

**ALTERNATIVES
FOR THE
EU PORT SERVICES DIRECTIVE**

Portnet Workshop

Antwerp Port Authority

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OVERVIEW

- Starting point
- Amendments ?
- A new Directive proposal ?
- A different instrument ?
- Preferable alternative

STARTING POINT

- Present PSD proposal lacks a convincing justification
- Proposal is too complicated
- Wording is confused
- Proposal will not achieve its purpose to create legal certainty
- Clear lack of support from stakeholders
- Alternative scenarios ?

AMENDMENTS ?

- Co-decision procedure (Art 251 EC)
 - Subsequent intervention of EP, EC, CoM, influenced - or not - by stakeholders and public opinion
 - Conciliation text to be submitted to the EP
 - Pros
 - Public debate
 - Normal democratic scenario
 - Cons
 - Outcome unpredictable (cf 2003 vote in EP)
 - Quality of amendments ?
 - Social unrest in EU port sector
 - Slow process

A NEW PROPOSAL (1) ?

- Withdrawal of present Directive proposal followed by a completely new draft
 - Pros
 - EC would take into account massive criticism of present proposal
 - Scenario would offer the opportunity to thoroughly re-consider need for a Directive and its individual provisions
 - Would enable EC to draw up a PSD which is widely supported
 - Cons
 - May be considered to imply ‘loss of face’ and be politically difficult
 - May strengthen fundamental opposition against the very idea of adopting a PSD

A NEW PROPOSAL (2) ?

- Contents ?
 - Cf ESPO paper
 - A code of good port management practice
 - Basic question: finding a suitable criterion for organising an open selection procedure
 - Limitations ?
 - Request from PA or service providers ?
 - State aid ?
 - ‘Declaration of interest’ after publication available sites of strategic importance
 - Need to *support* ports and *encourage* investors in port facilities (cf EC’s PPP policy)

A DIFFERENT INSTRUMENT (1) ?

- Hard law
 - Regulation or Directive
- Soft law
 - “Rules of conduct that are laid down in instruments which have not been attributed legal binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects“

A DIFFERENT INSTRUMENT (2) ?

- A three-fold classification of soft law instruments on the basis of their function and objective:
- Preparatory and informative instruments (1)
 - Adopted with a view to preparing further Community law and policy and/or providing information on Community action
 - Fulfilling a *pre-law* function
 - Types: Green Papers, White Papers, action programmes and informative instruments

A DIFFERENT INSTRUMENT (3) ?

- Preparatory and informative instruments (2)
 - Examples
 - **Green Paper of 10 December 1997 on seaports and maritime infrastructure, COM (97) 678 final**
 - **White Paper submitted by the Commission on 12 September 2001: "European transport policy for 2010: time to decide", COM(2001) 370**
 - **Green Paper on vertical restraints in EC competition policy, COM(96)721 final**
 - **White Paper on energy policy for the European Union, COM(95)682 final**

A DIFFERENT INSTRUMENT (4) ?

- Preparatory and informative instruments (3)
 - Communication on the EU action plan. Satellite communications in the information society, COM(97)91 final
 - Green Paper on public-private partnerships and Community law on public contracts and concessions, COM(2004)327 final
 - Communication from the Commission to the Council and the European Parliament of 13 March 2001, "Completing the internal energy market“, COM(2001) 125 final

A DIFFERENT INSTRUMENT (5) ?

- Interpretative and decisional instruments (1):
 - These instruments aim at providing guidance as to the interpretation and application of existing (primary or secondary) Community law
 - *Interpretative* instruments esp. restate or summarise the interpretation that should be given to Community law provisions, also on the basis of the case law of the ECJ
 - *Decisional* instruments go further than mere interpretation by indicating in what way a Community institution - usually the Commission - will apply Community law provisions in individual cases when it has implementing and discretionary powers

A DIFFERENT INSTRUMENT (6) ?

- Interpretative and decisional instruments (2)
 - Fulfilling primarily a post-law function, being adopted subsequent to already existing Community law with a view to supplementing and supporting it
 - Types: the Commission's communications and notices and also certain guidelines, codes and frameworks frequently adopted in the areas of competition law and state aid

A DIFFERENT INSTRUMENT (7) ?

Interpretative and decisional instruments (3)

- Examples

- Communication concerning an internal market for pension funds, OJ 1994, C 360/8 (cf. C-57/95, France v. Commission)
- Communication concerning the free movement of workers and access to the public service, OJ 1988, C 72/2
- Commission interpretative communication concerning the application of the Single Market rules to the sectors of fairs and exhibitions, OJ 1998, C 143/2

A DIFFERENT INSTRUMENT (8) ?

Interpretative and decisional instruments (4)

- Interpretative Communication on the freedom to provide services and the concept of ‘general good’ in the second Banking Directive, SEC(97)1193 final
- Notice from the Commission on the application of the competition rules to the postal sector and on the assessment of certain State measures relating to postal services, OJ 1998, C 39/2
- Commission Communication to the Member States – Application of Articles 92 en 93 of the EEC Treaty and of Article 5 of Commission Directive 80/723/EEC to public undertakings in the manufacturing sector, OJ 1991, C 273/2

A DIFFERENT INSTRUMENT (9) ?

Interpretative and decisional instruments (5)

- Code on aid to the synthetic fibres industry, adopted on 30 March 1996, OJ 1996, C 94/7
- Guidelines on the application of EEC competition rules in the telecommunications sector, OJ 1991, C 233/2
- **Commission interpretative communication on concessions under Community law, OJ 2000, C 121/2**
- Vademecum Community rules on state aid
- Commission Communication of 7 February 2001 to the Council and the European Parliament on e-commerce and financial services, COM (2001) 66

A DIFFERENT INSTRUMENT (10) ?

Interpretative and decisional instruments (6)

- Commission Communication to the Council, the European Parliament and the European Central Bank of 14 May 2003 on the application to financial services of Article 3(4) to (6) of the Electronic Commerce Directive, COM(2003) 259
- Commission interpretative communication on freedom to provide services and the general good in the insurance sector
- **Community guidelines for State aid to maritime transport, OJ 1997, C 205**
- **Vademecum on Community Rules on State Aid and the Financing of the Construction of Seaport Infrastructures, Commission Staff Working Document, 15 January 2003**
- **State aid Guidelines for Sea Ports ?**

A DIFFERENT INSTRUMENT (11) ?

- Steering instruments (1)
 - These aim at establishing or giving further effect to Community objectives and policy or related policy areas. Sometimes this is done in a rather political and declaratory way but often also with a view to establishing closer cooperation or even harmonisation between the Member States in a non-binding way. These instruments are not necessarily linked to the existing legal framework

A DIFFERENT INSTRUMENT (12) ?

- Steering instruments (2)
 - The *recommendation* constitutes a formal steering instrument (presented as a Community legal instrument in Article 249 EC). *Other instruments* are non-formal instruments (occur only in daily practice). To a certain extent, the latter instruments are used as alternatives to legislation and fulfil a para-law function. However, sometimes they merely perform the pre-law function, in the sense that they pave the way for the adoption of future legislation

A DIFFERENT INSTRUMENT (13) ?

- Steering instruments (3)
 - Types: declarations, conclusions, recommendations, resolutions and codes of conduct
 - Examples
 - Commission Recommendation 98/322/EC of 8 April 1998 on interconnection in a liberalised telecommunications market (Part 2 – Accounting separation and cost accounting), OJ 1998, L 141/6
 - **Commission recommendation of 30 July 1997 concerning transactions by electronic payment instruments and in particular the relationship between issuer and holder, OJ C 1997, C 208/52**

A DIFFERENT INSTRUMENT (14) ?

- Steering instruments (4)
 - Council resolution of 7 February 1994 on the development of Community postal services, OJ 1994, C 48/3
 - Commission Communication of 9 February 2004 entitled "Report on Competition in Professional Services“, COM(2004) 83 final

PREFERABLE ALTERNATIVE (1) ?

- Two main sub-alternatives (1)
 - Soft law instruments **supplementing** the PSD
 - State Aid Guidelines AND Market Access Guidelines
 - PSD not to enter into force until Guidelines are adopted ?
 - Guidelines could also accompany a *new* PSD proposal
 - In other words: a PSD with a clear Interpretative Handbook attached to it
 - A soft law instrument **replacing** the PSD
 - A Port Services Communication or Recommendation on the application of the great freedoms and competition law in the sea port sector
 - Such a Communication or Recommendation may announce a proper PSD if it is not complied with

PREFERABLE ALTERNATIVE (2) ?

- Two main sub-alternatives (2)
 - Pros
 - Soft law a useful tool for enhancing legal certainty
 - Many precedents in other sectors
 - Would allow a step-by-step liberalisation approach
 - Could find stronger support from stakeholders and MSs
 - Cons
 - Drawing up reliable soft law instrument requires time and effort as well as consultation and a study on the need for liberalisation
 - May not fit into the political process

PREFERABLE ALTERNATIVE (3) ?

- An alternative approach which guarantees legal certainty, finds broad support and avoids unrest could consist of three steps
 - A White Paper or similar instrument establishing the need for a liberalisation instrument
 - A Communication or Recommendation on the application of the EC Treaty in the port sector, announcing a proper PSD if it is not complied with
 - If needed, a new PSD proposal accompanied by thoroughly elaborated State Aid *and* Market Access Guidelines

PREFERABLE ALTERNATIVE (4) ?

- Directive provisions should rely on sound principles of good port management practice rather than consist of over-detailed bureaucratic stipulations
- Directive should support ports and encourage private investment
- Other combinations are possible
- Rushing the matter will inevitably lead to bad legislation and useless litigation to the detriment of port authorities and port users alike !

SOURCES

- Sources on soft law
 - KC Wellens and GM Borchardt, “Soft Law in European Community Law”, ELR 1989 265 ff
 - L Senden, *Soft Law in European Community Law*, Oxford and Portland Oregon, 2004

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