

# THE IMPACT OF THE PROPOSED PORT SERVICES DIRECTIVE ON PORT AUTHORITIES

*Portnet Workshop*

*Antwerp Port Authority*

15 September 2005

© Prof. Dr. Eric Van Hooydonk

# OVERVIEW

- Legal assessment of the new proposal
- Hypothetical cases
- Impact on port authorities: conclusions

# LEGAL ASSESSMENT (1)

- The need for a Port Services Directive (PSD)
  - Implications of primary EU law unclear
  - Enforcement policy of EC unclear
  - PSD could consist of a common code of good port management
  - PSD could enhance legal certainty

# LEGAL ASSESSMENT (2)

- Reiteration of principles contained in first proposal
  - Political justification identical: lack of legal certainty and transparency – in Member States' law
  - Legal basis unaltered
  - Key concepts and provisions unchanged (scope, authorisations, objective selection procedures, self-handling, duration, transparency, neutrality)

# LEGAL ASSESSMENT (3)

- Limited concessions to earlier criticism
  - Adoption of principles contained in 2003 conciliation draft
  - e.g. emphasis on social protection (including ILO rules on dock work), safety and security, public service requirements, proper and efficient management of ports, compensation, (limited) extension of duration, less strict liberalisation of pilotage

# LEGAL ASSESSMENT (4)

- Unresolved old problems (1)
  - Absence of a convincing justification (1)
    - Dogmatic transposition of other liberalisation measures
    - Lack of a thorough examination of specific needs and problems of EU port sector
    - No demonstration of real problems affecting the port sector

# LEGAL ASSESSMENT (5)

- Unresolved old problems (2)
  - Absence of a convincing justification (2)
    - A profound distrust vis-à-vis port authorities
    - EU ports industry one of the most efficient – and cheapest – in the world
    - Need for self-handling ? (cf. Airports Groundhandling Directive)
    - Impact on modal shift not demonstrated

# LEGAL ASSESSMENT (6)

- Unresolved old problems (3)
  - Scope
    - Ports “open to general commercial maritime traffic”
    - PSD also applicable to integrated port authorities – encroachment upon property rights
    - Port traffic threshold may lead to a distortion of competition
    - ‘Community providers of port services’ ?

# LEGAL ASSESSMENT (7)

- Unresolved old problems (4)
  - Limitation concept
    - “a situation in which the competent authority does not allow a provider that fulfils the criteria for authorisation to provide one or more categories of services”
    - Port authorities may easily circumvent provisions on objective selection procedures
      - By granting an authorisation to first applicant
      - By offering a commercially unattractive site to customers

# LEGAL ASSESSMENT (8)

- Unresolved old problems (5)
  - Legality of port authorities' exclusive rights
  - Compatibility of exclusive rights of registered dock workers with EU law
  - Maximum durations and return on investment

# LEGAL ASSESSMENT (9)

- New or additional problems (1)
  - Increased complexity and confused wording
    - will endanger legal certainty

# LEGAL ASSESSMENT (10)

- New or additional problems (2)
  - Cases where an open selection procedure must be organised
    - Decision by PA / request from existing service provider / request from new potential service provider / termination of existing authorisations where a limitation has occurred
    - Direct negotiations still possible
    - Competitors may abuse their right to provoke an open selection procedure

# LEGAL ASSESSMENT (11)

- New or additional problems (3)
  - Conformity of prior selection procedure to the Directive's requirements
  - Encroachment upon property rights
    - Specific but unclear provisions on private ports
    - Private sector investment not encouraged

# LEGAL ASSESSMENT (12)

- New or additional problems (4)
  - Lack of a proper transitional regime
    - Disproportionality in the termination of existing authorisations
    - Fate of existing authorisations will depend on circumstances beyond the control of existing service providers and PAs
    - All authorisations must be terminated whenever a limitation occurs

# LEGAL ASSESSMENT (13)

- New or additional problems (5)
  - Social achievements after take-over of authorisations
  - Rigidity of port development plans
  - Differentiation of authorisation criteria
  - Self-handling to be allowed ‘wherever possible’
  - Competent authorities versus port authorities

# LEGAL ASSESSMENT (14)

- New or additional problems (6)
  - Renewability of authorisations
  - Sanction for non-publication of expiration of authorisations
  - Calculation of compensation
  - Disparities between PSD provisions and recitals

# HYPOTHETICAL CASES

## after entry into force of PSD (1)

- Goethe Schleppern GmbH from Hamburg applies for an authorisation to operate a towage service in the Antwerp docks
- The Antwerp Port Authority which holds an exclusive right under local port regulations, does not grant an authorisation
- Is that in accordance with the PSD ?
- Nobody knows !

# HYPOTHETICAL CASES

## after entry into force of PSD (2)

- Cervantes Terminals from Valencia announces that it will employ Spanish dockers on its new terminal in the port of Ghent
- The PA, the social inspection and trade unions point out that Belgian legislation grants an exclusive right to registered dock workers
- Is that in accordance with the PSD ?
- Nobody knows !

# HYPOTHETICAL CASES

## after entry into force of PSD (3)

- Byron Pilots has obtained an exclusive concession for pilotage services to and from English ports
- Tariffs are unreasonably high and shipping companies lodge a complaint on the basis of an abuse of a dominant position (Art 82 EC)
- Is it still possible to declare the creation of the monopoly contrary to the EC Treaty whereas the PSD expressly permits the granting of a pilotage monopoly ?
- Nobody knows !

# HYPOTHETICAL CASES

## after entry into force of PSD (4)

- Dante Tank Storage in the port of Naples considers heavy investments in new tanks on its present terminal
- There are no other suited sites in the port
- French competitor Molière Tanking has been announcing similar plans for years
- As soon as Molière would submit a proposal, a limitation would occur, which would lead to a termination of Dante's authorisation
- As a consequence of this Sword of Damocles, Dante Tank Storage cancels its investment plan altogether

# HYPOTHETICAL CASES

## after entry into force of PSD (5)

- Ibsen Stevedoring Company submits a proposal for the creation of a new coal terminal in the port of Oslo
- The port is full
- A limitation occurs
- As a consequence, the Port of Oslo will have to terminate ALL existing authorisations for cargo terminals, including those for containers, fruit and ro/ro traffic

# HYPOTHETICAL CASES

## after entry into force of PSD (6)

- Sophocles Terminals in Piraeus submits an investment plan for a container terminal in a recently built new dock
- So far no other candidates have appeared
- The proposal is exceptionally attractive and the PA – perfectly lawfully - accepts it
- Afterwards, Aristotle Terminals submits a proposal of its own
- Notwithstanding the PSD, Aristotle comes too late !

# IMPACT ON PORT AUTHORITIES (1)

- As a tool for creating legal certainty, a PSD is in itself a useful initiative
- In its current wording, the PSD will however create more legal problems than it will resolve
- Legal certainty will be endangered throughout the entire shipping and port sector
- PSD does not offer solutions to existing fundamental legal problems
- PSD contains too many loopholes
- PSD may be abused

# IMPACT ON PORT AUTHORITIES (2)

- PSD will have a negative impact on
  - Commercial confidence between PAs and port users
  - Investment level
  - Efficiency of ports
- PSD will create massive red tape
- Continuous litigation - A paradise for lawyers
- PSD proposal should be amended, supplemented or replaced by better alternatives...

[...to be continued after the lunch !]

# CONTACTS

- Eric Van Hooydonk  
Emiel Banningstraat 21-23  
B-2000 Antwerp  
Belgium  
T + 32 3 238 67 14  
F + 32 3 248 88 64  
[eric@ericvanhooydonk.be](mailto:eric@ericvanhooydonk.be)