

THE IMPACT OF THE PORT SERVICES DIRECTIVE ON TERMINAL OPERATORS

Portnet Workshop

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SELECTED ISSUES RELEVANT TO PRIVATE PORT OPERATORS

- Duration of contracts
- Stability of contracts
- Compensation
- Private investments

DURATIONS (1)

- A legislative bidding procedure...
- No investments
 - 2001 Proposal: 5 years
 - 2003 Conciliation Text: 10 years
 - 2004 Proposal: 8 years
- Significant investments in movable assets
 - 2001 Proposal: 10 years
 - 2003 Conciliation Text: 15 years
 - 2004 Proposal: 12 years

DURATIONS (2)

- Significant investments in immovable assets
 - 2001 Proposal: 25 years
 - 2003 Conciliation Text: 36 years
 - 2004 Proposal: 30 years
- Do these maximum durations allow a sufficient return on investment ?
- In many MSs, durations of 50, 75 or 99 years are common practice

DURATIONS (3)

- Longer durations would encourage private investments
- PAs may prematurely terminate a contract if the general interest so requires
- Authorisations are *not* renewable
- Negative impact on investment climate

STABILITY OF CONTRACTS

- Existing contracts will have to be terminated depending on external circumstances
 - Leads to massive legal uncertainty
- New contracts *must* be varied or revoked where “in a substantial manner” authorisation criteria are not or no longer complied with
 - Encroachment upon commercial flexibility of PAs ?
 - What about *force majeure* situations ?
 - What if development policy of the port turns out to be superseded by commercial developments ?

COMPENSATION (1)

- “Member States shall enact provisions whereby an existing service provider which is not selected following the application of the present Article shall be compensated by the newly selected service provider for those past investments which it has made and 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”
- Provision too detailed and too vague at the same time ?

COMPENSATION (2)

- Why exclude additional compensation for other items ?
 - e.g. equipment which is not taken over
 - e.g. lost profits
 - e.g. training of employees

PRIVATE INVESTMENTS (1)

- Specific provisions on
 - Authorisations deriving from ownership or property (type 1)
 - New ports built and commercially financed before 18 months' transitional period (type 2)
 - New ports built and commercially financed after that period (type 3)
- Is this distinction necessary ?
- Why impose identical maximum durations on private investors in port infrastructure ?

PRIVATE INVESTMENTS (2)

- Why no distinction on the basis of the origin of ownership or property rights in type 1 situations (sale by auction or not) ? Such a distinction *is* made for type 2 and 3 situations
- Owners of port facilities will either be enabled to continue their port operations perpetually, or be abruptly confronted with severe restrictions, merely dependent on whether or not a competitor emerges - the Sword of Damocles of limitations...

PRIVATE INVESTMENTS (3)

- Open procedures for private infrastructure investment projects may be mandatory on the strength of other instruments:
 - public procurement Directives – which take priority over PSD
 - Interpretative Communication on concessions - no further guidance as to inter-relation with PSD
- Private financing of transport infrastructure through public-private partnerships is a priority objective of the Commission's transportation policy but is not encouraged by PSD

CONCLUSIONS

- Doubtful whether private port operators will benefit from introduction of liberalisation measures
- PSD not in line with call for increased private financing of ports

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