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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT AND THE COUNCIL**

Reinforcing Quality Service in Sea Ports: A Key for European Transport

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INTRODUCTION

The Commission's Green Paper on Seaports and Maritime Infrastructure¹ sparked a lively and knowledgeable debate with stakeholders and European institutions.

This was not surprising. The Green paper was the first attempt by the Commission to move towards a coherent policy on ports and maritime infrastructure and could, for this reason alone, expect a wide audience. In addition, the perception was fast gaining ground that seaports played a key role in the operation of intermodal door-to-door transport chains, that their functioning was essential for both intra- and extra-Community trade and that, with the apparently inexorable growth of transport demand, maritime transport and hence seaports would have to be called upon to shoulder increasingly more of the burden placed on transport infrastructure.

The soon to be published White Paper on the Common Transport Policy will focus, inter alia, on the increasing role seaports will have to play in order to alleviate current land transport constraints and to ensure a better functioning of the Community's transport market.

Whilst it is understandable that stakeholders would place particular emphasis on areas of direct concern to them, the key issues emerging from the debate can be categorised as follows:

- The inclusion of seaports in Trans-European Transport Network;
- The systematic approach to regulate access to the market of port services; and
- Public financing of seaports and ports infrastructures.

1. SEAPORTS AND TEN-T

Decision No. 1692/96/EC on Community guidelines for the development of the Trans-European transport Network (TEN)² provides a broad framework for the establishment of an integrated, multimodal infrastructure network. Seaports obviously play an important role in such a network.

Although the TEN Decision set out the conditions for the categories of port and port-related projects of common interest, the specific aims of projects as well as the specific conditions to be met, agreement could not be reached on an identification, and inclusion in the TEN outline plans (maps), of the seaports in question, essentially because volume and/or type of traffic criteria could not be agreed.

¹ COM(1997) 678 final of 10.12.1997

² OJ L228, 9.9.1996, page 1

In line with a previously made commitment the Commission re-assessed the situation. It was concluded that the position of seaports (and that of inland ports and intermodal terminals) needed to be specified more clearly in the guidelines in order to help achieve the multimodal objectives of the TEN.

In fact, since the TEN is intended as a multimodal infrastructure network, which should progressively combine and integrate the different transport modes and national networks, a continued exclusion of seaports would not be justified.

As a result, the Commission proposed the identification of, *inter alia*, some 300 seaports, using objective criteria³, for inclusion in the outline plans and sought to improve the definition of relevant projects of common interest relating to seaports. Reactions to the Green Paper were unanimous in requesting that seaports be given their appropriate place in the TEN.

The Commission's proposal has not yet been adopted by Parliament and Council. At the moment an agreement is being sought by the institutions and a satisfactory solution appears close. The Commission has proved its willingness actively to work towards a solution and can be counted on continuing to do so.

2. ACCESS TO THE MARKET OF PORT SERVICES

'Port services' are services of a commercial nature that are provided, for payment, to port users, and this payment is not normally included in the charges collected for being allowed to call at or operate in a port.

It is self-evident that the quality, efficiency and price-performance ratio of port services are essential for the overall quality of service provided by the port. These factors have become key elements in the competition at play between Community ports in order to attract customers.

Historically port services have been provided within frameworks characterised by exclusive rights and/or legal or de facto monopolies of a public or a private nature. Discussions following the publication of the Green Paper have shown that the conventional structures are being eroded and that considerable developments are taking place in all Member States.

In the area of cargo handling the traditional structures have often been successfully challenged, with the result that restrictions have been gradually removed from many markets which have become more commercially oriented with increasing participation of the private sector and, as is generally recognised, increased efficiency accompanied by more market-oriented pricing.

This general development is welcome. It is, however, far from uniform in all Community ports. In addition, it has been pointed out on many occasions that it must be accompanied by clear and reliable procedural rules setting out the rights and obligations of current and

³ The criteria were:

- Seaports must be open to all commercial operators;
- Volume-related (1 million tons of goods/or 200,000 international passengers per year) with certain exceptions for Greek islands;
- Strategic importance ensuring territorial continuity between land links of the TEN.

potential service providers, as well as those of the competent national authorities involved in overseeing the ports and/or the selection of service providers.

Other port services have not experienced the same level of development; restrictions and private and public monopolies are still prevalent in particular in port pilotage and, albeit to a lesser extent, in towing and mooring. Ports are conscious of the fact that one of the consequences of this situation has been that the supply of these services often represents a disproportionate cost factor to port users and that this, in turn, has become an important element in competition between ports.

Despite the varying levels of market openness in Member States, and even between different ports within the same Member State, all Member States have opted for the principle of gradually opening up this sector to competition.

Nobody is contesting that all port services of a commercial nature are governed by the competition rules of the Treaty as well as the rules on the major freedoms: the freedom of establishment, the free movement of workers, of goods and services.

However, a number of port-specific facts cannot be ignored. Ports may only be able to offer limited space; they have a well-defined role to play in the Community's customs procedures. Ports bear specific responsibility for maritime as well as on-shore safety and environmental protection. These considerations may constitute legitimate grounds for restrictions in the access to the market for the provision of certain port services. However, no restrictions can be unconditionally justified. Furthermore, the diversity of the Community ports requires a differentiated approach. Since no two ports are identical, it has rightly been pointed out that a number of decisions with regard to the level of market access in port services will be influenced by the individual characteristics of the port in question.

The Commission has so far addressed problems in the application of the Treaty rules on a case-by-case basis and will continue to exercise this obligation. Consultations have, however, shown widespread support for the establishment of a regulatory framework at Community level aiming at more systematic rules on access to the port services market in ports with international traffic, while taking into due consideration the maritime safety and environmental requirements and, where appropriate, public service obligations as well as recognising the diversity of the ports in question. This framework should accompany and guide national measures which continue to further eliminate existing restrictions in the port services market whilst ensuring, on grounds of subsidiarity, that this process adequately respects local, regional and national port specificities.

Support for such an approach is not unanimous. The view was expressed that access restrictions to the cargo handling market have been largely eliminated and that therefore no new regulatory framework was necessary. However, this assessment does not reflect the situation in the Community as a whole and, in any case, does not take into account the widely felt inadequacy of procedural rules in connection with the award of authorisations. The port pilots and, considerably less strongly so, towage operators oppose a regulatory framework; they wish to maintain the current structures on the grounds that it has in the past served well to ensure high safety standards. The boatmen, responsible for mooring services, maintain a neutral position. Whereas the pilots' and towage operators' contribution to port safety is appreciated, this in itself is not sufficient ground to exempt these services a priori from the application of the Treaty rules or a new regulatory framework at Community level, although this framework will have to ensure that due account be taken of safety and specific local considerations.

The challenge, therefore, is to combine maritime safety and environmental imperatives and, where necessary, public service obligations with a regulatory structure compatible with competitive patterns. On the basis of extensive consultations, the Commission proposes the enclosed (**annex 1**) legislative framework on access to the port services market.

In view of the complexity of Member States' port regimes and of the diversity of ports with regards to size, status and function and maritime safety and environmental protection requirements, a Directive is considered the most appropriate legal instrument leaving the implementation of the framework at the level of the Member States.

3. PUBLIC FINANCES AND SEAPORTS

The ownership, organisation and administration of ports vary between and within Member States, thus leading to great diversity in the port sector. While accepting that it should be left to the Member States to decide upon the ownership and organisation, a key issue from a competition point of view is the financial flows between the public authorities, the port operators and the users of the port facilities and services.

Whilst in the past, ports and ports facilities were expected to be paid for by the taxpayer, a discernible trend has developed towards greater private participation in their financing. As a result, financing of many port facilities is increasingly becoming the responsibility of the private sector, while the port authorities tend to restrict themselves more and more to their "landlord" role and the financing and operation of those facilities which are essential to the safe and efficient operation of the port as a whole.

At the same time, more and more ports are seeking to develop a more active commercial role, in cooperation with private partners inside and outside the port. Indeed, some ports are operating entirely on a commercial basis.

3.1. The Report on Public Financing and Charging Practices in the Community Sea Port Sectors ("Inventory")

Under these circumstances, it is not surprising that the competition between the ports, intensified by the completion of the internal market, is influenced by the implementation of Member States' port policies, varied as they are. This may or may not require initiatives at Community level. However, before the debate could be moved forward, it was felt, by all institutions alike, that a satisfactory level of information be established with regard to such key issues as the organisational and managerial structures in Community ports, the financial flows from the public sector to the various types of ports as well as charging practices in these ports.

The Commission therefore gathered, with the help and active involvement of Member States, information in the form of an inventory on public financing and charging practices in Community ports. The Commission committed itself to publish the findings; the inventory is found in **annex 2**.

Although Member States' information was on the basis of previous facts and data and considerable developments have since taken place, it is nevertheless considered that the information remains in substance valid and should be seen as a useful basis for further work.

The inventory is self-explanatory, its details need not be repeated here. Nevertheless it is appropriate to focus on some key conclusions.

- Despite the growing role of private involvement in port developments, 90% of the Community's maritime trade is estimated to be handled in ports where investments and other policy and managerial decisions, e.g. charging, are, to varying extents, dependent or, at least, influenced by public bodies.
- Public investments in port projects represent between 5 and 10% of all Community transport infrastructure investments. Throughout the Community the main emphasis of these investments varies: the Baltic region shows important funding in start-up investments, whilst the North Sea and Mediterranean regions register strong investments in modernisation schemes.
- The transparency of public financial flows is unsatisfactory: the accounting tools cannot normally deliver aggregate information on public investments going into a port, nor can they retrace satisfactorily flows and use of public monies within ports which are, at the same time, engaged in public infrastructure management and commercial activities.
- Charging and cost recovery systems vary considerably; cost recovery is not always the main objective.
- The port services sector is developing and access possibilities to the market are clearly increasing. However, procedural rules which should ensure fair and open selection procedures where the number of service providers is limited are unclear and unsatisfactory.

3.2. Transparency

The inventory has confirmed the view previously expressed by the Commission and others that the current levels of transparency in the ports sector are inadequate to ensure information on aggregated public money flows going into the ports, where this is happening under national schemes, and to retrace flows and use of public monies within port entities, which are, at the same time, engaged in both port management, including port infrastructure management, and commercial activities within ports.

Readily available information on public money flows, from whatever source, would help the Commission in dealing with state aid cases. Under the Treaty rules, Member States are obliged to notify to the Commission any aid they grant and, where, for whatever reason, a state aid case has to be investigated, the Commission normally requests information on public money flows which, under national budget rules, should be readily available.

The principle of neutrality of Article 295 of the Treaty ensures that the Treaty in no way prejudices the rules in Member States governing the system of property ownership. Competition between private and public operators, however, must not be distorted by financial flows from public authorities which would allow the public operator to reduce its own costs. Currently, due to the complexity of the institutional and financial regimes for ports, port management and maritime infrastructure in the Community, the financial relationships between the public sector, the ports and other undertakings working within them are often not clear.

Work on the inventory has shown that at least three major accounting systems are being applied in ports.

First, port management may use an accounting system generally comparable to those used in the private sector and relying on generally accepted accounting principles of the respective

Member State and audits through independent bodies. This system is being increasingly used, although its prime purpose is not to show up, as a general rule, the influx, or not, of public monies but rather as an operating tool for the port management and as a benchmarking instrument for its shareholders.

The second system can be described as the public accounting or ‘budget’ approach. It is intended to record the use of public monies.

The third type of accounting system is employed in certain ports which are part of a wider public body (e.g. at municipal level) and, as a consequence, do not maintain separate accounts. Expenditures such as investments are executed under the authority of the public body and are recorded as an integral part of the public accounting system of the municipality. This approach, termed as ‘bundled’ accounts, is designed to monitor and control the financial affairs of the wider public body as a whole.

When analysing these three key accounting models, it is clear that none is in a position, by its very nature, to provide transparent and clear information on the public money flows into ports and the use made of them by the port management in the accomplishment of its many tasks. This is not surprising because the systems used were simply not devised to record the information now required and to distinguish between commercial activities and public port and infrastructure management. Indeed, the public budget accounting system practised by certain municipal ports with its inherent principle of universality, i.e. the non-dedication of expenses and income, precludes a clear identification of money flows for specific activities.

The consultations following the publication of the Green Paper have pointed to this unsatisfactory situation. It gives rise to suspicion and recrimination between ports, be it justified or not. It does not allow satisfactory control, where warranted, of state aid rules by the Commission and generally risks to impede competition at a time when Member States and port authorities introduce more and more private initiative, competition and capital into ports.

The Commission believes that application of “Commission Directive 2000/52/EC⁴ on the transparency of financial relations between Member States and public undertakings as well as on financial transparency within certain undertakings” (the “Transparency Directive”) combined with a legal requirement to keep separate accounts to be introduced as part of the proposed “Directive on market access to port services” will lead to considerable improvements.

3.2.1. Transparency Directive.

The Transparency Directive [article 1(1)] acknowledges that public undertakings continue to play an important role in the economies of the Member States, but requires that the financial relations between public authorities and public undertakings are transparent so as to help ensure fair competition between public undertakings and between public and private undertakings and an effective application of the Treaty's competition rules. The appropriate level of transparency should be achieved if the following emerge clearly:

- public funds made available directly by public authorities to the public undertakings concerned;

⁴ OJ L 193, 29.7.2000, p. 75; amending Directive 80/723/EEC

- public funds made available by public authorities through the intermediary of public undertakings or financial institutions;
- the use to which these public funds are actually put.

and shall apply in particular to the following aspects of financial relations between public authorities and public undertakings:

- (a) the setting-off of operating losses;
- (b) the provision of capital;
- (c) non-refundable grants, or loans on privileged terms;
- (d) the granting of financial advantages by foregoing profits or the recovery of sums due;
- (e) the foregoing of a normal return on public funds used;
- (f) compensation for financial burdens imposed by the public authorities.

These rules apply to publicly owned ports. The legal structure of the port is irrelevant⁵. Indeed, a public port does not even have to have a legal personality distinct from that of the state because otherwise Member States could decide whether or not a port is covered by the Transparency Directive by choosing a specific legal status or by not granting a port a legal status at all. It is observed in this regard that the fact that a body carrying out economic activities of an industrial or commercial nature is integrated into the state administration and does not have legal personality separate therefrom does not prevent the existence of financial relations between the state and that body. Through the mechanism of budgetary appropriations, the state has by definition the power to influence the economic management of the undertaking, permitting it to grant compensation for operating losses and to make new funds available to the undertaking. It may therefore permit that undertaking to carry out its activities independently of the rules of normal commercial management, which is precisely the situation which the Directive seeks to make transparent.

The Transparency Directive furthermore acknowledges [article 1(2)] that in certain sectors Member States often grant special or exclusive rights to particular undertakings, or make payments or give some other kind of compensation to particular undertakings entrusted with the operation of services of general economic interest⁶ which are common occurrences in the Community's ports sector. These undertakings are often also in competition with other undertakings and may be public, private or of a mixed public-private nature.

The appropriate level of transparency should be achieved if the following emerge clearly:

- the costs and revenues associated with different activities;
- full details of the methods by which costs and revenues are assigned or allocated to different activities.

and if the following is carried out:

⁵ Court Judgement 118/85 Commission v. Italian Republic

⁶ Services of General Interest in Europe, OJ C281, 26.9.96, p. 3

- (a) the internal accounts corresponding to different activities are separate;
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

As with Article (1), the obligations apply to undertakings irrespective of their legal structure or whether or not the activities in question are carried out by a distinct body.

The Transparency Directive does not apply without exceptions. It is of particular relevance for the ports sector that its obligations only apply to undertakings whose total annual net turnover for each of the last two years exceeded € 40 million. In cases where the compensation for the fulfilment of services of general economic interest has been fixed for an appropriate period following an open, transparent and non-discriminatory procedure the Transparency Directive does not require such undertakings to maintain separate accounts.

3.2.2. *Proposed Directive concerning market access to port services.*

The Commission proposes (in Article 12) that where the managing body of a port provides port services, it must separate the accounts of its ports services activities from the accounts of its other activities, in accordance with current commercial practice and generally recognised accounting principles. This should ensure that:

- (a) the internal accounts corresponding to different activities are separate;
- (b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;
- (c) the cost accounting principles according to which separate accounts are maintained are clearly established.

The auditor's report on the annual accounts must indicate the existence or, of course, non-existence, of financial flows between port services activity of the managing body of a port and its other activities.

The same rules should apply where, in application of the rules of the proposed Directive, the managing body of a port is the sole supplier of a specific port service.

The Commission has considered whether the level of transparency should be enhanced either by an appropriate modification of the 'Transparency Directive' or by proposing a regulation similar to Regulation 1107/70⁷ on the granting of aid to transport by rail, road and inland waterway, which contains certain information requirements.

An appropriate modification of the Transparency Directive would have been, and remains, a feasible option because prior modifications of it were made in order to take account of sectoral specificities, and there is no reason why a similar approach could not be made for the ports sector.

⁷ OJ L130, 15.6.1970, p. 1, as last amended by Council Regulation N° 543/97 (OJ L84, 26.3.1997, page 6)

Equally, a regulation comparable to Regulation 1107/70 with appropriate transparency rules remains an option, all the more so since ports are, contrary to the land transport modes, not covered by specific legislation on aid.

However, the Commission believes that a combination of the application of the modified Transparency Directive and the introduction of accounting requirements in the port services sector will significantly increase the transparency levels in ports. Under these circumstances it has been decided not to propose a change of Directive 80/723/EEC (as amended). This option, and the other one described above, remain and recourse may be had to them if the levels of transparency in the sector are not enhanced as a result of the above measures.

3.3. State aids to ports .

The debate following the publication of the Green Paper and work on the inventory have confirmed that the financing of ports and maritime infrastructure in the Community continues to vary considerably, reflecting the considerable differences in the way in which their ownership and organisation has been approached.

The Commission has been requested to issue guidelines on port state aids for the construction of port infrastructures.

The key reason given to support this request is that in other sectors⁸ the Commission has issued a series of guidelines dealing essentially with the conditions under which state aid may be authorised. Equally, certain categories of aid⁹ exist which the Commission has said it will authorise and which, subject to exclusions, may well apply in the ports sector as well. The existence of guidelines in other sectors is not a sufficient reason for issuing formal Commission guidelines on state aid in ports, all the more since stakeholders in favour of state aid guidelines explicitly oppose state aid to ports.

On the other hand the Commission is fully aware that guidance and clarification of existing rules would be of help both to Member States, the port authorities and, indeed, the Commission itself. However, such clarification, apart from relying on the Treaty rules, has to be built up from case law. With regard to ports there is little case law. And as clarifications of the Treaty rules should not be built up from theoretical situations whilst reality is different and not always transparent, any attempt on clarification must be qualified, for the time being, as a theoretical exercise: the Commission will continue to carry out case-by-case examinations where the facts and specificities of each case alone determine the outcome.

State aid is defined by article 87(1) of the Treaty as “aid granted by a Member State or through State resources in any form whatsoever”.

State aid can therefore take any one of a number of forms, e.g. grants; loans at less than a commercial rate of interest and guarantees; total or partial exemption from charges, taxes or social contributions; fiscal advantages resulting from accelerated or enhanced depreciation schemes; contributions to operating or training costs; benefits in kind such as free provision of services.

⁸ For example in maritime transport; aviation, steel, shipbuilding.

⁹ For example in employment.

Article 87(1) further stipulates that only selective aid, i.e. aid given to specific undertakings or sectors of undertakings constitutes state aid; genuinely non-selective and non-discriminatory measures are outside the scope of state aid.

Any selective state aid which distorts or threatens to distort competition shall, insofar as it affects trade between Member States, be incompatible with the common market.

Article 87(2) lists three categories for aid which, as a matter of law, are considered as being compatible with the common market. Article 87(3) lists five categories which, on examination by the Commission, may be found to be compatible with the common market.

Not only private undertakings are subject to the state aid rules of the Treaty, but also public undertakings and undertakings to which Member States grant special or exclusive rights (article 86(1)) or which Member States entrust with the operation of services of general economic interest (article 86(2)).

Article 88 of the Treaty obliges Member States to notify any plans to grant or alter aid to the Commission to obtain approval.

Although in the port sector interested parties have come to distinguish between investments in port infrastructure, superstructure, mobile assets and operational services, this distinction cannot replace the key criterion set out by the Treaty for the definition of state aid, namely that of selectivity under Article 87(1). This criterion remains the only benchmark for deciding whether a concrete investment measure, no matter whether it is categorised as port infrastructure, superstructure, mobile asset or operational service, constitutes an aid or not.

As regards infrastructure a subdivision into ‘public (general)’ and ‘user-specific’ infrastructure is seen as helpful by interested parties.

‘Public (general)’ infrastructure is open to all users on a non-discriminatory basis. It includes maritime access and maintenance (e.g. dikes, breakwaters, locks and other high water protection measures; navigable channels, including dredging and ice-breaking navigation aids, lights, buoys, beacons; floating pontoon ramps in tidal areas); public land transport facilities within the port area, short connecting links to the national transport networks or TENs; and infrastructure for utilities up to the terminal site. Investments in such infrastructure are normally considered by the Commission as general measures, being expenditures incurred by the state in the framework of its responsibilities for planning and developing a transport system in the interests of the general public provided the infrastructure is de jure and de facto open to all users, actual or potential, in accordance with Community legislation. However, the characteristics of a specific case may show that such infrastructure benefits a specific undertaking and may therefore warrant the conclusion of aid despite its prima facie appearance as public infrastructure..

‘User-specific’ infrastructure includes yards, jetties, pipes and cables for utilities on the terminal sites of a port; works that make the terminal site “ripe for construction” (i.e. rough levelling and – if necessary – the demolition of existing buildings and structures). In general, if public authorities prepare land in their possession for development and sell it or lease it at market rates (following the kind of procedures indicated in the land sales communication)¹⁰

¹⁰ Commission Communication on State aid elements in rules of land and buildings by public authorities, OJ C 209 of 10.7.1997.

the Commission would not regard such investments in infrastructure as state aid. This would be different if, for example, the development were done with a particular end-user in mind.

Two particular investment areas, namely docks and quay walls do not easily fit into either of the above-mentioned groups. Indeed, whereas for each of the above examples situations could be envisaged where the general conclusions would not apply, the specificities of any development and the variety of options make it impossible even to draw conclusions of a very general nature for works concerning docks and quay walls. It is therefore clear that the factual situation, potential and/or concrete beneficiaries, size and measurements of the installations and their actual and/or potential users will play a key role in any assessment by Member States and/or the Commission.

Investments in superstructures may include all types of buildings (warehouses, workshops, offices) and all types of fixed or semi-mobile equipment such as cranes and ramps. Such investments normally favour certain undertakings and thus constitute aid which may, however, where the conditions are fulfilled, benefit from the exemptions provided for in the Treaty.

It has been claimed that an investment in superstructure should not be considered a state aid where there will be full cost recovery from the user.

However, the Commission cannot accept such a general conclusion. An undertaking which is given the money for an investment in infrastructure or equipment or financed on favourable terms, or provided with the assets themselves for use by itself or its clients, is certainly advantaged in a number of ways. Its balance sheet will be improved (net assets, debt/equity) as will its profit and loss account and flow of funds by comparison with a port undertaking which has to finance the investment from its own resources or to borrow. Cost recovery from users does not remove these advantages which in themselves constitute a distortion of competition, unless the choice of the beneficiary and the terms on which it obtained the use of the facilities were reached as a result of an open and non-discriminatory procedure. However, in particular cases where the exemptions of the Treaty apply, such distortion may be considered compatible with the Treaty.

Public support to investments in mobile assets and operational services, e.g. those of individual port service providers, generally favours certain undertakings and it is difficult to foresee a situation where this is not the case.

Such support would be a state aid, again with the possible application of the exemption rules of the Treaty.