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CURRENT ISSUES IN MARITIME AND TRANSPORT LAW

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IL DIRITTO MARITTIMO – QUADERNI

2

Current Issues in Maritime and Transport Law

Editors

Stefano Zunarelli - Massimiliano Musi

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II

Regulation of Investment Aid for European Union Airports - Could It Be Applied to Seaports?*

Abstract [1]

The issue of the regulation of State aids in the seaport sector of the EU seems to be controversial. Namely, all efforts of the European Commission to issue specific guidelines for State aids in the seaport sector were unsuccessful. Consequently, there are still no specific sectorial EU rules on that matter. In this paper special emphasis is put on the analysis of the investment aid for seaport infrastructure. Historical overview and the current legal framework of State aid law in the seaport sector of the EU is presented in the paper. We are also trying to explore could rules on investment aid to airport infrastructure be *mutatis mutandis* applied on the investment aid to seaport infrastructure. Lastly, in a conclusion evaluation of the proposed EU legislation regarding the investment aid for seaport infrastructure and superstructure is provided.

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* This article has been submitted to double blind peer review.

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1. *Introduction*

With the objective of enhancing legal certainty and transparency, European Commission issues a number of guidelines on State aids for different sectors of the economy. The Guidelines on State aid to airports and airlines, which are the subject of this paper, set out the conditions under which Member States and local authorities can grant State aid to airports and airlines in the European Union (hereinafter: EU). The European Commission, which is competent for controlling State aid in order to preserve fair competition in the Internal Market, apply these criteria when it receives notifications from Member States and when it carries out State aid investigations in the aviation sector.

On 20 February 2014 the European Commission adopted new Guidelines on State aid to airports and airlines (hereinafter: the 2014 Aviation Guidelines) [(1)]. The 2014 Aviation Guidelines replaced previously adopted Commission Guidelines on State aid in the aviation sector. These are Community Guidelines on financing of airports and start-up aid to airlines departing from regional airports (hereinafter: the 2005 Aviation Guidelines), as well as guidelines regarding the application of Articles 92 and 93 of the Treaty of the Functioning of the EU (hereinafter: TFEU), and Article 61 of the EEA Agreement to State aids in the aviation sector (hereinafter: the 1994 Aviation Guidelines) [(2)].

In this paper special emphasis is put on the analysis of the 2014 Aviation guidelines rules on investment aid to airports [(3)]. While the previously adopted Aviation guidelines from 1994 and 2005 didn't regulate the issue of investment aid intensities (i.e. the level of aid that can be granted in relation to eligible costs of a project), the 2014 Aviation Guidelines has determined ceilings of permissible aid intensity, which depend on the size of the airport as measured by the number of passengers per annum. The maximum permissible amount of State aid is expressed as a percentage of eligible costs (the maximum aid intensity). To ensure

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(1) See, Communication from the Commission - Guidelines on State aid to airports and airlines, OJ C 99, 4.4.2014, p. 3-34.

(2) The 1994 Aviation Guidelines were adopted in the context of the liberalisation of the market for air transport services and contain provisions for assessing social and restructuring aid to airlines in order to provide a level playing field for air carriers. They were complemented in 2005 by guidelines on the public financing of airports and on the start-up of airline services from regional airports.

(3) The scope of the 2014 Aviation Guidelines is wide and they cover not only the State aid to airports and the start-up aid to airlines, but also the public funding of services of general economic interest and the aid of a social character.

proportionality, the maximum permissible aid intensities are higher for smaller airports than for larger once.

Although there are many differences between seaports and airports, there is also great resemblance between them as regards their infrastructures. The main similarity concerns the characteristic of these infrastructures which is their limited capacity and, consequently the limited access to them by vessels or aircrafts and other users, such as services providers and self-handlers [4]. The main difference between them that ports are more heterogeneous. As a consequence, different ports often can not be compared. For that reason, it is difficult to set uniform rules for investment aid in ports, especially as regards ceilings of permissible aid intensities.

Recently, air transport records the highest growth among all other modes of transport and consequently, it is also leading sector when it comes to number and variety of legal rules adopted for that transport sector on the EU level. At the same time, the seaport sector of the EU is not sufficiently regulated in many areas. One of these areas is certainly investment aid for seaport infrastructure and superstructure. The issue of investment aid to seaports seems to be controversial one because some Member States grant great amounts of State aids for the investment in seaport infrastructure and that matter is regulated only by general rules of the TFEU and by case-law of the European Courts and decisional practice of the European Commission. For that reason, in this paper we are trying to explore could rules on investment aid to airport infrastructure be *mutatis mutandis* applied on the investment aid to seaport infrastructure. In the first part of the paper fundamental characteristics of the seaport and airport infrastructures are described. The second part of the paper presents the rules on investment aid for airports of the 2014 Aviation Guidelines. The third part contains historical overview of the EU State aid policy for seaports and the actual EU legal framework on the financing of the seaport infrastructure. Lastly, evaluation of the proposed EU legislation regarding the investment aid for seaport infrastructure and superstructure is provided.

[4] See E. ORRÙ, *Public Financing of Infrastructures and Charges within the Seaports Sector in the Current and Proposed EU and Domestic Law*, in M. Musi (edited by), *New Challenges in Maritime Law: de lege lata et de lege ferenda*, Bologna, 2015, p. 460 ff.

2. *Seaport and airport infrastructure- fundamental similarities and differences*

Traditionally, public sector always had an important role as regards construction, maintenance, development and provision of transport infrastructure. Reason for that could be found in the fact that transport infrastructures, especially seaports and airports, seems to be very important for military and security purposes [5]. Furthermore, some legal theoreticians also point out strong public role of the transport infrastructures, especially ports, which traditionally have a deep socio-economic importance, especially for the community in the area where they are situated [6]. Consequently, in many Countries transport infrastructures, especially seaports and airport infrastructures are traditionally managed by the State, Regions or Municipalities or other local government bodies or public entities. Additional consequence of the public involvement in ports has been that transport infrastructures' regimes, especially rules on their management and the charges are taking into consideration primarily their social and political role. In that sense, in some Member States, ports are not always obligated to make profit on exploitation of their infrastructure [7].

For a long time, investments in the seaport infrastructure were not considered as State aids if access to that infrastructure was open to all users under the same conditions [8]. Also, according to the 1994 Aviation guidelines, the construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) was considered as general measure of economic policy which cannot be controlled by the Commission under the TFEU rules on State aids.

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[5] D. DOMINICI, *La gestione aeroportuale nel sistema del trasporto aereo*, Milan, 1982, p. 23 ff.; E. ORRÙ, *op. cit.*, p. 448 ff.

[6] E. VAN HOOYDONK, *Soft values of seaports: a strategy for the restoration of public support for seaports*, Antwerp, 2007, p. 47.

[7] E. ORRÙ, *op. cit.*, p. 450; For instance, in the Republic of Croatia seaports are considered as maritime domain. Maritime domain is defined as common good of special interest of the Republic of Croatia that enjoys its special protection and is to be used under the conditions and in the manner prescribed by the Maritime Domain and Seaports Act, 2003, as amended. Since maritime domain is common good (*res extra commercium*), it is in general use and no ownership or other property rights are allowed on it. By principle of *superficies solo cedit*, this covers not only land by also buildings and other object built on or under it. On maritime domain and seaports regulation in Croatia see D. BOLANČA, *Pravni status morskih luka kao pomorskog dobra u Republici Hrvatskoj*, Split, 2003; V. SERŠIĆ, *Koncesije na pomorskom dobru*, Zagreb, 2011; E.L. RAK, I. VIO, *Port Regulation in Croatia* de lege ferenda, in M. Musi (edited by), *New Challenges in Maritime Law: de lege lata et de lege ferenda*, Bologna, 2015, p. 425.

[8] For example, according to the Commission's Communication *Reinforcing Quality Service in Sea Ports: A Key for European Transport* (Ports Package), investments in infrastructure which is *de facto* and *de jure* open to all users were not considered as State aid. See, COM (2001) 35, p.11.

However, over the years the operation of seaport and airport infrastructures has started to be considered as an activity of economic nature. According to the Court of Justice of the EU case-law 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 [9]. In the *Leipzig-Halle* judgment [10] the Court of Justice of the EU concluded that it is the future use of the infrastructure, possibility of its economic exploitation, which determines whether the TFEU rules on State aids should be applied on financing of that infrastructure. Consequently, the European Commission has changed its decisional practice and confirmed, in a number of decisions, that construction and operation of some kinds of seaport and airport infrastructures could be considered as an economic activity.

As regards seaports infrastructure, provision of that infrastructure to the service providers and users for a charge could be considered as activity of an economic nature because of the competition that exists among seaports that are dedicated to the same types of traffic and located within the same region or serve the same hinterlands and, therefore have the same product and geographic market [11].

As it has been mentioned above, the most important similarity between seaports and airports is the characteristic of their infrastructures, namely it is their limited capacity and consequently the limited access to them by vessels or aircrafts and other users. In that sense, ports and airports could be considered as essential facilities since they have a limited capacity, that reduces the possibility to duplicate them and their facilities. With respect to seaports, we could consider as essential facilities either the single port or a terminal or another infrastructure, when they fall within the definition of essential facility [12].

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[9] The Court of Justice of the EU has defined undertakings as entities engaged in an economic activity, regardless of their legal status or ownership and the way in which they are financed. See, *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, part 2.1 and associated case law, in particular joined Cases C-180/98 to C-184/98 Pavlov and Others, [2000] ECR I-6451, par 75.

[10] Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, EU:C:212:821, par. 42.

[11] E. ORRÙ, *op. cit.*, p. 473.

[12] According to the Court of Justice of the EU case-law, two main requirements must be met for an essential facility: it must be indispensable for the competitor to compete on the downstream market and the access' refusal must not be objectively justified. See, *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungsund Zeitschriftenverlag GmbH & Co*, in *ECR* 1998, I-7791; E. ORRÙ, *op. cit.*, p. 463.

The main difference between seaports and airports is that ports are more heterogeneous. They are often dedicated to different types of traffic (containers, bulk, oil, cars and special cargoes, passengers, cruise industry, etc.), they also can be situated in different geographical area and serve different hinterlands. Another difference among ports could be found in their competitive position. Competition exists between ports that are dedicated to the same types of traffic and that are located within the same region or between ports which have the same hinterland. Competition often exists, also within ports (between terminals of a single port). Ports are very heterogeneous as regards their ownership, management and administration models. For that reason, comparison among seaports often isn't possible. As a consequence, it is difficult to set uniform rules for investment aid in ports, especially as regards maximum permissible aid intensities. Finally, it should be mentioned that EU ports help to sustain around 3 million jobs and trade unions that represent dock- worker's in many Member States are more coherent than trade unions that represent ground-handling personnel at airports. Consequently, trade unions which represent dock- worker's had an important role in negotiations for the adoption of EU seaport legislation [13].

In our opinion, the comparison of investment aid to seaport infrastructure with the rules on the investment aid in airport sector could be helpful because the specific provisions, which only partially regulate this matter with regard to seaports at EU level, are at the phase of a proposal. In this paper we would try to explore in which way the principles and rules adopted for the investment aid to airports could be applied to the investment aid to seaports.

3. *The 2014 Aviation Guidelines rules on investment aid to airports*

In the 2014 Aviation Guidelines investment aid is defined as *aid to finance fixed capital assets, specifically, to cover the capital costs funding gap*. The capital costs funding gap represents the net present value of the difference between the positive and negative cash flows, including investment costs, over the lifetime of the investment in the fixed capital assets [14].

[13] E. VAN HOOYDONK, *Prospects after the rejection European Port Service Directive*, in *Dir. mar.*, 2004, p. 855 ff.

[14] See the 2014 Aviation Guidelines, point 25.11).

The investment aid may be granted to airports that are defined as *an entity or group of entities performing the economic activity of providing airport services to airlines* [15]. The notion of economic activity under EU competition law means any activity consisting in offering goods and services on a market [16]. The airport services are defined as services provided to airlines by an airport or any of its subsidiaries in order to ensure the handling of aircraft from landing to take-off, as well as the passenger and freight service [17].

According to the 1994 Aviation guidelines, the construction or enlargement of infrastructure projects (such as airports, motorways, bridges, etc.) represents a general measure of economic policy which cannot be controlled by the Commission under the TFEU rules on State aids. In Case Aéroports de Paris, the EU Courts ruled against this view and held that the operation of an airport consisting in the provision of airport services to airlines and to the various service providers also constitutes an economic activity [18]. In its judgment in the Leipzig-Halle airport Case, the General Court of the EU clarified that the *operation of an airport is an economic activity, of which the construction of airport infrastructure is an inseparable part* [19].

Consequently, from the date of the judgment in Aéroports de Paris Case (12 December 2000), the operation and construction of airport infrastructure should be considered as an economic activity and the TFEU rules on State aids should be applied on financing of that infrastructure [20]. The Court of Justice of the EU has determined that 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 do not fall within the scope of the rules on State aid [21]. This includes activities such as, air traffic control, police, customs, firefighting, activities necessary to safeguard civil aviation against acts of unlawful interference. The investments relating to the infrastructure and equipment

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[15] See the 2014 Aviation Guidelines, point 25.6).

[16] See, joined cases C-180/98 to C-184/98, Pavlov and Others, *cit.*, par. 75.

[17] See, the 2014 Aviation Guidelines, point 25.8).

[18] Case T-128/98 Aéroports de Paris v Commission, [2000] ECR II-3929, confirmed by Case C-82/01, [2002] ECR I-9297, par. 75-79.

[19] Joined Cases T-443/08 and T-455/08 Mitteldeutsche Flughafen AG and Flughafen Leipzig Halle GmbH v Commission, (Leipzig-Halle airport judgment), [2011] ECR II-1311, in particular par. 93 and 94; confirmed by Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, *cit.*, par. 42.

[20] See, the 2014 Aviation Guidelines, point 28.

[21] Case C-118/85 Commission v Italy, [1987] ECR 2599, par. 7 and 8, and Case C-30/87 Bodson/Pompes funèbres des régions libérées, [1988] ECR 2479, par. 18; 2014 Aviation Guidelines, point 35.

necessary to perform those activities are considered to be of a non-economic nature. Public financing of these activities does not constitute State aid, but it may not be used to finance other activities [22]. As regards airports specialised in freight, European Commission deems that it does not yet have sufficient experience in assessing the compatibility of aid to this type of airports in order to issue specific guidelines for these airports. Because of that, the investment aid to airports specialised in freight will be assessed on a case-by-case basis and in accordance with the principles of compatibility as prescribed in section 5 of the 2014 Aviation Guidelines [23].

3.1. *Assessment of investment aid to airports under competition rules of the TFEU*

State aids in the EU are prohibited by Article 107(1) of the TFEU, but Article 107(2) and Article 107(3) of the TFUE lay down exceptions for certain types of aid that may be declared compatible with the Internal Market. With respect to investment aid to airports, the most appropriate exemption is one in Article 107(3)(c) of the TFUE. It prescribes that aid to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest, may be considered to be compatible with the Internal Market. This exception may be granted only by the Commission, which, in that case, has large discretionary powers. With the objective of enhancing legal certainty and transparency, Commission adopts a number of guidelines for different sectors of the economy.

The 2014 Aviation Guidelines take into consideration legal and economic situation concerning the public financing of airports and airlines and specify the conditions under which such public financing constitutes State aid within the meaning of Article 107(1) of the TFEU, and when it does constitute State aid, the conditions under which such aid can be exempted from the prohibition from

[22] Case C-343/95 Cali & Figli v Servizi ecologici porto di Genova, [1997] ECR I-1547, Commission Decision N 309/2002 of 19 March 2003, Aviation security — compensation for costs incurred following the attacks of 11 September 2001, (OJ C 148, 25.6.2003, p.7) and Commission Decision N 438/2002 of 16 October 2002, Aid in support of public authority functions in the port sector, (OJ C 284, 21.11.2002, p.2.); 2014 Aviation Guidelines, point 36.

[23] See the 2014 Aviation Guidelines, point 22. and J. URBAN-KOZLOWSKA, *New rules on investment aids to airports-do they clarify it all?*, in *Zbornik PFZ*, 66, 2016, p. 293.

Article 107(1). These Guidelines prescribe criteria for the assessment of compatibility of State aids to airports and airlines with the Internal Market. These criteria were first mentioned in the Commission's Communication on State Aid Modernisation [24]. Pursuant to point 79 of the 2014 Aviation Guidelines, the Commission has to determine whether following cumulative conditions are satisfied:

a) contribution to a well-defined objective of common interest; b) need for State intervention, meaning that a State aid measure must be targeted towards a situation where aid can bring about a material improvement that the market cannot deliver itself; c) appropriateness of the aid measure, meaning that the aid measure must be an appropriate policy instrument to address the objective of common interest; d) incentive effect, meaning that the aid must change the behaviour of the undertakings concerned in such a way that they engage in additional activity which they would not carry out without the aid or they would carry out in a restricted or different manner or location; e) proportionality of the aid, meaning that the aid amount must be limited to the minimum needed to induce the additional investment or activity in the area concerned; f) avoidance of undue negative effects on competition and trade between Member States; g) transparency of aid, meaning that Member States, the Commission, economic operators, and the public, must have easy access to all relevant acts and to pertinent information about the aid awarded.

These criteria could also be applied when assessing compatibility of investment aid for seaports with the Internal Market. However, their modifications are necessary because of the differences that exist among seaports. We illustrate that on the example of proportionality criterion by analysing its application in case of investment aid in the airport and seaport sectors (*infra*, point 7).

3.1.1. *Proportionality of the aid amount (aid limited to the minimum)*

The aid measure is proportionate when the amount and intensity of the aid is limited to the minimum necessary for the realisation of the particular investment project.

In order to be proportionate investment aid must be restricted to the extra costs (net of extra revenues) which result from undertaking of the aided project

[24] See Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions – EU State Aid Modernisation (SAM), COM (2012) 209, p. 4.

rather than the alternative project that the recipient company would have undertaken, if it had not received the aid. In the case of no counterfactual scenario, the amount of aid may be deemed proportionate, if it does not exceed the funding gap of the investment project. In case of counterfactual scenario (analysis) the Commission compares the levels of planed activity with aid and with no aid [25]. The capital cost funding gap corresponds to the net present value of the difference between the positive and negative cash flows over the lifetime of the relevant investment. It should be determined on the basis of an *ex ante* business plan covering the period of the economic utilisation of the asset [26].

The maximum permissible amount of State aid is expressed as a percentage of eligible costs (the maximum aid intensity). Eligible costs are defined as costs relating to the investments in airport infrastructure [27], including planning costs, ground handling infrastructure (such as baggage belts, etc.) and airport equipment. Investment costs relating to non-aeronautical activities (in particular parking, hotels, restaurants, and offices) and investment costs regarding the provision of ground handling services, insofar as they are not part of ground handling infrastructure are ineligible [28].

The 2005 Airport Guidelines didn't regulate the issue of aid intensity. For this reason, aid intensities proposed by Member States were assessed on a case-by-case basis [29].

The 2014 Aviation Guidelines has determined ceilings of permissible aid intensity, which depend on the size of the airport as measured by the number of passengers *per annum* [30]. Pursuant to point 101 of the 2014 Aviation Guidelines,

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[25] See the 2014 Aviation Guidelines, point 95.

[26] See the 2014 Aviation Guidelines, point 99.

[27] Airport infrastructure means infrastructure and equipment for the provision of airport services by the airport to airlines and the various service providers, including runways, terminals, aprons, taxiways, centralised ground handling infrastructure and any other facilities that directly support the airport services, excluding infrastructure and equipment which is primarily necessary for pursuing non-aeronautical activities, such as car parks, shops and restaurants. See, the 2014 Aviation Guidelines, point 25.5).

[28] See the 2014 Aviation Guidelines, point 97.

[29] Criteria fort the assessment of proportionality of aid were: size of the airport, type of investment and prevailing competition conditions in the relevant region. See: Commission Decision of 9 June 2010 in Case N° 63/2010 on *State guarantee for the construction of Murcia International Airport*, OJ C 217 of 11.8.2010, par. 69.

[30] According to the 2014 Aviation Guidelines, the average annual passenger traffic airport should be determined taking into account two financial years preceding the year in which the aid was notified or actually granted or paid in the case of non-notified aid. In the case of a newly created passenger airport, the forecasted average annual passenger traffic during the two financial years after the beginning of the operation of commercial passenger air traffic should be

the State aids granted to airports serving below 1 million passengers a year may cover up to 75% of eligible costs of the investment project because they are usually not able to cover their capital costs to a large extent. Regarding airports with a passenger volume of 1-3 million per annum, it is up to 50% of eligible costs because they should, on average, able to cover their capital costs to a large extent. The maximum permissible aid intensity is lower for a larger airports and, in the case of airports with 3-5 million passengers per year, it may not exceed 25% of eligible costs because under certain case-specific circumstances, public support might be necessary to finance some of their capital costs. Generally, investment projects at the airports above the 5 million passengers' threshold cannot involve State aid because they are usually profitable and are able to cover all of their costs, except in very exceptional circumstances.

legal certainty and transparency the Commission did not present any economic data or studies, which might confirm it [31]. For that reason, some scholars are of the opinion that the thresholds set by the 2014 Aviation Guidelines may be regarded as arbitrary [32]. The 2014 Aviation Guidelines introduced some exceptions to these thresholds, in order to provide flexibility [33].

4. *Historical overview of State aid policy for the seaport sector of the EU*

State aid rules from the TFEU are applicable to all economic sectors, including seaport sector [34]. Under TFEU Member States are obligated to notify State aids in the ports sector to the European Commission. Aids which have not been notified are classified as unlawful [35]. The notified measures can be implemented only when the Commission has approved them. However, considering the fact that the majority of ports in the EU are owned by Member States and

considered. These thresholds refer to a one-way count. This means a passenger flying for example to the airport and back would be counted twice; it applies to individual routes. See, Aviation Guidelines, footnote 94.

[31] In footnote number 84 of the 2014 Aviation Guidelines is mentioned that the categories of airports for the purposes of these Guidelines are based on the available industry data, but it is not explained from which sources are those data provided.

[32] See J. URBAN-KOZLOWSKA, *op. cit.*, p. 298.

[33] See the 2014 Aviation Guidelines, point 102-105.

[34] For instance, public financing of the football clubs is also subject to the authorization of the European Commission. See N. MIJATOVIĆ, *Provjeravanje državnih potpora*, in *Pravo i porezi, RRiF- plus*, pp. 77-78.

[35] About changes proposed on that issue, see *infra* point 7.

that their infrastructures are highly capital intensive, State intervention in seaports is often present more than in some other sectors of the economy.

The issue of the regulation of State aids in the seaport sector of the EU seems to be controversial. In 1970s and 1980s on Community level several studies on competition and State aid in the seaport sector had been made, but no particular measures had succeeded. European port policy concerning competition and State aids began in 1974 with the establishment of Port Working Group composed of representatives of port authorities and chaired by the European Commission [36]. This made possible that representatives of the most important EU seaports were meeting twice a year to discuss port relevant issues with the Commission [37]. In 1977 the Port Working Group delivered a report which described the legal and financial status of European ports. On the ground of that report the Commission decided that the measures adopted within common transport policy were also adequate for seaports, and that no other measures were necessary. In 1990s a number of decisions by the Court of Justice of the EU and European Commission concerning restrictions of the freedom of competition in Italian ports were brought [38]. At the same time, European rules for the liberalization of almost all transport sectors were issued [39].

For that reason, in its *Green Paper on Seaports and Maritime Infrastructure* from 1997 the Commission announced liberalisation of the seaport market. In that Paper it is emphasized that seaports are mostly used as terminals designated to commercial activities performed by private operators, for that reason previous

[36] The reason for that could probably be found in the fact that in 1973 States such as UK, Ireland and Denmark, which have very developed maritime industries, joined to the EU. E. ORRÙ, *op. cit.*, p. 453.

[37] That was after the judgment by the European Court in the French Seamen's case, which ruled that competition principles laid down in the Treaty of Rome were applicable to the transport sector, and accordingly also to the port sector. See Case 167/73, *Commission v France* [1974] ECR 359.

[38] These are, for instance, decisions in the following cases: Case C-179/90, *Merci Convenzionali Porto di Genova v Siderurgica Gabrielli,* [1991] ECR I-5889, case C-343/95, *Diego Cali & Figli protiv Servizi Ecologici Porto di Genova,* [1997] ECR I-1574, case C-266/96, *Corsica Ferries France SA protiv Gruppo Antichi Ormeggiatori del Porto di Genova & Others,* [1998] ECR I-3949, case C-18/93, *Corsica Ferries Italia Srl protiv Corpo dei Piloti del Porto di Genova* [1997] ECR I-1574. See B. BULUM, *Usluge pomorskog prijevoza i lučke djelatnosti u pravu tržišnog natjecanja Europske zajednice*, Zagreb, 2010, pp. 183-190.

[39] See E. VAN HOOYDONK, *The regime of port authorities under European Law including an analysis of the Port Service Directive*, in E. Van Hooydonk (edited by), *European Seaports Law, EU Law of Ports and Port Services and the Ports Package*, Antwerp/Apeldoorn, 2003, p. 88.

approach according to which "public funding of the port infrastructure which is open to all users" was not considered as an aid should be changed [40].

In Commission's Communication from 2001 *Reinforcing Quality Service in Sea Ports: A Key for European Transport* (hereinafter: Ports Package I) [41] and selectivity criterion is determined as the basic criterion for deciding whether a certain investment measure in the seaport sector constitutes an aid or not [42]. In that sense, investments in the infrastructure which is" *de jure* and *de facto* open to all users", are not considered a State aid because they are not selective. They are considered by the Commission as general measures, financed by the State in the public interest. On the other hand, investments in the infrastructure that favour certain undertaking constitute State aid [43]. Using this criterion the port infrastructure in the Ports Package is divided into public (general) and user-specific.

Pursuant to the Ports Package I public (general) infrastructures include all those infrastructures that allow sea and land access to a port area. They include maritime access and defence works (e.g. dikes, breakwaters, locks and other high water protection measures; navigable channels, including dredging and ice-breaking; navigational aids, lights, buoys, bacons; floating pontoon ramps in tidal areas). They also include public land transport facilities within the port area and land access connections to general public transport facilities, i.e. short connecting links to the national transport networks or Trans-European Networks. Finally, they include infrastructure for utilities (such as water and electricity supply systems, etc.) used on the terminal site.

User-specific (terminal) infrastructures include all those infrastructures designated for one user or category of users of the port such as yards, jetties, pipes and cables for utilities on the terminal site of a port. It also includes works that make the terminal site "ripe for construction" such as, filing of harbour basins, rough levelling and, where necessary, the demolition of existing buildings and structures.

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[40] *Green Paper on Seaports and Maritime Infrastructure*, COM (97) 678, par. 12.

[41] See European Commission, Port Package I, Proposal for a Directive on Market Access to Port Services COM (2001) 35, 2001 and European Commission, Port package II, Proposal for a Directive on market access to port services COM (2004) 654 final, 2004. Through Port Packages I (2001) and II (2004) the European Commission tried to liberalise port services market. They were rejected by the Plenary Session of the European Parliament.

See B. BULUM, *Pravo tržišnog natjecanja Europske zajednice i morske luke*, in *Zbornik PFZ*, 58, 2008, pp. 617-660.

[42] A State aid must be selective in favour of an undertaking or category of undertakings.

[43] See *Reinforcing Quality Service in Sea Ports: A Key for European Transport* (Ports Package), *cit.*, p.11.

As regards superstructure, investments in superstructure include all types of buildings (warehouses, workshops, offices) and all types of fixed or mobile equipment needed to provide services (cranes, ramps, trucks, etc.). Such investments in general favour certain undertakings and, for that reason are considered as State aid. However, these types of aids, could also be authorised by the Commission if the conditions prescribed by TFEU are fulfilled.

An important document on State aid policy in seaport sector is *Vademecum on community rules on State aid and financing of the construction of a seaport infrastructures* (hereinafter: Vademecum) from 2002 [44]. In the Vademecum is pointed out that port governance models in the EU are very different. As a consequence, there are great differences among seaports as regards financing of the public (general) port infrastructure. In the Vademecum Member States are divided into two groups in regard to financing the public (general) port infrastructure [45]. The Vademecum also divides port infrastructure into public (general) and user-specific (terminal). The Commission will consider that State aid is included in all the investments aimed to finance user-specific seaport infrastructure. However, public investments for the provision of user-specific infrastructure does not constitute State aid, if the minimum requirements for the application of the market economy investor principle [46] are provided. According to the European Commission's Vademecum the conditions to consider that the market economy investor principle has been applied by the managing body of the port are: 1.The managing body of the port has a strategic port development plan against which the decision to allocate the infrastructure to a particular user is adopted; 2. The managing body of the port has applied an adequate public selection procedure ensuring the selection of the best economic offer, and; 3. The managing body of

[44] See *Vademecum on community rules on State aid and financing of the construction of seaport infrastructures*, European Commission (2002), in E. Van Hooydonk (edited by), *European Seaports Law, EU Law of Ports and Port Services and the Ports Package*, *cit.*, pp. 495-526.

[45] In the first group there are Belgium, France, Germany, Italy and the Netherlands where the most of the public (general) port infrastructure is financed by public sector. For second group of Member States is characteristic that the State does not finance public (general) seaport infrastructure. These countries are Denmark, Finland, Sweden and the United Kingdom. Ports in this group have to finance all port infrastructures on their own. See, *Vademecum on community rules on State aid and financing of the construction of seaport infrastructures*, European Commission (2002), in E. Van Hooydonk (edited by), *European Seaports Law*, *op. cit.*, pp. 495 ff.

[46] The Commission will assess whether such funding constitutes aid by considering whether in similar circumstances a private operator, having regard to the foreseeability of obtaining a return and leaving aside all social, regional-policy and sectorial considerations, would have granted the same funding. Cases T-129/95, T-2/96 and T-97/96 *Neue Maxhütte Stahlwerke and Lech Stahlwerke v Commission,* [1999] ECR II-17, para. 120.

the port has the objective of attaining an adequate return on investment over a reasonable period of time. Final decision on compatibility of the particular investment with the market economy investor principle brings the European Commission after the measure was notified to it in accordance with the EU State aid rules [47].

Additionally, in the European Commission *Communication on a European Ports Policy* from 2007 the Commission underlined the need to improve hinterland Connections, dialogue with stakeholders and to enforce competition law as well as the principle of transparency within the port sector. In that document the Commission also announced that it will adopt Guidelines on State aids to ports [48]. In the *Europe 2020 Strategy* [49], the EU Commission pointed out the importance of the development of transport infrastructures for the Union's sustainable growth strategy for the next ten years. The 2013 Commission's Communication *Ports: an engine for growth* also focuses on "the need for well-connected port infrastructure, efficient and reliable port services and transparent port funding", in order to avoid also structural performance gaps among ports in the EU, but with no intention to harmonize the port governance and ownership models [50].

As it has been mentioned above, until now, no specific sectorial EU rule has been enacted yet as regards State aids in the seaport sector. At this moment, it seems that the Commission does not intend to adopt specific Guidelines for State aid to seaports [51]. Instead, it decided to enlarge General Block Exemption Regulation to State aid for airport and seaport infrastructure and superstructure (see *infra*, point 7).

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[47] See *Vademecum on community rules on State aid and financing of the construction of seaport infrastructures*, European Commission (2002), in E. Van Hooydonk (edited by), *European Seaports Law*, *op. cit.*, pp. 495 ff.

[48] See *Communication on a European Ports Policy*, COM (2007) 616 final, p. 9.

[49] European Commission, Communication *Europe 2020 – A strategy for smart, sustainable and inclusive growth*, of 3 March 2010, COM (2010) 2020 final.

[50] See p. 4 and 5.

[51] See Commission Staff Working Document, Impact assessment, Accompanying the document, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports*, SWD (2013)181 final, Volume 1, p. 6.

5. *Developments of port traffic and port management models in the EU Member States*

5.1. *Developments of port traffic*

EU ports handle, in volume, 74% of the goods exported or imported to the EU from the rest of the world. In terms of intra-EU trade, ports handle about 37 % of the total Internal Market exchanges of goods. Volume of goods handled in EU ports is increasing constantly. According to the latest projections, in a low growth scenario, it is estimated that overall cargo volume handled in EU ports will increase around 50% by 2030 (container traffic grow will exceed 85%) [52]. These changes demand port infrastructure investments including the extension of berths, quays, locks, deepening of basins and canals to enable accommodation of larger ships. Ports also require new facilities such as cranes, new passenger terminals, new operational procedures and good coordination of the different services that they provide. For that reason, over the years, in the context of the Trans-European Transport Network (hereinafter: TEN-T) and its financial instruments (Connecting Europe Facility and Structural Funds), the EU has provided substantial funding for the construction, renewal and maintenance of port infrastructures in all maritime regions of the EU [53]. The EU funding supporting these infrastructures will continue in the following years, as well as the funding from the Member States in which the seaports are situated, in order to enhance port expansion projects which are needed to avoid congestion at the major European ports in the future. Therefore, clear and transparent rules on financing of the seaports infrastructure and superstructure are necessary.

5.2. *Developments of the port management models in the EU Member States*

In the last two decades, many EU Member States changed their port management models from public service port [54] to landlord port management model

[52] That exceeds the capacity resulting from all the port expansion projects planned at this moment. See, Staff Working Document, Impact assessment, Accompanying the document, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports*, *Volume 1*, *cit.*, p. 25.

[53] This European Transport Infrastructure Plan identifies 329 ports of common interest, including 104 ports of strategic interest so-called core ports, nine multimodal core network corridors that start and end in seaports and reserves a budget of € 26 billion for the period 2014-2020. See, ESPO Annual report 2014-2015, http://www.espo.be/media/espopublications/espo_annual%20report%202015%20correct%20data2016_1.pdf., consulted on 10 July 2016, p. 11 ff.

[55]. This phenomenon is characteristic especially for the Mediterranean States. The reason for that could be that Member States became aware of the fact that government presence in ports does not guarantee their efficiency. Namely, public service ports are considered as less efficient [56]. For that reason, the number of public service ports in Europe decreases.

As regards different Member States, several of them have in the past years reformed their port sectors. For instance, France, Italy and Finland recently have changed their port management models.

France in 2008 has started a major port reform with the privatisation of handling equipment and dock labor. The reform program, however also modified the governance of the seven major ports in France, the former "*ports autonomes*" (autonomous ports) which have now become "Grands Ports Maritimes". "Grands Ports Maritimes" used to be examples of tool ports [57]. However, due to the "*Loi de réforme portuaire*" (Law on the reform of ports) of 2008, these ports switched to the landlord port model.

In 1994, a general reform partially revised in 2010, came into force concerning the reorganisation of the Italian ports. Through this reform, the previous model of a tool port authority was replaced by the landlord port authority model.

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[55] The characteristic of a public service port is that port authority provides different kinds of port services, including cargo handling services. Additionally, the port authority owns, maintains and operates all infrastructure, superstructure and equipment. In landlord port the port authority owns the general (basic) seaport infrastructure. Private companies provide port services for ship-owners or cargo-owners. Port authorities are landlords which are in charge for management of the basic seaport infrastructure within the port. On the other hand, terminal infrastructure is being leased to private operating companies under concession agreements. See, UNCTAD, Development and improvement of ports: the principles of modern port management and organisation, 1992.

For an economic review on this question, see Port Reform Toolkit, Second Edition, The World Bank, 2007. About models of seaport governance see also M.R. BROOKS, K. CULLINANE (editors), *Devolution, Port Governance and Port Performance*, Amsterdam, 2007.

[56] The exception is port of Singapore which as State-owned port was considered by many to be one of the most efficient ports in the world. In 1997 it is transformed into a private company. See P. ALDERTON, *Port Management and Operations*, London, 2013, p. 94; K. VANROYE, K. VERWEIJ, R. DE KORT, M. KOSTER, H. KRAMER, G. MEYER, D. DUBREUIL, G. DEFFONTAINES, *Study on State Aids to EU Seaports*, December 2011, ordered by the European Parliament, Directorate General for Internal Policies Policy Department B: Structural and Cohesion Policies Transport and Tourism, in http://www.europarl.europa.eu/RegData/etudes/etudes/join/2011/460079/

IPOLTRAN_ET(2011)460079(SUM01)_EN.pdf, consulted on 20 June 2016, p. 38.

[57] In the tool port model, the port authority owns, renews and maintains the port infrastructure as well as the superstructure, including cargo handling equipment. But it operates only the seaport infrastructure and its own facilities and equipment.

The characteristic of the former tool port model was that all port activities were regarded as being of public interest. Consequently, public authorities besides administrative, had large management functions. In that sense, they had strict control over the different port services. Seaports are by the Italian law defined as public domain. As regards the major ports, the State takes care of its tasks through dedicated noneconomic public bodies established by law n° 84/94, the port authorities. For port authorities, it is forbidden to provide cargo handling activities, either directly or through participation in port handling companies.

A 2007 decision of the European Commission regarding the existence of State aid in a Finnish so-called 'state enterprise' has induced Finnish government to legislate that government-owned entities must be corporatized by the beginning of 2014. This has also affected Finnish port authorities, which are mostly owned by municipalities [(58)].

Moreover, in the context of the structural adjustments required by the Conditional Assistance Program to Member States in financial difficulties, a radical reform of the ports regulatory regimes has been required in some Member States. In that sense, Greek Ports of Piraeus and Thessaloniki due to the current financial and economic problems in that country are going through privatization process. Moreover, Greece government has already formally signed an agreement to sell 67 percent stake of Piraeus Port Authority to the Chinese Cosco group [(59)].

However, privatization of the seaport sector is not a characteristic only for Member States in financial difficulties. Namely, especially from 1990s the seaport sector has met with privatization process in many Member States [(60)]. Recently, private sector is interested in financing of the construction of terminals,

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[(58)] Commission Decision No C 7/06 (ex NN 83/05) implemented by Finland for Tieliikelaitos/Destia, C(2007) 6073, 11.12.2007; K. VANROYE, K. VERWEIJ, R. DE KORT, M. KOSTER, H. KRAMER, G. MEYER, D. DUBREUIL, G. DEFFONTAINES, *Study on State Aids to EU Seaports*, *cit.*, p. 60 ff.; Commission Staff Working Document, Impact assessment, Accompanying the document, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports*, Volume 2, *cit.*, p. 19.

[(59)] This process is still going on. See, http://ec.europa.eu/economy_finance/ assistance_eu_ms/index_en.htm; Commission Staff Working Document, Impact assessment, Accompanying the document, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports*, SWD (2013)181 final, Volume 1, p.6.

[(60)] About privatisation and commercialisation of ports see also K. NOUSSIA, *The ports policy of the European Union: current status and future prospects*, in *Dir. mar.*, 2009, pp. 645-669; K. VANROYE, K. VERWEIJ, R. DE KORT, M. KOSTER, H. KRAMER, G. MEYER, D. DUBREUIL, G. DEFFONTAINES, *Study on State Aids to EU Seaports*, *cit.*, p. 42.

dredging, port superstructure, equipment, etc. Consequently, different kinds of public-private partnerships have been developed. Their purpose is to attract private capital in ports.

6. *Current legal framework on the investment aid to seaports*

Regarding current legal framework on the investment aid to seaports, as it has been mentioned above, no specific sectorial EU rule has been enacted yet as regards State aids in the seaport sector. Consequently, granting of State aids in the seaport sector is currently regulated only with the rules of Article 107 of the TFEU and case-law of the European Courts and decisional practice of the European Commission. In practice most of the cases regarding State aids for seaport infrastructure and superstructure are decided by the European Commission, and very few of them are, until now, brought before the European Courts [(61)].

6.1. *Article 107 of the TFEU*

In cases in which a public funding for the investment in seaport infrastructure and superstructure is qualified as State aid, it can also be authorised by the European Commission on the basis of one of the exemptions provided by the TFEU. These exemptions are prescribed by the rules of Article 107 paragraphs 2 and 3 of the TFEU. The main difference between paragraphs 2 and 3 of Article 107 is that exemptions provided in the paragraph 2, compared to these in paragraph 3, are very restrictive. Paragraph 3 gives larger discretionary powers to the Commission. Probably, for that reason, paragraph 3 of Article 107 of the TFEU, especially its points (a) and (c), is used more often in the Commission decisions regarding State aids in the seaport sector. The Article 107(3), (a) regulates the aids meant *to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment, and of the regions referred to in Article 349, in view of their structural, economic and social situation*, while the Article 107(3)(c) deals with aids *which facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affects trading conditions to an extent contrary to the common interest.*

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(61) See K. VANROYE, K. VERWEIJ, R. DE KORT, M. KOSTER, H. KRAMER, G. MEYER, D. DUBREUIL, G. DEFFONTAINES, *Study on State Aids to EU Seaports*, *cit.*, p. 21.

According to established Commission's decisional practice, the most appropriate legal basis for assessing compatibility of State aid to port investment projects (as well as in case of airport investment projects) is Article 107(3)(c) of the TFEU [62].

6.2. *Case-law on the investment aid to seaport infrastructure*

According to the Court of Justice of the EU case-law 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 [63]. In the *Leipzig-Halle* judgment [64] the Court of Justice of the EU concluded that it is the future use of the infrastructure, possibility of its economic exploitation, which determines whether the financing of that infrastructure falls within the scope of EU State aid rules. Consequently, the European Commission has changed its decisional practice and established in a number of decisions that the construction and exploitation of some kinds of seaport infrastructures is an economic activity [65]. We illustrate that on two Commission's decision on the State aid in the seaport sector.

The first case concerns financial support for infrastructure works in Flemish ports in Belgium. Financial support was given for four types of investments: a) maintenance and exploitation of nautical access, b) maintenance and exploitation of sea locks, c) development of project related infrastructure and d)

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[62] Commission's Decision of 27 March 2014 in case SA.38302-Italy- *Investment aid to the port of Salermo*, OJ C 156, 23.5.2014., p.10., par. 49 and Commission Decision of 15 June 2011 in State aid case no. 44/2010-Latvia- *Public financing of port infrastructure in Krievu Sala*, OJ C 215 of 21.7.2011, p. 19.

[63] See joined Cases C-180/98 to C-184/98 Pavlov and Others, *cit.*, par 75.

[64] Case C-288/11 P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission, *cit.*, par.42.

[65] 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; Commission Decision of 15 June 2011 in State aid case no. 44/2010 *Public financing of port infrastructure in Krievu Sala, cit.*; Commission Decision of 22 February 2012 on State aid case no. SA.30742 (N/2010) – Lithuania *Construction of infrastructure for the passenger and cargo ferries terminal in Klaipeda*, OJ C 121 of 26.4.2012, p. 1, Commission Decision of 2 July 2013 in State Aid case no. SA.35418 (2012/N) – Greece – *Extension of Piraeus Port*, OJ C 256 of 5.09.2013, p. 2, Commission Decision of 18 September 2013 in State Aid case no. SA.36953 (2013/N) – Spain – *Port Authority of Bahía de Cádiz*, OJ C 335 of 16.11.2013, p.1.

maintenance of berths along the nautical access channels. In its decision European Commission brought conclusions on the existence of State aid. As regards nautical access and sea locks, Commission considered that *the project did not give the port authority a commercial advantage* [66]. As a consequence, the financial contribution was not qualified as State aid. With respect to project related infrastructure and maintenance of berths along the nautical access channels, due to the fact that the governmental financial contribution was used for port investments that are commercially exploited, the financial contribution was qualified as State aid [67].

The second case is about public financial contribution towards the Port of Ventspils in Latvia. The Ventspils State aid measures concern a major port infrastructure upgrade, including the construction of a terminal, two berths, the reconstruction of a breakwater, dredging of the port basin, construction of access railroads, renovation of mooring jetties for the port authority's vessels and the fortification of the coast of the channel. Previously, the Commission would not have considered existence of State aid in the public financing of general infrastructure such as breakwaters and coastal defence. In this case it was of the opinion that, although such infrastructure works are generally highly capital intensive and extremely risky from a financial perspective, these investments are, at the same time, necessary for the commercial operation of the port. Therefore, they may be considered to be commercial as well. Dredging and access railroads, generally have been considered as (maintenance of) general infrastructure. In the Ventspils Case, the Commission found that if *dredging works are directly related to the development of terminals and berths, i.e. infrastructure that is commercially exploitable, they confer an economic advantage to the port authority and public financing of that objects may, therefore involve State aid.* The same applies to access railroads, if these can be directly linked to the commercial exploitation of the port, e.g. are directly linked to a terminal [68].

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[66] Commission Decision of 20 October 2004. In State aid case N° 520/2003-Belgium-*Financial support for infrastructure works in Flemish ports,* OJ C 176 of 16.7.2005, par. 32 ff. See also K. VANROYE, K. VERWEIJ, R. DE KORT, M. KOSTER, H. KRAMER, G. MEYER, D. DUBREUIL, G. DEFFONTAINES, *Study on State Aids to EU Seaports*, *cit.*, p. 24 ff.

[67] Nevertheless, Commission considered that infrastructure investment contributed to modal shift to intermodal transport and that notified measure did not exceed maximum aid intensity for transport infrastructure of 50 %. Therefore, it concluded that the aid was compatible to the Internal Market on the basis of Article 107 3 (c) of the TFEU.

[68] Commission Decision of 15 December 2009 in State Aid case no. N 385/2009- Latvia– *Public financing of port infrastructure in Ventspils Port*, *cit.*, par. 57 ff.

According to established Commission's decisional practice, 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 it not fall within the scope of the State aid rules (for instance, maritime traffic control [69], police [70], customs [71], antipollution surveillance [72], control and security of navigation) [73].

In the line with the Altmark case-law criteria, the existence of State aid, may be excluded, if the operation of infrastructure is entrusted as a service of general economic interest (hereinafter: SGEI). The conditions that must be fulfilled are: (i) the project is necessary for the provision of port services that can be considered as services of general economic interest (SGEI) for which the public service obligations have been clearly defined; (ii) the compensation has 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 require [74].

As regards proportionality requirement, the aid measure is considered to be proportionate, if the same result could not be achieved with less aid. Therefore, the intensity of the aid must be limited to the minimum needed for the particular investment project to be realized. However, there is no general maximum amount of State aid for seaport infrastructure determined in advance by the European Commission decisional practice, since different seaports in general can not be compared. For that reason the needed aids is determined according to circumstances of the particular case which *depend on variables, such as the kind of*

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[69] 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.

[70] 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.

[71] 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.

[72] Case C-343/95 *Cali & Figli v Servizi ecologici porto di Genova*, *cit.* par. 22 and 23.

[73] 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, cit.*

[74] See *Infrastructure Analytical Grid N°3-Construction of port infrastructures, ec.europa.eu/competition/ state_aid_grids_2015_studies_reports/state_aid_grids_2015_en. pdf, last consulted on 30 June 2016, p. 3*; Case C-280/00 Altmark Trans and Regierungspräsidium Magdeburg, EU:C:2003:415.

activities to be carried out with the infrastructure, volumes of traffic, expected revenues, costs for constructing the infrastructure, etc. [75].

In the past, the Commission has authorised investment aid for ports up to an aid intensity of 50 % [76]. Recently, where Member States have demonstrated the economic need for higher aid intensity, the Commission has been willing to accept such higher intensities in cases where it was justified [77].

7. *Proposal for the inclusion of investment aid for maritime ports and airports in the General Block Exemption Regulation*

European Community supervision of State aid is based on a system of ex ante authorisation. According to this system, Member States are required to inform (ex ante notification) the Commission of any plan to grant or alter State aid and they are not allowed to implement such aid before it has been authorised by the Commission (standstill-principle). In the past Commission has adopted several block exemption regulations. With these regulations, Commission can declare some categories of State aid compatible with the TFEU if they fulfil certain conditions, thus exempting them from the requirement of prior notification and Commission approval. General Block Exemption Regulation, adopted in 2008, unified the existing legal rules and also introduced some new types of measures which are exempted from the notification requirement. General Block

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[75] Commission's Decision of 27 March 2014 in case SA.38302-Italy- *Investment aid to the port of Salermo, cit.*, par. 62.

[76] Commission Decision of 18 September 2013 in State Aid case no. SA.36953 (2013/N) – Spain – *Port Authority of Bahía de Cádiz, cit.*

[77] In the *Investment aid to the port of Salermo* case, the Italian authorities have notified a measure which foresees an aid intensity of 97.28 % in favour of the Port Authority of Salermo. As the aid intensity was above 50%, the Commission had to decide whether this higher aid intensity can exceptionally be found compatible with the Internal Market. The Commission concluded that the aid was necessary to achieve a well-defined objective of common interest and the advantage conferred by the aid to the Port Authority of Salermo is not disproportionate, and the aid does not affect competition and intra-EU trade to an extent that would be contrary to the common interest, although overall costs of the notified project which include expanding the port entrance, stabilizing the dock and dredging were € 73 million. For that reasons, the Commission concludes that the aid is compatible with the TFEU under Article 107(3) (c). Commission's Decision of 27 March 2014 in case SA.38302, -Italy- *Investment aid to the port of Salermo, cit.* par 61. See also, Commission Decision of 17 October 2012 in case SA.34501, Germany – *Extension of the inland port of Königs Wusterhausen/Wildau,* OJ C 176, 21.6.2013, p.1.; Commission Decision of 19 June 2013 in case SA.35738, -Greece - *Aid for the upgrading of Katakolo Port, cit.*; Commission Decision of 2 July 2013 in case SA.35418, -Greece - *Extension of Piraeus port, cit.*

Exemption Regulation was changed in 2014 and its current title is Commission 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 TFEU [78]. In February 2016 the Commission have started the initiative for the inclusion of exemption provision for ports and airports in the General Block Exemption Regulation [79].

In the Proposal of Regulation for amendment of the Regulation 651/2014 is prescribed that investment aid for maritime ports (hereinafter: the Proposal to amend Regulation 654/2014) shall be compatible with the Internal Market within the meaning of Article 107(3) of the TFEU and shall be exempt from the notification requirement of Article 108(3) of the TFEU, provided that the conditions laid down in that Regulation are fulfilled [80].

According to the Article 56 b) point 2 of the Proposal to amend Regulation 654/2014 the eligible costs shall be the costs, including planning costs, of investments:

(a) for the construction or upgrade of maritime port infrastructures [81] and superstructures [82], with the exception of mobile equipment; and

(b) for the construction or upgrade of access infrastructure [83], including dredging and excluding maintenance dredging [84], dedicated to commercially ex

[78] OJ L 187, 26.6.2014, pp. 1-78.

[79] More about consultations with stakeholders on the proposed changes of Regulation 651/2004 see on DG Competition website http://ec.europa.eu/competition/consultations/2016_gber_review/draftregulation.pdf.

[80] Until now, the European Commission has issued 33 decisions concerning the public financing of the seaports.

[81] Port infrastructure means 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. Article 1, point 155.

[82] Port superstructure means surface arrangements, buildings as well as mobile equipment (e.g. cranes) and fixed equipment that directly relate to the transport function of the port. Article 1, point 156.

This is the first time that the investments in superstructure (with the exception of mobile equipment) are not considered as State aid and are being exempted from the prior notification requirement.

[83] 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, breakwaters, access channels, locks. Article 1, point 157.

[84] Maintenance dredging means dredging routinely done in order to keep the waterway accessible. Article 1, point 159. Dredging is not an activity of an economic nature *per se*, but it may be considered as economic if dredging works are directly related to the development of terminals and berths, i.e. infrastructure that is commercially exploitable. This provision is based

ploited maritime port infrastructure [85].

Furthermore, under the Article 56 b) point 2 of the Proposal to amend Regulation 654/2014 maximum aid intensity shall not exceed:

(a) if eligible costs are up to € 20 million: 100% of the eligible costs [86]; (b) if eligible costs are above € 20 million and up to EUR 50 million: 80% of the eligible costs; (c) if eligible costs are above € 50 million and up to EUR 100 million: 50% of the eligible costs; (d) if eligible costs are up to € 120 million for the maritime ports included in the work plan of a core network corridor as referred to in Article 47 of Regulation (EU) No 1315/2013 of the European Parliament and of the Council [87]: 50% of the eligible costs. The maximum aid intensity shall not exceed 100% of the eligible costs [88].

In order to prevent abuses, pursuant to the Proposal to amend Regulation 654/2014 any investment started by the same beneficiary within a period of three years from the date of the start of works on another aided investment in the same maritime port shall be considered to be part of a single investment project [89]. Additionally, 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. With the aim to avoid excessive foreclosure of the market, 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. The infrastructure, for which aid is granted, shall be made available to interested users on an open, transparent

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on the Commission's decisional practice. See, Commission Decision of 15 December 2009 in State Aid case no. N 385/2009-Latvia – *Public financing of port infrastructure in Ventspils Port*, *cit.*, par. 57ff.

[85] Investment costs relating to non-transport related activities, including industrial production facilities active in the perimeter of the port, offices or shops, are ineligible. Article 56 b), point 2.

[86] As regards investment aid for airports the maximum permissible amount of State aid is expressed as a percentage of eligible costs which depend on the size of the airport as measured by the number of passengers per annum. See, Article 56 a) of the Proposal to amend Regulation 654/2014.

[87] Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, OJ L 348, 20.12.2013, pp. 1-128.

[88] It also follows from the Commission's decisional practice, see Commission's Decision of 27 March 2014 in case SA.38302 -Italy- *Investment aid to the port of Salermo, cit.*, par 61.

[89] The aid amount shall not exceed the difference between the eligible costs and the operating profit of the investment. The operating profit shall be deducted from the eligible costs *ex ante*, on the basis of reasonable projections, or through a claw-back mechanism, Article 56 b), point 3.

and non-discriminatory basis. The price charged for the use of the infrastructure shall correspond to the market price.

With the adoption of the Proposal to amend Regulation 654/2014 a legal vacuum would still exist with respect to State aids in maritime ports where eligible costs are up to €120 million, for maritime ports that are not included in the work plan of a core network corridor and also as regards State aids to maritime ports where eligible costs are higher than € 120 million. We are aware of the fact that European ports are very heterogeneous. For that reason, it is difficult to set uniform rules for investment aid in ports, especially as regards ceilings of permissible aid intensities. As regards the maximum permissible amount of investment aid for seaport infrastructure, we are of the opinion that the regulatory approach which would relate maximum permissible amount of State aid (which is expressed as a percentage of eligible costs) and size of the maritime port (measured by cargo or passenger volume per annum) would ensure application of principles of proportionality and freedom of competition between seaports in better way than an approach which relates the maximum permissible amount of State aid with the size of the investment in seaport infrastructure, as proposed by the European Commission with the Proposal to amend Regulation 654/2014. Determination of the maximum permissible amount of the investment aid, which makes that aid dependent on the size of the maritime port (as in case of airports), would take into consideration fundamental characteristic of particular port (its size measured by cargo or passenger volume per annum) [90] and not only the size of the investment in the seaport and consequently, would guarantee that the freedom of competition between ports dedicated to the same types of traffic and located within the same region or serve the same hinterlands will be provided. We are also aware of the fact that such regulatory approach is not applicable to seaports, because of the great diversity among different seaports which are often not comparable. For that reason, in our opinion, the provision of the Proposal to amend Regulation 654/2014, according to which maximum aid intensity depends on the size of the investment in the port infrastructure and/or superstructure is a good solution and it will enhance legal certainty as well as the application of the proportionality principle with respect to investment aid in seaport infrastructure and superstructure, if it comes into force. Unfortunately, the legal vacuum will still exist with respect to investment aid in maritime ports which are not covered with the proposed changes of the Regulation 654/2014.

[90] As it is perscribed with the 2014 Aviation Guidelines. See, 2014 Aviation Guidelines, point 101.

8. *Relevant provisions of the Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports*

On the 29 June 2016 the Permanent Representative Committee of the European Council approved new rules of the Proposal for a Regulation establishing a framework on market access to port services and financial transparency of ports (hereinafter: Proposal for a Regulation on market access to port services and financial transparency of ports) [91] which are agreed with the European Parliament on 27 June 2016. In this chapter we are presenting provisions of the Proposal for a Regulation on market access to port services and financial transparency of ports on the seaport infrastructure charges and financial transparency of ports which are relevant in the context of the analysis of State aids for seaport infrastructure and superstructure.

8.1. *Seaport infrastructure charges*

As regards seaport infrastructure charges this matter is still not regulated by the specific EU rules for the seaport sector. That will be changed if the Proposal for a Regulation of the European Parliament and the Council establishing a framework on market access to port services and financial transparency of ports comes into force. In that Proposal distinction is being made between port infrastructure charges and port service's charges. Port infrastructure charge is defined as *a charge levied for the direct or indirect benefit of the managing body of the port, or the competent authority, for the use of infrastructure, facilities and services, including the waterways giving access to those ports, as well as access to the processing of passengers and cargo, but excluding land lease rates and charges having equivalent effect* [92]. The payment of the port infrastructure charges may be integrated in other payments, such as the payment of the port service charges. In this case, the managing body of the port must make sure that the amount of the port infrastructure charge remains easily identifiable by the user of the port infrastructure. The Proposal for Regulation on market access to port services and financial transparency of ports empowers the seaport's managing body to autonomously set port infrastructure charges according to the individual port's commercial strategy and investment plans.

[91] See *Proposal for a Regulation of the European Parliament and the Council establishing a framework on market access to port services and financial transparency of ports, Final compromise text with a view to agreement*, 10579/1/16 REV1, Brussels, 29 June 2016.

[92] See Article 2.9.

These charges should comply with competition rules, and where relevant, should also respect the general requirements set within the framework of the general ports policy of the Member State concerned.

According to this Proposal port infrastructure charges may vary in accordance with the port's economic strategy and the port's spatial planning policy, related inter alia to certain categories of users [93]. The criteria for such a variation should be transparent, objective and non-discriminatory and must be consistent with competition law, including rules on State aid. The managing body of the port, or the competent authority, are obligated to inform port users and the representatives or associations of port user about the nature and level of the port infrastructure charges. They also must ensure that users of the port infrastructure are informed of any changes in the nature and level of the port infrastructure charges at least two months in advance. However, they should not be required to disclose differentiations in the charges that are the result of individual negotiations [94].

Under the Article 15 of the Proposal for a Regulation on market access to port services and financial transparency of ports managing body of the port is obligated, in accordance with applicable national law, consult port users on its charging policy. Such consultation must be provided in cases which include substantial changes to the port infrastructure charges and port service charges in case of internal operators provides port services under public service obligations [95]. Some of the previous versions of the Proposal prescribed that the consulta tions with the port users should be organised once a year, in any event [96]. In our opinion, consultations with port users and other stakeholders only in cases which include substantial changes of the port infrastructure charges and port

[93] Variation of charges is allowed in order to promote a more efficient use of the port infrastructure, short sea shipping or a high environmental performance, energy efficiency or carbon efficiency of transport operations. Article 14, paragraph 3.

[94] Only in the event of a formal complaint and upon request the managing body of the port should make available to the relevant authority in the Member State concerned relevant information on the elements serving as a basis to determine the structure and the level of the port infrastructure charges. Such information also should be made available to the Commission by the national authority upon request. Article 14, paragraph 7.

[95] Additionally, the managing body of the port must consult port users on the following matters:(a) the coordination of port services within the port area; (b) measures to improve connections within the hinterland; (c) the efficiency of administrative procedures in the port and measures to simplify them; (d) environmental matters; (e) spatial planning; and (f) measures to ensure safety in the port area, including, where appropriate, health and safety of port workers.

[96] See *Proposal for a Regulation on market access to port services and financial transparency of ports*, COM (2013) 296, Article 15, paragraph 2.

service charges is a better solution because, in that way, the possibility of exchanging of the commercially sensitive information between managing body of the port, service providers and port users will be reduced [97].

8.2. *Financial transparency of ports*

According to the study ordered by European Commission on the public financing of European ports, because of the absence of reporting and accounting obligations, it is not possible to determine the volume of funds granted to EU ports and the use of those funds in the ports [98]. Although Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings [99] prescribes minimum requirements as regards transparency, it only applies to undertakings with an annual turnover higher than € 40 million.

For that reason, Article 12 of the Proposal for a Regulation on market access to port services and financial transparency of ports [100], prescribes that the financial relations between public authorities and a managing body of the port that receives public funds must be reflected in a transparent way in their accounting system. The accounts must particularly show all the public funds the seaport's managing body directly or indirectly (through the intermediary of public undertakings or public financial institutions) received from public authorities and their use [101]. In cases where public funds are paid as a compensation for a

[97] For instance, exchanging of information on prices of the transport services between different port users is forbidden by EU competition law.

[98] ISL – INSTITUTE OF SHIPPING ECONOMICS AND LOGISTICS, *Public Financing and Charging Practices of Seaports in the EU, Final*, ordered by the European Commission Directorate-General Energy and Transport Directorate G –Maritime and inland waterway transport; intermodality, Short Sea Shipping, Inland Waterways, and Ports, Bremen, June 2006, inhttp://ec.europa.eu/transport/modes/maritime/studies/doc/2006_06_ eu_seaports_ study.pdf, last consulted on 30 June 2016, p. 283 and p. 319; Commission Staff Working Document, Impact assessment, Accompanying the document, *Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports*, Volume 1, *cit.*, p. 19.

[99] Commission Directive 2006/111/EC on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings ("Transparency Directive").

[100] Proposal for a Regulation on market access to port services and financial transparency of ports, *cit.*

[101] The public funds referred to include share capital or quasi-capital funds, non-refundable grants, grants only refundable in certain circumstances, award of loans including overdrafts

public service obligation, they should be shown separately in the relevant accounts and may not be transferred to any other service or business activity. Where the seaport's managing body provides also port services or dredging [102], including cases in which another entity provides such services on its behalf, separation of accounts is also imposed. Member States may decide to exempt from a such obligation seaport's managing body in their ports of the comprehensive network which do not meet the criteria in point (b) of Article 20(2) of Regulation (EU) No 1315/2013 [103]. These are so-called small ports. Conditions that must be fulfilled for the exemption from the obligation of the separation of the accounts are that it would cause disproportionate administrative burdens and that any public funds that seaport's managing body has received, and their use for providing port services, are fully transparent in their accounting system. Member States must inform the Commission about their decision to exempt a seaport's managing body from the obligation of the separation of the accounts in advance.

9. *Regulation of investment aid for infrastructure and superstructure in case of nautical tourism ports with particular emphasis on nautical tourism ports in the Republic of Croatia*

The nautical tourism is a branch of economy that is of a strategic interest to the Republic of Croatia. There are about 112 nautical tourism ports in Croatia, including about 56 marinas, 16 dry dock marinas and 36 nautical tourism ports of other types. The total capacity of berths is about 17.221. The total income of

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and advances on capital injections, guarantees given to the managing body of the port by public authorities or any other form of public financial support. Article 12, paragraph 3.

[102] When it comes to the different categories of port services according to the Proposal for a Regulation on market access to port services and financial transparency of ports, cargo handling and passenger services will be subject to the financial transparency rules, but exempted from the access provisions. Member States may decide to apply the access rules to pilotage services. In such cases they should inform the Commission. Dredging will only be covered by the rules requiring separate accounts for publicly founded services.

[103] The total annual cargo volume – either for bulk or for non-bulk cargo handling – exceeds 0,1 % of the corresponding total annual cargo volume handled in all maritime ports of the Union. The reference amount for this total volume is the latest available three-year average, based on the statistics published by Eurostat. See, Article 20(2) point (b) of Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU, *cit.*

the nautical tourism ports in 2014 was over € 94 million, and there is a constant stabile increase of the income from this activity each year [104].

The Croatian law recognizes distinction between public ports (defined as ports open to public traffic), as seaports which, under the same conditions, may be used by everybody in accordance with its purpose and within the limits of available capacity, and private ports (defined as ports for specific purpose), as seaports, which are of particular use or economic use of private persons (nautical tourism, industrial ports, shipbuilding port, fishing port, etc.) or governmental body (navy port). Both public and private ports are further classified in respect of significance, as follows:

Ports open to public traffic, further classified as: 1. Ports of special (international) economic importance, 2. Ports of regional importance, and 3. Ports of local importance.

Ports of specific purpose, further classified as: 1. Ports of state importance, 2. Ports of regional importance [105].

Nautical tourism port is a special purpose port which serves for reception and accommodation of cruising vessels and which is equipped for provision of services to clients and vessels. From business, construction and functional aspects, it makes an integral whole. In the Republic of Croatia seaports are considered as maritime domain. Maritime domain is defined as common good of special interest of the Republic of Croatia that enjoys its special protection and is to be used under the conditions and in the manner prescribed by the Maritime Domain and Seaports Act, 2003, as amended. Since maritime domain is common good (*res extra commercium*), it is in general use and no ownership or other property rights are allowed on it. By principle of *superficies solo cedit*, this covers not only land by also buildings and other object built on or under it. For that reason, economic exploitation of ports may be performed only on the basis of granted concession. In case of nautical tourism ports, as special purpose port which serves for economic use of private persons, nautical tourism port operator

[104] See, *Nautical tourism development strategy of the Republic of Croatia 2009-2019.*, Ministry of maritime affairs, transport and infrastructure of the Republic of Croatia, http://www.mppi.hr/UserDocsImages/Strategija%20razvoja%20nautickog%20turizma%20HR%201.pdf., p.7 ff.

As regards Europe there are around 10 182 marinas with around 925 570 moorings. Furthermore, there are around 5 775 745 pleasure boats in Europe. The following countries have been taken into account fort the estimation: Sweden, Norway, Finland, Italy, United Kingdom, Netherlands, Germany, France, Spain, Greece, Poland, Portugal, Denmark and Ireland. 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. 3., par. 28.

[105] Article 42 of Maritime Domain and Seaport Act, 2003, as amended. See, also, E.L. RAK, I. VIO, *op. cit.*, p. 427.

is a concessioner which has functions of port's administration/management [106], it also provides port services and autonomously determines port infrastructure charges as well as port service charges. According to the European Commission decisional practice if the terminal or infrastructure is already exploited by a specific user under concession, its operator should finance all the works [107]. Accordingly, State aids for the investments in the seaport infrastructure and superstructure in case of nautical tourism ports are not allowed, if the infrastructure and superstructure is already exploited by a specific user under concession.

Another characteristic of the seaport regime in the Republic of Croatia is that ports open for public traffic (publicly owned ports) can also have nautical berths for nautical vessels, but unlike in case nautical tourism port, State aids for the investments in seaport infrastructure and superstructure in that ports can be granted to their port authorities [108]. As a consequence, nautical tourism ports, as special purpose ports, are in inferior competitive position than ports open for public traffic that have nautical berths for nautical vessels, although ports open for public traffic also commercially exploit their infrastructure and superstructure as well as nautical tourism ports. It should also be mentioned that European Commission also approved State aid (it decided that public support does not qualify as an aid because of its marginal-effect on cross-border trade) for modernising a marina and lengthening the quay in a fishing port in Netherland which is publicly owned port administered by Port Authoriy of the port of Lauwersoog [109].

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[106] There are no Port Authorities who are" landlords" as in case of ports open to public traffic.

[107] Commission's Decision 23 March 2015, C(2015) 66 final, *State aid SA.28876 (2012/C) (ex CP 202/2009) [implemented by Greece for Container Terminal Port of Piraeus & Cosco Pacific Limited]*, par. 20 ff.; E. ORRÙ, *op. cit.*, p. 501.

[108] These ports are publicly owned and administrated by port authorities which have "landlord" function.

[109] The investment project in *the port of Lauwersoog* consists in a lengthening of the quay in its fishing port, modernising its marina for pleasure boats and constructing a floating platform for recreational fishing. Lauwersoog port is used by small fishing vessels, because of its proximity to the fishing grounds for shrimp fishing in the Netherlands. The Commission decided that the investment will not lead to a significant increase in the port's capacities and, consequently, it will not increase its capacity in order to accept larger ships. Therefore, the investment in the fishing port will have influence only at local market. In that sense, it would not have a decisive and significant impact on the decision of fishermen from other Member States to use the Port of Lauwersoog rather than fishing ports in other Member States. The parts of the project intended for recreational activities are also targeted at a local market, because the marina has only 60 berths and, consequently, the investment aid will have only marginal effect on cross-border trade. See,

10. *Conclusion*

State aids for the investment aid to seaport infrastructure and superstructure are currently regulated only by general rules of the TFEU and the case-law of the European Courts and the decisional practice of the European Commission. Such legal regulation does not guarantee legal certainty.

For that reason, our opinion is that the adoption of the specific Guidelines for State aids to seaports is necessary. For the assessment of compatibility of State aids to seaports with the Internal Market the same criteria from the 2014 Aviation Guidelines such as, need for State aid, appropriateness of the aid, incentive effect, proportionality of the aid, transparency of aid, etc. (*supra*, point 3.1), which were first mentioned in the Commission's Communication on State Aid Modernisation, could be *mutatis mutandis* applied.

As it has been mentioned, the main difference between seaports and airports is that ports are more heterogeneous.

They can be dedicated to different types of traffic, situated in different geographical area and serve different hinterlands.

As a consequence, different seaports often can not be compared. For that reason, it is more difficult to set uniform rules for seaports at EU level than for airports, and that rules are generally based on a compromise of the Member States.

Financial transparency of ports and clear rules on State aids for investment in the seaport infrastructure and superstructure are preconditions which are indispensable to attract private investments into ports, in order to enhance port enlargement projects.

These projects are needed to avoid congestion at the major European ports in the future. In our opinion, the proposed EU seaport legislation, although it is based on a compromise, is a big step forward in regard to achieving goals of financial transparency of seaports and clear rules on State aids for the investments in the seaport infrastructure and superstructure.

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Commission decision of 29 April 2015 in case SA.39403 (2014/N) – Netherlands – *Investment aid for Lauwersoog port*, *cit.*; *Infrastructure Analytical Grid N°3-Construction of port infrastructures*, p. 4.

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