
The European Port Services Directive: the good or the last try?

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1 Background

On 13 October 2004, the European Commission presented a second proposal for an EU Directive on access to the market for port services, for the purpose of liberalising the EU port sector.¹ This new proposal is currently going through the legislative co-decision procedure, according to which the Directive shall only be conclusively adopted if its final (possibly amended) version is approved jointly by the Council of Ministers of the Member States and the European Parliament.² Remarkably, a previous proposal for a Port Services Directive, launched by the Commission in 2001, was rejected by the European Parliament at the end of 2003 following a political campaign that focused mainly on the supposed social repercussions of the self-handling principle for EU dock workers.³ Most interested parties had not expected the Commission to come forward with a new legislative initiative so soon.

This article provides an overview of the provisions contained in the new proposal and assesses its merits and limitations from a purely legal perspective. It compares the new proposal with the previous version and tries to ascertain which issues it has resolved and, as the case may be, where it gives rise to potential new problems.

2 Outlines of the new proposal

2.1 Introduction

Although the new Directive proposal is more complex – in terms of its individual provisions as well as its overall structure – than the 2001 version, we shall first attempt to provide a brief description of its outlines. We shall also point out similarities and differences with earlier versions, especially the initial Commission proposal of 2001⁴ and the political compromise contained in the 2003 conciliation draft,⁵ which was unsuccessfully submitted to the European Parliament.⁶

¹ Commission Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services COM (2004) 0654 final, COD 2004/0240.

² Article 251 EC Treaty.

³ For a commentary, see E Van Hooydonk 'Prospects after the Rejection of the European Port Services Directive' [2004] *Il diritto marittimo* 851–73.

⁴ Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services COM (2001) 35 final, COD 2001/0047 [2001] OJ C154 E/290.

⁵ Joint text approved by the Conciliation Committee (Brussels 22 October 2003) (2001/0047 COD C5–0461/2003 PE–CONS 3670/03).

⁶ In its Explanatory Memorandum (hereinafter EM), the Commission acknowledges that its new text is based both on its original 2001 proposal and the 2002 amended proposal, as well as numerous constructive amendments brought forward by the European Parliament's two Readings, the Council's Common Position and Conciliation texts. For a

2.2 Objective, scope and other introductory provisions

In essence, the *objective* of the Directive proposal has remained unchanged. It is defined as the application to Community⁷ providers of port services of freedom to provide port services in seaports⁸ (Article 1 (1)). However, this freedom may be subject to a port's or port system's constraints relating to available space or capacity, maritime traffic-related safety, security or the development policy of the port in compliance with requirements in respect of safety, environmental protection and public service obligations. Services relating to waterway access

detailed analysis of the various drafts and amendments up until the second reading in the European Parliament as well as an overview of primary EU law relevant to ports, see E Van Hooydonk 'The regime of port authorities under European law including an analysis of the Port Services Directive' in E Van Hooydonk (ed) *European Seaports Law. EU Law of Ports and Port Services and the Ports Package* (Maklu Antwerp/Apeldoorn 2003) (hereinafter Van Hooydonk (ed) *European Seaports Law*) 79–185; E Van Hooydonk 'The regime of port authorities under European Law Including an Analysis of the Port Services Directive' in L Delwaide (ed) *Liber amicorum R. Roland* (Larcier Brussels 2003) 467–570. On general EU seaports law, see Ph Corruble 'Le droit communautaire de la concurrence appliqué aux ports européens' *Droit maritime français* [2002] 68–83 and 160–85; Ph Corruble and R Rézenthel 'La gestion des ports maritimes sous le contrôle des autorités de concurrence' *Droit maritime français* [2002] 664–74; D Hickey 'Application of European Competition Laws to European Ports and Port Operators' in European Institute of Maritime and Transport Law (University of Antwerp) *Shipping Law Faces Europe: European Policy, Competition and Environment* (Maklu Antwerp 1995) 231–243; M-Y Le Garrec and J-M Pietri 'Les concessions d'installations portuaires octroyées aux Chambres de commerce et d'industrie au regard du droit communautaire' *Droit maritime français* [2002] 655–63; AWH Meij and H Nyssens 'State Intervention in Port-related Services: A Bird's Eye View' *Il diritto marittimo* [2001] 72–89; V Power 'European Union Competition Law and Sea Ports' *Il diritto marittimo* [2001] 90–115; V Power 'European Union Seaports Law: The General Principles of European Union Law' in Van Hooydonk (ed) *European Seaports Law* 17–78; H-J Rabe 'EU-Kompetenzen im Gebiet der Seehäfen und Seeverkehrs-Infrastruktur im Überblick' in R Lagoni (ed) *Beiträge zum deutschen und europäischen Seehafenrecht* (LIT Münster/Hamburg/London 2001) 95–104; R Rézenthel 'Le droit portuaire français face au droit communautaire' in Van Hooydonk (ed) *European Seaports Law* 275–83; Ph Ruttlely 'Sea Ports and EC Law' *European Transport Law* [1995] 821–36; PJ Slot and A Skudder 'The Legal Regime of Ports and Airports under Community Law' *Tijdschrift Vervoer & Recht* [2000] 1–9; G Straetmans and S Lavrijssen 'Toepassing van de mededingingsregels op havenwerkzaamheden. Enkele recente tendensen' in *Liber amicorum Hubert Libert* (Maklu Antwerp 1999) 331–51; E Van Hooydonk *Beginselen van havenbestuursrecht* (Die Keure Bruges 1996) 173–203 no 87 and 442–83 no 164; E Van Hooydonk 'Het onderscheid tussen havendiensten in het mededingingsrecht' *obs. under Court of Appeal Antwerp 7 June 1999* [2000–01] *Algemeen Juridisch Tijdschrift* 7–10. On technical-nautical services, see SM Carbone and F Munari 'Port Services Ancillary to Navigation Between Market and Safety Requirements' *LMCLQ* [1996] 67–92; SM Carbone and F Munari 'The Regime of Technical-Nautical Services (Pilotage, Towage, Mooringmen) under European Law' in Van Hooydonk (ed) *European Seaports Law* 187–206; T Lechner 'Wettbewerb und EG-Freiheiten im Bereich der technisch-nautischen Dienste' in R Lagoni (ed) *Beiträge zum deutschen und europäischen Seehafenrecht* (LIT Münster/Hamburg/London 2001) 147–54; M-Y Le Garrec 'Réflexion sur la réglementation applicable à un service de remorquage portuaire objet d'une consultation européenne' *Droit maritime français* [2003] 341–49; A Le Monnier de Gouville 'Les services nautiques portuaires confrontés au droit communautaire de la concurrence' *Droit maritime français* [2003] 86–99. Other interesting studies on European aspects of seaports law include: CI Chlomodis and AA Pallis *European Union Port Policy* (Edward Elgar Cheltenham UK/Northampton MA 2002) 231; A Le Monnier de Gouville 'Les redevances portuaires saisies par le droit communautaire' *Droit maritime français* [2003] 607–16; G Mattei-Dawance 'Les ports dans le contexte européen' *Droit maritime français* [1990] 350–80; G Migliorino 'Current status of ports competition in Southern Europe' *Il diritto marittimo* [2001] 116–24; E Orrù *La disciplina dei servizi portuali negli stati membri dell'Unione Europea* (Libreria Bonomo Editrice Bologna 2005) 320; R Rézenthel 'Les régimes portuaires et le droit de la concurrence' in E Gouvernal, M Guilbault and C Rizet (coord) *Politiques de transport et compétitivité* (Hermes Paris 1997) 107–25; A-M Van den Bossche 'The Regime of Stevedores, Terminal Operators and Harbour Workers under European Law' in Van Hooydonk, (ed) *European Seaports Law* 207–28; E Van Hooydonk 'Juridische vestigingsfactoren voor goederenbehandelaars in zeehavens en het statuut van "dedicated terminals"' in E Van Hooydonk (ed) *Stouwers, naties en terminal operators. Het gewijzigde juridische landschap* (Maklu Antwerp/Apeldoorn 2003) (11) 47 et seq nos 26 et seq.

⁷ See below, para 3.5.2.1.

⁸ The legal basis of the Directive proposal is arts 49, 51 and in particular 80 (2) EC Treaty. This is also in accordance with the 2001 proposal. Introductory Recital (hereinafter IR) (2) also refers to Regulations (EEC) Nos. 4055/86 (maritime transport) and 3577/92 (maritime cabotage) and the ensuing recital adds that port services are essential to the proper functioning of maritime transport, since they make an essential contribution to the efficient use of maritime transport infrastructure. IR (4) recalls the Commission's Green Paper of December 1997 on Seaports and Maritime Infrastructure COM (1997) 678 final. These recitals also formed part of the 2001 and 2003 versions. On the legal basis, see further Van Hooydonk in Van Hooydonk (ed) (n 6) no 31 fn 219.

to and from the port or port system may equally be subject to specific safety constraints (Article 1 (2)). Providers of port services, and self-handlers, shall have non-discriminatory access to port infrastructure that is generally accessible, to the extent necessary for them to carry out their activities (Article 1 (3)).

The scope of the new Directive proposal is circumscribed in a twofold respect. First, the Directive shall only apply to the following port service operations, on condition that they are provided against payment for users of the port (Article 2 (1)): the technical-nautical services of pilotage, towage and mooring; all cargo-handling operations (including loading and unloading, stevedoring, stowage, transshipment and other intra-terminal transport) and passenger services (including embarkation and disembarkation). Whether these services are provided inside the port area or on the waterway access to and from the port or port system is not relevant (Article 3 (6)).⁹ Secondly, the Directive shall apply to any seaport or port system located in the territory of a Member State and open to general commercial maritime traffic, provided that the individual port's average annual maritime traffic volume over the previous three years is not less than 1.5 million tonnes of freight and/or 200,000 passengers (Article 2 (2)).¹⁰ Although these thresholds have been lowered as compared to the 2001 proposal,¹¹ the definition of the scope of the Directive has not been substantially altered. As already confirmed in the 2003 conciliation draft, Member States may also apply the Directive to other ports.¹²

The Directive proposal further contains *definitions* of key terms (Article 3). These have not been fundamentally altered since the earlier version either, albeit that a number of definitions have been added, which is partly due to the increased complexity of the Directive. A 'seaport' or 'port' still means an area of land and water made up of such works and equipment as to permit, principally, the reception of ships, their loading and unloading, the storage of goods, the receipt and delivery of these goods, and the embarkation and disembarkation of passengers (Article 3 (1)). A 'provider of port services' or 'service provider' means any natural or legal person providing, or wishing to provide, for remuneration, one or more categories of port services (Article 3 (7)). Other important definitions will be discussed below together with the material provisions to which they are relevant.

The Directive formulates two politically important reservations relating to *social protection* and *safety, security and environmental protection*. First, the Directive shall in no way affect the application of the social legislation of Member States, including relevant national rules on health, safety and employment of personnel. Social standards must not be below those laid

⁹ For a further discussion of the port services concerned, see Van Hooydonk in Van Hooydonk (ed) (n 6) no 41; in respect of services provided on access routes, see also arts 1 (2) and 3 (2) of the Directive proposal as well as Van Hooydonk in Van Hooydonk (ed) (n 6) no 46. Member States may exclude from the scope of the Directive services to which art 296 EC Treaty applies, or which are declared secret or the execution of which must be accompanied by special security measures in accordance with the laws, regulations or administrative provisions in force in the Member State concerned or when the protection of the basic interests of the State's security so requires (art 2 (8)). This exception may, for example, apply to the loading and unloading of military equipment and supplies in port areas (see also Van Hooydonk in Van Hooydonk (ed) (n 6) no 45).

¹⁰ For this purpose, and if applicable, Member States may decide that traffic in parts of a port that are not open to general commercial traffic will not be taken into consideration (art 2(2)). Member States may exclude ports with a high seasonal character from the scope of the Directive on condition that they are satisfied that an adequate level of market access for port services is ensured (art 2 (5); see Van Hooydonk in Van Hooydonk (ed) (n 6) no 44. Where a port reaches only one of the two traffic thresholds without reaching the other, the Directive shall only apply to the traffic threshold which is reached (art 2 (3)). The Commission shall publish for information, in the Official Journal and on the basis of information provided by Member States, a list of the ports and port systems to which the Directive will apply (art 2 (6)). For a critical discussion of the system of thresholds, see Van Hooydonk in Van Hooydonk (ed) (n 6) no 43.

¹¹ The traffic thresholds are the same as under the 2003 conciliation draft and correspond with those for category A seaports under Decision 1692/96/EC of the European Parliament and of the Council of 23 July 1996 on Community Guidelines for the Development of the Trans-European Transport Network [1996] OJ L228/1 as amended by Decision 1346/2001/EC [2001] OJ L185/1.

¹² Article 2 (4).

down by applicable Community legislation (Article 4). This wording signifies a clear reinforcement of social concerns as compared to the initial 2001 proposal, and it is inspired by the 2003 conciliation draft compromise.¹³ Secondly, the Directive states that it in no way affects the rights and obligations of Member States in respect of law and order, safety and security at ports, as well as environmental protection (Article 5).¹⁴ The reference to security issues is new and relates to international and EU developments after 9/11.¹⁵

In line with the initial 2001 proposal, the new version is without prejudice to existing EU rules on *public procurement*¹⁶ and on the *mutual recognition of professional education and training*, in particular where Member States issue authorisations based on a provider's professional qualifications (Article 6).

2.3 *Obligation to obtain an authorisation*

After the aforementioned introductory provisions, the Directive proposal lays down a first basic principle which relates to *authorisations* for service providers. An 'authorisation' means any permission, including a contract, allowing a natural or legal person to provide one or more categories of port services or to carry out self-handling (Article 3 (12)). This definition is identical to the corresponding one contained in the 2001 proposal. It may be assumed to include land leases, concessions of the public domain and service concessions, but not sales of lands and buildings in the port area.¹⁷ In our view, authorisations within the meaning of the proposed Directive cannot be granted to service providers as such; a separate authorisation would be required for each of the port services, quays or terminals concerned.

No later than 18 months¹⁸ after the date for transposition of the Directive,¹⁹ all providers of port services in a port *shall* operate on the basis of an authorisation granted by the competent authority,²⁰ within the maximum durations foreseen in the Directive²¹ (Article 7 (1)). In other words, authorisations for service providers become mandatory. Under the previous versions, the introduction of a requirement to obtain an authorisation was optional for Member States. According to the Explanatory Memorandum preceding the new Directive proposal, the Commission wishes to reconcile the need to allow efficient and effective access of competent port service providers with the need to ensure proper management of a port with its inherent

¹³ Van Hooydonk in Van Hooydonk (ed) (n 6) no 74; see further text at paras 3.4 and 3.5.2.4.

¹⁴ Van Hooydonk in Van Hooydonk (ed) (n 6) no 73.

¹⁵ R Asariotis 'Container Security: Major Initiatives And Related International Developments: New UNCTAD Report Published' JIML [2004] 201-3; Ph Boisson 'La sûreté des navires et la prévention des actes de terrorisme dans le domaine maritime' Droit maritime français [2003] 723-36; ZO Özçayır 'The ISPS Code' JIML [2003] 578-82; V Power 'The Proposed EC Port Security Directive' JIML [2004] 190-93; E Van Hooydonk 'Juridische aspecten van de financiering van havenbeveiliging' in F Witlox (ed) *Beveiliging in het vrachtvervoer. Mythe, macht of noodzaak?* (Garant Antwerp/Apeldoorn 2005) (forthcoming).

¹⁶ Where one of the Directives on public procurement already requires a contract to be tendered, it will be those Directives rather than the Port Services Directive that determine the manner in which this should be done (see art 6 (2), EM p 8 and IR (16)). The Directives mentioned in the proposal will be superseded by Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts [2004] OJ L134/114. Article 80 of the latter Directive obliges Member States to bring into force the laws, regulations and administrative provisions necessary to comply with it no later than 31 January 2006. From that date, art 82 repeals Directive 92/50/EEC, except for art 41 thereof, and Directives 93/36/EEC and 93/37/EEC.

¹⁷ Compare further Van Hooydonk in Van Hooydonk (ed) (n 6) no 49.

¹⁸ Erroneously, the Explanatory Memorandum mentions a period of 12 months (EM p 7 and 8).

¹⁹ See below, para 2.13.

²⁰ 'Competent authority or authorities' means a body designated by Member States which, whether or not in conjunction with other activities, has as its objective under national law or regulations the implementation of the Directive. It may consist of several separate bodies or be responsible for more than one port (art 3 (15)). This or these authorities may be public or private and may be responsible for one or more tasks covered by the Directive (IR (12)).

²¹ See below, para 2.8.

constraints as well as to ensure a satisfactory level of professional qualifications. As will be discussed below, this fundamental provision deserved a more thorough justification on the part of the Commission.²²

If the competent authority so decides, or if an existing and/or new potential service provider so requests, the specific objective *selection procedure* described in the Directive shall apply to the granting of the authorisation (Article 7 (2)). This also deviates from the earlier drafts, where the objective selection procedure only had to be followed in the case of a limitation of the number of service providers.²³

The *criteria* for the granting of authorisations by the competent authority must be transparent, non-discriminatory, objective, relevant and proportional. The criteria shall only relate, where applicable, to:²⁴

- (a) the professional qualifications of the service provider and of his personnel, his sound financial situation and sufficient insurance cover,
- (b) maritime safety or the safety and security of the port or access to it, its installations, equipment and persons,
- (c) compliance with employment and social rules, including those laid down in collective agreements, provided that they are compatible with Community law. In any case, those minimal rules set out in European social law will be respected.
- (d) compliance with local, national and international environmental requirements,
- (e) the development policy of the port.²⁵

The authorisation may include public service requirements relating to safety, regularity, continuity, quality and price and the conditions under which the service may be provided (Article 7 (3)).

To some extent, this last point specifies the general definition of a 'public service requirement' as a requirement adopted by a competent authority in order to secure adequate provision of certain categories of port services (Article 3 (8)).²⁶

The authorisation criteria shall be made public and providers of port services shall be informed in advance of the procedure for obtaining the authorisation. This requirement shall apply equally where an authorisation links the provision of service to an investment in immovable assets (Article 7 (4)).

Similar rules on criteria for the granting of authorisations were already included in the initial 2001 proposal. During the subsequent legislative process, certain amendments were adopted – including those relating to social standards, environmental requirements and the port development policy. Their inclusion in the new proposal therefore does not constitute a novelty.

Pursuant to the new proposal, Member States may adopt *rules on access to the occupation and on the certificates of competence* to be acquired by examination. Additionally, where the required technical professional qualifications include specific local knowledge or experience of local conditions, Member States shall ensure that there exists adequate access to relevant training for applicant service providers under transparent and non-discriminatory conditions, and where appropriate, against payment (Article 7 (5)). The initial proposal from 2001 only

²² See below, para 3.5.1.

²³ For a detailed analysis, see Van Hooydonk in Van Hooydonk (ed) (n 6) no 55 et seq.

²⁴ Apparently, there is no obligation upon competent authorities to introduce or apply all or even any of the criteria permissible under the Directive. The only aim of the Directive is to exclude the application of any *other* criteria than those accepted by the European legislator (Van Hooydonk in Van Hooydonk (ed) (n 6) no 50).

²⁵ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) nos 48 and 50.

²⁶ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 50 as well as the Communication from the Commission – Services of General Interest in Europe (2001/C 17/04) [2001] OJ C17/4 and especially the definition of terms in its Annex II.

provided for the obligation for Member States to ensure adequate training. The new proposal is identical to the 2003 conciliation draft and takes into account concerns about professional qualifications in the port sector as well as the interests of existing service providers such as pilots, who could not reasonably be expected to organise training for their competitors free of charge.²⁷

The provider of port services carrying out the service covered by the authorisation shall have *the right to employ personnel of his own choice* on condition that he fulfils the authorisation criteria laid down in accordance with the above-mentioned provisions and with the legislation of the Member State in which the service provider is providing the services in question, provided that such legislation is compatible with Community law (Article 7 (6)).²⁸

The competent authority shall *vary or revoke an authorisation* where, in a substantial manner,²⁹ the authorisation criteria are not or no longer complied with, or where the Member State's social legislation is not or is no longer complied with (Article 7 (7)). This rule was also included in the 2003 conciliation draft. It seems self-evident that it does not preclude competent authorities from terminating authorisations for other reasons (eg termination of concessions in the general interest or due to non-compliance with minimum throughput clauses).³⁰

2.4 Objective selection procedure

Another fundamental article deals with the transparent and objective *selection procedure*, which must, in certain cases,³¹ be organised by the competent authority using proportionate, non-discriminatory and relevant criteria (Article 8 (1)). A similar selection procedure was already described in the initial proposal from 2001.³²

According to the new proposal, the competent authority shall make public, for the general information of the sectors³³ concerned in the Community, an *invitation* to interested parties to participate in the selection process (Article 8 (2)).³⁴

The competent authority shall ensure that full *documentation* is communicated to interested parties requesting it. The documentation given to potential providers shall include at least authorisation, selection and award criteria, regulatory and organisational conditions for the provision of the service, penalties and the terms governing cancellation in the event of non-compliance and the authorisation period (Article 8 (3)).³⁵ These elements were also provided for in the 2003 conciliation draft.

The Directive proposal further sets out the *minimum interval* of 52 days between the dispatch of the call for proposals and the latest date for receiving them (Article 8 (4)), and obliges competent authorities to *make their decision public* (Article 8 (5)). The former rule was also part of the 2001 proposal, while the latter was added during the legislative process.

²⁷ Compare IR (18) and Van Hooydonk in Van Hooydonk (ed) (n 6) no 51.

²⁸ See below, para 3.5.2.4.

²⁹ This wording is a potential cause of legal uncertainty.

³⁰ Compare further Van Hooydonk in Van Hooydonk (ed) (n 6) no 53.

³¹ Compare further below, para 3.6.2.

³² Van Hooydonk in Van Hooydonk (ed) (n 6) no 58.

³³ The term 'sectors' is not defined in the proposal.

³⁴ This publication shall be made in the Official Journal of the European Union for authorisations concerning art 12(2)(b) (ie cases involving significant investments in immovable or comparable movable assets and long durations) and for all other authorisations in any appropriate manner which makes the necessary information available in a timely way to any person interested in the process (art 8(2)). Under the 2001 draft, all publications had to be made in the Official Journal, which seemed disproportionate in the case of authorisations of minor importance.

³⁵ Without any doubt, the elements described in art 8 (3) may also be included in the conditions and clauses of authorisations which are granted without an open selection procedure.

In cases where a selection procedure for granting an authorisation fails to yield a suitable service provider for a specific port service, the *managing body of the port* may, under conditions relating to transparency, *reserve the provision of this service for itself* for a period that may not exceed five years, following which a new selection procedure for granting an authorisation shall be launched (Article 8 (6)).³⁶ In itself, this principle reiterates the 2001 draft.³⁷

Where the competent authority carrying out the selection procedure for one or more port services in a specific port is itself a provider of the same or a similar service or wishes to be one or has direct or indirect control over a provider or potential provider of the same or a similar service or services in that port, Member States shall designate a *different and independent competent authority* and entrust it with the selection procedure, or approval or supervision of such procedure (Article 8 (7)). The Commission did not retain the full incompatibility of providing a service and at the same time deciding on procedures and limitations of other service providers, which was contained in its 2001 proposal. However, it did not go so far as to follow the alternative suggested in the 2003 conciliation draft, whereby Member States would merely be obliged to designate an existing body to consider any appeals or complaints against the decisions of a competent authority.³⁸

When an authorisation as a result of a selection procedure is *taken over by another service provider*, the relevant rules on employment of the personnel of the previous service provider shall not be affected. Social standards must not be below those laid down by applicable Community legislation (Article 8 (8)). This is apparently an entirely new provision which again stresses social concerns.³⁹

2.5 Limitations of the number of service providers

Under the 2001 Directive proposal, the existence or not of a *limitation* of the number of service providers had far-reaching consequences for the application of the Directive's individual provisions. The articles on the conditions for the introduction of limitations, the objective selection procedure and the limitation of the duration of authorisations would only have applied in the case of a limitation within the meaning of the Directive. In all other cases, these basic rules simply would not have applied. It was therefore of the utmost importance to know what the term 'limitation' meant exactly and when it would have applied.⁴⁰ The new Directive proposal retains the limitation concept but takes a fundamentally different line as to its significance to the Directive's normative structure. The concept has lost its trigger function for the application of the selection procedure and duration provisions and instead has become the criterion for determining whether or not and for how long existing authorisations may remain in force after the transposition of the Directive into domestic law.

A 'limitation of the number of providers' is still *defined* as a situation in which the competent authority does not allow a provider fulfilling the criteria for authorisation laid down in accordance with the Directive to provide one or more categories of services. This may only be done for reasons or constraints relating to available space or capacity, safety considerations or

³⁶ The new proposal adds that the managing body of the port shall be compensated by the newly selected service provider for all relevant investments it made during this period, which have not yet been fully amortised and which the newly selected service provider takes over, taking into account the overall economic balance of the service provided during the previous period, according to clear and pre-established criteria (art 8 (6)).

³⁷ Compare further Van Hooydonk in Van Hooydonk (ed) (n 6) no 60.

³⁸ Van Hooydonk in Van Hooydonk (ed) (n 6) no 59.

³⁹ Compare further below, para 3.6.6.

⁴⁰ For a detailed discussion of the (in)appropriateness of the limitation concept, see Van Hooydonk in Van Hooydonk (ed) (n 6) no 55.

requirements deriving from environmental regulations (Article 3 (13)). These principles have not been altered since the 2003 conciliation draft.⁴¹

Further (Article 9 (1)), Member States shall ensure that, in the case of a limitation of the number of providers, the competent authority must:

- (a) *inform interested parties* of the category or categories of port services and, where appropriate, the specific part of the port to which the restrictions apply as well as the reasons for such restrictions;
- (b) *allow the highest number of service providers* appropriate under the circumstances.

These provisions have remained unaltered since the initial 2001 proposal.

The competent authority may, if appropriate, determine the *range of commercial activities* to be carried out in the port or parts of the port, in particular the categories of cargo to be handled, and the allocation of port space or capacity to such activities, pursuant to the published development policy of the port, without this constituting a limitation of the number of providers (Article 9 (2)). This important provision was also part of the 2003 conciliation draft.

Where the competent authority deciding on limitations in relation to one or more port services in a specific port is itself a provider of the same or a similar service or services, or has direct or indirect control over a provider of the same or a similar service or services in that port, Member States shall designate a *different and independent competent authority* and entrust it with the decision on limitations, or approval or supervision of such decision (Article 9 (3)). As indicated above, a similar provision applies to the selection procedure.⁴²

2.6 Granting of authorisations

Where the new Directive becomes particularly intricate, and deviates fundamentally from the internal logic of the earlier drafts, is in its provisions on the granting of authorisations.

Where limitations appear later than 18 months after the date for transposition of the Directive, for one or more port services 'and the condition foreseen in Article 7 (2) has been fulfilled', *all existing authorisations* for this service or services at the moment these limitations appear, *shall remain in force* until they expire (Article 10 (1)). The passage between quotation marks is confusing, as Article 7 (2) to which it refers is not phrased in terms of a 'condition'. Most probably, the 'condition' alluded to is the condition that (all) the existing authorisations for the relevant service or services should be granted after an objective selection procedure. In such a case, all the existing authorisations may remain in force.⁴³

Where, later than 18 months after the transposition period, limitations appear but 'the condition foreseen in Article 7 (2) has not been fulfilled', *all existing authorisations for this service or services shall have to be terminated* and the objective selection procedure provided for in the Directive shall be launched within six months of the date on which the limitation occurred (Article 10 (2)). The preferable interpretation would seem to be that, when at a given moment a limitation of the number of service providers appears, all existing authorisations must be terminated if they were not granted after an objective selection procedure.

⁴¹ IR (20) reads: 'Since ports are made up of limited geographical areas, access to the market may, in certain cases, be subject to constraints relating to space or capacity, traffic-related safety concerns or requirements in accordance with environmental rules. In such cases and in order to ensure the ports' overall efficiency it may therefore be necessary to limit the number of authorised providers of port services whilst public service obligations of a service provider or the managing body of the port as well as environmental rules are respected. The criteria for any limitation should be objective, transparent, non-discriminatory, relevant and proportional'. Whether it should be inferred from this elucidation that limitations should always be expressly based on efficiency needs is unclear.

⁴² See above, para 2.4.

⁴³ See below, paras 3.6.2, 3.6.3 and 3.6.5.

Further, Member States shall enact provisions whereby an existing service provider that is not selected following the objective selection procedure after termination of existing authorisations shall be *compensated* by the newly selected service provider for those past investments which it has made, which have not yet been fully amortised and which the newly selected service provider takes over, taking into account the overall economic balance of service provided during the previous period, according to clear and pre-established criteria (Article 10 (2)).⁴⁴

Existing authorisations which include *rights deriving from ownership of a port or of property in a port* may remain in force unchanged after 18 months have elapsed since the final date for transposition. In this case, the provisions of the Directive on duration 'may not' apply. If however limitations appear after that period for one or more port services, existing authorisations for this service or services, which include rights deriving from ownership of a port or of property in a port, shall remain in force unchanged until they expire, but within the maximum durations laid down in the Directive, which will then start from the end of aforementioned date (Article 10 (3)).⁴⁵ The meaning of this provision would appear to be that even authorisations based on⁴⁶ the ownership rights of a given port service provider can only be kept in force for a limited duration as soon as a limitation occurs.

In view of their rather confused wording and their extreme importance to day-to-day port management and investment decisions, these provisions – which are in their essence transitional measures – will be further discussed below.⁴⁷

2.7 *New ports or new parts of a port*

The new proposal contains a specific article on investments in basic port infrastructure by cargo-handling companies or terminal operators in particular.⁴⁸ A similar provision was included in the 2003 conciliation draft but, here again, the new wording seems far more complicated.⁴⁹ Its aim is to ensure that development of new ports and port facilities is encouraged by the Directive.⁵⁰

Pursuant to the new draft, an investor or investors who commercially financed and jointly built a new port or a new part of a port, including basic infrastructure, prior to the 18 months' transitional period after the final transposition date, and who wish to provide port services, excluding technical-nautical services, therein, *shall be granted a relevant authorisation* within the maximum duration periods provided for in the Directive reckoned from the end of the 18 months' transitional period. In case limitations appear after that date for one or more port services and provided the investment opportunity was generally available, all existing authorisations for this service or services at the moment these limitations appear shall remain in force until they expire (Article 11 (1)).

⁴⁴ See below, para 3.6.13.

⁴⁵ The text reproduced here is a simplification of the cumbersome original wording of art 10 (3), which reads: 'Existing authorisations, which include rights deriving from ownership of a port or of property in a port, may remain in force unchanged after the date foreseen in Article 7 (1). In this case, the provisions of Article 12 may not apply.

If however limitations appear after the date foreseen in Article 7 (1), for one or more port services existing authorisations for this service or services at the moment these limitations appear, which include rights deriving from ownership of a port or of property in a port, shall remain in force unchanged until they expire, but within the periods provided for in Article 12 starting from the date foreseen in Article 7.1'.

⁴⁶ The relevant provision should perhaps have better read 'based upon' instead of 'deriving from'. Furthermore, it is unclear whether the ownership or property of superstructure or equipment may also be relevant.

⁴⁷ See below, paras 3.6.4 and 3.6.5.

⁴⁸ The article does not apply to technical-nautical services (art 11 (4)).

⁴⁹ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 79; see further below, para 3.6.4.

⁵⁰ Compare also IR (45), which rather obscurely adds: 'Any such investment made by a commercial entity in accordance with national rules on acquisition of property should be considered to have been generally available'.

Where, after the 18 months' transitional period, the decision on the construction of a new port or a new part of a port depends on the parallel decision of a future service provider to contract irrevocably for significant investments in that new port or new part of a port, including in basic infrastructure, authorisations are to be granted for a period of time within the limitations on duration set out in the Directive, without any further requirements on that future service provider (Article 11 (2)).

In the event of a *later limitation* of the number of service providers for one or more port services, all existing authorisations for this service or services at the moment these limitations appear, *shall remain in force* until they expire, provided that the investment opportunity was generally available (Article 11 (3)).

2.8 Duration

Under the new Directive proposal – as under the previous drafts⁵¹ – authorisations shall be granted to service providers for a *limited and renewable period of time* to be determined in accordance with the following criteria (Article 12):

1. In cases involving *no investments* which are considered significant by the competent authority in order to carry out the provision of services, the maximum duration of its authorisation shall be *8 years* (under the 2001 proposal, the limit was 5 years; under the 2003 conciliation draft it was 10 years).
2. In cases where investments which are considered *significant* by the competent authority involve:
 - (a) *movable assets*, the maximum period shall be *12 years* (in 2001 the proposed limit was 10 years; under the conciliation draft compromise it was 15 years);
 - (b) *immovable assets* and comparable movable capital assets, such as container bridges, ship-to-shore gantry cranes, bridge unloaders and specialised tugboats,⁵² the maximum period shall be *30 years* (25 years in 2001; 36 in 2003), irrespective of whether or not their ownership will revert to the managing body of the port.

If the investments made by the service provider include both movable and immovable assets, the maximum period shall be the longer of the maximum periods considered (a clarification which was also included in the 2003 conciliation draft).

According to the Commission, the time frames proposed are in line with real general depreciation rules applied in the EU.⁵³

Member States may establish a procedure which allows a service provider who intends to make or irrevocably contract for significant investments in immovable assets *during the last 10 years* before the end of the existing authorisation and who is able to demonstrate that these investments will lead to an improvement in the overall efficiency of the service concerned, to request the competent authority to launch an objective selection procedure in accordance with the Directive for a new authorisation before the authorisation in question expires (Article 12 (3)). A similar although not identical provision was included in the 2003 conciliation draft.⁵⁴

Competent authorities shall *make public*, for the general information of the sectors concerned in the Community, the authorisations which are going to expire, at least six months before their date of expiry (Article 12 (4)). The latter provision is a novelty.

⁵¹ Van Hooydonk in Van Hooydonk (ed) (n 6) no 61 et seq.

⁵² Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 64.

⁵³ EM p 7; see however below, para 3.5.2.5.

⁵⁴ Compare further below, para 3.6.11.

2.9 Self-handling

The politically sensitive concept of *self-handling* was one of the cornerstones of the 2001 proposal.⁵⁵ The fierce debate on the need for self-handling in seaports and its repercussions on dock work, especially in Member States where dock workers must be officially registered, was perhaps the main cause of the rejection of the Directive by the European Parliament in 2003.

Under the new proposal, 'self-handling' refers to 'a situation in which an undertaking (a self-handler), which normally could buy port services, provides for itself, using its own land-based personnel, with the exception of the situation foreseen in Article 13 (2),⁵⁶ and its own equipment, one or more categories of port services in accordance with the criteria set out in this Directive' (Article 3 (9)). Under the latter definition, 'land-based personnel' means persons employed by the self-handler and who are not members of its seafaring crew (Article 3 (10)).⁵⁷ Under the 2001 proposal, self-handling was not restricted to the use of *land-based* personnel. Conversely, under the 2003 conciliation draft, self-handling was limited to the use by the undertaking of its own *sea-faring* crew.

The new proposal provides that Member States shall take the necessary measures to *allow self-handling* to be carried out, wherever possible,⁵⁸ in accordance with this Directive. They shall ensure that the competent authority refuses self-handling for one or more categories of port services only where there exist objective reasons or constraints relating to available space or capacity, safety considerations or requirements deriving from environmental regulations (Article 13 (1)). This provision is similar to the corresponding one agreed upon in the 2003 conciliation draft. Its drift is that self-handling can be refused only in exceptional and well-defined cases.⁵⁹

With regard to cargo-handling operations and passenger services for an authorised regular shipping service⁶⁰ carried out in the context of *Short Sea Shipping and Motorways of the Seas* operations,⁶¹ Member States shall recognise the right to self-handle using also the vessel's regular sea-faring crew (Article 13 (2)). This extension of the scope of self-handling is in itself a novelty.

Under the new proposal, self-handling shall always be *subject to an authorisation*. The criteria for such authorisation must be the same as those applying to providers of the same or a comparable port service and as referred to in the provision on authorisations,⁶² provided these are relevant. Competent authorities shall grant such authorisations to self-handlers in an efficient and expedient manner. They shall remain in force so long as the self-handler complies with the criteria for granting them⁶³ (Article 13 (3)). The initial proposal and the conciliation draft left it to the Member States to decide whether to subject self-handling to an authorisation or not.

⁵⁵ Van Hooydonk in Van Hooydonk (ed) (n 6) no 65 et seq.

⁵⁶ Which refers to Short Sea Shipping and Motorways of the Sea operations.

⁵⁷ As a result of the new wording, international cruise ships would no longer be entitled to carry out on-board checks using their own sea-faring crew (Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 18).

⁵⁸ See below, para 3.6.9.

⁵⁹ EM p 9.

⁶⁰ An 'Authorised Regular Shipping Service' is a regular short-sea service, which operates exclusively between ports situated in the Customs territory of the Community. The service may not come from, go to or call at any ports outside the Community Customs territory (eg in a third country) or a free zone of a port (where the free zone is 'principally' segregated by a fence) in this territory (art 3 (14)).

⁶¹ The proposal contains the following footnote: 'As defined in Decision no 884/2004/EC of the European Parliament and of the Council of 29 April 2004, amending Decision No 1692/96/EC on Community guidelines for the development of the trans-European transport network, OJ L 167, 30.04.2004'.

⁶² See above, para 2.3.

⁶³ As a consequence, art 12 on duration is not applicable.

The Directive shall in no way affect the application of national rules concerning *training requirements and professional qualifications, employment and social matters*, including collective agreements, provided that they are compatible with Community law and the international obligations of the Community and the Member State concerned (Article 13 (4)). This clarification was also made in the 2003 conciliation draft, but in the new proposal an express reference to collective agreements has been added. The initial proposal from 2001 only made a very general reservation with regard to social protection.

Where self-handling is subject to the payment of a fee as a *contribution to public service obligations* for technical-nautical services which cannot be met by self-handlers, the fee shall be determined in accordance with relevant, objective, transparent and non-discriminatory criteria and shall be proportional to the costs of maintaining the public service obligations (Article 13 (5)). Apart from the proportionality condition, which was added, this rule has been adopted literally from the 2003 conciliation draft.

2.10 Pilotage

During the legislative procedure following the 2001 proposal, the question of whether *pilotage*⁶⁴ should come under the scope of the Directive was much debated.⁶⁵ The new proposal considers pilotage to be a service of a commercial nature⁶⁶ and accordingly keeps pilotage within the Directive's scope, but enforces liberalisation in this sector less strictly than for the other port services.⁶⁷ In that, it leans on the 2003 conciliation draft as well.

Under the new proposal, Member States may submit the granting of an authorisation for pilotage to *particularly strict criteria* relating to maritime safety and public service requirements. The competent authorities may also recognise the compulsory nature of pilotage and prescribe such organisational rules for the service as they deem appropriate for reasons of safety and of public service requirements, including, when the circumstances in a port or a group of ports and/or its access so require, the possibility of reserving for themselves the service in question or assigning it, directly if appropriate, to a single provider.⁶⁸ In particular they may require that such service be provided by competent persons meeting equitable and non-discriminatory conditions laid down in national law (Article 14 (1)). In its essence, this wording is identical to the corresponding section in the 2003 conciliation draft. The Commission wishes to allow the adoption of port-specific solutions.⁶⁹

Exemption from compulsory pilotage or the exemption of certain categories of vessel from compulsory pilotage, possibly through pilotage exemption certificates,⁷⁰ shall constitute self-handling. Where such exemptions are subject to special authorisation, the conditions for this authorisation must be appropriate, objective, transparent and non-discriminatory. Member States shall report to the Commission no later than five years following the entry into force of the Directive on measures to improve the effectiveness of pilotage services (Article 14 (2)). Such provisions were not contained in the 2001 proposal, but they were included in the 2003 conciliation draft.

⁶⁴ In our view, the proposed Directive only covers pilotage as such, and not its supporting services to the extent that they are organised separately from the pilotage service.

⁶⁵ Van Hooydonk in Van Hooydonk (ed) (n 6) no 68.

⁶⁶ EM p 5.

⁶⁷ Including towage and mooring, which in several EU ports are subject to comparable market access restrictions, requirements on professional qualifications and conditions of (mandatory) use.

⁶⁸ What will happen if the monopoly turns out not to conform to conditions for the creation and the use of exclusive rights, as set out in case law on the basis of arts 82 and 86 EC Treaty, is unclear.

⁶⁹ EM p 6.

⁷⁰ A 'pilot exemption certificate' means a document issued by the competent authority by which an exemption from or modification of compulsory pilotage is granted (art 3 (11)).

2.11 Appeals

The new Directive proposal almost literally recaptures the 2001 and 2003 provisions on the right of interested parties to *appeal* against the decisions or individual measures taken by competent and port authorities (Article 15 (1)) and to be informed of the *reasons* for not having been authorised or selected (Article 15 (2)). Member States shall take the necessary measures to ensure that decisions taken by appeal bodies are subject to judicial review (Article 15 (3)). Although these provisions may seem somewhat superfluous, they were never considered controversial.⁷¹

2.12 Transparency, state aid and accounting

The initial 2001 proposal already imposed obligations on service providers and port authorities to keep separate accounts. Inspired by the legislative process, especially the 2003 conciliation draft, the new proposal adds rules on transparency of financial relations between ports and Member States and on state aid.⁷² The latter set of rules mainly deals with inter-port competition (between ports), while the other provisions of the Directive primarily focus on intra-port competition (competition between providers of a same port service within a port).⁷³

First, in order to establish fair conditions of competition in and between Community ports, every port and port system falling under the Port Services Directive shall be obliged to submit the details required under the Commission Directive 80/723/EEC of 25 June 1980 on the Transparency of Financial Relations Between Member States and Public Undertakings⁷⁴ to the Member States and the Commission within the prescribed time limits. The same shall apply to financial relations between Member States and providers of port services, regardless of whether the other provisions of Directive 80/723/EEC apply to them (Article 16 (1)). Next, the Commission and the Member States shall use the data submitted by ports and port systems to take the *measures required under Community law* to establish fair conditions of competition in and between Community ports (Article 16 (2)). Not later than three years from the date of entry into force of the Directive and thereafter every three years, the Commission shall submit to the European Parliament and the Council a *report* on the transparency of financial relations in ports and port systems and the measures taken in relation thereto by the Member States and the Commission (Article 16 (3)). Further, the Commission shall draw up, no later than one year from the date of the entry into force of this Directive, common guidelines for funding given to ports by Member States or out of public funds and shall indicate which funding to ports is compatible with the internal market (Article 17).⁷⁵

Selected service providers shall keep *separate accounts* for each port service for which they hold an authorisation. The accounts must be compiled in accordance with current

⁷¹ Van Hooydonk in Van Hooydonk (ed) (n 6) no 72.

⁷² Van Hooydonk in Van Hooydonk (ed) (n 6) no 69 et seq.

⁷³ EM pp 3–4.

⁷⁴ [1980] OJ L195/35; Directive as last amended by Directive 2000/52/EC [2000] OJ L193/75.

⁷⁵ Meanwhile, some guidance on the Commission's approach towards state aid in the seaport sector may be found in the Commission's 2003 Vademecum on Community rules on state aid and the financing of the construction of seaport infrastructures (reproduced in Van Hooydonk (ed) *European Seaports Law* (n 7) 495–528) and in its 2002 and 2004 decisions relating to the Flemish port decree (aid measures N 520/2003 – Belgium and N 438/2002 – Belgium). Compare also the Memorandum to the Commission 'Community guidelines on financing of airports and start-up aid to airlines departing from regional airports' http://europa.eu.int/comm/transport/air/rules/doc/stateaid_consultation/com_2005_en.pdf (18 April 2005). See also Van Hooydonk in Van Hooydonk (ed) (n 6) no 19; Ph Corruble 'Le droit communautaire et le financement des ports' *Droit maritime français* [2002] 274–88; K Heitmann, K 'Staatliche Beihilfen für Seehäfen und Seeverkehrs-Infrastruktur (art 92 EGV)' in R Lagoni (ed) *Beiträge zum deutschen und europäischen Seehafenrecht* (LIT Münster/Hamburg/London 2001) 113–22; J-P Keppenpe 'Les aides d'Etat dans le secteur portuaire' in Van Hooydonk (ed) *European Seaports Law* (n 7) 251–73; Ph Wareham 'State aids' *Il diritto marittimo* [2001] 125–73.

commercial practice and generally recognised accounting principles (Article 18). Where the managing body of the port provides port services, it must fulfil the authorisation criteria set out in the Directive⁷⁶ and keep the accounts of each of its port service activities separate from the accounts of its other activities. The accounts must be compiled in accordance with current commercial practice and generally recognised accounting principles (Article 19 (1)). The auditor's report on the annual accounts must indicate the existence of any financial flows between the port service activity of the managing body of the port and its other activities. The auditor's report must be kept by the Member States and made available to the Commission upon request. A separate auditing report may be considered sufficient provided it includes the same information (Article 19 (2)). The Port Services Directive shall in no way affect the rights and obligations of Member States under the aforementioned Transparency Directive 80/723/EEC (Article 19 (3)).

2.13 Final provisions

The proposed Directive shall in no way affect the rights and obligations of the Member States with regard to the *international status of ports, waterways and maritime zones* (Article 20). This provision had been added to the initial Commission proposal of 2001 and was retained in the 2003 conciliation draft.⁷⁷

The Directive is addressed to the Member States (Article 24). They shall bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by *18 months* from the date of entry into force of the Directive at the latest (Article 22).⁷⁸ The Directive itself would enter into force on the twentieth day following that of its publication in the Official Journal (Article 23).⁷⁹

3 Legal assessment

3.1 The need for a Port Services Directive

As we have argued elsewhere,⁸⁰ the introduction of a specific European Directive on port operations is, in itself, to be applauded. The main reason is that the implications of primary European Community law for the port sector are not always clear to see. The available case law on port services inevitably paints a fragmented picture of the legal status of the port sector under Community law. Moreover, this case law is often intrinsically unclear and in constant evolution. A Directive could fix, codify and complete the jurisprudence in an all-embracing and surveyable set of norms. Ideally, a Directive on ports should provide a comprehensive code of good port managerial practice. This should also incorporate rules that are borrowed from the international legal status of ports and from managerial practice in the Member States and ports that operate transparently and in conformity with market conditions. A general legal instrument on the Community status of seaports could contribute to creating a level playing field for open port competition under normal and equal market conditions, without compromising the operational and commercial autonomy of the ports. For example, it is only normal that all port authorities should be compelled to organise an

⁷⁶ See above, para 2.3.

⁷⁷ Van Hooydonk in Van Hooydonk (ed) (n 6) no 75.

⁷⁸ Under the 2001 proposal, the implementation period was one year; under the 2003 conciliation draft, it was two years.

⁷⁹ Surprisingly, the proposal obliges Member States to send the Commission a report on the application of this Directive within 36 months following its entry into force (art 21 (1)). Only at the expiration of that period does the general obligation to issue authorisations enter into force (see especially art 7 (1)). As a consequence, there will be no time left to assess the application of the Directive in the report. On the basis of the Member States' reports, the Commission shall make an assessment of the implementation by Member States of the Directive (art 21 (2)).

⁸⁰ Van Hooydonk (n 3) 856.

open selection procedure for strategically important terminal contracts. There are no arguments against the introduction of a Directive that imposes this principle throughout Europe. A Directive is also strongly preferable to the sometimes arbitrary case-by-case approach of the Commission. In practice, the European Commission sometimes receives complaints about real or assumed abuses in the port sector, but as far as enforcement is concerned it remains rather constrained. It is not always clear how the Commission decides which complaints to take further. A Directive would contribute towards a more uniform enforcement of European law with cooperation from the Commission and the national courts of law. For all these reasons, the Commission's initial decision in 2001 to put forward a Port Services Directive was entirely justified. Moreover, this conclusion remains valid in relation to the new proposal presented by the Commission in 2004: an EU Port Services Directive could in itself be a very useful instrument for creating more legal certainty for the benefit of port authorities, operators and users alike. However, given the heated discussions on the previous proposal and its final rejection by the European Parliament less than one year before, several interested parties have questioned the timing and deemed it premature to come up with a new Directive proposal. Many had rather expected the Commission to embark on a case-by-case enforcement of the EC Treaty in the port sector.⁸¹

3.2 *Initial responses from the ports and shipping industry*

The new proposal has already met with fundamental criticism both from the EU ports and shipping industry associations, including the European Sea Ports Organisation (ESPO), the Federation of European Private Port Operators (FEPORT), the European Community Shipowners' Associations (ECSA), the European Maritime Pilots' Association (EMPA) and the European Transport Workers' Federation (ETF), and from MEPs, Member States' governments and other political representatives. Many believe that the new proposal was formulated too hastily and that the Commission should have consulted intensively with the sector before venturing forth. Moreover, it is feared that the new draft may compromise legal certainty and commercial confidence, to the detriment of port authorities and commercial service providers alike. Finally, it is expected once more to stir up social unrest in ports and to lower social standards for dock workers and seafarers. As will emerge hereunder, legal scrutiny of the new proposal suggests that many of these concerns are justified.

3.3 *Reiteration of principles contained in the previous proposal*

The new proposal leans heavily on its predecessor from 2001. In its Explanatory Memorandum, the Commission stresses that the key philosophy, principles and objectives have remained the same.⁸² According to the Commission, this approach is justified by the fact that the doctrine of the previous proposal remained intact during the inter-institutional discussions.⁸³ As a matter of fact, the basic concepts and key provisions relating to the scope of the Directive, authorisations, objective selection procedures, self-handling, duration, transparency, neutrality, etc. were retained unchanged. The same applies to the Directive's legal basis – freedom to provide services in the maritime sector⁸⁴ – and its political justification, namely an alleged lack of legal certainty and transparency in the current organisation of port services and the granting of access to the market.⁸⁵ The general framework of the previous draft – which most interested parties eventually supported – was thus left in place.

⁸¹ On the alternative scenarios after the failure of the 2001 draft, see Van Hooydonk (n 3) 861–63.

⁸² EM p 5.

⁸³ EM p 2.

⁸⁴ See above, n 9.

⁸⁵ See below, para 3.5.1.

3.4 Limited concessions to earlier criticism

The willingness of the European Commission to give way to constructive criticism is apparent from its literal adoption of many key provisions of the political compromise laid down in the 2003 conciliation draft. Indeed, it cannot be denied that the new Directive proposal has completely abandoned some unrealistic provisions contained in the Commission's original proposal from 2001 and that instead it relies on alternative or amended rules initiated or found acceptable by stakeholders and a large part of the political world. These concessions include:

- the emphasis on the need for social protection and for the application of national social legislation,⁸⁶ whereby the Commission still denies having overlooked social issues in its previous drafts and even claims that the new Directive will lead to the enhancement of employment in ports;⁸⁷
- the attribution of a more prominent role to safety and security considerations⁸⁸ and public service requirements;⁸⁹
- the repeated reference in the new proposal's provisions and accompanying texts to the need for proper and efficient management of ports,⁹⁰ which is in line with a similar provision contained in the Statute on the International Regime of Maritime Ports;⁹¹
- the deletion of the obligation to appoint at least two service providers for each category of cargo;⁹²
- the limitation of the obligation to publish invitations to interested parties in the Official Journal to cases involving large investments and, accordingly, long durations;⁹³
- the introduction of rules on compensation for existing service providers whose authorisation is terminated before its normal date of expiration;⁹⁴
- the confirmation of the possibility to demand payment for the obligatory provision of training by existing service providers;⁹⁵
- the reference to existing international rules on the organisation of port labour and the regime of maritime ports and waterways, which were completely overlooked in the 2001 proposal,⁹⁶ whereas the Commission now positively invites Member States to ratify International Labour Organisation conventions on dock work;⁹⁷

⁸⁶ For example arts 4, 7 (3) (c), 7 (5), 7 (6), 7 (7), 8 (8) and 13 (4).

⁸⁷ EM p 4.

⁸⁸ For example arts 1 (2), 5, 7 (3) (b), 13 (1) and 14 as well as IR (14) and (37)–(39); cf Van Hooydonk in Van Hooydonk (ed) (n 6) no 38.

⁸⁹ For example arts 1 (2), 3 (8), 7 (3), 13 (5) and 14; cf Van Hooydonk in Van Hooydonk (ed) (n 6) no 39.

⁹⁰ For example EM pp 6–7 and IR (17) relating to mandatory authorisations, and IR (36) relating to self-handling.

⁹¹ Article 3 of the Statute on the International Regime of Maritime Ports (annexed to the Geneva Convention of 9 December 1923 58 LNTS 285) stipulates that it 'in no way restrict[s] the liberty of the competent port authorities to take such measures as they may deem expedient for the proper conduct of the business of the port provided that these measures comply with the principle of equality of treatment'. The rationale was to mark 'nettement la ferme volonté de ne s'ingérer en aucune manière dans l'administration du port que les autorités compétentes doivent pouvoir, dans l'intérêt même du commerce international, conduire à leur guise, du moment que l'égalité effective, prescrite par l'article 2, se trouve respectée' (Deuxième conférence générale des communications et du transit *Comptes rendus et textes relatifs à la Convention et au Statut sur le régime international des ports maritimes* (Société des Nations Paris 1923) 92).

⁹² Van Hooydonk in Van Hooydonk (ed) (n 6) no 57.

⁹³ Article 8 (2). This provision presupposes that a competent authority is able to assess in advance the extent of investments involved.

⁹⁴ Article 10 (2) and Van Hooydonk in Van Hooydonk (ed) (n 6) no 80.

⁹⁵ Article 7 (5) and Van Hooydonk in Van Hooydonk (ed) (n 6) no 51.

⁹⁶ Article 20, as well as Van Hooydonk in Van Hooydonk (ed) (n 6) no 37 and Van Hooydonk (n 3) 859.

⁹⁷ EM p 4. The Commission expressly refers to ILO Convention C 137 of 1973 on Dock Work, ILO Convention C 152 of 1979 on Occupational Safety and Health (Dock Work) and ILO Convention C 145 of 1976 on Continuity of Employment (Seafarers).

- the (limited) extension of the maximum duration periods for authorisations (at least in comparison to the initial Directive proposal);⁹⁸
- the recognition of the importance of investments in movable assets which are comparable to immovable assets in relation to the duration of authorisations;⁹⁹
- the acknowledgement of the maritime safety-related aspects of pilotage and the less strict enforcement of liberalisation in that sector;¹⁰⁰
- the acceptance of the fact that a competent authority itself offering port services should not necessarily be deprived of the competence to select other service providers, on condition that its decisions are approved or supervised by a neutral body;¹⁰¹
- the clarification of some other subordinate issues.¹⁰²

Apart from these substantial amendments, the Commission has exerted itself to present some of its propositions in a less antagonistic way. Conspicuously, the reservation clause referring to national social legislation has been moved from the final provisions to the introductory section of the Directive. Another illustration is the complete deletion from the Explanatory Memorandum to the proposal of the underlying justification for the Directive that it is needed in order to be able to remedy the current lack of transparency in authorisation procedures in the seaport sector.¹⁰³ From a lawyer's viewpoint, however, such cosmetic amendments, introduced in order to render the proposal politically more acceptable, are irrelevant.

3.5 *Unresolved old problems*

Worryingly, some fundamental shortcomings of the previous proposal are still apparent in the new version.

3.5.1 *Absence of a convincing justification*

In several respects, the foundation of the proposal and many of its single provisions remain unclear. We have argued elsewhere¹⁰⁴ that the preceding Directive proposal was not based on a thorough examination of the specific needs of the port sector, and that it appeared to be rather dogmatic in that it blindly transposed to the seaport sector concepts and rules taken from other liberalisation Directives. According to the Commission's Explanatory Memorandum to the new proposal,¹⁰⁵ the proposal for a Port Services Directive is first and foremost justified by the Lisbon Agenda, which explicitly calls for a Port Services Directive, and by the 2001 White Paper on Transport, which seeks to promote maritime transport and especially the development of short sea shipping and motorways of the sea in order to reduce road congestion and to increase cohesion with peripheral regions. Further, the Commission refers to the enlargement of the EU to 25 Member States, 20 of which have ports. Another argument that is put forward is that ports are virtually the only transport service sector where problems have to be dealt with on a case-by-case basis.¹⁰⁶ Finally, the Commission stresses the complexity and variety of applicable national and other rules and the heterogeneous nature of port services and the diversity of ports in terms of status, ownership, type of management, size, function and geographical characteristics.

⁹⁸ Article 12; see also above, para 2.8.

⁹⁹ *ibid*; cf Van Hooydonk in Van Hooydonk (ed) (n 6) no 61.

¹⁰⁰ Article 14; see also above, para 2.10. Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 68.

¹⁰¹ See above, para 2.4 but also below, para 3.6.10.

¹⁰² See for example below, para 3.6.14 relating to the clarification on the status of the hiring out of equipment (which in turn, however, raises new problems).

¹⁰³ See below, para 3.5.1.

¹⁰⁴ Van Hooydonk (n 3) 857 et seq.

¹⁰⁵ EM p 2 et seq.

¹⁰⁶ IR (7), however, elucidates that the Directive will not exclude a further case-by-case application of other Community rules, such as competition rules, including those relating to services of general economic interest, in particular to monopoly situations. On possible trends in that respect, see Van Hooydonk (n 3) 869–72.

In our view, it is doubtful whether any of the above-mentioned elements can provide a sufficient foundation for the proposed liberalisation measures. For one thing, the Lisbon Agenda seems to have been scaled down by the Council of the European Union in March 2005.¹⁰⁷ The effects of the proposed Port Services Directive on modal shift towards maritime transport have never been demonstrated at all. The relation between the enlargement of the EU and the need for a liberalisation in the seaport sector is even less clear. The argument that similar liberalisation measures have been taken in relation to other transport sectors is dogmatic: a liberalisation of the seaport sector should, of course, be based on a specific analysis of the needs of that particular sector. The variety in the EU port sector's organisational patterns is not a valid reason for imposing uniform liberalisation rules either and may even be considered to be a counter-argument against a harmonised EU seaports policy. To conclude, we can only regret that the Commission has – again – failed to present a convincing justification for implementing a Port Services Directive. Given the recent rejection of its first attempt, this is all the more deplorable.

While the Explanatory Memorandum to the new proposal strikingly does not refer to any malpractices or abuses in the seaport sector as a justification for the Directive, such accusations are still part of the introductory recitals. The Commission contends that facilitating access to the port services market at Community level should remove existing restrictions that hamper access for providers of port services and self-handlers, improve the quality of service provided to users of the port, increase efficiency and flexibility, help reduce costs and thereby contribute to promoting short sea shipping and combined transport.¹⁰⁸ National legislation and practices have led to disparities in the procedures applied and have created legal uncertainty regarding the rights of providers of port services and the duties of competent authorities.¹⁰⁹

To us, these allegations seem unfounded. First and foremost,¹¹⁰ the new Commission proposal still betrays a deep-rooted distrust vis-à-vis the European port sector, more in particular the European port authorities. The unqualified representation of a lack of transparency in current authorisation procedures is not further substantiated by the Commission. While jurisprudence shows that problems do arise in relation to market access in some Member States, others already follow very objective procedures for the awarding of authorisations, often resulting from a spontaneous choice on the part of the local port authority. The image that the Commission paints of a European port industry that is rife with abuse is exaggerated. Consequently, the motivation for the Directive proposal, which is still based on this one-sided perspective, remains dubious. As we have argued before,¹¹¹ the emphasis should be on a clarification of general *EU law* rather than Member States' law pertaining to the port sector. The practical consequences for the port sector of current EU law are indeed often vague and uncertain.¹¹² Therefore, an EU legal instrument for the port sector should focus on restoring legal certainty in EU law. As we shall argue below, the new Directive proposal is not likely to achieve this purpose. On the contrary, it will create numerous additional legal problems.

Secondly, as a result of fierce intra- and inter-port competition, the EU ports industry is a high-performing and very efficient sector and rates for port users (port dues, terminal handling charges and pilotage fees) seem in line with, if not significantly lower than, those applied on

¹⁰⁷ Compare especially para 22 of the Presidency Conclusions of the European Council (Brussels 22 and 23 March 2005) relating to the completion of the internal market for services.

¹⁰⁸ IR (5).

¹⁰⁹ IR (6) and (24).

¹¹⁰ Van Hooydonk (n 3) 857.

¹¹¹ For a further discussion of legal certainty in relation to the Port Services Directive, see Van Hooydonk in Van Hooydonk (ed) (n 6) nos 33–35.

¹¹² See above, para 3.1.

other continents.¹¹³ The EU ports industry is continuously investing in new port infrastructure and superstructure, and it maintains a high level of employment for ever more specialised workers. A recent WTO Report stresses that port handling charges are lower in more efficient ports.¹¹⁴ A research paper by Clark, Dollar and Micco on maritime transport costs and port efficiency confirms that, based on a world-wide subjective survey, North America and Europe have the most efficient seaports, followed by the Middle East, East Asia and the Pacific.¹¹⁵ The same study points out that those countries with inefficient seaports have higher handling costs and that countries with good infrastructure have lower seaport costs. Countries whose ports are considered to be among the most efficient (eg Singapore and Belgium) also offer the cheapest port services.¹¹⁶ The same authors further demonstrate that the determinants of port efficiency consist not only of infrastructure variables, but also of management and/or policy variables, including cargo-handling restrictions and mandatory port services.¹¹⁷ The first captures restrictions and special requirements imposed on foreign suppliers of cargo-handling services, where foreign suppliers refer to local companies with foreign participation. The second captures the extent to which port services are mandatory for incoming ships. Both indices represent restrictions at port level that could limit competition, so the authors expected a negative relationship between them and port efficiency. However, in view of certain quality and security considerations, they also consider that it may be beneficial to have a degree of regulation at seaports. The result of their analysis suggests that having *some* level of regulation increases port efficiency; however, *excessive* regulation may start to reverse these gains.¹¹⁸ The appendices of the study contain a detailed table showing cargo-handling restriction indices, mandatory services indices, container-handling charges and, most importantly, overall port efficiency indices for a large number of countries. According to the latter indices, seaports in North European countries are the most efficient in the world; ports in Southern Europe perform slightly lower and ports in recently acceded Member States still seem to attain better results than ports in many other continents.¹¹⁹ In other words, there is every reason to believe that, on average, European ports are significantly more efficient than ports in other parts of the world. Of course, such a conclusion seriously undermines the foundations of the new Directive proposal.

Similarly, the Commission never demonstrated the sense, let alone the necessity, of self-handling in the seaport sector.¹²⁰ This concept was adopted by the Commission from the Airport Services Directive.¹²¹ The new proposal still lacks a demonstration of the need to introduce self-handling in maritime ports. The mere claim that self-handling is necessary in order to promote short sea shipping and to move goods from environmentally less friendly transportation modes to maritime transport¹²² is unconvincing. The Commission's argument that self-handling by land-based personnel will increase employment¹²³ is also doubtful. As a matter of fact, the Commission has to this day failed to establish that there is a genuine economic need or rationale for self-handling in seaports.

¹¹³ A comparison of average container-handling charges in several continents in 1998 and 2000 carried out by Ocean Shipping Consultants Ltd. revealed that European rates were the lowest in the world, with rates in Asia often three times as high.

¹¹⁴ WTO *World Trade Report 2004: Exploring the Linkage between the Domestic Policy Environment and International Trade* (WTO Geneva 2004) 117.

¹¹⁵ X Clark, D Dollar and A Micco 'Maritime Transport Costs and Port Efficiency' November 2003 p 18 www.dii.uchile.cl/~cea/lase2003/program_3.pdf (consulted on 18 April 2005).

¹¹⁶ *ibid* p 19.

¹¹⁷ *ibid* p 19.

¹¹⁸ *ibid* pp 19–20.

¹¹⁹ *ibid* pp 29–31.

¹²⁰ Van Hooydonk (n 3) 858.

¹²¹ Article 7 of Council Directive 96/67/EC of 15 October 1996 on Access to the Ground-handling Market at Community Airports [1996] OJ L272/36.

¹²² EM p 6.

¹²³ EM p 6.

Likewise, adequate justification is lacking in respect of the new provisions on mandatory authorisations. While we have argued elsewhere that a system of authorisations is already common practice today,¹²⁴ it is difficult to see how a general EU obligation to issue authorisations to service providers would, as the Commission contends, promote efficient and effective access for port service providers.¹²⁵ Here again, one looks in vain for clear grounds for a nevertheless fundamental provision of the new proposal. In the Explanatory Memorandum and the introductory recitals of the proposed Directive, the considerable impact of the mandatory authorisation system on comprehensive port authorities owning and exclusively operating their port facilities is not discussed at all.

The subsidiarity justification given by the Commission is equally superficial: it refers to the 'dimension' of the legislative action without any further explanation.¹²⁶ In view of the clear need to regulate port affairs at the lowest possible level, which is confirmed both by international law and by recent developments in several Member States,¹²⁷ this lack of motives is hard to comprehend.¹²⁸

3.5.2 *Unresolved problems of a technical nature*

Some other important problems of a technical nature which relate to the defective wording of certain provisions have not been resolved either.

3.5.2.1 *Scope of the Directive*

First of all, the scope of the proposed Directive remains limited to ports 'open to general commercial maritime traffic' (Article 2 (2)).¹²⁹ The Directive grants access only to 'port infrastructure'¹³⁰ that is generally accessible¹³¹ (which sounds rather like a *petitio principii*¹³²). Undoubtedly, the aim was to exclude single-user port facilities linked to an industrial plant.¹³³ If one takes the relevant provisions literally, a port system consisting only of dedicated terminals would not fall within the scope of the Directive either. Indeed, such a port would not be open to general commercial maritime traffic, since it would be reserved for one or more shipping companies only. This is, however, absurd, as it implies that one could simply close access to a port and organise port services as an absolute monopoly in order to evade application of the Directive. Liberalisation could thus be avoided by simply reserving the port for one or more exclusive users, which would be exactly the opposite of what the Directive aims to achieve. In other words, it follows from a strictly literal reading of the Directive that port authorities are able to neutralise the very essence of the Directive by closing the port to general commercial maritime traffic. One could even argue that the Directive does not apply to ports run by comprehensive port authorities operating on a purely commercial basis, as

¹²⁴ Van Hooydonk in Van Hooydonk (ed) (n 6) no 50.

¹²⁵ EM pp 6–7 and IR (17).

¹²⁶ IR (49) reads: 'Since the objective of the action to be taken, which is access for any natural or legal person, established in the Community, to the market for port services, cannot be sufficiently achieved by the Member States, because of the dimension of the action and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective'.

¹²⁷ Van Hooydonk in Van Hooydonk (ed) (n 6) no 36.

¹²⁸ Compare Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 10.

¹²⁹ Compare also text at para 2.2. For a discussion of this provision, see Van Hooydonk in Van Hooydonk (ed) (n 6) no 42.

¹³⁰ Which excludes port superstructure such as cranes and tugboats.

¹³¹ Article 1 (3).

¹³² Unless one regards art 1 (3) as only referring to generally open transportation infrastructure leading to and from port facilities, such as roads, fairways, canals, etc.

¹³³ Fishing ports seem to remain excluded as well (Written Question no E-2300/00 Miguélez Ramos [2001] OJ C72E/192). The same holds for marinas and naval ports.

they are not open to all shipping companies, but only to those admitted by the port authority.¹³⁴

Of course, this was not the Commission's intention. On several occasions, representatives of the Commission confirmed that the 2001 proposal would apply to both publicly and privately owned and operated ports. The new proposal leaves no doubt that commercially run ports are within its scope.¹³⁵ The Directive even compels comprehensive port authorities, who run their port infrastructure and services on a purely commercial basis, to grant access to competing service providers. In this respect, the Directive has farther-reaching consequences than the principle of third-party access to 'essential (port) facilities'.¹³⁶ Under general competition law, the right of access to essential facilities only applies to ports for which there is no realistic alternative, whereas the Port Services Directive seems to open up the market for port services in all European ports attaining the traffic threshold discussed above, regardless of their competitive substitutability.¹³⁷ As a consequence, the Directive may in some Member States affect existing property rights of private port infrastructure owners. In the long run, this may also hamper new investments. While the Commission has stressed that its proposal is neutral towards public or private ownership and existing port management systems,¹³⁸ it is clear that it may ultimately lead to profound changes and to a far-reaching harmonisation of port management patterns.¹³⁹

The second facet of the scope of application of the new proposal is the port traffic threshold.¹⁴⁰ As we have argued before, such a legislative technique has inherent dangers. For several reasons, a traffic threshold may result in a distortion of competition between larger and smaller ports. Also, a young or recently extended port organising its services in its initial development phase will be enabled to circumvent the Directive's rules.¹⁴¹

Thirdly, the proposed Directive states that freedom to provide port services in seaports shall apply to 'Community providers of port services'.¹⁴² This concept is, however, not clarified in the preliminary definitions of the Directive. Does it refer to nationality, ownership or place of establishment of the providers? According to the proposal, Member States may require that vessels used principally¹⁴³ for the provision of port services shall be registered in, and fly the flag of, a Member State.¹⁴⁴ The provision of the 2001 and 2003 drafts, according to which Member States may also require that the providers of port services be established within the Community, has been deleted. As we have pointed out, such discrimination on the basis of nationality might have been contrary to international law, especially the Statute on the International Regime of Maritime Ports. As a result of the newly proposed wording, Member States would not be entitled to reserve the right to self-handling in ports for shipping companies operating ships flying the flag of a Member State. Neither the Explanatory Memorandum nor the introductory recitals indicate why the Commission reached this

¹³⁴ At least, if national law does not state otherwise.

¹³⁵ Compare especially art 11.

¹³⁶ Van Hooydonk in Van Hooydonk (ed) (n 6) no 19.

¹³⁷ However, Member States and port authorities may attempt to counter the Directive by referring to art 1 (3) which states that providers of port services shall have non-discriminatory access to port infrastructure only 'to the extent necessary for them to carry out their activities'. According to this article, access may still be denied where another port would serve the service provider equally well or even better. Whether such an interpretation is valid is very doubtful. The fundamental question is, who is to assess the 'necessity' of a port to a potential port service provider? One could argue that, as soon as a service provider applies for an authorisation, 'necessity' must be assumed. Service providers may wish to expand their business and to form a service network covering as many Community ports as possible.

¹³⁸ Article 295 EC Treaty and Van Hooydonk in Van Hooydonk (ed) (n 6) no 10.

¹³⁹ See also below, para 3.6.4.

¹⁴⁰ Article 2 (2), discussed above at para 2.2.

¹⁴¹ Compare further Van Hooydonk in Van Hooydonk (ed) (n 6) no 43.

¹⁴² Article 1 (1).

¹⁴³ The 2001 proposal read 'exclusively'.

¹⁴⁴ Article 2 (7).

fundamentally different conclusion. Whilst the new proposal probably reflects the better legal view, we still feel that the issue of reserving access to the port services market to Community providers has not been considered sufficiently. It is of the greatest importance given the clearly discernible trend towards globalisation of the container shipping industry and the cargo-handling sector.¹⁴⁵

3.5.2.2 *The limitation concept*

Although it did not attract any particular attention during the debate on the 2001 proposal, we maintain that the definition of the basic concept of a limitation of the number of service providers is far from clear. As explained above, only in cases of a limitation will existing authorisations (not granted through an objective selection procedure) have to be terminated after the entering into force of the Directive. A limitation is defined as a situation in which the competent authority does not allow a provider that fulfils the criteria for authorisation laid down in accordance with the Directive to provide one or more categories of services.¹⁴⁶ Basically, this definition is identical to the one agreed upon in the 2003 conciliation draft.

It would appear to be inadequate for four reasons. First, in the case of authorisations for the use of port sites or facilities it is unclear whether a limitation either results from a deliberate choice on the part of a competent authority or presents itself in consequence of the limited capacity of the port or the non-availability of other sites. In other words, it is unclear whether limitations should result either from an 'abstract' decision to that effect taken by the authority prior to any candidacy, or from the actual rejection of a given candidacy submitted by a prospective individual service provider.

Secondly, the definition of limitations gives the port authority the opportunity to circumvent the selection and duration rules by systematically granting an authorisation to the first applicant. In the case where a new terminal site becomes available – or where it is decided that a new infrastructure will be built – and where the first applicant fulfils the general authorisation criteria established under the Directive, the port authority is entitled to directly and immediately grant an authorisation, without any selection procedure. If it does grant authorisation, it follows that the site is no longer available. Subsequent applications by other service providers for the same site thus have no object. Consequently, a selection procedure for this site has no point either. Therefore, there would appear to be no reason for the port authority to organise such a procedure, as no authorisation, site or service is vacant. Ultimately, port authorities will be entitled to grant authorisations systematically to the first applicants through direct negotiations and without open selection procedures, provided the general authorisation criteria are met.¹⁴⁷ The root of this problem is that, according to the definition in the Directive, a limitation may be considered only to follow from the actual refusal of an authorisation to an applicant. Such a refusal will always occur and the limitation will only arise after the last available authorisation has been granted, and this may happen merely on the basis of the authorisation criteria and without any open selection procedure. From such a refusal on, authorisations are exhausted and any selection procedure becomes meaningless.

Thirdly, the competent authority may easily evade the requirement to organise open selection procedures by continuously offering a commercially unattractive site to potential customers (such as an outdated quay with limited draught and antiquated equipment). As long as one site theoretically remains available, the competent authority will never find itself in a situation

¹⁴⁵ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 47; GATS negotiations may also be relevant in this respect.

¹⁴⁶ Article 3 (13).

¹⁴⁷ The fact that, according to art 7 (4), providers of port services must be informed of 'the procedure for obtaining the authorisation' is not a valid objection, as this 'procedure' may merely consist of the opportunity for every interested party to enter into direct negotiations with the port authority.

where it can be accused of 'not allow[ing] a provider that fulfils the criteria for authorisation laid down in accordance with Article 7 to provide one or more categories of services' within the meaning of the definition of a limitation. The fact that no service provider is interested in the available site is irrelevant. As a consequence, a limitation will never occur in such a port.

Fourthly, if it is assumed that the occurrence of a limitation depends on the actual refusal of an individual candidate, one has to admit that the limitation will only materialise at the moment that the decision to refuse is taken. In order to protect the interests of existing service providers,¹⁴⁸ such a decision may be deliberately delayed by competent authorities, especially if national law does not oblige these authorities to reach a decision within a certain period of time.

As regards the reasons for limitations, the proposal still stipulates that Member States shall ensure that the competent authority limits the number of providers of port services only for reasons of constraints relating to available space or capacity, safety considerations or requirements deriving from environmental regulations. This would appear to exclude a limitation of the number of service providers for reasons of cost-effectiveness of the service combined with public service requirements.¹⁴⁹

The above discussion of the key concept of a limitation of the number of service providers justifies the conclusion that the Directive can lead to divergent interpretations in Member States and ports, add to the uncertainty of Community law pertaining to ports, and, contrary to its objectives, create anything but a level playing field for port competition in the EU.

3.5.2.3 Port authorities' exclusive rights

Also in other respects the Directive proposal appears rather to increase the level of legal uncertainty. The provision allowing competent authorities to reserve pilotage for themselves¹⁵⁰ might, in an *contrario* reasoning, be supposed to imply a prohibition on port authorities to reserve similar exclusive rights to themselves for *other* services than pilotage (including cargo handling, towage or mooring and unmooring services). Such a conclusion would appear to be corroborated by the reference in the introductory recitals to the obligation to keep accounts for activities carried out by port authorities in their capacity as managing body separate from 'those carried out on a competitive basis'.¹⁵¹ A further indication is that public service requirements or the efficiency of port operations are not mentioned, and seemingly excluded, as valid reasons for a limitation of the number of service providers: candidacies may only be refused for reasons or constraints relating to available space or capacity, safety considerations or requirements deriving from environmental regulations.¹⁵² Another argument against the continuance or introduction of general port authorities' monopolies is the provision that exceptionally allows these authorities to reserve services temporarily for themselves after an unsuccessful selection procedure.¹⁵³ Finally, the Directive also precludes unlimited authorisations being granted to owners of ports.¹⁵⁴

¹⁴⁸ Compare also art 10 (2), obliging competent authorities to launch the selection procedure 'within 6 months of the date on which the limitation occurred'.

¹⁴⁹ Indeed, it may be the case that a towage service operating under public service obligations is only viable if the number of competitors is restricted or if it holds a monopoly. The relevance of cost-effectiveness of public service providers has been stressed in several judgments of the Court of Justice. The need to ensure cost-effectiveness in order to maintain the public service is a generally accepted ground for restrictions of access to the market. In our view, cost-effectiveness and viability may still be taken into account when deciding on the 'highest number of service providers appropriate under the circumstances' (art 9 (1) (b)) (see also Van Hooydonk in Van Hooydonk (ed) (n 6) no 56).

¹⁵⁰ It is unclear whether in such a case an authorisation must be issued, and if it must, by whom and for what duration.

¹⁵¹ IR (41).

¹⁵² Article 3 (13); see also above, para 3.5.2.2 and the alternative view proposed above (n 149).

¹⁵³ Article 8 (6).

¹⁵⁴ Article 10 (3) and 11; see also below, para 3.6.4.

In our view, however, such indications do not suffice to conclude that the Directive would indeed impose a complete ban on exclusive rights to the benefit of port authorities.¹⁵⁵ Given available case law, which does not declare invalid port monopoly situations as such,¹⁵⁶ a prohibition to that effect should be based upon an express provision – which is lacking in the present draft. On the other hand, it seems doubtful whether any exclusive rights – which always amount to a limitation of the number of service providers – may in the future still be based on public service requirements or the efficiency of port operations. Under the proposed Directive, the exclusion of other service providers should be based on reasons or constraints relating to available space or capacity, safety considerations or requirements deriving from environmental regulations. What is clear, however, is that the new proposal fails to settle once and for all a question that is nevertheless of paramount importance to many ports and their users.

3.5.2.4 *Compatibility of exclusive rights of registered dock workers with EU law*

The Commission, while advocating the need for greater legal certainty, still parries the politically sensitive question of the compatibility of dock work registration schemes with Community law.¹⁵⁷ On the one hand, the proposal stresses the need for service providers to comply with national social legislation (which may provide for an exclusive right of employment for registered dock workers). It even indicates that social standards must not be below those laid down by applicable Community legislation,¹⁵⁸ which necessarily implies that social standards may be *stricter* than under Community instruments. Moreover, the Directive expressly provides that national social conditions must conform to international obligations of the Community and Member States.¹⁵⁹ These may be deemed to include obligations of the contracting Member States to ILO Convention C 137 of 1973 on Dock Work, which requires priority of engagement for registered dock workers. The Explanatory Memorandum even invites Member States to ratify that Convention.¹⁶⁰ Furthermore, the competent European Commissioner has declared that any liberalisation ‘will fully respect existing social, health, safety and environmental legislation both at European and national level’.¹⁶¹

On the other hand, the proposed Directive states that national social legislation must be in conformity with Community law.¹⁶² The latter, while still extremely unclear in this respect, is held by some to oppose the continuance of exclusive rights for dock workers.¹⁶³

In other words, the Directive tries to have it both ways: it still does not stipulate whether or not a system of priority of employment for registered dockers is contrary to EU law. The Commission refuses to elucidate this fundamental matter and regrettably puts the ball back into Luxembourg’s court. It therefore seems unlikely that the Commission’s new initiative will do anything to enhance legal certainty.

¹⁵⁵ Note also that art 19 (1) only obliges the managing body of the port providing port services to fulfil the authorisation criteria.

¹⁵⁶ Constant case law: see among others Case C-340/99 *TNT Traco* [2001] ECR I-4109; Case C-475/99 *Ambulanz Glöckner* [2001] ECR I-8089.

¹⁵⁷ Compare the discussion in Van Hooydonk in Van Hooydonk (ed) (n 6) no 52.

¹⁵⁸ Articles 4 and 8 (8).

¹⁵⁹ Article 7 (6).

¹⁶⁰ See above, para 3.4.

¹⁶¹ Speech by Mrs Loyola de Palacio at ESPO’s 2004 Conference at Rotterdam on 17 June 2004, p 6; see also p 11 where she states that respect for social and other legislation ‘has to be made crystal clear’.

¹⁶² Articles 7 (3) (c) and 7 (6). The latter provision reads: ‘The provider of port services carrying out the service covered by the authorisation shall have the right to employ personnel of his own choice provided that he fulfils the criteria laid down in accordance with paragraph 3 and with the legislation of the Member State in which the service provider is providing the services in question, provided that such legislation is compatible with Community law’.

¹⁶³ The Labour Court of Brussels ruled on 11 January 2002 (AR no 17866/00) that the Belgian Dock Work Act of 8 June 1972 is incompatible with the free movement of services as laid down in art 49 EC Treaty. The appeal procedure is pending.

3.5.2.5 *Maximum durations and return on investment*

It is doubtful that the maximum durations for authorisations provided for in the new proposal – which are shorter than under the 2003 conciliation draft compromise¹⁶⁴ – will allow a sufficient return on investment. In many Member States with efficient ports and considerable private sector investments, national legislation provides for longer periods. Furthermore, port authorities in many Member States are entitled to withdraw or terminate a contract prematurely if the general interest of the port so requires. Consequently, longer durations are not necessarily contrary to the needs of port development or to the general interest.¹⁶⁵

3.6 *New or additional problems*

In addition to the old problems that remain unresolved, some new ones have emerged.¹⁶⁶

3.6.1 *Increased complexity*

First of all, it will be clear from the overview above that the new proposal is in many respects far more complex than the one it has replaced. Undoubtedly, this could have been avoided by applying a clearer structure and wording. Increased complexity is likely to compromise legal certainty. Yet ironically, the Commission relentlessly defends its proposal by referring to the need to increase legal certainty in the port sector. The fact is that many interested parties fear that the new proposal will only create a lawyer's paradise. This would be detrimental not only to the interests of port authorities and existing port operators: all prospective service providers would face exactly the same legal problems. Therefore, the entire port and shipping sector is in danger of getting bogged down in a culture of systematic legal disputes and litigation.

3.6.2 *Cases where an open selection procedure must be organised*

It is vitally important that there should be unequivocal clarity about cases requiring an open selection procedure with a view to the granting of authorisations. According to the Directive's provisions, these cases are:

- a decision to that effect taken by the port authority;¹⁶⁷
- a request from an existing service provider;¹⁶⁸
- a request from a new potential service provider;¹⁶⁹
- a termination of existing authorisations where they were not granted after an open selection procedure prior to the entry into force of the Directive *and* where a limitation has occurred.¹⁷⁰

From this perspective, it is astonishing to read in the Explanatory Memorandum that the use of the procedure laid down in the Directive shall be necessary in cases of limitations of the number of service providers for one or more port services.¹⁷¹ It must be assumed that the latter elucidation – which conforms to the logic of the 2001 proposal but not to that of the new one – is an error.

Another flaw in the wording of the proposed Directive is the inaccurate introductory phrase of the provision laying down the obligation to organise an open selection procedure, which

¹⁶⁴ See above, para 2.8.

¹⁶⁵ Van Hooydonk in Van Hooydonk (ed) (n 6) no 62; cf also Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 16.

¹⁶⁶ In this section we discuss a selection of 14 major legal problems. Some further deficiencies have already been pointed out in para 2.

¹⁶⁷ Article 7 (2).

¹⁶⁸ *ibid.*

¹⁶⁹ *ibid.* This hypothesis is omitted in IR (25).

¹⁷⁰ Article 10 (2).

¹⁷¹ EM p 8.

reads: 'Whenever, [sic] reference is made to this Article, the competent authority shall take the necessary measures to ensure that a transparent and objective selection procedure, using proportionate, non-discriminatory and relevant criteria' (emphasis added).¹⁷²

Next, one wonders whether the alternative scenarios described above, in which an open procedure needs to be organised, will occur in practice and whether the Directive will ensure a sufficient level of competition when *new* terminal sites become available. When a potential service provider enters into negotiations with a port authority and submits an interesting investment proposal to that authority, neither of those parties will have an interest in organising an open selection procedure. Other candidates will not necessarily be aware of the opportunity, as the Directive does not impose publication of a list of available facilities (it only obliges competent authorities to make public forthcoming expirations of existing authorisations¹⁷³). As the terminal is new, there is no existing service provider who could request such a procedure either. Because of the flawed definition of the limitation concept in the Directive,¹⁷⁴ such a case will not even give rise to a limitation. As a result, rights of use of strategic terminal facilities may still be lawfully granted to port operators without any open procedure – which runs directly counter to the Directive's fundamental objectives.

In the case of an expiring *existing* authorisation of a given service provider, competitors who do not have a genuine interest in submitting a proposal of their own and obtaining the new authorisation may be tempted to abuse their right to request an open procedure, merely to complicate business, to cause harm to the interests of a competitor or to obtain commercially interesting information on operational conditions.

3.6.3 Conformity of prior selection procedures to the Directive's requirements

According to the introductory recitals, authorisations granted prior to the new Directive but not through a call for tenders should be terminated in case limitations appear after the entry into force of the Directive; in that case, a new selection should take place.¹⁷⁵ At first sight, the criterion appears to be whether or not the existing authorisation was granted after an open selection procedure, whatever its legal nature, basis or further specifications.¹⁷⁶ The proposed Directive itself, however, requires that the initial selection procedure be in strict conformity with the relevant Directive provisions.¹⁷⁷ The latter condition is unreasonable: one cannot expect port authorities to have organised their previous open selection procedures in literal conformity with a then non-existing European Directive. From the perspective of service providers and investors who were selected after an open selection procedure, it would be even more pointless to see their existent contracts terminated due to a minor procedural deviation from subsequent EU Directive prescriptions. Therefore, the wording of the relevant provision¹⁷⁸ should be amended in the sense that an existing authorisation may be kept in force in all cases where it was granted according to an open selection procedure, whatever its further nature and characteristics and regardless of its strict conformity with the detailed procedural requirements of the Directive.

3.6.4 Encroachment upon property rights

The new provisions on authorisations give rise to additional problems of a technical nature, especially when they are considered in relation to the protection of rights of ownership of port facilities and equipment. The previous Directive proposal had already provoked sharp

¹⁷² Article 8 (1).

¹⁷³ Article 12 (4).

¹⁷⁴ See above, para 3.5.2.2.

¹⁷⁵ IR (26).

¹⁷⁶ EM pp 7 and 9.

¹⁷⁷ Compare the passage 'Where [...] the condition foreseen in Article 7 (2) has (not) been fulfilled' in art 10 (1) and (2).

¹⁷⁸ Article 10 of the proposal.

criticism because of its implications for existing property rights of port authorities and especially of port operators who have invested large sums in specialised equipment on the basis of previously granted authorisations, which would suddenly have to be terminated or cut back as a result of the transitional measures. It was even submitted that the transitional provisions of the 2001 draft were contrary to international standards on the protection of the right of property and on conditions of expropriation.¹⁷⁹

Although the new proposal contains express rules on compensation for existing service providers, it is likely to invite additional criticism.¹⁸⁰ Even owners of port infrastructure and terminals will be obliged to obtain an authorisation with a limited duration to be granted after an open selection procedure. Furthermore, the wording of the relevant provisions is once again unclear.

The Explanatory Memorandum does not provide any helpful clarification: the Commission merely states that provisions for authorisations which include property and ownership rights in a port 'are somewhat different, as their specificity has been taken into account'.¹⁸¹ Whether the introductory recitals constitute any improvement is very doubtful. They are worded as follows:

This Directive should not require a Member State to take any action which constitutes a deprivation of property or interference with property contrary to the general principles of Community law, unless such deprivation or interference is justified in accordance with such general principles, and an authorised or selected service provider can be required to pay compensation for that deprivation or interference in accordance with those general principles.¹⁸²

It is worth further analysing the specific articles on authorisations deriving from ownership¹⁸³ and new ports (or new parts of a port).¹⁸⁴ They distinguish between three cases:¹⁸⁵ either (1) an existing service provider holds an authorisation deriving from ownership of a port or property in a port, or (2) a new port was built¹⁸⁶ and commercially financed before the 18 months' transitional period, or (3) a new port was built and financed afterwards.

In the first case, the existing authorisation may remain in force after the transitional period, and the limitations on duration may not apply, unless limitations appear, in which case the authorisation remains in force within the maximum duration periods. This means that the owner of port facilities¹⁸⁷ will either be enabled to continue perpetually his commercial port operations, or be abruptly confronted with severe restrictions of his ownership rights, merely dependent on whether or not a potential competitor emerges. Surprisingly, the Directive does not make a distinction on the basis of the origin of the ownership of the port and especially the question of whether or not the property was acquired after an open selection procedure (such as a sale by auction).

¹⁷⁹ Van Hooydonk in Van Hooydonk (ed) (n 6) no 77 and especially fn 459.

¹⁸⁰ For example Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 14.

¹⁸¹ EM p 7.

¹⁸² IR (46).

¹⁸³ Article 10 (3).

¹⁸⁴ Article 11; see also above, para 2.7.

¹⁸⁵ The internal structure of art 11 is far from clear. Apparently, art 11 (1) constitutes a first hypothesis, while art 11 (2) and (3) together constitute a second. Moreover, art 11 (4) is confusingly anticipated in art 11 (1).

¹⁸⁶ To add to the obscurity, the article does not state whether the construction works must have been commenced or completed before the end of the transitional period. The provision under discussion only covers situations where new ports are commercially financed and does not deal with the situation where an existing port was bought by a private investor (eg under a privatisation scheme). The latter case is covered by art 10 (3), the first hypothesis under discussion here. Compare also Van Hooydonk in Van Hooydonk (ed) (n 6) no 79 and especially fn 472.

¹⁸⁷ To the extent that the Directive should be considered to be applicable to such a situation: see above, para 3.5.2.1.

In the second case, the investor will be granted an authorisation with a limited duration. When limitations appear, authorisations will remain in force until they expire on condition that the investment opportunity was generally available. The Directive remains silent on what will happen if the opportunity was *not* generally available. Neither does the Directive regulate the case where an existing authorisation granted *before* the entry into force of the Directive has a longer duration than the maximum provided for in the Directive. Presumably the duration of such an authorisation would have to be cut back to the applicable maximum as well.¹⁸⁸

The third hypothesis is that of a decision on a new private investment project being taken after the transitional period. In that case, an authorisation with limited duration is to be granted 'without any further requirements on [sic][the] service provider' (Article 11 (2)). Whether the absence of 'any further requirements' means that an open selection procedure is not required is anything but clear.¹⁸⁹ In the event of a later limitation, all existing authorisations shall remain in force provided that the investment opportunity was generally available. It is however unclear what should happen if the investment opportunity was *not* generally available. Nor is it clear why authorisations for commercial investors should be treated differently according to the moment at which limitations occur, what the basis of the distinction is, and indeed whether any distinction should be made in the first place between the three envisaged hypotheses.

This brief analysis again reveals a number of legislative deficiencies which threaten to shake the confidence of potential investors and authorities alike. More fundamentally, one could raise the question of why the proposed Directive does not grant longer durations to private infrastructure investors (including docks and quay walls) than to investors in immovable and movable port equipment. One wonders why the Commission is not more eagerly supportive of private finance initiatives in the port sector. Private financing of transport infrastructure through public-private partnerships is indeed one of the priority objectives of the Commission's transportation policy.¹⁹⁰

3.6.5 *Lack of a proper transitional regime and disproportionality in the termination of existing authorisations*

The 2001 Directive proposal contained a specific transitional regime on the duration of existing authorisations, which, while it was controversial from the start, at least provided some clarity.¹⁹¹ The new proposal contains no separate transitional provisions; instead, the transition measures are integrated into the corpus of the Directive. It is submitted that this legislative technique will compromise legal certainty.¹⁹²

¹⁸⁸ This may be inferred from the general rule of art 7 (1) which stipulates that, after the transitional period, *all* providers of port services in a port shall operate on the basis of an authorisation granted by the competent authority, within the maximum durations foreseen in art 12. In our view, the fact that art 11 (1) allows certain authorisations to 'remain into force until they expire' is not a valid counterargument: it does not expressly deviate from art 7 (1).

¹⁸⁹ An open procedure is probably not required on the strength of the Directive itself. This may be inferred from art 11 (3), which deals with the case where the investment opportunity was not generally available. On the other hand, works concessions and service concessions – which may be used for public-private partnerships in ports – must be granted after open procedures pursuant to public procurement Directives and the general principles of equal treatment and transparency (see further: Commission Interpretative Communication on Concessions under Community Law [2000] OJ C121/2; Green Paper on Public-Private Partnerships and Community Law on Public Contracts and Concessions COM (2004) 0327 final). Pursuant to art 6 of the proposed Port Services Directive, the Directives on public procurement take priority. The relation between the Port Services Directive and the aforementioned general principles is not elucidated.

¹⁹⁰ Commission White Paper European Transport Policy for 2010: Time to Decide COM (2001) 370 final, especially 59–60; see also the Presidency Conclusions of the European Council at Brussels on 22 and 23 March 2005 para 27.

¹⁹¹ Van Hooydonk in Van Hooydonk (ed) (n 6) no 76 et seq.

¹⁹² Compare Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 17.

First of all, one should distinguish between the effects of the Directives on the duration of existing authorisations and the effects on their very continuance. With regard to the former, the Directive will probably lead to *all* authorisations being cut back to the maximum durations set in the Directive.¹⁹³ Most likely this includes existing authorisations which – by reason of their having been granted on the basis of an open selection procedure – may remain in force ‘until they expire’ after the transitional period of 18 months following the transposition period.¹⁹⁴ In other words, such authorisations are allowed to run on, but their expiration will be advanced.¹⁹⁵ From this perspective, the new Directive proposal may be said to contain no genuine transitional measures which respect the duration of running contracts. Besides, it is unclear whether, for existing authorisations, the maximum duration should be calculated starting from the end of the transposition period or from the initial start of the authorisation.¹⁹⁶

To a certain extent, however, the Directive does respect the existence of authorisations granted before the end of the transitional period. Their further fate will depend on circumstances beyond the control of the present service providers and even of the port authorities. In fact, existing authorisations will have to be terminated when limitations occur – and this will largely be in the hands of competitors who may present a request for a procedure only in order to disturb operations.¹⁹⁷ For years, if not decades, the possible occurrence of a limitation may hang like a sword of Damocles over existing service providers – which in turn may completely paralyse decisions on new investments. The fact that the very concept of a limitation is, in itself, rather obscure¹⁹⁸ makes matters even worse.

Next, the proposal¹⁹⁹ states that, where limitations appear after the transitional period for one or more port services and no open selection procedure has been followed, *all existing authorisations for this service or services* at the moment these limitations appear shall have to be terminated and the open procedure provided for in the Directive shall be launched within six months of the date on which the limitation occurred. The italicised passage refers to port services in general. This implies that when, for example, a prospective coal and ore handler is refused an authorisation due to the lack of available capacity for dry bulk operations in a given port, a limitation will automatically occur for the general port service of cargo-handling in that port.²⁰⁰ As a consequence, *all* existing authorisations of cargo handlers, including operators of container, fruit and ro/ro-terminals, would have to be terminated.²⁰¹ It is submitted that such a measure is not in conformity with the general principles of proportionality and legitimate expectations.²⁰² Accordingly, the relevant provision may be

¹⁹³ Article 7 (1) stipulates that, as soon as the 18 months’ transitional period has elapsed, all providers of port services in a port shall operate on the basis of an authorisation granted by the competent authority, within the maximum durations set out in the Directive.

¹⁹⁴ Article 10 (1).

¹⁹⁵ The opposite view, according to which art 10 (1) allows existing authorisations to run on for their full initial duration, is irreconcilable with art 10 (3), which in any event leads to a reduction of the duration of authorisations granted to owners of ports. In fact, it would be incomprehensible to see ‘ordinary’ service providers treated more favourably than owners of ports.

¹⁹⁶ Article 10 (3) and 11 (1) on commercially owned or built port infrastructure reckons the limited duration from the end of the transitional period.

¹⁹⁷ See above, para 3.6.2.

¹⁹⁸ See above, para 3.5.2.2.

¹⁹⁹ Especially art 10 (2).

²⁰⁰ In the sense of art 3 (6).

²⁰¹ The fact that the range of activities to be carried out in several parts of the port may, under art 9 (2), have been determined in the development policy of the port does not alter the fact that, according to art 10 (2), *all* authorisations will have to be terminated as soon as a prospective service provider is not allowed to operate in that port.

²⁰² Article 5 EC Treaty. For a general discussion of these principles, see among others P Craig and G de Búrca *EU Law. Text, Cases and Materials* (Oxford University Press Oxford 1998) 349 et seq; K Lenaerts and P Van Nuffel *Europees recht in hoofdlijnen* (Maklu Antwerp/Apeldoorn 2003) 130 et seq nos 98 et seq; Van Hooydonk in Van Hooydonk (ed) (n 6) no 77 fn 459.

challenged before the Court of Justice. The issue is all the more pressing since the Commission appears to respect fully existing contracts in other legislative instruments.²⁰³ The result of the provision under discussion will not only be legal uncertainty, but also an increase of bureaucracy for the competent or port authorities without any added value. If at all feasible, obligatory termination of authorisations in seaports should be restricted to identical or competing *categories* of services. In our view, the legally more solid and therefore preferable solution would be simply to give up any plan to cut back or terminate existing contracts before their normal date of expiration.

3.6.6 *Social achievements after take-over of authorisations*

When, as a result of a selection procedure, an authorisation is taken over by another service provider, the relevant rules on employment of the personnel of the previous service provider shall not be affected.²⁰⁴ Whether the concept of 'rules on employment' refers only to mandatory labour law provisions or also to clauses contained in contracts of employment is not clear. The same applies to the question of whether personnel should be taken over and social achievements should be fully respected by new service providers.

3.6.7 *Rigidity of port development plans*

As explained above, the competent authority may determine the range of commercial activities to be carried out in the port or parts of the port, in particular the categories of cargo to be handled, and the allocation of port space or capacity to such activities, pursuant to the published development policy of the port, without this constituting a limitation of the number of providers.²⁰⁵ Such binding development plans may cause legal problems as well. First, determining the range of commercial activities to be carried out in the port or part of the port²⁰⁶ could run counter to general EU competition law, especially the prohibition to abuse a dominant position.²⁰⁷ The limitation of access to ports through binding development policy plans endangers the necessary commercial flexibility of port authorities and may be challenged by applicants for authorisations anyway. For port authorities, new opportunities may always present themselves unexpectedly in market sectors which they might previously have considered to be unattractive. There are numerous examples of dock or quay infrastructure being built with a certain type of traffic in mind, only for port authorities to discover after completion that it is more interesting to use this new infrastructure for the handling of another type of cargo or vessel.²⁰⁸

3.6.8 *Differentiation of authorisation criteria*

Another aspect which should have been clarified is whether authorisation criteria may lawfully differ between several types of services and between several zones, docks or quays in a given port area. The Directive states that criteria must be non-discriminatory and

²⁰³ For example art 1 (3f) of Proposal for a Directive of the European Parliament and of the Council amending Directive 1999/62/EC on the Charging of Heavy Goods Vehicles for the Use of Certain Infrastructures COM (2003) 448 final, which reads: 'The weighted average tolls shall be calculated without prejudice, as regards taking into account construction costs, to rights relating to concession contracts existing at ... [date of entry into force of this directive]'. IR (4) of this proposal reads: 'However, a special provision should be introduced, so as not to cause prejudice, with regard to taking into account construction costs, to the rights relating to concession contracts in existence at the time of entry into force of the directive'. Similarly, the EU Airport Slot Allocation Regulation (EEC) 95/93 contains the principle of 'grandfather rights', ie air carriers that are entitled to a slot during a season have the right to reclaim it for the next equivalent season provided they make an established minimum use of it.

²⁰⁴ Article 8 (8).

²⁰⁵ Article 9 (2).

²⁰⁶ IR (21).

²⁰⁷ According to art 82 EC Treaty, such abuse may, in particular, consist in limiting production, markets or technical development to the prejudice of consumers. The right to enter and use a port facility may also derive from the essential facilities doctrine.

²⁰⁸ Van Hooydonk in Van Hooydonk (ed) (n 6) no 54.

proportional.²⁰⁹ Together with the general thrust of the new proposal to emphasise the need for efficiency of port operations and good port management, this justifies the presumption that criteria may vary according to the nature of the service in question and the geographical, infrastructural and commercial characteristics of sites, as long as the criteria remain objective. It would have been useful to confirm this reading through an express provision or recital to that effect.

3.6.9 *Self-handling to be allowed 'wherever possible'*

Similarly, the Directive obliges Member States to take the necessary measures to allow self-handling to be carried out 'wherever possible'.²¹⁰ This invites unwilling Member States to invoke all kinds of 'impossibilities' in order to frustrate the self-handling principle. As a consequence, such wording may be expected to contribute little to the so eagerly awaited 'level playing field' for EU ports.

3.6.10 *Competent authorities versus port authorities*

The new proposal assigns many responsibilities to so-called 'competent authorities' which are not necessarily identical to existing port authorities. Such competent authorities may²¹¹ even become responsible for the granting of authorisations, the enactment of the development policy of the port, the organisation of selection procedures, etc. The competent authority must be designated by the Member State.²¹² The transposition of the Directive by Member States may tempt the competent governments to take possession of powers which thus far were in the hands of autonomous or local port authorities.²¹³ In that respect, the Directive threatens to restrict the autonomy of port authorities, to clash with a general international and European trend to commercialise if not privatise ports, and ultimately to endanger port efficiency.

3.6.11 *Renewability of authorisations*

The new proposal expressly states that the duration periods of authorisations are 'renewable'.²¹⁴ This creates the impression that durations may be extended without any new selection procedure, which would appear not to conform to the objectives of the Directive. If a new selection procedure is not required, the provision on maximum durations in the end becomes pointless. The 2003 conciliation draft compromise expressly permitted extensions for 10 years.²¹⁵ Under the new proposal, the only real possibility for renewing an authorisation is through the open selection procedure, which may be provoked by an existing service provider who intends to make or irrevocably contract for significant investments in immovable assets during the last 10 years before the end of the existing authorisation and can demonstrate that these investments will lead to an improvement in the overall efficiency of the service concerned.²¹⁶ It is questionable whether existing operators will ever have recourse to this option in practice, as they would risk prematurely losing their existing authorisation.

²⁰⁹ Article 7 (3).

²¹⁰ Article 13 (1).

²¹¹ The Directive does not preclude Member States from confirming and restating existing competences of port authorities in this respect. That competent authorities may act as service providers may be inferred from art 8 (7).

²¹² Article 3 (15).

²¹³ This tendency may be reinforced by the provision obliging the managing body of the port providing port services to fulfil the authorisation criteria (art 19 (1)).

²¹⁴ Article 12.

²¹⁵ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 63.

²¹⁶ Article 12 (3); cf Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 16.

3.6.12 Sanction for non-publication of expiration of authorisations

Another indistinctness appears in the provision obliging competent authorities to make public, for the general information of the sectors concerned in the Community, the authorisations which are going to expire, at least six months before their date of expiry.²¹⁷ The Directive does not specify whether non-compliance with this requirement will lead to nullity of the selection procedure and of the subsequent decision to grant an authorisation or to any other sanction.

3.6.13 Calculation of compensation

The provisions pursuant to which an existing service provider that is not selected by means of a selection procedure shall be compensated by the newly selected service provider for past investments²¹⁸ still do not elucidate whether compensation should be paid for lost profits (*lucrum cessans*) as well. Moreover, the 'overall economic balance of service provided during the previous period' which must be taken into account²¹⁹ when calculating the appropriate amount in compensation seems an extremely vague concept. Under the proposed wording, compensation payments will fail to take account of expenditure on training employees and adjusting work management.²²⁰

3.6.14 Disparities between Directive provisions and recitals

Finally, some problems emerge as a result of disparities between the Directive provisions and the introductory recitals.

The principle that the managing body of a port should not discriminate between service providers, and the need to avoid any discrimination in favour of an undertaking or body in which it holds an interest, was contained in the 2001 proposal but has been omitted from the new text. It is still part of the introductory recitals,²²¹ but whether it may be considered to constitute a legally binding rule is far from clear.²²²

According to the recitals, self-handling should not hamper the overall efficiency of port operations or lower occupational health, social and safety standards or training levels as compared with those applicable to existing personnel.²²³ This far-reaching limitation to the self-handling principle is not as such laid down in the material provisions of the Directive.

Whereas the Directive is silent on this point, the introductory recitals clarify that the hiring out of equipment does not constitute a port service, but that it should nevertheless respect the principles of transparency and non-discrimination.²²⁴ The foundation and extent of the latter principle leaves room for doubt as well.²²⁵

4 Conclusions and prospects

The presentation, less than a year after the failure of the first attempt, of a new proposal for a Port Services Directive by the European Commission was an unexpected move. To a large extent, the new Directive proposal simply reiterates principles contained in the 2001 version. Upon closer scrutiny, the new draft also resolves a considerable number of legal problems

²¹⁷ Article 12 (4).

²¹⁸ Articles 8 (6) and 10 (2), as well as IR (27) and (30).

²¹⁹ Article 10 (2).

²²⁰ Committee of the Regions, Draft Opinion of the Commission for Territorial Cohesion Policy (COTER-034) of 21 January 2005, I, no 16.

²²¹ IR (29).

²²² Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 71.

²²³ IR (36).

²²⁴ IR (40).

²²⁵ Compare Van Hooydonk in Van Hooydonk (ed) (n 6) no 41 fn 255.

which had arisen in relation to the previous proposal. In particular, the Commission has shown its willingness to accept several important amendments agreed upon by interested parties during the previous legislative process.

Yet it cannot be denied that the new proposal still does not adequately respond to some fundamental criticism of the previous proposal. The Directive continues to lack a convincing justification. A number of basic concepts are still surrounded by obscurity as to their exact meaning and purport. Additionally, the internal logic of the 2001 draft is disturbed by some fundamental and rather complicated reversals. Generally speaking, the wording of the new proposal is confused and leaves room for divergent interpretations by Member States, public and private sector players and their lawyers. As a consequence, the new initiative threatens to create massive legal uncertainty for port authorities, existing and prospective port operators and port users alike. Therefore, a thorough revision of the Directive's overall structure and single provisions seems highly recommendable.