EUROPEAN
COMMISSION

Brussels, 20.9.2018
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COMMISSION DECISION

of 20.9.2018

ON THE STATE AID
SA 36112 (2016/C) (ex 2015/NN)
implemented by Italy
for the Port Authority of Naples and Cantieri del Mediterraneo S.p.A.

(Text with EEA relevance)

(Only the Italian version is authentic)

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PUBLIC VERSION

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THE EUROPEAN COMMISSION,

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

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

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

Whereas:

1. PROCEDURE

(1) In March 2006, the Commission requested information from the Italian authorities on potential State support to Cantieri del Mediterraneo S.p.A. ("CAMED") concerning planned works on a dry-dock located in the Port of Naples (dry-dock no. 3). Following the reply of the Italian authorities of 3 April 2006, the Commission did not act nor investigate the matter further to the Italian comments, and the Commission services closed the file internally, as the support was considered not to involve State aid. Italy has never formally notified to the Commission the measures at stake.

[1] OJ C 369, 7.10.2016, p. 78.

(2) On 21 January 2013, a ship repairer active in the Port of Naples expressed concerns in respect of funding provided by public authorities in Italy to three investment projects allegedly carried out between 2006 and 2014 for the refurbishment of three dry-docks (*bacini di carenaggio*) operated by CAMED by means of a concession contract. The case was registered as SA.36112 (2013/CP) – Alleged aid to Cantieri del Mediterraneo. On 27 June 2013, the complainant provided the Commission with additional information.

(3) Between 28 February 2013 and 12 June 2013 the Commission requested information from the Italian authorities in the light of the complainant's allegations.

(4) On 21 October 2013 the Commission services communicated to the complainant their preliminary findings concerning the alleged State aid to CAMED and informed the complainant that, based on the information available at the time, the alleged measures did not seem to constitute aid within the meaning of Article 107(1) TFEU since the presence of an advantage to CAMED appeared to be excluded. The Commission services explained that at that stage there were no indications that operating aid had been granted at the level of the operator, since CAMED did not appear to be released from costs which it would normally have had to bear in its day-to-day management or normal activities.

(5) Between 19 November 2013 and 10 February 2015 the complainant submitted further information. In particular, the complainant expressed concerns that the measures represented illegal investment aid to the Port Authority of Naples and illegal operating aid to CAMED. The Commission services requested additional information from the Italian authorities on 17 June 2014, 14 November 2014, and 12 March 2015, to which the Italian authorities replied on 1 August, 3 and 29 September 2014, 11 February 2015, and 10 June 2015. Since the information available showed that the public funding had already been granted, on 4 June 2015 the Commission services informed Italy that the measures would be registered as unlawful aid (2015/NN) - Investment Aid to the Port Authority of Naples and Cantieri del Mediterraneo S.p.A., and the procedural rules applicable would be those laid down in Chapter III of Council Regulation (EC) No 659/1999.[2]

(6) On 21 September 2015, the Commission services met the Italian authorities and the Commission requested additional information on 7 October 2015, to which the Italian authorities replied on 9 November 2015. On 11 November 2015 the Commission services met the complainant.

(7) By letter dated 28 June 2016, the Commission informed the Italian authorities that it had decided to initiate the procedure laid down in Article 108(2) TFEU in respect of the aid.

(8) The Commission decision to initiate the procedure ("the Opening Decision") was published in the Official Journal of the European Union[3] on 7 October 2016. The Commission invited interested parties to submit their comments on the aid/measures.

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[2] O J L 83, 27.3.1999, p. 1. That Regulation has been replaced by 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).

[3] Cf. footnote 1.

(9) The Commission received comments from two interested parties: CAMED and the complainant. It forwarded them to the Italian authorities, which was given the opportunity to react; its comments were received by letter dated 12 January 2017.

(10) The Commission sent additional questions to Italy on 9 and 16 November 2017, to which they replied on 24 November 2017.

2. DETAILED DESCRIPTION OF THE AID

2.1. Background and recipients of aid

(11) The Port of Naples is located in the Campania region and is administered by PAN.

(12) In the Port of Naples, there are three dry-docks owned by the State (dry-docks no. 1, 2, and 3) and two floating docks owned by two private operators (docks no. 5 and 6).

(13) Dry-docks no. 1, 2, and 3 are used to provide ship repair activities by CAMED and in principle any other ship repairer in compliance with "Regulation for the operation of ship-repairing docks of the Port of Naples"[4] adopted in 2002 and later modified (the "2002 Regulation").[5] According to the Italian authorities, all dry-docks in the Port of Naples must be made available to all interested users (e.g. other ship-repairers) on the basis of certain pre-defined and objective rules.

(14) The Italian authorities explained that, following the decision to withdraw from the Port of Naples by the Fincantieri Group – one of the largest operators of the shipbuilding sector at that time – at the end of the last century, the docks were in a very poor state. At that time, CAMED[6] was active as a port repairer in the Port of Naples by virtue of a land concession act valid from 1909 to 2008. According to the Italian authorities, CAMED agreed to invest in the area, provided that PAN undertook a number of structural investments on the dry-docks no. 1, 2, and 3. Following a request filed by CAMED in 1999 to PAN, the latter agreed to perform works to modernise and make the dry-dock no. 3 adequate for use ("the 2001 Agreement").[7]

(15) In 2001 CAMED requested from PAN the authorisation to perform a number of works on the docks in exchange for a 40 years prolongation of the existing land concession (*concessione demaniale*). Following CAMED's request, PAN started the administrative procedure under Italian law for the award of a land concession contract.[8] PAN published in the Municipality's register and in its own register CAMED's request for a land concession together with the business plan for a period of 20 days (from 18 January 2002 until 6 February 2002). The publication invited interested parties to present their observations or alternative proposals. According to

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4 *Regolamento per l'esercizio dei bacini di carenaggio,* http://porto.napoli.it/wp-content/uploads/2015/05/RegolamentoBacini.pdf.

5 The latest modification of the Regulation occurred in 2012, http://porto.napoli.it/wp-content/uploads/2015/06/Ordinanza_N.6_03-04-2012.pdf.

6 The Italian authorities explained that the company undertook a number of corporate transformations and changed name several times. For the sake of simplicity, the decision uses the name 'CAMED' to refer to the company, even if in the past it was called differently (Bacini Napoletani S.p.A.).

7 Agreement (*Convenzione*) between the Port Authority of Naples and Bacini Napoletani S.p.A. (*i.e.* CAMED) of 12 June 2001. According to the 2001 Agreement, CAMED has been operating dry-dock 3 at least since 1959.

8 Article 36 of the Naval Code (*Codice navale*) and Article 18 of the Naval Code Regulation (*Regolamento per l' esecuzione del codice della navigazione marittima*).

the procedure, in case of objections or complaints, the decision on the award of the concession is taken by the competent Minister.

(16) Since PAN received no observations following the publication of CAMED's request, it granted to CAMED the land concession act (*atto di concessione demaniale*) no. 125 of 29 July 2004 ("the 2004 Concession") for the operation and use of the three dry-docks, with the obligation to make them available to all interested users (e.g. other ship-repairers) in compliance with the 2002 Regulation. CAMED agreed to terminate the previous land concession valid from 1909. According to the 2004 Concession, CAMED has the right to operate and use the dry-docks for 30 years, starting from 28 July 2003 instead of the requested 40 years, in exchange of a yearly land use fee, calculated on the basis of fixed legal parameters (EUR/sqm) and annually adjusted to inflation pursuant to Ministerial Decree of 15 November 1995. The land use fee paid over the period 2004-2017 is presented in Table 1.

Table 1: Concession fees

Year	Yearly concession fee (in EUR)
2004	124 117
2005	103 300
2006	139 900
2007	147 800
2008	146 341
2009	154 392
2010	149 148
2011	153 321
2012	159 071
2013	143 671
2014	142 178
2015	132 664
2016	133 658
2017	133 257

(17) According to Article 1 of the 2004 Concession, the duration of the concession allows the amortisation of previous investments and a new programme of investments by

CAMED with a value of EUR 24 million (Italian lira 47 662 million).[9] According to the 2004 Concession, CAMED also provided a guarantee (*cauzione*) of EUR 275 000 in respect of the obligations provided for under the concession.

(18) According to Article 3 of the 2004 Concession, PAN also committed to perform structural works on the area granted to CAMED by 2006 and more specifically to: (i) adapt the pumping plant of docks no. 1 and 2; (ii) build a new certified dry-dock caisson (*barche-porte*) for docks no. 1, 2 and 3; (iii) redevelop walls (*paramenti*) and bedding (*platea*) for dock no. 2; (iv) conduct structural redevelopment of quays (*banchine*) and walls for dock no. 2 and quay 33b.

(19) After the Opening Decision, the Italian authorities clarified that CAMED carried out investments in the amount of EUR 24 610 420 in accordance with the 2004 Concession and additional investments in the amount of EUR 17 931 075 until 2016.

2.2. Allegation of State aid by the complainant

(20) In the first submission, the complainant argued that CAMED received aid at both levels: (i) as an operator (i.e. manager of the dry-docks), by means of a reduction of the costs for the refurbishment of the infrastructure (operating aid); and (ii) as a user of the infrastructure (e.g. as a ship-repairer), because the infrastructure, which should in principle be open to all business end-users on a non-discriminatory basis, was in fact solely used by CAMED. The complaint also contained antitrust allegations that are not relevant for the present decision and for which the complainant has been the addressee of a separate decision adopted on 24 July 2014.

(21) According to the complainant, the advantage received by CAMED derived from the performance of the following works ("the Interventions"):

(1) Intervention no. 1: Structural refurbishment of some parts of dock no. 3 (aid amount: EUR 12 928 537).

(2) Intervention no. 2: Adaptation of the pumping plant of docks no. 1 and 2, renewal of pier walls adjacent to dock no. 2 (aid amount: EUR 23 170 000).

(3) Intervention no. 3: Repair and strengthening of the internal pier of dock no. 3 (*Molo Cesario Console*) (aid amount: EUR 13 000 000).

(22) With the submission of 19 November 2013, the complainant extended the scope of the complaint claiming that the Interventions conferred aid to PAN, in line with the Commission's case practice.[10] According to the complainant there would also be aid at the level of the concessionaire (CAMED) because the concession was not entrusted by means of a public, open, transparent and non-discriminatory tender. The complainant further underlined the absence of any evidence to conclude that the land use fee paid by CAMED could exclude any advantage. According to the complainant, the methodology foreseen by the national legislation for setting the land use fees (see recital (16)) does not allow to reflect the increased value of the infrastructure after possible interventions, since it consists in a fixed amount of EUR/sqm.

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[9] The amount of investment specified in the 2004 Concession is indeed EUR 24 million and not EUR 24 000 as stated in the Opening Decision.

[10] The complainant referred, *inter alia*, to the Commission Decision in State aid Case no. SA.34940 (N/2012) - Italy - *Port of Augusta* of 19 December 2012, OJ C 77, 15.03.2013, p. 1.

(23) On 1 October 2015 the complainant also provided a list of PAN's decisions (delibere no. 308/2015, no. 181/2015, no. 233/2015, no. 277/2015, no. 279/2015, no. 281/2015, no. 293/2015, no. 302/2015) for works to be carried out in the dry-docks, as evidence of the breach of the standstill obligation.

2.3. Italy's comments on the alleged State aid measure/ Financing of the investment project and legal basis

(24) The Italian authorities clarified before the adoption of the Opening Decision that only part of the works foreseen for the refurbishment of dry-dock no. 3 have been completed in 2006, following a public procurement procedure (Intervention no. 1), while the works foreseen by Interventions 2 and 3 had not been completed at that time. Of the whole project agreed with CAMED in the 2001 Agreement and the 2004 Concession, only one part had actually been fully performed.

(25) According to Italy, the legal right to receive the financing had already been granted to PAN in 1998 pursuant to Article 9 of Law 413/1998, which provides that the Ministry of Transport and Shipping (the "Ministry") shall adopt a programme of investments in ports on the basis of the requests of Port Authorities[11]. It appears that the programme of investments was adopted by means of two decrees issued by the Ministry, and was modified subsequently. The first decree of 27 October 1999[12] (the "Ministerial Decree of 27 October 1999") lists 20 ports benefitting from the national funding and the second decree[13](the "Ministerial Decree of 2 May 2001") extends that list to 25 ports. On the basis of those decrees, Port Authorities are authorised to borrow or to request other financial operations for a total amount of 100 billion Italian lira (around EUR 51 million). The Ministry would directly repay the financial institutions every year.[14] Therefore, according to Italy, the measures in favour of PAN were granted in 1998 by means of Law 413/1998.

(26) After the Opening Decision, the Italian authorities provided additional clarifications on the amounts of investments by the Italian State and PAN.

Intervention no.1

(27) The Italian authorities indicated that the works on Intervention no. 1 started on 21 October 2002 and were completed on 24 January 2006. The costs incurred at the time when the present decision has been adopted amount to EUR 12 859 854.50.

Intervention no.2

(28) Intervention no. 2 has been co-financed by the Ministry in the amount of EUR 14 971 621.41. The amount of EUR 5 498 378.59, to be partly advanced by PAN and then reimbursed through cash grants by the Ministry, however has not been paid by the Ministry.

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11 "*Per la realizzazione di opere infrastrutturali di amplimento, ammodernamento e riqualificazione dei porti, il Ministero dei trasporti e della navigazione adotta un programma sulla base delle richieste delle autorità portuali o, laddove non istituite, delle autorità marittime, sentite le regioni interessate*".

12 "Decreto 27 ottobre 1999 Adozione del programma di opere infrastrutturali di ampliamento, ammodernamento e riqualificazione dei porti. (GU Serie Generale n.10 del 14-01-2000)"

13 "Decreto 2 maggio 2001 Ripartizione delle risorse di cui all'art. 9 della legge n. 413 del 1998, rifinanziate dall'art. 54, comma 1, della legge n. 488 del 1999 e dall'art. 144, comma 1, della legge n. 388 del 2000 per la realizzazione di opere infrastrutturali di ampliamento, l'ammodernamento e riqualificazione dei porti. (GU Serie Generale n.199 del 28-08-2001)"

14 Additional funding was later granted also by means of Article 54, paragraph 1, of Law no. 488/1999, Article 144, paragraph 1, of Law no. 388/2000 and Article 36 of Law no. 166/2002.

(29) For Intervention no. 2, PAN provided own resources of EUR 2 700 000 (Delibera 89/2016 of 22 March 2016) and EUR 5 830 000 (Delibera 175/2017 of 31 May 2017).

(30) The works on Intervention no. 2 started on 5 November 2012 and have not been completed yet. The costs incurred at the time of adoption of this Decision amount to EUR 11 192 515.79. The total costs for this intervention are projected to come to EUR 29 000 000.

Intervention no.3

(31) Finally, Intervention no. 3 is funded partly through PAN's own resources (EUR 5 091 000, provided in Delibera 356/2014 of 24 December 2014).

(32) As of December 2017, the works in respect of Intervention no. 3 had not started yet (the works were awarded on 19 July 2017) and the costs incurred amounted to EUR 6 880.50. The total costs for this intervention are projected to come to EUR 15 900 000.

(33) The total cost of the investment project (namely, all three intervention) is EUR 57 759 874.5, which was divided into three parts as demonstrated in Table 2.

Table 2: Planned public investments

Intervention	**Amounts**	**Paid?**	**Date of payment**	**Planned investment cost**
1. Structural refurbishment of some parts of dock no. 3	**9 760 629.57**	*Yes*	8.01.2003 21.12.2004 14.7.2005 26.10.2005 12.12.2011	12 859 854.50
	3 099 224.93	*Yes*	31.12.2002 26.4.2004 19.4.2005 6.10.2005 24.4.2006	
2. Adaptation of the pumping plant of docks no. 1 and 2, renewal of pier walls adjacent to dock no. 2	**8 300 000.00**	*Yes*	4.8.2006 27.12.2006 29.12.2006	29 000 000.00
	6 671 621.41	*Yes*	1.9.2011 22.3.2013 17.12.2014	
	2 700 000.00 (own	*Yes*	23.03.2016	

	contribution PAN)			
	5 498 378.59 (to be advanced by PAN and reimbursed by the Italian State)	*No*	N/A	
	5 830 000.00 **(own contribution PAN)**	*Yes*	31.05.2017	
3. Repair and strengthening of the internal pier of dock no. 3	**10 809 000.00**	*Yes*	18.11.2014	15 900 000
	5 091 000.00 (own contribution PAN)	*Yes*	24.12.2014	
Total funding by PAN				*13 621 000.00*
Total funding by Italian State				**44 138 854.50**
Total				***57 759 854.50***

(34) In the light of the above, the funding by the Italian State already granted or committed for this project amounted to EUR 44 138 854.50. It mainly took the form of direct reimbursement made to the financial institutions for the loans entered into by PAN by the Ministry as well as direct grants to PAN from the Italian national budget. The Italian authorities explained that the remaining amount of EUR 13 621 000 (of which EUR 2 700 000 and EUR 5 830 000 for Intervention no. 2 and EUR 5 091 000 for Intervention no. 3) was provided by PAN from their own resources, accumulated in the context of the exercise of its economic activity of managing the port.

2.4. Grounds for initiating the procedure

(35) On 28 June 2016, the Commission adopted a decision to open formal investigation with respect to the above mentioned measures in order to address its doubts whether these measures constitute State aid within the meaning of Article 107(1) TFEU and whether they are compatible with the internal market.

2.4.1. Doubts on the presence of aid to PAN

(36) In the Opening Decision, the Commission took the preliminary view that the measures constitutes State aid within the meaning of Article 107(1) TFEU because PAN received State resources to upgrade ship repair facilities which are commercially exploited by it. PAN – as an entity performing an economic activity on behalf of the owner, i.e. the Italian State – can be qualified as an undertaking. Therefore, that transfer seems to amount to a transfer of State resources and is imputable to the State.

(37) Furthermore, according to the Opening Decision, the public funding seems to confer a selective economic advantage to PAN. The Commission raised doubts whether PAN is required to discharge public service obligations ("PSO") that have been clearly defined and that fulfil the four cumulative Altmark conditions. The service provided by PAN (i.e. the rental of ship-repairing facilities in exchange for remuneration) does not exhibit any special characteristics compared with those of other economic activities. The Commission raised doubts as to whether (i) PAN is actually required to discharge a PSO and those obligations have been clearly defined, (ii) the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner, (iii) the compensation does not exceed what is necessary to cover the costs incurred in discharging the PSO, taking into account the relevant receipts and a reasonable profit for discharging those obligations, (iv) the operator has been chosen on the basis of a public procurement procedure or the costs of discharging the PSO are limited to the costs of a typical undertaking (well-run and adequately provided with means of transport so as to be able to meet the necessary public service requirements).

(38) The Commission preliminarily considered that the investment project will allow PAN to continue the economic activity of renting out the dry-docks, which is a sector open to competition and trade at Union level and that the measure is liable to distort competition and affect intra-Union trade.

(39) In the Opening Decision, the Commission found that qualifying the measures as State aid would not result in a violation of Article 345 TFEU, setting out the principle of neutrality between public and private entities. The Commission preliminarily noted that considering the measures as State aid does not seem to discriminate against public owners, since private owners in the same business would also have to prepare an ex ante business plan and would carry out the investment only if it was profitable on that basis. If this is not the case, both public and private owners could potentially receive compatible aid if all the conditions foreseen in the applicable State aid rules in the shipbuilding sector are respected.

(40) Furthermore, in the Opening Decision, the Commission took the preliminary view that the measures at issue could not be classified as existing aid within the meaning of Article 1(b) of Regulation (EU) No 2015/1589[15] ("the Procedural Regulation") since public support to shipbuilding and ship repair facilities had been considered to constitute State aid even before the Leipzig Halle judgment.

2.4.2. Doubts on the presence of aid to CAMED

(41) Concerning possible aid to CAMED, the Commission noted in the Opening Decision that the public support to PAN partly relieved it from investment costs that any other private owner of ship-repairing facilities in the market would have to pay in full, thus allowing it to charge lower fees to CAMED.

(42) The measures at issue are imputable to the State (i.e. granted by PAN, which forms part of the State administration even if the entity in question enjoys legal autonomy from other public authorities). In addition, the Commission found in the Opening Decision that by providing the dry-docks to CAMED potentially below market rates, PAN could have waived State resources.

[15] OJ L 248, 24.9.2015.

(43) In the absence of a tender and since the land use fee that CAMED pays to PAN was calculated on the basis of fixed legal parameters, the Commission took the preliminary view that the contractual arrangements between PAN and CAMED may bestow a possible economic advantage above market conditions on CAMED by providing refurbished dry-docks potentially below market rates. Moreover, even if it could be accepted that CAMED undertook some investments in exchange for the completion of the interventions, there was no indication that the value of the investments carried out by CAMED for PAN, together with the land use fee, correspond to the value of the interventions performed by PAN for CAMED. The Commission thus invited the Italian authorities and third parties to comment on these preliminary conclusions.

(44) In the Opening Decision, the Commission raised doubts whether the four Altmark conditions are cumulatively fulfilled with respect to the measures in support of CAMED.

(45) The Commission also noted that the measures were liable to distort competition and affect intra-Union trade.

2.4.3. Doubts on compatibility of the aid

(46) On compatibility, the Commission preliminarily considered that dry-docks are not transport infrastructures, but production facilities for shipyards as they are used for ship building or ship repairing and not for transport purposes. Consequently, the aid could not be assessed directly under Article 107(3)(c) TFEU as an investment aid for transport infrastructure.

2.4.3.1. Compatibility of the aid to PAN

(47) The Commission expressed doubts on the compatibility of the aid to PAN under the 2011 SGEI Framework and under the State aid rules for the shipbuilding sector applicable at the time of granting each measure. In the Opening Decision, the Commission took the preliminary view that the granting in principle occurred when each of the investments was included in the programme of investments on the basis of the Port Authorities' request. The Commission considered that the information in this respect was insufficient and invited Italy to provide the relevant granting dates for each measure/Intervention.

(48) Nevertheless, the Commission raised doubts as to the full compliance of the measures at issue as the aid intensity seemed to exceed the maximum permissible aid intensity for regional investment aid for shipbuilding facilities (to which reference is made in the successive frameworks), irrespective of the precise date of granting of each measure and under the following compatibility bases that could be applicable for shipbuilding aid:

- Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, which entered into force on 1 January 1999 until 31 December 2003[16];
- The 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011;[17]

[16] OJ L 202, 18.7.1998, p. 1.

- The 2011 Framework on State Aid to shipbuilding[18], which was applicable to non-notified aid granted after 31 December 2011. The application of this Framework has been extended until 30 June 2014;[19]
- The Guidelines on regional State aid for 2014-2020 as from 1 July 2014[20].

(49) As Italy did not provide the information necessary to establish the clear date of granting, the Commission was not in a position to perform a complete compatibility assessment as it could not identify the correct legal basis. In the Opening Decision, the Commission noted that it could not be excluded that at least part of the measures could be declared compatible under the relevant State aid rules and invited the Italian authorities to provide a compatibility analysis for each measure.

2.4.3.2. Compatibility of the aid to CAMED

(50) The Commission raised doubts as to the compatibility of the measures under the 2011 SGEI Framework with regard to the alleged aid to CAMED.

(51) However, as the Commission could not exclude entirely that at least part of the measures to PAN could be declared compatible under the relevant State aid rules which were applicable in the shipbuilding sector at the time of granting the measures, it was not excluded that such assessment could also influence the compatibility assessment regarding aid to CAMED. The Commission invited the Italian authorities to provide a compatibility analysis for each measure (regarding CAMED) on the basis of the applicable law, depending on the dates of granting of each measure.

3. COMMENTS FROM ITALY

3.1. Comments on the Opening Decision

(52) In the view of the Italian authorities, the Opening Decision infringes the primary sources of Union law and the general principles of sound administration, legal certainty, legitimate expectation and effective judicial protection. Italy argues that any Commission decision would in effect revoke a prior decision to close the case, which the Commission had taken in 2006[21].

(53) Italy further argues that the completion of proceedings within a reasonable length of time is a general principle of Union law[22], preventing the Commission from extending at its own discretion the length of the preliminary stage of the investigation initiated following receipt of a complaint relating to alleged aid which has not been notified unless such a measure was unlawful[23]. According to the Italian authorities this is not the case in the current proceedings.

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17 OJ C 317, 30.12.2003, p. 11. See also Commission communication concerning the prolongation of the Framework on State aid to shipbuilding, OJ C 260, 28.10.2006, p. 7 and the Communication from the Commission concerning the prolongation of the Framework on State aid to shipbuilding, OJ C 173, 8.7.2008, p. 3.

18 OJ C 364, 14.12.2011, p. 9.

19 See Communication from the Commission concerning the prolongation of the application of the Framework on State aid to shipbuilding, OJ C 357, 6.12.2013, p.1.

20 OJ C 209, 23.07.2013, p. 1.

21 See judgment in case C-222/92, *SFEI* ECLI:EU:C:1994:396.

22 See judgment in case T-156/94, *Siderurgica Aristrain Madrid SL* ECLI:EU:T:1999:53.

23 See judgment in case C-362/09 P, *Athinaïki Techniki AE* ECLI:EU:T/2010:783.

(54) The Italian authorities refer to Article 16(1) of the Procedural Regulation, according to which the Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.

3.1.1. On the presence of aid to PAN

(55) With regard to the existence of aid to PAN, Italy explained that the port authorities are not undertakings, but non-economic public entities (*enti pubblici non economici*), governed by public law (e.g. Law No. 84/1994, the Italian framework law on ports)[24]. The national port authorities possess administrative, organisational, regulatory, budgetary and financial independence. The Italian State gave the port authorities the institutional mandate of carrying out, on its behalf and solely in the public interest, the functions of administration, regulation and control of Italian ports. The port authorities, therefore, do not commercially exploit the property assets owned by the State, but merely administer them, in fulfilment of the institutional mandate given to them.

(56) The Italian authorities argue that port authorities do not offer goods or services on any market and therefore do not perform an economic activity. Pursuant to Article 6 of Law No. 84/1994, port authorities cannot perform port activities directly or indirectly.[25] Moreover, the administration of Italian ports is reserved by law for the port authority with responsibility in the area. Therefore, according to Italy, while performing the institutional mandate of administering Italian ports, the port authorities do not act on a market open to competition since (i) no other party may carry out that activity and (ii) they are prohibited from performing economic activities in sectors open to competition.

(57) According to the Italian authorities, the land use fee (*canone demaniale*) is not a compensation for the provision of an economic service, but rather a consideration for the private occupation of publicly-owned property. The collection of the fee, on behalf of the State, falls within the institutional mandate given to port authorities.

(58) According to the Italian authorities, only commercial fees, which can be decided independently by the port authorities and calculated in accordance with values on the market could qualify the activity as economic.[26] In the present case however the fee is determined by Ministerial Decree No 595/1995 on the basis of fixed parameters that relate to the area of the property over which a concession has been granted. The fees are applied by all Italian port authorities for all concessions, irrespective of the use that the concessionaire intends to make of the area in question, or of any profits or losses that may be obtained. The fee is therefore part of the overall tax burden imposed on entities operating on land owned by the State, not just in the shipbuilding sector. Furthermore, the Italian authorities note that the fee cannot be set on the basis

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[24] See *Legge 28 gennaio 1994, n. 84: Riordino della legislazione in materia portuale, Gazzetta Ufficiale n.28 del 4-2-1994 - Supplemento Ordinario n. 21.*

[25] Under this law, the main functions of Italian port authorities are: (a) programming, coordination and promotion of the commercial and industrial activities carried out in the port; (b) maintenance of open access to infrastructures and spaces; (c) entrustment to third parties and control of port activities aimed at providing services of general interest to port users for money.

[26] The Italian authorities refer to the judgement in Case T-128/98 *Aéroports de Paris v. Commission* ECLI:EU:T:2000:290. According to Italy, the possibility of freely setting the amount of the fee requested from potential users by a manager of infrastructure is a necessary and indispensable precondition for classifying the fee as commercial and the activity as economic.

of market values as there is no market relating to the ownership and/or management of public assets.

(59) Italy further explains that the measures were not selective as the works on the dry-docks of the Port of Naples is one of the numerous investments that the Italian State made in assets that it owns, which do not solely relate to ports. The Italian State finances the specific maintenance of a large variety of assets belonging to the public, among which (under the Navigation Code and the Civil Code) are the Italian ports, including masonry docks.

(60) Furthermore, public funding for works to expand, modernise and upgrade ports allocated on the basis of Law 413/1998 (and refinanced under Law No 388/2000 and Law No 166/2002) have been available to all Italian port authorities.[27] The specific maintenance on dry-docks nos 1, 2 and 3 is not an *ad hoc* investment decision but it constitutes an internal fund transfer to public authorities in compliance with the national legal system, which stipulates that the State has ownership and is responsible for the administration of ports. The Italian authorities argue that the Commission cannot challenge under Article 107 TFEU measures that are not selective but are of general scope and which represent an expression of economic and industrial policy choices of individual Member States.

(61) Regarding a possible economic advantage to PAN, the Italian authorities consider that – pursuant to Law No 84/1994 and Law No 112/1998[28] – the specific refurbishing works are borne by the owner, i.e. the Italian state, and not the infrastructure manager. Therefore, the public funding of the specific maintenance costs does not mitigate any burden on the port authority, nor does it confer any advantage to it.

(62) Furthermore, according to Italy, there is no economic advantage for PAN as the measures are necessary for the execution of SGEI, i.e. for the management of dry docks (within the mandate conferred and the prohibitions imposed on the port authority as per Law No 84/1994). According to Italy, this activity carried out by all Italian port authorities is expressly described by national law as falling within the scope of SGEI. Therefore, the measures do not confer any selective advantage upon PAN as compared with other Italian port authorities.

(63) The Italian authorities refer to protocol 26 to the TFEU which grants wide discretion to national authorities regarding SGEI and consider that the Commission's role is limited to the control of a manifest error. According to Italy, the SGEI activity does not consist in the rental of an infrastructure against remuneration nor in the direct use of the infrastructure by PAN to carry out shipbuilding activities. The scope of the SGEI is the obligation imposed on Italian port authorities by Law No 84/1994 to manage dry-docks on behalf of the Italian State, and in particular the duty to perform and take care of the specific maintenance of these assets owned by the State, in accordance with the public interest.

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[27] According to Italy, within the framework of the national plan for upgrading Italian ports, through the adoption of Law No 413/1998, the national authorities have allocated funds for carrying out infrastructure work to expand, modernise and upgrade ports, authorising the port authorities to invest in infrastructure works in ports a total amount of approximately EUR 50 million annually.

[28] Under Article 5 of Law No 84/1994 and Article 104 of Legislative Decree No 112/1998, the economic burden of carrying out specific restructuring works on publicly owned infrastructure, of which it is the sole owner, falls solely upon the Italian state.

(64) The public finance granted by the State to allow the repair of dry docks nos 1, 2 and 3 did not confer any advantage upon PAN, since it merely constituted a transfer of resources within the public domain for the performance of specific functions granted by the State to the port authorities, or alternatively, the repayment of costs incurred by PAN in meeting the obligations imposed by Law No 84/1994 on all Italian port authorities.

(65) Regarding the refurbishment works, the Italian authorities explained that the public financing does not exceed what is strictly necessary to repay the costs incurred by PAN. The contracts for the works were awarded on the basis of a public tender process (resulting in a reduction in the costs compared with what had initially been estimated). In addition, CAMED has made significant investments complementary to those made by PAN in the amount of more than EUR 40 million.

(66) Regarding the institutional task of managing the ports on behalf of the State, Italy further stated that, in accordance with Articles 28 and 29 of the Navigation Code and with Articles 822 and 823 of the Civil Code, this task cannot be conferred upon other entities than the port authorities and much less through a tender procedure. By contrast, the concession of the State-owned assets in question was awarded to CAMED pursuant to national law[29] and in a competitive and non-discriminatory manner and in accordance with the principles of the Union.

(67) Italy also claims that the measures did not distort competition nor affect trade among Member States. The port sector in Italy is not liberalised, therefore the Italian port authorities do not operate in a sector open to competition. According to the Italian authorities, the Commission erred in the Opening Decision in classifying the activity as "renting out" rather than as "granting a concession over state assets". In contrast to a tenant renting an asset, a concessionaire has to abide by the public interest and undergo checks by the port authority in compliance with public law.

(68) Furthermore, Italy claims that the Commission neglected to take into account the differences between Member States in the way they manage ports. In the absence of a uniform approach at Union level, Italy opted to retain the management of the port sector within the public remit. Therefore, since the port sector in Italy is not liberalised, and since the port authorities do not operate in a sector open to competition, according to Italy, the measures did not distort competition nor affect trade among Member States within the meaning of Article 107(1) TFEU.

(69) The Italian authorities believe that classifying the measures as State aid would be a violation of Article 345 TFEU, setting out the principle of neutrality between private and public entities. A private owner could invest as much as he desires in its assets, while investments by the State in its own infrastructure would always be State aid. The Italian authorities disagree with the preliminary consideration by the Commission that private owners would normally only undertake investments that are profitable (an example could be investments for image enhancing purposes).

(70) Italy further states that, according to Article 345 TFEU, Union law cannot impose any privatisation on Member States, nor require the sale of assets that the Member State decided to retain in public ownership, especially in the absence of common measures to liberalise the sector. Any different interpretation would infringe the

[29] The concession was awarded pursuant to Article 36 of the Naval Code (*Codice navale*) and Article 18 of the Naval Code Regulation (*Regolamento per l' esecuzione del codice della navigazione marittima*).

general principle of equal treatment which makes it illegal to treat in the same way facts that are markedly different.

(71) The Commission, furthermore, may not prevent Member States from carrying out the maintenance of such assets. The right to preserve one's own assets in an operational state and to ensure they work efficiently lays at the heart of the right of ownership, which is now also protected by the Charter of Fundamental Rights of the European Union, a primary source of law that is also binding upon Union institutions.

(72) Regarding the classification of the measures as existing aid, Italy points out that the Commission – in the preliminary conclusions sent to the complainant in 2013 – stated that the dry docks concerned are part of the maritime state property. The Italian authorities point out that until the *Leipzig Halle* judgement, the Commission itself considered investment in infrastructure, including in port areas, to be an activity falling outside the scope of Article 107 TFEU. In the period in which the works on docks nos 1, 2 and 3 in the Port of Naples were decided upon, (i.e. before 2001), public support for infrastructure did not normally constitute aid, but rather general measures derived from the State's sovereignty in respect of economic policy, land planning and development.

(73) The Italian authorities refer further to the Notice on the notion of aid[30], which states that due to the uncertainty that existed prior to the *Aéroports de Paris* judgment, public authorities could legitimately consider that the public funding of infrastructure granted prior to that judgment did not constitute State aid and that, accordingly, such measures did not need to be notified to the Commission. Therefore, Italy considers that those measures cannot be put into question on the basis of State aid rules in view of the principles of legal certainty and legitimate expectations.[31]

(74) Concerning the preliminary conclusion of the Commission in the Opening Decision that State support to shipbuilding and ship repair facilities has always been considered State aid (even before the Leipzig Halle judgement), the Italian authorities made the following observations. According to Italy, the Commission wrongfully refers in the Opening Decision to Commission Decision No 94/374/EC.[32] Italy states that pursuant to that Decision, various public support measures to assist "ship-repair facilities at [a] dry-dock" could fall within the scope of Article 107 TFEU. The Decision thus related to the 'facilities', i.e. port superstructures (moveable structures, cranes etc.) owned by individual concessionaires, and not to State-owned port infrastructure. The Decision expressly states that (i) public finance to the entity managing an Italian port "relates to the management of regional infrastructures and does not therefore constitute State aid" and (ii) measures for "the

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

31 Italy notes that the *Aéroports de Paris* judgment described the management of airports and not the construction of infrastructure as an economic activity. Thus it is necessary to at least refer to *the Leipzig Halle* judgment. The Italian authorities continue to argue against the transposition of this judgment to the port sector, since there is a very great risk that applying it would draw Member States' entire economic and industrial policy in the port sector within the scope of State aid rules, having an effect on the relative spheres of responsibility of the Union and of Member States in a manner detrimental to Member States.

32 See e.g. Commission decision 94/374/EC of 2 February 1994, on Sicilian Regional Law No 23/1991 concerning extraordinary assistance for industry and Article 5 of Sicilian Regional Law No 8/1991 concerning, in particular, financing for Sitas, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0374&from=EN.

financing of infrastructures to be set up by a public body … cannot be regarded as State aid within the meaning of Article" 107(1) TFEU, confirming that until the Leipzig Halle judgment the Commission itself considered investment in infrastructure, including in port areas, to be an activity not falling within the scope of Article 107 TFEU.

(75) Italy reiterates the argument that the Italian port authorities do not operate on a market that is open to competition. In accordance with well-established case law, aid implemented in non-liberalised markets constitutes existing aid which may only be held incompatible ex nunc and as such is not required to be repaid.

3.1.2. On the presence of aid to CAMED

(76) As regards the alleged aid to CAMED, the Italian authorities explained that under Italian law, the extraordinary works for the refurbishment of the dry-docks fall within the area of responsibility of the owner (i.e. the State), and not of the operator of the infrastructure. Similarly to a rental contract, ordinary works are within the area of responsibility of the operator, whereas the owner must ensure that the infrastructure remains adequate for the use that is allowed to the operator under the concession contract for its entire duration. At the end of the concession period, the infrastructure will remain property of the State. According to the Italian authorities, this is the case not only for the 2004 Concession awarded to CAMED, but for all the concessions for the use and operation of State properties.[33]

(77) Italy claims therefore that the measures have a general, cross-cutting scope, because in line with the public model under which the Italian legislature has organised the ports sector, every Italian port authority (not just the PAN) has always received, and continues to receive public funds intended to finance infrastructure work on state-owned assets. It follows from this that all undertakings (not just CAMED) operating in the port area in all Italian ports (not just Naples) and in all economic sectors (not just shipbuilding) have 'benefitted' from 'aid' that is identical to that which CAMED has allegedly enjoyed. The Italian authorities argue that all economic operators that have obtained a concession over state property: (i) participated in an open and competitive process, (ii) have been able to use areas, assets and infrastructure built and repaired using public funds and (iii) paid a land use fee in accordance with national law. Therefore, CAMED has not obtained any selective advantage as compared with other undertakings that are in comparable factual and legal situations such as other shipbuilders, terminal operators, shipping companies etc.[34] Furthermore, CAMED is required by the 2002 Regulation to grant access to the State-owned infrastructure to other operators under equal conditions and on the basis of transparent and non-discriminatory priority criteria, in accordance with published

[33] The Italian authorities have also provided examples of similar situations where other concessionaires active in the Port of Naples have signed similar agreements, under which works carried out on various items of infrastructure have been financed by the Port Authority. Specifically, the Italian authorities refer to a concession contract signed by the Port Authority with the complainant in this case for the pursuit of shipbuilding activities in the Port of Naples, where (routine) maintenance work is the responsibility of the concessionaire, while the Port Authority has agreed to finance the construction of a new dock (specific work).

[34] The Italian authorities explained that especially at local level in application of Law No 413/1998, the Port Authority of Naples has carried out a number of measures, using public funds to refurbish and modernise a large number of state-owned assets and pieces of infrastructure, used by undertakings operating in all economic sectors and not only by shipbuilding firms and provided specific examples.

tariffs, which in the view of the Italian authorities, further reiterates the non-selectivity of the measures.

(78) The land use fee paid by CAMED for the use of the State property is established in compliance with national law and in particular with the Ministerial Decree No 595/1995. PAN did not have the possibility to charge CAMED lower fees also as this is not a commercial fee negotiated between the parties in line with market fees. The land use fees are determined in an objective way and are identical for all maritime land concessions for this type of activities, thus in a non-selective manner. Therefore, the measure did not reduce the costs to be borne by PAN nor did it enable it to charge CAMED lower fees.

(79) Furthermore, the Italian authorities consider that it is not necessary, during the concession period, for the concessionaire of State-owned assets to invest an amount which when combined with the fee paid, would equal the amount of any specific maintenance carried out by the State as the sole owner of the asset. The concessionaire – for the temporary use of the asset – does not have a duty to bear the same financial burdens as an owner would in order to maintain these assets in an operational condition, thus increasing their value.

(80) The Italian authorities further state that the Opening Decision does not take into account the fact that, although it was not necessary, CAMED has carried out a considerable plan of investments complementary to those carried out by PAN, exceeding EUR 40 million.

(81) The Italian authorities are of the opinion that with the investment project CAMED did not obtain any advantage, since the 2004 Concession was awarded to CAMED through an open and public procedure (see recital (15)) and CAMED has the right to operate an infrastructure which must be adequate for the agreed use. Moreover, in the view of the Italian authorities, Directive 2014/23/EU on the award of concession contracts does not apply to tenders regarding concessions of port areas. Therefore, PAN was not required to issue a call for tender for the award of the concession relative to those dry-docks, and in particular in relation to a concession granted more than 10 years before that Directive entered into force.

(82) Italy also argues that the measures neither distort competition nor affect trade among Member States since they do not strengthen the position of one undertaking against others active in the same sector. Under the conditions laid down in the 2002 Regulation, any undertaking may ask to use the docks, irrespective of its place of establishment. According to the Italian authorities, the measures, therefore, do not have any effect on cross-border investment and/or establishment conditions.

(83) According to Italy, the Commission cannot challenge a general public measure that is applicable across all of the national territory and to all undertakings operating there, by claiming that the measure confers an advantage on those operators as compared with the conditions enjoyed by undertakings established and operating in other Member States. Whether or not a selective advantage is conferred should be determined, in fact, solely on a national basis, since in the absence of common Union-wide rules, a comparison with the conditions offered to undertakings in different Member States would in effect compare different factual and legal situations arising from legislative and regulatory disparities between the Member States, and would thus distort the aim and functioning of State aid control.

(84) The Italian authorities repeat the arguments concerning the classification of the measures as existing aid (see recital (75)).

3.1.3. On compatibility of the alleged aid to PAN and CAMED

(85) Italy disagrees with the Commission's assessment that the granting occurred when each of the investments was included in the programme of investments on the basis of the Port Authorities' requests. Italy reiterates that the date of the award of a State aid scheme must be identified as the time at which the legal basis entered into force that created an entitlement for the alleged beneficiary to obtain the support measures, and not the date of adoption of subsequent, potentially numerous, implementing measures. Italy notes that all the implementing measures identified by the Commission make express reference to the refinancing acts under Law No 413/1998, which is therefore the genuine sole legal basis for the action, as well as to the various decisions by PAN in 2001 and the concession granted to CAMED in 2004.

(86) According to Italy, the measures should not be assessed on the basis of the Shipbuilding Frameworks (see recital (48)), because the measures concern merely the specific maintenance of State-owned port infrastructure. In the view of the Italian authorities, the alleged aid is not designed to promote an increase in productivity of the existing installations in a shipyard, i.e. of port superstructure (moveable structures, cranes, etc.), but rather to carry out specific maintenance to certain items of port infrastructure that are the sole property of the State. This is in order to stop them becoming obsolescent, particularly in terms of safety, and in view of the fact that all port users can access them on an equal footing and under non-discriminatory conditions. Thus, the compatibility of the measures in question cannot be assessed on the basis of sectoral rules regarding aid for shipbuilding.

(87) According to Italy, the measures are compatible with the internal market according to both Article 107(2)(b) and Article 107(3)(c) TFEU, because they aim at restoring State-owned property following the Second World War and the earthquake of 1980 that affected the city of Naples. The alleged aid measures are proportionate as the public funding is limited to what was strictly necessary and the works for the specific maintenance were awarded through an open, competitive tender procedure that made it possible to reduce costs compared with the original estimates. The Italian authorities further note that CAMED has carried out significant investments, reducing the intensity of the public contribution to approximately 40% of the total investment costs. The measures are further proportionate as – based on the law applicable to public concessions – the works carried out by the concessionaire remain in the State ownership at the end of the concession and CAMED would not be entitled to any compensation or repayment. Italy reiterates that the alleged aid measures benefit the economy of a disadvantaged region which is an assisted region in accordance with Article 107(3)(a) TFEU.

(88) The Italian authorities submitted further information in November 2017, in which they reiterated their view that the State aid rules applicable to shipbuilding do not constitute the correct legal basis to assess the compatibility of the aid. Nevertheless, the Italian authorities provided the following comments.

(89) With regard to the compatibility of the aid granted to PAN, Italy confirmed that PAN did not submit aid applications (invoking the relevant shipbuilding rules) before the start of works on each of the investments. The Italian authorities confirmed their position that the funds were used for the maintenance of the existing port infrastructure and do not constitute aid to shipbuilding facilities.

(90) Finally, Italy argues that the amounts under assessment could not be recovered, as the statute of limitations established by Article 17 of the Procedural Regulation expired.

4. COMMENTS FROM INTERESTED PARTIES

4.1. Comments from CAMED

(91) CAMED argues that the legality of the measures in question has already been examined and was ascertained in 2006, when the Commission requested information from the Italian authorities and subsequently terminated the procedure. The Opening Decision thus constitutes an unlawful revocation of that termination decision, made more than 10 years after the first measure, which violates the general principles of Union law of sound administration, legal certainty and effective judicial protection.

(92) Moreover, CAMED considers that the measures in question do not constitute State aid either for PAN or itself as it concerns the ordinary management and administration of a particular asset category rather than a specific economic activity, namely, public property belonging to the State. None of the conditions of Article 107(1) TFEU are met.

(93) CAMED repeats Italy's arguments that port authorities are non-economic public entities prohibited under Law No 84/1994 from engaging in any economic activity or from providing port services. Nor are Italian port authorities, according to CAMED, free to determine the amount of State fees collected from concessionaires on behalf of the State, since these were established in Ministerial Decree No 595/1995.

(94) According to CAMED, the work does not confer an economic advantage on PAN or itself. The remedial maintenance of the public assets in question by law falls exclusively to the State as their owner and in addition is necessary and instrumental for the provision of PSO. As such, the measures do not relieve CAMED of any financial burden or confer any advantage on it.

(95) CAMED further points out that when the public measures were planned and approved, it was not the concessionaire of the public land concerned, since the open and competitive tendering procedure was yet to take place. Therefore, PAN committed to the investment regardless of the future concessionaire's identity. Any undertaking could have submitted a competing bid for the concession, and could have obtained the assets under concession. Hence the procedure passes the market economy operator test and confers no advantage on the successful bidder.

(96) CAMED further states that the measures at hand are not selective as this is a standard method of intervention by the State which, in general (and not just for ports or the shipbuilding industry), seeks to maintain a vast quantity and variety of public assets and infrastructure in safe working order. This particularly applies to those assets that the state has decided should be publicly owned – a decision exempt from review by the Commission under Article 345 TFEU. In the present case, the work was also planned and authorised as part of a funding programme launched in 1998 by national law for the construction of infrastructure for the expansion, modernisation and redevelopment of all Italian ports.

(97) According to CAMED, this further demonstrates the non-selective nature of the measures, both with regard to (i) the position of PAN relative to all other port authorities, which received the same public funding to carry out work on publicly owned assets and infrastructure in ports within their territorial jurisdiction; and (ii)

CAMED's position relative to other companies operating in the shipbuilding industry and elsewhere, whether in the Port of Naples or in any other Italian port.

(98) Moreover, in CAMED's view, under the rules governing the use of the public infrastructure on which the maintenance work was carried out, any undertaking is entitled to have access on request to the docks operated by it under the concession, on the basis of transparent and non-discriminatory criteria and in return for the payment of public tariffs. Access to the infrastructure is on a level playing field with other potential users, not only other ship repairers, but any party interested in using the infrastructure, for example shipping companies, port service operators, shipping agents and vessel management companies. CAMED considers that this serves as further confirmation of the non-selective nature of the measures to renovate the docks, which do not favour 'certain undertakings or the production of certain goods'.

(99) CAMED also repeats Italy's arguments on the lack of distortion of competition or effect on trade among Member States.

(100) CAMED believes that the measures would in any case be compatible with the internal market under both Article 107(2) TFEU, as it is aimed at recovering "*the damage caused* by *a natural disaster or exceptional occurrences",* in this case the bombing and the earthquake of 1980; and Article 107(3) TFEU, as the measures pursue an objective of common interest. Furthermore, the measures are proportionate due to the investments carried out by CAMED itself (in the amount of EUR 42 541 495) that reduced the intensity of the State intervention to approximately 40% of total costs. According to the information provided, CAMED invested EUR 11.1 million in the docks, and the remaining amounts in other items relating to for example, the goods/land covered by the concession fee, warehousing and buildings, transport costs, IT and office equipment.

(101) Finally, CAMED states that if the measures are considered aid, the aid would constitute existing aid, given that the statute of limitations of Article 17 of the Procedural Regulation has expired.

4.2. Comments from the Complainant

(102) The complainant agrees with the preliminary assessment of the Commission that PAN should be considered as an undertaking engaged in economic activities. The complainant considers that it should be an undisputed fact by now that national ports carry out economic activities, in competition with each other and with other European and Mediterranean ports, considering the clarifications brought by the Commission in its case practice. For example, in its decision dating from 2012[35], the Commission considered that the Port Authority of Augusta was an undertaking in carrying out its economic activity consisting of the exploitation of port infrastructure owned by the State through the leasing of this infrastructure to port operators, in exchange for a concession fee. This is a precedent for PAN as the Port Authority of Augusta operates on the basis of the same national rules[36].

[35] Commission Decision of 19 December 2012, SA.34940 – Port of Augusta, OJ C 77, 15.03.2013, p. 1.

[36] Law N° 84/1994, the Italian framework law on ports.

(103) Regarding the concession fee, the complainant believes that it has been determined under national legislation[37] which was wrongly held to be applicable since the concession does not exclusively concern the use of the docks for shipbuilding purposes, but also the management of the dry docks by CAMED. As such, the complainant alleges that by granting the direct award of the concession to CAMED without organising a tender, PAN waived its right to receive a fee for the dry docks management, since PAN only perceives a fee for the land concession. The complainant also specifies that Article 6 of the concession contract expressly provides that CAMED shall pay the fee to PAN "as consideration for this concession" and not by way of a taxation.

(104) The complainant agrees with the preliminary assessment of the Commission regarding the public nature of the resources and the selectivity of the measures that benefit PAN. The complainant also specifically alleges that the measures cannot represent a mere transfer of resources among public administrations. Indeed, according to Law No 84/1994, although port authorities are non-economic public entities having legal personality under public law, they have large administrative and monetary autonomy and the ministerial scrutiny does not apply to the award of concessions relating, *inter alia*, to the management of dry-docks.

(105) The complainant agrees with the preliminary assessment of the Commission that the measures do not satisfy the four condition of the *Altmark* case and therefore that the administration of dry-docks carried out by PAN does not represent a service of general economic interest and granted PAN an economic advantage.

(106) The complainant agrees with the preliminary assessment of the Commission that the measures are liable to distort competition among European ports and affect trade among Member States. In particular, the complainant reiterates that the Italian ports compete with various European ports within a competitive market and consequently that the argument of the Italian authorities that the demand for ship-repair infrastructure is local in scale must be rejected.

(107) The complainant agrees with the preliminary assessment of the Commission regarding the existence of State aid for CAMED because PAN may have waived public resources by assigning to CAMED the concession of the dry-docks for a price which is below the market price. The complainant also supports the preliminary assessment of the Commission that CAMED received an economic advantage both because the concession was assigned not through a proper tender but by means of a different procedure (whose publicity was deemed to be only local), and because the concession fee was determined on a fixed parameter basis (without consideration for the infrastructure with which the area is equipped) and not on a market price basis. The complainant explains again that the concession includes not only the right to use the State-owned infrastructure for shipbuilding, but also for dry-docks management. Indeed, the way the concession fee is determined does reflect the two activities carried out by CAMED and the true economic value of the concession.

(108) The complainant also alleges that the management of the dry-docks is a service of considerable economic value that could be estimated to represent an annual turnover for CAMED between EUR 6 million and EUR 9 million (versus an yearly fee paid

[37] Decree of the Minister for Transport and Shipping No 595 of 15 November 1995, in consultation with the Treasury Minister for Finance, entitled "Regulation laying down rules for the establishment of the fees for maritime public concessions" in OJ No 158 of 8 July 1996.

by CAMED amounting to EUR137 409 68) and therefore that the value over the total duration of the concession for the management of the public dry-docks is between EUR 180 million and EUR 270 million. In particular, the fee revenue received by CAMED is made up of the fees paid for: (i) the use of the dry-docks and (ii) the provision by CAMED of other associated services (e.g. activity necessary for the entry, exit and maintenance of a vessel in a dock or supply of electricity). The complainant underlines that CAMED can set up the fees freely without any control of PAN and that the fees charged by CAMED are excessive and far higher than the fees charged by managers of similar type of infrastructure located in other ports (in November 2012, CAMED increased the fees by over 300%).

(109) The complainant agrees with the preliminary assessment of the Commission that the cumulative conditions of the *Altmark* case are not fulfilled for CAMED and consequently that it cannot be considered that CAMED's activities represent a PSO. The complainant considers that, if at all, only the operation of the dry-dock number 3 may constitute a public service since it represents the largest basin in the Port of Naples. In addition, as a matter of fact, the dry-docks managed by CAMED are not really open to third users. CAMED is a privileged user that prevents other port operators from having free access. In addition, the fees CAMED requires to grant access to third users to the infrastructure are allegedly over the market price.

(110) According to the complainant, the measures distort competition on two levels. Firstly, as infrastructure manager, CAMED received an advantage over its potential competitors by (i) having been granted the concession to manage the dry-docks without a tender procedure and (ii) paying an unjustifiably low level of fees to PAN while charging excessive fees to other ship-repairers wanting to use the docks. Secondly, as a ship-repair undertaking, CAMED received an advantage as an unduly privileged user of the public docks.

(111) Concerning the effect on trade, the complainant underlines that the demand for shipbuilding infrastructure comes mainly from international operators, often belonging to big multinational groups.

(112) On the compatibility of the aid measures with the internal market, the complainant agrees with the preliminary assessment of the Commission the dry-docks are not transport infrastructures and, as such, do not fall into the scope of Article 107(3)(c) TFEU. Moreover, the complainant considers that the measures do not meet the compatibility criteria of (i) Article 107(3)(a) or (c) relating to regional aid or (ii) the 2011 SGEI framework or (iii) the sectoral rules concerning State aid in the shipbuilding sector.

(113) Finally, the complainant supports the Commission's view that the aid measures were granted at the time when the relevant works were included in the investment programme drawn up on the basis of PAN's requests, and not in 1998 (as argued by the Italian authorities) by means of Article 9 of Law No 413/1998.

5. ASSESSMENT

(114) 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"*.

(115) The qualification of a measure as aid within the meaning of this provision therefore presupposes that the following cumulative conditions are met: (i) the measure must be imputable to the State and financed through State resources; (ii) it must confer an advantage on its recipient; (iii) that advantage must be selective; and (iv) the measure must distort or threaten to distort competition and affect trade between Member States.

5.1. Existence of aid to the Port Authority of Naples

5.1.1. Notion of undertaking

(116) Under Italian law, port authorities are non-economic public entities aiming to ensure the overall maintenance and development of port infrastructure. To that end, the financial resources at the disposal of a port authority may be used exclusively for the management of the port and for the performance of the functions attributed to it by the law (see recital (55)).

(117) The Court of Justice of the European Union[38] (the "Court of Justice") has consistently defined undertakings as entities engaged in an economic activity, regardless of their legal status and the way in which they are financed. The Court of Justice has consistently held that any activity consisting in offering goods and services on a market is an economic activity.[39]

(118) The classification of a particular entity as an undertaking therefore depends entirely on the nature of its activities. This general principle has three important consequences: (i) the status of the entity under national law is not decisive, (ii) the application of the State aid rules as such does not depend on whether the entity is set up to generate profits, and (iii) the classification of an entity as an undertaking is always relative to a specific activity.

(119) The measures at hand concern funding for the structural refurbishment of ship-repair infrastructure (dry-docks) located in a port that is owned by the Italian State, which exercises its ownership rights through PAN, acting as a manager. The Commission finds that dry-docks are not port infrastructure but production facilities for shipyards to be used for shipbuilding or ship-repairing activities. It has been long held in the Commission's decisional practice that shipbuilding is an economic activity involving trade between Member States.[40]

(120) The dry-docks are commercially exploited by PAN which charges land use fees for their use. In this respect, contrary to what the Italian authorities claim (see recitals (57) and (58)), those fees represent a compensation for the provision of an economic service (i.e. the leasing ship-repairing facilities for remuneration). The fees constitute one of the sources of income for PAN allowing it to finance its activities, which include investments to maintain the dry-docks operational. By maintaining the dry-docks in an operational state to accommodate ship-repair, allows PAN to avoid a reduction in its management activities in respect of the Port and to attract ship

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38 See e.g. judgment in Case C-41/90 *Hofner and Elsner* ECLI:EU:C:1991:161, para. 21; judgment in Case C-160/91 *Poucet and Pistre v. AGF and Cancava* ECLI:EU:C:1993:63, para. 17; judgment in Case C-35/96 *Commission v. Italy* ECLI:EU:C:1998:303.

39 See judgment in Case 118/85 *Commission v Italy* ECLI:EU:C:1987:283, para. 7; judgment in Case C-35/96 *Commission v Italy* ECLI:EU:C:1998:303, para. 36; iudgment in Joined Cases C-180/98 to C-184/98 *Pavlov and Others* ECLI:EU:C:2000:428, para. 75.

40 See for example Commission Decision of 12 May 2004 on the State aid implemented by Spain for further restructuring aid to the public shipyards, State aid case C 40/00 (ex NN 61/00) (2005/173/EC).

repairers. In fact, without performing such works, the dry-docks could not be properly operated and, in the long term, PAN would not be able to continue its business activity of leasing them for remuneration. In this respect, the 2004 Concession specifies in Art. 1 that "the concession is granted for the purposes of carrying out ship and pleasure craft conversion and repair activities, as well as for the management of the dry-docks…"[41], thereby specifying in advance the exact use of the public land in question.

(121) Although it cannot be excluded that, given its public functions, PAN may also perform activities in the public remit, the present decision only concerns the management of the aided dry-dock facilities and renting them out for remuneration. In accordance with established case-law, the classification of an entity as an undertaking is always relative to a specific activity. An entity that carries out both economic and non-economic activities is to be regarded as an undertaking only with regard to the former. Therefore, the Commission does not have to take a position on whether the remaining activities of PAN (i.e. other than the renting of ship-repairing facilities against remuneration) constitute economic activities.

5.1.2. Imputability and State resources

(122) The resources granted for the investment projects have been transferred to PAN from the State budget. As indicated in section 5.1.1, PAN can be qualified as an undertaking for the purposes of the present decision, being an entity performing an economic activity on behalf of the owner, which is the Italian State. Therefore, that transfer amounts to a transfer of State resources and is imputable to the State.

5.1.3. Selectivity

(123) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings and/or the production of certain goods.

(124) Since the present case concerns the aid measures granted individually to PAN, the existence of economic advantage leads to the presumption that the measures are selective.[42]

(125) In any event, the Commission finds that the measures at stake favour PAN as compared to other undertakings that are in a factual and legal situation comparable to that of PAN. Law 413/1998 provides that the Ministry, following the requests from Port Authorities, shall issue a programme of investments. Upon the request of PAN, the programme of investments was adopted with two Ministerial Decrees (27 October 1999 and 2 May 2001) (see recital (25)). Even if a number of other port authorities listed in that Programme of Investment[43] were also able to use public funds to carry out investments in other Italian ports, the Commission finds that the measures selectively favour PAN's shipbuilding facility. Indeed, PAN received State funding to expand, modernise and upgrade the shipbuilding facility it manages, as opposed to other managers of shipbuilding facilities not enlisted in the programme of investments, e.g. because they did not constitute port authorities. Such non-enlisted managers of shipbuilding facilities are in a factual and legal situation comparable to

41 "*la concessione è assentita allo scopo di esercitarvi un cantiere di transformazioni e riparazioni di navi e/o imbarcazioni da diporto nonché per la gestione dei bacini di carenaggio in muratura…*"

42 Judgment in Case T-314/15 *Greece v Commission* ECLI:EU:T:2017:903, para. 79.

43 The Programme of 27 October 1999 lists 20 ports benefitting from the national funding and the Programme of 2 May 2001 further enlarges that list (to 25 ports).

PAN, but they had to expand, modernise or upgrade the shipbuilding infrastructure without receiving that State funding. According to the Court, neither a large number of eligible undertakings (which can even include all undertakings of a given sector), nor the diversity and size of the sectors to which they belong, provide grounds for concluding that a State measure constitutes a general measure of economic policy.[44] Finally, the Commission notes that the measures are selective also because they favour a manager of shipbuilding and ship repair facilities in comparison to managers of manufacturing or repair facilities in other sectors of the economy. The latter are in a comparable factual and legal situation since they also exercise their economic activity on the basis of the manufacturing or repair facilities they manage. However, they have to pursue their economic activity without benefitting from the investment support granted to PAN.

5.1.4. Economic advantage

(126) The public funding of EUR 44 138 854.50 is provided through grants or repayments of loans contracted by PAN with financial institutions as presented in Table 2 above. A grant is a non-refundable financial instrument which bears no financing cost. Similarly, repayment by the State of loans entered into by an undertaking which results in no financial costs being borne by that undertaking as beneficiary is not available under normal market conditions as it reliefs the undertaking from the financial obligations it would normally have to face. In the market, such financing instruments would not be available to the beneficiary. The public financing provided, therefore, confers an economic advantage on PAN.

(127) However, it follows from the Altmark judgment that compensation granted by the State or through State resources to undertakings in consideration for PSOs imposed on them does not confer such an advantage on the undertakings concerned, and hence does not constitute State aid within the meaning of Article 107(1) TFEU, provided four cumulative conditions are satisfied:[45]

– First, *the recipient undertaking is actually required to discharge PSOs and those obligations have been clearly defined*. As the definition of the SGEI is within the Member States' competence, the Commission's powers are, in principle, limited to checking whether the Member State has made a manifest error when defining the service as an SGEI.

– Secondly, the parameters on the basis of which the compensation is calculated have been established beforehand in an objective and transparent manner. The need to establish the compensation parameters in advance does not mean that the compensation has to be calculated on the basis of a specific formula. Rather, what matters is that it is clear from the outset how the compensation is to be determined. Typically, the relevant act entrusting the PSOs must at least specify the content and duration of the PSOs, the undertaking and territory concerned, the parameters for calculating, controlling and reviewing the compensation, and the arrangements for avoiding and recovering any overcompensation.

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[44] See for instance judgment in Case C-75/97 *Belgium v Commission* ECLI:EU:C:1999:311, para. 32; judgment in Case C-143/99 *Adria-Wien Pipeline* ECLI:EU:C:2001:598, para. 48.

[45] See judgment in Case C-280/00 *Altmark Trans v Regierungsprasidium Magdeburg* ECLI:EU:C:2003:415, paras. 87-88.

– Thirdly, the compensation does not exceed what is necessary to cover all or part of the costs incurred in discharging the public service obligations, taking into account the relevant receipts and a reasonable profit for discharging those obligations.

– Fourthly, where the undertaking which is to discharge public service obligations is not chosen in a public procurement procedure, the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(128) In this case (see recital (62)), Italy argued that Article 1.g) of Ministerial Decree of 14 November 1994 imposed a PSO on all Italian port authorities. The Commission will therefore assess whether all four Altmark criteria are met.

(129) According to the case-law,[46] since the first Altmark condition is designed to ensure transparency and legal certainty, it requires that two minimum criteria be met: (i) the undertaking must be actually entrusted with the implementation of public service obligations, and (ii) the nature, duration and scope of those obligations must be clearly defined. In the absence of a clear definition of such objective criteria, it is not possible to verify whether a particular activity may be covered by the concept of an SGEI. Those two minimum criteria are of strict application and they are not covered by the Member States' wide discretion. Therefore, the Commission controls their fulfilment strictly and at this stage does not apply the manifest error test. That manifest error test is applied only at a subsequent stage, in order to control whether the actually entrusted and clearly defined services and obligations are suitable for designation as an SGEI. It is only in that latter stage that the existence of a market failure can be relevant.

(130) In the present case, the nature, duration and scope of the public service obligation allegedly entrusted to PAN has not been clearly defined. Contrary to what the Italian authorities claim (see recital (62)), the national law (Article 1.g) of Ministerial Decree of 14 November 1994) describes only in very general terms the obligation imposed on all port authorities, which consists in the management of dry docks ("*gestione di (…) bacini di carenaggio per il settore industriale*"), without further specifications. Article 1.g does not define at all the duration of the alleged public service obligation. Moreover, such generally phrased provision does not define in any clear manner the nature and scope of the obligation.

(131) In any event, with respect to whether the alleged public service obligations are suitable for designation as an SGEI, the Commission finds that the Italian authorities made a manifest error. The Italian authorities have not provided evidence showing that PAN, by renting ship-repairing facilities against remuneration, provides an activity which is not available in the market under comparable conditions of price, quality, continuity and access to the service. The Commission considers that the

[46] Judgment in Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* ECLI:EU:C:2017:999, paras 72, 73 and 75; See also the Opinion of Advocate-General Wathelet in Joined Cases C-66/16 P to C-69/16 P *Comunidad Autónoma del País Vasco and Itelazpi v Commission* ECLI:EU:C:2017:654, paras 112, 114-117 and 121-122.

existence of (or the possibility to build) other dry-docks and floating docks of the same size in the Port of Naples and other neighbouring ports can exclude the classification of the management of a specific dry-dock by the Port Authority as an SGEI. In addition, the subsidised facilities do not provide any general benefit for society but rather a mere service to ship repairers in the area of Naples.[47] In *Enirisorse*,[48] the Court confirmed that the operation of any commercial port does not automatically constitute the operation of a service of general economic interest. The Commission consequently considers that the economic services provided by PAN do not exhibit any special characteristics compared with the rental of ship-repairing facilities in the market[49] and do not address any market failure.

(132) With respect to the second and third Altmark conditions, the Commission observes the following. The Ministerial Decree of 14 November 1994 does not provide any quantification or any objective and transparent parameters to calculate beforehand the compensation for the PSO allegedly provided by PAN. Also the granting acts (see recital (25)) do not specify further the alleged PSO compensation.

(133) Therefore, it cannot be established whether any compensation granted does not exceed what is necessary to cover the relevant costs incurred in discharging the alleged PSO, including a reasonable profit.

(134) With respect to the fourth Altmark condition, the Commission notes that, according to Italy, the PSO was not and cannot be entrusted to PAN via a public procurement procedure pursuant to Italian law (see recital (66)).

(135) According to the Altmark judgment, where the undertaking that is to discharge a PSO is not chosen following a public procurement procedure to select a tenderer capable of providing these services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well-run and adequately provided with means to meet the PSO, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations.

(136) The Italian authorities have not provided any comprehensive analysis of the costs of such an undertaking that is adequately provided with means to discharge the alleged PSO. Neither have they indicated that such an analysis has been performed for the purpose of determining the methodology for the calculation of the compensation.

(137) In view of the above, the Commission finds that the four conditions are not cumulatively met; hence, the measures at hand entail an economic advantage.

5.1.5. Distortion of competition and effect on trade

(138) According to established case law, when financial support granted by a Member State strengthens the position of an undertaking compared to other undertakings

[47] See the 2011 SGEI Communication, paragraph 50.

[48] Judgment in joined cases C-34/01 to C-38/01 *Enirisorse SpA v Ministero delle Finanze* ECLI:EU:C:2003:640, para. 33.

[49] See Communication C (2011) 9404 final on the application the European Union State aid rules to compensation granted for the provision of services of general economic interest, of 20.12.2011 (the 2011 SGEI Communication), paragraph 45.

competing in intra-Union trade, there is at least a potential effect on trade between Member States and competition.[50]

(139) The Commission notes Italy's arguments that the under national law, the management of ports falls within the public remit and port authorities do not operate in a sector that is liberalised and open to competition and trade between Member States.

(140) As indicated in recitals (120) and (121), this investment project, by restoring the dry-docks to adequate conditions, will allow PAN to continue the economic activity of renting out the dry-docks and thus improve its competitive position. Although PAN is active on an upstream market of renting shipbuilding / ship repair infrastructure, the fact that such infrastructure is subsidised and then used to provide shipbuilding and ship-repair services at the downstream level distorts competition and affects trade at EU Union level. This is because the shipbuilding / ship-repair sector is open to competition and trade at Union level. For that reason, sector specific rules applicable to shipbuilding set a framework for a possible public intervention in those facilities.[51] Moreover, PAN competes against other managers that can rent shipbuilding / ship repair infrastructure in the Union, and thus operates in a market that is open to competition and trade at Union level.

(141) Therefore, the Commission concludes that the measures in question are liable to distort competition and affect intra-Union trade.

5.1.6. On the alleged violation of Article 345 TFEU

(142) The Italian authorities claim that considering the measures as State aid would be a violation of Article 345 TFEU setting out the principle of neutrality between private and public entities. A private owner could invest as much as he desires in ship-repairing facilities, while investments by the State on its own infrastructure would always be State aid.

(143) The Commission notes that the Union legal order is neutral with regard to the system of property ownership and does not in any way prejudice the right of Member States to act as economic operators. However, when public authorities directly or indirectly carry out economic transactions in any form,[52] they are subject to Union State aid rules. Economic transactions carried out by public bodies (including public undertakings) do not confer an advantage on its counterpart, and therefore do not constitute aid, if they are carried out in line with normal market conditions.[53]

(144) The Commission finds that in providing State funding to PAN the Italian State did not carry out the investment in compliance with the 'market economy investor principle'. First of all, that principle is not applicable in a situation where a public authority presents itself as the organising and delegating authority of a public service. The applicability of that principle is necessarily ruled out, since by definition the Member State is acting as a public authority in organising and delegating the alleged public service.[54] Secondly, even if the market economy investor principle were

[50] See e.g. judgment in Case 730/79 *Philip Morris v. Commission* ECLI:EU:C:1980:209, para. 11 and judgment in Case C-372/97 *Italy v. Commission* ECLI:EU:C:2004:234, para. 44.

[51] See Commission decision of 12 May 2004 on the State aid implemented by Spain for further restructuring aid to the public Spanish shipyards; State aid case C 40/00 (ex NN 61/00), (2005/173/EC).

[52] See, for instance Judgment in Case 40/85 *Belgium v Commission* ECLI:EU:C:1986:305, para. 12.

[53] Judgment in Case C-39/94 *SFEI and Others* ECLI:EU:C:1996:285, para. 60-61.

[54] Judgment in Case T-454/13 *SNCM v Commission* ECLI:EU:T:2017:134, para. 233.

applicable, the Commission considers that a private operator in the same sector would have prepared ex ante a business plan and would have carried out the investment only if it was profitable on that basis. Other considerations (e.g. image enhancing, as mentioned by Italy, see recital (69)) could exceptionally be taken into account in the profitability analysis, but would have to be substantiated by objective evidence, which was not provided by the Italian authorities.

(145) As stated in the Opening Decision, the Italian authorities presented a financial analysis based on the funding gap calculated as the difference between the discounted value of the expected operating profits of the investment and the discounted investment costs of the project. The results of this calculation show that over a reference period of 25 years the project has a negative financial net present value of – EUR 44 274 286.68.

(146) Therefore, the Commission is of the view that by qualifying the measures as State aid there would be no violation of Article 345 TFEU.

5.1.7. Classification of the measures as existing aid

(147) Italy claims that the measures at issue constitute existing aid within the meaning of Article 1(b)(v) of the Procedural Regulation, which defines existing aid as "*aid which is deemed to be an existing aid because it can be established that at the time it was put into effect it did not constitute an aid, and subsequently became an aid due to the evolution of the internal market and without having been altered by the Member State*." Article 1(b)(v) further provides that *"[w]here certain measures become aid following the liberalisation of an activity by Union law, such measures shall not be considered as existing aid after the date fixed for liberalisation*".

(148) The Commission is of the view that the aid cannot be classified as existing aid as State support to shipbuilding and ship-repair facilities has always been considered State aid, even before the Leipzig Halle judgment.[55]

(149) The Commission notes the arguments of Italy that decision No 94/374/EC on Sicilian Regional Law, (quoted in the Opening Decision, see recital (74)) does not support the conclusion that public support measures for ship-repair facilities at a dry-dock always fell within the scope of Article 107(1) TFEU. However, the Commission finds that this decision draws a clear distinction between the public support provided to the body responsible for the port administration (that was not classified as State aid) and the public support provided to the same public body for the maintenance work on the dry-dock (that was classified as State aid). In any event, the concept of State aid is an objective notion which is influenced only by whether a State measure confers an advantage on one or more particular undertakings, whereas that objective notion is not affected by the Commission's decision-making practice.[56]

(150) Therefore, the Commission reiterates its conclusion that the measures at hand constituted State aid also prior to the Leipzig Halle judgment.

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55 See e.g. Commission decision 94/374/EC of 2 February 1994, on Sicilian Regional Law No 23/1991 concerning extraordinary assistance for industry and Article 5 of Sicilian Regional Law No 8/1991 concerning, in particular, financing for Sitas, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31994D0374&from=EN.

56 Judgment in Case T-445/05 *Associazione italiana del risparmio gestito και Fineco Asset Management v Commission* ECLI:EU:T:2009:50, para. 145.

5.2. Existence of aid to CAMED

(151) Since PAN received and will continue to receive public support to fund the interventions agreed with CAMED, CAMED did not have to cover the entire investment costs like any other private operator of ship-repairing facilities in the market. The Commission finds that by providing the dry-docks to CAMED below market rates Italy granted a selective economic advantage in favour of CAMED.

5.2.1. Imputability and State resources

(152) Since PAN is a public entity that forms part of the State administration (even if it is considered as acting as a private undertaking, see recital (117)), the Commission finds that the measures are imputable to the State. In cases where a public authority grants aid to a beneficiary this transfer is imputable to the State, even if the body in question enjoys legal autonomy from other public authorities.

(153) State resources include all resources of the public sector, including resources of intra-State entities (decentralised, federated, regional or other). In addition, waiving revenue which would otherwise have been paid to the State constitutes a transfer of State resources. If public authorities provide goods or services at a price below market rates, that implies a waiver of State resources (as well as the granting of an advantage).

(154) Therefore, the Commission finds that by providing the dry-docks to CAMED below market rates, PAN waived State resources.

5.2.2. Selectivity

(155) To be considered State aid, a measure must be specific or selective in that it favours only certain undertakings and/or the production of certain goods. Italy claims that the measures have a general, cross-cutting scope, because in line with the public model under which the Italian legislature has organised the ports sector, all undertakings (not just CAMED) operating in the port area in all Italian ports (not just Naples) and in all economic sectors (not just shipbuilding) have 'benefitted' from 'aid' that is identical to that which CAMED has allegedly enjoyed. The Commission disagrees with this assessment for the reasons below.

(156) First, since the concession contract was signed specifically with CAMED, the advantage is presumed to have been granted to CAMED in a selective manner. In individual aid measures, the existence of economic advantage leads to the presumption that the measure is selective.[57] Secondly, and in any event, the measures are selective because they favour CAMED in relation to other undertakings in a comparable legal and factual situation. As demonstrated in section 5.2.3 of the present Decision, CAMED can operate the shipbuilding and ship repair facilities in the port of Naples by paying only a small fraction of their cost. By contrast, other shipyards (in other ports or outside the area of ports), which operate non-State-owned facilities and thus fall outside the scope of Ministerial Decree No 595/1995, must in principle bear themselves the full cost of setting up their own shipbuilding and ship repair facilities, which they operate to provide such services. Finally, the Commission notes that the measures are selective also because they favour an operator of shipbuilding and ship repair facilities in comparison to operators of manufacturing or repair facilities in other sectors of the economy. The latter are in a

[57] Judgment in Case T-314/15 *Greece v Commission* ECLI:EU:T:2017:903, para. 79.

comparable factual and legal situation since they also exercise their economic activity on the basis of the manufacturing or repair facilities they operate. However, contrary to CAMED, they have to pursue their economic activity without benefitting from below-cost rental prices for their facilities.

5.2.3. Economic advantage

(157) As regards CAMED, the Commission notes that the concession contract was not granted by means of an open tender but rather through a different type of procedure where other operators could present observations or alternative proposals against an individual application for a concession (sort of "opposition procedure", see recital (15)).

(158) The Commission also notes that the fee paid by CAMED in accordance with the 2004 Concession does not correspond to a market-conform fee. The land use fee paid by CAMED to the PAN is calculated on the basis of fixed legal parameters and amounts to around EUR 140 201.29 on average per year which for the concession period of 30 years would amount to around EUR 4.2 million[58]. That fee is determined on the basis of Decree No 595 of 15 November 1995 and takes into account the number of square metres of the public area to which the concession relates multiplied by a unit amount in euros, which is increased yearly on the basis of coefficient expressed as a percentage. The unit amount in euros varies according to the activities covered by the concession. One of the activities referred to in that decree is "shipyard activities" (i.e. shipping repairs/conversions). However, the activity of managing dry-docks that was also entrusted upon CAMED on the basis of the Concession is not mentioned in that decree.

(159) The Commission is of the view that the fee determined on the basis of the method above is merely a consideration for the occupation of State-owned property but does not take into account the actual subject and resulting economic value of the concession. Specifically, the fee does not take into account the fact that the concession allows CAMED not only to carry out ship-repair activities, but also the sole management of the State-owned dry-docks. This allows CAMED to charge other port operators wishing to carry out repair work on those docks a fee.[59]

(160) Moreover, the Commission notes that according to the 2004 Concession, CAMED undertook to carry out investments in the amount of EUR 24 610 420. According to the Italian authorities and CAMED, CAMED's investment programme in reality amounted to EUR 42 541 495 million (see recitals (80) and (100)).

(161) The Commission concludes that CAMED, as the manager and operator of the dry-docks (i.e. provider of ship-repair services) would be responsible for bearing the full costs of the renovation works. Alternatively, if the renovated facilities are put at its disposal, CAMED would be required to pay a (concession) fee that reflects at least the value of the investment made by the Italian State and PAN for the renovations. This is because CAMED uses the subsidised infrastructure for its lifespan, therefore at the end of the concession period the State will retain only a limited residual value.

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[58] This figure results from the extrapolation over a period of the 30 years of the average concession fee that CAMED already paid for the period 2004-2017.

[59] In particular, the fee paid by other port operators to CAMED covers: (i) the use of the dry-docks and (ii) the provision by CAMED of "associated services" such as entry, exit and maintenance of vessel in the dock, supply of electricity, compressed air, dock crane, monitoring and environmental safety.

(162) The Commission notes that only part of CAMED's investments concern the renovation of the dry-docks (see recital (100)). The remaining (major) part of the investments is directly incurred for the day-to-day operation and management of the facilities for which CAMED would in any event be responsible.

(163) Therefore, the investments in the amount of EUR 42 million that CAMED carried out for its own benefit (i.e. to cover costs that it would anyway be responsible to bear) is an additional private investment on top of all public interventions mentioned in Table 2 and cannot be considered as a contribution towards a market concession fee. Neither the part of this amount (EUR 11.1 million) carried out by CAMED for investments in docks (see recital (101) can be deemed as own contribution, since at the end of the concession contract no (or very minimal value) accrued to PAN, due to amortisation of all assets.

(164) Furthermore, as stated in the Opening Decision, the Commission had doubts whether a PSO was imposed on CAMED in the context of the Concession agreement. Italy had argued prior to the Opening Decision that, since dry-docks are used by CAMED for the provision of SGEI, any investment needed to provide that service represents a compensation for that service.

(165) Although after the Opening Decision Italy did not claim anymore that a PSO was imposed on CAMED, for the sake of completeness the Commission assesses in the following recitals whether the four Altmark conditions are cumulatively fulfilled with respect to the measures in support of CAMED.

(166) Regarding the first Altmark condition, the minimum criteria mentioned in recital (129) are not fulfilled. Specifically, the nature and scope of the public service obligation allegedly entrusted to CAMED has not been clearly defined. The obligation is defined in the Concession by mere reference to the generally phrased provision of Article 1.g of Ministerial Decree of 14 November 1994. Therefore, although it could be argued that the duration of the obligation is defined through the 30 year duration of the Concession, there is still no clear definition of the nature and scope of the alleged public service obligation for the reasons explained in recital (130) of the present Decision.

(167) In any event, with respect to whether the alleged public service obligations are suitable for designation as an SGEI, the Commission does not consider that CAMED is required to discharge obligations that can be defined as public service obligations. Indeed, the service (management of dry docks) is already provided and can be provided satisfactorily by other undertakings operating under normal market conditions. The service does not exhibit any special characteristics compared with those of private owners of ship-repairing services and managers of such facilities and it does not address any market failure. The Italian authorities have not provided evidence showing that CAMED provides an activity not provided in the market under comparable conditions of price, quality, continuity and access to the service. In addition, the subsidised facilities do not provide any general benefit for society but rather a mere service to ship owners in the area of Naples.[60]

(168) Regarding the second Altmark condition, the 2004 Concession does not explicitly provide any quantification or parameters established beforehand in an objective and transparent manner to calculate the amount of compensation that PAN should pay to

[60] See the 2011 SGEI Communication, paragraph 50.

CAMED in exchange for the obligation to grant open access to the dry-dock to any other ship-repairers. The 2004 Concession does not make any express link between that obligation and PAN's commitment to perform the Interventions at stake. Also, the 2004 Concession does not clearly identify the operating loss allegedly suffered by CAMED nor the amount of the Interventions.

(169) Moreover, the Commission notes that the funding of the Interventions as a compensation to CAMED for the obligation to grant open access to the dry-docks cannot exclude the risk of overcompensation as required by the third Altmark criterion. In fact, in the absence of any calculation or estimate of the operating loss allegedly incurred in discharging the PSO, it does not appear possible to verify that the amount of investments granted for the Interventions correspond to such operating loss, taking into account a reasonable profit.

(170) Regarding the fourth Altmark condition, the land concession was awarded to CAMED without a public procurement procedure and Italy never provided the necessary information to assess whether the amount of investments granted for the Interventions corresponds to the level of costs of a typical, well-run undertaking which grants open access to the dry-docks to any other ship-repairers.

(171) Therefore, the Commission finds that the four conditions are not cumulatively met; hence, the measures at hand entail an economic advantage to CAMED.

5.2.4. Distortion of competition and effect on trade

(172) Ship-repairing represents an economic activity in a sector open to competition and trade at Union level. Therefore, any advantage granted to CAMED is liable to distort competition and affect intra-Union trade.

5.2.5. Classification of the measures as existing aid

(173) For the reasons analysed in section 5.1.7 of this Decision regarding PAN, the Commission also considers that the measures in favour of CAMED cannot be considered as existing aid.

5.3. Compatibility

(174) The Commission finds that dry-docks are not transport infrastructures, but production facilities for shipyards as they are used for ship-building or ship-repairing and not for transport purposes. Therefore, the Commission is of the opinion that the measures cannot be assessed directly under Article 107(3)(c) TFEU as investment aid for transport infrastructure, as the Italian authorities claim (see recital (86)).

(175) The Commission also finds that the aid cannot be assessed on the basis of Article 107(2)(b) TFEU, concerning aid to make good the damage caused by natural disasters or exceptional occurrences. The Commission notes that aid can be found compatible under that Article only if very strict conditions are fulfilled, inter alia, that the aid only compensates for the damage directly caused by the event in question and does not result in overcompensation, which were not proved in this case.[61]

(176) Therefore, the Commission considers that the examination of the compatibility of the measures for PAN and for CAMED should be conducted first under the

[61] Commission decision SA.39622 (2014/N), Republic of Slovenia - Aid to make good the damage caused by glaze ice in Slovenia in January and February 2014 (all sectors except agriculture, forestry, fisheries and aquaculture).

Communication from the Commission - European Union framework for State aid in the form of public service compensation ("2011 SGEI Framework")[62].

(177) If the compatibility conditions set out in the 2011 SGEI Framework are not complied with, the Commission is of the view that the examination of the compatibility of the measures granted to PAN and CAMED could also be conducted under the State aid rules for the shipbuilding sector applicable at the time of the granting of each measure.

(178) The Commission finds that the date of grant of the individual aids to PAN is not the date of entry into force of Law No 413/1998, as Italy claims (see recital (85)). That law is too general and cannot confer on a beneficiary the legal right to receive the aid since it has not enumerated specific beneficiaries or the aid amounts[63]. Instead, the Commission finds that the right to receive the aid in question derives from the Ministerial Decree of 27 October 1999, adopted within the scope of the general framework set by Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001, which are the effective implementing acts of the measure, as required by Law No 413/1998.

(179) Pursuant to Article 9 of Law 413/1998, on the basis of a request by the relevant Port Authorities, article 1 of Ministerial Decree of 27 October 1999 provides for the adoption of an infrastructural works programme for the expansion, modernisation and redevelopment of ports and the allocation of resources set out in an annex thereto. According to that annex, the Ministry was to make available to PAN EUR 51.403 million (Italia lira 99.53 billion) for investment works for the dry docks in the Port of Naples. The amounts to be made available to all port infrastructural investment from 2001 until 2017 were set out in the annex to the Ministerial Decree of 2 May 2001, adopted also on the basis of Law 413/1998. In respect of PAN, this decree set the overall financing ceiling at EUR 102 million (Italian lira 197.5 billion). These decrees conferred on PAN, inter alia, the right to obtain the repayment by the Ministry of loans in respect of the port infrastructure projects set out in the annex to the ministerial decrees, including those relating to the dry docks at stake. These investments were already provided for at the time of the 2004 Concession to CAMED and the concession itself refers to these investments already set out in the 2001 Agreement. Accordingly, the following compatibility base could be applicable for the shipbuilding aid (regional aid for investment in upgrading or modernising existing yards with the objective of improving the productivity of existing installations) to PAN and CAMED:

(1) Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, which entered into force on 1 January 1999 until 31 December 2003;

(2) The 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011;

(3) The 2011 Framework on State Aid to shipbuilding, which was applicable to non-notified aid granted after 31 December 2011. The application of this Framework has been extended until 30 June 2014;

62 OJ C 8, 11.1.2012, p. 15–22.

63 See judgment in case C-245/16 *NEREA* ECLI:EU:2017:521, para. 32.

(4) The Guidelines on regional State aid for 2014-2020 as from 1 July 2014.

~~(180)~~ Italy has argued that the above compatibility base for aid to shipbuilding should not be applied as such and that compatibility should instead be assessed directly on the basis of Articles 107 TFEU, and in the light of other provisions of secondary law adopted in the sector of State aid[64]. Italy has mentioned the bombardments of the Second World War, earthquakes, the development of the economy of an assisted region and the modernisation and development of port infrastructure.

(181) According to the case-law, it is up to the Member State to show that the circumstances of a national measure are different from those envisaged in the relevant guidelines, and thus that the Commission should assess the measure directly under Article 107(3) TFEU.[65] To the extent that Italy argues the bombardments of the Second World War and earthquakes as a reason for deviating from the above guidelines, the Commission has already explained in recital (175) why the conditions of Article 107(2)(b) TFEU are anyway not fulfilled for the measures at issue. As regards the argument on modernisation and development of port infrastructure as a ground for assessing the measures directly under the Treaty, the Commission has also explained in recital (174) that dry-docks are not transport infrastructures and therefore they cannot be assessed directly under Article 107(3)(c) TFEU. Finally, as to Italy's argument on the development of the economy of the relevant assisted region, the Commission notes that such aid would not be assessed under the regional aid guidelines applicable at the time the measures were granted since aid to shipbuilding was governed by sectoral rules as presented in recital (176) a fact clearly acknowledged by each of the regional aid guidelines applicable at the time of granting the aid.[66] It also makes sense that aid on shipbuilding assets is assessed under the specific sectoral rules on shipbuilding rather than on the basis of the more general regional aid rules, as only the sectoral guidelines can cover the specific features of the sector and therefore address in the best way the common objective pursued by the aid.

5.3.1. Compatibility assessment of the aid to PAN

(182) One of the conditions to consider the aid compatible under the 2011 SGEI Framework is that the aid must be granted for a genuine and correctly defined SGEI as referred to in Article 106(2) TFEU. In addition, the SGEI should be entrusted through an act specifying the PSOs and the methods of calculating compensation, and the amount of compensation must not exceed what is necessary to cover the net cost of discharging the PSOs, including a reasonable profit.

(183) The arguments included in section 5.1.4 show that the Commission finds that Italy made a manifest error of appreciation in the definition of the public service imposed on PAN. In addition, the relevant acts do not give any indication of the amount of

64 Here Italy refers to Notice No 2003/C 317/06, OJ C 317, 30.12.2003, p. 11 and in particular to paragraph 12 which states that "aid to shipbuilding may be granted in accordance with Articles [107 and 108 TFEU] and all legislation and measures adopted on those bases."

65 Case C-431/14 P *Greece v Commission* EU:C:2016:145, paragraphs 70-72.

66 See point 8 (and footnote 9) of the Guidelines on national regional aid for 2007-2013, OJ C 54, 04.03.2006, p. 13: "(…) some other sectors [transport and shipbuilding] are also subject to specific rules which take account of the particular situation of the sectors concerned and which may totally or partially derogate from these guidelines", see point 2 of the Guidelines on national regional aid (2000-2006), OJ C 74 10.03.1998, p.9: "In addition, some of the sectors they cover are also governed by rules aimed specifically at the sectors in question".

compensation to be granted to PAN for the management of dry-docks or how such compensation should be calculated and therefore do not allow to conclude on whether any compensation granted is limited to what is necessary to cover the relevant costs incurred in discharging the alleged PSO. Furthermore, as explained in recital (130), the nature, duration and scope of the alleged public service obligations of PAN have not been clearly defined.

(184) Therefore, the Commission is of the opinion that the measures do not comply with all compatibility conditions and thus cannot be declared compatible under the 2011 SGEI Framework with regard to the aid to PAN.

(185) The Commission has also assessed whether the measures can be declared as compatible on the basis of the applicable shipbuilding rules.

(186) The Commission notes that, having regard to the granting acts of the aid (see recital (25) and (179)), the legal bases applicable to the various aid are the Council Regulation (EC) No 1540/98 and the Framework on State aid to shipbuilding, indicated as (i) and (ii) in recital (179)[67]. The Commission has verified below whether the conditions under each of the listed compatibility bases are respected.

(187) In order to be eligible for aid under the shipbuilding rules, the aid must be granted for investments in upgrading or modernising existing yards, not linked to a financial restructuring of the yard(s) concerned, with the objective of improving the productivity of existing installations (excluding mere replacements of depreciated assets).[68]

(188) The Italian authorities stated (see recitals (86)) that the alleged aid is not designed to promote an increase in the productivity of the existing installations in a shipyard, but rather to carry out specific maintenance of certain items of port infrastructure that are the sole property of the Italian state and to prevent them from becoming obsolete. The investments are therefore not eligible for aid under the shipbuilding rules.

(189) Furthermore, Italy has not demonstrated that the aid has an incentive effect, i.e. that an aid application has been submitted before the date of the start of works or that the aid is limited to support eligible expenditure as defined in the applicable regional aid guidelines (see recital (89)).

(190) The public funding already granted for this project (EUR 44 138 854.50, namely 76.42% of the total investment costs) exceeds the maximum permissible aid intensity for regional investment aid for shipbuilding facilities under all three subsequent Shipbuilding frameworks (which varied between 12.5% and 22.5% of the total investment costs depending on the regional aid status of the relevant region..

(191) In view of the fact that the above-mentioned compatibility conditions are not fulfilled, the Commission concludes that the aid measures in favour of PAN are not compatible with the internal market.

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[67] See (i) the Council Regulation (EC) No 1540/98 of 29 June 1998 establishing new rules on aid to shipbuilding, which entered into force on 1 January 1999 until 31 December 2003; (ii) the 2004 Framework on State aid to shipbuilding, which was originally applicable from 1 January 2004 until 31 December 2006, and was later prolonged twice until 31 December 2008 and until 31 December 2011.

[68] See Article 7 of the Council Regulation (EC) No 1540/98; paragraph 26 of the Framework on State Aid to Shipbuiling of 2003; recital 13 of Framework on State Aid to Shipbuilding of 2011; See also Commission decision on C21/2006 (ex N 635/2005) to be implemented by the Slovak Republic for Slovense lodenice Komarno, 2007/529/EC

5.3.2. Compatibility assessment of the aid to CAMED

(192) As demonstrated in section 5.2.3, Italy made a manifest error of appreciation in the qualification if ship-repair services to CAMED as a PSO. Furthermore, the relevant acts do not give any indication of the amount of compensation to be granted to CAMED for the obligation to keep open access to the dry-docks and therefore do not allow to conclude on whether any compensation granted does not exceed what is necessary to cover the relevant costs incurred in discharging the PSO. The Commission notes that considering the funding of the Interventions (in the amount of EUR 44 138 854.50 provided by the Italian State and EUR 13 621 000 provided by the own resources of PAN) as a compensation for the obligation imposed on CAMED to keep an open access to the dry-docks cannot exclude the risk of overcompensation (see recital (169)). Furthermore, as explained in recital (166), the nature and scope of the alleged public service obligations has not been clearly defined.

(193) Therefore, the Commission concludes that the measures cannot be declared compatible under the 2011 SGEI Framework with regard to the alleged aid to CAMED.

(194) As regards the compatibility of the aid to CAMED on the basis of the shipbuilding rules, the Commission notes that CAMED – as the manager and operator of the aided facilities – benefited from operating aid (in the form of reduced concession fees) aimed at reducing the expenditure that CAMED would have to bear. The State aid rules for the shipbuilding sector applicable at the time of the granting of each measure (see recital (179)) do not provide for operating aid to managers or users of shipbuilding facilities. Therefore, the Commission concludes that the aid to CAMED cannot be declared as compatible aid.

6. CONCLUSION ON THE EXISTENCE AND COMPATIBILITY OF AID

(195) The Commission finds that Italy has unlawfully put into effect investment aid to PAN in breach of Article 108(3) TFEU.

(196) The Commission also finds that Italy has unlawfully put into effect operating aid to CAMED in breach of Article 108(3) TFEU.

(197) Since no grounds can be identified for finding the measures to be compatible with the internal market, they must be held to be incompatible.

7. RECOVERY

7.1. Limitation period

(198) The Commission notes that according to the Italian authorities, the public support under assessment cannot be recovered as the statute of limitations established by Article 17 of the Procedural Regulation has expired.

(199) Article 17(1) states that "the powers of the Commission to recover aid shall be subject to a limitation period of 10 years". However, according to Article 17(2): "the limitation period shall begin on the day on which the unlawful aid is awarded to the beneficiary either as individual aid or as aid under an aid scheme. Any action taken by the Commission or by a Member State, acting at the request of the Commission, with regard to the unlawful aid shall interrupt the limitation period. Each interruption shall start time running afresh. The limitation period shall be suspended for as long

as the decision of the Commission is the subject of proceedings pending before the Court of Justice of the European Union".

(200) The Commission takes the view that the arguments of the Italian authorities cannot be accepted. Indeed, the Commission's actions in sending a request for information in March 2006, two preliminary assessment letters to the complainant in 2013 and 2014 and requests for further information to the Italian authorities (see recitals (3), (5) and (6)) interrupted the limitation period and therefore the statute of limitations period of 10 years has not expired.

7.2. Legitimate expectations and legal certainty

(201) Pursuant to Article 16(1) of the Procedural Regulation, any aid found to be incompatible with the internal market must be recovered.

(202) Article 16(1) provides, however, that "[t]*he Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law*". In this respect, the Court of Justice established that the Commission is required to take into consideration on its own initiative exceptional circumstances that provide justification, pursuant to Article 16(1), for it to refrain from ordering the recovery of unlawfully granted aid where such recovery is contrary to a general principle of Union law.[69]

(203) The Commission notes that Italy and CAMED put forward in their comments to the Opening Decision the argument that the Commission's decision is unlawful and represents a breach of the general principles of sound administration, legal certainty and legitimate expectations (see recitals (52)-(54) and (91)).

(204) According to the case-law of the Court of Justice, the right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the Union.[70] These assurances, according to the case-law, can be either explicit (e.g. direct communication to Member State on the validity of a certain measure)[71] or implicit (e.g. undue delay in the proceedings, approval of similar schemes in the past).[72] A legitimate expectation that the aid granted is lawful cannot, barring exceptional circumstances, be entertained unless the aid has been granted in compliance with the notification requirements of Article 108 TFEU.[73]

(205) The Commission finds that there is no breach of the principle of legitimate expectation in the case at hand. Indeed, as explained in recitals (147) to (150), the aid was never notified to the Commission by the Italian authorities. Furthermore, the Commission has not given any precise, unconditional and consistent assurances about the measure being no-aid or compatible aid.[74]

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69 Judgment in Case 223/85 *RSV v Commission* ECLI:EU:C:1987:502.

70 Judgment in Case C-537/08 P *Kahla Thuringen* Porzellan ECLI:EU:C:2010:769, para. 63 and case-law cited.

71 Judgment in Case 267/85 *Van den Bergh en Jurgens BV en Van Dijk Food Products (Lopik) BV* ECLI:EU:C:1987:121, para. 44.

72 Judgment in Case 223/85*Rijn Schelde Verolme*, ECLI:EU:C:1987:502.

73 Judgment in Joined Cases C-630/11 P to C-633/11 P *HGA Srl and others* ECLI:EU:C:2013:387, para. 134.

74 See, on the definition of the principle of legitimate expectation, the judgments of the Court of Justice in Cases 265/85 *Van den Bergh en Jurgens v Commission* ECLI:EU:C:1987:121, para. 44, and C-152/88

(206) The fundamental requirement of legal certainty, also covered by Article 16 of the Procedural Regulation, is designed to ensure the foreseeability of legal situations and relationships governed by Union law and hence has the effect of preventing the Commission from indefinitely delaying the exercise of its powers.[75]

(207) The Commission is of the opinion, in the light of the highly specific circumstances of this case, that the principle of legal certainty has not been taken proper account of vis-à-vis the Italian authorities.

(208) The Commission finds that there is a body of evidence to suggest, (i), that the Commission delayed exercising its powers when it came to examining the measures at issue and, (ii), that the implicit indication given by the Commission to the Italian authorities before the reopening of the file in 2013 could have misled them as to the lawfulness of those measures.[76]

(209) Firstly, the Commission delayed exercising its powers when it came to examining the measures at issue: the Commission sent a request for information in March 2006, to which Italy replied on 3 April 2006 providing exhaustive information which should have led the Commission to conclude that the measure under scrutiny was in fact public support. Nevertheless, the Commission services did not follow up that letter by any means and furthermore the file was closed. The file was reopened only seven years later, after a formal complaint in February 2013. The Opening Decision was issued ultimately in June 2016.

(210) Secondly, the implicit indication given by the Commission to the Italian authorities before the reopening of the file in 2013 could have misled those authorities as to its lawfulness. By their letter dated 3 April 2006, the Italian authorities claimed that the dry docks at stake were public infrastructure and as such, not subject to Shipbuilding Guidelines. Nevertheless, the information which the Italian authorities provided to the Commission should have led the Commission to conclude that the measure under scrutiny was in fact public support to shipbuilding and ship-repair facilities that constituted State aid, which ought to have been notified to the Commission. So, even if the Commission was made aware of the nature of the aided investment project, it did not take any further actions or undertake any further investigation during the 2006-2013 period, giving Italy the implicit signal that their characterisation of dry docks as port infrastructure was correct.

(211) The seven years which elapsed between the reply from the Italian authorities to the Commission's letter and the further request for information sent by the Commission to Italy, could have led Italy - in this specific case - to assume that, due to Commission's silence, Italy's original position, according to which the measure fell outside the remit of State aid control and hence no notification was required, had

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Sofrimport v Commission ECLI:EU:C:1990:259, para. 26; judgments of the Court of First Instance in Cases T-290/97 *Mehibas Dordtselaan v Commission* ECLI:EU:T:2000:8, para. 59, and T- 223/00 *Kyowa Hakko Kogyo v Commission* ECLI:EU:T:2003:194, para. 51; see, on the absence of a legitimate expectation on the part of recipients of aid unlawfully implemented, the judgment of the Court of Justice in Joined Cases C-183/02 P and C-187/02 P *Demesa and Territorio Histórico de Álava v Commission* [ECLI:EU:C:2004:701, paras. 44 and 45, and the case law cited therein.

75 See the judgment of the Court of Justice in Joined Cases C-74/00 P and C-75/00 P *Falck and Acciaierie di Bolzano v Commission* ECLI:EU:C:2002:524, para. 140.

76 See Commission Decision of 20 November 2006 on the aid scheme introduced by France on the basis of Article 39 CA of general tax law (G.I.E. fiscaux), OJ L 112, 30.04.2007, p.41 and Judgment in Case C-408/04 P *Salzgitter* , ECLI:EU:C:2008:236, para. 106.

been implicitly endorsed by the Commission. While it is true that, in principle, the absence of a reaction by the Commission to the answer of a Member State cannot, in itself, constitute an infringement of the principle of legal certainty, it is nevertheless clear that this particular case does not merely involve inaction on the part of the Commission, but also an implicit indication given by the Commission services to Italy, resulting in an exceptional combination of circumstances. Consequently, (i) the seven-year delay in the initial Commission's decision-making process (by not following up the initial letter of the Italian authorities dated 3 April 2006), in combination with (ii) the Commission's inaction that, in the specific circumstances of the present case, could have been interpreted as a tacit acceptance of the Italian authorities' position concerning the identification and interpretation of the legal framework for the assessment of the measure, could have left room for doubt as to the lawfulness of the measures and prevented the Italian authorities from taking steps to bring the measures concerned in line with State aid rules in a timely fashion.

(212) Therefore, on the basis of the specific circumstances of the present case and of the elements above taken together, in order to ensure the foreseeability of legal situations and relationships governed by Union law, the Commission concludes that the specific circumstances of the present case mean that Italy shall not be required to recover any incompatible aid referred to in section 5 in favour of PAN or CAMED that was granted before the request for information sent by the Commission to Italy on 28 February 2013, by which the present case has been reopened.

(213) As regards the aid granted after 28 February 2013, any incompatible aid is recoverable from its recipients. Indeed, the Commission finds that after the detailed request for information were sent on 28 February 2013, the Italian authorities were fully informed of the Commission's doubts regarding the lawfulness and compatibility of the aid.

(214) However, as noted in recital (178) above, the Commission finds that all the measures at stake were granted to PAN before 28 February 2013, the date of the request for information sent by the Commission to Italy after the 2013 formal complaint. CAMED was also granted all the measures at stake prior to 28 February 2013, since it obtained the legal right to receive the aid by virtue of the 2004 Concession agreement. Therefore, none of the aid measures that have been the subject-matter of the present case was granted after 28 February 2013.

7.3. Aid to be recovered from PAN and CAMED

(215) In the light of the specific circumstances presented in this case, as explained in recitals (207) to (211) and the conclusion in recital (214), Italy shall not recover any amount from either PAN or CAMED. For the same reasons, the present decision does not preclude future payments concerning the specific amounts of aid that were already granted to PAN (by virtue of the Ministerial Decree of 27 October 1999, adopted within the scope of the general framework set out in Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001) and to CAMED (by virtue of the 2004 Concession agreement) prior to 28 February 2013.

(216) Nevertheless, should Italy contemplate the granting of other aid measures in the Port of Naples, Italy would obviously be obliged under Article 108(3) TFEU to notify such measures to the Commission for assessment of their compatibility with the internal market (except, of course, if such measures are block-exempted from notification).

HAS ADOPTED THIS DECISION:

Article 1

(1) The State aid in the form of investment aid from Italy in favour of PAN granted through the Ministerial Decree of 27 October 1999, adopted within the scope of the general framework set out in Law 413/1998, read in conjunction with the Ministerial Decree of 2 May 2001, unlawfully put into effect by Italy in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

(2) The State aid in the form of unduly low concession fees from the Port Authority of Naples in favour of CAMED, unlawfully put into effect by Italy through the 2004 Concession agreement signed by CAMED and PAN on 29 July 2004, in breach of Article 108(3) of the Treaty on the Functioning of the European Union, is incompatible with the internal market.

Article 2

Italy is not obliged to recover the aid referred to in Article 1.

Article 3

This Decision is addressed to the Italian Republic.

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, 20.9.2018

For the Commission
Margrethe VESTAGER
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION