THE LIBERALISATION OF PORT SERVICES IN THE FRAMEWORK OF PORT SECURITY LEGISLATION

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1. PORT SERVICES LIBERALISATION

After three years of negotiation, the Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services (presented by the Commission) failed. The conciliated text rejected by the European Parliament at the end of the Conciliation procedure tried to compromise among too many contrasting interests (ports associations, port industry, trade unions, etc.) and managed to dissatisfy everybody. Perhaps the most controversial aspect of the proposal was the definition and promotion of self-handling. Member States trade unionists

2. O.J. 154 E, 29/05/2001, p. 290 - 296. The aim of the proposed Directive, also known as “Ports Package” was to reinforce quality service in ports, establishing clear rules and setting up open and transparent procedures for access to port services but taking local specificities into consideration, in particular in safety and environment. “Ports play a crucial role in intra and extra Community trade. They will be called upon to play an increasing role in attempts to transfer more goods and passengers to the environmentally less damaging and less congested sea transport mode, encouraging intermodal transport and making it less costly. (...) It is now time, in the interests of operators, authorities and consumers, to establish clear rules on access to the port services market, without of course making any concessions to the high port safety levels witnessed hitherto” said Vice-President Loyola de Palacio, responsible for the transport and energy portfolios.
strongly opposed to it on economic, safety and social grounds. Not only the loss of dockers' jobs was taken into account, but also the reduction in safety levels of port operations.

In 2004, the Commission presented a new Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services\(^3\), also known as "Ports Package No. 2".

Once again the objective of the proposal is the liberalisation of port services; the Commission wish to ensure freedom to provide port services or carry out "self-handling" at "sea ports" for EU providers of port services, subject to certain objectives and relevant constraints such as space or capacity available at the ports, the development policy of the port, maritime traffic security or safety requirements at certain ports, protection of the environment, "public service requirements", social protection, etc.

The new rules on market access to port services will contribute to the development of the Motorways of the Sea\(^4\), the alternative routes, part of the Trans-European Network (TEN-T), which could relieve bottlenecks on land. By 2010, a fully fledged network of Motorways of the Sea should be established throughout Europe on the following corridors: 1. Baltic Sea (linking the Baltic Sea Member States with Member States in Central and Western Europe, including the route through the North Sea/Baltic Sea canal); 2. Western Europe (leading from Portugal and Spain via the Atlantic Arc to the North Sea and the Irish Sea); 3. South-East Europe (connecting the Adriatic Sea to the Ionian Sea and the Eastern Mediterranean, including Cyprus); 4. Southwest Europe (Western Mediterranean, connecting Spain, France, Italy and including Malta and linking with the Motorway of the Sea

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of south-east Europe and including links to the Black Sea).  

The proposed Directive applies to "port services" provided either inside the port area or on waterway access to and from the port or the "port system" covered by the Directive.

Port services are defined as the technical-nautical pilotage services (within the limits of the Directive), towage and berthing, all cargo handling operations (including loading and unloading, stevedoring, stowage, transhipment and other intra-terminal transport) and passenger services (including embarkation and disembarkation). They are provided either inside the port area or on waterway access to and from the port or port system covered by the Directive.

The Directive also applies to ports exceeding a certain maritime traffic threshold, that is, any seaport or port system located in the territory of a Member State and open to general commercial maritime traffic, provided that the individual port's average annual maritime traffic volume over the previous three years is not less than 1.5 million tonnes of freight and/or 200,000 passengers. Accordingly, only category A ports of the Trans-European Transport Network are taken into account by the Directive.

Member States may extend the Directive to other ports. They may likewise exclude those ports with a "high seasonal character", on condition they ensure an adequate level of market access to port services.

5. The Port of Trieste aims at being a direct gateway to Europe for the coastal countries of the south-east Mediterranean. The intermodal land-sea links launched with the Ro-Ro and ferry services to Turkey and Greece are the basis of the overall network of the Motorways of the Sea, shortly to be extended also to EU commercial partners in the Mediterranean, Israel, Syria, Lebanon and Egypt (the "Green Corridor" Project). In February 2005 the Motorway of the Sea "Ro-La" between the Port of Trieste and Greece and Turkey has been connected with Salzburg (Austria) by railways with a frequency of 3 trains a day, every day of the week, for a total capacity of 120 trailers a day, transported on special ultra low railways carriages. This initiative has a great environmental impact, taking 20% of road traffic off the roads connecting the Regione Friuli-Venezia Giulia with Austria.

6. "Two or more ports in the same geographical area and managed by a single managing body".

7. "Any ports that reach 50% of the average total annual maritime traffic volume over the previous three years in any three consecutive months".
A list of the ports covered by the Directive must be published in the Official Journal of the European Union three months after the Directive enters into force. It will be reviewed regularly, for the first time within five years of entry into force, and thereafter every three years.

In order to be able to operate, all providers of port services must obtain, no later than 18 months after the entry into force of the Directive, an authorisation granted by the "competent authority" according to objective, transparent, non-discriminatory, relevant and proportionate, public criteria (basically the same criteria as those applying to providers of the same or a comparable port service, provided these are relevant). The authorisation may include public service requirements relating to safety, regularity, continuity, quality and price and the conditions under which the service may be provided.

Self-handling for cargo and passengers operations may be provided using the land-based personnel of the self-handler.

Ships providing an "authorised regular shipping service" in the context of short sea shipping or operating on Motorways of the Sea may, in addition to using land-based personnel, carry out self-handling using the ship's regular seafaring crew.

A specific scheme is provided for pilotage services. Pilotage requires authorisation by Member States in accordance with maritime safety and public service requirements. The competent authorities may recognise the compulsory nature of pilotage and reserve it for themselves or assign it to a single provider.

Exemptions from compulsory pilotage is possible through "pilot exemption certificates" (in self-handling situations).

The Directive provides for the application of Commission Directive 80/723/EEC on financial transparency to those ports caught within its scope. Furthermore, it introduces transparent accounting requirements for the managing body of the port.

It is important to note that service providers must have separate accounts for port service activities.
The Commission will adopt State aid guidelines on the financing of port infrastructure within a year of the entry into force of the Directive.

The Directive does not affect the rights and obligations of Member States in respect of the application of their social legislation, including relevant rules on health, safety and employment of personnel, and of law and order, safety and security at ports as well as environmental protection.

Port security, port safety, and environmental protection issues play nowadays a significant role in the management of ports and in the providing of port services.

The implementation of the EU ports policy (competition, pricing, financing, intermodality, Motorways of the sea, etc.) is strictly connected to port security, port safety, environmental protection legislative framework.

Ports must comply with an impressive amount of legislation set by the international conventions, the EU, the Member States, the Port Authorities/Maritime Authorities. E.g. ship pollution/ship generated waste and cargo residues are disciplined at an international level (73/78 Marpol Convention on the prevention of pollution by ships), at the EU level (Directive 2000/59/EC of the European Parliament and of the Council of 27 November 2000 on port reception facilities for ship-generated waste and cargo residues), by Member States legislation (see, for Italy, D.lgs. 24 June 2003, n. 182 "Implementation of Dir. 2000/59/EC"), as well as by the Member States Port Authorities/Maritime Authorities legislation (e.g. Trieste Harbour-Office Ordinance no. 17/04 "Scheme of notification of ship-generated waste" and "Trieste Port Authority development of a plan for ship-generated waste and cargo residues collection", to be agreed with the "Regione Friuli-Venezia Giulia" and to be called for tenders)8.

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8. In fact, on 31 May 2005 an inspection of the DG Environment D.1 Life Unit and of EMSA (European Maritime Safety Agency) was conducted in the Port of Trieste to ascertain the state of implementation of Directive 2000/59/EC.)
2. PORT SECURITY

The tragic September 11 terrorist attacks on the United States have launched a re-evaluation of the vulnerability of transportation, which is among the most visible and frequent targets of terrorist attacks in the US and in many other countries.

While most of the early attention following the September 11 terrorist attacks focused on airport security, an increasing emphasis has since been placed on ports, and, in particular on assessing the potential threats to ports and the range of measures that can be taken to guard against them, with the participation of all public and private bodies involved in port operations and oversight.

However, terrorism is not the only threat to ports world-wide: thefts, narcotics, smuggling, organised crime constitute a serious security concern for the multiple actors involved in the complex port environment.

Governments are striving to ensure that ports and, in general, transportation infrastructures are secure from acts of terrorism and crime and adapt rapidly to natural or intentional disruptions.

From 9 to 13 December 2002 a Diplomatic Conference, attended by 108 Contracting Governments to the 1974 SOLAS Convention, observers from two IMO Member States, two IMO Associate Members, several United Nations specialised agencies, intergovernmental organisations and non-governmental international organisations, was held in London at the International Maritime Organization (IMO) headquarters with the aim of setting up a series of measures to strengthen maritime security and prevent and suppress acts of terrorism against shipping.

The Conference adopted a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS), the most far-reaching of which enshrines the new International Ship and Port Facility Security Code (ISPS Code).

The Code is a comprehensive set of measures to enhance the security of ships and port facilities developed in the wake of the September 11 attacks in the United States. It contains detailed
security-related requirements for Governments, Port Authorities and shipping companies in a mandatory section (Part A),
together with a series of guidelines about how to meet these
requirements in a second, non-mandatory section (Part B).

The ISPS Code takes the approach that ensuring the security
of ships and port facilities is a risk management activity and
that, to determine what security measures are appropriate, an
assessment of the risks must be made in each particular case.

Therefore, the purpose of the Code is to provide a standardised,
consistent framework for evaluating risk, enabling Governments
to offset changes in threat with changes in vulnerability
for ships and port facilities through determination of appropriate
security levels and corresponding security measures.

In order to evaluate risk accurately, each Contracting Government
must conduct port facility security assessments according
to predetermined criteria.

To communicate a threat at a port facility or for a ship, the
Contracting Government sets the appropriate security level,
which creates a link between the ship and the port facility, since
it triggers the implementation of appropriate security measures
for the ship and for the port facility.

Three ISPS Code security levels are provided, namely:
• security level 1: normal, the level at which the ship or port
  facility normally operates;
• security level 2: heightened, the level applying for as long
  as there is a heightened risk of a security incident;
• security level 3: exceptional, the level applying for the
  period of time when there is the probable or imminent risk
  of a security incident.

As threat increases, the only logical counteraction is to reduce
vulnerability in such a manner as stated in the Code: ships will
be subject to a system of survey, verification, certification, and
control to ensure that their security measures are implemented.
This system will be based on a considerably expanded control
system as stipulated in the SOLAS Convention. Port facilities
will also be required to report certain security related informa-
tion to the Contracting Government concerned, which in turn will submit a list of approved port facility security plans, including location and contact details to IMO.

At the Community level, the basis for the harmonised interpretation and implementation and Community monitoring of the special measures to enhance maritime security adopted by the IMO Diplomatic Conference in 2002 is provided by Regulation (EC) No. 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security\textsuperscript{9}.

The Regulation sets down the legal framework for the implementation of Community measures aimed at enhancing the security of ships used in international trade and associated port facilities in the face of threats of intentional unlawful acts.

The Regulation imposes several obligations on Member States:

- to communicate to the IMO, the Commission and the other Member States the information requested and the special measures adopted to enhance maritime security under the SOLAS Convention.
- to draw up the list of port facilities concerned on the basis of the port facility security assessments carried out and to establish the scope of the measures taken to enhance maritime security and to communicate this list to the other Member States and to the Commission by 1 July 2004 at the latest.
- to monitor rigorously compliance with the security rules by ships intending to enter a Community port, whatever their origin.

When a ship announces its intention to enter a port in a Member State, the competent maritime security authority of that Member State should demand that the information is provided at least 24 hours in advance or, if the voyage time is less than 24 hours, at the latest at the time the ship leaves the previous port

\textsuperscript{9} O. J. L 129, 29/04/2004 p. 0006 - 0091.
or, if the port of call is not known, as soon as the port of call becomes known.

The Member States were required to designate a focal point for maritime security by 1 July 2004 at the latest. This authority should require each ship intending to enter port to provide, in advance, information concerning its international ship security certificate and the levels of safety at which it operates and has previously operated.

Security checks in the port may be carried out by the competent maritime security authorities of the Member States, but also, as regards the international ship security certificate, by inspectors acting in the framework of port State control, as provided for in Directive 95/21/EC.

Although the Regulation represents a relevant breakthrough in maritime security, it applies only to ships and port facilities, thus leaving a gap in security area beyond the ship/port interface. Therefore, a Directive of the European Parliament and of the Council on enhancing port security\(^\text{10}\) was proposed by the Commission on 10 February 2004.

The objectives of the Proposal are:

- to introduce a security system in all port areas;
- to establish a Community framework to guarantee a high and comparable level of security in all European ports;
- to complement the measures presented by the Commission in May 2003 (COM(2003) 229 final) including the proposal for the “Regulation on enhancing ship and port facility security” in line with the amendments to the SOLAS Convention and the ISPS Code.

Taken together, the proposed Directive on port security and the Regulation on ship and port facility\(^\text{11}\) security are meant to provide the necessary framework for protecting the whole chain of maritime transport logistics (from the ship to the port via the


\(^{11}\) "Port facility" means a location where the ship/port interface takes place; this includes areas such as anchorage, waiting berths and approaches from seaward, as appropriate."
ship/port interface\textsuperscript{12} and the whole port area) against the risk of attacks on Community territory.

The proposed Directive applies to people, infrastructure and equipment (including means of transport) in ports and adjacent areas.

A Port Security Authority shall be designated by Member States for each port and shall be responsible for identifying and taking the necessary port security measures in line with port security assessments and plans, for ports subject to the provisions of the proposed Directive.

Member States shall also ensure that port security plans are developed, maintained and updated, with a detailed description of the measures taken to enhance port security, such as the conditions of access to ports or the measures applicable to baggage and cargo). Member States must monitor security plans and their implementation, and specify penalties for non-conformity.

Different security levels are established in line with the perceived risk (normal, heightened or imminent threat), namely:

- security level 1: the level for which minimum protective security measures must be maintained at all times;
- security level 2: the level for which appropriate additional protective security measures must be maintained for a period of time as a result of heightened risk of security incident;
- security level 3: the level for which further specific protective security measures must be maintained for a limited period of time when a security incident is probable, although it may not be possible to identify the specific target.

Member States shall communicate the security level in force for each port as well as any changes thereto.

\textsuperscript{12} "Ship/port interface" means the interactions that occur when a ship is directly and immediately affected by actions involving the movement of persons or goods or the provision of port services to or from the ship.
A port security officer shall be designated in each port to act as the contact point for port security related issues. Port security officers should have sufficient authority and local knowledge to adequately ensure and co-ordinate the establishment, updating and follow-up of port security assessments and port security plans.

Member States shall ensure that port security committees are established to provide practical advice in the ports covered by the Directive, unless the specificity of a port renders such a committee superfluous. The membership of the port security committee may vary between ports, but should always reflect the operational and public authority functions in a port.

Member States shall ensure that port security assessments and port security plans are reviewed every time security-relevant changes occur, and at least every five years.

At last, Member States shall designate a focal point for maritime security and the security of port facilities who must communicate to the Commission the list of ports concerned by the proposed Directive and maintain a list of the contact details of the port security authorities.

3. CONCLUSIONS

Unlawful acts, such as terrorism, are a threat to the whole shipping industry and community, to port infrastructures, to the intermodal infrastructures, to citizens using them, as well as to the environment.

It is clear that international, Community and national legislation must provide ports world-wide with the guidelines for the development of an effective security plan.

EU Regulation 725/2004 provides for security measures which only cover the physical area between the ship and the port.

As ports are part of a logistic network, many European ports are already configuring security systems to protect also those infrastructures which are not covered by Reg. 725/2004, that is the entire port area and the hinterland connections to the port.
On these grounds, the Commission proposed the above mentioned 2004 Port Security Directive in order to develop a comprehensive port security policy.

As Community ports varies sensitively according to their size (large-small), administration (privately-publicly owned, etc.), and performed activities (cargo handling, industry, warehousing, transport, environmental areas, conurbation, etc.), the Commission has deemed the directive to be the most appropriate legal instrument to introduce the required flexibility while establishing the necessary common port security level throughout the Community.

However, the Commission is aware that the extension of security measures to adjacent areas may arise problems as the definition of a port, its legal boundaries, the jurisdiction and the legal status of the Port Authority over the port vary from one Member State to the other.

Many other aspects of the new port security Directive proposal have been debated.

Firstly, the draft is limited to a series of generic principles, which are currently compatible with those contained in Reg. 725/2004, as the European Sea Ports Organisation (ESPO) has pointed out in its Response to the Draft Report of the European Parliament (Rapporteur Jeanine Hennis-Plasschaert – PE 347.290) on 22 November 2004.

Secondary, the proposed Directive raises the issue of the coordination between the different authorities and actors within each port. In particular, it does not specify if in the Port Security Committee to be created within each port there will be a participation, next to the Port Authority and the terminal operators, also of the port user groups such as shippers, carriers, freight forwarders, hauliers, railways operators, labour unions, etc. Port user participation is strongly advocated by many associations.

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13. In the Italian legal framework the public bodies involved in security are: the Port Authorities, the Customs, the Coast Guard, and the Border & State Police.
which represent the transport interests of companies moving goods by road, rail, sea and air.

A broader security legislation extending the new security requirements to areas in and around ports, and therefore to all modes of transport, affects undoubtedly all port users, not only the port operators.

Thirdly, the draft provides for on site Community inspections on the implementation of the Directive, in order to ensure a level playing field among European ports in the implementation of the Directive. This is probably the most controversial issue of the Directive Proposal, arising substantial objections from the Member States, already undergoing several national and EU inspections. As ESPO has underlined, we should bear in mind that the use of the general competence of the Commission to check effective implementation of EU legislation by Member States should be sufficient; however, if additional inspections in ports are given, they should be limited to the control of the overall implementation of the general principles of the Directive and not of the details, which should be let up to each port’s risk assessment.

In conclusion, the framework of port safety, security, environmental legislation is today impressive at the international, EU and national level. Terrorism, in particular, has had a profound impact upon transportation all over the world and especially on ports, which are an essential link within the total transport chain, being often the focal point for shipments of dangerous cargo, for major chemical and petrochemical production centres, and/or situated near cities. It is clear that terrorist attacks in ports are a major threat to the transport systems, the industry, as well as the health of people, and, therefore, an effective port security policy must be provided and harmonised at a Community level.

However, the evaluation of the impact of port security measures on port management and control, port services tariffs, port operations efficiency, and consequently on the liberalisation of port services, is needed.
The achievement of the appropriate level of security in compliance with EU regulation obliges Member States to adopt measures that are costly and may turn out to be trade-restrictive.

The issue is how ports retrieve the cost of security: directly from shippers\textsuperscript{14} or from the terminal operators or from the Port Authorities? The decision of some Member States to subside their port industries may lead to distortions of competition.

It is clear that on the one hand the EU is promoting the liberalisation of ports services - with the aim of improving the quality of services and the decrease in prices as the result of the increased competition - but on the other hand the latter must come to terms with the array of security, as well as safety and environmental, measures imposed on ports and now also on adjacent areas.

The trend in the EU and abroad, especially in the USA, is that the implementation of such measures does not follow a strict cost-benefit analysis, as the value involved is maritime security.

The main problem now is to ascertain the effectiveness of all these security measures implemented in the fight against terrorism and of other unlawful acts threatening ports, to make the implications of EU directives and regulations more manageable, and to determine clearly the allocation of costs and their repercussion on port services liberalisation.

\textsuperscript{14} This is the case of some ports in the UK, which are recouping security costs directly from shippers even in the absence of any shipper-port contract. The British Freight Transport Association has underlined the unconventionality of this method and has warned against the imposition of fixed charges, which may discourage shippers to invest in the security of their own operations.