EUROPEAN SEA PORTS ORGANISATION ASBL / VZW
ORGANISATION DES PORTS MARITIMES EUROPEENS ASBL / VZW

EU Ports Policy Review

Statement following the Public Hearing held by DG Move on 18 January 2013

30 January 2013

1. General position

In our response to the 2011 Transport White Paper, we already confirmed the readiness of ESPO to contribute to the review of ports policy. The Commission's current policy is based on the 'Ports Policy Communication' that was issued in 2007, following the withdrawal of the Port Services' Directive. For us, this Communication still forms a good framework for action, one which was based on extensive stakeholder consultation.

The main added value of the review would lie in the elaboration of the Communication chapter that deals with 'A level playing field – clarity for investors, operators and users'. In providing more legal certainty through guidance on the application of Treaty rules with regard to financing, awarding of contracts and provision of services, the Commission could support the already successful development of EU ports. This would complement its policy on port infrastructure, which is part of the Trans-European Transport Networks (TEN-T).

The 2007 Communication essentially proposed non-legislative measures and instruments. We believe that future action from the Commission should continue to favour this approach as much as possible, as it matches best with the diversity of European ports and is proportional to the already competitive nature of the sector. Previous experience with ports policy has illustrated clearly that a 'one size fits all' regulatory approach does not work. Enhanced legal certainty through guidance and transparency measures can be combined with case-led action where manifest problems exist. In addition, the Commission should stimulate industry best practice and self-regulation. This approach would also correspond with one of the main findings of the Commission's own business survey, which indicated that 70 to 80% of the respondents do not see any major issues for services provided in European ports. Port authorities and service providers have furthermore continued to invest in new facilities to allow the growth of the European economy. A good example are the major new container terminals that are in the process of becoming operational in the course of this year.

The Commission however seems to imply that the approach set out the in the 2007 Communication did not work. We would rather argue that this approach has never been given a proper chance, as the following examples illustrate:

- although they were formally announced for 2008 and very much demanded by the sector, the Commission failed to produce state aid guidelines for ports;

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- our initiative to produce a practical toolbox on the use of terminal contracts was put on hold because the Commission came up with a horizontal legislative proposal on concessions;
- social partners encountered substantial delay in setting up a sectoral dialogue on ports.

Our consistent message since the 2007 communication has been to emphasis the value of non-legislative action. Given that this approach has not been made to work yet, we do not see a reason to change that message. We are therefore skeptical about the Commission's intention to produce a legislative proposal covering market access, transparency and port charges.

This statement follows the structure of the working document that the Commission has produced for the hearing of 18 January 2013. It first deals with the main challenges and then with the possible measures that could be taken at European level.

2. Main challenges

The Commission states that further efficiency development of the gateway function of ports will require (a) better connections with the hinterland, (b) improvement of the use of existing capacities by increasing port performance and (c) provision of new port infrastructure.

We would certainly agree with the first and last points and we fully share the view that the TEN-T proposals have the potential to improve hinterland connections and port infrastructure, provided of course that the necessary budget will be made available and that adequate co-funding rates are provided for port-related projects.

We also agree that further simplification of administrative procedures in ports and the creation of a single market for short sea shipping is vital. This is why we for instance fully support the Blue Belt concept.

We however do not see convincing evidence that there would be significant overall problems with the performance and, more specifically, the efficiency of European ports. The Commission nevertheless implies that there would be many unjustified market entry barriers or unclear rules governing the provision of services that would handicap modernisation of ports, investment flows and creation of new businesses and employment. But the initial results of the Commission's first stakeholder survey point on the contrary at a high degree of satisfaction with the performance of ports. Whilst particular problems may exist, these mainly appear to be of a local and specific nature. It should furthermore be taken into account that port authorities and service providers have a strong incentive in improving efficiency of existing capacity because new capacity is difficult to generate.

We in any case fail to understand why issues like separation of statutory and commercial activities, transparency of port charges and coordination of public investments are highlighted as major regulatory challenges. The Commission is however right in saying that transparency in the use of public funds and the need for a level playing field for inter-port competition is a repeated concern for all stakeholders. But this is precisely the issue where the Commission itself has so far failed to deliver, i.e. the State aid guidelines that were promised in the 2007 Ports Policy Communication.

3. Possible measures

In our recent manifesto *The Renaissance of Port Management and Policy*, we made a plea as ESPO for a fundamental revision of the traditional role of port authorities. Their basic functions, such as conservation of port land and regulation of nautical safety, need to be developed pro-actively in a wider portfolio of tasks that add value to the wider port community, the logistics chain, business in general and the societal and environmental context in which ports operate. Port authorities essentially have to become dynamic port developers and policy-makers, including the EU, need to give them the necessary means and tools to perform this role.

A renaissance of port management requires first of all a change of management culture among port authorities themselves, one that combines a dynamic business policy with good corporate governance and transparency, both within and beyond the port area. Secondly, it needs responsible governments to devise frameworks that guarantee and legitimate autonomous port management, removing all bottlenecks where necessary. Finally, it requires an adequate European ports policy. We believe that the European Union indeed has the potential to be a positive force in establishing a renaissance of port management and policy, by ensuring a level playing field and legal certainty on the one hand and removing any impediments to growth and development of ports on the other hand. Strong and well-performing port authorities will unmistakably contribute to the ambition of Europe to establish a competitive and resource-efficient transport system. For ESPO, any forthcoming measures should comply with this target.

3.1. Fair market access

It is clear that the principle of freedom to provide services should apply to the port sector. At the same time, the Commission is right in pointing out that there may be objective reasons to limit the number of suppliers within a port, such as scarcity of port space or reasons of public interest linked to safety, environment, security or nautical accessibility.

These reasons may warrant the granting of exclusive or special rights to one or a limited number of service providers. In such cases, using open, transparent and non-discriminatory procedures could be beneficial, provided the following pragmatic approach is followed:

- port authorities must have discretionary powers in setting the selection criteria, so that service providers can be chosen which are compatible with the port authority's strategic development plan;
- open selection procedures must only apply where they matter, i.e. where there is sufficient connection with the functioning of the internal market;
- contract durations have to be limited and proportional, allowing a reasonable return on investments, but maintaining at the same time a risk inherent in exploitation;
- incumbent service providers should not have an unconditional and automatic right of contract prolongation, but if an incumbent service provider is performing well and commits itself to continued investments, there should be scope for prolonging its agreement with the port authority.

In addition, a port authority should retain the freedom to opt for direct in-house provision if the best value can be obtained from this choice. It should also have the possibility to grant contracts and agreements in a direct award procedure, whenever this is justified by the strategic development needs of the port.

To improve legal certainty, any measures on market access must in any case be consistent with established competition rules that apply within the European Union. Existing procedures identify the relevant market on a case-by-case basis, taking into account products and services offered as well as geographical considerations. In some circumstances, a port may constitute a market in itself, but in others the relevant market to which access should be allowed may cover a number of competing ports.

The above principles could easily be developed further through guidance and self-regulation. In ESPO, we already made substantial progress in this sense with the development of a guide of good practice. This guide is meant to be a toolbox to support port authorities in optimally using terminal agreements as governance tools. It will guide port authorities through the entire awarding process of seaport terminals, from selection and design of the awarding process to the materialisation of the agreement in a contract. From a practical point of view, the guide will provide a number of recommendations and examples of good practice to serve the interest of port managers in their search for a more valuable use of terminal agreements. The guide is also aimed to disseminate lessons learnt from experience, warning port authorities about potential pitfalls in the award of agreements. The guide of good practice will be a dynamic tool, to be updated periodically to incorporate new materials and innovative practices.

We are however concerned as to how this pragmatic approach would match with the heavy-handed provisions of the Directive proposal on the awarding of concessions, which is currently being discussed in Parliament and Council. Although land-related contracts will probably be excluded from the scope of the Directive, it is not clear in the end which services would be covered by which instrument and to what extent.

3.2. Avoid abuses by internal (public) operators or operators with exclusive / special rights

We welcome the fact that the Commission recognises the basic right for public authorities – in casu port authorities – to decide to operate themselves, or to entrust public undertakings that they control to operate certain port services, without having recourse to open tendering procedures.

It is however not clear to what extent the principle of ‘confinement’ would prevent port authorities from pursuing activities beyond the perimeter of the port(s) under their control or engage in public-private partnerships. More and more port authorities are indeed developing networks into the hinterland, with other seaports, inland ports, dry ports and logistics zones, and are often co-owners or shareholders in service providing companies, such as icebreaking, port community systems, stevedoring companies etc.

3.3. Administrative simplification and intra-port coordination

Reduction of red tape is one of the main areas in the port sector where further improvements can be made. Although port authorities can and indeed already play a pivotal role in bringing

local authorities and stakeholders together through existing port users' committees or administrative action plans, it has to be recognised that these can only be supplementary measures which should be left to the initiative of port authorities themselves, rather than being artificially imposed. This would only add to more bureaucracy.

Given that a considerable amount of administrative bureaucracy in ports is the result of EU legislative requirements, be it in the field of customs, phyto-sanitary controls, security etc., the Commission should find real gains in better implementation and coordination of its own regulatory framework, ensuring a level playing field between Member States. In addition, the Commission should step up the creation of a true internal market for shipping and support the development of port community systems through initiatives such as e-Maritime.

3.4. Financial transparency of public funding

An important distinction must be made between transparency of public funding and transparency of the different activities pursued by a port authority.

We have consistently supported the idea of extending the provisions of the Directive on financial transparency of public undertakings (currently Directive 2006/111/EC) to TEN-T ports.

We however do not support the proposed requirement for port authorities to separate accounts in order to enable the identification of financial flows linked to provision of port services and those linked to the port authority's infrastructure management and regulatory functions. Let alone the fact that such separation would do injustice to the interrelatedness of these financial flows, we fail to see the need to impose such separation if no public funding is involved, i.e. funding other than that generated by the port authority itself. Port authorities have generally three sources of own generated income: port dues, land lease or concession fees and service charges. The possibility to cross-subsidise between these income sources is essential to achieve the overall objective of the port authority, which is to administer, maintain and commercially exploit the port area in a safe and sustainable manner, including investments to safeguard its competitiveness. In that sense, all activities of the port authority are interrelated and serve the overall quality of the total 'port product'. The total income (from port dues, land lease and services) is used to finance the total expenditure.

Any potential abuses by port authorities in their role as service providers that would lead to unfair competition can adequately be monitored by national competition authorities. We would in any case strongly oppose the idea of a functional and/or legal separation between statutory functions and commercial activities. Whilst such a measure may be useful to deal with national monopoly structures in sectors as railways, telecommunication and energy, the competitive landscape in the port sector offers much more choice for port users. Apart from the practical difficulties in separating statutory functions and commercial activities (which are often mixed), imposing a functional and/or legal separation would be totally disproportional.

3.5. Port infrastructure charging

For reasons which are not entirely clear, the Commission seems to restrict 'port charges' to 'port dues', i.e. charges for the general use of port infrastructure. These are in most cases

charged to the ship, but in some cases also to the cargo owner or receiver. The main diversity of these dues lies in their legal nature, which is quite often determined nationally: port dues can be taxes, retributions or prices.

We are very skeptical about imposing a common charging system for European ports. If the Commission would want to introduce common principles on port dues, or port charges generally, it would first of all need to ensure that Member States remove port charges from any fiscal status (de-taxation). Secondly, the Commission should ensure that Member States provide port authorities with effective financial autonomy. Although the Commission indeed says that port authorities should be in a position to set the structure and level of port charges, this is not the case in all European ports today.

Assuming that the Commission has indeed the competence to achieve these two important pre-conditions, a number of common principles could eventually be considered. We however believe that a dominant focus on cost-relatedness is not an appropriate basis. Where port authorities have the autonomy to set the structure and level of port charges, these are in practice established in relation to the economic value that the service or facilities represent. In addition to cost, two other elements play an even more important role: the competitive landscape, i.e. the pricing policy of competing ports, and the economic strategy of the port authority.

If port authorities would be obliged to make port charges exclusively cost-related, the following problems would typically emerge:

- How far should the principle of cost-relatedness go? If this means proportionality of cost to the related investment, one has to understand that a port authority is not making the same costs for each type of ship and that each ship is not benefiting in the same way of the costs made. A good example is dredging: is a port authority decides to dredge a fairway to 15m, a ship with a draught of 13m can claim that this cost is not relevant since it does not need 15m. But it would be commercially very difficult to charge the dredging cost only to ships with a bigger draught.
- To what extent would a port authority be allowed to include a profit margin and/or overhead costs in these costs?
- A port authority is often making large investments which do not offer an immediate return, e.g. the construction of a dock or a quaywall. A strict cost-relatedness of port charges would imply that these investments should be financed through other means.
- Port charges are often set in a tariff structure which distinguishes between roro, bulk etc., but these cannot always be linked to costs in a straightforward way. At a multipurpose terminal different kinds of ships and goods can for instance be handled. How far should we go in the differentiation and breakdown of costs?
- Port dues are generally levied as consideration for the general access to the port, its overall service and infrastructure use (as opposed to port service charges which are charged for specific services, such as stevedoring, pilotage etc.). Given that these port dues cover many general expenses, it is very difficult to demonstrate direct cost relationships. Moreover, a cost-related approach may lead to discussions with port users who feel that this or that service included in the general ‘port product’ do not apply to them and therefore should not be paid.
- A unilateral cost approach would to a large extent prevent port authorities from deploying a commercial strategy, for instance in attracting new traffics by giving

lower rates or discounts. Such commercial policies are standard practice and should remain possible, as long as they are transparent, do not involve State aid and do not result in dumping. We therefore do not understand why the Commission would qualify commercial rebates to attract traffic from other ports as potentially incompatible with TFEU principles. We would argue that such practices are on the contrary indicators of a healthy competitive landscape.

- Port authorities perform certain public tasks, often imposed by law, which can only be provided under the cost price for reasons of fairness, safety, etc.. This loss of revenue must be compensate through other sources of income, including port dues.

These are but a few reasons why a pure cost-related approach of port charges would be detrimental for port authorities. It has been amply demonstrated in the past (among others through the Commission-funded ATENCO study on port pricing) that a marginal social cost approach for ports may look good in theory, but would not work in practice.

From a user perspective, it should be noted that port charges, and especially port dues, only represent a small element in the total transportation cost. An elaborate common charging system would therefore be disproportional. For the customer who calls a the port, the economic value prevails, i.e. what is he willing to pay for the overall service he gets from that port, taking into account that the market is competitive, that the he has a choice in ports and that this choice is not just a matter of price, but of a much wider package, including the connection of the port to the hinterland, quality of service providers, reliability and efficiency of customs and administrative authorities etc. It would therefore make much more sense to approach port charges from the 'economic value' concept, i.e. what is the customer willing to pay for the overall port product that is represented through the port charges. Both the Commission and national competition authorities have accepted in individual cases that economic value would be a good basis.

In the same spirit, we propose that port authorities would consult port users on a regular (e.g. annual) basis on the level of port charges. This can for instance be done through a port users committee, but also other solutions exist. A port users committee should in any case work as an advisory body which is fully independent from the governance structure of the port authority. Port charges should furthermore be reviewable, a responsibility which can be left to national competition authorities.

Finally, we are convinced that environmental performance rewarding schemes should be left to the discretion of individual port authorities. We continuously stimulate best practice in this respect through the recent ESPO Green Guide and the EcoPorts network of environmental port managers.

3.6. Coordination between ports

We are firmly opposing any system that would be imposing coordination of port investments and port planning at EU level. This should be left to the discretion of port authorities and Member States. Port-related projects that are part of the TEN-T core network corridors, should however be part of the appropriate coordination and governance mechanisms foreseen in the new TEN-T framework. Port authorities should be fully involved in these mechanisms.

3.7. Inland ports

We can understand why the Commission would first want to carry out an ad-hoc investigation on the particular features of inland ports before making them part of the overall policy framework for ports. At the same time, inland ports are in the process of being fully integrated in TEN-T core and comprehensive network, so there should be no a priori reason to exempt them from competition and internal market rules.

3.8. Issues related to port labour

Individual ESPO members that are employing dock workers or are otherwise involved in collective agreements between port employers and dockers' unions, will be participating in the employers' delegation to the European Social Dialogue Committee for Ports. Unfortunately, the set-up of this committee has encountered considerable delay and will only become operational in 2013. The success of social dialogue, whether at local, national or European level, is based on mutual trust. Building trust takes time, which is why it would be advisable to focus the initial agenda of the European social dialogue on health and safety as well as training and qualification issues, including the development of minimum qualification principles.

The study on port labour regimes and practices that was commissioned by DG Move will no doubt be a good basis for discussion on more delicate matters, but it will take considerable time to find solutions on those through the European social dialogue, especially since regimes and practices differ a lot from country to country, and even from port to port. Difficult as this debate will be, we nevertheless believe that one basic principle should prevail, which is the right for service providers in ports to have full freedom to engage qualified personnel of their own choice and to employ them under conditions required by the service, provided all applicable social and safety legislation is respected.

3.9. Scope and monitoring

An EU policy framework for ports should, in the interest of a level playing field, generally apply to all ports, at least to those that are in the TEN-T core and comprehensive network. A lot depends on the actual measures that will be proposed, but we do not see any priori reason to distinguish between these two layers.

It is not clear what the Commission exactly means with 'improved information availability' at European level for policy makers and port operators. As ESPO, we have in any case demonstrated our willingness to contribute to a culture of transparency on the organisation and performance of the port sector, notably through its 'Fact-Finding Report' on port governance and the coordination of the PPRISM project on port performance indicators. Both projects are continued and ESPO will continue to develop and participate in other sector-led initiatives in this field. The Commission is very much encouraged to both morally and financially support such projects.