PROSPECTS AFTER THE REJECTION OF THE EUROPEAN PORT SERVICES DIRECTIVE

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1. *Outlines of the proposal for a European Port Services Directive*

In 1997, in its *Green Paper on Seaports and Maritime Infrastructure*, the European Commission announced a community legal framework on the liberalisation of the port services market[1]. On 13 February 2001, the European Commission adopted a Communication to the European Parliament and Council entitled *Reinforcing Quality Service in Sea Ports: A Key for European Transport*[2]. Added to this Communication, which is better known as the Ports Package, was a proposal for a Directive on market access to port services[3]. This proposal was the first attempt at designing a specific European legal regime for the port sector. The proposal for the Directive was dealt with by the European institutions in accordance with the co-decision procedure, which essentially implies that the Council of Ministers and the European Parliament share legislative power and that the Directive should have been adopted by both these institutions[4]. On 20 November 2003, at the third reading, the European

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[1] COM(97) 678 final. For a discussion, see JARZEMBOWSKI, G., "Grünbuch der Europäischen Kommission über Seehäfen und Seeverkehrs-Infrastruktur aus Sicht des Europäischen Parlaments", in LAGONI, R. (Herausg.), *Beiträge zum deutschen und europäischen Seehafenrecht*, Münster/Hamburg/London, LIT, 2001, 87-93.

[2] COM/2001/35 final. For an elucidation by an authoritative civil servant of the Commission, see ELSNER, W., "Reinforcing Quality Service in Sea Ports: A Key for European Transport" – The European Commission's so-called Ports Package", in VAN HOOYDONK, E. (ed.), *European Seaports Law. EU Law of Ports and Port Services and the Ports Package*, Antwerp/Apeldoorn, Maklu, 2003, 9-16.

[3] Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services, COM/2001/35 final, OJ 2001 C 154 E/290.

[4] See further Art. 251 EC. On 20 September 2001, the Committee of the Regions delivered its opinion on the Directive proposal. On 10 October 2001, the Committee on

Parliament rejected the Directive narrowly but decisively[5]. In this contribution, we look back at the Directive proposal, whereby we consider its strengths and weaknesses as well as the consequences of its rejection for the European port and shipping industry.

To this end, we provide a brief overview of the outlines of the original Directive proposal. For a more detailed analysis of the consecutive versions of the proposal, we refer the reader to legal comments published elsewhere[6].

The main objective of the Directive proposal was to liberalise port services and to make port installations accessible to service providers[7].

The Directive would have applied to (1) technical-nautical services (pilotage, towage, mooring), (2) cargo handling, including stevedoring, stowage, transhipment and other intra-terminal transport, storage, depot and warehousing and cargo consolidation, (3) passenger services (including embarkation and disembarkation).

It would have applied only to sea ports or port systems located in the territory of a member state and open to general commercial maritime traffic, provided that the port's average annual throughput had, over the last three years, not been less than 3 million tonnes of goods or 500,000 passenger movements.

The member states could require that the providers of port services be established within the Community and that vessels used exclusively for the provision of port services be registered in and fly the flag of a member state.

Regional Policy, Transport and Tourism of the European Parliament adopted a draft legislative resolution comprising a number of amendments. On 14 November 2001, the resolution was in turn revised during the plenary session of the European Parliament. On 29 November 2001, the European Economic and Social Committee adopted its opinion on the proposal. On 19 February 2002, the European Commission published an amended Directive proposal (COM/2002/101 final, OJ 2002 C 181E/160). On 5 November 2002, the European Council adopted its common position. On 14 November 2002, the European Commission declared that it supported the latter. On 11 March 2003, the European Parliament amended the text at the second reading. The Commission gave a partly negative advice on this new text on 15 April 2003. The Conciliation Committee adopted a joint draft on 22 October 2003.

[5] With 209 votes in favour, 229 against, and 16 abstentions.

[6] See VAN HOOYDONK, E., *The regime of port authorities under European law including an analysis of the Port Services Directive*, in ID. (ed.), *European Seaports Law. EU Law of Ports and Port Services and the Ports Package*, Antwerp/Apeldoorn, Maklu, 2003, 79-185; ID., *The regime of port authorities under European Law Including an Analysis of the Port Services Directive*, in *Liber amicorum R. Roland*, Brussels, Larcier, 2003, 467-570. These contributions deal with the various drafts and amendments up until the second reading in the European Parliament.

[7] The proposal was based on Art. 49 and 80(2) EC.

The Directive proposal confirmed that member states may require that a provider of port services should obtain prior authorisation. An authorisation was defined as any permission, including a contract, allowing a natural or legal person to provide port services or to carry out self-handling.

According to the initial Directive proposal, the criteria for the granting of the authorisation by the competent authority had to be transparent, non-discriminatory, objective, relevant and proportional. The criteria could relate only to the professional qualifications of the service provider, his sound financial situation and sufficient insurance cover, or maritime safety or the safety of installations, equipment and persons. The authorisation could include public service requirements relating to safety, regularity, continuity, quality and price, as well as the conditions under which the service may be provided. The criteria and the procedural rules had to be made public. Under the proposal, the provider of port services had the right to employ personnel of his own choice.

Still according to the initial proposal, the member states could only limit the number of providers of port services for reasons of constraints relating to available space or capacity or, for technical-nautical services, to maritime traffic-related safety. If the competent authority wanted to limit the number of service providers, it would be required to state the reasons for such a limitation and allow the highest number of service providers possible under the circumstances. Save under exceptional circumstances in relation to the traffic volume and cargo categories, the competent authority had to authorise at least two completely independent service providers for each category of cargo.

If the authority deciding on limitations was both acting as the port authority and as a (prospective) service provider, then the decision would have to be entrusted to an independent competent body. The same held for the actual selection of the service providers.

If the number of service providers was to be limited, the competent authority would have to ensure a transparent and objective selection procedure through tendering, using proportionate, non-discriminatory and relevant criteria. The proposal of Directive defined the basic procedural requirements.

Further, the proposal limited the duration of the authorisations to 5 years (if no or insignificant investments were made), 10 years (if significant investments in moveable assets were made) and 25 years (in the case of significant investments in immovable assets).

The service providers selected would have been required to keep separate accounts for each of the port services in question.

The Directive proposal would have allowed self-handling. Self-handling was defined as "a situation in which a port user provides for itself one or more categories of port services and where normally no contract of any description

with a third party is concluded for the provision of such services". The port user/self-handler should, in other words, not be obliged to call on local service providers established within the port. Authorisations could be awarded for self-handling under conditions that were not stricter than those applied to the providers of the same or a comparable port service.

Further, the proposal imposed special obligations upon port authorities providing port services, such as the separation of the accounts of each of its port service activities from those of its other activities. If, after a selection procedure, no suitable service provider was found, the competent authority could temporarily reserve the provision of the service in question to the port authority. As a rule, the port authority could not discriminate between service providers. In particular, it had to refrain from discriminating in favour of an undertaking or body in which it holds an interest.

The proposed Directive imposed minimum requirements with regard to the right to appeal of any party with a legitimate interest and the obligation to state the grounds of decisions on the granting of authorisations.

The proposed Directive in no way affected the rights and obligations of member states in respect of law and order, safety and security at ports as well as environmental protection. Without prejudice to the application of the Directive and subject to the other provisions of Community Law, the member states were required to take the necessary measures to ensure the application of their social legislation.

Finally, the proposal of Directive contained transitional measures, which often implied a drastic reduction in duration of existing authorisations.

A number of the abovementioned provisions were amended in subsequent versions of the Directive, and other rules were added. It was stipulated, for example, that in principle the freedom to provide port services could be subject to constraints relating to available space and capacity in the port concerned. It was emphasised in various amendments that one should always take into account safety, environmental protection and public service obligations. Under the allowed criteria for the granting of authorisations, such aspects were mentioned as employment and social matters, environmental requirements and the development policy of the port. Authorisations could be granted automatically to private investors in new port infrastructure. Limitations on the number of service providers should also have to be possible pursuant to existing environmental regulations. The obligation to establish an independent competent authority besides the port authority became less peremptory. Self-handling was restricted to work undertaken by the crew of the vessel, under conditions laid down in national social legislation and with the use of own equipment; it could, under certain conditions, be excluded or made dependent

upon a contribution to the funding of public service obligations of other technical-nautical service providers; an exemption from compulsory pilotage was also considered as a case of self-handling. Member states could establish standards regarding professional training and skills. National social standards for port services could not be lower than those laid down in the applicable Community legislation. The limitations of the duration of authorisations were reduced. A selected service provider would, where appropriate, be required to pay compensation for any immovable assets taken over from a previous service provider. In the European Parliament, initiatives were taken to lift pilotage out of the field of application of the Directive and to add stipulations relating to transparency of the financial relationship between ports and member states and about guidelines on state aid to be issued by the Commission. In relation to the latter two issues, suffice it to refer to the Commission's Vademecum on state aid to the port sector, dating from 15 January 2003, and to specialised literature[8].

2. *The strengths and weaknesses of the proposed Port Service Directive*

2.1. *Importance of a legal assessment*

It is worthwhile considering the reasons why the Directive was rejected. From the beginning, the Directive met with hefty resistance in certain port circles, including in the UK and Germany. Broad public opposition to the Directive only began to gain momentum after Belgium's trade unions came to realise – rather belatedly – that existing national legislation on dock work would be compromised. The trade unions believed that the Directive would lead to *ports of convenience* that could operate relatively cheaply by a lowering of safety and labour standards. The Commission and associations representing shipping companies and ports challenged this view. The processing of the proposal by Parliament was erratic, and the technical quality and consistency of the amendments that were carried through was questionable. According to observers, the narrow rejection in the final vote could in part be attributed to

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[8] Text of the Vademecum in Van Hooydonk, E. (ed), *o.c.*, 495-530; see also Corruble, Ph., *Le droit communautaire et le financement des ports*, *D.M.F.*, 2002, 274-288; Heitmann, K., *Staatliche Beihilfen für Seehäfen und Seeverkehrs-Infrastruktur* (Art. 92 EGV), in Lagoni, R. (Herausg.), *Beiträge zum deutschen und europäischen Seehafenrecht*, Münster/Hamburg/London, LIT, 2001, 113-122; Keppenne, J.-P., *Les aides d'Etat dans le secteur portuaire*, in Van Hooydonk, E. (ed.), *o.c.*, 251-273; Van Hooydonk, E., *The regime of port authorities*, in Id. (ed.), *o.c.*, 102-104, no. 19; Id., *The regime of port authorities*, *Liber amicorum R. Roland*, *o.c.*, 487-491, no. 19; Wareham, Ph., *State aids*, *Il diritto marittimo*, 2001, 125-173.

certain incidents in Parliament and during the conciliation process. In what follows, we shall of course not deal in further detail with the political vicissitudes, but point out a number of weaknesses of a legal nature which contributed to the rather negative reception of the first Commission proposal. On the other hand, it is also worth focusing on the positive aspects of the Commission's initiative.

2.2. *The need for a comprehensive legal framework for port management*

The materialisation of a specific European Directive on port operations is, in itself, to be applauded. The main reason for this is that the implications of primary European Community law for the port sector are not always clear to see. The available case law on port services inevitable offers a fragmented image of the Community legal status of the port sector. Moreover, this case law is often intrinsically unclear and in constant evolution. A Directive could fix, codify and complete the jurisprudence in an all-embracing and surveyable set of norms. Ideally, a Directive on ports should provide a comprehensive code of good port managerial practice, which also incorporates rules that are borrowed from the international legal status of ports and from managerial practice in the member states and ports that operate transparently and in conformity with market conditions. Such a code should, for that matter, also pay attention to other aspects than market access, to which the Directive proposal related. A general legal instrument on the Community status of seaports could contribute to creating a level playing field for open port competition under normal and equal market conditions, without compromising the operational and commercial autonomy of the ports. For example, it is only normal that all port authorities would be compelled to organise an open selection procedure for strategically important terminal contracts. Indeed, there are no arguments against the introduction of a Directive that would impose this principle throughout Europe. A Directive is also strongly preferable to the sometimes arbitrary case-by-case approach of the Commission. In practice, the European Commission often receives complaints about real or assumed abuses in the port sector, but as far as enforcement is concerned it remains rather constrained. It is not always clear how the Commission determines which complaints to take further. A Directive would contribute towards a more uniform enforcement of European law with cooperation from the Commission and the national courts of law. For all these reasons, the Commission's decision to put forward a Port Services Directive was entirely justified.

In practice, however, the initial proposal of Directive proved to have some significant shortcomings, relating to both the underlying motivation and the actual provisions it encompassed.

2.3. *An unjustified distrust vis-à-vis the EU port sector*

First and foremost, the Commission proposal betrayed a deep-rooted distrust vis-à-vis the European port sector, more in particular the European port authorities. In the justification, it was asserted that the rules governing access to the market of port services – despite recent improvements - were still not transparent and unequivocal; it was also claimed that there was a general feeling that the procedural rules related to the awarding of authorisations were inadequate and uncertain, and it was suggested that market access was often unnecessarily hampered. This unqualified representation was, however, not further substantiated by the Commission. While jurisprudence shows that problems do arise in relation to market access in some member states, others already follow very objective procedures for the awarding of authorisations, often as a result of a spontaneous choice by the local port authority. The image that the Commission painted of a European port industry that is rife with abuse was exaggerated. Consequently, the motivation for the Directive proposal, which was based on this one-sided perspective, was immediately dubious.

2.4. *The lack of a thorough examination of the specific needs of the port sector*

Second, the Directive appeared to be rather dogmatic, based as it was on the unarticulated logic that, if there are liberalisation guidelines for other utilities and transport sectors, then there should also be one for ports. The proposal for a Port Services Directive clearly contained ingredients that had been borrowed from other Directives. This was the case, for example, with the stipulation that ports authorities should keep separate accounts for commercial port services and other services. The *material* unbundling of commercial service provision and infrastructure service provision, and their assignment to separated and independent entities, would not have become mandatory under the Directive, but it would have been encouraged. Such an unbundling of infrastructure management and commercial port operations under competitive conditions is typical of several other liberalisation Directives. As a result of the prohibition for port authorities to decide on the granting of authorisations in situations where that authority is also providing commercial port services and to discriminate in favour of their own commercial activities, and by the obligation to open up ports maximally to all prospective service providers, an evolution towards a unified European model of port management was encouraged. In this model, the port authority would act as a landlord port, and all service provision activities would be left to independent, private players. The assurance by the Commission that it did not wish to intervene in the port managerial traditions of the various member states, and that the public or

private ownership of port facilities did not come into play[9], failed to convince many of those concerned, all the more so as the European Commission supports the privatisation of port facilities as part of its state aid policy[10]. Certainly the privatised operating, comprehensive or integrated port authorities, which manage the port infrastructure without government intervention and themselves provide all the commercial port services, were fearful of parasitical break-in attempts by competing service providers. The transposing of the "unbundling" concept to the port sector would, in any case, have caused a lot of problems.

Even more striking was the fact that the self-handling principle – i.e. the right of the infrastructure user to organise own handling services – was adopted by the Commission from the Airport Services Directive[11]. The Commission never demonstrated the sense, let alone the necessity, of self-handling in the sea port sector. The copying from other directives contributed to the fact that the proposal met with a negative response. One may, after all, expect a liberalisation measure to be based on a thorough examination of the characteristics and needs of the sector involved. Rightly or not, the Commission certainly created the impression that it had not looked carefully into the specific environment and needs of the port industry and had paid too little attention to the real bottlenecks. It put forward liberalisation rules that appeared not to exist in other continents, while precisely Europe is marked by very fierce inter-port competition with low rates and by an economic predominance of shipping companies over port authorities. The Commission failed to recognise that, in many European ports and port ranges, there is hefty competition between terminal operators, which keeps the profitability of existing service providers worryingly low. On the other hand, the will to introduce competition in technical-nautical services, such as towage and pilotage, seemed inconsistent with increasingly strict European policy to enhance maritime safety. The liberalisation envisaged by the European Commission would, in other words, not necessarily have had a favourable impact. Generally speaking, the Directive lacked a solid foundation that took account of real market conditions.

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[9] See art. 295 EC.

[10] Commission Decision 2000/410/EC of 22 December 1999, OJ 2000 L 155/52.

[11] See Art. 7 of the Council Directive 96/67/EC of 15 October 1996 on access to the groundhandling market at Community airports, OJ 1996 L 272/36.

2.5. *Friction with international law on ports*

A third shortcoming was the failure to recognise a number of rules of international law with regard to port operations. The most striking aspect in this context was again the regulation regarding self-handling that was incorporated into the Directive Proposal, combined with the right of service providers to choose their own personnel. This would inevitably apply pressure on systems of mandatory recognition or registration of dock workers, as laid down in Belgium's Dock Work Act[12]. Yet, Convention C 137 of the International Labour Organisation of 1973 grants priority of engagement to registered dock workers[13]. The fact that the competent European Commissioner emphasised that national social legislation remained unaffected[14] did not take away this insecurity.

Further, the Directive failed to recognise the rule that States can validly impose monopolies in the pilotage and towage sectors, which was recognized during the preparation of the International Regime of Maritime Ports of 1923 and by international customary law[15]. The subjection of pilotage to the Directive would hardly have been compatible with the special international legal status of the Scheldt, according to which Flanders is entitled to its own pilotage service on the Dutch stretch of the river[16].

This fundamental friction with the international legal status of ports and waterways illustrates once again how the initial European Directive proposal encompassed rules that deviate from international port management practice.

2.6. *Unrealistic provisions*

Apart from the motivation and context, it should also be pointed out that the proposal of Directive contained a number of unreasonable rules. It would, for example, have put a disproportional bureaucratic burden on large port authorities, as they would have been compelled also to organise cumbersome

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[12] Act of 8 June 1972, also called the Major Act after the former minister of social affairs Louis Major.

[13] Art. 3 (2) Convention C 137 concerning the Social Repercussions of New Methods of Cargo Handling in Docks, Geneva, 25 June 1973. The Convention has been ratified by 8 of the 25 member states: Finland, France, Italy, the Netherlands, Poland, Portugal, Spain and Sweden.

[14] Address by Ms. Loyola de Palacio during the ESPO Conference on 'European Sea Port Policy, Challenges and Solutions', held in Antwerp on 11 October 2001, 6-7.

[15] GIDEL, G., *Le droit international public de la mer*, II, Vaduz/Paris, Topos Verlag/Edouard Duchemin, 1981, 134.

[16] Art. 9, § 2 of the Dutch-Belgian Separation Treaty of 19 April 1839.

selection procedures for authorisations of little significance. For self-evident market-economic reasons, the obligation to appoint at least two competing service providers would have been impossible to realise in many of the smaller ports. The obligation to appoint a second, independent, port authority if the first port authority also provides commercial services would have played havoc with port planning. The limited duration of authorisations took insufficient account of the necessity to depreciate important investments over longer periods of time and it was not in line with common managerial practice in many member states. It would rather have discouraged future investment. The transitional stipulations regarding the limited duration of existing authorisations shook the legitimate expectations of enterprises that had only recently made heavy investments in new port terminals. Existing pilotage service providers that had accumulated specific local knowledge and professional competence would have been forced to train future competitors and thus undermine their own future strategy. Furthermore, many found it hard to understand why the Commission was so intent on carrying through self-handling for the benefit of often non-European shipping companies and to the detriment of Europe's own, often very high-performing, port enterprises. From a strictly legal point of view, it is noticeable that the proposed Directive generalised the right of access to ports, which had previously been ensured under the Commission's competition policy on the basis of the essential facilities doctrine, to all ports, including for substitutable services in relatively small ports.

For all these reasons, it is not surprising that the initial Directive proposal was seen as a threat by the port sector. It turned out to be inspired too one-sidedly by the will to reduce the cost of port calls for the profit of shipping companies and at the cost of existing well-organised services within EU ports. On the other hand, it provided too few incentives for the majority of port authorities and port undertakings that do operate in conformity with regular market principles.

2.7. *Legal uncertainty and interpretative divergences*

A fifth shortcoming of the Directive was that a number of essential stipulations lacked clarity. Consequently, the Directive would never be able to achieve the objective of providing legal security. On the contrary, it would have given rise to numerous disputes and interpretative divergences in the various member states. One of the most striking examples was the crucial definition of the notion of a limitation of the number of service providers. The stipulations of the Directive regarding open selection procedures and limited duration of authorisations would only have applied if the number of authorisations had

been limited by the port authority. Never, however, was an unequivocal definition provided of what precisely the term 'limitation' meant. Should the number of service providers be restricted numerically to one, two or more? Or would the existence of a limitation depend on the actual availability of alternative terminal sites? Or on the number of candidates, so that a limitation would occur if one or more candidates had to be rejected? The Commission never provided a satisfactory answer to these questions, so that the scope of application of the fundamental rules of the Directive with regard to selection and duration would have remained particularly unclear and exhibited substantial differences from member state to member state. Consequently, the Directive could hardly have achieved its ambition of creating a level playing field for port competition.

2.8. *A futile compromise*

Thanks to some constructive criticism by, among others, the European Sea Ports Organisation (ESPO) and the Federation of European Private Port Operators (FEPORT), combined with equally constructive collaboration on the part of the Commission itself, numerous improvements were made to the original Directive proposal throughout the legislative procedure. As we have explained, some of the most controversial stipulations were relaxed (longer permitted duration of authorisations, greater role for port authorities, relevance of the port's own planning policy, etc) and account was given to considerations regarding nautical safety and social protection, and to the international regime of waterways and ports. The real scope of the right to self-handling was reduced. The amended Directive was generally regarded to be an honourable compromise and, all in all, a useful regulatory tool. Yet, it was ultimately and rather unexpectedly rejected. Apart from the purely political explanations for the rejection, it is regrettable with hindsight that the European Commission did not engage in more preliminary consultation with those involved, and instead adopted a rather rigid position in its original proposal, thus stirring up needless controversy. If it had taken a more diplomatic approach, it would have been possible to launch a Directive that could count on more substantial support from within the sector itself and would probably not have met with such stiff political resistance.

3. *Implications of the rejection for the port and shipping sectors*

3.1. *Three possible scenario's*

At the time of writing (early August 2004), the European Commission was still considering its position after the rejection of the Directive proposal. There

would appear to be three options: (1) the launching of a new draft Directive, (2) the termination of any action vis-à-vis the port sector, and (3) the option of a case-by-case approach that targets abuses within individual ports. According to some observers, the first option appeared unlikely, given the negative climate after the rejection of the previous Directive proposal, the uncertainty about whether a fresh initiative will be more successful, and the upcoming European elections. It would have seemed more plausible to prepare a Directive in three or four years' time, after the Court of Justice's case law on the legal regime of port services is clarified. In our view, such a Directive could have been conceived as a codification of principles deduced from the jurisprudence, as suggested above. However, some sources did not totally exclude a new legislative initiative from the Commission in the near future. The second option, namely to terminate any action vis-à-vis the port sector, seemed unlikely from the start given that, after the launch of the Ports Package, the Commission could hardly close its eyes and refuse to consider well-grounded complaints in relation to port activities. Initially, the third option would have appeared to offer the greatest chance of success. In the Ports Package itself, the Commission already made it clear that the Directive proposal would not stop it from dealing with individual cases on the basis of primary Community Law. It also threatened to develop a more thorough case-by-case approach in the run-up to the final vote on the draft Directive. Following its rejection, the Commission could indeed decide to open exemplary files to deal strictly with manifest violations of primary European Community Law in certain ports. On the basis of the EC Treaty, the European Commission can take measures to ensure free market access. The organisation of open selection procedures for terminal operators and non-discrimination in the employment of dock workers can, after all, probably be enforced on the strength of the great freedoms and competition law[17]. The objectives of the Directive proposal could be largely recuperated and thus accomplished within a case-by-case approach. Evidently, the Commission would need to take account of the risk of legal contestation of its decisions. It is to be expected that the Commission will not venture lightly into cases where the defendant's position is or may be covered by existing jurisprudence. According to informal sources, the Commission has already insisted that certain groups of port users should lodge complaints. This

[17] It speaks for itself that due account must be given to Regulation (EC) No. 1/2003 of the Council of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L 1/1). This Regulation also amends the competition Regulations for transport. It applies from 1 May 2004.

indicates that the Commission will probably not be keen to open dossiers on its own initiative.

Which approach the Commission will take is presently undecided. For a long time, the case-by-case approach on the basis of complaints appeared to be the most likely scenario. However, at the ESPO Conference held in Rotterdam on 17 June 2004, the European Transport Commissioner announced her forthcoming submission of a new Directive proposal to the Commission. At the time of writing, the official text of this new proposal was not yet available. Probably, most of the new provisions will be drawn from the rules contained in the initial Directive proposal launched in 2001. Whether the new legislative initiative will put the Commission's more or less expected case-by-case approach on hold, is far from clear. Whether it will in the end be more successful than the previous attempt, is even less certain.

As regards the matter of port financing, which will not be discussed in further detail in the present contribution, the Commission is said already to have initiated a more determined supervision of the compliance with the Transparency Directive[18] in the port sector. At the time of writing, the Commission was drawing up guidelines on the public financing of ports.

In addition, one should take into account that other, more general, initiatives might affect the port sector in the years to come.

3.2. *The proposal for a General Services Directive*

First, on 13 January 2004, the Commission adopted a proposal for a Directive of the European Parliament and the Council on services in the internal market[19]. The objective of the proposal is to provide a legal framework that will eliminate the obstacles to the freedom of establishment for service providers and the free movement of services between the member states, giving both the providers and recipients of services the legal certainty they need in order to exercise these two fundamental freedoms enshrined in the Treaty. In order to eliminate obstacles, the proposal i.a. provides for administrative simplification measures, involving the establishment of "single points of contact", at which service providers can complete the administrative procedures relevant to their activities, and the obligation to make it possible to

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[18] Directive 80/723/EEC of the Commission of 25 June 1980 on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings, OJ 1980 L 195/35 (subsequently amended).

[19] Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM/2004/0002 final.

complete these procedures by electronic means; certain principles which authorisation schemes applicable to service activities must respect, in particular relating to the conditions and procedures for the granting of an authorisation; the prohibition of certain particularly restrictive legal requirements that may still be in force in certain member states; the application of the country of origin principle, according to which a service provider is subject only to the law of the country in which he is established and member states may not restrict services from a provider established in another member state; the right of recipients to use services from other member states without being hindered by restrictive measures imposed by their country or by discriminatory behaviour on the part of public authorities or private operators; a mechanism to provide assistance to recipients who use a service provided by an operator established in another Member State; in the case of posting of workers in the context of the provision of services, the allocation of tasks between the member state of origin and the member state of destination and the supervision procedures applicable; etc.

The question arises whether this broad Directive proposal may also apply to the port sector. The proposal is not applicable to the transport services to the extent that these are governed by other Community instruments the legal basis of which is Article 71 or Article 80 (2) EC[20]. As the proposal for a Port Services Directive was based on the latter Treaty article, and was definitively rejected, the conclusion would appear to be that the General Services Directive, in its initial version, does indeed apply to the port sector. It is beyond the scope of the present contribution to study the concrete impact of the new text on the port sector. We would like to point out, however, that the General Services Directive adheres to a series of principles that had already been laid down in the Port Services Directive, e.g. the need for objective and transparent selection procedures. On the other hand, there are points of contrast: while the Port Services Directive merely strove to limit the duration of authorisations in cases where the number of service providers within a port was limited, the General Services Directive also stipulates that, if the number of available authorisations is *not* restricted, the duration period *cannot* be limited[21]. Other provisions such as the country of origin principle were not contained in the proposed Port Services Directive at all and may severely cut down the national legislator's powers to organise port services.

According to some observers, the Commission would be willing to consider an amendment to the proposed General Services Directive lifting

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[20] Art. 2 (2) c) of the Directive proposal.

[21] See Art. 11 and 12.

ports completely out of its scope. Whether such a measure would be supported by the other institutions, remains to be seen. In a note to the Council's Working Party on Competitiveness and Growth submitted on 25 June 2004, the Commission declared that the intention of the proposal was to exclude from its scope of application all transport services which are within the scope of the Common Transport Policy, including port services; the Commission agreed that there is a need for a modification of the present wording of the Directive proposal.

3.3. *A Framework Directive on Services of General Interest?*

A second new regulatory tool in the pipeline is a Framework Directive on Services of General Interest. On 21 May 2003, the European Commission published a Green Paper on Services of General Interest[22]. The European Parliament has since requested a Framework Directive on such services, which the European Commission is presently considering. Such a general instrument could set out, clarify and consolidate the objectives and principles common to all or several types of services of general interest in fields of Community competence. It could provide the basis for further sectoral legislation, which could implement the objectives set out in the framework instrument, thus simplifying and consolidating the internal market in this field[23]. If such a Framework Directive is drawn up and if it applies to the port sector, then it would, most likely, have important legal consequences for the organisation of port services under public service obligations relating to universal services, continuity, quality of service, affordability and user and consumer protection[24]. The Commission recognises in its Green Paper that it is primarily for the competent national, regional and local authorities to define, organise, finance and monitor services of general interest[25]. On the other hand, the Commission – referring to the relevant case law – confirms that providers of services of general economic interest, including in-house service providers, are

[22] COM/2003/270 final. See further Communication by the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on the Status of Work on the Examination of a Proposal for a Framework Directive on Services of General Interest, COM/2002/0689 final. See also the Communication of the Commission 'Services of general interest in Europe', OJ 2001 C 17/4; Report from the Commission on the state of play in the work on the guidelines for state aid and services of general economic interest (SGEIs), COM/2002/636 final.

[23] Green Paper, no. 38.

[24] See Green Paper, nos. 50 ff.

[25] Green Paper, no. 31.

undertakings and therefore subject to the competition provisions of the Treaty. Decisions to award special or exclusive rights to in-house service providers, or to favour them in other ways, can amount to an infringement of the Treaty, despite the partial protection offered by Article 86 (2) EC[26]. Case law shows that this is true, in particular, where the public service requirements to be fulfilled by the service provider are not properly specified, where the service provider is manifestly unable to meet the demand, or where there is an alternative way of fulfilling the requirements that would have a less detrimental effect on competition[27]. Where a public authority of a member state chooses to entrust the provision of a service of general interest to a third party, selection of the provider must respect certain rules and principles in order to ensure a level playing field for all providers, public or private, that are potentially capable of providing that service. This will ensure that these services are provided under the economically most advantageous conditions available on the market. Within the framework of these rules and principles, public authorities remain free to define the characteristics of the service to be provided, including any conditions regarding the quality of the service, in order to pursue its public policy objectives. If the act by which public authorities entrust a third party with the provision of a service of general economic interest is not covered by the Procurement Directives, such act must nevertheless comply with the principles that derive directly from the EC Treaty, and in particular the provisions relating to the freedom to provide services and the freedom of establishment. This is the case for instance of public contracts or work concessions falling below the thresholds, of service concessions (i.e. contracts stipulating that the consideration for the service provider consists, at least in part, in the right to exploit the service) or of unilateral acts assigning the right to provide a service of general economic interest. These rules and principles include equal treatment, transparency, proportionality, mutual recognition and the protection of the rights of individuals[28]. With the above positions, the

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[26] On the basis of this Article, service providers operating under public or universal service obligations may ultimately escape and be *beyond* the scope of application of general Community law, including the competition law provisions, in cases where application of Community law would demonstrably obstruct compliance with the aforementioned obligations. See further *infra*, item 4.2.

[27] Green Paper, no. 80.

[28] Green Paper, no. 81; see also the Commission Interpretative Communication on concessions under Community law, OJ 2000 C 121/2; Green Paper on public-private partnerships and Community law on public contracts and concessions, COM (2004) 327 final.

Commission confirms the general principles that derive from the case law of the Court of Justice. Clearly the principle of a transparent and objective selection procedure for choosing the providers of services of general economic interest is again in line with the previous proposal for a Port Services Directive. A possible threat to port authorities is the continuing and even increasing legal uncertainty over whether assigning public service tasks – such as the management and maintenance of port infrastructure – to publicly owned enterprises can still be organised by unilateral legislative acts adopted by the member states, thereby avoiding open selection procedures involving competition from prospective private service providers. In our view, there is no valid reason why local ('decentralised') port authorities should be forced to compete with private service providers in order to obtain a legal confirmation of their basic tasks and ultimately their very *raison d'être*.

Recently, on 12 May 2004, the Commission has adopted a White Paper on services of general interest, which draws conclusions from the debate on the Green Paper. In the White Paper, the Commission considers appropriate not to proceed to submitting a proposal for a Framework Directive at this point in time but to re-examine the issue at a later stage[29].

4. *The prospect of a more determined enforcement of primary Community Law in the port sector*

4.1. *Increasing significance of case law*

If, over the next years, the Commission further focuses on dealing with individual complaints, then primary European Community Law will of course gain in significance. The development of European case law on port administration and management and, more generally, on the liberalisation of (public) services and abuses of monopolies will thus become all the more important for the port sector. For overviews of this case law, we refer the reader to other literature[30]. In what follows, we briefly consider the possible effects of

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[29] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'White paper on services of general interest', COM (2004) 374.

[30] See Corruble, Ph., *Le droit communautaire de la concurrence appliqué aux port européens*, *D.M.F.*, 2002, 68-83 and 160-185; Corruble, Ph. and Rézenthel, R., *La gestion des ports maritimes sous le contrôle des autorités de concurrence*, *D.M.F.*, 2002, 664-674; Le Garrec, M.-Y. and Pietri, J.-M., *Les concessions d'installations portuaires octroyées aux Chambres de commerce et d'industrie au regard du droit communautaire*, *D.M.F.*, 2002, 655-663; Meij, A.W.H. and Nyssens, H., *State intervention in port-related services: a bird's eye view*, *Il diritto marittimo*, 2001, 72-89; Power, V., *European Community competition law and*

a case-by-case approach on the various port services, without dealing in depth with the legal details of the available jurisprudence.

4.2. *A legal distinction between port services*

The Commission already emphasised the difference between various port services in the Green Paper on Ports and Maritime Infrastructure.

First and foremost, there are the port services of a public authority nature, such as the harbour master services and traffic control services[31]. These non-economic activities are beyond the scope of the treaty provisions on competition[32] and they also fall under exceptional provisions in relation to the great freedoms[33]. It is therefore unlikely that the European Commission will focus its case-by-case approach on these services.

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sea ports, Il diritto marittimo, 2001, 90-115; POWER, V., *European Union Seaports Law: The General Principles of European Union Law*, in VAN HOOYDONK, E. (ed.), *o.c.*, 17-78; RABE, H.-J., *EU-Kompetenzen im Gebiet der Seehäfen und Seeverkehrs-Infrastruktur im Überblick*, in LAGONI, R. (Herausg.), *Beiträge zum deutschen und europäischen Seehafenrecht*, Münster/Hamburg/London, LIT, 2001, 95-104; RÉZENTHEL, R., *Le droit portuaire français face au droit communautaire*, in VAN HOOYDONK, E., (ed.), *o.c.*, 275-283; RUTTLEY, PH., *Sea Ports and EC Law*, *European Transport Law*, 1995, 821-836; SLOT, P.J. and SKUDDER, A., *The legal regime of Ports and Airports under Community Law*, *Tijdschrift Vervoer & Recht*, 2000, 1-9; STRAETMANS, G. AND LAVRIJSSEN, S., *Toepassing van de mededingingsregels op havenwerkzaamheden. Enkele recente tendensen*, *Liber amicorum Hubert Libert*, Antwerp, Maklu, 1999, 331-351; VAN HOOYDONK, E., *Beginselen van havenbestuursrecht*, Bruges, Die Keure, 1996, 173-203, nos. 87 and 442-483, nr. 164; ID., *Het onderscheid tussen havendiensten in het mededingingsrecht*, obs. under Court of Appeal Antwerp, 7 June 1999, *Algemeen Juridisch Tijdschrift*, 2000-2001, 7-10; ID., *The regime of port authorities*, in ID. (ed.), *o.c.*, 95 ff., nos. 11 ff.; ID., *The regime of port authorities*, in *Liber amicorum R. Roland*, *o.c.*, 480 ff., nos. 11 ff. See also CHLOMOUDIS, C.I. AND PALLIS, A.A., *European Union Port Policy*, Cheltenham,UK/Northampton, MA, USA, Edward Elgar, 2002, 231 p.; MATTEI-DAWANCE, G., *Les ports dans le contexte européen*, *D.M.F.*, 1990, 350-380; MIGLIORINO, G., *Current status of ports competition in Southern Europe*, *Il diritto marittimo*, 2001, 116-124; RÉZENTHEL, R., *Les régimes portuaires et le droit de la concurrence*, in GOUVERNAL, E., GUILBAULT, M. AND RIZET, C. (coord.), *Politiques de transport et compétitivité*, Paris, Hermes, 1997, 107-125.

[31] See Case C-430/99 and C-431/99, Inspecteur van de Belastingdienst Douane, district Rotterdam, *ECR*, 2002, I-5235 and *D.M.F.*, 2002, 986, obs. R. RÉZENTHEL; see further ALGERA, W.T., *Nationale tarieven voor verkeersbegeleiding op zee (VBS) versus algemeen en bijzonder EG-recht voor de sector vervoer (vrij verkeer, mededinging en een nieuwe richtlijn*, *Tijdschrift Vervoer & Recht*, 2003, 171-180.

[32] With regard to Flemish subsidising of harbour master services, which is not to be considered as state aid, see Commission Decision C(2002)3763fin of 16 October 2002, N 438/2002.

[33] See Art. 39.3, 39.4, 45 and 46 EC.

A second group of port services consists of services of general economic interest which, according to Article 86 (2) EC, may be exempt from the rules contained in the EC Treaty if the application of such rules might obstruct, in law or in fact, the performance of the particular tasks assigned to them. In practice, this exception usually concerns port services which, on the strength of internal law, are assured under public service obligations, e.g. the provision of infrastructure by the port authority and the provision of technical-nautical services. With regard to the technical-nautical services, there is a judgment of the Court in which the exception of article 86 (2) EC was applied in practice[34]. As case law does not exclude monopolies as such[35], and as the intended services enhance safety at sea, it appears that pressing for a liberalisation of technical-nautical services on a case-by-case basis would be a tough and delicate proposition for the Commission. With regard to the provision of port infrastructure on the part of port authorities, the Commission has until today adopted a reticent position vis-à-vis exceptions on the basis of article 86 (2) EC. No unequivocal case law is available on the issue of whether or not port authorities (can) provide a service of general economic interest[36]. However, even if this is the case (as we feel it irrefutably is), it usually appears in practice that the normal application of competition law will not obstruct the port authority in performing its assigned task[37]. Thus, the practical significance for port authorities of Article 86 (2) EC Treaty has, until today, proven rather modest. In order that port authorities could use this provision as a refuge from Commission initiatives, it is necessary that their public service obligations be incorporated more explicitly in the internal legislation.

Finally, there are purely commercial port services, including cargo handling. Under fixed case law, this is a commercial sector like so many others[38]. The Commission sees no legal reason to make any reservations in this respect.

4.3. *Possible trends in the enforcement of the EC Treaty*

On the basis of this distinction between port services, it should not come as a surprise if the enforcement policy of the Commission exhibited the following tendencies.

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[34] Case C-266/96, *Corsica Ferries France*, *ECR*, 1998, I-3949.

[35] Constant case law: see among others Case C-340/99, TNT Traco, *ECR*, 2001, I-4109; Case C-475/99, *Ambulanz Glöckner*, *ECR*, 2001, I-8089.

[36] See recently Case C-34/01 - C-38/01, *Enirisorse*, *D.M.F.*, 2003, 1122, obs. R. Rézenthel.

[37] Cf. with regard to a airport authority Case T-128/98, *Aéroports de Paris*, *ECR*, 2000, II-3929.

[38] See Case C-179/90, *Merci*, *ECR*, 1991, I-5889.

If, in a given situation, a public port authority is unable to call on Article 86 (2) EC Treaty, then it will need to take account in the awarding of authorisations and contracts of the general principles regarding objective and transparent decision-making derived from European case law and elucidated by the Commission in the Interpretative Communication on concessions[39]. In this manner, the Commission could recuperate and as yet maintain many of the rules that were incorporated into its previous proposal for a Port Services Directive, at least vis-à-vis public port authorities. Thus, it may still achieve its goal of banning non-public negotiations with privileged commercial partners whereby other candidates are excluded beforehand. Another means of enforcing access to competitively important port facilities is the essential facilities doctrine, which the Commission has applied repeatedly in cases where shipping companies were refused access or were discriminated against to the benefit of competitors already present in a particular port[40]. An extreme policy

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[39] See *supra*, fn. 29.

[40] See on this issue BLUM, F. AND LOGUE, A., *State Monopolies under EC Law*, Chichester, John Wiley & Sons, 1998, 84-86 and 165-175; CAPOBIANCO, A., *The essential facility doctrine: similarities and differences between the American and the European approach*, *E.L.Rev.Dec.*, 2001, 548-564; DOHERTY, B., *Just what are essential facilities?*, *CMLRev.*, 2001, 397-436; FURSE, M., *The 'Essential Facilities' Doctrine in Community Law*, *ECLR*, 1995, 469-473; GLASL, D., *Essential Facilities Doctrine in EC Anti-trust Law: A Contribution to the Current Debate*, *ECLR*, 1994, 306-308; HANCHER, L. AND LUGARD, H.H.P., *De essential facilities doctrine. Het Bronner arrest en vragen van mededingingsbeleid*, *Sociaal-Economische Wetgeving*, 1999, 323-334; HICKEY, D., *Application of European Competition Laws to European Ports and Port Operators*, in *European Institute of Maritime and Transport Law* (University of Antwerp), *Shipping Law Faces Europe: European Policy, Competition and Environment*, Antwerp, Maklu, 1995, (231), 235 ff.; MURPHY, F., *Airport Management and EC Law*, in *European Transport. Regulation, Deregulation, Impact of the Euro Currency*, Brussels, Bruylant, 1999, 215-231; RIDYARD, D., *Essential Facilities and the Obligation to Supply Competitors under UK and EC Competition Law*, *ECLR*, 1996, 438-452; SLOT, P.J. and SKUDDER, A., *The legal regime of Ports and Airports under Community Law*, *Tijdschrift Vervoer & Recht*, 2000, (1), 6-8; SOAMES, T., *EC Maritime Policy: An Overview*, *European Transport Law*, 1995, (747), 765-777 and 791-795; STRAETMANS, G. and LAVRIJSSEN, "*Toepassing van de mededingingsregels op havenwerkzaamheden. Enkele recente tendensen*", *Liber amicorum Hubert Libert*, Antwerp/Apeldoorn, Maklu, 1999, (331), 334-344; VAN HOOYDONK, E., *Beginselen van havenbestuursrecht*, *o.c.*, 456-461, n. 164.6°; ID., *The regime of port authorities*, in Id. (ed.), *o.c.*, 106 ff., no. 19; ID., *The regime of port authorities*, in *Liber amicorum R. Roland*, *o.c.*, 492 ff., no. 19; VEGIS, E., *La théorie des "essential facilities": genèse d'un fondement autonome visant des interdictions d'atteinte à la concurrence?*, *Revue de Droit Commercial Belge*, 1999, 4-21; WHISH, R., *Competition Law*, London, Butterworths, 2001, 614-624.

of dedicating terminals to certain shipping companies, which prevents other shipping companies from using the port, could also be attacked by the Commission on the basis of the essential facilities doctrine. This way, the monopoly of shipping companies operating terminals in non-substitutable ports could be broken[41].

The levying of exorbitant port dues, for no or merely disproportionate performances, and the application of discriminatory port tariffs could be challenged by the European Commission on the strength of case law on free movement of goods and services, competition and internal taxation[42]. Too low a port tariff could be challenged on the basis of the state aid rules[43].

Conditional upon the application of Article 86 (2) EC, abuses of monopolies and other behaviour that distorts competition in the technical-nautical sector[44] or in the goods-handling sector[45] can be challenged by the Commission on the basis of general competition law. The freedom to provide services in maritime transport might be violated, for example, if port towage services are reserved for towing vessels under the national flag[46].

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[41] See further VAN HOOYDONK, E., *Juridische vestigingsfactoren voor goederenbehandelaars in zeehavens en het statuut van 'dedicated terminals'*, in ID. (ed.), *Stouwers, naties en terminal operators. Het gewijzigde juridische* landschap, Antwerp/Apeldoorn, Maklu, 2003, (11), 47 ff., nos. 26 ff.

[42] See among others Case 34/73, Variola, *ECR*, 1973, 981; Case 132/82, *Commission / Belgium* (storage charges), *ECR*, 1983, 1649; Case 266/81, SIOT, *ECR*, 1983, 731; Case C-381/93, *Commission / France*, *ECR*, 1994, I-5145; Case C-90/94, *Haahr Petroleum*, *ECR*, 1997, I-4085; Case C-242/95, GT-Link, *ECR*, 1997, I-4449; Case C-435/00, Geha Naftiliaki, *ECR*, 2002, I-10615; See further, among others, LE MONNIER DE GOUVILLE, A., *Les redevances portuaires saisies par le droit communautaire*, *D.M.F.*, 2003, 607-616; Commission Press releases IP/03/982 of 9 July 2003 and IP/03/1532 of 11 November 2003.

[43] See answer of the Commission to written question Bazin no. 2213/97, OJ 1998 C 82/44.

[44] See further CARBONE, S.M. and MUNARI, F., *Port services ancillary to navigation between market and safety requirements*, *Lloyd's Maritime and Commercial Law Quarterly*, 1996, 67-92; CARBONE, S.M. and MUNARI, F., *The Regime of Technical-Nautical Services (Pilotage, Towage, Mooringmen) under European Law*, in VAN HOOYDONK, E. (ed.), *o.c.*, 187-206; LECHNER, T., *Wettbewerb und EG-Freiheiten im Bereich der technisch-nautischen Dienste*, in LAGONI, R. (Herausg.), *Beiträge zum deutschen und europäischen Seehafenrecht*, Münster/Hamburg/London, LIT, 2001, 147-154; LE GARREC, M.-Y., *Réflexion sur la réglementation applicable à un service de remorquage portuaire object d'une consultation européenne*, *D.M.F.*, 2003, 341-349; LE MONNIER DE GOUVILLE, A., *Les services nautiques portuaires confrontés au droit communautaire de la concurrence*, *D.M.F.*, 2003, 86-99.

[45] See further VAN DEN BOSSCHE, A.-M., *The Regime of Stevedores, Terminal Operators and Harbour Workers under European Law*, in VAN HOOYDONK, E. (ed.), *o.c.*, 207-228.

[46] Commission Press Release IP/03/982 of 9 July 2003.

Unjustified restrictions on employment of dock workers could be challenged on the strength of the principle of free movement of services[47]. It is hard to assess to what extent the right to self-handling will be enforceable on the basis of primary Community Law. In the most recent versions of the proposal for a Port Services Directive, the right to self-handling was toned down, but not in very clear terms[48]. In a case where an airport authority had reserved goods-handling for itself, the Commission enforced the right to self-handling on the basis of the prohibition to abuse a dominant position (Art. 82 EC)[49]. On grounds of the essential facilities doctrine, self-handling might also be enforced on quays that represent essential facilities to certain users because of their non-substitutability[50]. It speaks for itself that the practice whereby existing service providers and trade unions are able, via social consultation, to impose labour conditions that purposely exclude new service providers from ports is prohibited.

5. *Conclusions*

The initiative by the European Commission to launch a proposal for a Port Services Directive was entirely justifiable. However, the initial proposal exhibited a number of fundamental shortcomings that contributed to negative responses and ultimately a narrow rejection by the European Parliament in 2003. Most observers expected that the Commission would now concentrate on dealing with the remaining non-market conform situations in individual ports on the basis of the EC Treaty. Primary Community Law seems to hand the European Commission enough tools to deal with practices that distort competition in the port sector and to open up the port services market to a satisfactory degree. Given its own policy on services of public interest, trends in European case law, the international legal regime of ports and the basic

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[47] The Labour Court of Brussels ruled on 11 January 2002 (A.R. no. 17866/00) that the Belgian Dock Work Act of 8 June 1972 is incompatible with the free movement of services as laid down in Art. 49 EC-Treaty. The appeal procedure is pending.

[48] According to the European Commission, an airport authority that forces suppliers of ground-handling services and self-handlers to take over staff from the airport managing body violates the Airport Services Directive (Commission Press Release IP/02/1494 of 16 October 2002).

[49] Commission Decision 98/190/EC of 14 January 1998 relating to a proceeding under Article 86 of the EC Treaty (IV/34.801 FAG - Flughafen Frankfurt/Main AG), OJ 1998 L 72/30.

[50] See the Commission decision challenged in Case T-52/00, Coe Clerici Logistics, *ECR*, 2003, II-2123.

requirements of good port practice, the Commission will need to take due account of public service obligations and the need for commercial autonomy and flexibility which are so essential to port authorities. In addition, it cannot ignore the obvious requirements of maritime safety and social protection. Besides this expected case-by-case approach, the port sector should take into consideration the possible repercussions of more general regulatory initiatives, such as the General Services Directive and in the future perhaps a Framework Directive for Services of General Interest. Very recently, the European Commissioner announced her submission of a second Port Services Directive proposal, the contents whereof are as yet unknown. In order to increase its chance of success, it would be advisable for the Commission to draw lessons from the legal weaknesses of the previous attempt and its subsequent failure.