HPH

HPH's response to the first Commission consultation on the Draft Commission Regulation amending Regulation 651/2014 declaring certain categories of aid compatible with the internal market in application of articles 107 and 108 of the Treaty

1. Competition in the cargo handling sector

Ports and container terminal operators are facing the dual challenges of pressure on prices and the need to invest to meet customers' demands. Pressure on operators' prices is coming from overcapacity and increased market power from major shipping lines and alliances. Significant overcapacity in container terminals is a consequence of investment decisions made 10 years ago, with the new terminal capacity just now coming onto the market, but without the growth in volumes that were predicted at the time. Consolidation amongst the shipping lines and the formation of alliances means that terminal operators have fewer, but larger customers with greater negotiating power. However, in a fiercely competitive sector, operators must continue to invest to meet customers' demands, both in the port (to accommodate larger vessels) and outside the port area (in hinterland connections and infrastructure to support the new volumes and peaks created by larger vessels).

Given the increasing need for investment in and around ports, we are likely to see further use of state resources to finance these types of projects (including commercial activities that would typically be subject to state aid rules) in the coming years. It is settled case law that port authorities can be considered as "*undertakings*" that perform tasks in the public interest (e.g. related to safety and security) as well as economic activities. Ports are therefore economic entities in themselves, even if they contain numerous operators. This means for instance that dredging the approaches to a port may not be dedicated to any particular operator but it can be dedicated to a port as a distinct economic entity conferring advantage to the latter and therefore subject to state aid rules.

This type competition between public port authorities and private operators has been further acknowledged by the Commission guidelines on EU State aid rules and public investment[1] where the Commission has identified infrastructure in the field of ports as an area often in competition with similar infrastructure, e.g, projects funded with public money competing with projects that need to operate without public support susceptible of conferring a selective economic advantage to public port authorities over their rivals. We agree with this analysis and believe that appropriate application of competition rules and transparency in the financing of infrastructure will become even more crucial to ensure any state funding is efficient, necessary and does not distort competition in a sector such as container handling, which is extremely competitive and where distortive effects can have a big impact on private businesses.

The Commission should also recognize that state aid for ports may not always be in the form of direct funding. It may also include, for example, instances where public authorities favour existing concessionaries by changing concession terms after the completion of the award through a public tender to the detriment of competing operators, or tax benefits given to port authorities, which then pass these on as port dues reductions to their customers, once again distorting competitive pricing. It is essential that state aid rules also capture these forms of indirect state support and ensure that they are properly addressed.

Transparency in state aid is an important element in identifying state aid that distorts competition. To avoid distortions, any state aid to a project that is already being exploited commercially should be reported. Furthermore, state aid should not be granted to projects that have been exploited profitably by operators or port authorities exercising commercial activities.

[1] Commission notice on the notion of state aid, May 19 2016.

2. Proposed changes to the Draft text

In light of the above, we propose the following changes to be taken into consideration by the Commission when reviewing its initial proposal:

Recital 5	
EC proposal	**HPH proposal**
(5) Maritime ports are of strategic importance for achieving major Union objectives [……..]. As highlighted in the Communication "Ports: an engine for growth"5, the Union needs ports which operate efficiently in all maritime regions, which requires efficient public and private investment. Investments 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.	(5) Maritime ports are of strategic importance for achieving major Union objectives [……..]. As highlighted in the Communication "Ports: an engine for growth"5, the Union needs ports which operate efficiently in all maritime regions, which requires efficient public and private investment. Investments 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**~~
Justification *Private operators have invested commercially to upgrade their infrastructure to meet customer demands. The GBER should ensure that state aid does not distort competition between commercial activities, and avoid that public support for non-commercial investment crowds out private investment in commercial activities, for example by creating overcapacity. In this context, aid for superstructure and larger vessels should not be exempt from notification as they are both susceptible of creating competition distortions.*	
Article 56, 2 (a)	
a) for the construction or upgrade of maritime port infrastructures and superstructures, with the exception of mobile equipment; and	a) for the construction or upgrade of maritime port infrastructures ~~**and superstructures, with the exception of mobile equipment**~~; and
Justification *The Leipzig Halle Court ruling states that it is the economic (or non-economic) character of the exploitation that determines the character of the construction of the infrastructure and not the nature of the infrastructure as such. Superstructure is a core activity of private operators (commercial in nature) and should therefore be excluded from the scope of the proposed Regulation.*	
Article 56, 2 (b)	
EC proposal	**HPH proposal**
…for the construction or upgrade of access infrastructure, including dredging and excluding maintenance dredging, dedicated to commercially exploited maritime port infrastructure.	…for the construction or upgrade of access infrastructure, including **capital** dredging ~~**and**~~ **but** excluding maintenance dredging **and** dredging dedicated to commercially exploited maritime port infrastructure.
Justification *It should be made clear that capital dredging is state aid relevant. This has been confirmed both in Leipzig Halle Court ruling and in the Commission Decision on the Port of Ventspils where the Commission found that dredging works directly related to the development of terminals and berths (i.e. infrastructure that is commercially exploitable under Leipzig Halle), are susceptible of conferring economic advantage to the port authority and public financing may therefore involve state aid. State aid for maintenance dredging should always be notified since it is likely to relate to activities that are already commercially exploited.*	
Article 56(b) paragraph 4	

EC proposal	HPH proposal (TBC)
(d) if eligible costs are up to EUR [120] million for the maritime ports 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: [50]% of the eligible costs.	(d) if eligible costs are up to ~~**EUR [120] million**~~ for the maritime ports 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: ~~**[50]% of the eligible costs.**~~
Justification *The financial thresholds (no notification for state aid of up to 50% on projects of up to EUR 120 million) are a priori high and could easily distort competition, in particular for upgrading infrastructure projects. Additional information is required from the Commission to understand the rationale behind the proposed thresholds.*	
Article 56(b) paragraph 6	
EC proposal	**HPH proposal (TBC)**
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.	Any investment started by the same beneficiary ~~**within a period of [three] years**~~ **under the same planning permission** ~~**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.
Justification *A period of 3 years is too short for major long-term infrastructure projects. The timeframe could be linked, for example, to planning consent.*	
Article 56(b) paragraph 7	
EC proposal	**HPH proposal**
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 nondiscriminatory 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 ports10] 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.	~~**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 nondiscriminatory 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 ports10] 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.**~~
Justification *There is no link between the need to notify and the length of the concession from a competition perspective. Furthermore, article 18 of the Concession Directive states that for concessions lasting more than five years, the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives (including both initial investments and investments during the life of the concession). The GBER is there to clarify when notifications are required or not, and not to reinterpret or override existing legislation.*	

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