

## SOME LABOUR AND SOCIAL QUESTIONS IN THE EUROPEAN UNION PORT SECTOR

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### *Sažetak*

#### NEKA PITANJA IZ RADA I SOCIJALNA PITANJA U LUČKOM SEKTORU EUROPSKE UNIJE

*Devedesetih godina prošlog stoljeća lučki sektor je doživio značajne promjene. Dodirna je točka ovih promjena liberalizacija u pristupu tržištu lučkih usluga. Ova je pojava utjecala na sve zainteresirane strane koje imaju veze s lukama, između ostalog i na lučke radnike. Nije li različito organiziranje lučkih radnika kako bi zaštitili svoja radna i socijalna prava u suprotnosti s Ugovorom o Europskoj zajednici i drugim EU propisima o tržišnom natjecanju bilo je jedno od glavnih pitanja koje je pratilo liberalizaciju pristupa tržištu lučkih usluga. Odgovor na ovo pitanje je negativan budući da ne spadaju u poduzetništvo prema odredbama Ugovora o Europskoj zajednici te se na njih ne mogu primjenjivati niti odredbe o tržišnom natjecanju tog Ugovora. Iako je radni i socijalni status lučkih radnika uistinu složen ne postoji posebno zakonodavstvo koje bi ga reguliralo. U tom se pogledu trebaju primijeniti odredbe Ugovora o Europskoj zajednici i opće zakonodavstvo Europske unije iz područja rada i socijalnih pitanja. Postojali su neki pokušaji usvajanja posebnog zakonodavstva za tržište lučkih usluga koje je također sadržavalo odredbe o radnom i socijalnom statusu lučkih radnika, no svi su ti pokušaji propali. Posljednji EU dokument iz područja tržišta lučkih usluga je Priopćenje o europskoj lučkoj politici. U sebi sadrži neke teme koje se odnose na radni i socijalni status lučkih radnika. Tako je državama članicama i državama u postupku pridruživanja predloženo da vode računa o radnom i socijalnom statusu lučkih radnika prilikom kreiranja svojih radnih i socijalnih politika.*

***Ključne riječi: lučki radnik, sindikat, lučki sektor, Smjernica o lučkim uslugama.***

## 1. Introduction to the transformation of the EU port sector

The port sector plays an important part in the European Union's (EU) economy. Its numerous ports from the Mediterranean to the North Sea are key points of modal transfer whereas their roles are vital for the handling of 90% of Europe's international trade<sup>1</sup>. All EU Member States are well aware of this fact. It is therefore not surprising that considerable investments have been made into the port sector and advanced technologies have been introduced in performing port services. However, this is only one aspect of the general development related to the port sector. Another important aspect is related to the legal area, more specifically to the liberalisation of the access to the market of port services, i.e., to a process which began in the early 90s with the decisions of the European Court of Justice (ECJ) and the European Commission (Commission). The essential point for them is that since dock work is not to be understood as a service performed in the public interest, there is no reason to perform it under monopoly conditions.

After the first ECJ's and Commission decisions, the EC started to work on the drafting of documents<sup>2</sup>. Within the documents two Proposals for a Directive of the European Parliament and the Council on Market Access to Port Services (Port Service Directive) represented the attempt to pass from a case by case approach in regulating the port services market to a regulatory framework which would have been able in to regulate that area a systematic way. Regardless of the type of document (whether their function is *regulatory or only consultative*), they were first and foremost focused on raising the productivity and efficiency in performing port services. In this respect it is emphasized that liberalisation or open access to the market for port services on the basis of transparent and non-discriminatory procedures in granting the authorisation for performing applicable services, necessitates that the costs of port services be covered by their users<sup>3</sup>, as well as engaging private capital in financing the port infrastructure; transparency of the state funding; a consistent division of accounts whereby a managing body provides the port services etc.

The labour and social policy in ports accounts for an area which was not fully covered by the Commission in its documents and the discussions which followed,

1 COM (2007) 616 final, {SEC(2007)1339} {SEC(2007)1340} Communication on a European Ports Policy, Introduction .

2 COM (97) 678 final, Green Paper on Seaports and Maritime Infrastructure (Green Paper), COM/2001/0035 final – COD 2001/0047 Proposal for a Directive of the European Parliament and of the Council On Market Access to Port Services (First proposal for a Port service directive), COM/2004/654 final – COD 2004/0240 Proposal for a Directive of the European Parliament and of the Council On Market Access to Port Services (Second proposal for a Port service directive); COM (2007) 616 final, {SEC(2007)1339} {SEC(2007)1340} Communication on a European Ports Policy.

3 In the past ports tended to be seen mainly as trade facilitators and growth poles for regional and national development providing services of general economic interest by the public sector and which principally were to be paid for by taxpayers; whereas now the trend has increasingly moved towards considering ports as commercial entities which ought to recover their costs entirely from port users who benefit from them directly. – Green paper, point 38. f

despite the fact that this constitutes an important area in the creation of the EU port policy. Each effort to increase the productivity and efficiency in ports should be accompanied by an optimal social and labour port policy. Therefore it can not be comprehended that labour and social rights represent mostly a factor of costs in performing port services. In recent decades more and more advanced technologies have been introduced in ports, bringing about the need for well trained dockworkers who are able to meet all the challenges of the new technologies. Such workers can contribute to raising the productivity in ports, from which the stakeholders benefit, thus, the work of such a manpower should be paid in proportion to their contribution to the raising of productivity, especially if the stakeholders want to continue successfully recruiting and obtaining such quality manpower. Well trained workforce is important not only to increase the productivity in ports, but also to prevent work accidents considering the danger present in the port environment.

Training of dockworkers and providing adequate wages is only one of the aspects of labour and social rights in the ports. There are others such as guaranteeing permanent work, reasonable work time, enough rest, adequate pension and health insurance policies, a healthy work place with as little potential dangers as possible, and the like. When making these arguments it should be taken into account that the labour in EU Member States obtained a certain level of labour and social rights that can not be overlooked in the ports, nor can it be ignored that stakeholders had benefits from a great part of labour and social rights granted to the workers.

## ***2. Main reasons for social protection of dock workers in ports***

In the past, port workers were rather disadvantaged in terms of social rights. They depended entirely on the needs of ship owners who hired them when their ships arrived in ports. This condition of temporary employment led not only European port workers, but workers all over the world to protect themselves.

There are different systems of employee social protection which are manifested in two forms: On the one hand, the dockworkers are registered in special registers kept under control by public bodies or parity committees, formed by dockworkers (or trade union associations which represent them), by ports' entities, associations of users or by port companies (depending on the kind of port management, public or private). On the other hand, dockworkers are associated into particular trade union associations, which protect their interests and conditions of labour and can be integrated into large trade union associations on both the national and international level<sup>4</sup>.

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4 G. Righetti, *Trattato di Diritto Marittimo*, First Part, First Volume, 1987, p. 866.

### ***3. European Community legislation on social and labour status of dock workers***

EC has developed a huge amount of legislation in the labour and social area. Typically for the latter is that there are no acts regulating a specific labour and social situation in the port sector. Accordingly, it is necessary to apply the general provision of EC's primary and secondary legislation in order to regulate the dock workers status.

A discussion about the issue which EU primary and secondary legislation applies to the specific situation of port workers, could be very ample. For this reason, only the legislation from which main issues have arisen in practice, shall be mentioned hereinafter.

When discussing the EC's primary legislation it is necessary to mention the EC Treaty and to emphasize those provisions which regulate free movement of workers. Ports throughout the EC shall ensure that they do not discriminate on the basis of the nationality between employees from other Member States. Free movement of workers in ports is directly connected with the freedom of movement for workers as one of the four freedoms regulated in the EC Treaty, from Article 39 to 42. The aim of the provisions regarding the free movement of workers is to establish a unified market of labour force. Freedom of movement for workers is strongly connected with other freedoms also regulated by the Treaty (free movement of goods, services and capital), whereas its effective performance cannot be conceived without them. Although in these issues the free movement of workers has been predominantly thought of in the economic sense, it is also a social category. Freedom of movement for workers in the common market enables workers and members of their families to gain means which are necessary for improving their standard of living<sup>5</sup>.

The EC's Treaty provisions which regulate the freedom of free movement for workers were deliberated by the European Court of Justice (ECJ) in the case of *Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli* (*Merci Convenzionali case*)<sup>6</sup> wherein ECJ stressed the incompatibility of the Italian legislation, since it stipulated that members of dock companies had to be of Italian nationality<sup>7</sup>.

Another very important issue in the port sector are collective agreements which set out terms of employment for a large numbers of employees. In many ports their application represents a problem because dock workers for whom the collective

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5 P. Grile, *Pravo Evropske unije*, Second volume, 2001, p. 434.

6 10<sup>th</sup> December 1991, C170/90, *Il diritto marittimo*, 1991, p. 1128.

7 The court emphasized that Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaty, in particular those provided in Article 12 (this Article was Article 7 of the EEC Treaty at the time of the judgement), which contained the general prohibition of discrimination on grounds of nationality. As regards workers, these principles have been specifically applied by Article 39 (ex 48) of the Treaty. In this respect, the ECJ concluded that it should be recalled that Article 39 (ex 48), of the EC Treaty precludes, first and foremost, rules of a Member State which reserve to nationals of that States the right to work in an undertaking of that State, such as the Port of Genoa company.

agreements are valid, receive higher wages than workers on the free market and it is obvious that the productive costs are higher. In this respect a question is if such collective agreements and different systems of employee's social protection can be submitted to the EC Treaty competence provisions<sup>8</sup>. The answer is negative mostly because the aim of the EC Treaty competence provisions is to achieve the economic goals which are manifested in augmenting the productivity by enabling all interested subject to have equal possibility of market competition in market and not to protect social status of workers through collective agreements and other forms of their protection as, for example, registered and/or recognized dock workers, dock workers pools etc. To this end, it is important to mention the ECJ's Judgement in Albany International BV/Stichting Bedrijfspensioenfonds Textielindustrie (Albany case),<sup>9</sup> in which where the ECJ denied that EC Treaty's competence provisions shall have regulated collective agreements<sup>10</sup>. Very similar and important ECJ's Decision for the port sector in this respect is also the Jean Claude Becu, Annie Veweire, NV Smeg and NV Adia Interim (Jean Claude)<sup>11</sup>, where ECJ took the position that recognized dockers in a port area cannot be regarded as constituting an undertaking in conformity to the EC Treaty's provisions and therefore they can not be a subject of its competition provisions<sup>12</sup>.

As regards the secondary legislation in labour and social area there is a handful of regulations, directives and communications. The secondary legislation is very important in practice which regulates safety and health at work, work equipment and protection from different risks at work. Significant part of this legislation is joined in the Directive 89/391/EEC (the "Framework" Directive) which is mentioned also in Communication on a European Ports Policy<sup>13</sup> issued by the Commission after the failure of two drafts of Port Services Directive<sup>14</sup>. Among secondary legislation, one should mention regulations and directives which regulate the free movement for workers. They are issued on basis of Article 40 of the EC, which enable the

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8 In EC Treaty the provisions regarding free competence are in Title VI Common Rules on Competition, Taxation and Approximation of Law from Article 81 till Article 97.

9 21. Septembre 1999, C-67/96, (1999) ECR I-5751.

10 The issue in this case was: Is a collective agreement between employers and employees to set up a »second pillar« pension fund (additional to the social security pension) an agreement which infringes Article 81 (ex 85) of the EC Treaty. The answer of the court was no, because such an agreement should be seen in the light of the social policy provisions of the EC Treaty and not in the light of competition provisions.

11 16<sup>th</sup> September 1999, C22/98, (1999) ECR I-5665.

12 See *infra* 4.1.

13 See *infra* 5.

14 See *infra* 4.2.

adoption of such secondary legislation<sup>15</sup>. In this respect many important regulations and directives were adopted.<sup>16</sup>

From many regulations and directives regulating the labour and social area we should mention expose the Working Time Directive<sup>17</sup>. It has its legal grounds in Article 138 (ex 118a) of the EC Treaty, which provides that the Council shall adopt, by means of directives, minimum requirements for encouraging improvements, especially in the working environment, to ensure a better level of protection of the safety and health of workers.

Typically for port work is that it is very unpredictable and very often depends on peaks when the work shall be organized in shifts and during the night. In this respect the Working Time Directive plays an important rule, as it sets down the minimum standards for daily rest, weekly rest period, maximum weekly working time and especially night work. All this is of great importance for the protection of dock workers, although for the port other matters are recommendable that would have been prescribed by this directive. One such matter is overtime work, which is mentioned only in preliminary provisions, where the limitation of duration of overtime work is very roughly mentioned. Another such matter is the distribution of

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15 The council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 39, in particular:

- (a) by ensuring close cooperation between national employment services;
- (b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Members States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;
- (c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States, as imposed on workers of other Member States condition regarding the free choice of employment other than those imposed on workers of the State concerned;
- (d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

16 Some of important secondary EC legislation regarding the freedom of movement for workers:

Council Regulation 1612/68 of October 1968 on Freedom of Movement for Workers Within the Community; OJ 1968 L 257 as amended by Council Regulation 312/76 and Council Regulation 2434/92, Council directive 73/148 on the Abolition of Restrictions on Movement and Residence Within the Community for Nationals of Members States with Regard to Establishment and the Provision of Services, Council Directive 68/360 on the Abolition of Restrictions on Movement and Residence Within the Community for Workers of Member States and Their Families, Council Directive 64/221 on Measures Concerning the Movement and Residence of Foreign Nationals which are Justified on Grounds of Public Policy, Public Security and Public Health, Council Regulation 1251/70 on the Right of Workers to Remain in the Territory of Another Member State After Having Been Employed in that State.

17 Directive 1993/104/EC as it was amended by Directive 2000/34/EC.

working time, which is sometimes inevitable because of the unpredictability of the starting time for the commencement of the stevedoring operations, mostly because of unpunctual arriving of vessels in ports.

The respect of the Directive's provision for dock work is not absolute. According to Article 17 (2), Member States can derogate certain of its provisions regarding rest, breaks, weekly rest period and length of night work in the case of activities involving the need of continuity of service or production. Such continuity is usually an indispensable condition for an effective performance of dock services. Therefore, it is not surprising that this directive explicitly defines that dock workers can be a subject to the derogation for Directive's provisions in above mentioned cases. The possibility of derogation from Directive's provisions is not unlimited and can be realised only on condition that equivalent compensation rest periods are granted to the workers concerned or, in exceptional cases, when due to objective reasons it is not possible to grant such periods, provided that appropriate protection is given to the workers concerned.

As already indicated, there are no special EC legislation regulating the labour and social relationships in port sector. The idea for starting the process of regulation via special EC legislation arose in the 90s. The labour and social area in this process was not the main goal, but it was not completely ignored by the different proposals prepared in order to achieve this goal. All attempts of regulating the port sector were to a large extent unsuccessful, mostly due to the reasons described hereinafter.

#### ***4. The main characteristics of the labour and social policy in the EU from the 90s***

##### ***4.1. Court practices and Commission's Decisions***

The situation of labour and social rights in EU ports is closely connected with the events which caused a great change in the comprehension of the nature of port services in the last decades. The main characteristic is that a great part of port services are no longer comprehended as services performed in the general economic interest<sup>18</sup>. The first changes in this direction happened in the 1970s when the feasibility of a joint European port policy became a point of debate<sup>19</sup>. It was only after the Judgement of the Court of Justice in the French Seamen's case<sup>20</sup> which confirmed that the general freedom and competition principles laid down in the Treaty of Rome were applicable

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18 The only exemption are services performed with the intention to provide safety and environmental protection in the ports where certain exclusive rights for their performers are permitted. Typically services of that kind are technical nautical services like pilotage, towing and mooring which are provided to ensure safe navigation. – see Green Paper, point 30-35 and 85-90; Art. 14, First Proposal for a Port Service Directive; Art. 5, Second Proposal for a Port Service Directive.

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

20 Case 167/73, *Commission v. France* (1974) ECR 359.

to the transport sector as a whole and thus also the port sector that the port sector became aware of the immediate consequences of Community law<sup>21</sup>.

In the 1990s, the legal status of ports under Community law drew renewed attention with a number of ECJ and Commission Decisions. A turning point for this event in the 1990s was a decision regarding *Merci Convenzionali* case<sup>22</sup>. 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 Genova, who were organized in two single port companies with a monopoly on the loading and discharging of cargo, it was not discharged 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 86 (1) (ex 90.1) precluded the application of Italian law restrictions on dock work, and whether Article 86 (2) (ex 90.2) could provide a justification based on entrustment with the provision of services of general economic interest.

The ECJ held that Article 86(1) (ex 90.1) when seen in conjunction with free trade and competition provisions precluded rules of a Member State 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 Article 86 (ex 90) , 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 interest. This means that dock work does not fall under the exception of Article 86(2) (ex 90.2).

This court judgement, in which the ECJ stated that in Italy a double monopoly existed, first on the level of management<sup>23</sup> and second on the level of dockworkers<sup>24</sup> and the request of commissioner with responsibility for competition requesting the Italian Navigation Code to be amended, brought port reform to Italy. This reform was realized despite protests of Italian doctrine, although some of those protests appeared to have been well founded. The main problem was that the ECJ did not distinguish between the status of dock workers organized in companies and undertakings in Italian ports which were performing port services. Only dock workers in Italian ports organised in companies, which were legal entities, enjoyed under Article 110 of the Navigation Code (itl. *Codice della navigazione*) legal monopoly, because according

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21 E. Van Hoydonk, *supra* 19, p. 88.

22 *Merci Convenzionali* case, *supra* 6, p. 1128.

23 Accordingly, under the Article 111 Navigation code the performing of the port services was in the hands of undertakings which received the concession from the compartment for maritime navigation and from the head of the port inspector for internal navigation, accordingly the modality prescribed by law.

24 The monopoly on the level of dockworkers meant that for performing dock operations in each port there was a company of dock workers with exclusive right to perform port operations. This exclusive right was regulated by Article 110 of the Navigation Code.



to the mentioned article, they were the only one authorized to perform loading and unloading as well as some other ports operations<sup>25</sup>. There is no doubt that such a regulation is in direct contrast with EC legislation on competition. Another situation existed with undertakings performing port services, according to Article 111 of the Navigation Code. They were allowed to perform such services in Italian ports only if they were given a concession. In case all participants in the concession proceeding for performing services in ports had equal position and possibilities, the EC competition legislation was not infringed<sup>26</sup>.

One of the main consequences of the reform was that the port companies were abolished and undertakings which operated in the ports could directly employ dockworkers. The next great change was self-handling, meaning that port users can perform port services by themselves if they get authorization, which requires that the following conditions be fulfilled: a ship disposes with its own equipment and crew, who are able to perform the port operations and that security is given<sup>27</sup>.

The mentioned self-handling which was a consequence of the reform after the *Merci Convenzionali* case, did not produce huge oppositions of Italian stevedores, as apposed to the self-handling regulated in the two drafts of Port Service Directives. In addition, after the *allowing self-handling* in Italian legislation, ship crews did not take a great initiative in performing operations of loading and unloading in ports.

After the Decision in *Merci Convenzionali* case, many other decisions of the ECJ and the Commission regarding port services were issued<sup>28</sup> but none of them treated the labour and social relationship directly. Another very important ECJ Judgment regarding dockworkers was the case of *Jean Claude Becu, Annie Veweire, NV Smeg and NV Adia Interim (Jean Claude)*<sup>29</sup>. In this case Smeg, a grain warehousing business in the Ghent port area, hired workers provided by Adia Interim, a temporary employment agency, rather than recognised dockworkers<sup>30</sup>. During the proceeding

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25 C. Medina, *Le norme del codice della navigazione sul monopolio delle compagnie portuali e sull'esercizio da parte di imprese di operazioni portuali per conto terzi alla luce dei principi fondamentali del trattato istitutivo della Comunità economica europea : il giudizio della corte del Lussemburgo*, Studi in onore di Enzo Volli, 1993, 273.

26 *Ibidem*, 276.

27 *Indent d*, Par. IV., Art. 16. Law no. 84/94.

28 *Holyhead I: B&I Line/Sealink*, 11<sup>th</sup> June 1992, (1992) 5 CMLR 223; *Corsica Ferries Italia v. Corporazioni Dei Piloti*, 17<sup>th</sup> May 1994, Case C-18/93, (1997) ECR I-1547, (1997) 5 CMLR 484); *Holyhead II: Sea Containers/Stena Sealink*, 21<sup>th</sup> December 1993, Case IV/34.689, OJ 1994 L15/8; *Diego Cali & Figli v. Servizi Ecologici Porto di Genova*, 18<sup>th</sup> March 1997, Case C-343/95, (1997) ECR I-1547, (1997) 5 CMLR 484, (1997) CCH 1183; *Rodby*, Commission Decision EC 94/119, 21<sup>th</sup> December 1993, OJ 1994 L55/52; *Irish Continental Group v. CCI Morlaix*, 16<sup>th</sup> May 1995, Case IV/35.388, (1995) 5 CMRL 177.

29 *Jean Claude*, *supra* 11.

30 According to Art. 1 of Belgium Law of 8 June 1972 (*Staatsblad*, 10 August 1972, p. 8826, »the 1972 Law«) no one shall cause the dock work in port areas to be performed by anyone other than recognized dockworkers. Under Article 4 of that Law, a fine is to be imposed on employers, or their employees or agents, who have caused or permitted dock work to be performed in breach of the provisions of that law or the decrees implementing it.

the national court posed two questions regarding compatibility with European Community (EC) law on Member State legislation which allows only “recognised” dockworkers to perform dock work and regarding the concept of such undertakings in the context of port activities.

In taking the decision The ECJ first stressed that the prohibition contained in Article 86 (1) (ex 90.1) of the Treaty, which appears in Part Three, Title V (now, after amendment, Title VI EC), Chapter 1-relating to the rules on competition, Section 1 – entitled “Rules applying to undertakings” – of the EC Treaty, is applicable only if the measures to which it refers concern “Undertakings”<sup>31</sup>. The employment relationship which recognized dockworkers have with the undertakings for which they perform dock work is characterised by the fact that they perform the work in question for and under the direction of each of those undertakings, so that they must be regarded as “workers” within the meaning of Article 39 (ex 48) of the EC Treaty. Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them, dockworkers do not therefore in themselves constitute “undertakings” within the meaning of community competition law<sup>32</sup>. Even taken collectively, the recognized dockworkers in a port area cannot be regarded as constituting an undertaking<sup>33</sup>.

On the above basis the ECJ ruled that article 86 (1) (ex 90.1) of the Treaty does not confer the individual right to oppose the application of legislation of a Member State which requires them to have resources for the performance of dock work, exclusively to recognised dockworkers such as referred to in the Belgian “1972 Law” organising dock work, and to pay those dockworkers fair remuneration in relation to the wages of their own employees or the wages which they pay to other workers.

The decision of the ECJ was not accepted peacefully by all; it was evident that recognized dockworkers, who had an exclusive right to perform the dock work and receive much greater wages than non-recognized dockworkers, had an impact on the EU market; on the other hand there was also the opinion that they had the nature of an undertaking. This opinions derived from the widespread comprehension of an undertaking formed by the ECJ in recent years<sup>34</sup>. There was the change from the subjective conception according to which the undertaking represents “a unified conception of personal, material and immaterial elements which belong to certain autonomous legal person which is directed to follow permanently a determined economic aim, to an objective-functional concept on which basis the undertaking represents ‘whichever entity’ which exercises the economic activity disregarding the

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31 Jean Claude, *supra* 11, para. 24.

32 *Ibidem*, para. 26.

33 *Ibidem*, para. 27.

34 See M. Brignardello, *La disciplina italiana e belga del lavoro portuale al vaglio della Corte di Giustizia CE nelle sentenze Porto di Genova e Porto di Gand*, *Il diritto marittimo*, 2000, p. 477.

juridical status of a determined entity and its mode of financing”<sup>35</sup>. When studying if recognised dock-workers can have the characteristics of an undertaking, the aim of their organising should be taken into account. In case of recognized dockworkers from Gent it is more evident that they rather organised themselves in order to protect their social status than to run a lucrative activity in the market, which is one of the key elements in defining an undertaking.

#### 4.2. Documents of the EC bodies

After some very significant ECJ and Commission Decisions the latter issued the Green Paper on Seaports and Maritime Infrastructure (Green Paper). The Green Paper does not represent a binding document for EU Members. Its purpose is to launch a wide ranging debate on individual port issues and possible future policies which should help to increase port efficiency and improve port and maritime infrastructure by integrating ports into the multimodal trans-European network and should also meet the Community responsibilities under the Treaty to ensure free and fair competition in the port sector<sup>36</sup>. From its text it is evident that the Green Paper supports free access to the market of port services for all those port services where it is not necessary to protect public interests (*services related to the cargo*) and consistent respect of EC competition laws. The paper also emphasised the necessity of attracting private capital to invest in port infrastructure and that port services are financed by port users on commercial principles, ensuring that investments and services rendered by port service providers will be demand driven. Labour and social policy are not the central points of the Green Paper. They are mostly mentioned in the context of the rigidities which are still characteristic a cargo handling services. Examples are the registration of port workers and the existence of labour pools in a number of EU ports, which have their origin in the past, when port work was highly irregular, in order to cope with the “peaks”, mainly due to the unpredictable pattern of ship arrivals. Generally restrictions or conditions for registration do not pose problems as long as they are non-discriminatory, necessary and proportional. On the other hand an obligation for port operators to participate in the pools and or use exclusively workers who are members of the pool for their port operations may under certain circumstances constitute a de-facto restriction to the market access<sup>37</sup>. The Green Paper does not describe these circumstances but it is not difficult to envisage situations where pools or other organisations of dock workers, which have the monopoly on labour work,

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35 In this respect M. Brignardello compares the decision of ECJ from 13 July 1962, Klöckner, Werke AG, Hoesch AC v. High Authority of the European Coal and Steel Community, Racc. 1962, p. 600, with contemporary court practice from 90’s and namely ECJ , 18. June 1998, Case 35/96, European Commission v. Republic of Italy, *Il diritto marittimo*, 1999, p. 494; ECJ 19. January 1994, Case 364/92, SAT Fluggsellschaft mbH v. Organisation européenne pour la sécurité de la navigation aérienne, *Foro it*, 1994, IV, p. 308; ECJ, 23. April 1991, Case 41/90, Höfner and Elsnér v. Macroton GmbH *Riv. it. dir. pubbl. Com.*, 1992, p. 1326. – *Ibidem*.

36 Green Paper, Executive Summary, point 3.

37 Green Paper, point 84.

have an influence on the restriction of market access and consequently on the costs of services. In *Merci Convenzionali* case it was emphasised that the unloading of the goods could have been effected at lower cost by the ship's crew, so that compulsory recourse to the services of the two undertakings enjoying exclusive rights involved additional expense<sup>38</sup>.

The next step of the Commission in its attempt to regulate the market of port services was the first proposal for a Port Service Directive. The main intention of that proposal was to set the frame of uniform legislation of EU Member states regarding access to the market of port services, assuring the performance of the provision of competition and the separation of the public port management from the private. It was the first attempt at designing a specific European legal regime for the port sector. From the establishment of the EC the port sector remained the only sector without a specific legal framework. The consequence of such a situation was that the Commission was forced to meet case by case the eventual problems connected with free competition and fundamental liberties (freedom of establishment, free circulation of labour, goods and services) regulated by the Treaty<sup>39</sup>. When the Commission issued the first proposal for a Port Service Directive it arose from the principles contained in the Lisbon Agenda, which emphasised the interest of liberalisation of all sectors in transport.

The first proposal for the Port Service Directive left to the Member States autonomy in regulating the area of social policy. In other words, it did not affect the application of the social legislation of Member States, including relevant rules on the employment of personnel<sup>40</sup>.

One of the most contestable provisions, which essentially contributed to its rejection in the EU Parliament on 20 November 2003 was the provision regulating self-handling, which permitted Member States to take the necessary measures to allow self-handling to be carried out in accordance with the Directive<sup>41</sup>. On the basis of this provision the dockworkers and their associations were afraid of a work reduction. The port/user self-handler should not have been obliged to call on local service providers established within the port<sup>42</sup>. This would inevitably put pressure on the system of mandatory recognition or registration of dockworkers as laid out in Convention 137 of the International Labour Organisation of 1973 granting priority of engagement to registered dockworkers<sup>43</sup>.

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38 *Supra* 6.

39 M. Vernola, *Direttiva servizi portuali: Motivi di un naufragio*, *Il diritto marittimo*, 2006, p. 779.

40 In the Art. 15 of first proposal for Port Service Directive it was defined that without prejudice to the application of Directive, and subject to the other provisions of Community law, Member States shall undertake the necessary measures to ensure the application of their social legislation.

41 Par. 1, Art. 11, first proposal for Port Service Directive.

42 E., Van Hoydonk, *Prospects after the rejection of the European Port Services Directive*, *Il diritto marittimo*, 2004, p. 854.

43 Art. 3 (2) Convention C 137.

After the rejection of the first proposal for a Port Service Directive the Commission started to work on a second proposal. That proposal had its origin in the so called "Port Package" adopted by the Commission on 13 February 2001, which contained the first proposal for a Port Service Directive<sup>44</sup>.

One of the important challenges of the second proposal for a Port Service Directive was assuring social stability. This proposal took a quite neutral position regarding social policy. It did not affect the application of the social legislation of Member States. The only requirement was that national social legislation must not be 'below' whatever was laid down by applicable community legislation<sup>45</sup>.

Among the provisions of the second proposal for Port Service Directive which would have an impact on employment in the ports it is worthwhile mentioning the provisions which regulate self-handling. It was treated as a situation in which an undertaking (a self-handler), which could normally buy port services, provides these services for itself, using its own land-based personnel<sup>46</sup>. This represented a compromise in respect of a first proposal for a Port Service Directive, where the port users were not obliged to use land-based personnel. The only exemption in the second proposal for a Port Service Directive where self-handling in performing cargo handling operations and passenger services was permitted by using the vessel's regular sea-faring crew was the authorised regular shipping service carried out in the context of Short Sea Shipping and Motorway of the Seas cargo operations<sup>47</sup>. Authorised Regular Shipping Service was the regular short-sea service, which operated exclusively between ports situated in the customs territory of the Community<sup>48</sup>. This meant that self-handling with non-land-based personnel was not possible in case the above mentioned sea service came from, went to or called at ports outside the Community Customs territory or a free zone of a port in this territory. The main aim of this compromise was to increase the employment in ports, with local communities as main beneficiaries. Although the system of self-handling according to the second proposal for a Port Service Directive did not represent such a danger for the reduction of jobs of dockworkers as the first proposal, it has been criticised for favouring ship owners who will integrate the ports in their productive chains. It will not have as a consequence the increase of productivity in the ports, but mostly the exclusion of port operators and users of port services from the market. The port terminal opened on the basis of self handling to all interested parties becomes a mono-client terminal of the ship owner, who will thereby obtain through financial and economic power a kind of leverage to exclude or to dictate the quota of the maritime traffic to competitors and

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44 M. Vernola, *supra* 39, p. 778.

45 Art. 4., second proposal for Port Service Directive.

46 Art. 3 (9), second proposal for Port Service Directive.

47 Second proposal for Port Service Directive, Art. 13.2.

48 *Ibidem*, Art. 3 (14).

therefore have primacy in the port<sup>49</sup>.

In the case of self-handling, the second proposal for a Port Service Directive in no way affected the application of national rules concerning training requirements and professional qualifications, employment and social matters, including collective agreements, provided that they opposed neither to the Community law nor the international obligations of the Community and the Member State concerned<sup>50</sup>.

Furthermore, the second proposal for the Port Services Directive was rejected 18 January 2006 and all the area of regulating the port work including labour and social policy which accompany this area remained opened. These attempts to put into force a directive which would have regulated the market of port services showed all the reality of the European port sector, where a variety of interests and a system of managing the ports are present, causing serious difficulties on the way to its adoption and ultimately to its rejection.

With the mentioned draft directives, the EU expressed a great interest to achieve an evident liberalization in the market of port services. The goal of the mentioned liberalization was to end with monopolies and to lower costs, improve the efficiency and encourage investments. It can not be denied that a progress was made in this direction but not thanks to the EC ports legislation which was a complete failure, but rather thanks to the ECJ practice, Commission Decisions and the Green Paper, since the last one indicated in a very systematic way the main characteristics of the future EU port policy. In search for the reasons why EC ports Directives failed, there are at least two reasons which have something to do with protecting the acquired positions of stakeholders in ports. The first stakeholder is represented by dock workers who were afraid that liberalization would bring cuts in jobs, lower wages especially in case of ships companies which had serious intention to introduce self-handling by their crews and labour. The second stakeholder is represented by port services' performers that obtained concessions in contrast to EC competition law and law which regulates public private partnership. For such port service operators the first draft of the Port Service Directive defined very short periods of ending their concession after the Directive would have come in power<sup>51</sup>. The third reason for the failure of the Port Service Directive had nothing to do with conservation of obtained position by certain ports stakeholders but with historical and social reasons. So many

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49 This possibility mentioned Munari directly before the presentation of a second proposal for a Port Service Directive. – see F. Munari, *Rischi e obiettivi di una revisione delle norme sull'accesso al mercato dei servizi portuali*, *Il diritto marittimo*, 2004, p. 846.

50 Second proposal Port Service Directive, Art. 13 (4).

51 In the first draft of the Port Service Directive this matter was regulated in Article 16 which in case of significant investments in immovable assets when authorisation for performing port services was not granted in conformity with the rules of Directive and was not preceded by a public tender or an equivalent procedure, defined that a new authorisation procedure in conformity with the rules of Directive must have been out within 5 years of the date of transposition of Directive in the case of a sole service provider and within 8 years in all other cases. According to the same Article, different was the position where the authorisation was not granted in conformity with the rules of Directive but was preceded by a public tender or an equivalent procedure, in this case the maximum duration of the existing authorisation was 25 years.

system of managing the ports have been developed in Europe and they differ from each other even within the same state. In such a variety of different systems it is not easy to achieve a common regulation of this area.

### ***5. Possible solutions for regulating the labour and social area in the ports sector after the rejection of a second proposal of the Port Service Directive and the position of the Commission***

After the rejection of the second proposal of a Port Service Directive, and despite the fact that there were a lot of questions regarding the future development of port regulation on the EU level, it was very clear that the third attempt to form a Port Service Directive or any other attempt of the regulation of the EU Port market would have been unrealistic at least on the short run.

Such situation did not mean that all endeavours to provide suitable solutions after the rejection of the second proposal for a Port Service Directive ceased. The Commission took over the initiative of the European Sea Ports Organisation (ESPO) to organise a series of thematic regional workshops involving all relevant European sector organisations and covering the themes of a European port policy. The preliminary conclusions of these workshops were presented and debated in Algeciras on 31 May 2007 at the ESPO Annual Conference. For this occasion ESPO issued the publication “A Port Policy for all Seasons”<sup>52</sup> wherein the main points of its vision of the EU port policy were presented: Development of ports and port-related infrastructure, port financing, state aid and transparency of accounts, relations between port authorities and service providers, port labour and technical-nautical services, logistics, administrative procedures and hinterland connections, competitiveness and the public perception of EU ports.

The fifth chapter, Port Labour and Technical-Nautical Services, covers health, safety and training at work, as well as the freedom of employers in engaging personnel for a dock work.

Regarding health, safety and freedom at work, ESPO supports the general point of view already accepted in this area and they do not differ from the point of view of other organisations with memberships that follow labour policies with completely different interests in other areas<sup>53</sup>. In that respect ESPO emphasized that the efficiency of operations in ports depends both on the reliability and safety components which are, despite technological progress, to a large extent determined by the human factor. This explains the need for a qualified and well-trained workforce in ports covering all services and operations, both on land and on board ships<sup>54</sup>. In this respect the EU can promote high reliability and safety standards in European ports by providing adequate

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52 <http://www.espo.be/downloads/archive/14963ea6-1d8e-4c83-b186-906099468ac3.pdf>, 24.12.2007.

53 Typical organizations of that kind are organizations of dock workers, which support a system of registered dock workers and their collecting in pools.

54 A Port Policy for all seasons, 5.2.

support to training and education programmes, projects aimed at exchanging best practice and by enforcing applicable legislation in the field of health and safety<sup>55</sup>. Such a point of view is not surprising because the high standard of dock worker protection in the area of health, safety and training does not benefit only the workers but also terminal operators.

However, the burning question concerns the employment of dockworkers. ESPO defends the principle that service providers in ports should have freedom in engaging qualified personnel of their choice and employing them under conditions required by the service, provided that all applicable social and safety legislation is respected<sup>56</sup>. In this context, ESPO does not believe that ILO Convention 137, which imposes a registration system for dockworkers as well as rules on priority employment, is in line with the basic right of service providers to engage qualified personnel of their own choice and with the basic freedoms of the Treaty<sup>57</sup>. This opinion on the part of ESPO is not surprising because the performance of port services only by registered dock workers who are in pools ensures that port services will be performed at higher cost. In general dock workers who are organized in whatever manner to protect their labour rights do not obtain only better safety conditions at work, health protection and better training but also higher wages than workers in the free market. Such a situation is evident also from the case of Jean Claude<sup>58</sup> where the warehouseman in the Port of Ghent hired workers from the free market instead recognised dock workers.

Furthermore, following the rejection of the second proposal for a Port Service Directive associations of dock workers took the initiative. The International Dockworkers Council (IDC) presented its position regarding the future European Port Policy in the Position Paper on a European Port Policy (Position Paper)<sup>59</sup>. On some points it is entirely opposite to the position of ESPO, which is not unusual given that the IDC represents the interest of dockworkers. It is clear that IDC favours the ratification of ILO Convention 137<sup>60</sup>. That, in all respects, runs counter to the right of a service provider to employ personnel of their own choosing, as ESPO proposed to the Commission. The mentioned ESPO proposal represents a direct attack on the "pool system". IDC considers that there is and should be no legislation, and, that would affect or impede the existence of pool systems that serve to organise, distribute or contract port labour<sup>61</sup>. Accordingly, the IDC "pool systems" are generally seen to be beneficial to competitiveness and productivity, and can serve as useful tools for economic flexibility that is vital for port operations<sup>62</sup>.

While ESPO and IDC have a different opinion on the freedom of engagement of dockworkers by port service providers, they do come together in the area of

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55 *Ibidem*.

56 *Ibidem*, 5.3.

57 *Ibidem*.

58 *Supra* 11.

59 <http://empa-pilots.org/pdf/IDCPortPolicyFinal.pdf>, 24.12.2007.

60 *Position Paper*, 4.1.

61 *Ibidem*, 7.26.

62 *Ibidem*,



professional training of dockworkers, health and safety at work. The IDC recognises that nowadays dock work is increasingly demanding and requires more specialised skills and therefore adequate training is necessary<sup>63</sup>. Dock work involves a potential high level of risk but the IDC does not consider work related deaths, injuries or illnesses to simply be accidents, as they view them as result of negligence and they can be prevented by adequate training, careful planning, proper management, and above all a willingness to treat the issue of safety and health as an intrinsic part of the investment in stevedoring activities<sup>64</sup>. IDC does not strive for adopting special legislation regarding the safety and health of work in ports, rather supports existing EU legislation<sup>65</sup>.

Considering that certain questions regarding labour and safety at work are not very realistic they will be solved among different associations or stakeholders with very different interests engaged in the port sector; it is expected that EU institutions will take into consideration the interests of all engaged parties.

This has been done in the port sector when the Commission, on the basis of consultation organised in collaboration with ESPO, issued the Communication on a European Ports Policy, published 18 October 2007. It covers several areas of port policy including the questions regarding labour and social policy. It represents a soft law approach on the area of port services which can not be ignored by anyone engaged in the port sector. It treats many questions important for EU ports such as port performance and hinterland connections, environmental protection, ensuring adequate waste facilities, short sea shipping, e-maritime approach, port authorities, public financing, port concessions, port dues, technical-nautical services, dialogue between ports and cities and work in ports.

Labour and social matters are treated in the section Work in Ports<sup>66</sup> and in the subsection Cargo Handling<sup>67</sup>. One of the key points of the Commission in the Communication on a European Ports Policy is the necessity of a social dialogue between the social partners<sup>68</sup>. In this respect, the Commission will encourage the establishment of a European sectoral dialogue committee in ports within the

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63 *Ibidem*, 7.2.

64 *Ibidem*, 7.8.

65 It is evident from the IDC statement that Commission Communication 2002-2006 COM 118 entitled »How to Change in Society and the World: New Communication Strategy on Safety and Hygiene at Work«, where IDC affirms that this Communication is not being entirely applied in many EC ports (see, *ibidem*, 7.11). Communication 2002-2006 COM 118 outlines a general medium – term strategy for occupational safety for the period 2002 till 2006 by exposing on a European level an integral dimension of risks at work (existent risks and new risks) and measures, and proposes how to prevent them. A part of this Communication is also a plan to adapt the extant legal framework regarding safety and health at work, whereas the problem is not that some areas of safety and health are not regulated by special provisions (like the port sector), but that people tend to see Community legal frameworks as excessively complex and ambiguous. Its simplification is emphasised also in Communication (see point 14 of Communication).

66 *Communication on a European Ports Policy*, 6.

67 *Ibidem*, 4.5.

68 *Ibidem*, 6.1.

meaning of Commission Decision 98/500/EC<sup>69</sup>. One of the important examples of social dialogue regarding the ports occurred on Malta in the framework of the 2007 Port Labour reform<sup>70</sup>. The social dialog has been going on also in Slovenia, where the negotiations regarding a new collective agreement have been recently concluded in the Port of Koper, the largest Slovenian seaport. This collective agreement is of great importance as in Slovenia there is no specific legislation regarding the labour in ports. In fact, the existing Slovenian labour legislation does not cover many questions important for the port sector. Among most important questions are the those regarding situations of sudden increase of work in the port. The Slovenian Labour legislation admits, that the conditions for the repartition of working time in case of the increased extent of work is regulated by the collective agreement. But on the other hand, its compulsory provisions prevent in a great part the flexibility of above mentioned repartition of working time. In case that there is a need for repartition of working

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69 In issuing this Decision the Commission drew mostly from Art. 118b of the Treaty which states that the Commission is to endeavour to develop dialogue between management and labour at the European level which could, if the two sides consider it desirable, lead to a relation based on an agreement; and from point 12 of the Community Charter of the Fundamental Social Rights of Workers which states that employers of employees' organizations, on the one hand, and workers' organizations on the other, should have the right to negotiate and conclude collective agreements under the conditions laid down by national legislation and practice. According to the mentioned Decision the social dialogue takes place inside the Sectoral Dialogue Committees. Such Committees are established in those sectors where the social partners make a joint request to engage in a dialogue at the European level, and where the organisations representing both sides of industry fulfil the following criteria: a) they shall relate to specific sectors or categories and be organised at the European level; b) they shall consist of organisations which are themselves an integral and recognised part of Member States' social partner structures and have the capacity to negotiate agreements, and which are representative of several Member States; c) they shall have adequate structures to ensure their effective participation in the work of the Committees (Art. 1. Decision).

70 The main objectives of the 2007 Port Labour Reform were: streamlining existing legislation, including under the »better regulation« initiative of the EU, rendering legislative provisions simpler and more practical, reflecting the needs of the industry, and to transfer the port labour regime from legislation to contract law; establishing the number of port workers in the pool and providing additional temporary labour; reducing the port labour charges by at least 20 per cent. Once the negotiations were concluded between social partners the agreement was finalized with the following main contents: a) abolition of all former labour committees and establishing a revised Port Workers Board, which is appointed by the Minister and is composed of a chairman and two representatives of the port workers (the board is responsible for recommendations to the authority on filling vacancies in the labour pool, the conditions of work of port workers, the establishment of fees for port work services, the discipline of port workers and the resolution of disputes), b) establishment of a number of permanent port workers (when a number of port workers is insufficient to meet demand filling it by the authorising terminal operators to employ other persons to provide labour services on condition that a person would have attended and obtained a certificate from a basic course in port work at a maritime institute), c) »Service Level Agreements« that establish the organisation of port work as best suits the particular terminal but within the confines of existing legislation and health and safety laws, d) establishment of the terms and conditions for the allocation of labour by Services Level Agreements could establish e) settlements of disputes in cases where transshipment rates and other specific labour services are negotiated between the terminal and pool for port workers, f) reducing of port workers fees by circa 20 per cent, g) the pension fund to pay port workers, h) training schemes for port workers through refresher training organised by terminals, maritime institutes, and the chartered Institute for Logistics and Transport (Malta).

time for ten workers or more, a previous free days notice shall be sent<sup>71</sup>. However, sometimes it is difficult to predict increased volume of work for three days in advance in ports. In case of the increased volume of work, the Slovenian legislation allows the employment of new workers for a defined time on basis of the fixed-term contract, but Slovenian courts are very rigid in establishing whether there was an actual increase of work and its cessation, which is often the reason why a fixed-term contract is by a court decision transformed into permanent employment contract. This is the main reason for employers' caution in concluding such of contracts. The described situations illustrate just some of the problems regarding the employment relationships of dock workers in Slovenia which can be only partly solved by the social dialogue or through collective agreements because of compulsory provisions of the Slovenian Labour Legislation. On the other hand, there are no problems with pools of dock workers in Slovenia and other organising of dock workers because such organising of dock workers does not exists. Compared to other workers, dock workers in Slovenia do not have a special status.

The situation is the same in other countries of the former Yugoslavia, such as Croatia and Montenegro. Dock workers in these countries are not protected by special labour legislation but by general legislation, which applies to all workers. The only special protection are the collective agreements concluded between dock workers and their employers which have to be in line with the current legislation.

In the Communication on a European Ports Policy the Commission establishes its position regarding the most burning topic in the area of labour policy, namely pools of dock workers. The Commission learned that in some EU ports dockworkers are often employed directly by terminal operators, while in some ports they are contracted via "pools", entities in charge of recruiting and training port workers. Commission does not observe that these pools and workers who are their members, could constitute a restriction to market access and furthermore, it does not expose situations when such restriction could be realized. Furthermore, the Commission emphasises that Treaty rules on freedom of establishment and freedom to provide services can fully apply to the activities carried out by the pools<sup>72</sup>. With this position the European Commission did not support all those who endeavour to abolish the pools or even affirm that they are in the contrast to Treaty rules. In this respect the Communication on a European Ports policy establishes fertile ground for EU Members States to ratify the 137 ILO Convention although under if it is in conformity with the Treaty. In the past there were a lot of doubts whether this Convention is in conformity with the Treaty, even between the EU institutions which recommended its ratification of this convention<sup>73</sup>.

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71 Art. 47 Labour Relationship Act.

72 Communication on a European Ports Policy, 4.5.

73 The European Economic and Social Committee recommends in its own-initiative opinion that the Commission should encourage Member States to ratify ILO Convention 137 and other related ILO Conventions (European Economic and Social Committee (2007), p. 2). This recommendation however contradicts the provision on p. 11 of the opinion which invites the Commission to first set out its views on whether ILO Conventions 137 and 152 on dock work are in line with the principles set out in the European Treaties and the existing body of EU law (the «acquis communautaire») before calling upon the Member States to ratify the two conventions.

It seems however that the Commission did not take into consideration all aspects regarding pools of dock workers. It can not be denied that Treaty rules on freedom of establishment and freedom to provide services can fully apply to the activities carried out by the pools, but on the other hand, it cannot be denied that pools of dock workers have in practice a lot of possibilities to restrict market access. When other protagonists with the same or similar qualities can not participate in performing port services which the consequence can be higher prices of services and other products. Pools of dock workers can play a positive role when they help to provide basic labour and social rights without affecting the market, but it should be taken into account that such functions of the pools were much more important in the past than in the present situation. In the past the occupation of dock workers was not permanent; today in the ports with advanced technology and great investment capacity long-term employment has become the rule. It must also be stated that today national legislation and competent state institutions protect workers much better than in the past. That being said, the pools are not longer a *sine qua non* for the workers protection.

Other important matters of the Communication on a European Ports Policy regarding labour and the social sphere are training, health and safety at work. These matters are less pressing, since for the most part, a consensus between different stakeholders in ports, has been reached.

The Commission, IDC and ESPO recognise that training of port workers has become of primary importance for safe and efficient operation in ports. Work in ports has consequently evolved and, as the consultation has shown, a set of common requirements for training of port workers should be established at the Community level, which is necessary to enhance the mobility of European port workers by means of mutual recognition of their qualifications<sup>74</sup>.

Regarding the health and safety of workers at work the Commission stated in the Communication on a European Ports Policy that the general rules of Directive 89/391/

EEC (the “Framework” Directive)<sup>75</sup> are important for improving working conditions<sup>76</sup>. That Directive represents the basis for several individual directives for particular areas of safety and health at work<sup>77</sup>. Up to the issuance of the Communication on a European Ports Policy, the eighteen individual Directives covering specific sectors

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75 The object of Directive 89/391/EEC is to introduce measures to encourage improvements with regard to the safety and health of workers at work (Art. 1.1.). It is applicable to all sectors of activity, both public and private (industrial, agricultural, commercial, administrative, service, educational, cultural, leisure, etc.) (Art. 1.2). In the Directive are several provisions which lay out for employers and workers different obligations in order to achieve the goals followed by the Directive. The main employee’s obligations are: Ensuring that an assessment is made of the risks to the safety and health of workers, taking necessary preventive measures, ensuring that workers and their representatives receive necessary information, in particular on safety and health risks, prevention measures, first aid, fire fighting, ensuring that each worker receives adequate and job-specific safety and health training, consulting workers and their representatives and allowing them to take part in discussions on all questions relating to safety and health at work. The main worker obligations are: Taking care as far as possible of his/her own safety and health and making correct use of machinery, tools, dangerous substances, personal protective equipment, informing the employer and workers of any situation that represents a serious and immediate danger to safety and health, cooperating with the employer and workers to ensure that the working environment and conditions are safe.

76 Communication on a European Ports Policy, 6.3.

77 According to the Art. (1)16 of Directive 89/391/EEC Council, acting on a proposal from the Commission based on Article 118a of the Treaty, shall adopt individual Directives, *inter alia*, in the areas listed in the text of annex: work equipment, personal protective equipment, work with visual display units, handling of heavy loads involving risk of back injury, temporary or mobile work sites, fisheries and agriculture.

and risks were adopted<sup>78</sup>. According to the Commission most of these Directives are relevant for work in ports<sup>79</sup>. With a more detailed analysis of individual directives it is evident the most important directives for the port sector are those which include provisions regarding safety and health requirements for the work place, equipment at the work place, risks related to exposure to carcinogens at work (if such cargo is stored in the ports), safety and/or health signs at work, risks arising from physical agents like noise and vibrations.

The Commission also emphasised the Communication COM (2007) 62 entitled: Improving Quality and Productivity at Work: Community Strategy 2007-2012 on Health and Safety at Work covers also the area of health and safety at work in the port sector<sup>80</sup>. The main topic of this communication is an ongoing, sustainable and uniform reduction in accidents at work and occupational illnesses<sup>81</sup>. In order to achieve this ambitious goal many instruments are proposed. One of them is proper

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78 Council Directive Concerning the Minimum Safety and Health Requirements for the Workplace (89/654/EEC), Council Directive Concerning the Minimum Safety and Health Requirements for the Use of Work Equipment by Workers at Work (Second Individual Directive within the Meaning Article 16 (1) of Directive 89/391/EEC) (89/655/EEC), Council Directive on the Minimum Safety and Health Requirements for the Use by Workers of Personal Protective Equipment at the Workplace (89/656/EEC), Council Directive on the Minimum Safety and Health Requirements for the Manual Handling of Loads where there is a Risk particularly of Back Injury to Workers (90/269/EEC), Council Directive on the Minimum Safety and Health Requirements for Work with Display Screen Equipment (90/270/EEC), Council Directive on the Protection of Workers from the Risks Related to Exposure to Carcinogens at Work (90/394/EEC), Council Directive on the Protection of Workers from Risks Related to Exposure to Biological Agents at Work (90/679/EEC), Council Directive on the Implementation of Minimum Safety and Health Requirements at Temporary or Mobile Construction Sites (92/57/EEC), Council Directive on the Minimum Provision of Safety and/or Health Signs at Work (92/58/EEC), Council Directive on the Introduction of Measures to Encourage Improvements in the Safety & Health at Work of Pregnant Workers and Workers who have Recently given Birth or are Breastfeeding (92/85/EEC), Council Directive Concerning the Minimum Requirements for Improving the H&S Protection of Workers in the Mineral-Extracting Industries through Drilling (92/91/EEC), Council Directive on the Minimum Requirements for Improving the Safety and Health Protection of Workers in Surface and Underground Mineral-Extracting Industries (92/104/EEC), Council Directive Concerning the Minimum Safety and Health Requirements for Work on Board Fishing Vessels (93/103/EEC), Council Directive on Occupational Health and Safety Requirements for Using Hazardous Chemicals and Materials Containing the Latter (98/24/EEC), Council Directive on Occupational Health and Safety Requirements for Working in Potentially Explosive Atmospheres (99/92/EEC), Directive of the European Parliament and of the Council on the Minimum Safety and Health Requirements Regarding the Exposure of Workers to the Risks Arising from Physical Agents (Vibration) (02/44/EC), Directive of the European Parliament and of the Council on the Minimum Safety and Health Requirements regarding the Exposure of Workers to the Risks Arising from Physical Agents (noise) (03/10/EC), Directive of the European Parliament and of the Council on the Minimum Safe and Healthy Requirements Regarding the Exposure of Workers to the Risks Arising from Physical Agents (electromagnetic fields) (04/40/EC), Directive of the European Parliament and of the Council on the Minimum Safe and Healthy Requirements Regarding the Exposure of Workers to Risks from Physical Agents (artificial optical radiation) (06/25/EC).

79 Communication on a European Ports Policy, 6.3.

80 Ibidem.

81 Communication COM (2007) 62, 3.

implementation of EU legislation on the area of safety and health on work<sup>82</sup>. The core of this legislation is the Directive 89/391/EEC (the “Framework” directive) and individual Directives issued on its basis.

The self-handling which was one of the reasons for rejection of both proposals for a Ports Service Directives is not mentioned in the Communication. From this point of view, EU Member States are free in regulating this sensitive area. The only limitation is the general EU legislation on competition regulated by the EC Treaty.

From a general point of view the Communication on a European Ports Policy defines basic points of port policy in the EU Member States, permitting its Member States a lot of room for initiative in creating new port policy. Since its text is not binding, it permits the Commission to be engaged with the questions regarding the port policy on the basis of a case-by-case method, which primarily means that the Commission considers each case separately on the basis of primary Community law. This method was one of those already considered after the rejection of the first proposal for a Port Service Directive<sup>83</sup>.

## **6. Conclusion**

The EU port service sector has in recent decades experienced considerable transformation. From the activity which was merely comprehended as an activity performed in the general economic interest it was transformed into an activity wherein the regulation of free competition for a great part of port services shall be strictly respected. This transformation had an impact on EU labour and social policy. Many decisions of the ECJ and Commission and documents issued by it and the EU parliament treating the questions of the EU labour and social policy in ports were issued. There were also a lot of efforts by different organisations which represented different interests relating to the port sector to influence EU institutions, which had been engaged in the creation of a European port policy in the last decade.

Certainly different organisations representing different interests in the port sector exposed two main questions regarding European port policy: the First one is whether or not to support the organisation of dockworkers in labour pools and similar organizations to protect their labour and social status; and the Second is the improvement of dock workers rights in some basic areas of their labour and social status like training, safety and health at work.

It should be pointed out that organising dockworkers with the view of protecting their labour and social rights is not in contrast to the Treaty and other EU competition laws. It can become so if it has an impact on the EU market by limiting access to it. However, although organising dock workers in pools and similar organisations is not in contrast with EU legislation, such organizing has, in practice, lost a lot of its past *raison d'être*, when permanent jobs were an exception and the state did not provide

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82 *Ibidem*, 4.1, 4.2.

83 See Van Hoydonk, E., *supra* 42, p. 862.

them efficacious protection. Today legislators have adopted adequate legislation and the state provides for institutions to protect workers rights.

From another point of view pools of dock workers and similar organisations can over a long term reduce the competitiveness of the port sector if they *unreasonably* demand wage increases. That can have an influence on all stakeholders in ports, including dock workers. The most effective way to overcome such a situation is a social dialogue among all stakeholders in order for them to realize that each of them has to renounce a part of the present benefit for growth of ports in the future.

As the two Proposals for a Directive of the European Parliament and of the Council on Market Access to Port Service failed, the Communication on a European Ports Policy momentarily represents the only EU document which systematically treats the port sector. It does not have obligatory nature and represents only a guide to EU Member States to illustrating some possible concept regarding the regulation of the port sector according to the EU legislature. General EU labour and social legislation is thorough and comprehensive enough to regulate a wide spectrum of questions from this area, so that there is no need to adopt special legislation of that kind for the port sector.

Regarding the Communication on a European Ports Policy there are questions whether it is more in favour of the large Member States, some of them with a very developed port sector, of the or smaller ones, like Malta, Cyprus, Slovenia and the Baltic States, that are still transforming their port sector to the requirement of EU legislation. Considering that the Communication represents only a framework in which some basic points regarding a future EU port policy are explicated, it leaves enough space for all EU Member States to create their own port policy following the basic principles of EU legislation on one hand, and specificities in their ports on the other.

The Communication is not only relevant for the states that are already members of the EU, but also for those who are negotiating for accession. While the Communication as such does not have obligatory content, it can function as a useful guideline in the adjustment of their port systems to the requirements of the EU legislation.



## Summary

In the nineteen nineties the port sector experienced considerable transformation. The common point of this transformation is liberalisation of access to the market of port services. This event has touched all stakeholders in ports, one of them are also dock workers. One of the main questions which accompanied the liberalisation of access to the market of port services was whether different organising of dock workers with the intent to protect their labour and social rights is not contrary to the European Treaty and other EU competition laws. The answer to this question is negative due to the fact they do not constitute an undertaking in conformity to the provisions of EC Treaty, and therefore, they cannot be a subject of its competition provisions. Although the labour and social status of dock workers is quite complex matter there is no special legislation to regulate it. In this respect the EC Treaty and general EU legislation regarding labour and social area shall be respected. There were some attempts to adopt special legislation for the market of port services which contained also provisions regarding the labour and social status of dock workers, however, all these attempts failed. The last EU's document in the area of the market of port services is Communication on the European Ports Policy. It contains also some topics regarding the labour and social status of dock workers, for which is recommendable to be respected by EU member states and joining states in their creation of labour and social policy for dock workers.

**Key words:** *Dock worker, Labour pool, Port sector, Port Service Directive.*

## Riassunto

**ALCUNE QUESTIONI LAVORISTICHE E PREVIDENZIALI  
NEL SETTORE PORTUALE DELL'UNIONE EUROPEA**

A partire dagli anni '90 del secolo scorso il settore portuale ha subito una considerevole trasformazione. Il comune denominatore di questa trasformazione è rappresentato dalla liberalizzazione dell'accesso al mercato dei servizi portuali. Tale circostanza ha inciso su tutte le parti interessate collegate al porto e tra loro anche sui lavoratori portuali. Una delle questioni principali che accompagnò la liberalizzazione dell'accesso al mercato dei servizi portuali fu rappresentata dalla questione se la diversa organizzazione dei lavoratori portuali al fine di tutelare i loro diritti in ambito lavoristico e previdenziale non fosse in contrasto con il Trattato dell'Unione europea o con altre normative comunitarie sulla concorrenza. La risposta a tale interrogativo è negativa, giacché non rientrano nell'impresa in forza delle disposizioni del Trattato dell'Unione Europea e, pertanto, nei loro confronti non si possono applicare nemmeno le disposizioni del medesimo concernenti la concorrenza. Sebbene lo status lavoristico e previdenziale dei lavoratori portuali costituisca una questione certamente complessa, tuttavia non esiste una legislazione specifica che disciplina detto settore. A tale riguardo occorre applicare le disposizioni del Trattato dell'Unione europea, come pure la normativa comunitaria generale riguardante il settore del lavoro e delle questioni sociali. Va rilevato che ci furono dei tentativi di emanazione di una legislazione speciale per il mercato dei servizi portuali, la quale avrebbe previsto anche delle disposizioni sui profili lavoristici e previdenziali dello status dei lavoratori portuali; tuttavia, tutti i tentativi sono falliti. L'ultimo documento comunitario concernente il mercato dei servizi portuali è la Comunicazione sulla politica portuale europea, la quale contiene alcuni temi che si riferiscono a profili lavoristici e previdenziali dello status dei lavoratori portuali. Pertanto, agli Stati membri ed a quelli candidati all'ingresso viene suggerito di tenere in considerazione i profili lavoristico e previdenziale dello status dei lavoratori portuali in occasione della creazione delle proprie politiche di previdenza sociale e del lavoro.

**Parole chiave:** *lavoratore portuale, sindacato, settore portuale, Direttiva sui servizi portuali.*