May 30th, 2016

FEPORT comments and reply to the first consultation concerning the Draft Global Block Exemption Regulation

Draft Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

---

Introduction

FEPORT, the organization which represents the interests of large variety of terminal operators and stevedoring companies performing operations and carrying out activities over 400 terminals in the seaports of the European Union and Turkey welcomes the opportunity to provide comments regarding the Draft Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

FEPORT has always been in favour of clarifications about key concepts relating to the notion State Aid as regards transport infrastructure because terminal operators need a fair and predictable environment to be able to invest in a sustainable manner.
Terminal operators consider as crucial that the overall objective of ensuring that measures that distort competition are prevented remains a priority.

FEPORT believes that the inclusion of provisions about ports in the GBER can contribute to bringing clarity and limiting the uncertainty resulting from a case-by-case approach.

While we do understand that procedures of notifications may be heavy and time consuming, we do consider that those procedures can be helpful in preventing risks of distortion of competition when cases of State Aid are established.

This being said, FEPORT would also like to stress upon the importance of ensuring that that Member States can continue to plan and finance transport infrastructure and projects of European and national interest.
From our point of view, it is also crucial that any framework interacts in a sensible manner with other EU objectives in terms of development of infrastructure which contributes to growth and job creation in Europe.

Through the below general and more specific comments, FEPORT wishes to express the views of more than 1200 companies including small, medium size and global operators carrying out cargo handling and stevedoring activities in the seaports of the European Union and Turkey.

General comments:

Member States' exercise of public powers

FEPORT believes that the construction and operation of basic transport infrastructure is an exercise of public powers, and should be by no means considered an economic activity subject to State Aid control.

Prior to 2000[1], in most Case Laws as well as in the Commission's 1994 Aviation Guidelines[2], "the construction [or] enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents (ed) a general measure of economic policy which cannot be controlled by the Commission under the Treaty rules on State aids".

The Commission has often recognized the freedom of exercising public powers of Member States[3] in consistency with "Article 107 TFEU does not apply where the States acts by exercising public powers or where public entities act in their capacity as public authorities. An entity may be deemed to act by exercising public powers where the activity in question is a task that forms part of the essential functions of the State or is connected with those functions by its nature, its aim and the rules to which it is subject".

---

[1]ie to the case Aeroports de Paris In 2000 and more recently to the Leipzig Halle ruling in 2010
[2] "Application of Article 92 and 93 of the EC Treaty and Article 61 of the EEA Agreement to State aidsin the aviation sector", OJ C 350, 10.12.1994, p. 5, paragraph12.
[3]Case 118/85 Commission v Italy [1987] ECR 2599, paragraphs 7 and 8

As from 2000 onwards, the Commission went further in highlighting the need for a clear distinction between on the one hand cases where the State engages in economic activities and on the other hand cases where the State in its capacity as a public authority undertakes general public interest activities (exercises public powers) which should not be subject to State aid control.

Indeed as long as the construction and operation of basic public transport infrastructure is open to all on equal terms and is intended to fulfil basic policy aims which only States can and will undertake and which by their very nature differ from ordinary economic exploitation of an infrastructure, Member States are achieving larger goals such as creating better conditions for economic growth and employment.

User-financed infrastructure does not automatically imply economic activity

While the 2010 Leipzig/Halle ruling has established that the construction of any type of infrastructure that is meant to be exploited economically, such as a commercial airport runway, is an economic activity in itself (which means that State aid rules apply to the way in which it is funded), the Court of Justice's subsequent judgment from 2012 criticized the General Court for being too general in its reasoning ie applying the specific case relating to Leipzig Halle airport to any infrastructure operated for an economic activity.

It is important to recognize that the developments in Case Laws have been gradual and always justified by specific circumstances in each case. Therefore, their extrapolation to draw conclusions on other cases can be misleading and not always relevant given the variety of modes of transport and their corresponding infrastructure.

The Court of Justice still requires a careful analysis of whether, having regard to the nature and purpose of the infrastructure is an exercise of public authority or an economic activity. In particular, no Commission decision or Court of Justice judgment to date has concluded that user-financed infrastructure is, as a matter of principle, an exercise of economic activity. Neither the General Court nor the Court of Justice have denied the fact that basic public infrastructure open to all users can be financed by Member States without being subject to EU control.

It is a fact that the financial situation in Europe has led to a need for alternative financing measures, particularly when it comes to the financing of costly transport infrastructure. In this regard user paid transport infrastructure is certainly welcome as is private investment in large-scale infrastructure projects which can be challenging to finance within a State budget.

If alternative financing measures are not recognized by the Commission, or if they are potentially subject to strict review by the Commission, the consequences for such projects could ultimately challenge the ability to realize them. Moreover, it is appropriate that the users who benefit from the infrastructure also contribute to the financing, especially with regard to large-scale and costly infrastructure.
The choice of the financial model does not in itself change the nature of the public tasks related to the construction and operation of basic transport infrastructure. This remains an essential function of the State and thus an exercise of public authority.

Last but not least, when wholly owned State entities, which have as their sole purpose to construct and operate such a general transport infrastructure, are financed through State resources, we do not see any reasons why the financing should be subject to State Aid control. It makes no sense to apply State aid Law in these situations.

In fact, the systematic distinction made by the Commission between infrastructure which "is meant to be commercially exploited" and general infrastructures which justifies the application of State Aid rules to the first category, contradicts the existing case law on Article 107(1) which establishes that user-financed infrastructure is not necessarily "commercially exploited" infrastructure.
There is currently no transparent legal framework in the EU in the field of funding of general/user specific infrastructure or superstructure of seaports (e.g. operational services).

Specific comments:

Definitions:

There are substantial differences among the seaports of Member States with regard to organizational structures, ownership and financial responsibility, and investments. These differences also have an impact on the financing of port infrastructure and possibilities for State Aids. Since 1992, the Commission has undertaken a number of initiatives under the form of reports and legislative proposals aiming among others at introducing more transparency in the flows of public funding in ports.

They include:

- 1992: the first 'European Transport White Paper' [European Commission, 1992]
- 1995: the 'Development of Short Sea Shipping in Europe: Prospects and Challenges', COM(95) 317 final [European Commission, 1995]

- Directive proposal on market access to port services [European Commission, 1997]
- 2001: the second 'European Transport White Paper' [European Commission, 2001]
- 2001: Port Package I [European Commission, 2001]
- 2004: Port Package II [European Commission, 2004]
- 2006 – 2007: Port Policy consultation process
- 2007: Port Policy Communication [European Commission, 2007]
- 2008: 'Vademecum: Community law on State aid', [European Commission, 2008]

Much of the discussion evolves around the diversity of the situations that prevails in Member States particularly when it comes to the definition of "superstructure" and "infrastructure" and the various different legal regimes (and pertaining rules) concerning port ownership in the different Member States.

The 2003 Vademecum updated in 2008 which provided a concise summary of State Aid legislation was among others preceded and followed by two port packages which have been rejected due to the fact that some provisions were not bringing more uncertainty for private investors. Besides, the proposed rules in the framework of the two packages were not taking into account the fact that port models of organization are diverse.

More recently in 2011, in a report requested by the European Parliament's Committee on Transport and Tourism[4] a number of definitions very relevant to the discussion about the draft GBER have been provided :

• Port basic infrastructure, which includes maritime access channels, navigation aids, turning basins, breakwaters and road, rail and inland waterway infrastructure access in the ports but outside the terminals.
• Terminal related infrastructure, which includes land reclamation, quays and docks, jetties and stacking yards.
• Port superstructure, which includes terminal paving/surface, cranes, mobile equipment, port/office buildings, warehouses, road & rail on the terminal.

FEPORT believes that port basic infrastructure is part of the public remit, and must not be subject to State Aid control.

Besides the above mentioned example of superstructure/infrastructure, we would like to make some additional comments regarding other definitions:

[4] *Directorate General for Internal Policies - Policy Department B - Structural and Cohesion policies - Transport and tourism - State Aid to Seaports*

a) Clear criteria for the consideration of **quay walls** are necessary. Quay walls have also the public function of water protection and are therefore part of the (public/access) infrastructure.
b) **Port basins** are access infrastructure, and their financing must not be considered state aid.
c) The term "**port management**" is not defined. Does it refer to port authorities or to ministries, for instance? A clear definition is required, consistent with the PSR.
d) The term "**port**" needs to be redefined, in particular with reference to the geographic perimeter.

FEPORT respectfully recommends to the Commission to propose definitions that reflect the different types of port infrastructure and superstructure existing in European seaport regimes in place.

Inclusion of superstructure

Recent State Aid cases reviews (amongst others being the case of the Port of Ventspils, Latvia) show that when a review of State Aid for the infrastructure and superstructure of seaports is undertaken, in particular the subsections 2 and 3 of Article 107, it often gives room for diverse interpretations of investments in the public infrastructure of seaports.

Diversity of interpretations reflect in fact the variety of mechanisms that are used by governments (or any other public bodies) to finance port infrastructure. It can indeed be done through:

- Direct investments coming from the government public investment budget;
- Direct investments coming from a special (port) fund;
- Loans from international finance institutions;
- Public Private Partnership.

In the majority of ports however ie Landlord ones, investment in terminal superstructure is privately financed by the terminal concessionaire or the lessee (private operator), while the port provides the land. The port may also build the quay wall besides the land, although private concessionaires (private operators) are also increasingly willing to invest in this infrastructure.

Superstructure (buildings, mobile and non-mobile equipment) is in general privately financed and owned by private operators who perform commercial activities.

We are quite concerned to see that the Commission has taken the option of including superstructure as part of the provisions of the draft GBER thus implicitly suggesting that the minority cases whereby Member States through Port Authorities are actually publicly funding superstructure justify an exemption from notification.
The possible exemption from notification of public investments in superstructure may lead to a high risk of distortion of competition between public entities receiving public funding and private companies performing the same activities.

Therefore, FEPORT is of the opinion that any public investments in superstructure as defined in point (155) of article 2 e) is more likely to benefit to certain undertakings and should be subject to the notification procedure foreseen in Article 108(3) of the Treaty.

Superstructure should be removed from the scope of the draft GBER.

Consistency with Ports Regulation

As a matter of principle, given the fact that some provisions of the draft GBER refer to the Regulation of the European Parliament and the Council establishing a framework for the market access to port services and the financial transparency of ports (Ports Regulation), FEPORT is of the opinion that there should be consistency between elements of both texts subject to the appropriate alignment of the principles and objectives which underpin the respective proposals.

Duration of concessions:

The provisions regarding the 30 years' duration for concessions is not only confusing but also misleading because it implies that there is a maximum duration for concessions in all ports. Previous attempts to introduce maximum durations of concessions have been rejected in the framework of two port packages both by Parliament and Member States. It is up to the Member state to decide upon the criteria and the terms of the concession contracts. In some cases, an investor needs a longer period of time for paying back the investment.
As mentioned, in recital 9 of the draft GBER "*(9)* the Regulation of the European Parliament and the Council establishing a framework for the market access to port services and the financial transparency of ports (Ports Regulation) is the relevant text regarding contracts in ports is the reference text regarding contracts:

"[The Regulation of the European Parliament and the Council establishing a framework for the market access to port services and the financial transparency of ports has introduced transparent and separate accounts which enable the use of public funds by port managing bodies and port service providers to be easily identified.

This financial transparency encourages an efficient use of public funds in ports and facilitates, whenever appropriate, the control of state aid. Moreover the Regulation introduces common and transparent procedures to award port service contracts and transparent and autonomous port infrastructure charging policy.]".

FEPORT is of the opinion that the draft GBER should focus on procedural aspects, and should avoid enacting harmonized rules for port management or promoting particular models of organization or references to durations of concession and rent agreements.

The paragraph regarding the duration of concessions should therefore be removed from the draft GBER.

Dredging:

Dredging is very much connected to the variety of geographical attributes and characteristics of ports. While some ports can be fully accessible to vessels without dredging, most are compelled to dredge (eg : Baltic and North Sea).

The proposed provisions in the draft GBER regarding dredging create uncertainty and seem to ignore few key functions of dredging ie:

- guaranteeing adequate water depths and maximum draughts are adhered to continuously and irrespective of the tide, at least at berth
- ensuring general transport safety, even within individual internal basins and places of refuge for emergency situations.

If the European Commission interferes in the existing inter port competition to the extent that it makes it mandatory for port operators to pass on the costs for dredging (whatever the definition may be) and similar costs in full to the direct users of access infrastructure, this would greatly endanger the competitiveness of the companies situated in those ports and would be unfair compared to those established in ports which do require dredging.

The proposed definitions in the draft GBER of capital and maintenance dredging are restrictive and do not reflect diversity of situations that prevail in ports.

Similarly, when it comes to costs, the provisions of the GBER are not clear. While the costs for dredging are included, those for "maintenance dredging" are not included in the estimated costs as per Article 56b II.

It is important that the draft GBER and Ports regulation are consistent. The definition of dredging as adopted by the European Parliament last March 7th states that:

> "Dredging' is 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; it includes original removal (capital dredging) as well as maintenance dredging in order to keep the waterway accessible and is not a port service offered to the user; (European Parliament 2016, see amendment 53). "
>
> This provision recognizes the role of dredging be it capital or maintenance as an operation to be considered as an exercise of public powers in the meaning of the following provision of the "Commission Notice on the notion State aid pursuant to Article 107(1) TFEU" which states that:

…"the funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules. This concerns, for instance, infrastructure that is used for activities that the State normally performs in the exercise of its public powers (for instance, military facilities, air traffic control in airports, lighthouses and other equipment for the needs of general navigation including on inland waterways, flood protection and low water management in the public interest, police and customs)"

On the basis of the above, FEPORT would be of the opinion to consider that dredging be it capital or maintenance is not a service dedicated to an economic activity and should be therefore excluded from the application of State Aid rules thus from any obligation of notification.

FEPORT would therefore strongly advocate the exclusion of capital and maintenance dredging from the scope of the draft GBER.

Thresholds

As a matter of principle, FEPORT respectfully recommends that the retained thresholds are consistent with the overall objective of the draft GBER which is to alleviate the administrative burden of systematic notification for all types of public funding for infrastructure in ports with the risk of delaying projects.

This being said, FEPORT reiterates its attachment to transparency and to the necessity of proposing a clear method for calculating thresholds.

Thresholds constitute an important filter to avoid competition distortions. It would be therefore appreciated if the Commission could provide further insights regarding the rationale behind the different thresholds, the method of calculation and the reference to time frames because it is unclear.