DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 2 on Competition and Regulation

COMPETITION CONCERNS IN PORTS AND PORT SERVICES

-- European Union --

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1. **Overview**

1. There are more than 1,200 ports on Europe's 100,000 km of coast line and several hundred others on its 36,000 km of inland waterways. They are key points of modal transfer and handle 90% of Europe's international trade in volume. The network of smaller ports also plays an important role in Europe's economy: they are essential for the development of short sea shipping and of inland waterways traffic; they provide ferry services for passenger and freight that play an important role for the free movement of persons and goods within the European Union ("EU"); and the development of the cruise industry has transformed some of them into focal centres of tourism for cities and whole regions.

2. The pattern of activity within ports is very complex. Certain activities pertain to typical public authority tasks (e.g. traffic control). Other activities are economic in nature, for example the provision of access to port infrastructure and services (essentially cargo handling and technical-nautical services, such as pilotage, towage and mooring) which are increasingly provided by private undertakings. There is wide diversity as to the ownership, organisation and financing of ports in Europe with an increasing number of private sector participation in the provision of port services. Nevertheless, and as opposed to maritime transport services, port services have not yet been liberalised in the European Union. Two legislative proposals (in 2003 and 2006) on market access to port services drafted by the Commission were rejected by the European Parliament.

3. The major issues with respect to competition concerns in ports that the European Commission ("the Commission") and the EU Courts have dealt with in that past include (see detailed discussion below):

- The qualification of the port activities concerned as "economic" or "public". Since antitrust rules apply only to undertakings engaged in economic activity, this distinction is preliminary to any antitrust analysis.

- Distinction between two levels of competition: between ports and within ports. Ports may compete with each other when customers view them as substitutable. In addition, within one and the same port there may be competition between several service providers (e.g. two terminals or two pilotage companies). In the latter case the geographic market may very well be defined as encompassing only one and single port. Competition between ports has in the past given rise to concerns relating to the creation of dominant position in merger cases. Competition within ports has in the past given rise to concerns relating to abuse of dominant position and state monopolies. Evidently, on both levels of competition, concerns regarding restrictive agreements and concerted practices may arise.

- Product market definition which focused on different cargo flows and the technical requirements for their handling; geographic market definition which in some cases may differ significantly according to the different product markets.

- Market power among the varying players (ports, carriers, shippers).

- The effects on future competition of industry trends such as development projects, increase of port capacity and the move to increasingly larger vessels.

- Competitive concerns may stem from the vertically integrated activity of owners of port infrastructure. Abuse of dominant position was found in situations where owners of port infrastructure that were also active in a downstream market (e.g. ferry or pilotage services) withheld from their downstream competitors access to the upstream infrastructure,
• Another important concern was abuse of dominant position by owners of port infrastructure who overcharged for access to infrastructure.

4. DG Competition continues to follow the developments in the port sector and together with the national competition authorities and national courts, will continue to examine alleged distortions of competition under EU competition rules. We note however that our current level of expertise in the field of port activities is less advanced as compared to other sectors of the transport industry. The last antitrust decision, in relation to port services to ferries, rejecting a complaint, was taken in 2004. The reason for this seems to be that in a number of cases the national competition authority where the port is located appears to be well placed to handle the respective cases. Conversely, a number of merger cases have been decided, although almost all of which were cleared in a Phase I decision or under the simplified procedure. The only major merger case in which thorough phase II analysis was required dates back to 2001.

5. The following contribution therefore draws from the past experience of DG Competition in the port sector. It discusses separately the two levels of competition in ports: competition between ports, which was mostly dealt with in merger cases, and competition within ports which was mostly dealt with in antitrust cases.

6. The section on competition between ports follows the general analytical framework of merger cases discussing product market definition, geographic market definition and typical competitive concerns analysed in the Commission's merger decisions.

7. The section on competition within ports deals with issues relating to abuse of dominant position in access to port services and discuss the typical concerns analysed by the Commission and the EU courts.

2. Competition between ports

2.1. Product market definition

8. The approach of the Commission to the definition of product market in the competition between ports differentiates between various services in which ports can compete with each other. A single port can be active at the same time in different markets, each with its distinct characteristics. In the Scandlines Sverige case for example, the Commission considered that the port of Helsingborg (Sweden) was active in two distinct product markets: the market for port facilities and services for ferries carrying passengers and vehicles, in which it held a monopoly on the Helsingborg-Elsinore (Denmark) route and in the market for port facilities and services for cargo vessels in which it faced strong competition from other ports in the Oresund region.

9. When analysing stevedoring services, the Commission's approach to the product market distinguished between stevedoring services according to technical and user requirements. The Commission has identified three separate stevedoring markets: for deep-sea container cargos, bulk cargos and short-sea cargos. In one decision the Commission also identified a separate market for stevedoring services for

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1 Case No Comp/A.36.586/D3 Scandlines Sverige v Port of Helsingborg, Commission decision of 23 July 2004 rejecting the complaint of Scandlines Sverige.


3 Case No Comp/A.36.586/D3 Scandlines Sverige v Port of Helsingborg, Commission decision of 23 July 2004 rejecting the complaint of Scandlines Sverige.

4 Case No COMP/M.5093 DP WORLD / CONTI 7 / RICKMERS / DP WORLD BREAKBULK / JV, Commission decision of 18 November 2008.
break-bulk cargos. In that decision the Commission considered that delineation according to the type of break-bulk is not warranted since all break-bulk terminal services providers are, in principle, able to handle all types of break-bulk. The Commission did not have the opportunity to develop and to nuance further the product market definition in the bulk cargos sector. It could however be assumed that this sector could be differentiated according to types of cargo (e.g. liquids and solids) that require different port infrastructure for handling. As noted above, in few antitrust cases the Commission identified a distinct product market for port facilities services for ferries carrying passengers and vehicles.5

10. In the container cargos sector the industry usually distinguishes between different flows of deep-sea container cargos. The Commission however found that the stevedoring service provided in respect to these flows is essentially the same and further segmentation of the market on this basis was not warranted. The Commission did however differentiate between markets for hinterland traffic ("direct deep-sea") and for transhipment traffic. The Commission acknowledged that the two markets are linked because deep-sea container vessels carry both hinterland and transhipment traffic and the ports of call are determined mainly on the basis of hinterland consideration. Nevertheless, the range of ports that may be potential substitutes is not identical between the different traffics. Thus, while British and Irish ports compete with North European ports on transhipment traffic, they can not compete with them on hinterland traffic. Furthermore, unlike handling hinterland traffic, handling transhipment traffic does not require road / rail infrastructure and a hinterland linkage.

11. On the other hand, the Commission did not follow the industry's distinction between transhipment relay and transhipment feeder traffic.6 The Commission found that port operators have difficulty in identifying and quantifying relay and feeder traffic and therefore can not differentiate between them commercially (e.g. price wise).

2.2. Geographic market

12. The geographic market for hinterland traffic is determined by the "catchment area" of the ports, i.e. the inland geographic range to which the containers can be economically distributed. Accordingly, the Commission has identified three separate geographic blocs in Europe: United Kingdom and Ireland, Northern Europe and the Mediterranean.7 It left open the question whether Northern Europe should be further divided, the widest geographic range being Hamburg – Le Havre and the narrowest Hamburg – Antwerp. Although the question was finally left open, in a recent decision the Commission was inclined to consider the narrower geographic range as more appropriate.8

13. The geographic market for stevedoring services for transhipment traffic was considered wider. The Commission has distinguished between the Mediterranean market and Northern European market

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5 See also Case No IV/39.689 Sea Containers v Stena Sealink, Commission decision of 21 December 1993; Commission decision 94/119/EC of 21 December 1993, concerning a refusal to grant access to the facilities of the port of Rodby (Denmark). Compare to Case C-242/95 GT-Links v DSB [1997] ECR I-4449.

6 Relay is the transfer of containers between deep-sea vessels (for example from a vessel on an Asia-Europe route to a vessel on a Europe-America route). Feeder is the transfer of containers between deep-sea vessels to short-sea vessels for distribution to closer destinations.

7 The Commission has acknowledged however that the catchment area of some Northern European and Mediterranean might overlap with respect to the land-locked countries of West and Central Europe such as Switzerland and Austria.

8 The Commission considered that there was limited competition between the German and the French ports because of limited overlap in their catchment areas and the higher handling fees in the German ports. See Case No COMP/M.5066 EUROGATE / APMM, Commission decision of 5 June 2008.
which spread over the geographic range between Le Havre and Gothenburg and includes the United Kingdom and Ireland. In a recent decision the Commission was inclined to consider that the Northern European market should be further segmented because it was observed that for various reasons not all ports in Northern Europe are substitutable. Such reasons were: draft restrictions,\(^9\) distance from key shipping routes, distance from "transhipment markets" (such as Scandinavia / the Baltic countries, Spain / Portugal and United Kingdom / Ireland), and capacity limitations that restrict switching.\(^{10}\)

14. Also for the break-bulk market the Commission looked at the Hamburg-Le Havre geographic range as the starting point for its analysis. It has found that ports in that area serve the same hinterland. However, prices for break-bulk terminal services seem to differ substantially within that geographic range. The Commission has left the question of the exact definition of the geographic market for stevedoring services for break-bulk cargos open as in any event the notified transaction did not raise competitive concerns under any market definition.\(^{11}\)

15. The scope of the geographic market for ferries carrying passengers and vehicles is determined by the travellers' point of departure and destination and travelling time to each port. In defining the geographic market the Commission looked at elements such as population density, destination patterns and the road infrastructure. The Commission found that competition normally takes place between the ports on the same side of a group of small number of routes. Thus, for example, the Commission found that ferry services between the United Kingdom and Ireland should be divided into three separate geographic markets - northern, central and Southern corridors – composed of one, two and six routes respectively.\(^{12}\)

2.3. The competitive analysis in the merger cases

16. In the antitrust cases referred to above the Commission found the ports concerned to enjoy a monopoly position and therefore did not compete with other ports. For that reason the issue of competition between ports was not analyzed. The discussion below on competition between ports is therefore based on the Commission's merger cases.

17. The starting point of the Commission's competitive analysis was the market share of the merging parties in terms of container traffic volume (TEU). Most notifications were cleared on the basis of low combined market shares (0-20%) that did not raise competitive concerns. When market shares by volume were high enough to raise competitive concerns (40-50%) the Commission also looked at the market shares by port calls (i.e. number of ship entries to the port) as supporting evidence.

18. In merger cases the Commission may look at capacity utilization in the markets concerned. In general terms, significant spare capacity in the market may suggest that competitors could compete effectively with the merging parties. In the past the Commission examined mergers in the port industry in light of development projects and capacity expansion, normally within a time frame of 5 to 6 years. The Commission considered that when the new capacity would become operational it would be likely to impose competitive constraints in the future on the merging parties. The issue of port capacity was also raised in few cases by merging parties who argued that their position in the market should be examined in

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\(^9\) The minimum depth of water a ship or boat can safely navigate.

\(^{10}\) *Ibid.*

\(^{11}\) Case No COMP/M.5093 *DP WORLD / CONTI 7 / RICKMERS / DP WORLD BREAKBULK / JV*, Commission decision of 18 November 2008.

light of their current market shares in terms of capacity and spare capacity. The Commission was not inclined to accept these arguments. The reason was that the Commission has found the evidence on capacity not to be helpful because it is impossible to differentiate between data referring hinterland and transhipment traffic (which as explained above are in separate product markets) and because the calculation of capacity is very complicated and consequently estimations diverge significantly.

19. An important question that was discussed repeatedly by the Commission was the relationship between the ports and their customers and the effect of trends in the shipping industry on the competition between the ports. The main question was whether the shipping companies exerted, through their organization in conferences and consortia, customer power over the ports. Such arguments were advanced by merging parties who endeavoured to show that their post-merger ability to raise prices would be limited. The Commission found that conferences only regulate the prices charged for shipping services and do not interfere with decisions of shipping operators regarding routes and ports of call. The Commission concluded that conferences do not exert customer power over ports.

20. Similar conclusion was reached with respect of consortia. The Commission was doubtful whether they can benefit from combined bargain power considering that their members compete with each other both on price and on door-to-door service and that consequently their interests do not always coincide. In addition, the Commission considered that any demand-side concentration created by the conferences is offset by the higher degree of concentration on the supply-side of stevedoring services. Finally, the Commission found that consortia have difficulties to switch between ports because of the complexity of reworking schedules, timetables, loops and changes in terminal cut-offs, which a switch would require. Another important constraint that limits the ability of carriers to switch between ports is the fact that following a switch, their customers, the shippers, will also have to adapt their logistical arrangements for transporting the cargo from the port to its final inland destination. Carriers might therefore find it difficult to switch between ports because of potential objections by shippers.

21. The Commission had the opportunity to examine the important trend in the container shipping industry of building vessels with increasingly larger capacity. In its two Hutchison / ECT decisions of 2001 the Commission found that the new generations of bigger vessels would have the effect of limiting competition between ports. It was considered at the time that the new generation of vessels would require special stevedoring infrastructure that would limit the number of potential ports they could call at. In addition, it was estimated that the economics of such big vessels would require spending as much time at sea as possible requiring them to limit even further the number of ports of call, concentrating only on those ports that can serve sufficient hinterland volumes. In 2004 however, with the benefit of few years of additional industry experience, the Commission found that there is no concern that the expanded port of

13 In few cases the merging parties tried to argue that their competitors have ample spare that would allow customers to switch should prices rise.

14 Estimating capacity requires considering berth lengths, number of cranes, stacking areas and workforce productivity.

15 Conferences are groups of liner shipping operators which operate under uniform or common ocean freight rate. In many countries conferences benefit from a specific exemption from the antitrust laws. The exemption under EU law was abolished in 2006 with effect as of October 2008.

16 Consortia is a type of cooperation between liner shipping operators to provide joint service. Unlike shipping conferences they do not regulate prices. Consortia agreements are still exempted from the application of antitrust laws in the EU as in many other countries of the world.

17 Case No COMP/JV.55 HUTCHISON / RCPM /ECT, Commission decision of 3 July 2001; Case No COMP/JV.56 HUTCHISON /ECT, Commission decision of 3 July 2001.

18 Case No COMP/M.3576 ECT / PONL / EUROMAX, commission decision of 22 December 2004.
Rotterdam will enjoy a special advantage in attracting extra large vessels, noting that such vessels call in all the main ports in Northern Europe.  

3. Competition between ports: access to port services

22. The main problem that was dealt with in port antitrust cases before the Commission and the Court of Justice was not competition between ports but rather difficulties in access to service within a port, usually on the background of legal monopolies protected by the State. The two typical situations were:

- An undertaking holding monopoly in an upstream market of port services distorting downstream competition. For example: a port authority also active in the provision of ferry services discriminates between its own ferry operations and a competitor's operations in port fees or frustrates a competitor's plan to open a new ferry service. In the latter type of cases the Commission defined the ports as essential facilities (i.e. facilities without access to which competitors cannot provide services to their costumers) and obliged the port owners to give downstream operator access. In fact, the Commission's doctrine on access to essential facility originates in these port cases. In another case a legal monopoly in manpower services for docks companies was found to fall foul of European competition rules because the monopolist was also allowed to offer downstream dock services in clear conflict of interests with its monopoly rights.

- Abuse of dominant position by a company holding a monopoly in a certain port service (e.g. mooring, piloting or docks work) and overcharging its clients with respect to the services provided.

23. Antitrust rules apply only to undertakings, namely entities that are engaged in an economic activity. One preliminary question may therefore be the extent to which ports engage in such activities. This can only be a case by case assessment, depending on the nature of the activity under consideration. The Court of justice found that a distinction must be drawn between a situation where the State acts in the exercise of official authority and that where it carries on economic activities of an industrial or commercial nature by offering goods or services on the market. In order to make the distinction between the two

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19  It should be noted however that at the time the Commission made reference to a "new generation" of vessels capable of carrying 6,000 to 8,000 TEU, with even newer vessels with a capacity of up to 8,500 TEU in sight. Today, vessels carrying up to 15,000 are already in use and 18,000 TEU vessels are under construction.


situations, it is necessary to consider the nature of the activities carried on by the public undertaking or body on which the State has conferred special or exclusive rights. The Court then found that anti-pollution surveillance in relation to the loading and unloading of acetone products in the oil port of Genova is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.  

24. Another question on the relationship between "economic" and "public" activities relates to "services of general economic interest". Article 106(2) TFEU stipulates that an undertaking entrusted with the operation of services of general economic interest shall be subject to the rules on competition in so far as the application of such rules does not obstruct the performance of the tasks assigned to it. Because of the strategic importance of ports and the high level state intervention in their affairs, a recurrent question in EU antitrust port cases was whether the general economic interest exemption applies to them.

25. In the Muller case the Court of Justice considered that company operating the river port of Mertert (Luxembourg) enjoyed the "general economic interest" exemption since it is "responsible for ensuring the navigability of the State's most important waterway." Similarly, in the Corsica Ferries case the Court of Justice held that mooring services are of general economic interest and the fees which the applicant considered excessive and abusive were necessary for ensuring their performance. However, it was held that not all port services are of general economic interest. Consequently, the party arguing for the application of the exemption in Article 106(2) has to bear the burden of proving that the service concerned is indeed of general economic interest and that the application of the rules on competition would obstruct the performance of the service.

26. Finally, an important question in the context of EU law stems from Article 102 TFEU that applies only to undertakings holding dominant position in the internal market or substantial part of it. This requirement raises the difficulty whether a monopoly in the provision of services in a single port can be caught by this requirement. The consistent approach of the Commission and the Court of Justice in all antitrust port cases was that due to the importance of the ports concerned for intra community trade and travel they should be considered as constituting a substantial part of the internal market.

4. Conclusions

27. This contribution was based on the limited experience of DG Competition with port cases. The main competition issues that DG Competition and the EU courts dealt with were the characterization of port activity as "public" or "economic" for the purposes of competition law and concerns of abuse of the dominant position of owners of port infrastructure that enjoy monopolistic position and are in many cases still vertically integrated and competing with independent operators in downstream markets.

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27 See for example Case C-343/95 Diego Cali & Figli Srl v Servizi ecologici porto di Genova SpA (SEPG) [1997] ECR I-1547, where the Court of Justice held that anti-pollution surveillance in relation to the loading and unloading of acetone products in the oil port of Genova is a task in the public interest which forms part of the essential functions of the State as regards protection of the environment in maritime areas.

28 Case 10/71 Ministère public luxembourgeois v Muller [1071] ECR 723.


30 In Case C-179/90 Merci convenzionali porto di Genova v Siderurgica Gabrielli [1991] ECR I-5889, it was held that dock work consisting of loading, unloading, transhipment, storage and general movement of goods or material of any kind is not necessarily of general economic interest exhibiting special characteristics compared with that of other economic activities.