



Juridical Regime of Pilotage's Service in Spain

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ABSTRACT

Pilotage is a technical-nautical port service that is configured as a service of general economic interest. The provision of this service port corresponds to private individuals after obtaining a license, which may only be obtained by competitive bidding in accordance with the "special specifications" in each case approved by the respective Port Authority.

The patrimonial liability of the Spanish Maritime Administration is directly and secondarily excluded, except in cases where for lack of offer has to support direct management Port Authority (Administration) or for those other cases that must be a pilotage service, this had not provided by the Port Authority.

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1. Evolution of port services

The Spanish Law 27/1992 of Ports and Merchant Marine (hereafter LPMM), regulated port services of the ports of general interest (for ports managed by the Spanish State). The important thing at the organizational level of the LPMM was establishing public ownership of port services and consideration of genuine public services whose provision was entrusted to the respective Port Authorities. The rendering was done through direct management by the Port Authority or by indirect management. This Law attributed to the Port Authority the ownership, management, provision of port services and maritime signaling (Acero, 2002; Menéndez, 1996; Navajas, 2000).

The legal framework for the provision of services was the Private Law. The legal relationship between the provider and the receiver of the port service was a private legal relationship. Some authors define this situation as a escape of Administrative Law in the provision of public services to achieve greater

efficiency example, the previous regime was fastened to Public Law (Menéndez, 1996; Pérez, 2003).

1.1. From public service to service economic interest

With Law 48/2003 of Economic System and Provision of Services in the Ports of General Interest (hereafter LPSP), a new legal concept of port services based on a system of services liberalization, in order to achieve was introduced greater economic competitiveness that benefit the end user (Arroyo, 2004; Horgué, 2007). This law carried out a "advance transposition" of the Directive of the European Parliament and of the Council on market access for port services. This proposal was not adopted by the EEC, but served the Spanish Administration as an excuse to introduce measures to liberalize port services in Spain. This Act applies to the ports of general interest. Curiously, the posterior Directive 2006/11/EEC on services, expressly excluded from its scope of application Article 2, to transport services, including port services.

The highlights that introduced the LPSP, has been the liberalization or privatization of port services to subsidiarity. The State through the Port Authorities, no longer retains ownership of port services. These services pass paid in free competition over the ownership and management to the private sector under the criteria of efficiency and profitability (Arroyo, 2004). Exception of general services in which ownership and management remain relevant to the Port Authorities. Thus, port services are defined as services of general economic interest (Laguna, 2009). Namely, activities or services for its im-

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pact on the lives of people or services are heavily regulated and controlled by public authorities subject to are provided by individual subjects (Cubero, 2011).

Liberalization creates free access to the realization of port services by companies that comply with requirements and requirements established by the Port Authority, which granted a license to lend (Ariño, 2004). This model attempt to guarantee that any private individual can acquire the status of port services provider, subordinating the acquisition of such license status by meeting the requirements set by the Port Authority. These requirements are set out in the Act and the corresponding “particular specification requirements” of the corresponding service.

The Law 33/2010 deepened the liberalization of port services (Trias, 2011), despite the initial draft of 2009 recuperating public ownership of port services through indirect management. A report of the Commission on Defense of Competition of 25 February 2009 on this draft, did give up that possibility and caused a total change, keeping the system of liberalization set in LPSP. All above rules have been repealed by Royal Legislative Decree 2/2011 of 5 September, approving the revised text of the Law on State Ports and Merchant Marine (hereafter TRPMM) is approved. This text has not changed substantially regulation and standards set by its predecessors. Its adoption has established a coherent and unified regulatory body. The TRPMM regulates within its extensive articulated, providing comprehensive services and port services.

The port activity will develop in a framework of free and fair competition between service operators at the ports of general interest. Applies to State Ports promote competition in the entire port system and the Port Authority in their own territorial and functional areas. The freedom of access to the provision of services in the ports of general interest is also recognized.

1.2. Types of port services

Amongst the various port services, TRPMM defines the general services that are common services that benefit port users without the need for request. It also covers services that are necessary for the performance of the functions of Port Authorities (Pérez, 2003). Corresponds the provision of general services to the Port Authorities that are entitled to these services. We can assert that this is strictly public service to be rendered without any financial compensation by the port authorities in each of the ports of general interest. In these cases, we find that public ownership and management is, in some cases, directly or indirectly through the corresponding management contract.

Port services are:

- The service of organization, coordination and control of port traffic, both maritime and terrestrial.
- The service of coordination and control of the operations associated with the port, commercial services and other activities.
- The services of signage buoying and other navigational aids (nautical engineering) serving approach and access the ship in port.
- The police service in public areas (without prejudice to the competencies that correspond to other authorities).
- The service lighting public areas.
- The cleaning of the common areas of land and water. Not included in this service spring cleaning and concourses as a result of reservoir operations and handling of goods, or spills and discharges of marine pollutants.
- The prevention and emergency control, in the terms established by the legislation on civil protection, in cooperation with the competent authorities on civil protection, prevention and firefighting, rescue and pollution prevention. This service must be coordinated both Safety and Security (IMO, 2013; Martínez M., 2009).

Port services “strictu sensu” are services, which were traditionally owned, and public management legislative developments but have become privately owned services that are offered like any other service in conditions of free competition within the port and are subject a license to the Port Authority.

The TRPMM distinguishes between so-called port services (Article 108) the services’ technical-nautical “(Zurutuza 2010)

- Pilotage Service (Figure 1).
- Service port towing.
- Service huggers.
- Passenger service, which includes: Boarding and disem-

Source: Capt. Antonio Cuesta, Pilot of Santander's Port.



Figure 1: Pilots' boat of Corporation of Santander Port.

barking passengers, loading and unloading baggage and vehicles with passengers.

- Reception facilities for ship-generated waste, including: Receipt of waste and residues of Annex I and/or Annex IV and/or Annex V and/or Annex VI of MARPOL 73/78.

Service handling of goods, consisting of: Loading, unloading, stowage, unstowage, maritime transit and transshipment of goods.

Although it is a service provided by private subjects in concurrence and in a limited space, the granting of licenses to operators must take into consideration all the proper principles of public service in its service provision are: Safety, efficiency, regularity, continuity and non-discrimination.

Can occur the case that in a port do not exist companies willing to provide these services (and unable to ensure the abovementioned principles of regularity and continuity) the need to perform the Port Authority of the port, either directly or indirectly, is where the principle of subsidiarity. This is the case where the licenses issued can not meet the entire demand in the port with the quality indicators in the statement required individual service requirements. The TRPMM provides for this possibility (exceptionally), Port Authority will have to provide a favorable report.

2. Legal status of the Spanish Pilotage Service

The pilotage service is advising masters of vessels and floating structures (IMO, 2010; Osante, 2006; Pérez, 2000, 2002; Zurutuza, 2010) to facilitate the entry and exit port and the nautical maneuvers necessary within the geographical boundaries of the pilotage area ensuring the security (IMO, 2013; Martínez M., 2009; Zurutuza, 2010).

2.1. Definitions & concepts.

The present definition of pilotage service is in the Article 126 of the Law TRPMM (derived from the LPSP 48/2003) after the reform by Law 33/2010 (Trias, 2011). This definition eliminated the reference to as' assisted pilotage "linking" service "from the first radio contact with the pilot station. Now the pilotage service, is limited to advice provided by the convenient but on board ships. Conversely, various maritime specialists (Zurutuza, 2010) say that the service includes the instructions and has' just wanted to lighten the definition missing something that is obvious and can determine the start of the responsibility of the pilot.

2.2. Legal Status

The Law TRPMM has been to simplify into a single text articulated, in particular Articles 126, 279, 280 and 281. It is necessary to emphasize the force of Royal Decree 393/1996, amending the General Pilotage Regulations and Resolution of October 11, 2006 State Ports amending General terms and conditions approved by the Service approves Pilotage. The Particular Specification requirements for each port service

must be approved by each Port Authority prior binding report of the State Ports. Therefore, there will be many "special requirements specifications" for each port service as Port Authorities exist in Spain. At present there are twenty-eight in Spain Port Authorities in eleven regions. These Port Authorities managed forty-six commercial ports and feature fifty-three corporations are shown in Tables practical 1-11.

Table 1: Corporations Pilots of Andalucía.

Andalucía	9 Corporations
Puerto de Tarifa, S.L.P.U.	
Puerto de Sevilla y Ría del Guadalquivir, S.L.P.	
Puerto de Motril	
Puerto de Málaga, S.L.P.	
Puerto y Ría de Huelva, S.L.P.	
Puerto Garrucha-Carboneras, S.L.P.	
Cádiz, S.L.P.	
Puerto de Almería, S.L.P.	
Bahía de Algeciras, S.L.P.	

Source: Authors.

Table 2: Corporations Pilots of Asturias.

Asturias	2 Corporations
Puerto de Gijón, S.L.P.	
Puerto y Ría de Avilés, S.L.P.	

Source: Authors.

Table 3: Corporations Pilots of Canarias.

Canarias	9 Corporations
Cementos Especiales de Las Islas, S.A. (Arguineguín) (Las Palmas de Gran Canaria)	
El Hierro, S.L.P.	
Puertos de Tenerife, S.L.P.	
Santa Cruz de La Palma	
La Gomera, S.L.	
Fuerteventura, S.L.P.	
Puerto de Los Cristianos, S.L.P. (Tenerife)	
Puerto de La Luz y Las Palmas, S.C.P.	
Puerto de Arrecife, S.L.P.	

Source: Authors.

Table 4: Corporation Pilots of Cantabria.

Cantabria	1 Corporation
Puerto de Santander, S.L.P.	

Source: Authors.

Table 5: Corporations Pilots of Cataluña.

Cataluña	5 Corporations
Ports de Vilanova i Vallcarca, SLP	
Puerto de Tarragona, S.L.P.	
Puerto de Palamós	
Puerto Alfaques y Rada de Alcanar	
Puerto de Barcelona, S.L.P.	

Source: Authors.

Table 6: Corporations Pilots of Ceuta and Melilla.

Ceuta and Melilla	2 Corporations
Puerto de Melilla, S.L.P.	
Puerto de Ceuta, S.L.P.	

Source: Authors.

Table 7: Corporations Pilots of Galicia.

Galicia	9 Corporations
PorAlumina Española S.A. - Puerto Privado	
Prácticos Vivero, S.L.P. (Lugo)	
Puerto de Villagarcía y Ría de Arosa, S.L.P.	
Puerto y Ría de Vigo, S.L.P.	
Ría de Ribadeo, S.L.P.U.	
Puerto de Marín y Ría de Pontevedra, S.L.P.	
Coruña Pilots, S.L.P.	
Puerto y Ría de Ferrol, S.L.P.	
Corcubión Sada Laxe, S.L.P.	

Source: Authors.

Table 8: Corporations Pilots of Islas Baleares.

Islas Baleares	4 Corporations
Puerto de Palma, S.L.P.	
Mahón, S.L.P.	
Puerto de Ibiza, S.L.P.	
Prácticos de Alcudia	

Source: Authors.

Table 9: Corporation Pilots of Murcia.

Murcia	1 Corporation
Puerto de Cartagena	

Source: Authors.

Table 10: Corporations Pilots of País Vasco.

País Vasco	3 Corporations
Puerto Pasajes, S.L.P.	
Puerto y Ría de Bilbao, S.L.P.	
Puerto de Bermeo-Mundaka	

Source: Authors.

Table 11: Corporations Pilots of Valencia.

Valencia	8 Corporations
BP OIL Refinería de Castellón, S.A. (Private Port).	
Puerto de Sagunto, S.L.P.	
Valencia, S.L.P.	
Puerto de Torre Vieja, S.L.	
Gandía, S.L.	
Denia, S.L.P.	
Puerto de Castellón/Burriana, S.L.P.	
Puerto de Alicante, S.L.P.	

Source: Authors.

In spite of the liberalization and privatization in the delivery of port pilotage, the Administration keeps public powers of the activity. These skills are:

- Determination of the need for pilotage service and, if non-mandatory use and the technical conditions with which service should be provided.
- Determination of minimum requirements and professional qualifications to be met by applicants Practical as well as the establishment and implementation of accurate tests for the recognition of training to provide pilotage services in a port or group of ports.
- The determination of the conditions for lifelong learning (IMO, 2010, Martínez M., Eguren; Martínez, 2012) and recycling of Pilots. Proficiency tests that must pass the Pilots at any time to check their technical skills and physical fitness.
- Carrying out the operations of pilotage in acceptable conditions of maritime safety (Safety and Security) (IMO, 2013).
- The precautionary suspension of accreditation of a Pilot for safety or security requirements in the pilotage service.

2.3. *Obligation in the provision of pilotage and exceptions*

The pilotage service is a service that is performed by the request of the receiver. This request is obligatory (is determined by the Maritime Administration of the port) for input and output port of the vessels as well as for nautical maneuvers in port. The pilotage is compulsory reception or request.

The previous Law 33/2010, introduced a number of exceptions to compulsory pilotage service reception, which already provided previously in other regulations. They are not obliged to accept Pilotage Service: Vessels and vessels serving the Port Authority, for use in the execution of works in the port public domain, for the fueling and provisioning of vessels, for the provision of port services (same port) and those who are in support of other government (which have their base in the port) and vessels whose master has exercised (even interim) as Pilot at the port in question, or if this Pilot has passed the tests of theoretical and practical qualification at that port. The current Ministerial Order 1621/2002 of the Ministry of Public Works and Transport was already regulating the conditions relating to the granting of exemptions from Pilotage Service. In Figure 2, a pilot going up on board a merchant entering port.

2.4. *Issuing of the license: Public tender*

The provision of pilotage service in a port of the public interest requires obtaining a license. This license is awarded by the Port Authority of the port, subject to the provisions of TRPMM in the regulatory specifications and particular requirements. The license for the provision of pilotage service is specific. The term of this license shall be determined by the Port Authority on the "particular requirements" and may not exceed 10 years as planned (Article 114.1.a. TRPMM). The licenses for the provision of pilotage service, may not be re-

Source: Capt. Eva M^a Muller.

Figure 2: Pilot on board.

newed. For licensure Pilotage Service will require the applicant demonstrates a number of conditions, including: economic, technical and professional solvency in the service.

As a requirement of professional capacity, the applicant must demonstrate that the service will be performed for pilots duly authorized by the Maritime Administration, appointed by the Port Authority and belong to a professional association, in accordance with current regulations. In Figure 3, the daily work, all year at any hour of a pilot.

In the case of pilotage service, we find with a service that is given by a private and service subject under license. Due to a limited number of providers to a single provider, the granting of the license in each port area must be granted by competition (Art.126.3 TRPMM) prior preparation and adoption of the particular specification requirements for each contests by each Port Authority. The particular specifications shall contain the requirements to participate in the contest, the information and documentation to be provided by the applicant and the award criteria that must be objective and non-discriminatory. Regardless of what the natural or legal person to be granted a license to provide the service on a particular port area, anyone is free to turn to the evidence presented in each case the Maritime Administration to perform obtain the so-called “qualification” as pilot. In this sense TRPMM (Art.126.4.b) establishes the possibility that the company providing the service port may be required by the Port Authority to assist in the discussion of test pilot for preparing aspirants of that empowerment. This qualification does not carry the right to practice as a Pilot on a given port, but to be able to provide such services as convenient as long as the service provider in a particular port area counts it for him. In each port area is the Maritime Administration determines the required number of pilots who have to have every service provider.

Source: Capt. Antonio Cuesta.



Figure 3: Pilotage, a complicated and dangerous nautical engineering work.

2.5. Impossibility of self-provision and incompatibilities

The guarantee of safety at sea (IMO, 2013) in the pilotage service generates positions contrary to privatization and defends their positions particularized treatment. Although the incorporation of the private sector in the provision of such service (Osante Martin, 2006) is accepted, the Workshop has responsibility to the Port Authority and this danger if competitive services to different groups change time slots are installed. The system designed after the MMPA, and now back LPSP contained in TRPMM does not detract in any maritime port security (IMO, 2013) because it has not brought freedom of establishment to provide this service.

The current reality of Spanish ports has expressed the absence of incorporation of the private sector in the provision of port services. We find the maintenance of traditional Port Authority contracts with a single provider for each port services (Osante Martin, 2006). In spite of the theoretical allocation pilotage service to the private sector after the LPSP, the reality is that at present the pilotage service continues to be provided under indirect management through contracts between the Corporation of Pilots and Port Authorities (Zurutuza, 2010).

Despite the asserted liberalization and competition in the provision of port services, pilotage service, due to its character of virtual monopoly (in service provision within a port) only admits the existence of a single provider. In the case of port services and particularly in the pilotage service (the prior authorization check) means the recognition of special rights. As defined Law TRPMM (Article 126.3), due to the uniqueness and special emphasis Pilotage Service in maritime safety, the number of service providers is limited to a single provider in each port area defined. This is done based on the criterion of maximum security (IMO, 2013). Thus the port area sets a single license.

In the case of pilotage service, the scope for competition is limited by its very structure, configuration and technical requirements (IMO, 2010). The number of possible operators in a port is limited or possible only through a single operator making it virtually impossible to enter the competition in the provision of service (Esteve, 2007). The granting of the license for the provision of port pilotage service will precede the competition. The competence and concurrence will be reflected in the preliminary contest, not in terms of effective service delivery. In these cases, the principles of openness, transparency and the granting of authorizations based on objective, proportionate and reasonable criteria are necessary to ensure that the choice of the most suitable for the activity in question (Laguna, 2009). In these cases, the licenses for the provision of port services obviously lose their regulated so you should ensure that these principles are respected character.

This is not a service which to be provided under concession or indirect management is an activity subject to the delivery of prefatching a license, as well as for the delivery of other port services. Not applicable the license renewal for the provision of port pilotage, being a port service providers whose number is limited to only one port area.

In spite of the generally expected TRPMM of its Article 109.2 "in fine" the possibility that the Port Authorities may grant licenses for self-provision and integration of port services, pilotage service is expressly excluded from this possibility, not being able authorize the system of self-provision (Art.135.2 TRPMM). The holder of the license pilotage in the same area port cannot perform other technical-nautical services, such as the harbor towage and mooring services. The Law forbids stating that the holder of a license for the provision of port pilotage shall not engage, by itself or through natural or legal persons lodged in the capital or management companies authorized to provide technical-nautical any other service on the same port.

2.6. Public service obligations in Pilotage Service

Pilotage is essential for the port traffic to develop properly and therefore should be given on a regular and continuous that is what has always characterized utilities. The pilotage service despite not configured at present as a public service in the strict sense, like other technical-nautical port services must be provided on a regular, continuous, and must be operational twenty four hours a day for all day of the year, except in cases of force majeure, and under the conditions established by the Private Prescriptions. The holder of the pilotage service should provide its service to every user on request provided they have been authorized by the Port Authority for docking, undocking and mooring and do non-discriminatory.

This category of the public service obligations means the government intervention for securing the service provided by private operators. This requirement stems from the transfer to the private area of public law (Esteve, 2007).

The Law TRPMM enumerates the public service obligations to be met by all providers of these services. Thus, Article 110 of the Law TRPMM provides as obligations the universal

coverage, continuity and regularity, cooperation with the Port Authority and the Maritime Administration among others (Laguna, 2009).

2.8. Subsidiarity of the Port Authority in the service

The holder of the license granted by the Port Authority borrows the pilotage service in private legal regime. Given the possibility that anyone would contest the granting of the license will be the Port Authority (Martínez M., 2009) which has to bear either directly or indirectly provide the service with the obligations described above (Article 109.3 TRPMM). The legal implications that may result from the relationship between provider, Public Administration and the service receiver may be different on patrimonial responsibility.

3. Regime of liability

The LPSP with the privatization of the Pilotage Service provides a legal and contractual relationship between the provider of pilotage service and the user of the service is strictly private. It is a service contract and therefore damages arising from the service will be under the Civil law. Jurisdiction is the ordinary and Management subsidiary cannot be held responsible for damage caused by pilots during the execution of their tasks (Osante, 2006; Zurutuza, 2010).

In advance of the Law LPMM of 1992 was official and the practical management of pilotage service was a direct management of this public service from the Port Authority. Damage due to normal or abnormal operation of that service was attributable to the Administration (Zurutuza, 2010).

The TRPMM establishes (Article 113.8.b.) that the Bidding Particular requirements will regulate the liability of the supplier. The liability for damages resulting from the provision of pilotage service provided for in the Article 24.2 of Royal Decree 393/1996 of 1 March, the General Pilotage Regulations approved. If the accident was the fault of the captain's failure to follow instructions handy, or do carelessly, shall be the sole responsibility of the captain and his shipowner.

In another sense, if the fault of the accident was of the pilot, it would be the responsibility of the Pilot and Pilotage Service. In the event that the damages are attributable exclusively to the deficient or inaccurate provision of pilotage service, which obviously would have to prove, is still even considering the possible existence of subsidiary patrimonial liability the Port Authority

4. Conclusions

1st. Pilotage Service has stopped being a public service to happen to be a service of general economic interest in which the Port Authorities is limited solely to regulate the service and control the adequacy and appropriateness of the provider.

2nd. The juridical relationship between the service provider and user of the private is a legal relationship, a contract for

services responds whose failure or damage the service provider, not the supervisory Administration.

3rd. The Administration has no subsidiarity have to deal with the damage caused by a regulated activity. The Administration acts like supervisory mere subjects that provide a service.

4rd. In the cases in which the pilotage service is not given, being necessary this service and a damage occurred, would be patrimonial liability the Spanish Maritime Administration

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