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## **Dock Labor Schemes in the Context of EU Law and Policy**<sup>\*</sup>

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**Abstract:**

*The organization of dock labor and, more in particular, the use of dock labor schemes has been under EU scrutiny for a long while. The EU however has not come with clear-cut answers so far. The diversity of dock labor schemes existing in Europe is an important factor in assessing their compatibility with EU law. The compliance of dock labor schemes with internal market principles such as the freedom to provide services and the freedom of establishment has not been put to the direct test of European jurisprudence yet. It was the European Commission's Directive proposal on port services that put the principle of freedom to provide services centre-stage. This paper sets out the EU legal and policy framework that applies to dock labor schemes. It also gives an extensive analysis of how dock labor interests contributed to the failure of the port services' Directive. It further describes the process that emerged after the downfall of the Directive, including the proposal to set up a European social dialogue on port labor. Finally, it gives insight in ways in which European policy-makers may address the issue in the future.*

**Key Words:** *Dock Labor, Dock Labor Scheme, Port Services, Market Access, Port Policy, European Union*

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## **1. Introduction: A Brief History of European Ports Policy**

The debate on a common policy framework for European ports is almost as old as the European integration process itself. Especially the European Parliament was an early advocate of a common ports policy and published from 1961 until 1993 a series of reports and resolutions calling for an ambitious agenda covering port organisation, financing, labour etc. Parliament however did in those days not have the same political influence it has today and its calls for a common ports policy were initially not actively taken up by the European Commission.

In a non-published note from 1970, the Commission did identify the two main objectives that would characterise all of its future attempts to devise a common ports policy: to ensure, on the one hand, the consistent application of general Treaty rules, notably with regard to competition and the basic internal market freedoms, and, on the other hand, to achieve a balanced development of European ports (Commission of the European Communities 1970). In 1974, the Commission set up a Port Working Group of port authority representatives from Europe's major ports which produced a so-called 'Fact-Finding Report' which showed considerable diversity in the organisation, management, operations, finance and legal obligations of the ports that were surveyed in the then 8 Member States of the European Union.<sup>2</sup> The majority of the experts came to the conclusion that these differences however did not seem to be capable of provoking serious distortions to competition which would require solutions at Community level. The Commission initially followed this 'non-interventionist' approach advocated by the sector.

Things changed in the early 1990s however when the Commission devised a common transport policy which aimed to develop a coherent European infrastructure network through the concept of the Trans-European Transport Networks (TEN-T) and the objective of achieving 'sustainable mobility'. The latter gave a prominent place to intra-European maritime transport as an environmental-friendly alternative to congested road transport. A specific communication on 'short sea shipping' followed in 1995 which contained a section on ports policy. This was followed by a 'Green Paper on Sea Ports and Maritime Infrastructure' produced in 1997. This discussion paper can be seen as the Commission's first genuine attempt to move towards a coherent policy on ports and maritime infrastructure. The Commission then published in 2001 a communication on the improvement of quality services in ports. The operational part of this communication was a Directive proposal on market access to port services.

In what can best be described as a very unusual political process, the Commission's proposal failed twice to gain political majority in the European

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<sup>2</sup> An updated version of the Fact Finding Report followed in 1986. In 1993, the European Sea Ports Organisation (ESPO) was born out of the Port Working Group as an independent lobby for European port authorities. ESPO produced further updates of the report in 1996 and 2005 and a conceptually revised edition was published in May 2011.

Parliament. After the second rejection, in January 2006, the Commission withdrew the proposal and initiated a major consultation round of stakeholders which resulted in an all-embracing ‘Ports Policy Communication’, which mainly relied on ‘soft law’ in the form of guidance and recommendations. The action plan contained in the communication is currently being implemented, with some actions progressing faster than others. Table 1 summarises the main steps involved up to the present date.

**Table 1. Main steps in the making of a common European ports policy**

1961	First European Parliament report to call for a common ports policy
1974	Foundation of the Community Port Working Group
1991	Commission White Paper on Transport Policy
1993	Foundation of the European Sea Ports Organisation
1995	Commission Communication on Short Sea Shipping
1997	Commission Green Paper on Sea Ports and Maritime Infrastructure
2001	First Directive Proposal on Market Access to Port Services
2004	Second Directive Proposal on Market Access to Port Services
2007	Commission Communication on European Ports Policy

The following sections will analyse more in detail to what extent European law and policy regarding ports impacts on port labour arrangements and, more specifically, dock labour schemes. A first section will address the application of the basic principles of the EU Treaty. This is then followed by descriptions of the genesis of the Commission’s port services’ Directive proposal and its main provisions on port labour. Next comes a brief analysis of the process that led to the downfall of the proposal and a section which looks at what the Commission’s 2007 Ports Policy Communication, which was issued after the downfall of the port services’ Directive, has to say about port labour. A final section sheds light on some recent developments.

## **2. Dock Labour Schemes and the Principles of the EU Treaty**

The organisation of dock labour varies considerably throughout Europe. In many Member States the system is rather opaque and, to the present day, no comprehensive European overview exists. The variety starts with the interpretation of what ‘dock labour’ actually means. This can be defined very narrowly (loading and unloading of ships) or very broadly (all forms of cargo handling in a port, including warehousing, stuffing and stripping, loading and unloading from inland waterway vessels, trucks, railway wagons etc.). Also ‘dock workers’ come in many shapes and forms, ranging from civil servants in state-owned service ports, workers directly employed by private terminal operating companies or workers employed through dock labour schemes.

In the context of this analysis, the focus is on the latter, i.e. systems whereby ports have centrally managed pools of registered dock workers. Such schemes were historically introduced to protect dockers from suffering abuse of their rights as a result of the inherent fluctuations in dock labour, a phenomenon which was more outspoken in the pre-container era.

Dock labour schemes themselves show a great variety. The use of registered dockers through a pool can be mandatory or not. This obligation can be *de facto* or imposed by law. The scheme can cover all work or only temporary work during peak periods. The scheme can be financed by all operating companies in a port or it can be (co-) financed by the port authority, subsidised by government etc. Finally, a labour pool can be organised in the form of an undertaking that provides labour services to port operators or workers in a pool can be hired by these operators.

The latter distinction is particularly important with regard to the application of the basic rules of the EU Treaty<sup>3</sup> as shall be discussed below. The organisation of dock labour schemes is notably subject to Treaty rules on competition and the so-called four basic freedoms, i.e. freedom of establishment, free movement of workers, goods and services.

Although jurisprudence of the European Court of Justice (ECJ) with regard to the application of these principles to dock labour schemes is relatively scarce, there are a number of important cases which have given guidance on the compatibility of dock labour schemes with EU law. Three cases from the 1990s stand out in particular. These relate to the organisation of dock labour in the port of Genoa (Merci case, C-179/90), the port of La Spezia (Raso case, C-163/96) and the port of Ghent (Becu case, C-22/98).

The Merci case concerned the application of EU competition rules (Art. 101 of the EU Treaty and further) on centuries-old dockers corporations that had the exclusive right to provide dock labour in Italian ports. The Court ruled that the mere fact of creating a dominant position by granting exclusive rights was in itself not incompatible with the Treaty. It would therefore be possible for Member States to grant exclusive rights to a corporation whereby port users have to take recourse to registered dockers supplied through this corporation. There are however limits to the use of such exclusive rights. In the case of Genoa, the Court found that the corporation which had the monopoly to perform dock work demanded payment for services which had not been requested, charged disproportionate prices and refused to have recourse to modern technology, all of which involved an increase in the cost of the operations and a prolongation of the time required for their performance. The Court also found that dock work is not, in principle, a service of general economic interest.

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<sup>3</sup> References to the 'Treaty' are based on the consolidated version of the Treaty on the Functioning of the European Union (TFEU) also known as the 'Lisbon Treaty'.

Following the *Merci* case ruling, Italy reformed its port legislation in 1994 but maintained measures in favour of the old corporations. These were transformed in port companies that provided port services in competition with independent operators, but they maintained a monopoly for the provision of temporary labour to deal with peak periods. The Court ruled in the *Raso* case (Port of La Spezia) that the former dockers corporation was thus put in a conflict of interest situation which led it to abuse its dominant position.

What made the Genoa and La Spezia cases different from many other labour schemes is that the provision of dock work was organised through a form of undertaking. In many ports this is not the case and this therefore makes the application of EU competition rules not possible. This was made clear through the *Becu* case where, referring to the legally protected dock labour monopoly existing in Belgian ports, the Court was asked whether individuals can oppose, on grounds of competition law, legislation of a Member State which requires them to have exclusive recourse, for the performance of dock work, to recognised dockers and have to pay these dockers remuneration far in excess of the wages of their own employees or the wages they pay to other workers. The Court confirmed that there was a question of granting exclusive rights involved in the port of Ghent, but since these were not confirmed to undertakings, but to recognised dockers that had an employment relationship with the undertakings for which they perform dock work, Community competition law was not applicable. The Court added that, even taken collectively, the recognised dockers in a port area could not be regarded as constituting an undertaking. It would be different if recognised dockers would be linked by a relationship of association or by any other form of organisation which would support the inference that they operate on the market in dock work as an entity or as workers of such an entity.

It is remarkable that the Court seemed to have regretted that the question referred to it did not ask whether the obligation to have recourse, for dock work, to the services of recognised workers, is capable of constituting, for other recognised dockers and/or workers satisfying the conditions for recognition, a barrier for the purposes of article 45 (free movement of workers) and/or article 56 (freedom to provide services)<sup>4</sup>.

It was precisely the principle of freedom to provide services that formed the basis of the port services' Directive.

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<sup>4</sup> The Brussels labour court ruled on 11 January 2002 in a similar case concerning dock labour in the port of Brussels that the Belgian legislation governing the dock labour scheme (the Major Law) was contrary to the freedom to provide services. The Belgian State appealed against this ruling, but the appeal case was never actually started.

### **3. The Ports' Green Paper and the Genesis of the Port Services' Directive**

As explained earlier, the Green Paper on Sea Ports and Maritime Infrastructure was the European Commission's first genuine initiative to come to a common policy framework for ports. The Green Paper was initiated by Transport Commissioner Neil Kinnock.

As regards port services, the Green Paper indicated that, complementary to the case-by-case approach followed until then, Community action could be envisaged in the form of developing a regulatory framework aiming at a more systematic liberalisation of the port services market in the main ports with international traffic. The Commission indicated that such a framework would be especially relevant for technical-nautical services (i.e. pilotage, towage and mooring), but did not exclude its application to cargo handling. The Commission recognised that restrictions had been gradually removed from the market of cargo-handling services, but pointed at the same time at port labour rigidities which remained characteristic of the sector, mainly where it concerned the registration of port workers and the existence of port labour pools in a number of EU ports. The Commission also said that, generally, restrictions or conditions for registration do not pose problems as long as these are non-discriminatory, necessary and proportional. 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, however, under certain circumstances constitute a de-facto restriction to market access. The Commission also referred explicitly to the possibility of 'self-supply', which would later become better known as 'self-handling', i.e. the right for port users to perform certain services themselves. According to the Green Paper this right could only be restricted if it would be detrimental to safety standards or the functioning of public service restrictions.

Not surprisingly, the Green Paper provoked substantial debate. Whereas trade unions were downright negative about the proposed liberalisation of port services, representative organisations of ship-owners and shippers were very much welcoming EU intervention in this field, hoping this would also imply the 'adjustment of outmoded labour prescriptions' (Commission of the European Communities 1998). Port authorities and terminal operators were rather lukewarm on the issue, attaching greater value to the question of State aid in ports and the Commission's proposed intervention on port charging. Terminal operators lobbied through their trade organisation FEPORT (Federation of European Private Port Operators) for a differentiated approach on port services, whereby cargo handling would remain largely untouched. This approach found support in the European Parliament.

The Commission would however pursue in the end with a legislative proposal that would cover cargo handling services, including both the use of dock

labour and self-handling<sup>5</sup>. This was not so obviously clear however in the period immediately following the Green Paper. Contradictory signals were given, for instance by Commissioner Kinnock who in 1998 urged Member States to ratify ILO Conventions 137 and 152 on dock labour<sup>6</sup>. At the very same time, his services were compiling, with the assistance of FEPORT, a comparative report on dock labour arrangements and self-handling in European ports, a report which was never published.

A clearer course was taken after a new Commission took office in 1999. Neil Kinnock remained member of the new team, but passed the transport portfolio on to the late Loyola de Palacio; She was not only determined to make EU short sea shipping policy a success, but she also wanted to restore the perceived north-south imbalance in Europe, by making ports in the Mediterranean more competitive. A legislative instrument on port services, including dock labour, would help getting reforms through, not in the least in her own country, Spain, where the government was in the process of preparing new national legislation on port services that would pave the way to a full landlord model and reduce restrictive dock labour practices.

She initiated the concrete follow-up to the Green Paper and, after a brief consultation round of stakeholders, the Commission published on 13 February 2001 its Communication 'Reinforcing Quality Services in Sea Ports: A Key for European Transport' of which the operational part was a Directive Proposal on Market Access to Port Services. The Communication acknowledged, as did the Green Paper, that liberalisation of cargo handling services had advanced significantly, certainly compared to technical-nautical services such as pilotage, but noted that this was still far from uniform in all Community ports. In addition, the Commission recognised the need to have clear and reliable procedures setting out the rights and obligations of potential service providers, as well as those of the competent national authorities involved in overseeing the ports and/or the selection of service providers.

#### **4. The Right to Employ Personnel of own Choice and "Self-Handling"**

The Directive proposal established the basic rule that Member States may require an authorisation for the providers of port services. In case the number of providers of port services would be limited, then these would have to be selected through a transparent and objective selection procedure and would thus automatically be granted an authorisation. The essence of the proposal was thus

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<sup>5</sup> The latter had already been established in 1996 as a principle for airports through Directive 96/67/EC on access to the ground-handling market at Community airports. An often-heard criticism on the original port services' proposal was that it was a mere copy of the airports Directive.

<sup>6</sup> ILO Convention 137 of 1973 stipulates that registered dock workers have priority of engagement for dock work. It is currently ratified by 24 countries, of which 8 are Member States of the European Union. The Dutch government originally ratified the Convention as well, but denounced it in 2006. ILO Convention 152 of 1979 deals with occupational safety and health in dock work. It is currently ratified by 26 countries, of which 9 are Member States of the European Union.

about the way in which port authorities use concessions, lease agreements or other types of ‘authorisations’ to regulate market access for potential service providers, thus ensuring market contestability and intra-port competition.

The Directive stipulated that the (selected) provider of port services would have the right to employ personnel of his own choice to carry out the service covered by the authorisation. Although legal opinions about the impact of this clause differed, it was meant to counter the mandatory use of dock labour pools.

The proposal furthermore obliged Member States to take the necessary measures to allow the principle of ‘self-handling’, which was defined as ‘a situation in which a port user provides for itself one or more categories of port services and where normally no contract of any description with a third party is concluded for the provision of such services’. The Directive further stipulated that self-handling could be subject to an authorisation, but criteria for such an authorisation could however not be stricter than those applying to providers of the same or a comparable service.

### **5. The Political Process Leading to the Downfall of the Port Services’ Directive**

The full analysis of the political and lobbying intrigue that led to the downfall of the port services’ Directive would fill an entire book<sup>7</sup>. This section attempts to summarise the main highlights of this remarkable process. Table 2 provides a chronological overview of the main steps involved.

**Table 2. Political process port services’ Directive 2001-2006**

13 Feb 2001	Commission publishes first Directive proposal – COM(2001)35
14 Nov 2001	Parliament adopts opinion in first reading
19 Feb 2002	Commission issues modified proposal based on Parliament’s opinion
17 Jun 2002	Council reaches political agreement in first reading
5 Nov 2002	Council adopts formal common position in first reading
11 Mar 2003	Parliament adopts opinion in second reading
22 Jul 2003	Council adopts common position in second reading
9 Sep 2003	Conciliation meetings start
29 Sep 2003	Conciliation delegations of Parliament and Council reach compromise
20 Nov 2003	Parliament rejects conciliation compromise, the proposal falls
13 Oct 2004	Commission publishes new Directive proposal – COM(2004)654
18 Jan 2006	Parliament rejects second Directive proposal in first reading
8 Mar 2006	Commission officially withdraws the second proposal

The Directive proposal was subject to the co-decision procedure, a process whereby the European Parliament and the Council of Ministers go through one or

<sup>7</sup> Such a book is currently being prepared by T. Pallis and the author. It is meant to be a follow up to Chlomoudis and Pallis’ standard work on European Union Port Policy (2002) and it is expected to be published in 2013 by Edward Elgar.



two ‘readings’ of the Commission’s proposal and decide on amendments. If after two readings Council and Parliament cannot come to an agreement, a third and more restricted ‘conciliation’ reading is held. This is usually the case for more controversial proposals as the port services’ Directive certainly was. In this particular case the conciliation phase was unsuccessful, something which does not occur often. What is even more exceptional – if not unique – is that a revised Directive proposal, that the Commission issued a year after the rejection of the initial proposal, was turned down as well.

The political and lobbying process on the Directive was a ‘hands-on’ learning experience for many stakeholder organisations that were for the first time confronted with a European legislative proposal that had such a potentially large impact on their members. This was certainly the case for the European Sea Ports Organisation (ESPO). ESPO initially struggled mainly with the diverse governance systems in European ports, for which the Directive would either have meant a welcome instrument to push national or local reforms through or an unwelcome bureaucratic intrusion in an already liberalised system. Forced by the awareness that only a common position would be able to influence the political process, a compromise position was eventually found which confirmed that a European legal framework on market access to port services could have added value, provided that a series of substantial amendments would be introduced which reinforced the strategic function of the port authority (Verhoeven 2006; 2009; 2010).

Also trade unions were confronted with internal disputes. These were partly related to different interpretations about the content (not all unions felt equally concerned), differences about the strategy to follow and dispersed representation at EU level. The main representative organisation was and still is the European Transport Workers’ Federation (ETF), which originated as an independent European organisation, but which became in 1999 a regional division of the long-established International Transport Workers’ Federation (ITF). Tensions about jurisdiction and strategic approaches remained nevertheless rife. Whereas ETF was in favour of a more ‘conventional’ lobbying approach, ITF advocated ‘militant’ strategy through rank-and-file mobilisation and collective industrial action. Complicating the process was the rivalry with the International Dockers Council (IDC), a more militant ‘grass-roots’ federation of dockers born out of the labour dispute in Liverpool at the end of the 1990s and with a stronghold in Mediterranean ports (Turnbull 2006).

As a result of these internal differences, unions did not manage to get fundamental amendments through when the Directive was discussed in first reading in Parliament. Parliament therefore kept cargo handling within the scope of the Directive and maintained both the right to employ personnel of own choice and the right to self-handling in its first reading opinion on the proposal. The lobbying of pilots had been more effective as Parliament proposed to exclude pilotage from the scope of the Directive.

Militant trade union action became only visible during the debate in Council which was held under the Spanish Presidency in the first half of 2002. Unions linked

the debate on the Directive to the debate on the Lisbon Strategy and made it symbol of the un-social character of the European Union. In this way the original set up of the Directive, i.e. to apply the principle of freedom to provide services to the port sector, became completely buried by, often exaggerated, arguments about uncontrolled competition, social dumping and unsafe ports. The portrayal of ruthless shipowners bringing shiploads of Filipino workers to European ports to take over jobs of registered dock workers is but one example of the wild stories that were told to persuade public opinion that the Directive was an outrageous assault on dockers' rights.

Since the Spanish Presidency wanted to have the Directive in place to support its national port reform plan it was ready to accept many amendments, but not to the extent that the Directive would become an empty shell, as trade unions were now demanding. The right to employ personnel of own choice and the right to self-handling were made conditional to elements of safety, environment, public service and social protection, but remained firmly in the Directive.

Trade unions had meanwhile opted for a dual strategy, using militant actions such as walk-outs and mass manifestations, which were held both in Brussels and Strasbourg, but also conventional lobbying techniques. It is remarkable how in some countries, like Belgium and the UK, unions managed to form 'unholy alliances' with port authorities and port employer organisations that would normally take a pro-liberalisation stance. Union pressure persuaded especially socialist and other left-wing Members of Parliament to table more radical amendments for second reading. Much to their surprise, these amendment proposals were procedurally not accepted as they were contrary to Parliament's opinion in first reading.

This further radicalised union positions and mobilised the militant component of their strategy, which now essentially went for the complete rejection of the Directive, the fall-back position being an 'empty' Directive as far as dock labour was concerned. The general perception is therefore that it was union pressure that single-handedly led Parliament on 20 November 2003 to reject the conciliation compromise with a narrow majority of 229 votes against 209 and 16 abstentions. Unions certainly claimed it as a massive victory. The principal reasons for Parliament's rejection were however more subtle. First there was the fact that Parliament's Rapporteur Georg Jarzembowski was eager to come to a quick deal with Council and had not used the full time available to negotiate a conciliation compromise with Council's delegation<sup>8</sup>, something which mainly the socialist group resented<sup>9</sup>. Several sources within the party confirmed afterwards that they would

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<sup>8</sup> A deal was already reached at the first meeting of the Conciliation Committee.

<sup>9</sup> The socialist group thus became determined to vote against the compromise. However, on the day that the vote in Parliament was scheduled, the German delegation in the group was holding a party congress outside Strasbourg. This led the group to move the voting day to Thursday which is traditionally the day with the highest absenteeism during Parliament's Strasbourg week. On the day of the vote only 454 out of 626 MEPs were present, the day before 530 still took part in the voting session.

have accepted the compromise should the full possibilities of negotiation have been used. Another factor was no doubt the eagerness of some MEPs to demonstrate the power of Parliament versus the Commission and the Council. Probably the most important overall factor was the effect of the upcoming European elections in June 2004. It is clear that if the vote would have taken place further away from an election period more MEPs would have resisted local pressures. Whilst pressure of trade unions has no doubt contributed significantly to the downfall of the Directive, it would be exaggerated to write the result fully on their account.

Late spring 2004, it became clear that the Commission was devising a new proposal. At the ESPO Annual Conference, held in Rotterdam on 17-18 June that year, Commissioner De Palacio confirmed this. The revised proposal saw the light of day on 13 October, a few weeks before the Prodi-Commission ended its mandate. This was in itself a rather unusual move for a resigning college. The revised proposal did try to meet a number of trade union concerns and proposed that:

- authorisations were mandatory;
- the provider of port services carrying out the service covered by the authorisation has the right to employ personnel of his own choice provided that he fulfils a number of criteria such as compliance with employment and social rules, including those laid down in collective agreements, provided that they are compatible with Community law;
- as a rule, self-handling for cargo and passenger operations may be provided using the land-based personnel of the self-handler, but is subject to an authorisation, it may also be done with sea-faring personnel for an authorised regular shipping service carried out in the context of short sea shipping and Motorways of the Sea, again in compliance with national rules, provided these are compatible with Community law.

As a token of goodwill to the unions, the Commission added in its explanatory memorandum a recommendation that Member States should ratify the ILO Conventions on dock labour.

Unions were not to be convinced however. Already at the ESPO conference in June, the ETF representative present had declared that issuing a similar proposal would be ‘an unacceptable provocation’ (ESPO 2004a) which they could not explain to their members. Whereas some ETF leaders would have been ready to negotiate, rank-and-file dockers could not be stopped and, as soon as the new proposal came forward, aggressive labour opposition started. The difference with the first proposal was that those stakeholders that had defended the Directive were now a lot less enthusiast in their support. Shipowner interests found the proposal too protectionist whereas port authorities were disappointed that a number of good compromises reached on the first proposal were no longer retained in the new one. Even if Parliament’s Rapporteur was ready to make further concessions to unions, by proposing to fully exclude self-handling, all attempts to salvage the second proposal

proved to be in vain. Parliament rejected the proposal on 18 January 2006 with 532 votes against 120 and 25 abstentions. During the voting week unions staged in Strasbourg the most violent demonstration against the Directive ever, which was however completely unnecessary, given that it was clear enough that Parliament would not back the proposal.

## **6. The 2007 Ports Policy Communication and its “Soft Law” Approach**

Following the final downfall of the Directive proposal on market access to port services, it looked for a while as if the prospect of a European ports policy was definitely off the table. This would have left ports governed by the basic principles of the Treaty and secondary legislation not specifically designed for ports. The essential question was whether it would be in the interest of ports to be subject to an incoherent patchwork of jurisprudence and legislation which often demonstrated contradictions. Already in 2004, ESPO had made a plea for a thorough reflection on the priorities of a European seaport policy, expressing the need for a coherent framework with a broad perspective focusing on the main challenges of the port sector (ESPO 2004b). The time for such a profound discussion only became ripe after the failure of the second Directive proposal. Several factors helped to bring the debate back on its feet. There was first of all the determination of the new Transport Commissioner, Jacques Barrot, to restore a climate of confidence after the traumatic experience of the Directive. In addition, the Commission had launched a process to develop a comprehensive and integrated maritime policy, which covered ports. Finally, there was the proposal of ESPO to organise a wide-ranging stakeholder consultation on the principal themes and challenges of a European ports policy. The latter two initiatives broadened the scope of the debate beyond the traditional transport policy context.

Between June 2006 and June 2007, the Commission held an extensive and unprecedented stakeholder consultation process which consisted of two conferences and six thematic workshops covering a broad spectrum of issues, including port authorities and port services, port financing, sustainable development of port capacity and environmental issues, labour issues and technical-nautical services, hinterland connections, competition and cooperation with neighbouring non-EU ports and the image of ports.

Participation to the consultation process was high and very active. One of the workshops dealt specifically with labour-related questions and was held in Valencia on 8-9 March 2007. The workshop focused among other things on the organisation of labour pools. Some stakeholders questioned these arrangements and declared them incompatible with the Treaty principle of freedom to provide services, whereas others put up a staunch defence for reasons of social protection and safety. The conclusions of the workshop highlighted the need to move from pooling systems towards a permanent, trained workforce. It was added that this should be done smoothly, by means of social dialogue between employers and unions

(Commission of the European Communities 2007a). The conclusions also said that casualisation of port work was to be avoided, particularly when competition between ports would result in reduction of wages. The workshop further came out with a plea for a social dialogue at European level, although considerable discussion existed about what this dialogue should focus on and which parties should be involved.

The consultation resulted in a Commission communication on European ports policy which was published 18 October 2007 (Commission of the European Communities 2007b). The communication resorted under the Commission's integrated maritime policy and formed part of its freight transport agenda, which were both adopted around the same time. The communication's actual policy proposals were spread over six areas as summarised in table 3.

The measures proposed in the communication largely rely on 'soft law', i.e. non-binding guidance or interpretation, rather than actual legislation. Two of the themes laid out in the communication concern port labour. First is the 'level playing field' theme which recognises, as the Green Paper already did in 1997, the evolution of cargo handling, both in technological terms and in the context of ports transforming into gateways to logistics chains. The communication also recognises the diversity of port labour arrangements, whereby port workers are often directly employed by terminal operators, while in some ports they are contracted via pools, which are defined as 'entities in charge of recruiting and training port workers'. The above described diversity of pooling arrangements is also mentioned.

**Table 3. Main themes 2007 ports policy communication**

<b>Theme</b>	<b>Most important measures proposed</b>	<b>Planned timing</b>	<b>Current status</b>
Port performance and hinterland connections	Evaluation ports hinterland connections status in context mid-term review TEN-T	2009-2010	TEN-T proposals published October 2011
Expanding capacity while respecting the environment	Guidelines on application Natura 2000 legislation	2008	Published March 2011
Modernisation	Common Maritime Space without Barriers	2009-2010	Pilot project ongoing
A level playing field – clarity for investors, operators and users	State aid guidelines	2008	Uncertain if they will be issued
Establishing a structured dialogue between ports and cities	European 'Open Ports' Day in context European Maritime Day (EMD)	2008	EMD organised annually
Work in ports	Sectoral social dialogue on ports Proposal on mutual recognition of training	Not indicated  Not indicated	Possibly start in 2012 Uncertain if it will be issued

The Commission confirms that Treaty rules on freedom of establishment and freedom to provide services can fully apply to the activities carried out by the pools. Whilst recognising that these pools often provide sound training to workers

and are an efficient tool for employers (e.g. to cover peak periods), the Commission stipulates that such arrangements should not be used to prevent suitably qualified individuals or undertakings from providing cargo-handling services, or to impose, on employers, workforce that they do not need. This could under certain circumstances fall foul of the Treaty rules on the internal market, in particular of Article 49 on freedom of establishment and Article 56 on freedom to provide services. This wording is almost identical to that of the 1997 ports' Green Paper.

The communication also contains a theme dedicated to 'work in ports', but this looks less at compatibility of dock labour with legal provisions. It rather advocates the establishment of dialogue between stakeholders as a means to contribute significantly to a better understanding between parties concerned and a successful management of change. The Commission particularly encourages the establishment of a European sectoral social dialogue committee as a means to contribute to management of change, modernisation and more and better jobs. The Commission also announces that it would propose a mutually recognisable framework on training of port workers in different fields of port activities and would monitor closely the implementation of Community rules on safety and health of workers at work and pursue a more systematic collection of accident statistics.

## **7. Recent Developments**

At the time of writing this paper, which is four years after the ports policy communication was published, nothing concrete has happened yet with regard to dock labour. Bearing in mind the trauma of the port services' Directive, the Commission preferred to wait until social partners came forward with a joint request to set up a European sectoral social dialogue before taking any initiatives at all. Although trade unions and terminal operators seemed to be eager to get this social dialogue started back in 2007, a concrete proposal from the social partners to set up the dialogue only came forward in spring 2011. This delay was mainly due to internal discussions between trade union organisations (ETF and IDC) and port organisations (FEPORT and ESPO) about their representation. Taking into account the formalities involved, a social dialogue could now start at the earliest in 2012. It can be assumed however that the delicate question of labour pool organisation will not be the first item that will be addressed, let alone solved.

Partly incited by the slow progress on social dialogue, the Commission recently started a review of its 'soft law' policy for ports. In its new Transport Policy White Paper (Commission of the European Communities 2011), the Commission announced that it will review restrictions on market access to port services. For dock labour, this will be done through a study on 'port labour, health, safety and qualifications' of which results are expected by spring 2012. The study will build on a report that the Institute of Transport and Maritime Management Antwerp (ITMMA) produced in 2010 on behalf of ESPO (ITMMA 2010), but it is expected to go much more in-depth. The study will have to provide an in-depth overview of

labour-related issues of the stevedoring sector in EU ports (labour conditions, labour arrangements, training and qualifications, health and safety issues), to identify possible shortcomings in these areas and to propose recommendations, including action at Commission level

## **8. Conclusions**

The organisation of dock labour and, more in particular, the use of dock labour schemes has been under EU scrutiny for a long while but the EU has not come with clear-cut answers so far.

The diversity of dock labour schemes existing in Europe is an important factor in assessing their compatibility with EU law. A principal difference needs to be made between schemes whereby dock labour is provided through a form of undertaking, in which case both the competition and internal market rules of the Treaty apply, and schemes whereby a pool of recognised dockers exists in a port but whereby these dockers are employed by local terminal operators. In that case only internal market rules can be applied.

So far, case-law of the European Court of Justice has focused on the first type only. From this, it appears to be possible for Member States to grant exclusive rights to a corporation whereby port users have to take recourse to registered dockers supplied through this corporation. There are however limits to the use of such exclusive rights. If a corporation which has the monopoly to perform dock work would demand payment for services which have not been requested, charge disproportionate prices and refuse to have recourse to modern technology, then there would be an abuse of dominant position. From case-law it is also clear that dock work is not, in principle, a service of general economic interest.

The compatibility of dock labour schemes with internal market principles such as the freedom to provide services and the freedom of establishment has not been put to the direct scrutiny of the European Court of Justice yet.

It was the European Commission's Directive proposal on port services that put the principle of freedom to provide services centre-stage. This proposal would have introduced the right for authorised service providers in ports to employ personnel of their own choice as well as the right for port users to provide port services with their own personnel ('self-handling'). In what can best be described as a very unusual political process, the proposal however failed twice to find a political majority. Although not entirely justified, trade union organisations have claimed the downfall of the Directive as their victory. This has greatly reinforced their power, both at European and national level, thus rendering vital reform processes in a number of Member States more difficult than ever. The failure of the Directive can

generally be seen as a missed opportunity to create legal certainty about the use of dock labour schemes<sup>10</sup>.

Following the downfall of the Directive, the Commission has chosen a non-confrontational approach based on 'soft law'. Its opinion on the compatibility of dock labour pools has not fundamentally changed compared to the 1997 Green Paper, but it remains very general, i.e. dock labour schemes can be compatible with Treaty rules unless these would be used to prevent suitably qualified individuals or undertakings from providing cargo-handling services, or to impose, on employers, workforce that they do not need or impose similar restrictions.

In the non-confrontational spirit that emerged after the downfall of the Directive, the Commission has for some years not undertaken any further initiatives on the issue, neither in the form of a new legislative proposal, nor in the form of case-by-case action. It has put responsibility with European social partners, hoping that these would address the issue through a sectoral social dialogue. Social partners however took considerable time to set up such a dialogue. This is now expected to commence in 2012, but it is unlikely that the delicate question of labour pool organisation will be the first item that will be addressed, let alone solved.

The use of dock labour pools under EU law and policy therefore remains uncertain. Meanwhile, ports in several Member States continue to struggle with restrictions imposed by dock labour schemes that gravely affect their competitiveness.

This explains why the Commission has recently taken the initiative to reconsider its 'soft law' policy and started reviewing restrictions on market access to port services, including those related to dock labour. The Commission's intention to map out a comprehensive overview of dock labour arrangements in European ports is probably the most effective way forward. This would then have to go beyond the *prima facie* evidence, but also reveal the actual practices involved. On this basis it would be perfectly possible to identify situations which are in breach of EU law. The question then remains whether anyone will have the courage to act upon the conclusions of such an analysis.

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<sup>10</sup> The failure of the Directive was also a missed opportunity for governments and port authorities wishing to introduce, complete or refine governance reform or reorganisation programmes. The Directive would furthermore have provided port authorities with a set of common principles on the use of concession-type instruments which would have strengthened their position in changing market surroundings (see Verhoeven 2009 for a fuller analysis).



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