

Initial appraisal of a European Commission Impact Assessment

European Commission proposal on a Regulation on Port Services

Impact Assessment (SWD (2013) 182, SWD (2013) 183 (summary)) for a Commission Proposal for a Regulation of the European Parliament and of the Council establishing a framework on the market access to port services and the financial transparency of ports (COM (2013) 296).

- **Background**

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's Impact Assessment accompanying the above proposal, submitted on 23 May 2013.

Europe is one of the most dense port regions worldwide with 319 ports identified under the TEN-T guidelines, 83 of which are core network ports¹. Ports play a crucial role in EU trade: 4 per cent of goods traded with third countries, 37 per cent of intra-EU trade and 385 million passengers arrive at our ports annually.

The port sector in Europe is not homogenous and is based on a number of different private and public organisation models. With the exception of port waste reception facilities, there is no EU legislation in this area.

The Commission initiated the start of a port policy with a Green paper in 1997. This was followed, in 2001, by a proposal for a directive on market access to port services which was rejected by the European Parliament in 2003. A further proposal was also rejected by the Parliament and withdrawn. In 2007, the Commission adopted a 'soft' approach with a Communication on ports policy, issuing guidelines on state aid, environment, and best practices and began working more closely with the stakeholders.

Despite the 'soft' approach, the European Commission indicates that problems in the port sector still remain, which could put at risk the goals of an efficient, interconnected and sustainable Trans-European Transport Network and, as a consequence the functioning of the internal market. These challenges include the need to adapt ports to new transport and logistical

¹ Proposal for a Regulation on Guidelines for the development of the trans-European transport Network (TEN-T) COM (2011) 650. The TEN-T network consists of two layers: 1) the comprehensive network will ensure full coverage of the EU and accessibility of all regions, to be completed by 2030, and 2) the core network that will feed into the comprehensive network and will prioritise the most important node of the TEN-T, and is to be completed by 2050.

requirements and to overcome port congestion (which according to the Commission puts at risk the goal of the White Paper on Transport² of shifting 30 per cent of long distance road freight transport to other modes such as rail or waterborne transport by 2030) and the increased cost of sea shipping.

For these reasons, the White paper on Transport and the Single Market Act II³ emphasise the need to review the EU's port policy.

- **Identification of the issue at stake**

After a clear and comprehensive presentation of the policy context, including the TEN-T network and the financial instrument Connecting Europe Facility (CEF), as well as of the EU ports' heterogeneity (further detailed in annex II of the Impact Assessment (IA)), the Commission identifies the main challenge as the structural performance gap between TEN-T seaports, aggravated by the need to adapt ports to new transport and logistical requirements at a moment of scarce public funding. This problem leads to further congestion, capacity and connectivity problems.

The three underlying drivers of the core problem are substantiated⁴, as are their root causes. These include:

- **The port services and operations in some ports are sub-optimal.** The IA indicates that stakeholders have identified the root causes to be weak competition within the port services market arising from market access restrictions, market abuses by service providers with special rights and a high administrative burden stemming from a lack of communication within ports.
- **The current port governance framework in some TEN-T seaports does not provide enough incentives to attract investments.** The IA indicates that the root causes for this are, among others, the unclear financial relations between the public authorities, port authorities and the service providers and the low level of autonomy given to port authorities to set infrastructure charges including the lack of incentive to reward environmentally friendly practices.
- **Inadequate connections with the hinterland**, notably by rail and inland waterways.

The IA also identifies persisting credit restrictions and curtailing private investment which will lead to a technological standstill in the future as potential problem drivers, but dismisses them as they either go beyond the immediate scope of regulatory intervention by the EU or are already covered by other EU initiatives which do not relate to transport.

The IA provides a useful table which lays out the links between the problems, their drivers and their root causes and another table presenting the affected stakeholders and their key interests (IA, p. 30).

² Transport White Paper 2011 « Roadmap to a Single European Transport Area- Towards a competitive and resource efficient transport system ».

³ Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the Committee of the regions, Single Market Act II, Together for new growth, COM (2012) 573 final, 3.10.2012.

⁴ The third driver, viz connection problems with the hinterland, is not analysed in the IA as it is addressed by the TEN-T and CEF (connecting Europe Facility) proposals, as well as by the new cohesion policy.

The IA includes clear explanations on the model applied to evaluate TEN-T ports' performance and the related assumptions and limitations (further detailed in Annex VI of the IA). The discussion on the problem drivers and their root causes is substantiated by abundant data and research, and stakeholders' opinions on the identified problems are well reflected.

The definition of the problem is quite comprehensive, although it would be strengthened by a more in-depth discussion on why current competition law is unsuitable to tackle issues surrounding monopolies and state aid in the ports sector. The reasons put forth by the Commission for not systematically being able to follow up complaints about abusive restrictions imposed to port operators appear rather unconvincing.

As foreseen in the Commission's IA Guidelines, a discussion on the evolution of the problem without further EU action is included. The analysis comprises traffic projections until 2030 by region and by sector and the forecasting uncertainties are acknowledged⁵. While the Commission indicates that the baseline scenario takes account of the changes in individual Member States⁶ and of the impact of the new Directive on concessions in ports (which will enter into force in 2015) and the foreseen modernisation of state aid rules, it states the 'status quo assumes that those possible reforms will not lead to the establishment of a level playing field for all TEN-T ports' without, however, entering into a discussion on the potential impacts that these reforms could have on the problems identified.

• Objectives of the legislative proposal

The *general* objective of the Commission proposal is to 'improve the performance of the TEN-T seaports in order to contribute to the goal of a more efficient, interconnected and sustainable functioning of the TEN-T'⁷.

This general objective is further broken down into the *specific* objectives of (1) modernising the port services and operations within the TEN-T seaports, and (2) optimising port governance frameworks as to make investment more attractive.

In order to achieve this, *operational* objectives have been identified for each of the specific objectives.

To modernise the port services, it is vital to:

- clarify and facilitate access to the port services market;
- prevent market abuse by port service providers with exclusive or special rights; and
- ensure that consultation of port users on the main decisions which affect the functioning of the port in all TEN-T ports by the end of the implementation date of the initiative.

To encourage investment this initiative must by the end of the implementation date of the initiative:

⁵ For example, the baseline scenario assumes that the current state of affairs will prevail and does not perform a sensitivity analysis on possible trade agreements or new trade barriers.

⁶ Annex II of the IA contains an overview of recent and on-going port reforms in selected European Countries.

⁷ IA, p. 29.

- ensure the transparency in the financial relations between public authorities, port authorities and port service providers in all TEN-T ports;
- ensure that all TEN-T port authorities are free to autonomously set their port infrastructure charges, with the possibility of environmental modulation of charges.

The links between the objectives and the problems are made clear in Table 13⁸. Each of the root causes gives rise to a number of measures designed to alleviate the problem.

• Range of the options considered

The IA presents a very detailed range of policy options by linking possible action to each of the root causes of the problem identified. These are then combined into four policy packages which seek to address the combination of problems. The Commission indicates that each policy package is composed of measures addressing the two specific objectives and all of the five operational objectives. A clear table on the measures proposed in each of the policy packages in relation to the specific and operational objectives is included.

The IA indicates that the reform of the port labour market, the generalisation of the self-handling and the prohibition of exclusive rights to operate port services, or of in-house services were discarded as policy options at an early stage, giving explanations for that choice.

Consequently, the examined four policy packages are the following:

Policy Package 1: 'horizontal instruments and transparency': This option would combine the use of horizontal instruments, soft measures on market access and binding provisions on financial transparency, intra-port coordination and port infrastructure charges. The current TFEU rules on non-discrimination and freedom of establishment, as well as the enforcement of horizontal instruments such as the Concession Directive⁹, the Transparency Directive¹⁰ and any future approach on State Aid shall be explained in a Commission Communication. There would also be regulatory measures in relation to the pricing of port services which would require transparency, non-discrimination and proportionality where a monopolistic situation continues. The port management, the stakeholders and service providers would form a Port Users Committee to be consulted on administrative procedures of the port. There would be financial transparency between public and port authorities and transparency for the calculation of port dues.

Policy Package 2: 'regulated competition': This package would introduce the freedom to provide services, while allowing Member States a discretionary margin in deciding whether to restrict this freedom for objective and transparent reasons, such as a lack of space. In this scenario the port authority would have to enter into a contractual arrangement with a port service provider via a tendering procedure (except in small contracts). The obligation of public tendering would apply only to future contracts. Port authorities will be required to separate their accounts. A port user committee would be established under this option too. The port dues will be charged in a transparent manner, according to actual costs and will vary according to the environmental performance of the ships.

⁸ IA, p. 30.

⁹ To be finalised in Parliament in November 2013.

¹⁰ Transparency Directive 89/105/EEC.

Policy Package 2a: 'reinforced regulated competition and port autonomy': this option consists of Policy Package 2 with the following differences:

- Market access would be slightly eased. The obligation to have recourse to public tendering in the case of space restrictions would apply to both new contacts and to substantial changes to existing contracts.
- There would only be regulatory oversight of service providers who are in a monopolistic position which cannot be contested.
- Greater autonomy would be given to the ports in the areas of infrastructure charging (each port would be given the right to set itself the structure and level of port dues) provided that the charging remains transparent. A differentiation according to the environmental performance of ships and fuel would be encouraged.

Policy Package 3: 'full competition and port autonomy'. This option builds on Policy Package 2a. At least two competing and independent operators would be required for every port service where the number of operators is limited as a result of lack of space. There would be a legal and functional separation between the commercial functions of public authorities. This would lead to multiple port actors. In order to ensure that the port functions properly the central coordination would be strengthened. Each authority would be free to determine the structure and level of infrastructure charges according to its own commercial practices. The transparency of the charges would not be considered necessary, as the competitive environment will induce enough pressure to keep the charges at an appropriate level.

Policy Package 2a was deemed the most appropriate response. The baseline scenario (no action) is not among the policy options examined and the options do not appear to be systematically compared to the baseline, contrary to the provisions of the IA guidelines.

• **Scope of the Impact Assessment**

All policy packages were analysed for their economic, social and environmental impacts, and compared for their efficiency, effectiveness and coherence in meeting the policy objectives.

The economic analysis of the proposals includes an analysis of their impacts on direct and indirect transport costs, on attracting investments, on administrative burden (with a distinction between the costs for the public sector and the costs for businesses¹¹), on SMEs, on transport and multimodality and on international competitiveness.

The calculation of cost savings was based on the assumption that open markets will reduce the price of port services. Information obtained from the users' survey regarding the scope of cost decreases assumes a price decrease ranging from 2 per cent to 20 per cent according to the policy package and type of service. The calculation methodology is detailed in annex VII of the IA. The impact of each of the policy packages on the total port costs was calculated by extrapolating port tariffs data from the port of Rotterdam, which was taken as a reference for the benchmarking exercise because of its goods results. Assumed annual savings range from 318.15 million euro per year in policy package 1 to 1,245.21 million euro per year in policy package 3. The IA acknowledges however caution when interpreting results based on price assumptions, as these could vary according to regions and individual ports

¹¹ Annex IX of the IA explains the calculation of administrative costs.

The IA includes a very brief and general discussion on the regional distribution of impacts but no territorial impact assessment was carried out. The Member States, regions and ports most affected by the required modifications are not apparent.

According to the Commission, all policy packages aim to reduce the overall environmental impact of transport insofar as they all contribute to making maritime transport more attractive in comparison to road haulage¹². The IA includes a table on the impact of each policy package on the increase in short sea shipping, the decrease of road transport over 300 km and the corresponding gains in external costs. External cost savings range from 23 million euro for policy package 1 to 76 million euro for policy package 3 (savings for policy package 2a represent 69 million euro). The Commission's Impact Assessment Board had requested that the assessment of environmental impacts be strengthened to include direct impacts through water pollution and the handling of shipping waste. This recommendation does not appear to have been followed.

The potential social impacts are assessed in relation to the possible increase in productivity associated with technological changes generated by the policy packages. The IA considers that technological changes could in the short term lead to job suppressions, but that in the medium and long term all policy packages would generate additional port activities and have a net positive impact on the creation of jobs, though modest. The detailed calculations and assumptions in that regard are provided in Annex VII of the IA. Since the proposal does not touch upon labour regimes, no particular impact with regard to wages, labour relations and labour conditions was identified.

The IA indicates that all policy packages present a trade-off between economic and social impact and recognises that in policy packages 2, 2a and 3 'the risk of social tension in relation with the lifting of restrictions to the market access, and more specifically for cargo handling, cannot be neglected'¹³.

- **Subsidiarity / proportionality**

The IA provides a subsidiarity analysis for each set of policy measures. The analysis is based on both the necessity test and the EU added value test. The proposal is based on Article 100(2) TFEU which states that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea transport. The IA indicates that a parallel can be drawn with other transport modes, arguing that the port sector is the only transport sector for which there is almost no EU legislation on issues such as the access to the market, financial transparency, infrastructure charging and coordination issues. Although the specific nature of the maritime sector and its long lasting history and culture is recognised, because of the effect of scale and the international dimension of the sector, the Commission considers that the proposed initiative is in line with the subsidiarity principle.

Proportionality is also examined, with the Commission arguing that proportionality is ensured insofar as the initiative applies only to TEN-T seaports which deal with 90 per cent of the traffic.

¹² 2011 White Paper on Transport.

¹³ IA, p. 54.

Reasoned opinions were issued by the Swedish Parliament, the Spanish Parliament, the Latvian Parliament, the Polish Sejm, the Italian Senate and the Maltese Senate. The parliaments are concerned that a regulation is too restrictive an instrument to use in the circumstances, which does not allow flexibility based on national practices. They have also questioned the proportionality of the proposal.

- **Budgetary or public finance implications**

The Commission does not indicate any budgetary implications.

- **SME test / Competitiveness**

The analysis of economic impacts includes a section on SMEs as mooring, towage, pilotage and bunkering activities are typically provided by SMEs and microenterprises. The IA considers that the introduction of free market access will be beneficial to SMEs as it will create a more business-friendly and entrepreneurial environment. Administrative costs for SMEs are also examined, with policy package 2a being the one creating the smallest additional administrative costs for these enterprises. The IA concludes that no policy package will impose any particular obligation on SMEs. However, the effect on SMEs of increased competition within the port services sector could be expanded upon.

It is assumed that all policy packages will improve international competitiveness of the Southern European ports which currently lose business to the North African ports and to a smaller extent the Baltic ports which have to compete with Russian ports.

- **Quality of data, research and analysis**

The IA is permeated by high quality research. In addition to contributions from stakeholders (through hearings, conferences and stakeholder surveys), the IA draws upon abundant academic research as well as a study by PriceWaterhouseCoopers in partnership with Panteia (PWC 2013) on 'measures to enhance the efficiency and quality of port services in the EU', carried out on behalf of the Commission in preparation of the present impact assessment. The latter study is however not well referenced in the IA.

The IA contains a substantial amount of quantitative information. The IA is very transparent about the underlying assumptions and the evidence (survey data) used for calculating the expected costs and benefits of the options and openly cautions against relying solely on analysis which is based on multiple assumptions.

- **Stakeholder consultation**

Due to the technical nature of the file, DG MOVE decided to carry out an intensive targeted sectorial public consultation, rather than a full public consultation open to the wider public. Public consultation was carried out through bilateral contacts between the Commission and the main industry associations in the port sector, as well as with the two main Unions of port workers. Stakeholders were also consulted through two targeted online surveys designed by PWC in the context of the study 'on measures to enhance the efficiency and quality of port

services in the EU'. An EU conference on the future of EU Ports Policy was also held¹⁴, as well as a public hearing in Brussels, with all interested parties.

The online surveys carried out by PWC attracted some criticism from the two main Unions of port workers regarding the consultation method and the drafting of the questions relating to aspects of quality and efficiency of ports connected with port work issues. The IA in Annex V acknowledges that there was low participation by national trade unions in the on-line surveys; rather trade unions at EU level have expressed their opinions in position papers and manifestos. Annex V also includes a summary of stakeholders' positions.

- **Monitoring and evaluation**

The Commission will monitor the implementation and effectiveness through a set of core progress indicators. Data will be gathered through the already established PPRISM project¹⁵ and through a fact-finding survey. A research project has also been launched by the Commission to examine the practical and operational requirements for setting up a port observatory which aims to provide data on a continuous basis. An implementation report will be carried out by the Commission on the basis of the foreseen core progress indicators three years after the end of the implementation date of the proposed legislation.

- **Commission Impact Assessment Board**

The IA acknowledges the opinion of the Impact Assessment Board and details the changes made to comply with the recommendations of the Board. In its opinion of 20 March 2013, the Board's main concerns focused on weaknesses in the problem definition and the baseline scenario, the definition of the key objectives and the choice of options, notably the absence of a horizontal instrument as an option. The baseline scenario is now dealt with comprehensively and includes an explanation of issues likely to arise if the status quo continues.. An option for a horizontal instrument, policy package 1, has also been included.

There is also evidence that the current IA reflects most of the Board's further recommendations: it now contains detailed information on the assumptions and related uncertainties, on the different cost calculation models used, a more detailed subsidiarity analysis, a clearer description of the links with the European Semester exercise and the Structural funds, a better presentation of stakeholders' views on the options and their criticism regarding the consultation method and a short (however rather sketchy) discussion on the regional distribution of impacts. In that regard, the IA does not contain extensive evidence of analysis of the impacts of the proposal for the various regions containing major ports. Despite some general comments on the expected consequences for the regions, the regions are not scrutinised on an individual basis.

- **Coherence between the Commission's legislative proposal and IA**

The IA and the proposal seem to correspond.

¹⁴ 3rd quarter 2012.

¹⁵ The project delivers a shortlist of indicators that form the basis of a future European Port Observatory which will take the form of a Port Sector Performance Dashboard

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This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Transport and Tourism (TRAN), analyses whether the principal criteria laid down in the Commission's own Impact Assessment Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.

This document is also available on the internet at:

<http://www.europarl.europa.eu/activities/committees/studies.html>

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