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GBER and Ports

Comments on draft provisions to simplify implementation of unproblematic state aid for ports and airports

-- Translated from German --

LOGISTICS made in Germany

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Introduction

The success of the European economy depends on a strong port economy. German seaports manage more than 120,000 ships a year and handle about 300 million tonnes of cargo of all types, including more than 3.7 million cars and lorries, almost 16 million containers, 24 million tonnes of grains, oilseeds and feeding stuff as well as 38 million tonnes of coal, natural gas and crude oil. Almost all modes of transport are used to move this cargo in and out: ports link these modes of transport with one another. Thus, the primary prerequisite for the success of a place of business and of an industry is an efficient transport network apart from strategic elements such as an optimum regulatory policy and management, competitive environmental and energy policies, safe ports and appropriate wage and social policies.

It is the fundamental task of public authorities to provide the necessary infrastructure to the community. A society can fully develop in all aspects only if it has proper and efficient infrastructure at its disposal.

Ports are essential components of cargo and passenger transport networks. They are the nodal points that practically link all modes of transport to each other. Ports generate and safeguard jobs far beyond their locations. Furthermore, ports – some of which are centuries old – shape the image and structure of their locations like no other urban and spatial planning measure and like almost no other economic factor. Hence, it is logical, self-evident and necessary that the public authorities have the required means and instruments at their disposal to develop such ports that satisfy the needs, requirements and wishes of the people.

As a result, the ZDS - Zentralverband der deutschen Seehafenbetriebe (Central Association of German Seaport Operators), too, is in favour of establishing more clarity on the application of the State aid law to ports. The inclusion of ports in the General Block Exemption Regulation (GBER)[1], which the European Commission is striving for, can result in substantial easement. To the detriment of the economy, notification requirements, which are being applied more strictly for some years now, cause considerable burden and delays in the implementation of important port construction projects. However, the present draft for the inclusion of ports into the GBER cannot be supported as things stand due to the considerations mentioned below. However, the ZDS continues to be fundamentally open to a clarifying legal instrument such as the General Block Exemption Regulation.

Procedure does not guarantee adequate participation

The procedure adopted by the European Commission to draft the General Block Exemption Regulation seems lawful but the question arises as to whether European institutions are sufficiently involved or not, considering the unmistakable significance of ports as well as airports to mobility and the economic power of the European Union. Council Regulation (EU) 2015/1588 of 13 July 2015 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to certain categories

[1] Council Regulation (EU) No. 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union

of horizontal State aid (codification) is the basis of the selected procedure. Here, Article 6 on hearing of interested parties reads as follows:

> "Where the Commission intends to adopt a regulation, it shall publish a draft thereof to enable all interested persons and organisations to submit their comments to it within a reasonable time limit to be fixed by the Commission and which may not under any circumstances be less than one month."

Moreover, the European Commission must consult the member states in the Advisory Committee on State aid twice as per Article 8 of the previous regulation, namely at the same time as publishing any draft regulation in accordance with Article 6 and before adopting any regulation. Consultation of the committee shall take place in a meeting called by the Commission.

Moreover, the member states, the European Parliament, the parliaments of the member states and the relevant federal states in Germany do not have a formal say in the issues of great macroeconomic and even social significance for cities and municipalities, regions and member states. This is particularly problematic if the proposed amendment contains elements that have been explicitly rejected by the European Parliament and the member states more than once in the recent past. In view of the current discussion about the state of the European Union, this is quite questionable.

The European Parliament and the governments and parliaments of federal governments and states should actively participate in the current debate about the application of the competition law to investments in transport facilities and in the pending consultation process for the inclusion of ports into the GBER.

The Commission's proposal contains irrelevant elements

The proposal for amending the General Block Exemption Regulation contains irrelevant elements, which have already been dismissed several times by the Council and parliament. According to the proposal of the European Commission, a new Article 56b (7) and (8) would read as follows:

7. Any concession or contracts to a third party to construct, upgrade, rent and/or operate port infrastructures or port superstructures shall be granted on an open, transparent and non-discriminatory basis, having due regard to the procurement rules of the Union [as well as having due regard to the regulation to establish a framework for access to the market of port services and the financial transparency of ports]. The concession or contract term for renting or operating the infrastructure by a third party must not exceed a maximum period of [30] years.

8. The infrastructure must be made available to interested users on an open, transparent and non-discriminatory basis. The price for the use of the infrastructure must be in line with the market price.

This paragraph is supposed to establish a compulsory tender process for concessions and rental agreements after 30 years. The objective of these regulations and their connection with the other proposal are not clear.

Moreover, in case of such a blanket regulation, the principle of proportionality mentioned in recital 3 would need to be taken into account along with the fact that the investment amounts in ports naturally require very long contractual periods. It must be guaranteed that extension options for contracts with a term of 30 years are harmless even if they are exercised without a tender.

However, an astonishing aspect of the proposal is that precisely the limitation of the contract period in ports has been clearly overruled by the European Parliament and the member states in the debates on Port Package I, Port Package II and the concessions directive. The legislative procedures of both Port Packages failed and the concessions directive explicitly excludes rental and lease agreements as is customary in ports. The renewed attempt of the European Commission appears exceedingly strange against this backdrop and against the backdrop of limited participation possibilities of parliaments and member states in the present procedure as well as in the light of the general debate surrounding the relationship between the member states and the EU.

In this context, the ZDS also points to the infringement proceedings (whose outcome is still pending) initiated by the European Commission in connection with the rights of lease holders of public properties in ports.

The European Commission should delete paragraphs 7 and 8 on the duration of concessions and rental and lease agreements without substitution.

General infrastructure, no State aid

The European Commission assumes that every governmental infrastructure investment, which serves or can serve an economic activity, fulfils the prerequisite for State aid. This does not include the execution of tasks of public authorities or social measures that follow the principle of solidarity. If payment is made for the use of infrastructure, it is assumed to be an economic activity. According to the proposal of the European Commission, any kind of investment in infrastructure that facilitates the access of a port from sea or land and that generates direct revenues for the port managing body, which has not been defined in detail, would first be classified as State aid in order to be exempted under certain circumstances later. This would explicitly include access roads, for example federal motorway 7 in Hamburg, approach channels from the sea to the port (for example the course of the rivers Elbe or Weser, from their estuaries till Hamburg or Bremen), railway lines and locks. Any infrastructure investment is subject to the State aid law if payment has to be made for use.

The Commission itself has not yet clarified the notion of State aid in accordance with Article 107 (1) of the AEUV (Treaty on the Functioning of the European Union) in connection with infrastructure. The State aid guidelines for maritime transport that are still valid state that: “State aid for infrastructure investments is not considered as

State aid as per Article 87 (1) of the EC Treaty, if the state offers all operators free and equal access to infrastructure.“ (European Commission 17.01.2004, Pg. 5) (Europäische Kommission 17.01.2004, S. 5) At the start of 2014, the Commission held a public consultation on the notion of State aid for infrastructure and published a consultation document (European Commission 2014) (Europäische Kommission 2014). The outcome of the consultation procedure was not published. This means: essential issues, also those pertaining to the equal treatment of maritime transport and competing modes of transport such as roads, remain unresolved.

From the point of view of the ZDS, maintenance and development of general infrastructure on seaports, including land reclamation, are public responsibilities. By definition, as infrastructure they serve as prerequisite for the economic activities of the private sector. General infrastructure in the port industrial zone includes facilities and water and land areas, which are equally accessible to all potential users, particularly all components of the general transport system inside the port area and all connections to the national and international transport network. This is public infrastructure and is a prerequisite for business operations in the port industrial zone for fulfilling the tasks that lie in the general economic interest of a member state. Financing through state resources does not benefit any particular company. These infrastructure buildings that are funded through public resources are not State aid in the sense of Article 107 (1) of the Treaty on the Functioning of the European Union (AEUV) and therefore are not subject to the obligation to notify.

The European Commission should clarify that investments in general transport facilities do not constitute State aid. The notion of “State aid” for infrastructure investments needs to be clarified across all modes of transport. In its current version, the GBER does not provide any additional legal certainty and inordinately limits the scope of the public authorities.

“Access infrastructure”, no State aid

Based on the premise that general infrastructure does not constitute State aid, access infrastructure should not be classified as State aid. The proposal of the Commission states:

(157) ‘Access infrastructure’: any type of infrastructure necessary to ensure the access and entry from land or sea and river by users to the maritime or inland port, in particular, access roads, access rail tracks, breakwaters, access channels, locks;

Article 56b II (b) defines that general infrastructure also constitutes State aid. However, the construction and maintenance of infrastructure is the responsibility of the state.

The European Commission should delete Article 56b II (b) and clarify that “access infrastructure” does not fundamentally constitute State aid.

Non-inclusion of superstructure

According to Article 56b, superstructure costs would also be rated as chargeable costs.

Superstructure and mobile equipment

2 Eligible costs are the costs (including planning costs) for investments

a. in the construction or modernisation of infrastructure and superstructure of seaports, with the exception of mobile equipment and

b. in the construction or modernisation of access infrastructure (including dredging, but not maintenance dredging) for seaport infrastructure that is used for commercial purposes.

ZDS is of the view that the financing of superstructure in a commercial space in a port is the task of a port management company. Funding through public resources constitutes State aid in the sense of Article 107 (1) of the AEUV, unless the prerequisites of Article 107 (3) a to c are satisfied. Superstructure investments help in focusing on the operation-related purpose pursued by the port management company.

The definition of superstructure as proposed by the European Commission makes differentiation difficult, for example the differentiation between mobile and immobile superstructure. Moreover, it does not take into account the various competitive situations and organisational structures of European seaports. The inclusion of superstructures can result in massive changes in competition at individual locations.

The reference to superstructure in Article 56b 2 must be deleted.

Definitions raise questions

A General Block Exemption Regulation that also applies to ports should consider port infrastructure in a more narrow sense and not to general infrastructure, access infrastructure and superstructure (see above). For decades, European port policies have debated on the differentiation between general port infrastructure, access infrastructure, user-specific infrastructure and ports. The current proposals of the European Commission seem to ignore these discussions.

Definition of “port infrastructure”

Till date and to the extent evident, the EU law does not provide a universal definition. The definition given in paragraph 155 is broad and includes quay walls and internal basins as well:

(155) ‘Port infrastructure’: 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;

Inclusion of quay walls

Owing to the inclusion of quay walls in the definition of “port infrastructure”, financial benefits in connection with the construction or maintenance of quay walls can be understood as State aid, and require notification if the maximum limits are exceeded. However, whether such measures constitute State aid or not is doubtful if, for example, quay walls are equally accessible to all potential users or also if they serve the purpose of flood protection and reinforcement, thus serving non-commercial purposes.

The European Commission needs to provide a clear explanation of the criteria used for checking the funding of quay walls.

Inclusion of internal basins

Internal basins have also been included in the definition of ‘port infrastructure’ in paragraph 155. Since the costs of construction and maintenance of internal basins can vary greatly depending on the geographical conditions of ports, this would lead to distortion of competition if internal basins were to constitute State aid. Moreover, internal basins are a component of the access road to handling facilities and facilitate general transport safety.

Internal basins should be considered as access infrastructure and excluded from the notion of State aid.

Link to income of the port managing body

In Article 2 no. 155, the definition of the term “port infrastructure” is subject to the requirement that direct income is generated for the port managing body. This is so because the draft differentiates between commercially used port infrastructure and port superstructure as well as public access infrastructure. Thus the object of State aid in the sense of the GBER can either be (commercially used) port infrastructure or port superstructure or access infrastructure if (in an individual case) it is a part of the commercially used port infrastructure.

Linking with the income raises some questions: How would the European Commission assess a situation where a port operator entirely forgoes the income? Would the infrastructure still be considered as port infrastructure? On the other hand, what would happen if the managing body of the port unintentionally earns a direct income from the use of infrastructure owing to international obligations, for example towards environmental protection?

The definition of port infrastructure must be made more precise.

Port managing body

This term has not been defined in detail in the Commission's proposal. It needs to be clarified.

The European Commission defines the “managing body of the port” as follows:

> 5. “Managing body of the port” means a public or private body which, whether or not in conjunction with other activities, has as its objective under national regulations or instruments the administration and management of the port infrastructures and port transport, and the coordination and, if required, control of the activities of the different operators present in the port concerned; (European Parliament 2016, see amendment 54) (Europäisches Parlament 2016, S. Abänderug 54)

However, the European Parliament prefers the following definition:

> “Managing body of the port” means a public or private body which, whether or not in conjunction with other activities, has as its objective under national regulations or instruments the administration and management of the port infrastructures, and the coordination and execution, organisation or control of the activities of the different operators present in the port concerned as well as the development of the port area; (European Parliament 2016, see amendment 54) (Europäisches Parlament 2016, S. Abänderung 54)

Discussion on the exact definition in connection with the port regulation is still going on. In conclusion, the managing body of a port can be a local port authority as much as a regional or national ministry, and the scope of activity of the managing body is also open. As a result, the scope of application of the proposed regulation remains unclear as well.

A precise definition of “port managing body” must be added to the General Block Exemption Regulation.

Port

The definition of the term “Port”, too, raises questions:

(152) ‘Port’: an area of land and water made up of infrastructure and equipment for, principally, the reception of waterborne vessels, their loading and unloading, the 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;

(153) ‘Maritime port’: a port for, principally, the reception of waterborne vessels by sea;

(154) ‘Inland port’: a port other than a maritime port, with indirect access to the open sea through inland waterways;

The definition does not clarify who and based on what criteria a port area should be identified as such. For example, does the port area also include areas near the water, for example the areas of industries and power plants, which use the transshipment of cargo between ship and land as a subordinate production factor?

The definition of port must be made more precise.

Legal uncertainty in case of dredging

The proposal of the European Commission creates legal uncertainty in the important topic of dredging. Virtually all ports in the world rely on dredging for guaranteeing adequate water depths. Dredging ensures that the identified maximum draughts are adhered to continuously and irrespective of the tide, at least at berth. Like in case of roads, which need to be permanently and routinely kept free from precipitation, soiling, wear and vegetation, adequate water depths and navigation channel widths must be permanently guaranteed for ensuring the safety and ease of shipping traffic from the berth to the open sea. Meeting and diversion areas play a special role in guaranteeing general transport safety, even within individual internal basins. Places of refuge, which are equipped with internationally advised features, must be provided for emergency situations.

The definitions for dredging that are put forward by the European Commission do not take such connections into account and clearly differentiate between dredging and maintenance dredging.

(158) ‘Dredging’: 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;

(159) ‘Maintenance dredging’: dredging routinely done in order to keep the waterway accessible;"

The costs for “maintenance dredging” are not included in the estimate as per Article 56b II when applying the exemption regulation, while the costs for dredging are. These regulations are not clear.

Moreover, it is important that the GBER and the port regulation are consistent with each other. The European Parliament provides for the following definition of “dredging”:

> ‘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).

If Article 2 of the port service regulation were to be adopted in its planned version, i.e., with the passage that dredging is not a port service, this would indicate that dredging work should never be understood as State aid. Based on this premise, the differing calculative treatment of “dredging” and “maintenance dredging” in the exemption regulation does not make sense. Furthermore, the respective definitions are not adequately subsumable and feasible: if a port shows a tendency to siltation, dredging work must be carried out continuously with a certain regularity because otherwise ships would no longer be able to access the port. There is no feasible differ-

entiation measure between the definitions of the two terms. However, since maintenance dredging is needed in every port and is usually also urgent and time sensitive, it must not be classified as State aid.

Moreover, the European Commission must not unduly interfere with the well-functioning competition by imposing additional cost burdens on users of ports that are located further away in the hinterland. There are ports that rely more on dredging than others due to their geographical location. Port locations in Europe have been chosen centuries ago and they have proven their value. They build the foundation for the structure and economic success of entire regions and countries. If the European Commission were to interfere with the existing 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 impair the chances of further success of these locations.

The European Commission should delete Article 56b II (b) and incorporate a note, that dredging does not constitute State aid, as recital.

Threshold values and chargeable costs are not clear

The core components of a Block Exemption Regulation are the threshold values under which the obligation to notify would be dropped. The threshold values and the process of determining the project volume to be checked have been defined in the new Article 56b (2) to (6). Apart from the issues related to the individual chargeable cost components, the charging mechanism is particularly problematic. Paragraph 6 states:

6. An investment by the same beneficiary within a period of [three] years from the date of start of works on another aided investment in the same seaport shall be considered to be part of a single investment.

This formulation does not clarify the actual calculation period to be used or the factual connection of various investments at all. Besides, even the threshold values that have been specified are in no way conclusive. The EU Commission needs to first concretise the calculation methodology before a productive evaluation and opinion can be reached. The charging mechanism in the current version provides no legal certainty.

The European Commission should formulate a more precise, clear and practically oriented charging mechanism.

Charging of costs for environmental measures

The ZDS also proposes to supplement Article 56 b (2) as follows:

(2) Eligible costs are the costs (including planning costs, costs for any environmental measures required for port investment) for investments …

This clarifies once again that environmental measures (e.g., soil decontamination), which are implemented as part of port construction work and which are financially and technically related to this work and/or would not be necessary without this work, are also considered as an integrated component of the port construction project even from the point of view of State aid. Otherwise there would be a risk that – contrary to the request of the Commission to simplify procedures through exemptions – the separation of environment-conducive partial measures would again necessitate independent notifications.

It should be possible to unambiguously charge costs for environmental measures.

Final assessment

The ZDS – the Central Association of German Seaport Operators – is in favour of establishing more clarity on the application of the competition law. The ZDS has taken a neutral stand vis-a-vis the legal instrument. The inclusion of ports in the General Block Exemption Regulation can result in substantial easement. To the detriment of the economy, notification requirements, which are being applied more strictly for some years now, cause considerable burden and delays in the implementation of important port construction projects. Hence the ZDS continues to be fundamentally open to a clarifying legal instrument such as the General Block Exemption Regulation.

However, the current draft for the inclusion of ports into the GBER does not provide any legal certainty and therefore cannot be supported:

- Important institutions are not a part of the procedure that is taken as basis for the draft. The European Parliament and member states must participate more actively for better acceptance.
- The draft contains irrelevant elements, which have been clearly overruled by the Parliament and the member states.
- Threshold values and the process of determining chargeable costs are not clear.
- The draft creates legal uncertainty in the important topic of “dredging”.
- The proposed definitions of “port infrastructure” and “access infrastructure” and the handling of superstructure raise many questions.

According to ZDS, the following measures are necessary to improve the draft:

The European Parliament and the governments and parliaments of federal governments and states should actively participate in the current debate about the application of the competition law to investments in transport facilities and in the pending consultation process for the inclusion of ports into the GBER.

The European Commission should delete paragraphs 7 and 8 on the duration of concessions and rental and lease agreements without substitution.

The European Commission should clarify that investments in general transport facilities do not constitute State aid. The notion of “State aid” for infrastructure investments needs to be clarified across all modes of transport. In its current version, the GBER does not provide any additional legal certainty and inordinately limits the scope of the public authorities.

The European Commission should delete Article 56b II (b) and clarify that “access infrastructure” does not fundamentally constitute State aid.

The reference to superstructure in Article 56b 2 must be deleted.

The European Commission needs to provide a clear explanation of the criteria used for checking the funding of quay walls.

Internal basins should be considered as access infrastructure and excluded from the notion of State aid.

The definition of port infrastructure must be made more precise.

A precise definition of “port managing body” must be added to the General Block Exemption Regulation.

The definition of port must be made more precise.

The European Commission should delete Article 56b II (b) and incorporate a note, that dredging does not constitute State aid, as recital.

The European Commission should formulate a more precise, clear and practically oriented charging mechanism.

It should be possible to unambiguously charge costs for environmental measures.

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