

## Insight &amp; Opinion

## Lloyd's List

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## Blocking the bloc

THERE is no denying that the Euro-federalists are on the march again. Not content to see the rejected European constitution introduced by stealth, the German presidency, backed by the French, is anxious to see it back on the table again, to be forced upon those ill-advised people who object to living in a centralised superstate.

So it is not surprising to see Transport Commissioner Jacques Barrot foreseeing Europe as a sovereign state in its right in its relations with the Interna-

tional Maritime Organization. One cannot really blame him. The Eurocrats genuinely believe that a group of regions ruled by Brussels would be a more modern and effective arrangement than the present system which attempts reconciling the views of a disparate number of nation states with their differing agendas and priorities. It is a matter of profound irritation to them that the IMO continues to resist either a presence at the London-based intergovernmental body as an observer or a voting "nation state" in its own right. Seeking to exercise its ever greater competence in transport safety matters, it rules the European member states by co-ordinating their activities prior to all IMO meetings.

European Union states which stray from the agreed "message" are whipped into line, and the emergence of a European "bloc" in an increasingly politicised IMO has become a regrettable fact. Should not the EU member states just bow to the inevitable and support the commission's lobby for a change of stat-

us at IMO? If they are all speaking with a single voice as a result of their non-negotiable pre-meeting instructions, why not formalise the arrangement?

Perhaps if the EU was made up of a group of microstates with little maritime experience and expertise there might be a benefit from such a strategy. But within this disparate group are a number of the world's biggest shipping nations, which individually encapsulate expertise in maritime transport far in excess of anything that can be assembled in a Brussels secretariat.

There is no advantage in having the commission behave in a sort of supervisory role. Furthermore, the emergence of a European bloc vote is the very antithesis of the consensual, technical, scientific debating chamber that has served the maritime industry and environment for half a century.

Commissioner Barrot sees Brussels as a spur to a slow and reluctant international consensus, with the IMO, he says, treated as a "brake" by industry. He has a point. While the IMO has

shown itself able on occasion to accelerate its regulatory processes, there have been times when member states have effectively filibustered progressive proposals that would have improved the shipping industry's environmental and safety record.

The tension comes that Brussels' intentions are not as pure as some politicians would like to claim. The arguments against regionally imposed rules have been spelt out many times, that the shipping industry cannot tolerate operating in a patchwork of differing regulations imposed by well-meaning but ill-advised bureaucracies. But for that to be avoided the global regulatory framework needs to be seen to be acting with due speed.

## Voice for change

NOT for the first time the problem of US port and terminal productivity has been aired at the Trans-Pacific Maritime Conference, which attracts a representative selec-

tion of shippers and carriers to California each year. The message rarely seems to change, with the terminals' customers voicing their dissatisfaction at the pace of productivity improvements in the US ports.

For the most part these are global operators that know very well what goes on in the terminals on the west side of the Pacific. They would just like a little of this energy to be shipped across to the eastern side of that busy ocean.

Union problems, along with management reluctance to confront these issues, have long been identified as obstructions to progress on the stevedoring front. Those who defend the status quo know full well that the carriers cannot switch their operations to more productive ports and terminals because they do not really exist, with the competition between them largely notional.

It is not a situation which ought to be maintained, but it is difficult to see any positive response to the present complaints as they have never worked in the past.



Delicate balance: competing needs of nature and industry have led to confusion in port planning. Gannets look out to sea, above. Trimley Marshes Nature Reserve at the port of Felixstowe, top right, and the Isle of Scilly, home to many

# Port planners left dazed and confused

Could yet another EU Directive find the delicate balance between nature and industry? A fresh perspective on this hugely sensitive issue says yes, writes **Helen Hill**

THE EUROPEAN Commission might have got more than it bargained for when it asked Eric Van Hooydonk of the University of Antwerp to study the impact of environmental law on port development.

The result is that Prof Van Hooydonk has recommended a new European Union Directive — not to increase red tape but rather to convey legal certainty for port planners.

Prof Van Hooydonk has investigated the problematic implementation of EU environmental law on the protection of natural habitats and surface waters in the port sector.

The study describes how public authorities and investors encounter tremendous difficulties in complying with environmental obligations.

Frequent delays, disruption and cancellation of projects increasingly jeopardise the achievement of transport policy objectives, which presuppose the provision of additional port capacity in order to cope with growing demand and to support a modal shift.

While it must be admitted that some port expansion projects were badly managed, the prevailing malaise is mainly caused by the fact that both natural habitats and potential port development areas are scarce and in many cases overlap geographically.

The undeniable ambiguity of the still very stringent Birds, Habitats and Water Framework Directives adds to that malaise.

"At EU level, nature protection enjoys a strong legal status, while EU rules ensuring port development are almost totally lacking.

"This makes policy integration and a just balancing of policy objectives very difficult," Prof Van Hooydonk says.

"Moreover, transport policy objectives did not come into play at all during the designation of protected natural habitats.

"Reserved port expansion areas were all of a sudden converted into nature conservation zones. Stakeholders were



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Eric Van Hooydonk  
University of Antwerp

hardly consulted, suffered economic losses and were not compensated," he adds.

To this day, transport policy priorities, TEN-T status of ports and existing legal regimes of waterways and ports are often ignored when the 'imperative reasons of overriding public interest' of a plan or project in a protected zone are assessed under the Habitats Directive, he says.

An analysis of case law shows that many, if not most, legal disputes relating to the application of the Birds and Habitats Directives — and at least most of the causes célèbres such as Deurganckdok, Second Maasvlakte and Flushing's WCT — involved waterways and ports.

Legal uncertainty prevailed even in cases where the project was well prepared by public authorities and where the commission itself gave a favourable opinion, as in the case of Rotterdam's Second Maasvlakte.

The latter case shows that national

courts may produce judgments that are totally unpredictable.

Even routine maintenance of waterways and ports can become subject to a prior environmental assessment.

In practice, the priorities of waterway and port policies are increasingly determined within the framework of environmental policy rather than transport policy.

"Worryingly, environmental law is often being abused as a tool to defend not the case for the environment but the private interests of nimbyists [not in my backyard]," Prof Van Hooydonk says.

Prof Van Hooydonk's study makes many concrete suggestions for better integrating environmental and port policy. One of these is to issue port-specific guidelines on the implementation of the Birds, Habitats and Water Framework Directives.

"Available guidance documents adopted by the EU do not tackle basic questions of port economics and remain much too vague," he says.

Prof Van Hooydonk points to the European Sea Ports Organisation's recently-issued code of conduct.

"I recommend that the Commission consider elaborating and endorsing this document as an official interpretation tool."

And he has gone further, calling for the adoption of an EU Port Planning Directive.

Designed as a mirror image of the Natura 2000 scheme, it would entail the development of a Portus 2010 network of EU port expansion areas. "Portus 2010 areas would consist of future port expansion areas that enjoy an EU legal status.

"The fact is that potential port expansion areas are just as scarce as protected natural habitats.

"As a result, they deserve a similar protective regime, which would ensure a genuine integration of EU environmental and port policies."

The designation of Portus 2010 areas should be based on objective economic assessments meeting minimum quality standards.

Once a Portus 2010 area is designated, concrete projects within that perimeter could be carried out quicker and in full legal certainty.

The very location of, for example, a terminal project within a Portus 2010 area would amount to conclusive evidence of imperative reasons of overriding public interest and to presumptive evidence that there are no alternatives within the meaning of Article 6 of the Habitats Directive.

At the recent Greenport Conference in Lisbon, environmentalists and port managers raised several objections against Portus 2010.

Firstly, it was observed that the EU should not decide where to build new container terminals.

Prof Van Hooydonk says proposals for Portus 2010 designations should be "brought forward exclusively by port authorities, who know the market needs.

"The only role of the EU, if any,

could be to refuse designations which are totally insufficient to meet future demands," he says.

Another complaint is that after the rejection of the Port Services Directive, nobody actually wants EU legislation on ports.

"I agree that EU port policy should be based on guidance instruments on the implementation of the European Commission Treaty, rather than on legislation," Prof Van Hooydonk says.

"In the environmental field, however, there is massive legal uncertainty. This can only be solved through new — and high quality — legislation."

Opponents regarded Portus 2010 as a theory drawn up in an Ivory Tower. "That is totally wrong," says Prof Van Hooydonk.

"An increasing number of ports around the EU adopt development, master or strategic plans.

"It is not only daily, but moreover excellent practice to do so. Portus 2010 would merely attach a clear legal status to these existing plans," he adds.

Another criticism is that — at least in some Member States — nobody wants port planning, at any level whatsoever. Prof Van Hooydonk adds: "I am aware of that. Portus 2010 would however, only be optional for Member States and ports.

"Those who prefer to continue launching individual projects within the existing legal framework would be allowed to do so. Within Portus 2010, on the other hand, commercial adaptability and managerial flexibility for port authorities should be guaranteed."

Other sceptics said that it was sufficient to consult with stakeholders and that ports have learned to reach agreements with them. Prof Van Hooydonk is totally unconvinced.

"For the Second Maasvlakte, the port spent huge time and effort in consulting with everybody, it reached formal agreements with stakeholders and even got the go-ahead from the European Commission.

"Yet this did not prevent the court from stopping the project on the basis of a breach of the Habitats Directive."

Another misunderstanding was that Portus 2010 would put the environmental clock back 30 years and that it would undermine environmental policy.

Prof Van Hooydonk says: "This objection is of course, fundamentally wrong. Under Portus 2010, the Birds, Habitats and Water Framework Directives, would remain fully applicable.

"What is more, Portus 2010 would do justice to environmental concerns, especially the need to improve the quality of economic assessments and to better plan and co-ordinate projects.

"It would be a tool for policy integration and, in that respect, fit in with the European Commission Treaty, the Implementation Strategy on the Water Framework Directive and the objectives of the Green Paper on Maritime Policy".

At the conference it was also said that if ports would demand an expansion directive, airports and railways would also like to have one.

This does not impress Prof Van Hooydonk either: "Ports are located in scarce areas near coasts and estuaries and their very specific location causes extremely frequent overlaps with natural habitats," he says.

Amending the environmental regime of port expansion is believed by many to be a political taboo and Prof Van Hooydonk accepts it is a very delicate issue.

"Not being a politician, I only wanted to point out that, legally, there are several possible ways out of the present malaise," he says.

"Let us not forget that currently, in the three largest ports of Europe, vital projects are at risk due to the vagueness of the Habitats Directive: the deepening of the Elbe and Scheldt and the Second Maasvlakte.

"Europe can simply not afford to avoid a debate on the issue".  
The study is available from Maklu Publishers, Antwerp [www.maklu.be](http://www.maklu.be) ISBN 90 466 0055 6