II

(Non-legislative acts)

DECISIONS

COMMISSION DECISION (EU) 2017/2115

of 27 July 2017

on aid scheme SA.38393 (2016/C, ex 2015/E) implemented by Belgium — Taxation of ports in Belgium

(notified under document C(2017) 5174)

(Only the French and Dutch texts are authentic)

(Text with EEA relevance)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to those articles ([1]) and having regard to their comments,

Whereas:

1. PROCEDURE

1.1. *QUESTIONNAIRE ON THE FUNCTIONING AND TAXATION OF PORTS AND COOPERATION PROCEDURE*

(1) On 3 July 2013, the Commission sent a questionnaire on the functioning and taxation of ports to all Member States to gain an overview of the state of play and clarify the situation of ports in the light of European Union State aid rules pursuant to Article 107 of the Treaty on the Functioning of the European Union ('TFEU'). The Belgian authorities responded by letters dated 30 September and 9 October 2013. By letter dated 20 January 2014, the Commission requested additional information on the taxation rules applicable to ports. The Belgian authorities responded by letter dated 13 March 2014 and the Port of Brussels sent its observations in a letter received on 18 March 2014.

(2) By letter dated 9 July 2014, the Commission informed Belgium, in accordance with Article 21 of Council Regulation (EU) 2015/1589 ([2]) ('the Procedural Regulation'), of its preliminary assessment, according to which the corporate tax exemption provided for certain Belgian ports ('the Belgian ports') constituted State aid incompatible with the internal market and this aid constituted existing aid within the meaning of Article 1(b) of the Regulation. A meeting took place with the Belgian authorities on 23 September 2014. The Walloon Region and the Port of Brussels each presented their observations by letters dated 30 September 2014, whereas the Flemish Region communicated its comments by letter of 1 October 2014. By letter dated 1 June 2015, the Commission informed Belgium that it had taken note of all the arguments put forward by the latter and that it still considered

([1]) OJ C 302, 19.8.2016, p. 5.
([2]) Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (OJ L 248, 24.9.2015, p. 9).

that the corporate tax exemption for a series of ports constituted aid incompatible with the internal market, if and to the extent that these ports engaged in economic activities. An appeal ([3]) was lodged against this letter on 3 August 2015, and rejected as inadmissible by order of the General Court of 9 March 2016 ([4]).

1.2. *PROPOSAL FOR APPROPRIATE MEASURES BY THE COMMISSION AND RESPONSE BY THE BELGIAN AUTHORITIES*

(3) By letter dated 21 January 2016, the Commission reiterated its position that the corporate tax exemption granted to ports constituted a State aid scheme incompatible with the Treaty and proposed to the Belgian authorities, asappropriate measures, in accordance with Article 108(1) TFEU and Article 22 of the Procedural Regulation, the abolition of the corporate tax exemption laid down for the Belgian ports, in so far as they engaged in economic activities. The Belgian authorities were requested to adapt the legislation within a period of 10 months from the date of the decision, with the amendment applying no later than to the income generated by economic activities from the start of the 2017 tax year. The Belgian authorities were requested to inform the Commission in writing of Belgium's unconditional and unequivocal acceptance of these appropriate measures, in their entirety, within 2 months of the date of receipt of the decision, pursuant to Article 23(1) of the Procedural Regulation. An appeal ([5]) was lodged against this proposal for appropriate measures on 18 March 2016, and rejected as inadmissible by order of the General Court of 27 October 2016 ([6]).

(4) By letter of 21 March 2016, the Belgian authorities forwarded comments on the proposed appropriate measures to the Commission.

1.3. *OPENING OF THE FORMAL INVESTIGATION PROCEDURE*

(5) By letter dated 8 July 2016, the Commission decided to initiate the procedure provided for in Article 108(2) TFEU, pursuant to Article 23(2) of the Procedural Regulation.

(6) The Commission decision to initiate the procedure was published in the *Official Journal of the European Union* ([7]). The Commission invited interested parties to submit their comments on the measure. A meeting was organised on 24 August 2016 with representatives of certain Belgian ports concerned by the measure.

(7) Belgium presented its comments by letters dated 9 September 2016 (Federal Ministry of Finance) and 16 September 2016 (Walloon Region and Walloon ports).

(8) The Commission received comments from the following interested parties: Sea Invest, user of the ports of Antwerp, Ghent and Zeebrugge (14 September 2016), the Port of Rotterdam, acting on behalf of five Dutch publicly owned seaports (16 September 2016), the Port of Brussels (16 September 2016), the Flemish Port Commission (*Vlaamse Havencommissie*) (19 September 2016) and, after an extension of the deadline to present comments, the ports of Antwerp and Zeebrugge (4 October 2016).

(9) The European Commission forwarded those comments to Belgium, which was given the opportunity to respond. It received comments from Belgium by letter of 14 November 2016. A meeting was organised between the Belgian authorities and the Commission on 19 December 2016, during which additional comments were communicated to the Commission. A further meeting was organised between the Belgian federal and regional authorities, certain beneficiaries of the measure and the Commission on 10 January 2017.

2. **DESCRIPTION OF THE MEASURE AND ITS CONTEXT**

2.1. *OWNERSHIP AND MANAGEMENT OF PORTS IN BELGIUM*

(10) In Belgium, the land occupied by ports is part of public property (*domaine public/openbaar domein*). In the 1990s, the operation of the main Belgian ports was transferred to decentralised bodies. Some ports are operated by autonomous municipal port authorities (such as the ports of Ghent, Ostend and Antwerp), while others are operated by legal persons under public law (such as the autonomous ports of the Centre and West, Liège, Charleroi and Namur) or by a limited liability company under public law for the port of Zeebrugge.

([3]) OJ C 156, 2.5.2016, pp. 46-47.
([4]) Order of 9 March 2016, *Port Autonome du Centre et de l'Ouest SCRL and others* v *Commission*, T-438/15, EU:T:2016:142.
([5]) OJ C 175, 17.5.2016, pp. 23-24.
([6]) Order of 27 October 2016, *Port Autonome du Centre et de l'Ouest SCRL and others* v *Commission*, T-116/16, ECLI:EU:T:2016:656.
([7]) OJ C 302, 19.8.2016, p. 5.

(11) The ports are operated by port authorities, which are public entities.

2.2. *INCOME TAX RULES APPLICABLE TO PORTS*

(12) In accordance with Article 1 of the Income Tax Code (*Code des Impôts sur les Revenus*) of 1992 ([8]) ('CIR'), resident 'companies' are subject to income tax in the form of corporate tax ([9]). On the other hand, resident legal persons other than 'companies' are subject to income tax in the form of a tax on legal persons ([10]). Article 2 of the CIR defines a 'company' as 'any company, association, establishment or body of any kind, duly constituted, which has legal personality and engages in a business or transactions of a profit-making nature'.

(13) Article 180(2) of the CIR provides that a certain number of Belgian ports are not subject to corporate tax ([11]). Article 220(2) of the CIR provides that legal persons who are not subject to corporate tax pursuant to Article 180 of the CIR are subject to the tax on legal persons ([12]). The tax on legal persons is not charged on the total amount of income or profits, but only certain types of income. Thus, in accordance with Article 221 of the CIR, for legal persons that are subject to this tax, tax is levied only on the cadastral income of property located in Belgium and the income and proceeds from investment capital and movable assets ([13]). In addition, the rates applicable to the various types of income subject to the tax on legal persons usually correspond to the rates of property tax or withholding tax ([14]) and are generally lower than the rates applicable for corporate tax (33,99 %).

3. **GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE**

(14) In its letter of 8 July 2016, the Commission considered that the Belgian authorities had not accepted the timetable for the implementation of the appropriate measures indicated by the Commission in its letter of 21 January 2016 and that the Belgian Government apparently did not clearly accept even the principle of subjecting the ports to corporate tax or undertaking to abolish the tax exemption in favour of the Belgian ports. The Commission concluded from this that the Belgian authorities had not accepted the appropriate measures proposed by the Commission on 21 January 2016 unconditionally, unequivocally and in full.

(15) Since the Commission still considered that the corporate tax exemption in favour of Belgian ports, where they engaged in economic activities, constituted an existing State aid scheme and since it had doubts about the compatibility of this aid scheme with the internal market, it decided to initiate the procedure provided for in Article 108(2) TFEU, pursuant to Article 23(2) of the Procedural Regulation.

([8]) Article 1(1) of the CIR: 'The following shall be established as income tax:
1. a tax on the total income of the inhabitants of the Kingdom, in the form of a tax on natural persons;
2. a tax on the total income of resident companies, in the form of corporate tax;
3. a tax on the income of Belgian legal persons, other than companies, in the form of a tax on legal persons;
4. a tax on the income of non-residents, in the form of a tax on non-residents.'

([9]) Article 179 of the CIR repeats this rule set out in Article 1. The corporate tax rules are provided for in Title III, Articles 179 to 219*bis* of the CIR.

([10]) The rules in respect of the tax on legal persons are provided for in Title IV, Articles 220 to 226 of the CIR.

([11]) Article 180(2) of the CIR refers to the following entities: SCRL Port autonome du Centre et de l'Ouest (a limited liability cooperative company), Compagnie des installations maritimes de Bruges, the Port of Brussels, the autonomous municipal port authorities of Antwerp, Ostend and Ghent, the autonomous ports of Liège, Charleroi and Namur, the public limited companies Waterwegen en Zeekanaal and De Scheepvaart. Article 110 of the Law of 18 December 2016 organising the recognition and management of crowdfunding and laying down miscellaneous financial provisions (*Loi du 18 décembre 2016 organisant la reconnaissance et l'encadrement du crowdfunding et portant des dispositions diverses en matière de finances*) (*Moniteur belge* of 20 December 2016; Numac: 2016003460) provides on the subject of Article 180(2) of the CIR that: '(…) the words 'the autonomous municipal port authorities of Antwerp and Ostend, the public limited company Havenbedrijf Gent' shall be replaced by the words 'the autonomous municipal port authority of Ostend, the public limited companies Havenbedrijf Antwerpen and Havenbedrijf Gent".

([12]) Article 220 of the CIR: 'The following shall be subject to the tax on legal persons: (…) 2. legal persons who, by virtue of Article 180, are not subject to the corporate tax; (…)'.

([13]) Article 221 of the CIR: 'The legal persons subject to the tax on legal persons shall be taxable only with regard to:
1. the cadastral income from their immovable property located in Belgium, (…);
2. the income and proceeds from investment capital and movable assets, including the first tranches of income referred to in Article 21(5), (6) and (10), and the interest referred to in Article 21(13), as well as the sundry income referred to in Article 90(5) to (7) and (11).'

([14]) Article 225 of the CIR: 'The tax relating to the income referred to in Article 221 shall be equal to the property tax and withholding tax. (…)'.

4. COMMENTS RECEIVED AFTER THE INITIATION OF THE FORMAL INVESTIGATION PROCEDURE

4.1. *UNDERTAKINGS/ECONOMIC ACTIVITIES*

(16) The Belgian ports and Belgian authorities consider that ports are not 'undertakings' within the meaning of Article 107(1) TFEU, since their tasks, notably the administrative management of public and private property, are not of an economic nature. They stress that these tasks are of general interest and are imposed on or delegated to them by the public authorities, which are free to define the scope of non-economic services of general interest. They point out that the port authorities have special powers to carry out these tasks, are subject to the control of the authorities and do not have a profit-oriented objective, the surplus being reinvested in the port infrastructure and, in the case of some ports, paid to their shareholder municipality.

(17) The ports of Antwerp and Zeebrugge and the Belgian authorities consider that the Court of Justice case-law on airports (case C-82/01 *Aéroports de Paris* ([15])) is not applicable to ports, which are a different form of infrastructure. They point out in particular that the monopoly of the ports results from administrative decentralisation in favour of a public-law entity which is not profit-oriented, whereas the management of the airports is entrusted to private persons under the exclusive concession of an economic activity with transfer of the economic operational risk. They also consider that the legal dispute examined by the Court of Justice in the *Aéroports de Paris* case did not relate to the supply of 'infrastructure services', so the analogy with the provision of the port infrastructure by the Belgian authorities is inappropriate.

(18) The majority of interested parties and the Belgian authorities dispute the economic nature of the activities mentioned by the Commission in the opening decision, in particular making the port infrastructure available to shipping and renting land and infrastructure to undertakings. They explain that the tariffs for land rental, infrastructure concessions and access to the port infrastructure (port charges) are public, non-discriminatory and fixed unilaterally in advance by the port authorities and are not determined by the interaction of supply and demand. They mention in particular a judgment by the Belgian Constitutional Court of 19 November 2015 ([16]) recognising that the port charges constitute 'pure remuneration', by third parties, for the intervention of the port authorities. They also refer to the Flemish Port Decree of 2 March 1999 on seaport policy and management ([17]) ('Flemish Port Decree of 2 March 1999'), which provides that port charges must be set in 'reasonable proportion' to the value of the consideration received. Moreover, they point out that the concession fees are proportionally lower for the sites generating higher added value, are based on objective parameters (relating to the sites concerned) and reflect the intrinsic value generated by the service provided. Likewise, the Walloon Region and the Walloon ports consider that the payment of charges for the use of the infrastructure does not necessarily point to the economic nature of the port activities, since the fact that these charges do not cover the reconstitution of the capital invested indicates that the port activities are services of general interest.

(19) In their view, the principal economic activities which take place in the ports are carried out by concessionaires which take care of the handling (loading and unloading) of goods, while the port authorities have nothing at all to do with the commercial contracts concluded between concession-holding companies and shipowners. The ports are therefore not operated commercially by the port authorities but by the companies to which the infrastructure concession is granted and on which these companies must themselves construct the superstructures (cranes, warehouses) necessary for the handling services.

(20) They add that the port authorities must increasingly finance non-economic activities coming within the remit of the regions, and even activities unrelated to the operation of the port ([18]). They mention several Commission decisions and Court of Justice judgments which, in their view, establish that neither making available infrastructure open to all potential users on a fair and non-discriminatory basis, nor the management and operation of sites of a public authority with a view to the development of industrial and commercial activities for the private sector constitute economic activities.

(21) Finally, they consider that the economic activities of the ports, such as lifting (crane services) and towing, are entirely ancillary in nature.

([15]) Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01, EU:C:2002:617.

([16]) C.C., 19 November 2015, No 162/2015; *Moniteur belge* of 5 February 2016; Numac: 2015205632.

([17]) *Moniteur belge* of 8 April 1999; Numac: 1999035415. See Article 13(3): 'Port charges shall be set autonomously by the port authorities, in reasonable proportion to the value of the consideration received (…)'.

([18]) This point is also mentioned by the Flemish Port Commission. It specifies that government funding for maritime access infrastructure (in particular the functioning of the locks and dredging of shipping channels crossing certain ports), the basic port infrastructure and the harbourmaster's services has been reduced in recent years.

4.2. *ECONOMIC ADVANTAGE GRANTED THROUGH STATE RESOURCES*

(22) The Flemish Port Commission considers that, since the port authorities increasingly have to finance non-economic infrastructures coming within the remit of the regions, the corporate tax exemption does not constitute an advantage.

(23) The Port of Rotterdam points out that the ports of Antwerp, Zeebrugge and Ghent have a real tax rate below 1 % of accounting profit.

(24) The Belgian authorities maintain that, since the ports pay the tax on legal persons, the condition that the advantage must be granted from State resources is not met.

4.3. *SELECTIVITY*

(25) Most of the interested parties and the Belgian authorities consider that the reference system with regard to the taxation of legal persons is not corporate tax (as stated in the opening decision), but Article 1 of the CIR, which establishes two taxation systems in parallel for resident legal persons (corporate tax and tax on legal persons) according to the criteria defined in Article 2 of the CIR (activity of the legal person consisting, or not, in a 'business' or 'operations of a profit-making nature'). They add that Article 180 of the CIR, which provides that the ports are not subject to corporate tax, merely clarifies and applies Article 1 of the CIR. Certain interested parties and the Belgian authorities also consider that the tax on legal persons is the reference system for the ports, which are not 'companies' within the meaning of Article 2 of the CIR, and that Article 180(2) of the CIR does not derogate from the general rules for the taxation of legal persons, but merely applies these general rules. They therefore maintain that, even if Article 180(2) were deleted, the ports would not necessarily be subject to corporate tax since the administration would have to examine their situation individually in the light of the general criteria of Articles 1 and 2 of the CIR and, since the ports are not 'companies' within the meaning of Article 2 of the CIR, they would not be subject to corporate tax.

(26) The Walloon Region and the Walloon ports add that this duality (existence of two systems for the taxation of income: corporate tax and tax on legal persons) is essential and inherent in the income tax system and derives from the Belgian Constitution. Moreover, in their view, the Belgian Constitution does not require the legislator to subject certain activities to tax and, for the public administrations by definition (the State, communities, regions, provinces and municipalities), the public and private property assigned to a public service is exempt from taxation by virtue of a generally accepted principle of law. The Belgian authorities also point out that, according to the case-law of the national courts, public services, tasks and goods are not taxed unless expressly provided for by law.

(27) For the port authorities of Antwerp and Zeebrugge and the Belgian authorities, entities which, like the ports, do not distribute their profit but reinvest it or which pursue an objective beyond their own interests are subject to the tax on legal persons, which is in keeping with the logic of the system.

(28) They also maintain that they are in a different situation from that of other undertakings subject to corporate tax. Although enjoying a certain autonomy and notwithstanding the possible existence of economic activities, the port authorities are public authorities and carry out tasks of general interest, on a non-profit basis, in accordance with their statutes. They do not use industrial or commercial methods and their actions are not guided by short-term returns on investments. The concession fees and port charges do not always cover the costs they incur. They carry out public service tasks, the net cost of which would not be deductible from the corporate tax base pursuant to Article 49 of the CIR. If this net cost were subject to corporate tax, this would lead to discrimination in relation to other undertakings and to a reduction in the investment capacity of the ports.

(29) The Belgian authorities point out that, in a judgment of 1 December 2016 ([19]), the Belgian Constitutional Court confirmed the choice of the legislator to exempt the ports from corporate tax.

4.4. *DISTORTION OF COMPETITION AND EFFECT ON TRADE*

(30) The Flemish Port Commission maintains that, in other Member States, and in particular the Netherlands, the same port activities are financed by the public authorities, so the conditions of competition are not distorted.

([19]) C.C., 1 December 2016, No 151/2016; *Moniteur belge* of 12 January 2017; Numac: 2016206080.

(31) The port authorities of Antwerp and Zeebrugge, referring to paragraph 188 of the Commission Notice on the notion of State aid ([20]) ('the Notice of 19 July 2016'), explain that each port has a legal monopoly over its port area, with this monopoly excluding not only 'competition on the market, but also for the market'. They conclude from this that the measure does not introduce any distortion of competition. They also mention an opinion by the Dutch competition authority ([21]), according to which the Port of Rotterdam is not in competition with the operators of other ports since the port charges represent only a limited fraction of the transport costs of the shipowners, so that increasing or decreasing these tariffs would have no impact on port traffic.

(32) They indicate that, according to the Notice of 19 July 2016, in a network infrastructure different elements of the network complement each other, instead of competing with one another (paragraph 211 and footnote 311), which rules out a distortion of competition. They point out that, in this Notice, the Commission applies this principle to the construction of railway infrastructure (paragraph 219) and the construction of road infrastructure, including toll-roads (paragraph 220), but they consider that it also applies to ports.

(33) The Walloon Region and the Walloon ports note in particular that the inland ports exempt from corporate tax are not in competition with other private inland ports making the same infrastructure accessible to the public. The Federal authorities add that the inland ports, which are small, are complementary to the other ports and are in competition only with road transport.

(34) The Port of Rotterdam points out that the Dutch public ports are in competition in particular with the ports of Antwerp, Zeebrugge and Ghent.

4.5. *COMPATIBILITY*

(35) The Walloon Region and the Walloon ports consider that Article 106(2) TFEU constitutes an appropriate basis for the compatibility of the measure: the ports have a clear legal mandate and the ports undeniably meet all the conditions laid down by that Article. They stress that compatibility in terms of Article 93 TFEU, which does not make the absence of an effect on trade a condition of its application, must be evaluated extensively.

(36) The port authorities of Antwerp and Zeebrugge consider that the Commission's response to the arguments presented concerning the compatibility of the measure is insufficiently reasoned. They add that Article 93 TFEU could be used as a basis for the compatibility of the measure, since the ports have to finance infrastructure contributing to the trans-European transport networks.

4.6. *NEED FOR A TRANSITIONAL PERIOD*

(37) The Belgian authorities ask the Commission for a transitional period with respect to subjecting the ports to corporate tax. They stress that the time limit provided for in the opening decision of 8 July 2016 (subjecting the ports to corporate tax from 1 January 2017) is too short, especially in relation to the time limit allowed the Netherlands in the context of case SA.25338. They emphasise that the deletion of Article 180(2) CIR would involve a legislative procedure lasting 'generally speaking, at least three to six months'. In their view, legislative amendments which are far more complex than merely deleting Article 180(2) are required, since (i) this deletion would not necessarily result in the ports being made subject to corporate tax, (ii) the preparation of a new tax regime for the ports must take account of the constitutional principle of equality and (iii) the transition by a legal person from the tax on legal persons to corporate tax is not explicitly regulated in Belgian tax law. They add that the Commission, in the case of expiry of an aid scheme presumed to be existing, must respect a Member State's legitimate interests in ensuring legal certainty for beneficiaries.

(38) The Port of Rotterdam asks the Commission to postpone subjecting the Dutch ports to corporate tax until a sector inquiry has been carried out and all the seaports in the North Range become subject simultaneously to the tax or, at the very least, to subject the Belgian and French ports to corporate tax rapidly and simultaneously.

([20]) OJ C 262, 19.7.2016, p. 1.
([21]) Report by the Dutch competition authority on the port authority of Rotterdam, 2005, P_600019/255.R261, p. 2.

5. **ASSESSMENT OF THE MEASURES**

5.1. *PRESENCE OF STATE AID WITHIN THE MEANING OF ARTICLE 107(1) TFEU*

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

5.1.1. UNDERTAKINGS/ECONOMIC ACTIVITIES

5.1.1.1. ***General remarks***

(40) According to the Court of Justice, an economic activity is 'any activity consisting in offering goods and services on a given market' ([22]). Likewise, 'The concept of an undertaking covers any entity engaged in an economic activity, regardless of its legal status and the way in which it is financed.' ([23])

(41) In addition, in accordance with the case-law on the economic nature of the operation of infrastructures ([24]), the Commission has established, in a series of decisions, that the commercial operation and construction of port infrastructure constitute economic activities ([25]). For example, the commercial operation of a port terminal by making it available to users against the payment of a fee constitutes an economic activity ([26]). Likewise, the Court of Justice has already implicitly, but definitely, recognised the economic nature of certain port operations, in particular the '*loading, unloading, transhipment, storage and general movement of goods or material of any kind within the port*' ([27]). The Commission applies these rules not only to seaports, but also to inland ports ([28]).

(42) In this respect, and unlike the Belgian authorities and certain interested parties, the Commission considers that the case-law of the Court concerning airports must be applied to ports, which are simply another type of infrastructure. The differences identified by certain interested parties between ports and airports – and especially the differences in legal structure or the fact that the ports are public-law entities which are not profit-oriented – are not relevant in terms of the general criterion relating to the supply of goods or services on a market, which forms the basis for the Court case-law. Likewise, the Commission notes that the Court, in paragraph 90 of the *Aéroports de Paris* judgment, recalls that 'the Court of First Instance properly found that the commercial fees in issue constituted consideration for […] services as manager of the airport facilities'; it is therefore incorrect to assert that this case did not relate to the supply of infrastructure services, as the Belgian authorities and certain interested parties maintain.

([22]) Judgment of the Court of Justice of 16 June 1987, *Commission* v *Italy*, 118/85, EU:C:1987:283, paragraph 7; Judgment of the Court of Justice of 18 June 1998, *Commission* v *Italy*, C-35/96, EU:C:1998:303, paragraph 36.

([23]) Judgment of the Court of Justice of 12 September 2000, *Pavlov and others*, Joined Cases C-180/98 to C-184/98, EU:C:2000:428, paragraph 74.

([24]) Judgment of the General Court of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt and others* v *Commission*, Joined Cases T-443/08 and T-455/08, EU:T:2011:117, in particular paragraphs 93 and 94, upheld on appeal in Judgment of the Court of Justice of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, in particular paragraphs 40-43, 47. Judgment of the General Court of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, EU:T:2000:290, paragraph 125, confirmed on appeal in Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617.

([25]) See, for example, Commission Decision of 15 December 2009 in State aid case N 385/2009 – Public financing of port infrastructure in Ventspils Port (OJ C 62, 13.3.2010, p. 7); Commission Decision of 15 June 2011 in State aid case 44/2010 – Latvia – Public financing of port infrastructure in Krievu salā (OJ C 215, 21.7.2011, p. 21); Commission Decision of 22 February 2012 in State aid case SA.30742 (N/2010) – Lithuania – Construction of infrastructure for the ferry terminal in Klaipėda (OJ C 121, 26.4.2012, p. 1); Commission Decision of 2 July 2013 in State aid case SA.35418 (2012/N) – Greece – Extension of Piraeus port (OJ C 256, 5.9.2013, p. 2); Commission Decision of 18 September 2013 in State aid case SA.36953 (2013/N) – Spain – Port Authority of Bahía de Cádiz (OJ C 335, 16.11.2013, p. 1).

([26]) See, for example, Commission Decision of 18 September 2013 in State aid case SA.36953 (2013/N) – Spain – Port Authority of Bahía de Cádiz (OJ C 335, 16.11.2013, p. 1).

([27]) Judgment of the Court of Justice of 10 December 1991, *Merci Convenzionali Porto di Genova*, C-179/90, EU:C:1991:464, paragraphs 3 and 27; Judgment of the Court of Justice of 17 July 1997 in case C-242/95 *GT-Link A/S* v *de Danske Statsbaner*, EU:C:1997:376, paragraph 52: 'It does not follow, however, that the operation of any commercial port constitutes the operation of a service of general economic interest or, in particular, that all the services provided in such a port amount to such a task.'

([28]) See, for example, Commission Decision of 18 December 2013 in State aid case SA.37402 – Freeport of Budapest (OJ C 141, 9.5.2014, p. 1); Commission Decision of 17 October 2012 in State aid case SA.34501 – Inland port Königs Wusterhausen/Wildau (OJ C 176, 21.6.2013, p. 1); Commission Decision of 1 October 2014 in State aid case SA.38478 – Győr-Gönyü Public Port (OJ C 418, 21.11.2014, p. 1).

(43) In order to determine whether the Belgian ports are undertakings, there is no need to evaluate the economic or non-economic nature of each of their activities. It is sufficient to establish that the entities referred to by the measure at issue in fact engage in one or more economic activities, for which they will be regarded as an 'undertaking'. In this respect, the fact that an entity engages in one or more sovereign or non-economic activities does not disqualify it altogether from being designated an 'undertaking'.

(44) The Belgian ports may engage in several types of economic activity corresponding to the supply of various services on different markets. First, the ports provide a *general* service to their users (mainly shipowners, more generally any operator of a vessel) by providing ships with access to the port infrastructure in exchange for a remuneration generally known as 'port charges' ([29]). Second, certain ports provide *particular* services to ships, such as piloting, lifting, handling, mooring, also in exchange for remuneration ([30]). Third, the ports, for remuneration, make certain infrastructure or certain land available to undertakings, which use these areas for their own needs or to supply some of the aforementioned *particular* services to ships.

(45) The fact that third-party undertakings use certain port land and infrastructure to provide services to shipowners or ships does not prevent the management activities carried out by the port authorities, consisting in particular in renting the land and infrastructure to these third-party undertakings, also being of an economic nature.

(46) The Commission also points out that Belgian domestic law itself contains indications concerning the industrial and/or commercial nature of the port activities ([31]), In particular, the official administrative comments on the CIR necessarily imply that the ports operate 'an industrial, commercial or agricultural undertaking of some kind' ([32]) or that, even on a non-profit-making basis, they engage in 'a permanent professional activity consisting of […] the repetition, which is sufficiently frequent to constitute an 'occupation', of operations of an industrial, commercial or agricultural nature [and] the use of industrial or commercial methods' ([33]) ([34]).

(47) Moreover, the Commission does not dispute the fact that certain activities of the ports may be of a non-economic nature, especially some of the services supplied by the harbourmasters, such as maritime traffic control and safety ([35]) or anti-pollution surveillance ([36]). In the present case, the activities considered by the Commission to be economic are nevertheless separate from these (other) activities mentioned in the previous sentence.

([29]) See Article 15(1) (concerning the 'general port charges') of the Flemish Port Decree of 2 March 1999.

([30]) See Article 15(2) (concerning the 'particular port charges') of the Flemish Port Decree of 2 March 1999.

([31]) See Articles 25(2) ('The Flemish Government shall be authorised to set up a joint concertation commission. A five-year promotion plan, based on an industrial economy model, shall be drawn up') and 26(1) ('Disputes between port authorities in operation matters, especially with regard to the commercial activities of the port authorities […] shall be regulated by the port disputes commission […]') of the Flemish Port Decree of 2 March 1999. See too Article 3 of the Decree of 1 April 1999 on the creation of the autonomous Port of the Centre and West (*Décret du 1er avril 1999 relatif à la création du Port autonome du Centre et de l'Ouest*) ('Port activities shall mean the activities associated with the function of the Company, i.e. loading, unloading, storage and transport of goods, as well as industrial, commercial and service activities.')

([32]) See comment No 179/10 on the CIR below.

([33]) See comment No 179/11 on the CIR below.

([34]) See comments Nos 2/4, 179/10 and 179/11 on the CIR.

— Number 2/4: '"Company" means any company, association, establishment or body of any kind which:
(a) is duly constituted;
(b) has legal personality;
(c) engages in a business or transactions of a profit-making nature (Article 2, § 2(1), first line, CIR 92).
For fuller explanations on the subject of the concepts referred to under points a, b and c, reference is made to 179/6 to 20.'

— Number 179/10: 'The expression "engages in a business" means "operating an industrial, commercial or agricultural undertaking of some kind", the profits from which would constitute professional income subject in this capacity to personal income tax, if this operation were carried out by a natural person or a company, etc., which does not have legal personality (Articles 23, § 1(1) and 24, CIR 92).'

— Number 179/11: 'The expression "engages in transactions of a profit-making nature" covers both:
1. "profit-making occupations" (Articles 23, § 1(2) and 27, CIR 92), this expression being interpreted by case-law to mean "occupation with a profit motive";
2. "occupations of a profit-making nature, but not for profit", which are characterised by a permanent professional activity consisting of:
(a) the repetition, which is sufficiently frequent to constitute an "occupation", of operations of an industrial, commercial or agricultural nature;
(b) the use of industrial or commercial methods.
It is therefore a matter under point 2 of occupations which, essentially, normally generate profits even if the legal person engaging in them does not, according to its statutes or in fact, have a profit motive.'

([35]) Commission Decision of 16 October 2002 in State aid case N 438/02 – Belgium – Subsidies to port authorities for carrying out public authority tasks, OJ C 284, 21.11.2002, p. 2.

([36]) Judgment of the Court of Justice of 18 March 1997, *Calì & Figli*, C-343/95, EU:C:1997:160, paragraph 22.

(48) The Commission also notes that, although the national authorities have 'wide discretion […] in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users' ([37]), this does not preclude these activities being of an economic nature. It is settled case-law that the concept of 'economic activity' itself derives from matters of fact, in particular the existence of a market for the services concerned ([38]), and does not depend on national choices or assessments. The Commission is therefore justified in classing certain port activities as economic, even though the national authorities consider these activities to constitute non-economic services of general interest.

(49) Finally, the following considerations do not per se call into question the economic or non-economic nature of the activities carried out:

— The fact that the tasks of ports are of general interest and imposed on or delegated to them by the public authorities: this is the case for all services of general economic interest ('SGEIs'), which are nevertheless economic activities. More generally, 'the fact that a particular service is provided in-house has no relevance for the economic nature of the activity' ([39]). On the other hand, the general interest may be taken into consideration to assess, where appropriate, compatibility of aid granted by a State to an undertaking to support its economic activity.

— The fact that the port authorities are vested with special powers to perform these tasks ([40]): such special powers do not prevent the port authorities from being able to engage in an economic activity by offering goods or services on a market. Where appropriate, these powers may constitute an instrument for intervening on this market.

— The fact that the port authorities increasingly themselves have to finance non-economic activities coming within the responsibilities of the regions, and even activities unrelated to port operation: such a characteristic in no way alters the economic nature of the port activities consisting of supplying goods or services on a market. Absent or imperfect compensation by the State for the costs associated with non-economic activities that it imposes on the ports confirms, rather than refutes, the fact that ports engage in economic activities alongside certain non-economic activities. The tax benefit derived by a port from the scheme at issue is proportional to the profits made by that port and is in no way linked to the (uncompensated) cost of the non-economic activities imposed on it by the State. The Commission cannot therefore take account of this in its assessment of the scheme.

— The fact, assuming it to have been established ([41]), that the ports do not have a profit motive and systematically reinvest their profits: it is settled case-law that the absence of profit motive on the part of the person providing a service does not imply that this service is of a non-economic nature ([42]). Likewise, the systematic reinvestment of the profits in the activity is not decisive in differentiating an economic activity from a non-economic activity. Any undertaking for that matter has the choice between distribution and reinvestment of all or part of the profits it has made.

5.1.1.2. ***Concerning the tariffs applied***

(50) Also irrelevant with regard to the classification of ports as 'undertakings' is the argument put forward by the Belgian authorities and certain interested parties that the tariffs of the services provided by the port authorities are public, non-discriminatory and fixed in advance unilaterally by the port authorities and are not determined directly by the interaction of supply and demand ([43]).

([37]) Protocol (No 26) on services of general interest (annexed to the TFEU).
([38]) Judgment of the Court of Justice of 16 November 1995, *FFSA and others*, C-244/94, EU:C:1995:392, paragraph 21; Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 27 and 28.
([39]) See paragraph 14 of the Notice of 19 July 2016.
([40]) Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 25; Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris*, C-82/01 P, paragraphs 74 and 77.
([41]) The Commission points out in particular that, according to the Belgian authorities, some Belgian ports transfer part of their profits to their shareholder.
([42]) Judgment of the Court of Justice of 29 October 1980, *Van Landewyck*, Joined Cases 209/78 to 215/78 and 218/78, EU:C:1980:248, paragraph 88; Judgment of the Court of Justice of 16 November 1995, *FFSA and others*, C-244/94, EU:C:1995:392, paragraph 21; Judgment of the Court of Justice of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraphs 27 and 28; Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and others*, C-222/04, EU:C:2006:8, paragraphs 122 and 123.
([43]) Judgment of the Court of Justice of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 78.

(51) The Commission notes first that the characteristics of the tariffs applied by the ports (publicity, non-discrimination, etc.) are similar to those of tariffs applied in the context of SGEIs ([44]), which are economic activities and are subject to the law on State aid. Likewise, prices are also public, non-discriminatory and set unilaterally in advance by the provider for the vast majority of economic activities.

(52) Although the proportion of expenditure associated with a given activity that is covered by revenue collected from users and, conversely, the proportion that is covered by tax (the taxpayer) may sometimes point to the existence of a market and an economic activity, the way in which the prices are set is not as such decisive from this point of view.

(53) Incidentally, it is not contested that the prices paid by users and customers of the ports (general and particular port charges, concession fees) cover at least the bulk of the costs incurred by the port authorities when they offer their services on the market ([45]).

(54) Furthermore, although the Walloon Region and the Walloon ports point out that the fees for the use of the infrastructure do not cover the reconstitution of the capital invested, they do not provide any factual evidence in support of their argument.

(55) Incidentally, this argument is presented as the demonstration of the general interest nature of the port activity, which, as such, is not relevant to determine the economic or non-economic nature of the port activities. The Commission also notes that, by definition, the costs of SGEIs (which are economic activities) are not in general covered in full by the revenue collected from users, so the existence of a funding shortfall does not necessarily preclude the existence of an economic activity within the meaning of Article 107 TFEU.

(56) Moreover, the mere fact that prices are set by the port authorities does not mean that demand is not taken into account. On the contrary, the port authorities do take the market conditions into consideration (supply and demand, especially the prices charged by competitors and the demand behaviour of users and customers) when they determine their tariffs and especially the port charges ([46]). As regards the concession fees, the ports of Antwerp and Zeebrugge point out that the tariffs are set according to objective parameters relating to the nature of the land or the activity concerned and reflect the 'intrinsic value' and the 'added value' generated. Consequently, the tariffs are linked to the characteristics of the service provided by the ports and to the characteristics of the undertakings or activities that the port is seeking to attract. On this basis, the tariffs obviously constitute an important instrument of the commercial policy implemented by the port to encourage shipowners and shippers to use the port infrastructure and undertakings to establish themselves there to develop their production or service activities.

(57) Consequently, making available both port infrastructure and land against payment of remuneration in fact constitute services offered on a market and therefore economic activities.

([44]) An SGEI is the 'supply of services which, if it were considering its own commercial interest, an undertaking would not assume or would not assume to the same extent or under the same conditions', notably regarding price and quality (see points 47 and 48 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest, OJ C 8, 11.1.2012, pp. 4-14).

([45]) For the port of Antwerp in 2015, the various port charges and fees accounted for EUR 290.3 million or approximately 84 % of current revenue (which also includes operating subsidies paid by the Flemish Government) and 113 % of current expenditure (cf. Annual Report 2015, pp. 61-62).

([46]) Article 25(3) of the Flemish Port Decree of 2 March 1999 provides that 'The Flemish Government and the port authorities shall develop initiatives with a view to achieving […] harmonious tariff structures in the Flemish seaports so as to guarantee the Flemish seaports a level playing field' . The documents annexed to the comments forwarded by the Port of Brussels (p. 102) also show that prices (and discounts) are considered as a means to influence demand-side behaviour: 'The Port actively seeks to develop waterway transport and to strengthen modal transfer to waterways by means of the following measures: The Port pursues its tariff incentive policy, i.e. navigation rights of EUR 0,00025 tonne/km and an exemption from docking charges for maritime traffic, new forms of traffic and forms of traffic on the increase. The Region will compensate the Port for the loss of revenue associated with this measure. […] In this context, the Port provides rebates on the concession fees for its land to undertakings which are the heaviest users of the waterways. […].'

5.1.1.3. ***Concerning the making available of the port infrastructure to shipowners against remuneration and the supply of specific services by the port authorities to shipowners against remuneration***

(58) As regards the services offered by the ports in exchange for the payment of port charges (access to the port infrastructure in general and any specific services), the Commission points out that the judgment of the Belgian Constitutional Court of 19 November 2015 (No 162/2015) recognising that the port charges constitute 'pure remuneration', by third parties, for the intervention of the port authorities, as well as the references made in the Flemish Port Decree of 2 March 1999 establishing that the port charges must be set in 'reasonable proportion' to the value of the consideration received, confirm that the ports offer services on a market against remuneration. The fact that this remuneration is supposed to reasonably cover the value of the consideration means that it can be ruled out *a priori* that the services provided to users of the ports are financed essentially by taxation rather than by real remuneration for the service obtained by these users, which again confirms the economic approach adopted by Belgium in the relationship between the ports and their users and the economic nature of the activities at issue.

(59) The Commission points out, moreover, that the Flemish Government argued before the Belgian Constitutional Court that the general port charges (consideration for access to the general port infrastructure) were comparable 'to the toll payable for use of a toll-road or tunnel' ([47]). However, it is clear from the Commission's decision-making practice that the use of a toll-road or toll tunnel is an economic activity ([48]). Finally, the Commission notes that the port charges are in principle subject to VAT in Belgium, just like other supplies of services ([49]).

(60) The decisions of the Commission or the Court of Justice mentioned by the interested parties and the Belgian authorities do not undermine this conclusion. In case N110/2008 JadeWeserPort ([50]), the question of the economic or non-economic nature of the activities at issue was not decided by the Commission; the recitals cited by the interested parties and the Belgian authorities in support of their reasoning (recitals 52 to 63 of the Decision) are followed by recitals indicating that the activity could be regarded as economic (recitals 64 to 66 of the Decision). As far as cases N390/2005 Construction of transhipment facilities on the railway line Lanaken – Maastricht ([51]) and N478/2004 Coras Iompair Eireann ([52]) are concerned, the Commission points out that they relate to the financing of the construction of railway infrastructure and not to making available port infrastructures against remuneration, and that in any case, the position taken by the Commission in those cases no longer corresponds to the Court of Justice case-law ([53]) or even to the Commission's current decision-making practice, according to which the construction of infrastructure to be exploited economically constitutes an economic activity. Finally, the judgment of the Court of Justice in case C-18/01 *Korhonen* ([54]) does not concern State aid law but Council Directive 92/50/EEC ([55]).

5.1.1.4. ***Concerning making available land and infrastructure to undertakings against remuneration***

(61) The Commission Decision in case SA.36346 ([56]), referred to in paragraph 17(f) of the Notice of 19 July 2016 and cited by the interested parties and the Belgian authorities, does not imply that the management or development of the port area and, in particular, the renting or making available of specific land and infrastructure against remuneration, is a non-economic activity. Case SA.36346 in fact concerned support for the revitalisation of public land and not the renting of land or infrastructure against remuneration.

([47]) Judgment No 162/2015 of 19 November 2015 of the Constitutional Court, point A.2.2.
([48]) See paragraph 220 of the Notice of 19 July 2016.
([49]) The port charges relating to inland shipping are subject to VAT. See Article 5 of the tariffs of the port of Antwerp for inland shipping (Tariff regulations for inland shipping, p. 11). On the other hand, due to a specific exemption provided for in Article 139 of the VAT Directive (Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 347, 11.12.2006, p. 1), reproduced in Article 42(1)(5) of the Belgian VAT Code, the port charges relating to international shipping are specially exempted from VAT (no reference to VAT in the Port of Antwerp Tariff Regulations for Sea-going Vessels). The need for a specific exemption shows that the supplies of services at issue would normally be included in the scope of VAT as supplies of services within the meaning of Article 2(1)(c) of the VAT Directive.
([50]) Decision of 10 December 2008 (OJ C 137, 17.6.2009).
([51]) Decision of 4 July 2006 (OJ C 276, 14.11.2006).
([52]) Decision of 7 June 2006 (OJ C 207, 31.8.2006).
([53]) Judgment of General Court of 24 March 2011 in Joined Cases T-443/08 and T-455/08 *Freistaat Sachsen and others* v *Commission*, cited above.
([54]) Judgment of the Court of Justice of 22 May 2003, Korhonen, C-18/01, EU:C:2003:300.
([55]) Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1).
([56]) Decision of 27 March 2014 GRW land development scheme for industrial and commercial use (OJ C 141, 9.5.2014, p. 1).

(62) The Commission practice has already been to consider that renting public property against remuneration constitutes an economic activity, especially where the port's co-contractor provides port services to its customers ([57]). It can also be inferred from the tariff conditions published by the port authorities ([58]) that the concession fees are subject to VAT, which is evidence of their economic nature. Similarly, the renting of land by the ports constitutes an economic activity subject to VAT ([59]).

(63) The Commission also notes that, in their comments, the ports of Antwerp and Zeebrugge emphasise that the choice of concessionaire is made after an 'invitation to tender', which confirms that these ports, where they give access to the port infrastructure, offer goods or services on a market.

5.1.1.5. ***Concerning the ancillary or principal nature of the economic activities***

(64) The fact that the economic activities of an entity are minor or marginal in relation to its non-economic activities does not in principle allow these economic activities to be regarded as exempt from the State aid rules.

(65) In addition, and without it being necessary to undertake a port-by-port evaluation of the proportion of the different economic activities, it can be inferred from the preceding arguments that a very large part of the activities considered to be non-economic by the interested parties and the Belgian authorities (renting of land, access to infrastructure against remuneration) are, in reality, economic. As indicated above, it is not contested that the port charges and concession fees account for the vast majority of the turnover of the Belgian ports and this revenue even exceeds total current expenditure in the case of the port of Antwerp.

(66) Finally, although the Commission accepts that, if the infrastructure is used almost exclusively for a non-economic activity, its funding may fall outside the State aid rules in its entirety, provided the economic use remains purely ancillary ([60]), the fact that the ports engage in non-economic activities does not mean that the port infrastructure itself is used almost exclusively for a non-economic activity.

Conclusion

(67) The Commission therefore considers that the activities carried out by the Belgian ports covered by the measure are – at least in part – economic activities.

5.1.2. ECONOMIC ADVANTAGE

(68) According to the Court of Justice, an advantage comprises not only a positive benefit, but also all the measures which in various forms mitigate the charges which are normally included in the budget of an undertaking ([61]).

(69) The Commission points out that, under Belgian tax law, the profit generated by economic activities carried out by the Belgian ports referred to in Article 180(2) of the CIR are not subject to corporate tax. Therefore, the ports are not required to bear the costs normally borne by entities subject to corporate tax.

(70) The tax on legal persons is not levied on total profits. For entities subject to the tax on legal persons, tax is levied only on part of the revenue generated by the port activities, namely on the cadastral income of property located in Belgium and on the income and proceeds from investment capital and movable assets ([62]). Consequently, the taxable amount for the tax on legal persons does not include the total profits made by the ports, for example, the port charges and fees paid by customers in consideration for services offered by the ports or the fees and rents

([57]) See Commission Decision in State aid case SA.36953 (2013/N) Port of Bahía de Cádiz, recital 29 (OJ C 335, 16.11.2013, p. 1), Commission decision in State aid case SA.30742 (N/2010) Klaipėda, recitals 8 and 9 (OJ C 121, 26.4.2012, p. 1), Commission Decision in State aid case N 44/2010 Port of Krievu Sala, recital 67 (OJ C 215, 21.7.2011, p. 21), Commission Decision in State aid case C 39/2009 (ex N 385/2009) Port of Ventspils, recitals 30, 57 and 58 (OJ C 62, 13.3.2010, p. 7).

([58]) See, for example, point 2.7 of the document General terms and conditions for concessions in the Antwerp port area. Also see the Tariff conditions of the port of Liège.

([59]) Answer to Parliamentary question No 397 of Mr Willem-Frederik Schiltz of 7 May 2013 (Lower House, Questions and Answers, 2012-2013, QRVA 53/128 of 9 September 2013, p. 86); answer to oral parliamentary question No 4288 of Mr Servais Verherstraeten of 11 May 2011 (Summary record 53, Finance and Budget Committee 229 of 11 May 2011, p. 22.). The Court of Justice also considers that this activity is an economic activity within the meaning of the VAT Directive (see Judgment of the Court of Justice of 25 October 2007, *Ministero delle Finanze — Ufficio IVA di Milano* v *CO.GE.P. Srl*, C-174/06, EU:C:2007:634, paragraphs 31-35).

([60]) See paragraph 207 of the Notice of 19 July 2016.

([61]) Judgment of the Court of Justice of 8 November 2001, *Adria-Wien Pipeline*, C-143/99, EU:C:2001:598.

([62]) See Article 221 of the CIR.

paid for the use of port infrastructure. Moreover, for the part of this revenue which is subject to the tax on legal persons, the rates are generally lower ([63]) than the applicable corporate tax rate (33,99 %). The amount of tax paid for the economic activities is therefore lower than the amount resulting from the application of the corporate tax rules.

(71) In addition, Belgium did not submit any evidence of a nature to alter this conclusion by the Commission during the cooperation procedure launched on 9 July 2014 or in its comments after the opening of the formal investigation procedure on 8 July 2016. It did not challenge the comments presented by the Dutch ports either, according to which the ports of Antwerp, Zeebrugge and Ghent have a real tax rate well below the corporate tax rate in Belgium (33,99 %).

(72) It is not possible either to subscribe to the arguments of the Flemish Port Commission, according to which, essentially, the advantage resulting from the corporate tax exemption is designed only to compensate for the increasing financing, by the port authorities, of non-economic infrastructure outside their remit. This is because there is no provision of national law guaranteeing that the amount of the advantage is limited to the net cost of such non-economic infrastructures ([64]). The exemption from corporate tax, the amount of which is proportional to the profit made, therefore leads to an advantage disproportionate to any cost of financing non-economic infrastructures.

(73) Consequently, the Commission considers that the ports at issue benefit from an advantage within the meaning of Article 107(1) TFEU which corresponds to the difference between the corporate tax that the ports should have paid for their economic activities and the proportion of the tax on legal persons which can be attributed to these economic activities.

5.1.3. STATE RESOURCES AND IMPUTABILITY TO THE STATE

(74) Pursuant to Article 107(1) TFEU, only measures granted by Member States or through State resources are considered as State aid. It is settled case-law that waiving revenues that would – in principle – otherwise have been paid to the State constitutes a transfer of State resources ([65]).

(75) Contrary to the arguments put forward by the Belgian authorities, since the taxation of the economic activities of the ports in the form of the tax on legal persons leads to taxation which is more favourable to the taxpayer than taxation in the form of corporate tax would have been (see section 5.1.2 above concerning the existence of an economic advantage), it gives rise to a shortfall in tax revenue for the State.

(76) Consequently, the Commission considers that this measure constitutes a transfer of State resources within the meaning of Article 107(1) TFEU.

(77) In addition, since the tax system at issue comes under Belgian law and is not imposed on Belgium by Union legislation, it is imputable to the State ([66]).

5.1.4. SELECTIVITY

(78) To be considered State aid, a measure must be selective, in the sense that it favours certain undertakings or the production of certain goods within the meaning of Article 107(1) TFEU ([67]).

([63]) See Article 225 of the CIR.
([64]) See paragraph 206 of the Notice of 19 July 2016 and, as regards SGEIs, the Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, EU:C:2003:415, paragraphs 87 to 95.
([65]) Judgment of the Court of Justice of 16 May 2000, *France* v *Ladbroke Racing and Commission*, C-83/98 P, EU:C:2000:248, paragraphs 48 to 51.
([66]) Judgment of the Court of Justice of 22 June 2006, *Belgium and Forum 187* v *Commission*, Joined Cases C-182/03 and C-217/03, EU:C:2006:416, paragraph 128.
([67]) Judgment of the Court of Justice of 15 December 2005, *Italy* v *Commission*, C-66/02, EU:C:2005:768, paragraph 94.

(79) According to settled case-law ([68]), the assessment of the material selectivity of a measure mitigating the charges which are normally included in the budget of an undertaking, such as a tax exemption, consists of three steps. First, it is necessary to identify the common or 'normal' tax regime (the 'reference system') applicable in the Member State concerned. Second, it is necessary to determine whether the measure in question derogates from the reference system by differentiating between economic operators which, in the light of the objective pursued by the reference tax regime, are in a comparable factual and legal situation. If this is the case, the measure would be deemed *prima facie* selective. As a third step, it is necessary to establish whether the derogating measure is justified by the nature or general scheme – in other words, the intrinsic logic – of the reference tax system ([69]). As regards this third step, the Member State must demonstrate that the differential tax treatment results directly from the basic or guiding principles of its tax system ([70]).

(80) In the course of the procedure, the Belgian authorities have defended two lines of argument in turn. In their replies to the questionnaire sent on 3 July 2013 by the Commission, the Belgian authorities first pointed out that Article 180(2) of the CIR was the legal basis for the exemption from corporate tax in favour of the ports. However, they then argued, in their comments dated 19 December 2016, that it was not merely as a result of applying the general rules of the CIR provided for in Articles 1 and 2 of the CIR that the ports were not subject to corporate tax, since ports were not 'companies' within the meaning of Article 2 of the CIR.

(81) State aid is an objective concept and only the effects of the measure must be taken into account. The fact that the Belgian ports do not pay corporate tax is not contested, but the basis for this absence of payment of corporate tax, according to the Belgian authorities, can be either Article 180(2) of the CIR or Articles 1 and 2 of the CIR.

5.1.4.1. ***Assessment of selectivity if Articles 1 and 2 of the CIR constitute the legal basis for the non-payment of corporate tax by the Belgian ports***

(82) In their comments dated 19 December 2016, the Belgian authorities maintain that Article 180(2) of the CIR has no legal implications and is purely declarative. Deleting it would not in any way alter the situation of the ports in relation to corporate tax. According to the Belgian authorities, the ports are exempt from corporate tax pursuant to Articles 1 and 2 of the CIR and the general criteria of the Belgian tax system. The Belgian authorities maintain that the ports are not 'companies' within the meaning of Articles 1 and 2 of the CIR.

(83) In this scenario, the reference system would be constituted by Articles 1 and 2 of the CIR, which provide that 'companies' are subject to corporate tax, whereas resident legal persons other than companies are subject to the tax on legal persons. According to the Belgian authorities, since ports are not 'companies', they would necessarily be subject to the tax on legal persons. Article 180(2) of the CIR, which, according to the Belgian authorities, merely draws the consequences from the general rules set out in Articles 1 and 2, would therefore not constitute a derogation to the reference system and would even form an integral part of it. In so far as ports are not 'companies', the rules relating to the tax on legal persons could also be considered to be a narrower reference system.

(84) This interpretation is therefore based essentially on the assumption that the nature of the activities carried out by the ports would necessarily preclude the possibility of their classification as 'companies' for the purposes of the taxation of income (of resident legal persons), whereas they constitute 'undertakings' within the meaning of Article 107 TFEU, as established above. Neither the observations made by Belgium, nor those of the third parties, provide any convincing evidence to validate this assumption.

(85) The Commission considers, on the contrary, that the ports are in principle 'companies' for the purposes of taxation of income as regards the bulk of their activities and that they carry out economic activities of a nature to classify them as 'undertakings' within the meaning of Article 107 TFEU. Nor is this classification as companies called into question by any provision of national law.

([68]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56; Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 49.

([69]) This is the case where a measure derives directly from the intrinsic basic or guiding principles of the reference system or where it is the result of inherent mechanisms necessary for the functioning and effectiveness of the system, see Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 69.

([70]) Judgment of the Court of Justice of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 81; Judgment of the Court of Justice of 8 September 2011, *Paint Graphos and others*, Joined Cases C-78/08 to C-80/08, EU:C:2011:550, paragraph 65.

(86) The Commission notes that the assumption on which the Belgian authorities base their reasoning is in contradiction with the official comments on the CIR, with other domestic texts and with official positions adopted by the Belgian Government. The official comments on the CIR state that legal persons who are 'unconditionally' excluded from corporate tax (notably the ports pursuant to Article 180(2) of the CIR) should 'in principle be regarded as taxpayers subject to corporate tax' ([71]). Also in view of their legal form (and the characteristics generally associated with this legal form), the majority of the ports listed in Article 180(2) of the CIR – which are public limited companies (SA), private limited companies (SPRL) or autonomous municipal authorities – should also be subject in principle to corporate tax ([72]). Second, the Flemish Port Decree of 2 March 1999 itself contains indications concerning the industrial ([73]) and/or commercial nature ([74]) of the port activities and therefore their classification as 'company' within the meaning of Article 2 of the CIR, the consequence of which should be that they are subject to corporate tax. Likewise, the Belgian Government itself argued, before the Belgian Constitutional Court, that the ports, among other companies and legal persons referred to in Articles 180 and 220(2) of the CIR, are 'in fact legal persons who engage in a business or transactions of a profit-making nature within the meaning of Article 2 of the CIR' ([75]). Before the Lower House of the Belgian Parliament, the Deputy Prime Minister and Minister for Finance and Foreign Trade also stated that the Belgian ports were public undertakings which, in the absence of the unconditional exemption provided for in Article 180 of the CIR, would be subject to corporate tax pursuant to Articles 1, 2 and 179 of the CIR ([76]). Finally, the ports are not subject to the tax on legal persons naturally and directly, but only because they are specifically exempted from corporate tax by Article 180(2) of the CIR, according to the actual wording of Article 220(2) of the CIR, which contradicts the Belgian authorities' interpretation that the ports do not pay corporate tax because they are naturally subject to the tax on legal persons, as resident legal persons other than 'companies'.

(87) Therefore, the Commission does not concur with the position that, even if Article 180(2) were deleted, the ports would not be subject to corporate tax under the general criteria provided for in Articles 1 and 2 of the CIR. In the light of the references cited in the previous recital, the Commission considers, on the contrary, that, pursuant to the general rules of Belgian national law, the ports, which are 'companies' within the meaning of Article 2 of the CIR, should be subject to corporate tax, in the absence of formal and unconditional exemption from this tax under Article 180(2) of the CIR. For the same reasons, the Commission disputes that the rules relating to the tax on legal persons constitute the reference system for the taxation of the ports.

(88) In their comments, the Belgian authorities and certain interested parties maintain that the exemption from corporate tax for the ports is inferred, quite apart from the general rules of the CIR (Articles 1 and 2), from other general rules of national law (a general principle of law, a rule derived from case-law according to which public services, tasks and goods are not taxed unless explicitly provided for by law, or even by the Belgian Constitution itself).

([71]) See comment 179/2: 'Already now, attention is drawn to the fact that, although they may in principle be regarded as taxpayers subject to corporate tax, the following are excluded from corporate tax on the basis of Articles 180 to 182 of the CIR 92: 1. legal persons who are 'unconditionally' excluded from corporate tax (see comment on Article 180 of the CIR 92); […]'.

([72]) See comment No 179/16: 'Belgian commercial companies (SA, SCA, SNC, SCS, SPRL, SC and SCRIS) are in principle constituted to engage in a profit-making activity. As a general rule, they therefore in fact engage in either an industrial, commercial or agricultural business of some kind, or a profit-making occupation, or both at once, and all the profits in general of any kind that they make must be considered as resulting from this activity.' Also see points A.2.1 and B3.1 of judgment No 148/2012 of the Constitutional Court of 6 December 2012 (*Moniteur belge*, 29 January 2013). In response to a parliamentary question, the Minister for Finance stated that, as far as the autonomous municipal authorities are concerned, it was necessary to examine on a case-by-case basis whether they were subject to corporate tax or the tax on legal persons, depending on the nature of the activities concerned. Since by virtue of the Royal Decree of 10 April 1995, these activities must be of an industrial or commercial nature, it can be considered, according to the Minister, that the autonomous municipal authorities are in principle subject to corporate tax (QRVA, Lower House, 1996-1997, No 86, 16 June 1997, pp. 11749-11750; QRVA, Lower House 2001-2002, 26 March 2002, CRIV 50 COM 702, pp. 8-9).

([73]) See Article 25(2): 'The Flemish Government shall be authorised to create a joint concertation commission. A five-year promotion plan, based on an industrial economy model, shall be drawn up.'

([74]) See Article 26(1): 'Disputes between port authorities in operational matters, especially with regard to the commercial activities of the port authorities […] shall be regulated by the port disputes commission […]'.

([75]) See Judgment No 136/98 of 16 December 1998 (*Moniteur belge* of 6 January 1999, p. 261), point A.7.1: 'According to the Council of Ministers, the companies and legal persons referred to in Article 220(2) of the CIR are in comparable situations. Although Article 180 of the CIR excludes the aforementioned legal persons from corporate tax, they are in fact legal persons who engage in a business or transactions of a profit-making nature within the meaning of Article 2, § 2(1) and (2) of the CIR.' Also see point A.7.2: 'An objective criterion exists to distinguish between the legal persons referred to in Article 220(1) and (3), on the one hand, and those referred to in Article 220(2) [namely the ports] on the other hand, in that only the latter category engages in transactions of a profit-making nature. […]'

([76]) Public meeting of Wednesday 29 January 1997, Finance and Budget Committee, Question by Mr Jacques Simonet to the Deputy Prime Minister and Minister for Finance and Foreign Trade on the liability of Belgian ports to the tax on legal persons (No 1017). See http://www3.dekamer.be/digidocanha/K0112/K01120466/K01120466.PDF p. 5.

(89) In the light of the references cited above, the Commission considers that the normal application of the general rules of Belgian law would result in the ports being subject to corporate tax with respect to the income from their economic activities.

(90) Incidentally, even if, contrary to what the Commission has just shown, the national rules in question – or their interpretation by the administration – were such as to result in the non-payment of corporate tax by Belgian ports, these rules would introduce discrimination between 'undertakings' engaging in economic activities within the meaning of Article 107 TFEU (see section 5.1.1. above). Just as in the case of Article 180(2), in the analysis set out below by the Commission, these rules, or the Belgian income tax regime as a whole, would therefore be the source of advantages granted to certain 'undertakings', namely the ports, despite the fact that these undertakings, with regard to the profits generated from 'economic activities', are in a comparable situation to other undertakings subject to corporate tax (resident legal persons) from the point of view of the objective of taxation of the income of resident legal persons – which is to tax profits. The Commission considers that the ports do not conform to 'particular operating principles which clearly distinguish them from other economic operators' subject to corporate tax ([77]). In particular, the fact that the ports do not seek a profit ([78]) is not sufficient to consider that they are in a different situation from that of other operators subject to corporate tax. In this scenario, the Belgian system would itself be selective ([79]).

(91) Therefore, even if Articles 1 and 2 of the CIR constituted the legal basis for non-payment of corporate tax by the Belgian ports, this non-payment would be a measure which is *prima facie* selective with respect to the economic activities of the ports.

5.1.4.2. ***Assessment of selectivity if Article 180(2) of the CIR constitutes the legal basis for non-payment of corporate tax by the Belgian ports***

(92) As results from the arguments developed above, the Commission considers that Article 180(2) of the CIR is the only legal basis for non-payment of corporate tax by the Belgian ports and that, in the absence of this provision, the ports would pay corporate tax like any other company or undertaking deriving taxable income from an economic activity.

5.1.4.2.1. **Reference system and derogation from the reference system**

(93) The Commission considers that the **reference system** in the case at issue is constituted by the general tax rules arising from Articles 1 and 2 of the CIR. Article 1 of the CIR establishes a dual system for the taxation of income for legal persons resident in Belgium: it subjects 'companies' to corporate tax and 'legal persons other than companies' to the tax on legal persons. Article 2 of the CIR comprises the criteria for the definition of 'companies' and therefore the determination of the legal persons to be subject to corporate tax and by elimination those whose income will be subject to the tax on legal persons. Article 179 confirms that taxpayers subject to corporate tax are resident companies.

(94) Article 180(2) of the CIR constitutes a **derogation** from these general tax rules in so far as it exempts the ports from corporate tax unconditionally, without applying the general criteria for allocation between corporate tax and tax on legal persons defined in Articles 1 and 2, in other words without taking into account the status of 'companies' (or otherwise) of these ports ([80]).

(95) In so far as, for the reasons set out in recital (86), the ports are 'companies' within the meaning of Article 1 of the CIR, the reference system for the taxation of the income of the ports can also be defined more narrowly as all the rules relating to corporate tax, namely Articles 1 and 179 of the CIR, which provide that resident 'companies' are subject to corporate tax which is defined as a 'tax on the total income'.

([77]) The Court of Justice, in its judgment of 8 September 2011 (judgment *Paint Graphos and others*, Joined cases C-78/08 to C-80/08, EU:C:2011:550, paragraphs 55 and following), points out that the primacy of the individual principle, the 'one man, one vote' rule or the management in the interests of the members of the entity in question constitute particular operating principles, which are characteristics that do not arise in the case of the ports.

([78]) Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and others*, C-222/04, EU:C:2006:8, paragraphs 136 and 137.

([79]) See Judgment of the Court of Justice of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, Joined Cases C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 101 *et seq*.

([80]) The interpretation according to which Article 180(2) of the CIR merely applies the general rules to the ports, considering that they are not 'companies', is examined below.

(96) In terms of this reference system, Article 180(2) of the CIR explicitly constitutes a derogation (it is its raison d'être), since it removes the ports from the scope of Article 179 and corporate tax, even though the ports are then subject to the tax on legal persons by virtue of Article 220(2) of the CIR. In the absence of the explicit, specific exemption provided for in Article 180(2) of the CIR, Belgian ports – like other resident companies – would in fact be automatically subject to corporate tax.

5.1.4.2.2. **Derogation from the reference system introducing differentiation between economic operators in a comparable legal or factual situation in terms of the objective pursued by the reference tax system**

(97) It results from the above that Article 180(2) of the CIR derogates from the general rules of the taxation of income of 'companies' (both by reference to the general rules under Articles 1 and 2 of the CIR and by reference to the less general rules under Article 179 of the CIR) and introduces differentiations between economic operators in a comparable legal or factual situation in terms of the objective pursued by the reference tax system. In fact, whichever reference system is adopted (corporate tax or taxation of the income of resident legal persons in general), the objective of income tax is to tax income, an objective in relation to which all undertakings are in the same factual and legal situation as regards the profits from their economic activities.

(98) The fact that the ports do not pursue a profit motive or that they concentrate less on a short-term return on investment does not in any way alter this assessment. It has been established that a tax exemption in favour of non-profit undertakings which engage in economic activities is in general regarded as selective, even if it is granted in the light of the national legislator's objective of favouring entities regarded as socially deserving ([81]). The fact that the Belgian ports are owned and controlled by public authorities or – aside from economic activities – that they engage in non-economic activities, such as public authority tasks, does not imply that they are in a different legal and factual situation with respect to the application of corporate tax to the revenue generated by their economic activities.

(99) The measure at issue is therefore *prima facie* selective regarding the economic activities of the ports.

5.1.4.3. ***Justification by the nature or general scheme of the system***

(100) As indicated above, it is for the Member State to demonstrate that the derogation is justified by the nature or general scheme of the reference tax system. In the final step of the three-step analysis, only the characteristics inherent in the reference tax system can justify differentiated treatment.

(101) Conformity of a measure with national law cannot, as such, constitute justification by the scheme of the system unless it is shown that this justification results from characteristics inherent in the reference tax system ([82]).

(102) In this respect, Decision No 151/2016 of the Belgian Constitutional Court of 1 December 2016 in any case does not have the scope which the Belgian authorities try to assign to it. In fact, this decision does not concern the exemption from corporate tax in favour of the ports in relation to State aid, but the liability to corporate tax of intermunicipal associations, cooperation structures and project associations, in relation to the principles of equality and non-discrimination, which means that the absence of discrimination in national law does not prejudge the absence of selectivity within the meaning of Article 107(1) TFEU.

(103) Likewise, since the decisive criterion for liability to corporate tax or to the tax on legal persons is the pursuit of a 'business' or 'transactions of a profit-making nature' by the entity concerned (Article 2 of the CIR), the arguments to the effect that the ports are exempt from corporate tax because they do not distribute their profit but reinvest it, that they pursue an objective beyond their individual interest, that they do not have the statutory objective of the pursuit of profit, that they are public authorities and that they carry out tasks in the general interest are not sufficient to justify more favourable tax treatment than that of other resident companies in relation to the guiding principles of the tax system. Other undertakings also reinvest their profit, pursue

([81]) Judgment of the Court of Justice of 10 January 2006, *Cassa di Risparmio di Firenze and others*, C-222/04, EU:C:2006:8, paragraphs 136 and 137.

([82]) National law can decide on the conformity of a measure with higher sources of law in the light of criteria other than the smooth functioning of the tax system.

objectives or generate effects on the economy beyond their individual interest ([83]) without being exempted from corporate tax on those accounts. Likewise, entities which are not public authorities (such as not-for-profit associations) may be subject to the tax on legal persons provided that they respect the general criterion laid down in Article 2 of the CIR, which means that the fact of belonging to the public sphere is not relevant either in relation to the national rules. Hence, these associations, in spite of their non-profit-oriented statutory objective, may be subject to corporate tax pursuant to the general criteria provided for in Articles 1 and 2 of the CIR if they engage in a 'business' or carry out 'transactions of a profit-making nature'.

(104) The alleged fact that the resources of the ports do not always cover their costs cannot constitute a justification for exemption from corporate tax since, in this situation of absence of profit, no tax is due under the normal system for the taxation of income, and since a loss can be carried forward and charged against any future profits generated by economic activities, exemption is superfluous and has a consequence only where the ports make a taxable profit. The Commission notes that, over the period 2004-2014 (eleven financial years), the results of the ports of Antwerp, Ghent, Zeebrugge and Ostend have been almost consistently positive (one negative result for Antwerp in 2011 and one negative result for Ostend in 2013), so the justification invoked is theoretical and even contradicted by the facts. Moreover, no provision for exemption from corporate tax similar to that benefiting the ports is made for other 'companies' in the event of their resources not covering their costs.

(105) Similarly, the fact that certain costs not inherent in the object of an undertaking would not be deductible from corporate tax, pursuant to Article 49 of the CIR, does not provide any justification either for exempting the ports from corporate tax. Article 49 of the CIR provides that 'the expenses incurred or borne by the taxpayer during the taxable period with a view to acquiring or retaining the taxable income shall be deductible'. First, the exemption from corporate tax in favour of the ports is unrelated to the fact that the ports would be financially disadvantaged by Article 49 of the CIR: the exemption from corporate tax concerns all the profits made and is not limited to the profits resulting from the possible absence of deductibility of certain expenses pursuant to Article 49 of the CIR. The exemption of ports from corporate tax is therefore not justified by a guiding principle of the Belgian tax system, even assuming that Article 49 of the CIR constitutes such a guiding principle. Furthermore, neither the Belgian authorities nor the interested parties have shown, in the light of the objective of the measure ([84]) and its drafting, how this kind of provision would in fact be of a nature to impede the deductibility of the costs of the non-economic activities of general interests of the ports. The ports of Antwerp and Zeebrugge for that matter only present this problem as a simple risk and not as an established fact.

(106) Again, the fact that the exemption of the ports from corporate tax, like the exemption from tax of the public or private property of certain public entities assigned to a public service, results from a general principle of law, or even from the Belgian Constitution itself, assuming this fact to have been established ([85]), is not as such necessarily of a nature to justify this exemption through the nature or general scheme of the system, in so far as any considerations taken into account by the authors of the Constitution or the national courts may be external to the smooth operation of the tax system or its guiding principles.

(107) Finally, the arguments of the Belgian authorities and interested parties relating to the criteria developed by national case-law to assess whether a legal person is a 'company' within the meaning of Articles 1 and 2 of the CIR (in particular absence of industrial and commercial methods) are ineffective to demonstrate the justification for the measure by the logic inherent in the tax system, in so far as they aim in reality to prove that the ports are not 'companies', in which case the absence of liability to corporate tax would be selective due to the very choice of the criteria used to determine the limits of the reference system (see above) and not due to a derogation from this reference system which could possibly be justified.

([83]) Certain entities, and especially the intermunicipal associations recently made subject to corporate tax in Belgium, also carry out tasks of general interest. See point 19.1 of judgment No 151/2016 of 1 December 2016 of the Belgian Constitutional Court recalling that the intermunicipal associations were 'set up for a general interest purpose' and 'perform the task of fulfilling a municipal obligation'.

([84]) According to point 11 of the official comments on Article 49, the non-deductibility refers to 'purely private transactions', whereas it is argued in the present procedure that the costs incurred under the general interest would not be deductible.

([85]) The comments received by the Commission relate to the property of the public authorities 'by definition', referred to in Article 220(1) of the CIR, namely 'the State, the Communities, the Regions, the provinces, the metropolitan districts, the federations of municipalities, the municipalities, the public intermunicipal social action centres, the public religious establishments and the polders and water boards', not to the property of the ports: neither the autonomous municipal port authorities nor the other types of Belgian ports referred to in recital (13) and footnote No 12 are concerned by this Article.

5.1.5. DISTORTION OF COMPETITION AND EFFECT ON TRADE

(108) In order to be classified as State aid, the measure must affect intra-EU trade and distort, or threaten to distort, competition. Both criteria are closely linked.

(109) According to case-law, a distortion of competition is generally established as soon as a State grants a financial advantage to an undertaking in a liberalised sector where there is, or could be, competition ([86]). It is indisputable that there is competition in the port sector and that it is exacerbated by the nature and characteristics specific to transport, and especially maritime and inland waterway transport. The transport services offered by the ports are, at least to some extent, in competition with those offered by or in other ports and by other providers of transport services in Belgium and in other Member States.

(110) Thus, in the context of the public consultation of the interested parties on a draft Regulation in the ports sector, 'All stakeholders stressed the need for a stable and fair level playing field […] for inter-port (competition between ports) […] competition in the EU.' ([87]) Likewise, the ports, and especially the inland ports and more generally inland waterway transport of which they form a constituent part, are in competition with other forms of transport. Moreover, competition is particularly exacerbated between the Belgian and Dutch coastal ports (mention is often made in this context of the Amsterdam — Rotterdam — Antwerp area).

(111) By strengthening the position of beneficiaries in international trade, the measure is therefore likely to affect intra-EU trade and distort competition.

(112) Moreover, the alleged fact that similar State aid measures exist in other Member States and the behaviour of the Commission concerning these possible measures have no bearing on the classification of the measure concerned as State aid, since the measure in favour of the Belgian ports referred to in Article 180(2) of the CIR has the consequence of improving their competitive situation in relation to a reference situation in which they would be taxed under the normal conditions of the corporate tax system ([88]).

(113) In addition, even though it can be considered that the ports benefit from a legal monopoly to offer their services within the port they operate, the transport services they offer are, at least to a certain extent, in competition with those offered by other providers of transport services, notably the ports of other Member States.

(114) The opinion of the Dutch competition authority cited by the interested parties is not relevant in the context of the current State aid procedure as it does not concern the assessment of a scheme in relation to Article 107 TFEU, which requires a specific examination of the competition criterion. Moreover, Article 25 of the Flemish Port Decree of 2 March 1999 implies that the tariffs used by the ports have a bearing on their competitive position ([89]). The existence of competition between European ports is moreover also confirmed by the comments of the Dutch public ports.

(115) Furthermore, the references to paragraphs 211, 219 and 220 of the Notice of 19 July 2016 are not relevant in the present case as they do not concern the port infrastructure mentioned in paragraph 215. The latter indicates that 'public funding of port infrastructure favours an economic activity and is hence in principle subject to State aid rules' and that 'ports may compete with one another and the financing of port infrastructure is therefore also likely to affect trade between Member States'. Moreover, paragraphs 219 and 220 of the Notice indicate that aid

([86]) See Judgment of the Court of Justice of 24 July 2003, *Altmark Trans*, C-280/00, EU:C:2003:415.

([87]) See Proposal for a Regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports, COM(2013) 296 final (OJ C 327, 12.11.2013, p. 111) point 2.1. Also see Communication from the Commission on a European Ports Policy{SEC(2007)1339} {SEC(2007)1340}, COM(2007) 616 final, point II.4.2.

([88]) Judgment of the Court of Justice of 10 December 1969, *Commission* v *France*, Joined cases 6/69 and 11/69, EU:C:1969:68, paragraph 21; Judgment of the Court of Justice of 22 March 1977, *Steinike & Weinlig*, 78/76, EU:C:1977:52, paragraph 24; Judgment of the General Court of 30 April 1998, *Vlaamse Gewest* v *Commission*, T-214/95, ECLI:EU:T:1998:77, paragraph 54, and Judgment of the Court of Justice of 19 May 1999, *Italy* v *Commission*, C-6/97, EU:C:1999:251, paragraph 21.

([89]) Article 25(3): 'The Flemish Government and the port authorities shall develop initiatives with a view to achieving […] harmonious tariff structures in the Flemish seaports in order to guarantee a level playing field for Flemish seaports.' Article 25(4): 'Where the tariffs […] are obviously contrary to the general interest or are contrary to fair competition between the port authorities, the regional ports commissioner shall present these decisions to the concertation commission. […].'

for the construction of the infrastructure concerned may not affect intra-Community trade or competition, whereas the measure at issue in the present procedure does not constitute aid for construction of infrastructure but operating aid linked to the profit made in the context of its operation.

5.1.6. CONCLUSION

(116) In the light of the arguments set out above, the tax exemption for the Belgian ports provided for in Article 180(2) of the CIR constitutes State aid within the meaning of Article 107(1) TFEU, in so far as the exempted revenue is generated by economic activities carried out by the ports.

5.2. *COMPATIBILITY OF THE MEASURE WITH THE INTERNAL MARKET*

(117) It is for the Member State concerned to demonstrate that the State aid measures can be regarded as compatible with the internal market. In their various contributions, responses and comments, the Belgian authorities have not put forward any arguments concerning the compatibility of the measure. The Walloon Region and the Walloon ports consider that Article 93 and 106(2) TFEU could constitute appropriate bases for compatibility. The port authorities of Antwerp and Zeebrugge do likewise regarding Article 93 TFEU.

(118) First, Article 106(2) TFEU provides that compensation for carrying out public service tasks can be declared compatible with the internal market if it meets certain conditions ([90]). However, the Commission points out that the measure at issue, which links the amount of aid to the profits made, is not linked or limited to the net costs of the public service tasks ([91]), whereas this is a precondition for the aid to be recognised as compatible on the basis of Article 106(2) TFEU. Consequently, the measure cannot be regarded as public service compensation compatible with the internal market and is not compatible on the basis of Article 106(2) TFEU.

(119) Second, Article 93 TFEU stipulates that aids which meet the needs of coordination of transport or represent reimbursement for the discharge of certain obligations inherent in the concept of a public service can also be declared compatible with the internal market. Although the ports play a major role in the development of multimodal transport, not all the investments made by the ports are covered by Article 93 TFEU, which is limited to aids which meet the needs of coordination of transport. Moreover, the corporate tax exemption does not constitute investment aid but operating aid which is not targeted at specific investments The measure favours undertakings making the most profit or therefore having greater internal capacity *prima facie* to finance investments. It is not targeted either at compensation for the cost of certain obligations inherent in the concept of a public service, as pointed out above. In addition, the measure, a tax exemption, results in an unlimited advantage in relation to costs of any kind. It is therefore not limited to the amount needed for coordination of transport or for reimbursement for the discharge of certain obligations inherent in the concept of a public service and therefore does not guarantee compliance with the principle of proportionality. It has no identified incentive effect either. Therefore Article 93 TFEU is not applicable.

(120) Third, and although Article 107(3)(c) was not invoked either by Belgium or by the interested parties, the Commission has examined whether the measure at issue is of a nature to 'facilitate the development of certain economic activities or of certain economic areas' without adversely affecting trading conditions to an extent contrary to the common interest. For the reasons already set out above (absence of proportionality, absence of incentive effect and absence of link with an identified public interest objective), the Commission considers however that Article 107(3)(c) TFEU is not applicable.

([90]) See Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (2012/C 8/02) (OJ C 8, 11.1.2012, p. 4). Also see Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

([91]) See opinion of Advocate General Kokott in case C-74/16, *Congregación de Escuelas Pías Provincia Betania* v *Ayuntamiento de Getafe*, EU:C:2017:135, paragraph 75.

5.3. *EXISTING AID OR NEW AID*

(121) The Belgian authorities explained that the ports have been subject to the tax on legal persons since the 1960s and that prior to this they were subject to schedular tax (*impôt cédulaire/cedulaire belastingen*), which is similar to the tax on legal persons. The tax treatment accorded to the ports was also linked to their legal status, which has changed over time. According to the Belgian authorities, the ports were already subject to the tax on legal persons prior to the entry into force of the Treaty of Rome in 1958. On the basis of the information received, it would appear that the ports have always been exempt from corporate tax.

(122) In accordance with Article 1(b)(i) of the Procedural Regulation, aid schemes that were put into effect prior to the entry into force of the Treaty are existing aid schemes.

(123) On the basis of the information available, the exemption from corporate tax for the ports was applicable before 1958 and has not undergone any substantial changes since then. Consequently, the measure is deemed to be an existing aid scheme.

6. CONCERNING THE REQUEST OF THE BELGIAN AUTHORITIES TO GRANT A TRANSITIONAL PERIOD FOR THE BELGIAN PORTS

(124) As regards the request for a transitional period made by the Belgian authorities, the Commission recalls that, at this stage of the procedure concerning existing aid, a transitional period cannot in principle be granted, unless there are exceptional circumstances. In the final decision, the Commission can grant the Member State concerned only a reasonable period for implementation in the light of the modifications required.

(125) The Commission also notes that, since the start of the cooperation procedure launched on 9 July 2014, the Belgian authorities have already had a certain amount of time in which to start considering possible legislative amendments. It also points out that there is no question, as the Belgian authorities feared, of the ports being made subject to corporate tax from 1 January 2017.

(126) In accordance with the mandatory role allotted to it by Articles 107 and 108 TFEU, the Commission must end State aid deemed incompatible with the internal market and re-establish the conditions for a level playing field as quickly as possible. If, at this stage in the procedure, the Commission considers that incompatible aid has been granted to certain undertakings, it cannot in principle suspend the State aid procedure in question or grant a transitional period, since that would amount to authorising the payment of aid incompatible with the internal market for a longer period, which would also be unfair in relation to competitors not receiving aid or even a lower amount of aid. The Commission notes in this respect that the Dutch ports, which have been subject to corporate tax since 1 January 2017, have asked it to take rapid action to ensure that the Belgian ports are subject to corporate tax.

(127) As pointed out above, the possible existence of other State aid to other ports in other Member States does not justify suspension of the procedure or a delay in the entry into force of the national measures implementing the Commission decision. Such a delay would have the effect of prolonging the current distortions between Northern European ports, and more precisely between the Belgian ports, the Dutch ports already mentioned, and the French ports, since the latter are the subject of a similar parallel decision abolishing the tax exemptions from which they currently benefit.

(128) Also the fact that the Commission allegedly allowed the Netherlands a longer implementation period in case SA.25338 ([92]) is not relevant in support of a request for a transitional period in the present case. The Commission treats all Member States equally and each case in the light of its specific characteristics and the Dutch case cannot be compared to the Belgian case. Incidentally, in its final decision, the Commission explicitly refused to allow the Netherlands a transitional period in spite of the existence of similar measures still in force in other Member States. It should also be noted that the Netherlands had to end the tax advantages at issue before Belgium, so its ports have not received favourable treatment.

(129) In addition, in the present case, the arguments put forward by the Belgian authorities concerning compliance difficulties under domestic law do not constitute exceptional circumstances of a nature to justify a transitional period. In particular, as the Commission has pointed out above, the repeal of Article 180(2) of the CIR should suffice in principle for the ports to be made liable to corporate tax. Similarly, the fact that the transfer of a legal person from the tax on legal persons to corporate tax is not explicitly governed by Belgian tax law is not

([92]) Commission Decision (EU) 2016/634 of 21 January 2016 on aid measure SA.25338 (2014/C) (ex E 3/2008 and ex CP 115/2004) implemented by the Netherlands — Corporate tax exemption for public undertakings (OJ L 113, 27.4.2016, p. 148).

a sufficient argument; the Belgian tax authority has the possibility (and uses it) to reclassify the activity of an entity subject to the tax on legal persons in order for it to be subject to corporate tax, in the absence of any legislative measure organising this transfer. Finally, the Belgian authorities do not explain how the abolition of an unconditional exemption from corporate tax for the ports would be contrary to the principle of equal treatment, even supposing that this circumstance, derived from national law, is relevant for the allowance of a transitional period. On the contrary, the recent reform to make Belgian intermunicipal associations liable to corporate tax, when they were previously exempted from this tax and subject to the tax on legal persons (which is also the case for the ports), was presented by the Belgian Government as designed to promote equal treatment ([93]).

(130) Moreover, the Commission has never approved the measure at issue which has never been notified by the Belgian authorities. The principles of legal certainty and legitimate expectations are therefore not applicable in the present case, especially as, since the measure is existing aid, the Commission cannot order the recovery of the aid granted in the past.

7. **CONCERNING THE REQUESTS OF THE DUTCH PORTS**

(131) As regards the request by the Dutch ports to defer their liability to corporate tax, the Commission recalls that the present procedure does not concern Dutch ports, but Belgian ports. In its final decision in case SA.25338 concerning the Dutch ports ([94]),the Commission refused to delay the liability of Dutch ports to corporate tax for the same reasons of principle as those set out in the present decision. The liability of the Dutch ports to corporate tax derives after all from Dutch national law and the Commission, in any case under Article 107 TFEU, is unable to require a Member State to change its legislation to grant State aid to certain economic operators.

8. **CONCLUSION**

(132) The corporate tax exemption for the Belgian ports mentioned in Article 180(2) of the CIR constitutes an existing State aid scheme which is incompatible with the internal market.

(133) It is therefore appropriate for the Belgian authorities to abolish the exemption from corporate tax at issue and to subject the entities in question to corporate tax. This measure should be adopted before the end of the calendar year in progress on the date of this decision and apply at the latest to the income generated by the economic activities from the start of the tax year following its adoption,

HAS ADOPTED THIS DECISION:

Article 1

The corporate tax exemption for the Belgian ports listed in Article 180(2) of the CIR constitutes an existing State aid scheme which is incompatible with the internal market.

Article 2

1. Belgium shall remove the corporate tax exemption referred to in Article 1 and subject the entities for which this exemption applies to corporate tax.

2. The measure by which Belgium executes its obligations under paragraph 1 shall be adopted before the end of the calendar year in progress on the date of notification of this decision. This measure shall apply at the latest to the income from economic activities generated from the start of the tax year following its adoption.

Article 3

Belgium shall inform the Commission within two months of the date of notification of this decision of the measures taken to comply with it.

([93]) See Parliamentary document, Lower House No 54 0672/001, pp. 8-9.
([94]) See footnote 92.

Article 4

This Decision is addressed to the Kingdom of Belgium.

Done at Brussels, 27 July 2017

For the Commission
Margrethe VESTAGER
Member of the Commission