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The European Commission's Directive Proposal on market access to port services

Seaports play a very important role in European transport: 30% of all intra-European trade and 70% of all extra-European trade moves through our ports. What is becoming, however, more and more obvious now is that these huge quantities have to be increased even more in order to keep the transport system working. Ports will have to play an increasing role in attempts to transfer more goods and passengers to the environmentally less damaging and less congested sea transport mode and to accommodate ever-growing transport demand. Europe needs ports more than ever; Europe needs good ports and needs improving the quality service in ports – and this statement should not be misconstrued as meaning that European ports are bad on a world-wide scale.

The so-called 'Ports Package' addresses three key interlinked areas:

- Seaports and the trans-European network;
- Access to the market of port services; and
- Public finances and seaports.

The first issue, namely the inclusion of seaports in the Trans-European network has meanwhile been resolved: ports are on the map.

This leaves the two other areas. They are dealt with one by one in the Ports Package. It is, I think, more appropriate, and adds to the discussion on these issues, if we look at the issues from a slightly different angle, namely,

- competition between ports and
- competition within a port.

Competition between ports.

The variety of philosophies in the European Union on port ownership is well-known: there are privately-owned and privately-run ports at one end and publicly-owned and publicly-run ports at the other end of the spectrum, if you so wish, and any combination in-between. It is probably right to say that a majority of ports follow one of the many landlord/tenant models, although any detailed analysis would not really serve any useful purpose, as I will point out in a minute. Competition between ports would, of course, be on a level playing field if the same philosophy prevailed all over the Union, and, indeed, such approach was proposed.

However, the Commission did not take this course of action. Apart from legal problems, the key consideration was that it would not have been in the overall Union's interest to try and harmonise port structures. The ports' diversity is in fact a bonus because it spawns new ideas.

This is therefore an issue of subsidiarity where Member States are best placed to decide within a general European framework.

Why then can't we have a common system of charging for all European ports, you will ask. In fact, the word 'charging' does not even appear in the Ports Package. I understand that some of you find that omission unsatisfactory.

The issue of charging for the use of infrastructure is certainly not dead. But it is an issue for all modes of transport and for all parts of the infrastructure, not just for ports. My Commissioner, Vice President de Palacio, has announced a White Paper on European Transport Policy. I am sure that the issue of charging will be given a prominent role. But the Vice President has made it clear that nobody would do the ports and shipping industries, nor the economy as a whole, a service by introducing charging in ports alone, only because it is easier to implement it there than, e.g., on the roads. At a time when all policy makers agree to move more cargo from land to water, charging in ports only, with the possible consequence of cost increases, would be clearly counter-productive.

This answer may not be fully satisfactory to those ports which operate a full charging policy whilst others do not operate any. But whilst it is correct some ports in general operate a policy of full charging and many ports in other Member States do not, look at the roads, here the situation is far from uniform, too: users of roads in countries like France, Spain, Italy and soon Germany have to pay whilst use of roads in the UK is free. If proof was necessary, it shows that different philosophies prevail in different countries for different modes of transport which make it desirable that a common charging policy for all modes be found, especially one which takes into account the respective environmental impact caused by the different modes. We think that this is where maritime transport and ports stand to win.

How then can we ensure a more level playing field for ports. The European Union has state aid rules. They apply and are being applied to ports. The Ports Package contains guidance as to how these rules are applied in the ports sector. You may wish to consult this chapter.

We accepted that if we cannot, at this stage, find a satisfactory charging system, we should tackle the problem from a different angle.

Whereas the rules on state aids are relatively clear, the facts certainly are not.

There have been mutual recriminations between European ports about hidden aid granted by public authorities to ports. We believe that current levels of transparency in the ports sector are inadequate to ensure proper information on aggregated public money flows going into the ports and to retrace flows and use of public monies within port entities. But only full and genuine transparency will eventually lead to fair competition between ports.

We want to achieve very substantial improvements by a two-tiered approach.

The first tier relies on the so-called Transparency Directive. It requires that the financial relations between public authorities and public undertakings are transparent – and public ports are public undertakings, no matter how they are legally structured, even where they have no legal identity at all. Transparency must cover public funds made available directly or

indirectly by public authorities and the use to which these public funds are actually put. In detail, the following aspects of financial relations between public authorities and public undertakings must become apparent: provision of capital; off setting of losses; grants and loans on privileged terms; other financial advantages like the foregoing of profit or the recovery of sums due or the foregoing of a normal return on public funds used.

Similar rules, only recently put in place, apply to undertakings which are granted exclusive rights or which are given compensation for the operation of services of general economic interest which are common occurrences in the Community's ports sector. Since such undertakings are often also in competition with other undertakings, often private ones, it is only right that public money flows and their use come out into the open.

We believe that a strict application of these rules will have a major impact on the level of fair play.

The second tier which should substantially increase transparency and, hence, the level of fair play between ports, relies on the proposal for a Port Services Directive. The Commission proposes that where the port authority – or managing body of a port or whatever its title is – provides port services, it must separate the accounts of its port services activities from the accounts of its other activities, in accordance with current commercial practice and generally recognised accounting principles.

Indeed, we propose, that the auditor's report on the annual accounts must indicate the existence or, of course, non-existence of financial flows between the various activities of the port authority.

We believe that a combination of the transparency measures, both the existing and the proposed ones, will significantly increase the transparency levels in ports.

By mentioning the last point I have already ventured to the second key area, namely that of

Competition within ports.

Before going into detail, let me set out our underlying philosophies.

First, over recent years, a clearly discernable trend has been observed which shows a reduction of single, monopolistic service providers, in many cases publicly-owned or controlled, and an increase of competitive market forces. The results were positive; ports have become increasingly attractive to the private sector. Our proposal supports this trend: increase the private role and decrease the public role in ports.

Secondly, too many decisions are taken behind closed doors. It is simply unacceptable that a terminal operator is greeted over breakfast by the headline that its competitor has been awarded an operating licence (we call it 'authorisation') and he did not even know that a licence was on offer. Procedures must come into the open. Procedural rules must become transparent, non-discriminatory, objective and proportional. This is the principle of good governance. There is absolutely no reason why ports should be exempted.

Third, every prospective service provider should be given a fair and equal chance to take part in the growth industry of port services and fairness is, and is seen to be, exercised through clear rules and procedures. This is, of course, linked to the previously made point.

Then there is the tricky issue of reconciling already existing strict legal rules on the provision of services, the right of establishment and, of course, those on competition with the reality of the port sector. These rules already apply to ports. And let there be no illusion: if a prospective service provider wishing to exercise its right to provide services knocks at the door of a port authority, the port authority – today, under current law – will have to find ingenious reasons for saying ‘No, thank you’. But a port has its specificities: there may be space constraints; there are certainly important maritime safety and environmental considerations; ports play a specific role in customs and immigration matters. We had to find a balance, therefore, between a pure application of the law as it stands and the practicalities and realities of the port sector. And through the latter local specificities will be duly taken into account.

And finally, let us reverse the burden of proof – and lawyers will forgive me for using this metaphor. Too often, a prospective service provider has to prove to the port authority that it is in the port’s interest to let him do his job. We want the port authority to have to show that there are overriding reasons why the application is refused – and these reasons can be contested.

Let me now lead you on a step-by-step tour of the Commission’s proposal.

Step 1. Which ports are covered? There has to be a simple threshold. We propose 3 million tonnes and 500.000 passengers per year because market opening measures are less necessary and may be too cumbersome for small ports.

Only port services explicitly mentioned are covered: cargo handling in all its variations, passenger services and the so-called technical-nautical services of towing, mooring and pilotage.

Step 2 contains the recognition that, in order to ensure proper management of a port with its inherent constraints as well as to ensure a satisfactory level of professional qualifications, Member States may – it does not say ‘must’ – operate a system of prior authorisation for port service providers. In other words: somebody may be made responsible for running a port and setting the rules of the game. This is nothing new. It is done today in most ports in Europe. But our proposal introduces the concept of good governance which means, as I said before, that conditions for granting authorisations must be transparent, non-discriminatory, objective, relevant and proportional. This in turn means that these conditions may relate only to the provider’s professional qualifications, his sound financial situation and sufficient insurance cover, to maritime safety or the safety of installations, equipment and persons as well as to environmental protection.

Step 3 is of crucial importance for the application of our proposal. It recognises that the number of service providers may be limited, but only where clearly specified conditions are fulfilled: these conditions are lack of space or capacity or, as far as technical-nautical services are concerned, maritime traffic-related safety reasons. In other words: where the port

authority wants to limit the number of service providers, it must justify it and the grounds for justifying it are limited and clearly spelt out. This step reconciles the strict legal rules to which I referred earlier with the reality in certain ports, namely that well-specified and verifiable constraints make a limitation unavoidable.

Step 3 has a second function. It determines the scope of our proposal to a specific port service: where a port does not restrict the number of service providers, the incidence of the Commission's proposal is very limited and most clauses do not even apply because the main objective, namely better access for potential service providers, is already achieved.

Now that we have seen that our proposal has very limited consequences for ports which do not operate restrictions, let us address those ports which operate access restrictions and where our proposal would have consequences. I call it step 4.

The thrust of the Commission's initiative is particularly clear in the area of cargo handling where, as a general rule, at least two service providers for each category of cargo should be allowed. However, the Commission is aware that certain situations may not allow viable commercial operations by two service providers. It is obvious that the purpose of the Commission's initiative is not to jeopardise their commercial viability; such a situation may be treated differently.

As you will note, our proposal does not follow the somewhat crude approach adopted by Member States when they opened up access to the market of airport ground handling with which our initiative on ports is often compared. There the rule is simple: from a given date the airport must allow at least two service providers. We do not think that the same approach should be adopted for ports: they are more complex than airports and so are the port services. Our approach recognises the variety of ports and services and leaves a considerable margin for discretion to the port authority – but it has to act publicly and remain open to scrutiny by market forces.

The next steps would appear to be logical.

Step 5 addresses the selection process. It must be open and fair. The principle of fairness would introduce a fundamental procedural change in many ports where the port authority exercises both its function as port manager and, at the same time, as provider of a commercial service.

The managing body of the port must not be judge and party at the same time.

Where the managing body of the port provides, or wishes to provide, port services in competition with other service providers, it must be treated like any other competitor. This requires that the managing body must not be involved in the selection procedures of service providers, must not discriminate, in its function as managing body of the port, between service providers in which it holds an interest and other service providers and must, in particular, separate its port services accounts from the accounts of its other activities.

The selection procedure will settle the duration of the authorisation. It is inappropriate to grant authorisations unlimited in time. Instead we propose that its duration should depend on the

level of investment to be made by the service provider, obviously allowing for considerable longer duration where substantial investments must be made in immoveable infrastructure as compared to situations where no, or very little, investment is necessary.

We propose a maximum period of 25 years but I am fully aware that many think that this period is too short where investments easily reach hundred of millions of Euros. Let us see where the legislative process will lead us.

As to what happens to existing authorisations, this is obviously an important issue. We do not have to enter uncharted territory to solve this issue since a comparable situation had to be addressed in other areas where market-opening measures were adopted, e.g. in airport ground handling, telecommunications and the utilities. We believe that the specificities of the ports are best served if the length of transitional measures reflects the level of investments, just like for the duration of authorisations.

But there are important provisos. First, where an existing authorisation was granted after a fair procedure and is otherwise in conformity with the new rules, it should remain in force unchanged. The logic is clear: such authorisation has already been given in line with the new rules – why should it then be changed. By referring to the second proviso, I repeat what I said earlier. These rules would not apply to ports where access to a port service is not restricted.

Finally, and for completeness sake in my step-by-step description of the Commission’s proposal, a word about safety, environmental and social rules. Many interested parties urged us to set up clear and uniform rules for all European ports and port services. We do not believe that any such action would be in our overall interest because it would not adequately reflect national, regional or local specificities for which rules are normally best made at national, regional and local levels. Let us leave this system as it is today. It has, I believe, served us well.

I have left out two points of particular interest which did not fit into my step-by-step presentation.

The first concerns an already existing legal right which we thought merited re-emphasising: a port service provider may employ personnel of his own choice. The key objective of the Commission’s initiative, namely to increase port efficiency, requires that a port service provider can exercise his own choice. However, when exercising this choice the service provider must respect the existing social legislation applicable to workers in the port concerned. And, of course, he is bound by the criteria for professional qualifications of workers which a port authority may have fixed.

The second concerns self-handling. We describe as self-handling the situation where a port user provides for itself one or more categories of port services, for example ferry operators carry out their own loading operations. There are in fact no reasons why self-handling should not, in principle, be allowed if operators believe that such action provides better use of their resources and gains in efficiency.

Proposal for a Directive concerning reporting formalities for ships arriving in and departing from Community ports

The Problem: Diversity of Document Formats.

Public authorities frequently require, for their retention on arrival and/or departure of a ship, documents and information relating, *inter alia*, to the ship, its stores, its crew's effects, its crew and passengers. These requirements are formalities that ships have to fulfil when calling at ports.

The Commission Communication COM(1999) 317 final on short sea shipping[1] recognised that the formats of the documents to be submitted for the provision of such information differed considerably between Member States.

The use of different formats of documents for the same or similar purposes creates complexity for maritime transport and, in particular, short sea shipping. Therefore, the Commission recommended in its Communication that "EU Member States should consider accepting a uniform set of ship arrival and departure forms based on IMO FAL forms 1, 3, 4 and 5 when those forms are applicable" (point 9.2.3 of the Communication and Recommendation No. 12 in Annex I to it).

The Solution: Recognition of Standard Ship's Arrival and Departure Forms in the Community.

The International Maritime Organisation's Convention on Facilitation of Maritime Traffic (IMO FAL Convention) was signed on 9 April 1965 and came into force on 5 March 1967. The Convention has been signed by most Member States.

As it stands, the Convention recommends, *inter alia*, the use by national authorities of six standardised forms to be filled in for ships to report when arriving in port and departing from port.

The Commission has decided to use the IMO FAL Forms as the basis for its proposal.

The proposal reflects the relevant existing IMO model FAL Forms in detail because the Commission considers that it would not be opportune to establish a separate set of documents for Europe for the same purpose as IMO FAL Forms are used world-wide. Community support to the FAL Forms could also encourage wider application of them in their model format and, consequently, lead to facilitating documentary procedures world-wide.

The proposal provides that the Member States shall accept a set of common standardised IMO FAL Forms when they require any or all the information contained in those forms as part of the reporting formalities for a ship to arrive in and/or depart from a Community port. The FAL Forms are intended to fulfil the purpose of providing that reporting information in

[1] The Development of Short Sea Shipping in Europe: A Dynamic Alternative in a Sustainable Transport Chain - Second Two-yearly Progress Report, COM(1999) 317 final, 29.06.1999.

documentary form and be sufficient for ships to report on arrival and departure. The proposal provides for IMO FAL Forms Nos. 1, 3, 4 and 5 for all ships and No. 6 for cargo ships to be sufficient for the particular formalities they cover:

- Provision of information relating to the ship (General Declaration, Form No.1)
- Provision of information relating to ship's stores (Ship's Stores Declaration, Form No.3)
- Provision of information relating to crew's effects (Crew's Effects Declaration, Form No.4)
- Provision of the information relating to the number and composition of the crew (Crew List, Form No.5)
- For ships certified to carry 12 passengers or fewer (cargo ships), provision of information relating to passengers (Passenger List, Form No.6).

The Member States will not be able to require other categories of information than those on the relevant IMO FAL Forms or require any other documents or formats to satisfy the particular formalities for which the FAL forms covered by the proposal are intended. The Member States would also have to accept the Forms signed by the signatories stipulated in the IMO FAL Convention.

In respect of the IMO FAL Forms concerned, there does not seem to be any justification for restricting the uniform recognition to short sea trades or to Community flags. The purpose of the documents to be submitted in Community ports is the same for any trade or flag. Also, the IMO FAL Convention does not make a difference between trades or flags. Consequently, the Commission proposes the Directive to apply to all ships arriving in or departing from Community ports irrespective of flag or trade.

The proposal does not make it compulsory for the Member States to introduce any formalities they do not currently require to be fulfilled. Neither would they be obliged to ask for all the information that IMO FAL Forms can provide to be submitted. However, for the formalities concerned to be fulfilled, they cannot ask for more information to be submitted.

Member States remain free to ask for information relating to other topics and formalities in other formats (subject to other Community and/or international rules) as long as those topics and formalities are not covered by the IMO FAL Forms concerned.

The proposal does not make it compulsory for the Member States to sign or accept the IMO FAL Convention.

If the IMO FAL Forms concerned were transmitted electronically, the proportions of their electronic end-format on the end-user screen and when printed would have to follow the proportions of the standardised model forms. The proposal does not aim to harmonise the interconnection tools or types of electronic messaging used to transfer the data itself.

Note on IMO FAL Forms Nos. 2 and 6.

The Commission does not propose uniformity in relation to IMO FAL Form No. 2 (Cargo Declaration) because this document is commonly replaced by cargo manifests which serve

both commercial and authority purposes. There would be a danger that including that Form in the proposal would actually introduce a new document and add to administrative complexity in shipping instead of facilitating it. In other words, for the provision of cargo information, an IMO FAL Form would be required in addition to manifests often accepted in their commercial format today. Further, a manifest can include more detailed information than IMO FAL Form No. 2 does.

On the other hand, no indications have been received that passenger lists (IMO FAL Form No. 6) would generally create problems. Established standard practices exist in Europe at least for regular services. In addition, the IMO FAL Form does not include all information required, *inter alia*, by Directive 98/41/EC[2] (in particular, sex and special care or assistance). However, for the sake of consistency, the Commission proposes recognition of IMO FAL Passenger Lists for ships not covered by Directive 98/41/EC (i.e. cargo ships with 12 passengers or fewer).

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[2] Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community, OJ L 188, 02.07.1998, p. 35.