December 8th, 2016

FEPORT comments and reply to the Second consultation concerning the draft Global Block Exemption Regulation (GBER)

Draft Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty

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Introduction

FEPORT, the organization which represents the interests of large variety of terminal operators and stevedoring companies performing operations and carrying out activities over 400 terminals in the seaports of the European Union and Turkey welcomes the opportunity to provide comments regarding the Second draft Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty.

As expressed in its reply to the first consultation relating to the GBER, FEPORT has always been in favour of clarifications about key concepts relating to State Aid as regards transport infrastructure. Private port operators are seeking for legal clarity to be able to invest in a sustainable manner.

FEPORT welcomes a number of changes that have been introduced in the second draft of the GBER such as the exclusion of superstructure from the scope of GBER given the fact that it is commercially exploited. We do however still have significant concerns about some provisions that we shall detail in this document.

General comments :

Need for consistency between rules applicable to ports

Definitions of infrastructure differ amongst Member States and cover a variety of configurations with regard to organizational structures, ownership and financial responsibility. These differences also have an impact on how State Aid rules are interpreted. To date, the European Commission has not provided a list of public infrastructure falling within the scope of exercise of public powers in the different European ports.

Given the strategic importance of the transport network for EU trade and economy, it is essential that Member States can continue to plan and finance transport infrastructure and projects of European and national interest. The construction and operation of basic transport infrastructure is an exercise of public powers. Therefore as long as a basic infrastructure is open to all on equal terms, it should by no means be considered as an economic activity subject to State Aid.

It is crucial for private port operators who invest significantly for their operations to have legal certainty and clarity over the applicable legal framework. Applicable rules should not distort competition and penalize ports which have natural geographical constraints that are dealt with by Member States in the framework of their exercise of public powers.

Last but not least, provisions of the GBER should not introduce confusion, interfere or contradict the clearly and repeatedly expressed will of the European Parliament and the Member States in the framework of the discussions about Ports Regulation and other legislation applicable to ports.

Notion of State aid

While FEPORT understands that the adoption of GBER will block exempt certain types of aid from the obligation to be notified to the Commission, we regret that DG Competition‘s competence is not extended to also clarify what types of measures constitute State aid or not. The port terminal and stevedoring industry requires legally binding clarifications on the scope of State aid rules for infrastructure financing. Non binding instruments, for instance such as analytical grids will not provide adequate legal certainty.

For this reason, FEPORT highly recommends that any clarifications are included directly in the GBER rather than being part of a standalone explanatory document detaling all State Aid related decisions.

Need for further clarifications

FEPORT welcomes a number of clarifications relating to definitions and eligible costs as they are certainly useful. Yet, we are still missing some essential definitions.

The definition of "Port" is unclear:

(154) 'port' means an area of land and water made up of such infrastructure and equipment, so as to permit the reception of waterborne vessels, their loading and unloading, the storage of goods, the receipt and delivery of those goods and the embarkation and disembarkation of passengers, crew and other persons and any other infrastructure necessary for transport operators within the port area;

This definition works well in the context of the Port Services Regulation, in combination with the term "managing body". In the context of the GBER, it does not work because it remains unclear whether it describes a terminal or a collection of terminals. The definition could be applicable to both.

The definitions that have been for instance provided in the Ports Regulation are clarifying each other and constitute a homogeneaous corpus. It would have been highly preferable to use the same definitions and methodology in the GBER.

In the GBER, port and access infrastructure are defined :

(157) 'port infrastructure' means infrastructure and facilities for the provision of transport related port services, including berths used for the mooring of ships, quay walls, jetties and floating pontoon ramps in tidal areas, internal basins, backfills and land reclamation, alternative fuel infrastructure, infrastructure for the collection of ship-generated waste and cargo residues and transport facilities within the port area;
(159) 'access infrastructure' means 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 and access channels and locks;

The Commission makes a distcintion between activities carried on inside and outside the port area and applies a reasoning which leads to a diffrentiated legal treatment :

- If operations are carried out outside the area of a port and they are available free of charge and on equal and non-discriminatory terms to all users, such infrastructures are normally considered to benefit society at large and their funding, therefore, does not constitute State aid.

- On the contrary if operations are conducted inside the port area then infrastructures are normally considered to benefit the economic exploitation of that port. Their funding, therefore, normally constitute State aid.

- The only exception apparently accepted by the Commission concerns access infrastructure crossing a port and serving also other destinations (such as a river crossing a port and leading also to other ports). As it stands, the definition in the GBER encompasses any and all infrastructure in a port area, however defined.

FEPORT has some concerns with this approach because there is at this stage no harmonized definition of what a port area is. It is therefore difficult to decide whether an operation takes place inside a port and when it becomes geographically speaking a dedicated access infratsructure.

This has particular importance given that the Commission intends to exclude maintenance dredging from the eligible costs for investment aid exempted from notification. Since dredging costs can be rather large, perfectly clear definitions on access infrastructure are required to be able to calculate whether or not costs exceed a threshold.

Besides the above, in the new proposed draft GBER, access infrastructure is defined as an infrastructure **leading to a port**[1] but in 56b[2] reference is made to access infrastructure **in** a port.

The same proposed definition of access infrastructure does not either clearly distinguish between infrastructure available to all and dedicated infrastructure.

The definition does not say either where access infrastructure outside the port area begins and ends. Is the distance between the river and the port access infratsructure or is it the distance between the sea and the port ? And why does the Notion of State Aid consider general infrastructure such as roads in a different way from general infrastructure such as fairways ?

Other remarks

No guidance for the assessment of the nature of some infrastructure such as quay walls and port basins (which are of a general nature and therefore not state aid related) is provided.

There is no legal certainty regarding the distinction between capital dredging and maintenance dredging while in the Ports Regulation, both are not considered as port services.

Given the lack of clarity with regards to some key definitions, it is still difficult to calculate and propose theresholds

Proposed approach

FEPORT respectfully recommends to the Commission to propose definitions that reflect the different types of port infrastructure existing in European seaport regimes in place.

We do consider that port basic infrastructure is part of the public remit, and must not be subject to State Aid control.

[1] (159) 'access infrastructure' means 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 and access channels and locks;
[2] 56(b)

There is also a need to clarify the following elements :

a) Clear criteria for the consideration of **quay walls** are necessary. Quay walls have also the public function of water protection and are therefore part of the (public/access) infrastructure.
b) **Port basins** are access infrastructure, and their financing must not be considered state aid.
c) The term "**port**" needs to be redefined, in particular with reference to the geographic perimeter.

FEPORT respectfully recommends to the Commission to propose definitions that reflect the different types of port infrastructure existing in European seaport regimes in place.

Specific comments :

Link between the GBER and Directive 2014/23/EU on the award of concession contracts

Regarding contracts in ports, recital 15 of the Concession Directive stipulates that "*certain agreements having as their object the right of an economic operator to exploit certain public domains or resources under private or public law, such as land or any public property, in particular in the maritime, inland ports or airports sector, whereby the State or contracting authority or contracting entity establishes only general conditions for their use without procuring specific works or services, should not qualify as concessions within the meaning of this Directive.*
This is normally the case with public domain or land lease contracts which generally contain terms concerning entry into possession by the tenant, the use to which the property is to be put, the obligations of the landlord and tenant regarding the maintenance of the property, the duration of the lease and the giving up of possession to the landlord, the rent and the incidental charges to be paid by the tenant".

Current contracts in ports are submitted to a procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity or the exercise thereof (Article 4 of Services Directive 2006/123/EC).

In the case of greenfield projects, article 18 and 43 of the Concession Directive clearly stipulate the conditions which apply to concession contracts in terms of duration of the concession and modification of contracts during their term.

Terminal operators are therefore quite surprised to see that recent infringement procedures, Decisions as well as the current proposals for including ports in the General Block Exemption are used to impose provisions of the Concession Directive about durations for existing land lease contracts thus assimilating them to concession contracts.

Whilst we appreciate that the new proposed wording no longer sets a maximum duration for concession agreements, we do have strong concerns regarding its inclusion in the GBER. Moreover, we are surprised about the inclusion of the rental and land lease agreements in the scope of the GBER. Indeed, this inclusion de facto extends the scope of the Concessions Directive which from our point not acceptable. Therefore, we strongly recommend the removal of of the entire clause on the duration on concessions and certainly of a any reference to entrustment for rental from the GBER.

Dredging:

Dredging is very much connected to the variety of geographical attributes and characteristics of ports. While some ports can be fully accessible to vessels without dredging, most are compelled to dredge (eg : Baltic and North Sea).

The proposed provisions in the draft GBER regarding dredging create uncertainty and seem to ignore few key functions of dredging ie:

- guaranteeing adequate water depths and minimum draughts are adhered to continuously and irrespective of the tide, at least at berth
- ensuring general transport safety, including within individual internal basins and places of refuge for emergency situations.

If the European Commission interferes in the existing inter port 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 endanger the competitiveness of the companies situated in those ports and would be unfair compared to those established in ports which do not require dredging.

The proposed definitions in the draft GBER of capital and maintenance dredging are restrictive, legally uncertain (maintenance dredging always means removing "sand, sediment or other substances from the bottom of the waterway access to a port, or within a port area, in order to allow vessels to have access to the port); and do not reflect diversity of situations that prevail in ports.

Similarly, when it comes to costs, the provisions of the GBER are not clear. While the costs for dredging are included, those for "maintenance dredging" are not included in the estimated costs as per Article 56(b).
It is important that the draft GBER and Ports regulation are consistent. The definition of dredging as adopted by the European Parliament last March 7th states that:

> *"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). "*

This provision recognizes the role of dredging be it capital or maintenance as an operation to be considered as an exercise of public powers in the meaning of the following provision of the "Commission Notice on the notion State aid pursuant to Article 107(1) TFEU" which states that:

> *…"the funding of infrastructure that is not meant to be commercially exploited is in principle excluded from the application of the State aid rules. This concerns, for instance, infrastructure that is used for activities that the State normally performs in the exercise of its public powers (for instance, military facilities, air traffic control in airports, lighthouses and other equipment for the needs of general navigation including on inland waterways, flood protection and low water management in the public interest, police and customs)"*

On the basis of the above, FEPORT would be of the opinion to consider that dredging be it capital or maintenance is not a service dedicated to an economic activity and should be therefore excluded from the application of State Aid rules thus from any obligation of notification.

Thresholds

As a matter of principle, FEPORT respectfully recommends that the retained thresholds are consistent with the overall objective of the draft GBER which is to alleviate the administrative burden of systematic notification for all types of public funding for infrastructure in ports with the risk of delaying projects.

This being said, FEPORT reiterates its attachment to transparency and to the necessity of proposing a clear method for calculating thresholds.

Thresholds constitute an important filter to avoid competition distortions particularly at a moment where due to a significant reduction of ship calls in European ports (resulting from the increase in size of ships), the ever-growing overlap in port hinterlands is severly increasing competition between ports.

As highlighted by the European Court of Auditors report[3], projects involving high level of public expenditure have the ability to distort markets and a level playing field, not only between ports but also between port operators and, therefore, state aid checks need to be made more effective.

FEPORT believes this requires not only more scrutiny ex post, but also ex ante, by ensuring that large projects where public funding is involved, do not remain unnotified due to the generous thresholds currently being proposed.

[3] **Special report No 23/2016:Maritime transport in the EU: in troubled waters — much ineffective and unsustainable investment**

By removing the square brackets, the Commission has indicated that it consider the figures associated with the thresholds as appropriate. At this stage, it is not possible to adequately comment on the adequacy of the thresholds as fundamental questions such as the treatment of dredging, which usually constitutes a significant cost item, remain unanswered. Projects that could easily distort competition should always have to be notified.

FEPORT takes note that the notion of single investment project has been maintained to avoid a possible circumvention of the notification threshold (artificial split of a large project into smaller ones). This rule however concerns only aided investment projects within one port conducted by the same beneficiary within 3 years.

FEPORT believes that a three-year period is inappropriate and not practicable. It puts projects in relation that have no bearing on one another, and it remains unclear when an investment period would be considered to have started. It may lead to situations in which the eligible aid intensity for an individual project changes over the course of the project. The period should only apply to projects that have a direct inherent connection.

Therefore, instead of setting a specific timeframe we would suggest to link the investment period to planning consent. This would also ensure that unrelated projects within the same port area are not considered as part of the same investment project. If this proposal is not feasible, then we would propose to extend the reference period to five years to better reflect the time scales of major port projects.

Summary

FEPORT supports the inclusion of ports in the GBER. However, in its current version, FEPORT cannot support the GBER, for the following reasons:

- The application of important state aid principels remains unclear. There is no distinction between general infrastructure that does not fall under the remit of state aid rules and other infrastructure. This applies both to infrastructure within a port and outside a port.
- Important definition such as the definitions for “port”, “port infrastructure” and “access infrastructure” are ambiguous.
- Because of unclear definitions, the thresholds cannot be calculated.

FEPORT urges the European Commission to clarify that investments in public infrastructure especially defense and access infrastructure do not constitute State Aid. A definition of State Aid in the transport sector should encompass all transport modes.

The GBER is not the good vehicle to define specific periods for concessions, assignments, rental or leasing contracts. This has been conclusively done by the Concession Directive.