PORT AND TERMINAL OPERATIONS IN ITALY
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1. Preface

The organisation, functions and regime of Italian ports have been recently deeply modified by the enactment of the Law 28.01.1994 n° 84. Such bill passed after decades of a substantial uncontested State control on harbours, mainly deriving from an anachronistic approach to the subject matter of State regulations of coastal areas of military and economical importance.

Before 1994 in Italy the State (defined as “Public Administration”) had an unconditioned control over harbour areas, whichever was their actual economic importance in terms of traffic, including control and power to regulate the use of berths and warehouses, offer of port services, execution of the same by private, public or semi-public operators, offer and execution of technical-nautical services ancillary to navigation, power to determine the subjects licensed to provide specialised labour force and manpower to public or private operators, determination of tariffs related to every kind of services rendered in port in connection with either the port activity or navigation within the port area. Obviously the State then maintained the traditional attributions and powers in connection with Custom’s regulation, safety of navigation and harbour police, which still preserves today.
In fact many of the traditional State powers of control over port activities were in clear contrast with some crucial provisions of the 1957 Rome Treaty founding the European Economic Community (later renamed simply European Union, EU), aiming at establishing a free, uniform and competitive market within the EU States, to which Italy is a party. In particular article 86 of the Treaty prevents Member States from promulgating or enforcing national legislations containing provisions capable of jeopardising the free competitive commerce between companies and commercial operators of the Member States by allowing or otherwise consenting or tolerating that any particular entrepreneur, either private or public, acquires and maintains a dominant position in the relevant market thus illegitimately abusing, or being able to abuse, of such position with detriment to the competitors. Article 90 of the Treaty, on the same line, prevents Member States from promulgating or enforcing legislative provisions creating or maintaining privileges and special or exclusive rights upon public enterprises resulting in a violation of the free competition in the common market guaranteed by the Treaty. Clearly the traditional regime regulating ports activity and operation in Italy, before 1994, was in contrast with both articles 86 and 90 of the EU Treaty, as well as in breach of many other relevant provisions.

As a result of the above situation on the 10th December 1991 The European Court of Justice (Case C-179/90, Merci Convenzionali Porto di Genova, hereinafter the “Port of Genoa” case) ascertained the described violations of the Italian ports’ legislation as in contrast with the provisions of articles 90, n. 1 and 30, 48 and 86 of the EU Treaty. The case originated from a shipment of steel imported in Italy by the steel company Siderurgica Gabrielli S.p.a. from Germany. The Italian importers chartered a self geared vessel able to discharge at Genoa with ship’s cranes and without any public stevedoring assistance. At that time the only stevedoring company in the port of Genoa licensed by the public authority to discharge that type of cargo was CULMV (Compa-
gnia Unica Lavoratori Merci Varie del Porto di Genova). Delays resulted in the discharging operations and charterers suffered a loss as a consequence. Charterers sued CULMV and the Court of Genoa referred to the European Court of Justice the question whether the national provisions, deriving from the Italian Code of Navigation at the time in force, obliging a port operator, such as a charterer/importer, to subcontract the services to a predetermined public stevedoring company, was or not in contrast with the EU Treaty’s provisions. The EU Court of Justice upheld the theory of the “conflict of interest” and stated that Italian legislation at the time in force was in contrast with the aforementioned provisions of the EU Treaty.

Following said decision the EU Commission, having realised that Italy failed to amend the relevant port legislation, sent to the Italian Government a formal injunction on the 31st July 1992 pursuant to art. 90 parag. 3 of the EU Treaty, inviting the same to communicate the intended measures to be adopted without delay in order to overcome the conflict with the Treaty’s provisions.

The above referred injunction forced Italy to re-examine the entire subject matter and to put forward various legislative proposals, resulting in the enactment of the aforementioned Law n° 84/94 on the re-assessment of the Italian port legislation. Such bill was later further revised by Italian Parliament with the enactment of the Law 23rd December 1996 n° 647. We shall see that Law 84/94, as revised by Law 647/96, is still maintaining situation of conflicts with the EU Treaty.

2. The “privatisation” of Italian Ports - Law 28.01.1994, n° 84

The new bill recently enacted by the Italian Parliament sets forth new rules of reclassification of the existing ports. In particular, article 4 modifies the old criteria of classification of ports based merely on the volume of traffic of each of the last three years (provided by former art. 2 of the Royal decree 2.4.1885, n°
3095), dividing national ports and harbours into the following objective categories: (a) Category I: ports or specific port areas dedicated to military or national safety functions; (b) Category II, Class I: ports of relevant international economical importance; (c) Category II, Class II: ports of relevant domestic economical importance; (d) Category II, Class III: ports of relevant regional or inter-regional economical importance. All ports falling into the Category II, Class I, II and III are dedicated to commercial purposes as well as to serve industrial and petrol activities, passengers traffic, fishing industry, pleasure and tourism yachting. The classification of each port into one of the aforementioned categories is determined by the Ministry of Transport and Merchant Marine, as advised by local port authorities, bearing into consideration the present or potential level of national and international operators entertaining business with such port (the “basin of users”), the entity of the global traffic, the operational capacity of the berths and ports structures, the level of safety for passengers and ships as well as for storage operations, including liquid and bulk cargo facilities, the consistency and operational level of ship supply and repair services, docking and dry-docking structures, level and efficiency of infrastructures with the inland (art. 4, parag. 4).

The new law goes further to fix parameters and objectives for the modernisation and development of the existing port and harbour infrastructures. In particular article 5 of the law refers all the intended projects of development of the global port activity, including shipyard and ship-repair industry, rail and road infrastructures and industrial parks in port areas, to the Port Regulatory Plan (“PRP”), to be jointly adopted by the Port Steering Committee and the interested City Council, subject only to the power of control of the Public Works Supreme Council, a division of the Ministry of Public Works, to be exercised within and not later than 45 days from the date of submission of the final draft of the PRP to said Council, failing which the PRP should be
deemed approved. For industrial activities involving oil refineries and chemical industry further reports and detailed studies on safety shall have to be added to the PRP. It is interesting to note that, in an effort of coordinate central and regional powers in the delicate matter of port organisation, the State and namely the Ministry of Transport and Merchant Marine, will maintain the administrative functions related to the port developments for the ports classified in Category I and II, Class I as well as in all the major developments affecting national safety (art. 5, parag. 6); the local administrations ("Regions") acquire control over the administrative functions related to port developments and infrastructure reforms affecting ports classified in Category II, Class II and III (art. 5, parag. 7). Furthermore Regions are not prevented, in principle, from financing and intervening directly in the realisations of major works otherwise falling in the competence of the central state, provided the financing and efforts are directly proportioned and related to the economical benefit that the particular local administration can gain from such public work in terms of increase of port traffic and port industry development.

As far as maintenance of port areas is concerned, article 6 of Law 84/94 transfers upon the newly founded "Port Authorities", previously incorporated in the Harbour Master's Offices' structures, the obligation of care of berths, mooring areas, port entrances, port lights and port infrastructures. Some of said activities are often delegated by the Port Authority to private operators as assignees of specific port areas in relation to the specific area assigned. Port entrances, on the contrary, are under the direct responsibility of the President of the Port Authority, to whom the law imposes the continuing control and maintenance to make sure that level of draft and navigational port safety remains within the commercial port standards.

The nature and the functions of the Port Authority, as designed by the Law 84/94, is therefore to realise essentially a role of promotion, advise, planning and control over port opera-
tions and over the remaining port industrial and commercial activities, availing itself of regulatory powers also in respect of safety and health regulations in the relevant working environments. Other duties of the Port Authority are to organise and coordinate public bids to subcontract the port maintenance services on the common port areas as well as the supply to the port operators of services of general interest not directly related to port operations, such as cleaning services, garbage removal services, water supply, energy supply, software and hardware assistance and other services common to industrial and commercial activities of the port. The Harbour Master’s Office remains responsible for the control over the technical-nautical services ancillary to navigation, the coordination of which is anyway exercised by the Port Authority (art. 14 Law 84/94).

Port Authorities have presently been instituted in the ports of Ancona, Bari, Brindisi, Cagliari, Catania, Civitavecchia, Genoa, La Spezia, Livorno, Marina di Carrara, Messina, Naples, Palermo, Ravenna, Savona, Taranto, Trieste and Venice.

The juridical nature and status of the Port Authority could be defined as a “legal person” of public law, with independence and autonomy in accounting and financing, subject to some limitations provided by the law and to the control of the Italian “Corte dei Conti” (a public controller of public accounts).

It is important to draw the attention on the fact that the Port Authority is prevented from performing, either directly or through controlled companies, port activities of a private and commercial nature in competition with port operators. In other words port authorities are not entrepreneurs and cannot manage or otherwise exercise, nor directly nor indirectly, commercial port activities (art. 6, parag. 6).

The revenues of Port Authorities in Italy are represented by: a) royalty rents in respect of the lease or use of port areas by private or public operators as well as regular fees related to authorised port services; b) taxes levied on goods loaded or landed in
the port; c) contributions of local administrations and other public entities, excluding the State; d) other minor revenues.

The Port Authority is the only competent body to grant licences and authorisations to private or public operators competing in the port.

In particular the exercise of the so called “port operations” is subject to prior authorisation. Article 16 of the law, defining port operations, provide that an authorisation is required to exercise stevedoring activities, warehousing and storage of containers, bulk or liquid cargoes, cargo handling, lighterage and any other related activity performed in the port area. Any port operator wishing to exercise port operations of the above described nature can apply and obtain from the Port Authority an authorisation, provided the Authority will be satisfied about the level of professionalism, the structure and organisation of the applicant also in relation to workmanship. The validity of the authorisation is subject to the payment of regular annual fees and to the issuance of a bond to guarantee the punctual fulfilment of the contracted obligations.

A different mention should be done to that particular operator, usually known as “Terminal Operator”, willing to obtain the (exclusive) use of a port area for terminal operations. The law 84/94 somehow perceived the relatively recent concept of terminal operator, also in connection with multimodality, prescribing different requisites for terminal operator. The applicant will need to obtain a “licence” (something different from a simple authorisation) and in order to succeed shall have to satisfy the Port Authority about the strict compliance with the following requisites:

a) to have accurately prepared a detailed program of activities to be exercised in the port terminal, purported to increase the volume of the port traffic; such results shall have to be guaranteed by an insurance or bank bond or other suitable forms of securities;
b) to have an adequate technical equipment and a solid organisation to guarantee safety of workers and commercial efficiency in handling of port terminal operations, with continuing professionalism and increasing results;

c) to have an organisation chart and a minimum personnel staff proportioned to the presented productive program sub a) above;

d) to perform directly the activity in the port terminal, being prevented from subcontracting whole or part of the activities to third parties;

e) to have the right of use of one single area in the same port and for the same activity and to refrain from exercising port terminal operations outside the area assigned to the applicant.

Useless to note that the Port Authority has been granted by the law (art. 18.8) with powers of control and intervention in order to periodically examine and verify the persistence of the respect of the above requisites by the terminal operator, leading in case of ascertained breach to the revocation of the Licence and eventually to sanctions.

The above described provisions shows that the new law foresees the nature of a terminal operator as that one of a particular port operator, leading to unity a fragmented series of port activities usually exercised in the port, rationalising energies and minimising costs and time of intervention in loading, handling, storing, shifting and discharging goods in containers as well as in bulk, in line with the nature of the terminal operator as defined since long time ago by the best Italian literature (see Carbone - Dalla riserva di lavoro portuale all'impresa terminalista tra diritto interno, diritto comunitario e diritto internazionale uniforme, in Diritto marittimo, 1992, p. 599 and following). This approach receiveid an international confirmation in the 1992 UNCTAD Convention on the Terminal Operator Liability. Although such an important source of uniform law is not yet in force, the provisions therein
contained still have great relevance in the interpretation of the rules and laws involving port operations.

The law further provides for two institutes, not new to the Italian market but never formally regulated so far. These are the right of so called "self-production" (decree 31.3.1995 n° 585) and the so called "functional autonomy" (art. 19 law 84/94). We shall briefly examine both of them as they are peculiar to the Italian port operations.

1. The right of "self-production" (Diritto all’autoproduzione)

The law recognises officially the right of the shipowner or the charterer calling an Italian port to use, if so desired, the ship’s crew for stevedoring operations, without being otherwise obliged to get manpower from local stevedoring companies, which in turn would get manpower from the monopolist Port Stevedoring Company (PSC) or from the equivalent transformed commercial company (former PSC, as we shall see later). The above right is subject to the following conditions:

- that the ship is equipped with ship cranes adequate to discharge the intended cargo and in line with class and safety regulation;

- that, should the vessel decide to use, in addition to the crew, their own subcontractors and/or auxiliaries (agents, private stevedores, etc.), avoiding PSC personnel, such subcontractors should limit their activity to participate in the mere organisation of the port operations performed and should not take direct part in the same;

- that the shipowner or charterer would obtain a prior authorisation from the local authority in connection with the ship’s call or with a series of ship’s calls in the same port already planned;

- satisfying the authority that the number of crew members on board are adequate to exercise the requested activity in “self-production” and stipulate a proper insurance policy against the risks of damages to third parties, including crew members, deriving from such activities.
2. The functional autonomy (*Autonome Funzionali*).

Article 19 of the new law preserves the traditional right of particular industries, such as the iron and steel industry, to have the exclusive use of berths situated in proximity of their factories and to load and discharge cargo destined to their production plants with their own employees. This right has always been subject to renewable and extended authorisations of the local maritime authorities and the new law states that such factories that were authorised to perform in autonomy said activities at the time of entry into force of the law remain authorised to continue until the expiration of the respective licence. The rule adds that anyway at the time of expiration of said licences, the prosecution of the industrial activity is a title of preference to obtain a renewal of the authorisation. The new regime has therefore formally excepted the "functional autonomies" from the discipline otherwise provided above in relation to the right of "self-production".

Another delicate issue innovated by the Law 84/94 concerns the use of labour force and professional manpower in port operations and in terminal operations. This is probably one of the most debated issue, representing the engine of the reform and an attempt by the Italian State to adequate its legislation to the prescriptions imposed by the recommendations and critics of the European Court of Justice and the European Commission.

Before the entry into force of the Law 84/94, also known as the law of privatisation of the ports in Italy, the specialised manpower in the Italian ports was exclusively and compulsorily provided by the Port Stevedoring Company ("PSC"), acting as a sort of basin of specialised work force to which all the stevedoring companies authorised to operate in port were bound to get manpower from. In the old times the PSC was not a port operator itself and therefore was not in direct competition with the (few) other realities acting in the port industry. Around the eighties in some ports (i.e. the Port of Leghorn) the PSC created both consortiums and companies substantially entirely controlled or man-
aged by the former. This generated a conflict of interest resulting in unfair competition as the manpower supplied for port operations to some companies was cheaper than the one supplied to others. Useless to add that the privileged companies where the ones controlled or managed by the same PSC.

Among the various distortion of a free market acting in a fair competition regime, the above described situation produced two main negative effects:

a) all private stevedoring companies were left with the option of employing far more staff than the necessary required by the average level of work, so to avoid the obligation to get manpower from the PSC in case of need or, as usually occurred, employ the average number of staff suggested by the market conditions but then, on occasions where the work increased for a limited period of time, suffer the higher costs of the manpower supplied by the PSC;

b) terminal operators were discouraged from getting extra manpower from the local monopolist PSC on the one hand and prevented by law, on the other hand, from sub-contracting particular or predetermined services to professional companies, such as lashing, stowing or stuffing operations, thus inevitably not being competitive on the market. The prohibition for port operators, particularly strong in terminal operators activity, of subcontracting specialised part of their main activity to small professional companies derived from a general legal prohibition of Italian labour law (laws n° 264/49 and n° 1369/60) applying to all sectors of labour and confining the right to allocate manpower, upon request of the intended employers, to governmental agencies only (so called “uffici di collocaimento”), sanctioning as a criminal offence any activity directly or indirectly resulting in private intermediation between the demand of work force and the offer of the same. A similar prohibition affected also the sub-contract of mere manpower services, consisting in other words in a temporary transfer of manpower from an employer to a differ-
ent employer. All this provisions were, and still are, considered in the interest of workers as a form of protection against abuses and exploitation of manpower. The above referred prohibitions of general Italian labour law applied and still applies in the port industry with an only exception: the Port Stevedoring Company (PSC). The latter was licensed by articles 110 and 111 of the Italian Code of Navigation to provide manpower to port operators, on an exclusive and monopolistic base, although not being a governmental manning agent. This was recorded to be the only exception in the entire Italian legal system to the rule of public manning agent prescribed by law n° 264/49.

The new law n° 84/94, as later modified by law n° 647/96, formally abolished articles 110 and 111 of the code of navigation and the role and institution of the PSC in supplying specialised manpower to port operators and terminal operators. The law goes further to prescribe the duty of the PSC to be transformed, shortly after the enactment of the bill, into a commercial company pursuant to one of the forms provided by the Italian Civil Code (i.e. partnerships or limited liability company with or without extended shareholding), acting on the market in free and fair competition with the other port operators.

Unfortunately the same legislation provided also that, during the period of time necessary to the Italian Parliament to amend the old law 1369/60 (prohibiting manpower mediation and subcontracts of mere work force services) and to reform the specific sector, the former Port Stevedoring Companies, transformed into ordinary commercial companies (either as partnerships or as limited liability companies) could be authorised to continue to supply manpower as a monopolist to other port operators in order to overcome the port operators' problems of needs of extra work force for limited periods.

The Italian Parliament, so far, has not amended or otherwise modified Law n° 1369/60 and the prohibitions therein contained. The entire subject matter is still debated and in view of its delica-
cy is likely to be discussed for many more years. Meanwhile in the Italian ports, allegedly privatised and open to a free market competition, a renamed PSC, now transformed in an ordinary commercial company, while rendering port services in competition with the other operators, continues to supply manpower to port and terminal operators on an exclusive base, conditioning the market, altering prices and fares, generating distortions in competition and abuse of dominant and privileged positions.

The reactions of the Italian market could have not been more fierce.

3. Aspects of unfair competition of Law n° 84/94 - The EU decisions

The first attack to the provisions of the new law on ports' privatisation came on the 23rd October 1995 when the National Steering Committee of Port Operators, on behalf of a private stevedoring company of the port of Brindisi (Brindisi Imbarchi & Sbarchi Srl, hereinafter "BIS") denounced to the Italian Antitrust Commission (Autorità Garante della Concorrenza e del Mercato - "I.A.C."), an institution created in Italy with Law 10th October 1990 n° 287, some unfair conducts of the Brindisi Stevedoring Company (the local "PSC"). BIS claimed that Brindisi PSC was repeatedly refusing to supply manpower according to Law 84/94 and/or supplied unspecialised work force or, sometimes, imposed to BIS to accept more manpower and personnel than required, resulting in extra costs charged to BIS. The I.A.C., after examination of the case, with the decision adopted on 11th July 1996 n° 4062 ascertained and stated the following:

"In the exercise of the right to supply temporary manpower to port operators the Port Stevedoring Companies perform an activity of private commercial nature. As a consequence of the impositions upon port operators, formally until 31.12.1996, to get manpower for temporary purposes exclusively by the local PSC (among which the Brindisi PSC), pursuant to the provision of article 23.15 parag. 3 of the Law 84/94, the
latter entities becomes in fact a legal monopolist of the market of supply of manpower in the port of Brindisi assuming a dominant position. The conduct of Brindisi PSC consisting in refusing to supply manpower to local private port operators is in violation of article 3 of the law 287/90 (the so called “antitrust law”). Also the conduct of the Brindisi PSC consisting in delaying the operations of ship’s holds cleaning and in supplying unspecialised manpower in relation to the particular services to be rendered appears purported to obstruct the operational activity of the competitor operator and therefore constitutes a violation of art. 3 of law 287/90.”

A similar decision has been confirmed by the same Commission (I.A.C.) on 19th June 1997 (case n° 5131/97).

The second and worst attack to the above described system of law started on the 7th May 1997 by a far more authoritative body, the European Commission. Having finally ascertained that notwithstanding the enactment of the new law n° 84/94, also in the text modified by the Law 647/96, in the Italian Port industry persisted a general unfair competition conducts allowed and in fact generated by the same law, the European Commission sent to the Italian Government a further letter of injunction to which Italy replied with arguments not found convincing and sufficiently grounded. As a consequence the European Commission on the 21st October 1997 adopted the famous decision N° 97/744/CE formally and finally declaring that:

The following provisions of the law 84/94, as modified by law 647/96, are in violation of art. 86 and art. 90 § 3 of the European Union Treaty:

a) the rule according to which the Italian Port Authorities encourage the establishment of voluntary consortiums of port operators authorised to exercise and perform port activities for the only purposes of supplying manpower and to such extent, provided that such realities demonstrate to have adequate professionalism, know-how, resources and extra manpower to supply to other port operators, authorise one or
more of the associated companies to provide work force to the other companies of the consortium (art. 17 § 1, lett. A of Law 84/94);

b) the rule according to which, in the period of time required to establish the aforesaid consortium or manning agency, the only company in port authorised to supply manpower to other port operators for temporary needs is the local Port Stevedoring Company (PSC) (art. 17 § 2 law 84/94);

c) the rule according to which the local PSC supplies in a monopolistic regime the subcontract of services, including those one characterised by a labour intensive content, to the other port operators (art. 17 § 3, law 84/94).

It is interesting to note that the decisions of EU Commission are immediately binding, although not constituting law, with the consequence that the Italian Judge must disregard any national rule in conflict with the same. It could be foreseen that this decision will create a great deal of litigation between private port operators and local PSC, as in fact is already creating in Italy.

An example is given by what could be defined as the third major attack to the new port legislation in Italy. It is the famous case of “Mr. Silvano Raso”, decided by the European Court of Justice on the 12th February 1998 (case n° C-163/96).

Following an inspection of the Labour Inspectorate in the port of La Spezia in 1995 a denounce was transmitted to the Public Prosecutor of La Spezia supposing a potential activity of illegal mediation of manpower in violation of Law 1369/60 which, as we saw above, prohibits any kind of mediation in supply of work force in Italy with the only exception of former Port Stevedoring Companies, later transformed into ordinary commercial companies. In particular public investigating authorities supposed that La Spezia Container Terminal (LSCT), a primary terminal operator of La Spezia, was in breach of such law when subcontracting some labour intensive parts of the productive cycle of the terminal to private minor subcontractors, thus avoiding to get manpower the local Port Stevedoring Company at higher prices, in
order to increase profits. Some of the LSCT managers and executives were prosecuted (Mr. Raso was one of the them). During the trial the accused pleaded innocence and asked the Court to refer to the European Court of Justice the key issue of the accusation, i.e. whether a local port stevedoring company (PSC), acting also in competition with other port and terminal operators, could legitimately have the monopoly of the market of specialised manpower supply to the other competitors in the same port or, as it was believed to be the case, such provision was in clear contrast with articles 86 and 90 of the EU Treaty. The Court of La Spezia, with ordinance dated 12\textsuperscript{th} April 1996, decided to stay the criminal proceeding and referred the issue to the EU Court of Justice. The European Court on 12\textsuperscript{th} February 1998 uphold, in line with previous decisions, the theory of the conflict of interest and declared, again, that Law 84/94 on Italian port privatisation was contrasting with the referred provisions of the European Treaty. As a consequence the Italian Judge had to disregard the conflicting domestic legislation with the consequences that accusations against Mr. Raso and the other managers of the LSCT terminal are most likely to fail. The judgment is also in line with other relevant decisions adopted by the Court, such as the "CBEM-Telemarketing/CLT" case (n° C-311/84, decision dated 3.10.85), the "Hofner/macronot" case (n° C-41/90, decision dated 23.4.1991) and the "RTT/BB-Inno-BM" case (n° C-18/88, decision dated 13.12.1991).

It is interesting to note that in his final conclusions Mr. Fennelly, the EU Advocate General, recognised that the Italian legislation n° 84/94 prevents the terminal operator and the several port operators, although duly authorised to exercise their activity, from cooperating in providing to shipowners and other port customers and users a full "package" of services, reduced at unity, efficiently organised to minimise costs and maximise production. The role and the function of the terminal operator should be that one to constitute a flexible reality able to adapt to
the changeable levels of port traffic, offering all the times at the best possible rates the most efficient service from ship's stow to final inland destination. This function is frustrated by a persistent monopoly in Italy of local Stevedoring Companies, competing on the same market of the other operators but abusing of the dominant position assigned to them by the monopoly of manpower's supply for temporary needs. The Advocate General went further to observe that should the costs of manpower supplied by the local monopolist PSC be lower than the market ones or at least compensated by a higher quality of service rendered and professionalism, it could be assumed that the terminal operator would make some profit if and when choosing to get manpower from them. On the contrary it is the "prohibition of choice" left to the port and terminal operators which constitutes a restriction to fair competition and free market, in clear breach of the EU Treaty and spirit.

The above discussed complex of European Court's decisions, including the European Commission decision already examined, lead us to finally recapitulate the framework of port activities in Italy, the relevant markets directly interested in the productive port cycle, defined in broader terms, as well as the organisational models connected to port operations as determined in each port:

- a first market is that one of the terminal operators, such entities supplying port services by means of areas, equipment and fixed structures along berth or in its proximity. This is a competitive market system since each terminal operator competes with other similar entities in the same port or in related geographical market areas;

- a second market is that one of the supply of port services, including labour intensive port services, rendered to the terminal operator or to the port user by port operators specifically authorized by Port Authority. Also this market is of a competitive nature;
- a third market is that one of the supply of manpower for temporary needs to local port and terminal operators. The examined European Court's decisions do not clarify how this market should be organised. It is likely that such market could preserve a monopolistic nature subject to the condition of abolishing any conflict of interest, also potential, with the other competing port operators.

The problem of the conflict of interest in the delicate subject of work force in Italian ports is presently far from being resolved by Italian legislation, although several proposals are at study.

4. The Distinction between Port Operations and Port Services

An official opinion rendered by the Italian Supreme Administrative Court (Consiglio di Stato) on the 30th August 1996 is the occasion to briefly draw the distinction between port operations and port services in the Italian and EU legislation. A clarification in such respect is needed. When referring during the entire paper to supply of "services", exercise of "services" in relation to port activities, etc.. I always referred and meant services intimately related to port operations or, in other words, services related to the cargo (as defined by art. 16 of Law 84/94) and constituting the contents of the same. As we saw port operations must be authorised or licensed and must take place in a free and competitive market. A different situation happens for the so called "port services". They consist of services related to the ship and the difference must be stressed for the importance given to the latter services as prominently functional "to the safety of vessels, cargo, passengers and the port community as a whole" (abstract from the European Commission Green Paper on Ports and Maritime Infrastructures, brilliantly commented by Prof. Sergio M. Carbone and Prof. Francesco Munari in Dir. Mar. 1998, 902 and following). Such services are constituted by pilotage, towage, moorage and similar technical-nautical services strictly related to safety of navigation and ship's manoeuvring in port areas and eventually
outer roads. In line with Italian legislation the European Commission, in the above mentioned Green Paper on Ports Infrastructures, individuates the nature and purpose of the technical-nautical services ancillary to navigation and legitimises the regulation of the market for such services, justifying also the recourse to monopolistic models without falling in contradiction with the seminal investigation on ports carried out by the Italian Antitrust Authority. The Green Paper further clarifies that operators rendering the technical-nautical services (or port services) ancillary to navigation qualify as undertakings whose activity is covered by art. 90.2 of the EU Treaty, and which may be therefore legally exempted from competition rules as long as this exemption is required in order to comply with the public service obligations entrusted to the undertakings. It might be practical to remember that art. 90.2 of the EU treaty recites: “The undertakings (companies) entrusted with the exercise of activity of general economical interest ... are subject to antitrust and competition rules dictated by this Treaty, provided that the application of such provisions does not obstacle to the fulfilment, in fact and in law, of their specific mission”. The above mentioned literature, although appreciating the role and efforts of the Green Paper elaborated by the EU Commission, constituting an undisputed precious guideline for the Member States legislators in the subject matter of ports and maritime infrastructures, pointed out a few critics investing, inter alia, a partial lack of attention on the matter of “professional requirements” to render the technical-nautical services ancillary to navigation. “Such issue seems particularly important for the mooring services, for which standards differ among member States. In some member States, e.g. Italy, the access to the profession is reserved to person having seamen professional skills who are selected port by port through an open competition organised and controlled by the Maritime Authority” (Carbone-Munari, see above). The examination of the issue concerning access to the market of the technical-nautical services carried out by the Com-
mission reveals further insights: "the peculiar features of such services show that when they are organised to meet public service obligations under a universal supplier framework, the size and features of the universal supplier are determined by the controlling authorities, and not by the suppliers themselves" (again Carbone-Munari).

The principle according to which the technical-nautical services ancillary to navigation (port services) constitute a "natural monopoly" which could not be abolished is also in line with the European Commission's approach and has been recently upheld also by the Lazio Administrative Court (Tribunale Amministrativo Regionale del Lazio) in a decision adopted on the 12th Jan

5. A comparative approach with the United States Ocean Shipping Reform Act 1998

The recently enacted U.S. Ocean Shipping Reform Act 1998, replacing the earlier 1984 Act, substantially deregulates pricing tariff and service contracting practices in U.S. foreign shipping lanes. The major changes include the ability of shippers to negotiate confidential service contracts with one or more ocean carriers. Before the entry into force of such law, except for contracts on exempt commodities, the essential terms of a service contract, including rates, were a matter of public record. Under the new law, several essential terms can be confidential.

In particular the Federal Maritime Commission (FMC) will remain a separate and independent agency. The new law, effective as of May 1, 1999 retains antitrust immunity for carriers and ports. As under the 1984 Act, antitrust immunity applied to activity pursuant to an agreement filed with the FMC.

The new law further expands the scope of antitrust immuni
ty for ports to include jointly set rates or conditions of service offered to carriers in domestic as well as foreign commerce. The change was designed to address the "mixed use" terminal prob-
lem where a port might charge wharfage or dockage rates set by a terminal conference at a facility used by both foreign and domestic carriers. Under the 1984 Act, the port was not protected by antitrust immunity as to the domestic carrier. Even under the new law, port antitrust immunity for engaging in exclusive, preferential or cooperative working arrangements is limited to the extent that such agreements involve ocean transportation in the foreign commerce of the U.S.

All service contracts between carriers and shippers will be filed with the agency (as under the earlier bill) and the following essential terms will be made available for all contracts: the origin and destination port ranges, the commodity or commodities involved, the minimum volume and the duration of contract. No longer public information would be rates, the origin and destination geographic areas in the case of through intermodal movements, service commitments and liquidated damages for non-performance. Ports that may have used this information for internal marketing purposes will not have access to it through the FMC.

Labour Unions have the ability to request more information regarding specific dock or port areas cargo movements governed by a collective bargaining agreement.

Neither carriers nor ports will be required to file tariffs with the FMC under the new law. However, common carriers must make tariffs open to public inspection in an automated tariff format. Port tariffs, while not filed with the agency, would be enforceable as implied contracts, providing relief from years of court precedents that prevented terminal operators from enforcing liability provisions. The new law includes a provision that marine terminal operators may make available to the public a schedule of rates, regulations and practices, including limitation of liability for cargo loss of damage. The FMC is authorised to prescribe the form and manner in which marine terminal operator schedules are published.
The new law makes no changes with regard to the filing of terminal leases or port agreements with carriers. Under former FMC regulations, agreements between marine terminal operators and carriers for marine terminal services (and terminal facilities furnished in connection with such services) were exempt from filing. However a port would not have antitrust immunity unless the agreement is filed voluntarily with the FMC. Marine terminal facilities agreements are exempt from antitrust laws.

The ability of ports to challenge unfair or discriminatory behaviour is unchanged by the law. At the same time also ability of shippers, private terminal operators or others to challenge port behaviour as unfair or discriminatory is also unchanged. By contrast the ability of shippers to challenge unfair and discriminatory practices by carriers is limited under the new law in many cases to service pursuant a tariff (although not pursuant to a service contract).

Finally, as far as joint carrier inland transportation is concerned, the new law allows groups of ocean carriers to negotiate with non-ocean carriers for rates and service for inland transportation, subject to antitrust laws.

To my modest opinion the above reform preserves and incorporates the final result of the Study Commission, created by U.S. Congress in a compromise effort in section 18(e)(9) of the 1984 Shipping Act. As a matter of facts the conclusions reached by such Study Commission, now dating back to September 20, 1989, as released by the Federal Maritime Commission, were that there was no clear public benefit in allowing private marine terminals to fix rates within a port and that the need to give marine terminals antitrust immunity to put them in parity with carrier conferences was questionable. However, the Commission concluded that even if there was no economic need for antitrust immunity for public port authorities and private terminal operators, there still may be policy reasons for the continuation of such immunity, which would require the balancing of the economic analysis

After nine years from such conclusions some changes are finally recorded in the new bill, although United States do not seem having gone too far with their antitrust policy for ports and marine terminals, at least according to the substantial part of the provisions of the new law (particular reference is made to § 1706 of the 1998 Act).

As I believe having evidenced so far, European Union’s policy on the subject matter is very much orientated in the opposite direction, not only within member States, in the sense of completely abolishing antitrust immunities in the port industry. It should anyway be noted that European Union legislation is focused on the definition of “market” inside the relevant EU industry sector, while United States seem to maintain a far more protectionism attitude considering the U.S. nation as a whole and single market vis-à-vis the “foreign countries”. Both systems anyway seem to sponsor the pricing tariff deregulation, to be welcome provided it will generate higher quality services in the port industry and in connection with the increasing demand of port users for “full package” services from ship’s stow to final inland destination.

6. The Italian private law legislation – Terminal Operator’s Liability

Italy has not yet ratified the United Nations Convention on the liability of operators or transport terminals in international trade (Wien, 19th April 1991), which so far has been ratified only by Chile, Mexico, Hawaii, Rwanda and Senegal. The Convention defines the “operator of a transport terminal” as “a person who, in the course of his business, undertakes to take in charge goods involved in international carriage in order to perform or to pro-
cure the performance of transport related services with respect to the goods in an area under his control or in respect of which he has the right of access or use. However, a person is not considered an operator whenever he is a carrier under applicable rules of law governing carriage” (article 1).

According to the above definition the Convention will therefore not apply to domestic or cabotage shipments nor when a terminal operator will be also the carrier according to the relevant legislation governing carriage. The latter circumstance is not infrequent in large international freight forwarders operators and in NVOCC movements, where the NVOCC issuing the bill of lading detains also direct control of marine terminal operations. In other words the Convention will not conflict or otherwise contrast with the provisions dictated by other international or domestic legislation governing carrier’s liability.

The Convention represents an important guideline of interpretation of international and domestic rules affecting through carriage shipments, liability for loading and discharging operations and transport-related services.

In Italy the terminal operator’s contract is still considered as a heap of several different codified contracts, such as the contract of bailment ("deposito") and the commitment to perform a work and/or a service ("appalto"), respectively disciplined by articles 1766 and 1655 of the Italian Civil Code. In other words the concept of a single contract of terminal operations is not yet perceived by our private law legislator, although, quite surprisingly, has been finally recognised in many public law rules.

In the absence of a uniform legislation regarding the liability of the marine terminal operator, the latter is subject to the same domestic regulation applicable to stevedoring companies, when performing stevedoring operations, and to port bailees when acting as bailee of cargo, including storage, custody and depot operations.
The relevant private law discipline, applicable to stevedores and port bailees, is provided for marine operations by the Italian Code of navigation and, in respect of whatever is not provided therein, by the Italian Civil Code.

In particular article 454 of the Code of Navigation contemplates two cases of discharge in liner traffic operations:

a. discharge by order of authority;
b. liner terms discharge.

The discharge by order of authority, which should not be confused with the authorisation to discharge the whole or part of cargo in exercise of a ship-owner's lien for unpaid freight or accrued demurrage, is that case of discharge which occurs when the vessel is ready to unload but the receivers are either untraceable or refuse to accept delivery. In this case the Code of navigation grants to the carrier the right to deliver the cargo to an authorised port stevedoring company, the latter becoming liable as bailee vis-à-vis the receivers of the goods. The carrier availing himself of this right is bound to inform the receivers or the notify party in the bill of lading.

On the other hand the liner terms discharge, which in major Italian ports (such as Leghorn, Genoa, Venice, Naples, etc.) is compulsory in the interest of port efficiency and berths safety, occurs every time that, although the receivers are present and available to receive cargo, the discharge operations take place in the interest of the carrier again through an authorised stevedoring company to prevent delays to liner traffic. In this case discharging costs fall upon the carrier, as typical and known under "liner terms" conditions of movements.

The two cases above described differ partially as far as liability profiles are concerned. In case sub a), when discharge is performed by order of authority due to non cooperation of receivers, the carrier has validly delivered by entrusting the goods to the local stevedoring company, the latter remaining the only liable party vis-à-vis the receivers for the goods. Furthermore discharge
costs will fall upon cargo interests and are eventually recoverable, as for port stevedoring costs and fees, following forced sale of the goods or part thereof. The procedure is much the same of the one provided for the exercise of liens in connection with unpaid freight or demurrage.

In the case of liner terms discharge the carrier remains jointly and severally liable with the port stevedoring company vis-à-vis the receivers, although in case of loss of or damage to cargo in port will maintain an action of redress against the stevedoring company should the receivers prefer to act on the bill of lading against the carrier rather than directly against the stevedoring company.

It is worthwhile to point out that receivers, in case of damage to goods, have ability to sue either the carrier under the bill of lading or the stevedoring company, both actions being brought in contract. The potential action against the carrier will of course be brought in contract on the bill of lading. The alternative action against the local stevedoring company could be brought in contract based on an implied bailment contract. The latter is in fact stipulated by the carrier and the stevedores in the interest of the receivers, as third party’s beneficiary. In such quality the beneficiary of the bailment contract can enforce the contract as if he was a party to the same, unless he expressly waives his right to do so.

Of course the carrier, if sued directly by receivers on the bill of lading for a cargo claim involving a damage occurred in port, is relieved from liability in case he can disclose a clean receipt of goods signed by stevedores, the latter document therefore becoming essential for carrier’s defences vis-à-vis the receivers. On the other hand, in the recourse action between the carrier and the stevedores, the carrier is not estopped to prove by all means that the latter were the ultimate party at fault.

Usually the so called “Himalaya” clause in the bill of lading, extending the benefits of carrier’s limitation to his agents and subcontractors, is not upheld by Italian Courts, which consider
such provisions to be null and void because not specifically approved by receivers on the bill of lading. Therefore it is not unusual that marine terminal operators and stevedoring companies, entrusted with the goods by the carrier in liner terms discharging operations, are not entitled to limit their liability in case of loss of or damage to cargo.

This is not the case when the receivers in the bill of lading have a specific and direct contract of terminal operations with the marine terminal operator. These contracts usually provide for limitation of liability in favour of the terminal operator. It should anyway be noted that according to Italian law the limitation of liability clauses contained in contracts stipulated with entities different than carriers are valid except in cases of gross negligence or wilful misconduct of the performing party. In these cases limitation provisions remain without effect. Marine terminal operators should therefore seek adequate insurance covers for gross negligence damages, which will include the gross negligence of their staff, personnel and employees.

An exception to the above system of law derives from the international regime of limitation of liability of carriers although, as well known, potential stipulations derogating the limits provided by Hague-Visby Rules in favour of carrier will be regarded as null and void in Italy as elsewhere.