

## **Breakthrough on EC's Port Directive**

**The proposed Directive on Liberalisation of Port Services being discussed within the European Union at the moment has been the subject of most controversy and concern within the shipping industry. Riccardo Celli and Louise Mills of maritime law firm Norton Rose's Competition and Regulatory Group in Brussels explain the implications of the Directive and lay out its proposals**

On 17 June 2002, the EU Member States' Council of Transport Ministers reached political agreement on the controversial EU Directive which aims to open up the supply of port services to competition. Since it was first proposed by the European Commission in February 2001, following the 1997 Green Paper on Sea Ports and Maritime Infrastructure, the Directive has been the subject of intense Member State and industry lobbying over issues such as the inclusion of pilotage and cargo handling within the Directive and proposed infrastructure concession periods. While this has resulted in several amendments to the original proposal, a Commission source said the Commission was "pleased with the outcome" of the agreement at the Council which "retained the basic philosophy" of the original proposal and was seen as a "good deal" by Commission staff.

### **Background**

The crucial role played by ports in the EU trade is evident: 70 per cent of all trade with third countries is channelled through ports and about one-third of all EU goods are transported by short sea shipping along EU and neighbouring coasts. Further development of shipping obviously depends on the efficient operation of ports and competitive provision of port services such as cargo handling, towage, mooring and pilotage, which represent a major part of the total cost of port calls for ships and of cargo transported through ports. In recent years, the provision of port services in some ports have undergone major changes, but in most cases remain far from liberalised. Traditionally, ports have largely been run as monopolies with single service providers, in many cases a publicly owned or controlled company. Gradually, competitive market forces have gained ground, particularly as the public sector has declined in some Member States, and this has generally led to improvements in both quality of service and a reduction in prices of port services. For example, the emergence of global terminal operating companies like Hong Kong's Hutchison ports, Britain's P&O ports, PSA of Singapore and Germany's Eurogate have opened up competition in port services in Northern Europe. For example, PSA is one of the biggest players in Antwerp, until recently a no-go area for outsiders. The recent decision in Case COMP/JV.55 Hutchison/RCPM/ECT showed that the Commission supported Hutchison's acquisition of a stake in Rotterdam, provided provisions were made to ensure continued third-party competition in the port services market. However, this trend of liberalisation is far from uniform throughout the EU, and there is a divergence particularly between Northern and Southern European ports. Although existing EU Treaty rules on freedom to provide services, rights of establishment and competition apply to ports and allow service providers access to the port services markets, in reality these rights are often difficult to exercise. Instead, competition has existed only insofar as neighbouring ports could be used as alternatives depending on factors such as the quality of the road and rail infrastructure in the area and the type of service required. For example, increases in efficiency in labour relations in Italian ports like Genoa have resulted from competition from domestic greenfield container ports such as Gioia Tauro and Taranto.

Drafting legislation to liberalise port services which is effective, relevant and acceptable throughout the EU has been difficult because of these differences in operation and organisational structure and funding of ports. Currently 75 per cent of maritime traffic passes through 'Landlord' ports, where public funding is very important, and the port authority (a public body) provides not only basic infrastructure, but also some facilities to port operators. In some areas - for example the UK - ports are more or less entirely owned and managed by private operators. Ironically, the support for the Directive has been strongest in the Southern European Member States, where traditional monopolies are more prevalent and supported by public funding. Some Northern European Member States have argued that competition within and between their ports already allows port-users to drive down rates through their choices of provider or location and therefore further regulation is not necessary. The proposed Directive has also forged unusual alliances. For example, shipowners and shippers, usually at loggerheads, joined forces to lobby members of the European Parliament to approve the Directive without amendments in November 2001. By contrast, there has been fierce opposition to the Directive from port employers and dock workers unions. They have lobbied the Commission to delete the right of shipowners to arrange their own cargo handling or for the appointment of more than one cargo handler which they see as raising major concerns in relation to waterfront safety and job security. These concerns led to strikes by German trade unions and the European Transport Federation in Belgium, Germany, and Scandinavia at the beginning of June 2002 and a pan-European strike in September 2001. Commission sources have been keen to emphasise that this is not a "Directive against dockers".

### **Key provisions of the Directive**

The objective of the Directive is to create freedom for port service providers to provide services (with corresponding rights of access to port installations) and transparency and fairness in the way operating concessions are awarded. In opening up port services however, the Directive recognises some limitations on the number of service providers. The key provisions of the current proposal as agreed by the EU Council are as follows:

- **Scope:** the Directive will apply to all seaports on the territory of an EU Member State which have exceeded 1.5m tonnes of freight and/or 200,000 passenger movements in the past 3 years. This was reduced from the original thresholds of 3 million tonnes and/or 500,000 passengers unanimously by the Member States at the Council. The Directive will also apply to port services provided on waterway access to the port.
- **Services:** The Directive applies to commercial port services which include technical-nautical services (pilotage, towage, mooring), cargo handling (stevedoring, stowage, transshipment, storage, warehousing, cargo consolidation) and passenger services. Shipowners and certain countries, such as France, had lobbied for, and in fact the European Parliament accepted in November 2001, the exclusion of pilotage from the Directive because of safety concerns where more than one provider was operating. However, the Commission and the Council have stated that these concerns will be addressed by specific provisions in the Directive which allow Member States some flexibility to restrict concessions to a single provider where justified for safety or public service requirements. At the same time, this will be offset by the grant of exemptions for captains of vessels that have a Pilotage Exemption Certificate ("PEC") and for certain types of vessel.
- **Procedure:** the Directive requires that procedures are established for grant of concessions for providers of port services. The procedures and criteria for granting authorisation must be transparent, non-discriminatory, objective, relevant and proportional. They may relate only to the professional and financial qualifications of the provider, safety issues including maritime safety and access to the port,

employment and social matters, environmental requirements and development plans and public service obligations. However, these issues must not become a pretext for reducing or excluding competition and therefore the burden of proving the relevance and proportionality of criteria will rest with the Member State.

■ **Limitations:** The Port Authority may only limit the number of providers of port services for reasons of constraints relating to available space or capacity and maritime traffic-related safety (e.g. for pilotage, towing and mooring). This recognises the fact that many ports have geographic constraints or specific safety problems which render unrestricted access impossible. However, the limitation on a number of service providers must be the exception rather than the rule and again the burden of justifying a limitation will rest with the Port Authority. Furthermore, in relation to cargo handling, at least two service providers for each category of cargo must generally be allowed subject only to constraints on space or capacity or exceptional circumstances relating to the viability of the services due to the volume of traffic. The requirement for a minimum of two service providers for each type of cargo has been retained in the face of strong resistance from the unions. However, since charges for cargo and cargo handling represent the main port service, at least in terms of revenue, the Commission has stated that it would "not be worthwhile" to proceed with the Directive if cargo handling were not within its ambit. Although these provisions do provide Member States with a certain amount of discretion in awarding concessions, the Commission has stated that the "transparency" of the proposed authorisation process and the mechanism for appeals to national courts or independent public authorities will act as a check on attempts to unfairly exclude service providers. How this will work in practice remains to be seen.

■ **Independent Authority:** an independent "Competent Authority" will be established for each port to oversee the appointment of service providers. In reality, this body will be the current Port Authority, a public body which manages the port. However, where the Port Authority is itself a service provider (or directly or indirectly controls or is involved in a service provision) Member States must designate an independent third-party authority to make decisions on the number of service providers and monitor the tendering process.

■ **Social rights:** Port services providers are entitled to employ personnel of their own choice. However, this right is subject to national social legislation which may require service providers to employ staff of the previous provider. This clause was included at the insistence of France, Belgium and Germany to avoid use of third-country handlers in conditions inferior to those in collective agreements applied in the sector.

■ **Non-discrimination:** Where the Port Authority also provides port services it may not discriminate between service providers and in particular not in favour of an undertaking in which it holds a direct or indirect interest. It must also keep separate accounts of its port services activities from its other activities. The Commission has stated that it does not wish to limit the management function of the port authorities but where the authorities are commercially active they should not have privileged rights compared to their commercial competitors.

■ **Concession duration:** Concessions for the provision of ports services will be limited to a duration of 10 years where the incumbent service provider has not made significant investment in the port, 15 years where there has been investment in moveable assets (e.g. cranes, tugs etc) or 36 years where the investments are in unmoveable assets, with a further 10-year extension for additional investments. The privatised port industry in the UK remains unhappy about the proposed contract duration even though it represents a compromise from the Commission's original position. Firms that have spent substantial sums developing waterfronts and container terminals and received leases of up to 99 years at privatisation are not pleased by the prospect of having to hand them over to rivals and face new competition in ports they have helped fund through their own investment. P&O ports,

for example, has put an estimated \$750m into converting the Shell oil refinery on the Thames into a megacontainer port and distribution hub. Various transitional measures and means of compensation are proposed to address this issue but are unlikely to satisfy many existing private sector service providers.

- Separation of accounts: Service providers generally must keep separate accounts for each service to ensure financial transparency.
- Self-handling: Port users shall have the right to engage in "self-handling" of cargo - where they provide their own cargo handling labour service - on equal terms with providers of comparable services.
- Implementation: Member States will have two years following the adoption of the Directive to ensure its provisions are implemented in national legislation. France and Belgium are said to be arguing for a three-year time span.

### **Next steps**

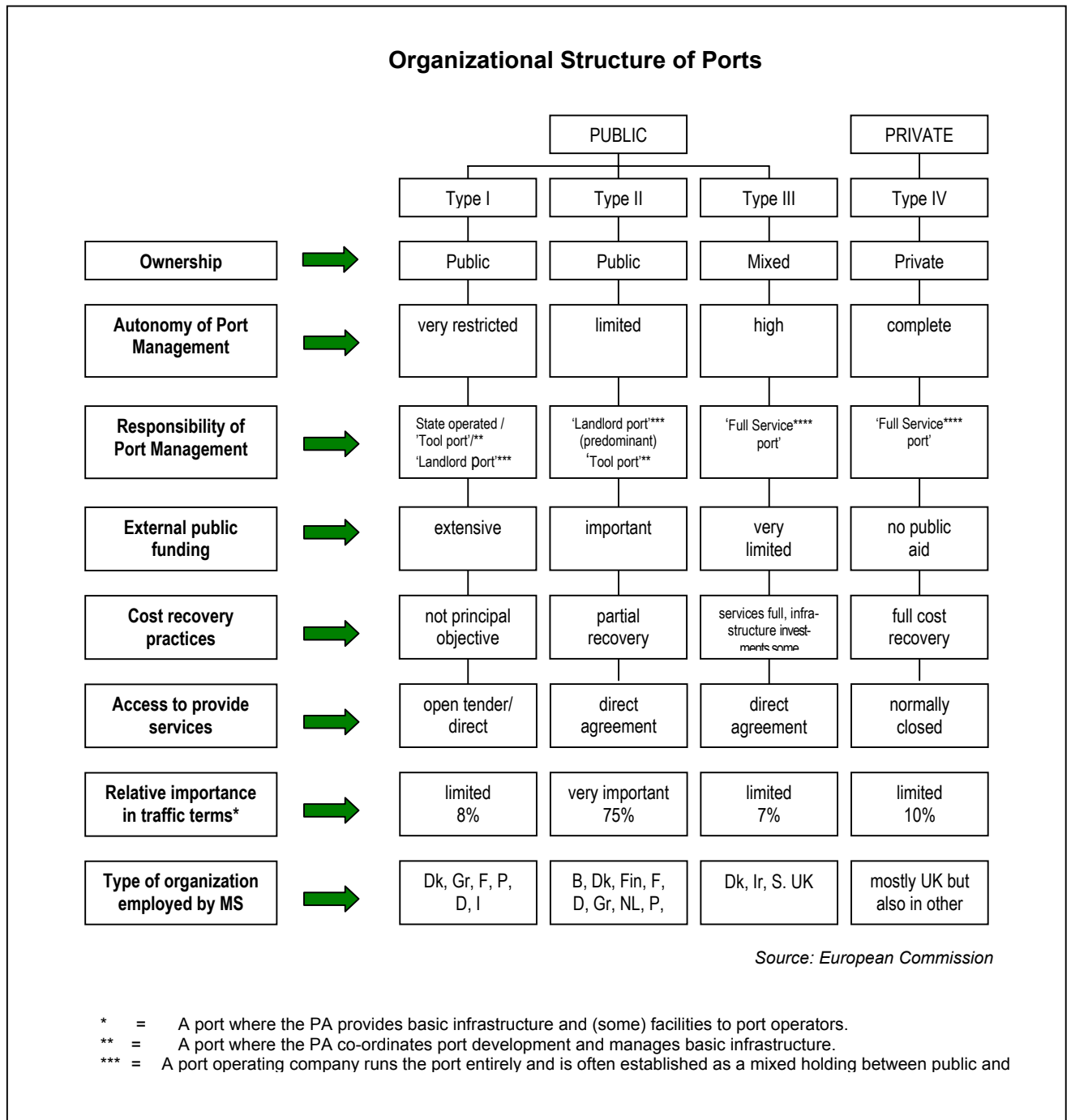
The agreement on the common position is a major step forward in the adoption of the Directive. The next steps in the process are for the amended proposal to be reconsidered by the European Parliament before final consideration and adoption by both the Council and the European Parliament. The Danish presidency, which supports port liberalisation, is about to take over the leadership of the EU and with a Greek presidency subsequently heading the EU and driving the Directive forward, Commission sources estimate that the Directive will be adopted early next year. How far the format will be watered-down by the vested interests remains to be seen.

A Commission source said that there has been "widespread misunderstanding" of the intentions of the Directive, and it is likely that there will be further industrial action and intensive lobbying, particularly in the build up to the second reading in the European Parliament, which may force further compromises in the Directive. In particular, the European Parliament voted to keep cargo handling within the scope of the Directive only by a narrow majority in November 2001, and this as well as self-handling, which sparked the pan-European International Transport Workers Federation strike last year, are likely to be major issues at the second reading. Given that the self-handling proposals contained in the Directive "are absolutely unacceptable to the dockers' unions" according to the European Sea Port Organisation, and the strikes that have already occurred, will deregulation fail to make waves on the entrenched positions of the EU's waterfronts? Loyola De Palacio, vice-president of the Commission, has said: "Everybody agrees that we need a Community framework on access to the port services, because a number of issues are not satisfactorily tackled: how can private service providers get a fair chance where a public body provides the same service? How should licences and authorisations be granted? Certainly not behind closed door as is often the case today." [From "Ports Policy in Europe", a speech given to the General Assembly of European Ports, Tarragona 26 May 2000].

Given this context, it seems disappointing that the Directive has met such opposition. It would be difficult to argue that European ports are not due for some kind of regulation. Other monopoly industries, notably air transport, telecommunications, the postal services and energy sector have all been forced to provide better services at lower prices through an increase in competition. Furthermore, port users, particularly tanker and bulk shipping, have been victims of global supply and demand for a long time, while the EU has already made significant inroads in curbing the power of liner shipping conferences. Time will tell in what form the Directive is eventually adopted, and how effective the new transparency and appeals procedures will be in promoting competition in practice.

However, despite the implementation process ahead, it does appear that shippers are likely to finally receive the benefits of transparent processes and competition for

services in ports - and the EU regulators will have successfully intervened in another of the few remaining monopolistic outposts in Europe.



### Timetable for implementation of the Directive

**10 December 1997:**

*EU Green Paper addressing the liberalisation of sea ports and port services*

**13 February 2001:**

*Proposed Directive adopted by the Commission.*

- 14 February 2001: Proposed Directive transmitted to European Parliament and Council.*
- 20 September 2001: Committee of Regions Opinion.*
- 14 November 2001: European Parliament opinion first reading, Commission's position on European Parliament's amendments to the Proposed Directive first reading.*
- 29 November 2001: Economic Social Committee opinion.*
- 19 February 2002: Amended proposal adopted by the Commission and transmitted to the Parliament and Council.*
- 10 April - June 2002: Meetings of Council working group to discuss the Directive.*
- 17 June 2002: EU Council of Transport Ministers reaches a common position.*
- September 2002: Parliament second reading, opinions and amendments will be put forward.*
- Early 2003: Greece assumes Presidency of EU at beginning of January. Commission sources state aim is for Directive to be adopted around this time.*
- Early 2005: EU Member States implement Directive into national legislation and its provisions take effect. Belgium and France are arguing for a 3 year which would push the date of implementation of of the Directive back to 2006.*

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