

State aid and the port sector - the legal aspects -

lecture for the
Port-Net workshop
„Port Financing I,

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Summary

1. Community rules on State aid for the seaport sector
2. Criteria of State aid, Art. 87 (1) EC-Treaty
3. Exemptions from the ban on State aid
4. Special State aid questions within the port sector
5. Impact and consequences
6. Outlook

1. Community rules on State aid for the seaport sector

- Regulations on State aid of the EC-Treaty, Art. 87 und 88 EGV
 - basic principles
 - unrestricted application to the seaport sector
- Individual decision of the Commission and the ECJ, Green Paper and Communications of the Commission, Vademecum

2. Criteria of State aid, Art. 87 (1) EC Treaty

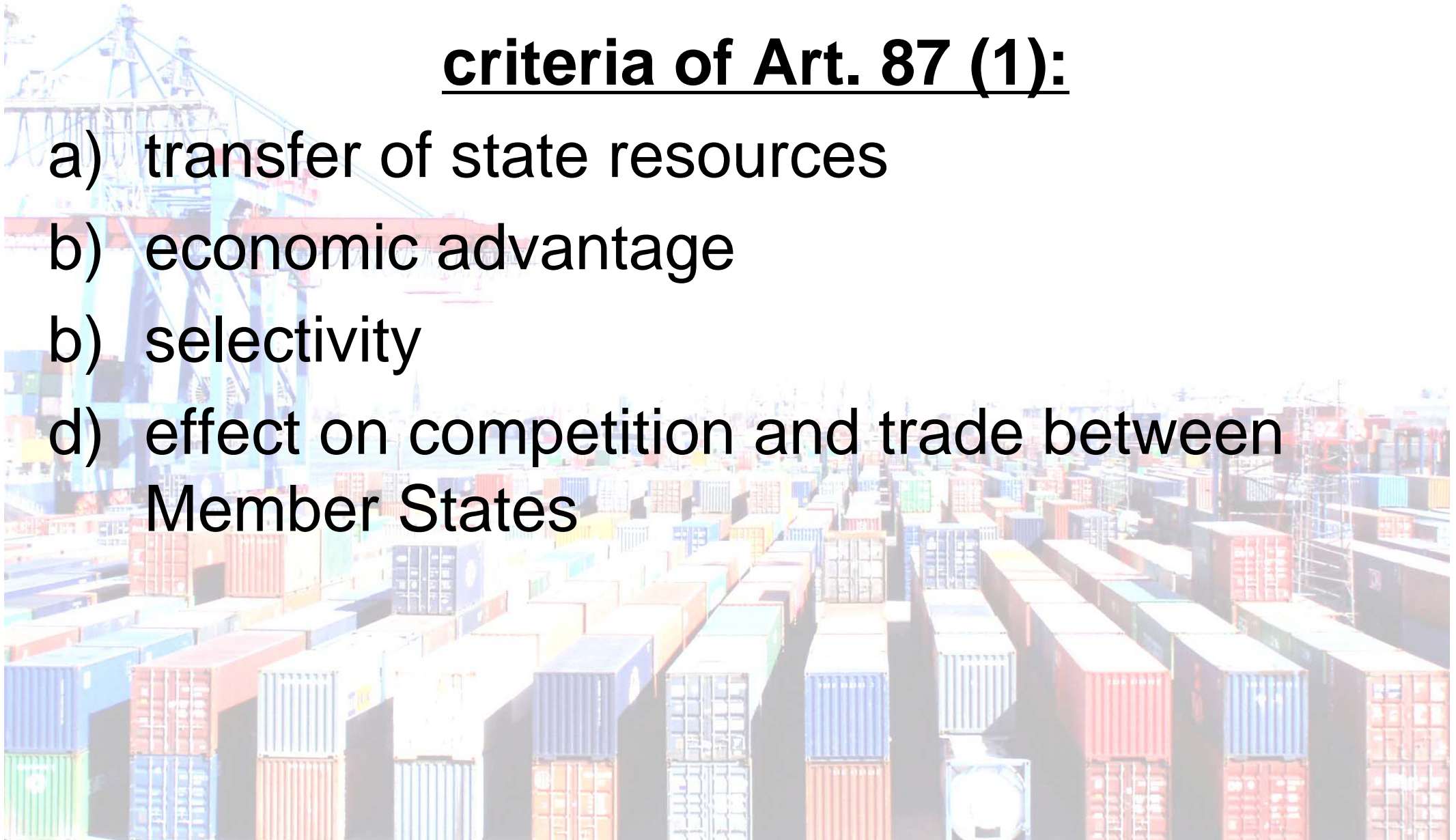
Art. 87 (1) EC Treaty:

„... 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, insofar as it affects trade between Member States, be incompatible with the common market“.

2. Criteria of State aid, Art. 87 (1) EC Treaty

criteria of Art. 87 (1):

- a) transfer of state resources
- b) economic advantage
- b) selectivity
- d) effect on competition and trade between Member States



2. Criteria of State aid, Art. 87 (1) EC Treaty

a) transfer of state resources

- “any aid granted by a member states or through state resources”
 - public funds administered by MS on central, regional or local level
 - or through public / private entities controlled by state (e.g. HPA)

2. Criteria of State aid, Art. 87 (1) EC Treaty

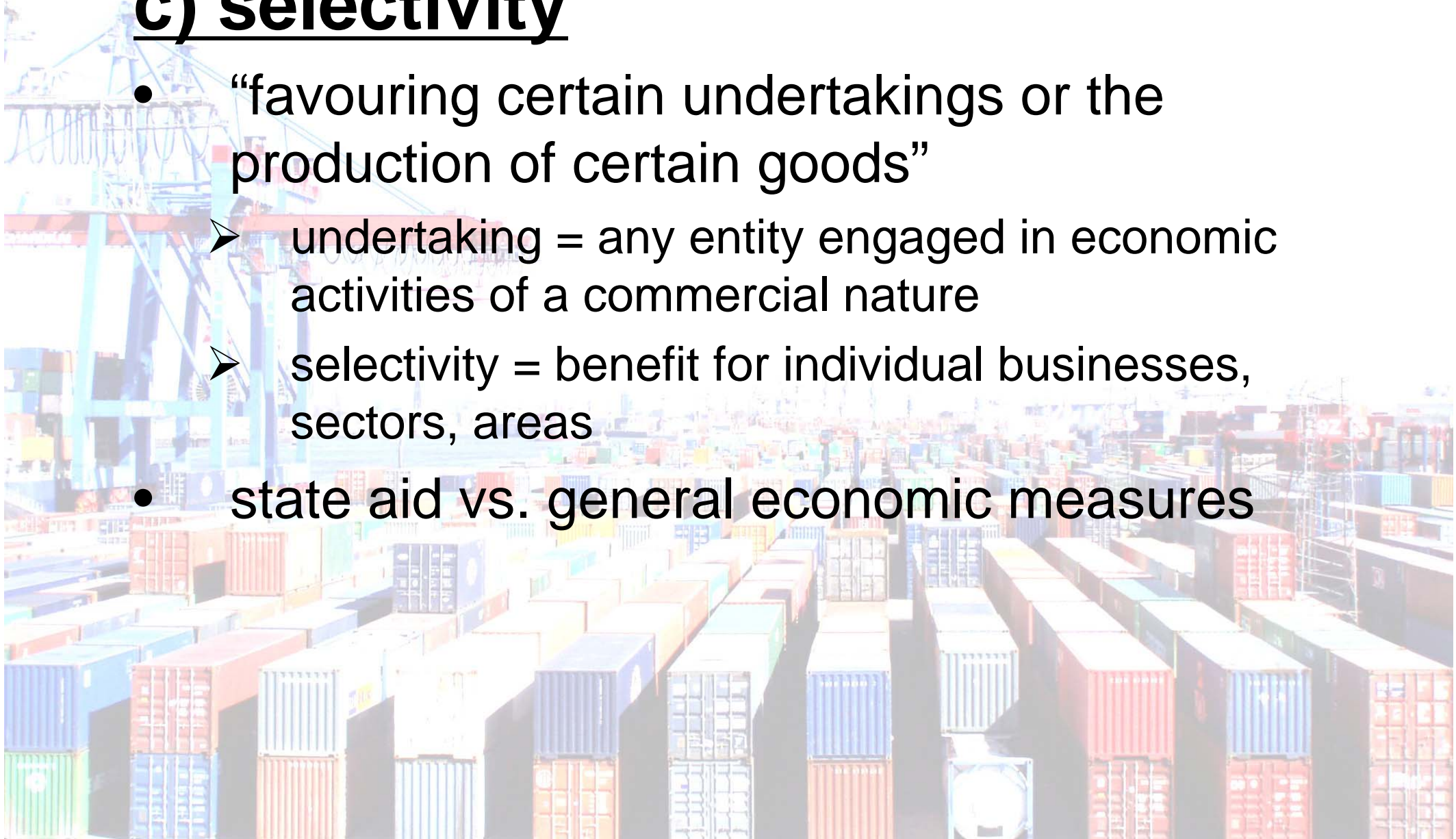
b) economic advantage

- „in any form whatsoever“
 - not only positive benefits
 - can take a number of forms
 - includes indirect advantages such as fiscal rebates, reductions on rent etc.
 - not received in the normal course of business
- private investor test

2. Criteria of State aid, Art. 87 (1) EC Treaty

c) selectivity

- “favouring certain undertakings or the production of certain goods”
 - undertaking = any entity engaged in economic activities of a commercial nature
 - selectivity = benefit for individual businesses, sectors, areas
- state aid vs. general economic measures



2. Criteria of State aid, Art. 87 (1) EC Treaty

**d) effect on competition and trade
between Member States**

- distorting or threatening to distort competition
- affecting trade between member states
- low requirements



3. Exemptions from the ban on State aid

- Art. 87 (2) and (3) and Art. 73 EC-Treaty provide opportunity to justify State aid
- Art. 87 (3)
- State aid conditions satisfied (+), aid may be deemed compatible by virtue of Art. 87 (3)
- Art. 87 (3) (c) EC-Treaty: aid to facilitate development of certain economic activities or certain economic areas

4. Special State aid questions within the port sector

- scope of application
- financing of port infrastructure
- special case: sale or lease of land in the port
- Typical criteria to avoid prohibited State aid
- The exemption of Art. 87 (3) (c) EC-Treaty and the port sector

4. Special State aid questions within the port sector

a) Scope of application in the port sector:

- Seaports as undertakings in the sense of Art. 87 (1)?
 - public services (Seaports as “port authority”) ► no state aid
- vs.
- economic activities (“managing body of the port”) ► rules on State aid apply

4. Special State aid questions within the port sector

a) Scope of application

Seaports as port authority

- Administrative, esp. supervisory activities linked to the administration and management of the port
- Coordination and control of operators present in the port
- Other port authority services, e.g. port police and custom facilities

4. Special State aid questions within the port sector

a) Scope of application

Seaports as managing body

- decisive criterion: offering of goods and services for which normally a return is given
- leasing of land
- operating of a container-terminal



4. Special State aid questions within the port sector

a) Scope of application

- State aid rules are applicable on two different levels in the port sector:

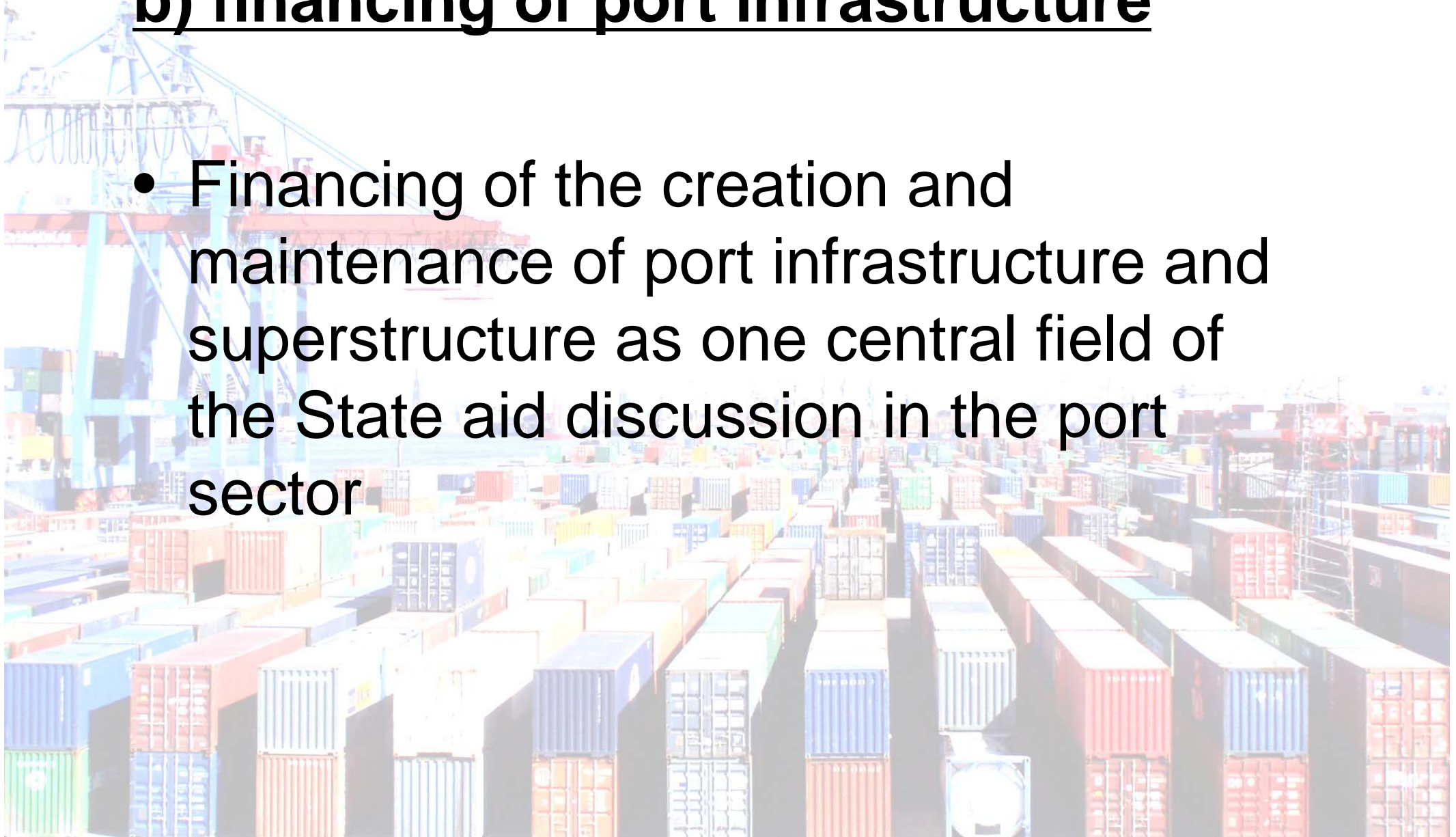
- transfer of funds from State to managing body of port
- benefit given to providers and/or users of port services – directly by state or through managing body of the port



4. Special State aid questions within the port sector

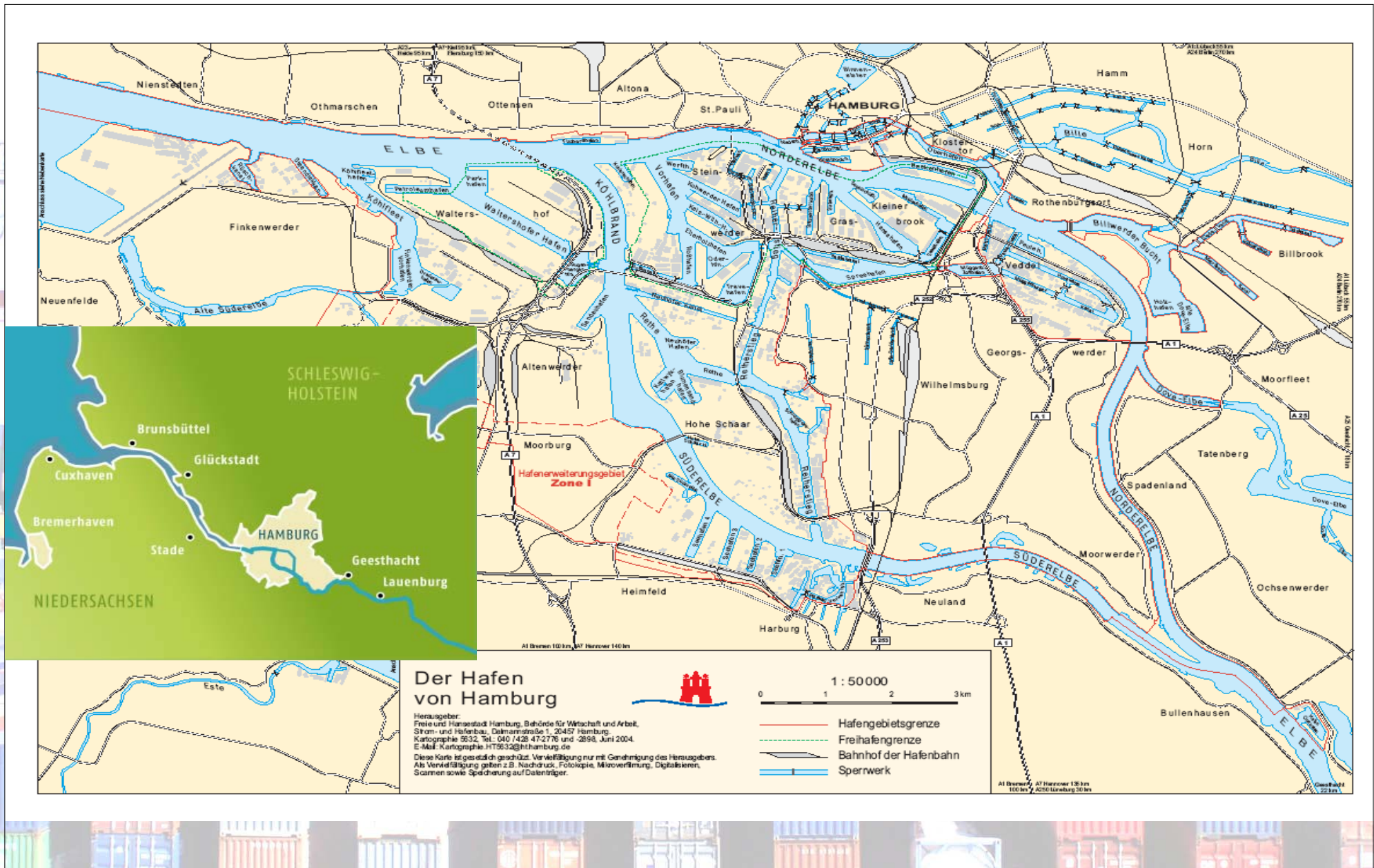
b) financing of port infrastructure

- Financing of the creation and maintenance of port infrastructure and superstructure as one central field of the State aid discussion in the port sector



4. Special State aid questions within the port sector

b) financing of port infrastructure



4. Special State aid questions within the port sector
b) financing of port infrastructure

- **in general: individual examination on a case by case basis**
- **categories of port infrastructure:**
 - In the past: infrastructure – superstructure
 - Green Paper, Vademecum:
public (general) port infrastructure and
user-specific port infrastructure
- **decisive criterion: Selectivity**

4. Special State aid questions within the port sector
- categories of port infrastructures -

General infrastructure:

- Infrastructural works that belong to the public domain and to which all potential users have guaranteed access on equal, non-discriminatory terms
- in principal **no State aid** in terms of Art. 87 (1) EGV

Typical public general infrastructure in ports

- access and defence infrastructure (infrastructure that allows sea and land access to a port area, e.g. navigable channels incl. dredging or high water protection measures as dikes and locks etc.)
- some port infrastructure (allowing supply of services to ships and cargoes, e.g. channels, land transport facilities, port information system)

3. Special State aid questions within the port sector - categories of port infrastructures -

- **User-specific infrastructures**
- Infrastructures designed for a particular user or category of users of the port
- In principle **State aid** in terms of Art. 87 (1) EGV
- **Typical user-specific infrastructure in ports**
- port superstructure (surface arrangements, buildings (e.g. warehouses, office buildings) mobile and fixed equipment
- yards, jetties, pipes and cables for utilities on terminal site
- works that make a terminal “ripe for construction” (filling of harbour basins, rough levelling, demolition of existing buildings and structures)

3. Special State aid questions within the port sector
- categories of port infrastructures -

• **Problematic items**

➤ docks

➤ quay walls

- Public general infrastructure (high water protection) or

- user-specific-infrastructure (loading and unloading of ships)?

➤ tendency of the Commission:
user-specific

3. Special State aid questions within the port sector

c) Special case: sale or lease of ,dry land‘ in ports

- Commissions Communication on State aid elements in rules of land and buildings by public authorities
- market economy investor principle
(sale or lease below market value constitutes state aid)
- instructive case: “Reebok” decision (OJ 2002 L 25/41)
 - Standard of comparison for the adequacy / real market conditions: regional comparison or comparison with competitors
 - positive net present value

3. Special State aid questions within the port sector

d) Typical criteria to avoid prohibited State aid

- Open and non-discriminatory access
- Market price („market economy investor principle”)
- Tendering procedure
 - well publicised, open and unconditional bidding
- De-minimis-rule
 - Funding of 100.000,- € within 3 years, not caught by Art. 87 (1)
 - Transport sector still exempted
- (*Altmark Trans* – criteria for services of general economic interest)

3. Special State aid questions within the port sector

e) The exemption of Art. 87 (3) (c) EC-Treaty

- Aid to facilitate development of certain economic activities or certain economic areas compatible with the common market
- Regional aid (port area):
 - disadvantaged region compared to national average
- Sectoral aid (port economy)
 - Flemish Ports decision
 - promotion of investments in port infrastructure and transfer of goods from roads to more environmental friendly modes like maritime transport = common interest, Art. 87 (3) (c).
 - may be need for State intervention to ensure realisation of investments in port infrastructure not generated by market

5. Impact / consequences

Impact and consequences of a violation of Art. 87, 88 EC-Treaty

- Where State aid is found to be incompatible with the common market by the COM, the role of the national authorities is merely to give effect to the Commission's decision
- Community law requires the competent authority to revoke a decision granting unlawful aid; obligation to demand recovery of the unlawful state aid

6. Outlook

Outlook

- State aid guidelines in preparation
- Main objectives:
 - legal clarity and certainty,
 - level playing field,
 - transparency
- Consultation process of the Commission:
 - 6 regional conferences, inter alia on port financing

Thank you
for your attention!

