Remarks of the Antwerp Port Authority with regard to the draft GBER amendments

1. **A preliminary remark in relation to the realisation and management of port infrastructure**

We take this opportunity to criticise the Commission's decision-making practice in which it persistently denies national settings in which the construction and management of maritime port infrastructure is legally defined by Member State as activities falling within the public remit. This, irrespectively whether the user of this infrastructure takes directly or indirectly a share in financing the costs of the investment and maintenance of this infrastructure or not. In its recently published communication on state aid (19/05/2016), the Commission has made it very clear that it still considers port authorities by definition as entities engaged in economic activities, including the construction and management of port infrastructure. We formally disagree.

2. **The relation between GBER and previously notified and approved aid measures for ports**

Will the GBER proposal affect previously approved legal frameworks for port investments by Member States? We conclude it would not. In our case, Commission decision N530/2003 has approved the legally based financing scheme of different types of port infrastructures and services in the Flemish region. This transparent, elaborated scheme is still in place[1]. Therefore, a new recital 2b is needed, to clarify that a national (regional) port financing scheme that has been notified and approved before the entry into force of this Regulation remains valid and is not overruled by this Regulation.

3. **Clarify what is not to be considered as state aid and therefore not subject to the GBER**

Further clarification on the notion of 'aid' is needed. The draft seems to imply that all port infrastructure management is, by definition, of economic nature, and that consequently all public investments in port infrastructure are subject to state aid rules. That is however not the case, as also recognized by the Commission on different occasions (e.g. decision N530/2003).

A new recital (5) is necessary to clarify that at least the construction and the maintenance, including dredging and maintenance dredging, of access and defense infrastructure, both on land and sea or inland waterways, is of non-economic nature when this infrastructure does not generate a direct income and is consequently not commercially exploited, and is made available on equal and non-discriminatory terms for all potential users. Therefore, such state investments do not fall within the scope of state aid rules. It should be left to the discretion of the Member State to define which infrastructure constitutes the access and defense infrastructure.[2]

[1] Although financial support for Flemish port authorities steadily decreases due to the budgetary situation of the Flemish region. What is more, port authorities have been engaged in recent years to contribute to the financing of infrastructure not even falling within the scope of their legal mission. This "reverse state aid" is equally important when assessing aid cases (see also remarks under 4.).
[2] See recital 22b of the Port Regulation as proposed by the European Parliament.

4. **Port authority spending for execution of public missions should be taken into account within the threshold values**

Even if one would take the positon of the Commission that qualifies port managing bodies as undertakings for granted, one cannot deny that many European port managing bodies do take on many public responsibilities, be it as a result of legal obligations imposed on them or not.

Up till now, the Commission has not developed any positive policy towards the public missions involved or related to seaport management. The fact that the execution of public missions may result either directly or indirectly in the loss of substantial financial resources or assets that can be spent on the so called economic activities of the port managing body puts a different perspective on this observation.

This situation has aggravated over the last decade, most of that due to the fiscal and financial crisis in which Member States are involved. This has led Member States, not least Belgium and its regions, to reduce budgets that were originally meant to support investments and maintenance of public (port) infrastructure.

Examples abound where this retreat from public responsibilities is accompanied with the transfer of financial responsibilities to other bodies, public or private. In the case of port infrastructure, many seaport managing bodies are increasingly confronted with situations of (enforced) transfer of financial responsibilities for public infrastructure, even infrastructure that is not directly related to the exploitation of the port.

Where before, the general taxpayer financed the investment and maintenance of infrastructure used by the port community, it is now up to the port community – in our view the general port user itself - to pay for the use of those self-same infrastructure. After all, the simple transfer of financial responsibilities does not make the nature of these goods any less public. The one thing changing, is the scope of the community that now has to deliver the financial resources and the port managing body being in no legal position to ask other parts of the public to take on financial responsibilities. The port managing body as well as the port community would surely be right if they would argue that many other communities beside them will benefit from the existence of this infrastructure.

The GBER regulation might restore the balance a bit. First, by excluding specific port infrastructure from the scope of the state aid rules, as stated above (3). Secondly, we would like to suggest an alternative and complementary improvement to the proposal for a GBER regulation that would give financial responsibilities of public missions taken on by seaport managing bodies due consideration.

We therefore propose that the general income generated from port infrastructure charges that the port managing bodies have to spend on the execution of public missions, including investments and maintenance of public infrastructure, can be added to the threshold values proposed in article 56b, par. 4. In the end, it is the net result of received aid and public spending that counts. Therefore, in the current situation of financially struggling state authorities, the concept of “reverse state aid” must be taken into consideration.

5. Adjustment Article 56b) GBER

a. Threshold of paragraph 4 seem arbitrary

The aid intensities seem arbitrary. Rather than adjusting the aid intensities to economically underpinned criteria such as wider benefits, European added value or synergies of scale – thus connecting the GBER initiative to settled transport objectives under TEN-T policy - the Commission opted for a 'one-size-fits-all' approach. This means no reasonable differentiation is made determining the thresholds or maximum eligible costs. Criteria effectivily supporting the efficient spending of scarce public resources, such as maximizing added value for the community as a whole, are not considered reasonable parameters to determine different thresholds.

b. Adjust the safeguard of paragraph 6

In the port sector, it would be inappropriate to consider projects in a period of 3 years as a single investment project solely based on the fact that they are undertaken by a single beneficiary. In practice, port authorities manage the entire port area, so it is not uncommon that they undertake several projects even at the same time, let alone in a period of 3 years. It does not make sense to add investments in totally different port projects within the same state aid assessment for the sole reason that they are carried out in the same port planning period.

In addition, article 4, par. 2, of the GBER already states: *"The thresholds set out or referred to in paragraph 1 shall not be circumvented by artificially splitting up the aid schemes or aid projects."* The thresholds for maritime ports will also be included in art. 4, par.1 according to this draft regulation, so the proposed par. 6 is not only impractical, but also superfluous. Therefore, we urge the Commission to delete this paragraph. If the European Commission insists on including this or a comparable provisions, the Antwerp Port authority strongly favours a provision with the focus on the project rather than on the beneficiary.

c. Adjust paragraph 7

Concessions, including their duration, have their own regulatory framework. There is no acceptable reason why they need to fall within the scope of the GBER. For the same reason, similar provisions were not included in the Regulation establishing a framework on market access to port services and financial transparency of ports, which is now being negotiated in Trilogue. Therefore, the last sentence of this paragraph concerning the duration of concessions should be deleted.

d. Adjust paragraph 8

The same reasoning applies to the 'port infrastructure charges'. The GBER is not the appropriate instrument to organize port infrastructure charges, and it should certainly not restrict the autonomy of port authorities therein given to them by the Port Services Regulation. We therefore urge the Commission to delete the last sentence of paragraph 8. Alternatively, we suggest following amendment: *'The infrastructure shall be made available to all interested users in accordance with the principles of the Port Regulation.'.*