COMMISSION DECISION

of 29 June 2011

on measure SA.27106 (C 13/09 — ex N 614/08) which France is planning to implement for ports

(notified under document C(2011) 4391)

(Only the French text is authentic)

(Text with EEA relevance)

(2011/519/EU)

THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments [2] pursuant to the first subparagraph of Article 108(2) of the Treaty on the Functioning of the European Union (TFEU) [3] and having regard to their comments,

Whereas:

1. PROCEDURE

(1) By letter of 4 December 2008, the French authorities notified, pursuant to Article 108(3) of the Treaty on the Functioning of the European Union (TFEU), an aid scheme consisting of tax measures to underpin the port reform set out in Law No 2008-660 of 4 July 2008 [4]. The aid was registered under number N 614/08.

(2) The tax arrangements notified were intended to underpin the transfer of port-handling equipment to private operators as provided for under the reform. The arrangements consisted of two measures: a diminishing reduction over a five-year period of the rental value used as a basis for calculating the local tax paid by private operators taking over the port-handling equipment, and the possibility for the local authorities managing sea ports to exempt handling companies from business tax for a period of 6 years.

(3) By letter of 11 December 2008, the Commission asked the French authorities to provide additional information, not only on the tax arrangements notified but also on the transfer by the major sea ports of specific port-handling equipment and facilities. The deadline for replying was extended to 9 February 2009 at the request of the French authorities.

(4) A meeting between the French authorities and Commission representatives took place on 28 January 2009. By letter of 10 February 2009, the French authorities sent the Commission the information requested.

(5) By letter of 9 April 2009 (D/2165) the Commission notified the French authorities of its decision of 8 April 2009 to initiate the formal investigation procedure pursuant to Article 108(2) of the TFEU. The decision was published in the *Official Journal of the European Union* [5]. The Commission's decision concerns the tax arrangements notified and also the transfer by the major seaports of specific port-handling equipment and facilities. In it, the Commission invited France and interested parties to submit their comments within a certain time limit.

(6) The Commission received the French authorities' comments on 11 May 2009 (A/18191). It also received comments within the time limit from one interested party, the European Sea Ports Organisation (ESPO). ESPO's comments were forwarded to the French authorities by letter of 16 July 2009 (D/60307). The latter's comments were received by letter dated 27 August 2009 (A/28446).

[1] OJ L 1, 3.1.1994, p. 3.
[2] OJ C 122, 30.5.2009, p. 16.
[3] From 1 December 2009, Articles 87 and 88 of the EC Treaty have become Articles 107 and 108 of the Treaty on the Functioning of the European Union (TFEU). The provisions laid down in the respective articles are identical in both cases. For the purposes of this Decision, references to Articles 107 and 108 TFEU should be understood as references to Articles 87 and 88 of the EC Treaty where appropriate.
[4] French Official Gazette (JORF) No 0156, 5.7.2008.
[5] OJ C 122, 30.5.2009, p. 16.

(7) A meeting between the French authorities and Commission representatives took place on 30 November 2009. By letters of 25 January 2010 (A/3263) and of 24 March 2010 (A/5136), the French authorities sent the Commission additional information.

(8) By letter of 9 June 2010 (D/7519) and in the context of the reform of business tax in France, the Commission asked the French authorities to provide additional information. The purpose of this letter from the Commission was to obtain clarification on the impact on the notified arrangements of the abolition of business tax and the procedural consequences of this.

(9) By letter dated 2 July 2010, the French authorities requested an extension of the deadline for replying. The Commission received the reply from the French authorities by letter of 4 August 2010 (A/11533).

(10) In this letter, the French authorities informed the Commission that they were withdrawing their notification of the tax measure as regards the possibility for the local authorities managing sea ports to exempt handling companies from business tax for a period of not more than 6 years. Under this measure, it was possible, under certain conditions, from 2010 to 2015, to exclude the rental value of specific port-handling equipment and facilities from the calculation of business tax. This possibility had now become irrelevant given the abolition of business tax and had in fact been repealed in the 2010 budget.

(11) As regards the part of the notification referring to the diminishing reduction, limited in time, of the rental value used to establish local taxes to be paid by private operators taking over large sea port equipment and facilities, the French authorities stated in their letter of 2 July 2010 that this reduction also applied to the land tax paid by companies under the regional business tax ([6]) which replaces business tax. The French authorities passed on to the Commission the names of four companies ([7]) benefiting under this measure and the amount of the resulting tax benefit for each one.

([6]) Under Law No 2009-1673 of 30 December 2009 on the budget for 2010 (JORF No 0303 of 31 December 2009), a regional business tax was introduced consisting of a land tax on companies and a levy on the added value of companies.

([7]) The companies are: Société d'Équipement du Terminal de Normandie (SETN), Générale de Manutention Portuaire (GMP), Compagnie Nouvelle de Manutention portuaire (CNMP) and STMC6.

(12) The updated figures for the tax benefits received showed that, for three of the companies concerned, the tax relief was lower than the threshold of two hundred thousand euro over a consecutive period of three fiscal years set out in Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid ([8]). However, the same did not apply to the fourth company.

(13) In this context, and following various contacts with the Commission, the French authorities decided to limit the tax benefit for companies under the measure set out in recital 11 to the threshold of the Commission Regulation (EC) No 1998/2006, subject to the conditions laid down therein.

(14) Thus by letter of 20 January 2011, the French authorities informed the Commission of the adoption of Article 36 of Law No 2010-1658 of 29 December 2010 on the supplementary budget for 2010 ([9]), which makes the diminishing tax reduction set out in the port reform subject to compliance with Regulation (EC) No 1998/2006. The French authorities also informed the Commission of the withdrawal of their notification concerning this tax aspect of the port reform.

(15) The Commission takes note of the withdrawal by the French authorities of the notification of all the tax arrangements notified. This Decision concerns only the procedure for transferring specific port-handling equipment and facilities that was the subject of the Commission's decision of 8 April 2009. This Decision does not in any way concern the conditions for operating specific port-handling equipment and facilities before or after they have been transferred.

2. DESCRIPTION OF THE MEASURE INVESTIGATED

2.1. Background

(16) The measure at issue is part of the reform introduced by the port reform law ([10]). The purpose of the reform is to improve the performance and competitiveness of French sea ports (Dunkirk, Le Havre, Nantes Saint Nazaire, La Rochelle, Bordeaux and Marseilles).

([8]) OJ L 379, 28.12.2006, p. 5.

([9]) This provision amending Article 1518 A bis of the General Taxation Code on the introduction of local taxes came into force on 1 January 2011 and thus applies from the first year of exemption. The following subparagraph has been added to Article 1518 A bis: 'Granting of this reduction is subject to compliance with Commission Regulation (EC) No 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to de minimis aid.'

([10]) Law No 2008-660 of 4 July 2008 on port reform (see footnote 4).

(17) In this context, the law on port reform is aimed at:

— redefining the missions of the autonomous ports which, in mainland France, will become the 'major sea ports' ([11]);

— modernising governance of the major sea ports,

— organising coordination between ports with the same hinterland or on the same inland waterway axis,

— simplifying and rationalising port-handling in line with the main European ports, with the introduction of integrated terminal operators responsible for all handling operations,

(18) The missions of the major sea ports will be redirected to management activities (security, safety and port police) and to tasks relating to renovation of the port area. However, integrated terminal operators will be responsible for all handling operations in order to enhance the efficiency of these activities.

(19) The French authorities explained that the transfer to private operators of the port-handling activities still carried out by the major sea ports under a procedure for the sale of equipment in the major maritime ports formed part of this drive to simplify and streamline port-handling operations. They also said that the reform would bring the French system closer to the European model where the functions of the port authority and port operator were clearly distinguished and where the latter was in most cases a private company.

2.2. **The procedure for transferring equipment**

(20) The major sea ports will stop operating specific port-handling equipment and facilities ('handling equipment'), which they will transfer to private companies under a sales procedure set out in Article 9 of the law on port reform.

(21) Under this measure ([12]), the procedure for selling the handling equipment and transferring the property rights attached to it consists of several stages:

— Initially, the major sea port must negotiate the arrangements for transferring the handling equipment with the operators that regularly use the port services or have made significant investments in the terminal,

— If there are no operators or if the negotiations are not successfully concluded within 3 months, the major sea port must publish an invitation to tender following a transparent, non-discriminatory procedure,

— If the tendering procedure proves fruitless and if the port's strategic plan provides for this, the port can set up a subsidiary to which it can entrust the activity in question. A new tendering procedure must be organised at the end of a five-year period. Terminal contracts must be concluded with the successful candidates after the tendering procedure.

([11]) Following this reform, sea ports will be classified in two categories: major sea ports (the former autonomous ports) and the other 'decentralised' commercial ports under the responsibility of local authorities.

([12]) 'I. — The procedure for selling the equipment referred to in Article 7 and transferring the property rights attached to it is as follows: If one or more operators have already invested in the terminal or have, as regular users of the equipment, handled significant traffic at this terminal, the negotiations for the transfer will, at their request, be conducted with them. If there are no operators as defined in paragraph 1, or if the negotiations have not been successfully concluded within 3 months of the adoption of the strategic plan or decision referred to in Article 8, the major sea port must publish an invitation to tender. It must then negotiate freely with the applicants, who must be selected by means of a transparent, non-discriminatory procedure. Following these negotiations, the major sea port chooses the operator and concludes a terminal contract. The contract, equivalent to an authorisation to occupy public property, can contain traffic targets. If the tendering procedure referred to in paragraph 2 proves unfruitful, and if the strategic plan provides for this, the major sea port must entrust the operations to a subsidiary for a period not exceeding 5 years. Following this period, the port must publish a new invitation to tender. If a further invitation proves fruitless, the activity must continue to be performed by the subsidiary, provided that this is set out in the strategic plan. The process must be carried out as many times as is necessary within a period of not more than 5 years each time until the tendering procedure is successful.'

(22) Under Article 9 of the port reform law, a national independent committee, the National Committee for the Assessment of Port Equipment Transfers (CNECOP), is tasked with ensuring the smooth functioning and transparency of the equipment transfer procedure ([13]). Its role is to issue an opinion on the assessment of the equipment before it is transferred. In this context, it must take account of economic balance and the prospects for developing the business. For the purposes of this evaluation, the CNECOP can also call in an expert to estimate the value of the equipment.

(23) The CNECOP's opinions are based on the draft sales deeds which must be included in the file communicated by the chairmen of the boards of major sea ports pursuant to Article 9 of the port reform law. These drafts contain a description of the equipment to be sold, their price and the financing conditions.

(24) No final sales deed can be signed without a prior opinion by the CNECOP. This is a simple opinion (non-binding) published at national and local levels.

(25) The members of the CNECOP include one judge from the Court of Auditors, one representative of local authorities and one person with professional experience of ports. The duties of a CNECOP member are incompatible with those inherent in another position of responsibility in the management or supervision of major sea ports or handling companies purchasing public equipment, for the entire contract period and for a period of 5 years after its cessation.

3. GROUNDS FOR INITIATING THE FORMAL INVESTIGATION PROCEDURE

(26) In its decision of 8 April 2009, the Commission considered that it could not rule out that transferring port-handling equipment through a direct agreement procedure could be considered a form of state aid. The Commission noted, in this respect, that the CNECOP opinion was not binding. Given this, the Commission expressed doubts as to whether the equipment would be sold at the market price. It also questioned the independence of the CNECOP members.

(27) When checking this handling equipment transfer procedure for compatibility with the internal market, the Commission considered that none of the derogations set out in Article 107(2) and (3) TFEU seemed applicable in this case.

([13]) The functioning arrangements of CNECOP are laid down in Articles 6 and 7 of Decree No 2008-1032 of 9 October 2008 implementing the port reform law and applying various provisions on ports.

(28) Accordingly, the Commission decided to initiate the formal investigation procedure in order to allay its doubts both as to whether the handling equipment transfer procedure constituted state aid and as to its compatibility with the internal market.

4. COMMENTS FROM THE FRENCH AUTHORITIES

(29) As regards the nature of the opinion issued by the CNECOP, the French authorities pointed out that this committee consists of four independent members, including the chairman, appointed from among the judges in the Court of Auditors by its First President, and that it issues an opinion on cases of public equipment transfers submitted to it by the chairmen of the boards of the major sea ports. These cases comprise a description of the direct agreement procedure, a list of the properties transferred, the draft sales deed stating in particular the envisaged price and the conditions for operating the terminal.

(30) The French authorities also pointed out that the CNECOP is, in particular, tasked with ensuring, in line with Article L. 3211-18 of the General Code on Public Authority Property, that public equipment will not be transferred 'free of charge or at a lower price than the market price', thus complying with the requirement of transfer of public property at the market price.

(31) This committee issues a simple opinion which is published to prevent transfers at a price lower than the market price. The authorities undertake to ensure that the opinion is published on the website and in the official gazette of the Ministry of Ecology, Energy, Sustainable Development and Regional Development, and at local level, by means of notices posted in each major sea port. The French authorities stated that they would also send a letter to each chairman of the board of a major sea port (the director of which is responsible for protecting the interests of the port), reminding them of the CNECOP's rules of procedure and the rules for transferring public property, with which they must comply.

(32) The French authorities added that, pursuant to Article L. 313-6 of the Public Finance Courts Code, the chairmen of the boards can be fined up to double the amount of the gross annual salary they are receiving at the date of the infringement for any unjustified advantage which they may have attempted to procure or have procured for a third party, either financial or in kind, causing damage to the Treasury, the local authorities or the organisation in question.

(33) The French authorities also undertook to notify the Commission before the signature of the sales deed of any decision by the chairman of the board of a major sea port which departs from the CNECOP opinion.

(34) As regards the competence and independence of the CNECOP members, the French authorities submitted to the Commission the curriculum vitae of the four CNECOP members, including that of its chairman, specifying the qualifications of each one of its members in terms of the CNECOP's responsibilities. According to the French authorities, all of these members were proposed because of their knowledge of sales and privatisation processes and their experience in relation to ports, as witnessed by their curriculum vitae.

(35) The French authorities pointed out that the independence of Court of Auditor judges is enshrined in the Constitution of 4 October 1958 and confirmed by Constitutional Council Decision No 2001-448 DC of 25 July 2001, and that the independence of members of parliament with respect to the executive power is enshrined in Article 16 of the Declaration of Human and Citizen's Rights of 26 August 1789 which lays down the principle of separation of powers and is included in the preamble to the Constitution of 4 October 1958.

(36) The French authorities also pointed out that, in accordance with Article 6 of Decree No 2008-1032 of 9 October 2008 implementing Law No 2008-660 ([14]), rules on conflicts of interest providing an additional guarantee of the independence of the CNECOP members apply to its members throughout their mandate and for 5 years following the end of it:

— this applies to all mandates for members of the board of directors, management board or supervisory board of a port-handling company which has purchased public port equipment and to the performance of activities paid for by such a company; and

— it also applies to all mandates as members of the supervisory board or management board of a major sea port.

(37) Lastly, they stated that the CNECOP's capacity in terms of experts can be reinforced since Article 7 of Decree No 2008-1032 of 9 October 2008 states that an expert can be called in to estimate more precisely the value of equipment before it is transferred to handling companies.

([14]) French Official Gazette (JORF) No 0237, 10.10.2008.

(38) In the light of the above, the French authorities felt that the transfer procedures laid down by the port reform law provide sufficient guarantees to ensure that port-handling equipment and the property rights attached to it are sold at the market price and, hence, no state aid is involved.

5. COMMENTS BY THE INTERESTED PARTY AND COMMENTS BY THE FRENCH AUTHORITIES ON THE COMMENTS BY THE INTERESTED PARTY

(39) ESPO pointed out, in support of the views of the French authorities, that by restoring the so-called 'landlord model', the reform in question contributes to improving the competitiveness of French ports and the overall performance of European ports. Transfer by the major sea ports of port-handling activities to private operators will in effect modernise the governance of the major French sea ports by bringing them into line with the most widely-used model in the European Union and throughout the world.

(40) Given the complexity of this reform and its social and financial implications, ESPO stated that support by the Member State concerned is often the only way of making such an extensive reform acceptable to all the stakeholders.

(41) While not wishing to assess in detail whether or not the measures in question qualify as state aid, ESPO pointed out that the conditions for evaluating the equipment are sufficient to guarantee that they are sold at the market price.

(42) The French authorities took note of the comments by ESPO.

6. ASSESSMENT OF THE MEASURE

(43) Following the initiation of the formal investigation procedure under Article 108(2) TFEU and bearing in mind the arguments put forward in that context by the French authorities and the interested party, the Commission takes the view that the tax scheme in question does not constitute state aid within the meaning of Article 107(1) TFEU.

(44) 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'.

(45) Classifying a national measure as state aid presupposes that the following cumulative conditions are met: the measure in question confers an advantage through state resources; (2) the advantage is selective; and (3) the measure distorts or threatens to distort competition and is capable of affecting trade between Member States ([15]).

(46) First it must be pointed out that, in order to rule out any advantage, the public property in question – the port-handling equipment – must be sold at the market rate.

(47) In this respect, the Commission points out that the port-handling equipment is not being sold by means of an open, transparent, non-discriminatory and unconditional procedure since only if the direct negotiations with the current operators are not successful, or if there is no current operator, will such a procedure be launched (see recital 21 above).

(48) However, the Commission notes that, in the event of sale by direct agreement, the proposed procedure involves the establishment of a National Committee for the Evaluation of Port Equipment Transfers, the CNECOP. The Commission notes that, prior to the sale, the CNECOP must issue a public opinion on the value of the property to be sold.

(49) In the framework of its decision of 8 April 2009 to initiate the formal investigation procedure, the Commission pointed out that, since that the opinion expressed by the CNECOP was not binding, it was still possible that the property could be sold at a lower price than the market rate.

(50) Acknowledging the doubts expressed by the Commission, the French authorities informed it, in letters dated 20 January 2010 and 24 March 2010, that the Director of the Transport Department had sent letters to all chairmen of the boards of the major sea ports on 16 March 2009 and 18 January 2010 explaining the framework for negotiating the sale of the port-handling equipment and specifying the conditions to be respected for the purpose of this sale.

(51) In these letters, the chairmen of the boards of the major sea ports were informed that the CNECOP would systematically ask the major sea ports to have the value of the property to be sold assessed. Thus, before referral of the matter to the CNECOP, an independent technical valuation of the market value of the port equipment should be carried out by an independent firm and should be included in the file sent to the CNECOP.

(52) The chairmen of the major sea ports were also informed that while the law did not regard CNECOP opinions as conferring approval, they could not be overruled, therefore no sales deed departing from an opinion issued by the CNECOP could be signed. Thus in the event of a negative opinion by the CNECOP, either the negotiations should be resumed, if the date for referral to the CNECOP permitted this, and a new file should where appropriate be presented, or the failure of the negotiations should be acknowledged and a tendering procedure should be launched.

(53) Moreover, the government commissioners for the major sea ports must automatically oppose all deliberations by the port supervisory board that disregard an opinion by the CNECOP, and chairmen of the boards of major sea ports are reminded of the sanctions in the event that they grant an unjustified advantage to third parties in the performance of their duties.

(54) The Commission considers that these instructions addressed to the chairmen of the boards of the major sea ports concerning the need to have an independent evaluation of the port-handling equipment to be sold and concerning the binding nature of CNECOP opinions are sufficient to guarantee that the equipment in question will not be sold at a lower price than the market price.

(55) The Commission notes, moreover, that this is further reinforced by the fact that the CNECOP opinion must be published nationally by the national authorities and locally by the ports. Where appropriate, these publications are sufficient to enable the conditions of sale of the handling equipment in question to be disputed.

(56) As regards the independence and qualifications of the CNECOP members for the purpose of evaluating the equipment sold, the French authorities have sent the Commission the curriculum vitae of its four members, including the chairman.

(57) It is worthwhile pointing out that one of the CNECOP members, a member of the Court of Auditors, has been proposed by the First President of the Court of Auditors as chair of the CNECOP, and that he has direct professional experience of maritime affairs. The French authorities point out that the independence of the judges in the Court of Auditors with respect to the legislative and executive powers is enshrined in the Constitution of 4 October 1958 and confirmed by Constitutional Council Decision No 2001-448 DC of 25 July 2001.

([15]) See, for example, the judgment of the Court of Justice in Case C-222/04, Ministero dell'Economia e delle Finanze v Cassa di Risparmio di Firenze (ECR I-289, paragraph 129).

(58) The CNECOP member who represents regional authorities has expertise directly relating to maritime ports. The French authorities state that the independence of members of parliament with respect to the executive power is guaranteed by Article 16 of the Declaration of Human and Citizen Rights of 26 August 1789, which contains the principle of separation of powers, and features in the preamble to the Constitution of 4 October 1958.

(59) As for the two members proposed as people with professional experience, it can be clearly seen from their curriculum vitae that one has experience of ports and that the other is experienced in the transfer of public property.

(60) The French authorities also point out that, in accordance with Article 6 of Decree No 2008-1032 of 9 October 2008 ([16]), rules on conflicts of interest are binding on CNECOP members throughout their mandates and for 5 years after they end (see recital 36).

(61) The Commission considers that these rules on conflicts of interest constitute, in the case in question, an additional guarantee of the independence of the CNECOP members.

(62) Given these elements and the specific circumstances in this case, the Commission feels that the obligation to have the market value of the equipment estimated by an independent firm, on the basis of which the experienced, independent CNECOP members would issue a binding opinion, in principle guarantees that transfers will be made in accordance with market conditions.

(63) Provided the conditions and circumstances referred to in Section 6, *Assessment of the measure*, are complied with, it follows from the above that there are no grounds for considering that the sale of port-handling equipment in the context of a direct agreement is likely to confer an economic advantage on the purchasers of that equipment. This would not be the case as regards individual transactions that did not strictly comply with the said conditions.

7. **CONCLUSION**

(64) In the light of all these comments, the Commission

— takes note of the withdrawal of the notification concerning the two support measures notified in relation to the tax dimension of the port reform and referred to in recital 2 of this Decision,

— considers that the procedure for transferring port-handling equipment and specific facilities, described in paragraph 16 et seq. of this Decision, which was also the subject of the Commission decision of 8 April 2009 and is set out in recitals 16-25 of this Decision, does not constitute state aid within the meaning of Article 107(1) TFEU.

HAS ADOPTED THIS DECISION:

Article 1

The measure entailing the transfer of port-handling equipment to private operators which France is planning to implement as part of the port reform provided for by Law No 2008-660 of 4 July 2008 does not constitute state aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union.

Implementation of the measure is accordingly authorised.

Article 2

This Decision is addressed to the French Republic.

Done at Brussels, 29 June 2011.

For the Commission
Joaquín ALMUNIA
Vice-President

([16]) Decree No 2008-1032 of 9 October 2008 implementing Law No 2008-660 of 4 July 2008 implementing the port reform law and applying various provisions on ports.