Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber, Extended Composition)

20 September 2019 *

(State aid – Corporate tax exemption scheme implemented by Belgium in favour of its ports – Decision declaring the aid scheme incompatible with the internal market – Concept of economic activity – Services of general economic interest – Non-economic activities – Separable nature – Selective nature – Request for a transitional period)

In Case T-696/17,

**Havenbedrijf Antwerpen NV**, established in Antwerp (Belgium),

**Maatschappij van de Brugse Zeehaven NV**, established in Zeebrugge (Belgium),

represented by P. Wytinck, W. Panis and I. Letten, lawyers,

applicants,

supported by

**Kingdom of Belgium**, represented by. J.-C. Halleux, P. Cottin, L. Van den Broeck and C. Pochet, acting as Agents, assisted by A. Lepièce and H. Baeyens, lawyers,

intervener,

v

**European Commission**, represented by B. Stromsky and S. Noë, acting as Agents,

defendant,

APPLICATION based on Article 263 TFEU seeking annulment of 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 (OJ 2017 L 332, p. 1),

THE GENERAL COURT (Sixth Chamber, Extended Composition),

composed of G. Berardis (Rapporteur), President, I. Labucka, D. Spielmann, Z. Csehi and O. Spineanu-Matei, Judges,

Registrar: L. Ramette, Administrator,

* Language of the case: Dutch.

having regard to the written part of the procedure and further to the hearing on 4 February 2019,

gives the following

## Judgment

### Background to the dispute

#### *Legal framework*

1 In Belgium, the rules on the taxation of income are codified by the 1992 Code des impôts sur les revenus (Income Tax Code).

2 Article 1 of the Income Tax Code, as amended and updated on 27 July 2017 ('the CIR') provides:

'§ 1. The following shall be assessed as income tax:

(1) tax on the total income of residents of the Kingdom, referred to as tax on natural persons;

(2) tax on the total income of resident companies, referred to as corporate tax;

(3) tax on the income of Belgian legal persons other than companies, referred to as tax on legal persons;

(4) tax on the income of non-residents, referred to as tax on non-residents.

§ 2. These taxes shall be levied by way of a withholding tax within the limits and subject to the conditions laid down in Title VI, First Chapter.'

3 The relevant passages of Article 2 of the CIR provide:

'§ 1. For the application of the present Code, the specific legal provisions on income tax and decisions taken in implementation thereof, the following terms shall have the meaning set out in this article.

…

(5) Companies

(a) "company" means 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.

Bodies governed by Belgian law which have legal personality and which, for the application of income tax, are deemed to lack legal personality, shall not be regarded as companies;

(b) "resident company" means any company which has its registered office, its principal place of business or its centre of management or administration in Belgium and which is not excluded from the scope of corporate tax.

…'

4 Article 179 of the CIR provides:

'Resident companies and the pension funding bodies referred to in Article 8 of the Law of 27 October 2006 on the supervision of institutions for occupational retirement provision shall be liable to corporate tax.'

5 Article 180 of the CIR provides:

'The following shall not be liable to corporate tax:

(1) intermunicipal associations, cooperation structures, project associations, autonomous municipal authorities and associations referred to in subparagraph 2 which, in the context of their corporate purpose, principally:

– operate a hospital as defined in Article 2 of the loi coordonnée du 10 juillet 2008 sur les hôpitaux et autres établissements de soins (Coordinated Law of 10 July 2008 on hospitals and other healthcare establishments); or

– operate an institution which assists victims of war, the disabled, the elderly, protected minors or indigents;

(2) the public limited company "Waterwegen en Zeekanaal", the public limited company "De Scheepvaart", the limited liability cooperative company Port autonome du Centre et de l'Ouest, the Maatschappij van de Brugse Zeehaven, the Port de Bruxelles, the autonomous municipal port authority of Ostend, the public limited companies Havenbedrijf Antwerpen and Havenbedrijf Gent and the autonomous ports of Liège, Charleroi and Namur;

(3) the Office national du Ducroire;

(4) the Compagnie belge pour le financement de l'industrie;

(5) [*repealed*];

(5a) the holding funds Fonds de participation, Participatiefonds – Vlaanderen, Fonds de participation – Wallonie and Fonds de participation – Bruxelles;

(6) the Société régionale wallonne de transport public de personnes and the operating companies which are related to it;

(7) the Vlaamse Vervoermaatschappij and the stand-alone divisions within it;

(8) the Société des transports intercommunaux de Bruxelles;

(9) water treatment companies governed by the Law of 26 March 1971;

(10) [*repealed*]

(11) the public company with a social purpose Coopération technique belge;

(12) the public limited liability company Infrabel;

(13) the public company with a social purpose Apetra.'

6 Under Article 181 of the CIR:

'The following shall also not be liable to corporate tax: not-for-profit associations and other legal persons who do not seek to make a profit and:

(1) whose activity is exclusively or principally the study, the protection and the development of the professional and inter-professional interests of their members;

(2) who are an extension or a product of the legal persons referred to in paragraph 1, where their exclusive or principal objective is either to fulfil, in the name of and on behalf of their affiliates, all or part of the obligations imposed on those affiliates because they employ staff or in accordance with tax or social legislation, or to aid their affiliates in fulfilling those obligations or formalities;

(3) who, in accordance with social legislation, are responsible for collecting, centralising, reinvesting or distributing funds intended to grant advantages provided for by that legislation;

(4) whose exclusive or principal objective is to provide or support education;

(5) whose exclusive or principal objective is to organise fairs or exhibitions;

(6) who are accredited as a service providing support to families and elderly persons by the competent bodies of the communities;

(7) who are approved for the application of the first subparagraph of Article 145(1)(b), (d), (e), (h) to (l), (2) and (3), or who would be, either if they had applied, or if they met all the conditions to which approval is subject, other than that of having, as the case may be, a national activity or an area of influence which extends to one of the communities or regions or the whole country;

(8) who are formed in accordance with the loi du 27 juin 1921 sur les associations sans but lucratif, les associations internationales sans but lucratif et les fondations (Law of 27 June 1921 on not-for-profit associations, international not-for-profit associations and foundations) in so far as they exclusively carry out certification activities within the meaning of the loi du 15 juillet 1998 relative à la certification des titres émis par des sociétés commerciales (Law of 15 July 1998 on the certification of securities issued by commercial companies) and the certificates they issue are treated as the securities to which they relate for the application of the 1992 Income Tax Code, under the first subparagraph of Article 13(1) of that law.'

7 Under Article 182 of the CIR:

'With respect to not-for-profit associations and other legal persons who do not seek to make a profit, the following shall not be regarded as transactions of a profit-making nature:

(1) one-off or exceptional transactions;

(2) transactions which consist in the investment of funds collected in the performance of their statutory tasks;

(3) transactions which constitute an activity that contains industrial, commercial or agricultural operations only on an ancillary basis or does not use industrial or commercial methods.'

8 As regards the basis of assessment for corporate tax specifically, Article 185(1) of the CIR stipulates that companies are to be taxed on the total amount of their profits, including distributed dividends.

9 Article 220 of the CIR provides:

'The following shall be liable to tax on legal persons:

(1) the State, the Communities, the Regions, the provinces, the metropolitan districts, the federations of municipalities, the municipalities, public intermunicipal social action centres, … public cultural establishments, emergency areas, police districts and the polders and water boards;

(2) legal persons who, under Article 180, are not liable to corporate tax;

(3) legal persons who have their registered office, their principal place of business or their centre of management or administration in Belgium and who are not engaged in a business or transactions of a profit-making nature or who are not liable to corporate tax under Articles 181 and 182.'

10 Under Article 221 of the CIR:

'Legal persons liable to tax on legal persons shall be taxable only with regard to:

(1) the cadastral income from their immovable property located in Belgium, where that cadastral income is not exempt from property tax under Article 253 or specific legal provisions;

(2) the income and proceeds from capital and moveable assets …'

### *The administrative procedure and the contested decision*

11 On 3 July 2013, the European Commission's services sent a questionnaire to all Member States regarding the functioning and taxation of their ports in order to gain an overview of the situation and to clarify the position of ports with regard to EU State aid rules. The Commission's services subsequently exchanged a number of letters relating to that matter with the Belgian authorities.

12 By letter of 9 July 2014, pursuant to Article 17 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), the Commission informed the Belgian authorities of its preliminary assessment, according to which the corporate tax exemption provided for certain Belgian ports constituted State aid that was incompatible with the internal market and that aid constituted existing aid within the meaning of Article 1(b) of that regulation. A meeting took place with the Belgian authorities on 23 September 2014. The Région wallonne (Walloon Region) and the Port de Bruxelles (Port of Brussels) (Belgium) each presented their observations by letters dated 30 September 2014, whereas the Vlaams gewest (Flemish Region) communicated its comments by letter of 1 October 2014.

13 By letter dated 1 June 2015, the Commission informed the Kingdom of Belgium that it had taken note of all the arguments put forward by the latter and that it still considered that the corporate tax exemption for a series of ports constituted aid that was incompatible with the internal market, if and to the extent that those ports engaged in economic activities. An action was brought against that letter and was dismissed as inadmissible by order of 9 March 2016, *Port autonome du Centre et de l'Ouest and Others* v *Commission* (T-438/15, EU:T:2016:142).

14 By letter dated 21 January 2016, the Commission confirmed its position and proposed to the Belgian authorities, in accordance with Article 108(1) TFEU and Article 22 of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), as appropriate measures, the abolition of the corporate tax exemption laid down for the Belgian ports, in so far as they were engaged in economic activities.

15 The Belgian authorities were requested to adapt the legislation within a period of 10 months, with the amendment applying no later than to the income deriving from economic activities from the start of the 2017 tax year. The Belgian authorities were requested to inform the Commission that, in accordance with Article 23(1) of Regulation 2015/1589, they accepted, unconditionally and unequivocally, those appropriate measures in their entirety, within two months of the date of receipt of the proposal for those measures. An action was brought against that letter and was dismissed as inadmissible by order of 27 October 2016, *Port autonome du Centre et de l'Ouest and Others* v *Commission* (T-116/16, not published, EU:T:2016:656).

16 By letter of 21 March 2016, the Belgian authorities sent observations on the proposed appropriate measures to the Commission. Following those observations, by letter of 8 July 2016, the Commission decided to initiate the procedure provided for in Article 108(2) TFEU, pursuant to Article 23(2) of Regulation 2015/1589 (OJ 2016 C 302, p. 5).

17 The Commission invited interested parties to submit their comments on the measure at issue. A meeting was organised on 24 August 2016 with representatives of certain Belgian ports concerned by the measure. The Kingdom of Belgium submitted its observations by letters dated 9 September 2016 in respect of the Federal Ministry of Finance and 16 September 2016 in respect of the Région wallonne (Walloon Region) and Walloon ports. The Commission received comments from the following interested parties: Sea Invest, user of the ports of Antwerp (Belgium), Ghent (Belgium) and Zeebrugge (Belgium); the Port of Rotterdam (Netherlands), acting on behalf of five Dutch public seaports; the Port of Brussels; the Vlaamse Havencommissie (Flemish Port Commission, Belgium) and the ports of Antwerp and Zeebrugge.

18 The European Commission forwarded those comments to the Kingdom of Belgium and gave it the opportunity to respond, which it did so 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.

19 After having examined the comments submitted by the Kingdom of Belgium and the interested parties, on 27 July 2017, the Commission adopted Decision (EU) 2017/2115 on aid scheme SA.38393 (2016/C, ex 2015/E) implemented by Belgium – Taxation of ports in Belgium (OJ 2017 L 332, p. 1, 'the contested decision').

20 In accordance with the contested decision, first, the Commission found that the activities carried out by the Belgian ports referred to in Article 180(2) of the CIR were – at least in part – economic activities, and therefore the ports had to be classified as undertakings in so far as they were engaged in such activities (recitals 40 to 67 of the contested decision). Secondly, the Commission submitted that, as they were liable to tax on legal persons rather than corporate tax under Article 180(2) of the CIR, the ports benefited from an advantage for the purposes of Article 107(1) TFEU which corresponded to the difference between the corporate tax that they should have paid for their economic activities and the proportion of the tax on legal persons which could be attributed to those economic activities (recitals 68 to 73 of the contested decision). Thirdly, the Commission considered that the measure at issue constituted a transfer of State resources within the meaning of Article 107(1) TFEU (recitals 74 to 77 of the contested decision). Fourthly, it took the view that the measure was selective (recitals 78 to 107 of the contested decision). Fifthly, it considered that, by strengthening the position of beneficiaries in international trade, the measure at issue was likely to affect intra-EU trade and distort competition (recitals 108 to 115 of the contested decision). It concluded that the tax exemption for the Belgian ports provided for in Article 180(2) of the CIR constituted State aid for the purposes of Article 107(1) TFEU, in so far as the exempted revenue was generated by the economic activities of the ports (recital 116 of the contested decision). Finally, it found that the aid measure at issue could not be declared compatible with the internal market, whether on the basis of Article 93 or Article 106(2) TFEU (recitals 117 to 120 of the contested decision) and it refused to grant a transitional period for the implementation of that decision (recitals 124 to 130 of the contested decision).

21 Article 1 of the contested decision provides:

'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.'

22 Under Article 2 of the contested decision:

'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.'

## Procedure and forms of order sought

23 By application lodged at the Registry of the General Court on 9 October 2017, the applicants, Havenbedrijf Antwerpen NV (Port of Antwerp) and Maatschappij van de Brugse Zeehaven NV (Port of Zeebrugge) (Belgium), which are both mentioned in Article 180(2) of the CIR, brought the present action.

24 By separate documents lodged at the Court Registry on 19 and 23 January 2018, the Kingdom of Belgium and the Vlaams gewest (Flemish Region) applied for leave to intervene in the present proceedings in support of the form of order sought by the applicants.

25 By decision of 15 March 2018, the President of the Sixth Chamber of the General Court granted the Kingdom of Belgium leave to intervene. The Kingdom of Belgium lodged its statement in intervention on 22 May 2018 and the parties lodged their observations on that statement within the prescribed periods.

26 By order of 25 October 2018, *Havenbedrijf Antwerpen and Maatschappij van de Brugse Zeehaven* v *Commission* (T-696/17, not published, EU:T:2018:736), the President of the Sixth Chamber of the General Court rejected the application to intervene submitted by the Vlaams gewest (Flemish Region).

27 By decision of 7 November 2018, the General Court decided to refer the case to the Sixth Chamber, Extended Composition, in accordance with Article 28 of its Rules of Procedure.

28 Acting on a proposal from the Judge-Rapporteur, the General Court (Sixth Chamber, Extended Composition) decided to open the oral part of the procedure and, by way of measures of organisation of procedure as provided for in Article 89 of the Rules of Procedure, put a number of written questions to the parties, to which they replied within the period prescribed.

29 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 4 February 2019.

30 As a member of the Sixth Chamber was prevented from sitting, in accordance with Article 17(2) of the Rules of Procedure, the President of the General Court designated another judge to complete the Chamber.

31 The applicants, supported by the Kingdom of Belgium, claim that the Court should:

– declare the action admissible;

– annul the contested decision;

– in the alternative, determine a transitional period until such time that the Commission has completed its investigation into the tax regime of the ports in the various EU Member States, amounting, in any event, to one full year;

– order the Commission to pay the costs.

32 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs and order the Kingdom of Belgium to bear the costs resulting from its intervention.

**Law**

33 In support of their action, the applicants raise four pleas in law. First, the Commission is alleged to have infringed Articles 107 and 296 TFEU by classifying the port authorities as undertakings. Secondly, the Commission is alleged to have infringed Article 107 TFEU by regarding the exemption from corporate tax as a selective measure. Thirdly, in the alternative, the Commission is alleged to have infringed Article 107 TFEU by taking the view that the derogation from the reference system was not justified by the nature and general scheme of the Belgian tax system in respect of income tax. Fourthly, in the further alternative, the applicants request that the Court grants them a transitional period until such time that the Commission has completed its investigation into the tax regime of the various ports in the European Union and amounting, in any event, to a period of one year.

***The first plea in law, alleging infringement of Articles 107 and 296 TFEU as a result of the port authorities being classified as undertakings***

34 The first plea in law, in so far as it alleges an infringement of Article 107 TFEU, is divided into two parts. In the context of the first part, the applicants submit that no market exists on which they offer their services. By the second part, they claim that their activities are not economic in nature.

35 The Court considers that it is appropriate first to examine the second part and then the first.

36 As a preliminary point, however, it is necessary to reject from the outset the first plea in so far as it alleges an infringement of Article 296 TFEU on account of a failure to state reasons in the contested decision in respect of the ports being classified as 'undertakings' within the meaning of Article 107 TFEU.

37 It should be noted in that regard that, in accordance with the case-law, a plea based on infringement of Article 296 TFEU is a separate plea from one alleging that the contested decision is unfounded. While the former, which alleges absence of reasons or inadequacy of the reasons stated, goes to an issue of infringement of an essential procedural requirement within the meaning of Article 263 TFEU, and, involving a matter of public policy, must be raised by the EU judicature of its own motion, the latter, which goes to the substantive legality of a decision, is concerned with the infringement of a rule of law relating to the application of the Treaty, again within the meaning of Article 263 TFEU, and can be examined by the EU judicature only if it is raised by the applicant. The obligation to state reasons is thus a separate question from that of the merits of those reasons (see, to that effect, judgments of 2 April 1998, *Commission* v *Sytraval and Brink's France*, C-367/95 P, EU:C:1998:154, paragraph 67, and of 15 June 2005, *Corsica Ferries France* v *Commission*, T-349/03, EU:T:2005:221, paragraph 52).

38 In the present case, not only did the applicants not substantiate in any way the complaint of an alleged infringement of Article 296 TFEU in the application, the fact remains that the contested decision is sufficiently reasoned since the Commission dedicated no less than 28 recitals of the contested decision to the classification of ports as 'undertakings' engaged in economic activities (see recitals 40 to 67 of the contested decision). Moreover, it is clear from the examination of the various complaints raised by the applicants below that the contested decision has enabled them to ascertain the reasons for the measure taken in that regard and the General Court to exercise its power of review.

39 Accordingly, the first plea in law, in so far as it alleges an infringement of Article 296 TFEU, must be rejected.

***The second part, alleging that the activities of the Belgian ports are of a non-economic nature***

40 In the context of the second part, the applicants recall, in the first place, relying on the Decreet houdende het beleid en het beheer van de zeehavens (Decree on seaport policy and management) of 2 March 1999 (*Belgisch Staatsblad* of 8 April 1999), that their essential functions consist primarily of non-economic tasks of general interest, such as the administrative management of the public and private port area, environmental inspection services or harbourmaster's services. In the context of those tasks, the port authorities exercise exclusive public powers which cannot be transferred precisely because of the public nature of the port management and its unity. Moreover, the Member States have a wide discretion in order to determine how 'economic services' and 'non-economic services' of general interest should be understood.

41 In the second place, the applicants note that a distinction must be made between the core tasks that are imposed on them by decree and the commercial port services offered by third parties. According to the applicants, the port authorities do not invest in the equipment required for the commercial operation of the port, unlike airport operators for example. They state that the port authorities' only task is to make the port infrastructure available, in a non-discriminatory manner, to users such as cargo handling companies or logistics companies which carry on economic activities and will subsequently be able to build their business on that basic infrastructure. The applicants emphasise, in that regard, the distinction between the management and the operation of the port area as a basic infrastructure, which is non-economic in nature, and the management and operation of the superstructure. They state that a distinction of that kind is confirmed by Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (OJ 2017 L 57, p. 1) and by the Commission's previous decision-making practice. They state that it is also clear from the case-law of the Court of Justice that the provision of an infrastructure in public ownership in a non-discriminatory manner does not constitute an economic activity, particularly where the provision and commercial operation of that infrastructure are not by the same entity, as in the present case.

42 In the third place, the applicants draw attention to the absence of any economic activity on account of the pricing practices of the port authorities. According to the applicants, the existence of remuneration does not always mean, a priori, that an economic activity exists. On the one hand, the port authorities collect port charges, which are designed to pay for the right to access the port area, to pass through it, to be moored there or to reside there and the guarantee of a secure and effective development of the port area. Those port charges are regarded as 'payments', thus remuneration for a service performed by the authority for the benefit of entities liable to tax.

Those charges are fixed not on the basis of market mechanisms, according to supply and demand, but unilaterally. They are not the result of commercial negotiations and they take account of legal requirements and administrative control. Moreover, the applicants' autonomy to set the rates for port charges is limited in view of the principles of equality, transparency and proportionality and the administrative control to which they are subject. On the other hand, the port authorities collect concession fees for the licensing, to third parties, of State-owned assets, following a non-discriminatory and transparent procedure. The land to be leased as a concession is not automatically allocated to the highest bidder, but is offered on the basis of predetermined criteria related to the added value of the project and societal well-being. Therefore, the rates are not a commercial policy instrument, as the Commission claims, but an instrument which is designed to accomplish the port authorities' public service tasks in order to safeguard the general interest.

43 In the fourth place, the applicants submit that the economic activities of the ports are ancillary in nature and therefore all of the ports' activities should be deemed not to be economic or of general interest. They note in that regard that the ports are not responsible for the commercial operation of the port infrastructure, but rather they make available waterways and basins and lease land as a concession in return for port charges and concession fees. Therefore, their activities which are of secondary importance should follow the classification of their main activities.

44 Consequently, according to the applicants, the conclusion drawn by the Commission in the contested decision, that the port authorities are undertakings for the purposes of applying State aid rules, is incorrect.

45 The Commission disputes those arguments.

46 First of all, it should be noted, as the Commission did in recital 40 of the contested decision, that, according to the case-law, the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed. In that regard, any activity consisting in offering goods and services on a given market is an economic activity (judgment of 12 September 2000, *Pavlov and Others*, C-180/98 to C-184/98, EU:C:2000:428, paragraphs 74 and 75; see, also, to that effect, judgments of 16 June 1987, *Commission* v *Italy*, 118/85, EU:C:1987:283, paragraph 7, and of 23 April 1991, *Höfner and Elser*, C-41/90, EU:C:1991:161, paragraph 21).

47 Moreover, it has been acknowledged in the case-law that the commercial operation and the construction of port or airport infrastructures with a view to that commercial operation constituted economic activities (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 78; of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraphs 40 to 43; and of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 78).

48 In the present case, in recital 44 of the contested decision, the Commission lists a number of economic activities that may be carried out by the ports. First, the ports provide a general service to their users (mainly ship owners, and more generally any operator of a vessel) by providing ships with access to the port infrastructure in exchange for remuneration generally known as 'port charges'. Secondly, certain ports provide particular services to ships, such as piloting, lifting, handling or mooring, also in exchange for remuneration. Thirdly, the ports, for remuneration, make certain infrastructures or certain land available to undertakings which use those areas for their own needs or to supply some of the abovementioned specific services to ships. In addition,

the Commission stated in recital 45 of the contested decision that the fact that third-party undertakings used certain port land and infrastructure to provide services to ship owners or ships did not prevent the management activities carried out by the port authorities, consisting in particular in renting the land and infrastructure to those third-party undertakings, also being of an economic nature.

49 When questioned in that regard at the hearing, the applicants confirmed, first, that they collected fees, classified as 'port charges', which were paid – at least in part – in return for granting ships the right to access the port infrastructure. Secondly, while they contest that they themselves perform the lifting, loading or unloading of goods using cranes in particular, or even maintenance activities, they admit nevertheless that they do carry out some transshipment and towing activities behind the locks. Thirdly, they do not dispute that they make land available to third-party undertakings in return for concession fees.

50 Consequently, the Commission did not commit an error of assessment when it considered, in recital 67 of the contested decision, that the activities carried out by the ports were – at least in part – economic activities.

51 None of the arguments raised by the applicants or the Kingdom of Belgium are capable of calling that conclusion into question.

52 In the first place, the applicants submit that their activities are not economic activities since they have the powers of a public authority and they are entrusted with tasks of general interest.

53 In that regard it should be observed, as the Commission did in recital 47 of the contested decision, that, in the present case, it is not disputed that the ports might be delegated to perform certain public authority tasks, which are non-economic in nature, such as maritime traffic control and safety or anti-pollution surveillance.

54 However, the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterised as an undertaking. In order to determine whether the activities in question are those of an undertaking within the meaning of the Treaty, it is necessary to establish the nature of those activities (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraphs 74 and 75, and of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 37).

55 The fact that the applicants may be entrusted with performing a service in the general public interest is not sufficient, therefore, for them not to be classified as 'undertakings', if and to the extent that they are also engaged in economic activities consisting in offering goods and services on the market in return for remuneration, such as those identified by the Commission in recital 44 of the contested decision (see paragraph 48 above).

56 Furthermore, it should be recalled, as the Commission did in recital 48 of the contested decision, that, although the national authorities have a wide discretion in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users, this does not preclude those activities being of an economic nature. According to settled case-law (see paragraphs 46 and 54 above), the concept of 'economic activity' derives from matters of fact, in particular the existence of a market for the services concerned and does not depend on national

choices or assessments. Thus, the State itself or a State entity may act as an undertaking (see judgment of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 35 and the case-law cited).

57 In that regard, it is to no avail that the Kingdom of Belgium relies on Regulation 2017/352 in order to establish that the ports are not engaged in economic activities. Although that regulation does stipulate that the Member States may decide to impose public service obligations related to port services on providers of port services and may entrust the right to impose such obligations to the managing body of the port, or to the competent authority, in order to ensure certain public service objectives, in the present case there is no link between the aid measure at issue – namely the exemption from corporate tax from which the ports benefit – and any public service task. Moreover, the contested decision in no way prevents the applicants from concluding public service delegation agreements with the Vlaams gewest (Flemish Region).

58 Furthermore, in so far as the Kingdom of Belgium invokes Commission communication C(2004) 43 – Community guidelines on State aid to maritime transport (OJ 2004 C 13, p. 3) in order to establish that the activities carried out by ports are not economic in nature, it should be noted that point 2.1 of those guidelines states that 'investments in infrastructure are not normally considered to involve State aid within the meaning of Article [107](1) [TFEU] if the State provides free and equal access to the infrastructure for the benefit of all operators concerned'. Like the Commission Notice on the notion of State aid as referred to in Article 107(1) of the FEU Treaty (OJ 2016 C 262, p. 1), that point therefore refers solely to aid for investments in infrastructure and not to aid in the form of exemption from corporate tax, the amount of which is directly dependent upon the profits made, as in the present case.

59 The Kingdom of Belgium also relies on paragraph 59 of the judgment of 22 May 2003, *Korhonen and Others* (C-18/01, EU:C:2003:300), which stated that the management of land and buildings in public ownership met a need in the general interest which was not economic in nature. Nevertheless, it must be noted, as the Commission did in recital 60 of the contested decision, that that judgment does not concern the concept of an undertaking in State aid law, but the question of whether a limited company which is established, owned and managed by a regional or local authority, meets a need in the general interest, within the meaning of the second subparagraph of Article 1(b) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1).

60 Therefore, the complaint alleging that there is no economic activity on account of the ports being vested with public powers must be rejected.

61 In the second place, the applicants consider that a distinction must be made between the ports' activities of managing of the port infrastructure and the port users' commercial activities.

62 In that regard, it should be noted, first of all, that the Commission identified with sufficient clarity the economic activities carried out by the ports in recital 44 of the contested decision (see paragraph 48 above). As the Commission found in that recital, the ports provide, inter alia, ships with access to the port infrastructure in exchange for remuneration and make land available in return for remuneration. Therefore, the applicants' argument that the ports facilitate only the supply of services by third-party port users has no factual basis.

63 It should be noted, in addition, that the Commission did not take the view that, in all cases, the ports themselves performed certain services such as lifting, handling, mooring, transshipment or piloting, for the benefit of ships using their infrastructure. It has thus acknowledged that, in some cases, those services may have been provided by other undertakings. In recital 45 of the contested decision, the Commission considered nevertheless that the fact that third-party undertakings used certain port land and infrastructure to provide services to ship owners or ships did not prevent the management activities carried out by the ports as port authorities, consisting in particular in renting the land and infrastructure to those third-party undertakings, also being of an economic nature.

64 With regard to the applicants' specific situation, the Commission also acknowledged, at the hearing, that some of the specific services mentioned in recital 44 of the contested decision may not be offered by the applicants, however that is not sufficient to call the remainder of its analysis into question (see paragraphs 48 and 49 above).

65 In that regard, it should be recalled that, in the case of a decision regarding an aid scheme, such as in the present case, the Commission may merely study in a general and abstract manner the characteristics of the scheme at issue in order to assess, in the grounds for its decision, whether, by reason of the arrangements provided for under the programme, that programme constitutes, in principle, State aid for its beneficiaries. Thus, the Commission is not required to carry out an analysis of the aid granted in individual cases under that scheme (see, to that effect, judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 63, and of 26 November 2015, *Navarra de Servicios y Tecnologías* v *Commission*, T-487/13, not published, EU:T:2015:899, paragraph 66).

66 Therefore, when it examines the general characteristics of an aid scheme, like in the present case, the Commission may also identify, in a general and abstract manner, the economic activities that may be carried out by the ports, even if all of those activities, in all cases, are not actually carried out by each port. Should a port not carry out any of the economic activities identified by the Commission in the contested decision, it cannot, however, be classified as an undertaking, to which the rules of the FEU Treaty relating to State aid apply. However, that is not the case here since the applicants carry out the majority of the economic activities identified by the Commission in recital 44 of the contested decision (see paragraphs 48 and 49 above).

67 The applicants further invoke, in support of their arguments, recital 43 of Regulation 2017/352, which provides that, 'in order to ensure a level playing field and transparency in the allocation and use of public funds and to avoid market distortions, it is necessary to impose on the managing body of the port in receipt of public funds, when it is also acting as a service provider, an obligation to keep accounts for publicly funded activities carried out in its capacity as managing body of the port separate from accounts for activities carried out on a competitive basis'. The applicants infer from this that only the provision of port services may be subject to the rules on State aid, in contrast to port management activities. However, as the Commission submits, the fact that the port services provided by third parties are economic activities does not prevent the ports themselves from also being able to carry out economic activities. Moreover, the final sentence of that recital provides that, 'in any event, compliance with State aid rules should be ensured'.

68 To the extent that the applicants also invoke the Commission's previous decision-making practice, it should be noted that, according to settled case-law, the Commission's decision-making practice with regard to other cases cannot affect the validity of the decision that

is contested, which can be assessed only in the light of the objective rules of the Treaty (judgments of 16 July 2014, *Germany* v *Commission*, T-295/12, not published, EU:T:2014:675, paragraph 181, and of 9 June 2016, *Magic Mountain Kletterhallen and Others* v *Commission*, T-162/13, not published, EU:T:2016:341, paragraph 59).

69 In any event, as the Commission acknowledged in recital 41 of the contested decision, its most recent decision-making practice reveals that the commercial operation and the construction of port infrastructures constitute economic activities. Even if the Commission was able to modify its decision-making practice in that regard, this was in order to comply with the case-law of the Court of Justice, in particular with the judgments of 24 October 2002, *Aéroports de Paris* v *Commission* (C-82/01 P, EU:C:2002:617), and of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* (C-288/11 P, EU:C:2012:821).

70 The applicants consider, however, that it cannot be inferred from the judgments mentioned in paragraph 69 above that the management of the port infrastructure necessarily constitutes an economic activity. Thus, first, they consider that the situation at issue in the judgment of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* (C-288/11 P, EU:C:2012:821), is different since they do not operate the infrastructure themselves, but make it available to third parties. Secondly, in the judgment of 24 October 2002, *Aéroports de Paris* v *Commission* (C-82/01 P, EU:C:2002:617), only the activities supplied in exchange for a commercial fee were classified as economic by the General Court.

71 As the Commission submits, however, the General Court and the Court of Justice have expressly found that the provision of airport facilities to airlines, in return for a fee, constituted an economic activity (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 78, and of 12 December 2000, *Aéroports de Paris* v *Commission*, T-128/98, EU:T:2000:290, paragraph 121). There is no fundamental difference between granting access to the infrastructure of an airport in return for airport charges and granting access to the port infrastructure in return for port charges.

72 Moreover, contrary to the applicants' submissions in that regard, the ports themselves operate the port infrastructure where they provide ships with access to the port infrastructure and make land available in return for remuneration, like Leipzig-Halle Airport in the case that gave rise to the judgment of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission* (C-288/11 P, EU:C:2012:821).

73 Therefore, the applicants are wrong to claim that, in the contested decision, the Commission confused the activities of the ports and those of their users, and the management of the infrastructure and the commercial operation of the port superstructure.

74 In the third place, the applicants draw attention to the absence of any economic activity on account of the pricing practices of the port authorities.

75 In that regard, it should be noted that, in accordance with the case-law, services normally provided for remuneration are services that may be classified as economic activities. The essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (see judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 47 and the case-law cited).

76 Therefore, contrary to the applicants' submissions in that regard, the existence of remuneration is indeed a relevant factor to establish the existence of an economic activity (see, to that effect, judgments of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraph 40, and of 24 March 2011, *Freistaat Sachsen and Land Sachsen-Anhalt* v *Commission*, T-443/08 and T-455/08, EU:T:2011:117, paragraph 93).

77 In that regard, the applicants' argument that the port charges were classified as 'remuneration' by the Cour constitutionnelle (Constitutional Court, Belgium), which prevented account being taken of any profit-linked component, does not undermine the Commission's argument that those charges constitute economic consideration for the provision of the service in question.

78 It is true that, as the applicants submit, according to the case-law, the fact that a product or a service supplied by a public entity and connected to the exercise by it of public powers is provided in return for remuneration laid down by law and not determined, directly or indirectly, by that entity, is not alone sufficient for the activity carried out to be classified as an economic activity and the entity which carries it out as an undertaking (see judgment of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 30 and the case-law cited). However, such a factor is not sufficient reason, in itself, to exclude the activity at issue from being classified as an economic activity.

79 Moreover, it must be noted, as the Commission did in recital 51 of the contested decision, that the characteristics of the tariffs applied by the ports in the present case (publicity, non-discrimination, etc.) are similar to those of tariffs applied in the context of services of general economic interest, which are economic activities and are subject to the law on State aid. Likewise, for the vast majority of economic activities, prices are also public, non-discriminatory and set unilaterally in advance by the provider.

80 Finally, with regard to the argument that the ports did not follow a commercial logic in setting their tariffs, but sought to accomplish public service tasks, it should be noted that the fact that the offer of goods or services is made on a not-for-profit basis does not prevent the entity which carries out those operations on the market from being considered an undertaking, since that offer exists in competition with that of other operators which do seek to make a profit (judgments of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 27, and of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 46; see also, to that effect, judgment of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 48).

81 Moreover, the mere fact that prices are set unilaterally by the ports under the supervision of the regional port commissioner does not mean that demand is not taken into account. On the contrary, as the Commission observes in recital 56 of the contested decision, the ports do take the market conditions into consideration when they determine their tariffs and especially the port charges. On this basis, the tariffs obviously constitute an important instrument of the commercial policy implemented by the ports to encourage ship owners and shippers to use the port infrastructure and undertakings to establish themselves there to develop their production or service activities. As regards, in particular, the ports of Antwerp and Zeebrugge, it follows from footnote 46 of the contested decision that, under Article 25(3) of the Decree on seaport policy and management of 2 March 1999, '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'.

82 Incidentally, it is not contested that the port charges and concession fees levied by the ports cover at least the bulk of the costs that they incur when they offer their services on the market, as the Commission found in recital 53 of the contested decision. In the case of the port of Antwerp, that revenue even exceeded total current expenditure in 2015. The fact that that revenue may also finance certain non-economic activities in no way alters the fact that it was received in return for economic activities such as making the port infrastructure available or access to the port infrastructure.

83 Therefore, the complaint alleging that there is no economic activity on account of the ports' pricing practices must also be rejected.

84 In the fourth place, the applicants submit that, even if the ports are engaged in economic activities, those activities are purely ancillary and, therefore, fall outside the scope of Article 107(1) TFEU.

85 In that regard, it should be recalled that the fact that, for the exercise of part of its activities, an entity is vested with official powers does not, in itself, prevent it from being characterised as an undertaking for the purposes of EU competition law in respect of the remainder of its economic activities (judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 74, and of 1 July 2008, *MOTOE*, C-49/07, EU:C:2008:376, paragraph 25).

86 It is true that, as the applicants submit, according to the case-law, in so far as a public entity exercises an economic activity which can be separated from the exercise of its public powers, that entity, in relation to that activity, acts as an undertaking, while, if that economic activity cannot be separated from the exercise of its public powers, the activities exercised by that entity as a whole remain activities connected with the exercise of those public powers (judgments of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 38, and of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 29; see also, to that effect, judgment of 26 March 2009, *SELEX Sistemi Integrati* v *Commission*, C-113/07 P, EU:C:2009:191, paragraphs 71 to 80).

87 In the present case, however, neither the applicants nor the Kingdom of Belgium have adduced concrete evidence to demonstrate that the economic activities carried out by the ports cannot be separated from the exercise of their public powers, such as maritime traffic control and safety or anti-pollution surveillance. The mere fact that there may be an economic link between those activities, in that the ports' economic activities finance, in whole or in part, their non-economic activities, is not sufficient for a finding that those activities cannot be separated from each other, in accordance with the case-law.

88 In that regard, it should also be observed that, in the present case, the ports' economic activities are not made compulsory by their non-economic activities of general interest and that, without them, those non-economic activities would not necessarily be rendered useless (see, to that effect, judgments of 12 July 2012, *Compass-Datenbank*, C-138/11, EU:C:2012:449, paragraph 41, and of 12 September 2013, *Germany* v *Commission*, T-347/09, not published, EU:T:2013:418, paragraph 41).

89 It must be held, therefore, that the ports' economic activities can be separated from their non-economic activities of general interest, in accordance with the case-law (see paragraph 86 above).

90 Furthermore, it should be observed that neither the applicants nor the Kingdom of Belgium have demonstrated that the ports' economic activities are secondary or ancillary to their non-economic activities of general interest.

91 On the contrary, as is clear inter alia from recitals 53 and 65 of the contested decision, the port charges and concession fees account for the vast majority of the ports' turnover. In reply to a written question from the Court, the applicants confirmed, moreover, that over 75% of their income came from three types of activity, namely concessions, navigation and towing. As is clear from examining other arguments put forward by the applicants, the Commission did not commit an error of assessment when it classified those activities as economic in the contested decision.

92 Therefore, the complaint alleging that the ports' economic activities are only ancillary to their non-economic activities of general interest must also be rejected.

***The first part, alleging that there is no market on which the port authorities offer their services***

93 In the context of the first part of the first plea, the applicants submit that, as no market exists on which they offer their services, the port authorities cannot be regarded as undertakings. Under the Decree on seaport policy and management of 2 March 1999, a legal monopoly has been created, in connection with the decentralisation of the administrative competences of public authorities, excluding any potential competition by introducing an exclusive provider of the service in question. Therefore, according to the applicants, no 'market' exists in respect of the management of the ports of Antwerp and Zeebrugge, which is confirmed by a report by the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority).

94 The applicants note, in that regard, that the port authorities merely facilitate the provision of services by third parties, namely towing companies or industrial undertakings, on the market on which those third parties are active, inter alia by leasing land as a concession and do not carry out those economic activities themselves.

95 Moreover, they state that the management of ports must be distinguished from the management of airports, for which national law confirms the market environment and, accordingly, the competition, for the performance of airport management activities.

96 In the reply, the applicants also accuse the Commission, first, of having wrongly concluded that a market existed since they offered their services for remuneration and, secondly, of not having examined whether other operators were willing and able to provide the services in question on the market concerned, in accordance with paragraph 14 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the FEU Treaty.

97 The Commission disputes those arguments.

98 In that regard, it must be pointed out that an entity which has a legal monopoly may indeed offer goods and services on a market and, therefore, be an 'undertaking' within the meaning of Article 107 TFEU. As the Commission noted in recital 48 of the contested decision, the concept of economic activity is an objective concept which derives from matters of fact, in particular the existence of a market for the services concerned, and does not depend on national choices or assessments.

99 In the present case, as previously stated, the applicants themselves do indeed carry out the majority of the activities which are classified as economic by the Commission in recital 44 of the contested decision (see paragraph 49 above). Even if, as the applicants claim, they benefit from a legal monopoly and, in Belgium, there are no private port operators which would compete with them for those activities, it should be observed, as the Commission confirmed at the hearing, that competition does exist at EU level between the different seaports, in particular on the Hamburg-Rotterdam-Antwerp route, to attract ships or other service providers, which is not disputed by the applicants. The applicants are therefore wrong to take the view that there is no market for those activities solely because they benefit from a natural and legal monopoly in Belgium to perform them.

100 The applicants also rely on a report by the Nederlandse Mededingingsautoriteit (Netherlands Competition Authority) which states that there is no competition between port managers. However, it should be noted that that report, which is concerned specifically with the competitive situation of the port of Rotterdam, in the Netherlands, in the context of an investigation concerning abuse of a dominant position, appears to be of little relevance for the purposes of establishing, as a general rule, that the ports do not carry out economic activities. Moreover, that report merely establishes the weak competition between the port authorities in respect of the setting of port tariffs in the Netherlands, but nonetheless does not conclude that making the port infrastructure available and allocating industrial land are not economic activities.

101 On the contrary, it has been acknowledged in the case-law that the commercial operation and the construction of port or airport infrastructures with a view to that commercial operation constituted economic activities (see, to that effect, judgments of 24 October 2002, *Aéroports de Paris* v *Commission*, C-82/01 P, EU:C:2002:617, paragraph 78; of 19 December 2012, *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle* v *Commission*, C-288/11 P, EU:C:2012:821, paragraphs 40 to 43; and of 15 March 2018, *Naviera Armas* v *Commission*, T-108/16, EU:T:2018:145, paragraph 119).

102 In that regard, the applicants are wrong to submit that the management of ports must be distinguished from the management of airports. As the Commission submits, the fact that the operation of some airports is on the basis of a concession does not mean that the operation of an airport or a port by a public undertaking or an undertaking with public powers is not an economic activity.

103 Moreover, in the case giving rise to the judgment of 15 March 2018, *Naviera Armas* v *Commission* (T-108/16, EU:T:2018:145), while it is true that the main focus was to examine whether an undertaking using the port, which has the exclusive right to perform commercial activities there, was, as a result, a recipient of State aid, the General Court nevertheless explicitly held in paragraph 119 of that judgment that the activity by which the managing body of the port managed the port infrastructure and made it available to a user shipping company in return for the payment of port dues was indeed an 'economic' activity.

104 Finally, the applicants invoke paragraph 14 of the Commission Notice on the notion of State aid as referred to in Article 107(1) of the FEU Treaty in order to argue that the Commission should have examined whether other operators were willing and able to provide the services in question on the market concerned. That paragraph provided as follows:

'The decision of a public authority not to allow third parties to provide a certain service (for example, because it wishes to provide the service in-house) does not rule out the existence of an economic activity. In spite of such market closure, an economic activity can exist where other operators would

be willing and able to provide the service in the market concerned. More generally, the fact that a particular service is provided in-house has no relevance for the economic nature of the activity.'

105 The Commission stated in the rejoinder and at the hearing that paragraph 14 of its Notice on the notion of State aid as referred to in Article 107(1) of the FEU Treaty could not be effectively invoked by the applicants since, in the present case, they themselves provide some services directly which, according to that paragraph, is not sufficient to consider that there is no economic activity. It cannot be ruled out that other private undertakings may be able and willing to carry out the economic activities performed by the applicants if those activities were actually open to competition and were not subject to a legal monopoly.

106 Accordingly, the first part of the first plea must also be rejected.

107 In view of all of those considerations, it must be held that the Commission did not commit an error of assessment when it considered, in recital 67 of the contested decision, that the activities carried out by the Belgian ports were – at least in part – economic activities.

108 The first plea in law must, therefore, be rejected.

***The second and third pleas in law, alleging, in essence, infringement of the selectivity criterion***

109 By their second and third pleas, the applicants allege, in essence, infringement of the selectivity criterion provided for in Article 107(1) TFEU.

110 Before examining the various complaints made by the applicants and the Kingdom of Belgium in the context of those two pleas, the position adopted by the Commission in the contested decision in order to conclude that the measure at issue is selective and the relevant case-law should be recalled.

***Summary of the Commission's analysis with regard to the selectivity of the measure in the contested decision***

111 In point 5.1.4 of the contested decision, which is devoted to the selectivity of the measure, the Commission submitted first of all that it was not disputed that the Belgian ports did not pay corporate tax. The basis for that absence of payment of corporate tax, according to the Belgian authorities, could have been either Article 180(2) of the CIR or Articles 1 and 2 of the CIR (recital 81 of the contested decision).

112 The Commission then went on to carry out a two-stage analysis, depending on whether Articles 1 and 2 of the CIR constituted the legal basis for the non-payment of corporate tax by the Belgian ports ('the second assumption') or whether Article 180(2) of the CIR constituted the legal basis for the non-payment of corporate tax by the Belgian ports ('the first assumption').

113 In the first place, in the context of the second assumption, the Commission analysed the Belgian authorities' argument that Article 180(2) of the CIR merely draws the consequences from the general rules set out in Articles 1 and 2 of the CIR and would therefore not constitute a derogation to the reference system (recitals 82 to 91 of the contested decision). The Commission considered, in that regard, that such an interpretation was essentially based 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. The Commission considered, on the contrary, that the ports were in principle 'companies' for the purposes of taxation of income as regards the bulk of their activities and that they carried out economic activities of a nature to classify them as 'undertakings' within the meaning of Article 107 TFEU (recitals 84 and 85 of the contested decision). It noted, in addition, that the assumption on which the Belgian authorities based 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 (recital 86 of the contested decision).

114 Therefore, the Commission stated that it did not concur with the position that, even if Article 180(2) of the CIR were deleted, the ports would not be liable to corporate tax under the general criteria provided for in Articles 1 and 2 of the CIR. For the same reasons, the Commission disputed that the rules relating to tax on legal persons constituted the reference system for the taxation of the ports. In the light of those factors, the Commission considered that the normal application of the general rules of Belgian law results in the ports being subject to corporate tax with respect to the income from their economic activities (recitals 87 to 89 of the contested decision).

115 The Commission stated, moreover, that, even if the national rules in question – or their interpretation by the administration – were such as to result in the non-payment of corporate tax by the Belgian ports, those rules introduce discrimination between 'undertakings' engaging in economic activities within the meaning of Article 107 TFEU. Just as in the case of Article 180(2) of the CIR, in the analysis set out below, the Commission considered that those rules, or the Belgian income tax regime as a whole, are therefore the source of advantages granted to certain 'undertakings', namely the ports, despite the fact that those undertakings, with regard to the profits generated from 'economic activities', are in a comparable situation to that of 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 considered, moreover, that the ports did not conform to 'particular operating principles which clearly distinguish[ed] them from other economic operators' subject to corporate tax. In particular, the fact that the ports did not seek to make a profit is not sufficient to consider that they are in a different situation from that of other operators subject to corporate tax, according to the Commission. In that scenario, according to the Commission, the Belgian system would itself be selective (recital 90 of the contested decision).

116 Therefore, according to the Commission, 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 (recital 91 of the contested decision).

117 In the second place, the Commission analysed the first assumption, which it favoured, that Article 180(2) of the CIR constitutes the legal basis for non-payment of corporate tax by the Belgian ports, as a derogation from the reference framework, composed of Articles 1 and 2 of the CIR (recitals 92 to 107 of the contested decision).

118 In that regard, the Commission considered, first, that the reference system in the present case was constituted by the general tax rules arising from Articles 1 and 2 of the CIR, whereas Article 180(2) of the CIR constitutes a derogation from those general tax rules. It found that 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 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 tax on legal persons. Moreover, Article 179 of the CIR confirms that taxpayers subject to corporate tax are resident companies. According to the Commission, Article 180(2) of the CIR exempts the ports unconditionally from corporate tax, 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 those ports (recitals 93 and 94 of the contested decision).

119 Secondly, the Commission took the view that that derogation from the reference system introduced differentiation between operators which are 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. According to the Commission, 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. The fact that the Belgian ports are owned and controlled by public authorities or that they engage in particular 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 (recitals 97 and 98 of the contested decision).

120 The Commission concluded from this, therefore, that the measure was prima facie selective regarding the economic activities of the ports (recital 99 of the contested decision).

121 In the third place, irrespective of the assumption made, the Commission went on to examine a possible justification for the measure by the nature or general scheme of the tax system. It recalled, first of all, that the conformity of a measure with national law could, as such, constitute justification by the scheme of the system unless it had been shown that that justification resulted from characteristics inherent in the reference tax system. Moreover, it observed that the absence of discrimination in national law did not prejudge the absence of selectivity within the meaning of Article 107(1) TFEU (recitals 101 and 102 of the contested decision).

122 Likewise, according to the Commission, since the decisive criterion for liability to corporate tax or to tax on legal persons is the act of engaging in a 'business' or 'transactions of a profit-making nature' by the entity concerned (see 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. In addition, the alleged fact that that the ports' resources do not always cover their costs or the fact that certain costs not inherent in the object of an undertaking are not deductible from corporate tax, pursuant to Article 49 of the CIR, is not said to provide any justification either for exempting the ports from corporate tax. Furthermore, the fact that the exemption of the ports from corporate tax results from a general principle of law, or even from the Belgian Constitution itself, assuming this fact to have been established, is not as such necessarily of a nature to justify that 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 (recitals 103 to 106 of the contested decision).

123 Finally, according to the Commission, 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 in demonstrating 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 and not due to a derogation from that reference system which could possibly be justified (recital 107 of the contested decision).

***Reminder of the relevant case-law***

124 Under Article 107(1) TFEU, 'save as otherwise provided in the Treaties, 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'.

125 According to settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Secondly, the intervention must be liable to affect trade between the Member States. Thirdly, it must confer a selective advantage on the recipient. Fourthly, it must distort or threaten to distort competition (judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53; of 6 March 2018, *Commission* v *FIH Holding and FIH Erhvervsbank*, C-579/16 P, EU:C:2018:159, paragraph 43; and of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 79).

126 So far as concerns the condition relating to the selectivity of the advantage, which is a constituent factor in the concept of 'State aid', within the meaning of Article 107(1) TFEU, it is clear from equally settled case-law that the assessment of that condition requires a determination whether, under a particular legal regime, the national measure at issue is such as to favour 'certain undertakings or the production of certain goods' over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which accordingly suffer different treatment that can, in essence, be classified as discriminatory (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

127 Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain sectors of activity (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 55 and the case-law cited).

128 The examination of the selectivity of a measure, in particular in matters of taxation, therefore seeks to establish whether it favours 'certain undertakings or the production of certain goods' within the meaning of Article 107(1) TFEU or whether, on the contrary, it is a general measure of

tax policy which applies without distinction to all undertakings on national territory (see, to that effect, judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerk*e, C-143/99, EU:C:2001:598, paragraph 35; of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 73; and of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 18).

129 In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the common or 'normal' tax regime applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that common regime in so far as it differentiates between operators who, in the light of the objective pursued by that common tax regime, are in a comparable factual and legal situation (see judgment of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 36 and the case-law cited).

130 The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general scheme of the system of which the measures form part (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58 and the case-law cited).

131 The examination of the selectivity condition therefore implies, in principle, the determination, first, of the reference framework within which the measure concerned falls, that determination being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation (see judgment of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 85 and the case-law cited).

132 However, the classification of a tax system as 'selective' is not conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, subject to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings (judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 91, and of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 87).

133 Such an interpretation of the selectivity criterion would require that, in order for a tax system to be classifiable as 'selective', it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although, by adjusting and combining various tax rules, they produce the same effects in law or in fact. It therefore conflicts with settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see judgment of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 88 and the case-law cited).

134 However, it also follows from that case-law that while, for the purposes of establishing the selectivity of a tax measure, the regulatory technique used is not decisive, with the result that it is not always necessary for it to derogate from a common tax system, the fact that it is a derogation as a result of the use of that regulatory technique is relevant for those purposes where it follows that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime, even though those two categories are in a comparable situation with regard to the objective pursued by that system (judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 77; of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 90; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 33).

135 It is in the light of those considerations that the various complaints made by the applicants and the Kingdom of Belgium should be examined.

136 In that regard, the Court considers it appropriate to examine the selectivity of the measure in question – namely the exemption from corporate tax from which the ports benefit under Article 180(2) of the CIR – in two stages, as the Commission did in the contested decision, depending on whether Article 180(2) of the CIR constitutes a derogation from the reference framework, formed of Articles 1 and 2 of the CIR (see paragraphs 117 to 120 above) or whether it forms an integral part of the reference framework (see paragraphs 113 to 116 above).

***The selectivity of the measure at issue in the event that Article 180(2) of the CIR constitutes a derogation from the reference framework***

***– The complaint alleging that the reference framework has been identified incorrectly***

137 In the context of their second plea, the applicants, supported by the Kingdom of Belgium, submit that the Commission erred in concluding that the measure at issue was selective by taking the view, first, that corporate tax was the reference system for entities such as the applicants and, secondly, that the liability of the ports to tax on legal persons constituted a derogation from the reference system, leading to a difference in the treatment of operators who, in the light of the objective pursued by the tax system concerned, were in a comparable factual and legal situation.

138 Thus, according to the applicants, the exemption from corporate tax granted to the Belgian ports under Article 180(2) of the CIR is merely a result of applying the general rules of Articles 1 and 2 of the CIR. The applicants also submit that the official comments on the CIR, on which the Commission relied in the contested decision, state solely that legal persons who are unconditionally exempted from corporate tax, in accordance with Article 180(2) of the CIR, may, in principle, be regarded as taxpayers subject to corporate tax. Therefore, it cannot be inferred from those comments that the deletion of Article 180(2) of the CIR would automatically result in the ports specifically being liable to corporate tax. Liability to tax on legal persons cannot in itself be regarded as a derogation from the reference framework.

139 According to the Kingdom of Belgium, entities which are liable to tax on legal persons are characterised, first, by the fact that they are not engaged in a business or transactions of a profit-making nature and, secondly, by the fact that they pursue an aim which goes beyond their personal interest or the interest of their shareholders. With regard to the port authorities, even though they pursue economic activities marginally, the absence of a profit-making objective and

the fact that their tasks are of general interest justifies their exemption from corporate tax. By establishing an automatic connection between economic activity and corporate tax, the Commission is said to have misinterpreted the concept of a company under Belgian law, which is characterised by the objective of making a profit, that is to say the act giving partners a direct or indirect capital benefit.

140 The Commission disputes those arguments.

141 In that regard, it should be noted at the outset that, contrary to the applicants' submissions, in the contested decision the Commission did not take the view that the reference system was constituted solely by corporate tax, from which other tax systems derogate. It is clear from recitals 83 and 93 of the contested decision that the Commission considered that the reference system was composed, in the present case, of the general tax rules arising from 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 tax on legal persons. The Commission examined, nevertheless, whether, in accordance with those general rules, the ports, in principle, fell within the scope of the concept of a 'company', referred to in Article 2(5) of the CIR, with the result that Article 180(2) of the CIR had to be interpreted as a derogation from the reference system in their favour or whether, in accordance with those general rules, they naturally fell within the scope of tax on legal persons, with the result that the effect of Article 180(2) of the CIR would be purely declaratory.

142 The applicants' argument that the Commission defined the reference system incorrectly as being corporate tax is therefore based on an incorrect reading of the contested decision and must, therefore, be rejected.

143 Furthermore, it should be noted that the approach advocated by the applicants and the Kingdom of Belgium, in accordance with which Article 180(2) of the CIR does not constitute a derogation from the reference framework, corresponds to the second scenario that has been examined by the Commission, in recitals 82 to 97 of the contested decision, in order to establish the selectivity of the measure at issue (see paragraphs 113 to 116 above).

144 In order to reject that approach, the Commission essentially relied on the fact that the ports were in principle 'companies' for the purposes of taxation of income on account of the bulk of their activities, which were economic activities. It therefore considered that, in the absence of Article 180(2) of the CIR, the ports would usually be liable to corporate tax and rejected the idea that, under a 'normal' application of Articles 1 and 2 of the CIR, the ports would be liable to tax on legal persons and not to corporate tax.

145 It must be held that that reasoning is not vitiated by any errors of assessment.

146 Article 1 of the CIR defines corporate tax as 'tax on the total income of resident companies', whereas tax on legal persons is defined as 'tax on the income of Belgian legal persons other than companies', without further clarification.

147 Moreover, Article 2(5) of the CIR which, as the Commission acknowledges in the contested decision, also forms part of the reference framework, defines what is meant by 'company' and 'resident company'. 'Company' is thus defined in Article 2(5)(a) of the CIR 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'. 'Resident company' is defined in

Article 2(5)(b) of the CIR as 'any company which has its registered office, its principal place of business or its centre of management or administration in Belgium and which is not excluded from the scope of corporate tax'.

148 When questioned in that regard by way of a measure of organisation of procedure and at the hearing, the parties have acknowledged that the decisive criterion in order to determine whether a resident legal person must be liable to pay corporate tax or tax on legal persons lies in whether or not that entity engages in a 'business or transactions of a profit-making nature' within the meaning of Article 2(5)(a) of the CIR.

149 It is necessary to examine, therefore, whether the ports engage in a 'business or transactions of a profit-making nature' within the meaning of Article 2(5)(a) of the CIR and whether, in principle, they fall within the scope of the definition of a 'company' laid down in that article.

150 In that regard, as the applicants have explained in response to a measure of organisation of procedure, the act of engaging in 'business of a profit-making nature' covers, according to comment 179/10 by the Belgian tax authority, 'the operation of an industrial, commercial or agricultural undertaking in any form', the profits from which would constitute professional income subject to tax on natural persons on that basis, if that operation was carried out by a natural person or a company which does not have legal personality. The expression 'to engage in transactions of a profit-making nature' covers both 'profit-making occupations', in the sense of an occupation with a profit motive, and occupations of a profit-making nature, but not for profit, which are characterised by a permanent professional activity consisting of either the repetition, which is sufficiently frequent to constitute an 'occupation', of operations of an industrial, commercial or agricultural nature, or the use of industrial or commercial methods. Moreover, according to comment 182/10 on the CIR, a legal person uses industrial and commercial methods where that person works with an objective, an organisation or an economic strategy and uses management methods that are essentially inspired by notions of cost, income and profitability.

151 Therefore, although, as the applicants and the Kingdom of Belgium submit, the notions of 'economic activity' and 'transactions of a profit-making nature' do not fully overlap, in the present case, in the light of their activities set out above (see paragraph 49 above), the ports are engaged in transactions of a profit-making nature, within the meaning of Article 2(5)(a) of the CIR.

152 According to the Kingdom of Belgium, nevertheless, a 'company', unlike any other resident legal person, is characterised primarily by the objective of making a profit. The Kingdom of Belgium refers in that regard to Article 1 of the Belgian Code des sociétés (Companies Code), in accordance with which 'a company is established by a contract under which two or more persons come together to carry out one or more specific activities and with the aim of giving partners a direct or indirect capital benefit'.

153 However, it should be noted, as the Commission has done, that it is not clear from Articles 1 and 2 of the CIR – which form the relevant reference framework in the present case – that the objective of making a profit is a decisive distinguishing criterion in that regard, since Article 2(5)(a) of the CIR makes reference not to the objective of making a profit, but to the act of engaging in a 'business or transactions of a profit-making nature'.

154 When questioned on that issue by way of a measure of organisation of procedure, the applicants and the Kingdom of Belgium acknowledged that the notion of a business or transactions 'of a profit-making nature', referred to in Article 2(5)(a) of the CIR, did not necessarily overlap with a 'profit-making objective'. That interpretation is also confirmed by comment 179/11 by the Belgian tax authority which interprets that provision, in accordance with which the expression 'to engage in transactions of a profit-making nature' also covers transactions of a profit-making nature which do not have the objective of making a profit, which are comparable to a permanent professional activity, since they consist of either the repetition, which is sufficiently frequent to constitute an occupation, of operations of an industrial, commercial or agricultural nature, or the use of industrial or commercial methods.

155 Moreover, it is clear from recital 103 of the contested decision that other undertakings also reinvest their profit, pursue objectives beyond their individual interest or generate effects on the economy beyond their individual interest without being exempted from corporate tax for that reason. In footnote 83 of the contested decision, reference is therefore made to the fact that certain intermunicipal associations, which also carry out tasks of general interest and were set up for a general interest purpose, have recently been made subject to corporate tax in Belgium, which has been acknowledged by the applicants and the Kingdom of Belgium in their responses to measures of organisation of procedure. It must be held, therefore, that the performance of tasks of general interest, the statutory objective of not seeking to make profits and the publicly owned status of partners are not the decisive criteria which form the basis of the tax scheme at issue.

156 Contrary to the Kingdom of Belgium's submissions, therefore, it is not clear from the very logic of Articles 1 and 2 of the CIR that Article 180(2) of the CIR has no legal significance and is purely declaratory. However, as the Commission submits, it is clear from the logic of those provisions that resident companies which engage in a business or transactions of a profit-making nature must, in principle, be liable to corporate tax. Article 180(2) of the CIR therefore establishes an unconditional exemption from corporate tax for the ports referred to therein, in so far as those ports are indeed engaged in transactions of a profit-making nature, within the meaning of Article 2(5)(a) of the CIR. Consequently, Article 180(2) of the CIR is not an integral part and is not governed by the logic of the reference framework, as the applicants and the Kingdom of Belgium have tried to point out, rather it constitutes a derogation from that framework.

157 That conclusion is supported by the various pieces of evidence which have been convincingly adduced by the Commission in the contested decision and in the proceedings before the Court such as, inter alia, the official comments on the CIR made by the Belgian tax authority and the official positions of the Belgian authorities given *in tempore non suspecto*, which perceive the ports as falling, in principle, within the scope of the definition of a 'company' as laid down in Article 2(5) of the CIR.

158 Thus, first, it is clear from recital 86 of the contested decision that, according to the official comments of the Belgian tax authority, the Belgian ports are public undertakings which, in the absence of the unconditional exemption provided for in Article 180(2) of the CIR, would be subject to corporate tax pursuant to Articles 1 and 2 of the CIR. Comment 179/2, cited in footnote 71 of the contested decision, states, for example, 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: 1. legal persons who are "unconditionally" excluded from corporate tax'.

159 Secondly, it is also clear from recital 86 of the contested decision that the Belgian Government itself took the view, before the Cour constitutionnelle (Constitutional Court), that the ports, among other companies and legal persons referred to in Article 180 and Article 220(2) of the CIR, were in fact legal persons who were engaged in a business or transactions of a profit-making nature within the meaning of Article 2 of the CIR. Furthermore, before the Lower House of the Belgian Parliament, the Deputy Prime Minister and Minister for Finance and Foreign Trade also took the view that the 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.

160 Thirdly, it follows from the law adopted by the Belgian Federal Parliament on 29 May 2018 – 'Loi fixant les conditions du passage à l'assujettissement à l'impôt des sociétés d'entreprises portuaires' (Law establishing the conditions for the transition to the corporate tax liability of port undertakings) (*Moniteur Belge* of 11 June 2018, p. 48409) – that, in order to comply with the contested decision and to remove the unconditional exemption from corporate tax from which the ports benefit, which is classified as State aid by the Commission, under Article 2 of that law, 'point 2 of the first subparagraph of Article 180 of the [CIR] is repealed'. It must be stated, therefore, as the Commission did at the hearing, that, according to the Belgian legislature, the mere removal of the exemption provided for in Article 180(2) of the CIR is sufficient in order for the ports to incur liability to corporate tax, which means that, without that exemption, the ports will be naturally or automatically liable to corporate tax.

161 Fourthly, it is clear from the wording and the logic of Articles 180 to 182 of the CIR that Article 180 establishes an unconditional exemption from corporate tax, in so far as, in contrast to Articles 181 and 182, it does not make the exemption from corporate tax for the entities referred to therein subject to any other conditions. In accordance with Article 181 of the CIR, 'the following shall not be liable to corporate tax: not-for-profit associations and other legal persons who do not seek to make a profit' and who perform certain activities of general interest which are listed in that provision, such as family support or education. Under Article 182 of the CIR, 'with respect to not-for-profit associations and other legal persons who do not seek to make a profit, the following shall not be regarded as transactions of a profit-making nature: (1) one-off or exceptional transactions; (2) transactions which consist in the investment of funds collected in the performance of their statutory tasks; (3) transactions which constitute an activity that contains industrial, commercial or agricultural operations only on an ancillary basis or does not use industrial or commercial methods'. Article 180 of the CIR, however, provides merely that the entities listed therein 'shall not be liable to corporate tax', without any other condition relating to absence of a profit-making objective or the ancillary nature of transactions of a profit-making nature carried out by those entities.

162 That logic is replicated in Article 220 of the CIR, which provides that 'the following shall be liable to tax on legal persons: (1) the State, the Communities, the Regions, the provinces, the metropolitan districts, the federations of municipalities, the municipalities, public intermunicipal social action centres, … public cultural establishments, emergency areas, police districts and the polders and water boards; (2) legal persons who, under Article 180, are not liable to corporate tax; (3) legal persons who have their registered office, their principal place of business or their centre of management or administration in Belgium and who are not engaged in a business or transactions of a profit-making nature or who are not liable to corporate tax under Articles 181 and 182'. Short of rendering Article 220(2) of the CIR ineffective and considering that that provision, like Article 180(2) of the CIR, is purely declaratory, that provision also states that, in the absence of the exemption provided for in Article 180(2) of the CIR, the ports would, in

principle, be liable to corporate tax, unless they can demonstrate that they do not engage in a business or transactions of a profit-making nature or that they satisfy the other conditions laid down in Articles 181 and 182 of the CIR.

163 Accordingly, in the light of all of those considerations, it must be held that the Commission was correct to take the view in the contested decision that the reference framework for the purposes of examining selectivity was constituted, in the present case, by Articles 1 and 2 of the CIR, from which Article 180(2) of the CIR constitutes a derogation, in so far as that latter provision exempts the ports unconditionally from corporate tax, even if they engage in a business or transactions of a profit-making nature, within the meaning of Article 2(5)(a) of the CIR.

164 Therefore, the first complaint must be rejected as unfounded.

***– The complaint alleging that the ports and entities which are liable to corporate tax are not comparable***

165 The applicants submit that the port authorities are not in the same situation as other entities which are liable to corporate tax, contrary to the Commission's findings in recital 90 of the contested decision. According to the applicants, the port authorities are subject to legal and factual arrangements that are different from other entities and are an extension of public authorities, which are entrusted with performing public law tasks. Moreover, the port authorities are unable freely to use the funds available to them in order to optimise their activities, which, in principle, other entities which are liable to corporate tax, such as not-for-profit associations, are able to do when they engage in transactions of a profit-making nature.

166 According to the applicants, entities which are liable to tax on legal persons are characterised, on the one hand, by the fact that they are not engaged in a business or transactions of a profit-making nature or, on the other, by the fact that they pursue a wider objective which goes beyond their own interest or the interest of their shareholders. Contrary to the Commission's claims, the legal form adopted by the ports is not decisive and the absence of a profit-making objective is therefore a significant element to distinguish corporate tax from tax on legal persons. Companies with a social purpose whose objective is not to distribute profits may be liable to tax on legal persons.

167 Furthermore, the applicants submit that they do not use industrial and commercial methods to carry out their activities, in accordance with Article 182(3) of the CIR. In that regard, they state that account must be taken of the fact that, first, the majority of the income received by the ports is not determined by the principles of supply and demand; secondly, their payments are remunerative in nature and, in principle, seek only to cover the costs of certain services, without seeking to maximise profits; thirdly, they do not choose the port that they must manage and cannot restrict their services to those users who are most profitable; fourthly, their income is not necessarily used to increase their efficiency or their own performance; fifthly, their investments are guided by the long-term macroeconomic outlook and not solely by short or medium-term microeconomic performance; and, sixthly, only they have the competence to exercise the powers relating to the administration of a port, which are not transferable. The absence of a profit-making objective, together with the fact that they do not use industrial and commercial methods, therefore justifies, in the applicants' view, the ports being liable to tax on legal persons rather than corporate tax.

168 The Kingdom of Belgium also submits, relying on the judgment of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550), that, in the light of the objectives that are intrinsic to the corporate tax system, the ports are not in a comparable factual and legal situation to that of profit-making companies liable to that tax. It observes, in that regard, that nowhere in the Decree on seaport policy and management of 2 March 1999 does it indicate that the ports must seek to make a profit.

169 The Commission disputes those arguments.

170 In that regard, it should be recalled that, in accordance with the case-law, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the common or 'normal' tax regime applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue derogates from that common regime in so far as it differentiates between operators who, in the light of the objective pursued by that common tax regime, are in a comparable factual and legal situation (judgments of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49; of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 36).

171 It is necessary, therefore, to determine whether a tax exemption such as that provided for in Article 180(2) of the CIR is such as to favour certain undertakings over others which are in a comparable factual and legal situation in the light of the objective pursued by the common regime.

172 In that regard, the Commission considered, in recitals 97 and 98 of the contested decision, that, whichever reference system was adopted (corporate tax or taxation of the income of resident legal persons in general), the objective of income tax was to tax income, an objective in relation to which all undertakings were in the same factual and legal situation as regards the profits from their economic activities.

173 However, according to the Kingdom of Belgium, the ports are not in a comparable situation to companies that are liable to corporate tax since, even if they are engaged in transactions of a profit-making nature, within the meaning of Article 2(5) of the CIR, they have certain specific features, such as the fact that their activities do not have a profit-making objective, the way in which they operate, their legal form or even the absence of competition with the private sector, which distinguish them from such companies.

174 In that regard, it should be pointed out that, contrary to the Commission's submissions, it cannot be considered that the ports must necessarily have the same characteristics as cooperatives, which were at issue in the case which gave rise to the judgment of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550), such as the principle of the primacy of the individual or the 'one man, one vote' rule, so that they can be differentiated from the companies liable to corporate tax in the present case.

175 In accordance with the case-law, it is for the Commission to determine that the measure at issue is a priori selective (see, to that effect, judgment of 8 September 2011, *Commission* v *Netherlands*, C-279/08 P, EU:C:2011:551, paragraph 62), which involves determining in the present case whether, despite certain characteristics which are inherent to them, the ports are in a comparable factual and legal situation to that of companies which are liable to corporate tax, in the light of the objectives of the reference framework.

176 Nevertheless, it must be observed that, to that end, the distinguishing criterion used in order to assess whether the ports and companies which are liable to corporate tax are in a comparable situation must be based on characteristics that are relevant and consistent in relation to the objectives of the reference framework (see, to that effect, judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraphs 52 to 56).

177 In the present case, none of the characteristics of ports that are invoked by the applicants and the Kingdom of Belgium – even if established – are relevant and consistent in relation to the objective of income tax, which is, as its name suggests, to tax the income of resident legal persons and, with regard in particular to 'companies' which engage in a business or transactions of a profit-making nature, to tax the profits they make from those activities.

178 First, as regards the fact that the ports are not said to pursue a profit motive and they reinvest all of their profits into the port infrastructure with a view to performing their tasks of general interest, it should be noted, as the Commission has done, that the objectives of general interest invoked in the present case relate to the ports' economic activities and not their non-economic activities of general interest (see paragraph 53 above). Those objectives essentially consist in promoting economic development and employment of the applicants and the Vlaams gewest (Flemish Region). It should be noted, as the Commission did in recital 103 of the contested decision, that other undertakings also reinvest their profit, pursue objectives beyond their individual interest or generate effects on the economy beyond their individual interest without being exempted from corporate tax for those reasons, which is not disputed by the applicants or the Kingdom of Belgium.

179 Therefore, even if the absence of a profit-making objective is an essential characteristic of ports and a distinguishing criterion based on that characteristic might, together with other factors such as those mentioned in Article 182 of the CIR, be relevant in order to establish whether a resident legal person must be liable to corporate tax or tax on legal persons, the fact remains that, in order to assess whether the situations of ports and companies which are liable to corporate tax are comparable, that criterion alone is neither relevant nor consistent in the light of the objective of income tax, covered by the scheme at issue.

180 In that regard, neither the applicants nor the Kingdom of Belgium can validly rely on the judgment of the cour d'appel de Bruxelles (Brussels Court of Appeal, Belgium) of 21 June 2006 – *Oxfam Magasins du monde*, to which reference was made at the hearing and by the Kingdom of Belgium in its written observations. In that case, the cour d'appel de Bruxelles (Brussels Court of Appeal) held that the not-for-profit association Oxfam had to be liable to pay tax on legal persons since its activities of selling fair trade products at fairs or markets were not transactions of a profit-making nature since they did not seek to use industrial or commercial methods, within the meaning of Article 182(3) of the CIR.

181 Article 182(3) of the CIR provides that, 'with respect to not-for-profit associations and other legal persons who do not seek to make a profit, the following shall not be regarded as transactions of a profit-making nature … (3) transactions which constitute an activity that contains industrial, commercial or agricultural operations only on an ancillary basis or does not use industrial or commercial methods'. That article therefore provides for two separate situations in which the activities of legal persons which do not pursue a profit motive are presumed not to constitute transactions of a profit-making nature, within the meaning of Article 2(5) of the CIR, namely, first, the act of engaging in industrial commercial or agricultural operations as an ancillary activity and, secondly, the act of not using industrial or commercial methods. As the Commission has

rightly argued, the case which gave rise to the judgment of the cour d'appel de Bruxelles (Brussels Court of Appeal) of 21 June 2006 – *Oxfam Magasins du monde*, concerned only the second situation, namely the association's use of industrial or commercial methods.

182 In that regard, it should be noted that, according to comment 182/10 on the CIR, a legal person uses industrial and commercial methods where that person works with an objective, an organisation or an economic strategy and uses management methods that are essentially inspired by notions of cost, income and profitability.

183 As far as the applicants are concerned, as the Commission observed at the hearing, the view cannot be taken that they do not use industrial or commercial methods, within the meaning of Article 182(3) of the CIR, like Oxfam in the case cited in paragraph 180 above. As the Commission recalled at the hearing, the ports develop a business plan, have a structured company policy and also have an HR department. Even if, as the applicants submit, the payments they receive are intended only to cover the costs of certain services, without providing any profit margin, it follows from the actual wording of the Decree on seaport policy and management of 2 March 1999, mentioned by the Commission in recital 46 of the contested decision, that their activities involve the use of industrial or commercial methods. Finally, there is nothing to suggest that their activities contain industrial or commercial operations only on an ancillary basis, within the meaning of that provision, with the result that they also do not fall within the scope of the first situation referred to in Article 182(3) of the CIR.

184 In any event, even if the ports do not pursue a profit motive, the exemption from which they benefit in the present case is based not on Article 182(3) of the CIR, but on Article 180(2) of the CIR, and there is nothing in the file to suggest that the Belgian legislature had carried out a specific assessment of the conditions set out in Article 182(3) of the CIR in respect of the ports. On the contrary, it is clear from paragraphs 156 to 163 above that, without that exemption, they should normally be liable to corporate tax, in accordance with the criteria laid down in Articles 1 and 2 of the CIR.

185 Secondly, as regards the distinguishing criterion based on the form or the legal status of ports, it should be noted, first, that, according to comment 179/16 by the Belgian tax authority, cited in recital 86 of the contested decision, the majority of the Belgian ports should, by virtue of their legal form (SA, SPRL or autonomous municipal authority), also in principle be liable to corporate tax, given that, as a general rule, they engage in either an industrial or commercial business of some kind, or a profit-making occupation, or both at once, and all the profits they make must be considered as resulting from that activity. Secondly, it is clear from recital 103 of the contested decision – without this having been disputed by the parities – that entities which are not public authorities, (such as not-for-profit associations), may be subject to tax on legal persons, which means that the fact of belonging to the public sphere is no longer a relevant criterion in relation to the national rules. Moreover, those associations, in spite of their non-profit-oriented statutory objective, may be subject to corporate tax pursuant to the general criteria if they engage in a business activity or carry out transactions of a profit-making nature.

186 It should be observed, furthermore, in that regard, as the Commission did in recital 98 of the contested decision, that, in accordance with the case-law, a tax exemption accorded on account of the undertaking's legal form and the sectors in which that undertaking carries on its activities, which results from the legislature's objective of favouring organisations regarded as socially

deserving is, in general, considered to be selective (see, to that effect, judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraphs 136 to 138).

187 Thirdly, the Kingdom of Belgium's argument, put forward for the first time in response to a measure of organisation of procedure, cannot be accepted either. The Kingdom of Belgium argued that the Belgian legislature could, in view of the regulatory framework organising the ports in the various regions of the country, have legitimately considered that, on the basis of their rules, the ports were not engaged in a business or transactions of a profit-making nature that are in competition with the private sector, which would have justified them being liable, as a whole, to tax on legal persons.

188 It is apparent from all of the evidence adduced by the Commission during the administrative procedure and before the Court that, in the absence of Article 180(2) of the CIR, the ports should, in principle, be liable to corporate tax (see paragraphs 156 to 163 above). Thus, in so far as they engage in a business or transactions of a profit-making nature, within the meaning of Article 2(5) of the CIR, they are in a comparable factual and legal situation to that of companies which are liable to corporate tax as regards the profits they make from those activities and the exemption from which they benefit under Article 180(2) of the CIR constitutes a difference in treatment which may, in essence, be classified as discriminatory (see the case-law cited in paragraph 126 above).

189 In that regard, the Kingdom of Belgium nevertheless relies on judgment No 151/2016 of the Belgian Cour constitutionnelle (Constitutional Court) of 1 December 2016 which recognised the legitimacy of the legislature's choice to continue to make the ports covered by Article 180(2) of the CIR liable to tax on legal persons. In that judgment, the Cour constitutionnelle (Constitutional Court), in proceedings brought by the intermunicipal associations which had recently been made subject to corporate tax, held as follows:

'Unlike intermunicipal associations and other cooperation structures and project associations which may cover a wide range of activities that could compete with private undertakings, the specific public economic operators covered by Article 180(2) to (13) of the [CIR] are engaged in an activity which is not in competition with private undertakings or which is a matter of specific public interest. The legislature was entitled to take the view that they should therefore be the subject of special tax treatment. The difference in treatment is not without reasonable justification.'

190 However, as the Commission submitted in recital 102 of the contested decision, judgment No 151/2016 of the Belgian Cour constitutionnelle (Constitutional Court) of 1 December 2016 does not concern the exemption from corporate tax in favour of the ports in relation to State aid, but the assessment of the liability to corporate tax of intermunicipal associations, cooperation structures and project associations, in relation to the principles of equality and non-discrimination. The absence of discrimination in national law does not necessarily prejudge the absence of selectivity within the meaning of Article 107(1) TFEU.

191 In any event, even if the argument put forward last by the Kingdom of Belgium (see paragraph 187 above) could be accepted, that would mean that the Belgian tax system is designed to ensure that the legislature may, in a discretionary manner, consider that certain entities do not fall within the scope of corporate tax, even though they are in principle 'companies' engaged in a business or transactions of a profit-making nature, within the meaning of Article 2(5) of the CIR. According to the case-law, if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment or the absence of

competition with the private sector, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation (see, to that effect, judgment of 18 July 2013, *P*, C-6/12, EU:C:2013:525, paragraph 27 and the case-law cited).

192 It must be concluded, therefore, that the Commission was right to find, in recitals 97 to 99 of the contested decision, that the measure at issue was prima facie selective, in so far as it constituted a derogation from the reference framework, consisting of Articles 1 and 2 of the CIR, and it introduced a differentiation between the ports and companies which are liable to corporate tax, even though, in the light of the objective of that reference framework, they are in a comparable factual and legal situation.

***The selectivity of the measure if Article 180(2) of the CIR does not formally constitute a derogation from the reference framework***

193 In the alternative, it is necessary to examine the second assumption made by the Commission in the contested decision in order to establish that the measure at issue is selective. According to that assumption, Articles 1 and 2 of the CIR constitute the legal basis for the non-payment of corporate tax by the ports in that Article 180(2) of the CIR does not formally constitute a derogation from the reference framework (see paragraphs 115 and 116 above).

194 In that regard, even if, as the applicants and the Kingdom of Belgium submit, Article 180(2) of the CIR does not constitute a derogation from the reference framework, in the sense that tax on legal persons is the relevant reference framework for entities, such as the applicants, it should be noted, as the Commission did in recital 90 of the contested decision, that the Belgian income tax regime is itself selective, in so far as it leads to 'certain undertakings' being favoured, namely the ports, even though they are in a comparable factual and legal situation to other undertakings which are subject to corporate tax in respect of the taxation of the profits which they derive from their economic activities (see, to that effect, judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 101 to 107, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 76 to 79).

195 It should be recalled that, in accordance with the case-law, it is not always necessary that a measure derogates from a common tax system in order for it to be established that it is selective, even if it is, in principle, a relevant criterion in that regard (see the case-law cited in paragraphs 132 to 134 above).

196 According to the settled case-law, however, the fact that only taxpayers satisfying the conditions for the application of a measure can benefit from the measure cannot, in itself, turn it into a selective measure (judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59, and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 24).

197 That is why, where it is not possible to identify a measure that derogates from a common tax regime, the criteria forming the basis of assessment which are adopted by that regime must, in order to be capable of being recognised as conferring selective advantages, be such as to characterise the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring 'certain'

undertakings or the production of 'certain' goods within the meaning of Article 107(1) TFEU (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104).

198 However, in the present case, as the Commission observed at the hearing, even assuming that Article 180(2) of the CIR does not derogate from the reference framework, consisting of Articles 1 and 2 of the CIR, that provision identifies by name certain entities, in particular the ports, and thus exempts them unconditionally from corporate tax, even though, with regard to the profits generated from 'economic activities', they are in a comparable situation to that of other undertakings (resident legal persons) which are liable to corporate tax. The ports are therefore identified as a category favoured by those provisions on account of their specific characteristics and the sector of activity to which they belong.

199 Accordingly the Commission was rightly able to take the view in recitals 90 and 91 of the contested decision that, even if Articles 1 and 2 of the CIR constituted the legal basis for non-payment of corporate tax by the ports, that non-payment is a measure which is a priori selective with regard to the economic activities of the ports.

200 It must also be ascertained whether, in accordance with the case-law recalled in paragraph 130 above, the measure at issue, although it is prima facie selective and irrespective of the assumption made in that regard in respect of the reference framework, may nevertheless be justified by the nature or the logic of the tax system of which it forms part, as the applicants and the Kingdom of Belgium submit.

***The complaint alleging that the measure is justified by the nature or the logic of the tax system***

201 In the context of their third plea, the applicants submit, in the alternative, that, even if the liability of the port authorities to tax on legal persons constitutes a derogation from the reference system, it may be justified by the nature and general scheme of the Belgian income tax system.

202 The applicants submit that the overall coherence of the Belgian tax system means that the public authorities are not liable to corporate tax, which is a tax on profits. The legal persons referred to in Article 180 of the CIR, which include the Belgian ports, are not liable to corporate tax in so far as they do not pursue a profit motive and constitute the extension of the State's authority. Moreover, according to the applicants, they do not act with the aim of maximising profits, but must reinvest any surpluses in the public infrastructure. It is therefore only logical that the port authorities fall within the scope of tax on legal persons and not corporate tax.

203 Finally, according to the applicants, the liability of the port authorities to corporate tax is penalising and discriminatory since it increases the tax burden on the port authorities in a disproportionate manner. Since they are liable to corporate tax, the ports are able to deduct only the costs which are associated with the social activity and intended to acquire or retain taxable income. Thus, the costs incurred by the ports for reasons of general interest cannot be deducted under Article 49 of the CIR and are added to the accounting profit as 'non-deductible expenses'. Moreover, there is a risk that such costs may be taxed as 'exceptional or gratuitous advantages' within the meaning of Article 26 of the CIR. Consequently, the fact that the port authorities are liable to corporate tax results in discrimination since entities which are in different situations are treated identically.

204 The Kingdom of Belgium also points out that, even if Article 180(2) of the CIR were to introduce a derogation which favours the Belgian port authorities, which it denies vigorously, it could be justified by the nature and general scheme of the Belgian income tax system. The logic of the Belgian income tax system is based on a distinction between commercial undertakings with a profit-making objective and entities operating in the general public interest. The fact that the port authorities, which are bodies governed by public law pursuing public interest tasks that were previously entrusted to the local authorities, are not liable to corporate tax, is merely an application of that principle.

205 The Commission disputes those arguments.

206 In that regard, it must be observed that the arguments put forward by the Kingdom of Belgium in connection with that complaint coincide broadly with those which were examined in the context of the complaint alleging that the ports are not comparable to undertakings which are liable to corporate tax (see paragraphs 173 to 190 above).

207 It must be recalled that, according to the case-law, a measure which creates an exception to the application of the general tax system may be justified by the nature and overall structure of the tax system if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system. In that connection, a distinction must be drawn between, on the one hand, the objectives attributed to a particular tax scheme which are extrinsic to it and, on the other, the mechanisms inherent in the tax system itself which are necessary for the achievement of such objectives (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 81; of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 69; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraph 48).

208 Thus, although the Court has accepted, in its case-law, that objectives inherent in the general tax system concerned, such as those aimed at avoiding double taxation or the prevention of abuse, could justify an a priori selective tax regime (see, to that effect, judgments of 29 April 2004, *GIL Insurance and Others*, C-308/01, EU:C:2004:252, paragraphs 74 to 76; of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 64 to 76; and of 19 December 2018, *A-Brauerei*, C-374/17, EU:C:2018:1024, paragraphs 50 to 53), it has consistently refused to accept that objectives which are external to the tax system, such as the desire to maintain international competitiveness or to safeguard employment in certain sectors, or even to favour socially deserving organisations, may justify a measure which is a priori selective and thus remove it from the scope of Article 107(1) TFEU (see, to that effect, judgments of 17 June 1999, *Belgium* v *Commission*, C-75/97, EU:C:1999:311, paragraphs 37 to 39; of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 54; and of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraphs 136 to 138).

209 The fact remains that, in the present case, the concepts of general interest, the absence of a profit-making objective and the public or private nature of the entities concerned are unrelated to the nature and logic of the Belgian income tax system, which is based, in respect of the distinction between corporate tax and tax on legal persons, on the definition of 'company', as laid down in Article 2(5) of the CIR (see paragraph 148 above).

210 Accordingly, the Commission did not commit an error of assessment when it took the view, in recital 103 of the contested decision, that, since the decisive criterion for liability to corporate tax or to tax on legal persons was the act of engaging in a 'business' or 'transactions of a profit-making nature' by the entity concerned (see Article 2 of the CIR), the arguments to the effect that the ports would be exempt from corporate tax because they did not distribute their profit but reinvested it, that they pursued an objective beyond their individual interest, that they did not have the statutory objective of the pursuit of profit, that they were public authorities and that they carried out tasks in the general interest were not sufficient to justify more favourable tax treatment than that of other resident companies in relation to the guiding principles of the tax system.

211 In any event, even if the objectives invoked by the Kingdom of Belgium may be covered by the nature or logic of the tax system, it must be stated that they are not pursued in a consistent way by the measure at issue in the present case (see, to that effect, judgments of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 88, and of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraphs 73 and 74).

212 As the Commission noted in recital 103 of the contested decision, other undertakings also reinvest their profit, pursue objectives beyond their individual interest or generate effects on the economy beyond their individual interest without being exempted from corporate tax for those reasons. Conversely, entities which are not public authorities, such as not-for-profit associations, may be subject to 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 no longer a relevant criterion in relation to the national rules.

213 Finally, as regards the applicants' argument that the fact that they are liable to corporate tax is penalising and discriminatory (see paragraph 203 above), it should be observed, as the Commission did in recital 105 of the contested decision, that the exemption from corporate tax from which the ports benefit is not linked to the fact that they are financially disadvantaged by Article 49 of the CIR, since the exemption at issue relates to all profits made and is not limited to profits resulting from the possible non-deductibility of certain costs under Article 49 of the CIR. The exemption provided for in Article 180(2) of the CIR is therefore not justified by a guiding principle of the Belgian tax system, even if Article 49 of the CIR constitutes such a guiding principle.

214 In the light of all of those considerations, the Commission did not commit an error of assessment when it considered, in the contested decision, that the exemption from corporate tax from which the ports benefited procured them a selective advantage in accordance with Article 107(1) TFEU.

215 Accordingly, the second and third pleas must be rejected.

### *The fourth plea in law, regarding, in the further alternative, a request for a transitional period*

216 In the further alternative, the applicants request that the Court grants a transitional period until such time that the Commission has completed its investigation into the tax regime of the various EU ports and, in any event, amounting to one full year, to enable them to adapt to the new situation. In the case concerning taxation of ports in the Netherlands, the Commission granted the legislature and the Netherlands ports a full year to adapt to the new situation. Moreover,

there are indications that similar measures exist in other Member States, and therefore a difference in treatment would harm the conditions of fair competition and strengthen the inequalities between ports in the various Member States.

217 First, the Kingdom of Belgium submits that, by carrying out certain investigations selectively in some Member States only, the Commission thus conferred a competitive advantage on the port authorities of the European Union which are not liable to any form or other forms of tax and are not the subject of any investigation. Secondly, the Kingdom of Belgium, invoking the practical possibilities of adapting the Belgian tax legislation and relying on the example of the Netherlands, considers that the Commission has failed to ensure a level playing field by refusing to grant a transitional period in order to permit that adaptation.

218 The Commission disputes those arguments.

219 As a preliminary point, it should be noted that, by that plea, the applicants are requesting that the Court grants a transitional period and not that it annuls the contested decision on account of a defect by which it is vitiated. It must be recalled, as the Commission has done, that the Court has no jurisdiction to issue directions to EU institutions or, when exercising the review of legality, to assume the role assigned to them (see to that effect, judgments of 22 April 2016, *Italy and Eurallumina* v *Commission*, T-60/06 RENV II and T-62/06 RENV II, EU:T:2016:233, paragraph 43, and of 12 May 2016, *Hamr – Sport* v *Commission*, T-693/14, not published, EU:T:2016:292, paragraph 91).

220 In the reply, the applicants submit, however that the limits of the Court's review do not preclude the annulment of a Commission decision on the ground that it does not provide for an appropriate interim measure. Such a plea may be understood, therefore, as alleging, in essence, infringement of the principle of equal treatment, which should result in the contested decision being annulled in that respect, since that decision contains no transitional period for the Kingdom of Belgium not to make the Belgian ports liable to corporate tax until the Commission has completed its investigation into the tax regime of the various ports in all of the EU Member States.

221 In that regard, first, in so far as the applicants appear to claim that the Commission should have granted a transitional period of one year, as in its 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 2016 L 113, p. 148), the fact remains that it is not apparent from the operative part of that decision that the Commission granted a transitional period to the Kingdom of the Netherlands. On the contrary, Article 2 of that decision provides that 'the Netherlands shall remove the corporate tax exemption for the seaports referred to in Article 1 within 2 months from the date of notification of this Decision, and the corporate tax scheme thus amended shall apply at the latest with effect from the tax year following the adoption of this Decision'. The obligations imposed on the Kingdom of the Netherlands under that decision are therefore similar to those which have been imposed on the Kingdom of Belgium under Article 2 of the contested decision in the present case (see paragraph 22 above), without there being any difference in treatment in that regard.

222 Secondly, in so far as the applicants appear to claim that the Commission should have waited until it closed its investigations into the taxation of ports in all EU Member States, in order not to create additional distortions of competition, it must be held that a similar argument was examined and rejected by the General Court in the judgment of 31 May 2018, *Groningen Seaports and Other*s v *Commission* (T-160/16, not published, EU:T:2018:317).

223 In that judgment, delivered following an action brought by certain Netherlands ports against Decision 2016/634 (see paragraph 221 above), the Court rejected the applicants' argument alleging infringement of the principle of equal treatment, recalling, first of all, that, according to settled case-law, observance of the principle of equal treatment had to be reconciled with the principle of legality, which implied that no one could rely, in support of his claim, on an unlawful act committed in favour of a third party (see judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 116 and the case-law cited).

224 Thus, in order to obtain annulment of the contested decision, the applicants cannot rely on the fact that the Commission did not, at the same time, request that other Member States abolish the aid granted to their ports (see, to that effect, judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 117).

225 In any event, it should be noted that, in accordance with settled case-law, observance of the principle of equal treatment requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. According to equally settled case-law, a breach of the principle of equal treatment as a result of different treatment presupposes that the situations concerned are comparable, having regard to all the elements which characterise them (see judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 119 and the case-law cited).

226 In the present case, there are relative differences, on the one hand, in the progress of the various procedures concerning the tax regimes of the Member States and, on the other hand, in the tax legislation which applies to the ports of the various Member States. Such differences are capable of constituting objective reasons justifying the Commission's adoption of the contested decision and its order that the exemption from which the Belgian ports benefited in the present case be abolished before it closed its investigations into the taxation of ports in all EU Member States (see, to that effect, judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraphs 120 to 130).

227 Moreover, to accept the applicants' line of argument would mean that the Commission had to wait to complete all of its investigations into all of the Member States which grant aid to their ports in order to take its final decisions and order the abolition of that aid, to the detriment of the Member States which do not grant aid to their ports (see, to that effect, judgment of 31 May 2018, *Groningen Seaports and Others* v *Commission*, T-160/16, not published, EU:T:2018:317, paragraph 132).

228 Finally, it must be held that the arguments put forward by the Kingdom of Belgium in support of the applicants must be understood in the same way as those referred to in paragraphs 219 to 227 above. Even if, however, the arguments put forward by the Kingdom of Belgium may be understood as alleging infringement of Article 107(1) TFEU, as regards the concepts of distortion of competition and the effect on trade between Member States, on account of the absence of fair

competition in the European Union, it must be observed, as the Commission has done, that such a plea was not raised by the applicants and therefore constitutes a new plea in law which is inadmissible. It must be borne in mind that, although the fourth paragraph of Article 40 of the Statute of the Court of Justice, which is applicable to the procedure before the General Court pursuant to the first paragraph of Article 53 of that statute, and Article 142(3) of the Rules of Procedure do not preclude an intervener from submitting arguments which are new or different from those used by the party it supports, as otherwise its intervention is limited to restating the arguments put forward in the application, it cannot be accepted that those provisions allow it to alter or distort the context of the dispute defined by the application by raising new pleas in law (see judgment of 12 December 2006, *SELEX Sistemi Integrati* v *Commission*, T-155/04, EU:T:2006:387, paragraph 42 and the case-law cited).

229 Accordingly, the fourth plea in law must also be rejected and the action must be dismissed in its entirety.

## Costs

230 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

231 However, in accordance with Article 138(1) of the Rules of Procedure, Member States which have intervened in the proceedings are to bear their own costs.

232 Since the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission, with the exception of the costs incurred by the Kingdom of Belgium, which is to bear its own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Havenbedrijf Antwerpen NV and Maatschappij van de Brugse Zeehaven NV to bear their own costs and to pay the costs incurred by the European Commission;**

3. **Orders the Kingdom of Belgium to bear its own costs.**

Berardis Labucka Spielmann

Csehi Spineanu-Matei

Delivered in open court in Luxembourg on 20 September 2019.

[Signatures]

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