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OUTCOME OF PROCEEDINGS

of : the Shipping Working Party
dated: 1st and 13 February 2002
Cion prop: 6375/01 MAR 13 CODEC 158
Subject : **MARKET ACCESS TO PORT SERVICES**

1. On 1st February 2002, the Working Party held a first debate of a general character on the Commission proposal for a directive on market access to port services.

The objective of the proposal is to establish a common legal framework to ensure the free access to the port services market in ports with general commercial traffic in the Member States, with a view to improve the quality and reduce the costs of these services and hence to encourage shipping and multi-modal transport. The proposal allows for a limitation of the number of providers of port services taking into account each port's specific characteristics and sets up the rules guaranteeing that the procedures for selecting the providers are clear and transparent.

The Commission proposal has been examined by the European Parliament which has emitted its opinion in first reading in November 2001¹ and the Commission is due to modify its proposal in the very near future. The opinions of the Economic and Social Committee² and of the Committee of the Regions³ have been given on 29 November and 20 September 2001 respectively.

¹ Doc. 13817/01 CODEC 1163 MAR 104.

² Doc. CES 1495/2001.

³ JO C 19, 22.01.02, p. 3.

When presenting its modified proposal¹, the representative of the Commission indicated that :

- The proposal should be seen in the light of the Lisbon European Council (23-24 March 2000) that asked *"to speed up liberalisation in areas such as [...] transport."* and of the need to balance the implementation of the general principles of the Treaty with the complex reality of the port sector;
- Whilst ensuring that providers of port services have access to the market for the provision of port services, Member States may require that a provider of port services obtain prior authorisation, the criteria for which must be transparent, non-discriminatory, objective, relevant and proportional;
- In the case the number of authorisations is not limited ², the proposed directive does not imply new rules;
- In the case the number of authorisations is limited for reasons of constraints relating to available space or capacity, or in accordance with environment regulations or maritime traffic related safety, a transparent, objective and non-discriminatory selection process has to be set up;
- The Commission's modified proposal will, i.a., extend the scope of the proposal to include waterway accesses to ports and port systems, clarify the criteria for authorising service providers and the rules on self-handling and a service provider's right to employ his own personnel, as well as establish the principle that a service provider whose authorisation is not renewed will receive compensation for the immovable assets he leaves. It will, however, not include EP's amendments concerning State aids and the exclusion of pilotage from the directive.

¹ Document yet to come.

² The Commission services provided delegations with a flow chart, explaining the structure of the proposed directive.

2. The overall aim of the proposal, being to ensure free access to the port services market on transparent and even conditions, the work carried out by the European Parliament and the proposal, modified as indicated by the representative of the Commission, were generally welcomed by a large majority of delegations¹. However, the complexity and diversity that characterise this sector were pointed out and many delegations indicated that they still had numerous doubts and concerns and that the modified proposal will thence have to be scrutinised thoroughly.

Among the various subjects mentioned by delegations, one can highlight:

- **Competition between ports** : this element, which covers State aids and the financing of port infrastructure, as well as transparency of public money flows is crucial and should be addressed;
- **Promotion of short sea shipping, cabotage and intermodality** : should also be part of the global package on ports;
- **Threshold for ports covered by the directive** : should be further discussed;
- **Definition of port services** : should be further detailed. The status of services that are not strictly port related services should also be further examined;
- **Safety** : is the very first concern and should not be jeopardised;
- **Social and environmental regulations** : should be adequately taken into account;
- **Administrative burden** : should be reduced to a minimum;
- **Port strategy, particularly concerning specialisation** : should be respected.

¹ A general scrutiny reservation is maintained at this stage by all delegations. There is also a parliamentary scrutiny reservation by the DK and UK delegations.

Some delegations also mentioned more specific issues, among which one can note:

- **Seasonal traffic** : there is concern to put an excessive burden on small ports used essentially for seasonal traffic;
- **Self-handling and other technical notions** : several notions were not deemed clear enough and should be further looked at;
- **Exemption** : it was agreed that Luxembourg and Austria should not apply the directive as they have no maritime ports ¹.

On 13 February, the Working Party discussed the first six articles. It agreed to revert to these articles on the basis of a modified text taking into account the remarks by delegations. This draft text is presented in Annex ² and is accompanied with a draft Council statement to the minutes of the Council when agreeing the directive, reading:

"The Council considers this proposal to be the first part of a package; it stresses the need to address the questions of inter-ports competition, security in the ports and the promotion of short sea shipping, cabotage and intermodality. To this effect, the Council asks the Commission to study the question and present, in the nearest future, proposals for measures concerning matters of competition between ports, public financing of infrastructure and State aids, as well as transparency rules, on the one hand, and matters of security and further promotion of short sea shipping, on the other part, taking into account the work in international fora."

¹ A statement to the minutes could be suggested to this effect, reading : *"The Council and the Commission agree that the obligations contained in this Directive are not applicable to Austria or Luxembourg, as they have no maritime ports."*

² Modifications compared to the Commission's modified proposal are presented in **bold** and ~~striketrough~~.

DRAFT DIRECTIVE
ON MARKET ACCESS TO PORT SERVICES

ARTICLES 1 TO 6

Article 1 – Objective

- ~~1.~~ Freedom to provide port services shall apply to Community providers of port services under the provisions set out in this Directive. ~~Providers of port services shall have access to port installations to the extent necessary for them to carry out their activities.~~

~~2.~~

Article 1a

Providers of port services shall have access to port installations to the extent necessary for them to carry out their activities, subject to a port's or port system's constraints relating to available space or capacity, or maritime traffic related safety or the strategic guidelines set up by the port authority and in compliance, where applicable, with requirements in respect of safety, environmental protection and public service obligations.

Article 2 – Scope

1. This Directive applies to those port services set out in the Annex which are provided for users of the port, ~~either inside the port area or on waterway access to and from the port or port system~~ **covered by this Directive.**

2. This Directive applies to ~~any seaports or port system located in the territory of a Member State and open to general commercial maritime traffic, provided that the port's average annual throughput over the last 3 years has not been less than 3 million tonnes or 500.000 passenger movements~~ **qualified as "international seaports (category A)" in Decision n° 1692/96/EC as amended by Decision n° 1346/2001/EC** ¹.

3. Where a port reaches the freight traffic threshold referred to in ~~paragraph 2~~ **the definition of an "international seaport (category A)" in Decision n° 1346/2001/EC** without reaching the corresponding passenger movement threshold, the provisions of this Directive shall not apply to port services reserved exclusively for passengers. Where the passenger movement but not the freight traffic threshold is reached, the provisions of this Directive shall not apply to port services reserved exclusively for freight.

~~The Commission shall publish for information, in the Official Journal of the European Communities and on the basis of information provided by Member States, a list of the ports and port systems referred to in this Article. The list shall first be published within three months following the entry into force of this Directive, and thereafter annually.~~

3a. **Member States may also apply this Directive to seaports qualified as "community seaports (category B)" or as "regional seaports (category C)" in Decision n° 1692/96/EC as amended by Decision n° 1346/2001/EC.**

3b. **Member States may exclude seaports with a high seasonal character from the scope of this Directive, under the condition that they are satisfied that an adequate level of market access for port services is ensured.** ²

¹ Decision n° 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community guidelines for the development of the trans-European transport networks (JO L 228, 9.9.1996, p. 1), as amended by Decision n° 1346/2001/EC of the European Parliament and of the Council of 22 May 2001 amending Decision n° 1692/96/EC as regards seaports, inland ports and intermodal terminals as well as project n° 8 in Annex III (JO L 185, 6.7.2001, p. 1)

² A review clause within 5 years will be included.

4. Member States may require that the providers of port services be established within the Community and that vessels used exclusively for the provision of port services shall be registered in, and fly the flag of a Member State.

Article 3

1. This Directive is without prejudice to the obligations for competent authorities, which flow from Directive 92/50/EEC, Directive 93/36/EEC, Directive 93/37/EEC and Directive 93/38/EEC.
2. Where one of the Directives referred to in paragraph 1 makes the tendering of a service contract mandatory, Articles 8 (1, 2, 3, 4 and 5), 12 (1 and 2), and 13 of this Directive shall not apply to the award of that contract. However Member States may include **specific rules** with regard to their ports in the tendering process of such contracts.
3. This Directive is without prejudice, where applicable, to the obligations of competent authorities which flow from Directives 89/48/EEC, 92/51/EEC and 99/42/EC on a mutual recognition among Member States of professional education and training.

Article 4 – Definitions

For the purposes of this Directive:

- (1) ‘seaport’ (in this Directive referred to as ‘port’) is an area of land and water made up of such improvement works and equipment as to permit, principally, the reception of ships, their loading and unloading, the storage of goods, the receipt and delivery of these goods by inland transport, the embarkation and disembarkation of passengers;
- (2) ‘port system’ means two or more ports in the same **geographical** area and managed by a single managing body;
- (2a) ‘**port with a high seasonal character**’ means any port that reaches **50 % of its annual turnover in three months**;

- (3) 'port authority' or 'managing body of the port' (hereafter referred to as 'managing body of the port') means a body which, whether or not in conjunction with other activities, has as its objective under national law or regulation the administration and management of the port infrastructures, and the co-ordination and control of the activities of the different operators present in the port or port system concerned. It may consist of several separate bodies or be responsible for more than one port;
- (3a) 'port user' is any undertaking carrying out maritime transport either with its own ships or with other ships;**
- (3b) 'port installation' means the general basic infrastructure and facilities in the port;**
- (4) 'port services' means the services ~~of commercial nature that are normally~~ provided against payment in a port and ~~which are~~ listed in the Annex;
- (5) 'provider of port services' means any natural or legal person providing, or wishing to provide, one or more categories of port services;
- (6) 'public service requirement' is a requirement adopted by a competent authority in order to secure adequate provision of certain categories of port services;
- (7) 'self-handling' means a situation in which a port user using its own personnel and equipment provides for itself one or more categories of port services in accordance with the criteria laid down in this Directive ~~and where normally no contract of any description with a third party is concluded for the provision of such services;~~
- (8) 'authorisation' means any permission, including a contract, allowing a natural or legal person to provide port services or to carry out self-handling.

Article 5 - Competent authorities

Member States shall designate the competent authority or authorities for the purpose of implementing articles 6, 7, 8, 10, 11, 12 and 19 of this Directive.

Article 6 – Authorisation

1. Member States may require that a provider of port services obtains prior authorisation under the conditions set out in par. (2), (3), (4) and (5). Authorisation shall be ~~automatically~~ **deemed** granted to service providers selected under Article 8.
2. The criteria for the granting of the authorisation by the competent authority must be transparent, non-discriminatory, objective, relevant and proportional. The criteria may only relate to ~~the provider's~~ :
 - (a) the professional qualifications of the provider, his sound financial situation and sufficient insurance cover,
 - (b) maritime safety or the safety of the port or access to it, its installations, equipment and persons,
 - (c) employment and social matters, where applicable,
 - (d) environmental requirements, where applicable,
 - (e) the ~~development plans~~ **strategic guidelines** of the port.

The authorisation may include public service requirements relating to safety, regularity, continuity, quality and price and the conditions under which the service may be provided.

3. Where the required professional qualifications include specific local knowledge or experience with local conditions, the competent authority must ~~provide~~ **facilitate** adequate training **being provided** for applicant service providers.
 4. Criteria referred to in paragraph (2) shall be made public and providers of port services shall be informed in advance of the procedure for obtaining the authorisation. This requirement applies equally to an authorisation linking the provision of service to an investment into immobile assets which will revert to the port upon expiry of the authorisation.
 5. The provider of port **services carrying out the service covered by the authorisation** has the right to employ personnel of his own choice provided he fulfils the criteria set according to paragraph (2) **and in accordance with the legislation of the Member State in which the service provider is providing the services in question.**
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