



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

Response from the European Sea Ports Organisation (ESPO)

to the draft report of Mr Fleckenstein on the proposal establishing a framework on market access to port services and financial transparency of ports

21 November 2013

Introduction

On Tuesday 26 November, the Transport Committee of the European Parliament will discuss the proposal for a Port Regulation and the draft report of Mr Fleckenstein.

Since his appointment as Rapporteur and during the preparation of his report, Mr Fleckenstein has been visiting different ports in the European Union and had different exchanges of views and meetings with ports and port representatives. ESPO and its members appreciate very much this open dialogue and recognise the efforts the Rapporteur has made to understand European ports and port authorities. ESPO believes this understanding of European ports and their diversity is better reflected in the draft report.

The European Sea Ports Organisation (ESPO) welcomes the draft report of Mr Fleckenstein. The report addresses to a large extent the problems that European port authorities had identified in their initial response to the draft Regulation. This response of ESPO to the draft regulation can be downloaded:

English version:

http://www.espo.be/images/stories/policy_papers/policy_papers2013/2013-09-26%20espo%20policy%20paper%20ports%20regulation%20final%20adopted%20dublin%20exco.pdf

French version:

http://www.espo.be/index.php?option=com_content&view=article&id=49&Itemid=60

ESPO's main concerns regarding the Commission proposal

(following the order of the articles of the Regulation)

In this section, ESPO is listing its main concerns regarding the Commission Port Regulation proposal and assesses the related proposals from the Rapporteur.

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.

⇒ **The Rapporteur is excluding dredging from the scope of this Regulation. ESPO fully endorses the amendments 25 and 27 of the draft Fleckenstein report.**

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 (e.g. case of pilotage). Such a limitation can, but 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.

⇒ **Amendments 8, 10, 35, 36, 37 and 48 address these concerns. ESPO fully supports these amendments.**

The rules on the selection procedure in case of 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. The duration of the port service contracts should be proportional to the investments made. Whenever port service contracts are "concessions" as defined in the forthcoming concession directive, those rules should apply. Port service contracts that are not "concessions" in the sense of that directive should not follow the rules of the concession directive.

- ⇒ **ESPO fully supports in that respect the Rapporteur's amendments 9, 40, 41, 42, 43, 44 and 46**

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.

- ⇒ **With his amendments 49, 50 and 51, the rapporteur aims at clarifying article 9. His amendments improve the Commission proposal.**

3. Port infrastructure charging

The Commission proposal recognizes the role of the port authority to set its own charges. ESPO fully welcomes this principle. Managing bodies of the ports are involved in economic activities in competitive markets. However, in order to provide ports 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.

- ⇒ **In his draft report Mr Fleckenstein fully recognizes that setting and varying port infrastructure charges in function of the port's economic strategy is an important tool for the managing body of the port. In addition the Rapporteur fully understands that the criteria for variation of infrastructure charges should be flexible. Finally, the Rapporteur strengthens the reference to state aid and competition rules.**
- ⇒ **ESPO supports in that respect amendments 19 and 61. But, to be fully consistent however with its aim (see deletion of last sentence of paragraph 4), the reference to "*relevant, objective, transparent and non-discriminatory*" in paragraph 4 (amendment 61) should be deleted as well.**

While setting the principle of the autonomy of the port in setting its own charges in paragraph 1 of article 14, the Commission is taking back this autonomy to some extent in paragraph 5 by empowering the Commission to decide on common classifications of vessels and fuels and on common charging principles for port infrastructure charges.

- ⇒ **The Rapporteur has limited the scope of the delegated acts to the classification of vessels and fuels. In accordance with amendment 62, the Commission should not be empowered any longer to decide on common charging principles on the**

basis of delegated acts. ESPO sees this amendment as a real improvement. ESPO would however prefer the complete deletion of paragraph 5 of article 14. The reference to the Environmental Ship Index (ESI) in amendment 22 is positive. ESI is a voluntary system designed to improve the environmental performance of sea going vessels. It enables ports to stimulate ships to improve their environmental performance. Variations on the basis of environmental performance should however be considered as a possible tool of the port to vary its charges, not as an obligation. Amendment 22 could be adapted in that sense.

By obliging the managing body of the port to explain port users, on top of the structure and criteria used to determine the charges, also the costs and revenues that served as a basis, the Commission is again interfering with the role of the port in setting its own charges. 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.

Furthermore, ESPO believes that the transparency provisions in Chapter III are an important instrument to monitor public funding, costs and revenues and eventual subsequent abuses.

⇒ **The Rapporteur deletes the reference to costs and revenues in paragraph 6 (see his amendment 63). ESPO welcomes this deletion.**

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.

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).

⇒ **With his amendments 65 and 66, the Rapporteur aims at making the provisions on consultations of port users more flexible and less burdensome. ESPO considers these amendments as substantial improvements of the Commission proposal.**

- ⇒ **ESPO believes though that the essential point to make in article 15 is that ports should ensure adequate consultation mechanisms with their users. Port users should in particular be informed in case the port is changing substantially the port charges.**
- ⇒ **ESPO believes that the provision on having adequate facilities for the consultation with port users is superfluous and too prescriptive. ESPO therefore asks the deletion of that part of paragraph 2 of article 15.**

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

ESPO believes that the rules of this regulation, when adopted, should be applied. Member States should also ensure that they have an independent complaint mechanism in place allowing any party having a legitimate interest can lodge a complaint.

But 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.

- ⇒ **The Rapporteur’s amendments on article 17 clearly show that the Rapporteur is sharing ESPO’s concerns. He replaces the concept of “independent supervisory body” by “independent supervision” and deletes paragraph 6 of article 17. He furthermore highlights the importance of an independent complaint procedure and recognizes that the supervision can be dealt with by different existing bodies such as competition authorities, courts, ministries or departments within ministries not linked to the managing body of the port.**
- ⇒ **Again ESPO supports these amendments which considerably improve the Commission proposal. ESPO however believes that article 17 would gain in clarity if it was reduced to a few paragraphs which stress the importance of application, of having a complaint procedure and of informing the Commission on the processes in place.**
- ⇒ **Furthermore to be in line with amendment 77 (deletion of article 18), recital 28 should be deleted too.**

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.