

INTERNATIONAL MARITIME AND TRANSPORT LAW COURSE 2021

SUPPLY OF TECHNICAL-NAUTICAL SERVICES IN THE CROATIAN PUBLIC  
PORTS WITH PARTICULAR REFERENCE TO THE ISSUE OF SELF-  
HANDLING OF THESE SERVICE BY CARRIERS

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# THE SPECIAL FEATURES OF TECHNICAL-NAUTICAL PORT SERVICES

**Technical-nautical port services are services ancillary to navigation;**

**Italian scholars prof. Sergio M. Carbone and Francesco Munari have distinguished mainly three such services;**

**Pilotage** (franc. *pilotage*, njem. *Lotsendienst*, tal. *pilotaggio*) means the guidance service of a waterborne vessel by a pilot or a pilotage station in order to allow for safe entry or exit of the waterborne vessel in the waterway access to the port or safe navigation within the port (Article 2/8 Regulation (EU) 2017/352);

**Towage** (franc. *touage*, *remorquage*, njem. *Schleppen*, tal. *rimorchio*) means the assistance given to a waterborne vessel by means of a tug in order to allow for a safe entry or exit of the port or safe navigation within the port by providing assistance to the manoeuvring of the waterborne vessel (Article 2/17 Regulation (EU) 2017/352);

**Mooring** (franc. *amarage*, njem. *Bindensdienst*, tal. *ormeggio*) means the berthing and unberthing services, including shifting along the quayside, that are required for the safe operation of a waterborne vessel in the port or in the waterway access to the port (Article 2/6 Regulation (EU) 2017/352).

**EU Commission used notion TNS in some of its instruments regulating EU port policy.**

# THE SPECIAL FEATURES OF TECHNICAL-NAUTICAL SERVICES

## Technical-nautical service – comp

- ▶ **Consequently, TNS subject to different rules in respect of their organisation, supply and market access.**
- ▶ **Call of ships** (ships calling at port ;  
shore services (cargo-handling, bunkering, collection of  
to cargo residues and cargo residues, passenger services)- related  
to cargo or passengers handling;
- ▶ Latter services - mainly have a **commercial nature** and can be **organised under competitive patterns.**
- ▶ TNS – are focused on the **safety matters**, offered and organised mainly for **non-economic reasons** - safety security and environmental protection
- ▶ **IMPORTANT: availability of TNS!**
- **Technical-nautical service fall within the scope of application of Article 106/2 of the TFEU on SGEI !**

„Provision on  
round the clock -  
round the year  
basis” is needed!  
24h a day, 365  
days a year

# LEGAL REGIME OF TECHNICAL-NAUTICAL SERVICE UNDER EU LAW

- ▶ Services that are characterised by the need for availability to all their users, at any time and at an affordable price are **universal services**. Universal services belong to services of general interest (public services).
- ▶ TNS are services of general economic interest (SGEI).
- ▶ **SGEI** are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in the terms of quality, safety, universal access...) by the market without public intervention.
- ▶ TNS are example of „market failure“!

## **TNS- offered as UNIVERSAL SERVICE when following conditions are fulfilled:**

- 1.TNS supplied to all users that request it (can come with any vessel, any crew, under all meteo-marine conditions);
- 2.Predetermined rules regarding the quality and supply procedures.Tariffs are fixed in advance, their level is affordable;
- 3.Round the clock-round the



MS may **intervene on the market** of these services and organise them according to the models that deviate from competitive ones (**monopoly situations in ports, mandatory nature of the service or exclusion of self-handling, provision of service may require professional qualifications for workers**)!

# ❑ DECISIONS OF THE EU CJEU AND THE GENERAL COURT IN 2000s

liberalization, privatization, market integration and technological progress have increased the potential for commercial exploitation of transport infrastructures, including seaport infrastructure. The operation of transport infrastructures, including ports and airports, changed, evolved to an entrepreneurial nature... their operators become providers of commercial and public services and facilities and of competitors in the market.

- General Court in its **Aéroports de Paris judgment** of 12 December 2000 (T-128/98, confirmed on appeal by the Court in case C-82/01P), which clarified that the **operation of an airport constitutes an economic activity.**
- ❑ In the **'Leipzig-Halle airport' case** (Judgement of the General Court of 14 March 2011, Joined Cases 443/08 and 455/08) the objective **construction of airport infrastructure** (extension, renovation, etc.) **nature or purpose, the exercise of an economic activity by its operator**, rather than the exercise of a public service.



**The Commission has followed the Court's approach.**

†Since the... the Court's approach.

# THE SPECIAL FEATURES OF TECHNICAL-NAUTICAL SERVICES

**-Technical-nautical service – compared to other port services:**

**Technical-nautical services**- rendered in favour of vessels calling at port ;

**Other services offered in ports** (cargo-handling, bunkering, collection of ship-generated waste and cargo residues, passenger services)- related to ship cargo or passengers handling;

Latter services - mainly have a **commercial nature** and can be **organised under competitive patterns**.

TNS – are focused on the **safety matters**, offered and organised mainly for **non economic reasons** - safety security and environmental protection.

Consequently subject to different needs in respect of **organisation, supply and market access**.

## TFEU-PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

The shared values of the Union in respect of SGEI within the meaning of Article 14 of the TFEU include in particular:

- the essential role and the **wide discretion** of MS in **providing, commissioning and organising SGEI** as closely as possible to the needs of the users;
- the **diversity between various SGEI and the differences in the needs and preferences of users** that may result from different geographical, social or cultural situations;
- a high level of **quality, safety and affordability, equal treatment and the promotion of universal access** and of user rights.

### EU case-law

- Member State's discretionary power to take action under Article 106/2 EC and to define is not unlimited and cannot be exercised arbitrarily for the sole purpose of removing a particular sector, from the application of the competition rules.
- **non-profit entities** also offer goods and services on a market.

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## EC DECISIONS ON STATE AIDS FOR FINANCING SEAPORTS INFRASTRUCTURE

- EC has established that the **commercial operation and construction of port infrastructure** constitute economic activities.



Case N 385/2009 – Public financing of port infrastructure in *Ventspils Port* ; Case 44/2010 – Public financing of port infrastructure in *Krievu salā* ; Case SA.30742 – *Lithuania* – Construction of infrastructure for the ferry terminal in *Klaipėda*; Case SA.35418 – Extension of *Piraeus port* ; Case SA.36953 – *Port Authority of Bahía de Cádiz*. Case SA 36112 - Port Authority of Naples and Cantieri; SA.38389-Port of SA 3612 - Port Authority of Naples.

- ❑ CJEU has recognised the economic nature of certain port operations '**loading, unloading, transshipment, storage and general movement of goods or material of any kind within the port**'.
- ❑ According to GC **activities** carried out by the port authorities, consisting in **renting the land and infrastructure** to undertakings which provide services to port users for remuneration **are services offered on a market-** economic activities.

*Merci Convenzionali Porto di Genova, C-179/90, EU:C:1991:464, paragraphs 3 and 27;*  
*GT-Link A/S v de Danske Statsbaner, C-242/95, EU:C:1997:376, paragraph 52*

*Havenbedrijf Antwerpen NV and Maatschappij van de Brugse Zeehaven NV v Commission, 696/17, ECLI:EU:T:2019:652;*  
*Union des Ports de France - UPF v European Commission, 747/17, ECLI: EU: T:2019:271*



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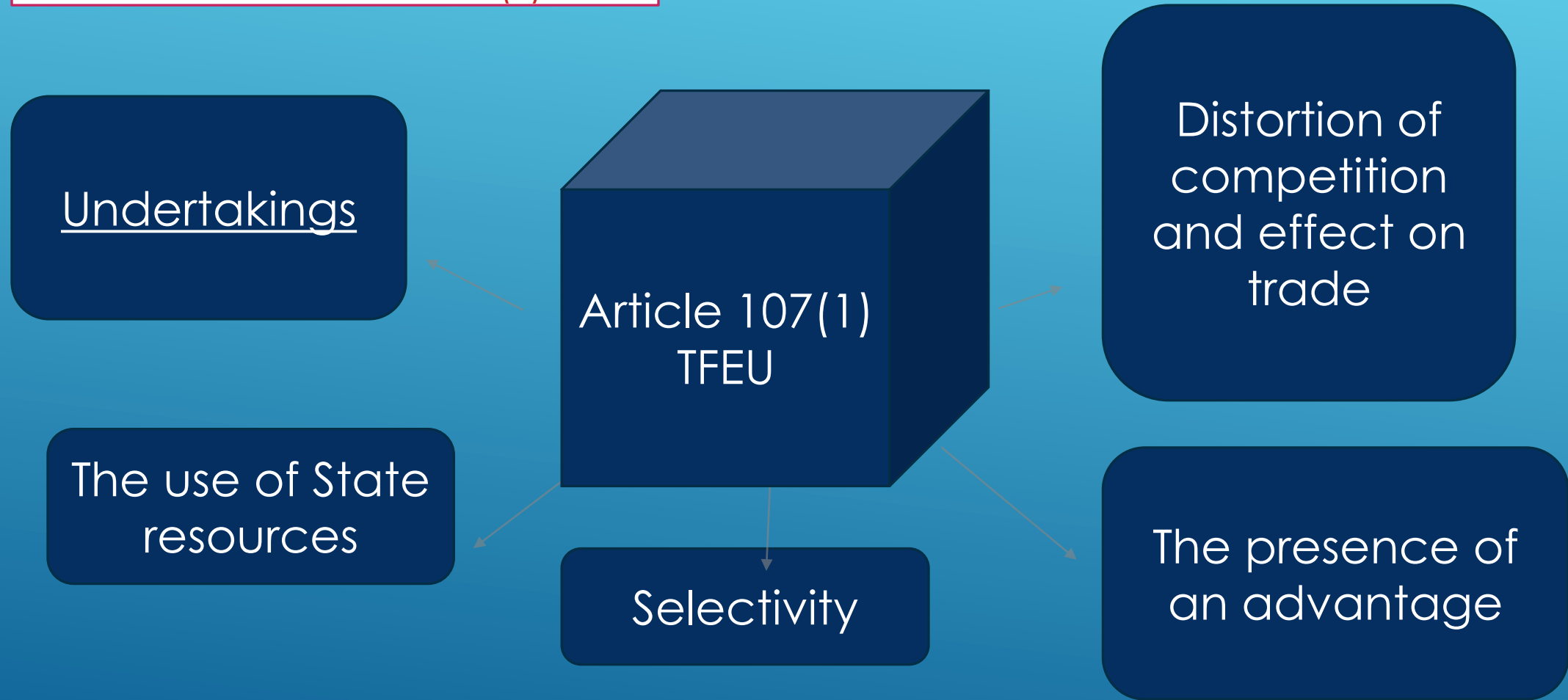
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## Technical-nautical services

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- ▶ **Technical-nautical services** (cargo-handling, bunkering, collection of ship waste and cargo residues, passenger services)- related to ship cargo or passengers handling;
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EXISTENCE OF STATE AID  
EXAMINATION OF  
CONDITIONS-ARTICLE 107(1) TFEU





PORTS – UNDERTAKINGS ?

PORT SERVICES - ECONOMIC SERVICES ?

- EU case law
- **undertaking** - every entity engaged in an economic activity, regardless of the legal status and the way in which it is financed;
- the fact that undertaking does not seek to make a profit is not decisive;
- **economic activity** is any activity consisting in offering goods and services on a market;
- **non-profit entities** can also offer goods and services on a market.

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State aid case SA.30742 (N/2010) Lithuania – Construction of ferry terminal in Klaipėda ; State aid case SA.35418 (2012/N) Greece – Extension of Piraeus port , etc.

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## RECENT DECISIONS REGARDING TAXATION OF PORTS

- ❑ **management activities** carried out by the port authorities, consisting in **renting the land and infrastructure** to undertakings which provide services to port users (concessions) **are services offered on a market-** economic activities;
- ❑ **choice of concessionaire after „invitation to tender”** confirms that ports, when give access to their infrastructure offer goods or services on the market;
- ❑ **concession fees are subject to VAT**, which is evidence of economic nature;
- ❑ **providing ships with access to the port infrastructure** in exchange for a remuneration is an economic activity;
- ❑ the fact that the **ports do not have a profit motive and reinvest their profits** is not decisive in differentiating an economic activity and non- economic activity;
- ❑ the fact that the port authorities **are vested with special powers to perform SGEI** does not prevent them to perform economic activities; these powers may be an instrument for intervening on the market.

SA.38393 (2016/c)  
Belgium- Taxation of ports  
in Belgium , paragraphs  
44, 45, 49, 63.

SA.38398 (2016/C)  
France - Taxation of ports  
in France, paragraph 55.

- ports may also perform certain **public authority or non-economic tasks**, such as **maritime traffic control and safety or anti-pollution surveillance**;
- in carrying out these tasks, the **ports are not undertakings**;
- but it **will not take away the designation of ‘undertaking’** for all purposes.



← A port will be regarded as an ‘undertaking’ if and to the extent that it in fact carries out one or more economic activities.

*SA.38398 (2016/C) France - Taxation of ports in France, paragraph 44.*

- Art. 48/3 MDSA-**port authorities non-profit legal persons** established for the purpose of managing, building and using ports open for public traffic (public ports). **Art.** MDSA port authorities are founded by the State or county assembly.
- Art. 61 MDSA public resources awarded by their osnivača, port authorities may use only for the financing of construction and upkeeping of the port infrastructure.
- **Important** : the objective of construction of seaport infrastructure should be taken into consideration!



← Decisions of the CJEU and Commission.  
← Rules of the GBER.

# CONCLUSION

- ▶ Profits earned from **economic activities** by port operators (including port authorities) **should be taxed under common national corporate tax laws** to avoid distortions of competition on the EU internal market.
- ▶ **Corporate tax exemptions** for ports provide them with **competitive advantage over their competitors** and therefore involve State aid if conditions prescribed by Article 107 (1) TFEU are fulfilled.



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