Abstract

This study examines the application of the EU State Aid rules for infrastructure investments in the seaport sector and compares recent examples of State Aids for the northern and southern EU seaports against the background of various types of port organisation. The findings of the study can be used for future debates on EU port policy in the TRAN Committee.
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EXECUTIVE SUMMARY

Research questions to be answered

The European Union (EU) has close to 1,200 seaports across 22 Member States [European Commission, 2006], and these seaports provide all kinds of facilities for the loading and unloading of goods. These facilities fall into three categories: (1) Basic port infrastructure, (2) Terminal-related infrastructure, and (3) Port superstructure. Investments are made in all of these three facilities in Europe’s different ports. These investments can be made by public and/or private parties, but State aid for any kind of seaport infrastructure or superstructure can distort (or threaten to distort) competition between European ports.

At present, there are no common EU guidelines on the provision of State aid to seaports, so the objective of this study is to examine and answer the following main policy questions:

(1) Are there any problems with the existing rules on the review of State aid for the infrastructure and/or superstructure of European seaports?
(2) If so, are guidelines required?
(3) Or are there any other options that could improve the coherence and effectiveness of European competition policy as regards financing the infrastructure and/or superstructure of seaports?

Definition of State aid and experiences with a common European port policy

The definition of State aid stems from Article 87(1) of the EC Treaty, which was replaced by Article 107 of the Treaty on the Functioning of the European Union (TFEU) [EU, 2008]. Article 107 contains three paragraphs. The first lays down the definition of ‘incompatible’ State aid; the second provides for cases of de jure derogations from the incompatibility criterion; and the third provides for cases of discretionary derogation from the incompatibility criterion. The Article reads:

(1) Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
(2) The following shall be compatible with the internal market:
   (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
   (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
   (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division. Five years after the entry into force of the Treaty of Lisbon, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.
(3) The following may be considered to be compatible with the internal market:
   (a) aid 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;
   (b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) 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;
(d) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Union to an extent that is contrary to the common interest;
(e) such other categories of aid as may be specified by decision of the Council on a proposal from the Commission.

In subsection 1, reference is made to ‘undertakings’. The established European Court of Justice definition describes an ‘undertaking’ as ‘any entity engaged in an activity of an economic nature which offers goods and services on the market, regardless of its legal status and the way in which it is financed’.

In fact, Article 107 defines five criteria, all of which must be met for State aid to be incompatible:

(1) aid is granted by a Member State or through State resources (including e.g. lottery distributions and European funds);
(2) it confers an advantage on the recipient;
(3) it favours certain commercial undertakings or the production of certain goods (i.e. is selective in nature);
(4) it distorts or has the potential to distort competition;
(5) if the activity is tradable between Member States, the aid has the potential to affect trade.

Article 107 states that any aid granted by a Member State which distorts or threatens to distort competition by favouring certain undertakings shall be incompatible with the internal market. However, State aid can be acceptable if it is considered to be compatible with subsections 2 and 3 of Article 107. The Commission’s review of several State aid cases shows that a flexible interpretation is possible by using subsections 2 and 3. This could create a distortion of competition and an uneven level playing field between ports and/or between operators in one port. Common guidelines would at least allow for a more transparent public financing framework throughout the EU.

Over the last twenty years, the Commission has unsuccessfully attempted to introduce secondary legislation implementing the Internal Market rules in the port sector through what are commonly called Port Packages I (2001) and II (2004). The proposed packages intended to minimise the distortion of competition between EU seaports and create transparency in investments. The Port Packages were both rejected at plenary sessions of the European Parliament. Despite the Commission’s promises in 2007 and 2009 to submit a proposal on State aid guidelines for seaports, little progress has been made.

In 2010, State aid responsibilities were transferred from DG Move to DG Comp. DG Comp then announced the launch of a study on public financing in seaports, the results of which would be the basis for determining appropriate steps such as State aid guidelines. In September 2011, Commissioner Kallas announced [cf. EC press release IP/11/1009] his intention to bring forward a package of measures in 2013 consisting of: (1) support for measures to help reduce the administrative burden in ports; (2) proposals to improve the transparency of port financing; and (3) proposals for measures on port services.
The question of whether Member States could or should finance port infrastructure depends entirely on their transport and economic policies and the organisation of their seaports. If ports are part of the public domain, the government will provide 100% financing and will not seek any return other than the positive effects that a port could generate. In the United Kingdom, ports belong to the private sector and do not belong to the public domain. The UK Government does not have a port regulator, leaving this responsibility to the private sector. Therefore, the UK Government will not usually invest in ports.

Changes in financing the infrastructure of seaports

Over the past fifteen years, the container trades in particular have been a motor for port and terminal capacity expansion. There has been much investment in port infrastructure against the background of changing competition between ports, which increasingly has a regional dimension as ports try to acquire a strong position within a region and look into cooperating with other ports or with hinterland locations. Container transport in particular has seen the development of different networks of ports in Europe in competition with each other. The competition between ports and port regions in Europe is also becoming more intense in other cargo sectors. The distinction between northern and southern European seaports is a bit outdated as they sometimes belong to the same port network, but there is still a difference in cargo generation, which is higher in north-western EU ports.

As a result of these developments, the role played by port authorities is changing. The future role of port authorities, on top of their traditional functions and obligations, could be described as developing and maintaining excellent interconnections between the port area and the hinterland through various intermodal transport systems and making business processes easier for their stakeholders.

The main role of port authorities has shifted from regulator to facilitator of logistics chains through:

1. Optimising port processes and infrastructure;
2. Playing a central role in the creation of platforms with all stakeholders to address issues affecting logistics performance;
3. Promoting and sustaining an efficient intermodal transport system;
4. Developing strategic relations with the hinterland.

Different Member States are analysed separately in this study, which shows that many differences exist between them regarding seaport policies. To give but a few examples:

- Slovenia has a centralised and State-controlled seaport policy;
- The United Kingdom has a fully privatised port system;
- The seaports in many other EU countries are landlord ports.

Consequently, the financing of port infrastructure differs considerably between countries. Slovenia and the United Kingdom have no State aid due to the way their ports are organised, whereas there are case studies of port authorities receiving State aid in all other countries.

The general trend in port policies and financing for EU seaports is (slowly) moving towards greater involvement of the private sector. This means that port authorities are increasingly being requested to finance parts of the desired port infrastructure investment, while the
Member State is no longer taking the lead due to limited investment budgets. This trend can be seen in all countries. In Germany and France, for example, port policies are in the process of being reformed, while in Italy and Spain this reform already took place at the end of the last century.

**Public financing of seaports is in practice often not classified as State aid**

Public financing of the infrastructure of seaports – both the basic infrastructure and terminal infrastructure – has been very common in the EU over the past ten years. In order to compete and attract market share, ongoing investment in the infrastructure of seaports is often necessary. As mentioned, there are many differences in financing between Member States across the EU depending *inter alia* on the legal form of the seaport.

In the southern EU countries, central government organisations sometimes play a role in financing the infrastructure of seaports, e.g. as a guaranteeing partner for bank loans. In Italy, the division of roles between organisations for financing ports is not entirely fixed, although new regional ports were created in 2010. The reason is that there is no clear definition of the various port infrastructures that do not form part of the basic infrastructure. Meanwhile, in northern EU countries, different government organisations can play a role in State aid. In France and the Netherlands, the national governments play a leading role, while federal states and/or municipalities play a major role in Germany and Belgium. In the United Kingdom, however, there is no major role for the government as it is not responsible for any financial investment in major UK seaports. All investments have to be made by private port owners and/or, to a much lesser extent, by self-financing trust ports (mainly with respect to access channels and waterways maintenance).

The organisational and financial differences between northern and southern EU ports do not affect the way in which State aid is treated by Article 107 of the TFEU, which is always the guiding legislation.

The State aid case reviews examined in this study indicate that invoking subsections 2 and 3 of Article 107 does not always lead to more transparency. In fact, the public financing of seaport infrastructure could distort (or threaten to distort) competition between ports and logistics companies in the EU. In the nine EU Member States reviewed, at least ten cases of State aid were reviewed in the past 10 years.

The Commission’s final decision in all of these cases was that there were no objections, so in none of these case reviews was it concluded that the public financing was incompatible State aid.

The case of Ventspils is particularly interesting. It seems that the Commission has taken a different approach towards port authorities by appearing to consider ports as ‘undertakings’. This basically implies that all public investment schemes in ports need to be notified to the Commission.

A legislative initiative is required to make the interpretation of Article 107, and especially subsections 2 and 3, more transparent. Guidelines for State aid to ports seem to be the most appropriate response.

To conclude, despite various EU attempts over the years to draw up specific guidelines for State aid reviews in the seaport sector, none exist at present. The Commission seems divided over the issue, although in 2011 Commissioner Kallas announced his intention to
issue a package of proposals in 2013, including cutting red tape in ports, improving the transparency of port financing and measures on port services. Consequently, Article 107 of the TFEU is currently considered to be the basis on which to determine whether State aid to seaports is acceptable. In practice, subsections 2 and 3 leave room for interpretation.

**Answering the three main policy questions**

With this conclusion in mind, the following major research questions can be answered:

(1) Are there any problems with the existing rules for the review of State aid for the infrastructure and/or superstructure of European seaports?

**Answer:** Yes, this seems to be the case, particularly as regards transparency. The existence of public finance schemes could currently lead to non-transparency vis-à-vis stakeholders, which in turn could lead to a perception of unfair advantage, even when this is not the case.

(2) If problems do exist, is it necessary to amend the rules on review, or to establish guidelines in order to set up adequate rules?

**Answer:** Yes, a solution in the form of State aid guidelines for ports is desirable. In the opinion of the consultants, it is better to set up guidelines than to create an institutional framework. The European ports sector is very diverse and this offers added value for the EU. It therefore needs to be maintained, but a ‘one size fits all’ approach to European ports policy is not feasible in practice. At Member State level, specific initiatives to support the port sector must remain possible, so long as they are compatible with the rules of the Internal Market. Strict regulations in the form of an institutional framework can harm the competitiveness of European seaports and make policies inflexible. The following principles must be central to any future European initiative: (1) legal certainty, (2) a level playing field and (3) open access to the market.

(3) Are there any other options that could improve the coherence and effectiveness of European competition policy as regards financing the infrastructure and/or superstructure of seaports?

**Answer:** Probably not. It is the opinion of the authors that the best option is to set up guidelines to improve the coherence, transparency and effectiveness of European port and competition policies as regards financing the infrastructure and/or superstructure of seaports. Guidelines are preferred to a framework on infrastructure charging, as this would take longer to implement and is less flexible in practice. Guidelines are also preferable because the seaport sector in the EU has a diverse and complex legislative framework, so it will not be easy to have Member States accept new primary legislation.

Taking the above into account, the main recommendation to the European Parliament is to set up common guidelines on the public financing in European Union Member States of:

- port access and basic infrastructure;
- terminal-related infrastructure;
- superstructure and handling material.
The European Parliament’s deliberations on an initiative pertaining to common guidelines on public financing and State aid for the infrastructure and superstructure of seaports should also cover:

- the extension of the Financial Transparency Directive to all major EU seaports;
- the conditions for granting concessions to commercial undertakings;
- compensations (e.g. ecological compensations).

The transparency of port authorities’ accounts is an enabling factor for the common guidelines. Without transparency of accounts, i.e. separating the accounts for the port authority’s public functions from its commercial revenues, an approach to State aid is not possible.

The issue of the public financing of terminal-related infrastructures and revenues in terms of rents paid by the terminal operator can be subject to distortion of competition. Rents and leases for terminal-related infrastructures (e.g. berths) should cover investment costs by the public stakeholder (national, regional or local authorities) including a market-oriented return on investment. However, rents and leases paid by terminal operators seem to differ among Member States. The conclusion of non-market-conform terminal concessions which do not cover investment costs and do not generate a rent may result in distortion of competition not only within a port but also between ports. Concession arrangements fall outside the scope of this study.

Another issue which is important, especially in the Mediterranean and the Black Sea countries, is the distortion of competition between EU ports and some third-country ports. Although the provisions of Article 107 only pertain to the Internal Market, thus excluding third countries, work should start on promoting a level playing field for EU ports with some third-country ports.