

“Development of policy, legislation, and programmes in the EU port sector.”

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### 1. INTRODUCTION

The EU port sector is particularly sensitive to reform. This may be attributed to its economic importance (over 90% of the EU's external trade passes through ports); the highly competitive nature of the trade in port services; and the highly unionised nature of dock work and the corresponding power of the trade unions.

Largely due to this sensitivity, reform of the port sector by EU legislation has been much slower than for other transport sectors. Indeed, nearly 50 years after the signature of the first of the Treaties that have led to today's EU, the port sector is the only transport sector in the EU yet to be liberalised by specific legislation.

However, the EU has not forgotten the port sector. As I will set out in this presentation, the sector has been the subject of actions by the Commission and the European Court of Justice to clarify precisely how the general Treaty rules apply to ports.

Today, the port sector in the EU finds itself at a crossroads as regards EU law. The choice is: either to continue the incremental development of law on a case by case basis with the uncertainty that brings; or to decide upon a framework directive to clearly set out precisely how the market for port services is to be regulated.

The presentation is divided into two parts:

- the development of EU legislation;
- and the development of EU policy and programmes.

## DEVELOPMENT OF EU LEGISLATION APPLICABLE TO THE PORT SECTOR

### 2. EU LEGISLATION MAY BE DIVIDED INTO TWO DISTINCT GROUPS:

- Primary legislation
- Secondary legislation

#### 2.1. Primary legislation

Primary legislation includes in particular the Treaties and other agreements having similar status. Primary legislation is agreed by direct negotiation between Member State governments. These agreements are laid down in the form of Treaties which are then subject to ratification by the national parliaments. The same procedure applies for any subsequent amendments to the Treaties.

The Treaties establishing the European Communities have been revised several times through:

- the Single European Act (1987),
- the Treaty on European Union - 'Maastricht Treaty' (1992),
- the Treaty of Amsterdam (1997), which entered into force on 1 May 1999.
- The Treaty of Nice which entered into force on February 1, 2003.

The Treaties also define the role and responsibilities of EU institutions and bodies involved in decision-making processes and the legislative, executive and juridical procedures which characterise Community law and its implementation.

#### 2.2. Secondary legislation

Secondary legislation is based on the Treaties and implies a variety of procedures defined in different articles thereof. In the framework of the Treaties establishing the European Communities, Community law may take the following forms:

- *Regulations* which are directly applicable and binding in all EU Member States without the need for any national implementing legislation.
- *Directives* which bind Member States as to the objectives to be achieved within a certain time-limit while leaving the national authorities the choice of form and

means to be used. Directives have to be implemented in national legislation in accordance with the procedures of the individual Member States.

- *Decisions* which are binding in all their aspects for those to whom they are addressed. Thus, decisions do not require national implementing legislation. A decision may be addressed to any or all Member States, to enterprises or to individuals.
- *Recommendations* and *opinions* which are not binding.

In the basic treaties of the EU, which were negotiated by the Member States, there are rules on their relations with the EU and on how decisions on more detailed rules can be drawn up by EU institutions.

### **3. LEGAL BASIS OF LEGISLATION**

#### **3.1. The three pillars**

The activity of the EU is usually illustrated by three pillars.

The first pillar is composed of the European Communities, and basically consists of traditional cooperation within the European Community. It covers matters pertaining to the Single Market and the 'four freedoms', that is, free movement of persons, goods, services and capital across borders. The first pillar also includes cooperation in fiscal and monetary issues, i.e., the development of the Economic and Monetary Union (EMU).

The second pillar consists of the Common Foreign and Security Policy (CFSP).

The third pillar comprises police cooperation and cooperation in the area of criminal law.

It is primarily within the Community pillar (i.e. the first pillar), that the institutions of the EU have regulatory powers, i.e., the right to draw up legal instruments and introduce legislation.

#### **3.2. Four freedoms**

The four basic freedoms are:

- (freedom of movement of goods — Article 28 EC;
- freedom of movement of persons — Article 39 EC;
- the right of establishment — Article 43 EC;
- and freedom to provide services — Article 50 EC)

These guarantee the basic freedoms of professional life in the EU.

### **3.3. Freedom to provide services**

The freedom of establishment and the freedom to provide cross border services, are two of the “fundamental freedoms” which are central to the effective functioning of the EU Internal Market for transport services.

The principle of freedom of establishment enables an economic operator (whether a person or a company) to carry out an economic activity in a stable and continuous way in one or more Member States. The principle of the freedom to provide services enables an economic operator providing services in one Member State to offer services on a temporary basis in another Member State, without having to be established.

These provisions have direct effect. This means, in practice, that Member States must modify national laws that restrict freedom of establishment, or the freedom to provide services, and are therefore incompatible with these principles. This includes not only discriminatory national rules, but also any national rules which are indistinctly applicable to domestic and foreign operators but which hinder or render less attractive the exercise of these "fundamental freedoms", in particular if they result in delays or additional costs. In these cases, Member States may only maintain such restrictions in specific circumstances where these are justified by overriding reasons of general interest, for instance on grounds of public policy, public security or public health; and where they are proportionate.

Under the Treaties the Commission is responsible for ensuring that these freedoms are correctly applied. As the guardian of the EC Treaty, the Commission has the option of commencing infringement proceedings under Article 226 EC against a Member State which they believe to be incompatible with Community law.

However, transport services do not fall under the Treaty’s provisions on general services. Indeed, transport is the only service sector in the EU to be treated separately. Article 51 of the provisions on general services makes this exclusion:

“Article 51

Freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport.”

The transport title of the Treaty sets out the provisions for the freedom to provide services in the areas of land and rail transport, but crucially not to air and sea transport. The latter two are the subject of Article 80.2:

“Article 80.2

“The Council may, acting by qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.”

There is an important point to note here as regards the port sector. Port services are treated as general services until such time as specific legislation on port services enters into force.

### 3.4. Competition rules

As regards the port sector, two articles in the Treaty's rules on competition are of particular importance: articles 82 and 87.

#### “Article 82

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts”

#### “Article 87

1. Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.
2. The following shall be compatible with the common market:
  - (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
  - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;
  - (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.
3. The following may be considered to be compatible with the common market:
  - (a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State.”

#### **4. LEGISLATIVE PROCESS**

##### **4.1. The European Commission**

The European Commission, a political body, has various responsibilities and plays a major role in the European Union's policy-making process as EU laws are mainly enforced by Commission action.

The European Commission has three distinct functions:

- initiator of proposals for legislation;
- guardian of the Treaties;
- manager and executor of EU policies and of international trade relations.

The Commission has a monopoly on the initiative in Community decision-making and drafts proposals for a decision by the two decision-making institutions: the Parliament and the Council. Thus, the legislative process begins with Commission proposals (for regulations or directives) which need to be in line with the Treaties and help to implement them. Normally, the Commission takes guidelines of national authorities into account. Commission proposals must encompass three core objectives:

- identifying the European interest;
- organising consultation as widely as necessary;
- respecting the principle of subsidiarity.

##### **4.2. The Council of Ministers**

The Council is the EU's main decision-making body. Like the European Parliament, the Council was set up by the founding treaties in the 1950s. It represents the member states, and its meetings are attended by one minister from each of the EU's national governments.

Which ministers attend which meeting depends on what subjects are on the agenda. When, for example, the Council discusses transport issues, the meeting will be attended by the Transport Ministers from each EU country and it will be known as the ‘Transport Council’.

Up to four times a year the presidents and/or prime ministers of the member states, together with the President of the European Commission, meet as the “European

Council”. These ‘summit’ meetings set overall EU policy and resolve issues that could not be settled at a lower level (i.e. by the ministers at normal Council meetings).

### **4.3. European Parliament**

The European Parliament (EP) is elected by the citizens of the European Union to represent their interests. Its origins go back to the 1950s and the founding treaties, and since 1979 its members have been directly elected by the people they represent.

Elections are held every five years, and every EU citizen who is registered as a voter is entitled to vote. Parliament thus expresses the democratic will of the Union's citizens (more than 455 million people), and it represents their interests in discussions with the other EU institutions. The present parliament, elected in June 2004, has 732 members from all 25 EU countries. Members of the European Parliament (MEPs) do not sit in national blocks, but in seven Europe-wide political groups. Between them, they represent all views on European integration, from the strongly pro-federalist to the openly Eurosceptic.

Parliament has three main roles:

- Passing European laws – jointly with the Council in many policy areas. The fact that the EP is directly elected by the citizens helps guarantee the democratic legitimacy of European law.
- Parliament exercises democratic supervision over the other EU institutions, and in particular the Commission. It has the power to approve or reject the nomination of commissioners, and it has the right to censure the Commission as a whole.
- The power of the purse. Parliament shares with the Council authority over the EU budget and can therefore influence EU spending. At the end of the procedure, it adopts or rejects the budget in its entirety.

### **4.4. The Codecision Procedure**

Having been established by the Maastricht Treaty, and extended and adapted by the Treaty of Amsterdam to make it more effective, the codecision procedure now covers 43 areas under the first pillar (based on the Treaty establishing the European Community) following the entry into force of the Treaty of Nice. Commission proposals for legislation in transport follow the codecision procedure.

Over the legislative period 1999-2004 and since the entry into force of the Amsterdam Treaty, 418 codecision procedures have been successfully completed (apart from two cases).

## 5. APPLICATION OF EU LAW TO THE PORT SECTOR

### 5.1. Competition rules: abuse of a dominant position

Regardless of whether a port operator is a public or private entity, for the purposes of the competition rules it is to be considered an undertaking if it is engaged in an economic activity: any activity consisting in offering goods and services on a given market is an economic activity. An undertaking which owns and operates a commercial port occupies a dominant position. Denying other undertakings access to the port services, without objective justification, constitutes an abuse of that dominant position. Furthermore, imposing discriminatory commercial fees for its services constitutes a similar abuse.

Relevant judgements by the European Court of Justice are:

*Case T-128/98: Aéroports de Paris (ADP) v Commission of the European Communities.*

On 11 June 1998, the Commission adopted its decision that ADP had infringed Article 82 of the EC Treaty by using its dominant position as manager of the Paris airports to impose discriminatory commercial fees in the Paris airports of Orly and Roissy-Charles de Gaulle.

ADP challenged the decision arguing that it is not an undertaking for the purposes of Article 82 of the Treaty. The court found that as ADP determines the commercial fees and the conditions of the activities of the ground handlers, it has a business activity for the purposes of Article 82 of the Treaty.

As to whether ADP was in a dominant position, the court found that it is settled case-law that the dominant position referred to in Article 82 of the Treaty relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. Since the relevant market in the present case is the market in management services for the Paris airports, ADP indisputably enjoys a dominant position, and even a legal monopoly. ADP therefore wields economic power which enables it to prevent effective competition from being maintained in the relevant market by giving it the opportunity to act independently.

The ruling does not prohibit ADP from levying fees in return for the services provided or even decide on the level of those fees; it merely requires that ADP put an end to the infringement consisting in imposing discriminatory commercial fees.

*Commission decision 98/190/EC: relating to a proceeding under Article 82 of the EC Treaty (IV/34.801 FAG - Flughafen Frankfurt/Main AG).*

FAG made use of its power as exclusive provider of airport facilities to deny potential competitors (in the market for the provision of ramp-handling services) access to the ramp. FAG thereby prevented potential suppliers of ramp-handling services from entering the market for the provision of those services. This applies both with regard to airlines and to independent suppliers. FAG thereby monopolised the market for the provision of ramp-handling services. In deciding to retain for itself the market for ramp-

handling services at Frankfurt airport, FAG extended its dominant position on the market for the provision of airport landing and take-off facilities to the neighbouring but separate market for ramp-handling services. FAG furthermore made use of its power as exclusive provider of airport facilities to deny airlines the right to self-handle. FAG thereby obliged the users of its airport facilities also to purchase from it the ramp-handling services that they need. In the absence of objective necessity, such behaviour infringes Article 82 of the Treaty.

*Case 242/95: GT-Link A/S v De Danske Statsbaner (DSB).*

Where a public undertaking which owns and operates a commercial port occupies a dominant position in a substantial part of the common market, it is contrary to Article 86(1) in conjunction with Article 82 of the EEC Treaty for that undertaking to levy port duties of an unreasonable amount pursuant to regulations adopted by the Member State to which it is answerable or for it to exempt from payment of those duties its own ferry services and, reciprocally, some of its trading partners' ferry services, in so far as such exemptions entail the application of dissimilar conditions to equivalent services.

*Commission Decision of 21 December 1993 concerning a refusal to grant access to the facilities of the port of Rødby (Denmark)*

According to the case-law of the Court, an undertaking with a legal monopoly of supply of certain services may hold a dominant position within the meaning of Article 82 of the Treaty (Télémarketing case, No C-311/84). DSB is a public undertaking which, by virtue of the exclusive right granted by the State in its capacity as port authority, holds a dominant position in Denmark on the market for the organization of port operations with regard to the transport of passengers and vehicles by ferry between Rødby and Puttgarden. This is dominant position.

The refusal to allow 'Euro-Port A/S', a subsidiary of the Swedish group 'Stena Rederi AB' (Stena) to operate from Rødby had the effect of eliminating a potential competitor on the Rødby-Puttgarden route and hence of strengthening the joint dominant position of DSB and DB on that route.

Thus an undertaking that owns or manages and uses itself an essential facility, i.e. a facility or infrastructure without which its competitors are unable to offer their services to customers, and refuses to grant them access to such facility is abusing its dominant position.

Consequently, an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a shipowner wishing to operate on the same maritime route access to that facility without infringing Article 82.

*Case C-343/95: Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG). Reference for a preliminary ruling: Tribunale di Genova - Italy.*

As regards the possible application of the competition rules of the Treaty, a distinction must be drawn between a situation where the State acts in the exercise of official

authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market.

The anti-pollution surveillance for which SEPG was responsible in the oil port of Genoa is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas. Such surveillance is connected by its nature, its aim and the rules to which it is subject with the exercise of powers relating to the protection of the environment which are typically those of a public authority. It is not of an economic nature justifying the application of the Treaty rules on competition.

*Case C-179/90: Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA.*

Although the simple fact of creating a dominant position by granting exclusive rights within the meaning of Article 86(1) of the Treaty is not as such incompatible with Article 82 of the Treaty, a State is in breach of those two provisions if the undertaking in question, merely by exercising the exclusive rights granted to it, cannot avoid abusing its dominant position or when such rights are liable to create a situation such that it is induced to commit such abuses. Such is the case when an undertaking to which a monopoly to perform dock work has been granted is induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers.

## **5.2. Discrimination on grounds of nationality**

Restricting the number of moorings for nationals from other member states infringes the prohibition on discrimination of article 59. Further, requiring that dock-work companies be formed exclusively of nationals is similarly prohibited.

Relevant judgements by the European Court of Justice are:

*Erich Ciola v Land Vorarlberg.*

The national court essentially asked the ECJ whether the Treaty provisions on freedom to provide services are to be interpreted as prohibiting a Member State from limiting the number of moorings which may be rented to boat-owners resident in another Member State.

The ECJ found that a restriction on moorings of the kind at issue in the main proceedings infringes the prohibition under the first paragraph of Article 59 of the Treaty of all discrimination, even indirect, with regard to providers of services.

National rules which are discriminatory, are compatible with Community law only if they can be brought within the scope of an express derogation, such as Article 46 (ex-Article 56) that concerns public policy, public security and public health.

The national court asked the ECJ whether Article 86(1) of the Treaty, in conjunction with Articles 12, and 82 thereof, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organize dock work and require it, for the performance of such work, to have recourse to a dock-work company formed exclusively of nationals, and whether those articles give rise to rights for individuals which the national courts must protect.

The court noted that *in limine* a dock-work undertaking enjoying the exclusive right to organize dock work for third parties, as well as a dock-work company having the exclusive right to perform dock-work must be regarded as undertakings to which exclusive rights have been granted by the State within the meaning of Article 86(1) of the Treaty. That article provides that in the case of such undertakings Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those provided for in Article 12 and the articles relating to competition.

As regards, in the first place, the nationality condition imposed on the workers of the dock-work company, it should be recalled, to begin with, that according to the case-law of the Court, the general prohibition of discrimination on grounds of nationality laid down in Article 12 of the Treaty applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination. As regards workers, that principle has been specifically applied by Article 39 of the Treaty. In this respect it should be recalled that Article 39 of the Treaty precludes, first and foremost, rules of a Member State which reserve to nationals of that State the right to work in an undertaking of that State, such as the Port of Genoa company which is at issue before the national court.

### **5.3. Pricing**

The pricing practices and arrangements of port operators and users are subject to EC competition law whenever they affect trade in the common market. For example, price-fixing arrangements are subject to EC competition law and are expressly prohibited by Article 81 of the EC Treaty. Similarly, dominant undertakings may not engage in discriminatory pricing practices or excessive pricing for their services.

An arrangement between undertakings which has the object or effect of preventing, restricting or distorting competition in the common market or any part of the common market is prohibited and void, unless exempted by the European Commission. Thus, for example, if a number of ports reached an arrangement on the prices which they would charge then arrangement would ordinarily be illegal under Article 81 of the EC Treaty.

This prohibition on price-fixing is contained primarily in Article 81. In order for there to be a breach of Article 81, the following conditions must be satisfied:

- there must be an agreement between undertakings or a decision by an association of undertakings or a concerted practice between undertakings;
- the object or effect of the arrangement must be the prevention, restriction or distortion of competition. As was outlined above, it is normally quite easy to find this object or effect;

- the prevention, restriction or distortion of competition must be in the common market or in a part of the common market. The “part” of the common market may be, for example, a single port or an area within a port and the port does not have to represent a substantial part of the common market;
- the arrangement must have an effect on trade between Member States. In practice, this effect is easily found;
- the arrangement must not benefit from an exemption under Article 81(3). In practice, an exemption for a price-fixing arrangement would be highly unusual and improbable.

#### **5.4. Access to Ports and Facilities in Ports**

One of the most important areas of EU ports law in recent years has been the issue of access to ports or better utilisation of port facilities. For example, Sea Containers sought access to the port of Holyhead while B&I Line sought better access or operational conditions in the same port.

*Commission decision 94/19: relating to a proceeding pursuant to Article 82 of the EC Treaty (IV/34.689 - Sea Containers v. Stena Sealink - Interim measures).*

Sea Containers complained that Stena Sealink had abused its dominant position as the owner and operator of the port of Holyhead, contrary to Article 82 of the EC Treaty, by failing to allow Sea Containers access on a reasonable basis to an essential facility or infrastructure, and had relied on its exclusive rights to protect its commercial interests as a ferry operator, without objective justification.

The court held that an undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility (i. e. a facility or infrastructure, without access to which competitors cannot provide services to their customers), and which refuses other companies access to that facility without objective justification or grants access to competitors only on terms less favourable than those which it gives its own services, infringes Article 82 if the other conditions of that Article are met. An undertaking in a dominant position may not discriminate in favour of its own activities in a related market. The owner of an essential facility which uses its power in one market in order to protect or strengthen its position in another related market, in particular, by refusing to grant access to a competitor, or by granting access on less favourable terms than those of its own services, and thus imposing a competitive disadvantage on its competitor, infringes Article 82.

#### **5.5. Services of general economic interest**

*Case 242/95: GT-Link A/S v De Danske Statsbaner (DSB).*

Dock work consisting of loading, unloading, transshipment, storage and general movement of goods or material of any kind is not necessarily of general economic interest exhibiting special characteristics compared with that of other economic activities.

*Case 179/90: Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA.*

The national court asked whether Article 86(2) of the Treaty must be interpreted as meaning that a dock-work undertaking must be regarded as being entrusted with the operation of services of general economic interest within the meaning of that provision. For the purpose of answering that question it should be borne in mind that in order that the derogation to the application of the rules of the Treaty set out in Article 86(2) thereof may take effect, it is not sufficient for the undertaking in question merely to have been entrusted by the public authorities with the operation of a service of general economic interest, but it must be shown in addition that the application of the rules of the Treaty obstructs the performance of the particular tasks assigned to the undertaking and that the interests of the Community are not affected.

*Case 41/90: Klaus Höfner and Fritz Elser v Macrotron GmbH.*

As an undertaking entrusted with the operation of services of general economic interest, a public employment agency engaged in employment procurement activities is, pursuant to Article 86(2) of the Treaty, subject to the prohibition contained in Article 82 of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has granted it an exclusive right to carry on that activity is in breach of Article 86(1) of the Treaty where it creates a situation in which that agency cannot avoid infringing Article 82 of the Treaty. That is the case, in particular, where the following conditions are satisfied:

- the exclusive right extends to executive recruitment activities;
  
- the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities;
  
- the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void;
  
- the activities in question may extend to the nationals or to the territory of other Member States.

## **6. OTHER APPLICATION LEGISLATION**

### **6.1. Regulation (EC) No 725/2004 of the European Parliament and of the Council of 31 March 2004 on enhancing ship and port facility security**

The main objective of this Regulation is to introduce and implement Community measures aimed at enhancing the security of ships used in international trade and domestic shipping and associated port facilities in the face of threats of intentional unlawful acts.

The Regulation is also intended to provide a basis for the harmonised interpretation and implementation and Community monitoring of the special measures to enhance maritime security adopted by the Diplomatic Conference of the IMO on 12 December 2002, which amended the 1974 International Convention for the Safety of Life at Sea (SOLAS Convention) and established the International Ship and Port Facility Security Code (ISPS Code).

### **6.2. Directive 2002/6: on reporting formalities for ships arriving in and/or departing from ports of the EU Member States.**

This Directive simplifies maritime transport by standardising certain basic reporting formalities relating, in particular, to the ship, its stores, its crew's effects, its crew list and - for passenger ships - its passenger list.

### **6.3. 'Authorised Regular Shipping Services'**

This is a simplified customs regime for regular (short-sea) shipping services carrying primarily Community goods (i.e. goods in free circulation within the Community) between two or more ports in the customs territory of the Community. Even if goods normally lose their customs status when a ship sails from one Community port to another, this is not relevant for an 'Authorised Regular Shipping Service' because Community goods carried on that service remain Community goods and their status does not need to be proven to the customs. Therefore, for Community goods, this service can be compared to a land bridge between two or more Community ports with no customs checks on either end of the bridge. This greatly speeds up the movement of goods on to and from ships.

## **7. LEGISLATIVE PROPOSALS**

### **7.1. Proposal for a European Parliament and Council directive on enhancing port security**

Adopted by the Commission on 10 February. This proposal for a directive supplements the regulation on ship and port facility security. The aim of the proposal is to achieve, with the requisite flexibility, the common level of security needed in all Community ports. The measures envisaged must comply with the following principles:

- differentiated security levels according to the degree of risk;
- a security plan describing all the measures and details for enhancing port security;

- a port security authority responsible for defining and implementing the measures;
- a port security officer to coordinate the development and implementation of the port security plan;
- a port security committee to provide advice to the responsible authority; and lastly, training and control activities to support implementation of the required measures.

## **7.2. Intermodal security**

DG TREN organised consultation meetings with the industry, Member States and international organisations have revealed that:

- Intermodal security has become a serious issue which needs addressing.
- The focus should be on assisting EU companies in enhancing overall supply chain security.
- Possible EU security measures should rather focus on terrorism than crime in general.
- No guarantee for absolute security is likely to be achieved in the medium term.
- The measures must take into account the realities of the market. Any measure should be EU wide as to avoid distortion between markets, and, as far as feasible, apply to all modes.
- Cost effectiveness and harmonisation of legislation which relates to intermodal transport security, i.e. customs code, air transport and dangerous goods, deserves high priority.
- A single window approach for effective and similar control between various organisations and traders is appreciated, i.e. voluntary systems like regulated agent and known shipper.

DG TREN is in the process of preparing a European directive to improve intermodal transport security (identifying risks, possible security measures, including a cost benefits analysis, a transport infrastructure plan and possible EU coordination).

## **7.3. Standardisation and Harmonisation of Intermodal Loading Units (ILUs)**

The Community has identified the lack of harmonisation and standardisation of loading units as an area that hampers the development of intermodality from reaching its full potential.

The Commission proposed, on 7 April 2003, a Council and Parliament Directive to provide more efficiency in the intermodal transport chain.

The objectives are:

- to make ILU compatible with all modes;
- to ensure the best handling maintenance of all Intermodal Loading Units;
- to simplify the transshipments in terminals for all the new Intermodal Loading Units;

The Commission proposes a smooth change:

- the use of existing ILU will be allowed, but they will have to comply with the obligations established for containers by CSC, or similar;
- the use of ISO containers with a length compatible with Directive 96/53 will be allowed;
- new ILU will comply harmonisation rules regarding in particular handling and fixation;
- a new unit, the European ILU, will be standardised. It has to be pallet-wide, stackable, compatible with SSS, IWW, rail and road.

In its first reading on 12 February 2004, the European Parliament adopted the proposal and introduced amendments aimed at clarification and making sure that there are no incompatibilities between the Commission proposal and the global ISO rules. Subsequently, the Commission presented an amended proposal on 30 April 2004. The directive has yet to be adopted.

#### **7.4. Infrastructure charging**

The key message of the Commission's infrastructure charging policy is that transport taxes and charges, in every mode of transport, should be varied to reflect the cost of different levels of sound and environmental pollution.

This is to be done by applying the polluter pays principle and providing clear fiscal incentives to help achieve the goals of

- reducing transport's congestion and pollution;
- re-balancing the modal split;
- and decoupling transport growth from economic growth.

Getting transport operators to pay is fair, and helps make better use of the existing infrastructure capacity.

Proper charging also supports the development of public-private partnerships and market liberalisation. The user charges provide a direct income source for potential public-private partnerships in managing infrastructure. This is the case in accession countries no less than in Member States; and applying the user pays principle is fundamental to commercial practices and liberalised markets.

The last initiative of the Commission concerning transport infrastructure charging is a proposal for a Directive of the European Parliament and of the Council amending

Directive 1999/62/EC (directive "Eurovignette") on the charging of heavy goods vehicles for the use of certain infrastructures. This proposal, adopted by the Commission on 23 July 2003 [COM(2003)488], has as an objective the alignment of the national systems of tolls and of user charges for infrastructure use on common principles.

## **DEVELOPMENT OF EU POLICY AND PROGRAMMES APPLICABLE TO THE PORT SECTOR**

### **8. COMMISSION GREEN PAPER ON SEAPORTS AND MARITIME INFRASTRUCTURE**

Adopted by the Commission on 10 December. With this Green Paper the Commission launched a wide-ranging debate on seaports and maritime infrastructure and policies to help to increase the efficiency of ports by integrating them into the multimodal trans-European transport network and ensure the effective application of the competition rules in this area.

To reach these objectives, the Commission recognised:

- the need to fully integrate ports into the trans-European transport network with a view to establishing a multimodal network;
- the need to ensure links to the peripheral areas and to encourage short sea shipping;
- the need to extend the network to the applicant countries in order to integrate their transport systems more effectively with those of the Union;
- the need to improve the role of ports in the intermodal transport chain and optimisation of this role through measures such as standardisation of loading units and integration of telematics;
- the role of ports in maritime safety through uniform compliance with international legislation by all ships entering Community ports; environmental protection by improving the quality of facilities and fostering new technology;
- the need to support research and development projects, in particular in order to ensure the compatibility and integration of the various information systems.

The Commission also considered the possibility of public funding of port infrastructure by pricing it in such a way that users bear the real costs of port facilities and services.

Lastly, where the application of the competition rules is concerned, the Commission suggests the development of a regulatory framework aimed at more systematic liberalisation of the port services market.

### **9. WHITE PAPER OF 2001 - “EUROPEAN TRANSPORT POLICY FOR 2010: TIME TO DECIDE”**

This White Paper sets out a new policy to shift the balance between modes of transport to achieve a sustainable and competitive transport system.

The White Paper notes that the establishment of an internal market for transport services in 1992 (with the notable exceptions of railway and port services), has led to reduced transport prices and has offered more choice to consumers and operators. Success however, has come at a price. These policy achievements have led to serious problems of

congestion, pollution and safety, notably in the road sector. Such costs reduce the competitiveness of firms and, more in general, the welfare of citizens. The White Paper sets out around 60 measures that are intended to achieve a significant break in the link between growth in the economy and growth in the demand for transport services, without restricting mobility.

In the EU it is clearly recognised that legislation to liberalise markets and open them up to competition will not achieve much if national networks are not interconnected. The Commission believes that emphasis should be put on a multimodal solution to bottlenecks. This can be achieved through the promotion of railway freight lines, Short Sea Shipping and inland waterways and to the full deployment of information technologies - like the EU's Galileo satellite navigation system.

## **10. TRANS-EUROPEAN TRANSPORT NETWORK (TEN-T)**

Good transport connections between the European Union and its neighbours are essential for trade and economic development. Smooth, safe and secure transport systems reinforce sustainable economic growth and competitiveness and ensure free movement of people, goods and services.

### High Level Group

Following a ministerial seminar on Wider Europe for Transport in Santiago de Compostela on 7-8 June 2004, a High Level Group has been established to look into the above mentioned issues. Based on previous exercises such as the Trans-European Transport Network policies and the Pan-European Corridors and Areas, the Group should identify a set of major transnational transport axes and priority projects on these axes. It will also analyse some horizontal issues such as safety and security, intermodality and interoperability, etc.

A public consultation was opened in July 2005 on how to connect better the major Trans-European transport axes to the neighbouring countries and regions. It will remain open until the end of March 2006. Stakeholders are invited to express their ideas and views

To speed up the completion of key routes in the TEN-T, the Commission has adopted a series of measures on closer political and technical coordination. These measures include the nomination of six prominent figures as European coordinators and the setting up of an Executive Agency for the TEN-T. As Vice-President Jacques Barrot, the Commissioner responsible for transport, has stated:

"Implementation of major transport projects is hindered not only by a lack of funding but also by problems of coordination between Member States. It is these transnational projects that experience most delays. The coordinators will facilitate the dialogue between the Member States concerned so that work and financing plans are better synchronised."

The six coordinators are Loyola de Palacio, Karel Van Miert, Etienne Davignon, Péter Balázs, Pavel Telička and Karel Vinck. Nominated after consultation with the European Parliament and with the agreement of the Member States concerned for an initial (renewable) period of four years, they will be responsible for the coordination of an EU

priority project. In order to guarantee their independence, none of them are nationals of the countries with which they will be working.

The Commission is also proposing to set up an Executive Agency in response to an increase in the budget proposed in the framework of the 2007-2013 financial perspective and the need to adapt existing staff in order to have access to the wide range of highly specialised skills required for each major project. The Commission will delegate to the Agency the technical and administrative tasks involved in the management of cofinancing granted to the TEN-T. The Agency, with which the European Investment Bank (EIB) will be involved, will also offer project promoters the possibility of coordinating with interventions by other European funds.

Initially, the Agency will be set up to manage the current budget, which will enable it to be fully operational from 2007. After the adoption of the new financial perspective, its size will be adapted to meet the needs arising from the new budget.

## **11. MOTORWAYS OF THE SEA (MOS)**

In its Transport White Paper of September 2001, the Commission proposed the development of “Motorways of the Sea” as a “real competitive alternative to land transport.” To help these lines develop, the White Paper states that European funds should be made available. These "motorways of the sea" should be part of the Trans-European network (TEN-T).

The “motorways of the sea” concept aims at introducing new intermodal maritime-based logistics chains in Europe, which should bring about a structural change in our transport organisation within the next years to come. These chains will be more sustainable, and should be commercially more efficient, than road-only transport. Motorways of the sea will thus improve access to markets throughout Europe, and bring relief to our over-stretched European road system. For this purpose, fuller use will have to be made not only of our maritime transport resources, but also of our potential in rail and inland waterway, as part of an integrated transport chain. This is the Community added-value of motorways of the sea.

The adoption of Article 12a of the TEN-T Guidelines of 29 April 2004 by Council and European Parliament gives a legal framework for funding the “motorways of the sea”.

Article 12a, TEN-T, gives three main objectives for the sea motorways projects:

- (1) freight flow concentration on sea-based logistical routes;
- (2) increasing cohesion;
- (3) reducing road congestion through modal shift.

Four corridors have been designated for the setting up of projects of European interest:

- Motorway of the 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) (by 2010);

- Motorway of the Sea of western Europe (leading from Portugal and Spain via the Atlantic Arc to the North Sea and the Irish Sea) (by 2010);
- Motorway of the Sea of south-east Europe (connecting the Adriatic Sea to the Ionian Sea and the Eastern Mediterranean, including Cyprus) (by 2010);
- Motorway of the Sea of south-west Europe (western Mediterranean, connecting Spain, France, Italy and including Malta and linking with the Motorway of the Sea of south-east Europe and including links to the Black Sea) (by 2010).

These corridors provide one essential part of the projects: the "floating infrastructures" of our European seas. However, it is up to industry, Member States and the Community to implement financially and operationally sound projects to use these maritime resources better for new intermodal maritime-based transport systems.

To make motorways of the sea a success, three conditions must be present for each project.

- First, in order to obtain the necessary concentration of freight flows, choices have to be made concerning ports and intermodal corridors and services.
- Second, all actors in the supply chain have to be committed to these projects.
- Third, motorways of the sea need to feature the best available quality throughout the chain in order to be attractive for users.

By 2010, a fully fledged network of motorways of the sea should be established throughout Europe on the corridors mentioned above.

## **12. MARCO POLO I**

In its White Paper - European Transport Policy for 2010: time to decide, the Commission proposed to take measures which should make the market shares of the modes of transport return, by 2010, to their 1998 levels. This will prepare the ground for a shift of balance from 2010 onwards.

One measure to achieve this objective is the establishment of the Marco Polo Programme with its adoption on 22 July 2003. The Programme's objectives are to:

- reduce road congestion;
- improve the environmental performance of the freight transport system within the Community;
- and to enhance intermodality, thereby contributing to an efficient and sustainable transport system.

To achieve this objective, the Programme supports actions in the freight transport, logistics and other relevant markets. These actions should contribute to maintain the distribution of freight between the various modes of transport at 1998 levels by helping to shift the expected aggregate increase in international road freight traffic of

12 billion tkm per year to short sea shipping, rail and inland waterways or to a combination of modes of transport in which road journeys are as short as possible.

All segments of the international freight transport market are within the scope of the Programme.

The Programme runs from 2003 to 2006 with a budget of 100 € million for the EU25. Countries such as Norway, Iceland and Lichtenstein have joined the programme. Each additional fully participating country will contribute to the available budget. Project proposals may officially only be submitted when a call has been published.

The first call for proposals was published on 11th October 2003 and closed on 10th December 2003, the 13 successful projects concluded a contract in autumn 2004.

The second call for proposals was published on 15th October 2004, with deadline for submission on 15th December 2004.

### **13. MARCO POLO II (2007-2013)**

On 15th July 2004 the Commission presented a proposal COM (2004) 478 to establish a second, significantly expanded "Marco Polo" programme from 2007 onwards. Marco Polo II includes new actions such as motorways of the sea and traffic avoidance measures. The programme, which has a budget of €740 million for 2007-2013, has been extended to countries bordering the EU. The Commission estimates that every €1 in grants to Marco Polo will generate at least €6 in social and environmental benefits.

The final form of Marco Polo II will depend on the outcome of the negotiations with the European Parliament and the Council.

### **14. CONCLUSION**

I hope that this presentation has given you an overview of the development of the application of EU legislation, as well as EU policies and programmes to the port sector.

Ports play a crucial role in the economic life of Europe. Perhaps for this reason, legislation has been applied on an incremental basis. The resulting legal uncertainty in those areas where laws have not been developed or rulings by the European Court of Justice have yet to be made, can only deter the much needed investment.

Whether or not you agree with the Commission decisions and the rulings of the European Court of Justice, I hope you will agree that their objective – open access to port services is a desirable one. Equally, I hope that you have appreciated how the Commission's policies and programmes add to the further development of the port sector in a safe and sustainable way.