would emerge, in which case the Regulation should take priority as a *lex specialis*.

66 Regime of port terminal contracts in landlord ports

Contracts concluded between managing bodies of ports and terminal operators, which are common in the widespread landlord port management model,[801] remain largely outside the scope of secondary EU law.

In most cases, such contracts take the form − depending on the national framework and local practices − of a lease agreement, a licence agreement, an emphyteutic lease, or a domain or land concession agreement.[802] As a rule, such agreements are neither a public or service contract nor a works or services concession within the meaning of the aforementioned EU Public Procurement (Public Sector) Directive, the EU Public Procurement (Utilities) Directive and the EU Concessions Directive,[803] respectively.

More particularly, it appears from quite straightforward case law that the allocation, including temporary allocation, of areas or hangars within ports to be used for the provision of terminal services cannot be classified as a service contract within the meaning of the EU Public Procurement (Utilities) Directive where the port authority does not acquire a service provided by the supplier in return for remuneration.[804] In the infringement case about land leases in the State Seaport of Klaipėda, the European Commission had already observed that land lease contracts and related preferential rights of renewal did not fall under the scope of the then applicable Directive on public procurement in the utilities sectors,[805] since they are not supply, works or service contracts in the sense thereof. The object of the land lease contracts, the Commission argued, *'does not concern the execution of works, the supply of products and the provision of services by the economic operators to the public authorities concerned, but rather the granting of a*

801 See *supra*, para. 8.

802 See *supra*, para. 46.

803 See *supra*, para. 65.

804 See, in relation to an airport, but perfectly transposable to seaports, ECJ 13 July 2017, *Malpensa Logistica Europa*, Case C-701/15, ECLI:EU:C:2017:545, paras. 29, 31 and 35. That the judgment concerns the formerly applying Directive 2004/17/EC, is not material either. The reference is to Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*OJ* 30 April 2004, L 134/1(repealed)).

805 Directive 2004/17/EC, referred to in the previous fn.

attributable to the fact that deep-sea pilots operate in marine areas where the right of innocent passage, if not freedom of navigation, is the starting point. Yet the profession of deep sea pilot in the North Sea and the English Channel has been subject, for many years, to an EU-wide certification requirement,[1073] which does not alter the fact that otherwise this services sector operates on a purely commercial basis. In the aforementioned waters, as well as in the Baltic Sea, the International Maritime Organization recommends its Member Governments to encourage masters and ship owners, when they choose to avail themselves of a deep-sea pilot, to make use only of the services of an adequately qualified and licensed deep-sea pilot.[1074] In the Baltic Sea, the deep-sea pilots are supplied by the competent pilotage authorities of the coastal States, which may further regulate this service activity, including applicable tariffs. These authorities cooperate within the framework of the Baltic Pilotage Authorities Commission (BPAC).

97 Notion of 'towage'

Finally, *'towage'* as defined in the EU Seaports Regulation refers to

> *the assistance given to a waterborne vessel by means of a tug in order to allow for a safe entry or exit of the port or safe navigation within the port by providing assistance to the manoeuvring of the waterborne vessel*.[1075]

To start with, we should highlight that, just as in the analogous definitions of mooring[1076] and pilotage,[1077] emphasis is placed on the safety aspect of towage (*'safe entry'* and *'safe navigation'*[1078]). Towage is indeed an essential safety-oriented port service, contributing to the prevention of collisions and other accidents. This is important because in the framework of the Regulation safety considerations may justify market access restrictions.[1079]

[1073] Council Directive 79/115/EEC of 21 December 1978 concerning pilotage of vessels by deep-sea pilots in the North Sea and English Channel (*OJ* 8 February 1979, L 33/32).

[1074] See IMO Resolution A.1080(28) of 4 December 2013 'Recommendation on the use of adequately qualified deep-sea pilots in the North Sea, English Channel and Skagerrak'; IMO Resolution A.1081(28) of 4 December 2013 'Recommendation on the use of adequately qualified deep-sea pilots in the Baltic Sea'.

[1075] Art. 2(6) EU Seaports Regulation 2017/352.

[1076] See *supra*, para. 91.

[1077] See *supra*, para. 94.

[1078] The insertion of *'safe navigation within the port'* results from the Council's General Approach and a Parliament Amendment (see *infra*, fns. 1090-1092). Compare also, as early illustrations of this concern, MEP Ams. 111 and 117 EU Seaports Regulation 2013 (Carlo Fidanza); MEP Am. 112 EU Seaports Regulation 2013 (Karim Zéribi).

[1079] See *infra*, paras. 164, 205 and 241.

codification of the Court's case law. The Court has indeed accepted maritime and port traffic safety as an instance of a *'public security'*-related measure within the meaning of the Treaty, or as a 'rule of reason'-based overriding reason of public interest that can justify a restriction on the fundamental freedoms.[2491] Such derogations from free movement do not, of course, apply unconditionally either, but must meet strict criteria, including proportionality.[2492]

Since an Amendment proposing the addition of a reference to *'the need to ensure the health and safety of workers'*[2493] was not accepted, such considerations are in themselves unable to justify a limitation on the number of service providers. Hence, the only *'safety'* considerations which may be invoked are concerns about the safety of the port operations as such. While the provision of a port service may of course be subject to laws and regulations in the field of occupational health and safety, these cannot support a limitation on the number of port service providers.

206 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'*.[2494]

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'*.[2495] 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.[2496] However, in the

[2491] See *supra,* para. 164, with the references to the relevant ECJ judgments.

[2492] On these conditions, see *supra*, paras. 132 and 176.

[2493] MEP Am. 393 EU Seaports Regulation 2015 (Stelios Kouloglou, Rina Ronja Kari, Fabio De Masi), covered by TRAN Comp. Am. 5 EU Seaports Regulation 2016; in the same sense Am. 8 EMPL Draft Op. EU Seaports Regulation 2015. The draft opinion was voted down.

[2494] Art. 6.1(d) EU Seaports Regulation 2017/352.

[2495] See *supra*, para. 202.

[2496] Thus, *e.g.*, EP Rapporteur Fleckenstein (see *infra*, fn. 2502); 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.

However, in the specific case of an internal operator running its service under unwritten national public service obligations,[3845] the pricing rule under discussion should apply, even if it would then probably only reiterate existing law.

293 Substantive requirements for port service charges. Proportionality

Finally, the EU Seaports Regulation stipulates that a port service charge must be *'proportionate to the cost of the service provided'*.[3846]

In this respect, two issues arise. Firstly, it has to be determined what cost proportionality exactly means. A closely related second question is how the Regulation's rule relates to EU competition law on pricing abuses by a dominant undertaking (which is based on Article 102 TFEU[3847]), and whether the relevant competition case law and methodologies should guide the interpretation of the provision under consideration.

At first sight, the cost proportionality requirement indeed seems to be closely related to the established doctrine on pricing abuses as prohibited by EU competition law. As the European Commission rightly recalled in its Impact Assessment, market power abuse may consist of *'[e]xcessive pricing to users'*. With explicit reference to the competition law-based jurisprudence of the Court, the Commission defined this, in the same Impact Assessment, as *'charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied'*.[3848] As we just saw, the Commission's Regulation Proposal stated in the same vein that the charges *'shall not be disproportionate to the economic value of the service provided'*. It thus seems that in its legislative Proposal, the Commission was (at least partly) inspired by the classic competition law doctrine on pricing. The European Parliament, for its part, while agreeing in principle that *'the economic value of the service'* should be the yardstick, made an

[3845] On this specific case, see *supra*, para. 285.

[3846] See, again, Art. 12.1 EU Seaports Regulation 2017/352.

[3847] Art. 102 TFEU provides:

> *Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.*
> *Such abuse may, in particular, consist in:*
> *(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
> *[…].*

[3848] Imp. Ass. 1 EU Seaports Regulation Proposal 2013, 16.

304 Procedural and substantive requirements for port infrastructure charges. Overview

The EU Seaports Regulation provides that, in order to contribute to an efficient infrastructure charging system, *'the structure and the level'* of port infrastructure charges *'shall be determined according to the port's own commercial strategy and investment plans, and shall comply with competition rules'*. The relevant paragraph adds that, *'[w]here relevant'*, such charges *'shall also respect the general requirements set within the framework of the general ports policy of the Member State concerned'*.[4073] The below discussion of these principles is structured as follows.

First, we will discuss the mainly procedural issue of which entity has power to decide on the tariff, and actually to collect the levies. During the legislative process, the tariff-setting autonomy of managing bodies of ports was a key point of discussion. The final compromise still recognizes the autonomy principle, although in a somewhat reduced form.

Secondly, we will enter into the substantive requirements. Except for its vague reference to the *'competition rules'*, the EU Seaports Regulation at first sight does not seem to subject the setting of port infrastructure charges to any further substantive conditions of its own. Quite the reverse, in fact, its emphasis on the tariff-making autonomy of the port managing bodies seems to suggest that such conditions were regarded as unnecessary and undesirable. Yet it would be wrong to conclude that the EU Seaports Regulation gives the port managing bodies *carte blanche* to introduce arbitrary pricing policies which do not have to meet certain elementary legal principles. Below, we will present a set of such requirements which can be deduced from the relevant provision, the relevant Treaty principles and a key Recital which clarifies the essential characteristics of a port infrastructure charge. These standards, which complement the explicit reference in the Regulation's paragraph to compliance with competition rules, include market conformity, compliance with the fundamental freedoms and internal taxation rules, transparency, objectivity, non-discrimination and (elementary) proportionality.

305 Procedural requirements for port infrastructure charges. Tariff-setting power of port managing bodies v. competent authorities. Analysis

Where the provision under scrutiny states that *'the structure and the level'* of port infrastructure charges *'shall be determined according to the port's own commercial*

[4073] Art. 13.3 EU Seaports Regulation 2017/352.