II

(Acts whose publication is not obligatory)

COMMISSION

COMMISSION DECISION

of 30 June 2004

concerning a series of tax measures which Belgium is planning to implement for maritime transport

(notified under document number C(2004) 2040)

(Only the Dutch and French texts are authentic)

(Text with EEA relevance)

(2005/417/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular the first subparagraph of Article 88(2) thereof,

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

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

Whereas:

1. PROCEDURE

1.1. Procedural overview

(1) By letter of 14 June 2002 from its Permanent Representation, the Belgian Government gave notification, in accordance with Article 88(3) of the Treaty, of a series of tax measures for the merchant navy contained in a draft programme act. All these measures have been registered in the register of notified aid under N 433/2002. Before the Commission could take a decision, the measures in question were included in the programme act of 2 August 2002.

(2) On 19 March 2003 the Commission decided [2] to initiate the formal investigation procedure provided for in Article 6 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [3] against particular aspects of the programme act of 2 August 2002 (with the dossier now registered under the new number C 20/2003) and to approve the remainder of the provisions of the programme act for the maritime transport sector.

(3) By Royal Decree of 7 May 2003 the Belgian authorities implemented all the provisions of the programme act for the maritime sector (Articles 115 to 127 of the said programme act), specifying in the preamble to the Royal Decree that the decree provided 'no legal basis to taxpayers for claiming vis-à-vis the tax administration or before the national courts the application of the fiscal aid measures whose compatibility is being investigated by the Commission' in accordance with the Commission's decision of 19 March 2003.

(4) By letter of 7 May 2003 the Belgian authorities submitted their comments on the Commission's decision of 19 March 2003.

[1] OJ C 145, 21.6.2003, p. 4.

[2] See note 1.

[3] OJ L 83, 27.3.1999, p. 1.

(5) By letter of 26 June 2003 the Commission put a number of additional questions to the Belgian authorities. After the Commission had sent a reminder on 18 August 2003, the Belgian authorities replied by letter of 12 September 2003.

(6) On 17 January 2004 new Community guidelines on State aid to maritime transport were published in the *Official Journal of the European Union* [4]. They entered into force on the same day.

1.2. **Title of the aid**

(7) This decision concerns the tax measures for maritime transport contained in the programme act of 2 August 2002, Title V — Finance, Chapter I — Maritime navigation.

1.3. **Recipient of the aid**

(8) The beneficiaries of the various aid schemes are undertakings established in Belgium that are engaged in maritime transport, exploitation of maritime resources and towage.

1.4. **Purpose of the aid**

(9) The main purpose of the planned tax measures is to bring ships back under the Belgian flag since the entire Belgian merchant has been flagged out.

2. **DETAILED DESCRIPTION OF AID**

(10) The programme act provides for a series of tax measures for maritime transport in Belgium:

— a flat-rate taxation scheme based on shipping company tonnage,

— a package of measures designed to benefit shipping companies that did not opt for flat-rate taxation based on tonnage, including accelerated depreciation of ships, relief from tax on capital gains resulting from the sale of ships subject to reinvestment conditions, and tax deductions for the purchase of ships,

— abolition of registration duties payable for the registration of mortgages on ships,

— a flat-rate taxation scheme based on tonnage for persons managing ships on behalf of third parties that provide services on behalf of shipowners.

(11) Under the tonnage-based flat-rate taxation scheme [5] the tax base used to calculate corporation tax for shipping companies that have opted for this scheme is replaced by a flat-rate amount determined on the basis of the tonnage of the fleet concerned. The present scheme does not impose any conditions as regards the flag flown by the ships.

(12) A similar mechanism, leading to an even more favourable flat-rate amount, is laid down for persons managing ships for third parties, but it is subject to the condition that three quarters of the fleet thus managed flies the Belgian flag.

2.1. **Flat-rate taxation scheme**

(13) Ships may be eligible under the flat-rate taxation scheme if they are used for the following eligible activities:

— operating a ship for the carriage of goods or passengers by international maritime transport and for the exploration or exploitation of natural maritime resources,

— profits accruing from operating a ship, with clearance certificate, for towage, assistance and other activities at sea,

— all activities directly connected with the abovementioned operation.

(14) By letter of 5 September 2002 the Belgian authorities pointed out that activities of the fishery sector could not be eligible.

(15) The amount of corporation tax for shipping companies [6] that have opted for this scheme is fixed at a flat rate on the basis of the net tonnage of their eligible ships. The tax base for corporation tax is equal to the sum of the amounts obtained for each eligible ship [7] in accordance with the following scale determined per tranche of 100 net tonnes

[4] OJ C 13, 17.1.2004, p. 3.

[5] Called Tonnage Tax in English.

[6] See section 2.8 of the Commission's decision of 19 March 2003.

[7] See note 6.

(NT) and per 24-hour period started, whether or not the ship is operational:

(EUR per 100 NT)

up to 1 000 net tonnes	1,00
between 1 001 and 10 000 net tonnes	0,60
between 10 001 and 20 000 net tonnes	0,40
between 20 001 and 40 000 net tonnes	0,20
40 001 net tonnes and over	0,05

(16) Once shipping companies have opted for this flat-rate taxation scheme, they remain subject to it for a period of 10 years. At the end of this period, the scheme is tacitly renewed for another 10-year period except if the company concerned has served prior notice of its wish to leave the scheme.

(17) Moreover, the scheme makes provision for additional tax relief for the newest ships. Article 119(2) of the programme act provides that taxable profits determined on a flat-rate basis in accordance with the above rates are reduced to:

— 50 % of the flat rate per day for ships that are less than five years old, to be counted from the date of delivery;

— 75 % of the flat rate per day for ships that are at least five years old but less than 10 years old, to be counted from the date of delivery.

(18) The age of a ship is determined on the basis of the date of delivery as fixed by the registrar of maritime and inland waterway ships' mortgages or the competent registration authority.

(19) Under Article 120(2) of the programme act, losses sustained in previous financial years may not be deducted from the tax base determined on a flat-rate basis. Any part of losses from maritime navigation not taken into account by the time when the tax base for maritime activities is for the first time determined in relation to tonnage may again be deducted from future profits upon expiry of the period in which the tax base has thus been determined. By way of derogation, however, business losses incurred in the same period by another division of the company may be deducted from the tax base determined on a flat-rate basis provided that, and to the extent that, such losses could not be deducted from the profits of any other division of that company not subject to flat-rate taxation.

2.2. **Tax measures for shipping companies that have not opted for the flat-rate taxation scheme**

(20) For all tax periods in which a shipping company has not been subject to flat-rate taxation, it may benefit from three types of tax concessions which derogate from the Belgian Income Tax Code 1992.

2.2.1. *Accelerated depreciation* ([8])

(21) Ships acquired new or second-hand which become the property of a Belgian taxpayer for the first time, parts of such ships and expenses incurred for major repairs and alterations carried out when acquiring second-hand ships may be depreciated as follows:

— 20 % for the accounting year when the ship is taken into service;

([8]) Provided for in Article 121 of the programme act of 2 August 2002: '*Article 121*

(1) Subject to the derogations mentioned in this section, depreciation on new or second-hand ships shall be determined in accordance with Articles 61 to 64 of the Income Tax Code 1992.

(2) The following depreciation percentages are allowed for new ships, co-ownership shares in new ships and shares in new ships: 20 % for the accounting year of entry into service, 15 % for each of the following two accounting years, and subsequently 10 % per accounting year until full depreciation.

(3) Depreciation shortfalls during the first three accounting years, counting from that in which the ship was taken into service, are recovered during the tax periods following the one in which the shortfall occurred, even if outside the normal depreciation period in accordance with paragraph 2, provided that total annual depreciation per ship does not in any case exceed 20 % of the investment or purchase value.

(4) Ships that are depreciated in accordance with the scheme provided for in this Article cannot benefit under the optional degressive depreciation scheme provided for in Article 64 of the Income Tax Code 1992.

(5) Ships, co-ownership shares in ships and shares in ships that were not acquired when the ship was new may benefit from depreciation as provided for in paragraphs 1 to 4 if these ships come into the possession of a Belgian taxpayer for the first time. Ships that are not acquired new and which, in accordance with paragraph 1, cannot benefit from depreciation as provided for in paragraphs 1 to 4 may be depreciated linearly over the period of normal usage. Depreciations as provided for in paragraphs 1 to 4 shall also apply to expenses incurred for major repairs and alterations made upon acquiring second-hand ships.

(6) The provisions of this Article do not apply in the period during which profits from maritime navigation are determined on the basis of tonnage.

(7) In the event of disposal after the end of the period in which profits from maritime navigation are determined on the basis of tonnage, the net tax value shall, for calculating the gains referred to in Article 122, be established on the basis of the normal depreciation rules for tax purposes, including for the period in which profits from maritime navigation are determined on the basis of tonnage.'

— 15 % for each of the next two accounting years;

— 10 % for each subsequent accounting year until full depreciation.

(22) Depreciation shortfalls during the first three accounting years, counting from that in which the ship is taken into service, may be recovered during taxable periods following that in which the shortfall occurred, even beyond the depreciation period, provided that the total annual amount of depreciation per ship in no case exceeds 20 % of the investment value.

(23) Ships thus depreciated may not benefit from the digressive depreciation scheme provided for in Article 64 of the Belgian Income Tax Code 1992.

(24) Ships that are not acquired new and do not become the property of a Belgian taxpayer for the first time may nevertheless be depreciated linearly over the normal length of use.

(25) The special depreciation scheme provided for in the programme act lays down in legislation an administrative measure which has already been applied in Belgium for several decades. This measure has been recorded in legislation to enhance its legal certainty and ensure continuity of the system.

2.2.2. *Exemption for gains on the sale of ships*

(26) Article 122 ([9]) provides that gains realised on the sale of ships are exempt from taxation provided that the ships sold have remained fixed assets of the company for more than five years at the time of sale and consequently that an amount at least equal to the sales value is re-invested within five years in the purchase of ships, co-ownership of ships, shares in ships or shares in shipping companies which have their headquarters in the Community and exclusively engage in eligible activities ([10]).

(27) If there is no re-investment in accordance with the conditions described, the gains realised are considered as profits in the taxable period during which the re-investment period expired.

(28) The investment taken into account for re-investment should be retained as an asset for at least five years. However, the said investment may be replaced within three months if it is sold. If the investment taken into account for re-investment has been replaced in this way, the same rules on gains shall apply for the disposal of the asset acquired as a replacement.

(29) In the event of a sale after the end of the period in which the tax base is determined in relation to tonnage, for the calculation of gains, the net tax value shall be established on the basis of the normal rules on depreciation, including for the period in which profits from shipping are determined in relation to tonnage.

([9]) Article 122 of the programme act of 2 August 2002 reads as follows:
'*Article 122*
(1) Subject to the derogations provided for in this section, the provisions laid down in Article 190 of the Income Tax Code 1992 apply to gains realised on ships by resident companies or Belgian branches of non-resident companies which engage exclusively in the activities described in Article 115(2).
(2) When an amount equal to the sales value is re-invested in the way and within the periods indicated below, the gains realised on the sale of ships are exempt provided that the ships sold were fixed assets for more than five years prior to their sale.
(3) The re-investment must be in ships, co-ownership of ships, shares in ships or shares in a shipping company/shipping operator which has its registered office in the European Union.
(4) The re-investment must be made at the latest at the cessation of the professional activities and within a period of five years from the first day of the taxable period in which the gains were realised or the first day of the penultimate taxable period preceding that in which the gains were realised.
(5) In order to justify application of the tax scheme referred to in paragraph 1, the taxpayer must enclose a statement in conformity with the model laid down by the Minister of Finance or his representative with his income tax declaration for the tax year relating to the taxable period in which the gains were realised and each subsequent tax year until the re-investment has been effected in accordance with paragraphs 2 to 4.
(6) If there is no re-investment in the manner and within the period provided for in paragraphs 1 to 4, the gains realised shall be regarded as profits in the taxable period in which the re-investment deadline has expired.
(7) The investment taken into account as re-investment must be retained as part of the assets for at least five years but can, where appropriate, be replaced within three months in the event of sale. If the investment taken into account as re-investment has been replaced in this manner, the provisions of this Article apply in respect of the sale of the asset acquired as replacement.
(8) The provisions of this Article do not apply to the period in which profits from maritime navigation are determined in relation to tonnage.'

([10]) See section 2.8.2 of the Commission's decision of 19 March 2003.

2.2.3. *Tax deductions for purchase of ships* ([11])

(30) Resident companies or Belgian branches of non-resident companies which exclusively engage in eligible activities ([12]) may benefit from an investment deduction of 30 % of the purchase price when buying new or second-hand ships which become the property of a Belgian taxpayer for the first time.

(31) A tax deduction not granted because of a lack of profit or because of insufficient profits in the corresponding accounting year shall be successively carried forward to the profits of subsequent taxable periods. In accordance with the provisions applicable to losses carried forward on joining the flat-rate taxation scheme, any part of the investment deduction not applied by the time when profits from maritime shipping are determined in relation to tonnage for the first time may again be deducted from the profit after expiry of the period in which the tax base has thus been determined.

2.2.4. *Reduction of registration duties for mortgages on ships*

(32) The Belgian Code on registration, mortgage and court registry duties is amended so that the raising of mortgages on a ship is no longer subject to the payment of proportional registration duties, irrespective of whether the ship is or is not subsequently subject to the flat-rate taxation scheme. This reduction of registration duties concerns mortgages on vessels for maritime shipping and those for inland waterway navigation.

(33) Under the current Belgian scheme, the charges made for registering a mortgage (in addition to a number of very limited fixed duties) are, on the one hand, a 0,052 % fee payable to the registrar of mortgages and, on the other hand, a 0,5 % registration duty payable on the amount of the mortgage. According to the Belgian authorities, this latter duty is a disincentive for registering ships under the Belgian flag. Under the new scheme, the registration duty payable on registering a mortgage is changed to the general fixed duty of €25 provided for in Article 11(2) and (3) of the Belgian Code on registration, mortgage and court registry duties.

(34) The transfer of a mortgage on a vessel following debt transfer against payment, contractual subrogation or any other agreement against payment is also subject to 0.5 % registration duty in accordance with Article 92(2) ([13]) of the said Code. In accordance with Article 93 of the Code, this registration duty is paid from the amount of the sums guaranteed by the mortgage, excluding interests or arrears over the three years guaranteed by Article 87 of the Mortgages Act of 16 December 1951.

2.2.5. *Tonnage-based flat-rate taxation scheme applicable to persons managing ships on behalf of third parties* ([14]).

(35) Under Article 124 of the programme act, persons managing ships on behalf of third parties are also covered by a flat-rate taxation scheme but with a scale of rates ten times more advantageous than that provided for in the scheme applicable to shipping companies because the same rates apply in this case to the ships being managed not per 100 NT tranche but per 1 000 NT tranche:

(EUR per 1 000 NT)

Up to 1 000 net tonnes	1,00
Between 1 001 and 10 000 net tonnes	0,60
Between 10 001 and 20 000 net tonnes	0,40
Between 20 001 and 40 000 net tonnes	0,20
40 001 net tonnes and over	0,05

(36) However, coverage by the scheme is subject to the condition that at least 75 % of the ships managed are registered under the Belgian flag.

([11]) Article 123 of the programme act of 2 August 2002 reads as follows:
'*Article 123*
(1) By derogation from Articles 68 and 201 of the Income Tax Code 1992, resident companies or Belgian branches of non-resident companies which engage exclusively in the activities provided for in Article 115 relating to ships acquired new or second-hand ships which become the property of a Belgian taxpayer for the first time may benefit from an investment deduction of 30 % of the purchase price of these ships.
(2) The provisions of this Article are not applicable during the period in which profits from maritime navigation are determined in relation to tonnage.
(3) If in a taxable period there is no or insufficient profits to be able to apply the investment deduction, the exemption not granted for that taxable period shall be successively carried forward to the profits of the following taxable periods.
(4) Any part of the investment deduction not applied by the time when the profits for maritime navigation are determined in relation to tonnage for the first time may again be deducted from the profits after expiry of the period in which the profits were thus determined.'

([12]) See section 2.8.2 of the Commission's decision of 19 March 2003.

([13]) Amended by Article 17 of Royal Decree No 12 of 18 April 1967 and by Article 64 of the Act of 22 December 1998.

([14]) Article 124 of the programme act of 2 August 2002.

(37) Those managing ships on behalf of third parties are in general service companies which prepare the ships, fit them out as required and provide crews on behalf of the shipowner. Article 115(4) of the programme act defines the person managing a ship on behalf of third parties as the 'taxpayer [who] ensures the technical management and/or equipment of a ship on behalf of third parties'. These managers acting on behalf of third parties are not transport undertakings as such. The Belgian authorities confirmed in their letter of 5 December 2002 that management of ships on behalf of third parties constitutes provision of services for the benefit of shipowners and that persons managing ships on behalf of third parties do not sell transport services either for goods or for passengers.

2.3. **Other aid for maritime transport**

(38) Maritime transport in Belgium also benefits from three other aid schemes:

— the scheme for exemption from the payment of employers' social security contributions and partial exemption from the payment of employed persons' contributions (approved by the Commission by decisions of 24 February 1998 ([15]) and 23 June 1999 ([16]));

— the scheme for exemption from the advance payment on earnings (approved by the Commission by decision of 27 June 2000 ([17])).

2.4. **Reasons for initiating the procedure**

(39) In its decision of 19 March 2003, the Commission approved the aid measures provided for in the programme act with the exception of seven specific points of the latter, in respect of which the Commission voiced doubts as to their compatibility with the common market. Four of these seven points concern the flat-rate taxation scheme and three concern the other aid measures provided for by the programme act.

2.4.1. *Flat-rate taxation scheme for shipowners*

2.4.1.1. Rates for ships over 40 000 tonnes

(40) While the Community guidelines allow such a rate in principle, the Commission has considered whether introducing a EUR 0,05 rate per tranche of 100 tonnes above 40 000 tonnes could lead to a distortion of intra-Community competition as none of the flat-rate taxation schemes previously approved by the Commission make provision for such advantageous rates for ships exceeding this tonnage.

(41) The following table shows, for the flat-rate taxation schemes already approved by the Commission, the rates for the determination of the tax base which is itself subject to the corporation tax rate.

Table 1:

Rates for determining the tax base in flat-rate taxation schemes of particular Member States

Rates in euros per tranche of 100 tonnes and per day

	NL	DE	DK	UK	ES	IE	FI	FR
0-1 000 NT	0,91	0,92	0,94	0,97	0,9	1	1,38	0,93
up to 10 000 NT	0,67	0,69	0,67	0,73	0,7	0,75	1,03	0,71
up to 25 000 NT	0,46	0,46	0,4	0,48	0,4	0,5	0,69	0,47
above 25 000 NT	0,23	0,23	0,27	0,24	0,2	0,25	0,57	0,24

Source: Commission

(42) Accordingly, by letter of 30 October 2002 the Commission asked Belgium to provide all the information and arguments that may justify the EUR 0,05 rate for ships over 40 000 tonnes, bearing in mind that the rates which the Commission had previously accepted for recent flat-rate taxation schemes in other Member States range from EUR 0,20 to EUR 0,25 for the highest tonnages.

(43) In their letter of 5 December 2002, the Belgian authorities provided the following information to justify the introduction of a specific rate for ships over 40 000 tonnes. According to the figures provided by the Belgian authorities, the total number of ships over 40 000 net tonnes worldwide was 1 257 in November 2002, of a total world fleet of 28 155. Even though this type of ship represents only 4,5 % of the world fleet in terms of number of vessels, it accounts for 34,17 % in terms of carrying capacity ([18]).

(44) Only 143 of these ships, i.e. 0,5 % of the world's fleet in number of vessels and 3,5 % in capacity, are registered in a Member State, as shown in the following table supplied by the Belgian authorities.

([15]) Letter SG(98) D/1660. Case NN 98/97.
([16]) Letter SG(99) D/4583. Case NN 35/99.
([17]) Letter SG(2000) D/105460. Case N 142/2000.
([18]) 253 430 610 NT of the world fleet's total of 741 600 000 NT.

Table 2:

Number of ships over 40 000 tonnes in the Member States

Country	Number of ships	Comments
Greece	108	of a Greek fleet of 3 261 ships, of which 2 476 (75 %) fly a foreign flag according to UNCTAD (36 ships > 60 000 NT of which 17 > 100 000 NT)
Spain	7	6 oil tankers < 48 933 NT + 1 oil tanker of 60 120 NT
Italy	6	2 oil tankers of 45 740 NT + 4 bulk carriers or ore carriers < 47 584 NT + 1 bulk carrier 56 579 NT
Britain	6	4 container ships < 48 880 NT + 1 oil tanker of 41 316 NT + 1 oil tanker of 105 889 NT
France	4	1 bulk carrier of 56 709 NT + 2 oil tankers <100 000 NT + 1 oil tanker of 108 708 NT
Germany	4	4 container ships < 42 233 NT
Netherlands	4	2 container ships 46 660 NT + 2 container ships of 48 880 NT
Luxembourg	3	3 oil tankers between 84 545 NT and 95 323 NT
Portugal	1	1 bulk carrier of 49 344 NT

Source: Belgian authorities.

(45) According to the Belgian authorities, the above figures bear out the view that the other flat-rate taxation schemes, although they have a digressive rate based on ships' tonnage, do not sufficiently take account of large ships. Tankers (53 % of ships over 40 000 tonnes) and bulk carriers (41.7 % of ships over 40 000 tonnes), in particular, occupy an important position in the fleet of Belgian shipowners. In support of these data, the Belgian authorities claim that the largest ships of Belgian owners will continue to fly flags of convenience if no attractive rate were introduced for ships over 40 000 tonnes.

(46) In its decision of 19 March 2003, however, the Commission expressed its concern that the introduction of such a low rate would encourage some non-Belgian shipowners to transfer their ships from a Community register to the Belgian register. Consequently, the Commission considers that this rate may thus lead to a distortion of competition within the Community. This is why the Commission has initiated the investigation procedure in respect of the introduction of the EUR 0,05 rate per tranche of 100 net tonnes applicable to ships over 40 000 tonnes.

2.4.1.2. Ancillary activities without a direct link with transport

(47) The Commission has so far refused to accept that tonnage-based flat-rate taxation schemes could also cover activities not directly connected with maritime transport. In their letter of 5 December 2002, the Belgian authorities provided a list of eligible activities, for some of which the Commission has had strong doubts as to whether they have a direct link with transport, namely:

— ancillary and temporary activities carried out by the company in order to make full use of the personnel and assets assigned to the company's principal activity, to the extent that these activities are minimal compared with that principal activity,

— sale of products not intended for consumption on board such as luxury goods and provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,

— advertising and marketing,

— revenue from short-term investment of operating capital, excluding, however, revenue from financial fixed assets,

— ship brokerage activities for its own ships,

— disposal of operating assets such as immovable property which serves management purposes and operating resources used to load and unload ships operated.

(48) The Commission considers that such ancillary activities are not directly connected with maritime transport and do not directly contribute to providing a transport service.

(49) In this case, the Commission therefore expressed doubts in its decision of 19 March 2003 as to whether the extension of the flat-rate taxation scheme to the abovementioned activities is compatible with the common market.

2.4.1.3. Deduction from the flat-rate tax of losses suffered by other divisions not subject to the flat-rate taxation scheme

(50) According to the information currently available to the Commission, the flat-rate taxation schemes approved by the Commission in the other Member States have not introduced mechanisms similar to the one provided for in Article 120(1) of the programme act ([19]). Article 120(1) provides for the possibility for companies simultaneously engaged in eligible and non-eligible activities to deduct from the tax determined at a flat-rate on the basis of tonnage any losses incurred by other company divisions to the extent that such losses could not be deducted from the profits of any other division for the relevant accounting year.

(51) The Commission has taken the view that this rule was in conflict with the general principle that eligible activities should be strictly separated from non-eligible activities for the determination of tax, a principle which has been observed in the other flat-rate taxation schemes already approved.

(52) Consequently, the Commission has expressed its doubt on the advantage that would thus be granted to shipping companies subject to Belgian tax and has sought the views of the other Member States and of any other interested party on the possible consequences which this provision might have for competition. This is why the Commission has also initiated the formal investigation procedure in respect of the provisions of Article 120(1) of the programme act.

2.4.1.4. Deduction for newer ships

(53) None of the flat-rate taxation schemes previously approved by the Commission provides for a deduction according to the ship's age for the purpose of determining the tax base.

(54) In its decision of 19 March 2003, the Commission considered whether this additional advantage would really be an incentive for registering the newest ships under the Belgian flag as such ships are in general more likely to meet the safety conditions required under the Belgian flag than older ships. The Commission notes that it is in fact more likely that older ships are registered under flags of convenience. Moreover, this provision would lead to a distinctly lower flat-rate tax for ships less than 10 years old than would have been the case for these ships in other Member States that have introduced a flat-rate taxation scheme approved by the Commission.

(55) For this reason, the Commission has initiated the formal investigation procedure with regard to the deductions provided for in Article 119(2) of the programme act for ships less than 10 years old.

2.4.2. *Measures outside the flat-rate taxation scheme for shipowners*

2.4.2.1. Accelerated depreciation of ships not intended for maritime transport

(56) Contrary to the requirements of the Community guidelines, the accelerated depreciation scheme does not make provision for links with eligible activities. In its decision of 19 March 2003, the Commission therefore expressed doubts about the compatibility of this depreciation scheme as regards its application to ships other than those intended for maritime transport and those carrying out eligible activities.

2.4.2.2. Reduction of registration duty for mortgages on ships

(57) The reduction of the duty payable on the registration of mortgages applies only to mortgages on ships for maritime shipping or inland navigation and not to mortgages on other types of investment such as immovable property. In its first analysis, the Commission took the view that this reduction seemed to be selective in that it applies only to a part of the types of assets on which a mortgage can be taken and promotes, even at a low level, activities for which ships are used. Accordingly, the Commission expressed doubts on whether such a reduction constitutes State aid or a general measure.

(58) Should it appear that the measure is aid within the meaning of the Treaty, the Commission would have strong doubts as to its compatibility with the common market since this measure would not only be conductive to maritime activities overall, including those not coming under maritime transport but also activities appertaining to inland navigation, which are not subject to the aforementioned Community guidelines but to Council Regulation

([19]) '*Article 120*

(1) Business losses incurred during a taxable period by another division of the company may be deducted from the profits determined at a flat rate for the same taxable period in accordance with Article 119 to the extent that these losses could not be deducted from the profits of any of the company's other divisions.'

(EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway ([20]). The said regulation does not allow the grant of such aid.

(59) In its decision of 19 March 2003 the Commission therefore expressed doubts that the reduction of registration duty for ships other than those intended for maritime transport activities is compatible with the common market.

2.4.2.3. Flat-rate taxation scheme applicable to persons managing ships on behalf of third parties

(60) Firstly, with regard to the scheme applicable to persons managing ships on behalf of third parties, the Commission noted in its decision of 19 March 2003 that their activity could not be treated as an activity of maritime transport, at least with regard to the way this sector is organised in Belgium. Only maritime shipping companies are covered by the Community guidelines ([21]). It would appear that Belgium would be the first Member State wishing to apply a flat-rate taxation scheme to subcontractors of maritime transport companies.

(61) Secondly, the Commission has noted that the same ship could at the same time qualify for the flat-rate taxation scheme via its owner and its manager, with the latter, as pointed out above, benefiting from rates that are 10 times lower than those applicable to the former for the flat-rate determination of the tax base.

(62) Thirdly, Belgium has not provided any information showing that the scheme applicable to persons managing ships on behalf of third parties could enhance the competitiveness of ships flying a Community flag. In particular, it has not been shown that this scheme could indirectly be favourable to Belgian shipowners through a reduction of the price of services which the managers perform on their behalf.

(63) Fourthly, even if the manager is in Belgium and the activities he performs are therefore pursued from Belgian territory, it is not certain that all of his on-shore activities relating to the management of ships are pursued from within the territory of the Community. A part of these services, such as business and strategic management, which are not provided by the managers on behalf of third parties, could be performed from a third country.

(64) Fifthly, before the procedure was initiated Belgium had not furnished any economic arguments to justify the fact that the tax base for persons managing ships on behalf of third parties is ten times lower than that applicable to shipowners.

(65) Finally, the Commission wondered whether persons managing ships on behalf of third parties work exclusively for Belgian or Community shipowners. The proposed scheme only requires that three quarters of the ships managed be registered in the Belgian register. If it is possible for managers to offer their services to shipowners not subject to tax in the Community for up to one quarter of their managed fleet, this may well be tantamount to an economic advantage being granted to non-Community maritime transport companies.

(66) For all of the above reasons, the Commission expressed doubts, in its decision of 19 March 2003, on the compatibility of the scheme applicable to persons managing ships on behalf of third parties ([22]).

([20]) OJ L 130, 15.6.1970, p. 1. Regulation last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

([21]) In section 3.1 entitled 'Fiscal treatment of shipowning companies', the Community guidelines refer to fiscal schemes for 'shipowning companies' and 'shipowners'.

([22]) '*Article 124*

(1) At the taxpayer's request, the taxable profits from the management of ships on behalf of third parties shall, by derogation from Articles 183, 185, 189 to 207, 233(1) and 235 to 240 of the Income Tax Code 1992, be determined at a flat rate on the basis of the tonnage of the ships covered by the management.

(2) The request referred to in paragraph (1) shall be submitted by the taxpayer to the tax office which shall take a decision within three months of the date on which it received the request. This deadline may be extended by common agreement between the taxpayer and the tax office. The tax office shall decide on the request by an appealable decision.

(3) If the request referred to in paragraph (1) is accepted, the scheme for determining profits from maritime shipping on the basis of tonnage shall, in accordance with this Article, take effect from the taxable period following that in which the request was submitted. The taxpayer may waive coverage under the said scheme not later than three months after the expiry of the taxable period closed during the 10th calendar year, or a multiple thereof, after that in which the request was submitted.

(4) Per ship, per day and per 1 000 net tonnes, the profits for the taxable period from the management of ships on behalf of third parties shall be determined in accordance with the amounts specified in the following table:

EUR 1,00 for the tranche up to 1 000 net tonnes;

EUR 0,60 for the tranche between 1 000 net tonnes and 10 000 net tonnes;

EUR 0,40 for the tranche between 10 000 net tonnes and 20 000 net tonnes;

EUR 0,20 for the tranche between 20 000 net tonnes and 40 000 net tonnes;

EUR 0,05 for the tranche above 40 000 net tonnes.

(5) Any non-allocated part of the losses incurred in managing ships on behalf of third parties remaining at the time when the profits are determined for the first time on the basis of tonnage may again be deducted from the profits after the expiry of the period in which the profits have thus been determined.

(6) The scheme provided for in this Article is reserved for taxpayers managing ships on behalf of third parties provided that at least 75 % of the number of ships managed on behalf of third parties are registered in the Belgian register of ships. Companies wishing to make use of the scheme provided for in this Article may not pursue any activity other than the management of ships.'

3. COMMENTS FROM INTERESTED PARTIES

3.1. Comments from the Union Royale des Armateurs Belges

(67) By letter of 26 August 2003 the *Union Royale des Armateurs Belges* (hereinafter referred to as the Union Royale), a non-profit-making association of Belgian shipowners, transmitted to the Commission its comments on all the points covered by the formal investigation procedure.

(68) The Union Royale first of all emphasises that the low rate applicable to the tranche above 40 000 tonnes is designed to bring ships above this tonnage back under a Community flag, recalling that these ships represent only 4,5 % of the world fleet (1 257 units of a total number of 28 155 units worldwide) but account for 34,17 % of worldwide carrying capacity (253 430 610 of a total of 741 600 000 tonnes deadweight).

(69) With regard to the tax deduction for newer ships (50 % for ships less than five years old and 25 % for those between five and ten years old), the Union Royale stresses that it is primarily intended to promote young fleets with safer and more environmentally friendly ships. It adds that these reductions may also contribute to maintaining attractive and high-quality jobs in the maritime sector and on shore and maintaining maritime know-how in Europe.

(70) According to the Union Royale, prohibiting the possibility for a maritime shipping company to deduct losses incurred in its other divisions from the flat-rate tax would lead to discrimination among Belgian companies as companies that do not have a maritime division may offset the losses of the year incurred in particular divisions against profits from other divisions whereas such losses cannot be deducted from profits based on tonnage.

(71) With regard to the list of ancillary activities on which the Commission has expressed doubts, the Union Royale points out that the Belgian Government took its cue from the OECD's commentary and tonnage tax schemes in the Netherlands and the United Kingdom. It emphasises in particular that ship brokerage activities performed for a company's own ships are perfectly consistent with the spirit of the Community guidelines.

(72) With regard to the scheme for accelerated depreciation of ships, the Union Royale notes that it was in fact the Union Royale itself which had asked the Belgian Government to confirm through legislation a tax scheme which, it argues, already existed before the entry into force of the Treaty in order to enhance legal certainty with regard to this scheme.

(73) With regard to the reduction of registration duties for registering mortgages on ships other than those intended for maritime transport activities, the Union Royale points out that this tax does not exist in most of the other Member States. It argues that not accepting this reduction would be detrimental to the competitive position of owners of Belgian ships. The Union Royale further stresses that the measure would help to improve the competitive position of the inland shipping sector.

(74) With regard to the management of ships on behalf of third parties, the Union Royale emphasises that the proposed scheme requires that at least 75 % of the ships managed fly the Belgian flag. It also points out that it is normal that the managers should be entitled to flat-rate taxation different from that applicable to shipowners as the managers do not pursue the same profession and do not run the same risks as shipowners.

3.2. Comments from the *Zentralverband der Deutschen Seehafenbetriebe*

(75) By letter of 3 July 2003, the *Zentralverband der Deutschen Seehafenbetriebe* (Federation of German sea port companies, hereinafter referred to as the Federation) transmitted its comments to the Commission. It takes the view that aid to maritime transport should not lead to distortion of intra-Community competition in the towage sector. The Federation points out that the competitiveness of Europe's ports depends to a large extent on towage costs. It maintains that it is desirable to foster competition among towage companies in the same port and between ports as this contributes to maintaining the competitiveness of the various ports. Nevertheless, however desirable this competition may be, it must take place under similar conditions of competition.

(76) The Federation regrets that the flat-rate taxation scheme also applies to Belgian towage companies. In general, the Federation takes the view that schemes to alleviate wage costs for towage companies are not compatible with the Community guidelines. Finally, it asks that all aid schemes for the towage sector be declared incompatible with the common market.

3.3. Comments from the *Handelskammer Hamburg*

(77) By letter of 18 July 2003, the *Handelskammer Hamburg* (Hamburg Chamber of Commerce) transmitted its comments to the Commission as the representative of the Hamburg economy and its companies.

(78) The *Handelskammer Hamburg* is concerned that the Belgian tonnage-based flat-rate taxation scheme distorts competition not only between towage companies but also between the ports of northern Europe. In its opinion, the Community guidelines should not be applicable to inland shipping, nor to activities in and around sea ports. Consequently, it asks that the formal investigation procedure be extended to the application of the scheme to the towage sector.

3.4. **Comments from *Bugsier***

(79) By letter of 2 June 2003, the Bugsier company (*Bugsier Rederei- und Bergungs-Gesellsschaft mbH*) transmitted to the Commission its comments as an interested party, asking that all its letters sent to the Commission between 2000 and 2003 be taken into account. In particular, it considers that the conditions laid down in the programme act in respect of towage, in particular the criteria 'at sea with a clearance certificate', are insufficient to prevent unfair competition within the Community in the port towage sector, asking the Commission to extend the formal investigation procedure also to this aspect of the programme act.

4. **COMMENTS FROM BELGIUM**

(80) Pursuant to Article 6(2) of Regulation (EC) No 659/1999, the Commission has sent the following documents to the Belgian authorities for its comments:

— the comments from the *Zentralverband der Deutschen Seehafenbetriebe* by letter of 7 August 2003,

— the comments from the *Handelskammer Hamburg* by letter of 7 August 2003;

— the comments from *Bugsier Rederei- und Bergungs-Gesellschaft mbH* by letter of 7 August 2003,

— the comments from the *Union Royale des Armateurs Belges* by letter of 17 September 2003.

(81) The Commission has not received any observations from the Belgian authorities on the comments transmitted.

(82) By letter of 7 May 2003, the Belgian authorities transmitted to the Commission their observations on the Commission's decision of 19 March 2003 to initiate the formal investigation procedure with regard to certain aspects of the planned fiscal measures for maritime transport.

4.1. **Flat-rate taxation scheme for shipowners**

4.1.1. *Low rate beyond 40 000 tonnes for the flat-taxation scheme* ([23])

(83) In its decision of 19 March 2003, the Commission considered whether the introduction of a EUR 0,05 rate per tranche of 100 tonnes above 40 000 tonnes could, even though not prohibited by the Community guidelines on aid to maritime transport ([24]), lead to a distortion of intra-Community competition. None of the flat-rate taxation schemes previously approved by the Commission have laid down measures that are equally favourable for ships over 40 000 tonnes. Moreover, the Commission has endeavoured to keep the tax rates of the schemes previously approved within a relatively narrow range, as shown in Table 1, to ensure a high degree of convergence among the various taxation schemes throughout the Community.

(84) Belgium emphasises that this rate is as such not contrary to the Community guidelines. The Belgian authorities also note that the purpose of this measure is not to distort intra-Community competition but to promote the return under the Belgian flag of ships over 40 000 tonnes.

(85) The Belgian authorities recall that ships of more than 40 000 tonnes represent only 4,5 % of the world fleet, namely 1 257 units. Only 143 of them are registered in the Community, or 11,38 %. Most of these (108 ships or 75,52 % of the 'European' fleet over 40 000 tonnes) are registered in Greece. Taking account of the small number of ships involved, the Belgian authorities assume that the other Member States have hitherto not introduced specific measures for this type of ship.

(86) Nevertheless, Belgium has wished to attract large-capacity ships to its flag by granting a rate that is, among other things, adapted to their specific features. The Belgian authorities point out that even after the introduction of the flat-rate taxation scheme as planned by Belgium, the tax burden would still be tantamount to 2 or even 2,5 times the amount of tax levied in third countries with flags of convenience or in countries such as Malta and Cyprus. As regards these two countries, the Belgian authorities maintain that it is much more their accession to the European Union that will bring about a distortion of competition rather than the introduction in Belgium of a specific rate for high-tonnage ships.

([23]) Article 119(1) of the programme act.

([24]) Former version (OJ C 205, 5.7.1997, p. 5).

(87) According to the Belgian authorities, the fact that other Member States have not shown a specific interest in high-capacity ships, probably because of the small number or total absence of such ships in these Member States, should not prevent Belgium from pursuing a different policy in this respect.

(88) Finally, the Belgian authorities refer to the Community guidelines which provide in the second paragraph of section 3.1 that 'the creation of conditions allowing fairer competition with flags of convenience seems the best way forward'.

4.1.2. *Application of the flat-rate taxation scheme to profits from particular activities without a direct link with transport activities*

(89) In compiling the list of eligible activities included in the reply which it sent to the Commission on 5 December 2002, Belgium referred to the following:

— the OECD commentary on the model convention with respect to taxes on income and on capital, and in particular the comments concerning Article 8 on shipping and air transport,

— the tonnage tax schemes established by the Netherlands and the United Kingdom, approved by the Commission by decisions of 20 March 1996 and 2 August 2000.

(90) As the list of eligible activities is based on certain existing schemes, the Belgian authorities consider that the Commission ought to treat them in the same way as it has done for the other Member States.

(91) Specifically, the Belgian authorities note that for the connected and temporary activities which a company pursues in order to make full use of the personnel and assets assigned to the company's principal activity, if these activities are minimal compared with that principal activity, the text has been modelled on the tonnage-based flat-rate taxation scheme of the United Kingdom ([25]).

(92) With regard to the sale of products not intended for consumption on board such as luxury articles and the provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers, the Belgian authorities argue that the description of the measure has likewise been modelled on the tonnage-based flat-rate taxation scheme of the United Kingdom.

(93) With regard to advertising and marketing, the Belgian authorities emphasise that points 7 and 8 of the commentary on the OECD model tax convention includes advertising and commercial propaganda among the additional activities connected with the direct operation of ships ([26]).

(94) With regard to revenue from short-term investment of operating capital, ship brokerage ([27]) for the company's own ships and the disposal of operating assets such as immovable property for management purposes and operating facilities for loading and unloading ships, the Belgian authorities have based their arguments on the explanatory memorandum ([28]) pertaining to the Dutch tonnage-based flat-rate taxation scheme ([29]).

4.1.3. *Provisions allowing losses of other divisions that could not be deducted from the profits of any other division of the company to be deducted from the tonnage-based flat-rate tax*

(95) Belgian fiscal law on corporation tax provides that companies are taxable on their total profits. This means that profits and losses in a particular tax year can be offset among all the divisions and/or branches of the company.

([25]) Commission Decision of 2 August 2000, Case N 790/1999.

([26]) '7. Shipping […] enterprises […] often engage in additional activities more or less closely connected with the direct operation of ships […]. Although it would be out of the question to list here all the auxiliary activities which could properly be brought under the provision, nevertheless a few examples may usefully be given.

8. The provision applies, inter alia, to the following activities:

[…]

(c) advertising and commercial propaganda;

[…]'

([27]) In Dutch also called 'cargadoor'.

([28]) Lower House of the Dutch Parliament, Parliamentary Year 1995 to 1996, 24 482, No 3. Unofficial translation made by the Belgian administration of the passage in the Dutch explanatory memorandum [and here translated into English from the Dutch original]: 'For the purposes of this article, profits from maritime shipping includes profits made in activities directly connected with the operation of the abovementioned ships. These activities include loading and unloading under the shipowner's own management and ship brokerage activities carried out under his own management. Such directly connected activities come under the scheme only to the extent that they are performed for the ships operated by the taxpayer. Moreover, directly connected activities also include the disposal of assets used by the taxpayer in the course of operation. This concerns not only ships operated by the taxpayer but, for instance, also buildings in which management takes place and the company's assets used for loading and unloading ships.'

([29]) Commission Decision of 20 March 1996, Case N 738/1995.

(96) The Belgian authorities recall that the flat-rate scheme does not determine the tonnage-based flat-rate tax but the taxable profits accruing from maritime shipping.

(97) Moreover, the Belgian authorities take the view that the position adopted by the Commission would lead to discrimination between Belgian companies as companies which do not have a maritime division may offset the year's losses incurred in some divisions against profits from other divisions whereas such losses cannot be deducted from profits determined on the basis of tonnage.

4.1.4. *50 % tax deduction for ships less than five years old and 25 % for ships between five and ten years old*

(98) The Belgian authorities stress that the Community guidelines do not lay down any rule on the applicable rates which Member States may introduce in flat-rate taxation schemes nor on the possibility of introducing incentives for new ships. In the opinion of the Belgian authorities, the fact that the other schemes recently approved do not provide for such a deduction cannot prevent Belgium from introducing such an incentive.

(99) In its decision of 19 March 2003, the Commission states that it knows from experience that there is a greater tendency to register older ships under flags of convenience. The Belgian authorities maintain that these arguments are contrary to reality and are without foundation and they refer to an extract from the *Review of Maritime Transport* of 2002 ([30]) which they enclosed with their letter of 7 May 2003.

4.2. **Tax measures outside the flat-rate taxation scheme for shipowners**

4.2.1. *Scheme for accelerated depreciation*

(100) According to the Belgian authorities, the accelerated depreciation scheme was set up in 1951 and has already undergone several amendments, most recently in 1996. The scheme therefore dates back to before the signing of the Treaty. The scheme was transposed into legislation through the programme act of 2 August 2002 to enhance its legal certainty.

([30]) Report of the UNCTAD Secretariat: UNCTAD/RMT/2002 UNITED NATIONS PUBLICATION Sales No E.02.II.D.23 ISBN 92-1-112571-5 ISSN 0566-7682.

(101) The Belgian authorities have provided the Commission with documentary proof showing that the scheme existed before the entry into force of the Treaty of 1 January 1958. The Belgian authorities enclosed with their letter of 7 May 2003 an internal instruction from the Ministry of Finance dated 24 August 1951 laying down the procedure for implementing the specific depreciation scheme for ships and a letter from the Ministry of Finance to the general shipowners' association dated 13 January 1967 indicating that the said scheme was still applicable.

4.2.2. *Reduction of registration duties on mortgages on ships not intended for maritime transport*

(102) In general, tax incentives may be accepted provided that they are confined to maritime transport activities. The Belgian authorities take the view that the reduction of the registration duty for ships used in maritime transport is compatible with section 3.1 of the Community guidelines if it should appear that the measure constitutes aid within the meaning of the Treaty.

(103) The Belgian authorities have indicated that the main reason for introducing this measure was the absence of similar taxes for registering mortgages on ships in the Netherlands and the Grand Duchy of Luxembourg. According to the Belgian authorities, the absence of such a tax in two of Belgium's neighbouring countries places the Belgian fleet in an unfavourable competitive position.

4.2.3. *Scheme applicable to managers acting on behalf of third parties* ([31])

(104) In response to the observations made by the Commission in the decision of 19 March 2003, the Belgian authorities indicate, referring to the explanatory memorandum to the draft for the programme act, that the flat-rate taxation scheme was established in order to make the technical management of ships more competitive and to make it possible to make crews available on the basis of a management contract. According to the Belgian authorities, there is a huge market for such activities in which Belgium has so far played only a very small part.

(105) According to the Belgian authorities, the Community guidelines explicitly mention the relocation of ancillary activities (such as management of ships) to third countries (section 1.2, fifth paragraph), involving even higher losses of jobs, at sea and on shore. The programme act provides that at least 75 % of ships managed must be registered in the Belgian register of ships. The Belgian authorities point out that such a condition does not exist under the flat-rate

([31]) Article 124 of the programme act.

taxation scheme for maritime transport companies. In order to benefit under the scheme, managers may not pursue activities other than ship management.

(106) Moreover, the Belgian authorities recognise that for the determination of the flat-rate tax the same ship may be taken into account twice, once for the shipowner and once for the manager. As these are two different legal personalities who pursue different activities, the Belgian authorities deem it normal that in this case income is determined and taxed separately. According to the Belgian authorities, the fact that different rates are applied is justified because different activities give entitlement to different remuneration.

5. EVALUATION OF THE AID

5.1. Existence of aid within the meaning of the EC Treaty

(107) Under Article 87(1) of the Treaty, 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 common market insofar as it affects trade between Member States.

(108) Through tonnage-based flat-rate taxation, the Belgian authorities intend to grant advantages to certain undertakings through state resources. These subsidies threaten to distort competition and could affect trade between Member States. For the above reasons, the various measures in question which are the subject of the formal investigation procedure constitute State aid within the meaning of Article 87(1) of the Treaty.

(109) The scheme for accelerated depreciation of ships, offering depreciation rules that are even more generous than those provided for in Articles 61 to 64 of the Belgian Income Tax Code 1992, is specific in that it applies only to a limited category of assets. The measure is in effect State aid within the meaning of Article 87(1) of the Treaty.

(110) Next, it should be ascertained whether the registration charge levied on the establishment of a mortgage on ships constitutes aid. The Belgian authorities have not supplied any information to show that this registration duty is a unique case in the Community and that none of the other Member States have an equivalent tax on the registration of a mortgage on a ship.

(111) The Commission notes that this registration duty is paid for mortgages taken out on immovable property and that the scheme in question is not confined to ships, whether used for maritime transport or inland navigation. The Commission points out that under the rules governing the tax scheme for mortgage registration, it is logical that registration duties are levied in proportion to the amount of mortgage, irrespective of the type of assets to which the mortgage relates.

(112) The Commission therefore takes the view that the abolition or substantial reduction of this tax for only a part of the sectors of activity concerned constitutes State aid within the meaning of Article 87(1) of the Treaty as the scheme continues to apply without change to the other activities for which mortgages have to be registered. Moreover, the measure applies only to one category of assets while categories of assets other than ships do not qualify for such reduction. Consequently, this measure cannot be treated as a general measure.

(113) Finally, the flat-rate taxation scheme for persons managing ships on behalf of third parties is specific, like that for shipowners. It is therefore aid within the meaning of Article 87(1) of the Treaty.

(114) Moreover, the Commission notes that it was already established in the decision of 19 March 2003 that it is tantamount to aid within the meaning of Article 87(1) of the Treaty. In fact, the Belgian authorities have not disputed this evaluation in the comments they submitted on the said decision.

(115) As a general rule, the Commission considers that the aid subject to the formal investigation procedure is unlawful as there is no longer any legal or administrative impediment to its implementation following the promulgation of the Royal Decree of 7 May 2003, even though no advantages have as yet been granted in practice. The Commission regrets that Belgium has implemented these measures without the Commission's prior approval.

5.2. Legal basis

(116) Under Article 87(3)(c), aid to facilitate the development of certain economic activities or of certain economic areas may be regarded as compatible with the common market if such aid does not adversely affect trading conditions to an extent contrary to the common interest. The Commission considers Article 87(3)(c) as the appropriate legal basis applicable in the case under scrutiny.

(117) Aid for the maritime sector should be examined in particular in the light of the Community guidelines on State aid for maritime transport. These guidelines describe schemes for State aid that may be introduced to promote the interests of maritime transport in the Community in the pursuit of general objectives such as:

— safeguarding employment in the Community (at sea and on shore),

— improving safety,

— maintaining maritime know-how in the Community and improving maritime skills.

(118) As the measures examined in the formal investigation procedure have been implemented, the text that should be examined is that which was in force on the date of entry into force of various measures. Consequently, for all the measures examined, the Commission used the Community guidelines in force, i.e. those published on 17 January 2004 ([32]), to investigate whether the various planned fiscal measures are compatible. Be that as it may, the new guidelines do not differ greatly from the former with regard to aid measures relating to corporation tax ([33]), except as regards the treatment of persons managing ships on behalf of third parties. Where sectors other than maritime transport could be affected by the measures investigated, the Commission referred to Community texts applicable to State aid in these sectors.

5.3. **Analysis of measures under the flat-rate taxation scheme**

(119) First of all, the Commission takes cognisance of the comments made by various interested parties on the need to extend the formal investigation procedure to the application of the tax measures to the dredging sector. The Commission points out that this aspect of the programme act cannot be covered by this decision as the decision to initiate the informal investigation procedure did not relate to this aspect. This is because the Commission considered in its decision to initiate the procedure that the conditions laid down by the programme act were sufficient to exclude all towage activities not covered by the definition of maritime transport from benefiting from the tax concessions. This view has been called into question by various interested parties even though they were not invited in the decision of 19 March 2003 to comment on this aspect of the programme act. The Commission intends to deal with this aspect of the programme act in another decision on the basis of a more thorough examination of the impact of the programme act on the Belgian towage sector.

(120) In light of the observations submitted by the various interested parties and comments from the Belgian authorities, the Commission will consecutively consider the seven points in respect of which it initiated the formal investigation procedure on 19 March 2003.

5.3.1. *Rates for ships over 40 000 tonnes*

(121) First of all, the Commission notes that the Belgian authorities have given a commitment not to apply the EUR 0,05 rate so long as the Commission has not ruled on its compatibility with the common market following the outcome of the formal investigation procedure. This measure has therefore not been implemented.

(122) Furthermore, the Commission notes that none of the tonnage-based flat-rate taxation schemes previously approved by the Commission made provision for specific treatment for very large ships and that the Community guidelines leave a degree of discretion with regard to the acceptable level of rates under the flat-rate taxation scheme. Moreover, the Commission does not have sufficient experience with these schemes to know whether the rates have been sufficiently attractive to encourage shipowners to bring large-tonnage ships such as those covered by the EUR 0,05 rate back from the flag of a third country to a Community flag.

(123) The Commission considers incompatible with the common market the plan of the Belgian authorities to apply the special EUR 0,05 rate for ships over 40 000 tonnes also to ships already flying the flag of a Member State. The aim of the guidelines is above all to strengthen the Community fleet and thereby create employment in the Community as well as ensuring that ships are subject to Community rules with regard to safety. It is obvious that this objective is already met by a ship which already flies the flag of one of the Member States.

(124) Care should be taken to prevent shipowners from nevertheless trying to benefit from the EUR 0,05 rate when reflagging a ship from a Community flag to the Belgian flag

([32]) See note 4.

([33]) See section 3.1 of the Community guidelines.

by letting them sail temporarily under the flag of a third country. In order to ensure that the introduction of the EUR 0,05 rate does not lead to reflagging within the Community, the Commission deems it necessary to impose on ships coming from registers of third countries a minimum period of five years during which a ship reflagged to the Belgian flag must have been previously registered under a non-Community flag. Such a condition would make it possible to attain the objective laid down in the Community guidelines to transfer ships controlled by Community shipowners and registered under the flag of a third country to Community ships' registers without running the risk of adversely affecting intra-Community trade.

(125) Accordingly, the Commission considers the introduction of a EUR 0,05 rate per tranche of 100 tonnes above 40 000 tonnes, such as provided for in Article 119(1) of the programme act of 2 August 2002, as compatible with the common market provided that the ships concerned are new or else have been registered for at least the last five years under a non-Community flag. If this condition is not met, the Commission considers the measure incompatible with the common market. If no such guarantees can be given, there is a significant risk that the aforementioned rate of EUR 0,05 leads to distortion of competition in intra-Community trade.

5.3.2. *Extension of the flat-rate taxation scheme to profits from particular activities*

(126) First of all, the Commission notes that the activities in respect of which the formal investigation procedure was instituted come from a list provided by the Belgian authorities in their reply to the Commission of 5 December 2002. As the Belgian authorities pointed out in their letter of 7 May 2003, Belgium took as the basis for this indicative list the OECD model tax convention on income and on capital and the tonnage tax schemes established by the Netherlands and the United Kingdom.

(127) The Commission notes that the list of activities in respect of which the procedure was instituted includes income-generating activities – for which the question whether these activities are eligible or not is completely relevant – and activities which only generate costs for shipowners, for which this question does not appear to be relevant. The latter activities are in fact intrinsically linked with maritime transport activities and it is therefore logical to include the costs they generate in the accounts on the basis of which the profits that are subject to the flat-rate taxation scheme are calculated so as to ensure that such costs are not deducted from profits calculated for any ineligible activities.

5.3.2.1. Ancillary and temporary activities

(128) With regard to ancillary and temporary activities 'carried out by the company in order to make full use of the personnel and assets assigned to the company's principal activity, to the extent that these activities are minimal compared with that principal activity', the Commission notes that the Belgian authorities have not furnished any arguments to show that such activities were indispensable or intrinsically linked with maritime transport activities. Nor have they specified within what limits and under what conditions certain activities which because of their particular nature are not eligible could be covered by the flat-rate taxation scheme.

(129) The Commission therefore takes the view that because such activities cannot fall within one of the categories of eligible activities they are ineligible activities. The Commission recalls the approach it has consistently adopted in its recent decisions with regard to ineligible activities in order to prevent abuse in the application of schemes for maritime transport.

(130) Finally, the Commission believes that the absence of clear limits and rules for covering these ancillary and temporary activities may be a significant potential source of deviations from the scheme's original objective.

(131) For all the above reasons, the Commission considers that covering these activities by the flat-rate taxation scheme is not compatible with the common market.

5.3.2.2. Sale of products and services not intended for consumption on board

(132) It is necessary to ascertain whether the sale of products not intended for consumption on board, such as luxury articles, or the provision of services without a direct link with maritime transport, such as gambling, gaming tables and casinos and excursions for passengers, may be regarded as eligible.

(133) In order to maintain a level playing field in competition within the Community in accordance with the objectives of the Community guidelines, the Commission has in its earlier decisions consistently pursued a policy of not including in flat-rate taxation schemes the sale of articles or

the provision of services that are not directly linked with maritime passenger transport. It is the Commission's view that the sale of luxury articles and gambling, gaming tables and casinos on board eligible ships could not be intrinsically linked with maritime passenger transport and that these activities could therefore not be eligible. In accordance with this principle, such activities have been explicitly excluded from the Irish ([34]), Finnish ([35]) and French ([36]) flat-rate taxation schemes.

(134) The Commission is of the opinion that the Belgian authorities cannot invoke implementing provisions pertaining to a taxation scheme of a Member State if these provisions have not been notified to the Commission and have not been mentioned in the Commission's decision approving the relevant scheme. In other words, a Member State could not invoke the existence of illegal aid, whether alleged or real, in another Member State to justify the compatibility of similar aid within its own territory.

(135) In view of the above considerations, the Commission considers that including the sale of products and services not intended for on-board consumption in the flat-rate taxation scheme is not compatible with the common market.

5.3.2.3. Advertising and marketing

(136) A distinction should be made between advertising and marketing activities involving costs for the shipowner (service provided by a third party) and those generating income (service provided by the shipowner).

(137) Advertising and marketing should be covered by the flat-rate taxation scheme if they entail costs connected with maritime transport (expenditure on advertising and marketing for the shipping company's own activities). This is because in this case advertising and marketing are eligible activities in that they do not generate income for the shipping company.

(138) If advertising and marketing generate income for the shipping company, it should be verified whether they are intrinsically linked with maritime transport. For instance, the Commission is of the opinion, in light of the Community guidelines, that only activities directly linked with maritime transport can be eligible under flat-rate taxation schemes and that 'activities that have nothing to do with maritime shipping' cannot be eligible. The sale of advertising space on board passenger ships is a normal activity of a company engaged in maritime passenger transport. In this specific case, including this activity in the flat-rate taxation scheme may be considered compatible with the common market. However, if advertising and marketing are ancillary activities for the shipping company that are not directly linked with its maritime transport services, the Commission takes the view that they cannot be considered eligible.

5.3.2.4. Short-term investment revenue from operating capital

(139) As in every business, revenue from short-term investment of operating capital within a shipping company results from normal financial management. Moreover, this revenue may be of particular importance for shipping companies whose activities are affected by strong seasonal variation.

(140) The short-term investment of ordinary cash resources is a normal activity directly linked with the shipping company's principal activity. Accordingly, the Commission is of the opinion that such revenue is eligible to the extent that it corresponds to the financial products of the shipping company's normal working capital in connection with the pursuit of eligible activities. If the financial products hail from exceptional assets of the shipping company or if they relate to long-term investment or originate from resources generated by ineligible activities, the Commission is of the opinion that the latter cannot be eligible under the flat-rate taxation scheme.

(141) The Commission therefore considers that including short-term investment revenue from operating capital is compatible with the common market if such revenue relates to financial products from the shipping company's normal working capital from eligible activities.

5.3.2.5. Ship brokerage for the company's own ships

(142) Ship brokerage activities consist of looking for cargo in a port on behalf of a shipowner and looking after the latter's interests. Ship brokerage activities on a company's own behalf consist of looking for additional cargo in a port to supplement the cargo of its own ships.

([34]) Commission decision of 11 December 2002, case N 504/02. See in particular point 29.

([35]) Commission decision of 16 October 2002, case N 195/02. See in particular section 2.8.2.

([36]) Commission decision of 13 May 2003, case N 737/02. See in particular point 26.

(143) The Belgian authorities have argued that they have taken as a basis the explanatory memorandum to the Dutch law establishing a tonnage-based flat-rate taxation scheme ([37]). As indicated above, the Commission cannot take this argument into account to show that this activity is eligible.

(144) However, the Commission notes that this activity does not generate revenue for the shipping company insofar as it is a normal activity for a shipowner looking for as much cargo as possible for his ships. This activity does not generate any turnover-increasing added value among the shipowner's existing customers and cannot give rise to specific remuneration from new clients supplying additional cargo. It is a normal activity of a shipowner seeking to use his assets to make a profit.

(145) For the above reasons, the Commission considers that the inclusion in the flat-rate taxation scheme of ship brokerage activities on the shipowner's own behalf is compatible with the common market.

5.3.2.6. Disposal of operating assets

(146) Disposal of operating assets such as operating equipment used for the company's own purposes in loading and unloading ships operated may be regarded as an activity directly linked with maritime transport for the same reason that capital gains on ships are normally covered by a flat-rate taxation scheme, if they are re-invested pro rata temporis under the flat-rate taxation scheme.

(147) However, this does not apply in respect of capital gains on office buildings which because of their very nature are not intended to be used for maritime transport. The fact is that such assets can be used by any other type of company. If the disposal does not concern property which by virtue of its nature is intended to be used in maritime transport activities, capital gains from such sale cannot be included in the flat-rate taxation scheme.

(148) The inclusion of capital gains which solely relate to property which by its nature is intended for use in maritime transport activities is therefore compatible with the common market.

5.3.2.7. Conclusions on the eligibility of the various activities examined

(149) In conclusion, the Commission considers the inclusion in the flat-rate taxation scheme of the following activities as incompatible with the common market:

— ancillary and temporary activities,

— the sale of products not intended for consumption on board such as luxury articles and the provision of services not directly linked with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,

— income from investment that does not correspond to revenue from the company's ordinary cash resources,

— advertising and marketing that does not relate to the sale of advertising space on board eligible ships,

— ship brokerage activities on behalf of ships of third parties,

— disposal of operating assets if by virtue of their nature they are not intended for maritime transport.

(150) However, the Commission considers inclusion in the flat-rate taxation scheme of the following activities as compatible with the common market:

— income from short-term investment of operating capital if it corresponds to revenue from the company's ordinary cash resources,

— advertising and marketing relating to the sale of advertising space on board eligible ships,

— ship brokerage activities for one's own ships,

— disposal of operating assets if they are by their nature intended for maritime transport.

5.3.3. *Deduction of losses of other divisions from the flat-rate tax*

(151) The Commission recalls that in its earlier decisions it called for the introduction of measures to prevent abuse (also referred to as ring-fencing measures) so as to prevent ineligible activities from benefiting from measures initially intended for maritime transport. Such limiting measures are of essential importance to ensure that protective mechanisms of the Community's maritime transport sector do not lose their credibility and thereby their justification in light of Community law when they are extended to activities not subject to the international competitive pressures which the maritime transport sector is subject to.

([37]) See, in particular, the Commission's decision of 20 March 1996, case N 738/1995.

(152) The Commission therefore considers it crucial to maintain a strict separation of accounts between eligible and ineligible activities for the determination of the taxation applicable to each. The Commission has ascertained that this principle is applied in the other flat-rate taxation schemes it has approved.

(153) The Belgian authorities have not been able to show that to calculate profits it was necessary to remove the barriers between the maritime divisions, both with regard to the maritime sector and the other sectors concerned.

(154) In fact, the Commission fails to understand the argument adduced by the *Union Royale des Armateurs Belges* that companies which have not made the separation would be penalised ([38]). In their letter of 5 September 2002, the Belgian authorities gave a commitment that a company simultaneously engaged in eligible and ineligible activities would keep separate accounts. The Commission regards this commitment as a guarantee of compliance with the principle of strict separation in the accounts between eligible and ineligible activities. Consequently, the situation described by the Union Royale could not arise.

(155) The Commission deems it necessary to maintain a strict separation between the accounts for eligible and ineligible activities and therefore considers the provisions of Article 120(2) of the programme act, under which any losses suffered by other divisions that are normally taxed may be deducted from tax determined on a flat-rate basis as incompatible with the common market.

5.3.4. *Deductions for ships more than 10 years old*

(156) The Commission notes that the Belgian authorities intend to favour newer ships in order to foster the development of a safer and more environmentally friendly fleet. Nevertheless, it notes that none of the tonnage-based flat-rate taxation schemes implemented by other Member States and approved by the Commission comprise specific rates varying according to the ship's age.

(157) Moreover, the Commission notes that while the nominal rates fixed by Belgium make the level of taxation comparable with schemes of other Member States which the Commission has previously approved, this is no longer the case if 25 % or 50 % reductions are applied to the newest ships. If these reductions were implemented, this would make the tax level in Belgium very attractive in comparison with schemes already in force in other Member States.

([38]) See section 3.1, point 70.

(158) In its previous decisions, the Commission has striven for convergence of flat-rate taxation schemes towards common features and towards very similar tax levels, as shown in the above Table 1. The fact that the Community guidelines do not indicate whether positive discrimination benefiting the newest ships can or cannot be taken into consideration does not remove the Commission's scope for discretion in determining which measures may lead to distortion to an extent contrary to the common interest. In the Commission's opinion, the introduction of reductions for ships between zero and 10 years old may disrupt the current balance among Member States with a flat-rate taxation scheme. Consequently, the Commission considers that it is in the common interest not to authorise particular flat-rate taxation schemes which deviate too much from the characteristics of schemes previously approved and benefit new ships in particular.

(159) Moreover, the Commission considers that there is no need to make provision for additional advantages for the newest ships in order to contribute to the objectives of the Community guidelines.

(160) In view of the above, the Commission considers that the reductions provided for in Article 119(2) of the programme act are not compatible with the common market.

5.4. **Analysis of measures not covered by the flat-rate taxation scheme for maritime transport**

5.4.1. *Scheme for accelerated depreciation of ships not intended for maritime transport*

(161) The Commission recalls, first of all, that the measure is in fact aid within the meaning of Article 87(1) of the Treaty as it derogates from Articles 61 to 64 of the Belgian Income Tax Code 1992 governing accelerated depreciation and because it lays down depreciation rules that are even more generous than those provided for in the said Articles.

(162) The Commission notes that the Community guidelines do not prohibit accelerated depreciation for maritime transport. However, the scheme in question is 'existing aid' within the meaning of Article 1(b) of Regulation (EC) No 659/1999.

(163) Outside maritime transport the various Community rules applicable to the various sectors to which this reduction of registration tax may apply, such as fisheries ([39]) and inland shipping ([40]), do not permit the grant of such aid.

(164) The Commission considers that the Decision of 19 March 2003 initiating the formal investigation procedure also serves as an invitation to Belgium to submit its comments under Article 17(2) of Regulation (EC) No 659/1999.

(165) Taking account of the unjustified advantage which this scheme gives ships not engaged in eligible activities, the Commission deems it necessary to make proposals for appropriate measures in this case, in accordance with Article 18 of Regulation (EC) No 659/1999. By the present decision, the Commission therefore proposes that Belgium take the following appropriate measures: before 30 June 2005, Belgium should abolish the special option scheme applicable to depreciations, as provided for by Article 121 of the programme act, in respect of all ships not engaged in eligible activities. Before 31 December 2004, Belgium should inform the Commission of its decision to abide by the said appropriate measures.

5.4.2. *Reduction of registration duty on mortgages on ships not intended for maritime transport*

(166) As in the case of the measure just examined, the Commission notes that outside maritime transport the various Community rules applicable to the various sectors to which this reduction registration tax may apply, such as fisheries ([41]) and inland shipping, do not permit the grant of such aid.

(167) While such investment aid may be accepted in the framework of the Community guidelines, as the Commission noted in its decision of 19 March 2003, this does not apply in respect of ships which by their nature are not intended to be used in maritime transport (tugs, dredgers, vessels for inland shipping, etc.). Accordingly, the Commission considers that the reduction of or the exemption from the payment of registration duty on mortgages on ships not intended for maritime transport is State aid incompatible with the common market.

5.4.3. *Flat-rate taxation scheme for persons managing ships on behalf of third parties*

(168) The Commission notes that no interested party apart from the *Union Royale des Armateurs Belges* has submitted comments on the scheme for ship managers, even though it was covered by the formal investigation procedure initiated on 19 March 2003.

(169) The Commission wonders whether persons managing ships on behalf of third parties engage in a maritime transport activity. In Belgium, ship management on behalf of third parties consists of providing a crew for a ship and, where appropriate, fitting the ship out with the equipment necessary for the planned maritime transport activities. The person managing a ship on behalf of third parties provides a service to the shipping company or the shipowner: he does not conclude any transport contract with a shipper. His activity can therefore not be treated as a transport service.

(170) The new Community guidelines published on 17 January 2004 on aid to maritime transport provide that ship management companies may receive aid for the ships for which they are responsible for crew management and overall technical management ([42]). Such companies may be eligible only if they assume full responsibility for the operation of the ship and all the duties and responsibilities imposed by the ISM code ([43]). The Commission can therefore authorise only aid for ship managers meeting the conditions laid down by the new Community guidelines.

(171) With regard to the level of taxation for persons managing ships on behalf of third parties, the Commission notes, on the basis of figures supplied by the Belgian authorities, that at equal fleet tonnage a manager has a much lower turnover than a shipowner if only because of the capitals

([39]) See the guidelines for the examination of State aid to fisheries and acquaculture (OJ C 19, 20.1.2001, p. 7).

([40]) See footnote 20.

([41]) See footnote 39.

([42]) See in particular section 3.1 of the Community guidelines: 'It is also of interest to stipulate that whereas Community-based shipping companies are the natural recipients of the above tax schemes, certain ship management companies established in the Community may also qualify under the same provisions. Ship management companies are entities providing different kinds of services to shipowners, such as technical survey, crew recruiting and training, crew management and vessel operation. In some cases ship managers are assigned both technical and crewing management of vessels. In this case they act as classic "shipowners" as far as transport operations are concerned. Moreover, as in the case of the shipping industry, this sector is experiencing strong and increasing competition at an international level. For these reasons, it seems appropriate to extend the possibility of tax relief to that cateogry of ship managers.'

([43]) 'ISM Code' means the international management code for the safe operation of ships and for pollution prevention as adopted by the International Maritime Organisation (IMO) by Resolution A.741(18).

costs incurred by the shipowner which the manager does not have to bear. According to the example provided by the Belgian authorities, there is a 1:100 ratio between a ship manager's and a shipowner's turnover for a ship of the *Very Large Crude Carrier* (VLCC) type. This example also shows that if the manager were subject to the flat-rate taxation scheme at the same rates as those applicable to the shipowner, his flat-rate tax would be significantly higher than that which he would have had to pay under the normal corporation tax scheme. The Commission is of the opinion that if this claim can be substantiated in a more detailed study on the relation between the respective turnovers of these two professions in respect of equalivalentships, it could in fact be logical to apply lower tax rates to managers than to shipowners. In the absence of such a study, the Commission takes the view that on the basis of the information currently at its disposal it cannot accept a 1:10 ratio in the taxation rates on the basis of tonnage between shipowners and ship managers.

(172) In view of the above and of the information available, the Commission believes that a flat-rate taxation scheme for persons managing ships on behalf of third parties, with taxation based on the tonnage of the fleet managed, is compatible with the common market if the rates relating to tonnage are the same as those applicable to shipping transport companies and if the managers in question are at the same time responsible for crew management and technical management of ships, in accordance with the requirements of the Community guidelines published on 17 January 2004 on aid to maritime transport.

6. **CONCLUSIONS**

(173) In conclusion, the Commission considers with regard to the flat-rate taxation scheme for shipowners as provided for in the programme act of 2 August 2002 that:

(a) the introduction of the EUR 0,05 rate per tranche of 100 tonnes above 40 000 tonnes (Article 119(1) of the programme act) is compatible with the common market, provided that the ships concerned are new or else have been registered at least for the past five years under a non-Community flag;

(b) inclusion in the flat-rate taxation scheme of revenue from the following activities (Article 115(2) of the programme act) is incompatible with the common market:

— ancillary and temporary activities,

— the sale of products not intended for consumption on board such as luxury articles, and the provision of services not directly connected with maritime transport such as gambling, gaming tables and casinos and excursions for passengers,

— short-term investment of operating capital if it does not correspond to revenue from the company's normal cash resources accruing from eligible activities ([44]),

— advertising and marketing provided that they do not relate to the sale of advertising space on board eligible ships,

— ship brokerage activities for ships of third parties,

— disposal of operating assets if by their nature they are not intended for maritime transport.

(c) inclusion in the flat-rate taxation scheme of revenue from the following activities (Article 115(2) of the programme act) is compatible with the common market:

— short-term investment of operating capital if it corresponds to revenue from the company's normal cash resources accruing from eligible activities ([45]),

— advertising and marketing provided that they relate to the sale of advertising space on board eligible ships,

— ship brokerage activities for the company's own ships,

— disposal of operating assets if by their nature they are intended for maritime transport.

(d) deduction, from taxation determined on a flat-rate basis in relation to tonnage, of the losses of other divisions which for the relevant accounting year could not be deducted from profits of any of the company's other divisions (Article 120(1) of the programme act) is incompatible with the common market;

([44]) Eligible activities are described in section 2.8.2, points 66 to 75, of the decision of 19 March 2003 and in point 173(c) of the present decision.

([45]) See footnote 44.

(e) the reduced rates used to calculate the flat-rate tax on ships less than ten years old (Article 119(2) of the programme act) are incompatible with the common market.

(174) With regard to the tax measures outside the flat-rate taxation scheme for shipowners, the Commission considers that the following are incompatible with the common market:

— the special depreciation mechanism provided for in Article 121 of the programme act for all ships not used for eligible activities,

— reductions, for ships not intended for maritime shipping, of the registration tax on mortgages on ships not intended for maritime transport.

(175) On the basis of the information at its disposal alone, the Commission cannot consider as compatible with the common market the flat-rate taxation scheme for persons managing ships on behalf of third parties as provided for in Article 124 of the programme act. This position can, where appropriate, be reviewed in a future Commission decision on the basis of a new notification and more complete and relevant information.

(176) However, the Commission considers as compatible with the common market the flat-rate taxation scheme for persons managing ships on behalf of third parties provided that the tonnage-related rates are the same as those applicable to maritime shipping companies and that the managers in question are simultaneously responsible for the management of crews and the technical management of ships in accordance with the requirements of the Community guidelines published on 17 January 2004 on aid for maritime transport.

(177) This decision is immediately enforceable, including with regard to the recovery of any individual aid illegally granted, without prejudice to the possibility that this aid may, where appropriate, not be qualified as State aid because the four criteria laid down in Article 87(1) of the Treaty are not all met or because the aid may be regarded as aid compatible with the common market by virtue of its own characteristics,

HAS DECIDED AS FOLLOWS:

Article 1

The fiscal measures laid down in the Belgian programme act of 2 August 2002 in respect of which a formal investigation procedure has been initiated by Commission decision of 19 March 2003 constitute State aid within the meaning of Article 87(1) of the Treaty.

Article 2

The introduction in the flat-rate taxation scheme for shipowners of a rate reduced to EUR 0,05 per 100 tonnes for the tranche above 40 000 tonnes is compatible with the common market, provided that the ships over 40 000 tonnes to which this reduced rate is applied are new or have been registered under the flag of a third country during the five years preceding their entry into the flat-rate taxation scheme.

Article 3

1. Revenue accruing from the following activities is not eligible under the flat-rate taxation scheme for shipowners:

(a) ancillary and temporary activities;

(b) the sale of products not intended for consumption on board, such as luxury articles, and the provision of services not directly connected with maritime transport such as gambling, gaming tables and casinos and excursions for passengers;

(c) revenue from short-term investment of operating capital if it does not correspond to income from the company's ordinary cash resources accruing from eligible activities;

(d) advertising and marketing if these do not correspond to the sale of advertising space on board eligible ships;

(e) ship brokerage activities on behalf of ships of third parties;

(f) disposal of operating assets if by their nature they are not intended for maritime transport.

Their inclusion in the flat-rate taxation scheme for shipowners is incompatible with the common market.

2. Revenue accruing from the following activities is eligible under the flat-rate taxation scheme for shipowners:

(a) revenue from short-term investment of operating capital if it corresponds to income from the company's normal cash resources accruing from eligible activities;

(b) advertising and marketing if these correspond to the sale of advertising space on board eligible ships;

(c) ship brokerage activities on behalf of the company's own ships;

(d) disposal of operating assets if by their nature they are intended for maritime transport.

Their inclusion in the flat-rate taxation scheme for shipowners is compatible with the common market provided that the conditions set out in this paragraph are complied with.

Article 4

Deduction of losses of other divisions of a company liable for taxation that are not subject to the flat-rate tax from the tonnage-based flat-rate tax for ship owners is incompatible with the common market.

Article 5

Reductions of tax rates of flat-rate taxation for shipowners in respect of ships less than 10 years old are incompatible with the common market.

Article 6

Application of the scheme for the accelerated depreciation of ships to ships that by their nature are not intended for maritime transport is incompatible with the common market.

As appropriate measures, it is proposed that Belgium abolish the special option scheme applicable to the depreciation of ships not intended by their nature for maritime transport before 30 June 2005.

Before 31 December 2004 Belgium shall inform the Commission of its decision to adopt the said appropriate measures.

Article 7

Reduction of or exemption from the payment of the registration duty on mortgages on ships which by their nature are not intended for maritime transport is incompatible with the common market.

Article 8

The tonnage-based flat-rate taxation scheme for persons managing ships on behalf of third parties is compatible with the common market provided that the latter are simultaneously responsible for the management of crews and the technical management of ships, in accordance with the provisions of the Community guidelines in force on aid for maritime transport and provided that the tonnage-related rates are the same as those applicable to maritime transport companies.

Article 9

Within two months of the notification of this decision, Belgium shall inform the Commission of the measures taken to ensure that the programme act of 2 August 2002 is in conformity with the present decision and, where appropriate, recover incompatible aid granted illegally under the said programme act. Interest shall be calculated in accordance with Commission Regulation (EC) No 794/2004 ([46]), in particular Articles 9, 10 and 11 thereof.

Article 10

This decision is addressed to the Kingdom of Belgium.

Done at Brussels, 30 June 2004.

For the Commission,
Loyola DE PALACIO
Vice-President

([47]) OJ L 140, 30.4.2004, p. 1.