



THE EUROPEAN COMMISSION

Legal Service

Brussels, X May 2024
sj.c(2024)4262312

HIGH COURT OF CASSATION AND JUSTICE
ADMINISTRATIVE AND TAX LITIGATION SECTION
CASE No.458/36/2020
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Concerning: Opinion of the European Commission in case no. 458/36/2020 Canal Sea Services S.R.L v. Ministry of Transport, Infrastructure and Communications

Further to your request addressed to the European Commission on 18 December 2023, registered on 10 January 2024, the Commission has the honour to forward to you, pursuant to the provisions of Article 29(1) of Council Regulation (EU) 2015/1589 laying down rules for the application of Article 108 of the Treaty on the Functioning of the European Union (the “Procedural Regulation”)¹ and the Communication from the Commission on the enforcement of State aid law by national courts (“Enforcement Notice”)², its opinion on the qualification of certain national measures established by Order No 991/2020 of the Ministry of Transport, Infrastructure and Communications for the establishment of ports and inland waterways for which the pilotage service of sea-going and river-sea vessels is mandatory and for the operation of that service (‘Order No 991/2020’) as State aid pursuant Article 107 (1) of the Treaty for the Functioning of the European Union (‘TFEU’)

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

² Commission Notice on the enforcement of State aid rules by national courts (2021/C 305/01) C/2021/5372 (OJ C 305, 30.7.2021, p. 1).

I. INTRODUCTION

1. In accordance with Article 29(1) of the Procedural Regulation and the Enforcement Notice, the Commission's opinions are not binding on the national court.³ Only the EU Courts can provide a binding interpretation of EU State aid rules. Therefore, the Commission's opinion is without prejudice to the possibility or obligation of the national court to request a preliminary ruling from the Court of Justice of the European Union ('CJEU') on the interpretation or validity of Union law in accordance with Article 267 TFEU⁴.

II. FACTS, LEGAL BACKGROUND AND QUESTION TO THE EUROPEAN COMMISSION

a) Facts

2. Pursuant to Government Order No 22/1999⁵, the pilotage service is ensured by the port administrations. Article 50(1) of that act lays down the modalities for the provision of that service, that is to say (i) through the pilots' corps belonging to the port administration; (ii) by specialised economic operators authorised on the basis of a contract concluded on a non-discriminatory basis between the port administration and those economic operators; (iii) by the concession of pilotage services, in accordance with the law, by the port administration to specialised economic operators. In accordance with Article 50(6) of that order, the actual modality of providing pilotage services is to be approved by order of the Minister for Transport.
3. In 2012, the Ministry of Transport issued Order No 1008/2012⁶, according to which pilotage in the ports of Galați, Brăila, Sulina, Tulcea and Constanța was to be provided through specialised economic operators, on the basis of service contracts concluded in a

³ Enforcement Communication, paragraph 117.

⁴ Enforcement Communication, paragraph 102.

⁵ Government Order No 22/1999 on the management of ports and waterways, the use of public infrastructure for waterborne transport and the carrying out of waterborne transport activities in ports and inland waterways, as amended.

⁶ Order No 1008/2012 of the Ministry of Transport and Infrastructure establishing the operation of the pilotage service of seagoing vessels.

non-discriminatory manner between specialised operators and port administrations. In 2017, that order was amended by Order No 708/2017. According to these amendments, the pilotage service in the ports of Sulina, Brăila, Tulcea and Galați was to be carried out only through the pilots' corps of the Fluvial Administration of the Dunării de Jos Galați ('AFDJ Galați').

4. Order No 1008/2012, as amended, was repealed by Order No 991/2020, which is the subject of the present national case. By that order, the Ministry of Transport removed the possibility for private undertakings to obtain authorisations to provide pilotage services freely for seagoing and river-sea vessels. In particular, Articles 1, 2 and 3 of Order No 991/2020 established that the pilotage service of seagoing and river vessels is a mandatory service in certain ports (Constanța, Brăila, Galați, Tulcea and Sulina) and under certain circumstances. In particular, these provisions provide that such pilotage services are provided only through the pilots' corps of the AFDJ Galați, the National Company Administration of Maritime Ports S.A. Constanța ("APM Constanța") and the Navigabile Canal Administration S.A. ("ACN") port administrations, each for the ports/areas in their competence.
5. S.C. Canal Sea Services S.R.L. ('Canal Sea') is a company authorised to provide the public pilotage service of seagoing vessels in accordance with the rules of international law and the Danube navigation regime. Canal Sea operated pilotage services on the Romanian section of the Danube, between the port of Sulina and the commercial port of Brăila (km 175) and in the ports located on that section (Sulina, Tulcea, Galați and Brăila) until July 2017, holding PNM licence No 78-GL, on the basis of contract No 68/29-06-2012 for the provision of pilotage services concluded with AFDJ Galați on the basis of Order No 1008/2012.
6. In early 2017, AFDJ Galați launched a public procurement procedure, in which Canal Sea participated⁷.
7. After less than six months, following the adoption of Order No 708/2017, all existing contracts for the provision of pilotage services with specialised operators, including the

⁷ The objective of this public tender is not entirely clear from the submitted documents, but the Commission understands that contracts for the provision of pilotage services in the ports/areas within the competence of AFDJ Galați were supposed to be concluded as a result of that procedure.

one concluded between AFDJ Galați and Canal Sea, were terminated. Since then, pilotage services have been provided exclusively by AFDJ Galați⁸.

8. Order No 991/2020 enshrined this situation and extended the same modality of providing pilotage services exclusively through port administrations, which excludes private operators, for all seagoing and river-sea vessels in the areas of the ports of Constanța, Brăila, Galați, Tulcea and Sulina.
9. Canal Sea has brought an action before the national courts seeking the annulment of that order (which is the subject matter of the present case before the High Court of Cassation and Justice), considering, inter alia, that it grants State aid prohibited by Article 107 (1) TFEU to port administrations which have been granted the exclusive right to provide pilotage services in the ports they manage.

[REDACTED]

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⁸ In its complaint to the Commission, Canal Sea considers that exclusivity for the provision of pilotage services was granted by Order No 708/2017 and subsequently only confirmed by Order No 991/2020. In its application for annulment of Order No 991/2020, which is the subject of the present application, Canal Sea confirms that Order No 708/2017 had already amended the operation of the pilotage service.

[REDACTED]

[REDACTED]

[REDACTED]

(c) The procedure before the national court and the main arguments of the parties to the national proceedings

15. In its application for annulment before the national court, Canal Sea relies on a number of grounds on which Order No 991/2020 must be annulled. Among other things, it argues that this Order must be regarded as granting unlawful State aid to APM Constanța, AFDJ Galați and ACN, given that the exclusive right to provide pilotage services:
- a) it is granted to undertakings operating in a market open to competition;
 - b) creates an economic or financial advantage for APM Constanța, AFDJ Galați and ACN as it strengthens their market position;
 - c) involves State resources and is imputable to the State, given that it appears from the report approving Order No 991/2020 that the main purpose of the amendment was to increase the profitability of state-owned enterprises to the detriment of private undertakings¹¹. Thus, Order No 991/2020 involves public resources, given that pilotage services are also paid for from the budget of public undertakings wholly owned by the

¹¹ Canal Sea argues that the profitability of the pilotage service was demonstrated by Competition Council Decision No 51/2016.

Ministry of Transport¹². Finally, the budget of state-owned enterprises is adopted through government decisions, which also provide for the amounts for pilotage services¹³;

d) the measure is *de facto* selective, since the provision of pilotage services was exclusively entrusted to APM Constanța, AFDJ Galați and ACN;

e) the measure distorts or threatens to distort competition and affects trade between Member States, which can be presumed in accordance with the case law of the Union Courts.

16. Canal Sea also considers that¹⁴:

a) there is no market failure and it is apparent from the report approving Order No 991/2020 that the establishment of a monopoly in favour of APM Constanța, AFDJ Galați and ACN was determined by reasons of alleged opportunity, without carrying out expert studies, without notifying the Commission in accordance with Article 108(3) TFEU and without consulting the Romanian Competition Council;

b) Order No 991/2020 was issued in the absence of any overriding public interest justifying a change in the operation of the pilotage service for seagoing and inland waterway vessels and without adequate reasoning;

¹² Canal Sea also considers that national courts have established the involvement of public resources in the operation of pilotage services: a) the Galați Court of Appeal established, with the force of *res judicata* in Decision No 3125/2017 delivered in Case No 4657/121/2014, that public resources are involved and managed by the State, and that compliance with the public procurement procedure is mandatory; and b) the Bucharest Tribunal, by Decision No 3316/2016, confirmed the fine received by AFDJ Galați from the National Regulatory Authority for Monitoring Public Procurement for non-compliance with public procurement procedures.

¹³ Canal Sea indicates that subsidies have been granted from budgetary resources to the APM Constanța, AFDJ Galați and ACN. For example, Order No 708/2017 included in the budget, from the financial resources managed by the State, the hiring of specialised staff, i.e. 40 pilots, and the 2017 budget of AFDJ Galați was approved by Government Decision No 264/2017.

¹⁴ Among other arguments, Canal Sea alleges a breach of the principle of legitimate expectations. AFDJ Galați and the Ministry of Transport would have created the impression that the legal relationship between the parties, consisting of the contract for the provision of services with economic operators authorised to carry out the pilotage service for seagoing and inland waterway vessels, in force since 1 July 2012, for a period of 5 years, would be extended under identical conditions. According to Canal Sea, the Romanian authorities did not communicate within a reasonable period of time, at least 6 months in advance, the modification of the provision of the service, its operating conditions and the monopolisation of the service and the closure of the market in order to allow private service providers to adapt or bring legal proceedings with a view to possible judicial protection. In addition, AFDJ Galați carried out all the public procurement procedures for the conclusion of a new contract for a period of 5 years from 1 July 2017 and Canal Sea was fully convinced that the legal relationship would continue in the same way after the completion of the procedure.

c) the issuing of Order No 991/2020 would also have infringed the national provisions on legislative technical rules for the drafting of regulatory acts, as well as the EU legislation¹⁵.

17. On the other hand, the Ministry of Transport argues that, in European ports, pilotage services are considered to be services of public interest, which cannot be subject to a competitive system and are provided by port administrations or by a single professional association (composed exclusively of pilots). In particular, the Ministry of Transport states the following:

a) the adoption of Order No 991/2020 was preceded by a public debate. According to this debate, the experience of recent years and expert analyses have shown that, in competitive pilotage services, the safety of navigation is affected and that pilots must act with full integrity, free from commercial pressure, in order to be able to ensure the security and continuity of the service, the competition hindering the achievement of an efficient service and increasing the overall costs of providing it;

b) the adoption of Order No 991/2020 also took into account the concerns expressed by the European Maritime Pilots Association (EMPA) as well as the provisions of Chapter II of Regulation (EU) 2017/352.¹⁶ According to this Regulation, access to the market for the provision of port services in maritime ports may be subject to “*a) minimum requirements for the provision of port services; (b) limitations on the number of providers; [...]*”¹⁷. Those limitations should comply with certain requirements laid down in Chapter II of Regulation (EU) 2017/352. However, pursuant to Article 10 of Regulation (EU) 2017/352 pilotage would be exempted from Chapter II and “*Member States may decide to apply this Chapter [...] to pilotage. Member States shall inform the Commission of such a decision.*” Therefore, as far as pilotage services are concerned, Member States would be sovereign to decide on their organisation and implementation, without this constituting an infringement of the competition rules or an infringement of the Regulation or involving State aid¹⁸. The Ministry of Transport considers that the reason for this derogation from

¹⁵ E.g. Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions (OJ L 173, 9.7.2018, p. 25).

¹⁶ 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 L 57, 3.3.2017, p. 1).

¹⁷ Article 3 (organisation of port services) of Regulation (EU) 2017/352 (which is part of Chapter II).

¹⁸ However, Canal Sea argues that, on the contrary, in order to limit the number of pilotage service providers, Romania should have informed/notified the Commission of its intention to apply the provisions of Chapter II of Regulation (EU) 2017/352.

the application of Chapter II of Regulation (EU) 2017/352 is that pilotage provides the maritime transport industry with an essential and unique service which, if open to competition, would jeopardise maritime safety and security, environmental protection and the efficiency of ports;

c) Order No 991/2020 was issued in the application of certain provisions of Government Order No 22/1999, which expressly provide for the obligation to provide pilotage services by port administrations. In accordance with Article 50(1) and (6) of Government Ordinance No 22/1999, the provision of pilotage services may be performed (i) through the pilots' corps belonging to the port administration; (ii) by specialised economic operators authorised on the basis of a contract concluded on a non-discriminatory basis between the port administration and those economic operators; or (iii) the concession of pilotage services by the port administration to specialised economic operators, in accordance with the law. Thus, Order No 991/2020 would not favour the port administration, but would implement express legal provisions, namely Article 50(1) and (6) of Government Order No 22/1999, in order to ensure the application of the law and to increase the safety of navigation.

18. Furthermore, according to the Ministry of Transport, Order No 991/2020 complies with State aid rules, as the condition that the beneficiary is an undertaking (carrying out an economic activity) is not fulfilled. As regards the nature of pilotage as a non-economic activity of the public authority, the Ministry of Transport considers that the Commission's practice is consistent in this regard¹⁹.
19. Therefore, according to the Ministry of Transport, Order No 991/2020 restores a fair balance between the requirements of general public interest and the imperatives to protect individual rights in the application of the provisions of Regulation (EU) 2017/352, which establishes that Member States are sovereign to decide how to organise and provide pilotage services, including the way in which they are provided, exclusively and directly

¹⁹ The Ministry of Transport refers to the Commission Decision of 27 July 2017, *Taxation of ports in France*, SA.38398, France (OJ C 332, 14.12.2017, p. 24), which states in recital (44): “*The Commission does not dispute that ports may be delegated tasks of public power or non-economic, such as maritime traffic control and safety or anti-pollution surveillance, or that, when carrying out these tasks, ports are not undertakings within the meaning of Article 107(1) TFEU. The Commission states in that regard that the corporate tax exemption at issue in the present proceedings can therefore constitute State aid only if it relates to income generated by economic activities. On the other hand, the fact that an entity engages in one or more activities of a public power or non-economic is not sufficient to exclude, in general, classification as an ‘undertaking’. A port will be considered an ‘undertaking’ if – and to the extent that it actually carries out one or more economic activities’.*”

by the port authority. Consequently, since Order No 991/2020 would not involve any State aid, there would be no obligation of prior notification to the Commission and Romania would not have infringed Article 108(3) TFEU.

20. In view of the above, in order to be able to rule on the application for annulment of Order No 991/2020, the High Court of Cassation and Justice requested the Commission's opinion on the State aid arguments put forward by Canal Sea and the Ministry of Transport. In particular, the High Court of Cassation and Justice requested the opinion of the Commission on the following question:

'If the measure taken by the Romanian State, through the Ministry of Transport, Infrastructure and Communications, in Order No 991/2020, which closed the market for maritime pilotage services existing until 31.12.2020, such services to be provided exclusively through the National Company 'Administration of Maritime Ports' S.A. Constanța, the Autonomous Regia of the Fluvială Administrația Fluvială a Dunării de Jos Galați and the National Administrația Administrația Canalelor Navigabile S.A., be regarded as State aid within the meaning of Article 107 (1) TFEU?'

III. THE OPINION OF THE COMMISSION

a) Preliminary remarks

21. A national court may be involved in settling disputes concerning the interpretation and application of the concept of aid provided for in Article 107 (1) TFEU, in particular in order to determine whether or not a State measure should have been subject to the prior review procedure provided for in Article 108 (3) TFEU and, if applicable, to verify whether the Member State concerned has complied with this obligation²⁰.
22. Classification as State aid within the meaning of Article 107 (1) TFEU requires four conditions to be met, namely that there must be an intervention by the State or through State resources, that the intervention must be liable to affect trade between Member States, that it grants a selective advantage to its recipient and that it distorts or threatens to distort competition.²¹

²⁰ See, to that effect, judgment of the Court in Case C-672/13 *OTP Bank Nyrt*, EU:C:2015:185, paragraphs 31 and 38, Case C-39/94 *SFEI* EU:C:1996:285, paragraph 49.

²¹ See, to that effect, judgment of the Court in Case C-262/12 *Vent De Colère!*, EU:C:2013:851, paragraph 15 and the case-law cited therein.

23. The Commission considers that, in the present case, the elements referred to in Article 107(1) which require particular attention are those relating to (i) the notion of undertaking and economic activity; and (ii) distortion of competition.
24. As regards the other elements of this provision, the Commission notes that Order No 991/2020 is a measure imputable to the State because it was adopted by the Ministry of Transport, which is a public authority. Nor does it appear to be disputed that the act grants exclusive rights to APM Constanța, AFDJ Galați and ACN with regard to the provision of the pilotage service in the ports/areas they manage. However, the grant of exclusive rights without adequate remuneration according to the market level may constitute a waiver of State revenue (as well as the grant of an advantage)²². As regards selectivity, the Commission notes that the pilotage service in respect of certain areas/ports was reserved to these entities by Order No 991/2020, each entity having a monopoly for each area/port. Since such measures are individual aid granted to the three entities, according to the case-law, the existence of an advantage makes it possible, in principle, to presume that the measure is selective²³. Such a measure may also affect trade between Member States, taking into account that suppliers from other Member States may be interested in providing such services in Romania and pilotage services are mandatory for all sea-going and river-sea vessels transiting through those ports.
25. In the following, the Commission will analyse in detail the elements in paragraph 23.

(b) The concept of undertaking and the exercise of public powers

26. The EU Courts have consistently held that any activity consisting of offering goods and services on a market is an economic activity²⁴.
27. The question whether a market exists for certain services may depend on the way those services are organised in the Member State concerned and may thus vary from one Member State to another. Also, depending on policy choices or economic developments, the classification of a given activity as an economic or non-economic activity may vary over time. However, the decision of a public authority not to allow third parties to provide

²² Commission Notice C/2016/2946 on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union ('Notion of aid Notice') (OJ C 262, 19.7.2016, p. 1), point 53.

²³ Notice on the notion of aid, paragraph 121. See also Case C-15/14 P, *Commission v MOL*, EU:C:2015:362, paragraph 60; case C-270/15 P, *Kingdom of Belgium v Commission*, EU:C:2016:489, paragraph 49; case T-314/15 *Greece v Commission*, EU:T:2017:903, paragraph 79.

²⁴ Notice on the notion of aid, paragraph 12.

a service, for example because it provides that service through an internal operator, does not exclude the existence of an economic activity. Even if there is a market closure, there may be an economic activity when other operators would be willing and able to provide that service on that market²⁵.

28. According to the case-law, activities connected with the exercise of public powers are not economic in nature, with the result that those activities do not fall within the scope of the rules on State aid. However, the fact that an entity has public powers for the exercise of part of its activities does not prevent it from being classified as an undertaking in so far as it carries out other activities of an economic nature. In so far as a public entity engages in an economic activity which is severable from the exercise of its prerogatives as a public authority, that entity acts, in respect of that activity, as an undertaking. Thus, in the case of State aid, the legal status of an entity under national law is irrelevant as regards its classification as an undertaking. Even a body which is integrated into the administration of the State with which it is confused in the same legal person can be classified as an undertaking²⁶.
29. In the present case, the Ministry of Transport argues that the alleged beneficiaries of the aid (i.e. APM Constanța, AFDJ Galați and ACN) do not carry out an economic activity but exercise public powers when providing pilotage services. The Ministry appears to rely in that regard on point 17 (c) of the Notice on the notion of aid, according to which ‘*Article 107(1) [TFEU] shall not apply where the State acts ‘in the exercise of public powers’ or where public entities act ‘in their capacity as public authorities’. An entity may be deemed to act by exercising public power where the activity in question forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which is it subject. Generally speaking, unless the Member State concerned has decided to introduce market mechanisms, activities that intrinsically form part of the prerogatives of official authority and are performed by the State do not constitute economic activities. Examples of such activities are the following: [...] c) control and safety of maritime traffic’.*

²⁵ Notice on the notion of aid, paragraphs 13 and 14.

²⁶ See, to that effect, Case T-166/21 *Autorità di sistema portuale del Mar Ligure Westale v Commission*, EU:T:2023:862, paragraphs 67 to 69 and the case-law cited.

30. However, the Commission considers that a distinction must be made between maritime traffic control and safety activities and the effective provision of services in a market which must comply with maritime traffic safety rules or contribute to the safe realisation of traffic.
31. According to the case-law, such a task includes a supervisory function consisting in ascertaining that the undertakings concerned will be able to provide the port operations which they offer in accordance with the statutory requirements. The carrying out of such a task is, in principle, a power of a public authority which is non-economic in nature²⁷. Therefore, making a parallel with the present case, the control of the provision of pilotage services by other undertakings could constitute a prerogative of public power.
32. In a previous decision concerning Belgian ports, the Commission considered maritime traffic control and safety activities to be activities of the public authority (thus non-economic) given that those activities did not generate revenue²⁸.
33. However, the situation is different in the present case. Indeed, Canal Sea complains that the provision of pilotage services is a remunerated activity, which is a profitable economic activity and that it has provided such services, together with other operators, at least until 2017.
34. As regards the legislative history of regulating pilotage services at Union level, the Commission notes that it was not considered useful to include pilotage in the scope of the proposal for a Directive on market access to port services²⁹ (which was withdrawn in 2006 due to a lack of consensus). The explanatory memorandum stated that *‘particular emphasis is placed on the essential importance of the specificities of the [pilotage] service. These specificities, in particular the public service obligations and maritime safety considerations related to pilotage, were recognised by the European Parliament, the*

²⁷ See, to that effect, Case T-166/21 *Autorità di sistema portuale del Mar Ligure Westale v Commission*, EU:T:2023:862, paragraph 100 and the case-law cited.

²⁸ See Commission Decision of 16 October 2002, *Subventions aux régies portuaires pour l'exécution de mission relevant de la puissance publique*, SA.14043 – Belgique, recital (16), which states that activities relating to the control and safety of maritime traffic *‘do not generate any revenue from port users and, by their very nature, are unlikely to generate revenue. These tasks are therefore a matter of public authority’*. However, it should be noted that the Commission took into account the fact that the activities carried out by régies portuaires which consisted in the exercise of public powers were not included in the Proposal for a Directive of the European Parliament and of the Council on access to the port services market, which aimed at liberalising port services, all considered as ‘commercial’ services generating revenue for the provider.

²⁹ Proposal for a Directive of the European Parliament and of the Council on market access to port services, COM/2004/0654 final – COD 2004/0240.

*Council and the Commission during the discussion of the initial proposal. That is why they considered that pilotage authorisations may be subject to particularly strict criteria relating to public service obligations and maritime safety; this could in particular concern explicit knowledge and navigation capacity for local areas of operation. To that end, the competent authorities may, on a case-by-case basis, either reserve for themselves or directly grant an exclusive right to an organisation to provide pilotage services in a port. It is therefore permissible to adopt port specific solutions*³⁰ (subl. ns). Indeed, Article 14 of the proposal for a Directive on access to the market in port services proposed a specific regime for pilotage due to maritime safety and public service requirements³¹. However, this proposal did not exclude that pilotage services could be provided as commercial services on the market in competition with other services. On the contrary, the fact that authorisations could be granted under restrictive conditions shows that those services could be provided on a market by several suppliers.

35. Following the withdrawal of the proposal for a Directive, the legal framework for the provision of port services was established by Regulation (EU) 2017/352. This Regulation aims at liberalising port services either within the port area or on waterways access to the port and also applies to pilotage³². However, recital (39) states that "*According to Resolution A.960 of the International Maritime Organisation, each pilotage area requires highly specialised experience and local knowledge from the pilot. Moreover, pilotage is generally mandatory and often organised or provided by the Member States themselves. In addition, Directive 2009/16/EC of the European Parliament and of the Council gives a role to pilots in reporting to the competent authorities apparent deficiencies that may prejudice the safe navigation of the ship or pose a threat to or harm the marine environment. In addition, where safety conditions allow it, it is important that all Member States encourage the use of Pilotage Exemption Certificates, or equivalent mechanisms, in order to improve efficiency in ports, in particular to stimulate short sea shipping. In order to avoid potential conflicts of interests between such public interest functions and*

³⁰ See explanatory memorandum to the proposal for a directive on market access to port services, § 3, pp. 5-6.

³¹ Explanatory memorandum to the proposal for a Directive on market access to port services, p. 9. See also recital 37: "*the particular importance of pilotage services for the safety of maritime traffic and therefore for the protection of the environment in particularly vulnerable regions requires the application of specific rules*"; and Article 14: '*As regards pilotage service, Member States may make the granting of the authorisation referred to in Article 7 [for the provision of port services in a port] subject to particularly strict criteria relating to maritime safety and public service requirements*'.

³² Except for deep sea pilotage services. See Article 1(2)(f) and recital 8 of Regulation (EU) 2017/352.

*commercial considerations, Chapter II of this Regulation should not apply to pilotage. However, Member States should remain free to decide to apply Chapter II to pilotage. If they decide to do so, the Commission should be duly informed in order to ensure the distribution of relevant information*³³. (subl. ns). Therefore, the possibility for Member States to exempt pilotage from Chapter II of the Regulation, which defines a framework for the provision of port services, can be attributed to the organisation of pilotage services in some Member States, which may indeed, in some cases, involve the exercise of public powers.

36. However, this does not mean that the provision of pilotage services cannot be of a commercial nature. On the contrary, the fact that those services may be subject to the provisions of Chapter II of that regulation, concerning the provision of the services by several operators, subject to certain conditions, indicates that pilotage services may be services of a commercial nature. The fact that pilotage services may be of a commercial nature, although they may be less exposed to competition, is recognised by the Regulation. In this regard, Article 12 of the Regulation provides that charges for pilotage services which are not exposed to effective competition are to be established in a transparent, objective and non-discriminatory manner and proportionate to the cost of the service provided. In any event, it is settled case-law that recitals of an EU act do not have binding legal force and cannot usefully be relied on to derogate from the very provisions of the act in question³⁴.
37. At the same time, the Court of Justice has already held that mandatory pilotage services may be services of a commercial nature, provided for remuneration³⁵, and the

³³ See also recital (46) of Regulation (EU) 2017/352 "*Port service charges applied by providers of port services under public service obligations and charges for pilotage services that are not exposed to effective competition could entail a higher risk of price abuse in cases where monopoly power exists. For these services, measures should be established to ensure that tariffs are set in a transparent, objective and non-discriminatory manner and are proportionate to the cost of the service provided*".

³⁴ See Case T-818/14 *BSCA v Commission*, EU:T:2018:33, paragraph 114 and the case-law cited.

³⁵ However, the mere fact that a product or service provided by a public body which is linked to the exercise by that body of public powers is provided in return for remuneration provided for by law is not sufficient to classify the activity carried out as an economic activity and the entity exercising it as an undertaking (see, in that case T-166/21 *Autorità di sistema portuale del Mar Ligure occidentale v Commission*, EU:T:2023:862, paragraph 114 and the case-law cited). According to the case-law, such situations may exist, for example, in cases where the authority has no control over the amount of remuneration, the methods for determining it or the use of funds (Case T-347/09, *Germany v Commission*, EU:T:2013:418, paragraph 30 and the case-law cited).

undertakings providing them are subject to competition rules, even if they have been entrusted with an exclusive right³⁶.

38. Furthermore, in a case concerning the nature of the activities carried out by the airport manager, the General Court noted that systems which contribute to safe landing do not contribute to the control and surveillance of airspace (and therefore do not fall within the scope of public powers), but contribute to the provision of services which the airport offers, in a competitive context, to airlines as part of its general activity, which is an economic activity³⁷. The Commission notes that a parallel can be drawn between this situation and that of a port manager offering pilotage services to shipping companies which contribute to the safe operation of traffic in a given port area.
39. It is therefore for the national court to assess (i) the status of each of the alleged beneficiaries (that is to say, whether they are public undertakings which also carry out economic activities or merely exercise public powers), (ii) if they provide both economic and non-economic activities, whether the prerogatives of public power can be dissociated from activities of an economic nature, (iii) whether the provision of pilotage services could be regarded as an exercise of public powers by the alleged beneficiaries or they have been granted an exclusive right to provide a service on a market, taking into account the characteristics of the pilotage services provided, including how remuneration is determined and whether there are operators willing or able to provide them by complying with certain conditions on safety.
40. In assessing those aspects, the national court should also take into account that whether a particular service is provided in-house is of no relevance to the economic nature of the activity³⁸. The Commission also notes that pilotage services were previously operated by private undertakings until the Romanian State re-monopolised the market in view of the alleged safety need for navigation. Thus, it appears that the provision of those services in Romania is not inextricably linked to the exercise of public powers. Similarly, the provision of those services appears to be provided in exchange for remuneration and it is not apparent from the available information that the remuneration for those services is not controlled by those undertakings. The Commission also understands that there are

³⁶ See Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova*, EU:C:1994:195.

³⁷ See Case T-818/14 *BSCA v Commission*, EU:T:2018:33, paragraph 102 et seq. and the case-law cited.

³⁸ Notice on the notion of aid, paragraph 11.

operators interested in providing pilotage services, at least in the ports within the competence of AFDJ Galați. In addition, the three entities entrusted with exclusive rights appear to be organised as public undertakings, whose overall objective is to make a profit. Therefore, on the basis of the information available in the present case, in the Commission's view, prima facie, port administrations carry out an economic activity when providing the pilotage service in the areas under their competence.

41. In the light of the foregoing, should the provision of the pilotage service be regarded as constituting an economic activity carried out by undertakings, it is necessary to examine whether the measure introduced by Order No 991/2020 distorts competition.
42. On the other hand, if the national court nevertheless considers that the provision of pilotage services by the three entities falls within the scope of the prerogatives of public power, Order No 991/2020 does not fall within the scope of Article 107(1) TFEU, given that the alleged beneficiaries of the aid carry out a non-economic activity.

c) Establishing a legal monopoly – distortion of competition

43. According to point 188 of the Notice on the notion of aid, '*[t]he fact that the authorities award a public service to an internal provider (even if they were free to entrust this service to third parties) does not, as such, exclude a possible distortion of competition. However, a possible distortion of competition is excluded if the following cumulative conditions are met:*
 - (a) a service is subject to a legal monopoly (established in accordance with Union law);*
 - (b) the legal monopoly not only excludes competition on the market, but also for the market, in that it excludes any possible competition to become the exclusive provider of the service in question;*
 - (c) the service is not in competition with other services; and*
 - (d) if the service provider is active in another (geographical or product) market that is open to competition, cross-subsidisation has to be excluded. This requires the use of separate accounts, proper allocation of costs and revenues, and public funding provided for the service subject to the legal monopoly cannot benefit other activities."*

44. By way of example, a detailed assessment of the abovementioned conditions was carried out in the Commission Decision of 12 July 2021 in case SA.48706 – *Alleged State aid to RVV and Nordwasser GmbH*.³⁹
45. It is for the national court to ascertain whether those conditions have been met cumulatively and to determine whether there is a distortion of competition, which is one of the conditions for a measure to constitute State aid. In the following, the Commission will refer to the application of those conditions in the present case.

(i) Existence of a legal monopoly established in compliance with EU law

46. In line with the Commission’s decision-making practice, the national court will first have to assess whether a legal monopoly has been established in accordance with EU law. Thus, according to the Notice on the notion of aid, ‘*a particular service is reserved by law or regulatory measures to an exclusive provider, with a clear prohibition for any other operator from providing such a service (not even to satisfy possible residual demand from certain customer groups). However, the mere fact that the operation of a public service is entrusted to a particular undertaking does not mean that such an undertaking enjoys a legal monopoly*’⁴⁰. In addition, the decision to close a market must be taken by the competent public authorities or entities, in accordance with competences established at national level, and these entities must act in accordance with Union law.
47. In the Commission’s view, Order No 991/2020 constitutes a regulatory measure which exclusively reserved to APM Constanța, AFDJ Galați and ACN the provision of pilotage services in certain areas/ports. In the second place, the national court would have to examine whether Canal Sea’s claims that the measure did not comply with the mandatory provisions on the technical legislative rules for drawing up national legislation⁴¹ and procedures in the field of State aid⁴² are correct. The national court must therefore

³⁹ Commission Decision C (2021) 1736 final of 18 March 2021 – *Alleged aid to RVV and Nordwasser GmbH*, SA.48706 – Germany (OJ C 317, 6.8.2021, p. 3), recitals (48) et seq.

⁴⁰ Footnote 272 of the Notice on the notion of aid. See also Commission Decision C (2002) 2622 of 17 July 2002 in case N 356/2002 – United Kingdom – *Network Rail* (OJ C 232, 28.9.2002, p. 2), recitals (75) to (77).

⁴¹ Article 7 of Law nr.24/2000, which requires, *inter alia*, a preliminary impact assessment.

⁴² The procedure provided for in Article 7(9) et seq. of Government Emergency Ordinance No 77/2014 on national procedures in the field of State aid and for amending and supplementing Competition Law No 21/1996.

determine whether the exclusive rights were entrusted to the three entities in accordance with national law.

48. Moreover, compliance with EU law is particularly important in the present case. According to the Commission's practice, a legal monopoly must be established in compliance with the fundamental freedoms of the internal market. The Commission pointed out that, according to the case-law, such measures may constitute restrictions of the freedoms, which can only be justified if certain conditions, developed by the CJEU, are met⁴³.
49. In this respect, the Commission first notes that pilotage services are services in the field of maritime transport. The right of establishment provided for in Article 49 TFEU applies in full to these services. On the other hand, the free movement of such services is regulated on the basis of measures adopted on the basis of Article 100(2) TFEU. On the basis of this provision, the Union adopted Regulation (EU) 2017/352.
50. The Ministry of Transport considers that the establishment of exclusive rights for pilotage services is justified because Member States may decide not to apply the provisions of Chapter II of this Regulation to pilotage services. However, if the Member State decides not to apply these rules to pilotage⁴⁴, these services nevertheless remain subject to the provisions of the Treaty, in particular Article 49, and the establishment of a legal monopoly must comply with that article⁴⁵.
51. In that regard, it follows from the case-law of the Court of Justice that national legislation under which exclusive rights to carry on an economic activity are conferred on a single private or public operator is capable, inter alia, of constituting a restriction both of the freedom of establishment and of the freedom to provide services, respect of which it would then be necessary to determine whether the restriction may be justified by an overriding reason relating to the public interest and, where appropriate, whether it is suitable for

⁴³ See recital (67) et seq. of Commission Decision of 18 March 2021 – *Alleged aid to RVV and Nordwasser GmbH*, SA.48706 – Germany.

⁴⁴ The situation to be determined in the present case by the national court. If the Member State has decided to apply Chapter II of the Regulation to pilotage services, the national court must assess whether the determination of the exclusive right complied, in particular, with Articles 6 and 8 of Regulation (EU) 2017/352. However, the Commission expresses doubts as to whether those provisions were complied with in the present case.

⁴⁵ See, to that effect, judgment of the Court in Case C-576/13 *Commission v Spain*, EU:C:2014:2430, paragraphs 36-38 and the case-law cited.

securing the attainment of the objective pursued and does not go beyond what is necessary to attain that objective⁴⁶.

52. In this respect, providers from other Member States might be interested in establishing themselves in Romania to provide pilotage services. Furthermore, given that the provisions of Order No 991/2020 apply *erga omnes*, both undertakings in Romania and in other Member States could be affected. The modality of providing pilotage services could also affect the provision of maritime transport services⁴⁷.
53. If the national court considers that the application of the freedom of establishment is relevant in the present case, it must determine whether the monopoly established in favour of APM Constanța, AFDJ Galați and ACN in respect of pilotage services is permitted, that is to say, whether that measure creates an unjustified obstacle to market entry, that is to say, whether that restriction is justified by a legitimate reason⁴⁸ and proportionate to it. The Commission notes that ensuring maritime safety could constitute a legitimate reason that could justify the establishment of restrictions. However, as regards proportionality, the Commission wonders whether there could be less restrictive measures to achieve such an objective, such as requiring undertakings or pilots to obtain licences or to lay down strict rules to be observed in the provision of such services.
54. As regards Canal Sea's allegations of a breach of Directive (EU) 2018/958 in that no study or analysis was carried out as regards the impact on the profession of seagoing ship pilot, the Commission notes that Member States were required to adopt the measures transposing this Directive by 30 July 2020. Since Order No 991/2020 entered into force on 1 January 2021, the national court should determine whether it complies with the provisions of that Directive.

(ii) Foreclosure of competition not only on the market but also for the market

55. According to the Notice on the notion of aid, it is necessary to assess whether the statutory monopoly excludes not only competition on the market but also for the market, in so far as it excludes any possible competition between different entities to become the exclusive

⁴⁶ See Case C-394/21 *Bursa Română de Mărfuri* EU:C:2023:146, paragraph 47 and the case-law cited.

⁴⁷ See Case C-18/93 *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova*, EU:C:1994:195.

⁴⁸ See, to that effect, judgment of the Court in Case C-179/14 *Commission v Hungary*, EU:C:2016:108, paragraph 165 and the case-law cited.

provider of the service in question. Where a contract is awarded through a competitive procedure, there is competition for the market⁴⁹.

56. As is apparent from the *INPS* and *Arriva Italia* judgments, in general, a legal monopoly cannot be established solely on the basis of the fact that the competent authorities have decided to conclude a contract by means of a direct award, unless they were required to assign the operation of the services in question exclusively to an undertaking by legislative, regulatory or administrative provisions. Only in such a case could it be considered that there was no competition for the market. If the relevant authorities retain the right to bid for the services in question, it cannot be concluded that competition for the market has been excluded⁵⁰.
57. In the present case, no competitive procedure took place for the entrustment of exclusive rights to APM Constanța, AFDJ Galați and ACN.
58. However, it does not follow from the information available that there would be any legal or regulatory obligation to grant the exclusive right for pilotage services to the three entities. On the contrary, it appears that the Romanian authorities would have been free to grant these rights to other providers. Indeed, the national legislation⁵¹ provides for different ways of providing pilotage services that can be used alternatively or complementarily. The Ministry of Transport, when adopting Order No 991/2020, exercised the discretion provided for by Government Order No 22/1999, by establishing that pilotage services in certain areas/ports shall be provided only by the three entities, by excluding any other means of providing these services. Therefore, entrusting the exclusive rights to port authorities was a possibility, not a legal or regulatory obligation.

(iii) Lack of competition with other services

59. As regards the third criterion for the existence of a legal monopoly, the pilotage service cannot be in competition with other services in the markets in which it is provided⁵².

⁴⁹ Notice on the notion of aid, footnote 273.

⁵⁰ Case C-659/17 *INPS* EU:C:2019:633, paragraph 38; Judgment of the Court in Case C-385/18, *Arriva Italia*, EU:C:2019:1121, paragraph 58 and the case-law cited. See also recitals (81) et seq. of Commission Decision of 12 July 2021 – *Alleged aid to RVV and Nordwasser GmbH*, SA.48706 – Germany.

⁵¹ Article 50(1) of Government Ordinance 22/1999. See also Article 50(2) of the Ordinance which appears to establish that the provision of services by port administrations takes place where there are no authorised operators or where there is an impossibility to provide the services under concession.

⁵² See Commission Decision of 12 July 2021 – *Alleged aid to RVV and Nordwasser GmbH*, SA.48706 – Germany, recitals (88) to (90).

60. It is for the national court to ascertain whether other services would be in competition with the provision of pilotage services in the relevant areas/ports.

(iv) Absence of cross-subsidisation

61. As regards the fourth criterion, it is for the national court to assess whether the alleged beneficiaries of the aid (APM Constanța, AFDJ Galați and ACN) are active in other markets that are open to competition.

62. In such a case, they must have a separate accounting system that excludes cross-subsidisation of services or products supplied on other markets. Such a system would not be necessary only if the other activities provided by the beneficiaries are of an ancillary nature and are economically minor.⁵³ The Commission does not have at its disposal the necessary information to assess compliance with this condition.

IV. CONCLUSION

63. In view of the above, on the basis of the information available, the Commission considers that:

a) Order No 991/2020 granted APM Constanța, AFDJ Galați and ACN an exclusive right to provide pilotage services in certain areas/ports;

b) Such measure (i) is granted through State resources, (ii) is imputable to the State, (iii) provides a selective advantage to the beneficiaries and (iv) may affect trade between Member States.

c) It is for the national court to determine whether the activity of providing pilotage services constitutes an economic activity and whether it distorts competition.

64. In order to assess whether pilotage services constitute an economic activity, the national court should verify the status of each of the alleged beneficiaries (i.e. whether they are public undertakings which also carry out economic activities or exercise only public powers), (ii) to the extent that they also provide economic and non-economic activities, whether the prerogatives of public power can be dissociated from activities of an economic nature, (iii) whether the provision of pilotage services could be regarded as an exercise of public powers by the alleged beneficiaries or they have been granted an exclusive right to provide a service on a market, taking into account the characteristics of

⁵³ See Commission Decision of 12 July 2021 – *Alleged aid to RVV and Nordwasser GmbH*, SA.48706 – Germany, recital (92).

the pilotage services provided, including how remuneration is determined and whether there are operators willing or able to provide them by complying with certain conditions on safety.

65. If the national court considers that pilotage services in Romania constitute an economic activity, it should determine whether the measure distorts competition, in particular whether the conditions set out in point 188 of the Notice on notion of aid are cumulatively fulfilled. In that regard, the national court would have to ascertain whether the statutory monopoly established in favour of the three entities complies with national and EU law, whether competition is excluded not only on the market but also for the market, whether those services are in competition with other services and whether the risk of cross-subsidisation is excluded.

V. PUBLICATION

66. Pursuant to point 130 of the Enforcement Notice, the Commission may make its opinions publicly available on its website.
67. For this reason, the High Court of Cassation and Justice is requested to give its consent to the publication of this opinion. If the opinion contains information considered confidential, including professional secrets and data protected by the GDPR⁵⁴ ('confidential information'), the High Court of Cassation and Justice is requested to provide the Commission services with a non-confidential version thereof or to indicate which parts of the opinion would contain confidential information.
68. The Commission would be grateful if the High Court of Cassation and Justice could reply as soon as possible, preferably within 2 months from the date of delivery of this opinion, to the following email address: COMP-AMICUS-STATE-AID@ec.europa.eu, mentioning the file number **SA.108667 (2024/NC) – Navigation paths on the Danube**. In case of objections, the High Court of Cassation and Justice is asked to set out its reasons for such refusal.
69. In addition to the envisaged publication of the opinion, the Commission also intends to publish on its website the entire judgment of the High Court of Cassation and Justice, when it is available, removing confidential information or including a link to the national

⁵⁴ Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (OJ L 295, 21.11.2018, p. 39).

page where it is published, in order to provide wider information to the public and share best practices with other jurisdictions. To this end, the Commission requests the High Court of Cassation and Justice to forward the judgment or, if it has been published on a national website, the link to this page. However, if the national legislation does not provide for such publication, the High Court of Cassation and Justice is requested to inform the Commission services as soon as possible and the Commission will only publish the opinion.

I am confident that the observations provided above will be useful in resolving the present case.

Sincerely,

