



EUROPEAN COMMISSION

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**Subject: State Aid SA.36628 (2015/NN) (ex 2013/CP) – Spain
Fred Olsen**

Sir,

1. PROCEDURE

- (1) By letter of 26 April 2013, registered on 6 May 2013, the Commission received a complaint from the shipping company Naviera Armas S.A. ("Naviera Armas" or "the complainant") alleging that the Spanish authorities had granted State aid to the shipping company Fred Olsen S.A. ("Fred Olsen") through several measures related to the port of Puerto de las Nieves (Canarias, Spain).
- (2) By letter dated 30 May 2013, the Commission forwarded the non-confidential version of the complaint to the Spanish authorities, who provided their observations by letter dated 4 July 2013. The Commission requested additional information by letter of 24 July 2013, which the Spanish authorities submitted on 20 August 2013.
- (3) The Commission sent a preliminary assessment letter to the complainant on 22 October 2013 stating that the measures objected did not seem *prima facie* to constitute State aid in the sense of Article 107(1) TFEU. The complainant disputed the preliminary findings of the Commission and submitted additional information by letter dated 13 December 2013.
- (4) By letter of 18 February 2014, the Commission forwarded the observations of the complainant to Spain, who replied by letter dated 18 March 2014.

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- (5) In October 2014, the Commission learned from the press that a tender was being organised in Puerto de las Nieves¹ and requested additional information by letter of 23 October 2014, which the Spanish authorities submitted on 24 November 2014.
- (6) On 30 October 2014, Fred Olsen submitted observations on its own initiative to the Commission, as a third party in the case. Then, by letter of 10 November 2014, Fred Olsen requested access to the Commission's preliminary assessment letter, which was refused by letter dated 27 December 2014.
- (7) By letter dated 9 December 2014, the Commission asked the Spanish authorities to provide additional information. The Commission also requested to be kept informed, on a regular basis, about the latest developments in the ongoing tender procedure regarding Puerto de las Nieves. The Spanish authorities replied by letter of 16 January 2015, and started regularly informing the Commission through letters dated 9 February, 9 April and 20 October 2015.
- (8) By email dated 20 April 2015, the Commission requested additional information, which the Spanish authorities submitted partly by phone on 30 April 2015 (minutes of the call were recorded on that same day), and then more extensively by letter of 21 May 2015.
- (9) On its own initiative, Fred Olsen informed the Commission about the evolution of the ongoing (and contested) tender procedure by letters of 9 March and 16 September 2015.
- (10) By letter of 6 October 2015, registered on 9 October 2015, the Commission received a formal request to act from the complainant, under Article 265 TFEU.
- (11) By email dated 28 October 2015, the Commission sent a last request of information, to which Spain replied by email of 23 November 2015.

2. BACKGROUND

2.1. The alleged beneficiary

- (12) Fred Olsen operates inter-island ferry services in the Canary Islands, Spain. The company operates five routes throughout the Canary Islands, linking the main islands of the archipelago. The fleet is composed of five fast-ferries. The annual number of passengers is of approximately 2.4 million, while the numbers of cars transported is of approximately 0.55 million annually.²
- (13) Fred Olsen links the two main islands (Tenerife and Gran Canaria) through a route between the ports of Santa Cruz de Tenerife and Puerto de las Nieves in Agaete, Gran Canaria. Puerto de las Nieves is a public port falling under the competence of, and directly managed by, the regional government of the Canary Islands.

2.2. The complaint and the alleged State aid measures

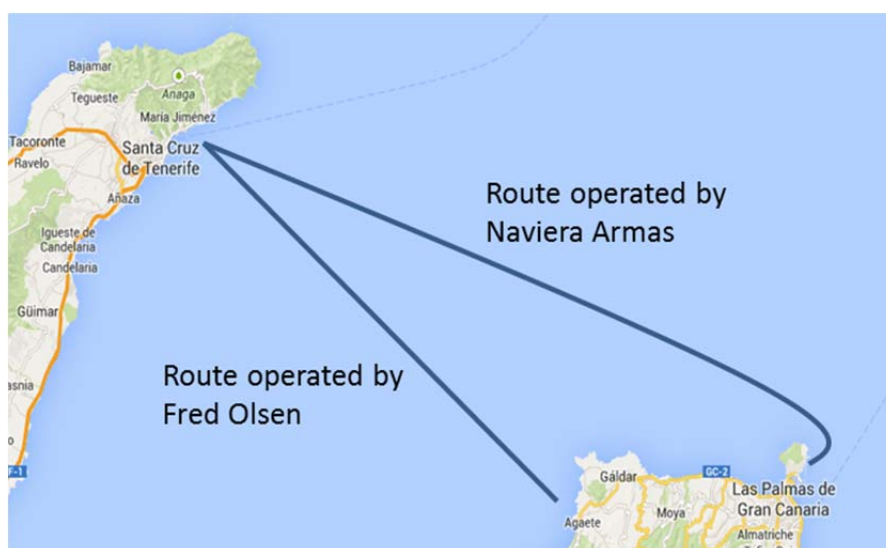
- (14) As noted in recital (1) above, the complaint was lodged by Naviera Armas, a shipping company based in the Canary Islands, operating a total of 12 routes with 11 vessels to transport passengers and freight. Naviera Armas has routes linking all the major islands, as well as routes connecting the archipelago to continental Spain and the south of Spain with Morocco.³

¹ See Part 2.3 of this Decision.

² See <http://www.fredolsen.es/en/about-fred-olsen>.

³ See <http://www.navieraarmas.com/en/home>.

- (15) As is the case of Fred Olsen, Naviera Armas also connects the two main islands (Tenerife and Gran Canaria), although in this case the route links the port of Santa Cruz de Tenerife with that of Las Palmas de Gran Canaria.



- (16) According to the complainant, Fred Olsen benefited from State aid through several measures (jointly referred to as "the measures under assessment"):
- (i) the decision of the Directorate General for Ports ("*Dirección General de Puertos*") of the Canary Islands (hereafter "DGPC") to grant an exclusive right to Fred Olsen to operate from Puerto de las Nieves without a public, transparent and non-discriminatory tender;
 - (ii) the partial exoneration of payment of port dues, in particular the so-called T-2 and T-9 port dues; and
 - (iii) the financing through public funds of infrastructure built for the exclusive use of Fred Olsen in Puerto de las Nieves.
- (17) The complainant is of the view that these measures violate Article 107 TFEU as well as Article 106(1) TFEU read in conjunction with Article 107 TFEU.
- (18) In relation to the alleged exclusive right to Fred Olsen to operate from Puerto de las Nieves, the complainant notes that only Fred Olsen operates the route Santa Cruz de Tenerife – Puerto de las Nieves. According to the complainant, this is an exclusive right granted to Fred Olsen without any kind of public, transparent and non-discriminatory tender to occupy or use the public domain, which would in itself grant an undue advantage to the company.
- (19) The complainant also claims that the DGPC is totally or partially exonerating Fred Olsen from the payment of the corresponding port dues, and in particular those due for T-9 (storage, premises and buildings) and those due for T-2 (docking).
- (20) Finally, the complainant alleges that the dock and the ramps in Puerto de las Nieves can only be used by companies using fast-ferries, while they are not usable by companies using conventional vessels, notwithstanding the fact that they were built with public funds. This would, according to the complainant, also entail an undue advantage to Fred Olsen.
- (21) The complainant concludes that the necessary criteria of the State aid definition of Article 107 TFEU are met for the three measures described above. As regards their compatibility with the internal market, the complainant notes that only the

Community guidelines on State aid to maritime transport⁴ or the Regional Aid Guidelines⁵ could be applicable but comes to the view that their criteria would not be met for any of the measures under assessment.

2.3. The contested organisation of a tender in Puerto de las Nieves

- (22) The situation has evolved in Puerto de las Nieves during the time of the Commission's assessment.
- (23) On 3 July 2013, Naviera Armas requested the authorisation to operate a conventional and a fast-ferry from Puerto de las Nieves. By letter of 22 July 2013, this request was rejected by the DGPC for both types of ferries due to capacity constraints. The DGPC considered that having two operators in Puerto de las Nieves would *inter alia* jam the car boarding area and be detrimental to the safety of the port operations. According to the Spanish authorities, this was the first time that Naviera Armas requested access for a fast-ferry in Puerto de las Nieves.
- (24) Despite the initial refusal of the request, the DGPC undertook to allow the operations of a second shipping company using fast-ferries in Puerto de las Nieves. After the completion of some works in 2014, the DGPC published a tender in the Official Journal of Canarias n°199 of 14 October 2014. The tender provided that two different batches of time slots would be offered to interested parties. Concretely, interested parties were asked to apply for the right to operate the port service of boarding, unboarding and transboarding passengers ("*servicio portuario de embarque, desembarque y transbordo de pasajeros*") at certain times during the day. Applicants had to bid for the concession of this right. The annual fee they would pay for operating this port service would add to the usual port fees.
- (25) The tender followed an administrative decision by the DGPC's Board of Directors, dated 25 July 2014. On the day after the tender was published, i.e. on 15 October 2014, Fred Olsen appealed the DGPC's decision. The DGPC rejected Fred Olsen's appeal by Decision of the Board of Directors of 24 November 2014.
- (26) Under the terms of the tender, applicants were allowed to submit an offer before 28 November 2014. Fred Olsen and Naviera Armas were the only applicants. By decision of 3 February 2015, the DGPC's Board of Directors attributed the first batch to Fred Olsen and the second one to Naviera Armas.
- (27) Fred Olsen and Naviera Armas were notified of the tender's result on 25 February 2015. Both companies formally accepted the notified adjudication. However, Fred Olsen simultaneously appealed the tender result before the Superior Court of Justice of the Canary Islands ("the Superior Court of Justice"). According to Fred Olsen, the tender was in breach of public procurement rules. Fred Olsen requested as a preventive measure that the tender should be frozen until a judgement was issued. By order of the Superior Court of Justice, dated 27 February 2015, the preventive measure was adopted and the tendering procedure was suspended. The DGPC appealed the suspension, but the appeal was denied by order of the Superior Court of Justice of 30 July 2015.
- (28) At the time of the Commission's decision, the outcome of the national judicial procedure initiated by Fred Olsen is still unknown. Fred Olsen continues operating but, given the circumstances, the DGPC plans to tender the operations of a single

⁴ Commission communication C(2004) 43 – Community guidelines on State aid to maritime transport, OJ C 13, 17.01.2004, p. 3.

⁵ Guidelines on national regional aid for 2007-2013, OJ C 54, 04.03.2006, p. 13.

operator, as a temporary solution until a judgement is issued and two operators can be selected again.

2.4. The comments of the Spanish authorities

- (29) The Spanish authorities explained as regards the alleged exclusive right granted to Fred Olsen to operate from Puerto de las Nieves that Fred Olsen was the first company interested in operating from Puerto de las Nieves in 1994. The company gradually increased its footprint in Puerto de las Nieves, starting rotations with two boats in 1995 (the two boats crossing each other in the middle of the sea, since only one single ferry can dock at the same time in Puerto de las Nieves). The company has duly paid all port dues and has not breached the applicable rules, reason why the Spanish authorities have maintained the operations of Fred Olsen from Puerto de las Nieves.
- (30) In relation to the alleged partial exoneration of payment of port dues, the Spanish authorities highlighted that Fred Olsen has been invoiced all port dues in conformity with the applicable laws and provided evidence of these invoices since at least 2005 and the accounting documents showing that Fred Olsen paid these invoices. The Spanish authorities also explained that the DGPC cannot invoice Fred Olsen for the use of the mobile port ramps, because in none of the ports under its competence does the DGPC charge fees for the use of ramps owned and fully maintained by the users themselves.
- (31) Also, in what relates to the alleged financing through public funds of infrastructure built for the exclusive use of Fred Olsen in Puerto de las Nieves, the Spanish authorities first explained that the infrastructure built as support for the use of mobile ramps cannot be considered as being exclusive for Fred Olsen, given that any other company operating fast-ferries could use this infrastructure. In addition, the Spanish authorities allege security reasons to justify the use of Puerto de las Nieves by fast-ferries only. In this respect, the Spanish authorities provided a technical report prepared by an independent consultant evidencing the physical limitations for manoeuvring in Puerto de las Nieves.⁶ According to this report, Puerto de las Nieves presents serious shortcomings for security reasons to the access of conventional ferries and concludes that the risks are lower in case fast-ferries are used. Lastly, the Spanish authorities explained that the port capacity was already saturated with Fred Olsen's use, especially as regards the surface available for cars waiting to board ships. New slots for a second operator could not be provided before some enlargement works were carried out.
- (32) The Spanish authorities underlined that, following Naviera Armas' request to operate fast ferries in Puerto de las Nieves, they undertook the necessary steps for the operations of a second shipping company. In particular, they carried out enlargement works for the waiting surface in the course of 2014, which enabled them to tender two batches of slots in October 2014.

3. ASSESSMENT OF THE MEASURES

- (33) By virtue of 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 production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market. The concept of State aid thus applies to any advantage granted directly or indirectly, financed out of State resources, granted by the State itself or

⁶ Annex 13 to Spain's submission of information of 4 July 2013..

by any intermediary body acting by virtue of powers conferred on it. In order to determine whether an economic advantage in favour of Fred Olsen was present in the different measures under assessment, it must be assessed whether Fred Olsen received an economic advantage which it would not have obtained under normal market conditions.

- (34) Moreover, in order to be State aid, a measure must stem from State resources and be imputable to the State. In principle, State resources are the resources of a Member State and of its public authorities as well as the resources of public undertakings on which the public authorities can exercise, directly or indirectly, a controlling influence.
- (35) Finally, the measures in question must distort or threaten to distort competition and be liable to affect trade between Member States.
- (36) Inasmuch as the measures under assessment entail State aid within the meaning of Article 107(1) TFEU, their compatibility must be assessed in the light of the exceptions laid down in paragraphs 2 and 3 of that Article.
- (37) Furthermore, in accordance with Article 106(1) TFEU, in the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
- (38) In the *Stanleybet* ruling⁷, the General Court has reaffirmed the case-law that "*in the area covered by Article 106(1) and (3) TFEU, the Commission enjoys a wide discretion, both in relation to the proceedings which it considers necessary to be brought and in relation to the means appropriate for that purpose*". In particular, "*individuals cannot require [the Commission] to take a position in a specific sense*".
- (39) Given the differences in substance and in applicable procedure between the two legal bases that the complainant invokes, i.e. Article 107 TFEU, on the one hand, and Article 106(1) TFEU read in conjunction with Article 107 TFEU, on the other hand, the Commission has decided to treat those two bases separately. Therefore, the Commission has informed the complainant via a separate letter about its assessment of the facts under Article 106(1) TFEU read in conjunction with Article 107 TFEU. In this decision, the Commission assesses the allegations and facts contained in Naviera Armas' complaint only under Article 107 TFEU.

3.1. Existence of State aid

- (40) The Commission will first analyse jointly the first and the third claims of Naviera Armas' complaint. Both claims essentially refer to the same ground, which is the existence of an advantage resulting from the alleged exclusive use by Fred Olsen of Puerto de las Nieves. Then, the Commission will assess Naviera Armas' second claim, which relates to the partial exoneration of payment of port dues.

3.1.1. The alleged exclusive use by Fred Olsen of Puerto de las Nieves

- (41) In the first branch of its complaint, Naviera Armas questions the exclusive right allegedly granted to Fred Olsen to operate from Puerto de las Nieves without a public, transparent and non-discriminatory tender. In the third branch, the complainant alleges that Fred Olsen benefits from State aid since it is the sole user

⁷ Case T-416/13 *Stanleybet Malta and Stanley International Betting v Commission*, EU:T:2014:567, paragraph 21 and the case-law cited therein.

of the publicly financed port infrastructure of Puerto de las Nieves, which – according to the complainant – was built for its exclusive use. Also according to the complainant, the infrastructure of Puerto de las Nieves can only be used by the fast-ferries of Fred Olsen and is not apt for conventional vessels of other shipping companies. In this respect, the complainant observes that its requests to operate from Puerto de las Nieves have always been denied by the competent authorities.

- (42) The Commission considers that the first and the third branch of Naviera Armas' complaint can be assessed together. Both claims are ultimately based on the same ground, which is that Fred Olsen would receive an advantage from the exclusive use of Puerto de las Nieves (a publicly financed infrastructure) without a public, transparent and non-discriminatory tender.
- (43) Firstly, the Commission observes that the previous fishing port in Puerto de las Nieves was first adapted to commercial traffic in 1994/1995, and then to operations with fast-ferries in 1999/2000, hence prior to the judgment of the Court of First Instance of 12 December 2000 in *Aéroports de Paris*.⁸ At that time, public authorities could legitimately consider that the financing of infrastructure did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission.
- (44) Secondly, the Commission notes that Fred Olsen gradually increased its presence in Puerto de las Nieves since it started operations in 1994 until it reached the maximum capacity of the port for the provision of ferry services. This indicates that the infrastructure was not initially planned and built in order to be dedicated to Fred Olsen. Puerto de las Nieves was not constructed for the benefit of any specific undertaking or any particular category of undertakings, and was not exclusively allocated to any particular undertaking at the moment that it was constructed.⁹
- (45) Thirdly, the first and third branches of the complaint are both based on the allegation that Fred Olsen is the exclusive user of Puerto de las Nieves. However, the complainant does not allege that the fees due by Fred Olsen for the use of the port are set at a level that would involve State aid. Since the complaint does not question the level of port fees that Fred Olsen has to pay for using the port, the complaint does not identify any advantage deriving from State resources. The fact alone that Fred Olsen may be *de facto* the only user of Puerto de las Nieves, which is the object of Naviera Armas' complaint, as such does not amount to an advantage deriving from State resources.
- (46) Fourthly it results from the Commission's decisional practice regarding ports that no aid is granted to the user(s) of a publicly financed port infrastructure if:¹⁰
- (i) The port operator charges fees that are similar to comparable ports;
 - (ii) Access to the port is open and non-discriminatory.
- (47) The first condition is met since, according to Spain, the DGPC applies the same port charges in the same way in all ports under its competence throughout the Canary Islands.¹¹ The complainant has not provided evidence to the contrary.

⁸ Case T-128/98 *Aéroports de Paris v Commission* [2000] ECR-II 3929, paragraph 125.

⁹ In that regard, see also Case C-518/13 *Eventech* EU:C:2015:9, paragraph 45.

¹⁰ See for instance the Decision of the Commission of 30 April 2015 regarding the extension of the cruise ship terminal in Wismar, JOCE C/203/2015, paragraphs 45 and 46.

¹¹ See part 3.1.2 of the present Decision.

- (48) As regards the second condition, the Commission considers it appropriate to distinguish between two periods: (i) before 3 July 2013, and (ii) after 3 July 2013.
- (49) Before 3 July 2013, Fred Olsen was the sole ferry company using the port but no competitor had formally expressed an interest to also operate fast-ferries from Puerto de las Nieves. Therefore, it cannot be said that the Spanish authorities had undertaken any measures to reserve the exclusive use of the port to Fred Olsen or to discriminate other potential users.
- (50) The Commission acknowledges that both Trasmediterránea¹² and Naviera Armas had asked the authorisation to operate from Puerto de las Nieves. However, these requests had always concerned conventional ferries. As noted in recital (31) above, the Spanish authorities have demonstrated, on the basis of a technical report prepared by an independent expert showing the physical limitations for manoeuvring in Puerto de las Nieves, that the limitation of the use of Puerto de las Nieves to fast-ferries was justified by security reasons.
- (51) Due to the absence of requests from other shipping companies to operate fast-ferries in Puerto de las Nieves, and considering that the DGPC had objective reasons to deny access to Puerto de las Nieves to conventional ferries, the Commission has no grounds to conclude that Puerto de las Nieves was meant to benefit to Fred Olsen only, or that access to the port was not open and non-discriminatory until 3 July 2013.
- (52) On 3 July 2013, Naviera Armas formally expressed for the first time its interest to operate fast-ferries from Puerto de las Nieves. It requested to start operations on 1 September 2013. This request was rejected by the DGPC on grounds of capacity limitations, which had been upheld by the Superior Court of Justice on a similar case in 2008.¹³
- (53) The Commission recognizes that the DGPC could in any event not have accommodated Naviera Armas' request under such a short notice. However, the Commission considers that the DGPC, as the manager but also the regulator of a scarce resource (the port capacity), from the moment that Naviera Armas had expressed its intention to operate the right type of ferries from Puerto de las Nieves had to take the necessary steps to ensure that access to Puerto de las Nieves would be open to all potential users operating fast-ferries on a non-discriminatory basis.
- (54) In this respect, the Spanish authorities have informed the Commission that the DGPC was planning to significantly enlarge the facilities of Puerto de las Nieves to allow for two fast-ferries to dock at the same time. However, such works would take some time.
- (55) In the meantime, the DGPC faced two alternatives to keep the access to Puerto de las Nieves open and non-discriminatory:

¹² See footnote 13 below.

¹³ The Spanish authorities explained that in 2004, the maritime passenger transport company Trasmediterránea was denied the right to operate a route from Puerto de las Nieves on the basis of the physical limitations of the port. Trasmediterránea appealed this decision before the Superior Court of Justice of the Canary Islands. This Court concluded in its judgment 338/08 of 24 November 2008 that the administration had rightly refused the request of Trasmediterránea to operate another line and therefore dismissed the appeal. According to the Court, the administration had based its negative decision (i) on the risks created by having another line operating from Puerto de las Nieves, since this would *inter alia* jam the waiting surface of the port infrastructure, (ii) and not on the alleged intention to create a monopoly in Puerto de las Nieves in favour of Fred Olsen.

- (i) Solution n°1: reduce Fred Olsen's frequency in order to make room for a second operator, as requested by the complainant – unless it could be proven that it was technically or logistically infeasible to reduce Fred Olsen's rotations.
 - (ii) Solution n°2: increase the capacity of the waiting surface for cars through minor works as a way to increase the overall amount of frequencies available to potential operators.
- (56) On 27 February 2014, i.e. ca. 7 months after Naviera Armas' request, the DGPC issued a study on the necessary measures to be carried out in Puerto de las Nieves in order to enable the operation of a second ferry operator. The DGPC concluded that construction works had to be carried out in the waiting surface, in line with its consistent diagnosis of the situation in Puerto de las Nieves since at least 2004.
- (57) Following the DGPC's technical study, works were carried out in the course of 2014. They allowed the doubling of the amount of rotations which could be realised within Puerto de las Nieves. Consequently, and as explained in recital (25), the DGPC's Board of Directors decided to tender two different batches of slots on 25 July 2014. Applicants were informed of the results of the tender on 25 February 2015.
- (58) In the light of the above, the Commission observes that the DGPC, acting as the regulator of a scarce resource, decided to choose "Solution n°2" mentioned in recital (55)(ii). Those steps have been carried out within a reasonable timeframe. Consequently, the Commission considers that the DGPC took the necessary steps in a timely manner in order to ensure open and non-discriminatory access to the infrastructure of Puerto de las Nieves from 3 July 2013 onwards.
- (59) The Commission also considers that the solution chosen by the DGPC was indeed preferable to "Solution n°1" mentioned in recital (55), even though "Solution n°1" could arguably have been carried out in a shorter timeframe. In the Commission's view, "Solution n°1" suffered from several shortcomings. First, it would have obliged Fred Olsen to reduce the services it had been offering for several years in Puerto de las Nieves, whereas it may well have had legitimate expectations that it could continue to use the port as it did, at least for a certain period, under the same conditions that apply to as other users of the ports managed by DGPC. Secondly, it would have had only very limited beneficial effects for competition: given the limited amount of time slots, each company could only have used very different slots during the day and competition would not have increased at any given moment of the day. "Solution n°2", on the other hand, had the advantage of allowing Fred Olsen to keep operating the same number of slots (supposing that Fred Olsen would win one of the two batches in the tender), and to increase competition on the Puerto de las Nieves – Santa Cruz de Tenerife route, since daily rotations would be doubled.
- (60) Nevertheless, and despite the DGPC's efforts, the Commission observes that, at the time of the present decision, Fred Olsen remains the sole operator in Puerto de las Nieves. This maintenance of the *status quo* derives from the impossibility for the DGPC to implement the results of its tender, following Fred Olen's appeal and the suspension injunction ordered by the Superior Court of Justice.
- (61) Considering (i) Fred Olsen's continuous presence in Puerto de las Nieves long before Naviera Armas first expressed its intention to operate fast-ferries, (ii) the diligent efforts of the DGPC to make room for a second operator from July 2013 onwards, and (iii) the intrinsically temporary circumstances of the current *status*

quo, the Commission considers that, at the moment of the adoption of the present decision, the maintenance of such *status quo* does not conflict with the open and non-discriminatory access to Puerto de las Nieves, insofar it remains temporary, pending the judgement of the Superior Court of Justice. Such conclusion shall not preclude the DGPC from continuing to make all the necessary arrangements to let a second fast-ferry company operate from Puerto de las Nieves as soon as possible.

- (62) In view of the finding that (i) the fees charged in Puerto de las Nieves are similar to those in comparable ports, and (ii) the DGPC has chosen a reasonable path to ensure open and non-discriminatory access to Puerto de las Nieves, the Commission considers that, at the moment of adoption of the present decision, Spain has not granted State aid to Fred Olsen.

3.1.2. The alleged partial exoneration of payment of port dues

- (63) As regards the second branch of Naviera Armas' complaint, the Spanish authorities have confirmed that Fred Olsen has been invoiced all port dues (in particular port dues T-1, T-2, T-3 and T-9) in conformity with the applicable laws. Moreover, the Spanish authorities have provided evidence of these invoices since at least 2005 and the accounting documents provided show that Fred Olsen has paid these invoices. The Spanish authorities have also explained that they cannot invoice Fred Olsen for the use of the mobile port ramps owned and maintained by the company.
- (64) In relation to port due T-9 – charged for storage services, premises and buildings – the complainant argues that the DGPC is not charging it properly to Fred Olsen in relation to mobile port ramps in Puerto de las Nieves. Although the complainant agrees that the DGPC cannot invoice Fred Olsen for the use of the mobile port ramps owned and maintained by the company, it nonetheless notes that port due T-9 should be calculated on the basis of the surface occupied by those ramps.
- (65) The Spanish authorities have explained that the surface occupied by the mobile port ramps is part of the taxable event ("*hecho imponible*") of port dues T-2, T-3 and T-4, and that it should not be covered by port due T-9. In addition, the Spanish authorities have explained that the DGPC does not charge port due T-9 on the basis of the surface occupied by mobile port ramps in any of the ports falling under the competence of Ports of the Canary Islands.
- (66) The Commission first observes that from a State aid perspective it does not belong to it to assess how a given port due is to be charged and for what taxable event. The assessment of the Commission from a State aid perspective is limited to assessing whether the beneficiary, in this case Fred Olsen, would have received any advantage when compared to other companies subject to the same port due. On the basis of the information provided by the Spanish authorities, it results that port due T-9 is charged in the same way in all the ports falling under the competence of Ports of the Canary Islands. As a consequence, Fred Olsen would not have received any advantage. The complainant has provided no evidence to the contrary.
- (67) As regards port due T-2 for dockage, berthing and mooring fixtures, the complainant considers that for mobile port ramps it should be charged for full periods of 24 hours and not only for the time when these ramps are actually in use, given that the ramps are always physically placed at the berth even when Fred Olsen's ferries are not docking at Puerto de las Nieves.
- (68) In this respect, the Spanish authorities have explained that according to the applicable legislation it is possible to charge port due T-2 for periods of 24 hours. The Spanish authorities claim that the DGPC actually charges port due T-2 for periods of 24 hours when the infrastructure is used by a single operator. This is the

case for all the ports falling under the competence of Ports of the Canary Islands. Therefore, Fred Olsen is charged for full periods of 24 hours, and not only for the time the ramps are actually in use.

- (69) The Commission reiterates that from a State aid perspective it does not belong to it to assess how a given port due is to be charged and for what taxable event. In this respect, the Spanish authorities have provided assurances to the Commission that the DGPC charges port due T-2 in the same way for all ports falling under its competence. On this basis, and bearing in mind the information available, the Commission considers that Fred Olsen would not have received an advantage in the form of reduced port due T-2.
- (70) Bearing the above in mind, the Commission concludes that the presence of State aid can be excluded in this measure, without it being necessary to assess whether the rest of necessary criteria of the State aid definition of Article 107(1) TFEU are met.

4. CONCLUSION

- (71) The Commission has accordingly decided that the measures under assessment do not constitute aid.

If this letter contains confidential information which should not be disclosed to third parties, 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 the disclosure to third parties and to the publication of the full text of the letter in the authentic language on the Internet site: <http://ec.europa.eu/competition/elojade/isef/index.cfm>.

Your request should be sent electronically to the following address:

European Commission,
Directorate-General Competition
State Aid Greffe
B-1049 Brussels
Stateaidgreffe@ec.europa.eu

Yours faithfully
For the Commission

Margrethe VESTAGER
Member of the Commission