

INFRASTRUCTURE ANALYTICAL GRID N° 3 ¹ – CONSTRUCTION OF PORT INFRASTRUCTURES

Disclaimer: The contents seek to reflect the current rules and decisional practice and do not prejudge possible developments in the State aid enforcement practice and the application of public procurement rules. In any case DG COMP services are available to provide further guidance on the need for a formal notification. Such guidance may be given in the course of a pre-notification procedure.

General principles

1. Concerning port infrastructure, the existence of State aid is in general² examined at three levels:
 - Owner/manager of port infrastructure
 - Operator of port infrastructure
 - User of the infrastructure
2. According to the established jurisprudence of the Union Courts, whenever an entity is engaged in an economic activity, regardless of its legal status and the way in which it is financed, it can be considered as an undertaking for the purposes of EU competition law. The construction or upgrade or extension of port infrastructure which is commercially exploited constitutes an economic activity. Therefore the entity carrying out such activity, regardless of whether it is public or private, is considered as an undertaking for the purposes of EU State aid law and its funding may fall within the ambit of State aid rules.

Instances in which the existence of State aid is excluded

No economic activity: activities within the public remit

3. The distinction between public policy remit and economic activities has to be assessed on a case-by-case basis.
4. Activities that normally fall under the responsibility of the State in the exercise of its official powers as a public authority are not of an economic nature and in general fall outside the scope of State aid rules. The funding of certain investments in port infrastructure linked to activities that normally fall under the State's responsibility in the exercise of its official powers as a public authority are not of an economic nature and do not fall within the scope of the State aid rules³

¹ This is a working document drafted by the services of the European Commission and it does not express an official position of the Commission on this issue, nor does it anticipate such a position. It is not intended to constitute a statement of the law and is without prejudice to the interpretation of the Treaty provisions on State aid by the Union Courts.

² Depending on the organisational structure of the port in question.

³ See Case C-288/11 P *Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission*, EU:C:2012:821, paragraph 42.

(for example maritime traffic control⁴, police⁵, customs⁶, antipollution surveillance⁷, control and security of navigation⁸).

5. However, if the funding concerns a project that also includes infrastructure elements which can be economically exploited, it can involve State aid.
6. The construction of access infrastructure (e.g. public road, rail, utilities etc.) to ports which is made available free of charge to all users and is thus not commercially exploitable, may be considered as non-economic, as long as it is ensured that it is not specifically dedicated to the activity of the operator in exploiting the port infrastructure but benefits the population as a whole⁹.
7. However, other activities, like for instance dredging or breakwater works, which may not be of an economic nature *per se*, may be considered as economic if they form an intrinsic part of a project with a commercial objective¹⁰. If the purpose of such works is directly linked to the development of a port infrastructure, which is commercially exploitable, they constitute economic activities. Such activities therefore require a case-by-case analysis¹¹.

No economic advantage: Investments in compliance with the Market Economy Operator Principle

8. If it is proven that the State acted under the same terms and conditions as a commercial investor when providing the necessary funding, then State aid is not involved. This should be demonstrated by: (i) significant *pari passu* co-investments of commercial operators, i.e. on the same terms and conditions as the public authorities; and/or (ii) the presence (ex ante) of a sound

⁴ See Commission decision of 25 June 2014 in case SA. 38048 – Greece – Upgrading of the Port of Patras, OJ C 280, 22.08.2014, p. 20.

⁵ See Commission decision of 30 April 2015 in case SA.39637 – Germany - Extension of the cruise ship terminal in Wismar, OJ C 203, 19.06.2015, p. 3.

⁶ See Commission decision of 19 June 2013 in case SA. 35738 – Greece - Aid for the upgrading of Katakolo port, OJ C 204, 18.07.2013, p. 3.

⁷ Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova* EU:C:1997:160, paragraphs 22 and 23.

⁸ See Commission decision of 15 December 2009 in case SA. C 39/2009 (ex N 385/2009) – Latvia - Public financing of a port infrastructure in Ventspils Port, OJ C 62, 13.03.2010, p. 7.

⁹ See Commission decisions of 30 April 2015 in case SA.39608 – Germany - Sea port extension Wismar, OJ C 203, 19.06.2015, p. 3 and in case SA.39637 – Germany - Extension of the cruise ship terminal in Wismar (see footnote 5).

¹⁰ See Commission decision of 19 December 2012 in case SA. 34940 (2012/N) – Italy – Port of Augusta, OJ C 77, 15.03.2013, p. 1.

¹¹ See, for instance, Commission decision of 27 March 2014 in case SA.38302 - Italy – Investment Aid to the Port of Salerno, OJ C 156, 23.05.2014, p. 10; in that case, the objective was to develop a dock that was to be commercially exploited. Furthermore, the upgraded infrastructure benefitted exclusively cargo ships, containers and Ro-Ro traffic. Therefore, the works did not provide an advantage to all the operators of the port but only to particular undertakings. For those two reasons, the dredging activity did not fall within the public remit and was considered to be of an economic nature. At the same time, see Commission decision of 11 March 2014 in case SA. 35720 – United Kingdom – Liverpool City Council Cruise Liner Terminal, OJ C 120, 23.04.2014, p. 4; in that case the Commission considered that dredging was not solely connected to the construction and operation of a specific port, but rather enhanced access to a river and benefitted all operators on the river without distinction. Thus, it was considered as public works aimed at maintaining access to maritime routes for the benefit of the maritime community as a whole, in the interest of the general public.

business plan (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors, in line with the normal market rate of return that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case. Note, however, that the existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor.

9. The financing of port infrastructure often requires substantial capital investments that can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEOP are nevertheless complied with.

No economic advantage: the operation of the infrastructure is entrusted as a service of general economic interest (SGEI) in line with the Altmark criteria

10. The existence of an economic advantage may be excluded, if: (i) the project is necessary for the provision of port services that can be considered as genuine services of general economic interest (SGEI) for which the public service obligations have been clearly defined¹²; (ii) the parameters of compensation have been established in advance in an objective and transparent manner; (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and (iv) the SGEI has been either assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community or the compensation does not exceed what an efficient company would require¹³.

SGEI de minimis Regulation¹⁴

11. Public funding granted for the provision of an SGEI not exceeding EUR 500 000 over three years is not regarded as State aid, provided the other conditions of the SGEI *de minimis* Regulation are also fulfilled.

No economic advantage at the level of the user

12. The existence of an economic advantage at the level of the end users may be excluded if the port is not dedicated for the use by a specific operator, all end users enjoy equal and non-discriminatory access to the infrastructure and the infrastructure pricing policy *vis-à-vis* end users is established on market terms¹⁵.

¹² For example if a port is the only one on an island.

¹³ See Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg EU:C:2003:415 and Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic, OJ C 8, 11.1.2012, p. 4.

¹⁴ Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

¹⁵ See list of Commission decisions at the end of this grid.

No potential effect on trade between Member States

13. There may be cases of very small ports that cater almost exclusively to local demand and where the investment does not lead to a significant increase of the port's capacities. In such cases a potential effect on competition and trade may be excluded¹⁶. The effect on trade between Member States for the purposes of Article 107(1) TFEU must be established on a case-by-case basis except for cases covered by the *de minimis* Regulations.
14. Support granted under the *de minimis* Regulation is not regarded as State aid if no more than EUR 200 000 is granted to a single undertaking over a period of three years and the other conditions set out therein are also respected¹⁷.

Instances in which there is no need to notify for State aid clearance, but other requirements could apply

15. Possible State aid is considered to be compatible with the internal market and can be granted without notification in the following instance¹⁸:

Service of general economic interest: SGEI Decision¹⁹

16. If the construction, renovation or extension of a port is necessary for the provision of an SGEI, it may be considered as part of the SGEI mission. If the compensation of such an SGEI concerns ports with an average annual traffic of fewer than 300 000 passengers, it may be covered by the **SGEI Decision**, provided that the criteria of that Decision are met: definition and entrustment of the SGEI, parameters of compensation²⁰ established ex ante in a transparent manner, amount of compensation not exceeding the costs for the provision of the SGEI and a reasonable profit, claw back mechanism ensuring the absence of overcompensation.

¹⁶ See Commission decision of 29 April 2015 in case SA.39403 (2014/N) – Netherlands – Investment aid for Lauwersoog port, OJ C 259, 7.8.2015, p. 3n. In that decision, the Commission considered that the Lauwersoog port was mainly used by small fishing vessels registered in that Member State which choose that port mainly in view of its geographical proximity to the relevant fishing grounds. The investment would not lead to a significant increase in the port's capacities and, in particular, would not increase its capacity to cater for larger ships. Thus, the investment in the fishing port was targeted at a local market in the sense that it would not provide incentives to fishermen from other Member States to use the Port of Lauwersoog rather than fishing ports in other Member States. The parts of the project aimed at recreational activities were also clearly targeted at a local market (the marina only has 60 moorings) and, as such, would not have any effect on cross-border trade.

¹⁷ Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid, OJ L 352, 24.12.2013, p. 1.

¹⁸ Currently, Commission Regulation No 651/2014 (GBER) includes no criteria based on which airports could be exempted from notification. Provided that sufficient case experience will have been developed allowing the design of operational exemption criteria ensuring the ex-ante compatibility of aid for port infrastructure, the Commission intends to review the scope of the GBER with a view to possibly including that type of aid.

¹⁹ Commission Decision 2012/21/EU of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

²⁰ Initial support for investment on necessary infrastructure may be averaged as (annual) compensation over the entrustment period (normally 10 years, unless a longer period is justified by the amortisation of investments) as SGEI compensation.

Instances in which notifying for State aid clearance is necessary

17. If the measure constitutes State aid and the measure does not meet the conditions allowing an exemption from notification, State aid clearance following a notification to the Commission is required:

State aid for port infrastructure directly under Article 107(3)(c) TFEU for seaport infrastructure and under Article 93 TFEU for inland ports and intermodal platforms

18. The compatibility of aid to seaports is normally assessed on the basis of Article 107(3)(c) TFEU. That provision constitutes the legal basis for aid to facilitate the development of certain economic activities or of certain economic areas. Under that legal basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality and incentive effect of the aid; and (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.
19. The compatibility of aid to inland ports, intermodal platforms or intermodal infrastructures in ports is assessed on the basis of Article 93 TFEU, which constitutes the legal basis for aid for the coordination of transport or the reimbursement for the discharge of certain public service obligations²¹. Under that legal basis a measure should, in particular, comply with the following conditions: (i) presence of a clearly defined objective of common interest; (ii) necessity, proportionality, and incentive effect of the aid; (iii) open access to all users on a non-discriminatory basis; and (iv) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest.

Service of General Economic Interest: SGEI framework²²

20. The compatibility of State aid for port infrastructure which is necessary for the provision of an SGEI in ports with more than 300 000 passengers per year may be assessed on the basis of the SGEI Framework²³.

References:

- [Commission Decision 2012/21/EU](#) of 20 December 2011 on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ L 7, 11.01.2012, p. 3.

²¹ See Commission decision of 1 October 2014 in case SA.37402 - Hungary - Development of the Győr-Gönyű Public Port, OJ C 141, 9.05.2014, p. 5, and Commission decision of 17 December 2012 in case SA.34501 - Germany - Extension of the inland port of Königs Wusterhausen/Wildau, OJ C 176, 21.06.2013, p. 1.

²² European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

²³ According to that article: "*Aids shall be compatible with the Treaties if they meet the needs of coordination of transport or if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.*"

- [Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest](#), OJ C 8, 11.1.2012, p. 4.
- [Commission Regulation \(EU\) No 1407/2013](#) of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1.
- [Commission Regulation \(EU\) No 360/2012](#) of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest, OJ L 114, 26.4.2012, p. 8.

Indicative list of Commission decisions taken under State aid rules concerning port infrastructure:

- C 39/2009 (ex N 385/2009) – Latvia – Public financing of port infrastructure in Ventspils Port:
http://ec.europa.eu/competition/state_aid/cases/234343/234343_1080097_16_1.pdf
http://ec.europa.eu/competition/state_aid/cases/234343/234343_1276398_146_2.pdf
- SA 38302 – Italy – Investment aid to the Port of Salerno:
http://ec.europa.eu/competition/state_aid/cases/251758/251758_1536127_128_2.pdf
- SA 38478 – Hungary – Development of the Győr-Gönyű Public Port:
http://ec.europa.eu/competition/state_aid/cases/253617/253617_1593938_102_2.pdf
- SA 38048 - Greece – Upgrading of the Port of Patras:
http://ec.europa.eu/competition/state_aid/cases/252397/252397_1563559_76_2.pdf
- SA 36953 - Spain – Investment aid to the Port of Bahía de Cádiz:
http://ec.europa.eu/competition/state_aid/cases/249217/249217_1481221_99_2.pdf
- SA 36621 - Italy – Investment aid to the Port of Capo d'Orlando:
http://ec.europa.eu/competition/state_aid/cases/248535/248535_1511225_165_2.pdf
- SA 36223 – Spain – Investment aid to the Port of Santa Cruz of Tenerife:
http://ec.europa.eu/competition/state_aid/cases/248020/248020_1453836_60_2.pdf
- SA 35720 – UK – Liverpool City Council Cruise Liner Terminal:
http://ec.europa.eu/competition/state_aid/cases/251566/251566_1529732_82_2.pdf
- SA 35738 – Greece – Aid for the upgrading of Katakolo port:
http://ec.europa.eu/competition/state_aid/cases/246700/246700_1444527_188_2.pdf
- SA 34940 – Italy – Port of Augusta:
http://ec.europa.eu/competition/state_aid/cases/246189/246189_1407362_66_2.pdf
- N 60/2006 – Pays-Bas – Project main port development Rotterdam:
http://ec.europa.eu/competition/state_aid/cases/203707/203707_1154249_37_2.pdf
- N 520/2003 – Belgique – Aide financière pour des travaux d'infrastructure dans les ports flamands:
http://ec.europa.eu/competition/state_aid/cases/136485/136485_486858_9_2.pdf
- N 110/2008 – Germany – Port infrastructure – Public financing of the Jade WeserPort Project:
http://ec.europa.eu/competition/state_aid/cases/224653/224653_1391736_43_2.pdf
- SA. 30742 – Lithuania – Construction of infrastructure for the Passenger and Cargo Ferries Terminal in Klaipėda:
http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf
- N 44/2010 – Latvia – Public financing of port infrastructure in Krievu Sala:
http://ec.europa.eu/competition/state_aid/cases/235848/235848_1304328_127_3.pdf

- SA 37402 – Hungary – The intermodal development of the Freeport of Budapest:
http://ec.europa.eu/competition/state_aid/cases/250036/250036_1534981_92_2.pdf
- SA 39403 – Netherlands – Investment aid for Lauwersoog port:
http://ec.europa.eu/competition/state_aid/cases/256021/256021_1668108_140_2.pdf