Changes to legislation: *There are outstanding changes not yet made to Regulation (EU) 2017/352 of the European Parliament and of the Council. Any changes that have already been made to the legislation appear in the content and are referenced with annotations. (See end of Document for details) View outstanding changes*

Regulation (EU) 2017/352 of the European Parliament and of the Council of 15 February 2017 establishing a framework for the provision of port services and common rules on the financial transparency of ports (Text with EEA relevance)

REGULATION (EU) 2017/352 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 15 February 2017

establishing a framework for the provision of port services and common rules on the financial transparency of ports

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 100(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The full integration of ports in seamless transport and logistics chains is needed to contribute to growth and a more efficient use and functioning of the trans-European transport network and the internal market. This requires modern port services that contribute to the efficient use of ports and a climate favourable to investments to develop ports in line with current and future transport and logistics requirements.

(2) Ports contribute to the long-term competitiveness of European industries in world markets while adding value and jobs in all Union coastal regions. In order to address the challenges facing the maritime transport sector and to improve the efficiency and the sustainability of transport and logistics chains, it is essential that the actions on administrative simplification set out in the Commission's communication of 23 May 2013 entitled 'Ports: an engine for growth' be implemented in tandem with this Regulation.

(3) In its communication of 3 October 2012 entitled 'Single Market Act II — Together for new growth', the Commission recalled that the attractiveness of maritime transport is dependent on the availability, efficiency and reliability of port services and the necessity of addressing questions regarding the transparency of public funding and port charges, as well as administrative simplification efforts in ports, and of reviewing restrictions on the provision of services at ports.

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(4) Facilitating access to the port services market and introducing financial transparency and autonomy of maritime ports will improve the quality and efficiency of the service provided to port users and contribute to a climate that is more favourable to investment in ports, thereby helping to reduce costs for transport users and contributing to the promotion of short sea shipping and a better integration of maritime transport with rail, inland waterway and road transport.

(5) The simplification of customs procedures can create significant economic advantages for maritime ports in terms of competitiveness. In order to promote fair competition and to reduce customs formalities, it is important that the competent authorities of the Member States adopt a proper and effective risk-based approach. In this context, it is necessary that the Commission consider the need for appropriate measures to reduce reporting formalities in maritime ports and to tackle unfair competition.

(6) The establishment of a clear framework of transparent, fair and non-discriminatory provisions relating to the funding of and charges for port infrastructure and port services plays a fundamental role in ensuring that the port's own commercial strategy and investment plans and, where relevant, the general national ports policy framework comply fully with competition rules. In particular, the transparency of financial relations allows a fair and effective control of State aid, hence preventing market distortion. To that end, the Council conclusions of 5 June 2014 called upon the Commission to explore State aid guidelines for maritime ports, with the aim of ensuring fair competition and a stable legal framework for port investment.

(7) The overwhelming majority of Union maritime traffic transits through the maritime ports of the trans-European transport network established by Regulation (EU) No 1315/2013 of the European Parliament and of the Council[(4)]. In order to achieve the aim of this Regulation in a proportionate way without imposing any unnecessary burden on other ports, this Regulation should apply to the maritime ports of the trans-European transport network, each of which plays a significant role for the European transport system, either because it handles more than 0,1 % of the total EU freight or the total number of passengers, or because it improves the regional accessibility of island or peripheral areas. However, this Regulation should give Member States the possibility to decide whether or not to apply this Regulation to maritime ports of the comprehensive network located in the outermost regions. Member States should also have the possibility of introducing derogations in order to avoid disproportionate administrative burdens for those maritime ports of the comprehensive network annual freight traffic of which does not justify the full application of this Regulation.

(8) Deep sea pilotage services do not have a direct impact on the efficiency of ports as they are not used for the direct entry and exit of ports and therefore do not need to be included in this Regulation.

(9) This Regulation should in no way prejudice the rules in Member States governing the system of property ownership applicable to maritime ports, and should allow for different port structures in Member States.

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(10) This Regulation does not impose a specific model for the management of maritime ports and does not affect in any way the competence of Member States to provide, in conformity with Union law, non-economic services of general interest. Different port management models are possible, provided that the framework for the provision of port services and the common rules on financial transparency set out in this Regulation are respected.

(11) In accordance with the general principles set out in the Treaties, providers of port services should be free to provide their services in maritime ports covered by this Regulation. However, it should be possible to impose certain conditions on the exercise of that freedom.

(12) This Regulation should not limit the managing body of the port, or the competent authority, in setting up its charging system, as long as port infrastructure charges paid by the operators of waterborne vessels or cargo owners are transparent, in particular easily identifiable, and non-discriminatory, and contribute to the maintenance and development of infrastructure and service facilities and to the provision of services that are needed to perform or to facilitate transport operations within the port area and on the waterways giving access to those ports that fall within the competence of the managing body of the port.

(13) In the interest of efficient, safe and environmentally sound port management, the managing body of the port, or the competent authority, should be able to require that providers of port services are able to demonstrate that they meet minimum requirements for the performance of the service in an appropriate way. Those minimum requirements should be limited to a clearly defined set of conditions in so far as those requirements are transparent, objective, non-discriminatory, proportionate and relevant for the provision of the port service. In accordance with the general objectives of this Regulation, the minimum requirements should contribute to a high quality of port services and should not introduce market barriers.

(14) It is important that all providers of port services, at the request of the managing body of the port, are able to demonstrate their ability to serve a minimum number of vessels, making available necessary staff and equipment. They should apply the relevant provisions and rules, including the applicable labour law and relevant collective agreements and the quality requirements of the port concerned.

(15) In deciding whether a port service provider satisfies the requirements of good repute, the competent authority, or the managing body of the port, should consider whether there are any compelling grounds to doubt the reliability of the provider of port services, such as convictions or penalties for serious criminal offences, or serious infringements of applicable Union and national law.

(16) Member States should be able to require compliance with obligations in the field of social and labour law for the operation of port services in the port concerned.

(17) Member States should inform the Commission prior to any decision to impose a flag requirement for vessels predominantly used for towage and mooring operations. Such

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a decision should be non-discriminatory, should be based on transparent and objective grounds and should not introduce disproportionate market barriers.

(18) Where compliance with minimum requirements is required, the procedure for granting the right to provide port services should be transparent, objective, non-discriminatory and proportionate, and should allow the providers of port services to start the provision of their port services in a timely manner.

(19) Since ports are constituted of limited geographical areas, the number of providers of port services could, in certain cases, be subject to limitations relating to the scarcity of land or waterside space, the characteristics of the port infrastructure or the nature of the port traffic, or the need to ensure safe, secure or environmentally sustainable port operations.

(20) Any limitation on the number of providers of port services should be justified by clear and objective reasons and should not introduce disproportionate market barriers.

(21) The managing body of the port, or the competent authority, should publish its intention to conduct a selection procedure for the provision of a port service, including on the internet and, where appropriate, in the *Official Journal of the European Union*. Such publication should contain information on the selection procedure, the deadline for the submission of tenders, the relevant award criteria and information on how the relevant documents necessary to prepare an application can be accessed.

(22) In order to ensure transparency and equal treatment, amendments to the provisions of a contract during its term should be considered to constitute a new award of a contract when they render the contract materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract.

(23) This Regulation should be without prejudice to the right of Member States to impose public service obligations related to port services.

(24) The Union has a wide variety of maritime ports with different models for the organisation of port services. Accordingly, imposing a single model would not be appropriate. The managing body of the port, or the competent authority, should be able to limit the number of providers of a given port service, where justified for one or more reasons.

(25) Article 34 of Directive 2014/25/EU of the European Parliament and of the Council[(5)] provides that contracts intended to enable certain types of activity to be carried out shall not be subject to that Directive if the Member State or the contracting entities can demonstrate that, in the Member State in which the activity is performed, the activity is directly exposed to competition in markets to which access is not restricted. The procedure for establishing whether this is the case should be that set out in Article 35 of Directive 2014/25/EU. Consequently, if it is established through that procedure that a port sector or subsector, together with its port services, is directly exposed to such competition, it is appropriate that it should not be subject to the rules framing the market access limitations under this Regulation.

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(26) Except where a competitive market derogation applies, any intention to limit the number of providers of port services should be published in advance by the managing body of the port or the competent authority and should be fully justified, in order to give the interested parties the opportunity to comment.

(27) If the managing body of a port, or the competent authority, provides port services itself or through a legally distinct entity which it directly or indirectly controls, measures should be taken to avoid conflicts of interests and to ensure fair and transparent market access to port services when the number of providers of port services is limited. Such measures could, inter alia, take the form of entrusting the adoption of the decision limiting the number of providers of port services to a relevant national authority which is independent from the managing body of the port or from the competent authority.

(28) The possibility to impose minimum requirements and limit the number of providers of port services that Member States continue to enjoy should not prevent them from ensuring an unrestricted freedom to provide services in their ports.

(29) The procedure for choosing providers of port services and its result should be made public and should be non-discriminatory, transparent and open to all interested parties.

(30) The only justification for recourse to public service obligations leading to a limitation on the number of providers of port services should be reasons of public interest in order to ensure the accessibility of the port service to all users, the availability of the port service all year long, the affordability of the port service to a certain category of users, the safety, security or environmental sustainability of port operations and territorial cohesion.

(31) While public service obligations are determined and imposed by national authorities, a general obligation set by Union or national law for a port to accept any vessel physically capable of entering and mooring without discrimination or hindrance should not be understood to be a public service obligation for the purposes of this Regulation.

(32) This Regulation should not preclude competent authorities from granting compensation for actions taken in fulfilment of the public service obligations provided that such compensation complies with the applicable State aid rules. Where public service obligations qualify as services of general economic interest, it is necessary to ensure compliance with Commission Decision 2012/21/EU[(6)] and Commission Regulation (EU) No 360/2012[(7)], as well as observance of the Commission's communication of 11 January 2012 entitled 'European Union framework for State aid in the form of public service compensation'.

(33) Where there are multiple providers of port services, the managing body of the port, or the competent authority, should not discriminate between providers of port services, and especially not in favour of an undertaking or a body in which it holds an interest.

(34) The managing body of a port, or the competent authority, should have the choice of deciding whether to provide port services itself or to entrust the provision of such services directly to an internal operator. When there is a limitation on the number of providers of port services, the provision of port services by the internal operators should