



Felicity Landon examines the potential impact of the introduction of the EU's Port Services Regulation

EARLY LAST YEAR, there were reports of 'chaos and confusion' in Brussels after a vote by MEPs stopped the controversial Port Services Regulation in its tracks. After near 20 years of arguments, opponents even hoped this might sound the death knell for Europe's third attempt to introduce port regulation. But compromises were made, the Regulation finally entered into force in March this year, and the resulting rules, somewhat watered down, seem broadly acceptable to the industry.

In a nutshell, the new Regulation is all about access to the market for port service providers, and transparency in terms of finance and state aid.

The new rules will apply from March 24, 2019. Governments and ports have two years to adapt their rules and practices, although the Regulation will not apply to port service contracts which were concluded before February 15 this year and are limited in time.

Prof Dr Eric Van Hooydonk, an Antwerp-based lawyer specialising in port law, is busy preparing a legal commentary on the Regulation.

"It will certainly not mean a revolutionary change in the way the EU port system functions," he says. "The Regulation respects the differences between port governance models in the EU. In addition, its rules on free market access for service providers do not apply to cargo and passenger terminals, or to pilotage, which are all very important port services. And nothing is said about the need to liberalise anachronistic dock labour monopolies, which still prevail in a number of EU

Eric Van Hooydonk



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The new rulebook



GREEN LIGHT: the European Parliament finally agreed to the port services regulation in March

ports. So, this is not going to be a radical 'liberalisation' of the port sector, but mainly a confirmation of the 'status quo' with the addition of a large number of procedural – one might say 'bureaucratic' – requirements."

The main reason for this was strong and combined resistance from port authorities, terminal operators and trade unions, supported by politicians, says Dr Hooydonk. "As a result of amendments introduced by the European Parliament, the initial Commission proposals were watered down very severely. Let's not forget that the debate about EU ports legislation started exactly 20 years ago and that two earlier proposals by the Commission were voted down by the Parliament. The finally adopted Regulation is a political symbol rather than a solution to the real problems that ports and port users are facing."

The Regulation applies to the 319 ports of the Trans-European Transport Network (TEN-T) – although the Brexit date means that the UK, which so vehemently opposed the Regulation throughout, could well repeal any implementation within days.

TWO CHAPTERS

The Regulation has two main chapters. The first covers rules on access to the market for port services, which govern the right of companies to obtain access to the port system in order to offer their services.

"Practically, the Regulation mainly regulates the right of authorities to limit free market access – for example, by the introduction of minimum

requirements for service providers, limits on the number of service providers in ports, or public service obligations to safeguard the general interest," says Dr Hooydonk. "If the number of providers is limited, the authorities must organise an open, objective selection procedure. But all these rules on market access only apply to towage, mooring, bunker supply and waste collection from ships."

The second chapter covers rules on the financial regime of ports, including financial transparency of the accounts of port authorities that receive public funding; the transparent setting of port service charges (which only apply in a number of specific cases where competition is limited); and port infrastructure charges – such charges must be levied and they must comply with competition law, but the autonomy of the port authorities is stressed as well, says Dr Hooydonk.

Isabelle Ryckbost, secretary general of the European Sea Ports Organisation (ESPO), says it is too early to say whether the new Regulation will mean major changes for some ports.

"We have been talking so long about this Regulation but we now have a final text; in all countries, our members and their national authorities are really looking at what is in the Regulation and checking it against the actual situation in the ports," she says. "I think in six months' time we will probably know more about what the difficulties might be and whether there are some problems in applying certain rules. However, we think the Regulation has moved very much into a 'tool box' – you can have different

systems and models but in each one you have to respect a minimum set of rules or principles, and it is about very fair principles."

The Regulations give member states the opportunity to apply certain exemptions, she points out. "For example, there are special exemptions for smaller ports, and member states can decide whether or not they want to make the regulations apply to pilotage. They also have to designate which authority will handle complaints – it can be an existing authority but they have to make clear who it is."

The rules allow for the number of service providers to be limited for certain reasons, for public service obligations to be put into contracts, and for certain minimum standards to be set, says Ms Ryckbost.

"The other part is transparency of accounts. If you receive public funding, it should clearly show in your accounts. Also, if you receive public funding for example for a port service for which you have introduced a public service obligation, this funding must be used for that and can't be used for anything else, to avoid cross-subsidy."

Ports are also required to be transparent in the way they set their charges: "You have to inform about the way you set your charges but you don't have to disclose the outcome of commercial negotiations," she says.

"The other part is how you get on with your users, your stakeholders – and it is quite a pragmatic approach. You must have a mechanism in place in case of a complaint. If one of the users has an issue with the port authority or what happens in the port – for example, if there is a service provider who would like to offer a service in the



COVERED: the rules on market access apply to towage, mooring, bunker supply and waste collection

port but is denied the opportunity and he thinks it is unfair – he will be able to lodge a complaint."

With the UK now in the process of exiting the European Union, Britain's ports face their own challenges under the Regulation. Anthony Woolich, head of competition and regulation at Holman Fenwick Willan, says: "One of the consequences of Brexit is that even if the Regulation is implemented in the UK, in the very short term it would be repealed."

However, he says, some of the elements of the

new rules will still be useful to the largely private sector UK ports industry. "The new Regulation puts the obligation on public sector ports to give a lot more transparency to what they receive in subsidies and public money – that would be useful to UK ports even when they are outside the EU. The Regulation will definitely make a difference and it will be in the interests of competition and transparency. Every time a port awards a contract, they will need to consider carefully the provisions of the Regulation." **PS**

Legal complexities muddy the waters

DEPENDING ON THEIR existing legislative framework, some EU member states will have to adapt their laws and regulations dealing with the operation of ports in order to comply with the new Port Services Regulation, says Eric Van Hooydonk. "Port authorities will have to adapt their procedures and ensure consultation of and information for port users and a neutral complaints handling procedure will have to be set up."

How will compliance be measured or monitored? "The member states must introduce penalties for breaches of the Regulation. No later than March 24, 2023, the European Commission has to submit a report to the European Parliament and the



TOWLINE: member states can decide whether they want the regulations to apply to pilotage

Council on the functioning and effect of the Regulation."

The Regulation does not cover State Aid in itself but it is likely that

the European Commission will soon introduce, via a separate instrument, a General Block Exemption for ports and airports, he

says. "That may enhance legal certainty in this field and reduce the bureaucratic burden on authorities and ports."

ESPO's Isabelle Ryckbost says one issue she can see regarding the Port Services Regulation is around interpretation: "Because the Regulation is the result of difficult compromises, the text is not always crystal clear, so there will be some interpretations to be made," she says.

Dr Hooydonk predicts there will be 'very many' legal complexities or issues to be resolved, "because the wording of the Regulation is in many respects vague and self-contradictory. A lot of new work for lawyers, for which they have to thank the European lawmakers!"