



## **State Aid to EU Seaports**

*ESPO Response to the Recommendations of the Study “State Aids for the EU Seaports” Commissioned by the Committee on Transport and Tourism of the European Parliament*

16 December 2011

### **General remarks**

ESPO welcomes the initiative of the Committee on Transport and Tourism of the European Parliament to commission a study on State aid to seaports, thus bringing this important issue in the political spotlight.

Seaports are the principal gateways of Europe’s internal and external trade. Moreover, they are major providers of employment and wealth and thus play a fundamental role in the overall competitiveness of the EU. The continuous growth in the transport sector reinforces the need to support and facilitate the development of the EU port system. For that, it must be clear where public financing in ports is compatible with the Treaty rules on State aid. An unambiguous set of State aid guidelines is needed that provides legal certainty to both public and private investors and ensures a level playing field across Europe. Despite a considerable number of attempts, years of intense discussion with the port sector and several requests by the European Parliament, the European Commission has thus far failed to produce such guidelines.

It is a public secret that this ongoing delay is mainly due to differing interpretations on the application of State aid rules to ports within the Commission. ESPO strongly supports the view that, next to public-private partnerships and existing financial instruments, national governments should continue to be able to fund basic transport infrastructure as part of their economic policy. This applies to seaports and their maritime and land-side connections, but also to rail, inland waterways and road infrastructure in general. A more dogmatic interpretation of Treaty rules, whereby any form of public funding would a priori be seen as State aid, would not only jeopardise the future development of seaports and their integration in logistics chains but would also lead to a tremendous bureaucracy in terms of notification procedures which would further delay already cumbersome port planning processes with no real added value. In addition, such an approach would then logically also have to be applied across the transport chain in order to ensure a level playing field.

The European Commission has recently started a review of its current policy for ports, in preparation of a new ‘ports package’. ESPO invites Members of the European Parliament to remain faithful to their earlier requests, insisting that the ‘ports package’ does not fail to provide a clear set of State aid guidelines that support the development of the port sector.

The study conclusions and recommendations positively underline this fundamental message, which is very much welcomed. This being said, there remains room to improve the factual content of the study, especially where it concerns the country reports and case studies (chapter 4). ESPO will provide the secretariat of the Committee on Transport and Tourism with specific comments and suggestions on this.

This response only concerns the five concluding recommendations that are described in section 5.2 (page 97) of the study.

## **Recommendation 1: the need for EU State aid guidelines**

ESPO fully acknowledges the need for EU State aid guidelines for the port sector and believes that these should be based on the following basic principles:

- State aid guidelines should only cover the port area as such, i.e. the area for which the port authority is fully responsible, and be concerned with economic activities only.
- Within the port area, a distinction should further be made between access and defence infrastructure, terminal or project-related infrastructure and superstructure. These can be defined as follows:
  - **Access and defence infrastructure:** all infrastructure that allows sea and land access to a port area including maritime access and defence works (e.g. dikes, breakwaters, locks and other high water protection measures; navigable channels, including dredging and ice-breaking; navigation aids, lights, buoys, beacons), land access connections to general transport facilities and infrastructure for utilities necessary in the port area.
  - **Terminal or project-related infrastructure:** civil works within the port area that include berths used for the mooring of ships (quay walls, jetties and floating pontoon ramps in tidal areas), the reclamation of land used for terminal construction, dredging alongside berths and access to terminals (roads, railways, ...) from the general public transport facilities within the port area.
  - **Port superstructure:** surface arrangements, buildings (warehouses, workshops, office buildings), as well as mobile and fixed equipment needed to produce services (cranes, trucks, etc). They include information and automation systems of the terminal activities.
- Public funding for the provision and operation (including maintenance) of access and defence infrastructure does not constitute State aid and should not be notified to the Commission unless such works would benefit a single user or operator.
- Public funding for the provision and operation (including maintenance) of project-related infrastructure and superstructure would in principle constitute State aid and should be notified to the Commission.
- Public funding for the provision of project-related infrastructure however does not constitute State aid, and should therefore not be notified, if the market economy investor principle is met according to specific conditions.
- Public funding for the operation (including maintenance) of project-related infrastructure and the provision and operation of superstructure can, when notified to the Commission, be declared compatible with art. 86(2) of the Treaty.
- State aid guidelines should apply to future funding schemes only and apply in principle to all ports. There should be no distinction between different categories of ports, with the exception of truly peripheral ports that are not engaged in international competition with other ports.
- State aid guidelines cannot function without the principle that port authorities should have financial autonomy.

## **Recommendation 2: potential distortions through concession policy**

On page 14 of the study it is stated that concession arrangements (and ecological compensations) fall outside the scope of the study and have therefore not been examined in detail. It is therefore premature to draw any conclusions or even speculate about potential distortions of competition.

On concession policy, ESPO advocates the following general principles:

- As regards the use of the term ‘concessions’, it should be noted that contractual arrangements between port authorities and terminal operators, as well as their applicable legal regimes, are very diverse in Europe. They can take the form of public service contracts, public domain concessions under public law, lease agreements under private law, authorisations, licenses, etc.

- Despite this diversity, fairness and transparency obligations must apply when port authorities decide to entrust a third party with a portion of port land for the provision of cargo-handling services. ESPO believes that the pragmatic approach taken in the European Commission's 2007 Ports Policy Communication should continue to prevail. This approach recognises the discretionary powers of port authorities in setting selection criteria and specifies that transparency obligations must only apply where they matter, i.e. in case there is a sufficient connection with the functioning of the internal market.
- Taking into account the diversity of applicable judicial regimes, contract durations have to be limited and proportional to depreciation of investments, allowing a reasonable return on investment but maintaining a risk inherent in exploitation.
- Incumbent terminal operators should not have an unconditional and automatic right of prolongation. ESPO however believes that if an incumbent operator is performing well and commits itself to continued investments, there should be scope for prolonging its agreement with the port authority. ESPO therefore pleads to find pragmatic and transparent solutions that match the need for open market access with the need for continuity of investment.

### **Recommendation 3: transparency of accounts**

ESPO fully agrees that more transparency on the use of public funding in ports should be achieved and is in favour of extending the provisions of the Transparency Directive (Directive 2006/111/EC) to all seaports covered by the State aid guidelines.

### **Recommendation 4: level playing field with ports in EU neighbouring countries**

Transport, and in particular shipping, is and will be global. EU policy and legislation should be framed in a global context and measures undertaken at EU level should avoid distortion of competition. ESPO therefore supports the recommendation to create a level playing field between EU seaports and ports in neighbouring third countries. This issue should not only be looked at from the perspective of public funding, but also take into account uneven environmental standards, labour conditions, customs procedures etc.

### **Recommendation 5: encourage seaports to always notify public investment schemes**

Given the continued legal uncertainty about the status of public funding in EU seaports, this is the safest option at the moment. The study correctly mentions on page 27 that ESPO has recommended this to its members. However, it is not a satisfactory situation. As said above, notifying all public investment schemes would lead to a tremendous bureaucracy in terms of notification procedures which would further delay already cumbersome port planning processes with no real added value. State aid guidelines would greatly facilitate things by clearly distinguishing those forms of public funding that would normally entail State aid and would therefore have to be notified to the Commission for further examination.

*Since 1993, ESPO represents the port authorities, port associations and port administrations of the seaports of the European Union and Norway. The mission of the organisation is to influence public policy in the EU to achieve a safe, efficient and environmentally sustainable European port sector operating as a key element of a transport industry where free and undistorted market conditions prevail as far as practical.*

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