tonnage tax regime if the EEA-flagged share of their fleet tonnage is above 60%. If their EEA-flagged fleet tonnage is below 60%, they can still register additional ships outside the EEA if (i) the share of their fleet tonnage under EEA flags has not decreased since 17 January 2004 or (ii) the total share under EEA flags of all vessels tax-liable in the Member State concerned has not decreased over the last three years.

(284) However, the Maltese tonnage tax scheme does not ensure that the conditions set out in recital (283) are respected. In particular, a beneficiary can still benefit from the Maltese tonnage tax scheme, if that beneficiary has not decreased the EEA-flagged percentage of its tonnage taxed fleet over a period of three years.[133] Moreover, a beneficiary can still benefit from the Maltese tonnage tax scheme, as long as such beneficiary simply commits to increasing or maintaining the EEA-flagged percentage of its tonnage taxed fleet.[134] The Commission therefore considers that the tonnage tax scheme does not provide sufficient safeguards to ensure that tonnage tax companies having also non-EEA flagged vessels in their fleet increase or maintain the share of EEA tonnage of the fleet and consequently that the share of EEA-flagged tonnage remains at satisfactory levels. In this respect the tonnage tax scheme is not in line with the Maritime Guidelines and it is therefore incompatible with the internal market.[135]

7.2.1.5. Time/voyage chartering

(285) In the opening decision[136], the Commission expressed doubts on a largely unrestricted eligibility of time charterers and similar companies that could benefit from tonnage tax. The Commission considered that this was not in line with the objectives of the Maritime Guidelines.

(286) The Maritime Guidelines as interpreted by the Commission in its previous decisions allow voyage/time charterers and similar commercial operators of ships to benefit from tonnage taxation under certain conditions. The Commission considers that such companies can only benefit from tonnage taxation if they contribute to an objective of the Maritime Guidelines, notably the development of EU flag or the preservation of EU know-how or a combination of the two. This is the case, for instance, if, in addition to time/voyage chartered vessels equipped and manned by other companies, the tonnage tax beneficiary has in its fleet also vessels for which he himself ensures crew and technical management and provided such vessels constitute at least 20% of the total tonnage taxed fleet.[137] Another possibility is that the share of the vessels that are both non-EEA and time/voyage chartered does not exceed 75% of the

132 See recitals 76 to 79 of the opening decision.

133 See lit. (c) of recital (24) of the present Decision.

134 See recital (25) of the present Decision.

135 The fact that in practice the requirements may have been met is a matter relevant for the recovery obligation (see section 0 of the present Decision).

136 See recital 58 of the opening decision.

137 Commission decision in the Lithuanian tonnage tax case, recital 36.

beneficiary's fleet under tonnage tax[138]. A further possibility is for Member States to require that at least 25% of the beneficiary's entire fleet is EEA-flagged[139]. In all mentioned cases, the tonnage tax beneficiary stays under the obligation to maintain/increase the share of EEA-flagged tonnage of its own fleet (owned vessels or chartered in on a bareboat basis).

(287) The Maltese scheme does not impose any of the requirements mentioned at recital (286). Therefore, the Commission concludes that the legal framework relating to commercial operators providing transport services with fully equipped and manned ships of other companies is not in line with the Maritime Guidelines.

7.2.1.6. Ring-fencing measures

(288) Chapter 3.1 of the Maritime Guidelines requires that spill-over effects between eligible and non-eligible activities should be excluded. The Taxation Regulations impose the obligation on a licensed shipping organisation to maintain separate accounts that distinguish income and gains derived from shipping activities from other sources of income.

(289) The rules on deductibility of expenses contained in the Income Tax Act require the existence of a direct link between an expense and the income it produces. Article 14(1) of the Income Tax Act only allows an expense to be deductible if the expense is "*wholly and exclusively incurred in the production of the income*". It is therefore not possible to claim deductions for expenses incurred in generating exempt profits (including tonnage taxed profits) against other types of taxable income.

(290) A licensed shipping organisation that derives benefits from the tonnage tax system is required to submit an annual income tax return distinguishing between eligible and non-eligible income. Losses from activities subject to income tax cannot be set off against tonnage tax liability.

(291) Any licensed shipping organisation is obliged to prepare financial statements that are in accordance with International Financial Reporting Standards endorsed by the Union and to have them audited by a certified public accountant.

(292) A shipping organisation cannot decide whether to opt in or out of the Maltese tonnage tax system depending on whether it has taxable profits or losses. Unless the licensed shipping organisation elects otherwise, it falls within the scope of the tonnage tax scheme. Where the organisation opts out this decision is irrevocable[140]. As a result no Maltese shipping organisation/group has part of its ships under tonnage tax scheme and part under the income tax scheme.

(293) Article 51 of the Income Tax Act contains wide ranging anti-abuse provisions intended to counter artificial arrangements and schemes aimed at obtaining any unjustified tax advantage. This general anti-abuse rule follows the Commission Recommendation of 6 December 2012 on Aggressive Tax Planning.

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138 Commission decision of 13.05.2003 in the French tonnage tax case N737/2002, recital 35, OJ C38 of 12.02.2004, p. 4;;Commission decision in the Lithuanian tonnage tax case, recital 37.

139 Commission decision in case SA.14551 of 04.02.2015, Change to the conditions for aid granted to time charterers under the tonnage tax scheme, recital 42, OJ L110 of 29.04.2015, p. 15.

140 Article 6 of the Taxation Regulations.

(294) The anti-abuse measures are supported by penalties that are imposed in case of breaches. Thus, in such cases, apart from payment of the unpaid tax, interest is imposed at the rate of 0.54% per month (i.e. 6.48% per annum), together with additional penalties at the rate of up to 1.5% per month (i.e. 18% per annum) on such unpaid tax.

(295) The Commission also positively notes that the concern raised in the opening decision as regards the too broad scope of the eligible activities[141] and organisations has been addressed by commitments from Malta.

(296) The Commission concludes that ring-fencing in Malta is robust and compliant with the requirements of the Maritime Guidelines and that its doubts raised in that regard are therefore alleviated.

7.2.1.7. The exemption from taxation of capital gains arising from the sale or transfer of tonnage tax ships

(297) As set out in section 7.1.3 the exemption from taxation of capital gains from the sale or transfer of tonnage tax ships constitutes aid.

(298) Article 3(1)(b) of the Taxation Regulations exempt from taxation capital gains from the sale or transfer of tonnage tax ships.[142] The Commission recognizes the exemption from taxation of capital gains from the sale or transfer of eligible ships which have been acquired and sold whilst being lawfully under the tonnage tax scheme.[143] As to ships acquired before the entry of the beneficiary into the tonnage tax scheme, such exemption would be acceptable only within the limits of the aid ceiling set in section 11 of the Maritime Guidelines. Capital gains arising from the sale of over-depreciated ships (which occurs before the entry into the tonnage tax scheme) must be taken into account for purposes of calculating the aid ceiling. This means that in case of ships bought before the entry into the tonnage tax scheme, the hidden tax liabilities arising from over-depreciation have to be settled upon the entry into the tonnage tax scheme, unless they can be accommodated within the aid ceiling over a ten-years' period. Such hidden tax liabilities would normally have to be determined as the difference between the market value and the tax value of the ship at the moment of entry into the tonnage taxation system.

(299) Given the current too broad wording of Article 85A of the Merchant Shipping Act which allows to declare a tonnage tax ship (which may consequently benefit from tonnage tax) any ship irrespective of the operations in which it is engaged and for lack of any rules to address potential over-depreciation of a ship acquired prior to the entry into the tonnage tax scheme, the Commission considers that the Maltese legal texts do not limit the exemption from taxation of capital gains from the sale or transfer of ships in an appropriate manner, neither in terms of amounts nor in terms of beneficiaries. Such general exemption as provided for in the Maltese scheme does not meet the requirements for compatibility.

(300) The Commission concludes that the exemption from taxation of capital gains from the sales or transfer of ships in its current wording is incompatible with the internal market rules, since the exemption extends to ships having been depreciated under

141 See recital (85) of the opening decision.

142 See recital (14).

143 See e.g. Commission decisions in the Finnish tonnage tax case, recital 38; the Croatian tonnage tax case, recitals 50 to 53, 113; and the Italian tonnage tax case, recitals 28 to 33, 64 to 66.

income tax rules prior to being transferred under the tonnage tax scheme. Therefore, the exemption constitutes illegal and incompatible aid. The respective provision therefore requires amendment.

7.2.1.8. Conclusion

(301) On the basis of the above, the Commission concludes that the following aspects of the Maltese tonnage tax scheme are incompatible with the Maritime Guidelines: the eligibility of activities "*as otherwise may be prescribed*", the eligibility of non-propelled barges, the conditions of eligibility of towage and dredging vessels, the eligibility of fishing vessels and oil rigs, the exemption from taxation of capital gains from the sale or transfer of tonnage tax ships and the absence of safeguards regarding bareboat chartering out, ancillary revenues, the EEA flag link and time/voyage chartering. For those reasons, the Maltese tonnage tax scheme is incompatible with the internal market.

(302) However, those incompatible aspects can be addressed for the future via the implementation of the commitments undertaken by Malta set out in the Annex, in particular points 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 14, 15, 20, 21 and 22. Therefore, subject to implementation within the three-month deadline of the commitments in Annex, the Maltese tonnage tax scheme would be rendered compatible as of the date of such full implementation.

7.2.2. Exemption from taxation of capital gains in relation to shares in shipping companies

(303) As set out in section 7.1.3 the exemption from taxation of capital gains relating to shares in shipping companies applied to Maltese residents constitutes aid.

(304) Buying and selling shares in shipping companies is part of the investment business (which is not eligible for tonnage taxation under the Maritime Guidelines[144]), rather than the shipping business. The Maritime Guidelines clearly state that Member States should *"preserve […] normal tax levels for […] personal remuneration of shareholders and directors"*. Such rule is necessary in order for compatible aid to focus on the activity that needs support, and to limit as much as possible the distortion of competition in other sectors. Otherwise, shareholders of companies receiving compatible aid would also be entitled to tax exemptions (and so would the possible shareholders of those shareholders too). This, however, would multiply to unpredictably high levels the amount of aid initially accepted for a specific company in a given sector, so that in the end multiple sectors of the economy could be "contaminated" by such aid (according to the beneficiary shareholders' activities). Such an outcome would be against the effectiveness of State aid rules and also against the principle of prohibition of State aid, which requires any exception (compatible aid) to be applied in a restrictive and well-targeted manner.

(305) The Commission concludes that the exemption from taxation of capital gains in relation to shares in shipping companies to the benefit of Maltese residents is incompatible with the internal market rules. Therefore, the exemption constitutes illegal and incompatible aid, which must be abolished. The Commission notes positively that the Maltese authorities have committed to abolish that exemption under point 16 of the commitments in Annex.

[144] See section 3.1 of the Maritime Guidelines.

7.2.3. The exemption from taxation of interest or other income in relation to financing of shipping companies or tonnage tax ships

(306) As set out in recital (212) Article 3(2) of the Taxation Regulations constitutes aid to financial institutions.

(307) The scope of the Maritime Guidelines and hence the benefit of tonnage tax is limited to the "transport of goods and persons by sea". This does not include financial institutions providing loans, issuing guarantees or issuing securities in relation to ship ownership, management, administration or operation as allowed by Article 3(2) of the Taxation Regulations.

(308) As such the exemption under investigation has no compatibility grounds under the Maritime Guidelines. Malta did not provide any other compatibility reasoning on the basis of Article 107(2) or (3) TFEU. The Commission does not consider that the exemption under investigation could be considered compatible under any compatibility ground of the Treaty.

(309) The Commission concludes that the current terms of the scheme relating to financial institutions are incompatible with the Maritime Guidelines and therefore constitute illegal and incompatible aid, which must be abolished. The Commission notes positively that the Maltese authorities have committed to abolish that exemption under point 3 of the commitments in Annex.

7.2.4. The exemption from certain duties on documents and transfers

(310) Whilst it could be the case that exemptions from the duty on documents and transfers could be potentially accepted where the direct beneficiary is a genuine shipping company, but only within the limits of the aid ceiling prescribed by Section 11 of the Maritime Guidelines, the current exemption could potentially benefit non-shipping companies. Furthermore, there is no mechanism to respect Section 11 of the Maritime Guidelines.

(311) Malta has not invoked any compatibility grounds and the Commission does not see any for the measure as it stands.

(312) The Commission concludes that the exemption from certain duties on documents and transfers as regards transactions related to marketable securities relating to shipping organisations to the benefit of Maltese residents is incompatible with the internal market rules. Therefore, the exemption constitutes illegal and incompatible aid, which must be abolished. The Commission notes positively that the Maltese authorities have committed to abolish that exemption under point 17 of the commitments in Annex.

7.2.5. Exemption from payment of fees at ministerial discretion

(313) The current legislation does not adequately restrict the use of the discretion of the Minister to exempt ships from the payment of fees under the Taxation Regulations to philanthropic and humanitarian purposes as intended by the Maltese authorities.

(314) Malta has not invoked any compatibility grounds and the Commission does not see any for the measure as it stands.

(315) The Commission concludes that the possibility to exempt ships at the Minister's discretion is incompatible with the internal market rules. Therefore, this possibility for exemption constitutes illegal and incompatible aid, which must be abolished. The Commission notes positively that the Maltese authorities have committed under point

19 of the commitments in Annex to issue guidance to ensure that the ministerial discretion shall be exercised only in the case of humanitarian and philanthropic operations which do not involve the offer of goods and services on a market.

7.2.6. Aid ceiling

(316) As regards the aid ceiling, Section 11, 2nd paragraph, of the Maritime Guidelines sets a maximum level of aid, in order to avoid cumulation of aid to levels which are disproportionate to the objectives of the Community common interest and could lead to a subsidy race between Member States. Total aid[145] for the benefit of shipping companies may not provide any benefit greater than the benefit represented by a reduction to zero of taxation and social charges for seafarers and a reduction to the level specified in Section 3.1, penultimate paragraph, of the Maritime Guidelines of corporate taxation of shipping activities.

(317) Malta has provided credible information that the ceiling has always been respected in the past and committed to ensuring observation of the ceiling in the future. This is complemented by the commitment to require beneficiaries of tonnage tax to submit mandatory annual compliance declarations on compliance with the aid ceiling. Moreover, Malta has committed to introduce a formal provision on control of the aid ceiling under point 12 of the commitments in Annex.

7.3. Recovery

7.3.1. New/existing aid classification, legitimate expectations and legal certainty

(318) Article 22 and Annex IV (Section 3) of the Accession Act[146] provides that aid to the transport sector shall be regarded as existing aid within the meaning of Article 88(1) of the Treaty until the end of the third year after the date of accession, provided it has been communicated to the Commission within four months of the date of accession.

(319) By the date of its accession, Malta had stated to the Commission that the Maltese tonnage tax regime was in line with the rules then in place and provided assurances on respecting the flag link but did not submit the details of the scheme to the Commission in accordance with the provisions of the Accession Treaty in order to establish it as existing aid. Discussions between the Commission and the Maltese authorities relating to transport matters took place on 19 October 2000 and 18 September 2001 and the brief discussion of tonnage tax is recorded in the minutes and negotiating position of the Maltese authorities[147]. At the meeting of the Accession Conference of Malta to the EU held on 26 October 2001 it was agreed to recommend the provisional closure of the negotiations on the transport chapter of accession, which expressly included State aid in the transport sector.

(320) The Commission considers that Malta and the beneficiaries do not benefit neither from legitimate expectations nor from legal certainty with respect to the aid measures

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145 Except for aid for training, restructuring aid, aid related to public service obligations and start-up aid for new short sea shipping services.

146 Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded ("Accession Act"), OJ L 236, 23.9.2003, p. 33–988. With respect to Malta's argument that the tonnage tax scheme and accompanying measures were established in 1973, suffice it to note that point 1(a) of Section 3 of Annex IV of the Accession Act does not apply to aid to the transport sector.

147 Maltese Accession record documents CONF-M 51/00 and CONF-M 65/01.

subject to this Decision. It is settled case-law that there can be no legitimate expectations that an aid is lawful unless the aid has been granted in compliance with the procedure laid down in Article 108 TFEU, since a diligent businessman should normally be able to determine whether that procedure has been followed[148]. In the present case, it is clear that the notification procedure of Article 108 TFEU, and the procedure provided for in the Accession Act were not followed and thus there are no legitimate expectations. Furthermore, the discussions cited by Malta[149], do not lead to the conclusion that precise, unconditional and consistent assurances would have been given by the Commission that the tonnage tax scheme would be treated as existing aid.

(321) In view of the above, the measures of the present case do not constitute existing aid falling within any of the categories provided for in Article 1(b) of Council Regulation (EU) 2015/1589[150]. In addition, Malta and the beneficiaries do not benefit neither from legitimate expectations nor from legal certainty with respect to the aid measures of this Decision.

7.3.2. The tonnage tax scheme

7.3.2.1. Eligible types of vessel

(322) The 2012 Rules on Internal Procedure list fishing vessels, pleasure yachts, fixed offshore installations including oil rigs, mobile platforms, non-ocean-going tugs, non-self-propelled floating cranes, pontoons, vessels whose main purpose is to provide gambling and/or casino and similar vessels as not eligible for the income tax exemption and treatment as ”tonnage tax ships” as they are not engaged in ”shipping activities”[151].

(323) The list of the tonnage tax ships provided by Malta and the accompanying explanations show that this is also how the rules have been implemented in practice and Malta confirms that no such vessels have benefitted from tonnage tax during the relevant period. The 2012 Rules on Internal procedure have clarified which types of vessels are not deemed to be carrying out shipping activities within the meaning of the Merchant Shipping Act. The past practice from 2004 did not deviate from these rules. The Commission therefore concludes that fishing vessels, pleasure yachts, fixed offshore installations including oil rigs, mobile platforms, non-ocean-going tugs, non-self-propelled floating cranes, pontoons, vessels whose main purpose is to provide gambling and/or casino vessels have in practice not benefitted from the tonnage tax scheme, although in theory it was available to them.

(324) As regards the possibility according to Article 85 of the Merchant Shipping Act that shipping activities “*otherwise may be prescribed*” Malta has confirmed that no regulations, rules, orders or instructions were ever issued that sought to expand the definition of shipping activities. The Commission therefore concludes that the

148 See Case C-24/95 *Alcan Deutschland* ECLI:EU:C:1997:163, para. 25 and the case-law cited therein.

149 See recital (319) of this Decision.

150 Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 248, 24.9.2015, p. 9; replacing Council Regulation No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, OJ L 83, 27.03.1999, p. 1, as amended.

151 See recital (10) of this Decision.

definition of shipping activities was not extended beyond the international carriage of goods or passengers by sea.

(325) The Commission therefore concludes that whilst the scope of the scheme was unacceptably wide no aid was paid out to the benefit of an ineligible vessel and therefore no recovery is required.

Towage and dredging vessels

(326) Whilst Malta has not had explicit requirements in place for dredging and towage the Maltese authorities confirmed that during the period 2004 to 2016 they have accorded the status of tonnage tax schemes only to such vessels where it was confirmed that the vessels performed the majority of their operational time in the international carriage of goods in accordance with the parameters of the Maritime Guidelines. In particular tugboats operating in ports were excluded from the application of the tonnage tax and tonnage tax is limited to ships involved in international maritime transportation.

(327) After examining the information provided by Malta, the Commission notes that there were only EEA-flagged vessels accepted for tonnage tax for towage and that *de facto* the requirements of the Guidelines were respected in the application of tonnage taxation to those vessels over the period concerned.

(328) The Commission therefore concludes that no recovery is required.

7.3.2.2. Income subject to tonnage tax

Ancillary activities

(329) As regards ancillary activities of cruise ships, based on the information provided by Malta, the Commission notes, firstly, that the profits of any sub-contractors have not been eligible under the tonnage tax scheme and, secondly, that services which are provided typically on board ships to customers as well as in relation to land excursions have benefitted from tonnage tax only if purchased by the shipping organisation at arm's length. The Commission is therefore satisfied that the interpretation of shipping activities as applied by Malta has ensured that the scope of the activities which the Commission has been accepting in the past as ancillary income eligible for tonnage tax has *de facto* been respected.

(330) In addition the Commission notes that Malta has in practice entered into individual discussions with each owner/operator of cruise ships seeking to enter the Maltese tonnage tax regime to understand the scope of their operation prior to entry to the tonnage tax scheme. This has provided a mechanism by which the Maltese authorities have been able to ensure that the owners and operators of such ships only derive the benefits of the tonnage tax regime where appropriate. Whilst there was no formal requirement in place ensuring that less than 50% of the tonnage taxed revenues of a vessel are ancillary, the Maltese authorities have demonstrated that core shipping revenues constituted the majority of shipping revenues per vessel. The Commission therefore concludes that no recovery is required.

Time/voyage chartering and bareboat chartering out

(331) Following the explanations received from Malta, the Commission notes that Maltese shipping organisations which have benefitted from tonnage tax have not engaged in time chartering activities and that the Maltese tonnage tax fleet is predominantly (namely 90%) EEA-flagged.

(332) No bareboat chartered out ships which were accepted in the past under the tonnage tax scheme were ships bareboat chartered out to third parties, as demonstrated by the overview covering the period 2004-2016 submitted by Malta to the Commission services.

(333) The Commission therefore concludes that no recovery is required regarding time/voyage chartering and bareboat chartering out.

7.3.2.3. Flag link

(334) As regards the past Malta has provided data on the share of Maltese and EEA-flagged ships for beneficiaries. The ratio of EEA-flagged vessels per beneficiary exceeds by far the 60%-share requested by the Maritime Guidelines.

7.3.2.4. The exemption from taxation of capital gains arising from the sale or transfer of tonnage tax ships

(335) The respective provisions require amendment as the tax exemption is not restricted to proceeds from the sale or transfer of vessels which have been acquired and sold whilst under the tonnage tax scheme. Notwithstanding the too broad scope of the tax exemption Malta has credibly demonstrated that only ship sales and transactions related to tonnage tax ships bought and sold by shipping companies while under tonnage taxation have ever benefitted from the tax exemption in the past. The Commission therefore considers that no recovery is required.

7.3.2.5. Conclusion

(336) Since in practice no amount has been paid out to ineligible beneficiaries under the Maltese tonnage tax scheme, the Commission concludes that no recovery is necessary in that regard.

7.3.3. Interest or other income payable in relation to financing of shipping companies and tonnage tax ships

(337) In view of the explanations provided by Malta[152] the Commission considers that no financial institution has benefitted in practice from the exemption from taxation of interest and other income in relation to the financing of shipping companies or tonnage tax ships. Since no aid has been paid out to any beneficiary under that measure, no recovery is required.

7.3.4. Exemption from the duty on documents and transfers and from taxation of capital gains relating to shares in shipping companies

(338) Under the rules of the general tax system all non-residents of Malta would be exempt from capital gains on a transfer of shares. Article 12(1)(u)(1) of the Income Tax Act exempt any income derived by a company registered in Malta from a participating holding or from the transfer of such holding from the tax.

(339) In relation to the duty on documents and transfers, where half the ordinary share capital is controlled by non-residents the transaction is exempt from duty under the general system. In addition there are also exemptions from the duty in the case of intragroup transfers.

(340) Malta has taken steps to construct a representative sample of the shareholders of shipping companies to determine the typical ownership structure. Malta constructed

[152] See recital (136).

this sample to reflect the composition of the Maltese tonnage tax fleet. Having identified an appropriate set of companies to accurately reflect the fleet Malta then went individually through the ownership of shares in these companies over the period. Malta established that all of these companies were exclusively owned by non-residents over the period 2004 to 2016. In addition Malta conducted a specific survey of shareholder transactions over the period to attempt to identify any transactions involving a Maltese resident. The result of the survey was that only one transaction was found involving a Maltese resident. This transaction involved a group where all other shareholders were non-resident. The size of the transaction identified meant that even if the general exemptions arising from foreign ownership had not applied, the value combining the capital gain and the duty on documents and transfers would have been vastly below the *de minimis* threshold.

(341) The structured representative sampling by Malta, combined with the transaction search, the available exemptions under the general tax system and the *de minimis* threshold, indicates that recovery is not likely to be widespread. However, the pay out of aid under those two measures cannot be excluded where none of the aforementioned exemptions apply and the amount paid out exceeds the *de minimis* threshold. In such cases recovery of the aid disbursed should take place.

(342) As regards the methodology for recovery, the amount to be recovered should consist in the duty or tax which should have been paid if the generally applicable rule had been applied. In order to identify potential beneficiaries the Maltese authorities will as, a first step, need to determine the ownership structure of shipping companies. As a second step, the Maltese authorities must verify whether transactions giving raise to duty on documents and transfers and taxation of capital gains relating to shares in shipping companies involved a Maltese resident.

7.3.5. Exemption from payment of fees at ministerial discretion

(343) The ministerial discretion described at recital (23) and (313) of this Decision has never been used and therefore no recovery is necessary.

7.4. Commitments

(344) The Commission welcomes Malta's commitments as set out in the Annex to this Decision.

7.5. Language

(345) Malta has waived its right to have the decision adopted in Maltese. The authentic language is therefore English.

8. CONCLUSION

(346) The Commission finds that the tonnage tax scheme constitutes State aid within the meaning of Article 107(1) of the Treaty. In addition to the application of tonnage tax in relation to income from vessel operation, aid is present in the exemption from taxation of capital gains relating to shares in shipping companies applicable to Maltese residents; the exemption from taxation of capital gains from the sale or transfer of ships applicable to Maltese residents; the exemption from duty on documents and transfers relating to shares applicable to Maltese residents; the exemption from payment of fees at ministerial discretion; and the exemption of financial institutions from taxation of interest or other income payable in relation to financing of shipping companies and tonnage tax ships.

(347) The Commission finds that the exemption from taxation of dividends from shares in shipping companies does not constitute State aid within the meaning of Article 107(1) of the Treaty as it does not provide a selective advantage.

(348) The Commission finds that the following State aid measures are incompatible with the internal market.

(a) The tonnage taxation scheme with respect to the following aspects: the eligibility of activities "*as otherwise may be prescribed*", the eligibility of non-propelled barges, the conditions of eligibility of towage and dredging vessels, the eligibility of fishing vessels and oil rigs, the exemption from taxation of capital gains from the sale or transfer of tonnage tax ships and the absence of safeguards regarding bareboat chartering out, ancillary revenues, the flag link with the EEA and time/voyage chartering;

(b) The exemption from taxation of capital gains from the sale of shares in shipping companies applied to Maltese residents;

(c) The exemption from income tax on the interest income or other income of financial institutions in relation to the financing of shipping companies or tonnage tax ships;

(d) The exemption from the duty on documents and transfers for the transfer of shares in shipping organisations for Maltese residents;

(e) The exemption from payment of fees at ministerial discretion.

(349) The Commission finds that the incompatible State aid measures listed in recital (348) must be abolished. However, Malta's implementation of the commitments as set out in the Annex to this Decision would render the Maltese tonnage tax scheme compatible as of the date of such full implementation.

(350) The Commission finds that the tonnage tax scheme as administered in practice by the Maltese authorities has not resulted in the disbursement of any aid amount to ineligible beneficiaries. Moreover, no disbursement of aid has taken place regarding the exemption from payment of fees at ministerial discretion and the exemption from income tax on the interest income or other income of financial institutions in relation to the financing of shipping companies or tonnage tax ships.

(351) The Commission finds that the incompatible State aid disbursed regarding the exemption from taxation of capital gains from the sale of shares in shipping companies applied to Maltese residents and regarding the exemption from the duty

on documents and transfers for the transfer of shares in shipping organisations for Maltese residents must be recovered to the extent it exceeds the *de minimis* threshold.

HAS ADOPTED THIS DECISION:

Article 1

The aid granted under the tonnage tax scheme constitutes new aid within the meaning of the Accession Treaty since 1 May 2004.

Article 2

The aid granted under the tonnage tax scheme is compatible with the internal market, subject to compliance with the commitments set out in the Annex.

Article 3

(1) The following elements of the tonnage tax scheme are incompatible with the internal market:

a) The eligibility for tonnage taxation of income generated from the operation of non-propelled barges, oil rigs and fishing vessels;

b) The eligibility for tonnage taxation of income generated from towage and dredging vessels and from bareboat chartering out without restriction;

c) The eligibility for tonnage taxation of vessels under time/voyage chartering without restriction;

d) The eligibility for tonnage taxation of revenues from ancillary activities without the restriction that the majority of the tonnage taxed revenues of the tax beneficiary stem from core shipping activities and the lack of mechanisms in place to ensure that land-based services are provided at arm's length;

e) The eligibility for tonnage taxation for companies engaged in shipping without the requirement that tonnage taxed shipping organisations having also non-EEA-flagged vessels in their fleet increase or maintain the share of EEA-flagged tonnage of the fleet if this share is below 60%;

f) the eligibility for tonnage taxation of activities "as otherwise may be prescribed";

g) The exemption from taxation of capital gains from the sale or transfer of ships applied to Maltese residents.

(2) The following measures are also incompatible with the internal market:

a) The exemption from taxation of capital gains from the sale of shares in shipping companies applied to Maltese residents;

b) The exemption from income tax on the interest income or other income of financial institutions in relation to the financing of shipping companies or tonnage tax ships;

c) The exemption from the duty on documents and transfers for the transfer of shares in shipping organisations for Maltese residents;

d) The exemption from payment of fees at ministerial discretion.

Malta shall remove those tax exemptions from its legislation and adapt the scope of the tonnage tax scheme as specified in the commitments set out in the Annex.

Article 4

Individual aid has not been granted in relation to the measure set out in Article 3, first paragraph, as well as in relation to the measures set out in Article 3, second paragraph, indents (b) and (d). No recovery is required in relation to these measures.

Article 5

Individual aid granted under the measures referred to in Article 3, second paragraph, indents (a) and (c) is incompatible and must be recovered, save where it fulfils the conditions laid down by Article 3 of Commission Regulation (EU) No. 1407/2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid.

Article 6

(1) Malta shall recover incompatible aid granted under the measures referred to in Article 5 from any beneficiaries.

(2) The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.

(3) The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004 and to Regulation (EC) No 271/2008 amending Regulation (EC) No 794/2004.

Article 7

(1) Recovery of any incompatible aid granted under the measures referred to in Article 5 shall be immediate and effective.

(2) Malta shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

Article 8

Malta shall inform the Commission, within two months of the notification of this Decision, of the measures taken to comply with it and shall submit the following information:

(a) the total amount of incompatible aid received by any beneficiaries identified;

(b) the total amount (principal and recovery interests) to be recovered from each beneficiary;

(c) a detailed description of the measures already taken and planned to comply with this Decision;

(d) documents demonstrating any beneficiaries have been ordered to repay incompatible aid.

Article 9

This Decision is addressed to the Republic of Malta.

If the decision 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 the decision. Your request specifying the relevant information should be sent by registered letter or fax to:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Fax: +32 2 296 12 42
Stateaidgreffe@ec.europa.eu

Done at Brussels, 19.12.2017

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION

ANNEX – Commitments provided by Malta

1. Malta commits to specifically exclude from the operation of tonnage tax the following vessels:

(a) Fishing and fish factory ships;

(b) Private yachts and ships used primarily for sport or recreation;

(c) Fixed offshore installations and floating storage units;

(d) Non-ocean going tug boats and dredgers;

(e) Ships whose main purpose is to provide goods or services normally provided on land;

(f) Stationary ships employed for hotel and or catering operations (floating hotels or restaurants);

(g) Ships employed mainly for gambling/as casinos (floating or cruising casinos);

2. Malta commits to reflect explicitly in legislation, following directly the terms of the Maritime Guidelines, a restriction of tonnage tax to vessels engaged in the international carriage of good or passengers by sea and the following vessels (previously approved on submission by other Member States):

(a) Cable-laying vessels;

(b) Pipe laying vessels;

(c) Crane vessels; and

(d) Research vessels.

3. Malta commits to delete Point 3(2) of the Taxation Regulations and to remove the possibility of financial institutions benefitting from tonnage tax and to restrict the benefits of tonnage tax to organisations which have assumed risks and responsibilities for the operation of a tonnage tax ship (i.e. technical management and crewing) or the carrying out of shipping activities.

4. Malta commits to explicitly limit the application of tonnage taxation to the chartering out of vessels on bareboat basis and similar transactions between third parties1. The chartering out of vessels on bareboat basis to third parties and similar transactions can be eligible only as ancillary activity of genuine shipping companies in the context of temporary overcapacity subject to the following conditions:

(a) Only to deal with a situation of temporary excess capacity;

(b) For a maximum period of up to three years;

(c) Bareboat chartered out capacity will not exceed 50% of the shipping companies' fleet, calculated on a group basis;

(d) Excess capacity specifically acquired for chartering out cannot be eligible.

5. Malta commits that existing and new entrants to the tonnage tax scheme must have at least 25% of their tonnage tax fleet EEA-flagged notwithstanding the requirement to maintain or increase the share as set out in 3.1 (paragraph 8) of the Maritime Guidelines.

[1] This also includes renting of ships (especially yachts) on bareboat charter basis to natural persons.

6. Malta commits to explicitly limit eligibility to tonnage taxation for dredgers to those dredgers whose activity consists in "maritime transport" - that is, the transport at deep sea of extracted materials - for more than 50 % of their annual operational time and only in respect of such transport activities. Eligible dredgers will be only those registered in a Member State or the EEA.

7. Malta commits to explicitly limit eligibility to tonnage taxation for towage to those vessels whose activity consists in maritime transport for more than 50 % of their annual operation. Waiting time may be proportionally assimilated to that part of total activity effectively carried out by a tug which constitutes maritime transport. Towage activities which are carried out inter alia in ports, or which consist in assisting a self-propelled vessel to reach port will not constitute maritime transport and only vessels registered in a Member State or the EEA will be eligible.

8. Malta commits to regulate the eligibility of revenues ancillary as set out at recitals **Error! Reference source not found.** to **Error! Reference source not found.** of the Commission's final Decision in the present case, by way of detailed regulation the draft of which has been shared with the Commission and that ship specific and non-ship-specific ancillary activities will not exceed 50% of overall gross revenue (both ship-specific and other) of a beneficiary company. Malta also commits to exclude entirely from tonnage taxation revenues from the activities set out in recital **Error! Reference source not found.** of the Commission's final Decision in the present case.

9. Malta commits to ensure that the capital gains exemption on the sale of ships covers only ships operated under the tonnage tax regime by companies engaged in genuine shipping activities and to introduce a requirement that only ships acquired and sold whilst under the tonnage tax regime may benefit from such an exemption.

10. Malta commits that shipping companies (except ship management companies) will not benefit from tonnage tax (except for ship management companies[2]) unless they:

(a) have at least 60% of the tonnage of their fleet[3] under the flag of a Member State of the Union or of a State party to the EEA Agreement on entering the scheme; or

(b) maintain or increase the share of tonnage of their fleet that they operated under the flag of a Member State of the Union or of a State party to the EEA Agreement at the moment that they entered the scheme.

In any event, by the third year of operation the organisation must have at least 60% of the tonnage taxed fleet EEA-flagged.

However, in connection with the initial entry of a shipping organisation into the Maltese tonnage tax system, the said applicable threshold may be reduced to twenty-five percent (25%). Malta will continue to check that the share of EEA-flagged fleet has not decreased on average over a period of three years (both for existing and new beneficiaries).

11. Malta commits that income from non-EEA-flagged vessels will only be eligible when the above criteria on flagging (see commitment 10) are met and shall apply only to fleets which are entirely managed from the EEA for commercial and strategic management. Ships which are not commercially and strategically managed from the EEA will be accepted under tonnage

[2] The current Taxation Regulations already provide for precise rules on newcomer companies (in line with the rules enshrined in the Ship-management Guidelines)

[3] Including the fleet chartered in (with crew or on bareboat basis) while excluding bareboat chartered out vessels.

taxation only if flying an EEA flag (except for vessels bareboat chartered out under conditions respecting the limitations mentioned in commitment 4).

12. Malta commits to introducing a formal provision on control of the aid ceiling set in Section 11 of the Maritime Guidelines.

13. Malta commits that legislation will be amended to clearly distinguish between:

(a) fees which are payable by vessels on registration and annual taxes on non-qualifying ships under the Maltese flag; and

(b) tonnage tax, which is only payable in respect of qualifying ships.

14. Malta commits to publishing internal guidelines which will make clear the ineligibility of a number of activities that may be in competition with land-based companies, in particular:

(a) ship building;

(b) sale on board of goods or services not customarily provided to passengers e.g. cars, domestic appliances or livestock; and

(c) the operation of a port or harbour, ship based holidays where the ship remains moored and there is no sea transportation element.

15. Malta commits to require beneficiaries of tonnage tax to submit mandatory annual compliance declarations for all controllable parameters such as type of vessel, activities performed with the vessel, net tonnage, days in use, flag, types of operation and compliance with the aid ceiling.

16. Malta commits to remove current sector-specific exemption from taxation of capital gains on shares in shipping companies for Maltese residents, as set out in Article 84Z (1)C of the Merchant Shipping Act.

17. Malta commits to remove the exemption in Article 5 of the Merchant Shipping Taxation Regulations from fees and charges payable under the Duty on Documents and Transfers Act.

18. Malta commits to amend the legislation to clarify that ships below 1000 net tonnes may only be declared as eligible for tonnage tax where that ship is engaged in shipping activities and which but for its tonnage would be eligible for such treatment under Article 85 (1) of the Merchant Shipping Act. and to exercise the power in such cases where the criteria are met by applicants. Malta will reformulate Article 85A (1) of the Merchant Shipping Act in the following way: *"The Minister shall with the concurrence of the Minister responsible for finance and subject to such conditions deemed appropriate in line with these Regulations, declare to be a tonnage tax ship, a ship of any net tonnage, which is engaged in shipping activities)".*

19. Malta commits to issue guidance clarifying that the ministerial discretion contained in the First Schedule to the Merchant Shipping Act to exempt any ship or class of ships from the payment of fees shall be exercised only in the case of philanthropic and humanitarian operations which do not involve the offer of goods or services on a market.

20. Malta commits to separate accounting wherever a company is not solely engaged in shipping activities.

21. Malta commits to restricting the benefit of tonnage tax to organisations which have assumed risks and responsibilities related to the operation of a tonnage tax scheme or to the carrying out of shipping activities and will include a specific definition in legislation following that in the Maritime Guidelines.

22. Malta commits to delete from Article 85 of the Merchant Shipping Act the words "*or as otherwise may be prescribed"*.

23. Malta commits that the new rules that will render the measures of this Decision compatible with the internal market will come into force within three months of the date of this Decision.

24. Malta commits to continue to administer the tonnage tax scheme and the other measures forming the object of this Decision in a way that does not lead to payment of incompatible aid that would then need to be recovered from the beneficiaries.

25. Malta commits to re-notify the tonnage tax scheme within ten years of the date of the Commission's final Decision in the present case.