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UK TRANSPORT INFRASTRUCTURE SUMMIT 2016

Ports – UK's Link to the Global Economy

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Ports – UK's Link to the Global Economy

Access to funds – EU law perspective

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Three major constraints on access



Concessions

State aid

**Port
Services
Regulation**

Consequences for –

- A port's business model
- Its ability to plan infrastructure and raise funds
- Investment planning, in particular whether to
 - contract services out/degree of vertical integration
 - invest own capital and resources
 - attract third party investment (private and public)
- Adds layer of bureaucracy and regulatory interference
- Litigation risks and potential deal breakers

1. Concessions

- Works **and services** concessions (new EU Directive)
 - Why?
 - To open up markets to EU competition
 - Bring down costs
 - Supposedly ‘light touch’ procurement regime: but is it?
 - Impact on private investment
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Concessions – law summarised

- Ports caught by procurement rules as public authorities
- Extension to services imminent – UK Regs adopted
- Third party contracts easily caught
- Wide definition of services ‘concession’
 - Does contract confer *a right to provide* services?
 - And earn revenue and/or receive payment?
 - Relevant exclusions?
- Contrast *procurement of services*

Is it a concession?

- Roles of the port authority and service structure?
- Nature, range and value of contracted services, e.g. terminal operations, pilotage, mooring, warehousing
- Distinguish –
 - Long leases
 - Licences to occupy/store
 - Berth appropriation agreements/priority user agreements/self-handling

Concessions Directive - highlights


- Supposedly ‘light touch’ regime. However –
 - Mandatory OJ notice above € 5,186,000
 - Maximum length related to investment return
 - Proportionate, non-discriminatory and fair selection and award criteria: ‘simpler and more flexible’ than normal
 - More flexibility with negotiations and changes
 - Risk of legal challenges and commercial disruption

Services concession defined

- **Contract for pecuniary interest**
 - **concluded in writing**
 - **by means of which one or more contracting authorities/entities entrust the provision and management of services (not works) to one or more economic operators**
 - **in return for the right to exploit the services that are the subject of the contract with or without payment**

- PPP/PFI potentially included but even simple outsourcing
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Transfer of operating risk

- Award must involve the transfer to the concessionaire (C) of an **operating risk** in exploiting the works or services, including demand and/or supply risk.
 - **Operating risk** is presumed where, under normal operating conditions, C is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services subject to the concession.
 - C must have **real exposure** to the vagaries of the market
 - C's potential estimated loss **not** merely **nominal or negligible**
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Excluded/not applicable

- Exclusive rights (lawfully granted)
 - International obligations
 - Defence and security
 - ***Leases etc.***
 - Broadcasting rights
 - Arbitration, conciliation, legal services
 - Services of general economic interest (subj. to state aid)
 - Non-economic services of general interest, *e.g.* customs
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Leases excluded


- Grant of rights to exploit certain public domains or resources, such as land or any public property, *in particular in the maritime...sector*, whereby the State or contracting authority or contracting entity establishes only general conditions for their use ...should not qualify

**Express exclusion for private operators who –
acquire or rent/lease, by whatever financial means,
land, buildings or other fixed property or related rights
if consideration for using land/infrastructure does not
encompass the provision of specific works or services**

2. State aid rules

- Why? To create a level EU playing field by
 - redressing regional imbalances
 - opening up EU competition
 - contained directly in the Treaty (Arts 107-9 TFEU)
- Huge impact on availability of public funding
 - Requires detailed advance planning and bureaucracy
 - Highly politicised
 - Ports are not ‘too large to fail’, or are they?

Is state aid for infrastructure caught?

- Is it within the definition of 'state aid'? Or is it a commercial deal on market terms or for non-economic activities?
 - Is it 'compatible' aid?
 - If not, it is incompatible and **illegal**...
 - ...and is repayable, with interest
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The law says: no gateway, no way

- Incompatible aid is prohibited
- Member States must notify plans to grant or alter aid
- Only Commission may authorise (declare ‘compatible’)
- Illegal for Member State to put unnotified/unauthorised aid ‘into effect’. So –
 - Related agreements potentially void
 - **Beneficiaries must reimburse aid with interest**
 - Governments may gain twice!

Is it state aid?

- ✓ Aid – any advantage, whether or not financial
- ✓ From Government, public authority, *any* public resources
- ✓ To a commercial enterprise/for commercial production
- ✓ Conferring a selective advantage (by favouring certain enterprises or production of certain goods)
- ✓ Distorting competition in the EU (actually or potentially)
- ✓ With an effect on intra-EU trade

Unless all boxes ticked, it is not state aid, so not caught



Compatible (authorised) aid

- Not aid at all, because it is ‘commercial’ (MEIP/MEOP)
- Fulfils non-commercial, non-economic public policy remit
- Authorised as ‘existing’ aid (including aid schemes)
- Authorised by Commission – 5 gateways, including
 - to facilitate development of certain economic activities or areas without adversely affect trading conditions to an extent contrary to the common interest
- General Block Exemption Regulation (GBER)/SGEI *de minimis* aid/SGEI block exemption

European Commission analysis

- European Commission study ‘Analytical Grids on the application of State aid rules to the financing of infrastructure projects’, September 2015
http://ec.europa.eu/competition/state_aid/studies_reports/state_aid_grids_2015_en.pdf
- Aid examined at three levels:
 - Owner/manager of port infrastructure
 - Operator of port infrastructure
 - User of the infrastructure


No aid

- The funding of certain investments in **port infrastructure** linked to activities that normally fall under the **State's responsibility** in the exercise of its official powers as a public authority are **not** of an **economic nature** and do not fall within the scope of the State aid rules
 - e.g. maritime traffic control, police, customs, antipollution surveillance, control and security of navigation
 - dredging, pilotage, reception facilities??

May be no aid

- Construction of **access infrastructure** (e.g. public road, rail, utilities *etc.*) to ports which is made available free of charge to all users and is thus not commercially exploitable, **may be** considered as **non-economic**, as long as it is ensured that it is not specifically dedicated to the activity of the operator in exploiting the port infrastructure but benefits the population as a whole
- **Other activities**, e.g. dredging or breakwater works, are not of an economic nature *per se*

But there is state aid here

- The construction or upgrade or extension of port **infrastructure which is commercially exploited** is an *economic* activity and so within ambit of State aid rules
 - **Activities** such as dredging or breakwater works, the purpose of which is directly linked to the development of a **port infrastructure which is commercially exploitable**, constitute economic activities
 - These therefore require a case-by-case analysis
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MEIP/MEOP


(market economy investor/operator principle)

- If State acts under **same** terms and conditions as a **commercial investor** when providing the necessary funding, no aid involved. Proof required of:
 - (i) significant *pari passu* **co-investments of commercial operators**, *i.e.* on the same terms and conditions; and/or
 - (ii) the presence (*ex ante*) of a **sound business plan** (preferably validated by external experts) demonstrating that the investment provides an adequate rate of return for the investors, in line with the normal market IRR that would be expected by commercial operators on comparable projects taking into account the specific circumstances of each case

Negative factors

- The existence of accompanying or prior State aid measures concerning the same project might invalidate the conclusion that a similar measure would also have been undertaken by a market economy investor
- The financing of port infrastructure often requires substantial capital investments that can only be recovered in the very long term and would therefore not be undertaken on the basis of purely economic considerations. In such cases, Member States would thus have to provide a convincing explanation why the criteria for the application of the MEIP are nevertheless complied with

No economic advantage (*Altmark*)

- (i) the project is necessary for the provision of port services that can be considered as genuine SGEI for which the public service obligations have been clearly defined
 - (ii) the parameters of compensation have been established in advance in an objective and transparent manner
 - (iii) there is no compensation paid beyond the net costs of providing the public service and a reasonable profit; and
 - (iv) the SGEI has been *either* assigned through a public procurement procedure that ensures the provision of the service at the least cost to the community *or* the compensation does not exceed what an efficient company would require
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SGEI *de minimis* exemption

- State aid required to provide SGEI block exempted
 - Maximum €500,000 over three years
 - Conditions apply

Avoiding unfair benefit to users

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

No 'aid'

- Great Yarmouth Outer Harbour – no aid decision for funding of **open access** port infrastructure

SGEI Decision for ports with...

- Annual traffic in last two years <300,000 passengers
 - Costs + reasonable profit for construction, renovation, extension necessary for SGEI
 - Provided no over-compensation
- Annual turnover <€100m in last two years
 - Annual aid <€30m
- Difficult to claim support for building or operating port infrastructure in areas already served by adequate transport links

Individual authorisation

- Need to show:
 - (i) presence of a clearly defined objective of common interest
 - (ii) necessity, proportionality and incentive effect of the aid and
 - (iii) effects on competition and on trade between Member States limited to an extent not being contrary to the common interest

Decisions taken

- Total 33 state aid cases so far (March 2016) on ports

GBER

- General Block Exemption Regulation
- Not currently applicable to port (or airport) infrastructure

3. Port Services Regulation

- Could state aid developments be connected with the PSR?

The proposal

- Launched by Commission 23 May 2013
- “...aimed at improving port operations and onward transport connections at [...] 329 key seaports. This initiative proposes an integrated strategy combining legislative [...] and non-legislative measures
- The proposed Regulation will introduce common rules on the transparency of public funding and the market access of port services. The rules on the market access of ports services will however not apply to cargo handling.”

Why?

- “This Regulation” claimed the Commission, “will protect port operators against legal uncertainties and unfair competition and help attract investors. The adoption of the Regulation will help provide a better allocation of scarce public funding and an effective and fair application of the State aid rules in ports. It was estimated that this Regulation could save the European economy up to €10 billion by 2030 and help develop new short sea links.”

Timeline

23/05/2013	Legislative proposal published	COM(2013)0296
10/06/2013	Committee referral announced in Parliament, 1st reading/single reading	
05/06/2014	Debate in Council	
08/10/2014	Debate in Council	
20/10/2014	Committee referral announced in Parliament, 1st reading/single reading	
25/01/2016	Vote in committee, 1st reading/single reading	
17/02/2016	Committee report tabled for plenary, 1st reading/single reading	
07/03/2016	Debate in Parliament	
08/03/2016	Decision by Parliament, 1st reading/single reading	


Highlights of the proposal

- Clear framework for access to the market of port services
- Common rules on the financial transparency and charges to be applied by managing bodies or providers of port services
- Applies only to TEN-T seaports, but Member States may extend the scope
- Ensure **financial transparency** of eight port services and open the **market access** to six* of them

* Cargo handling and passenger services exempt from market access provisions, but subject to Concessions Directive

Market access provisions

- Bunkering, dredging, mooring, port reception facilities (including waste collection), pilotage, towage covered
- Port managing body may cite the scarcity of land and public service obligations to limit the number of providers of a service and to impose minimum requirements on them
- **Autonomy** to set port infrastructure charges, provided done transparently. However, Commission can adopt regulations setting common charging principles for port infrastructure charges

- To increase **transparency over the use of public funds** port authorities must make information available to the national and EU monitoring authorities, though not required to publish detailed accounts
 - **port users' advisory committee**, to be consulted on the structure and level of port charges
 - **port stakeholders** should be consulted on issues related to the coordination of port services, hinterland connections and administrative procedures
 - **independent supervisory body** to monitor and supervise compliance and exchange information with each other
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Status and key EP changes

- 8.3.16 EP Plenary, partial vote, 1st reading
- New text adopted and remitted to Committee
- Dredging excluded
- No set port management model for Managing Body
- Market access chapter would allow ports to
 - Impose minimum requirements on, and limit number of, service providers
 - Impose public service obligations
 - Use internal operators

Key EP changes cont'd

- Cargo handling, passenger services and pilotage generally excluded from market access chapter
- EP noted the obligation to keep separate accounts where port services (including dredging) are provided by a port in receipt of public funds itself
- EP rewrote the provisions on port charging and inserted an explicit obligation to comply with State aid and competition rules
- EP restricted the Commission's power to dictate charges so ports can follow their own business strategy


State aid linkage

- New Recitals 22b and 22c inserted by EP:
With a view to ensuring fair competition and to reducing administrative burdens, the Commission should, in writing, clarify the notion of State aid with regard to the financing of port infrastructures, taking into consideration the fact that public access and defence infrastructure, whether maritime or on land, which is accessible to all potential users on equal and non-discriminatory terms, and infrastructure that is linked to the operation of Services of General non-economic Interest, have a non-economic nature since their goals are predominantly public in nature; such infrastructures fall within the State's responsibility to meet the general needs of the population.

State aid linkage

Moreover, the Commission should, in a timely manner and in consultation with the sector, identify which public investments in port infrastructure fall within the scope of Commission Regulation (EU) No 651/2014 (General Block Exemption Regulation)

DG COMP turns up the heat?

- 21 January 2016: DG COMP investigates tax breaks in Netherlands, Belgium and France
 - “...if port operators generate profits from economic activities these should be taxed under the normal national tax laws to avoid distortions of competition.” (Vestager)
 - “I will soon present a proposal to facilitate unproblematic investments in ports that can create jobs, to exempt them from scrutiny under EU state aid rules.”
 - 7 March 2016: Commission launches 1st consultation on extension of GBER to ports (and airports)
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First of two consultations

- Commissioner Vestager: *“Ports...are key infrastructure for economic growth and regional development. Our proposals aim at facilitating unproblematic public investments in ports...that can create jobs, by exempting them from scrutiny under EU state rules. I would like to encourage all public authorities, companies and others that would benefit from this simplification of state aid rules to participate in this consultation.”*

http://ec.europa.eu/competition/consultations/2016_gber_review/draft_regulation_en.pdf

Summary of proposal

- Will extend general exemption to cover investment aid to ports (and airports)
- DG COMP has built up enough experience (33 state aid decisions on ports so far)
- Aid can only be granted for transport-related investments and must not go beyond what is necessary to make the investment happen, taking into account future revenues from the investment

Proposed GBER definitions

- ‘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
- ‘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
- ‘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

Conclusions

- Three major legal hurdles with huge commercial impact
- Hugely political
 - Clear agenda from the European Commission
- Timing
 - Uncertain when (if) PSR will surface finally
 - State aid rules already with us but where next?
 - Concessions rules now (almost) a reality

References (concessions)

- EP and Council Directive 2014/23 of 26 February 2014 on the award of concession contracts OJ L94/1 of 28.3.2014
- The Concession Contracts Regulations 2016, SI 2016 No. 273, in force 18 April 2016

http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/bud08_procurement_533.pdf

References (state aid)

- Commission Decision 2012/21 of 20 December 2011 on the application of Article 106(2) TFEU to State aid in the form of public service compensation granted to certain undertakings providing services of general economic interest, OJ L 7/3 of 11.01.2012
- Commission Regulation 360/2012 of 25 April 2012 on the application of Articles 107 and 108 TFEU to *de minimis* aid granted to undertakings providing services of general economic interest, OJ L 114/8 of 26.04.2012
- 2016 tax decisions on aid to ports
http://europa.eu/rapid/press-release_IP-16-124_en.htm

References (Port Services Regulation)

- Ports – An Engine for Growth – Commission Report
<http://ec.europa.eu/transport/modes/maritime/ports/doc/2014-ports-leaflet.pdf>
- Council General Approach 24.10.14
<http://ec.europa.eu/transport/modes/maritime/ports/doc/2014-10-24-council-general-approach.pdf>
- EP Briefing Paper 7 December 2015
[http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572818/EPRS_BRI\(2015\)572818_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/572818/EPRS_BRI(2015)572818_EN.pdf)
- EP text adopted 8.3.16:
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P8-TA-2016-0069>

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