Commission Decision (EU) 2019/1246 of 23 November 2018 on alleged State aid SA.35905(2016/C) (ex 2015/NN)(ex 2012/CP) — Belgium Concessionaires active in the Port of Antwerp (notified under document C(2018) 7690) (Only the Dutch and French texts are authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2019/1246

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THE EUROPEAN COMMISSION,

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

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

Having called on interested parties to submit their comments pursuant to the provisions cited above[1] and having regard to their comments

Whereas:

1. PROCEDURE

(1) On 17 December 2012, the Commission received a complaint lodged by Katoen Natie NV ('the Complainant' or 'KN') regarding alleged State aid provided by Belgium to two terminal concessionaires active in the Port of Antwerp, namely: PSA Antwerp NV ('PSA')[2] and Antwerp Gateway NV ('AG'). On 4 and 7 January 2013, the Complainant provided the Commission services with additional information concerning the alleged aid.

(2) On 29 January 2013, the complaint was forwarded to Belgium for comments. By letter dated 8 April 2013, Belgium informed the Commission services that, in its view, the measure subject to the complaint did not involve unlawful aid. Belgium provided additional information on 11 July 2013.

(3) By letter dated 12 July 2013, the Commission services subsequently requested further information from Belgium, to which Belgium replied on 2 September 2013. Following the request from the Commission services dated 4 March 2014, Belgium provided additional clarifications on 6 March 2014, 1 and 24 April 2014 as well as on 19 May 2014.

Changes to legislation: *There are currently no known outstanding effects for the Commission Decision (EU) 2019/1246. (See end of Document for details)*

(4) On 11 August 2014, the Commission services sent a preliminary assessment letter to the Complainant stating that *prima facie* the measure subject to the complaint did not constitute State aid. By the same letter the comments of Belgium on the complaint were forwarded to the Complainant.

(5) By letter dated 9 September 2014, the Complainant challenged the Commission services' preliminary assessment and provided informed the Commission about new facts of the case. On 7 January 2015, Belgium provided comments on the new elements provided by the Complainant.

(6) By letter dated 18 January 2016, the Commission informed Belgium that it had decided to initiate the procedure laid down in Article 108(2) of the Treaty on the Functioning of the European Union ('TFEU'). Further to the initiation of the procedure, Belgium submitted comments on 15 March 2016. The Commission decision to initiate the procedure ('the opening decision') was published in the *Official Journal of the European Union*[3] on 18 March 2016. The Commission called on interested parties to submit their comments.

(7) Between 18 April and 3 May 2016, three interested parties provided the Commission services with comments. On 20 May 2016, the Commission services forwarded the comments of the interested parties to Belgium. Belgium replied to those comments on 15 June 2016.

(8) On 23 June 2016, the Commission services requested further information from Belgium, which was provided on 19 and 29 August 2016.

(9) On 10 October 2016, AG filed a submission with the Commission services.

(10) On 20 October 2016, the Commission services requested additional information from the Belgian authorities, which was provided on 16 December 2016.

(11) On 20 February 2017, the Commission services requested additional information from Belgium, which was provided on 21 March 2017.

(12) In connection with a meeting with the Commission services, which took place on 2 March 2017, the Complainant filed a submission dated 2 March 2017.

(13) On 7 March 2017, the Commission services requested additional information from Belgium, which was provided on 5 and 20 April 2017.

(14) By letters dated 4 August 2017, the Commission services sought information from PSA and AG, which each of them provided on 15 September 2017.

(15) On 13 November 2017, the Commission services requested additional information from Belgium, which was provided on 1, 4 and 14 December 2017.

(16) On 16 July 2018, the Commission services requested additional information from Belgium, which was provided on 18 and 27 July and on 10 August 2018.

2. BACKGROUND AND DESCRIPTION OF THE MEASURES

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(17) In 2004, following a public tender, the Antwerp Port Authority (Gemeentelijk Havenbedrijf Antwerpen, 'the GHA') concluded concession contracts[4] with PSA and AG for a duration of 42 years for the operation of container transhipment services in the port's new Deurganckdok ('DGD') terminal.

(18) The contracts provided for minimum tonnage requirements ('MTRs'), measured in Twenty-foot Equivalent Units ('TEU'), the purpose of which is to prevent concessionaires from keeping idle the areas attributed to them. MTRs for the DGD were gradually phased in during a start-up phase lasting until 2012[5]. As of then, the MTRs were supposed to be fixed. Where the concessionaires fell short of the MTRs provided for they were contractually obliged to pay penalties/compensations to the GHA. The concessions also provided that they could be terminated before the set expiry by the GHA in case of manifest underuse by the concessionaire or in case of insolvency of a concessionaire.

(19) Container traffic in the so-called Hamburg-Le Havre range[6] decreased by 15,8 % from 2008 to 2009, and in the five biggest ports (Rotterdam, Antwerp, Hamburg, Bremen and Le Havre) in that range by 16,3 %[7]. That traffic decline reflected the impact of the global economic contraction observed since 2008 (hereinafter referred to as 'the Crisis') on the Hamburg-Le Havre range. In Antwerp overall container traffic also decreased by 16,3 %. In the DGD, traffic decreased by 38,6 % overall (by 37,7 % for PSA and by 39,9 % for AG). PSA and AG were no longer able to meet their respective MTRs that were still increasing from year to year owing to the phase-in mechanism. Consequently, they were contractually obliged to pay compensations to the GHA, no compensation was however collected in the years 2009 to 2012.

(20) Following an email exchange between the GHA and AG in December 2009, discussions took place with regard to the lowering of the original MTRs. In that context, the GHA initially suggested to lower the original MTRs by the decline rate observed in the Hamburg-Le Havre range in that year (i.e.: 15,8 %)[8]. Since February 2011 the GHA repeatedly reminded PSA and AG of the unachieved MTRs and asked for their view. PSA and AG pointed in several answers[9] to their importance for the development of the port[10], hinted at their possible move to other ports[11], and to the impact of the Crisis. In addition, both PSA and AG also submitted legal opinions by their counsels, setting out why the penalty clauses were not applicable or non-enforceable[12]. Those arguments were later used by both PSA and AG in arbitration disputes against the GHA[13].

(21) As mentioned in recital 1, on 17 December 2012, KN submitted a complaint to the Commission on the non-enforcement of compensation payments due by PSA and AG for unachieved MTRs. In 1992, the GHA concluded a concession contract with KN. In 1998, MTRs were introduced in the concession contract of KN. KN failed to meet the MTRs in the year 2009. The GHA reduced the contractually due compensation for KN (as it did with regard to other terminal operators in the context of the Crisis), i.e. instead of ca. EUR [180 000-250 000][14], KN had to pay EUR [7 500-9 000] for the year 2009 (and only for the year 2009).

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(22) On 26 March 2013, the GHA decided to readjust the concession agreements with PSA and AG ('2013 GHA Decision'). The 2013 GHA Decision involved the following:

Measure 1 (applicable to PSA and AG) — see charts[15]1 and 2 below: Measure 1[16] consists in the reduction of the compensation payments due by PSA and AG for failing to fulfil the MTRs with a retroactive effect from 2009 under the '75/125 rule' determined by the GHA. According to that rule, the MTRs were adjusted by adding 125 % of the yearly Hamburg-Le Havre range growth rate to the MTR of the previous year. When there was a traffic decline, 75 % of the yearly Hamburg-Le Havre range decline rate was deducted from the MTRs of the previous year. The rule thus implies that PSA and AG have to perform 25 % better than their peers in the Hamburg-Le Havre range. The reference for establishing the new MTRs for the year 2009 was the traffic realised in 2008 in the DGD. The 'outperformance factor' of 25 % is based on the historic performance of the Port of Antwerp, which, in terms of yearly traffic growth rates, over a longer timespan average was 25 % better than the average of the ports in the Hamburg-Le Havre range. The implementation of Measure 1 led with regard to 2009 alone to MTRs reductions of – 41,7 % (PSA) and – 29,7 % (AG), when compared to the 2009 original MTRs.

(23) On 12 May 2014, the GHA decided the following:

Measure 2 — see chart 2 below: Measure 2[17] consists in maintaining the reduced compensations (in accordance with the 75/125 rule) with regard to AG only.

(24) PSA paid to the GHA the reduced penalties following the MTRs readjustment under the 2013 GHA Decision, but reserved its right to challenge this payment on the grounds that the contractual penalty clause was in violation of public order in that it was purely punitive, and that the enforcement of penalties amounted to an abuse of right by the GHA. On 2 May 2016, PSA asked an arbitration panel to order the GHA to repay PSA the compensations it had paid following the 2013 GHA Decision. The outcome of the proceeding is pending at the time of the adoption.

(25) AG did not pay the reduced penalties and was subsequently summoned by the GHA. The case was referred to an arbitration panel. AG argued, inter alia, that a penalty clause could only apply if the MTRs were not achieved due to circumstances related to AG, but in fact they were not achieved due to the Crisis, and that the enforcement of reduced penalties amounted to an abuse of rights by the GHA. The outcome of the proceeding was, however, that the reduced penalties applied by the GHA were ruled to be reasonable.

(26) On 12 May 2014, the GHA unilaterally amended the concession contracts with PSA and AG. The changes involved the attribution to PSA of an area in the DGD, initially attributed to AG but unused by it. As a result, PSA disposed of an area ca. 20 % larger, and, in turn, AG disposed of an area ca. 30 % smaller, as compared to the initially attributed areas. At the same time, the GHA decided to maintain the 75/125 rule with regard to AG under Measure 2 (see recital 22). With regard to PSA, the GHA decided

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to apply the 75/125 rule for the last time in 2013. The GHA gradually reinstated the originally contracted MTRs (after a phase-in lasting until 2016)[18]. In addition, as of 2016, PSA has been subject to additional MTRs applicable to the area attributed to it in 2014.

(27) In 2015, the Brussels Court of First Instance rejected the claim by KN against the GHA that the GHA's adjustment of MTRs towards AG and PSA amounted to State aid[19]. The court found, inter alia, that by adjusting MTRs the GHA reasonably took into account the Crisis and that it could be assumed that a private creditor would have adopted a similar decision. This judgement of 12 February 2015 was appealed by KN. The appeal is pending before the Brussels Court of Appeal at the time the present decision is adopted.

(28) On 15 January 2016, the Commission initiated the formal investigation procedure. It expressed doubts as to whether Measures 1 and 2 constituted State aid.

(29) The present Decision describes and assesses Measures 1 and 2, as defined in recital 22 above, and as initially defined in the opening decision, recitals 49(i) and (ii) as well as 81 and 82.

