COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

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1. BACKGROUND

Date of transmission of the proposal to the EP and the Council (document COM(2001) 35 final - 2001/0047 (COD)): 14 February 2001

Date of the opinion of the Economic and Social Committee: 29 November 2001

Date of the opinion of the Committee of the Regions: 20 September 2001

Date of the opinion of the European Parliament, first reading: 14 November 2001


Date of adoption of the common position: 5 November 2002

2. PURPOSE OF THE COMMISSION PROPOSAL

The Commission’s amended proposal for a European Parliament and Council Directive on market access to port services concerns market-opening measures for port services. Its aim is to ensure equitable competitive conditions for all service providers, as well as to establish clear rules, and to set up an open and transparent procedure, for access to these services.

The port services concerned are cargo handling in all its variations, passenger services and technical-nautical services such as towing, mooring and pilotage. They can either be provided inside the port area or on waterway access to and from the port.
3. COMMENTS ON THE COMMON POSITION

3.1. General observations on the common position

The Council, with a qualified majority, has introduced a number of amendments to the Commission’s amended proposal without, however, changing its main objective of establishing clear rules and setting up an open and transparent procedure for access to port services.

The common position also takes largely into account the views of the European Parliament in its first reading.


3.2.1. Amendments accepted fully, or partly, in the Commission’s amended proposal

The common position did not, in substance, modify or reverse any amendments made by the Commission subsequent to the European Parliament’s first reading.

3.2.2. Amendments not accepted in the Commission’s amended proposal

Number of service providers in case of limitations of their number [Article 8.2 and recital 21].

The common position follows the European Parliament in its amendment no 26, deleting the requirement, in case of limitations of the number of service providers, to have at least two service providers for each category of cargo.

The Commission finally accepts the deletion of its text in view of reaching a compromise. It believes that its aim of achieving market opening is satisfactorily assured by other clauses of the text.

Pilotage [Article 14 & recitals 33, 34].

It is recalled that the European Parliament voted against the inclusion of pilotage in the scope of the Directive (amendments 51 & 67). The Commission did not follow this when adopting its modified proposal in February 2002.

Although the common position includes pilotage in the scope of the Directive, it places particular emphasis on the key importance of service specificities as identified by the European Parliament.

In particular, the common position allows to submit authorisations to particularly strict criteria related with public service obligations and maritime safety. For this purpose, competent authorities may, on a case by case basis, either reserve to themselves, or directly grant an exclusive right to an organisation for the provision of pilotage services in a port. Where the circumstances in a port so require, the latter may be done without following the

1 The changes introduced by the Council, and in particular the addition of several articles, has led to a change in the numbering of the final articles of the Directive. The numbering is based on the text of the common position, which is different from the corresponding provisions in the Commission’s proposal.
selection procedures and other relevant procedures provided for by this Directive in cases of limitations.

This text allows for port-specific solutions to be adopted.

It is recalled that the behaviour of undertakings in a dominant position is subject to the competition rules of the EC Treaty.

Self-handling for pilotage is included in the Directive in the form of Pilotage Exemption Certificates (PECs).

Duration for the authorisation period is set for 10 years, in order to take into account the sometimes very long training periods required for pilots. The same applies for transitional periods.

The Commission believes that the common position represents a balanced approach to the issue of pilotage and should allow it to be included in the Directive, whilst the principle of subsidiarity is fully implemented. In fact, it recognises both the specificities of pilotage, including its key role for maritime safety and the complex structures often required by local particularities, and the fact that pilotage is generally recognised as a port service. It furthermore allows for public service obligations to be imposed where this is deemed necessary.

3.3. New provisions introduced by the Council.

The following are the main amendments introduced by the Council in its common position. They are acceptable to the Commission:

Scope (ports [Article 2, & recitals 11, 12]).

The text of article 2.2 aligns the ports’ threshold for this Directive to that of the TEN – T ports (Group A). This brings the threshold from a proposed 3 mio tonnes / 500,000 passengers to 1.5 mio tonnes / 200,000 passengers.

The text of article 2.5 of the common position allows the exclusion of ports with high seasonal and otherwise low volume (mainly seasonal passenger transport).

Finally, through the text of article 2.4, Member States are explicitly allowed to extend the application of the Directive to other ports, if they so wish.

Scope (services [Annex]).

The Commission had proposed that the Directive should cover all services provided in a port, even if some of those, by their very nature, could also be provided outside the port area (storage, depot, warehousing, cargo consolidation, etc).

The text of the annex of the common position limits the application of the Directive to services, which can only be provided inside the port area, so as not to create different sets of rules for a specific service depending on where it is provided.
**Scope** (services provided on waterway access to and from the port, [Article 1.2]).

The text of this article allows specific safety constraints to be imposed for waterway access so as to take account of the specificities of waterway access.

It is recalled that services on waterway access were included by the Commission in the scope of its amended proposal following amendment no 15 of the European Parliament.

**Development policy of the port, [Articles 7, 1.2 & recital 20].**

This modification explicitly allows a port for port-specific reasons (e.g. aim for specialisation in one or more cargo handling services) to determine, and where it considers this appropriate to limit its activities. In the latter case, the development policy could, therefore, allow the port not to authorise any activities falling outside the scope of its specialisation, without this being a limitation of the number of service providers within the meaning of the Directive.

**Selection procedure in case of limitations in the number of service providers (publication in O.J., [Article 9.2]).**

The proposal foresaw publication of all tenders in the OJ.

However, in view of the substantial increase of the number of ports covered by the Directive, publication of all tenders in the OJ would appear unreasonable. The common position now foresees OJ publications of tenders only for the longest authorisation periods [art. 12.2(b)]. As for the other authorisations, the necessary information shall be made available through any appropriate manner sufficiently in advance to any person interested in the process.

**Duration of authorisations granted through a selection procedure [Article 12].**

This issue is relevant only where the number of service providers is limited for reasons of scarcity of space or capacity or safety or environmental reasons.

In such cases of a necessary limitation of the number of service providers, a balance, therefore, has to be found between the openness of the market for new service providers and the protection of the commercial interests of service providers.

The Commission’s approach was centred on the level of investment by a service provider: duration of authorisation of 5 years where no investments were made; 10 years where significant investments into moveable assets were made; 25 years where significant investments into immovable assets were made.

The common position maintained the above structure, but the durations were extended. They now stand at 10/15/36 years respectively.

These maximum durations would allow Member States to find solutions, which adequately reflect, in particular, national depreciation rules for the assets in question.
Two alternative options to extend the duration where investments in immovable assets are made [Articles 12.2, 12.3 & recital 29].

In order to encourage investments, where authorisations in immovable assets were granted, the common position allows for two options:

Member States may introduce the option of a single 10-year extension where important investments were made during the last 10 years of the authorisation.

They may also allow an anticipated tender procedure where substantial investments are planned but where the authorised service provider wishes to enjoy a longer tenure so as to have assurance that it can adequately amortise its investments. In this case any interested service provider will, of course, be able to participate in the tender procedure.

Assimilation of certain substantial investments in moveable assets to investments in immovable assets [Article 12.2(b), 12.3 & recital 28].

Since investments in certain moveable infrastructures may well be considerably more costly than many investments in immovable assets, it is reasonable to allow, for the purpose of this Directive, for such investments to be considered investments in immovable assets.

These could be ship-to-shore gantry cranes, bridge unloaders or specialised tugboats, as enumerated by recital 28.

Self-handling [Article 13 & recitals 30, 31, 32].

The common position explicitly sets out that self-handling, whose definition [article 4(9)] has been clarified without changing its substance, should be allowed whenever possible.

It also allows limitations of the number of self-handlers but only for objective reasons compatible and relevant with those applicable for the limitation of the number of service providers as under article 8.

It finally stipulates that self-handling for technical and nautical services can be subject to a fee (as a contribution to public service obligations, which can not be met by a self-handler). This fee, which will have to be non-discriminatory and reasonable, has to be fixed in an objective and transparent manner.

Pilotage [Article 14].

See point 3.2.2.

Transitional periods [Article 21 & recitals 41, 42, 43, 44).

The common position keeps the principle of transitional periods. This issue is relevant only where the number of service providers has been limited for reasons of scarcity of space or capacity or safety or environmental reasons.

As in articles 12 & 14, the approach is again centred on the level of investment by a service provider, in order to achieve a balance between the need to set a date by which a restricted market will open, while protecting the commercial interests of established service providers.
The maximum durations foreseen are the same as those foreseen in articles 12 & 14 (10/15/36 years respectively).

*New ports [Article 22 & recital 45].*

This new article deals with private investments in new ports (paragraph 1) and private-public partnership (PPP) in developing new ports or new parts of a port (paragraph 2).

PPP often follows a specific time schedule: the public part of the investment is only made if and when the private operator is found. And a private operator is only ready to invest once he has a guarantee of the public investment. Both decisions are often interlinked.

A guarantee for an open, non-discriminatory and transparent procedure is contained in paragraph 2.

Two alternative approaches to set maximum durations are set in paragraph 3. These can either be in accordance with art. 9 or for a single maximum period of 40 years (which is not renewable).

*Social & employment protection issues (Articles 6.5, 13, 19 & recitals 18, 31, 32, 40).*

During its first reading, the European Parliament strongly favoured the explicit insertion in the Directive’s text of provisions aiming at the protection and respect of national rules of Member States concerning employment and social protection (in particular amendments 13, 22, 24, 29, 36, 43, 57).

The Commission maintained that its original proposal adequately covered these concerns. It nevertheless followed some of those European Parliament amendments in its amended proposal.

However, the text now explicitly refers to the social rules in the areas concerned:

Art. 6.5 now explicitly stipulates that the freedom of the service provider to employ qualified personnel of his choice is subject to national legislation, if this is compatible with Community law.

Art. 13.2, explicitly stipulates for self-handling that national rules on employment and social matters are in no way affected by the Directive, provided they are compatible with Community law and international obligations of the Community and of the Member State concerned. Any danger of social dumping is thus avoided.

Art. 19 on social protection, now explicitly stipulates that relevant national legislations and relevant rules on employment of personnel by a service provider taking over an authorisation as a result of a tender procedure are in no way affected by the provisions of the Directive.

**3.4. Commission position on the common position.**

The Commission agrees with and supports the common position, adopted by the Council, as it respects the key principles, doctrine and structure of its proposal.

Moreover, as explained above the common position takes largely into account the European Parliament’s first reading.
4. **JOINT DECLARATIONS**

At the moment of the adoption of the Common Position the Commission made the following statement to the minutes of the Council:

“The Commission points out that it will address the issue of competition between ports, in the nearest future, by introducing an amendment to the Transparency Directive so that ports covered by this Directive will equally fall under the Transparency Directive and by issuing a document on public financing of infrastructure and State aids. The Commission will continue to work on maritime safety, recalls in particular the recently published package in safety of passenger vessels and will take the appropriate measures on security. It will continue to take appropriate initiatives in short sea shipping and intermodality, recalls the recent Marco Polo proposal and the guide on Customs procedures in ports for Short Sea Shipping. The Commission recalls its recent Communication on Training and Recruitment of Seafarers and will look into other social aspects of the industry on the basis of information from member States and industry”.