

# EU State Aid Law & Ports

IBC's Comp Law Transport Conference

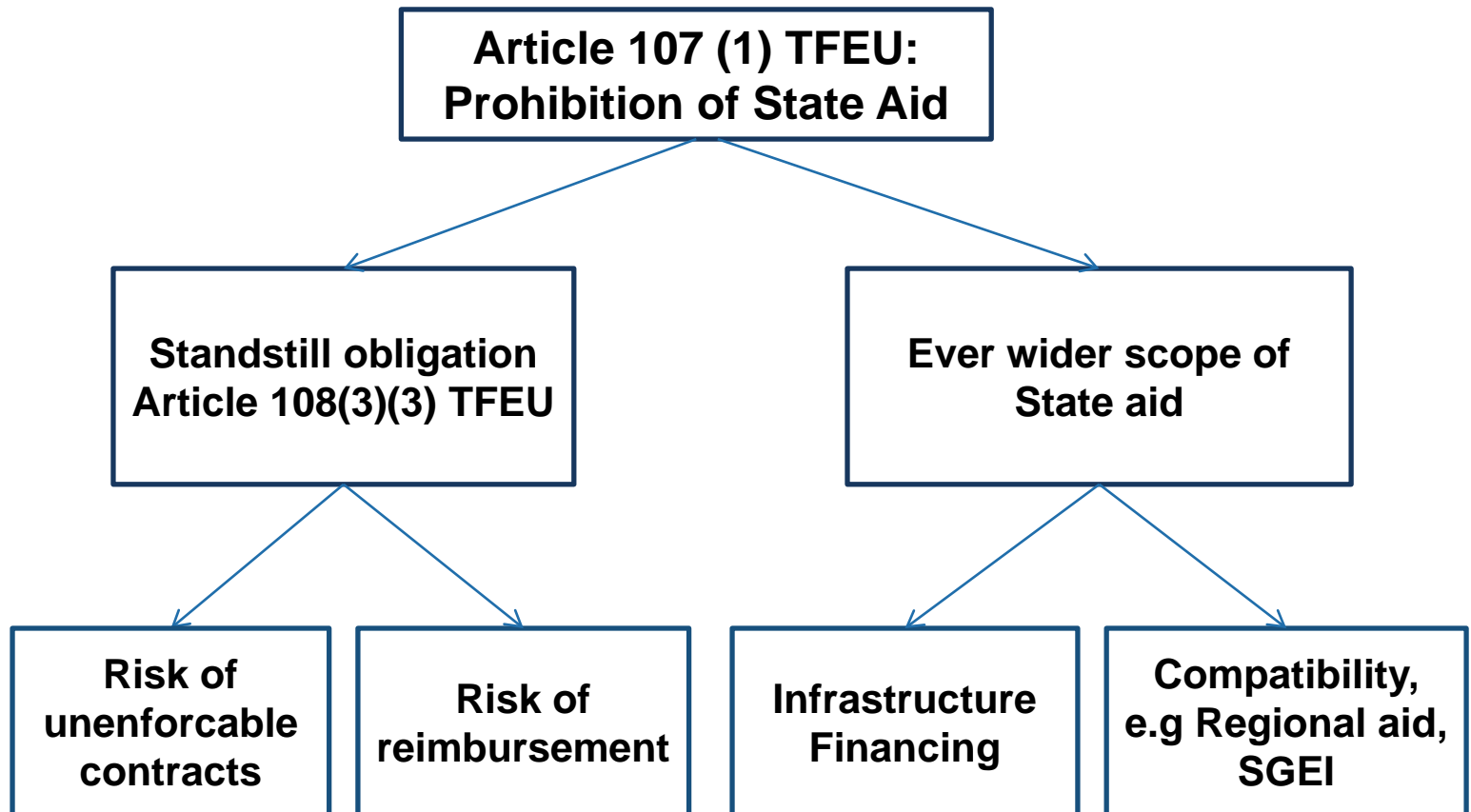
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# Why care about State Aid?



# Relative lack of Guidelines

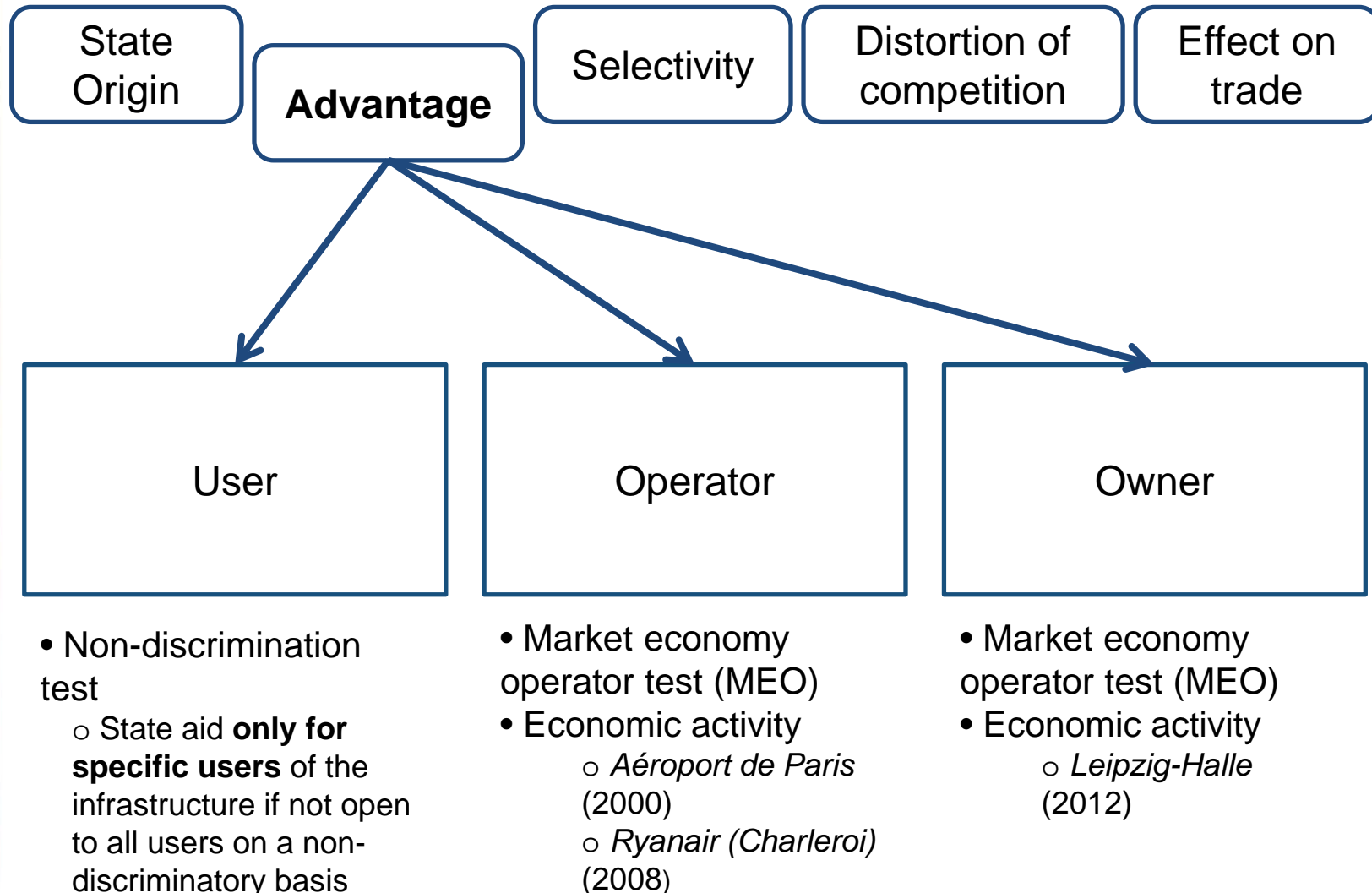
- No specific State Aid Guidelines for ports:
  - Port Packages I (2001) and II (2004): unsuccessful attempts to implement the Internal Market rules in the port sector
  - Port Policy Communication (2007)
  - Commission initiative to improve port operations and onward transport connections at 329 key seaports (May 2013)
  - Analysis of State aid measures directly under Article 107 (1) and Article 107 (3) TFEU
  - Commission Notice on the Notion of State Aid (2016)
  - Analytical Grids on the application of State aid (2015)
  - Consultations on the extension of the GBER to airports and ports (2016)



# Existence of Aid



# Existence of Aid



## Aid at the level of users

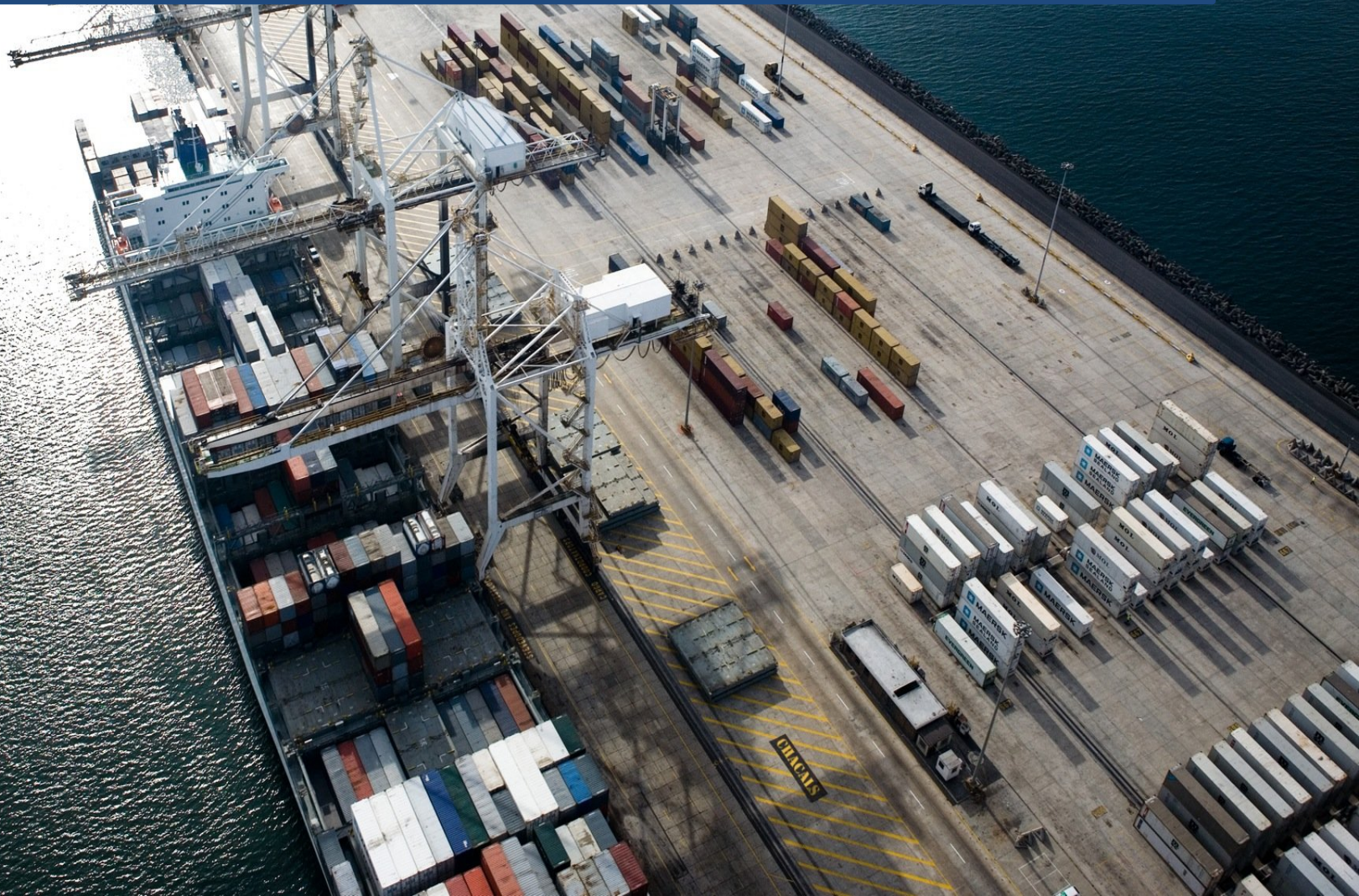
- No aid if equal and non-discriminatory access:
  - *E.g.*: Tariffs paid equal for all users and similar to tariffs in comparable infrastructures
  - Infrastructure not dedicated
- Fees charged by the operator directly should cover at least the incremental costs incurred by the operator in relation to the activity of the specific user

# Aid for operator / concession holder

- Commission notice on the notion of State aid:
  - Operators are “*undertakings who make direct use of the infrastructure to provide services to end-users, including undertakings which acquire the infrastructure from the developer/owner to exploit it economically or which obtain a concession or lease for the use and operation of the infrastructure.*” [para. 200]
- Market Economy Operator Principle
  - *Ex ante* profitability assessment
  - Market terms
  - *Pari passu* arrangements
  - System of recovery of excessive profits from the operation
- Public Procurement
  - Open competition



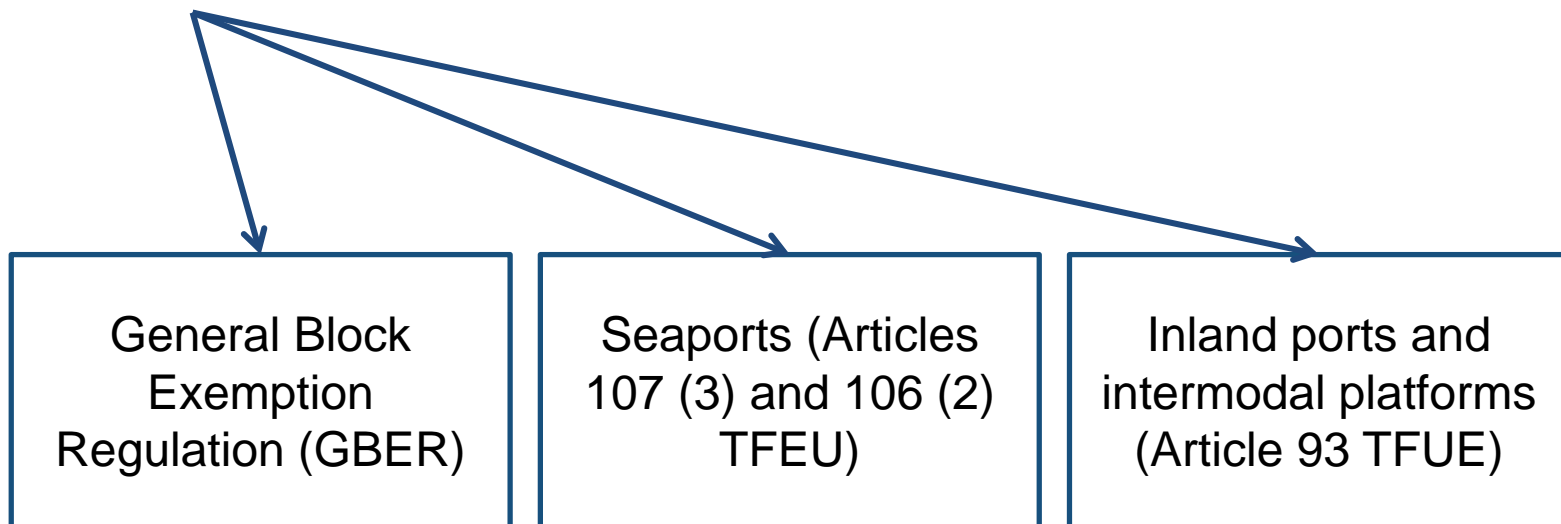
# Compatibility of Aid





# Compatibility Assessment

- 3 possibilities



# GBER – Overview

- Currently not covering ports
- Inclusion of exemption provisions for ports and airports however planned
  - Two public consultations held:
    - 1st consultation closed on the 30 May 2016
    - 2<sup>nd</sup> consultation closed on the 8 December 2016
- No adoption timeframe communicated



# GBER- Planned Rules

- Notification exemption for investments in seaports below EUR 100 million and for investments in inland ports below EUR 20 million if:
  - Eligible costs only cover costs related to the maritime or access infrastructure
  - Aid intensity does not exceed the difference between the eligible costs and the operating profit of the investment
  - Maximum intensity thresholds are respected
  - Any concession or other entrustment to third party is assigned on a competitive, transparent, non-discriminatory and unconditional basis, for a duration that is reasonable compared to the investments made by the third party to provide the service(s).
  - Aided port infrastructure is open to all users
- Notification exemption for investments in seaports below EUR 120 million if port included in the work plan of a core network corridor (Reg. 1315/2013) (+ same cumulative conditions)
- Additional simplification for investments in seaports below EUR 5 million and for investments in inland ports below EUR 2 million

# GBER – Maximum intensity thresholds for ports

Costs for the construction, replacement or upgrade of <u>maritime</u> port infrastructures (in EUR)	Maximum intensity
Up to 20 million	100%
Above 20 million and up to 50 million	80%*
Above 50 million and up to 100 million	50%*
Up to 120 million (for maritime ports included in work plan of core network corridor (Reg. 1315/2013))	50%*
Costs for the construction, replacement or upgrade of access infrastructure within the area of <u>maritime</u> ports (excluding maintenance dredging)	
Any amount	100%
Costs for the construction, replacement or upgrade of <u>inland</u> port infrastructure and access infrastructure within the area of <u>inland</u> ports (excluding maintenance dredging)	
Any amount	100%

\* Can be increased by 10 percents for investments located in assisted areas fulfilling the conditions of Article 107(3)(a) of the Treaty and by 5 percentage points for investments located in assisted areas fulfilling the conditions of Article 107(3)(c) of the Treaty.



# What will change with GBER?

- Rules mainly remain the same: new provisions are necessarily based on existing practice
- Main novelties are the thresholds of EUR 100 and 20 million
  - Below those thresholds, compatibility analysis is streamlined and left to the Member States:
    - No need to analyse the objective of the measure (no need anymore for a clearly-defined objective of common European interest)
    - No need to assess effect on competition and on trade
  - If Member State considers that the compatibility conditions are fulfilled: no notification or standstill obligation

# Compatibility - Seaports

- Compatibility conditions under Article 107 (3) TFEU
  - Meet a clearly-defined objective of common European interest;
  - Be necessary and proportionate to such objective;
  - Should not affect competition and intra-Union trade to an extent contrary to the common interest;
  - Open access to all users on a non-discriminatory basis
- Objective of common European interest
  - 2013 Commission Communication “Ports: an engine for growth” - importance of upgrading existing port infrastructures
- Necessity and proportionality
  - Funding gap method - difference between discounted value of expected operating revenues and discounted investment costs
  - Contract duration for the management of port infrastructure is longer than its average economic life (< 25 years)? – With exceptions
  - Very high aid intensities (up to 100 %)



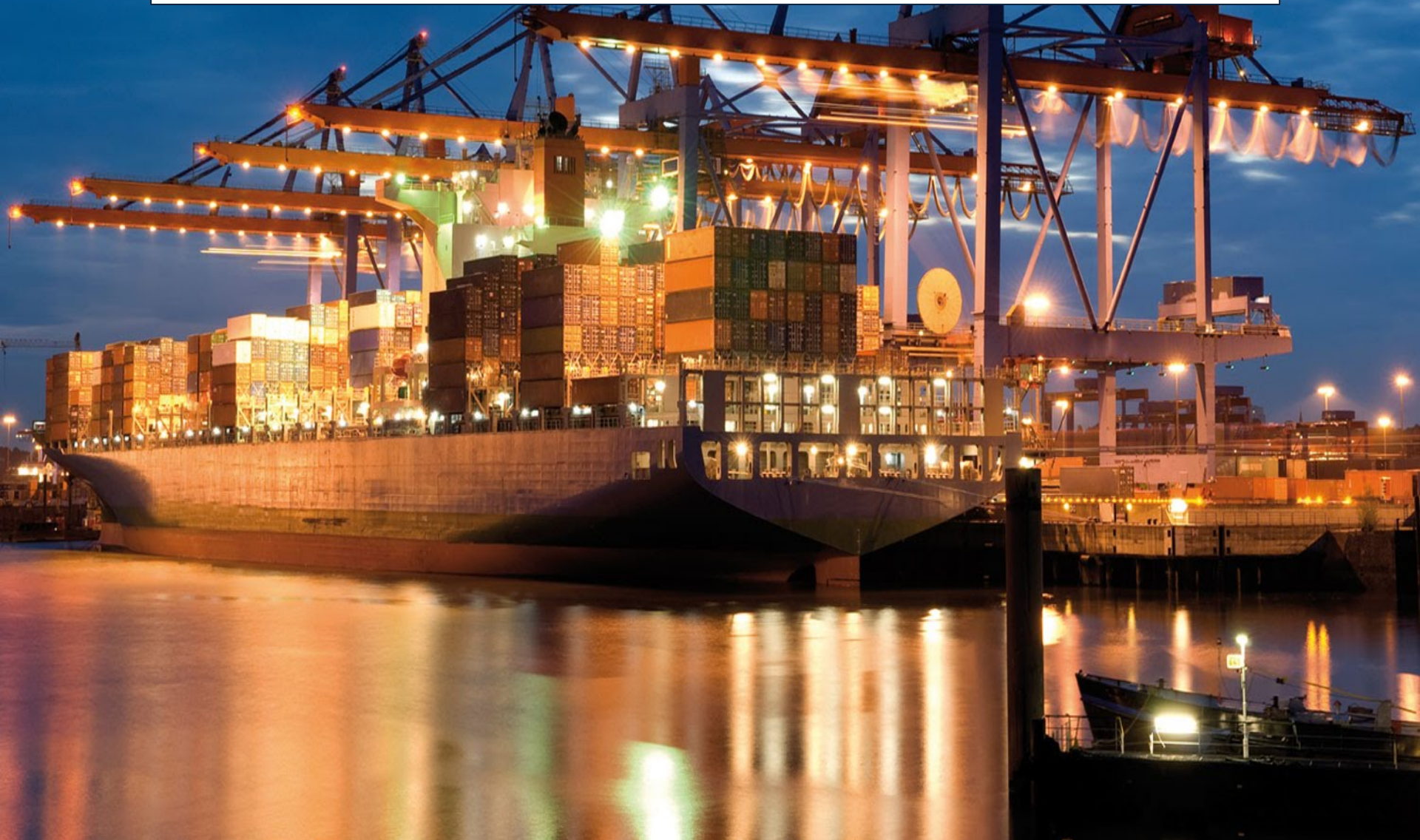
# Compatibility - Seaports

- Competitive assessment
  - Gateway ports: strongly linked to economic significance of area of economic influence (hinterland) - few risks for competition
  - Transshipment ports: generally not linked to the economic activity of the MS - High risks for competition
  - Other criteria used for the competition effects assessment:
    - Economic production of surrounding areas;
    - Foreseen increase in traffic compared to port market share;
    - Accessibility by road, rail and inland waterway;
    - Quality of the connections to port, proximity to point of original departure or final destination; etc...

# Compatibility – Inland ports

- Compatibility conditions under Article 93 TFEU
- Same conditions as under Article 107 TFEU
- Objective of common interest:
  - Generally met when aid supports the promotion of the modal shift from road to more environmentally-friendly modes of transport (i.e. inland waterway transport)
  - Naiades II Commission Communication of September 2013 encourages the development of quality infrastructures for inland navigation
- Necessity and proportionality based on the funding gap methodology
- High aid intensities (often > 70%)
- Competition analysis
  - Ports compete with each other
  - Ports compete with other modes of transports (i.e. road and rail)

# Case Study





# Port of Ventspils (2015)

## Contextual Information

- Located in Latvia on the East coast of the Baltic Sea
- One of the main network ports of the EU
- Cargo from Russia, Kazakhstan and Central Asia to the EU constitutes more than 90% of the turnover of the port.



## State aid measure

- Project aiming at dredging the seabed up to 15 meters so as to expand the ability of the port infrastructure to accommodate Panamax vessels (mid-sized cargo ships capable of passing through the Panama Canal lock).
- Beneficiaries of the project:
  - Ventspils Free Port Authority (the “VFPA”) (non-profit public body)
  - Operators/concessionaires
- Total investment of the project: EUR 4'000'000



Miraflores Locks from the  
Panama Canal





# Existence of the aid

Analysis of the existence of aid at the level of the Port Authority (VFPA):

Economic activity

*"[...] in this case dredging appears indissociably linked, by its nature and purpose, with the cargo transport activity, which is a commercial activity." [para. 34]*

State origin

*"Resources at the disposal of the Latvian authorities and therefore amount to State resources" [para. 36-37]*

Economic advantage

*" The public financing to be provided for the notified project clearly confers an economic advantage to the VFPA, because the measure covers the investment costs that the latter would otherwise have to fully cover itself " [para. 40]*

Distortion of competition and affection of trade

*"It is expected that as a result of this project, the Port will prevent the decline of its market share which would not be the case without the planned aid. The aid will therefore favour the Port of Ventspils, which is in competition with ports from other EU Member States for attracting cargo transport in the East Baltic" [para. 43]*



# Existence of the aid

- Existence of State aid for concessionaires?
  - “a possible economic advantage to the concessionaires, if at all established, would be minimised, and constitute compatible State aid [...]” [para. 50]
  
- Existence of aid for the port users?
  - “The information provided by the Latvian authorities shows that the fees charged to the port users correspond to the level of fees charged in comparable ports and, therefore, constitute market prices. Port users shall also enjoy equal and nondiscriminatory access to the infrastructure.  
  
Thus, the Commission concludes that no advantage will be granted to the port users and that there is, therefore, no aid granted to those users.” [para. 51-52]

# Compatibility of the aid

- Objective of common EU interest:
  - *“providing new port infrastructures, as well as improving the use of the existing capacities, is essential to ensuring that EU ports can cope efficiently with their function”*
  - the Port of Ventspils considered as part of the European core network corridor [para. 55-57]
- Necessity of the aid:
  - *“it is unlikely that the VFPA would be able to raise the funding required for carrying out the project itself, meaning that the project could not be carried out in absence of the aid. It follows that, the notified aid is necessary for this project and has an incentive effect”* [para. 60]

# Compatibility of the aid

- Proportionality of the aid:
  - *“the public funding provided for the project of EUR 3 400 000 is below the funding gap identified for the project, namely – EUR 3 809 524. Therefore, the aid is proportionate.” [para. 62]*
- No distortion on competition and trade between MS
  - *“ implementation of the project does not aim to increase the cargo turnover of the Port of Ventspils, but aims at preventing a further decline of market share (...).*

*Above element, combined with the relatively small share of the cargo turnover in the East Baltic held by the Port of Ventspils (11-15%), allows concluding that the aid for this project does not affect competition and intra-EU trade to an extent that would be contrary to the common interest.” [para. 64-65]*



# References



# References (1)



## Background materials

- ECJ, Case C-82/01 *P Aéroports de Paris/Commission* (Aéroports de Paris)
- EU Commission, Port policy Communication (COM(2007) 616)
- EU Commission, DG COMP, Note to DG Regio, Application of State aid rules to infrastructure investment projects (COMP/03/2011/)
- ECJ, Case C-288/11 *P Leipzig/Halle Airport*
- EU Commission, Notice on the notion of State aid (July 2016)
- Consultation on the extension of the General Block Exemption Regulation to airports and ports (Draft Regulation amending Regulation No 651/2014 declaring certain categories of aid compatible with the internal market in application of Article 107 and 108 of the Treaty and Regulation (EU) No 702/2014 declaring certain categories of aid in the agricultural and forestry sectors and in rural areas compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union.)

## References (2)



### Cases

- C(2001) 2383 *Reebok* (25/7/2001) (decision does not constitute aid (after formal investigation procedure))
- N 520/2003 *Financial support for infrastructure works in Flemish ports* (20/10/2004) (decision to raise no objection)
- N 503/2005 *Great Yarmouth* (21/12/2005) (decision that the measure does not constitute State aid)
- N 110/2008 *Financing of the JadeWeserPort project* (10/12/2008) (decision to raise no objection)
- C 39/2009 *Public financing of port infrastructure in Ventspils Port* (15/12/2009) (decision to raise no objection)
- C 21/09 *Greece public financing of infrastructure and equipment at the port of Piraeus* (18/12/2009) (approval of State aid following notification)
- N 44/2010 *Public financing of port infrastructure in Krievu Sala* (15/6/2011) (approval of State aid following notification)



## References (3)



- SA.34940 *Aid for infrastructure at port of Augusta, Sicily* (19/12/2012) (approval of State aid following notification)
- SA.35738 *Aid for the upgrading of Katakolo port* (19/6/2013) (approval of State aid following notification)
- SA.35418 *Extension of Greek Piraeus port* (2/7/2013) (approval of State aid following notification)
- SA.35720 *Construction of cruise terminal in Liverpool* (11/3/2014) (approval of State aid (not notified) following complaint)
- SA.38302 *Modernisation of the Italian port of Salerno* (27/3/2014) (approval of State aid following notification)
- SA.37322 *Alternative power supply for cruise ships in the Hamburg City Port (Altona - HafenCity)* (09.04.2014) (Decision not to raise objections)
- SA.35338 *Tax advantages for ports in NL* (9/7/2014) (opening of in-depth investigation)

## References (4)



- SA.38048 *Upgrading of the Port of Patras (5th pier)* (25.06.2014) (Decision not to raise objections)
- SA.38478 *Development of the Győr-Gönyű National Public Port* (01.10.2014) (Decision not to raise objections)
- SA.38771 *Investment aid to the Ventspils Free Port Authority - soil stabilization* (07.08.2014)(Decision not to raise objections)
- SA.28876 *Container terminal Port Piraeus & Cosco Pacific Limited* (23.03.2015) (Negative decision with recovery)
- SA.39403 *Investment in the port of Lauwersoog* (29.04.2015) (Decision does not constitute aid)
- SA.39608 *Sea port extension Wismar* (30.04.2015) (Decision not to raise objections)
- SA.39542 *Dredging and disposal of dredged materials in port of Taranto* (19.06.2015) (Decision not to raise objections)

## References (5)



- SA.39688 *Société des Ports du Détroit (Aide à l'investissement relative au port de Calais)* (02.07.2015) (Decision not to raise objections)
- SA.41865 *Extension of the port of Sassnitz* (13.07.2015) (Decision not to raise objections)
- SA.40838 *Modifications to the public support measures to the Ventspils Free Port Authority – soil stabilization* (22.07.2015) (Decision not to raise objections)
- SA.41275 *Development of Mohacs Port* (18.08.2015) (Decision not to raise objections)
- SA.39177 *The Intermodal Development of the Port of Baja* (21.8.2015) (Decision not to raise objections)
- SA.42388 *Mesure de soutien au transport intermodal par la voie d'eau dans la Région Bruxelles-capitale pour la période 2016-2020* (14.09.2015) (Decision not to raise objections)



## References (6)



- SA.41651 *Aide pour la mise en service et l'exploitation de l'autoroute de la mer entre les ports d'Algésiras et Vigo en Espagne et les ports du Havre et Nantes Saint-Nazaire en France (17.09.2015)* (Decision not to raise objections)
- SA.42219 *Refurbishment of the Schuhmacher-quay in the port of Maasholm (24.11.2015)* (Decision does not constitute aid)
- SA.42538 *Dredging in the Port of Ventspils (25.11.2015)* (Decision not to raise objections)
- SA.41734 *Dredging of the Port of Liepaja (30.11.2015)* (Decision not to raise objections)
- SA.39232 *Upgrading of the Port of Mykonos (02.12.2015)* (Decision not to raise objections)
- SA.43376 *Extension of the Port of Rostock (16.12.2015)* (Decision not to raise objections)

## References (7)



- SA.41927 *Investment aid in Cuxhaven Seaport* (11.02.2016) (Decision not to raise objections)
- SA.44846 *Investment aid for Berth 9 in Cuxhaven port* (20.04.2016) (Decision not to raise objections)
- SA.40680 *Offshore-Terminal Bremerhaven* (14.07.2016) (Decision not to raise objections)
- SA.43852 *DeltaPort GmbH & Co. KG* (28.07.2016) (Decision not to raise objections)
- SA.43724 *Investment in infrastructure at Kvarken Ports* (Umeå) (01.08.2016) (Decision not to raise objections)
- SA.45848 *Extension of cruise ship terminal Putbus-Lauterbach* (19.08.2016) (Decision not to raise objections)
- SA.45849 *Ferry port Sassnitz - breakwater* (19.08.2016) (Decision not to raise objections)

## References (8)



- SA.43109 *Investment aid to the port of Osijek* (26.09.2016) (Decision not to raise objections)
- SA.42701 *Port of Kiel* (18.11.2016) (Decision not to raise objections)
- SA.46569 *Extension of the inland port of Magdeburg* (28.11.2016) (Decision not to raise objections)
- SA.45521 *Projet de développement des infrastructures du port de Brest* (06.12.2016) (Decision not to raise objections)



# Questions?

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