

# FISCAL STATE AID IN INFRASTRUCTURE PROJECTS: THE CASE OF PIRAEUS PORT IN GREECE

Dr. Vasiliki Athanasaki\*

## A. General Remarks

### A.1. Introduction

The creation and development of the Internal Market has spurred competition and allows for businesses to expand in size to become European players, increasing further economic growth.<sup>1</sup> Modern European economies heavily rely on markets and private undertakings to decide what goods to sell, what markets to expand into, what R&D to undertake and so on. The underlying principle is that free competition based on equal and nondiscriminatory treatment of every undertaking will ensure optimal economic efficiency.<sup>2</sup> However, an uneven playing field may result from aid that Member States grant to companies operating in their territories. These measures may aim to support national champions, attract investments to their territory, etc.<sup>3</sup> Even when the intentions of public authorities

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\* Dr. Vasiliki Athanasaki, Lawyer – Tax Advisor, PhD, Law School of the Athens National and Kapodistrian University of Athens.

1 Jaques Derenne and Massimo Merola (eds), *Economic Analysis of State Aid Rules - Contributions and Limits* (Lexxion 2007).

2 This principle is based on the belief that competitive markets are an important protector of liberty. Daniel Yergin, Joseph Stanislaw, *The Commanding Heights: The Battle for the World Economy* (Simon & Schuster 2002) 16.

3 See Neelie Kroes, ‘*Industrial Policy and Competition Law & Policy*’, Speech at the Fordham University School of Law, New York, 14.09.2006 (IP Press Release SPEECH/06/499). The former Competition Commissioner pointed out that previous experience of supporting national champions shows that results are counterproductive in terms of success in the global economy. Nevertheless, these kinds of policies are widespread among Member States. See also Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wrocław Review of Law, Administration & Economics.

are most laudable, such policies may obstruct the process of economic growth and could lead to market fragmentation, which, in effect, would harm the overall competitiveness of the European Union's economy.<sup>4</sup> State Aid control is thus a vital tool which complements the Internal Market's rules.<sup>5</sup> The European Commission, which constitutes the executive body of the European Union, has stated that "aggressive tax planning" is incompatible with the fundamental principles of the internal market. One of such principles, playing a key role for the coherence of the internal market, is the principle of fair competition.

## A.2 Definition and components of State Aid

State aid is defined as an advantage in any form, including also tax benefits, whatsoever conferred on a selective basis, to undertakings by national public authorities. Therefore, subsidies granted to individuals or general measures open to all enterprises are not covered by this prohibition and do not constitute State aid (examples include general taxation measures or employment legislation).<sup>6</sup> The selectivity criterion is vital for the determination of the existence of state aid.

To be State aid, a measure needs to have these features:

- there has been an intervention by the State or through State resources which can take a variety of forms (e.g. grants, interest and tax reliefs, guarantees, government holdings of all or part of a company, or providing goods and services on preferential terms, etc.);
- the intervention gives the recipient an advantage on a selective basis, for example to specific companies or industry sectors, or to companies located in specific regions
- competition has been or may be distorted;
- the intervention is likely to affect trade between Member States.

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4 These strategies are often described as 'beggar-thy-neighbour', which means a State's remedies for its own economic problems tend to have a negative impact on the economic situation of other States. See Kenneth A Reinert, Ramkishan S Rajan and Amy Jocelyn Glass (eds), *The Princeton Encyclopaedia of the World Economy*. Volume I: A - H (Princeton 2009) 126. See also Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wroclaw Review of Law, Administration & economics.

5 Hans W Friederiszick, Lars-Hendrik Roller and Vincent Verouden, 'EC State Aid Control: an Economic Perspective' in Michael Sdnchez Rydelski (ed), *The EC State Aid Regime - Distortive Effects of State Aid on Competition and Trade* (Cameron May 2007) 145. See also Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wroclaw Review of Law, Administration & Economics.

6 [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html) (accessed 25.5.2018).

Despite the general prohibition of state aid, in some circumstances government interventions are necessary for a well-functioning and equitable economy. Therefore, the Treaty leaves room for a number of policy objectives for which State aid can be considered compatible. The legislation itself stipulates these exemptions. The laws are regularly reviewed to improve their efficiency and to respond to the European Councils' calls for less but better targeted State aid to boost the European economy. The Commission adopts new legislation in close cooperation with the Member States.<sup>7</sup>

The main purpose of EU state aid control, which can also include tax advantages, is to limit the possible negative repercussions of national state aids on European market integration. The most commonly used argument in favour of government subsidies to private firms is the presence of market failures. There are a number of market failure arguments that justify the use of subsidies, most notably the existence of informational asymmetries and other market imperfections, as well as arguments on scale economies.<sup>8</sup> Market failures are likely to be more severe in some geographic areas such as peripheral regions and in certain sectors such as those more dependent on research and development. Thus, subsidies can be expected to vary across countries and sectors. Indeed, at times, subsidies may be considered a more efficient policy instrument than, for example, general taxation measures because they can be better targeted at the sources of market failures.<sup>9</sup> The TEU substantially reduces the freedom of EU Member States to provide direct economic assistance to enterprises.

For the reasons enumerated above, state aid control has become one of the cornerstones of the EU policy for the common market. EU State aid rules are relevant for undertakings with business activities in the Member States of the EU (European Union) and the three countries of the European Economic Area (EEA), namely, Iceland, Liechtenstein and Norway. The term 'undertaking' has been widely construed by the courts but includes, inter alia, activities carried on by partnerships and companies, including activities carried on through a permanent

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7 [http://ec.europa.eu/competition/state\\_aid/overview/index\\_en.html](http://ec.europa.eu/competition/state_aid/overview/index_en.html) (accessed 25.5.2018). See also EU legislation on About Services of General Economic Interest (SGEI),

[http://ec.europa.eu/competition/state\\_aid/legislation/sgei.html](http://ec.europa.eu/competition/state_aid/legislation/sgei.html) (accessed 25.5.2018).

8 See e.g. R. Meiklejohn: *The Economics of State Aid*, in: *European Commission: State Aid and the Single Market*, European Economy - Reports and Studies, Vol. 3, 1999, pp. 25-31.

9 Ioannis Ganoulis and Reiner Martin, *State Aid Control in the European Union - Rationale, Stylised Facts and Determining Factors*, INTERECONOMICS, November/December 2001, pg. 289-297

establishment. EU/EEA States are prohibited<sup>10</sup> from providing certain forms of State aid to undertakings without prior authorization of the European Commission (or the EFTA Surveillance Authority with respect to Iceland, Liechtenstein and Norway).

### A.3 The notion of selectivity

The provision of Article 107(1) TFEU, “(...) *favouring of certain undertakings or the production of certain goods* (...)”, is commonly referred to as the notion of selectivity.<sup>11</sup> The *raison d’être* of this condition is to avoid an enquiry into the entire legislative system of the Member States by reference to rules applicable in other States.<sup>12</sup> In other words, the selectivity criterion serves as a yardstick which enables national measures that may distort the Internal Market to be identified and addressed by EU legislation and distinguishes them from those falling under the State Aid control regime.<sup>13</sup> As Advocate General Nial Fennelly correctly observed in *Ecotrade*, “the alternative would imply a generalised review of all State regulation (...) by reference to the yardstick, not of the normally applicable rules in that State (...), but, presumably, of the regulations in the other Member States.”<sup>14</sup> The Advocate General concluded that “this would be counter-productive, by penalising those States whose general economic organisation and regulation was the most competitive”.<sup>15</sup> It ensues from the above that article 107(1) defines five cumulative criteria:

- Economic advantage

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10 The legal basis for the State aid ban is in the Treaty on the Functioning of the European Union (TFEU) or for Iceland, Liechtenstein and Norway the EEA Agreement. (see PwC Tax Policy Bulletin, EU Fiscal State Aid - a briefing document, 15 October 2014). Article 107 (ex article 87 TEC) of the consolidated version of the Treaty on the Functioning of the European Union (Treaty on the Functioning of the European Union, Part Three, Union Policies and Internal Actions - Title VII - Common Rules on Competition, Taxation and Approximations of Laws - Chapter 1: Rules on Competition - Section 2: Aids granted by states (Official Journal 115,09/05/2008 P. 0091 - 0092) hereinafter referred to as “TFEU”,) lists the necessary cumulative conditions for an action, in order to qualify as stated aid.

11 Andreas Bartosch, ‘*Is there a need for a rule of reason in European State Aid law?: Or how to arrive at a coherent concept of material selectivity?*’ (2010) 47 CMLR 729. See also Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wroclaw Review of Law, Administration & Economics.

12 Ibid.

13 Pesaresi and Van Hoof (n 6) 7, Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wroclaw Review of Law, Administration & Economics.

14 C-200/97 *Ecotrade* (nil), Opinion of AG Fennelly, para 25, Jakub Kociubinski, *Selectivity Criterion in State Aid Control*, De Gruyter Open, Wroclaw Review of Law, Administration & Economics.

15 Ibid.

- Certain undertakings (selectivity)
- State Resources
- Distortion of competition
- Effect on trade between Member States

Moreover, in its assessment under Article 107(3) TFEU, certain types of aid are defined, that could be compatible with the internal market. These types of aid relate to the following:

- Disadvantaged regions
- Important project common interest
- Serious disturbance in economy
- Development of economic activities/areas
- Culture and heritage conservation

Furthermore, article 108 TFEU<sup>16</sup> (ex Article 88 TEC) defines the procedure followed by the Commission, which keeps under constant review all systems of aid existing in the Member States, especially in case the Commission finds that aid granted by a State or through State resources is incompatible with the internal market, pursuant to the criteria of Article 107 as well as the whole infringement procedure.

Finally, Article 109 TFEU (ex Article 89 TEC) provides that *“The Council, on a proposal from the Commission and after consulting the European Parliament, may make any appropriate regulations for the application of Articles 107 and 108 and may in particular determine the conditions in which Article 108(3) shall apply and the categories of aid exempted from this procedure”*.<sup>17</sup>

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<sup>16</sup> In Greece, the below cases of infringement procedures have been based upon article 108(2), namely: *Case T-150/12 Greece v Commission*, regarding recovery of state aid from cereal producers and unions of agriculture associations; *Cases T-233/11 and T-262/11 Greece v Commission*, regarding recovery of state aid granted to the mining company Ellinikos Chrysos; and *Case C-354/10 Commission v Greece*, regarding failure to take, within the period prescribed, the measures necessary for recovery of aid referring to a tax-exempt reserve fund.

<sup>17</sup> Apart from the above specific provisions, paragraph 3 of article 3 (ex article 2) of the Treaty on European Union (hereinafter referred to as “TEU”, Consolidated version of the Treaty on European Union - TITLE I: COMMON PROVISIONS, Official Journal 115, 09/05/2008 P. 0017-0017), states that the Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and

## **A.4 Types of State Aid**

State aid mainly takes place through the granting of certain state aid privileges by member states (for example subsidies or tax reliefs, taking the form of fiscal state

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social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance, whereas paragraph 6 prescribes that the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties. Furthermore, several provisions of the TFEU also indirectly refer to the state aid issue, which mainly consist of the following articles ([http://ec.europa.eu/competition/state\\_aid/legislation/provisions.html](http://ec.europa.eu/competition/state_aid/legislation/provisions.html), accessed 5/6/2018): Articles 3,4,5 and 6 of the TFEU, Article 14 of the TFEU, Article 42 of the TFEU, Article 50 (1) and (2) of the TFEU- Article 93 of the TFEU, Article 106 of the TFEU, Article 119 of the TFEU and Article 346 of the TFEU. Apart from the treaty provisions, relevant procedural regulations are also in place by virtue of Council Regulation No 659/1999 of 22 March 1999, which lays down detailed rules for the application of Article 93 of the EC Treaty (Official Journal L 83/1, 27.03.1999, p. 1-9) and which was amended by Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 (OJ L204, 31.07.2013, p. 15) and replaced by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (Text with EEA relevance) . For the implementation of Council Regulation No 659/1999, Commission Regulation (EC) No 794/2004 of 21 April 2004 (Official Journal L 140, 30.04.2004, p. 1-134) came into force and was subsequently amended by several Commission Regulations. Commission Regulation (EU) No 372/2014 of 9 April 2014 amending Regulation (EC) No 794/2004 as regards the calculation of certain time limits, the handling of complaints, and the identification and protection of confidential information (Official Journal L 109,12.4.2014, p. 14), Commission Regulation (EC) No 1125/2009 of 23 November 2009 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III.2, Part III.3 and Part III.7 of its Annex I (Official Journal L 308, 24.11.2009), Corrigendum to Commission Regulation (EC) No 794/2004 of 24 April 2004 implementing Council Regulation (EC) No 659/1999 laying detailed rules for the application of Article 93 of the EC Treaty, OJ L 25,28.1.2005, p. 74, Corrigendum of the Corrigendum to Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty OJ L 131, 25.5.2005, p. 45, Commission Regulation (EC) No 1627/2006 of 24 October 2006 amending Regulation (EC) No 794/2004 as regards the standard forms for notification of aid OJ L 302, 01.11.2006, p. 10-28 (Amendment concerning the standard forms for notification of regional aid), Commission Regulation (EC) No 1935/2006 of 20 December 2006 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (New notification forms following adoption of the Community guidelines for State aid in the agriculture and forestry sector 2007 to 2013, published in OJ C 319) Official Journal L 407, 30.12.2006, p.1, Commission Regulation (EC) No 271/2008 of 30 January 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, Official Journal L 82, 25.03.2008, p.1, Commission Regulation (EC) No 1147/2008 of 31 October 2008 amending Regulation (EC) No 794/2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, as regards Part III. 10 of its Annex 1, OJ L 313,22.11.2008, p. 1.

aid in the second case), to certain companies, operating within a member state in the internal market, without prior authorization by the European Commission and, as such, it is being forbidden as unlawful.

Broadly speaking, the most common and straightforward example of State aid is a subsidy provided directly to a certain undertaking. However, State aid can also consist of a reduction of taxes otherwise due (e.g. a tax exemption), insofar as this provides an advantage to certain undertakings (i.e. is selective). This is referred to as ‘fiscal’ State aid<sup>18</sup>. More specifically, fiscal State aid takes place mainly in two forms: (i) a tax measure or regime which provides a selective advantage, and (ii) an individual concession granted to a taxpayer (e.g. through the use of a tax ruling or via a settlement).

However, it should be mentioned that not in all circumstances state aid granted by EU or EEA Member States is considered as unlawful and, thus, incompatible with the EU law. The responsible body for the determination of whether a specific case of granting aid is compatible with the internal market is the EU Commission and EFTA Surveillance Authority, which monitors compliance with European Economic Area rules in Iceland, Liechtenstein and Norway, enabling them to participate in the European internal market<sup>19</sup>. In case of aid granted without such prior authorization by the European Commission or the EFTA Surveillance Authority, such an aid should be considered as *prima facie* unlawful.

In case the European Commission (or the EFTA Surveillance Authority) ultimately concludes that the state aid granted is unlawful, given that the local law gave an unjustifiable selective tax advantage, then the State is ordered to recover the unlawful tax benefit from the taxpayer. For the quantification of the tax advantage and the calculation of the aid to be recovered, a comparison of the tax which should ‘normally’ have been paid - i.e. without application of the selective tax measure - with the tax which has actually been paid should principally take place.

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18 See, for example, European Commission, State aid: Commission finds Hungarian advertisement tax in breach of EU rules (available at: [http://europa.eu/rapid/press-release\\_IP-16-3606\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3606_en.htm), accessed 7.6.2018). The same question was the subject of the ECJ case against the German nuclear fuel duty in *Kernkraftwerke Lippe-Ems*, where the ECJ held that the non-taxation of undertakings using other fuels was not an exception and thus not state aid because such other undertakings were not comparable with nuclear power undertakings with a view to the specific objectives of the nuclear fuel duty and how it was implemented; see ECJ 4 June 2015, *Case C-5/14 – Kernkraftwerke Lippe-Ems*, ECLI:EU:C:2015:354, paras. 78 f., ECJ 8 December 2011, *Case C-81/10 P – France Télécom*, ECLI:EU:C:2011:811, paras 16–18, ECJ 15 November 2011, *Case C-106/09 P – Gibraltar*, ECLI:EU:C:2011:732. See also Judgment of 2 July 1974, *The Commission v Italy*, *Case C-173/73*, ECLI:EU:C:1974:71, paragraph 13.

19 See <http://www.eftasurv.int/> (accessed 7.6.2018).

## A.5 State aid, Transfer Pricing Rules and APAs

At the beginning of 2014, the European Commission announced a new focus on fiscal State aid<sup>20</sup> which has been triggered by the unfolding OECD/G20's Base Erosion and Profit Shifting (BEPS) Action Plan and in the context of the EU's own agenda to crackdown on aggressive tax planning, tax avoidance and tax evasion by multinational companies. In concrete terms, this has resulted in the opening of a series of investigations into specific tax rulings and tax regimes. These cases have attracted a considerable amount of attention from the European Commission and they mainly relate to transfer pricing and allocation of profit rules.<sup>21</sup> More specifically, the European Commission has raised an issue as per whether the deviation from the arm's length standard could ultimately be found to be also unacceptable from a State aid perspective.<sup>22</sup> Nevertheless, apart from transfer pricing rules, special tax regimes that are applicable in particular member states may also have adverse tax implications, since any measures, arrangements or agreements, which result in a selective reduction of tax can lead to an adverse State aid ruling. This could be the case also with regard to Advance Pricing Agreements (APAs), which have recently triggered formal investigations at EU level, initiated by the Commission<sup>23</sup>.

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- 20 See, for example, investigations regarding tax rulings obtained by Apple, Starbucks and Fiat from the Irish, Dutch and Luxembourg tax authorities. Therefore, it is obvious that EU state aid rules and, more specifically, fiscal state aid is currently a hot topic in the world of International Taxation. See Anna Gunn & Joris Luts, *Tax Rulings, APAs and State aid: Legal Issues* (2015), EC Tax Review, 2015-2, Volume 24, Journal 2, Kluwer Law International BV, pgs. 119-125 (<https://www.kluwerlawonline.com/abstract.php?id=ECTA2015012>, accessed 5.6.2018).
- 21 PwC Tax Policy Bulletin, *EU Fiscal State Aid - a briefing document*, 15 October 2014
- 22 *Starbucks case*, Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (notified under document C(2015) 7143). See also related court decisions T-760/15, T-636/16 and T-877/16.
- 23 See, for example, Commission Final Decision of 21 October 2015 on Fiat (SA.3875), C(2015) 7152 Final, [2016] O.J. L351 at Recitals 34-36, ["FFT Final Decision"], Commission Final Decision of 30 August 2016 on Apple (SA.38373), C(2016) 5605 Final, [2017] O.J. L187 at Recitals 45-52, ["Apple Final Decision"], Commission Final Decision on the Excess Profit Exemption Scheme (SA.37667), C(2015) 9837 Final, [2016] O.J. L260 at Recitals 13-22, ["Excess Profits Final Decision"]. The Commission investigation case in FFT concerns a tax ruling on transfer pricing granted by the Luxembourg Tax authorities in 2012. The ruling endorses a method for the allocation of profits to FFT. The Commission investigation in the Apple case focuses on an individual tax ruling in 1991 and 2007 purportedly granted to the Irish branches of two Apple associated companies – Apple Sales International [ASI] and Apple Operations Europe [AOE] by Revenue in Ireland. The 'Excess Profit tax Ruling System' allowed Belgian resident companies that are part of a multinational group and Belgian permanent establishments of foreign resident companies that are part of multinational groups to reduce their tax base in Belgium by allowing them to deduct from their actual recorded profits, excess profits.



## B. Fiscal State Aid in infrastructure projects - *The Cosco Case*

### B.1 General Framework

According to the Commission Decision of 23.03.2015 (No. 2015/1827) on State Aid<sup>24</sup>, certain fiscal benefits granted by Greece<sup>25</sup> in favour of port operator Piraeus Container Terminal S.A.(PCT) and its parent company Cosco Pacific Limited gave the companies an undue advantage over their competitors in breach of EU state aid rules. These benefits included tax exemptions and preferential accounting treatment<sup>26</sup>. The companies were required to pay back the advantage received. To avoid further distortions of competition, the Greek authorities are also expected to

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24 SA 28876 (2012/C) (ex CP 202/2009)

25 The Greek authority responsible for overseeing national state aid issues is the Central State Aid Unit (CSAU), which constitutes a directorate of the Ministry of Finance and was established under Law 4152/2013 (the Law). CSAU is also responsible for the monitoring of cases regarding compliance with decisions of the European Commission ordering the recovery of a state aid. Recently enacted Law 4399/2016 regulates the legal framework for the establishment of aid regimes, aimed to support private investments for Greece's regional and economic development, subject to the provisions of EU Regulation 651/2014, declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty. There are no specific provisions regarding the application or enforcement of EU state aid rules with the exception of procedural rules (article 22 of Law 4002/2011) for the recovery of aid, following a decision by the European Commission or the Court of Justice of the EU. See Anastasia Dritsa and Konstantinos Sakellaris, Kyriakides Georgopoulos Law Firm, *State Aid 2017, Greece*, (last verified on Wednesday 21st February 2018), Global Competition Review ("GCR"), <https://globalcompetitionreview.com/iurisdiction/1004482/greece> (accessed 25.5.2018).

26 Namely i) Exemption from income tax on interest accrued until the date of commencement of operation of pier III; ii) Right to VAT credit refund irrespective of the stage of completion of the contract object and definition of the notion of "investment good" for the purposes of VAT rules; right to arrear interests from the first day following the 60th day after the VAT refund request; iii) Loss carry forward without any temporal limitation; iv) Choice among three depreciation methods concerning the investment costs of the reconstruction of Pier II and the construction of Pier III; v) Exemption from stamp duty on the loan agreements and any ancillary agreements for the funding of the project; vi) Exemption from taxes, stamp duties, contributions and any rights in favour of the State or third parties on the contracts between the creditors of the loan agreements under which are transferred the obligations and rights resulting therefrom; vii) Exemption from stamp duties for any compensation paid by Port Piraeus Authority ("PPA") to PCT under the Concession contract, which is outside the scope of the VAT code; viii) Protection under the special regime for foreign investments. In the same decision the Commission concluded that Greece did not grant State aid by exempting PCT from rules concerning forced expropriation.

cease granting these advantages to PCT from now on. The text of Commission's decision was published on 12.06.2015.<sup>27</sup>

More specifically, the Concession Agreement between Piraeus Port Authority S.A. (hereinafter referred to as "PPA") and Piraeus Container Terminal S.A. ("PCT" or "SEP", which stands for the respective Greek acronym), a subsidiary of special purpose of COSCO Pacific Limited ("COSCO")<sup>28</sup>, consists of two parts: (a) The text of the Agreement between PPA and COSCO, concerning the concession of Pier II and the construction of the Eastern Pier III of the Container Terminal, signed on 25.11.2008 and (b) Articles 2 and 3 of Law 3755/09: The decision of the General/Directorate of Competition concerns exclusively Article 2 (financial and tax issues) and not Article 1, which is the conventional part of the Convention PPA / COSCO. It should be noted that the Decision does not apply to any part of the subsequent expansion the Concession Agreement through amicable settlement to the Western Pier III of the Container terminal ratified by Law 4315/14.

Greece appealed against the abovementioned decision on 2 June 2015 before the General Court (Case T-314/15) for the annulment of such decision. The pleas in law and main arguments of Greece can be summarized, as follows:

- The first plea in law for annulment was a claim of infringement of the rights of defence of Greece. In support of that plea, Greece invoked the change in the factual and legal basis for the procedure between the decision to initiate the procedure and the decision declaring that aid had been granted.
- The second plea in law for annulment is a claim of misinterpretation and misapplication of Article 107(1) TFEU in relation to the concept of State aid. In support of that plea, Greece invokes the absence of economic advantage and the absence of selectivity with respect to the measures at issue. Furthermore, Greece also particularly highlights the fact that the defendant failed to define correctly the reference system of the measures at

<sup>27</sup> [http://ec.europa.eu/competition/state\\_aid/cases/245376/245376\\_1659472\\_210\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/245376/245376_1659472_210_2.pdf) (accessed 27.1.2017) and [https://ec.europa.eu/commission/index\\_en](https://ec.europa.eu/commission/index_en) (accessed 5.6.2018). To be noted that subsequently another Commission Decision was issued ( Commission Decision of 7.3.2016 on state aid SA 28876 - 2012/C (ex CP 202/2009) [implemented by Greece for Container Terminal Port of Piraeus], Brussels, 7.3.2016 C(2016) 1978 final), according to which "*The Decision in case SA.28876 regarding Container terminal Port Piraeus & Cosco Pacific Limited (OJ L 269, 15.10.2015, p. 93) is amended as follows: - In the seventh numbered point of Article 1, a second sentence is added: 'this measure does not cover compensation to PCT due to the activation of a penalty clause of the Concession contract, where anyway no stamp duty is due;'*" See [http://ec.europa.eu/competition/state\\_aid/cases/245376/245376\\_1877909\\_265\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/245376/245376_1877909_265_2.pdf) (accessed 12.6.2018).

<sup>28</sup> Such concession agreement was ratified by the L.3755/2009.

issue and failed to assess the substantially distinct legal and factual situation of the undertakings which are active in public infrastructure projects in the light of the particular characteristics of the concession agreements with that subject matter. Last but not least, according to Greece, the defendant disregarded the basic and guiding principles of the general tax system which the measures at issue manifestly serve.

- The third plea in law for annulment was a claim of erroneous, deficient, and contradictory statement of reasons with respect to the determination of State aid. In support of that plea, Greece invoked the erroneous, deficient, and contradictory statement of reasons, as regards: (a) the granting of State aid through State resources, (b) the existence of a selective advantage, (c) the comparison with similar tax related provisions with respect to concession agreements for public infrastructure projects which the Commission approved, and (d) distortion of competition and the effect on trade between Member States.
- The fourth plea in law for annulment was a claim of misinterpretation and misapplication of Article 107(3) TFEU in relation to the compatibility of the aid with the internal market. In support of that plea, Greece invoked the defendant's erroneous assessment with respect to the existence of compatible regional aid and with respect to whether the aid was necessary and proportionate and had an incentive effect in achieving an objective of common interest.
- The fifth plea in law for annulment was a claim of erroneous quantification of the aid and infringement of the general principles of EU law at the stage of recovery. In support of that plea, Greece invoked the erroneous methodology employed by the defendant with respect to the quantification of the aid and infringement of the principle of equal treatment.

## B.2. Factual Background

The company PPA S.A. was established by law 2688/1999, through conversion of a body governed by public law, namely PPA created in 1930, into a public utility company. On 13 February 2002 a 40-year concession agreement was signed between the Greek State and PPA. This agreement was ratified by law 3654/2008. According to this agreement, PPA was granted the exclusive right of use and exploitation of land, building and infrastructure of the port land zone of the Port of Piraeus<sup>29</sup>. In particular, the concession agreement provides for the right of PPA to sub-contract the operation of part of the port to a third party against payment<sup>30</sup>.

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29 Article 1.1 of the concession agreement concerning its scope, and Section 3 on the right of use and exploitation.

30 Article 3.1 .iii of the concession agreement.

The Port of Piraeus is divided into two main areas: the commercial port and the passenger port. The commercial port has 3 terminals; the container terminal, the cargo terminal and the automobile terminal. The container terminal has two piers. PPA decided to expand the infrastructure of the container terminal with the extension of Pier I, the upgrade of equipment of Pier II and the construction of Pier III.

It is worth mentioning that, according to a Commission decision<sup>31</sup>, the Commission had already concluded that the State aid which Greece was then planning to implement in favour of PPA, in relation to the construction of Pier I in the Container Terminal of the Port of Piraeus amounting to EUR 35 million, was compatible with the internal market within the meaning of Article 107(3)(c) of the TFEU. Thus, implementation of the State aid amounting to EUR 35 million was

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31 See Commission Decision of 18.12.2009 on state aid C 21/09 (ex N 105/2008, N 168/2008 and N 169/2008) – Greece, Public financing of infrastructure and equipment at the Port of Piraeus, C (2009) 10374 final, according to which “1) *In view of the above, the Commission considers that investment in port facilities – and more concretely, in container shipping infrastructure – featured with elements of State aid contributes to an objective of common interest (par. 101). (...) The Commission also concludes that the State aid in question has an incentive effect (par. 104) and that there is a need for State intervention in order to ensure the construction of Pier I (par. 108). The Commission considers that the State aid in question is proportional to the objective of developing the Port of Piraeus, it is limited to the minimum necessary, and does not give an excessive advantage to PPA (par. 111) and that that the public financing of the construction of Pier I in the Container Terminal will not distort competition or affect trade between Member States to an extent contrary to the interest of the Union (par. 120), given that, among others, the Commission takes note of the fact that the concession of part of the port services will have particularly positive consequences on intra-port competition since it will establish real competition between the port services provided by COSCO and PPA. As the Greek authorities indicated, this is the first case in Greece to establish such competition which should enhance both the efficiency and quality of the provided services (par. 114)*”. The notified measures subject to the formal investigation procedure concern the partial financing through State resources of the following port infrastructure projects: a) The construction of a jetty in Pier I of the Port of Piraeus (case N 168/2008); and b) The acquisition of loading and unloading equipment in the Container Terminal section of the Port of Piraeus put at the disposal of both COSCO and PPA (case N. 169/2008). In its decision of 13 July 2009 (OJ C 245, 13.10.2009, p. 21) the Commission considered that the public financing of the construction of the passenger bridge in the Passenger Port did not constitute State aid and that the public financing of the construction of the two jetties in the Passenger Port constituted State aid which was compatible with the internal market. Consequently, the two measures covered by case N 105/2008 were not subject to the formal investigation procedure. The decision referred to above points out, however, that the public financing of the acquisition of loading and unloading equipment in the Container Terminal section of the Port of Piraeus (case N 169/2008) requires further, more detailed examination. It is therefore excluded from the scope of the current decision and will be dealt with in a separate later Commission decision. The present decision therefore covers exclusively the construction of a jetty in Pier I of the Port of Piraeus (case N 168/2008) and does not prejudge the Commission’s future assessment of the State financing of the acquisition of equipment in the Container Terminal (N 169/2008).

accordingly authorized. Such a Commission decision seems to form a precedent which is now been overturned by the subsequent Commission decision as well as the General Court's ruling, as explained here below.

### B.3. The Commission decision 2015/1827

The main question was whether a special tax regime of several benefits in favour of the concession holder of a part of the Port of Piraeus, the Piraeus Container Terminal S.A., a subsidiary of special purpose of COSCO Pacific Limited, constituted state aid measures. The Commission referred extensively to the exception of the logic of the Greek tax system. Indeed, according to the jurisprudence of the CJEU a measure *prima facie* selective can be ultimately been considered as non-distortive, if it is in line with the basic or guiding principles governing the relevant tax system in question<sup>32</sup>. This jurisprudentially accepted category of exception is rather opaque and its limits of application are not always of crystal clear in terms of clarity.

According to the argumentation of the Greek authorities, the special tax regime in question was consistent with the basic principles of the Greek tax system since the special taxation rules imposed:

- (a) were intended to pursue a public policy objective consistent with the basic principles of the general tax system, in particular the principle of proportionality, the economy and the revenue raising objective of the tax system and key policies of Greece regarding the creation of public infrastructure,
- (b) aimed to ensure that objectively different situations are treated differently, thus applying the principles of equality and proportionality and ensuring that the results intended by the tax system are not distorted,
- (c) were applied upon the basis of objective criteria and
- (d) were designed specifically as the legislative mechanism addressing key financial concerns arising in the implementation of public infrastructure projects, to the extent that the respective risks could jeopardize the private sector participation.

The Commission has not endorsed these arguments. The basic reason for that was the fact that, according to the Commission, the exception referring to the logic of the fiscal system could not admittedly refer to goals of public policy, such as those

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32 See *inter alia* CJEU, *Joined Cases C-78/08 to C-80/08, Paint Graphos and others* [2011] ECR I-7611, paragraph 69 and 70, *Case C-88/03 Portugal v Commission* [2006] ECR I-7115, paragraph 81; *Case C-279/08 P, Commission v Netherlands (NOx)* [2011] ECR I-7671; *Case C-487/06 P British Aggregates v Commission* [2008] ECR I-10515.

alleged by the Greek government (promotion of investments, mitigation of the risks of private participations to the implementation of important infrastructure projects etc.) but must refer rather to reasons inherent to the functioning of the tax system in question.<sup>33</sup>

Thus, the Commission proceeded in a restrictive way refusing to transform the exception of the logic of the tax system to a “mandatory requirements” theory in the field of application of the rules of State Aid. One could expect that the decision of the Commission, given that it was confirmed by the Court, would pave the way for contesting special tax regimes for other infrastructure investments, although some limits could be imposed, especially in terms of possible recovery, for reasons of legal certainty and protection of legitimate expectation of the beneficiaries. However, as these principles are, in the field of State Aid Law, interpreted constantly in a restrictive way, it is, in the first place, a matter for the Commission to trace the limits.<sup>34</sup>

As a point of departure, one must note that there is no legal definition of ‘general’ or ‘selective’ measures in the *acquis communautaire*.<sup>35</sup> While the notion of ‘selectivity’ is largely based on the wording of Article 107(1) TFEU, then, a contrario with reference to ‘apparently general’ measures one must indicate that the aid is not aimed at one or more specific recipients defined in advance, but rather subject to a series of objective criteria pursuant to which it may be granted to a potentially indefinite number of operators who are not exhaustively identified.<sup>36</sup> It is then a measure that serves the whole economy, effective on the entire territory of a given Member State, and is applicable to all undertakings in all sectors.<sup>37</sup>

33 *CJEU, Joined Cases C-78/08 to C-80/08 Paint Graphos and others* [2011] ECR I-7611, paragraphs 69 and 70; *Case C-88/03 Portugal v. Commission* [2006] ECR I-7115, paragraph 81; *Case C-279/08 P, Commission v Netherlands (NOx)* [2011] ECR I-7671; *Case C-487/06 P British Aggregates v. Commission* [2008] ECR I-10515.

34 [http://www.klcclawfirm.com/uploads/CRR\\_2015\\_3 .pdf](http://www.klcclawfirm.com/uploads/CRR_2015_3.pdf) (accessed 27.1.2017).

35 Phaëdon Nicolaïdes, Mihalis Kekelekis and Philip Buyskes, *State Aid Policy in the European Community: A Guide for Practitioners* (Kluwer Law International 2005) 25.

36 Ebner and Gambaro (n 7) 27. Andrea Biondi, Piet Eeckhout, James Flynn (eds) *The Law of State Aids in the European Union* (OUP 2004) 3. It is worth mentioning that the ECJ hardly provides a definition of ‘general’ measures, thus the discussed notions are purely doctrine based. They are largely based on the AG’s opinions. See *C-308/01 GIL Insurance Ltd and Others v Commissioners of Customs and Excise* [2004] ECR I-4777, Opinion of AG Geelhoed and *C-241/94 France v Commission of the European Communities (Kimberly Clark Sopalin)* [1996] ECR I-4551, Opinion of AG Jacobs.

37 Leigh Hancher, Tom Ottervanger and Piet-Jan Slot (eds), *EC State Aids*, 3rd Edition (Sweet & Maxwell 2006) 53. See also Commission Notice on the application of the State Aid rules to measures relating to direct business taxation [1998] OJ C384/3, Jakub

As a rule of thumb, a measure in question is hence selective if it produces advantages exclusively for certain undertakings or certain sectors.<sup>38</sup> To determine that, it is necessary to establish a point of reference for comparison.<sup>39</sup> As per ECJ case law, such a comparison must be made with operators which are in a 'comparable legal and factual situation' in light of the objective pursued by the given State measure.<sup>40</sup> Furthermore, this comparison must relate to an undertaking in the same Member State.<sup>41</sup> It is not sufficient for a measure to be considered selective simply because it produces an advantage for an undertaking in one Member State which is not enjoyed by the operators in a corresponding position located in other EU states.<sup>42</sup> It goes without saying that aid may not be compatible

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Kociubinski, *Selectivity Criterion In State Aid Control*, Wrocklaw Review of Law, Administration & Economics, De Gruyter Open, Volume 2, Issue 1, published 9 April 2014, pg. 1-15, DOI: <https://doi.org/10.2478/wrlae-2013-0016> (accessed 07.06.2018).

38 *T-55/99 CETM* (n 11), para 39; *T-152/99 HAMSA* (n 16), para 156; *T-210/01 British Aggregates Association v Commission of the European Communities* [2006] ECR 11-2789, para 105.

39 *C-189/91 Petra Kirsammer-Hack v Nurhan Sidal* [1993] ECR 1-6185, Opinion of AG Darmon, para **58-61**; *C-353/95 Tiered Ladbroke SA v Commission of the European Communities* [1997] ECR 1-7007, Opinion of AG Cosmas, para 30; *C-88/03 Portugal v Commission of the European Communities (Azores)* [2006] ECR 1-7115, para 56.

40 *C-143/99 Adria Wien* (n 11), para 41; *C-409/00 Spain v Commission of the European Communities* [2003] ECR 1-1487, para 47; *C-308/01 GIL Insurance* (n 25), para 68; *C-172/03 Heiser* (n 17), para 40; *C-88/03 Azores* (n 27), para 54 and 56; *T-233/04 Netherlands v Commission of the European Communities* [2008] ECR 11-591, para 88 - 96. See also Judgment of the Court (Grand Chamber) of 21 December 2016, *C-20/15 P, European Commission v World Duty Free Group SA and Others*, concerning amortisation of goodwill resulting from acquisitions by undertakings resident for tax purposes in Spain of shareholdings of at least 5% in undertakings resident for tax purposes outside Spain, the concept of 'State aid' and the condition relating to selectivity. To be noted that the Court (Grand Chamber) has set aside the judgments of the General Court of the European Union of 7 November 2014, *Autogrill España v Commission (T-219/10, EU:T:2014:939)*, and of 7 November 2014, *Banco Santander and Santusa v Commission (T-399/11, EU:T:2014:93)* and referred the cases back to the General Court of the European Union. The said decision indicates another increasing focus is on general differences in the treatment of economic operators. See German Federal Ministry of Finance, Tax benefits and EU state aid control: The problem of and approaches to resolving the conflict of jurisdiction with fiscal autonomy Report of the Advisory Board to the Federal Ministry of Finance, October 2017, [https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Ministry/Advisory Board/2018-02-07-tax-benefits-and-eu-state-aid-control-download.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Ministry/Advisory Board/2018-02-07-tax-benefits-and-eu-state-aid-control-download.pdf?__blob=publicationFile&v=2) (accessed 7.6.2018).

41 *T-308/00 Salzgitter AG v Commission of the European Communities* [2004] ECR 11-1933, para 81. This part was approved on appeal in *C-408/04 P Commission of the European Communities v Salzgitter AG (Salzgitter II)* [2008] ECR 1-2767, para 109.

42 Kelyn Bacon (ed), *European Community Law of State Aid* (OUP 2009), para 2.1112.

with the Internal Market if it solely seeks to establish parity with the situation in other Member States.<sup>43</sup>

#### B.4. The Court decision

The General Court, with its Judgement of 13 December 2017 (*Greece v Commission, Case T-314/15*<sup>44</sup>), dismissed the appeal of Greece aiming at the annulment of Commission Decision 2015/1827, concerning State aid that had been granted to Piraeus Container Terminal and Cosco Pacific, in its entirety. This is a rich and wide-ranging judgment because it deals both with the concept of State aid in situations where Member States try to remedy alleged market failure and with the issue of compatibility of State aid.<sup>45</sup>

A core argument of Greece was that no advantage arises, given that the beneficial tax measures implemented (including the postponement of tax payments, specific tax exemptions and other tax advantages) played a purely compensative role aiming at offsetting structural disadvantages.<sup>46</sup> However, the Court rejected that argument, stating that this was not related to the characterization of the tax measures as state aid, invoking its judgment in case C-211/15P, *Orange v Commission* as well as *Altmark* conditions<sup>47</sup> about services of general economic

43 Ibid, Jakub Kociubinski, *Selectivity Criterion In State Aid Control*, Wrocklaw Review of Law, Administration & Economics, De Gruyter Open, pg. 1-15

44 OJ C 279, 24.8.2015.

45 Phedon Nicolaides, *Structural Disadvantages and Regional Aid*, State Aid Hub EU, 09.01.2018, <http://stateaidhub.eu/blogs/stateaiduncovered/Dost/9121> (accessed 24.5.2018).

46 See also Court judgment in case T-157/01, *Danske Busvognmaend v Commission* ("Combus").

47 In its 2003 *Altmark* judgement (Case C-280/00, *Altmark Trans GmbH and RegierungsprSsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH*), the European Court of Justice held that public service compensation does not constitute State aid when four cumulative conditions are met:

- the recipient undertaking must have public service obligations and the obligations must be clearly defined;
- the parameters for calculating the compensation must be objective, transparent and established in advance the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit;
- Where the undertaking which is to discharge public service obligations is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs of a typical well-run company.

Where at least one of the *Altmark* conditions is not fulfilled, the public service compensation will be examined under State aid rules. See:



interest, which, according to the Court, it is not the case at hand.

As per the issue of selectivity, the Court ruled that this criterion is different from the issue of economic advantage and that a core distinction should be effected between a measure falling under the general system and an individual aid. In the second case, the economic advantage implies that the measure in question is in principle selective. In this sense, it is required that the advantage is granted selectively and that it results in a more advantageous position for some enterprises compared to others<sup>48</sup>. The Court concluded that the measures under review were individual and applied solely to PCT.

Another crucial factor in this respect is the determination of the applicable general or common tax regime, within the frame of a three-stage-approach applied for the identification of a selective tax measure. Such a standard three-stage-approach consists in:

- a) the selection of the reference or normal tax system (“reference stage”),
- b) the assessment of any potential derogation or deviation of the tax measures under review from the standard reference tax system (“derogation stage”) and
- c) the assessment of any potential justification of such deviation/derogation, with reference to the nature and/or general logic of the tax system (“justification stage”).<sup>49</sup>

According to the General Court, the Greek Income Tax Code, the Greek VAT Code as well as the Greek Stamp Duty Code were correctly determined as the reference system of the case at hand, instead of the special tax provisions specifically enacted in case of huge public infrastructure projects, having taken place in Greece within the previous years<sup>50</sup>. The Court considered that it could not be supported that a separate ad hoc reference tax system as regards infrastructure constructions and concessions has been generated, although all major public infrastructure projects in Greece (such as the construction of the new Athens international airport, the Rio-Antirrio bridge and the Attiki motorway) had been carried out pursuant to national legislation which granted the same or particularly

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[http://ec.europa.eu/comDetition/stateaid/overview/public\\_services\\_en.html](http://ec.europa.eu/comDetition/stateaid/overview/public_services_en.html) (accessed 25.5.2018).

48 Court Judgments of 4 June 2015, *Commission vs. MOL*, C-15/14 P, EU:C:2015:362, par. 59 and 30 June 2016, *Belgium vs. Commission*, C-270/15 P, EU:C:2016:489, par. 48.

49 Court Judgements of 21 December 2016, *Commission vs World Duty Free Group SA etc.*, C-20/15 P and C- 21/15 P, EU:C:2016:981, par. 57, 8 September 2011, *Paint Graphos etc.*, C 78/08 - C-80/08, EU:C:2011:550, par. 49).

50 Paragraph 93.

similar tax benefits. Such measures had not been regarded as constituting state aid by the Commission and had not been classified as state aid. The Court overcame the respective plea concerning such precedents, stating that an argument based on the Commission's decision-making practice so far is not accepted, since the existence of state aid is a very fact-sensitive and facts driven matter, which should be examined in terms of objective parameters. Therefore, the Court ruled that such precedents should be regarded as irrelevant and each case should be assessed in its own merits and on an ad hoc basis. Moreover, pursuant to paragraph 94 of the *PCT/Cosco* Court decision (*Greece v Commission, Case T-314/15*), in the case of special tax measures, the pursuit of an economic or industrial policy objective, such as the encouragement of investment does not entail the automatic exemption of selective measures from article 107(1) TFEU, since the provision would lose its practical effectiveness. In this respect, the purpose of a contested tax measure is irrelevant to its characterization and classification as state aid<sup>51</sup>.

According to the Court, it is undeniable that the tax treatment of PCT deviated from the general corporate tax system applicable in Greece, irrespective of the fact that all companies carrying out infrastructure projects were subject to the same or similar tax treatment, derogating from the basic corporate tax rules. This fact leads to material differentiation from undertakings operating in a comparable factual and legal situation, irrespective of Greece's argumentation that the specific features and characteristics of concession agreements for public works create a distinct category of undertakings carrying out such infrastructure projects, which is subject to differentiated tax rules provided for in the respective concession agreements ratified by law that should form another reference system.

As regards the third step of the selectivity test, the Court denied that the contested tax measures were in line with the proportionality principle and with inherent objectives of the tax system and agreed with the Commission that tax concessions in favour of PCT could not be justified by the nature and logic of the reference tax system, because they were based on objectives extrinsic to the tax system<sup>52</sup>.

Furthermore, the General Court rejected Greece's argument concerning the incorrect application of the requirements of having an effect on trade and distortion of competition, stating that only the likelihood of distortion suffices in terms of the General Court's case law for a measure to be considered as state aid. In other words, no actual determination or quantification of the distortion of completion or effect on trade is required in this respect.

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51 See also Court Judgement of 6 March 2002, *Diputación Foral de Álava etc. vs. Commission, T-92/00 και T- 103/00*, EU:T:2002:61, par. 51.

52 Paragraph 101.

With regard to the ways in which the trade could be affected, the Commission pointed out that the following are the key issues in this respect:

- the international invitation to tender,
- the expansion of the capacity of Piraeus port through the tax measures,
- the high competition with other ports in the European Union and
- the strengthening of PCT's competitive position in the EU market for the provision of port services.

With respect to the compatibility of the state aid pursuant to Article 107(3) TFEU and the guidelines on regional State aid for the period 2007-2013, the General Court stressed that both the tender procedure and the concession agreement clearly stated that the whole investment would be carried out by the concessionaire without any public funds. This means that the latter would have to bear all relevant costs and expenses. The Court concluded that the aid had no incentive effect<sup>53</sup>. Moreover, the discretion of the Commission for the interpretation and application of Article 107(3) TFEU is very wide, while also compliance with the Commission guidelines should be safeguarded.

Within the framework of such a discretion, the Commission observed that in the case at hand the aid granted to PCT in the form of specific tax advantages should be characterized as operating aid, instead of investment aid, thus, not falling within the scope of Article 107(3) TFEU. Even though the port of Piraeus constitutes a region, according to the guidelines on regional State aid for the period 2007-2013, both the General Court and the Commission ruled that the tax measures under review did not satisfy any of the conditions stipulated in the guidelines and, thus, they should be considered as an ad hoc aid, not aiming at regional development.<sup>54</sup> This conclusion is drawn given that such an aid is granted to a specific undertaking and not to all operators of a specific region or sector<sup>55</sup>.

Last, but not least, the alleged infringement of Greece's rights of defense was rejected, given that Greece has already had the opportunity to submit its views during the investigation procedure. The Court adopted a more substantive rather than a formalistic approach in this respect, to the extent that, in any case, the result would be the same in the case at hand. As concerns the recovery of the illegal aid, the fact that the Commission provides guidelines for the quantification of the state

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<sup>53</sup> Paragraphs 184-185.

<sup>54</sup> Paragraphs 167-168.

<sup>55</sup> See also paragraphs 180-182, concerning the incentive effect of the aid and its necessity as per the achievement of the objectives of Article 107(3)(a), (b), (c) or (d) TFEU.

aid granted and the estimation of the exact amount to be recovered is sufficient, according to the Court's judgment.

To sum up, the Court upheld the Commission decision, ruling that Greece's recourse should be rejected, given that the aid granted was regarded as unlawful and incompatible with the EU law, since it grants a selective advantage, which is likely to distort competition and affect trade. The argument of Greece concerning the offsetting of structural disadvantages was not accepted. Moreover, Greece's pleas with regard to the infringement of rights of defense, the irrelevance of precedents as well as the recovery of the aid were all rejected by the Court. In other words, the Court dismissed all legal arguments brought forth by the Greek state and validated the March 2015 European Commission decision ordering Athens to recover aid granted to the container port of Piraeus (SEP) and Cosco Pacific Ltd. Thus, Cosco Pacific, through its Piraeus Container Terminal, is obliged to pay back concession-related 'advantages' to the Greek state.

### C. Basic Comments and Conclusions

The EU Commission and subsequently the Court have followed a strict and narrow approach, as per the tax incentives granted in the case of significant infrastructure projects. A crucial issue, which arises, refers to whether the precedents enumerated by Greece had given the impression that the contested tax measures would have been accepted. Therefore, the principle of tax and legal certainty and equity as well as the principle of the protection of legitimate expectations may be questioned accordingly. In this respect, a significant reversal of the respective attitude of the EU Commission is observed, also confirmed by the Court<sup>56</sup>, especially if compared with prior EU Commission decisions regarding major infrastructure projects in Greece (See EU Commission Decisions on cases L. 508/07 N 508/2007 Ionia Odos, N 45/2008 – Motorway ElefsinaKorinthos-Patras-Pirgos-Tsakona, N 566/2007 Korinthos-Tripoli-Kalamata Motorway and Lefktro-Sparti Branch, N 565/2007 Central Greece Motorway, N 633/2007 Maliakos-Kleidi section of Patras-Athens-Thessaloniki-Evzona Motorway concession contract, N 134/2007 Thessaloniki Submerged Tunnel concession contract, N 462/99 Attiki Odos, NN 143/1997 Rion Antirion Motorway Bridge, NN 27/1996 Spata International Airport).<sup>57</sup> More specifically, the Greek

<sup>56</sup> In this respect, we should not fail to mention that the Commission considered that the appropriate reference system was the general corporate income tax systems of Luxembourg (FFT Final Decision, Recital 194), Ireland (Apple Final Decision, Recital 228) and Belgium (Excess Profits Final Decision, Recital 121). This appears to be based primarily on the approach taken by the CJEU in the *Paint Graphos* case.

<sup>57</sup> See also State aid No. SA.34586 (2012/N) Chania Airport Modernisation, Brussels, 25.7.2012 C(2012) 5071 final, The Commission found that investment aid of €77.7 million

authorities and PCT have indicated that similar provisions to those of Article 2 and 3 of the Law were included in the Greek laws that ratified several individual public infrastructure projects as well as Law 3389/2005 concerning Public Private Partnerships. Greece pointed out that, as the Commission examined those laws under Article 107(1) TFEU and decided that they did not give rise to State aid, a conclusion that the fiscal provisions in favour of PCT constitute a selective measure and confer an undue advantage falling within the scope of Article 107(1) TFEU would jeopardise legal certainty and would be contrary to the Commission's practice and previous statements concerning the application of such provisions to public infrastructure projects in Greece<sup>58</sup>.

A core aspect of the Court's judgement is the Court's denial to recognize the tax rules specifically applicable in concession agreements as a separate and distinct

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for Chania airport in Greece was limited to the minimum necessary. The Commission also took into account the important role of this regional airport for the accessibility of Crete and for local development, reaching a balance between fair conditions of competition in the aviation industry and transport needs. See EU Commission, Press Release, State aid: Commission adopts three decisions in aviation sector in Finland, Greece and Ireland Brussels, 25 July 2012. See also State aid No SA.35220 (2012/N) – Greece – Makedonia Airport Modernisation, Brussels, 19.12.2012 C (2012) 9427 final and State aid No SA.35697 (2012/N) – Greece – Skiathos Airport, Brussels, 20.02.2013 C (2012) 787 final. However, these decisions mainly relate with the investment itself, namely the financing of the project and do not particularly concern fiscal state aid and related tax measures.

58 See also paragraphs 57-58 of the Commission Decision of 23.03.2015 on state aid SA 28876 (2012/C) (ex CP 202/2009 [implemented by Greece for Container Terminal Port of Piraeus & Cosco Pacific Limited], Brussels, 23.03.2015 C(2015) 66 final, according to which: “ (57) Concerning the Athens International airport case43, where the Commission considered that the fiscal provisions applied in respect of airport services that were not liberalised at the time, they argue that the same conclusion can also be drawn for port infrastructure services in the current case. Moreover the Greek authorities retain their argumentation that the Commission examined the said provisions in that case. (58) Concerning the Athens Ring Road case44 and the Rio Antirion Motorway Bridge case, according to them the Commission examined carefully the public and private sector financial contributions to the costs of the project as well as the fiscal provisions concerned. The Commission then concluded that the amount of the public sector contribution (in the form of grants and State guarantees) was determined as “market price” (i.e. the lowest amount of the public sector contribution required) through an open, non discriminatory and competitive tender. In the Athens Ring Road decision the Commission concluded that the fiscal provisions constituted a clarification of the applicable tax regime, the absence of which could risk jeopardising the success of the project and did not consider them as part of the remuneration of the concessionaire. Any financial value that might be associated with the application of the fiscal provisions adopted could not have been considered as part of the public sector contribution, since it could have been determined with accuracy only upon the expiry of the concession period. These provisions were only the necessary clarifications so that private investors would not be discouraged in particular as regards this type of non-viable construction projects of high risk. Thus PCT cannot be distinguished from the concessionaires in these cases, as these provisions were in all cases a “clarification” and not a “remuneration” as the Commission considered in its opening decision”.

reference system for public infrastructure works. According to the Court's ruling, the reference system in all cases, including concession agreements and large-scale public projects, should remain the Greek Income Tax Code, VAT Code and Stamp Duty Code, in other words, the common, national tax legislation, without any deviations, although such deviations existed in all previous major public infrastructure works performed in Greece in terms of public procurement.

The main consequence of the Court's judgement is that Greece should recover the incompatible aid, in order for the competitive situation to be restored. According to the Court, Greece should determine and quantify the exact amount to be recovered, pursuant to the guidance already provided by the Commission. However, apart from the recovery of the aid, the Court's judgment, which ratified the EU Commission's decision, is anticipated to have a broader impact for Greece as well as the other Member States, since the governments should re-examine their national measures, which grant tax incentives and preferential tax treatment in general. Especially in case of Greece, the practice followed so far in case of large-scale infrastructure projects, public works and concession agreements should be revisited, in view of the Court's judgment in question, which completely ratified the respective Commission Decision. In this respect, any deviation from the national tax legislation should be carefully reviewed, given that the argument about a separate reference tax system, particularly applicable in case of public infrastructure seems not to be accepted any more.

It should be noted that the special features of long-term concessions for infrastructure construction and operation projects may necessitate respective adaptation of the applicable tax provisions. However, in light of the above, tax incentives granted to concessionaires and specific tax measures designed within the frame of concession arrangements should be carefully reviewed in terms of re-examination of their selective character, their ability to offset structural disadvantages and their compliance with the state aid legislation in general. Moreover, any distortive effect in terms of trade and competition should be also taken into account, accordingly. The Court judgement highlights the importance of tax treatment as a potential element of public subsidy, since the omission of collection of tax revenues or any respective preferential tax regime can be equivalent to a cash benefit, in principle constituting state aid.