# Extension of the General Block Exemption Regulation to Ports

## Contribution of the European Sea Ports Organisation (ESPO) to the first public consultation round

## 20 May 2016

*Preliminary remark*

***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.***

## ESPO's contribution

**Introduction**

**For years already, 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 opportunity given to contribute to the first public consultation round and is formulating in that respect the following remarks and concerns:**

1. **ESPO asks the Commission to clarify what is not to be considered state aid (outside the scope of Article 107 Treaty)**

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 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.

ESPO believes that the GBER proposal would gain in clarity if reference would be made to these categories of public funding that are to be considered as non-economic and do not have to be considered as state aid.

2. **ESPO believes investment aid for port superstructure should be subject to notification**

ESPO believes that investment aid for port superstructure as defined in point (155) of article 2 e) 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 asks the Commission to define a specific category of port infrastructure needed to adapt to the use of alternative fuels and to stricter requirements on environmental performance**

Recital 5 of the GBER proposal for ports states that '*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.***

ESPO understands that these are examples of investments that could be exempted of notification if all conditions as foreseen in article 56b) are fulfilled.

ESPO welcomes this proposal but believes however that infrastructure needed for the use of alternative fuel and for the implementation of stricter requirements on environment should be defined and be added to the list of definitions foreseen in article 2 e) since this infrastructure is neither included in the definition of "port infrastructure" nor in the definition of port superstructure. A separate definition of this category seems most appropriate in view of defining the eligible costs in article 56b).

ESPO proposes in that respect the following definition:

*(160) (new) 'Infrastructure needed to adapt to the use of alternative fuels and/or to adapt to stricter requirements on environmental performance' : means infrastructure and facilities within the port area that directly relate to the need to adapt to the use of alternative fuels for (maritime) transport and/ or infrastructure and facilities that are being developed in the port area to meet stricter requirements on environmental performance;*

**=> As a result of point 2 and 3 of this position paper, article 56b), paragraph 2, should read as follows:**

*2. The eligible costs shall be the costs, including planning costs, of investments:*

*(a) for the construction or upgrade of maritime port infrastructures* ***~~and~~ ~~superstructures, with the exception of mobile equipment;~~ and***

*(b) for the construction or upgrade of* ***land and maritime*** *access infrastructure, including dredging and excluding maintenance dredging, dedicated to commercially exploited maritime port infrastructure.*

***c) (new) for infrastructure needed for adapting to the use of alternative fuel and/or for implementing stricter requirements on environmental performance.***

*Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible.*

4. **ESPO believes that maintenance dredging done on a public maritime access is not to be considered state aid. This should also be clarified in the framework of the GBER.**

Capital dredging that is not dedicated to commercially exploited maritime port infrastructure is considered as a non-economic activity. Consequently, maintenance dredging linked to such a dredging project is also be considered as non-economic. It would be helpful to specify that maintenance dredging in these cases is not falling under the state aid rules and is not subject to a GBER.

5. **Considering all investments in a port as one single investment project is not the right way to avoid circumventing the thresholds foreseen in the GBER proposal**

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 legislation[1] 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 6 of the GBER proposal will on the contrary artificially bring together investment aids for a port that are not connected and not at all aim at realising one project. Ports are very complex and broad entities both in terms of area and functions. There might be different investment

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

projects running at the same time which serve completely different needs 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.

Paragraph 6 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 4 of this Regulation. Investments in a maritime port that are subject to a single planning consent shall be considered to be part of a single investment project.*

6. **Article 56 b) paragraph 7 and 8 is not the most appropriate way to avoid that an advantage is being given at operator level.**

ESPO fully understand the intention of the Commission to avoid that state aid is being given at operator level. It is true that one should assess if advantages are given by the port authority to the third party that constructs or operates port infrastructure or superstructure. ESPO however believes that "market price" only is not a correct parameter and would suggest that one should refer to "market conditions". Other elements and criteria of the contract (e.g. conditions of operation, need to have a min staff,…) can make it more/less difficult for an operator and can thus present indirectly a (dis)advantage for a certain operator.

As regards paragraph 8, in view of defining what "available to all interested users" should imply, it seems preferable to refer to the forthcoming Port Regulation to avoid differences between both texts.

Paragraph 7 and 8 should therefore read as follows:

Paragraph 7: "*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 non-discriminatory 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 ports] 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.~~ *shall be granted against market conditions.*

*Paragraph 8: The infrastructure shall be made available to all interested users in accordance with the principles of the Port Regulation.".*