

**FEPORT position on the Draft Regulation establishing a framework on market access to port services
and financial transparency in ports
COM (2013) 296 final**

Overview

On 25 May 2013 the European Commission adopted a draft regulation on market access to port services and financial transparency of ports. The objective of the regulation is to establish the three principles of (i) freedom to provide services (market access), (ii) financial transparency of public funding and (iii) encouraging private sector investment in ports. In essence, all three of these elements are something which FEPORT can support. FEPORT has welcomed the decision to exclude social elements from the regulation. FEPORT strongly believes that it is best to let the European social dialogue run its course in this regard. The findings of the social dialogue should lead to be a better understanding of port labour and, in turn, more appropriate legislation.

We also believe that the decision to exclude cargo handling from Chapter 2 (Market Access) from the regulation is justified. Firstly, the cargo handling sector is extremely competitive both between ports and within ports. Even in cases where there is only one terminal operator in a port, there is competition between ports within a competitive range, for example, the East Mediterranean Sea, Baltic Sea, Adriatic Sea and the North Sea. FEPORT strongly believes that monopolistic situations in regards to cargo handling are a rarity in European ports and such situations can be handled on a case by case basis.

Concerns

FEPORT has a number of concerns with the proposed regulation. We believe, in areas, the regulation goes beyond the three principles listed above and encroaches on the activities of competitive private operators. For instance, in a number of cases the regulation appears to encroach on the business models of ports and terminal operators. We believe that the following articles need to be clarified as it was never the Commissions intention to intervene in what is already a highly competitive market.

Article 13: Transparency and cost-orientation of private sector cargo handling charges

FEPORT's primary concern with the regulation is the potentially restrictive impact of Article 13 on the pricing freedom for private terminal operators. Article 13 would impose transparency, non-discrimination and cost-orientation obligations to services that are provided in-house or those that have not been subject to a competitive tender. FEPORT is of the understanding that this regulation is intended to tackle exclusive rights and monopolies in ports but FEPORT fears that this regulation may unintentionally include competitive cargo handling services and private ports.

The rationale behind this is the reality that a large number of existing cargo handling contracts were not granted under a competitive tender. This is because competitive tenders in the cargo handling sector are relatively new (1980's). Before this, there was very little interest in terminal operating contracts and, in many cases, an operating contract was offered to a sole applicant. For this reason many contracts were offered to terminal operators without competition solely on the grounds that there was no competing bids. In its current form, the provisions of Article 13 would apply to older cargo handling contracts. This would create huge distortions as terminals with older cargo handling contracts would be required to set transparent, non-discriminatory and cost-orientated prices while their competitors, which in some cases are in the same port, would enjoy complete pricing freedom. This Article also fails

to take into accounts the existence of integrated ports, where the port authority is the terminal operators (and so would be regarded as an “in-house provider”), as is the case in the United Kingdom. The existence of private port who also provide port services as part of a broader business plan also need to be taken into account. This example can be seen in ports where a private company provides general cargo handling services as well as technical nautical services. To include such ports in this regulation would be to ignore an existing business model which is both competitive and privately funded.

The Commission has stated on a number of occasions that Article 13 is not intended to impact on competitive terminal operators, but rather to address the issue of existing legal monopolies or the existence of exclusive rights. FEPORT therefore believes that an amendment is needed so that **ARTICLE 13 is limited to service providers that benefit from exclusive rights to operate monopoly services and does not apply to competitive services.** This was the original intention of the Commission and is something which FEPORT could strongly support.

Article 14.5 and 21: Common charging principles and implementing powers

FEPORT also has major concerns regarding the provisions of Article 14.5 and Article 21 given that they empower the Commission to adopt delegated acts to set common charging principles for port infrastructure charges without consultation. FEPORT does not understand the rationale behind the Commission being granted such powers. FEPORT believes that should the European institutions wish to introduce common charging principles, they should be subject to an implementing acts procedure. This would hopefully minimize any unintended consequences that may harm the competitiveness of ports as any Commission proposal would be open to greater scrutiny and debate.

FEPORT also strongly believes that in commercial negotiations in “an open and competitive market (Recital 5)” there should be no regulatory intervention. Given that cargo handling has already been deemed competitive, there is no clear justification for imposing pricing regulation on the cargo handling business. FEPORT therefore strongly believes that port authorities should have the autonomy to set port infrastructure charges and the commercial freedom to vary them as they see fit.

Concluding Remarks

FEPORT’s suggestion would be that cargo handling services and private port systems are excluded from the entirety of the regulation. Cargo handling services have been proven to be extremely competitive both between ports and within ports. The proposed regulation fails to take into account a number of market realities (for example; Article 13) and for this reason FEPORT fails to see how the regulation in its current form would not have a damaging impact on cargo handling services in Europe. Nonetheless, FEPORT has suggested a number of amendments which should improve the regulation regardless of your position on excluding cargo handling services and private port systems.