

PORTS POLICY

RÉSUMÉ

The EC Ports Package is still in the approval cycle. EuDA has commented in particular to the Rapporteur in the European Parliament, raising questions about the effectiveness of the proposed package in terms of legislation. The dredging industry promotes in particular free nautical access to and transparency in the accounts of all ports, public or private.

PORTS POLICY

1. Ports Structure

There is a great variation between ports in ownership, activities and jurisdictional forms (Table 1)

Table 1 : Port function matrix

| Port models | Port functions | | |
|------------------|------------------|------------------|-----------------|
| | <i>Regulator</i> | <i>Landowner</i> | <i>Operator</i> |
| Public | Public | Public | Public |
| Public / Private | Public | Public | Private |
| Public / Private | Public | Private | Private |
| Private | Private | Private | Private |

The position of private ports is rather unique :

“Ports established as private enterprises with managerial decision making purely based upon economic considerations with no public influence whatsoever, aside from constraints associated with public policies as environment, regional / territorial planning, or connection to land networks.”

The spectrum of activities and services to be offered in and around ports is also rather diverse (Table 2)

Table 2 : Port related activities



| | Cargo related | Transport related |
|-----------------------|---|---|
| Infrastructure | Port infrastructure Terminal infrastructure Terminal superstructure | Nautical access Nautical depth (incl. dredging) Traffic control Reception facilities |
| Port services | Load / unload Storage Stevedoring, etc. } Cargo handling | Pilotage Towage Mooring } PTM |

This diversity makes it very difficult to develop EU wide legislation to regulate competition between ports and ensure market access.

2. Ports package

The European Commission has nevertheless introduced a package of proposals to harmonise the position of ports. The overall objective of the ports policy package is to improve functioning of the EU internal market in relation to competition between ports and competition within ports. The package itself consists of :

- A draft Directive aimed at opening up the market for port services;
- A communication to highlight the applicability of Directive 80/723/EEC and 2000/52/EC which deal with transparency of accounts for public undertakings and certain particular undertakings;
- A background report highlighting the diversity amongst ports.

The European dredging industry has a keen interest in the development of port infrastructure and in the maintenance of nautical access and as such wishes to comment on the proposed package.

The draft legislation is currently under review by the Council and the European Parliament and final positions may change from current proposals.

Our comments are primarily formulated by asking the question : are the proposals likely to be effective legal instruments in view of the very wide diversity in local conditions and constraints between ports ?

It appears that the first objective of ports policy should be to maintain the possibility of fair competition between ports.

The second goal may be to improve market access conditions for service providers within ports, but the unique structure of ports as public service providers may imply the



existence of monopolies. The policy should secure instruments that prevent abuse of monopolies.



3. Is the proposed package an effective legal instrument ?

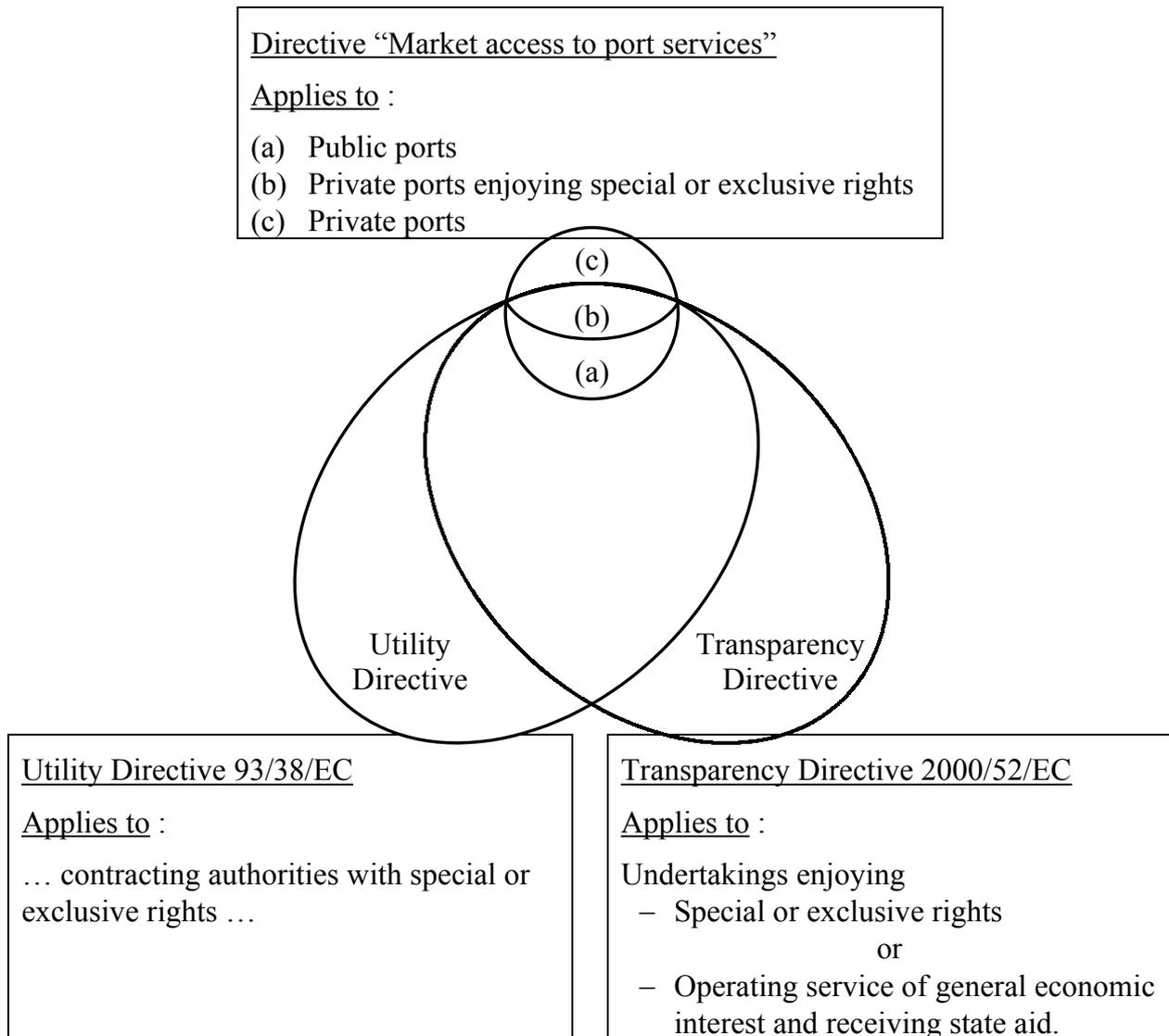
In terms of complying with rules that touch upon competition, ports would in principle have to comply with :

- Utility Directive 93/38/EC on Public Procurement;
- Proposed Directive on Market Access to Port Services;
- Transparency Directive 2000/52/EC.

It is not obvious that the implementation requirements for these 3 areas of activity are consistent. In particular the statute of private ports is determined by national legislation and one could imagine cases where private ports are not covered by the proposed directive (see diagram 3), thus leading to unequal treatment.

There are potential inconsistencies between the regulations for providing services and the obligations in procurement of services and works. There are also problems with the territorial limits of competence.

Diagram 3 : Ports services and public procurement



- The ports directive would apply only within the jurisdictional boundaries of the port, while several of the services covered in the Commission proposal are being performed outside these boundaries (pilotage, nautical access) and would not be covered by the terms of the directive.
- The Transparency Directive 2000/52/EC exists already and imposes obligations on all semi-public and utility bodies that provide a public service. The existence of the Directive has thus far not had any noticeable effect on financial reporting in general. It is a bit odd that one should specifically emphasise applicability for a specific sector; this might be seen as unequal treatment.
- On the Transparency Directive, when compared with the Port Services draft, one can make several more observations :
 - The Transparency Directive would apply to all public and private ports. This raises the question of enforcement and verification in view of identifying state aid or cross-subsidisation; can this be done effectively ? By whom ?
 - In contrast, the draft on ports services seems to limit the scope of the Transparency Directive to those managing bodies of ports that provide port services (Art. 2) and service providers selected by the competent authority (Art. 10). Both restrictions do not match the thrust of Directive 2000/52/EC and are in our view inconsistent.
- Art. 12-4 of the draft ports' directive is an attempt to deal with conflict of interest : '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.'. This simply is not likely to work and would therefore be poor legislation.

4. Transparency and State Aid

Traditionally ports are seen as a necessary part of public infrastructure, the construction of which is financed by public coffers. This was perfectly in order, but problems may arise if one considers the issue from the perspective of competition between ports, each with a different organisational structure.

Where does investment in public infrastructure end and where does financial participation become state aid ? This problem presents itself in particular for cargo-related infrastructure. Landlord ports will usually apply public finance to the realisation of new port infrastructures, but when it comes to the specific infrastructure for terminals it may be argued that financial support with public money is state aid.



The construction of terminal superstructure is definitely considered to be a commercial matter which should not be realised with public finance.

From a EU policy perspective it is important to issue clear guidance for what constitutes state aid and which part of investments can be financed with public funds.

The second issue is that private ports typically would have to finance all port development with private funds and would argue that competition between landlord ports and privatised ports is not taking place under equitable conditions.

Port development, infrastructure and services will receive different treatment in matters of financing, public support and accounting. It follows that it is important to have insight in the financial accounts of ports. For public ports one would hope to learn what public funds have been made available and for what purpose in order to verify that the ports receive only approved state aid; for private ports one expects that port operations and other commercial operations are kept separate and that no cross-subsidisation occurs.

The Transparency Directive puts requirements on ‘the transparency of financial relations between Member States and public undertakings’. For ports that are public undertakings the Directive aims to obtain the following information :

- Public funds made available directly by public authorities to the public undertakings concerned.
- Public funds made available by public authorities through the intermediary of public undertakings or otherwise.
- The use to which these funds are put.

For private ports, which are considered to be particular undertakings with special or exclusive rights, the reporting requirements are different, since there is normally no question of public financial support :

- Costs and revenues associated with different activities are to be reported in separate accounts.
- Full details of the methods by which costs and revenues are assigned or allocated to different activities must be specified.

While it would be interesting to have access to all this information, the question remains whether this kind of regulation is easily enforceable within the EU ? Who would compare all the financial reports and draw a consistent set of conclusions ? If it is left to national governments there is no real incentive to report about unauthorised state aid to a particular port, because the government would be party to the deal and the results would not be comparable anyway.