Commission Decision (EU) 2019/1116 of 19 December 2017 on State aid SA.33829 (2012/C) Maltese tonnage tax scheme and other State measures in favour of shipping companies and their shareholders (notified under document C(2017) 8734) (Only the English text is authentic) (Text with EEA relevance)

COMMISSION DECISION (EU) 2019/1116

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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) Based on a complaint received by an interested party in October 2011 the Commission entered in discussion with the Maltese authorities on the Maltese tonnage tax scheme and further tax measures. Following written and oral discussions with the Maltese authorities between November 2011 and June 2012, the Commission informed Malta by letter dated 26 July 2012 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') on possible illegal aid measures applied by Malta in favour of shipping companies and their shareholders ('the opening decision')[(2)].

(2) In the opening decision the Commission invited interested parties to submit their comments on the measures set out in the opening decision in recitals 3 to 30.

(3) The Commission received comments from six interested parties: European Community Shipowners' Association; Malta Maritime Law Association; Norwegian Shipowners' Association; Malta Chamber of Commerce, Enterprise and Industry; Malta International Shipping Council; Super Yachts Industry Network — Malta. The

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Commission also received comments from a German shipping sector employee wishing to remain anonymous.

(4) The comments were forwarded to Malta, which was given the opportunity to react; its comments were received by letter dated 15 December 2012.

(5) Malta submitted further observations by letters of 15 October 2012, 21 December 2012, 27 February 2013, 31 October 2013, 25 March 2014 and 24 December 2015.

(6) By letter dated 9 December 2016, Malta waived its right under Article 342 TFEU in conjunction with Article 3 of Regulation (EEC) No 1 determining the languages to be used by the European Economic Community[3] to have this Decision adopted in Maltese and agreed that this Decision be adopted in English.

2. DESCRIPTION OF THE MEASURES

(7) This Decision relates to the following measures:

(a) the tonnage tax scheme and specifically:

(i) the vessels eligible for tonnage tax;

(ii) specific types of income and activities of tonnage tax ships[4] subject to tonnage tax, tonnage tax scheme, including the extension of the tonnage tax to non-core shipping activities;

(iii) the level of tonnage tax;

(iv) the flag link requirement;

(v) ring-fencing measures;

(b) the exemption from taxation of capital gains arising from the sale or transfer of ships;

(c) the exemption from taxation of capital gains in relation to shares in shipping companies;

(d) the exemption from taxation of dividends in relation to shares in shipping companies,

(e) the exemption from taxation of interest or other income in relation to financing of shipping companies or tonnage tax ships,

(f) the exemption from certain duties on documents and transfers.

2.1. The tonnage tax scheme

2.1.1. *General principles — Eligible vessels, income and activities*

(8) Under the Merchant Shipping Act[5], as specifically supplemented and amended by the Merchant Shipping Taxation Regulations[6] ('the Taxation

Regulations'), income derived by a licensed shipping organisation from shipping activities may be exempted from income tax under the Income Tax Act[7], provided that all relevant registration fees and tonnage taxes[8] are duly paid. The option to pay tonnage tax relates to income arising from the operation of a tonnage tax ship[9].

(9) A shipping organisation is defined, in the Merchant Shipping Act[10], as organisation having its principal objects as one or more of the following activities provided they are licensed to do so:

(a) the ownership, operation (under charter or otherwise), administration and management of a ship or ships registered as a Maltese ship in terms of this Act and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(b) the ownership, operation (under charter or otherwise), administration and management of a ship or ships registered under the flag of another state and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(c) the holding of shares or other equity interests in entities, whether Maltese or otherwise, established for any of the purposes stated in this article and the carrying on of all ancillary financial, security and commercial activities in connection therewith;

(d) the raising of capital through loans, the issue of guarantees or the issue of securities by the company when the purpose of such activity is to achieve the objects stated in this article for the shipping organisation itself or for other shipping organisations within the same group; […]

(e) the carrying on of such other activities within the maritime sector which the Minister may, on the advice of the Authority, from time to time prescribe by regulations as qualifying for the above purpose.

(10) The tonnage tax scheme covers the income arising from shipping activities[11]. The Taxation Regulations require account separation to be ensured in respect of shipping and non-shipping activities[12]. 'Shipping Activities' are defined as 'the international carriage of goods or passengers by sea or the provision of other services to or by a ship as may be ancillary thereto or associated therewith including the ownership, chartering or any other operation of a ship engaged in all or any of the above activities or as otherwise may be prescribed'[13].

(11) Article 85(1) of the Merchant Shipping Act sets out the requirements for a ship to qualify as 'tonnage tax ship' and hence to benefit from the tonnage tax scheme: 'Tonnage tax ship' means 'either a ship declared to be a tonnage tax ship by the Minister in terms of Article 85A of this Act or a Community ship of not less than 1 000 net tons which is owned entirely, chartered, managed, administered or operated by a shipping organisation'. Article 85A(1) of the Merchant Shipping Act allows for any ship, including those below 1 000 net tons[14], to be declared a 'tonnage tax ship', therefore eligible for the tonnage tax scheme. The current wording specifies

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that this may be done 'irrespective of operations or trade in which engaged', and on such conditions as the responsible Minister 'may deem appropriate'.

(12) Income derived from shipping activities of a licensed shipping organisation is exempt from income tax under the Income Tax Act[15].

(13) Summarized, vessels within the tonnage tax scheme ('tonnage tax ships') which are eligible for tonnage taxation while being exempted from income tax are vessels which are 'owned entirely, chartered, managed, administered or operated by a shipping organisation'[16] and which are engaged in shipping activities[17].

(14) Furthermore, the following is exempt from taxation under the Income Tax Act: any income, profits or gains of a licensed shipping organisation derived from the sale or other transfer of a tonnage tax ship or from the disposal of any rights to acquire a ship which, when delivered or completed, would qualify as a tonnage tax ship[18].

2.1.2. *Specific types of income and activities eligible to tonnage tax*

2.1.2.1. Bareboat chartering out

(15) Under the Maltese legislation all revenue from bareboat chartering out is eligible for tonnage taxation, without any limitations.

2.1.2.2. Time/voyage chartering

(16) Because of the wide definition of 'shipping organisation'[19] in combination with the wide definition of 'shipping activities'[20] in the Maltese legislation it may be interpreted that the profits of pure commercial managers of ships without any responsibility for crew or technical management (that is to say, companies which enter into transportation contracts and rely on other companies to deliver the service, through time or voyage chartering) are eligible for tonnage tax.

(17) The use of time-chartered vessels is subject to the flag link requirements set out in recital 24. However, there is currently no explicit rule as to minimum EEA flagging requirement for new entrants into the tonnage tax scheme.

(18) On 6 January 2012 the Registrar General of Shipping issued internal rules on the eligibility for the application of the Maltese tonnage tax scheme ('2012 Rules on Internal Procedure')[21]. Those include restrictions on time-chartering and similar activities as a percentage of the total tonnage of the fleet. The same internal procedure allows for derogations of up to three years:

> At the time of opting into the tonnage tax scheme, the total net tonnage of the ships chartered-in and included in the tonnage taxation scheme does not exceed 80 % of the total net tonnage of all ships chartered-in and operated by the qualifying charterer and any other organisation forming part of the same group. Chartered-in ship means a ship taken on a time charter or on a voyage charter or on a contract of affreightment basis. Ships operated means ships owned or bareboat chartered-in. This percentage can reach 90 % provided that every chartered-in ship flies a Community flag or is entirely managed (crew and technical) from the territory of the EU/EEA. Following

the entry into the system, the charterer may increase the percentage net tonnage chartered-in from the above mentioned maximum, provided that this excess does not occur for more than three consecutive tax periods.

2.1.2.3. Ancillary revenues

(19) In relation to carriage of cargo and passengers, the 2012 Rules on Internal Procedure give some details as to which 'ancillary activities' would normally be considered by the Maltese authorities to be covered by the definition of 'shipping activities'. It is specified that in general 'All activities which are substantially connected to and form a normal part of the ship operating service being offered in the course of the operation of qualifying ships should qualify for the tonnage tax regime'. In particular, the following activities are in that regard specified:

(a) In relation to the carriage of passengers by sea (cruise ships), all hotel, catering, entertainment and retailing activities on board a qualifying ship, provided that these services are performed as ancillary activities to the activity of carriage of passengers by sea by that ship and are all consumed or used on board that ship;

(b) the operation of office facilities in connection with shipping activities subject to tonnage tax;

(c) the operation of ticketing facilities and passenger terminals in connection with shipping activities subject to tonnage tax[(22)];

(d) the provision of excursions for passengers of a qualifying ship operated by the company, where any cabin for the passenger remains available for his exclusive use;

(e) any interest or similar return earned on working capital where such interest/return is used for the purposes of financing the licensed shipping organisation or its shipping activities and/or the acquisition and maintenance of a tonnage tax ship.

(20) According to Malta, the activity described in point (a) of recital 19, and in particular consumption or use on board, is interpreted to cover all receipts from goods and services sold to the passengers still maintaining a cabin on board as long as the revenues of the ship mainly stem from the traditional shipping revenues.

2.1.3. *The level of the tonnage tax*

(21) Malta charges an annual tonnage tax in the form of a lump sum[(23)]:

TABLE 1

Ship of Net Tonnage (Net Tons)		**Annual tonnage tax**
0	2 500	EUR 1 000