



**Targeted review of the General Block Exemption Regulation (GBER):
Extension to ports (2nd consultation)¹**

**Contribution of the European Sea Ports Organisation (ESPO)
to the second public consultation round**

8 December 2016

Preliminary remarks

This response builds on the concerns already shared by ESPO in its response to the first round of consultation on this GBER proposal².

As already pointed out in the first response, there is considerable diversity within ports in Europe in the way they are financed, with a mixture of private and public funding. This position paper outlines certain points of common understanding among ESPO members about state aid to ports in general and the proposal for a GBER for ports in particular. This ESPO contribution to the public consultation has to be considered together with the individual contributions from ESPO members, reflecting the diversity in which ports in Europe are financed and organised.

¹ http://ec.europa.eu/competition/consultations/2016_second_gber_review/index_en.html

² <http://www.espo.be/views/espos-contribution-to-the-first-round-of-public-co>

ESPO's contribution

Introduction

For many years, the European Sea Ports Organisation (ESPO) has sought greater clarity as regards the application of relevant Treaty rules on the public funding of ports.

In that respect and at a general level, ESPO asks the Commission to:

1. provide a fair, pragmatic, predictable and stable environment for port authorities allowing them to develop together with all parties involved (public authorities, private investors, etc..) a long-term strategy for port investments and thus limiting the legal uncertainty that might result from a case-by-case approach of the Commission.
2. achieve a level playing field for port investments and operations between ports and transport modes in the European Union but also with third country ports which are in direct competition with EU ports.
3. reduce the administrative burden and shorten the timeframes.
4. take a consistent (coherent) approach in the assessment of EU funding and national/regional funding of transport infrastructure.

ESPO believes that developing a GBER for ports could contribute to these aims by:

- bringing clarity and limiting the uncertainty that would result from a case-by-case approach;
- reducing the administrative burden on port development and speeding up project implementation;

Furthermore we strongly encourage the Commission to use the resources freed up from analysing standard aid notifications to examine significant state aid investment cases and potential distortions to trade. Advantage should also be taken of the transparency provisions of the upcoming Port Regulation which should allow a better flow of information about sources of funding and facilitate the control of state aid.

ESPO welcomes the publication of a new analytical grid³ and the recital 45 of the Port Regulation as a way to further clarify the current rules and decisional practice regarding public funding for port and port related infrastructure that is not to be considered state aid.

ESPO however acknowledges that an analytical grid does not express an official position of the Commission and cannot be considered as a statement of law. ESPO moreover realizes that this analytical grid may change at any time as a consequence of developments in State

³ http://ec.europa.eu/competition/state_aid/modernisation/grid_ports_en.pdf

aid enforcement practice. ESPO believes as a result that an analytical grid is by itself not removing entirely the uncertainty in terms of identifying what is not to be considered “state aid” in the sense of article 107 of the Treaty.

In that respect, ESPO and its members ask the Commission to continue their efforts towards clarifying what is not to be considered state aid, thus providing a long-term stable environment for port investments and limiting the legal uncertainty that might result from a case-by-case approach of the Commission.

ESPO welcomes the opportunity given to contribute to the second public consultation round and is formulating in that respect the following remarks and concerns:

1. ESPO and its members regret that no reference is made in the GBER proposal to publicly funded port infrastructure that is not to be considered state aid (outside the scope of Article 107 Treaty)

ESPO recognizes that the latest analytical grid seeks to clarify this category. ESPO believes however that the whole question of compatibility of state aid to ports would gain in clarity if reference would be made in the GBER to these categories of public funding that are to be considered as non-economic and do not have to be considered as state aid.

In the analytical grid, the distinction between publicly funded access infrastructure that constitutes state aid and publicly funded access infrastructure that does not constitute state aid is made on a geographical basis. In that respect, access infrastructure “inside the port area” is “normally considered” to be state aid, whereas access infrastructure “outside the port” is normally considered as non-economic.

ESPO would favour a distinction between infrastructure that is to be considered “economic” versus infrastructure that is “non-economic”. A distinction made on a geographical basis is not appropriate since in many cases the “port area” is defined entirely arbitrary (e.g. as a result of historical geography).

As already outlined in its response to the first round of consultation, ESPO believes that the following categories of public funding do not constitute state aid:

- *Public funding for access and defense infrastructure to the port, both from the maritime and the landside, does not constitute state aid, insofar this public funding:*
 - *is not selective (or not “dedicated”) and*
 - *potentially benefits (through the port) a whole region, hinterland and/or corridor and/or potentially links those with the rest of the world.*

- *Infrastructure that is strictly needed for and linked to the operation of Services of General Non-Economic Interest.*

For ESPO and its members this clarification reflects the intention of the Commission to identify access and defense infrastructure that benefits society at large versus infrastructure that benefits the economic exploitation of the port and is very much in line with recital 45 as formulated in the final text of the Port Regulation.

Considering the analytical grid, ESPO welcomes the fact that, when the construction of access infrastructure is considered as “non-economic”, also its replacement and maintenance is to be excluded from the state aid rules.

Moreover, ESPO welcomes the fact that “infrastructure for protection and resilience against extreme weather conditions” is to be considered as infrastructure that is used for activities that the State normally performs in the exercise of its public powers and is thus not to be considered state aid (see grid II, 1. (4)). ESPO believes that in that respect, it should be further clarified that breakwaters are falling under this category and are not to be considered state aid.

Finally European ports believe that the “availability free of charge” of access infrastructure, to which reference is made in the analytical grid, cannot be used as an element for assessing the non-economic nature of access infrastructure in the case of railways. In accordance with EU railway legislation, railway infrastructure is due to be subject to railway infrastructure charges, whether it is economic or not. ESPO therefore believes this should be further clarified.

2. ESPO welcomes the new proposal not to exempt investment aid for port superstructure from notification

ESPO believes that investment aid for port superstructure is more likely to favour certain undertakings and should thus be subject to the notification procedure foreseen in Article 108(3) of the Treaty.

3. ESPO welcomes the proposal to define specific categories of port infrastructure needed to adapt to the use of alternative fuels and to stricter requirements on environmental performance

ESPO welcomes the proposal to insert definitions of “alternative fuel infrastructure” and “infrastructure for the collection of ship-generated waste and cargo residues”, since this will clarify the scope of the port infrastructure investments (the “eligible costs”) that can be exempted according to article 56, paragraph 2), (b).

Considering the proposed definition of “alternative fuel infrastructure”, ESPO would like to propose however the following changes:

*‘alternative fuel infrastructure’ means a fixed, mobile or offshore port infrastructure allowing a port **to supply** vessels with **energy sources** such as electricity, hydrogen, biofuels (liquids), synthetic fuels, methane, including natural gas (CNG and LNG) and biomethane and liquefied petroleum gas (LPG) **in line with the obligations foreseen in Directive 2014/94/EU on the deployment of alternative fuels infrastructure. These energy sources serve, at least partly, as a substitute for oil based sources in the supply of energy to transport, contribute to its decarbonisation and enhance the environmental performance of the transport sector;***

Since “electricity” is mentioned, it is preferable not to refer to “fuels” or “oil based fuels” but rather to “energy sources” and “oil based sources”.

4. The “single investment project” principle needs to be defined taking into account the complex character of ports

ESPO agrees that a safeguard has to be foreseen in view of avoiding circumvention of the foreseen thresholds by artificially splitting up a project in different smaller projects, the so-called “salami slicing”.

Also in other European legislation⁴ such safeguards are foreseen. In that respect, ESPO would fully support a provision specifying that the method of delimiting a port investment shall not be made only with the intention to remain underneath the investment aid and aid intensity thresholds of the GBER. Connected investments that are part of one project should not be artificially split. E.g. a long-distance maritime access project should not be split in different short-distance projects.

ESPO however believes that the safeguard foreseen in Article 56b), paragraph 7 of the GBER proposal will on the contrary artificially bring together aided investments in a port that are not connected and do not at all aim at realising one economic investment project.

Ports are very complex and broad entities both in terms of area and functions. There might be different investment projects running at the same time, which serve completely different

⁴ The European procurement Directives (2014/24/EC and 2014/25/EC), the Concession Directive (2014/23/EC)

needs (markets, e.g. freight versus passengers) or aim at improving completely different functions or areas of the port.

Moreover, by considering all investment aid for a given port over a 3 year period as “one single project”, it will be very difficult to assess the aid intensities as foreseen in article 4.

Finally, given the complexity of port projects, often due to long permitting and procurement procedures, it is often very difficult to predict the “start of works” and consequently to assess if the “start of works” of the second aided investment will fall within the three years period foreseen in this paragraph. As a result, this rule would give the port authority a lot of insecurity as whether the thresholds will be exceeded or not, the aided investments need to be notified or not. In addition, there should be a concrete point of reference, which triggers the calculation of the 3 years’ time period. Therefore, It should be clearly specified what is meant by “the start of the investment” in the sense of this provision.

For all these reasons, ESPO therefore proposes to limit the scope of this “single investment project” principle to projects that are intrinsically connected, that serve the same aim and/or that are not independently viable. Projects that are subject to a single planning consent, e.g. that are subject to a same social cost-benefit analysis or to a same impact assessment might be seen as belonging to “one single investment project”.

In the same logic, ESPO believes that alternative fuel infrastructure and waste reception facilities infrastructure serve environmental needs and should not be considered together with other aided investments in the port in the context of paragraph 7.

Paragraph 7 of Article 56b could be amended as follows:

“A project shall not be subdivided with the intention of remaining underneath the investment aid threshold foreseen in Article 4 (ee) and the aid intensities foreseen in article 56 b), paragraph 5 of this Regulation. Any aided 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 **related to the same economic investment project and based on a single planning consent** shall be considered to be part of a single investment project **if they are intrinsically linked to each other**. An investment is considered started with the formal beginning of the construction/implementation works on the project.
“

Aided alternative fuel infrastructure and infrastructure for the collection of ship-generated waste and cargo residues as defined in this Regulation will not be considered as being part of a single investment project if the related works started within the same period of three years of another aided investment in the same maritime port”.

5. ESPO proposes a rewording of paragraphs 8 and 9 of article 56 b)

ESPO fully understands the intention of the Commission to avoid that state aid is being given at operator level. ESPO also understands that the aided port infrastructure must be made available to all end port users. ESPO believes that in that respect, the GBER should be consistent with other relevant existing legislation, such as the concession directive and/ or the Port Regulation. As regards paragraph 9, ESPO believes it is important to clarify who are in that respect the “interested users”.

ESPO therefore proposes the following short rephrasings:

Paragraph 8: *“Any concession or other entrustment to a third party to construct, upgrade, operate or rent aided port infrastructure shall be assigned on **an open, transparent and non-discriminatory basis.**”*

Paragraph 9 should read: The infrastructure shall be made available to all interested end port users (shipping and transport undertakings).

In addition a new recital 8b should be added: “This Regulation applies without prejudice to the Regulation of the European Parliament and the Council establishing a framework for the provision of port services and financial transparency of ports and the Concession Directive 2014/23/EU.”

ESPO favours a rewording of the simplified approach for small projects

ESPO welcomes the Commission proposal to ease the assessment of the needed aid intensities in case of very small projects. For ease of understanding, ESPO would propose the following rewording of paragraph 10 of Article 56 b).

“For projects with an eligible cost not exceeding 6.25 million EUR, the maximum amount of aid maybe be set at 80% of eligible costs, alternatively to the method referred to in paragraphs 4, 5 and 6.”