concerned must also be taken into account. If necessary, through the delimitation of territorial competences, the national regulator should ensure a rational organisation of work both on waterway access and in the port area.

75 Notion of 'bunkering'

Within the meaning of the EU Seaports Regulation, *'bunkering'* refers to

> *the provision of solid, liquid or gaseous fuel or of any other energy source used for the propulsion of the waterborne vessel as well as for general and specific energy provision on board of the waterborne vessel whilst at berth*[878].

This particularly broad definition encompasses the provision of shore-side electricity, as well as fuel or any other energy source to both maritime and inland vessels[879]. The Regulation also applies where bunkering is provided on the *'waterway access'*[880]. It is equally irrelevant whether the ship is moored or anchored during operations. The Committee on Employment and Social Affairs tried in vain to delete *'whilst at berth'*, based on the argument that bunkering *'may be carried out at sea, not only at berth'*[881]. However, that view was obviously too broad, because elsewhere the Regulation clearly states that it only applies to the provision of port services *'either inside the port area or on the waterway access to the port'*[882]. The phrase *'general and specific energy provision on board of the waterborne vessel* whilst at berth' (emphasis added) only intends to clarify that it is immaterial whether the energy source will be used during the next voyage, or prior to it, while the vessel is still in port (or, as the case may be, in the waterway access). It should be said that some language versions cause confusion because they incorrectly state that the activity of the fuel or energy provision should take place while the ship is at berth[883]. The

878 Art. 2(1) EU Seaports Regulation 2017/352. The definition as initially proposed by the Commission remained unchanged during the entire legislative process and resulted in an easy Trilogue agreement (see CEU doc. 9409/16, 27 May 2016, 50, line 146).

879 On port services provided to inland vessels, see *infra*, no. 109.

880 See already *supra*, no. 74.

881 Just. Am. 15 EMPL Op. EU Seaports Regulation 2013.

882 See, once again, Art. 1.2 EU Seaports Regulation 2017/352, discussed *supra*, no. 74.

883 See, in that sense, the French version (*'«soutage», le ravitaillement du bateau,* alors qu'il est à quai*, en combustible solide, liquide ou gazeux ou toute autre source d'énergie visant à assurer la propulsion du bateau et son approvisionnement général et spécifique en énergie'* (emphasis added)) and the Portuguese version (*'«Abastecimento de combustível», o fornecimento,* aos navios acostados, *de combustível sólido, líquido ou gasoso ou de qualquer outra fonte de energia para propulsão dos navios e para o seu aprovisionamento geral e específico em energia'* (emphasis added)).

Regulation sets no particular limits to the freedom of national regulators to fix the boundaries of the *'port area'*. It cannot be contested that a special *'port area'* may be demarcated separately for the purpose of applying the EU Seaports Regulation. As a result, the boundaries of such area may deviate from the geographical limits applied in other legal contexts. After all, this would only confirm the practice, common in many States, of delimiting *'port areas'* differently for specific purposes. As a result, different definitions of a given *'port area'* may co-exist (for example, specific port areas may be delineated for customs, security, police, navigation, safety, road traffic, environment and labour-related purposes).

Clearly, any delimitation of the *'port area'* for the specific purpose of implementing the EU Seaports Regulation should not unduly restrict the scope of the Regulation, nor defeat the purpose of the instrument. As a rule, all areas where cargo and passenger traffic-related *'port services'* are rendered that are included in the material scope of the Regulation, should also be included in the delimitation of the relevant *'port area'*. National or local decisions to eliminate certain cargo or passenger terminals from the *'port area'* may amount to an infringement of the EU Seaports Regulation and/or the EU principle of loyal cooperation. Likewise, the EU Seaports Regulation should be applied to facilities that were included in the relevant port area prior to the implementation of the EU Seaports Regulation, and the throughput of which served as a basis for the calculation by Eurostat of the traffic volume that serves as a threshold under the EU TEN-T Regulation[1287].

Nor are Member States allowed to exclude those port areas or port facilities which Annex II to the EU TEN-T Regulation mentions explicitly as parts of the *'maritime port'* concerned. For example, according to that Annex the port of Tallinn comprises the Old City Harbour, Muuga Harbour, and Paljassaare Harbour. The port of Rosslare comprises the Europort, and the port of Athens the Piraeus. The port of Marseilles, managed by the Grand Port Maritime de Marseille, consists of Marseilles proper and Fos-sur-Mer. In relation to Dublin, the Annex mentions the *'G.D.A. port cluster'*, which refers to the Greater Dublin Area, of which not only the port of Dublin, but also the ports of Arklow, Dún Laoghaire, Howth and Wicklow form part (even if today the commercial cargo and passenger traffic handled in the latter locations seems very limited, if not insignificant). The port of Cagliari comprises Cagliari proper and the Porto Foxi, both managed by the Autorità Portuale di Cagliari. The port of Palermo encompasses both Palermo proper and Termini Imerese, which all fall under the jurisdiction of the Autorità Portuale di Palermo. The

[1287] See, once again, the relevant EU legal instruments cited *supra*, no. 99 and 104, fn. 1129.

205 Characteristics of port infrastructure or nature of port traffic

The fourth reason to introduce a limitation on the number of providers is where *'the characteristics of the port infrastructure or the nature of the port traffic are such that the operations of multiple providers of port services in the port would not be possible'*[923].

Again, the language is quite vague. At first, it seems that this ground may partly overlap with the first criterion, which refers to *'scarcity or reserved use of land or waterside space'*[924]. On closer inspection, it appears that initially the EU legislator had cases in mind where multiple providers would not be able to operate in economically satisfactory conditions. Several participants in the debate simply termed this point the *'market size'* criterion[925]. However, in the final Regulation this economic rationale is no longer mentioned. The legislative history shows that there was indeed strong opposition to the possibility of restricting market access because of the small size of the services market concerned.

The basis for the point under consideration was laid in changes demanded by both Council and Parliament. In the Council's Shipping Working Party, the initially tabled proposal sounded quite explicit as it purported to allow limitations based on *'the specific market constraints due to the economic capacity of the port, where the characteristics of the traffic do not enable multiple providers of port services to operate in economically satisfactory conditions in that port'*[926]. At a next session, the reference to *'the specific market constraints due to the economic capacity of the port'* was removed[927]. The minutes of the Shipping Working Party show that Finland, and initially also the Netherlands and the European Commission, considered that *'the absence of a viable market'* is not *'in itself a sufficient condition for a limitation'*. Still, Greece, Ireland and the United Kingdom supported this reason for introducing a limitation[928]. The

923 Art. 6.1(d) EU Seaports Regulation 2017/352.

924 See *supra*, no. 201.

925 Thus, for example, EP Rapporteur Fleckenstein (see *infra*, fn. 931); Katsarova, I. and Pape, M., *The liberalisation of port services*, EU Legislation in Progress Briefing, *s.l.*, European Parliamentary Research Service (EPRS), March 2017, 7; European Tugowners Association, *ETA (European Tugowners Association) response to the Draft Report 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. Regulation (COM (2013) 0296 –C7-0144/2013-2013/0157 (COD)*, Brussels, 16 December 2013, 2.

926 CEU doc. 6901/14, 19 June 2014, 20, Art. 6.1(bc); CEU doc. 6901/1/14 REV 1, 27 June 2014, 20, Art. 6.1(bc).

927 CEU doc. 11426/14, 3 July 2014, 21, Art. 6.1(bc) (partly deleted).

928 CEU doc. 12705/14 INIT, 4 September 2014, 20, fn. 38; CEU doc. 12984/14, 11 September 2014, 20, fn. 34; CEU doc. 13210/14, 18 September 2014, 20, fn. 28.

213 Meaning of 'selection procedure'. Need for competitive test

The EU Seaports Regulation's concept of a *'selection procedure'* might surprise many. The concept does not intend to refer to *'(qualitative) selection criteria'* as mentioned in the EU Directives on public procurement and concessions[1064], which are used to assess the standing of tenderers regarding financial, economic and technical matters. Rather, the term *'selection procedure'* designates the award process as such. In its consideration of alternative policy measures in the preparatory Impact Assessment, the European Commission used the term *'public tendering'*[1065]. But the Proposal for a Regulation had *'selection procedure'*[1066]. As for the Council, it preferred expressions such as *'a procedure of the choice of'* or *'a procedure to choose'* providers of port services[1067]. However, the term *'selection procedure'* also appeared in the initial EC Seaports Directive Proposals[1068], and is indeed used in several other similar instruments such as the EU Services Directive[1069] and the EU Airport Groundhandling Directive[1070]. In these instruments, just as in the EU Seaports Regulation, an element of *'selection'* is always present because of the underlying *'limitation'* of the number of providers or market access rights.

Theoretically, in order to achieve an objective allocation of limited market access rights, several alternative procedures can be envisaged. These include a comparative or competitive test (also called 'beauty contest' or 'tender' − an auction and a public procurement procedure can be considered special applications); allocation to the first applicant ('first come first served'); proportional division; and even a lottery (which may be also a feature of

1064 See Art. 58 *et seqq.* Directive EU Public Procurement (Public Sector) Directive; Art. 78 *et seqq.* EU Public Procurement (Utilities) Directive; Art. 38 EU Concessions Directive.

1065 See, for example, Imp. Ass. 1 EU Seaports Regulation Proposal 2013, 33; Imp. Ass. 2 EU Seaports Regulation Proposal 2013, 2.

1066 Art. 7.1 EU Seaports Regulation Proposal 2013.

1067 See Art. 7 and 7.1 CEU Gen. Appr. EU Seaports Regulation 2014. The Council's preparatory documents show that during the preparation of the Council's (unsuccessful) alternative procedural regime, the use of the concept of a *'selection procedure'* was indeed deliberately avoided, and that terms were preferred such as *'procedure to choose providers of port services'*, *'the award of a port service contract'* and *'award criteria'* (rather than *'choice criteria')* (see, *inter alia*, CEU doc. 13238/14, 25 September 2014, 22-23, Art. 7; CEU doc. 13555/14 INIT, 29 September 2014, 31-32, Art. 7).

1068 See Art. 8 EC Seaports Directive Proposal 2001; Art. 8 EC Seaports Directive Proposal 2002; Art. 8 EC Seaports Directive Proposal 2004.

1069 Art. 12 EU Services Directive.

1070 See Art. 11 EU Airport Groundhandling Directive.

Regulation allows a differentiation of charges *'in accordance with the port's own economic strategy and its spatial planning policy'*[562]. The crucial term *'own'* – which suggests that the managing body has ownership of the process – appears again[563], while there is no longer any direct reference at all in this context to the *'general ports policy'* of the Member State[564].

Further insight can be drawn from the developments during the final and, indeed, crucial phase of the 2016 Trilogue negotiations, which concluded a debate that had in fact been raging since the very start of the legislative process[565]. Once again, the advocates of charging autonomy – as already indicated, a *'red line'* for the European port authorities – faced stubborn resistance from Spain, which defended the tariff-setting prerogatives of its national Parliament. At a time when a compromise proposal was expected from the European Parliament representatives[566], the Spanish authorities submitted a detailed paper explaining why full charging autonomy for ports was unacceptable to them. In essence, Spain put forward three different arguments. Firstly, it pointed to the historically developed specificity of its port management system, which grants local ports only limited tariff autonomy through bonus and corrective coefficient mechanisms, and to the commitment of the Commission and the European Parliament to respect the freedom of each Member State to determine its own port organization and

Am. 586 EU Seaports Regulation 2015 (Isabella De Monte, David-Maria Sassoli), mentioning the same Justification). Yet other Amendments, tabled by Spanish MEPs, which radically stated that the structure and the level of port infrastructure charges had to be defined by the competent authority did not succeed either. See, for example, MEP Am. 589 EU Seaports Regulation 2015 (Inés Ayala Sender), which was based on the following crystal-clear Justification:

> *Some Member States define their port charges directly by the Parliament rather than through the managing authority of the port. This is the case not only for ports, but it is also established and allowed by EU legislation in the rail and airport sectors. In order to respect the different systems in the European Union, it should be also allowed for the ports provided that the charges are not discriminatory and comply with state aid legislation.*

In the same vein, see already MEP Am. 415 EU Seaports Regulation 2013 (Luis de Grandes Pascual); MEP Am. 416 EU Seaports Regulation 2013 (Inés Ayala Sender). For the sake of completeness, see some more neutral propositions in MEP Am. 587 EU Seaports Regulation 2015 (Ivo Belet, Helga Stevens); MEP Am. 588 EU Seaports Regulation 2015 (Kathleen Van Brempt, Christine Revault d'Allonnes Bonnefoy).

562 Art. 13.4 EU Seaports Regulation 2017/352; see *infra*, no. 330.

563 The word *'own'* was inserted during the final legal and linguistic check (EP-CEU doc. PE-CONS 41/16, 16 December 2016, 43, Art. 13.4). The same change was made in the corresponding Recital (47) (*ibidem*, 17, Recital (47)).

564 Although the paragraph which deals with differentiations mentions that it is *'[w]ithout prejudice'* to the paragraph dealing with the main tariff (see *infra*, no. 322).

565 See *supra*, no. 300, concerning the responsibility of ensuring that a port infrastructure charge is levied.

566 See CEU doc. 9409/16, 27 May 2016, 100, line 352.