



EUROPEAN COMMISSION

Brussels 15.11.2019  
C(2019) 8067 final

PUBLIC VERSION

This document is made available for  
information purposes only.

**Subject: State Aid SA.38399 (2019/C, ex 2018/E) – Italy  
Corporate Taxation of Ports in Italy**

Excellency,

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

## **1. PROCEDURE**

### *The procedure before the proposal of appropriate measures*

- (1) On 3 July 2013, the Commission services sent a comprehensive questionnaire to all Member States in order to collect information on the issue of corporate taxation of ports as well as possible other forms of State support for different types of investment or the operation of ports.
- (2) The Italian authorities sent their answers to the above-mentioned questionnaire by letter dated 12 September 2013 and by letter dated 1 October 2013. By letters dated 24 January 2014 and 2 September 2014, the Commission services requested further information, which was submitted by Italy by letters of 14 February 2014, 11 September 2014 and 29 September 2014. By letter dated 14 November 2014, the Italian authorities submitted further information.
- (3) By letter of 27 April 2017, the Commission services sent an additional request for information to the Italian authorities, to which the latter responded on 24 May 2017.

Onorevole Luigi Di Maio  
Ministro degli Affari esteri e della Cooperazione Internazionale  
P.le della Farnesina 1  
I - 00194 Roma

- (4) By letter dated 30 April 2018, the Commission services, in accordance with Article 21 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (hereafter Procedural Regulation)<sup>1</sup>, informed Italy of their preliminary assessment of the tax provisions in subject as to their State aid qualification and compatibility with the internal market and invited the Italian authorities to present their observations.
- (5) On 22 May 2018 and 27 June 2018, meetings between the Commission services and the Italian authorities were held.
- (6) By letter dated 3 July 2018, Italy replied to the Commission letter dated 30 April 2018. Further information was provided by Italy by letter dated 10 September 2018.

*The Commission's proposal of appropriate measures and the response of the Italian authorities*

- (7) The Commission proposed appropriate measures on 8 January 2019 pursuant to Article 22 of the Procedural Regulation. The Commission invited Italy to adopt measures that would ensure that port authorities that carry out economic activities are subject to corporate tax in the same manner as other undertakings (recital 120). The Italian authorities were invited to inform the Commission, in writing and within two months from the receipt of the proposal, that Italy accepts, pursuant to Article 23(1) of the Procedural Regulation, unconditionally, unequivocally and in its entirety the proposal for appropriate measures (recital 121).
- (8) By letter dated 7 March 2019, Italy rejected the Commission proposal, citing the following reasons:
  - *“According to the Italian Republic, there are in fact serious legal arguments which do not appear to have been duly taken into account by the Commission's letter, also due to the peculiarity of the Italian system compared to other countries that were affected by similar decisions (Belgium, France, Spain ).”*
  - *“In fact, it is worth highlighting that the majority of Italian ports are far from competing, even potentially, within European markets and that almost all ports do not handle significant commercial relations with foreign countries, as emerges from the data analysis of traffic of the Port System Authorities.”*
  - *It should also be noted that, unlike northern European ports, all of which are competitors in the EU, Italian ports, due to their proximity to North Africa, where development is taking place that follows very different rules and investment dynamics than those established in the EU, suffer a ruthless competition (a sensational case is taking place in the port of Gioia Tauro, where the terminal company has reduced the investments to move its*

---

<sup>1</sup> 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.

*business to Tanger), also due to the labour law that allows it to support enormously lower costs than those of companies operating in Italy, generating a very marked competitive asymmetry.”*

*- “To this it should be added that in these geographical areas there is a strong development of vast logistical areas of production with subsidized regimes in terms of trade / customs clearance, investments (subsidized loans and grants) and taxation (Free Trade Zones, Special Economic Zones, etc.), which are potential elements of distortion of competition, given the irreconcilability of their regulation with Community rules.”*

*“Given the above, pursuant to Article 23, paragraph 2, of the Rules of Procedure, and in accordance with the requirements of point 21 of the letter in question, the Italian Republic currently considers that it cannot accept the Commission's proposal.”*

- (9) On 2 April 2019 and 7 May 2019, further meetings between the Italian authorities and the Commission services took place. In these meetings, Italy consistently repeated the arguments outlined above and did not agree to adopt measures that would ensure that port authorities carrying out economic activities are subject to corporate tax in the same way as other undertakings.

## **2. DESCRIPTION OF THE MEASURE**

### *The Regulation of Ports in Italy*

- (10) Law 84/1994 regulates the tasks of Port System Authorities (hereafter referred to as PSA) in Italy, their financial resources, their operations, as well as the provisions for granting concessions<sup>2</sup>.
- (11) Article 6(1) of Law 84/1994 specifies that 15 PSA are established in Italy. The ports administered by the 15 PSAs are listed in Annex A of Law 84/1994 and are the following:
- PSA of the Western Ligurian Sea: Genova, Savona and Vado Ligure;
  - PSA of the Eastern Ligurian Sea: La Spezia and Marina di Carrara;
  - PSA of the Northern Tyrrhenian Sea: Livorno, Capraia, Piombino, Portoferraio, Rio Marina and Cavo;
  - PSA of the Central-Northern Tyrrhenian Sea: Civitavecchia, Fiumicino and Gaeta;
  - PSA of the Central Tyrrhenian Sea: Napoli, Salerno and Castellamare di Stabia;
  - PSA of the Southern Tyrrhenian and Ionian Seas and of the Strait: Gioia Tauro, Crotone, Corigliano Calabro, Taureana di Palmi, Villa San Giovanni, Messina, Milazzo, Tremestieri, Vibo Valentia and Reggio Calabria;

---

<sup>2</sup> Legge 28 gennaio 1994, n. 84

- PSA of the Sea of Sardinia: Cagliari, Foxi-Sarroch, Olbia, Porto Torres, Golfo Aranci, Oristano, Portoscuso-Portovesme and Santa Teresa di Gallura;
- PSA of the Western Sicilian Sea: Palermo, Termini Imerese, Porto Empedocle and Trapani;
- PSA of the Eastern Sicilian Sea: Augusta and Catania;
- PSA of the Southern Adriatic Sea: Bari, Brindisi, Manfredonia, Barletta and Monopoli;
- PSA of the Ionian Sea: Taranto;
- PSA of the Central Adriatic Sea: Ancona, Falconara, Pescara, Pesaro, San Benedetto del Tronto and Ortona;
- PSA of the Central-Northern Adriatic Sea: Ravenna;
- PSA of the Northern Adriatic Sea: Venezia and Chioggia;
- PSA of the Eastern Adriatic Sea: Trieste and Monfalcone.

*Tasks of the Port System Authorities*

- (12) Article 6(4) entrusts the above-mentioned PSA with, among others, the following tasks:
- Strategic management, planning, coordination, regulation, promotion and control of port operations and services; the authorisation of concessions; as well as other commercial and industrial activities carried out in the ports; and in the territorial districts.
  - Ordinary and extraordinary maintenance of common parts within the territory of the ports, including maintenance of the seabed;
  - The attribution and oversight of activities aimed at providing paid-for services of general interest to port users other than those defined in Article 16(1) (see below).
- (13) According to Article 6(10) of Law 84/1994, the activities mentioned above shall, where applicable, be assigned by the PSA in the form of concessions awarded by public tender.
- (14) PSA may not perform certain port or port-related operations (as defined in Article 16(3) of Law 84/1994) or activities closely connected to them, either directly or through participation in a company. However, Law 84/1994 does not rule out the performance by PSA of other services (pilotage, bunkering, mooring, towage, collection of waste), which, according to EU law are considered as port services<sup>3</sup>.

---

<sup>3</sup> See Article 1(2) of the Regulation 2017/352 of the European Parliament and of the Council establishing a framework for the provision of port services and common rules on the financial transparency of ports, OJ L 57/1, 3.3.2017.

- (15) According to Article 6(5) of Law 84/1994, PSA are non-economic public bodies of national importance with special status and are provided with administrative, regulatory, budgetary and financial autonomy.

*Financial Resources of Port System Authorities*

- (16) According to Article 13(1) Law 84/1994, the revenues of PSA are made up of:
- Concession fees for state-owned areas and quays included in the port area as well as authorisation for port operations;
  - Revenue from taxes on goods unloaded and loaded;
  - Contributions by the regions, local authorities and other public bodies;
  - Miscellaneous revenue;
  - Port fees.

*Port Operations and Carrying-Out of Port Operations*

- (17) Article 16(1) of Law 84/1994 states that port operations consist of loading, unloading, transshipment, storage and general movement of goods and any other material, carried out within ports. The PSA shall govern and supervise the performance of port operations and port services, and the application of the relevant fees. Port services refer to specialized, complementary and accessory services to port operations. Port services allowed are identified by the PSA, or, where not established, by the maritime authorities, through a specific regulation to be issued in accordance with binding criteria established by the Minister of Transport and Navigation.

*Criteria for Granting Authorisations to Perform Port Operations and for Defining Fees for Authorisations*

- (18) According to Article 16(4) Law 84/1994, the Minister of Transport and Shipping, by means of a decree, shall determine:
- Personal, technical and organisational requirements, the financial and professional capacity of operators and applicant undertakings able to carry out the activities required;
  - The criteria, procedures and deadlines for issuing, suspending and revoking authorisations;
  - The parameters for defining the minimum and maximum amounts of the annual fees and the security deposits in relation to the duration and specific features of the authorisation, taking account the volume of investments and the activities to be carried out.
- (19) The fees for the port operations shall be made public. Authorised undertakings must notify the PSA of the fees they intend to impose on users as well as any subsequent changes (Article 16(5) Law 84/1994). The duration of the authorisation shall be based on the operational programme

submitted by the undertaking or, where the authorised undertaking is also the holder of a concession (see below), the authorisation shall coincide with the duration of the concession. The authorisation may be renewed in conjunction with new operational programmes or following the renewal of the concession (Article 16 (6) Law 84/1994).

#### *Granting of Concessions and Setting of Concessions Fees*

- (20) Article 18 of Law 84/1994 lays down the provisions for the granting of concessions and the establishment of concession fees to be paid by the concessionaires.
- (21) The PSA shall grant concessions of State-owned areas and quays in the territory of the port to undertakings for the purposes of carrying out port operations, without prejudice to the use of State-owned property by public administrations for the discharge of functions relating to maritime and port activities. In addition, the PSA shall grant concessions for the execution and management of works connected with maritime and port activities at sea, in water ways outside of the breakwaters, as well as for the provision of port services including the construction of facilities to be used for loading and unloading, tailored to the functions of the sea port (Article 18(1) Law 84/1994).
- (22) The concessions shall be granted after the Minister for Transport and Shipping, in cooperation with the Minister of Finance, has established the relevant fees, in proportion to the port traffic in that area, by decree on the basis of appropriate forms of publication.
- (23) Article 18(1) of Law 84/1994 specifies that the above-mentioned decree shall also indicate:
  - The duration of the concession, the supervisory and inspection powers of the authorities in issuing concessions, the terms of the renewal of the concession and the concession of facilities to a new concessionaire;
  - The minimum fees the concessionaires are required to pay.
- (24) Concessions may include the construction of infrastructure work (Article 18(5)).
- (25) Article 18(6) a) explains that in order for concessions to be granted, concession applicants must submit a business plan, supported by appropriate guarantees, designed to increase port traffic and productivity.

#### *The System of Corporate Income Taxation in Italy*

- (26) Italian income tax is regulated in the Presidential Decree 917 of 22 December 1986: Testo Unico delle Imposte sui Redditi (Consolidated Tax Act, hereafter referred to as TUIR)<sup>4</sup>.
- (27) Title II of TUIR lays down the rules for the taxation of corporate income.

---

<sup>4</sup> TUIR Testo Unico delle Imposte sui Redditi, D.P.R., 22/12/1986 n° 917, G.U. 31/12/1986

- (28) Corporate income tax in Italy (IRES) is a tax whose taxable base is made up of the total income made by the entity (Article 81 TUIR). The standard rate is 24%.
- (29) Taxable entities, regardless of their legal form, are also subject to the Regional Tax on Production Activities (IRAP), whose taxable base is the net value of production deriving from the regular exercise of an independently run activity. IRAP is a non-personal tax. The standard rate of this tax is 3.90%.

*Articles 73 and 74 TUIR*

- (30) Article 73(1) TUIR subjects the following entities to corporate income tax:
- Joint-stock companies and limited partnerships, limited liability companies, cooperative companies and mutual insurance companies, as well as European companies pursuant to Regulation (EC) no. 2157/2001 and the European Cooperative Societies under the regulation (CE) n. 1435/2003 resident in the territory of the State;
  - Public and private entities other than companies, as well as trusts, residing in the State, which have as their exclusive or principal object the exercise of commercial activities;
  - Public and private entities other than companies, trusts that do not have as their exclusive or principal object the exercise of commercial activity as well as the undertakings for collective investment of savings, resident in the territory of the State;
  - Companies and institutions of any kind, including trusts, with or without legal personality, not resident in the territory of the State.
- (31) Article 74 of TUIR introduces special provisions for State and public bodies and defines activities that are not considered as commercial activities:
- State bodies and administrations, including autonomous administrations, and, where they have legal personality, municipalities, consortia of local bodies, associations and bodies administering public property, mountain communities, provinces and regions shall not be liable for tax.
  - The following shall not constitute a commercial activity:
    - The performance of public functions by public bodies;
    - The exercise of social security, welfare and health activities by public bodies set up exclusively for this purpose, including local health authorities as well as the exercise of social security and welfare activities by private entities administering statutory welfare schemes.

### *The Taxation of Port System Authorities in Italy*

- (32) PSA in Italy are subject to the Regional Tax on Production Activities (IRAP) as explained under (29) above<sup>5</sup>.
- (33) However, PSA in Italy are not subject to corporate income tax (IRES).
- (34) The corporate income tax exemption for the Italian PSA is the measure tackled by the present decision. It is based on the Article 74 of TUIR described under (31) above, as interpreted by the Italian authorities.

### **3. POSITION OF THE ITALIAN AUTHORITIES**

#### *The Position of Italy with regard to the Corporate Tax Exemption of Port System Authorities*

- (35) According to the Italian authorities, there are no privately owned ports in Italy. PSA belong to the public administration. Italy argues that as such, they fall under the provisions of Article 74 of TUIR as described under (31) above and are therefore not subject to corporate income tax.
- (36) Moreover, Italy claims that PSA do not exercise commercial activities, but only perform official regulatory and monitoring functions over the activities carried out by private undertakings operating in the ports. These private port service providers that operate in the ports on a commercial basis are liable to corporate income tax.

### **4. ASSESSMENT OF THE MEASURE**

#### *Existence of State Aid under Article 107(1) TFEU*

- (37) Under Article 107(1) TFEU, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is incompatible with the internal market if it affects trade between Member States.

#### *The Presence of Undertakings*

- (38) According to settled case-law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed<sup>6</sup>. The fact that an entity does not seek to make profit is not decisive to establish if it is an undertaking or not<sup>7</sup>. The fact that it is publicly owned is not decisive, either.
- (39) As clarified by the European Courts, "*any activity consisting in offering goods and services on a given market, that is, services normally provided for remuneration is an economic activity. The essential characteristic of*

---

<sup>5</sup> See Article 2, Article 3 (1) e-bis), and Article 10-bis of Legislative Decree No 446 of 15 December 1997

<sup>6</sup> See case C-41/90 *Höfner c. Macroton GmbH* [1991] ECLI:EU:C:1991:161, paragraph 21.

<sup>7</sup> See case C-49/07 *MOTOE* [2008], ECLI:EU:C:2008:376, paragraphs 27 and 28.



remuneration lies in the fact that it is consideration for the service in question"<sup>8</sup>. Also non-profit entities can offer goods and services on a market<sup>9</sup>.

- (40) When it comes to the construction and exploitation of public infrastructures, the European Courts<sup>10</sup> have made clear that it is the future use of the infrastructure, i.e. its economic exploitation or not, that determines whether the funding of the construction of such infrastructure falls within the scope of EU State aid rules or not<sup>11</sup>.
- (41) In accordance with this case-law, the Commission established in a series of decisions that the construction and commercial exploitation of port infrastructures constitute economic activities<sup>12</sup>. For example, the commercial exploitation of a port or airport terminal by making it available to users against the payment of a fee constitutes an economic activity<sup>13</sup>. Consequently, public funding of port infrastructure favours an economic activity and is in principle subject to State aid rules<sup>14</sup>.
- (42) Conversely, investment for infrastructure that is necessary to perform activities that fall under the responsibility of the State in the exercise of its public powers is not subject to State aid control. Examples for such non-economic activities are: (a) Maritime traffic control; (b) Firefighting; (c) Police; (d) Customs<sup>15</sup>. Only infrastructures that form part of the essential functions of the State are non-economic in nature.

---

<sup>8</sup> See joined cases C-622/16 P C-624/16 P, *Scuela Elementare Montessori v. Commission, Commission v. Scuela Elementare Montessori and Ferraci* [2018], ECLI:EU:C:2018:873, paragraph 104 and the case-law cited therein.

<sup>9</sup> Joined cases 209/78 to 215/78 and 218/78 *Van Landewyck* [1980] ECLI:EU:C:1980:248, paragraph 21, case C-244/94 *FFSA and others* [1995] ECLI:EU:C:1995:392; case C-49/07 *MOTOE* [2008] ECLI:EU:C:2008:376, paragraphs 27 and 28. See also the 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, paragraphs 7 to 10 and 12.

<sup>10</sup> Joined cases T-455/08 and T-443/08 *Flughafen Leipzig-Halle GmbH and Others v. Commission* [2011] ECR II-01311, confirmed by the ECJ, Case C-288/11 P *Mitteldeutsche Flughafen AG and Others v. Commission* [2012] ECR I-0000, ECLI:EU:C:2012:821; Case T-128/89 *Aéroports de Paris v. Commission* [2000] ECR II-3929, confirmed by the ECJ, Case C-82/01P [2002] ECR I-9297, ECLI:EU:C:2002:617

<sup>11</sup> Joined cases T-455/08 and T-443/08 *Flughafen Leipzig-Halle GmbH and Others v. Commission* [2011] ECR II-01311, ECLI:EU:C:2012:821.

<sup>12</sup> See e.g. Commission Decision of 15 December 2009 in State Aid case no. N 385/2009 – *Public financing of port infrastructure in Ventpils Port*, OJ C 72 of 20.03.2010; Commission Decision of 15 June 2011 in State aid case no. 44/2010 *Public financing of port infrastructure in Krievu Sala – Latvian Republic*, OJ C 215, 21.7.2011, p. 19; Commission Decision of 22 February 2012 on State aid case no. SA.30742 (N/2010) - *Lithuania – Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda*, OJ C 121, 26.4.2012, p. 1.

<sup>13</sup> See e.g. Commission Decision of 18 September 2013 in State Aid case no. SA.36953 (2013/N) – *Spain – Port Authority of Bahía de Cádiz*, OJ C 335, 16.11.2013, p. 1.

<sup>14</sup> Commission Decision of 27 March 2014 on State aid SA.38302 — *Italy — Port of Salerno*, OJ C 156, 23.5.2014; Commission Decision of 22 February 2012 on State aid SA.30742 (N/2010) — *Lithuania — Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda*, OJ C 121, 26.4.2012, p. 1; Commission Decision of 2 July 2013 on State Aid SA.35418 (2012/N) — *Greece — Extension of Piraeus Port*, OJ C 256, 5.9.2013, p. 2. See also the 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. 1–50.

<sup>15</sup> 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. 1–50.

- (43) According to the Italian authorities, PSA are non-economic public bodies of national importance with special status and are provided with administrative, organisational, regulatory, budgetary and financial autonomy (see 15 above). The Commission considers that the fact that PSA are publicly owned is not sufficient to conclude that PSA are not undertakings.
- (44) Taking into account the description of the activities and revenues of the Italian PSA above, the Commission considers that PSA are performing both economic and non-economic activities.
- (45) In particular, PSA perform certain non-economic activities as described under (42) above<sup>16</sup>. In carrying out these activities, PSA are not undertakings within the meaning of Article 107(1) TFEU.
- (46) However, PSA also carry out economic activities (see 39 above). They grant authorisations and concessions to private undertakings who then commercially operate the assets (namely port infrastructure, they allow the use of an asset against the payment of a fee). In addition, Article 16(3) of Law 84/1994 does not rule out the performance by PSA of pilotage, bunkering, mooring, towage, collection of waste for which it is not disputed that they are economic. Furthermore, granting access to ports against payment of port fees also entails an economic activity.
- (47) The Italian authorities contest the Commission finding that PSA perform economic activities. They consider that PSA merely grant administrative authorisations against the payment of fees, which would be comparable to taxes.
- (48) However, even if PSA are, as Italy claims, organized according to the “landlord model”<sup>17</sup>, the alleged fact that they would not carry out port services by themselves does not mean that they do not perform economic activities. As already indicated above, PSA acting as “landlords” rent out the port land and basic infrastructure to private users against the payment of fees. This is an economic activity like renting out any other asset against payment.
- (49) The Commission already clarified this in several cases involving State aid to Italian PSA<sup>18</sup>. In the cases concerning the exemption from corporate income tax of Belgian and French ports, the Commission made clear that: “*the renting out of public domain against remuneration is an economic activity*”<sup>19</sup>.

---

<sup>16</sup> 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. 1–50

<sup>17</sup> Case C-174/06, Ministero delle Finanze - Ufficio IVA di Milano v CO.GE.P. Srl., ECLI:EU:C:2007:634, par. 32-34.

<sup>18</sup> See Commission Decision of 19 December 2012 in State aid case SA.34940 *Port of Augusta*, OJ C 077, 17.3.2013; Commission decision of 27 March 2014 in State aid case SA.38302 *Investment Aid to the Port of Salerno*, OJ C 156, 23.5.2014; Commission Decision of 19 June 2015 in State aid case SA.39542 *Dredging and disposal of dredged materials in the Port of Taranto*, OJ C 259, 7.8.2015; Commission Decision of 28 June 2016 in State aid case SA.36112 *Port Authority of Naples and Cantieri del Mediterraneo S.p.A.*, OJ C 369, 7.10.2016.

<sup>19</sup> See Commission Decisions in case SA.38393 (§62) (« Dans sa pratique, la Commission a déjà considéré que la location du domaine public contre rémunération constitue une activité économique,

- (50) For VAT purposes, the ECJ also ruled that "*conferring by a landlord on a tenant, for an agreed period and in return for payment, of the right to occupy property*" (in this case State property) is an economic activity<sup>20</sup>.
- (51) Moreover, the Commission notes that the classification of port fees as "taxes" is not relevant for determining whether PSA are carrying out an economic activity<sup>21</sup>. What matters is that money is paid in exchange for a counterpart. Port fees are not paid by taxpayers like general taxes, but by users benefitting in return from a specific service. As the ECJ already noted in the case of the Spanish ports, "*port taxes*" (port fees) are "*comparable to fees charged for the use of port infrastructure*"<sup>22</sup>.
- (52) In addition, the Italian authorities do not claim that the fees charged would be merely symbolic or that they would be unrelated to the cost of the service provided.
- (53) Contrary to the claim of the Italian authorities that the above-mentioned fees have to be seen as taxes that are paid by the concessionaires to the State, the Commission therefore considers that these fees should be seen as prices for the renting out of public infrastructure and the granting of authorisations to perform port services to private operators.
- (54) The Italian authorities also argue that port authorities have no competitors and that there is no market in which they would operate. The Commission notes that this does not imply that the activities carried out by port authorities are non-economic, as implicitly evidenced by the *Aéroports de Paris* case-law<sup>23</sup>.
- (55) In conclusion, in the light of the above, PSA carry out a mix of non-economic and economic activities. To the extent that they carry out economic activities, they qualify as undertakings within the meaning of Article 107(1) TFEU.

#### *The Use of State Resources and imputability to the State*

- (56) To qualify as State aid, Article 107(1) TFEU requires that the measure be granted by a Member State or through State resources in any form whatsoever. Exemption from corporate tax is the result of the application of legal provisions as interpreted by the tax administration. They are thus imputable to the State. A loss of tax revenue is equivalent to consumption of State resources in the form of fiscal expenditure.

---

en particulier lorsque le cocontractant du port fournit des services portuaires à ses clients) and in case SA.38398 (§55) (« De manière générale, la location du domaine public contre rémunération constitue une activité économique, en particulier lorsque le cocontractant du port fournit des services portuaires à ses clients »).

<sup>20</sup> Case C-174/06, *Ministero delle Finanze - Ufficio IVA di Milano v CO.GE.P. Srl.*, ECLI:EU:C:2007:634, par. 32-34.

<sup>21</sup> Case C-49/07 *MOTOE*, ECLI:EU:C:2008:376, paragraphs 27 and 28.

<sup>22</sup> Case T-108/16, *Naviera Armas*, ECLI:EU:T:2018:145, paragraph 124.

<sup>23</sup> See *Aéroports de Paris* case-law C-82/01, ECLI:EU:C:2002:617, paragraphs 91 and 106: despite the existence of a legal monopoly on the supply side, ADP is regarded as supplier on the market of management services in the Paris airports "*while the ground handlers, who need the licence issued by ADP and the airport facilities in order to carry out their activity, constitute the demand side of that market.*"

- (57) As the European Court of Justice held in case *Banco Exterior de España*, a measure by which the public authorities grant to certain undertakings a tax exemption which, although not involving a cash transfer of State resources, places the persons to whom the tax exemption applies in a more favourable financial situation than other taxpayers, fulfils the notion of “State resources” within the meaning of Article 107(1) TFEU<sup>24</sup>.
- (58) Hence, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities forego revenue, which constitutes State resources. The Commission therefore takes the provisional view that the measure at issue involves a loss of State resources and is therefore granted through State resources.

#### *The Presence of an Advantage*

- (59) To qualify as State aid a measure also has to confer a financial advantage on the recipient. The notion of advantage covers not only positive benefits but also interventions, which, in various forms, mitigate the charges normally borne by an undertaking<sup>25</sup>.
- (60) Under the present measure, PSA are exempt from corporate income tax while other enterprises are in principle subject to corporate income tax. The tax exemption reduces the charges that are normally included in the operating costs of an undertaking carrying out economic activities. It provides an economic advantage to PSA in comparison to other enterprises, which could not benefit from such a tax advantage, although they may perform similar economic activities. It follows that the measure involves an advantage for PSA to the extent they carry out economic activities.
- (61) The Commission notes that the Italian authorities do not consider that PSA are entrusted with public service obligations and that the tax exemption would compensate PSA for costs incurred in performing public service obligations. The Commission also does not consider the criteria of the “Altmark judgment” to be met<sup>26</sup>. Furthermore, the measure at issue, which links the amount of aid to the profit made, is not related to or limited to the net costs of a public service task. Nor does it derive from a mandate given to the beneficiaries of the measure to carry out such a task.
- (62) Hence, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage. The Commission therefore takes the provisional view that the measure at issue provides an advantage to PSA.

#### *Distortion of Competition and Effect on Trade*

- (63) Under Article 107(1) TFEU, to be qualified as aid a measure must affect intra-EU trade and distort, or threaten to distort competition.

---

<sup>24</sup> Case C-387/92, judgment of 15.03.1994, ECLI:EU:C:1994:100, paragraph 14.

<sup>25</sup> Case 30/59 *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community* [1961] ECLI:EU:C:1961:2, p. 19. Case C-143/99 *Adria-Wien Pipeline* [2001] ECLI:EU:C:2001:598, paragraph 38.

<sup>26</sup> Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECLI:EU:C:2003:415.

*Existence of competition and competitive markets*

- (64) The Commission recalls first of all, that, in the context of the public consultation of interested parties on a draft Regulation in the ports sector, *'all stakeholders stressed the need for a stable and fair level playing field ... for (competition between ports) ... in the EU<sup>27</sup>.'*
- (65) It is true that, in certain Member States, the operation of basic port infrastructure is legally reserved to certain entities. In that regard, operators from other Member States cannot operate basic port infrastructure in these Member States, so that that particular market can, at least to a certain extent, be seen as not liberalized or open to competition. But this specific market is not the only market on which an advantage to port authorities could distort competition<sup>28</sup>.
- (66) Firstly, logistics/transport companies willing to transport a good can use different ways to do so, involving the use of other (foreign or domestic) ports managed by other port authorities or even no port at all. Ports from different Member States can share the same hinterland so that port authorities compete to provide transport services to operators willing to serve that hinterland. The services offered by port authorities (granting ships access to ports) are thus, at least to a certain extent, in competition with those offered by other port authorities and by other providers of transport services both in Italy and in other Member States. More generally, the Commission notes that, as ports are to a large extent involved in the international transport of goods and passengers and as the EU guarantees the freedom of movement of goods and persons, an advantage to Italian ports is also by nature liable to affect competition and intra EU trade.
- (67) In that regard, the alleged fact that PSA are the only entities entitled to operate their own port infrastructure (and offer access to port infrastructure) does not put into question the existence of a broader competitive market, where transport services (access to port infrastructure) provided by PSA are in competition with the ones offered by other transport operators established in Italy and by other ports or transport providers in other Member States<sup>29</sup>. PSA customers are free to use other ports (in Italy or abroad) and other ways of transport, so that PSA provide services in competition with other operators in the broad market of transport services and in the narrower market of port services (other European ports grant access to the European market and thus to Italy via road, rail or waterway).
- (68) Also, concessionaires willing to provide port services can do so in other ports managed by other port authorities. PSA compete to attract these operators (concessionaires carrying out port services). The level of the fee charged by the PSA in exchange for land and infrastructure (port equipment)

---

<sup>27</sup> See point 2.1 of the proposal for a Regulation on port services. Also see Communication from the Commission on a European Ports Policy, COM/2007/0616 final, point II.4.2.

<sup>28</sup> See opinion of Advocate General Wahl in case C-387/17 *Fallimento Traghetti del Mediterraneo*, para 66-67: the ECJ already made clear there can be State aid (distortion of competition and effect on trade) although entities operate in a non-liberalized market. See also the judgment of the Court in that case, para 38 and following.

<sup>29</sup> In that regard the conditions laid down in paragraph 188 of the Communication on the notion of aid are not fulfilled.

being made available to concessionaires, also plays a role in the choice made by concessionaires to establish themselves in one port rather than another. The existence of competition and cross-border effects in this market is acknowledged by the case-law<sup>30</sup>.

- (69) Moreover, undertakings willing to establish themselves close to a port can also settle outside the port (and not necessarily on land owned or managed by port authorities), so that port authorities are in competition with other operators renting out land outside ports.
- (70) Also, when PSA provide "port services" themselves, which is not explicitly ruled out under Law 84/1994, they can be in competition with other providers of such services active in the market.
- (71) In conclusion, as is the case with airports, ports may compete with one another and the financing of port infrastructure is therefore also likely to affect competition and trade between Member States<sup>31</sup>.

#### *Distortion of competition*

- (72) A measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes<sup>32</sup>. For all practical purposes, a distortion of competition within the meaning of Article 107(1) of the Treaty is generally found to exist when the State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition<sup>33</sup>. Public support is liable to distort competition even if it does not help the recipient undertaking to expand and gain market share. It is enough that the aid allows it to maintain a stronger competitive position than it would have had, if the aid had not been provided. In this context, for aid to be considered to distort competition, it is normally sufficient that the aid gives the beneficiary an advantage by relieving it of expenses it would otherwise have had to bear in the course of its day-to-day business operations.<sup>34</sup> The definition of State aid does not require that the distortion of competition or effect on trade is significant or material.
- (73) As the measure at issue constitutes an aid scheme, which applies to ports of very different size, geographical location, and activities, it is not necessary to demonstrate individually that that measure results for each port in a distortion of competition and an effect on trade in order to establish that the measure examined is State aid.

---

<sup>30</sup> Case C-576/13, *European Commission v Kingdom of Spain*, ECLI:EU:C:2014:2430, paragraph 37-38. The ECJ considered that a Spanish regulation made it less attractive/possible for foreign (cargo handling) operators to provide their services in Spanish ports. Similarly, the tax exemption for Spanish port authorities makes it more attractive for (cargo handling and other) operators to carry out their business in Spanish ports.

<sup>31</sup> 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. 1–5

<sup>32</sup> Case 730/79, *Philip Morris*, [1980] ECLI:EU:C:1980:209, paragraph 11; joined cases T-298/97, T-312/97 etc., *Alzetta*, [2000] ECLI:EU:T:2000:151, paragraph 80.

<sup>33</sup> Joined cases T-298/97, T-312/97 etc., *Alzetta*, [2000] ECLI:EU:T:2000:151, paragraphs 141 to 147; case C-280/00, *Altmark Trans*, [2003] ECLI:EU:C:2003:415.

<sup>34</sup> Case C-172/03, *Heiser* [2005] ECLI:EU:C:2005:130, paragraph 55.

- (74) The corporate tax exemptions grant an advantage to the PSA, which is liable to improve their competitive position. In particular, the price of the services provided by the port authorities (port infrastructure charges and other fees paid by ship owners) is one of the factors influencing the relative competitiveness of different ports<sup>35</sup>.
- (75) The Italian authorities argue that PSA only have limited influence on the setting of the fees for their activities. However, the public decree only defines minimum and maximum fees and therefore leaves certain margin of discretion for the PSA to set the precise level of the fees. In any event, even the existence of prices fixed at a central level – without discretion for individual ports – would not rule out a distortion of competition because undertakings can also compete on non-price parameters (quality of service, etc.).
- (76) Hence, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage that has the potential to affect competition. The Commission therefore takes the provisional view that the measure at issue distorts or threatens to distort competition.

*Effect on trade*

- (77) Public support to undertakings only constitutes State aid under Article 107(1) of the Treaty insofar as it ‘*affects trade between Member States*’. It is not necessary to establish that the aid has an actual effect on trade between Member States but only whether the aid is liable to affect such trade<sup>36</sup>. In particular, the Union Courts have ruled that “*where State financial aid strengthens the position of an undertaking as compared with other undertakings competing in intra-[Union] trade, the latter must be regarded as affected by the aid*”<sup>37</sup>.
- (78) This case-law can be applied in the present case as the corporate tax exemption strengthens the position of PSA. This allows the latter to lower their prices and make the port infrastructure they manage more attractive for clients, especially clients from other Member States.
- (79) In the present case, there is no doubt that Italian ports are involved in intra-EU trade so that an advantage to the concerned port authorities affects intra EU trade. Italian ports are actively involved in intra-Union trade and several Italian ports are among the most important EU-wide ports in terms of container traffic and cargo tonnage. On the basis of publicly available information, it results that among the 20 busiest ports in Europe (including

<sup>35</sup> The price of transport services provided by the ports often represents a large share of the total transport cost. See *Europe's Seaports 2030: challenges ahead*, European Commission memo of 23 May 2013: ‘*The costs and quality of port services are a major factor for European business. Port costs may account for a significant part of the total costs in the logistics chain. Handling cargo, port dues and port nautical services can account for between 40%-60% of the total door-to-door logistic costs for business using short sea shipping to transport goods.*’ (underscored by the Commission).

<sup>36</sup> Case C-518/13, *Eventech v The Parking Adjudicator*, [2015] ECLI:EU:C:2015:9, paragraph 65; joined cases C-197/11 and C-203/11, *Libert and others*, [2013] ECLI:EU:C:2013:288, paragraph 76.

<sup>37</sup> Case C-518/13, *Eventech v The Parking Adjudicator*, [2015] ECLI:EU:C:2015:9, paragraph 66; cases C-197/11 and C-203/11, *Libert and others*, [2013], ECLI:EU:C:2013:288, paragraph 77; case T-288/97, *Friulia Venezia Giulia*, [2001] ECLI:EU:T:2001:115, paragraph 41.

Turkish ports), there are 3 Italian ports, namely Genoa, La Spezia and Gioia Tauro.

- (80) By relieving those undertakings of a tax liability they would otherwise have had to bear and which competing undertakings have to carry, the exemption from corporate income tax frees up financial resources for those undertakings to invest in their business operations, which in turn affects the conditions under which they can offer their products and services on the market, thereby distorting competition in the internal market. Consequently, the measure, which provides for a tax exemption of PSA, affects intra-Community trade and distorts or threatens to distort competition.
- (81) Therefore, by exempting PSA engaged in economic activities from corporate taxation, the Italian authorities provide to them an advantage that has the potential to affect intra-EU trade. As to the argument made by Italy (see recital 8 above) that the majority of Italian ports are far from competing, even potentially, within European markets, the Commission notes that the Italian authorities have not put forward any element to substantiate this view. Moreover, none of the arguments put forward by the Italian authorities undermines the conclusion presented above in recitals (79) and (80). The Commission thus at this stage takes the provisional view that the measure at issue affects or has the potential to affect competition and intra-EU trade

#### *Selectivity of the Measure*

- (82) To be considered State aid, a measure must be selective<sup>38</sup>, in the sense that it must favour only certain undertakings or the production of certain goods. According to established case-law<sup>39</sup>, the assessment of the material selectivity of a measure consists of three stages: first it is necessary to identify and examine the common or “normal” regime (“reference framework”) applicable in the Member State concerned. Second, it is in relation to this common or “normal” tax regime that it is necessary to assess and determine if any advantage granted by the tax measure at issue may be selective. This has to be done by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators that, in the light of the objective pursued by that regime, are in a comparable factual and legal situation. Third, if such derogation exists, it is necessary to examine whether it results from the nature or general scheme of the taxation system of which it forms part and could hence be justified by the nature or logic of the system. In this context, it is for the Member State to show that the differentiated tax treatment derives directly from the basic or guiding principles of that system<sup>40</sup>.

#### *Reference framework*

- (83) In the present case, the Commission takes the provisional view that the reference framework is the Italian system for corporate income taxation, as

---

<sup>38</sup> See case C-66/02 *Italy v. Commission* [2005] ECLI:EU:C:2005:768, paragraph 94.

<sup>39</sup> See, *inter alia*, case C-88/03 *Portugal v. Commission* [2006] ECLI:EU:C:2006:511, paragraph 56; joined cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2011:550, paragraph 49.

<sup>40</sup> See case C-143/99 *Adria-Wien Pipeline GmbH and Wietersdorfer & Peggauer Zementwerke* [2001] ECLI:EU:C:2001:598, paragraph 42.



laid down in the Italian Consolidated Tax Act TUIR (see 26-31 above). Title II of TUIR specifies the rules for the taxation of corporate income.

(84) Within Title II, Article 72 TUIR states that a prerequisite for corporate income tax is the possession of income in cash or in kind falling within the categories indicated in Article 6 TUIR. Article 6 TUIR specifies that income is classified into the following categories:

- land income;
- income from capital;
- employee income;
- income from self-employment;
- business income;
- different income.

(85) Article 73(1) TUIR subjects the following entities to corporate income tax:

- Joint-stock companies and limited partnerships, limited liability companies, cooperative companies and mutual insurance companies, as well as European companies pursuant to Regulation (EC) no. 2157/2001 and the European Cooperative Societies under the regulation (CE) n. 1435/2003 resident in the territory of the State;
- Public and private entities other than companies, as well as trusts, residing in the State, which have as their exclusive or principal object the exercise of commercial activities;
- Public and private entities other than companies, trusts that do not have as their exclusive or principal object the exercise of commercial activity as well as the undertakings for collective investment of savings, resident in the territory of the State;
- Companies and institutions of any kind, including trusts, with or without legal personality, not resident in the territory of the State.

(86) Article 74 lays down rules applicable to the State and public bodies. This provision identifies also the activities that are not considered as commercial activities.

- Article 74(1) defines State and public bodies as State bodies and administrations, including autonomous administrations, and, where they have legal personality, the municipalities, consortia of local bodies, associations and bodies administering public property, mountain communities, provinces and regions. These are not subject to corporate tax.
- Article 74(2) a) states that the performance of public functions by public bodies shall not constitute a commercial activity.

- (87) Under the selectivity analysis devised by the Court for schemes, it is necessary to begin by defining the appropriate reference framework and then determining whether the measure in question gives rise to discrimination under that framework. A reference framework is composed of a consistent set of rules that generally apply — on the basis of objective criteria — to all undertakings falling within its scope as defined by its objective. Typically, those rules define not only the scope of the system, but also the conditions under which the system applies, the rights and obligations of undertakings subject to it and the technicalities of the functioning of the system. In the case of taxes, the reference framework is based on elements such as the tax base, the taxable persons, the taxable event and the tax rates. In the present case, the Commission considers the reference framework to be the Italian corporate tax system, including the definition of taxable persons, which results from Article 72 in combination with Article 73 TUIR. It subjects to corporate income tax all income from land, capital, compensation of employees, self-employment, business income and other income when generated by companies (Article 73(1) a)) or by public or private entities other than companies (Article 73(1) b) and c)). The objective of this regime would therefore be to tax all income of companies as well as public and private entities other than companies.
- (88) Article 74 TUIR limits the scope of the corporate income tax liability defined by Article 73(1) TUIR, by specifically excluding State bodies and administrations, including autonomous administrations, and, where they have legal personality, the municipalities, consortia of local bodies, associations and bodies administering public property, mountain communities, provinces and regions from corporate income tax.
- (89) In its reply (see (6) above) to the letter sent by the Commission services in accordance with Article 21 of the Procedural Regulation (see (4) above), Italy puts forward the following arguments:
- The reference system defined by the Commission in its letter is too broad:
  - PSA should not be seen as falling within the scope of Article 73 TUIR;
  - PSA fall within the scope of Article 74 TUIR;
  - Given the range of bodies to which Article 74 TUIR applies, it is, according to the Italian authorities, evident that this rule does not derogate from Article 73 TUIR in favour of the PSA. On the contrary, Italy states that Article 73 and Article 74 TUIR have different and parallel scopes;
  - Articles 73 and 74 TUIR establish two coherent ordinary tax regimes applicable to indefinite categories of entities that are not in a comparable factual and legal situation;
  - Therefore, Italy claims that the corporate income tax exemption is not selective, as Article 74 applies to PSA as well as the State, to various public bodies and to other entities belonging to the public administration on the basis of objective, general and abstract criteria. All these entities are in the same factual and legal situation.

- (90) In addition, Italy puts forward the argument that all activities carried out by PSA are those typical of a State administration and qualify as the performance of public functions. Therefore, Article 74(2) a) TUIR (see recital (31) above) would apply. According to Article 74(2) a), the performance of public functions by public bodies shall not constitute a commercial activity. In the view of the Italian authorities, because all activities carried out by PSA qualify as exercise of public functions, they therefore do not constitute commercial activities.

#### *Derogation*

- (91) At this point, the Commission wishes to recall that the way the provisions described above have been understood and applied leads to the non-taxation of ports in Italy. This fact has been confirmed by the Italian authorities.
- (92) The Commission also wishes to reiterate that, as described under (38) to (55) above, the exploitation of port infrastructure is an economic activity. In the light of the inherent objectives of the corporate income tax system, namely the taxation of income, the income of PSA should therefore also be taxed.
- (93) This stems from Articles 72 and 73 TUIR as described above. In particular Article 73, that defines the scope *rationae personae* of the tax, covers all types of entities: public limited companies and partnerships, private companies, cooperatives, mutual societies, public and private entities that conduct commercial activities, as well as public and private entities that do not have the exercise of commercial activities as their main purpose.
- (94) As a consequence, Article 74, as interpreted and applied by the Italian authorities, leads to a situation where the ports authorities in Italy are exempted from corporate income tax and this is contrary to and derogates from the guiding principles of the corporate income tax system TUIR.
- (95) The Commission recalls in this context the argument of the Italian authorities according to which the exemption from corporate income tax of PSA would not derogate to the general principles of the Italian corporate tax system, but reflect its logic, namely that non-economic activities are generally not subject to corporate tax. However, if the arguments presented by Italy would lead to the conclusion that the revenues generated from certain activities, which are considered as economic for the purposes of State aid rules, are excluded from corporate income tax as a matter of principle and without a valid justification this would mean that in relation to the taxation of PSAs the Italian corporate tax system as such would be selective<sup>41</sup>.
- (96) Indeed, in that case, the design of the Italian corporate tax system as such would give rise to advantages to certain undertakings<sup>42</sup>, namely the PSAs, while they are in a comparable legal and factual situation to other companies

---

<sup>41</sup> Joined cases C-106/09 P and C 107/09 P *Commission and Spain v Gibraltar*, [2011], ECLI:EU:C:2011:732, paragraphs 101 et seq.

<sup>42</sup> See Commission decision of 27 July 2017 in State aid case SA.38393 *Fiscalité des ports en Belgique*, OJ C 302, 19.8.2016, paragraph 90.

(when it comes to the profits they draw from their economic activities) in the light of the objective of the corporate tax system, which is to tax profits<sup>43</sup>.

- (97) The Commission considers that the ports are not guided by specific "*operating principles which clearly distinguish them from other economic operators*" subject to corporate tax<sup>44</sup>. In particular, the fact that the PSAs do not pursue a profit making activity is insufficient to consider that they are in a different situation to other operators subject to corporate tax. None of the characteristics of the PSAs invoked by Italy is relevant and consistent with regard to the objective of the corporate tax system, which is, in the case of companies engaged in profit-making or non-profit-making activities, to tax the profits they derive from these activities.<sup>45</sup> Therefore, even if it were considered that the corporate tax exemption of ports does not derogate from the reference framework and that it is in the logic of the Italian corporate tax system not to subject to corporate tax bodies such as PSAs, such a design of a corporate income tax system would be arbitrary and not acceptable. Such situation would amount to exempting a specific group of entities active in a specific economic sector from corporate tax while these entities are in a comparable legal and factual situation to other companies in the light of the objective of corporate tax, namely to tax profits, and would thus involve a selective advantage to these entities<sup>46</sup>.

#### *Justification by the logic of the system*

- (98) Given that the Commission considers that the tax exemption at issue is *prima facie* selective, it will have to determine, in accordance with the case-law of the European Courts, whether this exemption is justified by the nature or general scheme of the system of which it forms part. Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that the measure results directly from the basic or guiding principles of its tax system.
- (99) No such arguments have been provided by the Italian authorities. The Commission has also not been able to identify such justification. Hence, the Commission considers the measure as not being justified by the logic of the tax system. The Commission provisionally concludes that the measure is selective.

#### *Conclusion*

- (100) Therefore, the Commission provisionally concludes that the non-subjection of Italian PSA to corporate income tax contradicts the guiding principles of the Italian corporate tax system. Even if it were considered that it is in line with the Italian corporate tax system that bodies, considered by the Italian authorities as exclusively fulfilling public functions, while at the same time engaging in activities that are considered as economic for the purposes of State aid rules, are exempted from corporate income tax, such a design of a

---

<sup>43</sup> See joined cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2011:550, paragraph 54; see also case T-673/17, *Port autonome du Centre et de l'Ouest SCRL and Others v European Commission*, ECLI:EU:T:2019:643, paragraph 173.

<sup>44</sup> See joined cases C-78/08 to C-80/08 *Paint Graphos*, ECLI:EU:C:2011:550, paragraph 55.

<sup>45</sup> See Case T-673/17, *PACO v. Commission*, ECLI:EU:T:2019:643, paragraph 178 et seq.

<sup>46</sup> See Case T-673/17, *PACO v. Commission*, ECLI:EU:T:2019:643, paragraph 194.

corporate income tax system would be arbitrary and not acceptable. Therefore, the Commission provisionally concludes that the non-subjection of ports' economic activities to corporate income tax involves a selective advantage. Furthermore, the Commission provisionally concludes that such more favourable treatment granted by the State and imputable to the State is capable of distorting the competition and intra-EU trade. Therefore, the Commission provisionally concludes that the tax exemption granted to PSA constitutes State aid within the meaning of Article 107(1) TFEU<sup>47</sup>.

## 5. COMPATIBILITY

(101) State aid measures can be considered compatible with the internal market on the basis of the exceptions laid down in Articles 93, Article 106(2), 107(2) and 107(3) TFEU.

### *Article 93 TFEU*

(102) Article 93 TFEU lays down that aids which "*meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service*" can be declared compatible with the internal market".

(103) The Commission notes first of all that not all the investments made by the port authorities are covered by Article 93 TFEU, but only those that meet the needs of coordination of transport. In the case at hand, there are no indications that the aid specifically finances such investments. On the contrary, the aid consists in corporate tax exemptions that are not related to any particular investment. Nor are the measures targeted at the reimbursement of public service obligations. Moreover, by definition, corporate tax exemptions favour undertakings making the most profit and therefore having already greater capacity to finance investments or other activities in the public interest.

(104) Thus, the aids do not have an incentive effect and are neither necessary nor proportionate. Consequently, the measure cannot be regarded as compatible under Article 93 TFEU.

### *Article 107(2) and Article 107(3) TFEU*

(105) Since the measure under review appears to constitute State aid within the meaning of Article 107(1) EC, it should be examined whether it is compatible with the Internal Market under the exceptions laid down in Article 107(2) and 107(3) TFEU.

(106) The Italian authorities have provided no arguments regarding the applicability of the exceptions described in Article 107(2) or 107(3) TFEU to the exemption from corporate income tax granted to PSA.

---

<sup>47</sup> In a similar case, concerning a three-year exemption from corporate tax granted to certain Italian public enterprises set up by local authorities, the Commission adopted a negative decision with recovery in 2002 (Decision C27/99 of 5 of June 2002), which was confirmed by the ECJ in case C-318/09 P of 21 December 2011, ECLI:EU:C:2011:856

- (107) The Commission considers, at this stage, that none of the exceptions under Article 107(2) TFEU apply, as the measure in review is not aimed at any of the objectives listed in this provision. More specifically, the measures under review do not appear to relate to aid having a social character which is granted to individual consumers or aid to make good the damage caused by natural disasters or exceptional occurrences or aid granted to the economy of certain parts of the Federal Republic of Germany.
- (108) Article 107(3) TFEU further states that: (a) aid to promote the development of certain areas, (b) aid for certain important projects of common European interest, (c) aid to develop certain economic activities or areas, (d) aid to promote culture and heritage conservation and (e) aid specified by a Council decision may be found compatible with the internal market.
- (109) The exception of Article 107(3) (a) TFEU authorises aid, which promotes the economic development of areas, where the standard of living is abnormally low or where there is serious underemployment. This exception does not seem applicable.
- (110) Moreover, the measure does not promote the execution of an important project of common European interest nor does it remedy a serious disturbance in the economy of Italy, as provided by Article 107(3) (b) TFEU.
- (111) In addition, the measure does not aim at promoting culture and heritage conservation, as provided by Article 107(3) (d) TFEU.
- (112) Under Article 107(3) (c) TFEU aid granted to facilitate the development of certain economic activities or certain economic areas could be declared compatible insofar as it would not adversely affect trading conditions to an extent contrary to the common interest. However, the available information does not indicate that the tax advantage granted is related to specific investments eligible to receive aid under the Union rules and guidelines.
- (113) On the contrary, at this stage, the Commission considers that the measure constitutes a reduction of charges that should normally be borne by PSA in the course of their business, and could therefore be considered as operating aid. Generally such aid is not considered compatible with the internal market to the extent that it is neither limited in time, nor necessary or proportionate to finance costs related to serving a well identified objective of European interest.
- (114) Consequently, the Commission provisionally considers that the exceptions of Article 107(3) TFEU do not apply.
- (115) As a result of the foregoing, the Commission has no indication, at this stage, that the contested measure can be considered compatible with the internal market.

*Article 106(2) TFEU*

- (116) In addition to the grounds of Articles 107(2) and 107(3) TFEU, where the recipient of aid has been entrusted by the State with the operation of services

of general economic interest (“SGEI”), the aid may also be compatible in application of Article 106(2) TFEU.

- (117) However, the Italian authorities have not provided any information from which it can be concluded that the exemption from corporate income tax for PSA could be justified under Article 106(2) TFEU. The measure at issue, which links the amount of aid to the profits made, is not related to or limited to the net costs of a public service task. Nor does it derive from a mandate given to the beneficiaries of the measures to carry out such a task. Consequently, the Commission’s provisional view is that the measure cannot be regarded as public service compensation compatible with the internal market and is not compatible on the basis of Article 106(2) TFEU.

### *Conclusion*

- (118) In light of the foregoing, the Commission provisional view is that the exemption from corporate income tax of PSA in Italy cannot be considered compatible with the internal market.

## **6. EXISTING AID**

- (119) Pursuant to the classification of the exemption from corporate income tax of PSA as incompatible State aid, the Commission has to determine whether this measure has to be considered new or existing aid.
- (120) Existing aid, as defined in Article 1(b) of the Procedural Regulation, would be either a measure that was in place before the entry into force in Italy of the EC Treaty, a measure that has been authorised, a measure that is deemed existing aid pursuant to Article 17 of the Procedural Regulation, or a measure that was not aid, when it was put into effect, but became aid due to the evolution of the common market. Any aid not falling under the definition of existing aid would be considered new aid pursuant to article 1(c) of the Procedural Regulation.
- (121) The corporate income tax exemption for the Italian PSA is based on Article 74 of TUIR described under (31) above as interpreted by the Italian authorities.
- (122) The Italian authorities have confirmed that the tax regime applicable to the PSA prior to 1958 was exactly the same as it is today. In particular, they have confirmed that port authorities have never been subject to corporate tax. Moreover, there is no element available to the Commission that would contradict this.
- (123) The Commission therefore considers that to the extent the exemption from corporate income taxation for the PSA in Italy existed before the entry into force of the EC Treaty in Italy, it constitutes existing aid in line with Article 1(b) of the Procedural Regulation.

## 7. CONCLUSION

- (124) On the basis of the above considerations, the Commission provisionally concludes that the above-described exemption from corporate income tax granted to Italian PSA is incompatible State aid within the meaning of Article 107(1) TFEU and that this aid qualifies as existing aid.
- (125) Where an existing aid is found to be incompatible with the common market, such aid should be subject to appropriate measures under Article 108(1) TFEU, with a view to abolishing or amending the scheme. With respect to the principle of legal certainty pertaining to the elimination of existing aids, the General Court recognised that “the Commission is, as part of its constant review of existing aid, only empowered to require the elimination or modification of such aid within a period which it is to determine”<sup>48</sup>.
- (126) Following the co-operation procedure initiated on 30 April 2018 pursuant to Article 21 of the Procedural Regulation, the Italian authorities have not come forward with a concrete proposal for amendments of the corporate tax exemption for PSA, ensuring that PSA that are involved in economic activities within the meaning of EU competition law are subject to the same corporate tax regime as other private undertakings. On the contrary, the Italian authorities have contested that the present system amounts to State aid under Article 107(1) TFEU.
- (127) The Commission therefore proposed appropriate measures pursuant to Article 22 of the Procedural Regulation and invited Italy to adopt measures that will ensure that port authorities that carry out economic activities are subject to corporate tax in the same manner as other undertakings.
- (128) By letter dated 7 March 2019, Italy rejected this Commission proposal.

The Commission has therefore decided to open the formal investigation procedure under Article 108(2) TFEU.

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

---

<sup>48</sup> Joined cases T-298/97, T-312/97, T-313/97, T-600/97, T-607/97, T-1/98, T-3/98, T-6/98, T-23/98, *Mauro Alzetta and others v Commission*, [2000] ECLI:EU:C:1998:270, para. 148.



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

Yours faithfully,

For the Commission

Margrethe VESTAGER  
Member of the Commission