

# **Report on the framework on future EU ports policy**

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# Glossary of terms

|       |                                       |
|-------|---------------------------------------|
| ARA   | Amsterdam/Rotterdam/Antwerp area      |
| Art.  | Article                               |
| CoR   | Committee of the Regions              |
| COSCO | China Ocean Shipping (Group) Company  |
| EEC   | European Economic Community           |
| EC    | European Commission                   |
| EP    | European Parliament                   |
| EU    | European Union                        |
| LRA   | Local and regional authorities        |
| MS    | Member State                          |
| PSO   | Public Service Obligation             |
| TEU   | Treaty on European Union              |
| TEU   | Twenty-foot Equivalent Unit (Table 1) |

# Summary

The proposed regulation establishing a framework on market access to port services and financial transparency of ports tries to pursue the policy ideas announced by the European Commission in the White Paper “Roadmap to a Single European Transport Area” (2011). To fulfil such policy requirements and to stay within the consent of social market economy as stipulated in the Treaty on European Union (TEU), the proposal demands a transparent separation of port infrastructure and port services by avoiding the maintenance of existing monopolies, be they state or private monopolies, avoiding possible cross-subsidisation if port service providers and port infrastructure managers belong to the same owner.

Ten examples of port organisations show that there is a wide variety of models used in the EU, reflecting the different historical development in the Member States where the ports are located (e.g. vertically integrated ports in post-communist countries, municipal ports according to Hanseatic traditions in the North Sea range, centralist traditions in Southern European states, privately-owned ports in the United Kingdom).

Political compromises have to be established between the interests of regions and their regional organisations that are owners or stakeholders of ports and, in this role, have to keep the commercial interest of their ports in mind and the regions that are landlocked thus depending on an efficient and low-cost access to short sea and deep sea transport in order to keep their local industry competitive in globalised markets. Furthermore, there are also conflicts of interest between regions with highly competitive ports and regions the ports of which face certain challenges that have to be reconciled. Based on the results of the compromises (rapid, slow or no market opening, the appropriate legal instrument, regulation, directive or guidelines) shall be decided).

The regulation has some resemblance on the EU directives on market opening in the railway and air sectors. The experience of the European Union in the railway sector clearly shows that an insufficient separation of infrastructure and services creates opportunities to discrimination, unfair market practices and non-transparent behaviour of the market participants. The proposals of the EC in the Fourth Railway Package and the Airport Package clearly reflect this development. Especially in the rail sector, potential private investors are still hesitant to invest where state or private monopolies exist and the incumbent companies have long-lasting powers to influence service quality and pricing.

# 1 Diversity of governance models and ownership structures

*Table 1. Assessment results – Ports Package*

| Name of Port      | Country | Owner of port infrastructure                   | Ownership status | Manager of port infrastructure                           | Owner of Manager                               | Management <sup>1</sup>      | Organisational Model  | Total cargo world port ranking 2010 <sup>2</sup> | Mio T  | Container traffic world port ranking 2010 | Mio TEU |
|-------------------|---------|--|------------------|--|--|------------------------------|-----------------------|--|--------|---|---------|
| Port of Rotterdam | NL      | 70% Municipality of Rotterdam, 30% Dutch State | public           | Port of Rotterdam Authority (public limited company)     | 70% Municipality of Rotterdam, 30% Dutch State | Government owned corporation | public landlord model | 3  | 429,90 | 10  | 11,10   |
| Port of Hamburg   | DE      | 100% Municipality of Hamburg                   | public           | Hamburg Port Authority (Anstalt des öffentlichen Rechts) | 100% Municipality of Hamburg                   | local government             | public landlord model | 29   | 121,00 | 15  | 7,80    |

<sup>1</sup> <http://www.uctc.net/research/diss131.pdf> 7.7.13, \* = not mentioned in the document – research consultant.

<sup>2</sup> Ranking (<http://aapa.files.cms-plus.com/Statistics/WORLD%20PORT%20RANKINGS%202010.pdf>) 7.7.13- Sources: Agência Nacional de Transportes Aquaviários - ANTAQ (Brazil), Institute of Shipping Economics & Logistics, Containerisation International Yearbook 2012; U.S. Army Corps of Engineers' Waterborne Commerce Statistics Center, Secretariat of Communications and Transport (Mexico), Waterborne Transport Institute (China); AAPA Surveys; various port internet sites)

| Name of Port      | Country | Owner of port infrastructure | Ownership status | Manager of port infrastructure                          | Owner of Manager   | Management <sup>1</sup>  | Organisational Model        | Total cargo world port ranking 2010 <sup>2</sup> | Mio T             | Container traffic world port ranking 2010 | Mio TEU |
|-------------------|---------|------------------------------|------------------|---|--|--------------------------|-----------------------------|--|-------------------|---|---------|
| Port of Immingham | GB      | 100% private                 | private          | ABPA Holdings Limited (Associated British Port Holding) | ABPA (Jersey) Ltd, which is made up of a consortium comprising Borealis, GIC, Goldman Sachs, and Prudential.   | *private limited company | private landlord model      | 68   | 54,00             | n.a.                                      | n.a.    |
| Port of Barcelona | ES      | n.a.                         | public           | Barcelona Port Authority                                | n.a.   | statutory authority      | public landlord model       | 92   | 42,80             | 62  | 1,90    |
| Port of Koper     | SI      | Republic of Slovenia         | public           | Luka Koper Inc. (Concessed till 2043)                   | 51% Republic of Slovenia, 11% Slovenian Restitution Fund, 3,3% Municipality of Koper, 3,8% Mutual and pension funds, 6,74% Legal entities, 15,6% Natural persons, 1,5% Local banks, etc. | *public limited company  | vertically integrated model | n.a  | 15,3 <sup>3</sup> | n.a.                                      | 0,4*    |

<sup>3</sup> <http://www.luka-kp.si/eng/termina>

| Name of Port        | Country | Owner of port infrastructure | Ownership status | Manager of port infrastructure                | Owner of Manager  | Management <sup>1</sup>                    | Organisational Model        | Total cargo world port ranking 2010 <sup>2</sup> | Mio T            | Container traffic world port ranking 2010 | Mio TEU |
|---------------------|---------|------------------------------|------------------|---|---|--|-----------------------------|--|------------------|---|---------|
| Port of Genoa       | IT      | Republic of Italy            | public           | Genoa Port Authority                          | 100% Republic of Italy  | Government owned corporation               | public landlord model       | 72   | 50,70            | 68  | 1,70    |
| Port of Constanta   | RO      | Republic of Romania          | public           | CN Maritime Ports Administration SA Constanta | 100% Republic of Romania  | *Government owned corporation              | public landlord model       | 84   | 47,50            | 124                                       | 0,50    |
| Port of Gioia Tauro | IT      | Republic of Italy            | public           | Port Authority Gioia Tauro                    | 100% Republic of Italy  | National government                        | public landlord model       | 107  | 35,30            | 39  | 2,80    |
| Port of Le Havre    | FR      | Republic of France           | public           | Grand Port Maritime du Havre (state agency)   | 100% Republic of France   | *Government owned corporation (since 2008) | public landlord model       | 50   | 70,40            | 52  | 2,30    |
| Port of Rijeka      | HR      | Republic of Croatia          | public           | Port of Rijeka Inc. (Concessed till 2042)     | 71% Government of the Republic of Croatia, 8,1% Croatian Health insurance fund, 3,5% Croatian Pension Fund, 2,8% Splitska Banka, 13% small stockholders, etc. | *public limited company                    | vertically integrated model | n.a  | 4,6 <sup>4</sup> | n.a.                                      | 0,1**   |

<sup>4</sup> [http://www.lukarijeka.hr/Data/Files/198\\_2011063015236967/Statistics\\_2010.pdf](http://www.lukarijeka.hr/Data/Files/198_2011063015236967/Statistics_2010.pdf)



The sample shows the following ownership models:

- Danish National Action Plan for Road Safety: The objective is to reduce fatalities and seriously injured by 40% from 2001-2012. The plan contains 62 measures which are related to speeding, alcohol, cyclists, and junctions (these factors contribute to approx. 85% of all Danish road accidents); measures are regularly subject to evaluation
- 100% state ownership
- Majority ownership by the municipality (interestingly, this is the case for the two largest ports in the sample)
- Consortia with the state as majority owner and financial investors as minority shareholders
- Private ownership

In the sample, state ownership is prevalent in the Mediterranean and Black Sea area, whereas the North Sea range shows a wider variety of ownership models with the municipality as owner or private ownership.

There are two basic types of organisational structure:

- Landlord model where the infrastructure owner does not provide cargo handling and passenger services
- Vertically integrated port where the infrastructure owner also provides the port services

In the sample, the two examples of vertically integrated ports are located in post-communist countries.

The governance models represented in the sample are:

- Public limited company
- Government-owned corporation
- Public authority

The sample shows a wide variety of models used in the European Union, reflecting the different historical development in the Member States where the ports are located (e.g. post-communist countries, hanseatic traditions in the North Sea range, centralist traditions in Southern European states).



## **2 Impact of the EC legislative proposal on local and regional authorities**

### ***Introductory note***

In the opinion of the Consultant, the present File Note contains a basic dilemma. On the one hand side, there are regions and their organisations that are capital owners or stakeholders of ports and, in this role, have to keep the commercial interest of their ports in mind. On the other hand side, there are regions that are landlocked and thus depend on an efficient and low-cost access to short sea and deep sea transport in order to keep their regional industry competitive in globalised markets.

To a certain extent, this dilemma seems to be mirrored in two antagonistic political stances, a “liberal” approach as adopted by the EC trying to open the market access to ports services and a “conservative” approach trying to preserve the status quo.

This constellation poses challenges to the Consultant, especially in drafting the recommendations. In the end, it boils down to a political decision by the CoR on the basic course of action to be taken.

### ***General remarks***

Although the TEU prescribes the principles of social market economy in a highly competitive environment (Art. 3.3), the regulation only partially applies the principles of the social market economy due to the fact that there have been significant distortions in the ports sector in the past with a high involvement of the state in the economic process of offering infrastructure and services.

Nevertheless, the proposed regulation tries to pursue the policy ideas announced by the Commission in the White Paper on transport (2011). To fulfil such policy requirements and to stay within the consent of social market economy, it is consequent to demand a transparent separation of port infrastructure and port services by avoiding the maintenance of existing monopolies, be they state or private monopolies, avoiding possible cross-subsidisation if port service providers and port infrastructure managers belong to the same owner.

Since the early nineties, the EC has dealt with the same challenges in the rail and airport sectors which have similar market structures, in particular the predominance of state-owned monopolies in the market (see Chapter 1). The experience in the two sectors may be of use when designing the new port

package. The experience of the EU from the liberalisation of the railway market clearly shows that an insufficient separation of infrastructure and services creates opportunities to discrimination, unfair market practices and non-transparent behaviour of the market participants.

### ***Geographical scope (Art. 1.3)***

- With the limitation of scope to “*all seaports of the trans-European transport network, as defined in Annex I of Regulation XXX [regulation on the TEN-T Guidelines]*”, the Proposal tries to avoid overloading small ports with administrative work and thus comply with the principle of proportionality. However, the criteria of the selection of the ports in Annex I shall be checked. An important criterion is the role of the ports for purely regional services (such as serving smaller islands, e.g. in Greece, Sweden, United Kingdom), European short sea shipping and international shipping.
- Decision No 661/2010/EU on Union guidelines for the development of the trans-European transport network gives the following selection criteria (Art. 12.2):  
“*The seaports included in the trans-European transport network shall correspond to one of the categories, A, B or C, defined as follows:*  
*A: international seaports: ports with a total annual traffic volume of not less than 1,5 million tonnes of freight or 200 000 passengers which, unless it is an impossibility, are connected with the overland elements of the trans-European transport network and therefore play a major role in international maritime transport;*  
*B: Union seaports, not included in category A: these ports have a total annual traffic volume of not less than 0,5 million tonnes of freight or between 100 000 and 199 999 passengers, are connected, unless it is an impossibility, with the overland elements of the trans-European transport network and are equipped with the necessary transshipment facilities for short-distance sea shipping;*  
*C: regional ports: these ports do not meet the criteria of categories A and B but are situated in island, peripheral or outermost regions, interconnecting such regions by sea and/or connecting them with the central regions of the Union.”*

### ***Definitions (Art. 2)***

- A definition of “competent authority” is missing although it plays a major role in Art. 8 and 9. The term “competent authority” is used in Regulation (EC) 1370/2007 on public passenger transport services by rail and by road where it is defined as “*any public authority or group of public authorities of*

*a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or anybody vested with such authority” (Art. 2 (b)). The definition shall remain unchanged in the recast of the Fourth Railway Package. It would contribute to the consistency of EU legal texts and increase the legal transparency to develop a harmonised definition not restricted to passenger services.*

- The term “managing body of the port” (Art. 2.5) has been taken over from the airport groundhandling directive 96/67/EC where the definition of “managing body of the airport” is almost identical (Art. 2c).

### ***Market opening***

- Cargo handling and passenger services are part of the exhaustive enumeration of Art. 1.2; however, in Art. 11 they are explicitly excluded from the parts of the regulation which deal with market access. In this way, the commercially most important types of services are not subject to Art. 3 to 10. Besides the fact that “hiding” the exemption of the commercially most important types of services at the end of the concerned Chapter is highly confusing, there remains the question how the explicit objective of improving the performance of European ports shall then be achieved. The EC argues that these services will partly be covered by the future directive on the award of concession contracts since these services are often organised by means of concessions (see Chapter 1). Furthermore, the EC states that it does not want to undermine efforts being made to initiate a Social Dialogue on EU level.
- The restriction to providers established in the EU as stipulated in Art. 3.1 might cause problems in the highly globalised shipping industry (e.g. the container terminal in Piraeus/Greece run by the Chinese company COSCO). This provision could block investment and hinder competitiveness and economic development of Community ports.
- For reference, the market opening in the ports sectors of Latin America and Asia has greatly contributed to the success of the emerging markets.

### ***Minimum requirements for the provision of port services (Art. 4-5)***

- With a minimum of restrictions, there are higher chances to attract new investors who would be blocked by the mostly state-owned incumbent port operators. This is particularly true if a MS has one predominant port such as Koper for Slovenia, Constanta for Rumania, the ports of the Baltic States

(Klaipedia for Lithuania, Ventspils for Latvia, and Tallinn for Estonia), Malta, and Cyprus.

- Art. 4.4 implies the obligation for ports to establish training facilities for “*specific local knowledge or acquaints with local conditions*” if they do not already exist; with the respective financial consequences. In the railway sector, the question of training facilities provided by the incumbent had led to many complaints by new entrants and to regular actions of the regulatory bodies.
- As stipulated in Art. 5.2, the managing body of the port has to provide sufficient resources to answer a request for the provision of port services on the basis of the minimum requirements within one month.

### ***Limitations of the number of providers of port services (Art. 6-7)***

- Art. 6.1 implies the obligation for the managing body of the port to draft a port development plan if it does not already exist. The LRA could play a role here.
- According to Art. 6.4, the port authority may not decide on its own to allow market access to only one service provider, obviously in order to avoid foreclosure of market participants. A possible procedure could be the following: The managing body of the port shall prove that the market situation renders possible a limitation. The independent supervisory body shall decide whether the decision has any discriminatory or inequitable impact on the market. The limitation shall be temporary in case that the market situation changes and the supervisory body is entitled to monitor it, but not longer than 5 years (to be harmonised with Regulation (EC) 1370/2007 resp. its recast). There is always a danger that such a rule “cements” the position of concessionaires thus establishing long-lasting monopolistic or oligopolistic market structures.
- Art. 7 mainly takes over the provisions of the Proposal for a Directive on the award of concession contracts (together with other proposals for directives). As the CoR points out, it thus refers to a “moving target” the legislative process of which has to be taken into consideration when assessing the Article.

### ***Public service obligations (PSO)***

- In Art. 8 and the other articles and paragraphs dealing with PSO, no reference is made to Regulation (EC) 1370/2007 on public passenger transport services by rail and by road. In addition, the important term of “competent authority” is not defined. It would make sense to take the prescriptions of Regulation 1370/2007 into account when formulating Art. 8 in order to avoid too many differing definitions and rules on the same issues in the EU transport sector.
- If a competent authority provides port services that fall under PSO itself, its activity must remain confined to the ports where it imposes PSO (Art. 9.3).
- The monitoring of PSO contribution as stipulated under Art. 12.7 could be left to the competent authority. The best solution would be to leave it to an independent supervisory body.
- Experience with PSO contracts in rail services has shown that there is a possibility that port contracts will be prolonged shortly before the regulation comes into force in order to undermine the regulation.

### ***Staff***

- The stipulations of Art. 10.2 open a possibility that the managing body will employ additional staff as soon as it knows of any type of privatisation (as happened in other parts of the world, in particular in Latin American port restructuring). One solution coming from German and Austrian legislation is the establishment of a “social plan”. Otherwise, it might become difficult to find potential investors and to avoid social strife.
- The compliance of Art. 10.3 with national and Community data protection laws should be checked. Publishing the “contractual rights” of staff seems problematic and might violate rights concerning their personal data.

### ***Financial transparency (Art. 12)***

- Transparency of financial relations is of paramount importance for the concept proposed by the regulation. For this reason, the implementation of a port policy requires the legal basis of a relation with respective designating acts and strict notification procedures. Without a close monitoring of transparency of financial relations, the regions which have no seaports might experience complex if not negative impacts in the global competition when it comes to sea-bound exports and imports.

- Similar provisions are included in Directive 2012/34/EU establishing a single European railway area (Art. 6) and the Airport Groundhandling Directive 96/67/EC (Art. 4).
- As it was the case with railways, a thorough restructuring of the accounting system of the port authorities might become necessary. The admission of internal services and the existence of vertically integrated ports (port infrastructure and port operations in one hand) contains the imminent danger of diluting state aid or making it less transparent since it is very difficult to monitor cross-subsidisation. Cross-subsidisation might distort competition among port operators. There are ample examples of ports at present which are competing against each other, being directly or indirectly subsidised by the respective Member States or their regions. It is therefore consequent to demand intensive monitoring and control of state aid whenever internal services and vertically integrated structures exist in the port.
- The non-observance of the clear separation of infrastructure and operations on the other hand side risks negative impact on the regions since potential investors are hesitant to invest in ports where state or private monopolies exist and the incumbent port infrastructure and port operations companies have long-lasting powers to influence service quality and pricing. The policy of the major container shipping lines in their selection of ports in a globalised world economy gives examples thereof.

### ***Port service charges (Art. 13)***

- As stipulated in Art. 13.3, the calculation methodology has to be developed and made transparent by the service providers, at least to the supervisory body which would check it under non-discriminatory, equitable and transparent aspects and PSO aspects if required.

### ***Port infrastructure charges (Art. 14)***

- Charging structures for port infrastructure are not specified in the proposed Regulation; however, the EC wishes to be empowered for delegated acts concerning common charging principles (Art. 14.5). This has been criticised from two different angles.
  - Some of the highly successful ports in Northern Europe fear losing their competitive advantage when a uniform charging model is imposed. The potential levelling effect would also contradict the intention of the Proposal to improve the European port system as a whole.



- Transferring legislative power from the legislative bodies to the executive body in such an important point is problematic.
  
- It seems to be the intention of the EC that the establishment of the proposed regulatory body (the independent supervisory body, Art. 17-19) is meant to be the tool to dispel fears of competitive distortion as has been the experience in other transport sectors.
  
- As a reference, the charging principles in the Railway Package are regulated in Directive 2012/34/EU, Art. 31 and 32. They are based on a direct cost approach (“the cost that is directly incurred as a result of operating the train service”, Art. 31.3) averaged over a “reasonable” time and number of trains with allowed modifications reflecting scarcity of capacity and environmental effects (in the case of railways, mostly noise). Mark-ups are allowed, if “*the market can bear*” them. “*The level of charges shall not, however, exclude the use of infrastructure by market segments which can pay at least the cost that is directly incurred as a result of operating the railway service, plus a rate of return which the market can bear.*” (Art. 32.1). As for additional and ancillary services that “*are offered by only one supplier, the charge imposed for such a service shall not exceed the cost of providing it, plus a reasonable profit*” (Art. 31.8).
  
- The respective provisions of the proposed Regulation of the Airport Package (Art. 28.3) are similar to the paragraph on additional and ancillary services in the railway sector: “*The managing body of the airport or, where relevant, the managing body of the centralised infrastructure shall be entitled to recover its costs and to make a reasonable return on assets from the fees charged. The fees shall constitute consideration for a service.*”
  
- It has to be added that after 20 years of market opening in the railway sector, the issue of infrastructure charges is still subject to continuous political struggles, heavy criticism by the infrastructure users and numerous cases before the regulatory bodies.

## ***Excursus on network statements in the rail sector***

- In the railway sector, information about port infrastructure charges is published in the so-called network statement as defined in Directive 2012/34/EC, Art. 3 (26): “‘network statement’ means the statement which sets out in detail the general rules, deadlines, procedures and criteria for charging and capacity-allocation schemes, including such other information as is required to enable applications for infrastructure capacity”.

Directive 2012/34, Art. 27 details the requirements:

*“The infrastructure manager shall, after consultation with the interested parties, develop and publish a network statement which shall be obtainable against payment of a fee which shall not exceed the cost of publication of that statement. The network statement shall be published in at least two official languages of the Union. The content of the network statement shall be made available free of charge in electronic format on the web portal of the infrastructure manager and accessible through a common web portal. That web portal shall be set up by the infrastructure managers in the framework of their cooperation in accordance with Articles 37 and 40.*

*The network statement shall set out the nature of the infrastructure which is available to railway undertakings, and contain information setting out the conditions for access to the relevant railway infrastructure. The network statement shall also contain information setting out the conditions for access to service facilities connected to the network of the infrastructure manager and for supply of services in these facilities or indicate a website where such information is made available free of charge in electronic format. The content of the network statement is laid down in Annex IV.*

*The network statement shall be kept up to date and amended as necessary. The network statement shall be published no less than four months in advance of the deadline for requests for infrastructure capacity.”*

The contents of the network statement as listed in Annex IV of the directive stipulate sections on:

- *Nature of the infrastructure which is available*
- *Charging principles and tariffs including details of the charging scheme*
- *Principles and criteria for capacity allocation including inter alia procedures, requirements and schedules*
- *Information relating to the application for a licence*
- *Information about procedures for dispute resolution and appeal relating to matters of access*

- *Information on access to and charging for service facilities*
- *A model agreement for the conclusion of framework agreements*

Based on the above structure, RailNetEurope, a Vienna-based association of the major European rail infrastructure managers, has published a model network statement thus contributing to a harmonized internal market.

- Concerning port infrastructure charges and, in general, the access to port services, it is advisable to have port network statements which unambiguously describe the conditions to enter port infrastructure (validity of one year). Such port network statements could include elements similar to those mentioned in Annex IV of Directive 2012/34/EU designed for water-bound (deep sea, coastal shipping, and inland shipping) and land-bound (road, rail).
- Such network statements could also include the publication of the minimum requirements as stipulated in Art. 4.5.

#### ***Consultation of port users and other stakeholders (Art. 15-16)***

- It is the obligation of the managing body of the port to set up a committee of representatives of “*operators of waterborne vessels, cargo owners or other port users which are requested to pay an infrastructure charge or a port service charge or both*” that has to be consulted concerning port infrastructure charges (Art. 15.1). It reminds of the “Airport Users' Committee” as stipulated in Art. 5 of Directive 96/67/EC and Art. 4 of the Regulation proposed in the Airport Package.
- According to Art. 16.1, it is the obligation of the managing body of the port to collect the feedback of “*stakeholders such as undertakings established in the port, providers of port services, operators of waterborne vessels, cargo owners, land transport operators and public administrations operating in the port area*” and take it into consideration. If no agreement can be obtained, the independent supervisory body as stipulated in Art. 17 would have to intervene, be it ex-officio or via appeals from the market participants.
- The most efficient consultation process – according to the experience in the rail sector – is the consultation process on the basis of a port network statement to be issued by the port infrastructure manager and distributed to the port users (Art. 15) and other stakeholders (Art. 16). A definite consultation procedure should be introduced lasting not longer than four months. In the consultation process of other stakeholders, the local

competent authorities and all those shall have a leading role. However, it shall be the independent supervisory body that moderates the consultation.

### ***Independent supervisory body and appeals (Art. 17-19)***

- The proposed independent supervisory body closely resembles the “independent supervisory authority” as stipulated in Art. 11 of Directive 2009/12/EC on airport charges. Especially Art. 11.3 referring to the independence is almost identical with Art. 17.2 of the proposed Regulation under study.
- The independent supervisory body bears close resemblance to the regulatory body that has to be set up for the railway sector according to Directive 2012/34/EC, Art. 55-57, too.
- The independent supervisory body preferably shall be independent from any authority that has financial and other stakes in any of the port participants and is decision-maker in state funding and PSO. The regulator shall have ex officio powers, be the appeal body (without prejudice to judicial review). He shall have the right to deal with any type of discriminatory, inequitable, non-transparent behaviour of port users and other stakeholders, in particular when it comes to state aid, be it by funding or by PSO. Without such an independent body which must be stronger than the body proposed in Art. 17, the regions, in particular those which depend on one or two ports only (danger of monopoly, duopoly and oligopolies) are in danger of being subject to such behaviour. The regulator shall also have the right to apply penalties to infringements.
- The right of ex officio (own-initiative) actions is not explicitly mentioned in the proposal as it is the case with the rail regulatory body 2012/34/EC, Art. 56.2: *“Without prejudice to the powers of the national competition authorities for securing competition in the rail services markets, the regulatory body shall have the power to monitor the competitive situation in the rail services markets and shall, in particular, control points (a) to (g) of paragraph 1 on its own initiative and with a view to preventing discrimination against applicants. It shall, in particular, check whether the network statement contains discriminatory clauses or creates discretionary powers for the infrastructure manager that may be used to discriminate against applicants.”* The ex officio right would be important, especially for monitoring internal operators as mentioned in Art. 9 as well as the services provided by the managing body of the port.

- Concerning the cooperation between independent supervisory bodies as stipulated in Art. 18, Art. 57 of Directive 2012/34/EC stipulates detailed provisions on the cooperation between regulatory bodies in the railway sector that could serve as a model since they incorporate 12 years of experience in the EU transport sector.
- Although the requirement of close cooperation for the purposes of mutual assistance in the tasks of the independent supervisory bodies has been mentioned in the regulation, in certain situations the independence from national administrative structures is required. It is recommended that for certain areas, in particular North Sea areas stretching from Le Havre to Hamburg, Baltic Sea areas, in particular on the Continental European side (Germany, Baltic States), Adriatic ranges comprising Italy to Croatia and Riviera range comprising France and Italy, Black Sea (Bulgaria, Romania) a transnational regulatory body shall be introduced that is not responsible to any national ministry or parliament. The ideal would be that such regulatory bodies are responsible to the European Parliament or in a transitional period to the European Commission. The experience of regulatory bodies in the rail sector has shown that the railway regulation in an increasingly important transnational traffic remains limited, almost ineffective, when national regulators deal with it, in particular when the body is a subordinate authority of any type of transport minister who simultaneously is in charge of the incumbent port infrastructure and/or service provider.
- Concerning appeals “*against the decisions or individual measures taken under this Regulation*” (Art. 19), the appeal to the supervisory body has proved to be efficient in all public utility markets. It avoided lengthy processes with the administrative courts which usually have no experience with port and other public utility matters.

### ***Choice of instrument***

The EC justifies the choice of the legal instrument of regulation (Art. 288 TEU) with two arguments: the recent diversification of actors in the port sector (not only public authorities but also other parapublic and private entities) and the need for “*uniform implementation, enforcement and a level playing field in the internal market*”. Therefore the EC prefers legislation that is directly binding.

The present structure of the port market in the EU which is far away from the open access and market principles of the social market economy concept seems to require a legal basis that has the power to modify the market according to the economic principles of the EU. The rail sector has given evidence that directives to be transposed by the Member States slow down or impede this development for rather national than regional reasons.. Therefore regulations with successive

designating acts are at present the most efficient means of implementing EU policy.

In the field of railway liberalisation (which has obviously served as one of the models for the Ports Package and which is largely considered as unsuccessful by the market players), the choice of directives has led to widely differing national transpositions that seriously hamper the introduction of a working single European market.

For similar reasons, the EC intended to replace Directive 96/67/EC by a Regulation on airport groundhandling services with the Airport Package of 2011.

However, the choice of a regulation has been criticised by several LRA with the argument that instruments like directives or guidelines make it easier to provide for the wide variation in ownership and organisational structure of European ports (see Chapter 1) and thus better comply with the principle of subsidiarity. It is interesting that parts of the proposed Regulation rather resemble a directive, e.g. in the fact that it does not prescribe a specific organisation form for the ports:

- Art. 6.4 (and 9.1 on PSO) imply the possibility that managing bodies of the ports continue providing port services by themselves.
- Passenger and cargo handling, the commercially most important services, are excluded from the market opening of Chapter II.

Dependent on the future progress in market opening, it might be possible that future legislative initiatives of the EC will interfere in the present organisation forms to “impose” the desired harmonised organization model. In this case, the argument of subsidiarity might come up again.

### 3 Recommendations

1. Political compromises have to be established between the interests of regions and their regional organisations that are owners or stakeholders of ports and, in this role, have to keep the commercial interest of their ports in mind and the regions that are landlocked thus depending on an efficient and low-cost access to short sea and deep sea transport in order to keep their local industry competitive in globalised markets. Furthermore, there are also conflicts of interest between regions with highly competitive ports and regions the ports of which face certain challenges that have to be reconciled. Based on the results of the compromises (rapid, slow or no market opening, the appropriate legal instrument, regulation, directive or guidelines) shall be decided).
2. Since the early nineties, the EC has dealt with the same challenges in the rail and air sectors which have similar market structures, in particular the predominance of state-owned monopolies in the market. The experience may be of use when designing the new port package.
3. Concerning PSO (Art. 8), the Proposal should be harmonised with Regulation (EC) 1370/2007 on public passenger transport services by rail and by road with regard to definitions, procedures and monitoring.
4. Concerning port service charges, port infrastructure charges and the respective consultation processes (Art. 13-16), port network statements could be introduced similar to the network statements in the railway sector as stipulated in Directive 2012/34/EU establishing a single European railway area in order to guarantee non-discriminatory, transparent and equitable charging systems.
5. Concerning the independent supervisory body (Art. 17), in order to make it function, independence from any authority that has financial and other stakes in any of the port participants and is decision-maker in state funding and PSO, ex-officio rights and the right to apply penalties to infringements are indispensable, at least according to the experiences in other public utility sectors.
6. In order to make work the ideas behind the cooperation between independent supervisory bodies (Art. 18), transnational regulatory bodies would have to be introduced for certain areas, in particular the North Sea range stretching from Le Havre to Hamburg, the Baltic Sea range, in particular on the Continental European side (Germany, Poland Baltic

States), the Adriatic range comprising Italy to Croatia and the Riviera range comprising France and Italy, the Black Sea (Bulgaria, Romania). They should not be responsible to any national ministry or parliament.



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