European Union state aid law and ports

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This article discusses EU state aid law relating to seaports by examining four topics: first, the general rules of EU state aid law (paying attention to the position of ports); secondly an analysis of the principles that have emerged from some of the EU state aid cases relating to ports; thirdly, the proposed extension of the EU's General Block Exemption Regulation (GBER) to ports; and finally some practical advice on state aid law for ports and those using ports.

Introduction

'Beware of Greeks bearing gifts' is a well known and ancient phrase. It is embodied in Book 2 of Virgil's *Aeneid* in the following terms, when translated into English: 'Do not trust the horse, Trojans. Whatever it is, I fear the Greeks even when they bring gifts'. The contemporary equivalent of the phrase might be: 'Beware of European Union Member States bearing gifts. Whatever they offer, you may have to repay it to them with interest and probably when it least suits you, with the result that they accomplish their project and you will have paid for it!'

This notion is embodied in Article 107(1) of the Treaty on the Functioning of the European Union (TFEU) in the following terms, when translated into English: '… any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

The contemporary TFEU phrase is less discriminatory than Virgil's original one: the warning is not confined only to Greeks but applies to all 28 Member States of the European Union (EU)[1] and the three additional Member States of the European Economic Area (EEA).[2] Thus, it is a general warning to *everyone* who does business in most of Europe.

The warning should be heeded by port users and operators who believe themselves to be obtaining a gift or, at least, a 'very good deal' when facilities are provided to them or deals done for them on terms that seem to be 'very good' or even 'too good'. However, in reality, the deals may just be 'too good to be true', with the result that the benefit may have to be 'repaid' by the recipients to the Member State that sought to provide the apparently 'good deal' in the first place.

Examples of deals that may simply be too good and which could involve state aid are:

(a) the provision of land in a port at less than market value
(b) the provision of facilities or services in a port at less than market value

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[1] On EU state aid law see in particular Treaty on European Union (TEU) art 3 and TFEU arts 3, 4, 5, 6, 14, 42, 50, 93, 106, 107, 108, 109, 119 and 345.

[2] On EEA state aid law see in particular 'Agreement on the European Economic Area' OJ Ll/3,3.1.1994 arts 7, 49, 61, 63 and Annex XV.

(c) the writing off of fees or payments in a port when a 'market economy operator' would not have done so
(d) the provision of favourable but discriminatory tax breaks (eg reliefs or rates) for port activities
(e) the provision of investment by state bodies on terms that a market economy operator would not have invested and
(f) the construction of port infrastructure that is supposedly open to all but is in fact destined for one operator or a select number of operators.

All of these examples beg the obvious question: what is 'market' value and what would a 'market' economy operator do when, in reality, there is often no market comparator to the port or state authority?[3] The absence of a comparator makes the plight of the port operator or shipping company all the greater. However, this would not prevent the European Commission from investigating or finding that there is unlawful state aid which must be repaid, with interest, to the very Member State which has caused the recipient the problem by: (a) not notifying the state aid; and (b) not having the aid authorised by the European Commission in the first instance.

This article discusses EU state aid law relating to seaports by examining four topics:

(a) the general rules of EU state aid law (paying attention to the position of ports)
(b) an analysis of the principles that have emerged from some of the EU state aid cases relating to ports
(c) the proposed extension of the EU's General Block Exemption Regulation (GBER)[4] to ports and
(d) some practical advice on state aid law for ports and those using ports. The article concentrates on *infrastructural* rather than *operational* state aid issues, although many of the principles examined here apply to both areas.

The topicality of the subject is clear from facts including that:

(a) port operators are beginning to complain about alleged state aid in other ports (eg ABP complaining about alleged state aid for the Liverpool Cruise Terminal)[5]
(b) ships are getting bigger (particularly container vessels and cruise liners), hence requiring new and bigger facilities

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[3] This is analogous to the situation where an employee who claims gender discrimination cannot point to an actual comparator.

[4] See Commission Regulation 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of arts 107 and 108 of the treaty (entered into force on 1 July 2014) OJ L187/1 (26 June 2014) http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1404295693570&uri=CELEX:32014R0651. For a practical guide to the GBER see http://ec.europa.eu/competition/state_aid/legislation/practical_guide_gber_en.pdf.

[5] See http://ec.europa.eu/competition/state_aid/cases/251566/251566_1529732_82_2.pdf. See also Commission press release of 11 March 2014 (http://europa.eu/rapid/press-release_IP-14-245_en.htm): 'State aid: Commission approves aid for construction of cruise terminal in Liverpool. The European Commission has found that public funding worth £17.8 million (ca €22 million) granted for the construction of the Liverpool cruise terminal is in line with EU state aid rules. The new infrastructure furthers EU transport policy objectives without unduly distorting competition in the Single Market. Following a complaint, the Commission started to examine the financing of a new cruise terminal in Liverpool in 2011. The project was conducted by the Liverpool City Council and received funding from the UK (£9.2 million) and from EU Structural Funds (£8.6 million). The UK carried out an in-depth financial analysis showing that the terminal operator's income from the use of the infrastructure would be insufficient to cover the investment costs over a period of 20 years. Therefore, the project would not be carried out without public funding. The investment will allow for a better exploitation of sea transport services, particularly in the cruise industry. The Commission found that the public funding was limited to the minimum necessary to make the investment possible. The Commission also found that the potential distortions of competition triggered by the public funding will be limited because the terminal will have a small market share, both in the EU and UK markets. The positive effects of the project will outweigh any potential distortions of competition brought about by the aid. The Commission therefore concluded that the project is in line with Article 107(3)(c) of the Treaty on the Functioning of the European Union (TFEU), which allows state aid for the development of certain economic activities, provided that it does not unduly affect trade and competition in the Single Market. … The investment was completed in 2007 but was not notified by the UK authorities under the assumption that the funding did not constitute state aid. The Commission has examined the project following a complaint from a competitor. The public funding of infrastructure investment projects is subject to EU state aid rules when the infrastructure is destined to be commercially exploited (see judgment of the EU General Court of March 2011 in Joined Cases T–443/08 and T–455/08). Therefore, such projects must be notified to the Commission for prior approval'.

(c) some of the facilities in the EU's 1200 commercial seaports simply need upgrading (eg breakwaters in Great Yarmouth[6]) and
(d) the Commission has become much more active with regard to ports and state aid. It is also timely because the Commission is considering extending the GBER to ports[7] and thereby to bring greater certainty for and impose less administration on the sector. Just one of those results would be admirable but both would be paradise!

Not only is the issue of state aid being given to ports clearly a topical one; it is also an important issue. The Commission recognises that ports are 'of strategic importance for achieving major Union objectives such as the smooth functioning of the internal market and the strengthening of economic, social and territorial cohesion'.[8] This point has been already been articulated in the Commission's White Paper entitled 'Roadmap to a Single European Transport Area – Towards a Competitive and Resource Efficient Transport System'[9] and its Communication entitled 'Ports: An Engine for Growth'.[10]

The Commission believes that investments in ports 'are necessary, in particular, for the adaptation of port access infrastructure and port infrastructure and superstructure to the increased size and complexity of the fleet, to the use of alternative fuel infrastructure and to stricter requirements on environmental performance. The lack of high quality port infrastructure results in congestion and extra costs for shippers, transport operators and consumers'.[11]

General rules of EU state aid law: paying attention to the position of ports

Introduction

It is impossible to encapsulate in a single article – or, more accurately a part of an article – the general rules of EU state aid law.[12] Nonetheless, it is useful to provide a summary of the rules so as to provide context for the rest of the article.

What is 'state aid'?

On 19 May 2016, the Commission published a Communication on the notion of state aid.[13] The Communication sets out in 68 pages a great deal of know-how and thinking on state aid and

[6] See also IP/05/1671 http://europa.eu/rapid/press-release_IP-05-1671_en.htm, where the Commission announced: 'European Commission approves UK public financing for the development of Great Yarmouth Outer Harbour. The European Commission has decided today to authorise a financing package that allows a number of public authorities in the East of England to partially finance the construction of maritime access infrastructure (breakwaters) to allow for the future development of the outer harbour at Great Yarmouth. The Commission considers that the activity of ensuring adequate and safe access to and from the port does not constitute an economic activity liable to distort competition between Member States but is rather a public task in the general interest benefiting the Union as a whole. It is the intention of the UK authorities that the development of the outer harbour be implemented through a public-private partnership (PPP), with part of the financing coming from the public sector. The public funding from state resources is approximately £13.425 million (€19.5 million) coming from the East of England Development Authority, Norfolk County Council and Great Yarmouth Borough Council. Additionally, the sum of £4.575 million (€6.78 million) of European Regional Development Fund (ERDF) has been applied for financing under Objective 2. This is the subject of a separate Major Project Notification to the European Commission. After examining the financing measures in light of the EU rules on State aid, the Commission has concluded that the public financing made available for the maritime access routes and sea-locks does not constitute State aid'.

[7] See Commission Press release IP/16/622 http://europa.eu/rapid/press-release_IP-16-622_en.htm.

[8] Commission 'Proposed regulation on the extension of the General Block Exemption Regulation (GBER) to ports' recital 5.

[9] COM(2011) 144.

[10] COM(2013) 295.

[11] Commission 'Proposed regulation on the extension of the GBER to ports' (n 8) recital 5.

[12] On state aid law generally see K Bacon (ed) *European Union Law of State Aid* (2nd edn Oxford University Press 2013); A Biondi, P Eeckhout and J Flynn (eds) *The Law of State Aid in the European Union* (Oxford University Press 2004); L Hancher, T Ottervanger and P J Slot *EU State Aids* (4th edn Sweet & Maxwell 2012); J J Piernas López *The Concept of State Aid Under EU Law: From Internal Market to Competition and Beyond* (Oxford Studies in European Law 2015); C Quigley *European State Aid Law and Policy* (3rd edn Hart Publishing 2015); E Szyszczak (ed) *Research Handbook on European State Aid Law* (Edward Elgar 2012); G L Tosato, L Bellodi *Procedure: Antitrust – Merger – State Aid* (Claeys & Casteels Publishers BV 2014).

[13] http://ec.europa.eu/competition/state_aid/modernisation/notice_of_aid_en.pdf. See also Press Release IP/16/1782 http://europa.eu/rapid/press-release_IP-16-1782_en.htm.

considers, for example, the notion of 'undertaking an economic activity', the notion of 'state origin', the concept of 'advantage', the concept of 'selectivity', the concept of 'effect on trade and competition' and the concept of 'infrastructure: some specific characteristics'. The document is a distillation of thought and an important starting point for anyone concerned with state aid law. Suffice it to say, for present purposes, that examples of state aid include grants, loans, capital investments and guarantees.

Article 107 of the TFEU: the substantive rules

General prohibition on state aid: Article 107(1) of the TFEU

Article 107(1) of the TFEU contains the *general* prohibition on state aid. This embodies a policy choice made over 50 years ago – on 25 March 1957 when the then treaty establishing the European Economic Community (EEC) was signed – that, in general, discriminatory state aid that distorts competition is to be prohibited and outlawed unless approved by the European Commission or permitted by the appropriate treaty (now, the TFEU). Article 107(1) thus provides: '[s]ave as otherwise provided in the Treaties, any aid granted by a Member State or through state resources in any form whatsoever that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market'.

Despite the reference to 'goods', Article 107(1) also applies to services. It should be borne in mind that this policy choice is not one that favours the private sector over the public sector: Article 345 of the TFEU (inserted at the insistence of France) provides that the EU does not favour either public or private ownership of property; in other words, it is neutral on the matter.

Automatically permitted state aid: Article 107(2) of the TFEU

Article 107(2) of the TFEU permits certain categories of aid de jure (ie by operation of law under Article 107(2)). There are two situations when this applies: Article 107(2)(a) automatically permits 'aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned', whilst Article 107(2)(b) permits 'aid to make good the damage caused by natural disasters or exceptional occurrences'.

A third provision, Article 107(2)(c), is now of largely historical significance only: it relates to 'aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division', although the provision adds that: '[f]ive years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point'.

Article 107(2)(a) is of little relevance to the port sector but Article 107(2)(b) is relevant in, for example, the case of storm damage or structural damage to a port (eg to a quay wall or breakwater) where the Member State could proceed to grant assistance, which would otherwise be illegal state aid, to repair the loss or damage. However, it is important that the Member State does not provide surplus funds because this exception to the general prohibition would be narrowly construed.

Permissible forms of state aid: Article 107(3) of the TFEU

Article 107(3) of the TFEU is the most relevant provision from the perspective of ports and state aid. It is the provision that permits the Commission to permit state aid which would otherwise be unlawful. So, for example, the Commission permitted aid being provided by Lithuania in regard to the port of Klaipėda under Article 107(3)(c) of the TFEU.

There are five possible grounds for permissible aid under Article 107(3). It is possible that any one of the five could be invoked in the context of a port in the right circumstances.

First, Article 107(3)(a) provides that the Commission may consider aid to be compatible with the internal market and therefore to permit: 'aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349 [of the TFEU], in view of their structural, economic and social situation'.

Secondly, Article 107(3)(b) provides that the Commission may consider aid to be compatible with the internal market and therefore to permit: 'aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State'.

Thirdly, Article 107(3)(c) provides that the Commission may consider aid to be compatible with the internal market and therefore to permit: 'aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest'.

Fourthly, Article 107(3)(d) allows the Commission to authorise 'aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest'. This could be relevant where, for example, an old port or harbour area is being conserved or converted into a heritage area or a centre for the benefit of tourists and society generally.

Finally, the last heading under Article 107(3)(e) is very open: it permits the Commission to authorise 'such other categories of aid as may be specified by decision of the Council on a proposal from the Commission'.

Article 108 of the TFEU: the procedural regime

Article 108 sets out the general procedural regime. Article 108(1) provides that the Commission 'shall, in cooperation with Member States, keep under constant review all systems of aid existing in those states. It shall propose to the latter any appropriate measures required by the progressive development or by the functioning of the internal market'. Article 108(2) provides that the Commission may abolish or alter state aid. Article 108(3) provides that the Commission must be informed, in sufficient time to enable it to submit its comments, of any plans by a Member State to grant or alter aid. The Commission must, without delay, initiate the procedure to review the aid. Moreover, the relevant Member State must not put any planned aid into effect until the Commission has made a final decision on the aid proposed. Importantly, for present purposes, Article 108(4) provides that the Commission may 'adopt regulations relating to the categories of state aid that the Council has, pursuant to Article 109, determined may be exempted from the procedure provided for by' Article 108(3), hence the possibility of block exemptions for certain categories of state aid.

Approval of port projects

There are three ways in which state aid could be approved:

(a) aid notified to, and approved individually by, the Commission
(b) aid is covered by an aid scheme pre-approved by the Commission and
(c) by virtue of a block exemption regulation.

At present, the third method of approval is not possible in the case of ports. By applying the GBER to ports, this would mean that it should be easier for EU public bodies to provide state aid for ports. If a port project fits within the scope of the proposed GBER amendment, then the project would not need to be notified to the Commission but would be approved automatically under the GBER.

General block exemption

The European Commission adopted the GBER in 2014. This was part of the state aid modernisation (SAM) process. The GBER declares measures falling within its scope to be compatible with state aid law and exempts it from notification to the Commission. It is therefore very useful because it obviates the need for a notification to the Commission where the aid falls within the GBER. The measure also identifies eligible beneficiaries, the maximum aid intensities[14] and the eligible expenses. The possible extension of the GBER to ports is examined more fully below.

An analysis of the principles that flow from the EU state aid cases relating to ports

Introduction

The Commission stated on 7 March 2016 that there have been 33 cases relating to ports and 54 cases relating to airports.[15] It is not proposed to examine all 33 cases in this article; rather, the purpose here is to analyse the principles that flow from some of the EU state aid cases relating to ports.

Diversity of cases

The fact patterns vary widely between the port cases. One example would be that, on 22 February 2012, the Commission authorised state aid totalling €49.2 million[16] in respect of the construction of the passenger and cargo ferries terminal at Klaipėda in Lithuania.[17] Klaipėda is the only seaport in Lithuania. The port is extremely important to Lithuania and to the city of Klaipėda, providing almost a quarter of the jobs in the city and about 5 per cent of the country's gross domestic product. The port is still small in relative terms, in that it handled only 321,000 international passengers in 2010.

The country is also an Article 107(3)(a) territory. The terminal was being financed publicly. Two economic entities would be involved in the terminal: the port authority and the future terminal operator (a private limited company known as KKIKT). The aid was notified before the works commenced. The Commission sought additional information on eight occasions and the entire process took 22 months from notification to decision.[18] The objectives of the infrastructure were to improve the connectivity of Lithuania and to develop maritime tourism by being able to service modern ro-pax ferries. The pre-existing infrastructure was neither safe nor suitable for modern conditions and vessels. Equally, the existing ferry terminal was far from the city centre and the main road transport routes.

To take a second example, on 19 June 2013, the Commission approved aid for an infrastructure project at the port of Katakolo in Greece.[19] The notification was filed on 19 November 2012 and the level of aid was €11,190,240. The Commission made five requests for additional information. The port was mainly a port of call (rather than a turnaround port) for cruise vessels and the project was to enhance the docking facilities for cruise vessels. Safety at the port would also be improved to avoid sea-swell and new generational longer vessels could be accommodated if the project proceeded. The cultural heritage would be improved. Indeed, as the Commission noted in recital 11 of its decision: '[t]he upgraded port is also expected to promote the cultural heritage of the region to visiting passengers' and there would also be a contribution to economic convergence.

The project was also included in the list of priority EU co-funded projects. There would be vessel docking infrastructure and passenger reception infrastructure added. Greece had excluded from the notification 'the construction of [a] new building for port traffic and passport control … because the Greek authorities claim that this is not related to the economic activities of the port of Katakolo'.[20] The total cost was to €12,265,965 and Greece notified €11,190,240 of this amount for state aid assessment.

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[14] That is, the maximum proportion of eligible costs of a project which may benefit from the state aid regime.

[15] Commission Press release IP/16/622 (n 7).

[16] The total cost of the investment to be implemented by the port authority was €27.825 million. Of this €27.8 million, the port authority would finance €9.9 million itself (which it would receive through port dues and rental payments, together with the port's cash reserves and commercial credits free of state aid).

[17] See SA.30742 (N/2010) – Lithuania – Construction of Infrastructure for the Passenger and Cargo Ferries Terminal in Klaipėda (22 February 2012).

[18] The notification was on 12 April 2010 and the decision was on 22 February 2012.

[19] See SA.35738 (2012/N) – Greece – Aid for the upgrading of Katakolo Port (19 June 2013).

[20] Recital 17. Activities that fall under state responsibility in the exercise of its powers as a public authority are not of an economic nature and do not fall within the scope of the state aid rules (see Case T–455/08 *Leipzig-Halle* ECLI:EU:T:2011:117).

A threshold question: is there state aid?

It is clear, and repeated often by the Commission and the Court of Justice of the European Union, that certain criteria need to be satisfied to amount to aid. For example, the Commission said in recital 34 in the *Port of Katakolo* case that:

> In order to conclude on whether state aid is present, it must therefore be assessed whether the cumulative criteria listed in Article 107(1) TFEU (i.e. transfer of state resources, selective advantage, potential distortion of competition and effect on intra-EU trade) are met for each of the measures identified.[21]

It found that there was state aid being provided. By contrast, on 21 December 2005, the Commission decided the *Great Yarmouth Outer Harbour* case[22] and held that the financing of parts of the development of the outer harbour at Great Yarmouth did not involve state aid because the works did not involve state aid – as recital 23 of the decision stated:

> As far as maritime infrastructure is concerned, the practice and policy of the Commission[23] has been to consider that public investments in maritime access routes (breakwaters, locks, navigable channels, dredging, etc.), and other maritime infrastructure that benefit the maritime community as a whole do not normally give rise to issues of state aid concern.

Principles that flow from the infrastructure port cases

In practice, it must be established that:

(a) an undertaking is involved. This criterion is satisfied easily in this context. As the CJEU has stated in various cases including *Hofner and Elsner*,[24] *Poucet and Pistre v AGF and Cancava*[25] and *Commission v Italy*,[26] whenever an entity is engaged in an economic activity then it is an undertaking, regardless of how it is financed. The General Court expanded on the point in *Leipzig-Halle*, where it stated that the construction of an infrastructure that will be exploited commercially amounts to an economic activity.[27] This is all the more so in the case of commercial ports[28]

(b) whether the infrastructure is general or project-specific – activities that fall under state responsibility in the exercise of its powers as a public authority are not of an economic nature and do not fall within the scope of the state aid rules[29]

(c) whether Member State resources are involved and whether the resources deployed could be imputed to the Member State. The aid must flow from a Member State. If it flows entirely from a private source then it is not state aid. If it flows from a third country then it is not state aid. But what if it flows indirectly from EU funds? The Commission stated very succinctly in the *Katakolo Port* case that:

> (44) … this project shall be financed partly though public resources, up to the total amount of EUR 11,190,240. The [European Regional Development Fund (ERDF)] resources that shall be made available for co-financing this project are placed at the disposal of the Greek authorities, and in particular the relevant managing authority. Therefore, they amount to state resources.

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[21] See SA.35738 (2012/N) – Greece – Aid for the upgrading of Katakolo Port (n 19).

[22] See N.503/2005 – United Kingdom – Great Yarmouth Outer Harbour (21 December 2005).

[23] See for instance the recent decision of the Commission entitled 'Flemish port infrastructure' (N520/2003 (20 October 2014).

[24] Case C–41/90 *Höfner and Elser v Macrotron GmbH* [1991] ECR I–1979 para 21.

[25] Case C–160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I–637 para 17.

[26] Case C–35/96 *Commission v Italy* [1998] ECR I–3851.

[27] Case T–455/08 *Leipzig-Halle* (n 20). See also Case T–128/89 *Aéroports de Paris v Commission* [2000] ECR II–3929 (affirmed in Case C–82/01P *Aéroports de Paris v Commission* [2002] ECR I–9297) and Case T–196/04 *Ryanair v Commission* [2008] ECR II–3643 para 88.

[28] See eg C(2009) 9949 of 15 December 2009 in Case No N.385/2009 *Public Financing of Port Infrastructure in Ventspils Port* OJ C72 (20 March 2010); see also C(2011) 3052 Final of 15 June 2011 in Case No N.44/2010 – Public Financing of Port Infrastructure in Krievu Sala OJ C215/19 (21 July 2011).

[29] See Case T–455/08 *Leipzig-Halle* (n 20).

> (45) As regards imputability to the State of the public financing …, it is noted that the Greek authorities enjoy a high degree of control in the selection at national level of the projects of this nature to be financed. The notified funding for this project was directly chosen by, and is therefore imputable to the Greek State.[30]

(d) the aid must be selective. This is rarely an issue in practice. For example, in the *Katakolo* case, the aid was provided selectively to the PMPF

(e) there must be an economic advantage flowing from the aid. In this context, the Commission must assess whether such a measure would have been undertaken at the same time by a private investor (ie a market economy investor) and whether the investment in the infrastructure is likely to yield a rate of return that would be acceptable to a private investor acting in normal market conditions. In this context, one should consult the Commission's *Guide to the Cost-Benefit Analysis of Investment Projects*[31] and evaluate the financial sustainability of the project. In particular, one should consider the financial net present value (FNPV). If the FNPV shows a negative value (ie the expected revenues do not cover the investment cost[32]) then there would be an advantage that would not have been obtained under normal market conditions and there would be aid (which would require approval)

(f) there must be a distortion of competition and there must be an effect on trade between Member States. This criterion is easily satisfied. For example, where the financial support granted by a Member State strengthens the position of an undertaking compared with other undertakings competing in intra-EU trade, then there is at least a potential effect on trade between Member States and on competition. In any event, this is usually not an issue in the context of ports as there will be cross-border trade from almost every port or a port will be in competition with other ports

(g) in terms of compatibility, one typically considers: (i) the objective of the common interest; (ii) the necessity of the aid to address a well defined object of common interest; (iii) the proportionality of the aid (ie the proportionality of the advantage conferred); and (iv) whether the level of distortion of competition and the effect on intra-EU trade would be to such an extent as to be contrary to the common interest.

Decisions usually take several months to be adopted. The typical time period would be six to nine months, although some decisions have taken longer. As the aid may not be given unless and until it has been approved by the Commission, applicants should allow plenty of time for the approval process to be completed. Therefore it is important to have the costings and forecasts undertaken prior to making the investment, rather than doing so retrospectively.

Operational and taxation cases

It is worth noting that, whilst cases to date have largely centred on *infrastructure* in ports, it must now be taken into consideration that the Commission has also become interested in the *operation* of ports. Two developments in 2016 demonstrate this very clearly.

First, according to the Commission, changing the terms of a contract in a port may involve the provision of state aid. The recent *Port of Antwerp* case – which has not yet been decided – is an interesting potential application of this principle. The Port of Antwerp is managed by the Antwerp Port Authority (a public authority). It is wholly-owned by the city of Antwerp. The authority makes land available to companies to operate in the port area on the basis of concession agreements. On 15 January 2016, the Commission announced that it had opened an in-depth state aid investigation into the retroactive variation of concession agreements between terminal operators PSA Antwerp and Antwerp Gateway and the Antwerp Port Authority. In 2004, the Antwerp Port Authority

[30] A similar statement was made in the *Port of Bahía de Cadiz* case. See C(2013) 5824 Final of 18 September 2013 relating to SA.36953 (2013/N) – Investment Aid to the Port of Bahía de Cadiz, recitals 30–31.

[31] Commission *Guide to the Cost-Benefit Analysis of Investment Projects: Economic appraisal tool for Cohesion Policy 2014–2020* (December 2014) http://ec.europa.eu/regional_policy/sources/docgener/studies/pdf/cba_guide.pdf.

[32] See eg Katakolo Port (n 19) recitals 47–50.

concluded with PSA Antwerp NV and Antwerp Gateway NV concession contracts for the provision of services related to the transhipment of containers in the Port of Antwerp. The concession contracts were concluded for a period of 42 years, ie until 2046.

The Commission stated that Antwerp Port Authority is a public authority and therefore that the reduction in compensation which it granted to PSA Antwerp NV and Antwerp Gateway NV was a public intervention. The Commission has announced that it intends to investigate whether the Antwerp Port Authority provided unauthorised state aid to the operators by revising downwards the minimum tonnage requirements to reduce any contractual penalties that would otherwise be incurred by the two parties. The heart of the case was described by the Commission in the following two paragraphs of its press release:

> The concession agreements for PSA Antwerp NV and Antwerp Gateway NV (ie two container terminal operators in the Port of Antwerp) contained a requirement that a minimum amount of containers must be handled in the port every year (ie minimum tonnage requirements). Between 2009 and 2012, PSA Antwerp NV and Antwerp Gateway NV did not reach these minimum tonnage requirements. Under the agreements, they were obliged to pay compensation to the authority. However, instead of collecting the compensation due from the two companies, in March 2013, the Antwerp Port Authority retroactively revised the minimum tonnage requirements downwards. This significantly reduced the amount of compensation to be paid by PSA Antwerp and Antwerp Gateway (by around 80%).
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> Under EU state aid rules, public interventions in favour of companies can be considered free of state aid when they are made on terms that a private operator would have accepted under market conditions (the market economy investor principle or MEIP). If this principle is not respected, the public interventions involve state aid within the meaning of Article 107 of the Treaty on the Functioning of the European Union, because they confer an economic advantage on the beneficiary that its competitors do not have.[33]

Interestingly, there were complaints from a competitor; the Commission has opened an in-depth investigation to examine whether a private investor would have accepted the reduction in its compensation in a similar manner, such that no state aid issue arises. However, if the Commission finds that the Antwerp Port Authority has not acted on market terms, the Commission will then investigate whether the variation of the agreements was compatible with the state aid rules. It is too early to say how the case will unfold but, in the interim, it is important for executives of ports and shipping companies to be cautious not only about agreements but also changes to those plans because retrospective changes can cause state aid law issues.

The second set of cases relates to taxation. On 21 January 2016, the Commission issued the following press release, which is worth quoting in full:

> State aid: Commission adopts three decisions requiring taxation of ports in the Netherlands, Belgium and France
>
> The Commission has required the Netherlands to abolish an exemption from corporate tax for its six seaports so as to align the regime with EU state aid rules. The Commission has also proposed in two separate decisions that Belgium and France align their taxation of ports with state aid rules.
>
> Commissioner Margrethe Vestager, in charge of competition policy, stated: 'Ports are key infrastructure for economic growth and regional development. I will soon present a proposal to facilitate unproblematic investments in ports that can create jobs, to exempt them from scrutiny under EU state aid rules. At the same time, the Commission's decisions today regarding the Netherlands, Belgium and France make clear that if port operators generate profits from economic activities these should be taxed under the normal national tax laws to avoid distortions of competition.
>
> Cross-border competition plays an important role in the ports sector and the Commission is committed to ensuring a level playing field in this important economic sector.

[33] See IP/16/81 http://europa.eu/rapid/press-release_IP-16-81_en.htm. For a copy of the letter to the Member State see http://ec.europa.eu/competition/state_aid/cases/262242/262242_1731656_19_2.pdf.

Public companies, when carrying out economic activities, compete with private players, who are subject to corporate tax. The commercial operation of port infrastructure constitutes an economic activity. Therefore, when they are carrying out economic activities public companies should be subject to pay corporate tax, in the same way that private companies are. These economic activities can be distinguished from other activities that are linked to the operation of infrastructure for the exercise of the essential responsibilities of the state (eg safety, surveillance, traffic control), which fall outside the scope of EU state aid control.

The Netherlands

Following complaints, the Commission asked the Netherlands in May 2013 to abolish provisions exempting certain public companies, including port operators, from corporate tax, because it was concerned that they may give the companies concerned an undue advantage over their competitors. In July 2014, the Commission opened an in-depth investigation.

In the course of the Commission's investigation, on 4 June 2015, the Netherlands adopted a law making public undertakings subject to corporate tax as of 1 January 2016. However, the law maintained a tax exemption for six publicly-owned Dutch seaports (namely, Groningen Seaports NV, Havenbedrijf Amsterdam NV, Havenbedrijf Rotterdam NV, Havenschap Moerdijk NV, Port of Den Helder and Zeeland Seaports).

The Commission considers that the Dutch legislation addresses its state aid concerns, except for the six Dutch seaports that remain exempt from corporate taxation. The Commission concluded that this exemption should also be abolished in order to remove the resulting distortion of competition. The Netherlands now has two months to take the necessary steps to remove the exemption in order to ensure that from 1 January 2017 the six ports are subject to the same corporate taxation rules.

Belgium and France

In July 2014, the Commission informed Belgium and France about its concerns regarding their regimes for the taxation of ports.

In Belgium, a number of sea and inland waterway ports (notably the ports of Antwerp, Bruges, Brussels, Charleroi, Ghent, Liège, Namur and Ostende, as well as along the canals in Hainaut Province and Flanders) are exempt from the general corporate income tax regime. These ports are subject to a different tax regime, with a different base and tax rates, resulting in an overall lower level of taxation for Belgian ports as compared to other companies active in Belgium.

Most French ports, notably the 11 'grands ports maritimes' (of Bordeaux, Dunkerque, La Rochelle, Le Havre, Marseille, Nantes – Saint-Nazaire and Rouen as well as Guadeloupe, Guyane, Martinique and Réunion), the Port autonome de Paris, and ports operated by chambers of industry and commerce, are fully exempt from corporate income tax.

The Commission takes the preliminary view that, in both Belgium and France, the existing regimes provide the ports with a selective advantage that may breach EU state aid rules.

Today, it has therefore proposed measures to Belgium and France to adapt their legislation, in order to ensure public or private ports pay corporate tax on their economic activities in the same way as other companies in Belgium and France, respectively. Each country now has two months to react.

Background

As announced in November 2015, the Commission is working on an extension of the General block exemption regulation (GBER) so as to cover non-problematic investments in ports and foster strategic investments in infrastructures that have the potential to create jobs in Europe.

Separately, the Commission is also continuing its investigation into the functioning and taxation of ports in other Member States and will take the necessary steps to ensure fair competition between all ports in the EU. The Commission has for example requested information on the financing of certain ports in Germany. This assessment is ongoing.

The exemption from corporate tax for Dutch public companies dates back to 1956. Similarly, the exemption from corporate tax for French ports dates back to 1942 and the Belgian favourable tax regime for ports also predates the entry into force of the Treaty of Rome, the founding Treaty of the EU, in 1958.

These measures are therefore considered as 'existing aid' and their assessment is subject to a specific cooperation procedure between the Member States and the Commission. When existing aid seems to be in breach of EU state aid rules, the Commission, as a first step, informs the Member State concerned about its concerns. In light of the reply, the Commission may then propose appropriate measures to the Member State to bring the measures in line with EU state aid rules.

Today's proposals to Belgium and France are such second steps. If the two Member States do not accept the proposal, the Commission may, as a third step, open an in-depth investigation to verify the compatibility of the existing aid. If the Commission concludes that the regime is not compatible with EU state aid rules, it may require the Member State to put an end to existing aid that distorts competition in the Single Market. Today's request to the Netherlands is this final stage in the existing aid procedure.[34]

The proposed extension of the EU GBER to ports

As mentioned above, in 2014 the European Commission adopted the GBER. Recital 1 of the GBER states that:

State funding meeting the criteria in Article 107(1) of the Treaty constitutes State aid and requires notification to the Commission by virtue of Article 108(3) of the Treaty. However, according to Article 109 of the Treaty, the Council may determine categories of aid that are exempted from this notification requirement. In accordance with Article 108(4) of the Treaty the Commission may adopt regulations relating to those categories of State aid. Council Regulation (EC) No 994/98 empowers the Commission to declare, in accordance with Article 109 of the Treaty, that the following categories may, under certain conditions, be exempted from the notification requirement: aid to small and medium-sized enterprises (SMEs), aid in favour of research and development, aid in favour of environmental protection, employment and training aid and aid that complies with the map approved by the Commission for each Member State for the grant of regional aid. On that basis, the Commission adopted Commission Regulation (EC) No 800/2008 (2). Regulation (EC) No 800/2008 originally applied until 31 December 2013 but was subsequently prolonged by Commission Regulation (EU) No 1224/2013 of 29 November 2013 amending Regulation (EC) No 800/2008 as regards its period of application (3) and now expires on 30 June 2014. On 22 July 2013 Regulation (EC) No 994/98 was amended by Council Regulation (EU) No 733/2013 of 22 July 2013 amending Regulation (EC) No 994/98 on the application of Articles 92 and 93 of the Treaty establishing the European Community to certain categories of horizontal state aid (4) to empower the Commission to extend the block exemption to new categories of aid, in respect of which clear compatibility conditions can be defined. Such new categories of block exempted aid include: aid to make good the damage caused by certain natural disasters, social aid for transport for residents of remote regions, aid for broadband infrastructures, aid for innovation, aid for culture and heritage conservation, aid for sport and multifunctional recreational infrastructures …

Importantly for present purposes, recital 1 then continues:

Provided that sufficient case experience is further developed allowing the design of operational exemption criteria ensuring the ex-ante compatibility of other categories of aid, the Commission intends to review the scope of this regulation with a view to including certain types of aid in those areas. In particular, the Commission envisages developing criteria for port and airport infrastructure by December 2015.

On 7 March 2016, the Commission announced its intention to extend the GBER to ports and airports.[35] It is important to highlight that the GBER is not being extended to deal with aid to ports generally but rather to port *infrastructure*; the distinction is an important one and should be borne in mind because this is not a panacea for all state aid to ports. The Commission described the exercises as a 'targeted review' of the GBER. As the Commission stated in its announcement, '[t]his initiative aims to simplify the application of State aid rules, thus reducing administrative burdens and costs and speeding up the implementation of projects'.[36]

[34] See SA.25338, SA.38393, SA.38398 and IP/16/124 http://europa.eu/rapid/press-release_IP-16-124_en.htm.

[35] http://ec.europa.eu/competition/consultations/2016_gber_review/index_en.html.

[36] In this regard, the initiative is part of the Commission's REFIT Agenda (the Regulatory Fitness and Performance of EU legislation), which is designed to cut or reduce red tape. The lead DG and responsible unit was DG COMP/Unit 03.

The proposed measure has not yet been finalised, and hence the Commission has placed square brackets around many of the numbers in the proposal. Many of the numbers set out in the following analysis therefore have square brackets around them, as inserted by the Commission.

The new measure would be a Commission Regulation. It would amend Regulation 651/2014 (ie the GBER). It would declare certain categories of aid to be compatible with the internal market in application of Articles 107 and 108 of the TFEU. Its legal basis would be Article 108(4) of the TFEU. It would have regard to Council Regulation 2015/1588 on the application of Articles 107 and 108 of the TFEU to certain categories of horizontal state aid (including, in particular, Articles 1(1)(a) and (b)).[37]

The Commission proposed the new regime based on its experience gathered over 33 port cases and 54 airport cases.[38] The Commission is satisfied, according to the second recital of the proposed regulation, that it has 'now gained the necessary case experience'.

The proposed regime would apply to both maritime/coastal ports, as well as to inland ports. With regard to the latter, the Commission has stated that the 'development of inland ports and their integration into multi-modal transport is a major objective of Union transport policy'.[39] The Commission has signalled that inland waterway infrastructure is already insufficiently interconnected and integrated with other modes of transport,[40] so the Commission seems well disposed towards investment (including state-aided investment) in such facilities.

The second recital to the proposed regulation states that the purpose of the new measure is 'to simplify and clarify the State aid rules, to reduce the administrative burden and to allow the Commission to focus on the potentially most distortive cases, aid for port and airport infrastructure should be included in the scope of Regulation No 651/2014'.[41]

The Commission's proposal is not for unlimited state aid. The seventh recital to the proposed regulation provides that:

> [c]onditions for exempting aid to ports should aim at limiting competition distortions that would undermine a level playing field in the internal market, in particular by ensuring the proportionality of the aid amount. In order to be proportionate, the aid should not exceed the maximum permissible aid intensity provided for in this Regulation, which for maritime ports varies according to the size of the investment project. The aid amount should not go beyond the difference between the eligible costs and the operating profit of the investment. Open and non-discriminatory access to the infrastructure should also be ensured.

The Commission is, however, open to more aid being provided to ports that are part of the core network corridors established by Regulation 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU.[42]

The new regime for ports would involve a new Article 56b and 56c[43] in the GBER, as well as corresponding definitions in Article 2 (at point 152 ff[44]), as well as notification thresholds in Article 4(1)(ee) and (ff). Article 2 of the GBER would be amended by the insertion of a number of definitions at points 152–159. It is useful here to tease through each of the definitions.

Point 152 would define the 'port' as *meaning* 'an area of land and water made up of infrastructure and equipment for, principally, the reception of waterborne vessels, their loading and unloading, the

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[37] OJ L248/1 (24 September 2015).

[38] With regard to airports, the Commission had also adopted Guidelines on state aid to airports and airlines OJ C99/3 (4 April 2014). Whilst there have been calls for comparable guidelines for ports, no such guidelines have yet been adopted for ports.

[39] Commission 'Proposed regulation to extend the GBER to ports (n 8) recital 6.

[40] COM(2013) 623.

[41] Commission 'Proposed regulation to extend the GBER to ports' (n 8) recital 2.

[42] OJ L248/1 (20 December 2013).

[43] The new art 56a would deal with airports.

[44] Article 2, points 144 ff would deal with airports.

storage of goods, the receipt and delivery of those goods, or the embarkation and disembarkation of passengers and any other infrastructure necessary for transport operators within the port area'. The proposed definition works well. It is worth noting, however, that it is not an inclusive definition (ie it does not say 'includes' but rather says 'means'). It is also worth noting that the word 'necessary' is attached to the term 'infrastructure', and so it would not cover ancillary but unnecessary facilities such as hotels for passengers, unless it could be shown that such infrastructure was 'necessary'. It would also not be immediately obvious whether it would cover storage facilities built a distance away from the port (eg a warehouse/depot two kilometres inland).

Point 153 would define 'maritime port' as meaning 'a port for, principally, the reception of water-borne vessels by sea'. It occurs that this would have been cross-referred to the definition of 'port' and used the capitalised 'Port' in the definition. Point 154 would define 'inland port' as meaning a 'port other than a maritime port, with indirect access to the open sea through inland waterways'.

Point 155 would define 'port infrastructure' as meaning 'infrastructure and facilities that generate a direct income for the port managing body including berths used for the mooring of ships, quay walls, jetties and floating pontoon ramps in tidal areas, internal basins, backfills and land reclamation, and transport facilities within the port area'.

Point 156 would define 'port superstructure' as meaning 'surface arrangements, buildings as well as mobile equipment (e.g. cranes) and fixed equipment that directly relate to the transport function of the port'. Again, this is a little more limited than might first appear because the arrangements, buildings and equipment must *directly* relate to the transport function of the port and cannot have merely an indirect link.

Point 157 would define 'access infrastructure' as meaning 'any type of infrastructure necessary to ensure the access and entry from land or sea and river by users to the maritime or land port, in particular, access roads, access rail tracks, breakwaters, access channels, locks'. Point 158 would define 'dredging' as meaning 'the removal of sand, sediment or other substances from the bottom of the waterway access to a port in order to allow waterborne vessels to have access to the port'. This means that the definition is relatively wide and would cover situations where dredging was necessary for reasons other than the operation of the port (eg following construction work in, or near, a port (eg the construction of quay walls or a tunnel)). Point 159 would define 'maintenance dredging' more narrowly as meaning 'dredging routinely done in order to keep the waterway accessible'.

Article 4 of the GBER would be amended to deal with the level of investment aid for maritime ports. It would read in '(ee)': 'EUR [100] million per single investment project (or EUR [120] million per single investment project in a maritime port included in the work plan of a core network corridor as referred to in Article 47 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council'. By contrast, inland ports would be treated less generously, so that '(ff)' would read: 'EUR [20] million per single investment project'.

More particularly, there would be a new Article 56b, which would be entitled 'Investment aid for maritime ports'. Article 56b(1) would provide that investment aid for maritime ports would be compatible with the internal market within the meaning of Article 107(3) of the TFEU and be exempt from the notification requirement under Article 108(3) of the TFEU, provided that the conditions laid down in Article 56b and Chapter I of the GBER are fulfilled.

A great deal turns on the so-called 'eligible costs' concept. Article 56b(2) provides that the 'eligible costs' are the 'costs, including planning costs, of investments: (a) for the construction or upgrade of maritime port infrastructures and superstructures, with the exception of mobile equipment; and (b) for the construction or upgrade of access infrastructure, including dredging and excluding maintenance dredging, dedicated to commercially exploited maritime port infrastructure'. Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible. This is all reasonably clear. It would not include mobile cranes but it would include fixed cranes, which is a distinction worth analysing as some fixed cranes can be removed. However, it would be useful to give some clarity to the meaning of the phrase 'planning costs'.

As mentioned, a great deal turns on the concept of 'eligible costs'. Article 56b(3) provides that the 'aid amount shall not exceed the difference between eligible costs and the operating profit of the investment'. The operating profit must be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.

Having calculated the eligible costs, it is then necessary to assess the maximum aid intensity. Article 56b(4) provides that the 'maximum aid intensity for the investments' in an Article 56b(2) project must not exceed the following limits:

(a) if eligible costs are up to €[20] million: [100] per cent of the eligible costs
(b) if eligible costs are above €[20] million and up to €[50] million: [80] per cent of the eligible costs.[45] This aid intensity may be increased by [10] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the TFEU and by [5] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the TFEU
(c) if eligible costs are above €[50] million and up to €[100] million: [50] per cent of the eligible costs.[46] This aid intensity may be increased by [10] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the TFEU and by [5] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the TFEU
(d) if eligible costs are up to €[120] million for the maritime ports included in the core network corridor: [50] per cent of the eligible costs. This aid intensity may be increased by [10] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the TFEU and by [5] per cent for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the TFEU.

The maximum aid intensity for the investments must not exceed [100] per cent of the eligible costs. Put another way, the value of the support must not exceed €100 million or, in the case of maritime ports included in the core network corridor, €120 million. Support is then limited to certain levels. These limits seem suitable for most projects to date but the limits may prove to be too low within a few years. The level of investments cases include €73 million in the case of the Port of Salerno.[47]

Just as in public procurement and merger control, the proposed GBER amendment deals with aggregation of projects to avoid the regime being circumvented too easily. Article 56b(6) provides that any 'investment started by the same beneficiary within a period of [three] years from the date of the start of works on another aided investment in the same maritime port shall be considered to be part of a single investment project'. This does not mean that additional projects could not be aided within that period; it simply means that the second or subsequent project would not benefit from the GBER and would have to be notified individually, all other things being equal.

Articles 56b(7) and (8) are important in terms of setting out the conditions on which infrastructure would be assigned, entrusted and accessed. Article 56b(7) would provide:

> Any concession or other entrustment to a third party to construct, upgrade, operate or rent port infrastructure and superstructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the Union public procurement rules [and Regulation establishing a framework on market access to port services and financial transparency of ports[48]] where applicable. The duration of any concession or other entrustment for the rental or operation of the infrastructure to a third party shall not exceed a maximum duration of [30] years.

[45] The drafting of art 56b(4)(b) falls into the trap of not specifying what the level would be if the eligible cost was exactly €[20] million because (a) deals with eligible costs 'up to' the amount and (b) deals with the eligible costs 'above' it, although neither deals with the situation where the relevant amount is precisely[20] million.
[46] The same drafting issue has arisen in respect of EUR [50] million.
[47] See eg C(2014) 1865 Final of 27 March 2014 relating to Case No SA.38302 (2014/N) – Investment Aid to the Port of Salerno, recital 11.
[48] This Regulation is currently under examination by the European Parliament and Council, and final adoption is expected by the end of 2016.

Article 56b(8) would provide that: 'The infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use of the infrastructure shall correspond to the market price'. Both Article 56b(7) and (8) seem sensible but it would be useful if they could clarify the issue of grandfather rights.

Inland ports

Article 56c would address the issue of inland ports. However, because they are of less significance than maritime ports and some of the issues overlap, it is proposed simply to recite the proposed Article 56c:

> Investment aid for inland ports
>
> 1. Investment aid for inland ports shall be compatible with the internal market within the meaning of Article 93 of the Treaty and shall be exempt from the notification requirement of Article 108(3) of the Treaty, provided that the conditions laid down in this Article and in Chapter I are fulfilled.
> 2. The eligible costs shall be the costs, including planning costs, of the investments:
>   (a) for the construction or upgrade of inland port infrastructures and superstructures, with the exception of mobile equipment; and
>   (b) for the construction or upgrade of access infrastructure, including dredging and excluding maintenance dredging, dedicated to commercially exploited inland port infrastructure.
>
>   Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible.
> 3. The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs ex ante, on the basis of reasonable projections, or through a claw-back mechanism.
> 4. The maximum aid intensity shall not exceed [100]% of the eligible costs.
> 5. Any investment started by the same beneficiary within a period of [three] years from the date of start of works on another aided investment in the same inland port shall be considered to be part of a single investment project.
> 6. Any concession or other entrustment to a third party to construct, upgrade, operate or rent port infrastructure and superstructure shall be assigned on an open, transparent and non-discriminatory basis, having due regard to the procurement rules where applicable. The duration of any concession or other entrustment for the rental or operation of the infrastructure to a third party shall not exceed a maximum duration of [30] years.
> 7. The infrastructure shall be made available to interested users on an open, transparent and non-discriminatory basis. The price charged for the use of the infrastructure shall correspond to the market price.

The proposed regime is to be welcomed because it will obviate some unnecessary notifications. In addition, it will save the Commission having to deal with unnecessary notifications – so-called 'washing clean linen in public' – and it will save ports and port users time and money, whilst increasing the level of certainty that they have concerning their investments.

This consultation will be the first of two consultations. As the Commission mentioned on 7 March 2016: '[as] required by the legal basis of the GBER (Council Regulation (EU) 2015/1588 of 13 July 2015), the Commission will carry out two public consultations on drafts of the Regulation and will consult Member States in Advisory Committees on both drafts. This is now the first public consultation'.[49] The consultation ended on 30 May 2016.

The reforms relating to airports refer to a particular threshold for passengers (three million according to recital 3 of the proposed regulation).[50] It is important that any future reform of the port regime does not take a similar line because the numbers of passengers can vary wildly in ports and some small ports can have very large numbers of passengers where they are making short local voyages. On this basis the simple threshold of passenger numbers could be deceptive and lead to misleading outcomes in the case of ports.

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49 http://ec.europa.eu/competition/consultations/2016_gber_review/index_en.html.

50 See also the Commission Guidelines on state aid to airports and airlines OJ C99/3 (4 April 2014).

It is not entirely clear when the amending regulation would be adopted. It is assumed that it would probably be adopted after the so-called Port Services Regulation and this is likely to be some months away.

Some practical advice on state aid law for those using ports

The advice to port authorities and port users could be summarised using the following tips:

(a) do not take a chance as to whether there is state aid or not – the cost of getting the gamble wrong will be high and it is not within the power of the beneficiaries to resolve the issue
(b) invoke the assistance of the Member State to ensure that the requisite notification is made
(c) it is better to make the notification and have the matter approved at the outset rather than seeking to retrofit an approval
(d) the notification should be as thorough as possible at the outset. This is important because the Commission can, and does, ask questions – for example, it asked for follow-up information on eight occasions in the case on the port of Klaipėda in Lithuania[51] and several times in regard to the Cruise Terminal at Liverpool[52]
(e) the notification should give a full break down of the costs of the investment[53]
(f) the notification should explain all of the background to the project and describe in detail the environmental and transport advantages of the project including decongestion[54]
(g) the Member State should agree in writing that any aid received for the project cannot be cumulated with aid received from other local, national or EU sources for the same eligible costs[55]
(h) the notification should set out the chronology of the project[56]
(i) it may be useful to pre-notify the proposed aid to the Commission so as to expedite the approval process – for example, the investment aid to the Port of Salerno was pre-notified on 13 December 2013 so that when the aid was notified on 6 February 2014, it could be approved as early as 27 March 2014 (ie six weeks later)[57]
(j) it is often useful to highlight the improvements to safety where possible[58]
(k) be mindful that there can be complaints made to the Commission about the alleged state aid
(l) it is important to have the costings and forecasts undertaken before the investment is made, rather than doing so retrospectively
(m) if there has to be an operator of the infrastructure to be selected then it is ideal that the operator is selected by way of open and non-discriminatory competitive selection or tender. This usually eliminates any state aid issue. However, care should be taken with regard to any modifications to the contract after the operator is selected because that could involve state aid[59]
(n) it is too tempting to concentrate solely on port cases – the answer to a particular problem could lie in cases on airports, sport stadiums or arenas – so survey the landscape broadly and widely!

Conclusions

The writing was on the wall. Whilst EU competition law has long been concerned with anti-competitive arrangements (ie what is now regulated by Article 101 of the TFEU) and became concerned in the 1970s (and since then) with abuse of dominance (ie what is now regulated by

51 See SA.30742 (N/2010) – Lithuania (n 17).
52 See recitals 1–5 in the decision http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html.
53 See eg Investment Aid to the Port of Bahía de Cadiz (n 30) recitals 8–10.
54 ibid recital 4.
55 ibid recital 23.
56 ibid recital 15.
57 See eg Investment Aid to the Port of Salerno (n 47) recital 1.
58 ibid recital 4.
59 ibid.

Article 102 of the TFEU) and then became interested in concentration control in the 1990s (ie what is now regulated by Regulation 139/2004), we are now in an era when state aid is centre stage – helped in no small way by the banking crisis, which saw €4884 billion of state aid approved[60] – and ports (like airports before them) were bound to be the subject of interesting case law and legislative developments. So far, the cases have been largely benign, with *investment* aid being largely approved. However, there is no doubt that future cases may not be quite so simple or positive in terms of the outcome, particularly as the area of focus expands from *investment* to *operation*, which is clearly where even greater dangers may lie.

[60] http://ec.europa.eu/competition/state_aid/scoreboard/financial_economic_crisis_aid_en.html.