



**EUROPEAN SEA PORTS ORGANISATION** ASBL / VZW  
**ORGANISATION DES PORTS MARITIMES EUROPEENS** ASBL / VZW

## Response from the European Sea Ports Organisation (ESPO)

### to the Regulation proposal establishing a framework on market access to port services and financial transparency of ports

**26 September 2013**

#### *Executive Summary*

On 23 May, the European Commission published a communication entitled *Ports: an engine for growth* and a Regulation proposal establishing a framework on market access to port services and financial transparency of ports.

Since the adoption of the Commission's proposal, ESPO members who are organised on a national level, have been assessing the concrete impact of the Regulation proposal. The conclusion of this process is that there are very differing reactions among groups of countries ranging from the extremely negative to the somewhat positive. This result broadly reflects the diversity of European ports.

ESPO believes that the European Union can be a positive force in strengthening port management and port development policy, by ensuring a level playing field and legal certainty on the one hand and fostering growth and development of ports on the other hand. Well-performing port authorities will unmistakably contribute to the ambition of Europe to establish a competitive and resource-efficient transport system.

ESPO welcomes in that respect that the Commission is recognizing the important role ports are playing in Europe's economy. ESPO however believes that the Port Regulation proposal, as it stands now will not lead to the hoped-for results. On the contrary, ESPO fears that the Commission's proposal in its current form, could make well performing European ports engines sputtering. Why?

- The diversity of the European port sector makes it impossible to frame all ports and their managing bodies within one stringent legal framework, without giving in on their specificity and on the particular role ports are playing for their national/regional economy.
- By restricting the commercial freedom of EU port authorities and interfering in port-related governance competences, the Regulation proposal could hamper the necessary transition of European port authorities towards dynamic port developers and worsen the position of ports which are already high performing.

Nevertheless, ESPO remains open to continue the dialogue with the European Commission, the European Parliament and the Member States in view of reaching an agreement on a policy that guarantees the respect of the Treaty rules while allowing European ports to develop further as engines of growth and development for their region and the European economy as a whole.

## Understanding European ports and port authorities

To allow a better understanding of ESPO's position on the proposed regulation, it is important to understand European ports and port authorities and to see what challenges they are facing nowadays.

### *Ports are indeed engines for growth*

European seaports are extremely important for Europe's economy.

- **Growth and jobs:** European ports directly employ around 1,5 million people<sup>1</sup>. More important even, a recent OECD study<sup>2</sup> shows that in European regions each additional million of tons of cargo creates 300 new jobs in the port region.
- **Seaports are clusters of industrial and economic activities and increasingly the location for sustainable solutions** (e.g. renewable energy production and storage, IT governed traffic management). Seaports go beyond their role as transshipment nodes linking water with land transport.
- **Seaports are gates to the world:** 74% of goods imported and exported transit through the seaports. In that respect, seaports are key for the competitiveness of many European industries and their gate to the world. At the same time, they allow European citizens to purchase goods from all over the world.
- **Seaports are essential nodes in the TEN-T network and facilitators of sustainable transport:** as part of the new multimodal corridors, the core seaports will play an important role in linking the sea with its hinterland through sustainable transport modes such as rail and inland waterway transport. Moreover, more than one third of goods being transported between EU Member States transits our seaports. Not least, in 2011 more than 200 Million passengers benefited from seaports infrastructure for short or long journeys across Europe<sup>3</sup>.
- **Cruise ships are increasingly calling at European sea ports.** The effect on the **tourist industry** and the economy is self-evident. The European cruise industry generates 615.500 jobs and €36.7 billion of goods and services in Europe in 2011<sup>4</sup>.
- **Seaports contribute to territorial cohesion:** coastal regions are often economically fragile regions. In some cases, the presence of a seaport opens opportunities for the region and is a catalyst for the development of the region.

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<sup>1</sup> <http://pprism.espo.be/>

<sup>2</sup> Merk, O., Notteboom, T. (2013), « The Competitiveness of Global Port-Cities: the Case of Rotterdam, Amsterdam – the Netherlands », OECD Regional Development Working Papers, 2013/08, OECD

<sup>3</sup> Eurostat

<sup>4</sup> European Cruise Council

## *European ports are very diverse*

While the common saying “*when you have seen one port, you have seen one port*” might be a little bit exaggerate, nobody can deny that European ports are very heterogeneous. The scope of the proposed European regulation will cover more than 330 seaports (all TEN-T maritime ports) differing substantially in many aspects:

- **in size:** the regulation would equally apply to small ports (ex. In Finland or Sweden) which are welcoming only a few vessels a week as well as to large ports as the Port of Rotterdam that has weekly calls of 650 vessels.
- **in governance and organisational structures:** Seaports may be publicly or privately owned entities, operated entirely on a commercial basis or without immediate commercial considerations, financially and economically autonomous or depending on the public financing; landlord type (contracting out port services and managing the port land) or integrated vertically (providing all port services in house). More strikingly, most of the ports operate on the basis of policies in between these extremes.
- **in markets:** Ports are handling different kinds of trade (containers, bulk , oil, cars and special cargoes, passengers, cruise industry, etc...), each segment carrying its own specificities. Each segment in turn boasts various other markets (terminals, logistics companies, production plants and value adding industries, etc...). At the same time, it is extremely difficult to even compare transshipment ports that are part of complex hub and spoke networks with gateway ports serving close or further hinterlands, or with regional and local ports linked with marine renewable energies, such as offshore wind farms and new models of short sea shipping. Sometimes ports are vast industrial sites in addition to their transshipment function.
- **in geographical location:** ports can be located in protected or engineered coast lines or in natural deep water coves, in tidally influenced estuaries or rivers as well as canals. The geographical location has a direct influence in terms of infrastructure requirements and environmental and safety considerations (e.g. dredging, breakwaters, locks, pilotage, etc..). Moreover, ports can be part of big cities or on the contrary be located in more remote areas.
- **in competitive position and market power:** Seaports operate in competitive markets. Competition exists between ports within the same region or maritime façade or between ports with an overlapping hinterland. Competition often exists within ports (e.g. between terminals of a single port). Seaports also face competition from other means of transport. Moreover, as a result of the concentration in the shipping industry, port customers market power is without doubt strong and increasing.
- **in financing ports investments and operations:** Different degrees of involvement of the public and private sector exists in the financing of seaports.
- **in tasks:** port tasks (such as water supply, security control, high water protection, safety and civilian infrastructure maintenance and building, etc.) often follow a certain historical and administrative heritage, which differs considerably from Member State to Member State and even among ports within Member States:

**All these differences make it very difficult to develop a set of rules that goes further than guiding principles.**

## *Managing bodies of all European ports or, or at least, want to become dynamic port developers*

Management of European seaports is in most cases devolved to a port authority, an entity which, regardless of ownership and other institutional features, assumes both public and economic responsibilities. This hybrid character makes port authorities ideally placed to meet the various challenges that both market forces and society impose upon seaports.

Ports realise that, to fulfil this mission, they have to do more - and be allowed to do more - than administering port land and regulating nautical safety. Though essential, these basic functions need to be developed pro-actively in a broader range of tasks that adds value to the wider port community, the logistics chain, business in general and the societal and environmental context in which ports operate.

Notwithstanding their diversity, European port authorities are, or are in the process of, becoming dynamic and commercial port developers. Policy at all levels should help them performing this role.

See also the ESPO manifesto, which can be downloaded from the ESPO website: [www.espo.be](http://www.espo.be)

## *All European Ports are in search of a level playing field*

European sea ports and sea port authorities strive to respect the Treaty rules that apply to them.

In that respect, the European Sea Ports Organisation has always been demanding **clear guidance** as regards the application of relevant Treaty rules, be it on public funding of port investments or the provision of port services. Guidance should facilitate the implementation of the Treaty rules and should be accompanied by a stringent Commission action in case of manifest breaches of Treaty rules in order to obtain a level playing field between ports.

ESPO has always believed that clear guidelines on the interpretation of the Treaty rules would be the most appropriate instrument to guarantee the application of the Treaty. However, ESPO members may in principle be able to support a legislative framework that:

- makes the freedom to provide services applicable to the port sector, while taking into account its specific character and features;
- ensures financial transparency where ports receive public funding for their infrastructure and/or operations.

But it needs to be said, that these challenges are not the only obstacles to a level playing field between ports. **A number of other issues jeopardize the competitiveness of European ports:**

- **Maritime transport is the only mode of transport for which there is no internal market.** Vessels transporting EU goods from one European port to another are, anno 2013, still considered as coming from outside the European Union. Existing customs facilitation

schemes are insufficient and reach only 10 to 15% of maritime traffic. The internal market for shipping still does not exist. This clearly puts maritime transport in a competitive disadvantage with other modes of transport;

- **Port users and customers still face burdensome and non-efficient administrative procedures and controls in ports** (custom controls, phito-sanitary, etc...). European ports with burdensome custom procedures and controls are competing with other European ports whose custom authorities are more efficient and more business driven.
- **Environmental** legislation, in particular the provisions of MARPOL Annex VI, imposing as from 2015 lower sulphur standards, lead to new challenges and might even radically change transport patterns and modes.
- The daily competition between some European ports and the **non European neighbouring ports**, functioning in a completely different legislative framework, is a much more fundamental challenge. In many areas (public funding, uneven environmental standards, labour conditions, customs procedures) the Union's neighbouring ports enjoy a more favourable regime.

*European ports need an economic and political environment that gives them the tools to face the challenges of tomorrow.*

- Growing volumes in ports: by 2030 traffic is predicted to rise by 50% according to the European Commission's Impact Assessment accompanying the proposal;
- Ever-increasing ships size and the cost of subsequent adaptation of port and hinterland infrastructure;
- An increasing societal (housing, city development needs) and environmental pressure;
- Further globalisation;
- Transition to alternative fuels.

*Ports should be empowered to meet these challenges. European ports are willing to respect the Treaty principles but do not believe a regulatory straightjacket, that does not fully consider the specificity of each port, will provide the means necessary.*

## ESPO's position on the proposed regulation

**In principle, the proposed port regulation addresses some important conditions for ensuring a level playing field:**

- By tackling the transparency of financing in ports,
- By recognizing the freedom to provide port services
- By acknowledging that the setting of charges and the minimum requirements for port services are important tools of port management.

**But the Commission proposal equally disappoints, since it partly undermines those principles:**

- by intervening in the commercial freedom of ports and port authorities to vary charges according to the port management's economic strategy;
- by prescribing how ports and port authorities should deal with their clients;
- by imposing additional administrative burden to ports which are not competing at the European scene;
- by creating an independent supervisory body.

Moreover, ESPO has always taken the view that it would be better if the European Commission had been concentrated on enforcing the general rules of the Treaty to the ports sector accompanied by non legislative guidance.

***In that overall context, ESPO and its members cannot accept the regulation proposal as it stands.***

In the light of these considerations, ESPO has listed below the main concerns ESPO members have, concerns, which, if not addressed properly during the legislative process, would make it impossible to accept this upcoming legislation.

### ***ESPO's main concerns:***

*(following the order of the articles of the Regulation)*

#### **1. Scope – Dredging is not a port service in the sense of this Regulation**

Dredging is part of the maintenance of the port infrastructure. It is the responsibility of the managing body of the port and/or competent authorities to keep the port accessible. Dredging is therefore not a port service that the port authorities are offering to their customers. Port users are not paying a port service charge for the dredging in the port but are charged through the port infrastructure charges. Moreover, dredging is considered a public task in many cases, in some cases even serving other than transport needs. Dredging operations are therefore often carried out in accordance to public procurement rules, which port authorities have to comply with.

## **2. Freedom to provide services and proportional market access rules and procedures**

It should be clear that ports and port authorities are also subject to the Treaty and that the freedom to provide services should apply to them as well. However, in the interest of the most efficient operation of a port, port authorities must have the possibility to limit the number of service providers. A port with limited operational space, or a limited capacity, should not be obliged to open its market for an unlimited number of service providers. Equally, a port can be obliged to restrict the number of service providers for reasons of safety, security or protection of the environment. Such a limitation should not automatically be linked to a public service obligation. But ESPO agrees that any limitation preventing competition should be then accompanied by open selection procedures and safeguards in terms of port charging to prevent potential abuses.

The rules on the selection procedure in case of the limitation of the number of providers should not result in additional and unnecessary administrative bureaucracy. The requirement to use a selection procedure which is open to all interested parties, non-discriminatory and transparent is enough to ensure an open market.

EU rules should not interfere with the freedom of Member States or public authorities to decide the way they carry out their public service tasks, be it in-house or through a controlled legal entity or through a private partner selected under the public procurement rules. Ports and port authorities must be allowed at all times to organise and/or operate themselves one or different port services. When a legally established limitation restricts competition, extra guarantees should be established to avoid abuses or conflicts of interest.

## **3. Port infrastructure charging**

Managing bodies of the ports are involved in economic activities in competitive markets. In order to provide them with proper autonomy to pursue their economic strategy, the possibilities to vary port infrastructure charges should not be restricted. In addition, the possibility to negotiate individually with port users should be allowed to attract new traffics or retain existing ones during downturns (e.g. Mega ships, new markets such as bio-mass, etc..).

A freedom to negotiate and differentiate port infrastructure charges should however not be seen as a “wild card” for applying dumping charges or a licence for the abuse of a port’s dominant position. State aid and competition rules should be fully applied.

## **4. Relationship with port customers**

The principle that there is a dialogue with port user representatives on the charging of port infrastructure and port services is a sound one. This already happens in practice. Port authorities have regular contacts with their customers as a normal commercial practice. Imposing EU rules is unnecessary and could lead to duplication of forums and processes. It should be left to the managing body of the port to organise such dialogue according to its particular circumstances (e.g.

the scale of a port) and needs (e.g. commercial strategy, development plans), while complying with this basic principle.

In the setting of port infrastructure charges, elements such as market evolution, investments and deployment plans, the competitive position of the port and other many relevant factors have a considerable influence. Providing information to users on total costs and revenues is therefore not relevant and can lead to unnecessary disputes and even jeopardize the port's commercial strategy.

The ports environment is a business to business environment. Port customers buying power is in most of the cases such as to ensure that the charges levied are subject to downward pressure. Certainly, as a result of the concentration in the shipping industry, ports have to deal with increasingly powerful customers which do not need extra protection from the EU (a good example is the recently announced P3 operational alliance on East – West trades, involving three of the major shipping lines).

#### **5. No need for an independent supervisory body to ensure application of the regulation**

The requirement to designate or establish an independent supervisory body is unnecessary. In response to complaints of abuse of dominant position or unfair pricing, national competition authorities or other existing competent authorities can already today request information from the parties involved and launch an investigation. Moreover different Member States, have an arbitration procedure in view of settling disputes. Since there are already procedures in place this provision is unnecessary. Additional institutionalisation and bureaucracy should be avoided in a time when resources are under pressure in all Member States.

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*Since 1993, ESPO represents the port authorities, port associations and port administrations of the seaports of the EU. The mission of the organisation is to influence public policy in the EU to achieve a safe, efficient and environmentally sustainable European port sector operating as a key element of a transport industry where free and undistorted market conditions prevail as far as practical.*