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**UNICE COMMENTS ON THE EUROPEAN COMMISSION'S
PROPOSAL FOR A DIRECTIVE ON MARKET ACCESS TO PORT SERVICES**

On 13 October 2004, the European Commission adopted revised proposals for improved *market access to port services*. This proposal is a follow up to its earlier proposal (2001) which failed at the final hurdle in 2003.

UNICE is the leading independent organisation representing European business. We speak for more than 20 million companies, the vast majority of which are small and medium-sized. Altogether, these companies provide employment for more than 110 million people and have a total turnover of around €18,000 billion. As such, when commenting on this revised market access to port services proposal, UNICE will focus its comments on what primarily and most directly affect our constituents the most.

GENERAL COMMENTS ON THE PROPOSAL

UNICE supports the objectives of the EC to encourage investment in Europe's ports and improve efficiency. We believe that this must be done in a way which does not introduce unnecessary or excessive bureaucracy.

As a general comment European industry believes that genuine liberalisation of market access to port services will improve the quality of said services by allowing free and fair competition in and, more importantly, between ports. Improved efficiency in the way ports are managed and run is essential to efficiently tackling the EU's ever growing transport needs (not the least of which is the need to encourage by means of competition modal shift of goods and passengers away from road to maritime transport). If today's ports are to compete with other transport modes in tomorrow's open Europe, free market access to port services is an essential requirement, today. It is also true that improving the EU's transport infrastructure (and the way it functions) has an important contribution to make towards making the European economy more competitive vis-à-vis its global rivals.

Whilst there are many ports that operate competitive and high quality services, there are still many where restrictive practices and a lack of competition results in inefficient and poor services provision. This Commission proposal, while in our view neither as far reaching as its predecessor nor as responsive to the issues that proved to be stumbling blocks in 2003, is nevertheless a positive contribution to the drive to enhance the efficiency and competitiveness of the services that ports offer.

But we have key reservations about the "one size fits all" approach which this proposal implies. A European framework should be proportional, intervening only where there is a justified need. We believe therefore that these proposals should only apply to those countries where there is limited competition in and between ports. Where competition exists to a high degree we are not convinced that proposals such as these, which would have the effect of overturning existing structures that already deliver a relatively high level of competition in and between ports, are the way forward. Indeed some of the currently drafted proposals could act to undermine the flow of investment into ports because of the different market models that are already in place.

Considering the different situations that exist in many European ports, and the potentially far-reaching consequences of the proposed legislation, UNICE considers it appropriate that, before new legislation is finally adopted, the Commission and Member States should first conduct an in-depth study on the impact of proposals, on service providers and users and which defines definitively the extent to which competition exists or doesn't in Europe's ports (thereby identifying clearly where these proposals are needed and where they are not).

With this important caveat, UNICE is nonetheless genuinely supportive of these revised Commission proposals for a Directive on market access to port services and the principle they represent. A start has to be made (again) to address this issue and, to start with, we are, as stated, genuinely positive. We do hope that this time European Member States and the European Parliament will seize the opportunity that is in front of them and make, amongst other things, a genuine contribution to the development of a sustainable European transport policy.

But we also believe that the issue of state aid is a major challenge facing the industry and guidelines addressing this must be put in place as soon as possible.

SPECIFIC COMMENTS ON THE PROPOSAL

With reference to the proposal on the table (*COM (2004) 654*), European business and industry would like to reiterate its earlier position (on the 2001 proposals) that the scope of this proposal should extend to all ports (which are open to general commercial traffic) and to all services offered in these ports where free and fair competition is proven not to exist.

With reference to particular points in the proposal, we would like to underline a number of points which we believe require clarification and/or revision. While not wanting to detract from our overall support for this proposal it is never-the-less our view that further attention is required on these points in order to make this proposal 'water-tight'.

Management of the Port

The "*managing body of the port*" or "*port authority*" responsible for the management of a ports infrastructure should be fully separated (both legally and administratively) from the provision of services. In lay-man's terms, the "*port authority*" should not also be a "*service provider*" (though exception perhaps should be considered in very strictly controlled and limited situations if this furthers the goal of introducing the element of free and fair competition to the provision of services in a given port). Normally however this separation is essential to encouraging free market access to port services and should apply even in cases where "*no suitable services provider [can] be found*"¹. If a selection procedure fails to find a suitable service provider, rather than cross the (necessary in our view) demarcation line between the management of a port and the provision of services, efforts should be redoubled and re-launched to secure a suitable, non-management service provider.

Limitation on the number of service providers

Limitations to the number of service providers should only be allowed in extremely limited circumstances and only if there is a genuine lack of space or capacity.

¹ Proposal for a Directive of the EP and the Council on market access to port services, European Commission, Brussels, 13 October 2004, Page 22, Article 8 (6).

Authorisation

UNICE strongly agrees that the criteria for granting of authorisation/permission (including a contract) allowing for the provision of port services or to carry out self-handling must be “transparent, non-discriminatory, objective, relevant and proportional”².

While the merits of existing authorisation agreements need to be addressed on a case-by-case basis, we do believe that the duration of the ‘authorisation’ period must be sufficient to allow the operator to achieve a suitable return on his/her investment. At the same time due consideration must be taken of the fact that given the option of renewal, the period of authorisation could conceivably last for a significant period of time. This being the case then there is a need for safeguard clauses to be included making it possible to withdraw authorisation if there is either a failure to provide the required services or if those services fail to deliver what is required. We are also of the opinion that such procedures should not be mandatory. Given the different structures that exist in different countries, the application of these proposals for authorisation should be at the discretion of Member States.

Furthermore, a port service provider must be able to invest up to the expiry of his authorisation's time limit, regardless of the latter's duration. That is why such clauses should nevertheless be accompanied by other clauses that allow for compensation in the event of eviction before the end of the concession's term, failing which the mechanism might not offer adequate incentive for private investors. For the same reason, when a new service provider is selected, he/she should compensate his predecessors at the current market rate for the value of equipment that he/she inherits.

Self handling

As already stated this Commission proposal should apply to all services in a port where free and fair competition is shown not to exist. This includes *self-handling* and *pilotage*. With regard to self-handling we believe that it is essential that Member States take the necessary measures to allow self-handling be carried out in accordance with the provision of this Directive. It is clear that if Member States are serious about encouraging both short sea shipping and ‘motorways of the sea’ Trans European Networks, then the right to self-handling (under normal competitive conditions) in the Internal Market using land based and a vessels regular sea-faring crew is essential.

We agree that these proposals should in no way affect the application of national rules concerning training requirements and professional qualifications, employment, safety and social matters, provided that they are compatible with Community law and the international obligations of the Community and the Member State concerned.

We also believe that where self-handling is subject to an authorisation, the criteria for such authorisation must be the same as those applying to providers of the same or a comparable port service, provided these are relevant.

Increasing the efficiency of the supply chain (improving work practices and services, stimulating market competition in dockside activities with a view to facilitating efficiency and rapid turn around of ships in port) is essential to supporting a more prominent role for maritime transport and short sea shipping in Europe.

Pilotage

Pilotage is equally important. We support the Commission’s proposals with the exception of where it allows for the possibility of port authorities “reserving for themselves the service [pilotage] in question”³. As previously stated, there must be a full separation between the

² *Ibid.* Page 21, Article 7 (3).

³ *Ibid.* Page 26, Article 14 (1).

management of a port and the provision of services. This should also apply to the provision of pilotage services.

Redress

It is entirely proper and in the interest of all that redress to appeal be allowed against decision or individual measures taken by competent authorities or the managing bodies of a port. Industry welcomes the insistence that reasoning for taking of measures or decisions “*must be objective, non-discriminatory, well-founded and duly substantiated*”⁴. We also fully agree with the inclusion of provisions that allow for such appeals to be made to national courts.

State aid

The issue of competition between ports is a major issue and should be treated as a priority. It is essential that transparency is required where state funding is provided to ports or port operators and that there is clarity about what constitutes state aid.

Industry is of the strong opinion that *Article 87* of the Treaties, governing the conditions for granting state aid, applies as much to this sector as any other. UNICE considers it very important to streamline the application of state aid rules in this sector, thereby avoiding distortions of competition. We favour a strict interpretation of the Treaty rules, allowing state aid only for the realisation of infrastructure, and not for its use. UNICE would therefore welcome Commission guidelines outlining and explaining the application of state aid rules to the ports sector, within 12 months of this directive coming into force.

CONCLUSION

It is regrettable that Europe did not avail of the previous opportunity to substantially boost the essential role of port services. The quality of Europe’s ports depends not just on cranes, infrastructure and investment, but also on the service rendered, i.e. on the way exports and imports are dealt with. In this respect a modern business approach, more efficiency and free and open markets within ports are key requirements in making ports and maritime transport an attractive and competitive alternative in the European supply chain. Europe has another opportunity to put this on the right track. It is European business and industry’s sincere hope that this current opportunity will be firmly grasped.

⁴ *Ibid.* Page 27, Article 15 (2).