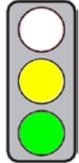


KEY ISSUES

Objective of the Regulation: The Commission wants to increase competition for port services and make the use of public money more transparent.

Parties affected: Operators and users of ports, port service providers.



Pro: (1) Extending the freedom to provide services to include port services leads to lower prices for port services.

(2) The regulation, applicable where port services are provided by the port management, which states that the number of service providers may not be limited to less than two, guarantees a minimum level of competition.

Contra: The regulation that port infrastructure charges may only vary for certain purposes, restricts the entrepreneurial freedom of port operators.

CONTENT

Title

Proposal COM(2013) 296 of 23 May 2013 for a **Regulation** of the European Parliament and of the Council establishing a framework on **market access to port services and financial transparency of ports**

Brief Summary

► Context and objectives

- Ports in the EU are of central importance to the European transport system.
 - A total of over 1,200 seaports handle 74% of imports and exports as well as 37% of internal EU trade.
 - 96% of freight and 93% of passengers passing through EU seaports are handled by the 319 seaports that, due to their importance, are to form part of the "Trans-European Transport Network (TEN-T) [Proposal COM(2011) 650 (TEN-T-Regulation), see [cepPolicyBrief](#)].
- The Services Directive, which regulates the provision of services in the internal market ("Freedom to provide services"; 2006/123/EC, Art. 16), does not apply to port services (2006/123/EC, Art. 2 (2)).
- The Commission complains of "low performance" in some TEN-T seaports [SWD(2013) 182, p. 2]. The Regulation will therefore make it easier for "providers of certain services" in seaports (Art. 2 (13)) - hereinafter: "port service providers" - to gain market access in order to promote competition and prevent market abuses.
- The Commission complains that some TEN-T seaports are "not attractive enough for investment" [SWD(2013) 182, p. 3]. The Regulation should therefore
 - make the financial relations between public authorities and port service providers more transparent,
 - strengthen the autonomy of port management (Art. 2 (5)) to define infrastructure charges.

► Area of Application

The Regulation applies

- to all 319 TEN-T seaports [Art. 1 (3) in conjunction with the proposed TEN-T regulation COM(2011) 650, Annex I], although the Member States may also apply the Regulation to other seaports (Art. 1 (4));
- to the following categories of port services (Art. 1 (2)): piloting and towing services, mooring of ships, cargo handling and passenger services (e.g. handling internal harbour transport), bunkering of ships, facilities for receiving ships' waste or cargo residues ("port reception facilities"; Art. 2 (10)) and dredging of waterway access.

► Freedom to provide a service

Port service providers based in the EU basically enjoy the freedom to provide services in the internal market (Art. 4 (1); exceptions: cargo handling and passenger services (Art. 11).

– Minimum requirements

The port management may impose minimum requirements upon port service providers (Art. 4 (1)), but only in relation to

- the professional qualifications of the port service provider,
- the equipment needed and
- compliance with safety and environmental regulations (Art. 4 (2)).

– **Public service obligations**

- The competent authority or port management may impose "public service obligations" on port service providers (Art. 8 (1) and (3)), if they
 - are in the public interest - e.g. safety, security, environment - and
 - would not be assumed by the port service provider considering its own commercial interest (Art. 2 (14)).
- A "public service obligation" should ensure that port services are available, without interruption, to all users at "affordable" prices (Art. 8 (1)).
- The competent authority can provide port services with public service obligations itself, or impose such obligations on a distinct entity over which it exercises a control ("internal operator", Art. 9 (1)).

► **Limitation of the number and selection of port service providers**

- The port management may limit the number of port service providers for a specific port service (Art. 6 (1)).
- This is only permitted due to (Art. 6 (1))
 - the scarcity or use of land reserved for essential port facilities, that cannot be replicated under "normal market condition" (Art. 2 (4)), or
 - a "public service obligation" whose performance may be obstructed if no limitation existed.
- In the case of a limitation on the number of port service providers, their selection takes place,
 - where the estimated value of the port service is € 2.5 million or less, by way of an open, non-discriminatory and transparent procedure which must be organised by the port management (Art. 7 (1));
 - where the estimated value of the port service is over € 2.5 million, strictly in accordance with the mandatory rules on the concession award procedure pursuant to the proposed Concession Directive [Art. 7 (2) and (3) in conjunction with Proposal for a Directive COM(2011) 897, particularly Art. 1, 5, 6, 35 and 39].
 - The concession award must take place on the basis of objective award criteria. These must - in addition to a transparent and non-discriminatory award procedure - ensure effective competition between the bidders so that the port management can select an overall economically advantageous offer [Proposal for a Directive COM(2011) 897, Art. 39 (1) and (2)].
 - The description of the concession to be awarded, the minimum requirements and the award criteria must be determined prior to the start of the award procedure and cannot be changed later [Proposal for a Directive COM(2011) 897, Art. 35 (1)].
 - The organisation of the award procedure (e.g. timing, communication) must be established and published in advance [Proposal for a Directive COM(2011) 897, Art. 35 (4)].
- The port management, or a distinct entity over which it exercises control, can carry out port services itself without having to undergo a selection or concession award procedure. The number of port service providers may be limited to no less than two. In this case, the body responsible for the decision on the number of service providers is an authority which is independent from the port management. (Art. 6 (4))

► **Port service charges**

- The port service charges payable by the users of port services must be set in a transparent and non-discriminatory way and must not be "disproportionate" to the economic value of the service provided (Art. 13 (1)) where
- port services are provided by an "internal operator" or
 - there is a limitation on the number and selection of port service providers (Art. 6 (1)) by way of the concession award procedure.

► **Port infrastructure charges**

- Port infrastructure charges are fees levied by the port management for the use of facilities and services which allow the entry and exit of vessels and the handling of passengers and cargo. (Art. 2 (14))
- They are defined by the port management (Art. 14 (1) and (3)).
- Port infrastructure charges may vary in order to (Art. 14 (1) and (3))
 - allow for rebates to be granted to frequent users of port services,
 - promote a more efficient use of the port infrastructure or short sea shipping or
 - to promote environmental performance, energy efficiency or CO₂-reduction.

► **Transparency regarding receipt of public funds**

- Where a port receives public funds, their provision and use must be clearly reflected in the accounts (Art. 12 (1)).
- Where the managing body of a port, that receives public funds, provides port services itself, each port service activity must be accounted for separately (Art. 12 (2)). This is to ensure that
 - all costs and revenues can be correctly assigned and
 - the "cost accounting principles of maintaining separate accounts" are complied with.
- Public funds paid in respect of "public service obligations" (Art. 12 (7))
 - must be shown separately in the relevant accounts and
 - may not be transferred to any other service or business activity.

► Supervisory body

- Member States have to ensure that a "supervisory body"
 - monitors and supervises the application of this Regulation (Art. 17 (1) and
 - handles complaints and disputes (Art. 17 (3) and (4)).
- The supervisory body must (Art. 17 (2))
 - be legally distinct and
 - independent of the port management and port service providers.

Main Changes to the Status Quo

Until now there has been no EU legislation on the freedom to provide port services, port service and port infrastructure charges or the financial transparency of seaports.

Statement on Subsidiarity by the Commission

According to the Commission, action is necessary at EU level because the TEN-T seaports play a key role in the cross-border transport of goods and passengers in the European transport system and it is the only way to achieve a true internal market for transport [SWD(2013) 181, p. 27 et seq.].

Policy Context

The European Parliament rejected the Commission's proposals on the deregulation of port services in 2003 ("Port Package I") and 2006 ("Port Package II"); both proposals were also intended to regulate cargo handling and passenger services. In future, these are to be covered by the Concession Directive proposed in 2011 [COM(2011) 897] which aims, in particular, to establish legal certainty with regard to the award of concessions. This proposed Regulation is accompanied by a Communication [COM(2011) 295] containing further measures to improve the efficiency of ports.

Legislative Procedure

23/05/2013	Adoption by the Commission
Open	Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General:	DG Mobility and Transport
Committees of the European Parliament:	Transport and Tourism (leading), Rapporteur Knut Fleckenstein (S&D Group, GER)
Federal Ministries:	Transport (leading)
Committees of the German Bundestag:	Transport (leading); EU Affairs; Economy
Decision mode in the Council:	Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

Formalities

Legal competence:	Art. 100 (2) TFEU (Sea Transport)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Legislative procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Extending the freedom to provide services to include certain port services leads to more competition and thus to better quality and/or **lower prices for port services** because it is no longer possible for individual ports to seal off the market to all but the established service providers. At the same time, the internal market will be strengthened because port service providers from other Member States will also be better able to offer cross-border services.

The rule whereby port services must be awarded by way of a concession award procedure in cases where the number of port service providers is limited and where the value exceeds the threshold of € 2.5 million, may reduce public expenditure. This is because ports are generally subsidised by public funds and port management bodies can now select the most economically favourable offer which will be determined in a competitive procedure on the basis of selection criteria which are established in advance.

The regulation that applies where port services are provided by the port management or a body over which it has control, **stating that the number of service providers may not be limited to less than two, guarantees a minimum level of competition.** This means that the market for port services cannot be

completely sealed off and the port management is thus prevented from charging as much as it likes for port services due to a lack of competition.

Impact on Efficiency and Individual Freedom of Choice

The rule that port infrastructure charges can only vary for certain purposes – granting rebates, efficient use of port infrastructure and environmental considerations – **restricts, without objective justification, the entrepreneurial freedom of the port operators.** In particular, ports handle goods, form part of what is generally a long transport chain and compete with one another. For freight forwarders therefore, the exact location of a port is generally of secondary importance; they choose the most economically favourable transport chain. It may be that the port closest to their destination does not form part of the most economically favourable transport chain. The ports should be allowed to vary their charges freely according to their own business model in order to win certain port users (e.g. certain sizes of vessel or types of cargo) by differentiated pricing.

The proposed accounting transparency in relation to the receipt and use of subsidies reduces the likelihood of wasting public funds.

A supervisory body to monitor compliance with the Regulation increases the chances that those affected will actually keep to the rules. The Commission should however make it clear that no additional authority will have to be created for this which would give rise to more costs, because the Commission itself is already responsible for overseeing the use of public funds and the state aid control. Competition with regard to port services can be monitored by national competition authorities. It should only be necessary to set up a complaints office in each Member State since this will help to reduce the cost of settling disputes.

Impact on Growth and Employment

Negligible.

Impact on Europe as a Business Location

Negligible. Although it is likely that international port service providers will set up branches in the EU as a result of the deregulation.

Legal Assessment

Legislative competence

Unproblematic. The EU is permitted to pass "suitable legislation" for ship transport (Art. 100 (2) TFEU). This applies, in particular, to the regulation of the freedom to provide services (Art. 58 (1) in conjunction with Art. 90 et seq. TFEU).

Subsidiarity

Unproblematic. In view of the central role of the TEN-T seaports for the cross-border transport of goods and passengers in the European transport system, action at EU level is necessary. In particular, rules to remove competitive distortions within the EU can only be made at EU level.

Conclusion

Extending the freedom to provide services to include port services leads to lower prices for port services. The regulation which applies where port services are provided by the port management, stating that the number of service providers may not be limited to less than two, guarantees a minimum level of competition. The regulation that port infrastructure charges may only vary for certain purposes, restricts the entrepreneurial freedom of port operators.