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**THE IMPACT OF THE DIRECTIVE OF THE EUROPEAN
PARLIAMENT AND OF THE COUNCIL ON THE AWARD OF
CONCESSION CONTRACTS ON THE PORT SECTOR**

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1. INTRODUCTION

The port sector in the European Union (EU) shares many typical characteristics. Some of them shall be explicitly emphasized in this paper: 1) Port sector is a very large sector and is important not only in a transport chain but also in the EU economy as whole; 2) Port regulations differ considerably according to each Member State and even between ports in the same Member State; 3) The EU has no special legislation regulating the market of port services; this is also true for awarding concessions to ports and/or terminal operators in ports.

The latest fact is of the key interest since the European Commission issued a proposal for the Directive of the European Parliament and of the Council on the award of concession contracts (*Proposal for a Concessions Directive*) on 20 November 2011. Questions regarding concessions in the port sector are not a new issue. Nowadays, a large part of the port services is no longer considered as services performed in the general economic interest¹. This process started in a very evident way in 1990's by some decisions of the ECJ. The most important case was *Merci Convenzionali Porto di Genova SpA v Siderurgica Gabrielli SpA*². The ECJ judgement stated that provisions of the Treaty relating to free trade preclude rules of a

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¹ E. Van Hoydonk, *The regime of port authorities under European law including an analysis of the port service directive*, Antwerp Maritime Law Seminars, 2003, p. 88.

² 10th December 1991, C 170/90, *Il diritto marittimo*, 1991, p. 1128.

Member State which confers on an undertaking an exclusive right to organize dock work, and a dock work is not a work performed in general economic interest³.

The principle for the port sector, which is very thoroughly explained in the *Merci Convenzionali* can be found in other less known ECJ cases which already appeared in 1970's, and are related to a transport sector in general. In the *French Seamen's Case*⁴ from 1970's ECJ stated that the general and competition principles laid down in the Treaty of Rome were applicable to the transport sector as whole, and the port sector became aware of an immediate consequence of the Community law.

After some very significant ECJ and Commission Decisions, it became clear that the area of port sector should be regulated with the documents of the European Community (EC) bodies. The first attempt in this direction was the *Green Paper on Seaports and Maritime Infrastructure (Green Paper)*⁵ issued by the European Commission. However, this document was not binding on the Member States. Its purpose was to launch a wide-ranging debate on individual port issues and possible future policies which should help to increase port

³ In this case the company Siderurgica Gabrielli imported steel from Germany and entrusted the unloading of the goods to *Merci convenzionali porto di Genova s.p.a.* Because of a strike of stevedores in the port of Genoa, who were organized in the single port companies with a monopoly on the loading and unloading of cargo, it was not unloaded on time, and the company Siderurgica Gabrielli brought an action to the court for compensation for delays. Before the Italian judge decided in the matter he had submitted to the ECJ two preliminary questions: Whether Article 106 (1) (ex 86.1, ex 90.1) precluded the application of Italian law restriction on dock work, and whether Article 106 (2) (ex 86.3, ex 90.2) could provide a justification based on entrustment with the provision of services of general economic interest. The court found out that double monopoly existed in Italy, first on the level of management and second on the level of dockworkers. In this respect the ECJ answered that Article 106 (1) (ex 86.1, ex 90.1) when seen in conjunction with free competition and competition provisions precluded rules of a Member States which confers on an undertaking established in that state the exclusive right to organize dock work, and requires it for that purpose to have recourse to a dock work company whose workforce is composed exclusively of nationals of that Member State. With regard to the Article 106 (2) (ex 86.2, ex 90.2), the ECJ held that dock work was not work of general economic interest exhibiting special characteristics or, even if it were, that the application of the competition rules would be such as to obstruct the performance of a task of general economic interests. This means that dock work does not fall under the exception of the Article 106 (2) (ex 86.2, ex 90.2).

⁴ Case 167/73, Commission vs. France 1974.

⁵ COM (97) 616 final.

efficiency, improve port and maritime infrastructure by integrating ports into the multimodal trans-European network as well as meeting the community responsibilities under the Treaty to ensure free and fair competition in port sector⁶. The Green Paper as a whole enables free access to the market of port services for all those port services where it is not necessary to protect public interest (cargo related services), as opposed to those port services where it is not in contrast to the EU competition legislation if public interest is protected (technical-nautical services). The first group includes all services related to cargo. The second group is related to services, such as pilotage, towing and mooring.

If the port services related to the cargo handling are clearly not services performed in the general interest, their performance regarding free access to the port must be regulated. The main problem is that a port is a very limited place wherein only a certain number of port service providers can perform their services efficiently. This is the reason why, in general, concessions are awarded to port providers. However, Community secondary legislation is still lagging behind and has yet not provided any applicable regulation regarding the awarding of concessions for services. In this respect, general principle of the *Treaty on the Functioning of the European Union (TFEU)* should be applied.

Because of the specificity of the port sector, two Proposals for a *Directive of the European Parliament and of the Council on Market Access to Port Services* (First and second Proposal for a Port Service Directive) were prepared⁷. Both proposals typically emphasize the freedom to provide port service operations. This freedom can be limited mostly because of space constraints of capacity as well as maritime safety, port security or the development policy of the port, in compliance with safety requirements, environmental protection and public service obligation⁸. Because restrictions were necessary, both directives required from the competent authority to ensure a transparent and objective selection procedure, using proportionate, non-discriminatory criteria in delivery of the authorisation for performing port services⁹. The criteria for granting authorisation may only relate to providers' professional

⁶ Green Paper, Executive Summary, point 3.

⁷ COM (2001) 35 Final – 2001/0047 (COD) submitted by the Commission on 14 February 2001 and COM (2004) 654 Final, 2004/0240 (COD).

⁸ Article 7, first Proposal for a Port Service Directive; Article 1, second Proposal for a Port Service Directive.

⁹ Article 8, first Proposal for a Port Service Directive; Article 8, second Proposal for a Port Service Directive.

qualifications, their sound financial situation and sufficient insurance cover; to maritime safety or the safety of installations; compliance with employment and social rules, equipment and persons, and the development policy of the port¹⁰.

Both directives were rejected in the European Parliament. The first directive because of the provision regulating self-handling, which permitted Member States to take necessary measures to allow self-handling to be carried out in accordance with the Directive¹¹. Because of this provision, the dockworkers and their associations were afraid of a work reduction. A port/user self-handler was not obliged to call on local service providers established within the port¹². A compromise was reached in the Second proposal for a Port Service Directive regarding the self-handling and land-based or local personnel must be hired for self-handling¹³. On the other hand, the Directive was criticised for favouring shipowners who would have integrated the ports in their productive chains.

After the rejection of both directives, the regulation of free access to the market of port services remained in general provisions of the TFEU and court practice. The European courts must still solve any disputes related to this subject-matter on a case-by-case basis.

2. NEW PROPOSAL FOR A CONCESSIONS DIRECTIVE

On 20th November 2011, the European Commission issued the proposal for a *Directive of the European Parliament and of the Council on the Award of Concession Contracts (Proposal for a Concessions Directive)*¹⁴. This directive not only regulates the

¹⁰ Article 6, first Proposal for a Port Service Directive; Article 7, second Proposal for a Port Service Directive.

¹¹ See Article (1) 11, first Proposal for a Port Service Directive.

¹² E. Van Hoydonk, op. cit., p. 854.

¹³ The only exemption when self handling can be also performed by not land-based personnel is defined in the Article 13 of the Second Proposal for a Port Service Directive, in case of Short Sea Shipping and Motorways of the Seas operations, when Member States shall recognize the right to self-handle using also the vessel's regular sea-faring crew.

¹⁴ COM (2011) 897 final, 2011/0437 (COD).

procedures related to the award of service concessions but also concessions regarding works and supplies.

One of the main reasons for the adoption of the Proposal for a Concessions Directive is the absence of clear rules and procedures governing the award of concession contracts at EU level. This creates uncertainty and unnecessary obstacles to the free provision of services and causes disturbance to the functioning of the Internal Market¹⁵.

The main characteristic of the concessions awarded on the basis of this directive is that they are awarded by contracting authorities whether or not works or services including the related supplies are intended for a public purpose¹⁶. By this provision, the new directive covers very large scope of concessions which not only comprises the area of public works, services and supplies, but also those performed in private interest.

Besides procedures regulating the award of concessions for performing works, services and supplies, the directive also includes other important matters, such as definitions of main terms important in concession proceedings and for the use of the directive (which are mostly elaborated in Art. 2, as well as in Art. 3, 4 and 22). The document also includes further explanation of the keywords, such as: contracting authorities, contracting entities and economic operators; duration of concessions (Art. 16); subcontracting (Art. 41); modification of concessions during their term (Art. 42); and termination of concessions (Art. 43).

3. HOW WILL THE NEW DIRECTIVE AFFECT PORT CONCESSIONS

Concessions are present in many sectors and the port sector is only one of them. The main purpose of a Proposal for a Concessions Directive is to regulate in a uniform way general matters regarding proceedings and other matters connected with concessions at EU level. This can have its advantages and disadvantages, mainly because of numerous specifics in the port sector.

¹⁵ Proposal for a Port Service Directive, Explanatory Memorandum.

¹⁶ Ibidem, Art. 1(2).

It is very clear that ports are included in the scope of the directive, but very general provisions regulating the award of concessions raises many questions regarding the impact of this document on the port sector. Some of the directive's provisions are very useful and can efficiently regulate general procedures related to the award of concessions, such as: concessions notices, methods for calculating value of concessions, technical specifications, selection of candidates, award criteria, etc. A current Proposal for a Concessions Directive also includes the definitions of the key words crucial for the uniform interpretation and application of the document at EU level.

Although the new directive will solve many problems in the port sector, there are also numerous questions regarding the Proposal for a Concessions Directive. One of the crucial questions is whether all terminal services contracts will fall under the provisions of the new directive. According to its provisions it is clear, that the new directive will only regulate concessions for the port services over the amount of 5.000.000,00 EUR (Art. 5). It should be pointed out that a great part of concessions in the port sector exceeds this value, but here still remains a question if all mentioned concessions fall under the regulation of directive.

One of the most important subject-matters of legislation regulating the area of concession contracts is the selection of awarding criteria. In the Proposal for a Concessions Directive, these criteria are elaborated in a very general way¹⁷, but are not inconsistent with the current criteria applied in concession contracts in ports. These criteria are also not in conflict with the awarding criteria defined in the two rejected Proposals for a Port Services Directive¹⁸. The only difference is that both proposals use more detailed criteria because of their much narrower scope of application. From this point of view, we can establish that the awarding criteria of the Proposal for a Concessions Directive can be also used in the port sector.

¹⁷ Art. 39, par. IV., of the Proposal for a Concessions Directive defines the criteria relevant to the port sector in terms of quality, technical merits, aesthetic and functional characteristics, environmental characteristics, organisation, qualification and experience of the staff assigned to perform the concession.

¹⁸ Paragraph II., Article 6 of the first Proposal for a Port Service Directive and paragraph III. of Article 7 of the second Proposal for a Port Services Directive define the criteria in the following terms: provider's professional qualifications, maritime safety, equipment and personnel.

One of the crucial questions in the port sector is the duration of a concession. Provisions of the Proposal for a Concessions Directive are not very detailed in this respect. They only define that the duration of a concession should be limited to the time estimated to be necessary for a concessionaire to recoup the investment made in operating the works or services together with a reasonable return of a capital¹⁹. Typical of concessions in the port sector is that they are stipulated for a long period of time. This is especially true when a concessionaire invests a considerable amount of money to build a port infrastructure²⁰. Therefore, it is not surprising if a great part of concessions awarded in the port sector are of long duration extending over 30 years and more. This fact is also observed in both Proposals for a Port Services Directive. If a concessionaire builds immovable assets, a maximum duration of a concession is either 25 years according to the first proposal²¹ or 30 years according to the second proposal of directive²², respectively.

The only definite rule regarding the duration of concessions, whether they are awarded in the port or any other sector, is that they cannot be awarded for an unlimited period of time. Permanent concessions are contrary to the EU law, since they distort fair competition. This is also the position of the European Court of Justice²³. The position of the European Court of Justice is as well that too long periods of concession could impede or even violate the exercise of the TFEU freedoms by operators in other Member States and therefore constitute a restriction on the exercise of those freedoms²⁴. Provisions in the Draft of a Concessions Directive are written in very general terms and define the duration of a concession based on the value of investments. In the port sector, concession periods between 30 and 40 years are quite common when significant investments are performed in ports. The

¹⁹ Article 16, Proposal for a Concession Directive.

²⁰ In Antwerp Port authority deployed for Greenfield terminals system of concession's duration which is based on investments in equipment and fix assets. In this respect, the maximum duration of concession is 40 years for investments over 375 EUR/m² of arable land and the minimum duration is 10 years for investments between 25 EUR/m² and 100 EUR/m² of arable land.

²¹ Article 12, first Proposal for a Port Service Directive.

²² Article 9, first Proposal for a Port Service Directive.

²³ ECJ C-451/08, Helmut Müller, para. 79.

²⁴ ECJ C-64/08, Engelmann, para. 46.

Ventspils decision of the European Commission clearly indicates that concessions can be awarded for a period of 35 years when significant investments in the port infrastructure are made²⁵. The decision of the European Commission does not mean that the duration of a concession cannot be longer, but only emphasizes that it is based on the value of investments.

Other very important problem regarding port concessions and concessions in general is the extension of their validity. This question is not directly addressed in a Proposal for a Concession Directive although it is very important, because there exists cases when validity of concessions is extended. The provision that concession period can be extended can be very restrictively supported. According to a Proposal for a Port Services Directive, the extend of concession fall in its renewal. It is possible if are present requirements from the Article 42 (5) of Proposal for a Concession Directive, wherein the most important is that in the concession documents are in clear, precise and unequivocal view defined renewal clauses or options²⁶. As a consequence, the renewal conditions or options need to be published already at the stage of the award procedure.

Nevertheless, a concession period cannot be extended if investment is recouped although all other criteria for renewal from the concession agreement are specified and met. This would be a clear violation of the TFEU and its provisions on the free competition as well as the provisions of a Proposal for a Concessions Directive, especially its Article 42 (5) which defines that "modification (renewal) of a concession agreement contract shall not be of such nature that would alter the overall nature of the concession".

Another very relevant question regarding a new Proposal for a Concessions Directive is related to the situation when a concessionaire makes investments during a concession period and these investments are not recouped. The easiest solution would be to prevent new investments after the stipulation of a concession agreement. Such solution is simple but unproductive in most cases with concessions for a long period of time. It is well known that technology in port industry is in continuous progress. If concessionaires are not allowed to

²⁵ C39/2009, 25.08.2011, *Ventspils*, par. 83 with further references.

²⁶ Concession modifications shall not be considered substantial within the meaning of paragraph 1, where they have been provided for in the concession documents in clear, precise and unequivocal review clause or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall provide for modifications or options that would alter the overall nature of the concession.

make new investments in the port infrastructure and other equipment to perform port services, they can no longer compete on the market. The problem of investments is especially relevant when significant investments are made in the last years of a concession period. In this case, it is evident that they will not be recouped. First of all, a systematic approach should be taken to solve the problem. This means that investments, mode of their realisation during a concession period and recoup of money regarding investments should be defined in detail in a concession agreement. If investments are not returned during a concession period, two solutions are possible providing that competition rules are not distorted. First solution is to extend a concession period, if such possibility is defined in a concession agreement²⁷. The main aim of renewal of a concession agreement is to recoup the investment. In each respect, such the agreement cannot be extended for a period disproportionate to the duration of a concession although the investment is not recouped.

Other solution for unreturned investments is the return of an undepreciated value to a concessionaire. This way a concessionaire gets no additional value which would overpass the investments in port infrastructure, but only the value not recouped. Any additional value would be a distortion of free competition and the violation of the TEUF. Such possibility shall be defined in the concession agreement.

4. CONCLUSION

A new Proposal for a Concessions Directive can be quite useful in the port sector. It is very general for the activities of the port sector, but it incorporates some definitions and rules which can be applied for a uniform regulation on the award of concession contracts at EU level. Some questions remain whether, if at all, the Proposal with its general provisions adequately regulates certain matters related to port concessions. In this respect, it is up to the port sector, stakeholders related to ports and courts to fill all gaps which brings future Concessions Directive.

²⁷ ESPO's guidelines define that port authorities may permit a possible short extension of an existing contract for a short term period, once during the last years of validity of the contract, if the operator is committed to do significant investments and if this possibility was anticipated in the bidding process and the conditions clearly detailed in the contract agreement.