

# **Proposal for a Directive of the European Parliament and of the Council on Market Access to Port Services**

(2001/C 154 E/30)

(Text with EEA relevance)

COM(2001) 35 final — 2001/0047(COD)

(Submitted by the Commission on 14 February 2001)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The objective of Article 49 of the Treaty is to eliminate the restrictions on freedom to provide services in the Community; in accordance with Article 51 of the Treaty, that objective must be achieved within the framework of the common transport policy.
- (2) Through Council Regulations (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries <sup>(1)</sup> and (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) <sup>(2)</sup> that objective has been attained with regard to maritime transport services as such.
- (3) 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.
- (4) In the Green Paper on Sea Ports and Maritime Infrastructure of December 1997 <sup>(3)</sup> the Commission indicated its intention of proposing a legislative framework in order to achieve access to the port services market in Community ports with international traffic. Therein, port services should be defined as those services of commercial value that are normally provided against payment in a port.

(5) Facilitating access to the port services market at Community level should remove prevailing restrictions that hamper access for port service operators, 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.

(6) Where the authorisation under this Directive takes the form of a contract falling within the scope of Directives 92/50/EEC <sup>(4)</sup>, 93/36/EEC <sup>(5)</sup>, 93/37/EEC <sup>(6)</sup> and 93/38/EEC <sup>(7)</sup>, these latter Directives apply. Equally, where applicable, Directives 89/48/EEC <sup>(8)</sup>, 92/51/EEC <sup>(9)</sup> and 1999/42/EC <sup>(10)</sup> on the mutual recognition of professional education and training apply.

(7) Diverse national legislations 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. It is in the Community's interest, therefore, to establish a Community legal framework which lays down basic rules on access to the port services market, the rights and obligations of current and prospective service providers, the managing bodies of the ports, as well as on the procedures accompanying the authorisations and selection processes.

<sup>(4)</sup> Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ L 209, 24.7.1992, p. 1), last amended by Directive 97/52/EC (OJ L 328, 28.11.1997).

<sup>(5)</sup> Directive 93/36/EEC of 14 June 1993 co-ordinating procedures for the award of public supply contracts (OJ L 199, 9.8.1993, p. 1), last amended by Directive 97/52/EC (OJ L 328, 28.11.1997).

<sup>(6)</sup> Directive 93/37/EEC of 14 June 1993 concerning the co-ordination of procedures for the award of public works contracts (OJ L 199, 9.8.1993, p. 54), last amended by Directive 97/52/EC (OJ L 328, 28.11.1997).

<sup>(7)</sup> Directive 93/38/EEC of 14 June 1993 co-ordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ L 199, 9.8.1993, p. 84), last amended by Directive 98/4/EC (OJ L 101, 1.4.1998).

<sup>(8)</sup> Directive 89/48/EEC of 21 December 1989 on a general system for the recognition of higher education diplomas awarded on completion of professional education and training of at least three years' duration.

<sup>(9)</sup> Directive 92/51/EEC of 18 June 1992 on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC.

<sup>(10)</sup> Directive 1999/42/EC of 7 June 1999 establishing a mechanism for the recognition of qualifications in respect of the professional activities covered by the Directives on liberalisation and transitional measures and supplementing the general systems for the recognition of qualifications.

<sup>(1)</sup> OJ L 378, 31.12.1986, pp. 1-3. Last amended by Council Regulation (EEC) No 3573/90 (OJ L 353, 17.12.1990, p. 16).

<sup>(2)</sup> OJ L 364, 12.12.1992, pp. 7-10.

<sup>(3)</sup> COM(97) 678 final of 10 December 1997.

- (8) In accordance with principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of the proposed action, which is the 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 that action and can therefore be better achieved by the Community. This Directive confines itself to the minimum required in order to achieve that objective and does not go beyond what is necessary for that purpose.
- (9) The Community legislation on access to port services does not exclude the application of other Community rules. Competition rules have already been applied to port services and are relevant in particular to monopoly situations.
- (10) In the interest of an efficient and safe port management, Member States may require that service providers obtain authorisations. The criteria for granting such authorisations must be objective, transparent, non-discriminatory, relevant and proportional. They must be made public.
- (11) Since ports are made up of limited geographical areas, access to the market may, in certain cases, meet capacity and available-space constraints and traffic-related safety constraints for technical-nautical services. In such cases it may therefore be necessary to limit the number of authorised providers of port services.
- (12) The criteria for any limitation must be objective, transparent, non-discriminatory, relevant and proportional. In the case of cargo handling, and unless exceptional circumstances prevail, the number of service providers for each category of cargo handling must not be limited to fewer than two completely independent providers.
- (13) Service providers should have the right to employ personnel of their own choice.
- (14) Where the number of providers of port services is limited, these will need to be selected by the competent authority, according to a transparent, objective, open and fair selection procedure with non-discriminatory rules.
- (15) In order to ensure that decisions and procedural measures under this Directive are taken, and are seen to be taken, by neutral bodies, the position of the managing body of a port which is itself, or wishes to become, a provider of a port service should be defined. It must be subject to the same conditions and procedures as other service providers whilst remaining in a position to ensure the functioning of the port. Therefore any decision on limiting the number of service providers and the selection itself must be entrusted to a neutral body and the managing body of a port shall not discriminate between service providers and between port users.
- (16) It is therefore necessary to ensure non-discrimination between the managing body of the port and independent operators, as well as between managing bodies of different ports.
- (17) In the financial field it is necessary to impose the obligation for managing bodies of ports covered by this Directive, which are also acting as service providers, to keep accounts for activities carried out in their function as managing bodies separate from those carried out on a competitive basis.
- (18) Commission Directive 2000/52/EC of 26 July 2000 lays down, for a certain number of undertakings, the obligation to maintain separate accounts which only applies to undertakings whose total annual turnover for each of the last two years exceeded EUR 40 million.
- In the light of the introduction of the freedom to provide port services in the Community, it is necessary to ensure that the principle of separation of accounts applies to all ports falling within the scope of the present Directive and to impose on ports transparency rules that are not less strict than those laid down in the Commission Directive 2000/52/EC.
- (19) The requirement to keep accounts for port service activities should apply to all undertakings which have been selected to provide such services.
- (20) Self-handling should be allowed and any criteria set for self-handlers should not be stricter than those set for providers of port services for the same or a comparable kind of service.
- (21) Authorisations granted through a selection procedure should be limited in time. It is reasonable to take into account, when determining the period of authorisation, whether the provider has had to invest in assets or not and, where this is the case, whether these assets are moveable or not. Although such procedure should lead to an adequate outcome, it is nevertheless necessary to set maximum periods of authorisation.
- (22) The current situation in the Community ports, with its multitude of authorisation and selection methods and periods, requires that clear transition periods be determined. These transition rules should distinguish between ports where the number of service providers is restricted and those ports where it is not.
- (23) Where the number of service providers is not restricted, there is no reason to change the existing authorisations, whilst future ones should be granted in accordance with the Directive's rules.

- (24) Where the number of service providers is restricted, the transitional periods should distinguish between authorisations granted in accordance with a public tender, or an equivalent procedure, or not; between situations where the service provider has made significant investments or not; and where these investments were made in moveable or immovable assets. The interests of legal certainty require that, in each case maximum periods be fixed, whilst leaving national authorities a substantial margin adequately to take into account the specificities of each case.
- (25) Member States should determine the competent authorities responsible for the implementation of this Directive.
- (26) Appeal procedures against decisions of the competent authorities should be in place.
- (27) Member States must ensure an adequate level of social protection for the staff of undertakings providing port services.
- (28) The provisions of this Directive in no way affect the rights and obligations of Member States in respect of law and order, safety and security at ports as well as environmental protection.
- (29) This Directive does not affect the application of the rules of the Treaty; in particular the Commission will continue to ensure compliance with these rules by exercising, when necessary, all the powers granted to it by Article 86 of the Treaty.
- (30) On the basis of Member States' reports on the application of this Directive, the Commission should make an assessment accompanied, if appropriate, by a proposal for the Directive's revision,

HAVE ADOPTED THIS DIRECTIVE:

#### Article 1

##### Objective

Freedom to provide port services shall apply to Community providers of port services under the provisions set out in this Directive. Providers of port services shall have access to port installations to the extent necessary for them to carry out their activities.

#### Article 2

##### Scope

1. This Directive applies to those port services set out in the Annex which are provided inside the port area for users of the port.

2. This Directive applies to any sea port or port system located in the territory of a Member State and open to general commercial maritime traffic, provided that the port's average annual throughput over the last 3 years has not been less than 3 million tonnes or 500 000 passenger movements.

3. Where a port reaches the freight traffic threshold referred to in paragraph 2 without reaching the corresponding passenger movement threshold, the provisions of this Directive shall not apply to port services reserved exclusively for passengers. Where the passenger movement but not the freight traffic threshold is reached, the provisions of this Directive shall not apply to port services reserved exclusively for freight. The Commission shall publish for information, in the *Official Journal of the European Communities* and on the basis of information provided by Member States, a list of the ports referred to in this Article. The list shall first be published within three months following the entry into force of this Directive, and thereafter annually.

4. Member States may require that the providers of port services be established within the Community and that vessels used exclusively for the provision of port services shall be registered in, and fly the flag of a Member State.

#### Article 3

1. This Directive is without prejudice to the obligations for competent authorities which flow from Directive 92/50/EEC, Directive 93/36/EEC, Directive 93/37/EEC and Directive 93/38/EEC.

2. Where one of the Directives referred to in paragraph 1 makes the tendering of a service contract mandatory, Articles 8 (1, 2, 3, 4 and 5), 12 (1 and 2), and 13 of this Directive shall not apply to the award of that contract.

3. This Directive is without prejudice, where applicable, to the obligations of competent authorities which flow from Directives 89/48/EEC, 92/51/EEC and 1999/42/EC on a mutual recognition among Member States of professional education and training.

#### Article 4

##### Definitions

For the purposes of this Directive:

1. 'sea port' (in this Directive referred to as 'port') is an area of land and water made up of such improvement 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 by inland transport, the embarkation and disembarkation of passengers;

2. 'port system' means two or more ports grouped together to serve the same city or conurbation;
3. 'port authority' or 'managing body of the port' (hereafter referred to as 'managing body of the port') means a body which, whether or not in conjunction with other activities, has as its objective under national law or regulation the administration and management of the port infrastructures, and the co-ordination and control of the activities of the different operators present in the port or port system concerned. It may consist of several separate bodies or be responsible for more than one port;
4. 'port services' means the services of commercial value that are normally provided against payment in a port and which are listed in the Annex;
5. 'provider of port services' means any natural or legal person providing, or wishing to provide, one or more categories of port services;
6. 'public service requirement' is a requirement adopted by a competent authority in order to secure adequate provision of certain categories of port services;
7. 'self-handling' means a situation in which a port user provides for itself one or more categories of port services and where normally no contract of any description with a third party is concluded for the provision of such services;
8. 'authorisation' means any permission, including a contract, allowing a natural or legal person to provide port services or to carry out self-handling.

#### Article 5

##### Competent authorities

Member States shall designate the competent authority or authorities for the purpose of implementing (Articles 6, 7, 8, 10, 11, 12 and 19 of this Directive).

#### Article 6

##### Authorisation

1. Member States may require that a provider of port services obtains prior authorisation under the conditions set out in paragraph 2, 3, 4 and 5. Authorisation shall be automatically granted to service providers selected under Article 8.
2. The criteria for the granting of the authorisation by the competent authority must be transparent, non-discriminatory, objective, relevant and proportional. The criteria may only relate to the provider's professional qualifications, his sound financial situation and sufficient insurance cover, to maritime

safety or the safety of installations, equipment and persons. 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.

3. Where the required professional qualifications include specific local knowledge or experience with local conditions, the competent authority must provide adequate training for applicant service providers.

4. Criteria referred to in paragraph 2 shall be made public and providers of port services shall be informed in advance of the procedure for obtaining the authorisation. This requirement applies equally to an authorisation linking the provision of service to an investment into immobile assets which will revert to the port upon expiry of the authorisation.

5. The provider of port services has the right to employ personnel of his own choice to carry out the service covered by the authorisation.

#### Article 7

##### Limitations

1. Member States may only limit the number of providers of port services for reasons of constraints relating to available space or capacity or, for technical-nautical services, to maritime traffic-related safety. The competent authority must:

- (a) inform interested parties of the category or categories of port services and 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 possible under the circumstances.

2. Where constraints relating to available space or capacity exist and, for as long as there are no exceptional circumstances in relation to the volume of traffic and categories of cargoes, the competent authority shall authorise at least two service providers for each category of cargo, which shall be completely independent of each other.

3. Where the competent authority deciding on limitations in relation to the port in question is the managing body of that port and where the managing body itself or a service provider over which it has direct or indirect control or is involved in, is, or wishes to become, also a service provider in that port, Member States shall designate a different competent authority and entrust it with the decision, or approval of a decision, on limitations. This newly designated competent authority must be independent of the managing body of the port in question and must not:

- (a) provide port services similar to those provided by any of the service providers in the port in question; and
- (b) have any direct or indirect control over, or be involved in, any of the service providers in the port in question.

#### Article 8

##### Selection procedure

1. Where the number of providers of port services has been limited in application of Article 7, the competent authority shall take the necessary measures to ensure a transparent and objective selection procedure, through tendering, using proportionate, non-discriminatory and relevant criteria.
2. The competent authority shall publish in the *Official Journal of the European Communities* an invitation to interested parties to participate in the selection process.

This publication may refer to the competent authority's or the port's own internet web-site or, where there is no such web-site, any other appropriate manner which makes the necessary information available in a timely way to any person interested in the process.

3. The competent authority shall include in its publication:

- (a) authorisation and selection criteria that define the authority's minimum requirements;
- (b) award criteria that define the grounds on which the authority will choose among offers meeting the selection criteria; and
- (c) conditions setting out the service requirements that the contract will cover and identifying any assets to be placed at the disposal of the successful tenderer together with the relevant terms and applicable rules.

4. The procedure shall provide for an interval of at least 52 days between the dispatch of the call for proposals and the latest date for receipt of them.

5. The competent authority shall include in the information it supplies to potential providers all relevant information it holds.

6. Where the competent authority carrying out the selection procedure in relation to the port in question is the managing body of that port and where the managing body itself or a service provider over which it has direct or indirect control or is involved in, is, or wishes to become, a service provider in that port, Member States shall designate a different competent authority and entrust it with the selection procedure in question. This newly designated competent authority must be independent of the managing body of the port in question and must not:

- (a) provide port services similar to those provided by any of the service providers in the port in question; and

- (b) have any direct or indirect control over, or be involved in, any of the service providers in the port in question.

#### Article 9

##### Duration

Providers of port services shall be selected for a limited period of time to be determined in accordance with the following criteria:

1. In cases where the service provider will make no or insignificant investments in order to carry out the provision of services, the maximum duration of its authorisation shall be 5 years.
2. In cases where the service provider will make significant investments in:
  - (a) moveable assets, the maximum period shall be 10 years;
  - (b) immovable assets, the maximum period shall be 25 years, irrespective of whether their ownership will revert to the port.

#### Article 10

##### Accounting provisions

The competent authority shall oblige the selected service providers to keep separate accounts for each port service in question. The compilation of the accounts must accord with current commercial practice and generally recognised accounting principles.

#### Article 11

##### Self-handling

1. Member States shall take the necessary measures to allow self-handling to be carried out in accordance with this Directive.
2. Self-handling may be subject to an authorisation for which the criteria must not be stricter than those applying to providers of the same or a comparable port service.

#### Article 12

##### Managing body of the port

1. Where the managing body of the port provides port services, it must fulfil the criteria set out in Article 6 and separate the accounts of each of its port service activities from the accounts of its other activities. The compilation of the accounts must accord with current commercial practice and generally recognised accounting principles to ensure that:

(a) the internal accounts corresponding to different activities are separate;

(b) all costs and revenues are correctly assigned or allocated on the basis of consistently applied and objectively justifiable cost accounting principles;

(c) the cost accounting principles according to which separate accounts are maintained are clearly identified.

2. 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.

3. Where as a result of a selection procedure under Article 8 no suitable service provider could be found for a specific port service, the competent authority may, under the conditions of paragraph 1 of this Article, reserve the provision of this service to the managing body of the port for a maximum period of 5 years.

4. The managing body of the port shall not discriminate between service providers. It shall in particular refrain from any discrimination in favour of an undertaking or body in which it holds an interest.

5. The provisions of this Directive in no way affect the rights and obligations of Member States in respect of the Transparency Directive 2000/52/EC.

#### Article 13

##### Appeals

1. Member States shall ensure that any party with a legitimate interest has the right to appeal against the decisions or individual measures taken, under this Directive, by competent authorities or the managing body of the port.

2. Where an application for access to provide port services under this Directive is rejected, the applicant(s) shall be informed of the reasons for not having been authorised or selected. Such reasons must be objective, non-discriminatory, well-founded and duly substantiated. Appeal procedures must be made available to the applicant. It must be possible to bring the appeal before a national court or a public authority that is independent in its organisation, funding, legal structure and decision-making of the competent authority or managing body of the port concerned and from any service provider.

3. Member States shall take the necessary measures to ensure that decisions taken by appeal bodies are subject to judicial review.

#### Article 14

##### Safety, security and environmental protection

The provisions of this Directive in no way affect the rights and obligations of Member States in respect of law and order, safety and security at ports as well as environmental protection.

#### Article 15

##### Social protection

Without prejudice to the application of this Directive, and subject to the other provisions of Community law, Member States shall take the necessary measures to ensure the application of their social legislation.

#### Article 16

##### Transitional measures

1. Where the number of providers of port services in a port is not limited by constraints relating to available space or capacity or maritime safety, existing authorisations may remain in force unchanged until such time as the number becomes limited. New authorisations must comply with the provisions of this Directive.

2. Where the number of providers of port services in a port is limited, the rules of points (a) to (e) apply.

(a) Where an existing authorisation was granted after a public tender or an equivalent procedure and is otherwise in conformity with the rules of this Directive, the authorisation may remain in force unchanged.

(b) Where an existing authorisation was not granted in conformity with the rules of this Directive and where the service provider has made no or insignificant investments, a new authorisation procedure in conformity with the rules of this Directive must be carried out within 2 years of the date of transposition of this Directive in the case of a sole service provider and within 4 years in all other cases.

(c) Where in the context of an existing authorisation a service provider has made significant investments in moveable assets, the following shall apply:

(i) where the authorisation was not granted in conformity with the rules of this Directive but was preceded by a public tender or an equivalent procedure, the maximum duration of the existing authorisation shall be 10 years;

- (ii) where the authorisation was not granted in conformity with the rules of this Directive and was not preceded by a public tender or an equivalent procedure, a new authorisation procedure in conformity with the rules of this Directive must be carried out within 3 years of the date of transposition of this Directive in the case of a sole service provider and within 5 years in all other cases.
- (d) Where in the context of an existing authorisation a service provider has made significant investments in immovable assets, the following shall apply:
  - (i) where the authorisation was not granted in conformity with the rules of this Directive but was preceded by a public tender or an equivalent procedure, the maximum duration of the existing authorisation shall be 25 years;
  - (ii) where the authorisation was not granted in conformity with the rules of this Directive and was not preceded by a public tender or an equivalent procedure, a new authorisation procedure in conformity with the rules of this Directive must be carried out within 5 years of the date of transposition of this Directive in the case of a sole service provider and within 8 years in all other cases.
- (e) Where in the context of an existing authorisation a service provider has made significant investments in moveable and immovable assets, point (d) shall apply.

#### Article 17

##### Information report and revision

Member States shall send the Commission a report on the application of this Directive no later than 3 years after the date of transposition.

On the basis of the Member States' reports, the Commission will make an assessment of the implementation by Member States of the Directive accompanied, where appropriate, by a proposal for its revision.

#### Article 18

##### Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than one year from the date of its entrance into force. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### Article 19

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

#### Article 20

##### Addressees

This Directive is addressed to the Member States.

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#### ANNEX

##### LIST OF PORTS SERVICES CONCERNED BY THIS DIRECTIVE

- 1. Technical-naulical services
    - (a) Pilotage,
    - (b) Towage,
    - (c) Mooring.
  - 2. Cargo handling including
    - (a) stevedoring, stowage, transhipment and other intra-terminal transport,
    - (b) Storage, depot and warehousing, depending on cargo categories,
    - (c) Cargo consolidation.
  - 3. Passenger services (including embarkation and disembarkation).
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