



EUROPEAN COMMISSION

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Dear President,

The Commission would like to thank the Bundesrat for its Opinion on the proposal 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 {COM(2013) 296 final} and apologises for the delay in replying.

The Commission takes note that the Bundesrat has no objections on grounds of subsidiarity. As regards the various concerns expressed by the Bundesrat in its Opinion, the Commission would first of all like to stress that the proposal has two essential objectives: (a) Transparency in the use of public funds and (b) respect of TFEU principles in ports that are publicly funded, in particular those that are eligible for funding under the Structural Funds and the Trans-European Transport Networks (TEN-T).

Effective enforcement of those basic principles should not have negative consequences regarding the distribution of traffic flows between European ports as suggested in point 7 of the Opinion of the Bundesrat. In line with the Single Market model, the Commission's approach is that the decision to choose a particular port belongs to a competitive market mechanism, based on the free choice of economic agents. With its proposal, the Commission aims to establish a fair level playing field for all actors, based on the respect of the core principles referred to above. Respect of basic rules should not be seen as giving an advantage or disadvantage to ports in different regions of the EU.

In point 2 of its Opinion, the Bundesrat is particularly critical of the instrument chosen by the Commission (a regulation). Among the possible instruments the Commission considered in its impact assessment, a regulation was considered to be more appropriate than a directive, for several reasons.

The first reason is that one of the main goals of the proposal is to ensure a level playing field which requires a uniform implementation of the few but essential rules such as the need to keep accounts according to standards in ports that receive public funding (financial transparency requirement) or the respect of the principles of transparency, non-discrimination and proportionality by public authorities in charge of managing TEN-T ports. A regulation, which is directly applicable in its entirety, is more likely to encourage harmonised conditions of competition.

The second reason is that a regulation does not necessarily impose a rigid uniform model, but can be conceived in a way which leaves to Member States the necessary flexibility to take account of particular circumstances. The proposal is not based on a "one size fits all"

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approach but on the contrary leaves the choice to Member States and the different authorities responsible for port matters, at federal, regional or local levels, to apply the rules best suited to their specific needs amongst a common but comprehensive "regulatory toolbox".

A third reason in favour of a regulation is that it offers a clearer legal framework for stakeholders since it is directly applicable. In view of the variety of stakeholders addressed, this is preferable to a directive which is addressed to the Member States. Lastly, the instrument of a directive would have involved the need to develop and then notify to the Commission national legislation implementing those rules, which are in the Commission's view straightforward.

It should also be noted that the proposal does not call for market opening of port services in all areas as indicated in point 3 of the Bundesrat's Opinion. The proposal affirms the general principle of freedom to provide services in ports while giving Member States the capacity of establishing the conditions they consider as most appropriate for each particular port.

In fact, the provisions in chapter II of the proposal exclusively require Member States to clarify the requirements that a provider of port services must fulfil to offer services in the port, the reasons and procedure for limiting the number of providers, the services that are considered to be of general economic interest and, as such, subject to public service obligations. Chapter II foresees also the capacity of public authorities to provide themselves, by means of an internal operator, particular port services, if they consider necessary to do so.

In full respect of the subsidiarity principle and of the particular traditions and forms of port organisation in the Member States, Chapter II of the proposal foresees an exercise of clarification and transparency. Under the provisions of the proposal, Member States are not forced to open up to competition services that, according to their own choice, should remain regulated by reasons of public interest. The requirement should not be seen as involving additional costs and administrative procedures, as it is just a matter of clarification of responsibilities. In sum, the approach of the proposal is a very flexible one.

In point 4 of its Opinion, the Bundesrat refers to services such as dredging, pilotage and services for disposal of ship-generated waste (port reception facilities), and asks for the removal of those services from the scope of the proposal.

Certainly, Directives 2000/59/EC and 2004/17/EC foresee obligations in respect of port reception facilities and ship waste disposals. The provisions in the proposed Ports' Regulation take account of existing legislation and in no way overlap and/or interfere with the obligations in those directives. As explained above, the application of the provisions of the port proposal to ports' technical-nautical services, including services for waste disposal, would merely require a clarification of their status in the port, either as public services to which the general rules applying to services of general economic interest in the EU apply or as commercial services to which market rules apply. In the Commission's view, this clarification is needed to provide legal certainty to all interested parties.

While dredging is not directly billed to the ports users, it is still a service necessary for the functioning of the port. The Commission has included it since it is often performed by an "internal operator", which may lead to a conflict of interest between external companies who want to perform dredging and the in-house operator of the port authority. This concerns in particular the domain of "maintenance dredging". The Commission also believes that a more transparent attribution of contracts would increase cost efficiency of dredging services and ensure equal opportunity for all interested undertakings.

Regarding the inclusion of pilotage services, the Commission wishes to emphasise that the proposal does not imply changes to the way pilotage services in EU ports are currently organised. It does not aim at privatising pilotage services but seeks to clarify the status of these services in order to ensure that they are performed in the most effective and efficient manner. The proposal leaves it to the authorities in Member States to decide on the form in which the pilotage services shall be performed and provides a stable framework for both public and private organisation of these services. Furthermore, the Commission believes that if compulsory pilotage tariffs are set up unilaterally by a body with exclusive rights, this should be done in a transparent manner and under the supervision of a public authority.

As regards the establishment of port infrastructure charges, referred to in point 5 of the Bundesrat's Opinion, the Commission would like to recall that the proposed Regulation is in line with the policy orientation of the EU Transport White Paper¹. Transport charges and taxes must be restructured in the direction of wider application of the 'polluter-pays' and 'user-pays' principles. They should underpin transport's role in promoting European competitiveness and cohesion objectives, while the overall burden for the sector should reflect the total costs of transport including infrastructure and external costs.

In this respect, the proposal seeks to reinforce the economic rationality criteria of port infrastructure charges. The absence of links between the public investment effort and the charges needed to recover investment costs and/or obtain adequate economic, environmental or social returns may lead to a misallocation of resources. Thus, the European Court of Auditors has criticised that Structural Funds have been used for creating unnecessary port capacities².

In certain cases, huge port capacities funded with public resources led port infrastructure managers to set very low port charges for attracting maritime traffic from neighbouring ports. Clearly, those charges are set disregarding investment costs and involve a serious risk of distortion of competition between ports.

After careful analysis, the Commission has come to the conclusion that in order to promote efficient charging and hence a better use of investment resources, the Regulation should not impose charges in direct relation with costs according to a uniform charging methodology but on the contrary ensure that charges can be set according to the commercial strategies and investment plans of each individual port, provided that the resulting charging structure is transparent and non-discriminatory.

Concerning the proposed delegated powers contained in paragraph 5 of Article 14, the main aim is to establish common classifications of vessels and fuels that can be used by those ports which wish to promote greener maritime transport by applying differentiated infrastructure charges. Ship-owners need consistent price signals across borders and the current proliferation of such classifications undermines their willingness to invest in cleaner vessels. Therefore, rather than creating new standards, the aim is to facilitate the harmonisation of existing classifications, aligning those as much as possible to international ones. The main aim of the powers delegated to the Commission is therefore related to technical standards of vessels.

The Commission agrees with the Bundesrat on the need to avoid the creation of new superfluous administrative structures (cf. point 6 of the Bundesrat's Opinion). In fact, articles

¹ White Paper "Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system", COM/2011/0144 final

² European Court of Auditors, Special Report Nr 4/2012 "Using structural and cohesion funds to co-finance transport infrastructures in seaports: an effective investment?"

15 and 16 are intended to extend good practice common to many ports. Consultation of port users and other stakeholders on matters on which they are directly concerned should not be seen as an unnecessary, low added value requirement for ports which are part of the TEN-T. In many ports, it is precisely the lack of coordination of port actors and the disregard of customers' needs that result in bureaucracy and administrative burden. The provisions of the proposal give ample flexibility to the managing bodies of the port to organise the consultation in the most appropriate manner.

In respect of the independent supervisory body foreseen in Article 17 of the proposed Regulation, the Commission's proposal does not seek the creation of new bodies in the port sector. As is already the case in several Member States, a national authority, or several authorities, should be in a position to ensure the adequate implementation of the draft Regulation, and the effective enforcement of the two elementary principles – fair market access and financial transparency in the use of public funds – referred to above. Those tasks can be undertaken at federal or regional levels, depending on the internal organisation of each Member State. It should be noted that those tasks could be made compatible with other functions provided that appropriate arrangements avoiding conflicts of interest are put in place to ensure the independence of the supervisory authority in the application of the draft Regulation. In Member States where the competition authorities already ensure after fair competition conditions in the port sector, the proposal would have, in practice, a reduced impact.

The Commission hopes that this reply provides useful clarifications which address the concerns raised by the Bundesrat and looks forward to continuing this political dialogue.

Yours faithfully,

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Vice-President*