

# COMPETITION COMMITTEE



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## **FOREWORD**

This document comprises proceedings in the original languages of a Roundtable on Competition in Ports and Port Services held by the Competition Committee (Working Party No.2 on Competition and Regulation) in June 2011.

It is published under the responsibility of the Secretary General of the OECD to bring information on this topic to the attention of a wider audience.

This compilation is one of a series of publications entitled "Competition Policy Roundtables".

## **PRÉFACE**

Ce document rassemble la documentation dans la langue d'origine dans laquelle elle a été soumise, relative à une table ronde sur la concurrence dans le domaine des ports et services portuaires qui s'est tenue en juin 2011 dans le cadre du Comité de la concurrence (Groupe de travail No.2 sur la concurrence et la réglementation).

Il est publié sous la responsabilité du Secrétaire général de l'OCDE, afin de porter à la connaissance d'un large public les éléments d'information qui ont été réunis à cette occasion.

Cette compilation fait partie de la série intitulée "Les tables rondes sur la politique de la concurrence".

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## EXECUTIVE SUMMARY

*by the Secretariat*

From the background paper, country contributions and the discussion at the roundtable held on June 27th 2011 at the OECD Conference Centre in Paris, the following key points emerged on *Competition in Ports and Port Services*.

### (1) *Competitive constraints that ports face*

The two main competitive constraints facing ports come from other modes of transport (inter-modal competition) and from other ports (inter-port competition). In assessing the strength of these constraints, it is important to consider the degree of substitutability between them—eg, how substitutable is road transport for maritime transport, or port A for port B?

In principle, demand for transport can be met by various transport modes, including sea, inland water, road, rail or air. Thus, at an abstract level, waterborne transport may compete with these other modes of freight transport. For example, if the price of one or more port services were to increase, some port users might switch to using a different mode of transport, such as rail or road.

Considering the degree of substitutability between transport modes, the background paper to the current discussion examined the value density (value per weight unit) of goods transported by different transport modes. The analysis indicated that these value densities vary substantially across modes. For example, the average value per tonne transported by sea was only a fraction of that transported by road. Furthermore, certain types of goods appear to be suited to being transported by certain modes of transport. These observations are consistent with limited demand-side substitutability between different modes of transport—in particular, between maritime and rail or road transportation—even where goods do not need to cross a body of water. This implies that other transport modes pose only a limited competitive constraint on waterborne transport.

There appears to be broad agreement between OECD member countries that other modes of transport, such as road, rail or air, pose only a limited constraint on maritime transport. For example, in its submission, Finland stated that, due to its geographic location, there is a limited degree of substitutability between sea and other modes of transport for bulk freight to/from Finland. Switzerland did, however, highlight the difference between maritime and river transport, noting that pricing of the latter would be constrained by road and rail.

In addition to inter-modal competition, a port may be constrained when setting price and service quality by inter-port competition. As neither the initial origin nor the final destination of freight or passengers tends to be ports themselves, customers may in principle choose between different ports of origin and ports of destination. The degree of substitutability between ports at or around these locations will determine the extent of competition between ports.

The ability of different ports to serve customers in a given area needs to be assessed on a port-by-port basis, although, in principle, a distinction can be made between captive and contestable hinterlands. All regions where one port has a substantial competitive advantage because of lower transport costs to these

regions (for example, owing to short distances to its customers' final destinations) belong to the captive hinterland. Such a port is likely to handle the majority of all cargoes to and from these regions. Competition between ports is more likely to occur in regions where no single port has a significant cost advantage over other ports. These ports may therefore operate in the same geographic market.

In addition to hinterland traffic, ports may compete for transshipment traffic, whereby larger vessels use a port to transfer cargo to smaller feeder vessels. These feeder vessels then transport the cargo on to ports that serve the required hinterland. The distinction between hinterland and transshipment traffic means that two ports that do not serve the same hinterland may still operate in the same geographic market with respect to the relevant goods if they compete for the same transshipment traffic. Where ports compete for transshipment traffic, the relevant geographic market is likely to be wider than in the case where ports compete for hinterland traffic only.

A number of contributions commented on the geographic scope of the competitive constraints faced by ports: Chinese Taipei, for example, suggested that competition at ports can be simultaneously national (for hinterland traffic) and international (for transshipment traffic). In port services, such as towage, markets are often defined more narrowly. During a merger investigation, the UK Competition Commission defined the relevant geographic market for towage services as being restricted to individual ports.

(2) *Factors that facilitate market power at ports*

Under EU competition law a port would be considered to have market power if it could behave independently of its customers and competitors to an appreciable extent.<sup>1</sup> A number of factors are relevant when considering whether ports have market power, including the extent of existing competition, the threat of potential competition, and the degree of buyer power.

To approximate the extent of existing competition, standard assessments of market power often start by looking at factors such as market shares. This step follows logically from the market definition exercise. In general, a port is more likely to be found to have market power if it has a persistently high market share than if it does not.

The evolution of market shares is also relevant. However, given the time required to alter the functionality of infrastructure, market shares are unlikely to change significantly in the short term, except in unusual circumstances (eg, when a new oil refinery opens near a port). This is exacerbated by the contractual nature of the maritime industry, which means that some companies are locked into using certain ports and are therefore unable to switch in the short run. In principle, however, volatile market shares would be indicative of strong competition, as price reductions, capacity expansions or innovation by individual ports result in increased traffic or the diversion of total traffic from other ports.

The existing level of competition between ports is not the only factor relevant for determining market power. The level of potential competition will also have an effect. The threat of entry by new ports (or intra-port entry) can help to constrain the behaviour of existing ports. Barriers to entry can be substantial, especially for ports that are integrated into networks and multi-layered supply chains. The constraint on port market power from potential competition is generally low, primarily owing to significant economic barriers to entry relating to economies of scale.

Apart from minimal entry barriers, the main other factor that could mitigate market power at ports is buyer power. Competition law often permits a defence against a finding of market power if it can be shown

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<sup>1</sup> Court of Justice of the European Communities (1979), *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76.

that the customers of an entity have sufficient bargaining strength to offset that market power. In such a situation, the buyer power of downstream operators, such as a shipping company, prevents the upstream business, such as a port or provider of port services, from acting to an appreciable extent independently of its customers—even though this business might have a persistently high market share.

Buyer power—which may be sufficient to countervail upstream market power—might exist where buyers are large relative to their supplier(s). Other factors that will affect the ability of buyers to constrain suppliers include buyers' ability to switch between suppliers; the extent to which buyers can credibly threaten to set up their own supply arrangements; and the extent to which buyers can impose increased costs on suppliers. Given these factors, larger port customers are more likely to have buyer power than smaller ones. In principle, ports' customers may have buyer power where ports face a concentrated downstream market.

The issue of whether buyer power exists in practice was addressed in the EU's submission. Shipping companies are often organised into conferences and consortia, increasing their scale and potentially giving them considerable buyer power. However, the European Commission has not found this to be a convincing argument because conferences regulate only the prices charged for shipping services; they do not interfere with shipping operators' decisions about routes and ports of call. The Commission was also doubtful that consortia facilitated substantial buyer power because consortia members actually compete with each other on both price and end-to-end service. Thus, the Commission was of the view that, although shipping companies can be large and conferences and consortia can increase concentration, buyer power may still be limited in the maritime sector.

### (3) *Potential abuses of market power*

Since it is possible for ports or providers of port services to have market power, there is a risk that they will abuse this power to the detriment of their customers. The main form of abuse of dominance is through excessive pricing and/or refusal to supply. However, under certain conditions, tying and bundling may also constitute a form of abuse of dominance.

Excessive pricing has been defined as “charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied”.<sup>2</sup> Excessive pricing clearly leads to a consumer detriment in terms of higher prices paid, and can lead to a net detriment to social welfare due to the allocative inefficiency caused by the elevated prices. In the context of ports, prices that could theoretically be set excessively include either general port charges or charges for specific services, such as berthing, electricity, fuel or water.

With regard to refusing supply, in general ports have the right to choose their trading partners. However, there are some instances where, if a dominant port refuses to supply a certain service to an applicant, this could constitute an abuse of a dominant position. This type of abuse can occur when a port has an interest in the downstream market and refuses to supply or grant access to competing downstream customers. Refusal to supply can be an abuse because it may artificially limit competition in a downstream market, and hence lead to ex post allocative inefficiency and higher prices downstream.

The ports sector is susceptible to refusal to supply because many operators of port infrastructure are also involved in passenger or freight shipping. Some shipping lines operate or own terminals within ports. This level of integration between the companies can provide them with incentives to restrict access to their

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<sup>2</sup> European Court of Justice (1978), *United Brands v Commission*, Case 27/76, [1978] ECR 207. A price is considered excessive if the difference between the costs actually incurred and the price actually charged is excessive and the price is either unfair in itself or when compared to competing products.

facilities only to their own downstream operations. However, refusal to supply can have welfare benefits if it creates incentives for the upstream operator to invest in facilities that it would not have invested in if it had to allow downstream competitors to access them. For example, the terminal operator may purchase specialised modern unloading equipment that creates efficiencies in unloading time. However, if some of the benefit of this new equipment were shared with a downstream competitor, it may no longer be a viable investment.

In Italy most of the Competition Authority's decisions concerning competition law infringements in the ports sector concern access to port infrastructure. For example, Provveditorato (an agency that both regulated the port of Venice and managed docks there) refused to authorise Nuova Italiana Coke to access certain docks at the port of Venice except for the docks managed by Provveditorato itself. This was deemed an abuse of a dominant position because it led to an unjustified restriction on Nuova Italiana Coke's activities to the benefit of the harbour activities performed and provided by Provveditorato itself.

(4) *Remedies that address competition issues in ports and port services*

Where competition concerns arise, there are several possible remedies. Some focus on addressing market power concerns by facilitating competition. However, in other cases, introducing competition through competition law may not be possible and regulation is required to address pricing or access concerns.

One option for addressing market power concerns is to implement remedies that create a situation where a port would no longer be deemed to be in a dominant position. This is only possible in situations where there is some physical possibility of dividing the components of what has been deemed to represent the relevant market. For example, if a single terminal port were found to be the relevant market, there may be no scope for reducing this level of dominance. Where there is scope for divisibility, this could occur between ports or within a port itself.

Where a market has been determined to include several competing ports and one entity owns or has a stake in each of them, one option for reducing dominance would be to force divestiture of individual ports. Many large ports have separate terminals, opening up some scope for separate ownership of these terminals. Therefore, if a port is found to be dominant and if there are concerns about this dominance, separating the ownership of different port terminals may help to alleviate the competition concerns. This requires the separated terminals to place some degree of competitive constraint on each other, so they need to be able to handle the same customer/commodity types.<sup>3</sup>

Pricing concerns may be addressed through structural measures that facilitate competition. Where inter- or intra-port divestiture is not possible, an alternative option is direct price regulation. This is usually appropriate where a port or port service is found to be a natural monopoly.

To address concerns regarding refusal to supply, a regulator could force a port to grant access to downstream customers. Besides structural measures, this could be done through transparency obligations, an access code, accounting separation of a vertically integrated port, or equivalence standards. Access regulation can help to address some of the issues around refusal to supply and any inefficiencies due to bottlenecks in infrastructure use that may arise because the port is capacity-constrained—i.e., it cannot serve all customers without delay and there is no adequate alternative. As a possible alternative to

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<sup>3</sup> On structural separation see also the Report on Recent Experiences with Structural Separation: A report to the council on implementation of the 2001 Recommendation Concerning Structural Separation in Regulated Industries, DAF/COMP(2011)12

structural separation, access regulation can help to limit the risk of discrimination where a port is a vertically integrated entity with interests downstream.

In Turkey the competition authority attempted to mitigate competition concerns that arose during the privatisation of the Port of Ismir and the Port of Mersin. Its evaluation of the privatisation plan recommended that the two ports be operated by two different operators, and that the operating rights should not be transferred to liner transport or ship broker services. Both of these recommendations were accepted.

During the roundtable discussion the UK's delegate explained that one of the core concerns for the UK competition authorities is the degree of vertical integration between port owners and port service providers, and that this can lead to downstream foreclosure. Despite its concern about vertical integration, the UK also noted that there is a risk that, in the long term, vertical separation may create costs and reduce efficiency.



## SYNTHÈSE

*par le Secrétariat*

Le document de référence, les contributions des pays et les débats lors de la table ronde tenue le 27 juin 2011 au Centre de conférences de l'OCDE à Paris ont mis en évidence les principaux aspects suivants concernant la *concurrence dans les ports et services portuaires*.

### (1) *Contraintes concurrentielles rencontrées par les ports*

Les deux principales contraintes concurrentielles que rencontrent les ports proviennent des autres modes de transport (concurrence intermodale) et des autres ports (concurrences interports). Pour mesurer l'importance de ces contraintes, il convient d'examiner le degré de substituabilité entre elles — par exemple, dans quelle mesure le transport routier peut-il remplacer le transport maritime, ou le port A peut-il remplacer le port B ?

En principe, la demande de transport peut être satisfaite par différents modes de transport, maritime, par voie navigable, routier, ferroviaire ou aérien. Aussi, en théorie, le transport maritime peut entrer en concurrence avec ces autres modes de transport de fret. Si par exemple le prix d'un ou de plusieurs services portuaires augmente, certains utilisateurs des ports pourraient opter pour un mode différent, comme le rail ou la route.

S'agissant du degré de substituabilité entre modes de transport, le document de référence qui sert de base à la discussion examine la densité de valeur (valeur par unité de poids) des marchandises transportées par différents modes de transport. L'analyse montre que ces densités varient beaucoup d'un mode à l'autre. Par exemple, la valeur moyenne par tonne transportée par mer ne représente qu'un faible pourcentage de celle transportée par route. En outre, certains types de marchandises semblent se prêter à certains moyens de transport plutôt qu'à d'autres. Ces observations cadrent avec la substituabilité limitée du côté de la demande entre différents modes de transport—notamment entre le transport maritime et le transport ferroviaire ou routier—même lorsque les marchandises ne doivent pas traverser une étendue d'eau. Cela signifie que la contrainte concurrentielle exercée par les autres modes de transport sur le transport par voie d'eau n'est que minime.

Un large consensus semble se dégager entre les pays membres de l'OCDE pour reconnaître que les autres modes de transport, comme le transport routier, ferroviaire ou aérien, ne font pas véritablement concurrence au transport maritime. Par exemple, dans sa contribution, la Finlande indique qu'en raison de sa situation géographique, le degré de substituabilité entre transport maritime et autres modes de transport est faible pour les marchandises en vrac à destination ou en provenance de la Finlande. Néanmoins, la Suisse souligne la différence entre transport maritime et transport par voie fluviale, et fait observer que les tarifs de ce dernier subissent des contraintes dues à la concurrence de la route et du rail.

Outre la concurrence intermodale, un port peut se heurter à des contraintes induites par la concurrence d'autres ports lorsqu'il fixe ses tarifs et le niveau de qualité de ses services. Étant donné que les ports proprement dits ne sont ni l'origine, ni la destination finale du fret ou des passagers, les clients peuvent en théorie choisir entre différents ports d'origine et de destination. Le degré de substituabilité entre ports situés à proximité déterminera l'intensité de la concurrence entre eux.



La capacité des différents ports à desservir des clients dans une zone donnée doit être analysée au cas par cas, bien qu'en principe une distinction puisse être faite entre arrière-pays captifs et arrière-pays ouverts à la concurrence. Toutes les régions où un port possède un avantage concurrentiel substantiel tenant à des coûts de transport plus faibles vers ces régions (en raison par exemple d'une plus grande proximité avec la destination finale du client) font partie de l'arrière-pays captif. Un tel port traitera vraisemblablement l'essentiel du fret vers et en provenance de ces régions. La concurrence entre ports est plus probable dans les régions où aucun port ne détient un avantage de coût significatif par rapport aux autres ports. Ces ports peuvent donc opérer sur le même marché géographique.

Outre le trafic avec l'arrière-pays, les ports peuvent se livrer concurrence pour le trafic de transbordement, par lequel de grands navires font escale dans un port pour réexpédier leur cargaison à bord de navires collecteurs plus petits. Ces navires collecteurs acheminent alors la cargaison jusqu'aux ports qui desservent l'arrière-pays voulu. La distinction entre trafic avec l'arrière-pays et trafic de transbordement signifie que deux ports qui, pour des marchandises données, ne desservent pas le même arrière-pays, peuvent néanmoins couvrir le même marché géographique s'ils se livrent concurrence pour le même trafic de transbordement. Lorsque des ports entrent en concurrence pour le trafic de transbordement, le marché géographique pertinent sera généralement plus vaste que s'ils se livrent concurrence uniquement pour le trafic avec l'arrière-pays.

Certains pays font des observations sur la portée géographique des contraintes concurrentielles que rencontrent les ports : ainsi, le Taipei chinois indique que la concurrence peut être à la fois nationale (pour le trafic avec l'arrière-pays) et internationale (pour le trafic de transbordement). En matière de services portuaires, comme le remorquage, la définition des marchés est souvent plus étroite. Au cours d'une enquête sur une fusion, la Commission britannique de la concurrence a conclu que le marché géographique concerné des services de remorquage était limité aux ports respectifs.

## (2) *Facteurs qui facilitent le pouvoir de marché des ports*

Selon le droit de la concurrence de l'UE, un port est considéré comme détenant un pouvoir de marché s'il a la possibilité de comportements indépendants dans une mesure appréciable vis-à-vis de ses concurrents et de ses clients<sup>1</sup>. Il convient de tenir compte d'un certain nombre de facteurs pour déterminer si un port détient un pouvoir de marché, notamment l'intensité de la concurrence existante, la menace d'une concurrence potentielle et l'importance du pouvoir de l'acheteur.

Pour appréhender l'importance de la concurrence existante, les évaluations classiques du pouvoir de marché commencent souvent par examiner des facteurs tels que les parts de marché. Cette étape est la suite logique de l'exercice de définition du marché. En général, un port sera plus susceptible d'exercer un pouvoir de marché s'il détient systématiquement une part de marché élevée que dans le cas contraire.

L'évolution des parts de marché est elle aussi pertinente. Toutefois, compte tenu du temps nécessaire pour reconvertir des infrastructures, il est peu probable que les parts de marché varient beaucoup à court terme, sauf circonstances exceptionnelles (comme l'ouverture d'une raffinerie de pétrole près d'un port). Cette rigidité est exacerbée par la nature contractuelle du secteur maritime, de sorte que certaines entreprises sont tributaires de certains ports et ne peuvent pas en changer rapidement. Néanmoins, de manière générale, des parts de marché volatiles traduisent une concurrence forte, car des baisses de prix, le renforcement des capacités ou l'innovation par tel ou tel port génèrent un accroissement du trafic ou le détournement du trafic d'autres ports.

<sup>1</sup> Cour de Justice des Communautés européennes (1979), *Hoffmann-La Roche & Co. AG c. Commission des Communautés européennes*, Affaire 85/76.

Le niveau actuel de concurrence entre ports n'est pas le seul facteur pertinent pour évaluer le pouvoir de marché. Le degré de concurrence potentielle joue également un rôle. La menace d'entrée de nouveaux ports peut dicter le comportement de ports existants. Les barrières à l'entrée peuvent être considérables, notamment pour les ports intégrés dans des réseaux et des chaînes d'approvisionnement à plusieurs niveaux. L'encadrement du pouvoir de marché d'un port induit par la concurrence potentielle est généralement faible, essentiellement du fait des importants obstacles à l'entrée liés aux économies d'échelle.

Hormis les barrières à l'entrée, le principal autre facteur susceptible d'atténuer le pouvoir de marché des ports est le pouvoir de l'acheteur. Le droit de la concurrence autorise souvent les recours contre une situation de pouvoir de marché s'il peut être démontré que les clients d'une entité possèdent un pouvoir de négociation suffisant pour compenser ce pouvoir. En pareil cas, le pouvoir d'acheteur des opérateurs en aval, une compagnie maritime par exemple, empêche l'entité en amont, comme un port ou un prestataire de services portuaires, d'avoir un comportement indépendant dans une mesure appréciable vis-à-vis de ses clients — même si cette entité peut détenir une part de marché systématiquement élevée.

Le pouvoir d'acheteur, parfois suffisant pour contrer un pouvoir de marché en amont, peut exister lorsque les acheteurs sont de grande taille par rapport à leur(s) fournisseur(s). D'autres facteurs influenceront sur la capacité des acheteurs de peser sur les fournisseurs, notamment : la capacité des acheteurs de changer de fournisseurs ; la menace crédible que peut constituer le fait pour les acheteurs d'organiser leur propre réseau d'approvisionnement ; et la possibilité pour les acheteurs d'augmenter les coûts supportés par les fournisseurs. Au regard de ces facteurs, les gros clients sont plus susceptibles d'exercer un pouvoir d'acheteur que les petits. En principe, les clients des ports peuvent détenir un pouvoir d'acheteur lorsque le marché en aval des ports est concentré.

La contribution de l'UE aborde la question de l'existence concrète d'un pouvoir d'acheteur. Les compagnies maritimes sont souvent organisées en conférences et consortiums maritimes, afin d'augmenter les économies d'échelle et d'acquérir un pouvoir d'acheteur considérable. Toutefois, la Commission européenne n'a pas jugé cet argument convaincant parce que les conférences maritimes réglementent uniquement les prix facturés pour les services de transport ; elles n'interviennent pas dans le choix des lignes et des escales par les armateurs. La Commission ne pense pas non plus que les consortiums favorisent un pouvoir d'acheteur substantiel dans la mesure où leurs membres se livrent concurrence sur les prix comme sur les services intégrés. Aussi, la Commission estime que le pouvoir d'acheteur est probablement limité dans le secteur maritime, même si les compagnies maritimes peuvent être de grande taille et les conférences et consortiums augmentent la concentration.

### (3) *Abus potentiel du pouvoir de marché*

Étant donné que les ports ou les prestataires de services portuaires peuvent exercer un pouvoir de marché, ils risquent d'abuser de ce pouvoir au détriment de leurs clients. La principale forme d'abus de position dominante est la tarification excessive et/ou le refus de vente. Toutefois, dans certaines circonstances, les ventes liées et la subordination de vente peuvent aussi constituer une forme d'abus de position dominante.

La tarification excessive désigne « la pratique d'un prix sans rapport raisonnable avec la valeur économique de la prestation fournie »<sup>2</sup>. À l'évidence, cette pratique est préjudiciable au consommateur qui

<sup>2</sup> Cour européenne de Justice (1978), *United Brands c. Commission*, Affaire 27/76, [1978] ECR 207. Un prix est considéré comme excessif si la différence entre les coûts effectivement subis et le prix effectivement facturé est excessive, et si le prix est inéquitable en soi ou par comparaison avec celui de produits concurrents.

subit des prix plus élevés, et peut nuire au bien-être social en raison de l'inefficience allocative induite par les prix élevés. Dans le contexte des ports, les prix susceptibles d'être excessifs incluent les droits portuaires généraux ou les droits au titre de services spécifiques, comme l'amarrage, l'électricité, le combustible ou l'eau.

S'agissant du refus de vente, en règle générale les ports sont autorisés à choisir leurs partenaires commerciaux. Néanmoins, si un port en situation dominante refuse de fournir un certain service à un demandeur, ce refus peut dans certains cas constituer un abus de position dominante. Ce type d'abus peut survenir lorsqu'un port possède des intérêts sur le marché en aval et refuse de vendre ou d'accorder l'accès à des clients concurrents sur ce marché. Le refus de vente peut être abusif s'il limite artificiellement la concurrence sur un marché en aval, entraînant une inefficience allocative ex post et une hausse des prix en aval.

Le secteur des ports se prête au refus de vente parce que de nombreux opérateurs d'infrastructures portuaires exercent aussi des activités de transport de passagers ou de fret. Certaines compagnies de navigation exploitent ou possèdent leurs propres terminaux dans des ports. Cette intégration entre compagnies peut les inciter à réserver l'accès à leurs installations à leurs seules opérations en aval. Toutefois, le refus de vente peut aussi procurer des gains en termes de bien-être s'il encourage l'opérateur en amont à investir dans des installations dans lesquelles il n'aurait pas investi s'il devait autoriser des concurrents en aval à les utiliser. Par exemple, l'opérateur de terminaux peut acquérir des équipements de déchargement modernes et spécialisés qui raccourcissent les délais de déchargement. Si les avantages de ces nouveaux équipements devaient être partagés avec un concurrent en aval, l'investissement risquerait de ne plus être viable.

En Italie, la plupart des décisions de l'Autorité de la concurrence relatives aux violations du droit de la concurrence dans le secteur des ports concernent l'accès aux infrastructures portuaires. Par exemple, Provveditorato (organisme qui réglementait le port de Venise et qui gérât des docks dans ce port) a interdit à Nuova Italiana Coke l'accès à certains docks dans le port de Venise, hormis ceux gérés par Provveditorato lui-même. Ce refus a été jugé constitutif d'un abus de position dominante parce qu'il a entraîné une restriction indue des activités de Nuova Italiana Coke, au bénéfice des activités portuaires exercées et fournies par Provveditorato.

#### (4) *Recours en cas d'infractions au droit de la concurrence dans les ports et services portuaires*

Divers recours sont possibles en cas de problèmes de concurrence. Certains tentent d'atténuer un pouvoir de marché excessif en facilitant la concurrence. Néanmoins, il n'est pas toujours possible de garantir la concurrence en s'appuyant sur la législation, et il faut alors réglementer pour remédier aux problèmes de prix ou d'accès.

Un moyen de s'attaquer à un pouvoir de marché excessif consiste à prendre des mesures visant à aboutir à une situation dans laquelle un port n'est plus considéré comme détenteur d'une position dominante. Ces mesures ne sont envisageables que s'il existe une possibilité physique de diviser les différentes composantes du marché concerné. Si par exemple un seul port est considéré comme étant le marché concerné, il n'est guère possible d'atténuer cette position dominante. Dans le cas contraire, la scission peut s'effectuer entre ports ou au sein d'un même port.

Si un marché comprend plusieurs ports concurrents et si une seule entité les possède ou détient une participation dans chacun d'eux, un moyen de réduire la position dominante est d'imposer le démantèlement de certains ports. De nombreux grands ports possèdent des terminaux distincts, ce qui permet d'envisager d'en scinder la propriété. Si la position dominante d'un port pose problème, scinder la propriété des différents terminaux portuaires peut contribuer à renforcer la concurrence. Il faut pour cela

que les terminaux scindés exercent des contraintes concurrentielles les uns sur les autres, ce qui suppose qu'ils traitent les mêmes types de clients ou de marchandises<sup>3</sup>.

Les problèmes de prix peuvent être réglés au moyen de mesures structurelles qui facilitent la concurrence. Lorsqu'un démantèlement est impossible, une alternative consiste à réglementer directement les prix. C'est une solution appropriée lorsqu'un port ou un service portuaire constitue un monopole naturel.

Pour s'attaquer à un refus de vente, une autorité de réglementation peut contraindre un port à octroyer l'accès à des clients en aval. Outre des mesures structurelles, elle peut imposer des obligations de transparence, un code d'accès, la séparation comptable d'un port verticalement intégré, ou des normes d'équivalence. La réglementation de l'accès peut contribuer à résoudre certains problèmes posés par le refus de vente et à remédier aux inefficiences générées par des goulets d'étranglement dans l'utilisation des infrastructures consécutives aux contraintes de capacités que connaît le port – son incapacité à servir tous ses clients sans retard et l'absence de solution de rechange. En alternative à la séparation structurelle, la réglementation de l'accès peut limiter le risque de discrimination qui survient lorsqu'un port est une entité verticalement intégrée qui possède des intérêts en aval.

En Turquie, l'autorité de la concurrence a tenté d'atténuer les problèmes de concurrence qui se sont posés au cours de la privatisation du Port d'Izmir et du Port de Mersin. Dans son évaluation du plan de privatisation, elle recommandait que les deux ports soient exploités par deux entités différentes, et que les droits d'exploitation ne soient pas transférés à des entreprises qui proposent des services de transport régulier ou de courtage maritime. Ces deux recommandations ont été acceptées.

Au cours de la table ronde, le délégué du Royaume-Uni explique que l'une des principales préoccupations des autorités britanniques de la concurrence est l'intégration verticale entre propriétaires de ports et prestataires de services portuaires, car elle peut conduire au verrouillage du marché en aval. Malgré les inquiétudes suscitées par l'intégration verticale, le Royaume-Uni souligne également le risque que, sur le long terme, la séparation verticale engendre des coûts et diminue l'efficacité.

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<sup>3</sup>

S'agissant de séparation structurelle, voir également le document intitulé *Expérience récente en matière de séparation structurelle : Rapport au Conseil sur la mise en œuvre de la recommandation de 2001 concernant la séparation structurelle dans les secteurs réglementés*, DAF/COMP(2011)12



## COMPETITION IN PORTS AND PORT SERVICES

*By the Secretariat<sup>1</sup>*

### 1. Introduction

This report reviews some of the competition concerns that can arise in the ports sector. Before discussing these concerns, the sector and its stakeholders are introduced below.

#### 1.1. *Why do ports matter?*

Waterborne transport has historically underpinned international trade and contributed to global economic growth. Waterborne transport is facilitated by ports, which provide a fundamental role in linking navigable water and surface transport.

As is the case for most transport services, demand for port services is a derived demand that depends ultimately on the demand for freight at a destination and the demand for travel by passengers. Ports are therefore only one component in a chain of services that deliver the outcome of the movement of people and goods.

Large-scale movement of goods is one of the main functions that ports help to facilitate. In 2009, a total of 7.84 billion tonnes of cargo was loaded onto ships worldwide.<sup>2</sup> In addition to this large volume of goods, maritime transport is also important in terms of its value. In 2007 the value of globally shipped liner goods was around \$4.6 trillion.<sup>3</sup>

The ports that handle these goods must therefore be able to deal with large volumes as well as being able to handle diverse loads. Singapore—the world’s busiest port—handles more than 25m twenty-foot equivalent units (TEUs) per year.<sup>4</sup> The busiest port in an OECD member country is Busan, in the Republic of Korea, which handles around 12m containers (TEUs) each year.<sup>5</sup>

The waterborne freight sector is growing significantly. According to the United Nations Conference on Trade and Development’s (UNCTAD) 2010 report, worldwide maritime freight volumes doubled between 1990 and 2009.<sup>6</sup> Table 1 below illustrates the growth in the waterborne freight sector between 1990 and 2009.

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<sup>1</sup> Enno Eilts (Oxera) and Paul Oxley (Oxera) drafted this document as consultants to the Secretariat.

<sup>2</sup> UNCTAD (2010), ‘Review of Maritime Transport 2010’, Table 1.3.

<sup>3</sup> World Shipping Council Trade Statistics (2007), ‘Top 20 Exporters of Liner Goods by Value, 2007’.

<sup>4</sup> UNCTAD (2010), *op. cit.*, Table 5.1.

<sup>5</sup> *Ibid.*, Table 5.2.

<sup>6</sup> *Ibid.*, Table 1.3.

**Table 1 Development of international seaborne trade, selected years (millions of tons loaded)**

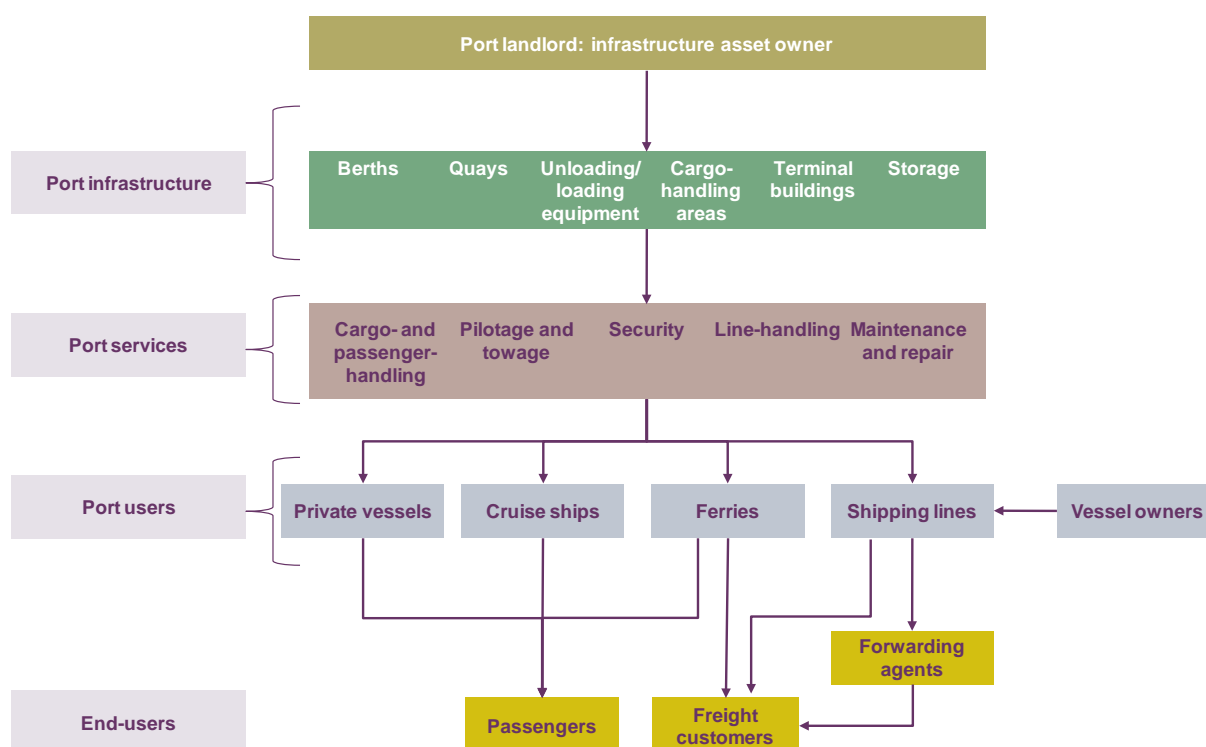
Year	Oil	Main Bulks	Other dry cargo	Total (all cargoes)
1990	1,755	968	1,285	4,008
2000	2,163	1,288	2,533	5,984
2006	2,698	1,849	3,135	7,682
2007	2,747	1,972	3,265	7,983
2008	2,732	2,079	3,399	8,210
2009	2,649	2,113	3,081	7,843

Source: United Nations Conference on Trade and Development (2010) 'Review of Maritime Transport 2010'. Table 1.3.

Ports are therefore important for the functioning of the world economy. As such, there is a need to ensure that appropriate competitive or regulatory constraints bind ports to behave in a competitive manner, in terms of price levels, service standards and degree of innovation.

### 1.2. *How is the ports industry structured?*

Ports are infrastructure assets that can be organised in various ways. The ownership structure of ports is often a feature of historical circumstances and will also be influenced by the characteristics of each individual port, the customers it serves and its scale. Given these factors, there is no uniform model for the structure of the port industry, but, to aid the reader's understanding of the issues that arise in the industry, Figure 1 below provides a stylised illustration of the value chain in the maritime/port sector.

**Figure 1 Maritime sector value chain**

Source: Oxera.

In order to clarify the differences between some of the entities shown in the above figure, as per the terminology used throughout this report, the main parties and port features are briefly introduced below.<sup>7</sup>

- **Port authority/landlord**—the **port authority** is the organisation responsible for the planning, authorisation, coordination and control of services within the port. In some instances, it will also provide services. The **port landlord** is the entity that owns the land on which the port is constructed and will usually own the essential infrastructure (eg, the quays and breakwaters) as well. Typically, the port authority is also the port landlord, although the landlord may be a separate entity.
- **Port infrastructure**—infrastructure is necessary for any form of port activities. In general, the core infrastructure (eg, maritime access channels, quays) will be owned by the port landlord. Operational and other infrastructure (eg, buildings, cranes, etc) may be owned and provided by the port landlord or by a different entity. To clarify the relationships between the infrastructures depicted in Figure 1, the associated components are defined below.
  - **Berths** are the specific part of a quay where a vessel can be moored.
  - **Quays** are the structure in a port where a ship docks and may contain one or more berths. Quays are also commonly referred to as wharfs.
  - **Loading and unloading equipment** includes infrastructure such as lifting cranes and pumps that are used to move cargo from ship to quayside and vice versa.
  - **Terminal buildings** are the structures at a port that are used to handle passengers and freight.
  - **Storage areas** are designated parts of a port for the storage of cargo before or after its waterborne transportation. These areas may be warehouses or uncovered areas.
- **Port services** – in order to use a port, a range of intermediary services is often required, which can be provided by the port itself or by independent intermediary parties.
  - **Pilotage** is a service provided by a pilot with local knowledge and skills which enable him to conduct the navigation and manoeuvring of the vessel in and approaching the harbour.
  - **Towage** is a service provided by tug boats which move larger ships that either should not or cannot power themselves.
  - **Cargo-handling** involves the movement of cargo in and around a port. This includes **marshalling** services (the receipt, storage, assembly and sorting of cargo in preparation for delivery to a ship's berth) and **stevedoring** services (the loading of cargo onto and discharging cargo from ships).
- **Port users**—a wide range of customers make use of ports, including freight shippers, ferries, cruise ship operators and private vessels. Depending on the specific port, users may access different parts of the port.
  - **Private vessels** are vessels owned by individuals that are large enough to use a port as opposed to a smaller marina.

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<sup>7</sup>

This is not an exhaustive list of all stakeholders in ports and terminology may differ elsewhere.



- **Cruise ships** provide services for leisure passengers and tend to operate to a pre-specified schedule.
- **Ferries** typically provide regular services between a specific origin and destination catering for both passenger and freight traffic.
- **Shipping lines** operate ships by arranging all of their movements. They may also own the vessels or there may be a separate vessel owner.
- **End-customers**—the ultimate users of port services are **passengers** who have made a journey or **freight customers** who consume a good that has been shipped through a port. **Freight forwarders** are companies that specialise in arranging shipping services for their customers and thus act as intermediaries to the ultimate consumers of the freight goods. The area in which these customers are located is known as the port hinterland.

#### **Box 1. Port organisational structure, Port of Trieste, Italy**

The Port of Trieste, Italy, is a Mediterranean sea port with a hinterland of southern and central Europe. It contains 47 operative berths and caters for a range of sea traffic. Broadly, it is organised as follows.

- The **Trieste Port Authority** is a public authority with responsibility for directing, coordinating, controlling and promoting port operations. It has the power to regulate the port operators; carries out maintenance of the shared parts of the port; and provides transport and operations logistics to promote the intermodal system.
- Several **port operators** (eg, Terminal Frutta Trieste and Grandi Molini Italia) conduct operations at the port's terminals.
- Separate companies provide a range of **port services**, including, for example, Impresa Portuale, which provides stevedoring services, and La Sorveglianza Diurna e Notturna, which provides surveillance.
- The Port of Trieste is used by a range of **port users** including passenger ferry operators such as Ustica Lines and international container shipping lines such as the Maersk Line.

The **end-customers** of the port's services include businesses and consumers in central and southern Europe.

Source: <http://www.porto.trieste.it/>.

#### *1.2.1. Types of port*

Ports are heterogeneous, differing considerably, depending on their location, in the types of vessel and cargo that they can handle and the services they offer. However, some broad categories can be used to distinguish between them.

#### Sea ports versus inland ports

Ports exist in several different locations: deep-sea ports, shallow-sea ports, and ports on inland waterways, lakes and rivers. In terms of volumes, the majority of waterborne freight traffic travels through seaports, although some inland ports can be quite large—the Port of Montreal (is the largest inland port in the world) handled 25m tonnes in 2010.<sup>8</sup>

<sup>8</sup> See [http://www.port-montreal.com/site/1\\_0/1\\_6.jsp?lang=en](http://www.port-montreal.com/site/1_0/1_6.jsp?lang=en).

The advantage of inland ports over coastal ports is that they are usually closer to the final destination of their cargo. However, their main disadvantage is that waterborne accessibility is usually more limited, particularly for larger vessels.

#### Transshipment hubs and hinterland ports

Some ports (eg, the Port of Jebel Ali, UAE) exist purely as hubs for the purpose of transshipment, while others (eg, the Port of Nagoya, Japan) primarily serve their hinterland. In transshipment ports, cargo is typically moved from ship to quay to ship; conversely, hinterland ports focus on moving freight from ship to hinterland. The location of ports has a clear role to play in determining the composition of transshipment versus hinterland traffic. For instance, transshipment ports are common in the Middle East due to its location on shipping corridors between Asia, Europe and Africa.

A related distinction exists between types of vessel. Feeder vessels transport freight from the transshipment ports to their ultimate destination, with movements between two transshipment ports being conducted by larger vessels. These larger vessels often only call at major ports at either end of their voyage. This form of distribution network can be more efficient than continually loading and unloading the larger vessels at a number of different ports.

The use of feeder vessels is relatively common, for example, 80% of Bangladesh's US\$40 billion foreign trade is done through Singapore Port, with feeder vessels transporting Bangladeshi cargo to the port, where it is placed onto large vessels to be taken to its final destinations.

The distinction of feeder vessels and transshipment hubs from larger vessels and hinterland ports, is important, because for long distance international trade the costs of short distance feeder services are likely to comprise a relatively small proportion of total transport costs.

#### Freight ports versus passenger ports

Many ports serve a range of customers. However, ports that have substantial amounts of passenger traffic are typically restricted to regions where there is a short-distance sea crossing, such as between Singapore and Batam, Indonesia. This report does cover passenger traffic, but its main focus is the freight sector.

#### Container traffic versus bulk freight traffic

Freight traffic comes in a number of forms, including oil traffic, liquefied natural gas (LNG), dry bulk and container traffic. Typically, each type of cargo will require specialised loading and unloading equipment at a port, be that in the form of cranes, pumps or other equipment. Given the complexities of handling different types of cargo, not all ports have the facilities to handle every type of cargo. For example, currently only three ports in France (Fos-sur-Mer, Fos Cavaou and Montoir-de-Bretagne) had the equipment to handle LNG.<sup>9</sup>

#### 1.2.2. *Ownership structure*

The ownership and institutional structure of ports can also differ considerably.

#### Public versus private ownership

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<sup>9</sup> Working group on the regulation of LNG terminals in France (2008), 'The regulation of LNG terminals in France', April.

Historically, the dominant model for ports has been public ownership combined with vertical integration of the port landlord and port operator. Typically, port authorities designed, constructed and financed the port from public funds. This may be of relevance for competition when considering the issues of competitive neutrality (see section 4.5) or non-recovery of publicly provided funds.

Landlord, leased or full service

Ports can be organised under a range of contractual structures. In some ports the landlord owns only the basic infrastructure and private companies own and operate other parts of the infrastructure. In other ports the landlord may own all the infrastructure, but lease out certain facilities. Lastly, there are ports where the integrated port authority owns all the assets and provides all the services.

### **1.3. *Why does competition at ports matter?***

Given some of the key features of ports, particularly their nature as limited capacity infrastructure, ports appear susceptible to possessing market power. Some may be found to have captive hinterlands, where transport through the port has a lower generalised transport cost than any alternative.

Where market power exists, there are typically a number of competition concerns relating to potential abuses of that power. These abuses can lead to various types of consumer harm, but fundamentally there is a net welfare detriment, which can arise from higher prices, reduced output, reduced service quality, reduced innovation or other factors.

Given the scale of port activities, and the scale of the maritime industry more generally, any harm from anti-competitive practices in the industry could have a large impact on end-users and in turn an impact on the wider economy. The remainder of this report turns to examining what concerns about anti-competitive practices may arise and how they could be alleviated.

The report is structured as follows:

- section 2 looks at the competitive constraints faced by ports;
- section 3 asks whether ports can possess market power;
- section 4 considers what might constitute an abuse of market power in the ports sector;
- section 5 examines some of the remedies that can address competition concerns at ports.

## **2. *What competitive constraints do ports face?***

### **2.1. *The concept of market definition***

The analytical framework for assessing competitive constraints that companies face is market definition. There are normally two dimensions to the definition of a market: the **product market** (in this case, are ports constrained in their behaviour by other modes of transport?) and the **geographic market** (is port A constrained by port B?).

The products that should be included in the relevant market, and the geographic boundaries of that market, are determined by the extent to which customers can readily switch between substitute products or services, or suppliers can readily switch their facilities between the supply of alternative products. The key to market definition is substitutability, which is what leads to competitive constraints.

Markets may also be defined by reference to customer groups. Separate markets might be defined for different customers or groups of customers (eg, freight and passenger maritime services) when suppliers can target higher prices at those customers willing to pay more than others (ie price discriminate between groups).

### *2.1.1. Market definition in the context of ports*

The products that should be included in the relevant market, and the geographic boundaries of that market, are largely determined by the extent of port users' ability to switch (demand-side substitutability) to a different port or terminal, or using a different mode of transport. Each port faces a unique set of competitive constraints that differ primarily depending on geographic location, the size of the port and its ability to handle different freight loads. The competitive constraints are likely to be weakest when a given port has a uniquely important geographic position or specialised features that allow it to deal with certain commodities (eg, petroleum handling).

Competition authorities often determine the boundaries of the relevant product market by reference to demand-side substitutability. However, there are circumstances where authorities may aggregate several narrow relevant markets into a broader one, on the basis of considerations about the response of suppliers to changes in prices. They may do so when, for example, production assets can be used by firms to supply a range of products that are not demand-side substitutes, and the firms have the ability and incentive to shift capacity quickly (generally within a year) between these products depending on demand for each.<sup>10</sup>

In principle, market definition should consider both demand- and supply-side substitutability. In the context of ports, however, supply-side substitution is unlikely to be an important aspect of the market definition, given the very specific nature of the assets employed in terms of functionality. For example, facilities used to provide container-related services cannot generally be readily converted into facilities needed to provide passenger-related services without some form of investment and time lag. Supply-side substitutability is therefore not considered any further in this report.

Market definition in the context of ports might also distinguish between different customers or groups of customers. This is particularly relevant where ports are able to discriminate across different customers, for example those that are 'captive' and those with more options.

The remainder of this section looks at the competitive constraints that a port faces from other modes of transport, other ports and other terminals, and the markets in which its services operate.

## *2.2. Product market definition—what are the competitive constraints from other modes of transport?*

The demand for services offered by ports is a 'derived demand', in that it depends on the demand for transport as whole. Transport demands can be met by different modes of transport, such as sea, inland water, road, rail or air. This means that, at an abstract level, waterborne transport may compete with these other modes of freight transport. For example, if a port were to increase the price of one or more of its services, some of its customers might decide to switch to a different transport mode, such as road or rail.

<sup>10</sup>

See, for example, European Commission (2004), 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings', February 5th; US Department of Justice and Federal Trade Commission, (2010), 'Horizontal merger guidelines', August; or Office of Fair Trading and Competition Commission (2010), 'Merger Assessment Guidelines', September.

Substitutability between waterborne and other modes of transport is restricted by a number of factors, including the available infrastructure, the characteristics of the goods being transported, and the fact that, in certain cases, geographic conditions limit the available options (for example, between England and Ireland, the two options are sea or air transport).

### 2.2.1. *The derived demand for port services*

Customers tend to demand port services to facilitate transportation of goods or people from origin to destination. This has important implications for how price-sensitive customers will be in relation to port charges. The total cost of transportation is made up of five main components: transport from starting point to port of origin, port-handling, shipping from port of origin to port of destination, port-handling, and transport from port of destination to end point. The middle part of this process will be extended if there is a transshipment to/from a feeder ship involved.

The fact that port charges are only one component of several charges that together make up the total cost of transportation means that an increase in port charges of, say, 5–10% translates into an increase in the total cost of transportation of a much smaller proportion.

As customers tend to choose their mode of transport (or port) based on the total cost of transportation rather than port charges alone, customers are less sensitive to price changes in port charges than they would be if port charges alone were the deciding factor.

### 2.2.2. *Infrastructure required*

The prerequisite for any intermodal substitution is the availability of the required infrastructure. Demand for transport by sea can only be switched to transport by, say, rail if the required infrastructure is in place. Any trade of bulk freight between Australia and North America, for example, would need to travel via sea and hence through a port. In this particular example, there would be no scope for demand-side substitutability between sea and other modes of transport.

In other cases, however, the required infrastructure might exist. For example, goods can be transported between Cologne (Germany) and Strasbourg (France) by water (via the Rhine) or by road. Similarly, fresh herbs could, at least in principle, be transported from Israel to Belgium by sea, by air or by road. The question that arises in this context is whether it is economically viable to transport goods that would normally be transported by sea or water by other modes of transport such as road, rail or air.

### 2.2.3. *Characteristics of goods transported*

A useful consideration in this regard is the value density of goods transported by different transport modes. Value density is a measure of the average financial value per unit of volume for a commodity. Data published by the Directorate-General for Energy and Transport (now DG MOVE) of the European Commission shows the average value densities of goods transported by different modes of transport—see Table 2

**Table 2 Value density of goods transported (external EU trade only)**

Modes of transport	€ per tonne
Air	43,308
Road	3,289
Sea	865
Rail	470
Inland waterway	383

Source: European Commission (2010), 'EU energy and transport in figures'.

The figures presented above suggest that the goods transported by different modes of transport differ in their value density characteristics. For example, the average value per tonne transported by air is over 100 times higher than for goods transported by sea. Although smaller, the differences in value densities between sea and rail or sea and road are still significant. The average value per tonne transported by inland waterways is the lowest.<sup>11</sup>

The observed differences in value densities are consistent with certain goods being pre-destined for certain modes of transport. In the extreme, it is unlikely that coal can be economically transported by air, as opposed to sea or inland waterway.

The UK Department for Transport (DfT) published some illustrative data in this regard in 2008, showing that the mix of goods transported by different modes of transport varies significantly—see Table 3.

**Table 3 Most common good by mode of transport**

	Inland water	Rail	Road
First most popular good	Oil and petroleum (71%)	Coal (37%)	Food, drink and tobacco (28%)
Second most popular good	Other dry bulk (10%)	Containers (24%)	Other miscellaneous (27%)
Third most popular good	Coal (7%)	Construction (13%)	Crude minerals (10%)

Note: The percentages (in parentheses) are based on tonne-kilometres using 2007 data.

Source: DfT (2008), 'Delivering a Sustainable Transport System: The Logistics Perspective'.

The above table shows that different modes of transport appear to transport different types of good. The most popular good transported by inland water is oil and petroleum. In the case of rail, the most popular good is coal and for road it is foodstuffs, beverages and tobacco. This data is consistent with limited demand-side substitutability between modes of transport—in particular, between inland water and rail or road transportation.

#### 2.2.4. *Product market definition in summary*

The degree of competition between ports and other modes of transport is likely to be limited for a number of reasons.

- customers are likely to be relatively insensitive to changes in price. This is because the demand for port services is derived from the overall demand for transport from origin to destination. Consequently, when choosing between different modes of transport, customers' deciding factor will be the total cost of transportation rather than port charges alone;
- for customers to switch between modes of transport, the required infrastructure needs to be in place. As this is not always the case, this limits the degree of substitutability;
- another factor constraining the degree of substitutability is the nature of the goods, which differs substantially across transport modes.

<sup>11</sup> The data presented in Table 2 omits intra-EU trade because estimates by transport mode are not available. However, the order of magnitude of the differences in value densities across the different modes of transport is unlikely to be fundamentally different.

The analysis regarding product market definition presented above is general. The degree of substitutability between modes of transport is, however, likely to vary from port to port. The question of product market definition therefore needs to be addressed on a case-by-case basis.

### 2.3. *Geographic market—what are the competitive constraints from other ports?*

As outlined above, customers' demand for port services is derived from the demand for transportation of goods from initial origin to final destination. Neither the initial origin nor the final destinations tend to be ports themselves. Therefore, customers may in principle choose between different ports to meet their overall transportation requirements. The extent to which customers can choose between different ports of origin and ports of destination—ie, the degree of substitutability between ports at or around these locations—will determine the scope of the geographic market.

The degree of competition between ports largely depends on three main factors: customers' level of price sensitivity; the degree of intra-port competition; and the degree to which ports at different geographic locations are able to serve the same hinterland. Each of these aspects is discussed in turn below.

#### 2.3.1. *Customers' degree of price sensitivity*

As discussed in the previous section on product market definition (section 2.2), the fact that the demand for port services is a derived demand means that customers tend to be less sensitive to a percentage change in port charges than to the same percentage change in the total cost of transportation.

Where port charges are considered in the context of the total cost of transport, customers are likely to be relatively less price-sensitive. For example, consider an origin (point A) and destination (point B) where freight between them can be shipped via Port C or Port D. Assume that port costs at Port C are 100 and rail transport costs 50, compared to port costs of 100 at Port D and rail transport costs of 55. In this example if Port C raised its price by more than 5% customers transporting goods between points A and B might switch away from using Port C to using Port D. Thus for port users it's the total costs of transport that matter.

The degree of price sensitivity is likely to vary across customer groups. For example from the perspective of a shipper, port charges are likely to be more important than for a final customer for whom they will necessarily represent a lower fraction of total cost. As both shippers and final customers can in principle choose which ports (not) to use, the price sensitivities for both groups of customers is relevant when defining the geographic market.

#### 2.3.2. *Intra-port competition*

Ports are not always a single entity. Many modern ports contain several independently operated quays and terminals. Where two or more operators own these terminals, a degree of intra-port competition can exist. In these cases, port users may have several options of where to dock and which terminal to use. In addition, there can be intra-terminal competition in some situations where multiple operators can provide competing services within the same terminal.<sup>12</sup>

Intra-port structural separation may mean that a market could be defined even more narrowly than a port itself, or that where a port is defined as a market, competition within that market may still exist. Such

<sup>12</sup> For a discussion of the benefits of intra-port competition See also, De Langen, P., and Athanasios P (2006), 'Analysis of the Benefits of Intra-Port Competition,' *International Journal of Transport Economics* **33**, 1-17.

competition can also help to facilitate specialisation because competitors are competing under the same conditions (labour market, regulatory, suppliers). Specialisation, in turn, can help to promote cost efficiencies. However, the extent of this intra-port competition can be limited if some quays have superior transport connections that may be essential for some operations (eg, passenger terminals) or specialised equipment for handling certain commodities.

### **Box 2. Intra-port competition, Buenos Aires, Argentina**

In the Port of Puerto Nuevo, Argentina terminal concessions are operated by different operators. The operators control the entire operation of their terminal under strict conditions set by the Port Authority. The operators receive performance guarantees, use of public facilities and are permitted to set their own tariffs.

Competition between operators has led to improvements in port efficiency: cargo handling increased 50 percent and labour productivity surged by 275 percent over 1990-95, meaning in 1997 its cargo handling had overtaken the largest port in South America, Santos in Brazil.

Source: World Bank (2007), 'Port reform toolkit: module 6'.

### *2.3.3. Ability to serve the same hinterland*

Since ports' customers ultimately require transportation from initial origin to final destination, ports that can economically receive or deliver goods from, or to, these destinations can compete for these customers. Ports that are able to compete for the same customers are likely to be in the same geographic market.

The ability of ports to serve the same hinterland needs to be assessed on a case-by-case basis. In principle, however, a distinction can be made between captive and contestable hinterland. All regions where one port has a substantial competitive advantage because of lower transport costs to these regions (for example, owing to short distances to its customers' final destinations) belong to the captive hinterland. Such a port is likely to handle the majority of all cargoes to and from these regions. Competition between ports is more likely to occur in those regions where no single port has a significant cost advantage over other ports. These ports may therefore operate in the same geographic market.

An interesting example of a contestable hinterland is Austria, a country without a coastline but with significant international import and export activities. In 2009, Austria imported a total of 8.0m tonnes of goods and exported 6.4m tonnes through the largest European sea ports including Hamburg and Bremen (Germany), Rotterdam (the Netherlands), Antwerp (Belgium), Trieste (Italy), Koper (Slovenia), Rijeka (Croatia) and Constanta (Romania).<sup>13</sup>

<sup>13</sup>

Österreichische Seehafenbilanz, 2010, available at [www.verkehr.co.at](http://www.verkehr.co.at).



**Table 4 Volumes of goods to/from Austria moved through different ports**

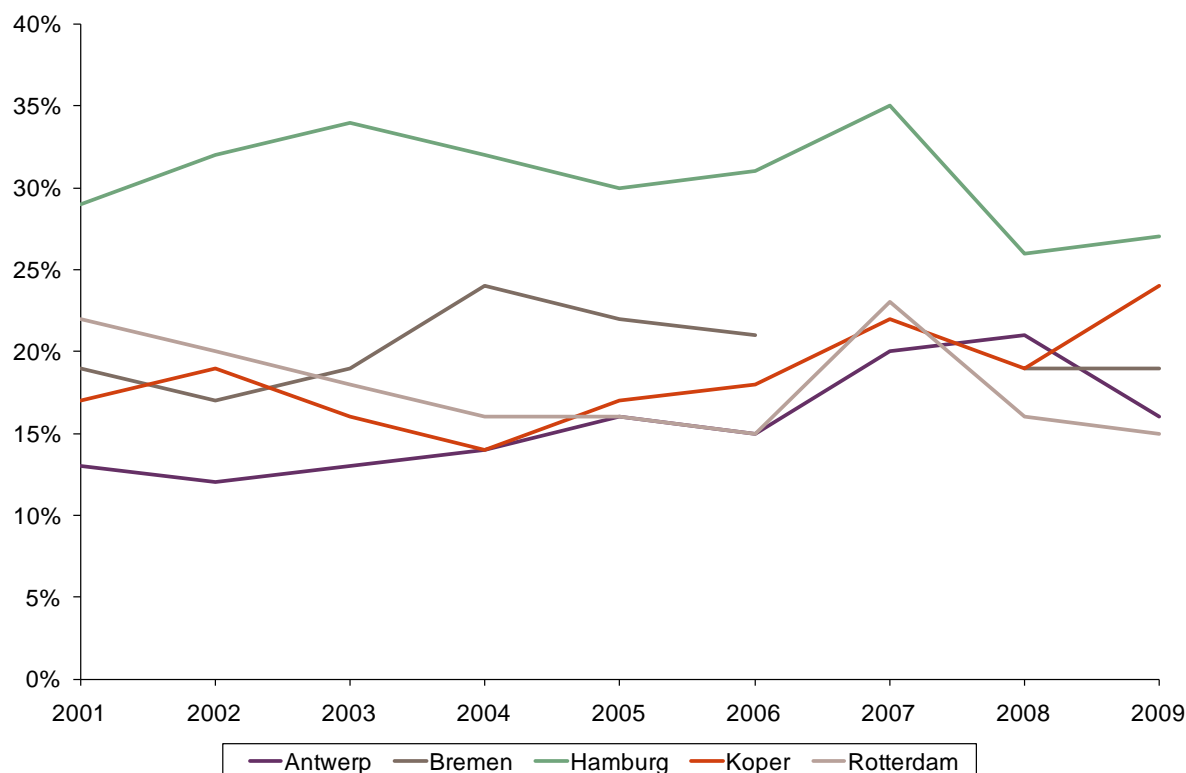
	Tonnes imported ('000)	Tonnes exported ('000)	Total tonnes transported ('000)	Share (%)
Rotterdam	820	3,250	4,070	28
Koper	1,324	2,025	3,349	23
Hamburg	1,504	897	2,402	17
Antwerp	878	952	1,830	13
Bremen	1,050	85	1,135	8
Trieste	546	480	1,026	7
Rijeka	251	36	287	2
Constanta	12	237	249	2
Total	6,385	7,963	14,348	100

Note: Totals may not sum due to rounding.

Source: Österreichische Seehafenbilanz.

The table shows that a total of eight sea ports currently service shippers moving goods to and from Austria. The largest of these ports are Hamburg, Bremen, Antwerp and Rotterdam to the north of the country, and Koper and Trieste to the south. It is interesting note that Rotterdam handles about four times as much cargo (in terms of volume) than Trieste, despite the latter port being in much closer proximity than the former.

Figure 2 below illustrates the proportion of Austrian's exports transported through the five largest ports: Antwerp, Bremen, Hamburg, Koper and Rotterdam.

**Figure 2 Share of Austrian exports**

Source: Österreichische Seehafenbilanz.

The above figure shows that shares of export were relatively volatile between 2001 and 2009—for example, Antwerp’s share varied between 12% and 21% during this time. Observing such fluctuations is consistent with competition working effectively: ports can gain or lose substantial market shares within relatively short periods of time.

## 2.4. *The customer dimension*

The extent of port competition can differ across different groups of customers. This may happen when, for example, ports target higher prices at customers that are willing to pay more, or when competition for customers differs significantly between different customer groups. In determining whether there are separate customer groups, the key question is whether some customers could get better terms than others for the same required services.

A range of factors is relevant when assessing the breadth of the relevant markets defined by customer groups. In particular narrower markets are only likely to be defined by customer groups when:

- customers who pay a low price cannot resell to those who would otherwise pay a high price (that is arbitrage is not possible); and
- ports can identify those customers with a high willingness to pay, or those in a weak bargaining position, and therefore can adopt a different negotiating stance towards them.

### 2.4.1. *Arbitrage opportunities between customers*

Arbitrage opportunities arise where customers who pay a lower price are able, at a transaction cost less than the original price difference, to resell to those who would otherwise pay a higher price. Where arbitrage opportunities exist between customers, ports are unlikely to be able to profitably price discriminate between them as price differences would get arbitrated away with few or no customers paying the higher price.

Pittman (2009) of the U.S. Department of Justice found that port terminal services are not easily arbitrated, especially across commodities.<sup>14</sup> The implication of this is that a terminal owner would be likely to be able to price discriminate across different customers – and potentially exercise market power over ‘captive’ shippers while offering competitive prices to those with more options. However, arbitrage opportunities might still exist. The existence of such opportunities needs to be considered on a case-by-case basis.

### 2.4.2. *Ability to identify high willingness to pay*

A shipper’s willingness to pay is partially determined by the number of transport alternatives available to that shipper. For example, a shipper may or may not be able to switch between different modes of transport if the shipper’s otherwise preferred port was to increase prices. The ability to switch between different modes of transport has been discussed in this paper’s section on product market definition.

Alternatively, in cases where maritime transport is the only option, a shipper may or may not be able to switch between different ports. Shippers located in the ‘captive’ hinterland of a port have limited

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<sup>14</sup> Pittman, R (2009), ‘Competition Issues in Restructuring Ports and Railways, Including Brief Consideration of these Sectors in India’, US Department of Justice, Economic analysis group discussion paper.

economic incentives to switch to a different port while those in a ‘contestable’ hinterland have greater ability to do so.

Some ports might have the ability to identify the higher willingness to pay of some shippers with reference to these shippers’ ability to economically switch between different modes of transport and/or ports in different geographic locations.

## 2.5. *Examples of market definition*

The analysis presented so far has been on the basis of economic principles. Boxes 3 to 5 below present examples of market definition in the ports sector from actual competition authority decisions. Box 3 provides an example where the relevant geographic market for passenger services differed to that defined for freight services. Box 4 provides an example where the defined geographic market included multiple ports and the product market multiple traffic types, while the example in Box 5 demonstrates that it is possible for each of these port services to be defined as its own separate market.

### **Box 3. Market definition, Port of Helsingborg, Sweden**

In *Scandlines vs Port of Helsingborg* (see also Box 16) the European Commission defined the relevant market as the provision of port services and facilities to passenger ferry operators in the Port of Helsingborg. Modal competition from the Øresund Bridge (located about 60km south of Helsingborg, between Malmö and Copenhagen) was found not to be in the same product market. This was because the Commission viewed the case from the perspective of the ship operators for which the bridge is not a substitute for the port infrastructure; the bridge was instead seen as competing with the downstream ferry operators.

In terms of the product market, the Commission found there to be two separate markets, one for the provision of port services to ferry operators and the other for cargo ships. As there is no alternative Swedish port that is a substitute for the provision of port facilities to ferry operators, this market was defined narrowly as the Port of Helsingborg itself.

However, the market for the provision of port facilities and services to cargo vessels was found to be significantly wider because there were alternative ports that were effective substitutes (eg, Gothenburg and Malmö).

Source: European Commission (2004), *Scandlines Sverige AB v Port of Helsingborg*, Case COMP/A.36.568/D3.

### **Box 4. Market definition, Bass Strait, Australia**

In assessing the proposed acquisition of Patrick Corporation Ltd by Toll Holdings Ltd, the Australian Competition and Consumer Commission (ACCC) examined the impact on shipping between mainland Australia and Tasmania. It concluded that the relevant market in this instance was the provision of shipping services for bulk, containerised and road trailer freight between Melbourne and the northern ports of Tasmania. Thus, the ACCC determined that there were multiple ports in one side of the market (Burnie, Devonport and Bell Bay) and that the market contained multiple products.

Source: Australian Competition and Consumer Commission (2006), ‘Toll Holdings Limited’s proposed acquisition of Patrick Corporation Limited’, Public Competition Assessment, May.

### **Box 5. Market definition of port services, towage services, UK**

A merger between SvitzerWijismuller A/S and Adsteam Marine Ltd, both providers of towage services, was referred to the UK Competition Commission (CC) in 2007. In assessing the merger the CC first defined the relevant market. In terms of demand-side substitutability, it found that, in the short term, harbour towage was an essential service once a ship had elected to dock at a given port. In the longer term, the scope for substituting to ships that did not require towage was limited due to the global nature of shipping companies. In terms of supply-side substitutability, it found that terminal towage services within the same port could be substituted for harbour towage services (although practical and/or contractual barriers may prevent this) and belonged in the same relevant market.

In terms of the geographic market, the CC examined the overall cost of berthing at ports, the switching costs and the existence of alternative ports. It found that many users were tied to specific ports due to their specialised infrastructure, contracts or investments, and that the price of towage was unlikely to be a significant factor in determining port choice.

The CC concluded that the relevant markets were the provision of harbour towage and terminal towage services in individual ports in the UK.

Source: Competition Commission (2007), 'SvitzerWijismuller A/S and Adsteam Marine Ltd', Final report, February.

## **2.6. Conclusion: market definition**

Market definition will differ in each case but in general both conceptually and from precedent a number of broad conclusions can be drawn.

- The level of competition between ports and other modes of transport is limited, primarily due to the bulk/weight of goods that maritime transport can carry.
- Individual commodities are likely to be defined as separate markets where the requirement for specialised infrastructure makes substitution difficult.
- Geographically ports could be considered to be in the same market if they share a hinterland, however, for many isolated ports, they will be considered a market in themselves.

## **3. What factors facilitate market power at ports?**

### **3.1. The concept of market power**

Using a standard definition,<sup>15</sup> a port would be considered to possess market power if it could behave independently of its customers and competitors to an appreciable extent. Market power is a concern for a number of reasons that will be described in section 4, but first this section identifies the factors that may cause market power to arise at ports. A thorough assessment of market power should consider factors such as existing competition, the threat posed by potential competition and the role of buyer power.

<sup>15</sup> Court of Justice of the European Communities (1979), *Hoffmann-La Roche & Co. AG v Commission of the European Communities*, Case 85/76.

### **3.2. Existing competition**

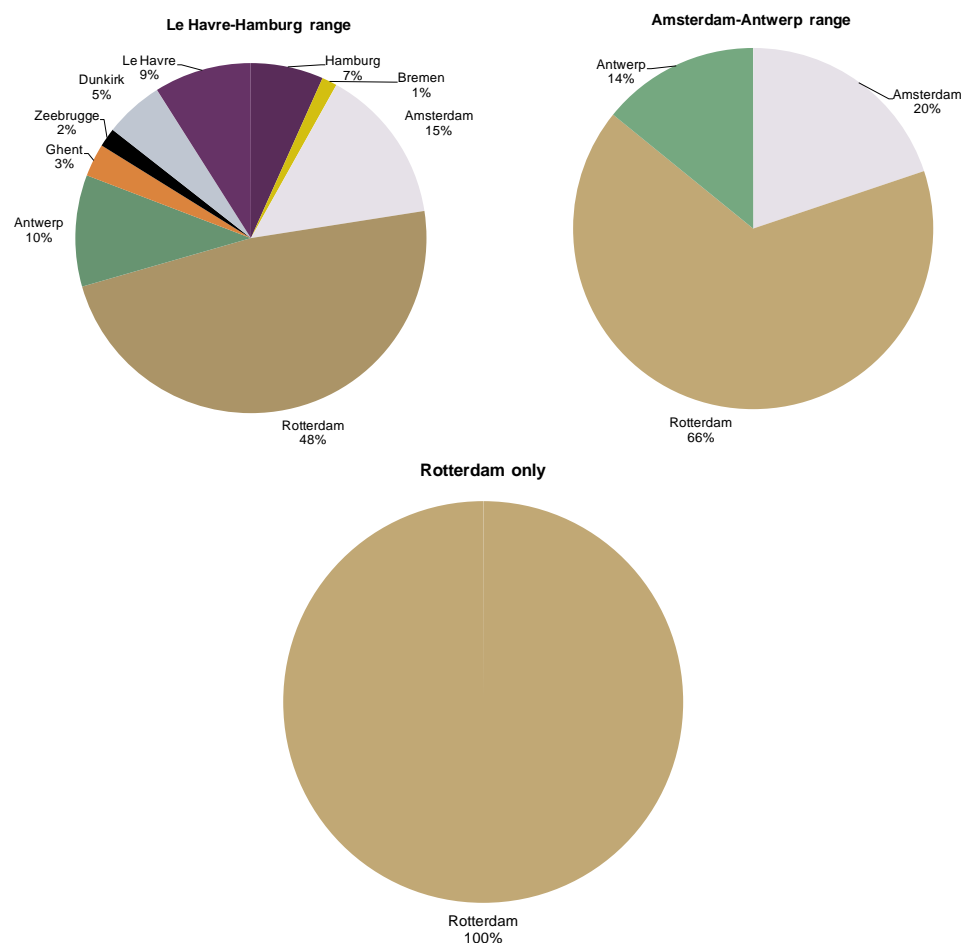
#### **3.2.1. Market shares**

Standard assessments of market power start by looking at factors such as market shares. This step follows logically from the market definition exercise. In general, a port is more likely to be found to have market power if it has a persistently high market share than if it does not.

The evolution of market shares is also relevant, but given the time required to alter the functionality of infrastructure, market shares are unlikely to change significantly in the short term except in unusual circumstances (eg, a new oil refinery opens near a port). This is exacerbated by the contractual nature of the maritime industry, which means that some companies will be locked into using certain ports and become unable to switch. Volatile market shares would be indicative of more competition, as price reductions, capacity expansions or innovation by individual ports results in increased traffic.

At a practical level, measuring market shares can be based on statistics of traffic volumes, or the value of traffic handled. This could be complicated if the measurement is given in total freight or vessel movements as the volumes could differ depending on vessel capacity and the size of vessels that a port can accommodate. Where a product market has been defined on the basis of a single commodity (eg, oil), value and volume measures would be expected to give broadly the same market share answer. Where markets contain multiple products, a value metric is likely to be the most appropriate.

Box 6 and Figure 3 examine the case of the Port of Rotterdam. The port is located comparatively near to a number of other ports. Figure 3 indicates the market shares of the Port of Rotterdam under different market definitions whilst Box 6 describes some analysis that indicates that the Port of Rotterdam does have market power.

**Figure 3 Market shares of Port of Rotterdam bulk cargo tonnage under different market definitions**

Note: This figure shows market shares under different market definitions but is for illustration only, no formal market definition exercise has been undertaken to verify these definitions.

Source: Port of Rotterdam.

#### **Box 6. Assessment of market power, Port of Rotterdam, the Netherlands**

The Port of Rotterdam (HbR) has a favourable geographic position allowing it to provide access from the sea to a large hinterland and immediate access to the most important European inland waterway, the river Rhine. Combined with past investment, and network effects, this has helped Rotterdam to become the leading European port in almost all cargo categories and Europe's largest container port. The hinterland of the Port of Rotterdam has considerable overlap with ports within the Amsterdam-Rotterdam-Antwerp (ARA) range, however, the overlap of hinterland between ARA ports and Le Havre or German ports is more limited.

A report commissioned by the NMa in 2004 conducted a survey to identify the estimated impact of a price increase. The survey identified that, if there was a 10% lasting price increase in Rotterdam's total port costs (total port call costs plus cargo handling costs), 73% of the volume that switched would switch to other ARA range ports, whereas German ports would attract only 10% of switched volumes, and Le Havre and Dunkerque would attract none. As regards assessing market power, the report for NMa also noted:

*"harbour dues are only a very small part of all the costs that are incurred by HbR's ultimate customer when choosing the port of Rotterdam. With respect to containers, for example, our analysis shows that an increase in*

*harbour dues by 10% increases the total relevant costs of routing the cargo through the port of Rotterdam by at most 0.4%. This increases the incentive to raise prices above competitive level: Only if the ultimate customers are extremely price-sensitive, the increase will lead to switching. In fact, based on demand elasticities implied by the survey result, we find that HbR could profitably raise current harbour dues for containers and dry bulk.”*

In addition to the evidence provided by the survey, there was very little observed switching of port users in response to changes in harbour dues. Port users also did not counterweigh any port market power through countervailing (buyer) power, as evidenced by the existence of list prices, and since not all port users were able to negotiate discounts.

The findings suggested that the Port of Rotterdam could price higher than rival ports.

*“Combining these various findings, we conclude that HbR has the ability to profitably charge higher harbour dues and land lease related prices than its rival ports. We also suggest relevant geographic markets for ten cargo types, ranging from the port of Rotterdam itself to ports in the ARA range plus Zeebrugge and Gent.”*

Note that this is only evidence of HbR holding market power (and not evidence that HbR was necessarily exercising any market power).

In a follow-up report on these issues, the NMa again observed that port tariffs were very low in relative terms compared to other beginning-to-end transport costs (with sea and land transport costs being more important in the choice of port), and that increases in port tariffs had rarely led users to choose an alternative port. This led the NMa to conclude that, in providing port infrastructure, the Port of Rotterdam did not compete with other ports and that the geographic market was limited to the port of Rotterdam. The NMa considered that, across the various product markets for providing port infrastructure in Rotterdam, HbR held a dominant position.

Source: CRA (2004), ‘Study on the Port of Rotterdam – Market Definition and Market Power’, prepared for NMa, December and NMa (2005) ‘Havenbedrijf Rotterdam. Onderzoek n.a.v. de vraag of HbR beschikt over een economische machtspositie op het gebied van de terbeschikkingstelling van haveninfrastructuur en de uitgifte van bedrijfsterreinen en zo ja, of een gereede kans bestaat dat HbR hiervan misbruik kan maken’.

In general, if a market definition exercise has found the relevant market to be a single port (as was the case in *Scandlines vs. Port of Helsingborg*, see Box 11) then the market share will inevitably be found to be 100%.

### 3.2.2. *Safe havens*

Some competition jurisdictions may use safe-havens (levels of market share below which an entity cannot be found to be dominant). When ports merge or are acquired by a joint owner, they may be investigated by competition authorities. For example, under the EU merger Regulation,<sup>16</sup> market shares of less than 25% are presumed to be compatible with the EU Single Market and not deemed a concern.

Conversely, there are instances where certain market shares are prohibited because of an implicit assumption of market power. A specific ports example arose in Chile where, upon reforming the system of ports ownership, the Antitrust Commission restricted any individual company from holding more than 15% of a port’s concession if it also held more than 15% in another terminal or port in the same region.

### 3.2.3. *Mergers and acquisitions*

For competition authorities, an understanding of the level of existing competition in the ports industry is vital for informing decisions about approvals of mergers and acquisitions.

<sup>16</sup>

Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), Official Journal L 24, 29.01.2004, pp. 1–22.

The global market for terminal operations has become more concentrated since 2006.<sup>17</sup>

#### Box 7. Acquisition, Port of Rotterdam, the Netherlands

In 2001 Hutchison Netherlands BV (Hutchison) acquired a stake in ECT, the container terminal operator at the Port of Rotterdam. At the time Hutchison already had stakes in the nearby ports of Felixstowe (UK) and Thamesport (UK) and controlled the container terminals at these ports.

The proposed acquisition was investigated by the Commission, which was concerned that it might lead to a dominant position in stevedoring services in the northern European transshipment market. The merged entity was found to have been expected pre-merger to have a market share of 50%. Although the Commission concluded that the acquisition would lead to a dominant position, it was allowed to proceed, subject to undertakings: ECT had to divest its minority shareholding in Maersk Delta BV joint venture (MDBV), which was formed with the aim of developing a competing terminal on separate land on the delta. Thus, effectively the acquisition was deemed acceptable given the competitive constraint from MBDV once it was fully independent of Hutchison.

Source: European Commission (2001), 'Case No COMP/JV.55 Hutchison/RCPM/ECT', July.

### 3.3. *Potential competition*

The existing level of competition between ports is not the only factor relevant for determining market power. The level of potential competition will also have an effect. The threat of entry of new-build ports (or intra-port entry) can help to constrain the behaviour of existing ports. One determinant of the threat of entry is the barriers that exist to entering the market—by constructing either an entirely new port or intra-port facility.

#### 3.3.1. *Barriers to entry*

Barriers to entry are factors that prevent or hinder new firms from entering a market. They can be substantial, especially in the case of ports that are integrated into networks and multi-layered supply chains. In the context of ports, barriers broadly fall into three categories: economic, regulatory and geographic barriers.<sup>18</sup>

#### Economic barriers

These barriers stem from cost advantages enjoyed by the incumbent; in the case of ports, such advantages arise from the following factors.

- **Economies of scale.** If the minimum efficient scale (the scale of activities needed to produce at the lowest average cost) is large relative to the market, the market might be able to support only one or a small number of ports. Ports tend to require large fixed costs associated with the infrastructure and thus the minimum efficient scale can be large.
- **Asset lifespan.** Even if a new entrant could obtain a viable scale of operation in the long term, it may well take time to reach that level, and hence the likelihood is that they would operate at a loss for some time. Indeed, the assets of port infrastructure typically have long lifetimes, and may well exceed the horizon over which private investors would wish to recover their investment.

<sup>17</sup> Van de Voorde, E and Vanelslander, T (2009), 'Market power and vertical and horizontal integration in the maritime shipping and port industry', *OECD and ITF Discussion paper 2009-02*, January, Figure 6.

<sup>18</sup> Langen, P. de and Pallis, A. (2007), 'Entry Barriers in Seaports', *Maritime Policy and Management*, **34**:5, 427–40. See also, OECD (2005), 'Policy roundtable: Barriers to entry', [DAF/COMP\(2005\)42](#).



- **Optimal location of the port.** If an incumbent has the optimal location with regard to hinterland transport modes then new entrants may have higher costs.
- **Customer switching costs.** The extent to which customers are restricted from switching to a new entrant can be a barrier to entry. This is particularly problematic in markets where customers are concentrated, which is the case at some ports. The level of switching costs clearly varies. For example, a shipper switching between transshipment facilities may be able to do so easily, but there may be more significant switching costs for a shipper that has undertaken any specific investment in relation to a port. Such investments could be in dedicated surface transport equipment, port facilities (for instance, for pre-delivery inspection and small repair activities used by a vehicle manufacturer), or if they are subject to a long-term contract.

#### Regulatory, legal and institutional barriers

In some markets, regulators, policy-makers or port authorities effectively limit the extent of entry, especially in relation to intra-port entry. These limits may be general—ie, there may be no more entry within a given port—or imposed discretionally. Such provisions are sometimes incorporated into leases or other operating agreements. An intra-port example would be where a private terminal operator was given a concession to operate a container-handling facility in a port and had exclusive rights over all handling of containers within that port for the length of the concession.

The ownership and funding structure of a port is also relevant here. In many existing ports, a large share of the capital expenditure has been contributed by public authorities with no requirement for cost recovery. This would place a private-sector new entrant at a disadvantage to a port benefiting from prior public investments, the costs of which it is not obliged to recover (see section 4.5).

#### Geographic barriers

Land and maritime geography can play a role in determining the extent to which entry into the ports market is physically possible. The requirement of available land in a suitable location is one of the main factors that can limit entry.

In order for a new ‘greenfield’ port to be considered as relevant new entry, it would need to be located in the same geographic market as the incumbent port. The location would also need to have direct contact with the relevant water to enable vessels to berth. Aspects of relevance here might be tidal factors, naturally protected bays, sheltered waters or water depth. Equally, as indicated above (under economic barriers), even if entry is possible, the location might be in an inferior position to that of the incumbent in terms of surface transport links. This would mean the ports were imperfect substitutes, due to differences in hinterland infrastructure or nautical access. Finally, for a new-build port, large investments are often required for dredging, quay construction, access roads and port infrastructure. These investments may require planning approval.

Entry within individual ports may also be restricted by geographic factors: there may physically be no spare land or space available at the port for additional berths, terminals or other facilities.

#### *3.3.2. Benefits of low barriers to entry*

Lower barriers to entry increase the contestability of a market. Contestability puts pressure on the pricing of the incumbent(s) to keep their prices at a competitive level. In theory, a fully contestable market will have prices equivalent those to a competitive market, even where there is a sole incumbent.

A further advantage of low entry barriers arises from the ability of an entrant to implement new technologies, systems and business models. It may be possible to build new ports in such a way as to make their future operation more efficient than that of the incumbent. In general, new entrants can bring business dynamism to a market when there are exogenous changes in demand. Indeed, the theory of ‘creative destruction’ suggests that firm entry and exit are important in moving resources to their most efficient usage.

An example of the threat of entry in the ports sector is given in Box 8 and an example of actual new entry in Box 9.

#### **Box 8. Threat of entry, Melford, Nova Scotia, Canada**

Melford International Terminal (MIT) is planning to develop a 315-acre container terminal, intermodal facility and logistics park in Nova Scotia, Canada. The first phase of construction is projected to cost US\$350m and the terminal will comprise two berths. This is projected to give initial capacity of 1.5m TEUs per year. Commercial operations are planned to start by 2013.

The new terminal will aim to offer customers a faster and better alternative for North American origin–destination containerised cargo. Melford would become the closest North American deep-water mainland port to Europe, Asia and the Indian Sub-continent.

Source: Melford International Terminal (2010), ‘Melford International Terminal and Maher Terminals Enter into Shareholder/Service Agreement’, July.

#### **Box 9. New entry, Port of Salalah, Oman**

The Port of Salalah, Oman, was established as a new-build transshipment hub port in the Gulf, offering advantages to ship liners in that it was in close proximity to the Europe–Asia trade route.

The contract to build and operate the port was agreed in 1996, and the port began operations in 1998 with two completed berths. Since operations began, the port has experienced significant growth and is now among the largest container terminals in the world, handling around 3.5m TEUs per annum.

Source: <http://www.salalahport.com/>.

### **3.4. Other factors**

#### **3.4.1 Countervailing buyer power**

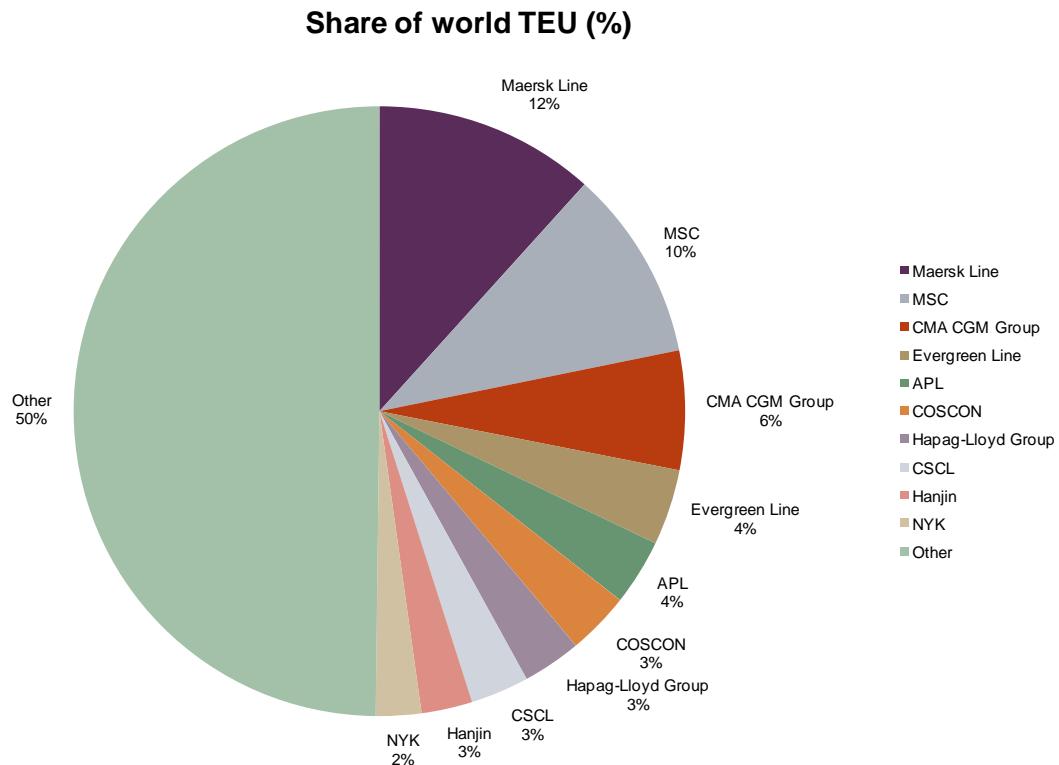
In general, competition law permits a defence against a finding of market power if it can be shown that the customers of an entity have sufficient bargaining strength.<sup>19</sup> In such a situation, the buyer power of downstream operators prevents an upstream business (even one with a high market share) from acting to an appreciable extent independently of its customers.

Countervailing buyer power (CBP) might exist where buyers are large relative to the size of their supplier(s). Other factors that will affect the ability of buyers to constrain suppliers include buyers’ ability to switch, the extent to which buyers possess a credible threat of setting up their own supply arrangements, or the extent to which buyers can impose costs on suppliers. Given these factors, larger port customers are more likely to possess CBP than smaller customers.

<sup>19</sup> For a discussion of buyer power see, OECD (2008), Monopsony and buyer power.

The main customers of freight ports tend to be major shipping lines. Figure 4, which shows the concentration of the global container shipping market, indicates that several players had significant global market share (at a global level there is a C4 of 32%); at a regional or port-specific level, concentration will tend to be at least as high. There is also evidence that market has been growing more concentrated over time.<sup>20</sup> This level of downstream concentration among port users could lead to CBP, particularly at ports with a single main user, where a monopsony may exist.

**Figure 4 Market concentration of container shipping**



Source: UNCTAD (2010), 'Review of Maritime Transport 2010'.

There are essentially two frameworks in which buyer power at ports can be examined. *Monopsony theory* assumes that there is a powerful downstream port user (eg, a shipping line), which can withhold demand for services from a particular port, pushing down the (uniform) price it faces and thus making its inputs cheaper than if it were competing with other buyers at this level in the value chain. Monopsony theory often assumes powerless upstream firms.

In contrast, *bargaining theory* assumes that a downstream port user can achieve lower input prices through the *threat* of purchasing less (as opposed to actually purchasing less in the monopsony situation). This framework also assumes that the upstream ports market is not perfectly competitive; bargaining power can be exercised only when ports would otherwise exercise market power.

A key element in a bargaining framework is the outside options that the port and port users have. This means that any discussion of the factors affecting the strength of CBP always comes back to the outside

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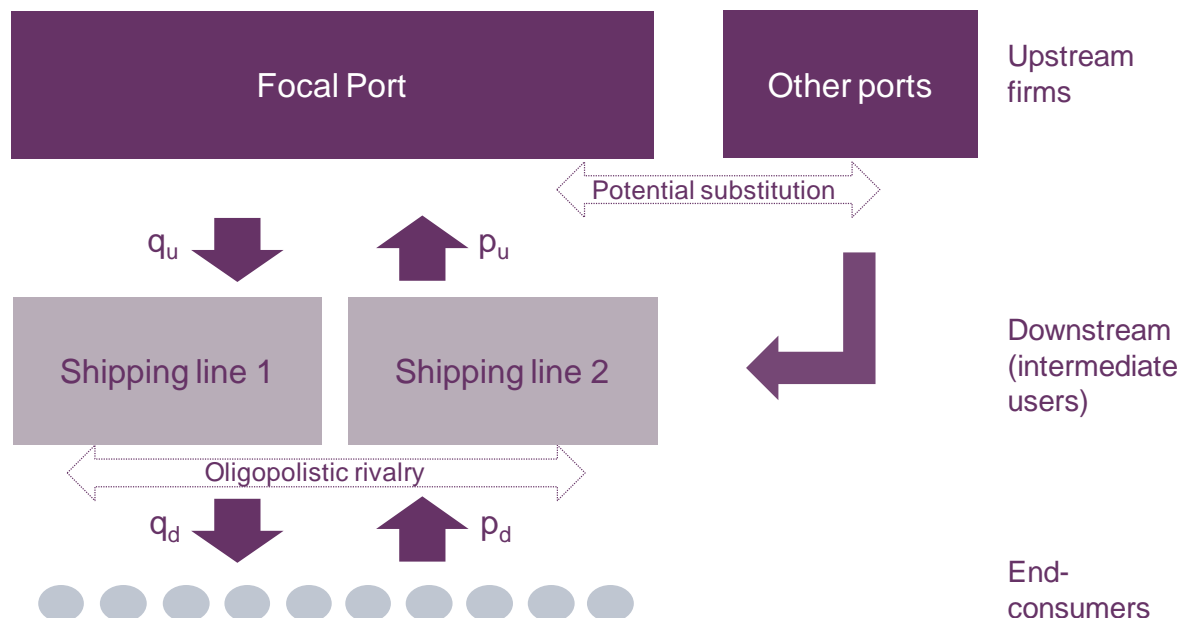
Van de Voorde, E and Vanelslander, T (2009), op. cit. Figure 7.

options of the port and port user. In addition, the effectiveness of the bargaining process can be affected by the characteristics of the market.

- **Port users' outside options**—these are affected by port user size and the substitutability of alternative ports or transport modes, which will largely be determined by the commodity being transported.
- **Ports' outside options**—these are affected by the nature of the market downstream (can port customers form collective bargaining groups?), investments made by the port specific to one port user, whether losing a port user would cause loss of economies of scale, and the port's financial situation.
- **Market characteristics**—the most important impact that market structure can have on bargaining outcomes is in relation to 'uneven bargaining' power, which in some cases leads to the 'waterbed effect'—a potential market failure in negotiation processes. For example this arises where one port user is considerably larger than the others, and the port naturally tailors its offer to the benefit of the larger port user. In some instances, favouring one port user is automatically detrimental to the interests of the other port users. For example, a price reduction offered to a large port user might be recouped from other port users. This was in effect one of the allegations made by Scandlines against the Port of Helsingborg (see Box 11).

To see how bargaining can work in practice, Figure 5 shows a stylised representation of a market with one main focal port and a limited number of customers.

**Figure 5 Countervailing buyer power**



Source: Oxera.

Here the few large intermediaries represent the main customer base for the upstream port. In this case, the upstream firm has little choice but to sell to these few players, limiting its outside options. Furthermore, as shown in the figure, it may be that the intermediate users have an outside option to use the input of another upstream firm (eg, shippers and their choice of regional port). Both factors are key to determining

the degree of bargaining power of intermediate users, as these factors determine the credibility of the intermediate users threatening to reduce their demand, and the impact on the upstream firm.

However, as the source of bargaining power is also a source of market power downstream, in this set-up (assuming that bargaining takes place over the level of charges for port services), consumers may not realise full pass-through of the resulting benefits. Rather, some sharing of rents might occur between the upstream and downstream firms. The outcome for end-users is ambiguous. Promoting CBP could be considered a remedy to competition concerns, see section 5.

#### *3.4.2. Collective market power and inter-port collusion*

Port infrastructure is capital-intensive and generally indivisible. Therefore, ports tend to be constructed to accommodate current and forecasted demand, resulting, in turn, in a degree of excess capacity. Excess capacity could help to promote inter- or intra-port competition because of the strong incentive to fill capacity, which may lead to intense price competition.

However, in some models of co-ordinated effects, the presence of excess capacity can create a risk of collusion. From a base of some degree of price co-ordination, the presence of excess capacity creates a credible punishment strategy in terms of reducing prices for any operator that breaks the price co-ordination.

#### *3.4.3. Port services—competition for the market versus in the market?*

In certain circumstances the level of competition within the market may not be the relevant benchmark. If the operation of port services is auctioned whereby there is sufficient competition for the market then any monopoly rents should be transferred to the state (or other seller) through the tendering process. Equally, depending on the criteria for the award of the concession, the seller can decide whether to limit prices or maximise revenue from the auction. This decision will typically be influenced by the level of state funding to the industry (ie, if there is a net subsidy then the seller may wish to recover as much as possible through the auction) and the state's overall fiscal position.

#### **Box 10. Competition for the market, port concessions, Chile**

In January 2000, a series of new concession contracts came into operation in Chile. The new system saw port terminals awarded as integrated concessions to private companies. Prior to this Chile had a multi-operator system, with private stevedores accessing otherwise state-owned and -operated ports.

The move to a concession system was driven by an attempt to attract investment in better port equipment. The previous system was found to have limited incentives for stevedores to invest in modern transfer equipment. Initially, the government had trialled a non-exclusive concession system, but this underperformed. The government then decided to award exclusive concession agreements for the operation and maintenance of, and investment in, Chile's main container terminals (in the first round, this was at the Ports of Valparaíso, San Antonio and San Vicente). Five world port operators participated in the bidding (Hutchison, P&O, Stevedoring Services of America, HHLA and ICTSI among others).

The bidding process was conducted simultaneously. The bids were evaluated primarily on the level of tariffs they proposed, but also accounted for service quality. The tariff offered in the bids incorporated four key ports charges, so there was scope for pricing flexibility within a bid, provided that the proposed tariffs were transparent and there was no undue discrimination. The government set a predetermined floor value for the tariffs in order to limit bids from those gambling on ex post renegotiation. If bidders chose to bid at the floor level, they had to offer a tie-breaking payment. As it transpired most bids did bid at the tariff floor level.

Prices at non-state-owned terminals were fixed at a minimum level, in order to provide the concessionaries with

some certainty when bidding.

In exchange for being awarded a concession, the concessionaire had to pay annual rental payments to the state-owned port owner. These payments were fixed in advance, to prevent implicit subsidies to concessionaires altering the competitive position of state ports compared with privately owned ports. The rent was set at a minimum of the risk-free rate (the rate on Central Bank bonds) applied to the asset value of the port. However, the rent increased as tonnage at the port rose, such that the government had a floor on the downside but revenue sharing on the upside. Ultimately, the state-owned ports earned substantially more than expected from this arrangement, indicating either that the port assets were undervalued or the tariff floor was too high.

The immediate outcomes of the concessionary process were to lower port tariffs and to improve efficiency.

Source: World Bank (2000), 'Port Concessions in Chile', *Public policy for the private sector note number 223*, October.

### 3.5. *Conclusion: market power*

In conclusion, assessing market power at ports should take into account several factors. The nature of the ports market means that the level of existing competition is often limited. This means that a finding of market power is not uncommon—indeed, where market definition has led to a narrow market being defined, market power is likely.

The constraint on port market power from potential competition is generally low, primarily due to significant economic barriers to entry relating to economies of scale. The main other factor that could mitigate market power at ports is CBP, which is possible since many of ports' main customers operate in a concentrated downstream market.

## 4. **What potential abuses and harm can occur?**

Since it is possible for ports, or parts of them, to possess market power, there is a risk that they will abuse this power to the detriment of their customers. For example, market power may confer the ability to price above the hypothetically competitive level. Given the importance of ports to trade and the global economy, such elevated prices could cause considerable consumer detriment. When considering an abuse of market power, it is normal to examine it in the context of the detriment that the abuse may cause. This section reviews some of these abuses.

### 4.1. *Excessive pricing*

Excessive pricing is the practice of directly or indirectly imposing unfair purchasing prices on customers. The central question to be addressed in these cases is usually the relationship between the price charged and the economic value of the service/product.

In some jurisdictions, including the US, excessive pricing is not an offence under competition law. The EU is one of the exceptions to this. In the EU, the European Court of Justice has defined excessive pricing as:

“charging a price which is excessive because it has no reasonable relation to the economic value of the product supplied<sup>21</sup> “

and suggested the relevant questions are therefore

<sup>21</sup> European Court of Justice (1978), *United Brands v Commission*, Case 27/76, [1978] ECR 207.

“whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products<sup>22</sup>,”

Excessive pricing clearly leads to a consumer detriment in terms of higher prices paid, and can lead to a net social welfare detriment due to the allocative inefficiency caused by the elevated prices. In the context of ports, prices that could be set excessively include either general port charges or charges for specific services, such as berthing, electricity, fuel, or water.

In general, excessive pricing can be examined by comparing prices to unit costs (or revenues to total costs), where costs take into account the cost of capital. However, finding that there is a positive difference between a price charged and the cost of production (including reasonable return) may not be sufficient to conclude that prices are excessive. If the price has a relation to the economic value of the downstream product/service then the price may be acceptable. This would be a case of the upstream entity extracting a rent that would otherwise be enjoyed by the downstream entity. Box 11 gives an example where prices were above costs but were not found to be excessive.

#### **Box 11. Allegations of excessive pricing, Port of Helsingborg, Sweden**

In 2004 the European Commission ruled on a complaint brought by Scandlines Sverige (Scandlines) that the Port of Helsingborg, Sweden, had been abusing its dominant position and charging excessive prices.

Scandlines operated ferry services between Elsinore, Denmark and Helsingborg—the route offering the shortest sea crossing between Sweden and Denmark. Three operators provided ferry services on this route.

The Port of Helsingborg handles both ferry and cargo traffic, although 90% of traffic was ferry traffic. Indeed, it is the largest ferry port in Sweden in terms of volume.

Scandlines alleged that the port charges for ferry services were excessive because they did not reflect the actual costs borne by the port. Simultaneously, it alleged that the charges were discriminatory because ferry operators were charged more than other port users. Thus, the foundations of the complaint were that prices were being set based on whole port costs rather than the costs associated with particular operations.

The Commission found that the relevant market was the provision of port services at the Port of Helsingborg, and hence that the port did hold a dominant position. In evaluating the complaint, the Commission first looked at whether the charges were actually excessive in relation to costs, and then whether the charges were unfair.

The Commission conducted analysis that included an approximate cost calculation. The cost calculation focused on operating costs and establishing a suitable distribution of the port's fixed costs. It separated the depreciation of the fixed assets owned by the City of Helsingborg from the lease that the Port of Helsingborg had to pay. The Commission noted separately that a company ought to have revenues above accounting costs in order to allow for the cost of capital. The Commission stated that although the higher ferry charges did not generate significant profits at the overall company level, it was necessary to consider the revenues, costs and profits of the port relating to ferry operations separately from those of other activities. Whether it used any profits from these services to subsidise other activities would not necessarily be an abuse.

On the basis of its approximate cost calculation, the Commission did find that it seemed like the revenues exceeded the costs incurred.

The Commission then turned to the question of whether the prices were unfair. To determine whether this was the case compared with other ports, it attempted to benchmark prices. There was difficulty in doing this because

<sup>22</sup>

Ibid.

infrastructure differs, as do the services provided, and some customers pay port charges while some have other specific charging arrangements.

To determine whether prices were unfair, the Commission considered how prices related to the economic value of the services, including the intangible value of port location, the sunk costs in the port, and the value of the land. However, the Commission concluded that it was not clear that there was no reasonable relation between the pricing of the services and their economic value.

Ultimately, the Commission dismissed the complaint for the reason that prices could be reasonably related to the value of the services. Scandlines subsequently appealed to the Court of First Instance (now the General Court), but the case was not upheld.

Source: European Commission (2004), 'Scandlines Sverige AB v Port of Helsingborg', Case COMP/A.36.568/D3.

## 4.2. *Refusal to supply*

In general, ports have the right to choose their trading partners. However, there are some instances where, if a dominant port refuses to supply a certain service to an applicant, this could constitute an abuse of a dominant position.<sup>23</sup> This type of abuse can occur when a port has an interest in the downstream market and refuses to supply or grant access to competing downstream customers.

Refusal to supply can be an abuse because it might be artificially limiting competition in a downstream market, and hence leading to ex post allocative inefficiency and higher prices downstream.

The ports sector is susceptible to refusal to supply because many operators of port infrastructure are also involved in passenger or freight shipping. Some shipping lines operate/own their own terminals within ports. This level of integration between the companies can provide the incentives for companies to restrict access to their facilities only to their own downstream operations. However, refusal to supply can have positive welfare benefits if it creates the incentives for the upstream operator to make investments that it would not if it had to provide access to these to downstream competitors. For example, the terminal operator may invest in specialised modern unloading equipment that creates efficiencies in unloading time. However, if some of the benefit of this new equipment were shared with a downstream competitor, it may no longer be a viable investment.

Boxes 12 and 13 review two competition authorities' decisions on refusal to supply at ports.

### **Box 12. Refusal to supply, Port of Puttgarden, Germany**

Scandlines, the owner and operator of the ferry port of Puttgarden, Germany, was found by the Bundeskartellamt (German federal cartel office) to have illegally prevented competitor access to the ferry port (a decision that was overturned with subsequent investigations ongoing). Bastø Fosen and Eidsiva were two Norwegian shipping companies that were seeking to gain access to the port.

Scandlines was the sole provider of services on the Puttgarden–Rødby route, and several competitors wished to operate on the route but were refused access to the Port of Puttgarden. The Bundeskartellamt found that a dominant company must allow another company access to its infrastructure facilities against adequate remuneration if the other company is unable for legal or factual reasons to become active in the downstream market as a competitor of the dominant company.

Source: Bundeskartellamt (2010), 'Bundeskartellamt opens up the Puttgarden–Rødby ferry route to competition', January.

<sup>23</sup>

For a more detailed discussion of refusal to supply see, OECD (2007), Refusal to deal.



### Box 13. Refusal to supply, Port of Marsden Point, New Zealand

The Commerce Commission of New Zealand investigated a complaint lodged by International Stevedoring Operations Limited (ISO) against Northport Ltd for refusal to supply. Northport Ltd (the owner of the Port of Marsden Point) had granted an exclusive licence to its own joint-venture port services company that prevented ISO from accessing the required facilities to handle cargo. ISO threatened Northport with legal action for refusal to grant access. Northport then offered an arrangement whereby ISO could access the port but cargo must be stored away from the port and transported to and from by road, without any reconfiguring on the quayside. This was a substantially more expensive means of operation and made it uneconomic for ISO and other competing companies to handle cargo at the Marsden Point Port.

Northport was found to have used monopoly power as the owner of the port to prevent downstream competition in cargo-handling. As a result of its investigation, the Commerce Commission issued a cease-and-desist order against Northport.

Source: Commerce Commission (2006), 'First ever Cease and Desist Order issued against Northport', August.

#### 4.2.1. Essential facilities

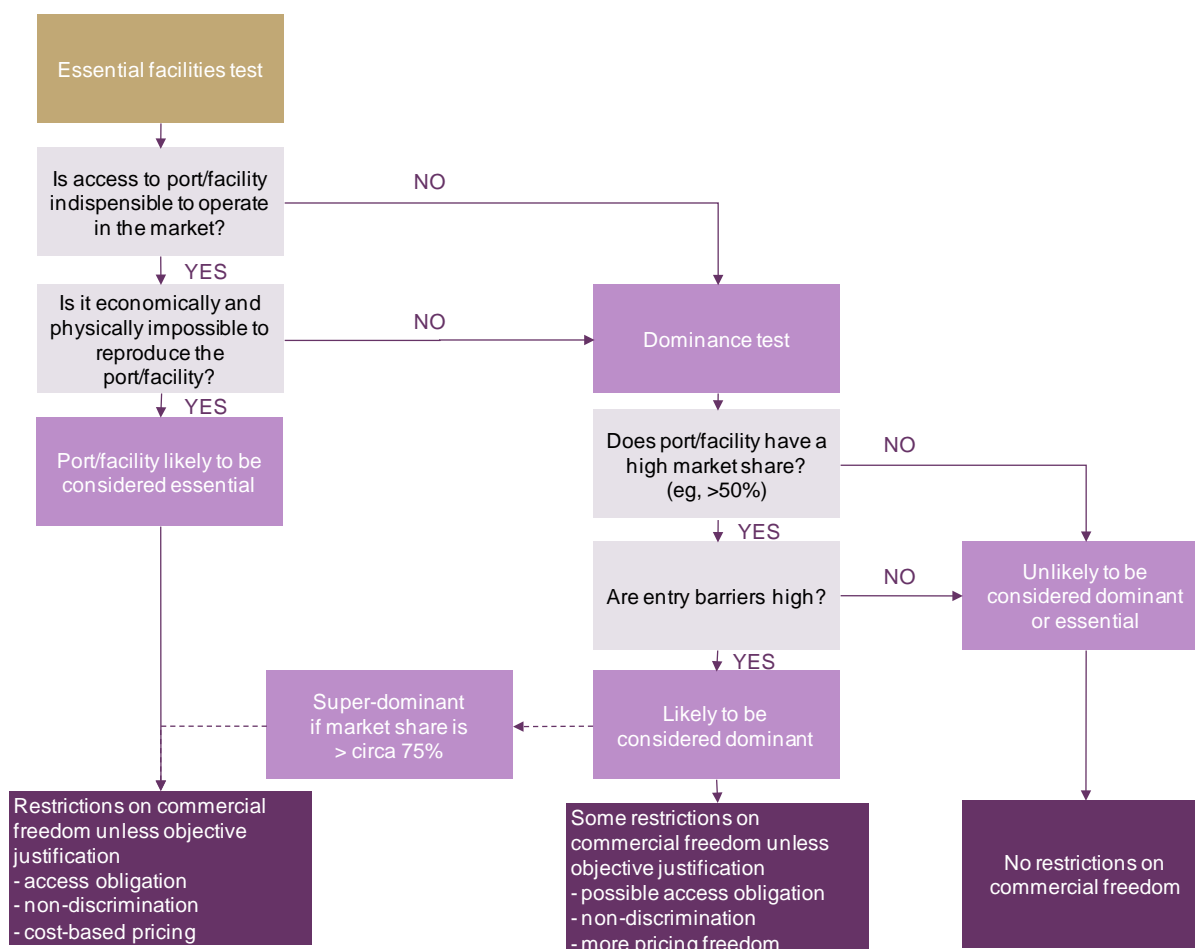
Competition authorities require some measure by which they can determine whether a facility may be forced to give downstream access against its wishes. One potential threshold is met if the facility can be deemed 'essential'.

- **Essential facility**—an input into the productive process is deemed to be an essential facility when it fulfils three conditions:<sup>24</sup>
  - without access to the facility, firms cannot operate in the related market—access is therefore essential, rather than 'nice to have';<sup>25</sup>
  - it enables the firm that is refusing to supply the essential facility to reserve to itself the secondary (related) market; and,
  - there is no objective justification for the refusal to supply the facility.

Furthermore, the firm must control all the potential essential input into production in the second market—reproduction of the facility must be economically or physically unfeasible. The conditions for a facility to be deemed essential are thus relatively strict, but may apply for core infrastructure such as ports. Figure 6 demonstrates a stylised example of how a competition authority might test whether or not a port is an essential facility.

<sup>24</sup> These conditions were first sets out in the *Magill* case. *Radio Telefis Eireann and Independent Television Publications Ltd v European Commission*, joined cases C-241/91 P and C-242/91 P, European Court of Justice.

<sup>25</sup> For example, in the *Ladbroke* case, the European Court of Justice viewed televised sound and pictures of the horse races to be an 'additional' feature to the existing service for those placing bets, not as an essential one. Case T-504/93 [1997] *Ladbroke SA v Commission*.

**Figure 6 Stylised essential facilities test for ports**

Source: Oxera.

#### 4.3. *Monopoly or cartel provision of potentially competitive intermediary port services*

Many intermediary port services are provided as a monopoly by an integrated authority, but could potentially be provided by a range of entities in a separate competitive market. Such services include cargo-handling, waste incineration, pilotage or towing services.

The standard competition concerns associated with monopolies apply in this case; namely, that prices may be elevated and output reduced. Careful assessment of this is needed, however, to account for potential efficiencies arising from economies of scope, in particular where port service providers may be able to share the common costs of operating at the port.

Even where the service providers are not part of the port authority, supply may not be akin to perfect competition. For example, the 450 or so harbour pilots in the Netherlands are organised into a private partnership called Nederlandse Loodsencorporatie (NLc).<sup>26</sup> This private partnership has a legal monopoly as provider of pilotage services in each of the four Netherlands harbours, in the sense that no-one is

26

<http://www.loodswezen.nl/>

allowed to be a pilot unless they are a partner in NLc. NLc charges are agreed by the NMa (the Dutch competition authority).

In addition to concerns about monopoly provision, there is the risk of cartelisation. If intermediary service providers operate as a cartel, there is a risk of an overcharge and consumer detriment. Box 14 describes a situation where a cartel of towage services was found.

**Box 14. Tug services cartel, Port of Setúbal, Portugal**

In 2007 the Portuguese competition authority fined three tug service providers (Rebonave, Rebosado and Lutamar) operating at the Port of Setúbal, Portugal for illegally acting as a cartel. The three providers were found to have fixed prices and shared clients.

The price-fixing resulted in significantly higher price levels than prior to the cartel.

The client-sharing worked by an ex ante agreement to retain each service's customer portfolio. Where clients had switched between the various providers, a compensation scheme operated to compensate the tug provider that lost the client. The compensation was effectively obligatory sub-contracting. This scheme deterred the tug service providers from cheating on the cartel agreements.

The authority fined the three firms €185,000 in total and ordered the decision to be published in a government gazette and national newspaper.

Source: Autoridade da Concorrência (2007), 'CA detect cartel operating in the Port of Setúbal and imposes fine of €185,000', April.

**4.4. *Tying and bundling of ancillary services***

The tying and bundling of services occurs when distinct products are sold as part of the same transaction. These arrangements come in a variety of forms.

- Pure bundling: two goods, A and B, are sold only together. They are not available for individual purchase. For example, access to a port may be bundled with stevedoring services.
- Mixed bundling: in addition to being sold individually, goods A and B are sold as an A–B package for less than the combined price of A and B. For example, waste incineration and marshalling services may be bundled.
- Tying: a customer who wants to buy A must also buy B. It is possible to buy B without A, which explains why this is a tie and not a (pure) bundle. The items for sale are therefore B on its own or an A–B package. Thus, a port might sell pilotage services (B) and towage services (A) only if pilotage is also bought. See Box 15 for an example.

**Box 15. Tying of ancillary services, Port of Nelson, New Zealand**

In 1995 complaints against the Port of Nelson for the tying of ancillary services were made by the Tasman Bays Marine Pilots Limited (TBMPL). Following these complaints the New Zealand Commerce Commission took action against the port which went to the high court.

The port was found to have a dominant position in the market for towage, but not for pilotage. TBMPL complained that the port was refusing to hire out its tugs unless its own pilots were also hired. This was found to be an abuse of a dominant position and the port was fined NZ\$300,000 and prevented from continuing with this practice.

Simultaneously, the Port of Nelson had also offered a 5% discount to customers which purchased all the services, and had set a minimum price for hiring out its own pilots that was below its cost. Both of these actions were found to have the purpose of substantially lessening competition and the port was fined NZ\$100,000 for each of them and prevented from offering a discount on bundles of its services.

Source: Commerce Commission (1995), 'Commission wins \$500,000 penalties against Port Nelson Limited', July.

The ports sector is particularly susceptible to tying and bundling because it involves a wide range of services being provided often by providers that are ultimately owned by the port itself.

The welfare effects of tying/bundling can be ambiguous. The potential detriment from these practices arises in two main ways. First, there is the potential leveraging of market power from one product to the other. This could occur through cross-subsidisation from the product with market power to the competitive product. Second, bundling creates an entry barrier by forcing new entrants to seek out customers who do not require one component of the bundle, or otherwise must enter to compete in providing bundle as a whole.

The detriments described above, however, could be offset. There can be cost efficiencies emanating from the economies of scope of joint supply that arise under tying/bundling. For instance, in ports, these efficiencies may arise by sharing the fixed costs of a terminal building. Purchasing multiple services from the same company can help to reduce the transaction and search costs for port users. Customers may also gain some assurance of quality and safety by purchasing products from the same supplier.

#### **4.5. *Competitive neutrality/state aid***

Competitive neutrality is the existence of markets where all providers of goods and services operate on a level playing field, regardless of whether they are privately or publicly owned.<sup>27</sup> Typically, the main competitive neutrality concern arises from advantages that public undertakings may enjoy. In the EU, this is a particular concern with regard to state aid, whereby public support to an entity can affect trade between Member States.

<sup>27</sup>

For a discussion of competitive neutrality see, OECD (2009), *State Owned Enterprises and the Principle of Competitive Neutrality* and OECD (2004) *Regulating Market Activities by the Public Sector*.

**Box 16. Competitive Neutrality, Australia**

Australia has a specific competitive neutrality policy based on the principle that government businesses operating in competitive or potentially competitive markets should not enjoy net competitive advantages over the private sector because of their public ownership. The principle of competitive neutrality in Australia is not based in competition law; rather it has been developed and implemented within government. At the national level, the policy is the responsibility of the Australian Treasury rather than the competition authorities.

The goal of the policy in Australia is to remove any distortions in a market that arise because a business is publicly owned. The policy applies to all government organisations wherever there is a market and only where the benefits outweigh the costs of implementation.

The key principles under competitive neutrality are:

- taxation neutrality, which requires that a government business is not advantaged by taxation exemptions or advantages not available to its competitors;

- debt neutrality, which requires that a government business is subject to similar borrowing costs to its competitors;

- regulatory neutrality, which requires that a government business is not advantaged by operating in a different regulatory environment to its competitors;

- commercial rate of return, entities are required to earn a return sufficient to justify a long-term retention of assets in the business and pay commercial dividends; and

- prices reflect costs, which requires tariff setting to take account of full cost attribution. This principle exists in part to ensure that public funds provided for non-business, non-profit activities are not used to subsidise business activities.

Source: OECD (2009), 'State Owned Enterprises and the Principle of Competitive Neutrality', DAF/COMP(2009)37.

Competitive neutrality matters for ensuring effective competition in the markets in question, but it is also of relevance for the best use of public funds.

In ports, one of the common risks to competitive neutrality arises where historical investments have been made by a public authority and their costs are no longer required to be recovered by the port through charges. This can place a competing port/terminal that is attempting to recover infrastructure costs at a cost disadvantage, as shown in Box 16.

One potential defence to complaints that competitive neutrality is not being adhered to can occur if the public authority can demonstrate that it is earning a return equivalent to that which would be needed by a private investor.

Incentives or discounts are common business practice when new products and services are offered, if they are offered by a state-owned port then this raises potential concerns over whether the incentive package is distorting competition. If it can be shown that investments, contracts or other commercial actions by a state entity are sufficiently profitable such that a private investor would also have undertaken them then there may be no concern about competitive neutrality.

### **Box 17. State aid investigation, Port of Reykjavik, Iceland**

The Port of Reykjavík is owned by the city of Reykjavík and hence is publicly owned. In 2000 it bought shares in Dráttarbrautir Reykjavíkur (DR), a company that owned and operated slipways for the building and repairing of ships. It bought the shares from Stáltak, a company that built ships and provided ship repair services in the Reykjavík harbour.

A complaint was made that this transaction constituted state aid to Stáltak, as the price paid for the shares was too high. The alleged consequence of the transaction was that it could be construed as financial support to Stáltak, which allowed it to offer slipway services at a lower price than its competitors. Thus, it was alleged that the Port of Reykjavík had disrupted the competitive position of ports offering slipway services (dry-docking and ship repairs) in the area near Reykjavík.

The allegations related to the price paid for the shares included the claim that it was clear that DR incurred operating losses and that it would be wound up within two years. The share purchase also included an annex rental agreement between DR and Stáltak.

Ultimately, the EFTA Surveillance Authority cleared the acquisition of shares and other transactions and ended its investigation.

Source: Official Journal of the European Union (2010), 'Invitation to submit comments pursuant to Article 1(2) in Part I of Protocol 3 to the Agreement between the EFTA States on the establishment of a Surveillance Authority and a Court of Justice on State aid with regard to alleged aid granted by the Port of Reykjavik', 2010/C, 54/2, March

#### **4.6. Conclusion: abuses of market power**

A wide range of potential abuses of market power can occur in the ports sector. These are primarily facilitated by various degrees of integration between infrastructure providers and port users, and the difficulty in replicating the facilities that ports provide. However, careful analysis is needed in each case to determine whether an alleged abuse is genuinely an abuse or a benign form of conduct driven by the nature of the industry or a past investment.

### **5. What remedies can address competition issues at ports?**

Where competition concerns arise, there are several possible remedies. Some approaches focus on facilitating competition to address the identified infringement or issue with the market structure. However, in some cases, introducing competition through competition law will not be possible and regulation is either required to introduce competition or to mimic the effects of competition.

#### **5.1. Addressing market power concerns**

One option for addressing competition concerns is to directly address the market power itself and implement remedies where a port would no longer be deemed to possess a dominant position. This is only possible in situations where there is some physical possibility of divisibility between the components of what has been deemed to be the relevant market. For example, if a single terminal port were found itself to be the relevant market, there may be no scope for reducing this level of dominance.

Where there is scope for divisibility, this could occur either between ports or within a port itself.

##### **5.1.1 Inter-port divestiture**

Where a market has been determined to include several ports and one entity owns or has a stake in each of these ports, one option for reducing dominance would be to force divestiture of individual ports, an example of this is provided in Box 18.

### **Box 18. Port divestiture, Transport Canada**

Historically, most of Canada's regional/local ports were owned by the Transport Canada, a government department. Throughout the 1980s and 1990s these ports suffered from over-capacity and inefficiencies that stifled their ability to compete. Furthermore, the ports were not providing an adequate return on the Canadian taxpayer funds that had been invested in these ports.

Since 1996, Transport Canada has had a Port Divestiture Program for regional/local ports, which transfers ownership and operation of the ports into the hands of other departments or organisations, giving greater local accountability. If there is no federal or local government interest in a port, the divestiture is initiated at a local or community level, where local interests form a legal entity to take control of the port.

A Port Divestiture Fund exists to facilitate the transfer process and provide funds for local interests to assume ownership and operate in local business conditions. These funds must be used directly for port operation or for bringing existing port property up to minimum safety or operating standards.

As of March 31 2005, a total of 459 of the 549 Port Divestiture Programs and facilities across Canada had been transferred or otherwise removed from the original Transport Canada inventory.

Source: Transport Canada (2005), 'Annual Report on Port Divestiture and Operations 2004-2005'.

#### *5.1.2. Intra-port divestiture/structural separation*

Many large ports are constituted by separate terminals opening up some scope for separate ownership of these terminals. Therefore, if a port has been found to be dominant and if there are concerns about this dominance, separating the ownership of different port terminals may help to alleviate the competition concerns.<sup>28</sup> This requires the separated terminals to place some degree of competitive constraint on each other so they need to be able to handle the same customer/commodity types. Box 19 presents an example where terminals that could handle grain within the same port were required to be under separate ownership.

### **Box 19. Intra-port divestiture, Port of Vancouver, Canada**

In 2002 the Competition Tribunal found that the acquisition by United Grain Growers Limited (UGG) of port terminal assets held by Agricore Cooperative Ltd (Agricore) at the Port of Vancouver would result in a substantial lessening of competition in grain-handling services at the Port of Vancouver. As such, the Competition Bureau investigated potential remedies. In November 2001, it announced that it would ask the Tribunal to order divestiture by UGG of a terminal at the Port of Vancouver. Initially there was a dispute about whether divestiture of part of a terminal was sufficient, before an agreement was received that a whole terminal would be divested. In 2007 Terminal West Ltd was selected as the buyer of Agricore's AUV grain-handling terminal

Source: Competition Bureau (2007), 'Commissioner of Competition Approves Purchaser of Port Terminal in Vancouver', April.

#### *5.2. Addressing pricing concerns*

Excessive pricing was one potential abuse that was identified in section 4. If it is not possible to intervene in the market to address this directly through competition, one option is price regulation. This is usually appropriate in situations where a port or port service has been found to be a natural monopoly, as was the case at the Port of Bunbury.

<sup>28</sup>

For a discussion of structural separation see also, OECD (2001), Recommendations and best practice: Recommendation of the council concerning Structural Separation in Regulated Industries.

*“the market for the provision of towage services at Bunbury is a natural monopoly [...] The volume of towage services required at the Port is historically relatively stable and unlikely to undergo any significant increase in the foreseeable future. That volume is incapable of supporting more than one towage operator having regard to the costs of establishing and operating towage services at the Port. There is therefore no competition “in” the provision of towage services [...]’<sup>29</sup>”*

### 5.2.1. Price regulation

Where the availability of access to a port is not a concern, there may still be a case for regulation of prices if the port faces limited competitive constraints. Price regulation is a direct solution to access pricing concerns, although detailed analysis is often required to ensure that the regulated prices are set at the most appropriate level. Box 19 gives a practical example of price regulation.

#### **Box 20. Regulation of port prices, Queensland, Australia**

The Australian system has a series of state-based regulators that impose regulation on ports in remote locations. For example, the Queensland Competition Authority (QCA) determines the fair and reasonable terms and conditions (including prices) of access to terminals at ports in Queensland. First, it determines whether ports provide services that are to be declared as monopoly services based on the criteria that it would be uneconomic to duplicate these services. If a port has been declared as a monopoly, the QCA regulates its prices, although ports can voluntarily submit pricing undertakings.

There has been some contention over the level of the price caps. In 2007 a resources boom, driven by Chinese demand, led to ships queuing to access the ports. The ports refused access unless the price caps were increased significantly. For example, the Dalrymple Bay Coal Terminal was declared subject to regulation under the Queensland Competition Act and the tariffs and revenues are set under a RAB/WACC style of regulation (this means that the value of the assets employed in the delivery of the regulated activities are valued and a return equivalent to the minimum investors require is permitted). This follows the standard building-block approach of calculating an annual revenue requirement (operating expenditure, return on capital, depreciation) and converting this to price caps. The weighted average cost of capital (WACC) is estimated using existing market data with scope for re-estimation based on updated data over time. In the detail of its decisions, the QCA used a depreciated optimised replacement cost to value the regulatory asset base.

Source: Queensland Competition Authority (2010), ‘Dalrymple Bay Coal Terminal 2010 Draft Access Undertaking’, September.

The Port of Singapore is a further example where port activities are regulated. The Maritime and Port Authority of Singapore has a licensing and regulatory function. It provides licences for port services and facilities, and implements price control arrangements including price-capping.

<sup>29</sup>

Australian Trade Practices Reporter (2000) 41-752, 40,720



### Box 21. Regulation of LNG terminals, France

Three LNG terminals currently operate in France—the Fos Tonkin terminal, Fos Cavaou terminal and the Montoir-de-Bretagne terminal—the first and last of which are owned by Gaz de France (GdF) and have been in existence for more than 20 years.

The French Energy Regulatory Commission (CRE) engages in regulation of these terminals in order to establish long term tariffs that help to promote security of supply. The tariff level is set based on the operator's allowed revenues taking into account operating costs, depreciation and the cost of capital. The RAB is measured using the current economic cost.

CRE also regulates these terminals in order to promote wider access whilst the competitive supply of LNG terminal services is limited. CRE has said:

*“to promote the development of new LNG terminals, investors must have priority access to the capacities of the facilities that they developed in conditions allowing proper market functioning. CRE recommends that no supplier should have access to more than 2/3 of the capacity of a new LNG terminal in France and that, while the competitive supply is not sufficiently developed, at least 10% of the new terminal capacity should be available to all the suppliers, for short-term contracts, in non-discriminatory conditions”*

In 2009 shortly before the new Fos Cavaou terminal came online the Commission issued a decision regarding concerns that GDF is foreclosing competitors. GDF offered commitments in order to alleviate these concerns and the commitments were accepted and made binding by the Commission. GDF offered to release long-term capacities in the Montoir de Bretagne (one block of 1 Gm<sup>3</sup>/year from October 2010) and Fos Cavaou (two blocks of 1 Gm<sup>3</sup>/year and one block of 0.175 Gm<sup>3</sup>/year from January 2011) LNG terminals to third parties. Thus when the Fos Cavaou terminal came online in 2010 GDF, Total and EDF all had a share of access to the capacity.

Source: Working group on the regulation of LNG terminals in France (2008), 'The regulation of LNG terminals in France', April and European Commission (2009), 'Commission decision of 3.12.2009 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement', Case COMP/39.316-Gaz de France.

#### 5.2.2. Promoting CBP

One additional approach to addressing the risk of excessive pricing is to promote CBP. By increasing the bargaining power of the customers of ports, a port's ability to price excessively may be limited. Instead the port charges and access conditions may be subject to a level of negotiation between the port and port user that could result in outcomes that are similar to competitive outcomes.

### 5.3. Addressing access concerns

To address concerns regarding refusal to supply, a regulator could force a port to grant access to downstream customers. This could be done through transparency obligations, an access code, accounting separation of a vertically integrated port or equivalence standards but if deemed necessary structural separation might be pursued (see section 5.1.2).

#### 5.3.1. Access regulation

Access regulation can help to address some of the issues around refusal to supply and the potential inefficiencies that can occur due to bottlenecks in infrastructure use arise because the port is capacity-constrained—ie, it cannot serve all customers without delay and there is an inadequate alternative. In addition to structural separation (see section 5.1.2), access regulation can also help to limit the risk of discrimination where the port is a vertically integrated entity with interests downstream.

A range of regulatory practices can be implemented to guard against discrimination. The spectrum of options include the following.

- A **transparency** obligation can be mandated simply by ensuring that the port/terminal provider publishes a Reference Offer with information on the prices and other terms and conditions that govern the provision of access, and that it publishes any changes to these terms and conditions as well as additional requests for downstream access made by third parties.
- Non-discrimination may also be enforced via **accounting separation** obligations, which allow the regulator to monitor the underlying cost of access products, as well as the implicit transfer prices that are charged to the notional upstream arm of the port authority.
- A regulator may also require the port authority to publish an **access code**, which would set out in detail the operational, logistical and financial terms and conditions governing the provision of downstream access, including detailed rules for dispute-resolution procedures.
- Along similar lines, a regulator may wish to specify a greater level of the **equivalence** standard that would govern the principle of non-discrimination. Two models of equivalence are possible: equivalence of outcomes (EOO) and equivalence of inputs (EOI).<sup>30</sup> EOO would require that the access product provided to an entrant be notionally equivalent to the implicit product that the port authority provides to its downstream services, even if the systems and processes followed to deliver the product are not the same. EOI is a much stricter approach, requiring the port authority to use the same systems and processes as those used to provide downstream access for its own shipping services. Specific key performance indicators could be designed to monitor the implementation of EOO or EOI, and targets enforced on the incumbent port authority.

On the one hand, obliging a port to grant access, even for fair remuneration, could undermine its incentives to invest, and thereby ultimately be to the detriment of consumers. Alternatively there may be an element of free-riding by downstream competitors on investments made by the dominant upstream entity that would otherwise not have been made. On the other hand, however, as seen for example in the ENI case of the EU Commission<sup>31</sup>, not forcing such access may have the contrary effect of preventing investments.<sup>32</sup>

#### 5.4. *Vertical integration*

In some circumstances the abuse of market power may be limited by vertical integration. This can occur where the port operator is also the cargo owner and the end-product is sold in a competitive market. In this case, the vertically integrated entity has no ability to manipulate market outcomes in the end-market and its upstream services will have no ability to abuse market power to its downstream component. Therefore, many shippers of liquid bulk (petroleum companies) also own port terminals. This potential solution is possible for large users only; otherwise, the ownership of a terminal may not be viable.

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<sup>30</sup> See Ofcom (2005), 'Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002', September.

<sup>31</sup> See F. Maier-Rigaud, F. Manca & U. von Koppenfels "Strategic Underinvestment and Gas Network Foreclosure – the ENI case", *EU Competition Policy Newsletter*, Issue 1, 2011.

<sup>32</sup> On this point see the 2010 OECD Report on the Implementation of the 2001 OECD Council Recommendation on Structural Separation and the literature cited therein.

### 5.5. *Combinations of remedies*

Within a port a combination of remedies may be appropriate to address any competition concerns relating to its different port services. Box 21 below describes the wider policy context around the Port of Darwin whereby a range of minor remedies were suggest to improve outcomes.

#### **Box 22. Wider policy context, Port of Darwin, Australia**

In 2006 the Council of Australian Governments (COAG) agreed an agenda for reform whereby all ports should:

- be subject to regulation where a clear need for it exists;
- allow for competition in the provision of port and related infrastructure including through
- planning for facilitating entry;
- permit access on a competitively neutral basis;
- and review vertical integration to ensure there are no material conflicts of interest.

These steps were intended to ensure the right mix of competitive and regulatory intervention was undertaken. The main elements of the Port of Darwin reviewed under this reform agenda are described below.

Since Darwin is an isolated port, competition within the port infrastructure services market was found to be limited. However, there was no evidence of an abuse of market power through pricing and access arrangements for third parties did exist. Despite this the reform agenda recommended that formal access criteria should be introduced along with building blocks to determine pricing at the port.

Competition within the Stevedoring market was found. The ability to lease equipment and berth areas facilitated this. The freight movement levels were probably to low to support multiple companies each with ownership of the required equipment. Thus the option to use leasing helped to facilitate competition.. The reviews main recommendation with relation to Stevedoring was to improve the transparency of the licensing process.

The Towage market was found to be similar to that of the Stevedoring market, with low barriers to entry and hence no need for tight regulation.

The market for pilotage saw a potential conflict of interest as Darwin Port Corporation (DPC) operated some pilot services but was also the regulator of pilots. The review concluded that having DPC fulfil both these roles was acceptable if improved licensing criteria and an appeals process could be set up. This approach to facilitating within market competition was preferred to competitive tendering for a pilotage contract, as the within market competition was deemed likely to generate greater competitive pressures and reduce administrative costs.

The review indicated that the lack of long-term planning in one area of the port risked harming the development of competition. As such the review recommended that a process for regular planning including public disclosure of forecasts should be made.

This experience at the Port of Darwin shows that a range of different interventions (or none, in the case of towage) may be suitable for a given port.

Source: Northern Territory Government (2008), 'Review of the Regulatory Framework for the Port of Darwin'.

### 5.6. *Conclusion: potential remedies*

Where competition concerns have been raised a range of remedies are possible to try and facilitate greater competitive pressures. However, in situations where ports can be considered a natural monopoly it

is unlikely to be appropriate to address concerns directly through competition. Instead regulation is likely to be the most suitable approach.

## 6. Conclusions

Ports are important pieces of infrastructure which facilitate transport and the functioning of the economy. Certain features of ports, such as their unique geographic position, requirements for specialised equipment and limited capacity can lead to competition concerns. This paper has reviewed how some of these concerns might be assessed.

Market definition will differ in each case but in general both conceptually and from precedent a number of broad conclusions can be drawn.

- The level of competition between ports and other modes of transport is limited, primarily due to the bulk/weight of goods that maritime transport can carry.
- Individual ports are likely to be defined as separate markets where the requirement for specialised infrastructure makes substitution difficult.
- Geographically ports could be considered in the same market if they share a hinterland, however many isolated ports will be considered a market in themselves.

In terms of assessing market power both existing and potential competition should be considered. The nature of the ports market, where some ports possess the characteristics of natural monopoly, means that the level of existing competition is often limited. This means that a finding of market power is not uncommon—indeed, where market definition has led to a narrow market being defined, market power is likely.

The constraint on port market power from potential competition is generally low, primarily due to significant economic barriers to entry relating to economies of scale. The main other factor that could mitigate market power at ports is CBP, which is possible since many ports customers operate in a concentrated downstream market.

Where market power exists there is a requirement to assess whether it has been exercised in a detrimental way.

A range of remedies exist, including trying to promote actual or potential competition. It is the nature of ports that competitive solutions may not always be possible and regulatory tools ought to be considered when appropriate in a wider policy context.

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## LA CONCURRENCE DANS LE DOMAINE DES PORTS ET DES SERVICES PORTUAIRES

*Par le Secrétariat<sup>1</sup>*

### 1. Introduction

Le présent rapport examine certains problèmes de concurrence qui peuvent apparaître dans le secteur portuaire. Auparavant, nous commencerons par présenter le secteur et ses intervenants.

#### 1.1. Importance des ports

Le transport par eau a de tout temps permis le développement du commerce international et contribué à la croissance économique mondiale. Les ports facilitent ce type de transport et jouent un rôle fondamental de passerelle entre le transport maritime et le transport de surface.

Comme pour la plupart des autres services de transport, la demande, pour les services portuaires, est une demande dérivée qui dépend en dernier lieu de la demande de transport de fret pour une destination donnée et de la demande de déplacement pour les passagers. Les ports ne sont donc qu'un maillon d'une chaîne de services qui assure l'acheminement des personnes et des marchandises.

Les ports facilitent en particulier le transport de fret à grande échelle. Ainsi en 2009, 7.84 milliards de tonnes de marchandises ont été chargées sur des navires dans le monde entier<sup>2</sup>. Outre la grande quantité de marchandises prises en charge, le transport maritime occupe également une place importante en termes de valeur. En 2007, la valeur des marchandises acheminées par des lignes régulières dans le monde entier avoisinait les 4 600 milliards USD<sup>3</sup>.

Les ports qui prennent en charge ces marchandises doivent donc être capables de gérer des quantités importantes et de traiter des cargaisons de types divers. Singapour — le port le plus actif au monde — traite plus de 25 millions d'équivalents vingt pieds (EVP) par an<sup>4</sup>. Dans la zone OCDE, le port le plus important est Busan, situé en République de Corée : il prend en charge environ 12 millions de conteneurs (EVP) par an<sup>5</sup>.

Le secteur du transport de fret par eau connaît une croissance importante. D'après le rapport 2010 de la Conférence des Nations Unies sur le commerce et le développement (CNUCED), les volumes de fret

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<sup>1</sup> Le présent document a été rédigé par MM. Enno Eilts (Oxera) et Paul Oxley (Oxera) en tant que consultants pour le Secrétariat.

<sup>2</sup> CNUCED (2010), *Étude sur les transports maritimes 2010*, tableau 1.3.

<sup>3</sup> World Shipping Council Trade Statistics (2007), *Top 20 Exporters of Liner Goods by Value, 2007*.

<sup>4</sup> CNUCED (2010), *op. cit.*, tableau 5.1.

<sup>5</sup> *Ibid.*, tableau 5.2.



maritime dans le monde entier ont doublé entre 1990 et 2009<sup>6</sup>. Le tableau 1 ci-dessous illustre le développement de ce secteur sur cette période.

**Tableau 1 Évolution du trafic maritime international, diverses années (millions de tonnes chargées)**

Année	Pétrole	Principaux vracs	Autres marchandises solides	Total (toutes marchandises)
1990	1 755	968	1 285	4 008
2000	2 163	1 288	2 533	5 984
2006	2 698	1 849	3 135	7 682
2007	2 747	1 972	3 265	7 983
2008	2 732	2 079	3 399	8 210
2009	2 649	2 113	3 081	7 843

Source : Conférence des Nations Unies sur le commerce et le développement (2010), *Étude sur les transports maritimes 2010*.  
Tableau 1.3.

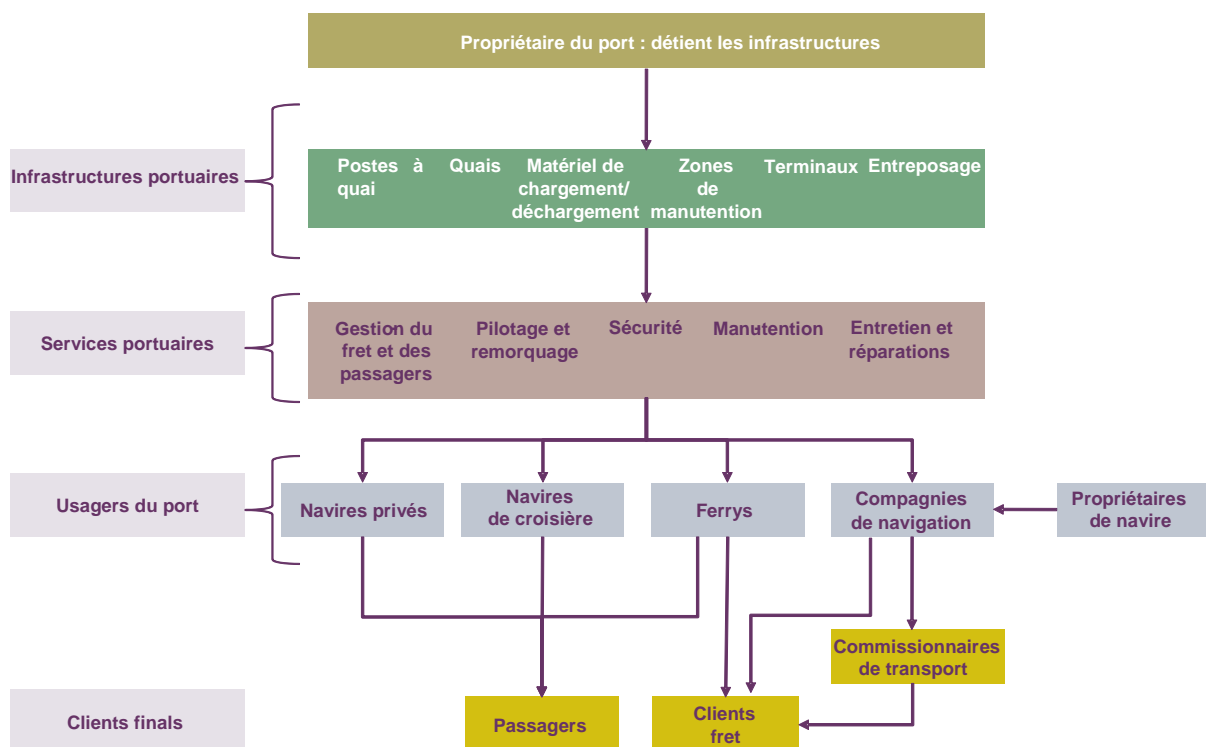
Les ports contribuent donc de manière importante au fonctionnement de l'économie mondiale. C'est pourquoi il faut s'assurer que la pression concurrentielle et les contraintes réglementaires sont suffisantes afin que les ports soient compétitifs en termes de niveaux de prix, de normes de qualité et d'innovation.

## **1.2. Organisation du secteur portuaire**

Les ports sont des infrastructures qui peuvent être gérées de diverses manières. La structure de propriété d'un port est souvent fonction des circonstances historiques et dépend des caractéristiques, des clients et de la taille du port. L'organisation des infrastructures portuaires ne repose donc pas sur un modèle unique mais, afin d'aider le lecteur à comprendre les problèmes auxquels ce secteur est confronté, la figure 1 présente de manière simplifiée la chaîne de valeur de ce secteur d'activité.

<sup>6</sup> *Ibid.*, tableau 1.3.

Figure 1 Chaîne de valeur du secteur maritime



Source : Oxera.

Afin de préciser les différences qui existent entre certaines des entités de la figure ci-dessus, entités dont les noms correspondent à une terminologie que l'on retrouvera dans tout le rapport, les principaux intervenants et les principales caractéristiques des ports sont brièvement présentés ci-dessous<sup>7</sup>.

- **Autorité portuaire/Propriétaire du port** — L'**autorité portuaire** est l'organisme en charge de la planification, de l'autorisation, de la coordination et du contrôle des services au sein du port. Dans certains cas, elle assure également certaines prestations. Le **propriétaire du port** est l'entité qui possède les terres sur lesquelles le port a été construit et qui détient en général également les principales infrastructures (comme les quais et les brise-lames). Le plus souvent, l'autorité portuaire et le propriétaire du port ne font qu'un, mais le propriétaire constitue parfois une entité distincte.
- **Infrastructures portuaires** — Les infrastructures sont nécessaires à toutes les activités portuaires. En général, c'est le propriétaire du port qui détient les infrastructures essentielles (canaux d'accès à la mer, quais). Les autres infrastructures, notamment celles qui servent à l'exploitation du port (bâtiments, grues, etc.), peuvent être détenues et mises à disposition par le propriétaire du port ou par une autre entité. Afin de mieux comprendre le lien entre les différentes infrastructures mentionnées sur la figure 1, nous définissons ci-dessous les éléments correspondants.
  - **Poste à quai** : Partie d'un quai destinée à l'amarrage d'un bâtiment.

<sup>7</sup>

Il ne s'agit pas d'une liste exhaustive de toutes les parties prenantes des ports et l'on pourra rencontrer une terminologie différente dans d'autres documents.

- **Quai** : ouvrage d'un port auquel les navires s'amarrent et qui comprend un ou plusieurs postes à quai.
- **Matériel de chargement et de déchargement** : comprend des infrastructures comme les grues et les stations de pompage utilisées pour mettre la cargaison d'un navire sur le quai et vice-versa.
- **Terminal** : bâtiment destiné à prendre en charge les passagers ou le fret.
- **Zone d'entreposage** : partie du port qui sert à entreposer les marchandises avant ou après leur transport par eau. Cette zone peut être constituée d'entrepôts ou de lieux à ciel ouvert.
- **Services portuaires** — L'exploitation d'un port nécessite souvent plusieurs services intermédiaires, lesquels peuvent être assurés par le port lui-même ou par des tiers indépendants.
  - **Pilotage** : assurée par un pilote disposant d'une grande expérience et connaissance de la navigation ainsi que des eaux locales et qui lui permettent d'assurer la navigation des bateaux lors de leur approche et de leur entrée au port.
  - **Remorquage** : service assuré par des remorqueurs et qui consiste à tracter de grands navires qui ne doivent ou ne peuvent pas se déplacer par eux-mêmes.
  - **Gestion du fret** : mouvement des marchandises dans et autour du port. Cette activité comprend les services de **tri** (réception, entreposage, regroupement et tri des marchandises en préparation d'une livraison au poste à quai d'un navire) et les services d'**acconage** (chargement et déchargement des navires).
- **Usagers du port** — un large éventail de clients se servent des ports, notamment des chargeurs, des ferrys, des croisiéristes et des navires privés. En fonction du port concerné, les usagers peuvent avoir accès à différentes parties de celui-ci.
  - **Navires privés** : bâtiments détenus par des particuliers et qui sont suffisamment grands pour avoir accès à des ports de commerce, par opposition à des ports de plaisance.
  - **Navires de croisière** : leurs prestations sont destinées à des voyageurs d'agrément. Généralement, ce type de navire est exploité suivant un horaire prédéfini.
  - **Ferrys** : en général, ils proposent des services réguliers entre un port de départ et une destination donnés destinés aux passagers comme aux marchandises.
  - **Compagnies de navigation** : exploitent des navires et organisent tous leurs mouvements. Les navires sont détenus soit par elles soit par un propriétaire distinct.
- **Clients finals** — les clients finals des services portuaires sont les **passagers** qui ont effectué un trajet et les **clients fret** qui consomment une marchandise qui a été expédiée par bateau. Les commissionnaires de transport sont des entreprises spécialisées dans la prestation de services de transport maritime et, de ce fait, font office d'intermédiaire pour le destinataire final des marchandises. La région où se situent ces clients s'appelle l'arrière-pays portuaire.

### Encadré 23. Structure organisationnelle du port de Trieste (Italie)

Trieste (Italie) est un port maritime méditerranéen dont l'arrière-pays portuaire se situe en Europe centrale et en Europe du Sud. Il compte 47 postes à quai et est utilisé pour plusieurs types de trafic maritime. Schématiquement, il est organisé comme suit.

- L'**Autorité portuaire de Trieste** est un organisme public chargé de diriger, de coordonner, de contrôler et de promouvoir l'exploitation du port. Elle dispose d'un pouvoir de réglementation vis-à-vis des opérateurs portuaires. Elle effectue l'entretien des parties communes du port et agit dans le domaine des transports et de la logistique afin de favoriser l'intermodalité.
- Plusieurs **opérateurs portuaires** (comme Terminal Frutta Trieste ou Grandi Molini Italia) exercent une activité dans les terminaux du port.
- Des entreprises indépendantes assurent un ensemble de **services portuaires**, notamment, par exemple, Impresa Portuale, qui propose des services d'acconage, ou La Sorveglianza Diurna e Notturna, qui assure une surveillance portuaire.
- Le port de Trieste est utilisé par divers **usagers**, notamment des compagnies de ferry réservées aux passagers comme UsticaLines ou des transporteurs maritimes de conteneurs comme Maersk Line.

Parmi les **clients finals** des services portuaires, il y a des entreprises et des consommateurs d'Europe centrale ou du Sud.

Source : <http://www.porto.trieste.it/>.

#### 1.2.1. Types de port

Les ports sont très divers et présentent des caractéristiques très différentes en fonction de leur emplacement, des types de navires et de cargaison qu'ils peuvent prendre en charge ainsi que des services qu'ils proposent. Toutefois, il est possible de les classer en quelques grandes catégories.

##### Ports maritimes et ports intérieurs

Il existe des ports dans différents types de lieux : ports en eau profonde, ports en eau peu profonde, ports situés en bordure de voies navigables, de lacs ou de rivières. En termes de volume, la majorité du fret transporté par eau passe par des ports maritimes, même si certains ports intérieurs sont très grands : le port de Montréal (le plus grand port intérieur au monde) a accueilli 25 millions de tonnes de marchandises en 2010<sup>8</sup>.

Les ports intérieurs, par rapport aux ports côtiers, présentent l'avantage d'être en général plus proches de la destination finale des marchandises. Cependant, leur principal inconvénient, c'est qu'ils sont souvent moins accessibles, surtout pour les gros navires.

##### Ports de transbordement et ports de marché

Certains ports (comme celui de Djebel Ali, situé aux Émirats arabes unis) ne servent qu'au transbordement de marchandises, tandis que pour d'autres (comme Nagoya, au Japon), la majorité des marchandises ont pour destination finale ou pour point de départ l'arrière-pays portuaire. Dans les ports de

<sup>8</sup> Cf [http://www.port-montreal.com/site/1\\_0/1\\_6.jsp?lang=fr](http://www.port-montreal.com/site/1_0/1_6.jsp?lang=fr).

transbordement, le fret est transféré du navire au quai, puis est chargé sur un autre navire. À l'inverse, les ports de marchés ont principalement pour fonction de transférer les marchandises du navire à l'arrière-pays portuaire. L'emplacement des ports joue un rôle important dans la répartition entre le trafic de transbordement le trafic lié à l'arrière-pays portuaire. Ainsi, les ports du Moyen-Orient sont souvent des ports de transbordement du fait que les routes maritimes qui relient l'Asie, l'Europe et l'Afrique passent par cette région.

Il existe une distinction connexe entre les types de navire. Les feeders acheminent des marchandises depuis les ports de transbordement jusqu'à leur destination finale, les déplacements entre deux ports de transbordement étant effectués par des navires plus gros. Ces derniers ont souvent pour origine ou destination un grand port maritime. Il peut être plus efficace d'avoir recours à ce type de réseau de distribution que de charger et de décharger de gros navires dans plusieurs ports différents.

Le recours à des feeders est assez fréquent. Ainsi, 80 % du commerce extérieur du Bangladesh, lequel représente 40 milliards USD, transite par le port de Singapour : des feeders transportent les marchandises bangladaises jusqu'à ce port, où elles sont transférées sur de plus gros navires qui les achemineront jusqu'à leur destination finale.

La distinction entre feeders et ports de transbordement d'un côté, et gros navires et ports de marché de l'autre, est importante car, pour le commerce international à longue distance, le coût du transport par feeder sur une courte distance ne représente en général qu'une part relativement faible du coût total de transport.

#### Ports de marchandises et ports de voyageurs

Nombre de ports ont des types de clients très divers. Cependant, les ports dans lesquels le trafic passagers est important se situent la plupart du temps dans des régions où il existe une courte traversée maritime, comme celle qui relie Singapour à Batam, en Indonésie. Le présent rapport n'exclut pas le trafic passagers mais s'intéresse principalement au fret.

#### Trafic de conteneur et trafic de vrac

Le trafic de marchandises prend des formes diverses : pétrole, gaz naturel liquéfié (GNL), vrac sec ou conteneurs. En général, chaque type de cargaison nécessite la présence de matériel de chargement et de déchargement spécifique dans le port, qu'il s'agisse de grues, de stations de pompage ou d'autres équipements. Compte tenu de la difficulté qu'il y a à prendre en charge les différents types de marchandises, tous les ports ne disposent pas des installations leur permettant d'accepter tous les types de cargaison. Ainsi, aujourd'hui, seuls trois ports en France (Fos-sur-Mer, Fos Cavaou et Montoir-de-Bretagne) disposent du matériel nécessaire pour prendre en charge le GNL<sup>9</sup>.

#### 1.2.2. Structure de propriété

De même, la structure institutionnelle et de propriété varie considérablement d'un port à l'autre.

#### Propriété publique ou privée

Depuis longtemps, le modèle qui domine est celui de la propriété publique associée à une intégration verticale entre le propriétaire et le gestionnaire du port. En général, les autorités portuaires concevaient, construisaient et finançaient le port sur fonds publics. S'agissant de la concurrence, cette situation peut

<sup>9</sup> Groupe de travail sur la régulation des terminaux méthaniers en France (2008), *La régulation des terminaux méthaniers en France*, avril.

avoir son importance lorsque l'on s'intéresse à la neutralité concurrentielle (section 4.5) ou aux problèmes de non-récupération des fonds publics investis.

Propriété, bail ou prestation de l'ensemble des services portuaires

Les ports peuvent être organisés suivant plusieurs types de contrat différents. Dans certains ports, le propriétaire ne détient que les infrastructures de base et ce sont des entreprises privées qui possèdent et exploitent les autres infrastructures. Dans d'autres, le propriétaire détient toutes les infrastructures et donne à bail certaines installations. Enfin, dans d'autres encore, l'autorité portuaire, intégrée, est propriétaire de toutes les installations et assure l'ensemble des services nécessaires.

### **1.3. Importance de la concurrence dans le domaine portuaire**

Compte tenu de certaines des principales caractéristiques des ports, et notamment du fait que leurs capacités sont limitées, les ports sont susceptibles de disposer d'un pouvoir de marché. L'arrière-pays portuaire peut être captif lorsque le coût global des acheminements effectués *via* le port est inférieur à celui de toute autre solution de transport.

Lorsqu'un pouvoir de marché existe, il y a en général plusieurs problèmes de concurrence relatifs à d'éventuels abus de ce pouvoir. Ces abus peuvent conduire à divers types de préjudice pour les consommateurs, mais fondamentalement ces derniers sont lésés, que cela se traduise par des prix plus élevés, par une baisse du tonnage, par une baisse de la qualité de service, par une moindre innovation ou d'une autre manière.

Compte tenu de l'ampleur des activités portuaires et, plus généralement, de la taille de l'industrie maritime, tout préjudice résultant de pratiques anticoncurrentielles dans ce secteur peut avoir une grande influence sur les clients finals et, par suite, un effet sur l'ensemble de l'économie. La suite du présent rapport s'attache à examiner les pratiques anticoncurrentielles qui peuvent survenir ainsi que les moyens de les prévenir.

Le rapport est organisé comme suit :

- la section 2 porte sur la pression concurrentielle qui pèse sur les ports ;
- la section 3 examine si les ports peuvent détenir un pouvoir de marché ;
- la section 4 étudie ce qui pourrait constituer un abus de pouvoir de marché dans le secteur portuaire ;
- la section 5 s'intéresse à certaines solutions qui permettent de résoudre les problèmes de concurrence dans les ports.

## **2. La pression concurrentielle qui pèse sur les ports**

### **2.1. La notion de définition du marché**

La définition du marché constitue un cadre d'analyse qui permet d'évaluer la pression concurrentielle qui pèse sur les entreprises. La définition d'un marché comporte en principe deux aspects : le **marché de produits** (dans le cas qui nous intéresse, les ports subissent-ils une pression concurrentielle de la part d'autres modes de transport ?) et le **marché géographique** (le port B exerce-t-il une pression concurrentielle sur le port A ?).

Les produits qui doivent être pris en compte dans le marché en cause ainsi que les limites géographiques de ce marché sont déterminés par la mesure dans laquelle les clients peuvent facilement remplacer un produit ou un service par un produit ou un service de substitution et les fournisseurs peuvent facilement adapter leurs installations pour fournir un produit de remplacement. Pour définir un marché, la notion essentielle est celle de substituabilité, laquelle entraîne une pression concurrentielle.

Un marché peut également être défini en fonction de groupes de clients. On peut être amené à définir des marchés distincts pour des clients ou des groupes de clients différents (par exemple, les services maritimes destinés aux voyageurs ou au fret) lorsque les fournisseurs peuvent chercher à appliquer des tarifs plus élevés aux clients qui sont disposés à payer plus cher que les autres (c'est-à-dire à pratiquer une discrimination tarifaire entre les différents groupes).

### 2.1.1. Définition du marché dans le cas des ports

Les produits qui doivent être pris en compte dans le marché en cause et les limites géographiques de ce marché sont, pour une large part, déterminés par la possibilité qu'ont les usagers du port de recourir à un port ou à un terminal différent (substituabilité du point de vue des demandeurs) ou d'utiliser un autre mode de transport. Chaque port subit un ensemble de pressions concurrentielles spécifique qui dépend principalement de sa situation géographique, de sa taille et de sa capacité à prendre en charge différents types de fret. Les pressions concurrentielles sont en général très faibles lorsque qu'un port bénéficie d'une situation géographique particulièrement favorable ou dispose d'équipements spéciaux qui lui permettent de prendre en charge certains types de marchandises comme le pétrole.

Les autorités de la concurrence définissent souvent les limites du marché de produits en cause en s'intéressant à la substituabilité du point de vue des demandeurs. Toutefois, il arrive que ces autorités regroupent plusieurs petits marchés pertinents en un seul, en s'appuyant sur des considérations relatives à la réaction des fournisseurs en cas de modification des prix. Elles peuvent être amenées à agir ainsi lorsque, par exemple, les entreprises peuvent utiliser leurs moyens de production pour proposer des produits qui ne constituent pas des substituts et qu'elles sont en mesure et ont intérêt à modifier les capacités de production de ces produits rapidement (en général, en l'espace d'une année) en fonction de la demande pour chacun de ces produits<sup>10</sup>.

En principe la définition du marché doit tenir compte à la fois de la substituabilité du point de vue des demandeurs et de la substituabilité de l'offre. Toutefois, s'agissant des ports, il est peu probable que la substituabilité de l'offre joue un rôle important dans la définition du marché, compte tenu des fonctionnalités très particulières du matériel utilisé. Ainsi, des installations qui permettent de proposer des services relatifs aux conteneurs ne peuvent en général pas être facilement transformées en installations destinées à proposer des services pour les passagers sans que cela implique des investissements et des délais. Par conséquent, nous n'envisagerons plus désormais que la substituabilité du point de vue des demandeurs.

Dans le cas des ports, la définition du marché peut également conduire à distinguer différents clients ou groupes de clients. Cette distinction est particulièrement importante lorsque les ports sont capables de pratiquer une discrimination entre leurs différents clients, par exemple entre ceux qui sont « captifs » et ceux qui peuvent changer de fournisseur.

<sup>10</sup> Voir par exemple, Commission européenne (2004), *Lignes directrices sur l'appréciation des concentrations horizontales au regard du règlement du Conseil relatif au contrôle des concentrations entre entreprises*, 5 février ; ministère américain de la Justice et Federal Trade Commission, (2010), *Horizontal merger guidelines*, août ; Office of Fair Trading et Commission de la concurrence (2010), *Merger Assessment Guidelines*, septembre.

La suite de la présente section examine les pressions concurrentielles qui pèsent sur un port du fait des autres modes de transport, des autres ports et des autres terminaux ainsi que les marchés sur lesquels ses services sont proposés.

## **2.2. Définition du marché de produits — pressions concurrentielles exercées par les autres moyens de transport**

S'agissant des services proposés par les ports, la demande est une « demande dérivée » dans la mesure où elle dépend de la demande globale de transport. Les demandes de transport peuvent être satisfaites par différents moyens, comme le transport maritime, le transport fluvial, le transport routier, le transport ferroviaire ou le transport aérien. Cela signifie que, dans l'absolu, le transport par eau peut être en concurrence avec d'autres modes de transport de marchandises. Ainsi, si un port augmente les prix d'une ou plusieurs de ses prestations, certains de ses clients peuvent décider de choisir un autre moyen de transport, comme la route ou le rail.

La substituabilité entre le transport par eau et les autres moyens de transport est limitée par plusieurs paramètres et notamment par l'existence des infrastructures nécessaires, par les caractéristiques des marchandises acheminées, et par le fait que, dans certains cas, les conditions géographiques réduisent le nombre de solutions possibles (ainsi entre l'Angleterre et l'Irlande, les deux seuls moyens d'acheminement sont le transport maritime et le transport aérien).

### **2.2.1. Les services portuaires, une demande dérivée**

Les clients font en général appel à des services portuaires lorsqu'ils souhaitent faciliter le transport de marchandises ou de personnes du point de départ au point d'arrivée. Cette constatation a des conséquences importantes sur la sensibilité des clients quant au montant des droits de port. Le transport global se compose de cinq éléments principaux : l'acheminement entre le point de départ et le port d'origine, la manutention portuaire, le transport maritime entre le port d'origine et le port de destination, la manutention portuaire et enfin l'acheminement entre le port de destination et le point d'arrivée. En cas de transbordement vers ou depuis un feeder, la partie centrale de ce processus est plus longue.

Le fait que les droits de port ne représentent qu'une partie du coût total de transport a pour conséquence qu'une augmentation des droits de port de 5 à 10 % se traduit par une hausse du coût total de transport dans des proportions beaucoup plus faibles.

Comme les clients choisissent leur mode de transport (ou leur port) en fonction du coût total de transport et non seulement des droits de port, ils sont moins sensibles à une modification du montant des droits de port qu'ils ne le seraient si ces droits constituaient un critère décisif.

### **2.2.2. Les infrastructures nécessaires**

La condition indispensable à toute substitution d'un moyen de transport par une autre est l'existence des infrastructures nécessaires. Le transport maritime ne peut être rempalcé par le transport ferroviaire, par exemple, que si les infrastructures nécessaires sont en place. Ainsi, l'acheminement d'une cargaison de vrac entre l'Australie et l'Amérique du Nord se fera nécessairement par mer et donc *via* un port. Dans cet exemple particulier, il n'existe aucune possibilité de remplacer le transport maritime par un autre mode de transport.

Cependant, dans d'autres cas de figure, les infrastructures nécessaires existent. Ainsi, entre Cologne et Strasbourg, les marchandises peuvent être acheminées par voie d'eau (*via* le Rhin) ou par la route. De même, au moins théoriquement, les fines herbes peuvent être expédiées d'Israël en Belgique par mer, par les airs ou par la route. Dans ces conditions, la question qui se pose est de savoir s'il est économiquement



viable de transporter par la route, le rail ou les airs des marchandises qui devraient normalement être acheminées par mer ou par voie d'eau.

### 2.2.3. Caractéristiques des marchandises transportées

À cet égard, un élément intéressant à prendre en compte est la valeur par tonne des marchandises transportées par les différents moyens de transport. La valeur par tonne correspond à la valeur intrinsèque d'une tonne d'une marchandise donnée. Les données publiées par la Direction générale de l'énergie et des transports (aujourd'hui appelée DG MOVE) de la Commission européenne montrent la valeur moyenne par tonne des marchandises transportées en fonction du mode de transport, cf. tableau 2 ci-dessous.

**Tableau 2 Valeur par tonne des marchandises transportées (commerce extérieur de l'UE uniquement)**

Modes de transport	€ par tonne
Air	43 308
Route	3 289
Mer	865
Rail	470
Voie navigable	383

Source : Commission européenne (2010), *EU energy and transport in figures*.

Les chiffres présentés ci-dessus font apparaître que, suivant le mode de transport, la valeur par tonne n'est pas la même. Ainsi, la valeur moyenne par tonne est plus de 100 fois plus élevée pour le transport aérien que pour le transport maritime. Même si elles sont plus faibles, les différences de valeur par tonne entre le transport maritime et le transport ferroviaire ou entre le transport maritime et le transport routier ne sont pas négligeables. Ce sont les voies navigables qui connaissent la valeur moyenne par tonne la plus faible<sup>11</sup>.

Les écarts de valeurs par tonne observés montrent que certaines marchandises sont mieux adaptées à certains modes de transport. Cas extrême, il est improbable que le charbon puisse être acheminé de manière rentable par les airs, alors qu'il peut l'être par mer ou par voie d'eau.

Le ministère britannique des Transports a publié quelques chiffres instructifs à cet égard, montrant que la répartition entre les types de marchandises transportées varie notablement d'un moyen de transport à l'autre. Cf. tableau 3 ci-dessous.

<sup>11</sup> Les chiffres du tableau 2 ne tiennent pas compte des échanges intra-européens car il n'existe pas d'estimations par mode de transport pour ce type d'échanges. Toutefois, il est peu probable que l'ordre de grandeur des écarts de valeur par tonne entre les divers modes de transport soit fondamentalement différent.

**Tableau 3 Marchandises les plus courantes par mode de transport**

	Voie navigable	Rail	Route
Marchandise la plus courante	Pétrole (71 %)	Charbon (37 %)	Produits alimentaires, boissons et tabac (28 %)
Deuxième marchandise la plus courante	Autres vracs secs (10 %)	Conteneurs (24 %)	Autres marchandises diverses (27 %)
Troisième marchandise la plus courante	Charbon (7 %)	Matériaux de construction (13 %)	Minéraux bruts (10 %)

Note : Les pourcentages entre parenthèses sont calculés à partir de tonnes-kilomètres et correspondent aux chiffres de 2007.

Source : ministère britannique des Transports (2008), *Delivering a Sustainable Transport System: The Logistics Perspective*.

Le tableau ci-dessus montre que le moyen de transport utilisé varie avec le type de marchandise transportée. La marchandise la plus fréquemment acheminée par voie d'eau est le pétrole. Pour le transport ferroviaire, il s'agit du charbon et pour le transport routier, des produits alimentaires, des boissons et du tabac. Ces chiffres confirment que les moyens de transport sont difficilement substituables, notamment entre le transport fluvial et le transport ferroviaire ou routier.

#### 2.2.4. Définition synthétique du marché de produits

L'intensité de la concurrence entre les ports et d'autres modes de transport est sans doute limitée, et ce pour plusieurs raisons.

- Il y a peu de chances que les clients soient sensibles aux variations de prix. Cela s'explique par le fait que la demande de services portuaires résulte d'une demande globale de transport entre une origine et une destination. Par conséquent, lorsqu'ils choisissent un moyen de transport, le facteur décisif, pour les clients, est le coût total du transport et non les seuls droits de port ;
- Pour que des clients puissent choisir un autre mode de transport, il faut que les infrastructures nécessaires existent. Comme ce n'est pas toujours le cas, cela limite le degré de substituabilité ;
- La nature des marchandises transportées, qui varie de manière notable en fonction du mode de transport, affecte également les possibilités de substitution.

L'analyse de la définition du marché de produits présentée ci-dessus est générale, or le degré de substituabilité entre modes de transport est susceptible de varier d'un port à l'autre. Le marché de produits doit donc être défini au cas par cas.

### 2.3. Le marché géographique — les pressions concurrentielles exercées par les autres ports

Comme nous l'avons exposé ci-dessus, la demande de services portuaires résulte d'une demande de transport de marchandises depuis un point de départ jusqu'à une destination finale. En général, ni le point de départ ni la destination finale ne sont des ports. Par conséquent, les clients peuvent en théorie effectuer un choix entre différents ports afin de satisfaire leurs besoins de transport dans leur ensemble. Le fait de savoir dans quelle mesure les clients peuvent choisir entre différents ports d'origine et de destination — c'est-à-dire le degré de substituabilité entre ports sur ou autour de ces sites — détermine le périmètre du marché géographique.

L'intensité de la concurrence entre ports dépend pour une large part de trois éléments essentiels : la sensibilité des clients aux niveaux de prix, l'intensité de la concurrence intra-portuaire et le fait de savoir

dans quelle mesure des ports situés à des emplacements géographiques différents peuvent avoir une partie de leur arrière-pays portuaire en commun. Chacun de ces aspects est successivement analysé ci-dessous.

### 2.3.1. *Sensibilité des clients aux niveaux de prix*

Comme indiqué dans la section précédente sur la définition du marché de produits (section 2.2), du fait que la demande de services portuaires est une demande dérivée, les clients sont en général moins sensibles à un pourcentage d'augmentation des droits de port qu'au même pourcentage d'augmentation du coût total du transport.

Lorsque l'on compare les droits de port au coût total de transport, il apparaît qu'il y a peu de chances que les clients soient sensibles au montant de ces droits. Considérons par exemple une origine (point A) et une destination (point B) entre lesquels le fret peut être acheminé *via* le port C ou le port D. Supposons que les droits de port au port C soient de 100 et que le transport ferroviaire coûte 50, alors que les droits de port s'élèvent à 100 au port D et que les coûts de transport ferroviaire se montent à 55. Dans notre exemple, si le port C augmente ses tarifs de plus de 5 %, les clients qui expédient des marchandises entre les points A et B pourraient décider d'abandonner le port C et de choisir le port D. Ainsi, pour les usagers du port, ce qui compte, c'est le coût total de transport.

Le degré de sensibilité aux prix est susceptible de varier en fonction des groupes de clients. Ainsi, pour un chargeur, les droits de port ont sans doute davantage d'importance que pour un client final pour lequel ils représentent nécessairement une part plus faible du coût total. Étant donné que les chargeurs et les clients finals peuvent en principe choisir quels ports (ne pas) utiliser, pour ces deux groupes de clients, la sensibilité aux prix joue un rôle dans la définition du marché géographique.

### 2.3.2. *Concurrence intra-portuaire*

Les ports ne sont pas toujours constitués d'une entité unique. Nombre de ports modernes sont composés de plusieurs quais et terminaux exploités de manière indépendante. Lorsque deux opérateurs ou plus détiennent ces terminaux, il peut y avoir une concurrence intra-portuaire. Dans ce cas, les usagers du port disposent de plusieurs possibilités pour ce qui est du lieu d'amarrage des navires et du terminal à utiliser. En outre, il peut y avoir une concurrence intra-terminal si plusieurs opérateurs proposent des services concurrents au sein du même terminal<sup>12</sup>.

En cas de séparation structurelle, il est possible de définir un périmètre de marché inférieur au port lui-même, ou, si le périmètre correspond au port, qu'il continue à y avoir une concurrence au sein du marché ainsi défini. Une telle concurrence peut par ailleurs faciliter la spécialisation car les concurrents opèrent dans les mêmes conditions (marché du travail, réglementation, fournisseurs). La spécialisation, elle, peut contribuer à améliorer l'efficacité. Toutefois, l'intensité de cette concurrence intra-portuaire peut être réduite si certains quais disposent de moyens de connexion qui peuvent être essentielles pour certaines activités (par exemple des terminaux passagers) ou du matériel spécial nécessaire pour manipuler certaines marchandises.

<sup>12</sup>

Pour une analyse des bienfaits de la concurrence intra-portuaire, voir également De Langen, P., et Athanasios P (2006), « Analysis of the Benefits of Intra-Port Competition », *International Journal of Transport Economics* **33**, pp. 1-17.

#### Encadré 24. Concurrence intra-portuaire à Buenos Aires (Argentine)

Dans le port de Puerto Nuevo (Argentine), des concessions de terminaux ont été accordées à différents opérateurs. Ceux-ci contrôlent entièrement l'exploitation de leur terminal dans le strict respect des conditions fixées par l'autorité portuaire. Les opérateurs bénéficient d'une garantie de bonne fin, peuvent utiliser les installations publiques et sont autorisés à fixer eux-mêmes leurs tarifs.

La concurrence entre opérateurs s'est traduite par une meilleure efficacité du port : le tonnage de fret pris en charge a augmenté de 50 % et la productivité du travail a bondi de 275 % sur la période 1990-1995. En 1997, le tonnage de fret pris en charge a dépassé celui du plus grand port d'Amérique du Sud, Santos (Brésil).

Source : Banque mondiale (2007), *Port reform toolkit: module 6*.

#### 2.3.3. Capacité à partager le même arrière-pays portuaire

Étant donné que les clients des ports, *in fine*, recherchent une solution de transport entre un point de départ et une destination finale, des ports qui peuvent recevoir ou livrer des marchandises depuis ou vers ces destinations peuvent se faire concurrence pour ces clients. Il est probable que des ports qui peuvent être en concurrence pour les mêmes clients font partie du même marché géographique.

La capacité des ports à disposer du même arrière-pays portuaire doit être appréciée au cas par cas. Toutefois, en principe, il est possible d'établir une distinction entre arrière-pays portuaire captif et arrière-pays portuaire ouvert à la concurrence. Toutes les régions où un port bénéficie d'un avantage concurrentiel notable au motif que les coûts de transports vers ces régions sont plus faibles via ce port (par exemple, du fait d'une moindre distance aux destinations finales demandées par les clients) font partie de l'arrière-pays captif. Il est probable qu'un tel port prendra en charge la majorité du fret en provenance ou à destination de ces régions. La concurrence entre ports a plus de chances d'apparaître dans des régions où aucun port ne bénéficie d'un avantage sur les autres ports en termes de coûts. Ces ports peuvent donc intervenir sur le même marché géographique.

L'Autriche, pays sans accès à la mer mais où les tonnages de marchandises importées et exportées sont importants, constitue un exemple intéressant d'arrière-pays portuaire ouvert à la concurrence. En 2009, elle a importé 8 millions de tonnes de marchandises et en a exporté 6.4 millions *via* les plus grands ports maritimes européens comme Hambourg et Brême (Allemagne), Rotterdam (Pays-Bas), Anvers (Belgique), Trieste (Italie), Koper (Slovénie) et Constanta (Roumanie)<sup>13</sup>.

<sup>13</sup>

Österreichische Seehafenbilanz, 2010, disponible sur [www.verkehr.co.at](http://www.verkehr.co.at).

**Tableau 4 Tonnage de marchandises en provenance ou à destination de l'Autriche acheminés via différents ports**

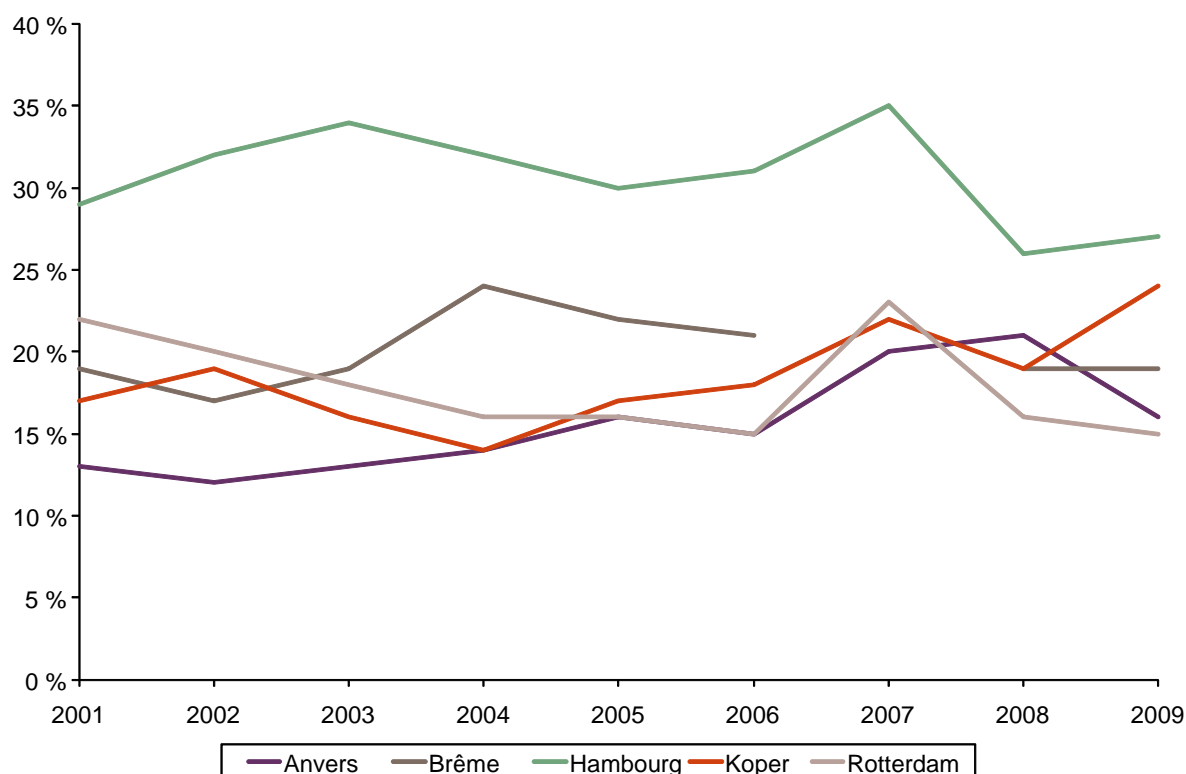
	Tonnes importées (en milliers)	Tonnes exportées (en milliers)	Total tonnes transportées (en milliers)	Part (en %)
Rotterdam	820	3 250	4 070	28
Koper	1 324	2 025	3 349	23
Hambourg	1 504	897	2 402	17
Anvers	878	952	1 830	13
Brême	1 050	85	1 135	8
Trieste	546	480	1 026	7
Rijeka	251	36	287	2
Constanta	12	237	249	2
Total	6 385	7 963	14 348	100

Note : L'addition des chiffres individuels peut ne pas correspondre aux totaux à cause des arrondis.

Source : Österreichische Seehafenbilanz.

Ce tableau montre que huit ports maritimes ont aujourd'hui pour clients des chargeurs qui transportent des marchandises en provenance ou à destination de l'Autriche. Les plus importants de ces ports sont Hambourg, Brême, Anvers et Rotterdam au nord du pays, et Koper et Trieste au sud. Il est intéressant de remarquer que Rotterdam prend en charge environ quatre fois plus de fret que Trieste en termes de tonnage, alors que ce dernier est beaucoup plus près de l'Autriche.

La figure 2 ci-dessous montre la part des exportations autrichiennes qui transitent par les cinq plus grands ports : Anvers, Brême, Hambourg, Koper et Rotterdam.

**Figure 2 Part des exportations autrichiennes**

Source : Österreichische Seehafenbilanz.

La figure ci-dessus fait apparaître que la part des exportations a été très instable entre 2001 et 2009. Ainsi, la part d'Anvers a varié entre 12 et 21 % durant cette période. Ces fluctuations montrent que la concurrence fonctionne réellement : les ports peuvent gagner ou perdre des parts de marché substantielles en un laps de temps relativement court.

## 2.4. *Le rôle des clients*

L'intensité de la concurrence portuaire peut dépendre du groupe de clients concerné. Tel est le cas, par exemple, lorsque les ports cherchent à appliquer des tarifs plus élevés aux clients disposés à payer plus cher ou lorsque les pratiques concurrentielles sont très différentes d'un groupe de clients à l'autre. Lorsque l'on cherche à déterminer s'il y a des groupes de clients distincts, la question essentielle est de savoir si certains clients pourraient obtenir de meilleures conditions que d'autres en réponse à la même demande de services.

Lorsque l'on cherche à évaluer le périmètre des marchés pertinents définis en fonction des groupes de clients, plusieurs paramètres interviennent. Il apparaît notamment qu'une définition plus étroite d'un marché en fonction des groupes de clients ne sera sans doute pertinente que lorsque :

- les clients qui paient un prix peu élevé ne peuvent revendre la prestation en question à d'autres clients qui, sans cela, paieraient plus cher (c'est-à-dire qu'il n'y a pas d'arbitrage possible) et que
- les ports sont capables de savoir quels clients sont disposés à payer le prix fort ou quels clients ne sont pas en position de force pour négocier et peuvent par conséquent adopter une position de négociation différente à leur égard.

### 2.4.1. *Possibilités d'arbitrage entre clients*

Des possibilités d'arbitrage existent lorsque des clients qui paient un prix moins élevé sont en mesure, à un coût de transaction inférieur à la différence de prix initiale, de revendre la prestation à des clients qui paieraient sans cela un prix plus élevé. Lorsque des possibilités d'arbitrage entre clients existent, il est peu probable que les ports puissent d'une manière rentable opérer une discrimination tarifaire entre eux, car la différence de prix ferait l'objet d'un arbitrage de sorte que très peu de clients voire aucun ne paieraient le prix fort.

M. Pittman (2009), qui travaille au ministère américain de la Justice, a établi que les services de terminaux portuaires ne peuvent pas facilement faire l'objet d'un arbitrage, surtout pour les marchandises<sup>14</sup>. La conséquence de cet état de fait, c'est que le propriétaire d'un terminal risque d'opérer une discrimination tarifaire entre ses différents clients et, éventuellement, d'exercer un pouvoir de marché sur les chargeurs « captifs » tout en proposant des prix compétitifs aux clients qui sont susceptibles de choisir un autre prestataire. Des possibilités d'arbitrage peuvent néanmoins exister. L'existence de telles possibilités doit être appréciée au cas par cas.

### 2.4.2. *Capacité à reconnaître les clients disposés à payer plus cher*

Le fait qu'un chargeur soit disposé à payer plus cher dépend pour partie du nombre de solutions de transport de remplacement dont il dispose. Ainsi, un chargeur peut être en mesure ou non de changer de

<sup>14</sup> Pittman, R (2009), *Competition Issues in Restructuring Ports and Railways, Including Brief Consideration of these Sectors in India*, ministère américain de la Justice, Economic analysis group discussion paper.

mode de transport si le port qui a sa préférence augmente ses tarifs. La capacité à changer de moyen de transport a été évoquée dans la section du présent document relative à la définition du marché de produits.

Lorsque le transport maritime constitue la seule solution possible, un chargeur peut ou non avoir la possibilité de changer de port. Les chargeurs situés dans l'arrière-pays « captif » d'un port ont peu intérêt, sur le plan économique, à changer de port, tandis que ceux qui se trouvent dans un arrière-pays portuaire ouvert à la concurrence sont davantage en mesure de le faire.

Certains ports sont capables de déterminer si des chargeurs sont disposés à payer plus cher en analysant si ces chargeurs ont la possibilité de changer de mode de transport ou de choisir un port situé à un autre emplacement tout en préservant leur rentabilité.

## 2.5. Exemples de définition du marché

L'analyse présentée jusqu'à présent reposait sur des principes économiques. Les encadrés 3 à 5 ci-dessous donnent des exemples de définition de marché dans le secteur portuaire, définitions établis dans le cadre de décisions concrètes d'autorités de la concurrence. Dans l'exemple de l'encadré 3, le marché géographique pertinent pour le transport de passagers n'était pas le même que pour le fret. L'encadré 4 donne un exemple dans lequel le marché géographique défini comprenait plusieurs ports et le marché de produits plusieurs types de trafic, tandis que l'encadré 5 montre qu'il peut arriver que chacun de ces services portuaires constitue un marché à lui tout seul.

### Encadré 25. Définition du marché, port de Helsingborg (Suède)

Dans l'affaire *Scandlines c. port de Helsingborg* (voir également l'encadré 16), la Commission européenne a défini le marché en cause comme étant la prestation de services portuaires et la mise à disposition d'installations à des compagnies de ferry réservées aux passagers dans le port d'Helsingborg. Elle a estimé que le pont d'Øresund (situé à environ 60 km au d'Helsingborg, entre Malmö et Copenhague), en concurrence avec le port, ne faisait pas partie du même marché de produits. Cela s'explique par le fait que la Commission considérait l'affaire du point de vue des armateurs des navires, pour lesquels le pont ne pouvait se substituer aux infrastructures portuaires. En revanche, le pont était en concurrence avec les compagnies de ferry.

S'agissant du marché de produits, la Commission a conclu qu'il y avait deux marchés distincts, l'un relatif à la fourniture de services portuaires à des compagnies de ferry et l'autre à des cargos. Comme il n'existe pas de port suédois qui puisse remplacer Helsingborg pour la mise à disposition d'installations portuaires aux compagnies de ferry, ce marché a été réduit au port d'Helsingborg lui-même.

En revanche, le marché relatif à la mise à disposition d'installations portuaires et à la prestation de services pour des cargos a été jugé notablement plus étendu car il existe des ports qui peuvent réellement se substituer à Helsingborg (comme Göteborg ou Malmö).

Source : Commission européenne (2004), *Scandlines Sverige AB c. port de Helsingborg*, Affaire COMP/A.36.568/D3.

### Encadré 26. Définition du marché, détroit de Bass (Australie)

Lorsqu'elle a étudié l'acquisition de Patrick Corporation Ltd envisagée par Toll Holdings Ltd, la Commission australienne de la concurrence et de la consommation (l'ACCC) a examiné ses conséquences sur le transport maritime entre l'Australie continentale et la Tasmanie. Dans cette affaire, elle a conclu que le marché en cause était la fourniture de services de transport maritime de vrac, de conteneurs et de remorques routières entre Melbourne et les ports du nord de la Tasmanie. Ainsi, l'ACCC a établi qu'il y avait plusieurs ports d'un côté du périmètre géographique du marché (Burnie, Devonport et Bell Bay) et que le marché comprenait différents produits.

Source : Commission australienne de la concurrence et de la consommation (2006), *Toll Holdings Limited's proposed acquisition of Patrick Corporation Limited*, *Public Competition Assessment*, mai.

### **Encadré 27. Définition d'un marché de services de remorquages au Royaume-Uni**

Une fusion entre SvitzerWijsmuller A/S et Adsteam Marine Ltd, deux sociétés qui proposent des services de remorquage, a été soumise à l'approbation de la Commission britannique de la concurrence (la CC) en 2007. Pour apprécier cette concentration, la CC a tout d'abord défini le marché en cause. S'agissant de la substituabilité du point de vue de la demande, elle a estimé qu'à court terme, le remorquage portuaire était un service essentiel dès lors qu'un navire avait choisi d'entrer dans un port donné. À plus long terme, la possibilité d'avoir recours à des navires qui ne nécessitent pas de remorquage est limitée en raison de la taille des compagnies de navigation. Pour ce qui est de la substituabilité de l'offre, la CC a conclu que les services de remorquage assurés par les terminaux au sein du même port pouvaient être remplacés par les services de remorquage effectués par le port (même si des considérations pratiques et/ou contractuelles pouvaient y faire obstacle) et faisaient partie du même marché pertinent.

S'agissant du marché géographique, la CC s'est intéressée au coût global d'accostage dans les ports, aux coûts engendrés par un changement de prestataire et à l'existence de ports de substitution. Elle a jugé que nombre d'utilisateurs étaient liés à des ports particuliers en raison d'infrastructures, de contrats ou d'investissements spécifiques et qu'il était peu probable que le coût du remorquage soit un paramètre important pour le choix d'un port.

La CC a conclu que le marché en cause était la prestation de services de remorquage par les ports et les terminaux dans les ports du Royaume-Uni considérés séparément.

Source : Commission de la concurrence (2007), *SvitzerWijsmuller A/S and Adsteam Marine Ltd, Final report*, février.

## **2.6. Conclusion : définition du marché**

La définition du marché est différente dans chaque cas mais, d'une manière générale, on peut tirer quelques conclusions de considérations théoriques et d'affaires qui ont eu lieu dans le passé.

- L'intensité de la concurrence entre les ports et d'autres infrastructures de transport est limitée, surtout en raison de la quantité de marchandises qui peut être acheminée par mer.
- Des marchandises de nature différente font en général partie de marchés distincts lorsque la nécessité de disposer d'infrastructures spécialisées rend la substitution difficile.
- Du point de vue géographique, on peut considérer que des ports se situent sur le même marché s'ils partagent une partie de leur arrière-pays portuaire. En revanche, nombre de ports isolés constituent un marché à eux seuls.

## **3. Les facteurs qui facilitent l'existence d'un pouvoir de marché dans les ports**

### **3.1. La notion de pouvoir de marché**

En s'appuyant sur une définition classique<sup>15</sup>, on estime qu'un port détient un pouvoir de marché s'il peut adopter des comportements sans tenir compte de ses clients et de ses concurrents dans une mesure appréciable. Le pouvoir de marché fait problème pour plusieurs raisons, lesquelles seront exposées dans la section 4, mais, avant cela, la présente section s'intéresse aux facteurs qui peuvent entraîner l'apparition d'un pouvoir de marché dans un port. Une analyse approfondie du pouvoir de marché doit tenir compte d'éléments comme la concurrence existante, la menace que représentent d'éventuels concurrents et la puissance d'achat des clients.

<sup>15</sup> Cour de justice des Communautés européennes (1979), *Hoffmann-La Roche & Co. AG c. Commission des Communautés européennes*, Affaire 85/76.



### **3.2. *La concurrence existante***

#### **3.2.1. *Parts de marché***

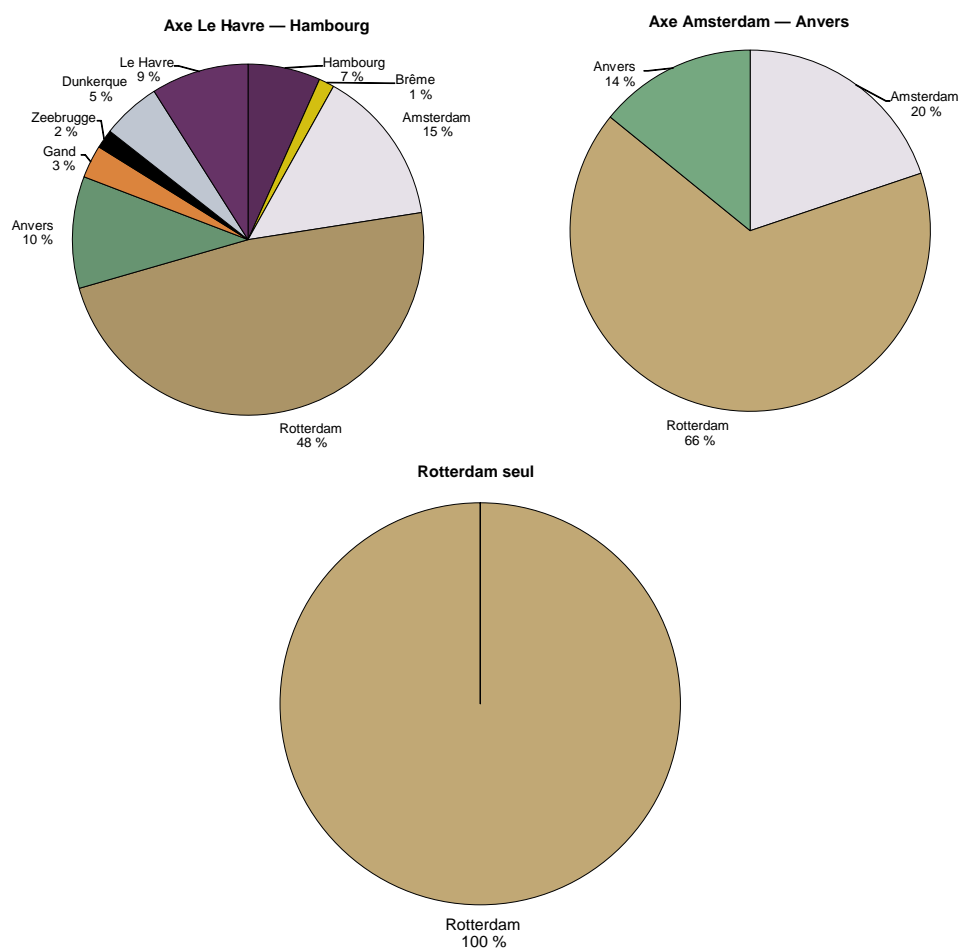
Lorsque l'on étudie un pouvoir de marché, on commence le plus souvent par examiner certains paramètres, comme les parts de marché. Cette étape constitue la suite logique de la définition du marché. En général, on s'attend davantage à découvrir un pouvoir de marché lorsque la part de marché d'un port est obstinément élevée.

Il peut également être intéressant d'analyser l'évolution des parts de marché, mais compte tenu du temps nécessaire pour modifier des infrastructures, il y a peu de chances que les parts de marché connaissent des changements importants sur une courte période sauf en cas de circonstances exceptionnelles (par exemple, si une nouvelle raffinerie ouvre près d'un port). Cette situation est amplifiée par le caractère contractuel des activités maritimes, ce qui a pour conséquence que certaines entreprises sont contraintes d'utiliser des ports donnés et n'ont pas la possibilité d'en changer. Si les parts de marché sont fluctuantes, cela indique qu'il y a davantage de concurrence car une baisse des prix, un accroissement des capacités ou des innovations effectués par un port particulier se traduisent par une augmentation du trafic.

D'un point de vue pratique, on peut calculer les parts de marché en s'appuyant sur les statistiques de volume de trafic ou sur la valeur des marchandises transportées. Cela peut se compliquer suivant que le résultat est exprimé en fret total ou en mouvements de navires car les volumes peuvent dépendre de la jauge des navires et de la taille maximale des navires qu'un port peut accueillir. Lorsqu'un marché de produits a été défini à partir d'une seule marchandise (par exemple le pétrole), le calcul en valeur ou en volume doit donner à peu près le même résultat en termes de parts de marché. Si le marché est constitué de plusieurs produits, c'est le calcul en valeur qui sera sans doute le plus pertinent.

L'encadré 6 et la figure 3 examinent le cas du port de Rotterdam. Ce dernier est situé relativement près de plusieurs autres ports. La figure 3 présente les parts de marché du port de Rotterdam en fonction de différentes définitions du marché tandis que l'encadré 6 expose certains éléments qui donnent à penser que ce port détient un pouvoir de marché.

**Figure 3 Parts de marché du port de Rotterdam en termes de trafic de vrac en fonction de différentes définitions du marché**



Note : Cette figure présente les parts de marché en fonction de différentes définitions du marché mais n'est donnée qu'à titre d'illustration : aucune démarche rigoureuse de définition du marché n'a été effectuée afin de vérifier la pertinence de ces définitions.

Source : port de Rotterdam.

### Encadré 28. Appréciation du pouvoir de marché du port de Rotterdam (Pays-Bas)

Le port de Rotterdam (HbR) bénéficie d'une situation géographique favorable, ce qui lui permet d'offrir un accès, depuis la mer, à un vaste arrière-pays portuaire et un accès immédiat à la plus importante voie d'eau européenne, le Rhin. Conjuguée aux investissements effectués et à des effets de réseau, cette situation a permis à Rotterdam de devenir le premier port européen pour presque tous les types de fret et le plus grand port à conteneurs d'Europe. Le chevauchement entre l'arrière-pays portuaire de Rotterdam et celui des ports de la zone ARA (Anvers – Rotterdam – Amsterdam) est très important alors que le chevauchement entre les ports de la zone ARA et le Le Havre ou les ports allemands est plus réduit.

Dans le cadre d'un rapport commandé par la Nma en 2004, une étude a été effectuée afin d'évaluer les conséquences prévisibles d'une hausse des prix. Cette étude a montré qu'en cas d'augmentation durable de 10 % du montant total du coût de passage portuaire à Rotterdam (droits de port plus coûts de manutention), 73 % du volume de marchandises qui ne serait plus acheminé via Rotterdam passerait par un des ports de la zone ARA, tandis que les ports allemands ne récupéreraient que 10 % de ce volume et que Le Havre et Dunkerque n'en tireraient aucun bénéfice. S'agissant de l'appréciation du pouvoir de marché, le rapport commandé par la Nma relevait par ailleurs que :

*« Les droits de port ne représentent qu'une très faible part du montant que doit acquitter le client final de HbR lorsqu'il choisit le port de Rotterdam. Ainsi, pour les conteneurs, notre analyse montre qu'une hausse des droits de port de 10 % ne conduit à une augmentation du coût total d'acheminement de la marchandise via le port de Rotterdam que de 0.4 % au plus. Cela peut inciter les intervenants à augmenter les tarifs de sorte que ceux-ci deviennent supra-concurrentiels : ce n'est que si le client final est extrêmement sensible au prix que cette hausse se traduira par un changement de port. De fait, compte tenu de l'élasticité de la demande révélée par les résultats de l'étude, nous estimons qu'HbR pourrait accroître sa rentabilité en augmentant les droits de port actuels applicables aux conteneurs et au vrac sec. »*

Indépendamment des éléments concrets fournis par l'étude, on a observé que très peu d'usagers changeaient de port en cas de modification des droits. Les usagers ne contrebalançaient pas le pouvoir de marché du port par une puissance d'achat compensatrice, comme le montre l'existence d'un barème de prix et le fait que tous les usagers ne peuvent négocier une remise.

Les conclusions laissent entendre que le port de Rotterdam pourrait pratiquer des tarifs plus élevés que ses rivaux.

*« En mettant bout à bout ces diverses observations, nous pouvons conclure que HbR a la possibilité d'accroître sa rentabilité en appliquant des droits de port et des tarifs de location de terrains plus élevés que ses concurrents. Nous proposons la définition de marchés géographiques pertinents pour dix types de marchandises, marchés dont le périmètre va du port de Rotterdam lui-même à la zone ARA plus Zeebrugge et Gand. »*

Notons que cela montre uniquement qu'HbR détient un pouvoir de marché (et non que ce port l'exerce effectivement).

Dans un rapport de suivi sur ces questions, la NMA a de nouveau constaté que les tarifs portuaires étaient très faibles en comparaison d'autres coûts de transport globaux (les coûts de transport maritime et terrestre jouant un rôle plus important dans le choix du port) et qu'une hausse de ces tarifs avait rarement conduit des usagers à changer de port. La Nma en a conclu que, s'agissant des infrastructures portuaires, le port de Rotterdam n'avait aucun concurrent et que le marché géographique se limitait au port de Rotterdam. La NMA a estimé que, sur tous les marchés de produits relatifs aux infrastructures portuaires à Rotterdam, HbR était en position dominante.

Source : CRA (2004), *Study on the Port of Rotterdam – Market Definition and Market Power*, établi pour la NMA, décembre et NMA (2005) *Havenbedrijf Rotterdam. Onderzoek n.a.v. de vraag of HbR beschikt over een economische machtspositie op het gebied van de terbeschikkingstelling van haveninfrastructuur en de uitgifte van bedrijfsterreinen en zo ja, of een gerede kans bestaat dat HbR hiervan misbruik kan maken*.

D'une manière générale, si, dans le cadre d'une démarche de définition du marché, on est arrivé à la conclusion que le marché en cause était constitué d'un seul port (comme, par exemple, dans l'affaire *Scandlines c. port de Helsingborg*, cf. encadré 11), alors la part de marché est automatiquement de 100 %.

### 3.2.2. Zones de sécurité

Certaines autorités de la concurrence ont recours à une notion de zone de sécurité (pourcentages de parts de marché en dessous desquels une entité ne peut être considérée comme étant en position dominante). Lorsque des ports fusionnent ou sont acquis par un même propriétaire, leur situation peut être examinée par les autorités de la concurrence. Ainsi, d'après le règlement CE sur les concentrations<sup>16</sup>, des parts de marché inférieures à 25 % sont supposées compatibles avec le marché unique et ne posent pas de problème.

À l'inverse, il arrive qu'il soit interdit à une entreprise de détenir une certaine part de marché car cela entraînerait implicitement un pouvoir de marché. Un exemple de ce type s'est produit dans le secteur portuaire au Chili où, lors de la réforme du régime de propriété des ports, l'Autorité de la concurrence a interdit à toute entreprise de détenir à elle seule plus de 15 % de la concession d'un port si elle possédait déjà plus de 15 % d'un autre terminal ou port situé dans la même région.

### 3.2.3. Fusions et acquisitions

Les autorités de la concurrence doivent avoir connaissance de l'intensité de la concurrence dans le secteur portuaire afin de rendre des décisions motivées en matière d'approbation des fusions et acquisitions.

Le marché mondial de l'exploitation des terminaux a fait l'objet de concentrations depuis 2006<sup>17</sup>.

#### Encadré 29. Une acquisition dans le port de Rotterdam (Pays-Bas)

En 2001, Hutchison Netherlands BV (Hutchison) a pris une participation dans ECT, le seul opérateur de terminaux à conteneurs du port de Rotterdam. À cette époque, Hutchison détenait déjà des parts dans les ports voisins de Felixstowe (Royaume-Uni) et Thamesport (Royaume-Uni) et contrôlait les terminaux à conteneurs de ces ports.

L'acquisition envisagée a été examinée par la Commission européenne, laquelle s'inquiétait de ce que cela puisse créer une position dominante dans les services d'acconage sur le marché du transbordement nord-européen. Elle a établi que l'entité fusionnée détenait une part de marché de 50 % avant la fusion. Même si elle a conclu que l'acquisition conduirait à une position dominante, la Commission l'a autorisée sous réserve de l'engagement suivant : ECT devait céder sa participation minoritaire dans la coentreprise Maersk Delta BV (MDBV), laquelle avait été créée dans le but d'installer un terminal concurrent dans une autre partie du delta. Ainsi, dans les faits, l'acquisition a été jugée acceptable compte tenu de la pression concurrentielle exercée par MDBV une fois que cette entreprise fut complètement indépendante d'Hutchison.

Source : Commission européenne (2001), *Affaire N° COMP/JV.55 Hutchison/RCPM/ECT*, juillet.

### 3.3. Concurrence éventuelle

Le degré existant de concurrence entre ports n'est pas le seul élément pertinent pour juger de la réalité d'un pouvoir de marché : le degré de concurrence éventuelle joue également un rôle. La menace d'entrée sur le marché de ports récemment construits (ou de nouveaux concurrents au sein d'un port) peut influencer sur le comportement des ports existants. Parmi les facteurs qui limitent la menace d'entrée sur le marché,

<sup>16</sup> Règlement (CE) n° 139/2004 du Conseil du 20 janvier 2004 relatif au contrôle des concentrations entre entreprises (« le règlement CE sur les concentrations »), Journal officiel L 24, 29.01.2004, pp. 1–22.

<sup>17</sup> Van de Voorde, E et Vanelslander, T (2009), *Market power and vertical and horizontal integration in the maritime shipping and port industry*, OECD and ITF Discussion paper 2009-02, janvier, figure 6.

on peut citer les barrières qui font obstacle à l'entrée d'un nouveau concurrent sur le marché, que ce soit en construisant un port entièrement neuf ou une nouvelle installation au sein d'un port existant.

### 3.3.1. Barrières à l'entrée

Les barrières à l'entrée sont des facteurs qui empêchent de nouvelles entreprises de pénétrer sur un marché ou les gênent dans cette démarche. Elles peuvent être importantes, surtout lorsque les ports sont intégrés dans des réseaux et des chaînes logistiques multi-acteurs. Dans le cas des ports les barrières sont globalement de trois types : économiques, réglementaires ou géographiques<sup>18</sup>.

#### Barrières économiques

Ces barrières résultent des avantages dont bénéficie l'entreprise en place en termes de coûts ; dans le cas des ports, ces avantages ont pour origine les facteurs suivants.

- **Économies d'échelle.** Si l'échelle minimale d'efficacité (niveau de production qui minimise le coût moyen) est grande par rapport au marché, celui-ci risque de ne pouvoir accepter qu'un seul port ou un petit nombre de ports. L'exploitation d'un port donne lieu à des coûts fixes importants du fait des infrastructures, par conséquent, l'échelle minimale d'efficacité peut être élevée.
- **Durée de vie des actifs.** Même si un nouvel entrant peut atteindre un volant d'affaires suffisant à long terme, cela peut prendre une certaine durée. Il est donc probable qu'il fonctionne à perte pendant quelque temps. De fait, les infrastructures ont en général une longue durée de vie, laquelle peut être supérieure à la durée à l'issue de laquelle un investisseur privé souhaitera récupérer son investissement.
- **Emplacement optimal du port.** Si l'entreprise en place jouit du meilleur emplacement pour ce qui concerne les moyens de transport dans l'arrière-pays portuaire, les nouveaux entrants peuvent être confrontés à des coûts plus élevés.
- **Coûts d'un changement de port pour le client.** La difficulté qu'ont les clients de pouvoir choisir un nouvel entrant sur le marché peut constituer une barrière à l'entrée. Cette question est particulièrement sensible sur les marchés où les clients sont concentrés, ce qui est le cas dans certains ports. Il est clair que le coût d'un changement de port est assez variable. Ainsi, un chargeur qui décide de changer d'installation de transbordement pourra le faire facilement tandis que pour un chargeur qui a réalisé des investissements spécifiquement pour un port les coûts induits par un changement risquent d'être plus élevés. Ces investissements peuvent porter sur du matériel de transport de surface spécifique, des installations portuaires (destinées, par exemple, à des contrôles avant livraison ou à de petites activités de réparation effectuées par un fabricant de véhicules) ou des contrats de longue durée.

#### Barrières réglementaires, légales et institutionnelles

Sur certains marchés, les autorités de régulation, les décideurs ou les autorités portuaires limitent en pratique les possibilités d'entrée sur le marché, surtout au sein d'un port existant. Ces restrictions peuvent être générales — par exemple en interdisant toute nouvelle entrée dans un port donné — ou décidées de manière discrétionnaire. De telles dispositions figurent parfois dans un bail ou dans une convention d'exploitation. Un opérateur de terminaux privé a par exemple pu obtenir une concession pour exploiter

<sup>18</sup>

Langen, P. de et Pallis, A. (2007), *Entry Barriers in Seaports*, Maritime Policy and Management, **34**:5, 427–40. Voir également OCDE(2005), *Policy roundtable: Barriers to entry*, DAF/COMP(2005)42.

une installation de manutention de conteneurs dans un port et jouit du droit exclusif de manutention des conteneurs dans ce port pendant toute la durée de la concession.

Le régime de propriété et la structure de financement des ports jouent également un rôle important. Dans de nombreux ports, les dépenses d'investissement ont été engagées par les pouvoirs publics sans obligation d'amortissement du coût. Cette situation désavantage un nouvel entrant privé par rapport à un port qui bénéficie d'investissements publics antérieurs dont il n'est pas obligé de recouvrer les coûts (voir la section 4.5).

### Barrières géographiques

La géographie terrestre et maritime peut jouer un rôle déterminant quant aux possibilités physiques d'entrée sur le marché portuaire. La nécessité de disposer de terrains situés à un emplacement adéquat est un des principaux facteurs qui peuvent limiter l'accès au marché.

Pour qu'un port entièrement nouveau puisse être réellement considéré comme un nouvel entrant, il faut qu'il fasse partie du même marché géographique que le port existant. Son emplacement doit également être tel qu'il soit baigné par des eaux qui permettent aux navires d'accoster. Les éléments à prendre en compte ici sont les coefficients de marée, les baies naturellement protégées, les eaux abritées ou la profondeur de l'eau. De plus, comme mentionné ci-dessus (dans le paragraphe sur les barrières économiques) même si l'entrée sur le marché est possible, l'emplacement peut être moins favorable que celui du port existant pour ce qui est du lien avec les transports de surface. Si tel est le cas, les deux ports sont des substituts imparfaits, du fait des différences relatives aux infrastructures de l'arrière-pays portuaire ou à l'accès à la mer. Enfin, quand un port qui vient d'être construit, il est souvent nécessaire d'engager des investissements importants pour le dragage, la construction des quais, les routes d'accès et les infrastructures portuaires. Ces investissements peuvent nécessiter un permis de construire.

L'entrée d'un nouveau concurrent dans un port existant peut aussi être limitée par des considérations géographiques : il est possible qu'il n'y ait plus de terrain ou d'espace libre sur le port pour des postes à quai, des terminaux ou d'autres installations supplémentaires.

#### 3.3.2. *Avantages des faibles barrières à l'entrée*

Des barrières à l'entrée faible augmentent la contestabilité d'un marché. Celle-ci contraint la ou les entreprise(s) en place à maintenir ses (leurs) tarifs au niveau de l'équilibre concurrentiel. En théorie, les prix sur un marché entièrement contestable sont les mêmes que sur un marché concurrentiel, même s'il n'y a qu'une seule entreprise en lice.

Un autre avantage des faibles barrières à l'entrée, c'est qu'un nouvel entrant peut mettre en œuvre des techniques, des méthodes et des modèles économiques nouveaux. Il est possible de construire un nouveau port de telle sorte que son exploitation future sera plus efficace que celle du port existant. En général, l'arrivée d'un nouvel entrant peut engendrer une dynamique commerciale sur un marché lorsque la demande est modifiée par des facteurs exogènes. De fait, la théorie de la « destruction créatrice » avance que l'arrivée de nouveaux concurrents et la disparition de certaines entreprises est nécessaire pour que les ressources soient utilisées au mieux.

L'encadré 8 présente un exemple de menace d'entrée sur le marché dans le secteur portuaire tandis que l'encadré 9 offre un exemple réel d'entrée sur le marché.

### Encadré 30. Une menace d'entrée à Melford, Nouvelle-Écosse (Canada)

Melford International Terminal (MIT) prévoit de construire un terminal à conteneurs, une plate-forme intermodale et un parc logistique sur une surface de 130 hectares en Nouvelle-Écosse (Canada). La première tranche de travaux devrait coûter 350 millions USD et le terminal comprendra deux postes à quai. La capacité initiale prévue est de 1.5 million EVP par an. L'activité commerciale devrait débuter en 2013.

Le nouveau terminus veut offrir à ses clients une solution plus rapide et plus efficace pour le trafic conteneurisé en provenance ou à destination de l'Amérique du Nord. Melford deviendrait le port continental en eau profonde nord-américain le plus proche de l'Europe, de l'Asie et du sous-continent indien.

Source : Melford International Terminal (2010), *Melford International Terminal and Maher Terminals Enter into Shareholder/Service Agreement*, juillet.

### Encadré 31. Un nouvel entrant, le port de Salalah (Oman)

Le port de Salalah (Oman) est un nouveau port de transbordement situé dans le golfe Persique. Pour les compagnies de navigation, il présente l'avantage d'être proche des routes commerciales qui relient l'Europe et l'Asie.

Le contrat de construction et d'exploitation du port a été signé en 1996 et le port a démarré ses activités en 1998 lorsque deux postes à quai eurent été achevés. Depuis sa mise en service, le port a connu un développement important et est maintenant l'un des plus grands ports du monde pour les terminaux à conteneurs, avec un trafic de près de 3.5 millions EVP par an.

Source : <http://www.salalahport.com/>.

## 3.4. Autres facteurs

### 3.4.1 Puissance d'achat compensatrice

En général, le droit de la concurrence autorise l'existence d'un pouvoir de marché si l'on est en mesure d'établir que les clients de l'entité concernée disposent d'un pouvoir de négociation suffisant<sup>19</sup>. Dans ce cas, la puissance d'achat d'un intervenant situé en aval empêche une entreprise située en amont (même si sa part de marché est élevée) d'agir indépendamment de ses concurrents dans une mesure appréciable.

La puissance d'achat compensatrice peut exister lorsque les clients ont une taille importante par rapport à celle de leur(s) fournisseurs(s). Parmi les autres facteurs qui influent sur la capacité des clients à exercer une pression sur leurs fournisseurs, on peut citer leur aptitude à changer de fournisseur, la crédibilité d'une menace consistant à se fournir par eux-mêmes et leur capacité à imposer leurs prix aux fournisseurs. Compte tenu de ces éléments, les gros clients des ports ont davantage de chances de disposer d'une puissance d'achat compensatrice que les petits clients.

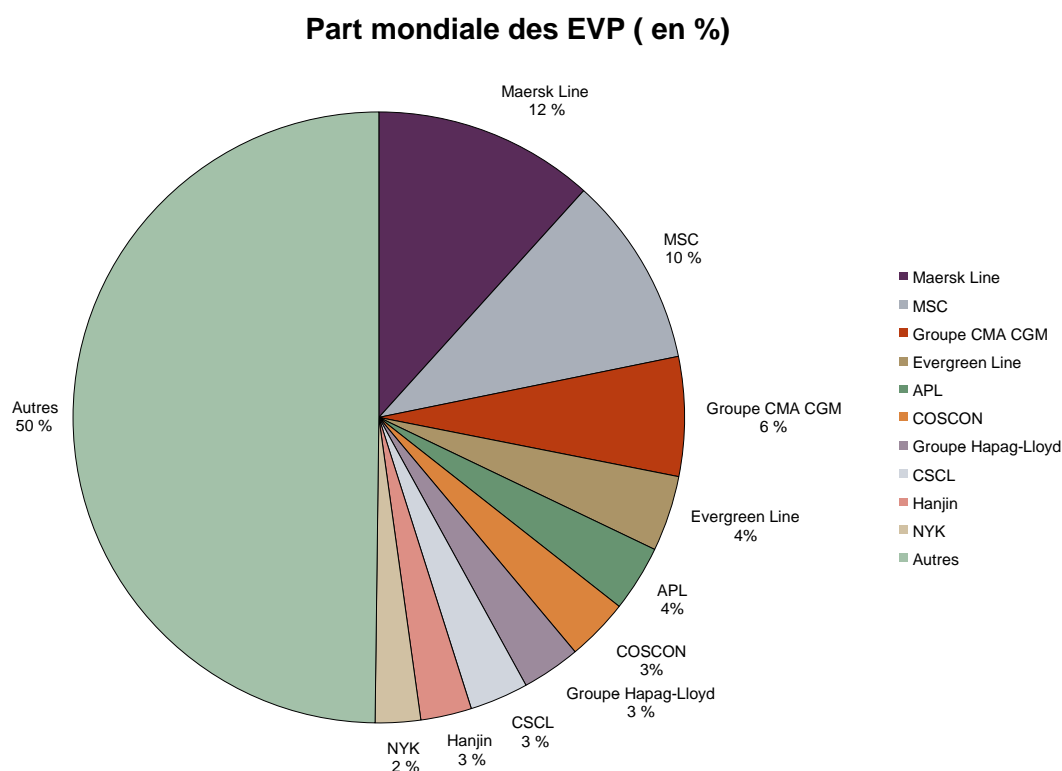
Les principaux clients des ports de marchandises sont généralement de grandes compagnies de navigation. La figure 4, qui représente la concentration du marché mondial du transport maritime de conteneurs, fait apparaître que plusieurs intervenants détiennent une part de marché appréciable (au niveau mondial, l'indice C4 s'élève à 32 %) ; à l'échelle régionale ou à celle d'un port, la concentration sera en général au moins aussi élevée. Par ailleurs, la concentration du marché s'est accrue avec le temps<sup>20</sup>. Ce

<sup>19</sup> Pour une étude de la puissance d'achat, voir OCDE (2008), *Monopsony and buyer power*.

<sup>20</sup> Van de Voorde, E et Vanelslander, T (2009), *op. cit.* figure 7.

degré de concentration parmi les usagers des ports pourrait entraîner l'apparition d'une puissance d'achat compensatrice, surtout dans les ports qui ne comptent qu'un seul client principal et où un monopsonne peut exister.

**Figure 4 Concentration du marché du transport maritime de conteneurs**



Source : CNUCED (2010), *Étude sur les transports maritimes 2010*.

Il existe essentiellement deux cadres d'analyse pour étudier la puissance d'achat dans les ports. La *théorie du monopsonne* postule l'existence d'un usager du port puissant (par exemple une compagnie de navigation) qui peut refuser les offres de service d'un port particulier, ce qui conduit à baisser le prix (uniforme) qui lui est proposé et par conséquent à rendre le coût de ses achats moins élevé que s'il était en concurrence avec d'autres acheteurs à ce niveau de la chaîne de valeur. La théorie du monopsonne suppose en général que les entreprises situées en amont sont impuissantes à contrer ce phénomène.

La *théorie du marchandage*, quant à elle, avance qu'un usager du port peut faire baisser le prix de ses achats en *menaçant* d'acheter moins (contrairement à la situation de monopsonne dans laquelle il achète effectivement moins). Ce cadre conceptuel suppose également que le marché portuaire en amont n'est pas parfaitement concurrentiel, car ce pouvoir de négociation ne peut exister que si, dans le cas contraire, les ports exerçaient un pouvoir de marché.

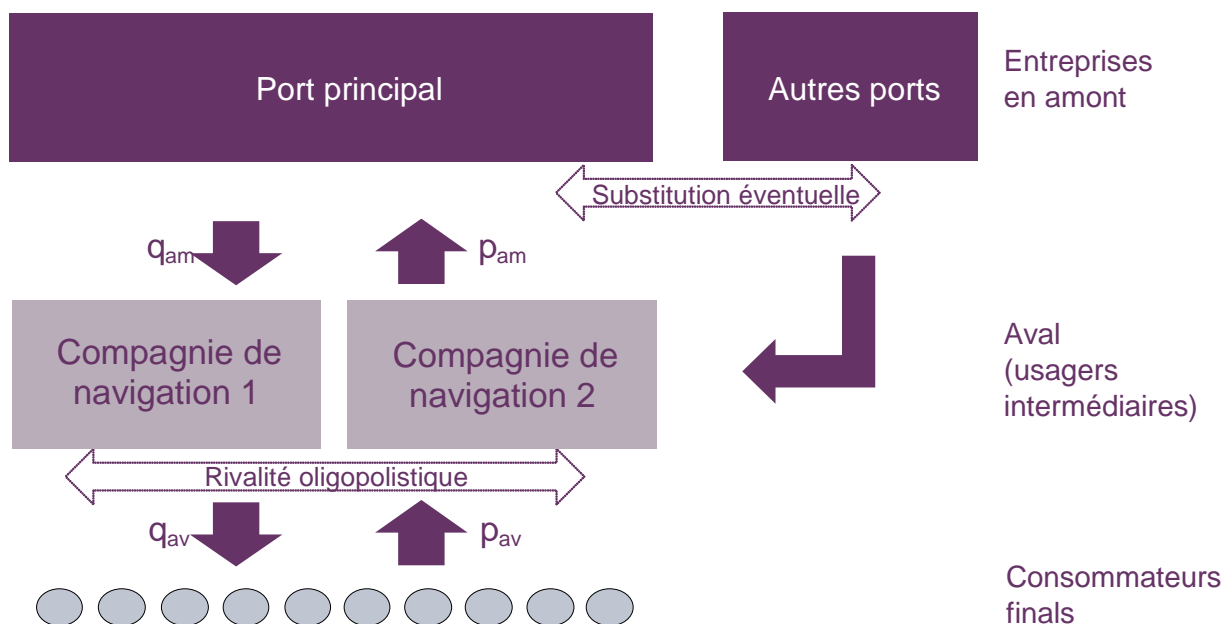
Les autres solutions dont disposent le port et les usagers du port constituent un des éléments essentiels de la théorie du marchandage. Cela signifie que toute analyse des facteurs qui influent sur l'importance de la puissance d'achat compensatrice retombe invariablement sur les autres solutions qui s'offrent au port et aux utilisateurs du port. Par ailleurs, les caractéristiques du marché peuvent avoir une incidence sur l'efficacité du processus de négociation.



- **Autres solutions pour les usagers du port** — Celles-ci dépendent de l'importance et de la substituabilité des autres ports ou modes de transport, laquelle est pour une large part fonction du type de marchandises transportées.
- **Autres solutions pour le port** — Celles-ci dépendent de la nature du marché en aval (les clients du port peuvent-ils constituer des groupes de négociation ?), des investissements spécifiquement réalisés par le port pour l'un des usagers, du fait de savoir si la perte d'un client ferait perdre le bénéfice des économies d'échelle et de la situation financière du port.
- **Caractéristiques du marché** — la conséquence la plus importante de la structure du marché sur le résultat des négociations concerne les pouvoirs de négociation inégaux, lesquels peuvent se traduire par un effet de vases communicants (ce qui constitue une éventuelle défaillance du marché au cours du processus de négociation). Cela se produit par exemple lorsque l'un des usagers du port est beaucoup plus gros que les autres et que le port adapte logiquement son offre au bénéfice de celui-ci. Dans certains cas, favoriser l'un des usagers du port est automatiquement préjudiciable aux autres usagers. Ainsi, une remise consentie à un client important peut être compensée en augmentant les tarifs des autres usagers. C'était d'ailleurs l'un des faits mis en avant par Scandlines dans l'affaire qui l'opposait au port d'Helsingborg (voir encadré 11).

Afin de comprendre comment les négociations se déroulent en pratique, la figure 5 représente schématiquement un marché auquel participent un port principal et un petit nombre de clients.

Figure 5 Puissance d'achat compensatrice



Source : Oxera.

Sur la figure, les quelques intermédiaires importants représentent les principaux clients du port. Dans cette situation, l'entreprise située en amont n'a pas d'autre choix que de vendre à ce petit nombre d'intervenants. De plus, comme le montre la figure, il est possible que les usagers intermédiaires fassent appel aux services d'une autre entreprise située en amont (dans notre exemple, la compagnie de navigation peut choisir le port régional qu'elle utilise). Ces deux éléments sont essentiels pour apprécier l'ampleur du

pouvoir de négociation des usagers intermédiaires, car ces éléments déterminent la crédibilité d'usagers intermédiaires qui menaceraient de réduire leurs commandes ainsi que ses effets sur l'entreprise située en amont.

Cependant, comme l'origine du pouvoir de négociation entraîne également un pouvoir de marché en aval, dans cette configuration (en supposant que la négociation porte sur le montant acquitté pour les services portuaires) il n'est pas certain que les consommateurs en tirent tous les avantages. Au contraire, il risque d'y avoir un partage des bénéfices entre les entreprises amonts et avals et les conséquences pour le consommateur sont incertaines. Favoriser la puissance d'achat compensatrice peut permettre de résoudre les problèmes de concurrence. Sur ce point, voir la section 5.

### *3.4.2. Pouvoir de marché collectif et collusion entre ports*

Les infrastructures portuaires nécessitent des investissements importants et ne sont en général pas divisibles. Pour cette raison, les ports sont souvent construits de manière à pouvoir prendre en charge la demande existante et attendue ce qui se traduit par des surcapacités. Celles-ci peuvent favoriser la concurrence entre les ports ou au sein d'entre eux du fait de la forte incitation à utiliser pleinement les capacités disponibles, ce qui peut conduire à une intense concurrence sur les prix.

Toutefois, dans certains modèles d'effets coordonnés, l'existence de surcapacités peut engendrer un risque de collusion. S'il y a une certaine coordination des prix, l'existence de surcapacités peut inspirer une stratégie de sanctions crédibles sous la forme d'une baisse de prix en réponse à tout intervenant qui ne respecterait pas la coordination.

### *3.4.3. Services portuaires — concurrence pour le marché ou au sein du marché ?*

Le degré de concurrence au sein du marché ne constitue pas toujours un critère pertinent. Lorsque l'exploitation de services portuaires est mise aux enchères de sorte que la concurrence pour le marché soit suffisante, les rentes de monopole doivent être reversées à l'État (ou à un autre vendeur) lors de la mise en vente. De même, suivant les critères retenus pour l'attribution de la concession, le vendeur peut décider de plafonner les tarifs ou de tirer le maximum de recettes possibles des enchères. Cette décision dépend en général de l'importance du financement public du secteur (en cas de subvention nette, le vendeur peut souhaiter récupérer le maximum d'argent lors des enchères) et de la situation budgétaire globale de l'État.

#### **Encadré 32. Concurrence pour le marché : l'exemple des concessions portuaires au Chili**

En janvier 2000, plusieurs nouveaux contrats de concession sont entrés en vigueur au Chili. Dans le cadre du nouveau dispositif, les terminaux portuaires ont été attribués sous forme de concessions intégrées à des entreprises privées. Auparavant, le régime en vigueur au Chili était un système à plusieurs exploitants, dans lequel des acconiers privés accédaient à des ports détenus et exploités par l'État.

Le régime des concessions a été adopté dans le but de susciter des investissements dans du matériel portuaire plus récent. Il était apparu que le régime précédent n'incitait guère les acconiers à investir dans du matériel de manutention moderne. Au départ, les pouvoirs publics avaient expérimenté un dispositif de concession non exclusive, mais celui-ci ne fonctionnait pas correctement. L'État a alors décidé d'attribuer des contrats de concession exclusifs pour l'exploitation et la maintenance des principaux terminaux à conteneurs chiliens ainsi que pour les investissements y afférents (dans une première phase, cela concernait les ports de Valparaíso, San Antonio et San Vicente). Cinq opérateurs portuaires de taille mondiale, entre autres, participèrent aux enchères (Hutchison, P&O, Stevedoring Services of America, HHLA et ICTSI).

Les enchères ont eu lieu simultanément. Les offres ont été jugées en premier lieu sur la grille tarifaire qu'elles proposaient mais la qualité de service était également prise en compte. Les tarifs proposés dans les offres incluaient quatre droits de port essentiels, les soumissionnaires disposaient donc d'une certaine marge de manœuvre en matière de prix, à condition que les tarifs proposés fussent transparents et qu'il n'y ait pas de discrimination injustifiée. Les

pouvoirs publics fixèrent à l'avance une valeur plancher pour les tarifs afin d'éviter de recevoir des offres d'entreprises qui miseraient sur une renégociation a posteriori. Si les soumissionnaires décidaient de faire une offre à la valeur plancher, ils devaient proposer un versement qui permettrait de les départager. En fin de compte, la plupart des offres ont proposé la valeur plancher.

Pour les terminaux qui n'appartenaient pas à l'État, les prix ont été fixés à un niveau minimal afin de rassurer les soumissionnaires.

En échange de l'attribution d'une concession, le concessionnaire devait verser un loyer annuel au propriétaire du port, qui était à capitaux publics. Ces paiements étaient définis à l'avance afin d'empêcher le versement de subventions implicites qui affecteraient la position concurrentielle des ports publics par rapport à celles des ports privés. Le loyer était fixé au taux d'intérêt sans risque (le taux des obligations de la Banque centrale) appliqué à la valeur des actifs du port. Toutefois, le loyer devait augmenter si le tonnage du port était en hausse, de sorte que les pouvoirs publics bénéficiaient d'un plancher en phase descendante et d'un partage des recettes en période de croissance. En fin de compte, ce dispositif a rapporté davantage d'argent que prévu aux ports publics, ce qui montre soit que les actifs portuaires étaient sous-évalués soit que le tarif plancher était trop élevé.

L'attribution de concessions a eu pour effets immédiats de faire baisser les tarifs portuaires et d'améliorer l'efficacité économique dans ce secteur.

Source : Banque mondiale (2000), *Port Concessions in Chile*, Public policy for the private sector note number 223, octobre.

### **3.5. Conclusion sur le pouvoir de marché**

En conclusion, pour apprécier le pouvoir de marché dans les ports, il faut prendre en compte plusieurs facteurs. De par la nature du marché portuaire, la concurrence est souvent réduite. Cela signifie qu'il n'est pas rare de conclure à l'existence d'un pouvoir de marché. De fait, lorsqu'une démarche de définition du marché a conduit à définir un marché étroit, il est probable qu'il existe un pouvoir de marché.

La concurrence éventuelle n'a en général que peu d'effets sur le pouvoir de marché d'un port, principalement du fait de l'existence de barrières économiques à l'entrée importantes, barrières qui concernent les économies d'échelle. L'autre facteur déterminant qui peut atténuer le pouvoir de marché dans les ports est la puissance d'achat compensatrice, laquelle peut exister car nombre des principaux clients des ports interviennent sur un marché aval concentré.

## **4. Les abus et les dommages éventuels**

Étant donné que certains ports ou une partie d'entre eux peuvent détenir un pouvoir de marché, le risque existe qu'ils abusent de ce pouvoir au détriment de leurs clients. Ce pouvoir peut par exemple leur permettre de pratiquer des tarifs supérieurs à ceux de l'équilibre concurrentiel théorique. Compte tenu de l'importance des ports pour le commerce et l'économie mondiale, des prix élevés peuvent être très préjudiciables aux consommateurs. Lorsque l'on s'intéresse à un abus de pouvoir de marché, il est normal de l'examiner à la lumière des préjudices que cet abus peut causer. La présente section passe en revue certains de ces abus.

### **4.1. Tarification excessive**

La tarification excessive est la pratique qui consiste à imposer directement ou indirectement des prix d'achat abusifs. Dans ce type de situation, la question centrale est en général d'établir le lien entre le prix facturé et la valeur économique du service ou du produit.

Dans certains espaces juridiques, notamment aux États-Unis, la tarification excessive n'est pas une infraction au droit de la concurrence. Tel n'est pas le cas dans l'Union européenne, où la Cour européenne de justice a défini la tarification excessive comme :

« la pratique d'un prix excessif sans rapport raisonnable avec la valeur économique de la prestation fournie<sup>21</sup> »

et a estimé que les questions importantes sont donc de savoir

« s'il existe une disproportion excessive entre le coût effectivement supporté et le prix effectivement réclamé et, dans l'affirmative, d'examiner s'il y a imposition d'un prix inéquitable, soit au niveau absolu, soit par comparaison avec les produits concurrents<sup>22</sup> »

Une tarification excessive est indiscutablement préjudiciable au consommateur car il paie un prix plus élevé. En raison de l'inefficience allocative qu'ils entraînent, ces prix élevés peuvent affecter le bien-être social. S'agissant des ports, les prix qui peuvent être excessifs peuvent être les droits de port généraux ou les droits qui concernent des services spécifiques comme le lamanage, l'électricité, le carburant ou l'eau.

En général, on peut établir l'existence d'une tarification excessive en comparant les prix aux coûts unitaires (ou les recettes aux coûts totaux) lorsque les coûts tiennent compte du coût du capital. Cependant, établir qu'il y a une différence positive entre le prix facturé et le coût de production (incluant un bénéfice raisonnable) n'est pas nécessairement suffisant pour conclure que les tarifs sont excessifs. Si le prix est en rapport avec la valeur économique du produit ou du service en aval, il peut être acceptable. Dans ce cas, l'entité située en amont tire un bénéfice dont profiterait dans le cas contraire l'entité située en aval. L'encadré 11 présente un exemple dans lequel les prix étaient supérieurs aux coûts mais n'ont pas été jugés excessifs.

### **Encadré 33. Accusations de tarification excessive dans le port d'Helsingborg (Suède)**

En 2004, la Commission européenne a rendu une décision concernant une plainte déposée par Scandlines Sverige (Scandlines) selon laquelle le port d'Helsingborg (Suède) avait abusé de sa position dominante et pratiqué des prix excessifs.

Scandlines exploitait des ferrys entre Elsenor (Danemark) et Helsingborg — l'itinéraire pour lequel la traversée maritime entre la Suède et le Danemark est le plus court. Trois compagnies faisaient circuler des ferrys sur cet itinéraire.

Le port d'Helsingborg prend en charge à la fois les ferrys et les marchandises, même si les ferrys représentent 90 % du trafic. De fait, c'est le plus grand port de ferrys de Suède en termes de volume.

Scandlines avançait que les droits de port pour les ferrys étaient excessifs car ils ne reflétaient pas les coûts réellement supportés par le port. De plus, elle avançait que les droits étaient discriminatoires car les compagnies de ferrys se voyaient imposées des tarifs supérieurs à ceux d'autres usagers du port. Par conséquent, la plainte reposait sur le fait que les tarifs étaient fixés en fonction des coûts portuaires complets et non des coûts associés à ces opérations particulières.

La Commission a conclu que le marché en cause était la prestation de services portuaires dans le port d'Helsingborg et, par conséquent, que le port était effectivement en position dominante. Lors de l'examen de la plainte, la Commission a tout d'abord vérifié si les droits étaient effectivement excessifs par rapport aux coûts, puis s'ils étaient abusifs.

La Commission a effectué une analyse qui comprenait un calcul du coût approximatif. Le calcul du coût portait principalement sur les charges d'exploitation et sur une répartition correcte des coûts fixes du port. La dépréciation des immobilisations détenues par la ville d'Helsingborg a été distinguée du loyer que le port d'Helsingborg devait verser. La Commission a relevé en passant que les recettes d'une entreprise devaient être supérieures aux coûts comptables

<sup>21</sup> Cour européenne de justice (1978), *United Brands c. Commission*, Affaire 27/76 (1978), Rec. p 207.

<sup>22</sup> *Ibid.*

afin de tenir compte du coût du capital. Elle a estimé que, même si les droits plus élevés appliqués aux ferrys ne généraient pas de bénéfices importants à l'échelle de l'entreprise globale, il était nécessaire de s'intéresser aux recettes, aux coûts et aux bénéfices du port relatifs à l'exploitation des ferrys indépendamment de ceux des autres activités. Le fait qu'elle se servait des bénéfices produits par ces services pour subventionner d'autres activités ne constituait pas nécessairement une infraction.

En s'appuyant sur le calcul du coût approximatif, la Commission a jugé qu'il apparaissait que les recettes étaient supérieures aux coûts supportés.

La Commission a ensuite examiné si les prix étaient abusifs. Afin de déterminer si tel était le cas par rapport à d'autres ports, elle a tenté de comparer les prix. Cela n'était pas facile car les infrastructures ne sont pas les mêmes, tout comme les services proposés, et certains clients versent des droits de port tandis que d'autres sont liés par des conditions tarifaires spécifiques.

Pour déterminer si les prix étaient abusifs, la Commission a étudié la relation entre les prix et la valeur économique des services, en y incluant la valeur immatérielle liée à l'emplacement du port, les coûts irrécupérables supportés par le port et la valeur du terrain. Toutefois, d'après les conclusions de la Commission, il n'était pas certain qu'il n'y avait pas de rapport raisonnable entre le prix des services et leur valeur économique.

Au bout du compte, la Commission a débouté le demandeur au motif que l'on pouvait établir un rapport raisonnable entre les prix et la valeur des services. Scandlines a ensuite fait appel de cette décision devant le Tribunal de première instance (aujourd'hui remplacé par le Tribunal) mais celui-ci a suivi la Commission.

Source : Commission européenne (2004), *Scandlines Sverige AB c. Port de Helsingborg*, Affaire COMP/A.36.568/D3.

#### 4.2. *Refus de vente*

En général, les ports ont le droit de choisir leurs partenaires commerciaux. Cependant, lorsqu'un port en situation de position dominante refuse de fournir un certain service à une entreprise qui lui en fait la demande, cela peut constituer un abus de position dominante<sup>23</sup>. Ce type d'abus peut se produire lorsqu'un port a des intérêts dans le marché aval et refuse de vendre un service ou de donner accès à des clients qui lui font concurrence sur ce marché.

Le refus de vente peut constituer un abus car il peut artificiellement restreindre la concurrence sur un marché aval et, par conséquent, entraîner une inefficience allocative et des prix plus élevés en aval.

Le secteur portuaire peut être affecté par le refus de vente car nombre d'entreprises qui exploitent des infrastructures portuaires interviennent également dans le domaine du transport de passagers et de marchandises. Certaines compagnies de navigation exploitent ou possèdent leurs propres terminaux au sein des ports. Ce degré d'intégration entre les entreprises peut les inciter à réserver l'accès à leurs installations à leurs propres activités aval. Cela étant, un refus de vente peut être bénéfique pour le consommateur si cela incite l'entreprise amont à réaliser les investissements qu'elle n'engagerait pas si elle devait laisser ses concurrents aval accéder à ses infrastructures. L'opérateur de terminaux peut par exemple investir dans du matériel de déchargement spécialisé et moderne qui permet de réduire le temps de déchargement. En revanche, si certains des avantages de ce nouveau matériel étaient partagés avec un concurrent aval, l'investissement pourrait ne plus être rentable.

Les encadrés 12 et 13 présentent deux décisions d'autorités de la concurrence qui concernent des refus de vente dans des ports.

<sup>23</sup>

Pour une étude plus détaillée du refus de vente, voir OCDE (2007), *Refusal to deal*.

#### Encadré 34. Refus de vente au port de Puttgarden (Allemagne)

Le Bundeskartellamt (l'Office fédéral allemand des ententes) a jugé que Scandlines, qui possède et exploite le port de ferrys de Puttgarden (Allemagne), avait illicitement empêché un concurrent d'accéder à ce port (cette décision de l'Office a été annulée et les investigations se poursuivent). Bastø Fosen et Eidsiva étaient deux compagnies de navigation norvégiennes qui désiraient avoir accès au port.

Scandlines était la seule entreprise à exploiter la ligne Puttgarden–Rødby et plusieurs de ses concurrents souhaitaient faire de même mais s'étaient vus refuser l'accès au port de Puttgarden. Le Bundeskartellamt a jugé qu'une entreprise en position dominante devait autoriser une autre entreprise à accéder à ses infrastructures contre une juste rémunération si l'autre entreprise ne pouvait entrer, pour des raisons légales ou pratiques sur le marché aval en tant que concurrent de la société qui était en position dominante.

Source : Bundeskartellamt (2010), *Bundeskartellamt opens up the Puttgarden-Rødby ferry route to competition*, janvier.

#### Encadré 35. Refus de vente au port de Marsden Point (Nouvelle-Zélande)

La Commission du Commerce de Nouvelle-Zélande a instruit une plainte déposée par International Stevedoring Operations Limited (ISO) contre Northport Ltd pour refus de vente. Northport Ltd (propriétaire du port de Marsden Point) a accordé un droit exclusif à sa propre coentreprise de services portuaires, ce qui empêchait ISO d'accéder aux installations nécessaires pour prendre en charge des marchandises. ISO menaçait Northport d'intenter une action en justice pour refus d'accès. Northport proposa alors un compromis en vertu duquel ISO pourrait accéder au port mais les cargaisons devraient être stockées loin de celui-ci et acheminées depuis ou à destination du port par la route, sans aucune modification des quais. Ce mode d'exploitation était nettement plus cher et faisait qu'il était non rentable pour ISO ou d'autres entreprises concurrentes de prendre en charge des marchandises dans le port de Marsden Point.

Il a été jugé que Northport avait fait usage de son pouvoir de monopole comme propriétaire du port afin d'empêcher la concurrence en aval dans le secteur de la manutention portuaire. Par suite de ces investigations, la Commission du commerce a rendu une ordonnance de ne pas faire contre Northport.

Source : Commission du commerce (2006), *First ever Cease and Desist Order issued against Northport*, août.

#### 4.2.1. Infrastructures essentielles

Les autorités de la concurrence imposent de fournir un critère leur permettant de déterminer si une entité peut être contrainte de donner accès à une installation contre sa volonté. Cette condition est éventuellement remplie si l'infrastructure peut être considérée comme « essentielle ».

- **Infrastructure essentielle** — un facteur de production est considéré comme une infrastructure essentielle s'il remplit trois conditions<sup>24</sup> :
  - Sans accès à l'infrastructure, les entreprises ne peuvent intervenir sur le marché en question. C'est pourquoi cet accès n'est pas seulement souhaitable, il est essentiel<sup>25</sup> ;
  - Il permet à l'entreprise qui refuse de mettre à disposition l'infrastructure essentielle de se réserver le marché secondaire (en question) ;

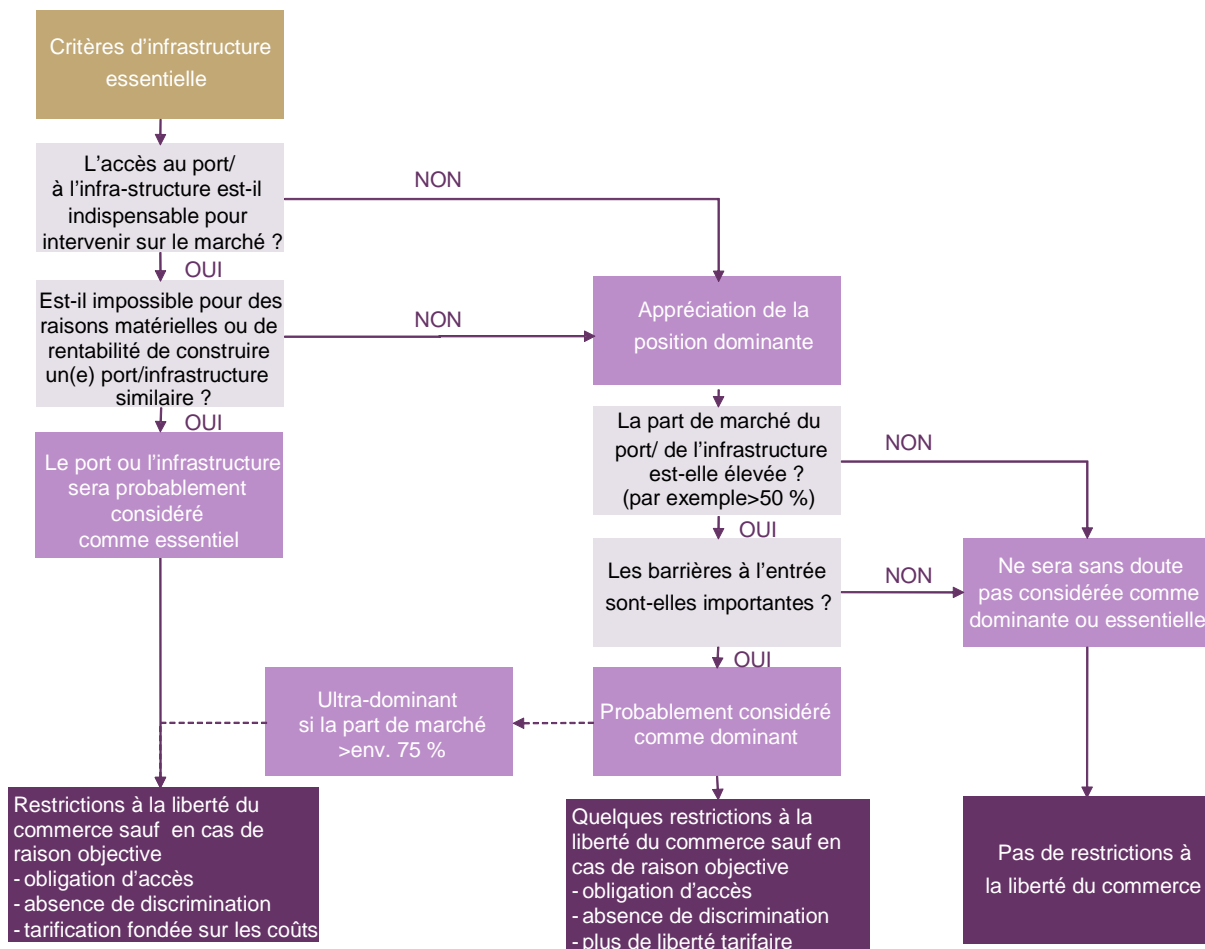
<sup>24</sup> Ces conditions ont été exposées pour la première fois dans l'affaire *Magill. Radio Telefis Eireann et Independent Television Publications Ltd c. Commission européenne*, affaires jointes C-241/91 P et C-242/91 P, Cour européenne de justice.

<sup>25</sup> Ainsi dans l'affaire *Ladbroke*, la Cour européenne de justice a considéré que les sons et images des courses de chevaux constituaient une composante « complémentaire » du service existant pour les parieurs, mais qu'elle n'était pas essentielle. Affaire T-504/93 [1997] *Ladbroke SA c. Commission*.

- Il n'y a aucune raison objective de refuser de mettre à disposition l'infrastructure concernée.

En outre, l'entreprise doit contrôler tous les facteurs de production éventuels sur le marché secondaire : il doit être impossible pour des raisons matérielles ou de rentabilité de construire une infrastructure similaire. Les conditions pour qu'une installation soit considérée comme essentielle sont donc relativement strictes, mais peuvent s'appliquer à des infrastructures fondamentales comme les ports. La figure 6 présente un exemple schématique de la manière dont une autorité de la concurrence peut déterminer si un port constitue ou non une infrastructure essentielle.

**Figure 6 Critères schématiques d'infrastructure essentielle pour les ports**



Source : Oxera.

#### **4.3. Monopole ou clauses d'entente de services portuaires intermédiaires potentiellement concurrentiels**

De nombreux services portuaires intermédiaires sont proposés par une autorité unique qui jouit d'un monopole, mais pourraient aussi être offerts par plusieurs entités sur des marchés concurrentiels distincts. Parmi ces services, on peut citer la manutention, l'incinération des déchets ou encore les services de pilotage et de remorquage.

On retrouve ici les préoccupations classiques au sujet des monopoles : les prix peuvent être élevés et les performances décevantes. Ces éléments doivent toutefois être évalués avec soin pour tenir compte des éventuels gains d'efficacité résultant des économies d'échelle, notamment lorsque les prestataires de services peuvent partager les coûts communs d'exploitation portuaire.

Même lorsque les prestataires de services ne dépendent pas de l'autorité portuaire, l'offre ne correspond pas nécessairement à celle d'une situation de concurrence parfaite. Ainsi, aux Pays-Bas, les quelque 450 pilotes portuaires sont associés au sein d'une société privée baptisée Nederlandse Loodsenorganisatie (NLO)<sup>26</sup>. Cette société jouit d'un monopole légal en tant que prestataire de services de pilotage dans les quatre ports néerlandais, en ce sens que nul n'est autorisé à être pilote s'il n'est pas un associé de la NLO. Ses tarifs sont soumis à une approbation de la Nma (l'autorité néerlandaise de la concurrence).

Outre les problèmes de monopole, il existe un risque de cartellisation. Si les prestataires de services intermédiaires forment une entente, il peut y avoir un surprix au détriment des consommateurs. L'encadré 14 présente un exemple réel de cartel dans les services de remorquage.

#### **Encadré 36. Une entente relative aux services de remorquage dans le port de Setúbal (Portugal)**

En 2007, l'autorité portugaise de la concurrence a infligé une amende à trois prestataires de services de remorquage (Rebonave, Rebosado et Lutamar) qui exerçaient leurs activités dans le port de Setúbal (Portugal) pour entente illicite. Elle a jugé que les trois prestataires s'étaient entendus sur les prix et avaient partagé leur clientèle.

L'entente sur les prix s'était traduite par des prix sensiblement plus élevés que ceux qui étaient pratiqués avant la formation du cartel.

Le partage de clientèle fonctionnait grâce à un accord préalable qui permettait à chacun des prestataires de conserver son portefeuille de clients. Lorsqu'un client passait d'un fournisseur à un autre, un mécanisme de compensation opérait en faveur du prestataire qui avait perdu le client. Cela se traduisait par une sous-traitance obligatoire. Ce mécanisme dissuadait les prestataires de ne pas respecter l'entente conclue.

L'autorité de la concurrence a infligé aux trois entreprises une amende totale de 185 000 EUR et a ordonné que la décision soit publiée au journal officiel portugais et dans un journal national.

Source : Autoridade da Concorrência (2007), *L'ADC détecte une entente dans le port de Setúbal et inflige une amende de 185 000 EUR*, avril.

#### **4.4. Ventes liées et groupées de services auxiliaires**

La vente liée et groupée de services se produit lorsque des prestations distinctes sont vendues dans le cadre de la même opération. Ces dispositions peuvent prendre des formes diverses.

- Vente groupée pure : deux produits, A et B, ne sont vendus qu'ensemble, ils ne peuvent être achetés individuellement. L'accès à un port peut par exemple être conditionné à l'utilisation de services d'acconage.
- Vente groupée mixte : outre qu'ils peuvent être vendus séparément, les produits A et B sont vendus sous forme d'une formule A-B pour un prix inférieur à la somme des prix de A et de B. L'incinération des déchets et les services de tri peuvent ainsi être groupés.

<sup>26</sup>

<http://www.loodswezen.nl/>



- Ventes liées : un client qui veut acheter A doit aussi acheter B. Il est possible d'acheter B sans acheter A, ce qui explique pourquoi c'est une vente liée et non (purement) groupée. Les articles à vendre sont donc B tout seul et la formule A+B. Ainsi, un port pourrait vendre des services de pilotage (B) et de services de remorquage (A) seulement si le pilotage est également commandé. À titre d'exemple, voir l'encadré 15.

#### **Encadré 37. Vente liée de services auxiliaires dans le port de Nelson (Nouvelle-Zélande)**

En 1995, la Tasman Bays Marine Pilots Limited (TBMPL) a déposé une plainte pour vente liée de services auxiliaires contre le port de Nelson. À la suite de cette plainte, la Commission du commerce de Nouvelle-Zélande a intenté une action en justice contre le port devant la High Court.

Il a été jugé que le port était en position dominante sur le marché du remorquage, mais pas pour le pilotage. La TBMPL avait avancé que le port refusait de louer ses remorqueurs si l'on n'engageait pas également les services de ses pilotes. Il a été jugé que cela constituait un abus de position dominante : le port a été sanctionné à hauteur de 300 000 NZD et s'est vu interdire de continuer à appliquer de telles méthodes.

Dans le même temps, le port de Nelson offrait également une réduction de 5 % aux clients qui commandaient tous les services et avait défini un prix minimal pour l'engagement de ses pilotes qui était inférieur à leur coût de revient. Il a été jugé que ces deux démarches avaient pour objectif d'affaiblir très sensiblement la concurrence et le port a été condamné à une amende de 100 000 NZD et s'est vu interdire de pouvoir proposer des réductions sur la vente groupée de ses services.

Source : Commission du commerce (1995), *Commission wins \$500,000 penalties against Port Nelson Limited*, juillet.

Le secteur portuaire est particulièrement concerné par les ventes liées et groupées car il comporte une gamme de services très divers, souvent effectués par des prestataires qui sont en fin de compte détenus par le port lui-même.

Les effets des ventes liées ou groupées sur le bien-être du consommateur peuvent être ambivalents. Les préjudices possibles résultant de ces pratiques sont de deux sortes. Tout d'abord, il y a un risque d'effet de levier d'un produit sur un autre. Cela peut prendre la forme de subventions croisées entre le produit qui dispose d'un pouvoir de marché et le produit soumis à la concurrence. Ensuite, les ventes groupées créent une barrière à l'entrée en obligeant les nouveaux entrants à trouver des clients qui n'ont pas besoin d'un des éléments de la formule tarifaire ou à entrer sur le marché en proposant le même type de formule commerciale.

Les effets préjudiciables présentés ci-dessus peuvent toutefois être contrebalancés. Les économies d'échelle résultant de la fourniture conjointe en cas de vente groupée ou liée peuvent permettre d'obtenir des gains d'efficacité sur les coûts. Dans un port, par exemple, ces gains peuvent résulter du partage des coûts fixes d'un terminal. Acheter plusieurs prestations à une même entreprise peut permettre à un usager du port de diminuer ses coûts de transaction. Les clients peuvent également obtenir une meilleure garantie en termes de qualité et de sécurité s'ils achètent leurs produits auprès du même fournisseur.

#### **4.5. Neutralité concurrentielle/aides d'État**

Il y a neutralité concurrentielle lorsque, sur un marché, tous les fournisseurs de biens et de services sont sur un pied d'égalité, qu'ils soient publics ou privés<sup>27</sup>. En général, les principaux obstacles à la neutralité concurrentielle ont pour origine les avantages dont les entreprises publiques peuvent bénéficier.

<sup>27</sup>

Pour une analyse de la neutralité concurrentielle, voir OCDE (2009), *State Owned Enterprises and the Principle of Competitive Neutrality* et OCDE (2004), *Regulating Market Activities by the Public Sector*.

Dans l'UE, ce problème concerne particulièrement les aides d'État, une forme de soutien des pouvoirs publics à une entité qui peut avoir un effet néfaste sur le commerce entre les États membres.

### **Encadré 38. La neutralité concurrentielle en Australie**

L'Australie a mis en place une politique de neutralité concurrentielle spécifique qui repose sur le principe que les entreprises publiques qui interviennent sur des marchés concurrentiels ou potentiellement concurrentiels ne doivent pas bénéficier d'avantages concurrentiels par rapport au secteur privé du fait que leurs capitaux sont publics. En Australie, le principe de la neutralité concurrentielle ne s'appuie pas sur le droit de la concurrence mais a été élaboré et mis en œuvre au sein des pouvoirs publics. À l'échelle nationale, cette démarche est sous la responsabilité du ministère australien des Finances et non des autorités de la concurrence.

En Australie, l'objectif de ce dispositif est de supprimer les distorsions de concurrence qui apparaissent sur un marché du fait qu'une entreprise est publique. Il s'applique à tous les organismes publics dès qu'il y a un marché à condition que les avantages l'emportent sur les coûts de mise en œuvre.

Les principes essentiels de la neutralité concurrentielle sont les suivants :

- la neutralité fiscale, qui impose qu'une entreprise publique ne bénéficie pas d'exonérations ou d'avantages fiscaux dont ne peuvent profiter ses concurrents ;
- la neutralité en matière d'endettement, qui impose qu'une entreprise publique soit soumise aux mêmes coûts d'emprunt que ses concurrents ;
- la neutralité réglementaire, qui impose qu'une entreprise publique ne soit pas avantagée par la réglementation qui s'applique à elle par rapport à ses concurrents ;
- un taux de rendement commercial ; les entités doivent dégager un résultat suffisant pour justifier le maintien d'actifs à long terme dans l'entreprise et verser des dividendes commerciaux ;
- les prix doivent refléter les coûts, ce qui impose de fixer des tarifs qui tiennent pleinement compte de l'attribution des coûts. Ce principe a été établi notamment pour s'assurer que les fonds publics versés pour des activités non commerciales et sans but lucratif ne servent pas à subventionner des activités commerciales.

Source : OCDE (2009), *State Owned Enterprises and the Principle of Competitive Neutrality*, DAF/COMP(2009)37.

La neutralité concurrentielle permet de garantir une concurrence réelle sur les marchés en question, mais elle contribue également à une meilleure utilisation des fonds publics.

Dans les ports, la neutralité concurrentielle risque habituellement d'être compromise lorsque des investissements ont été effectués il y a longtemps par une autorité publique et que leur coût n'a plus besoin d'être amorti par le port via des droits. Comme le montre l'encadré 16, cette situation peut, en termes de coûts, désavantager un port ou un terminal concurrent qui tente d'amortir le coût de ses infrastructures.

Lorsqu'elle est accusée de ne pas respecter la neutralité concurrentielle, l'autorité publique peut se défendre en démontrant que ses résultats sont équivalents à ceux qu'exigerait un investisseur privé.

Lorsque de nouveaux produits et services sont proposés, les mesures incitatives et les remises constituent des pratiques commerciales courantes. Si celles-ci sont mises en place par un port détenu par l'État, cela pose le problème de savoir si ces mesures commerciales provoquent des distorsions de concurrence. Si l'on peut établir que des investissements, des contrats ou d'autres actions commerciales engagés par un organisme public sont suffisamment rentables pour qu'un investisseur privé eût agi de même, il n'y a pas de violation de la neutralité concurrentielle.

### **Encadré 39. Examen des aides d'État dans le port de Reykjavik (Islande)**

Le port de Reykjavík est détenu par la ville de Reykjavík et est donc à capitaux publics. En 2000, le port a acquis des actions de Dráttarbrautir Reykjavíkur (DR), société qui détient et exploite des cales servant à la construction et à la réparation des navires. Il a acheté ces actions à Stáltak, une société qui construit des navires et propose des services de réparation de navires dans le port de Reykjavík.

Une plainte a été déposée. Elle avançait que cette opération constituait une aide d'état en faveur de Stáltak, car le prix versé pour les actions était trop élevé. La conséquence supposée de cette acquisition était qu'elle pouvait constituer une aide financière pour Stáltak, aide qui lui permettait de proposer des services liés à ses cales à un prix plus bas que ses concurrents. Le plaignant affirmait donc que le port de Reykjavík avait affecté la position concurrentielle des ports qui proposaient des services liés aux cales (mise en cale sèche et réparation de navires) dans la région de Reykjavík.

Entre autres affirmations relatives au prix payé pour les actions, le plaignant avançait qu'il était patent que DR subissait des pertes d'exploitation et que la société serait dissoute dans les deux ans. En parallèle de l'achat d'actions, un contrat de location avait été signé entre DR et Stáltak.

En fin de compte, l'Autorité de surveillance AELE a jugé que l'acquisition d'actions et les autres opérations étaient licites et a mis fin à son enquête.

Source : Journal officiel de l'Union européenne (2010), *Invitation à présenter des observations en application de l'article 1<sup>er</sup>, paragraphe 2, de la partie I du protocole 3 de l'accord entre les États de l'AELE relatif à l'institution d'une Autorité de surveillance et d'une Cour de justice au sujet d'une aide présumée accordée par le port de Reykjavik*, 2010/C, 54/2, mars.

#### **4.6. Conclusion : abus de pouvoir de marché**

Il existe des possibilités très diverses d'abus du pouvoir de marché dans le secteur portuaire. Elles résultent principalement des divers degrés d'intégration entre les entreprises qui mettent à disposition les infrastructures et les usagers des ports et de la difficulté qu'il y a à construire de nouvelles installations portuaires. Toutefois, il faut évaluer la situation avec soin dans chaque cas afin de déterminer si un abus suspecté constitue véritablement un abus ou simplement un comportement innocent qui trouve sa source dans la nature du secteur ou un investissement passé.

### **5. Comment remédier aux problèmes de concurrence dans les ports ?**

Lorsqu'un problème de concurrence se pose, il existe plusieurs solutions possibles. Certaines démarches ont pour objet de faciliter la concurrence dans le but de mettre fin au problème ou à l'infraction relative à la structure du marché. Toutefois, dans certains cas, il n'est pas possible d'instaurer une concurrence en modifiant le droit de la concurrence et une régulation est nécessaire, soit pour instaurer une concurrence, soit pour reproduire les effets de la concurrence.

#### **5.1. Résoudre les problèmes liés au pouvoir de marché**

Pour régler les problèmes de concurrence, une solution possible consiste à s'attaquer directement au pouvoir de marché lui-même et à mettre en place des mesures grâce auxquelles un port ne sera plus en position dominante. Cette méthode ne peut être appliquée que lorsqu'il existe des possibilités physiques de diviser les différents éléments du marché en cause tel qu'il a été défini. Ainsi, si le marché en cause est un port constitué d'un seul terminal, il peut n'y avoir aucun moyen de réduire sa domination.

Lorsqu'il est possible d'effectuer une séparation, celle-ci peut être effectuée entre plusieurs ports ou au sein d'un même port.

### 5.1.1 Cession qui concerne plusieurs ports

Lorsqu'il a été établi qu'un marché comprenait plusieurs ports et qu'une entité possédait chacun de ces ports (ou en détenait une partie), il est possible, pour réduire la domination de cette entité, de l'obliger à céder ces participations dans les ports. L'encadré 18 présente un exemple de ce type de cession.

#### Encadré 40. Cession de ports, Transports Canada

Dans le passé, la plupart des ports régionaux ou locaux du Canada étaient détenus par Transports Canada, un ministère fédéral. Durant les années 80 et 90, ces ports pâissaient de surcapacités et d'inefficiences qui l'empêchaient de rivaliser avec leurs concurrents. En outre, le rendement des fonds que le contribuable canadien avait investi dans ces ports était insuffisant.

Depuis 1996, Transports Canada a mis en place un Programme de cession des ports régionaux et locaux qui consiste à transférer la propriété et l'exploitation des ports à d'autres ministères ou organismes, ce qui contribue à responsabiliser les échelons locaux. Si le gouvernement fédéral ou local ne détient pas de participation dans un port, la cession est effectuée à l'échelle locale et des groupes d'intérêts locaux constituent une personne morale afin de prendre le contrôle du port.

Un Fonds de cession des ports accélère la procédure de cession et apporte les fonds aux groupes d'intérêts locaux afin qu'ils puissent devenir propriétaires et exploiter le port en tenant compte de la situation commerciale locale. Ces fonds doivent servir directement à l'exploitation du port ou à rendre les installations portuaires existantes conformes aux normes minimales de sécurité ou d'exploitation.

À la date du 31 mars 2005, 459 des 549 installations relevant des Programmes portuaires et cession dans tout le Canada avaient été cédées ou radiées d'une autre façon du répertoire d'origine de Transports Canada.

Source : Transports Canada (2005), *Rapport annuel sur la cession et l'exploitation des ports 2004-2005*.

### 5.1.2 Cession interne à un port/séparation structurelle

Nombre de ports de grande taille sont composés de terminaux distincts, ceux-ci pourraient donc être détenus par des entités différentes. Par conséquent, s'il a été jugé qu'un port était en position dominante et que cette situation n'était pas satisfaisante, une séparation patrimoniale entre les différents terminaux portuaires peut contribuer à résoudre ce problème<sup>28</sup>. Cela impose que les terminaux indépendants exercent des pressions concurrentielles les uns sur les autres, ils doivent donc être capables de prendre en charge les mêmes types de clients ou de marchandises. L'encadré 19 présente un exemple dans lequel des terminaux qui pouvaient prendre en charge des céréales et qui faisaient partie du même port se sont vus imposer une séparation patrimoniale.

<sup>28</sup>

Pour une analyse de la séparation structurelle, consulter également OCDE (2001), *Recommendations and best practices: Recommendation of the council concerning Structural Separation in Regulated Industries*.

#### **Encadré 41. Cession interne à un port, port de Vancouver (Canada)**

En 2002, le Tribunal de la concurrence a jugé que l'acquisition par United Grain Growers Limited (UGG) des terminaux portuaires détenus par Agricore Cooperative Ltd (Agricore) dans le port de Vancouver entraînerait un affaiblissement notable de la concurrence sur le marché des services de manutention des céréales dans le port de Vancouver. Pour cette raison, le Bureau de la concurrence a cherché à remédier à ce problème. En novembre 2001, il a annoncé qu'il demanderait au tribunal d'ordonner à UGG de céder un des terminaux du port de Vancouver. Au départ, il y a eu un débat pour savoir si la cession d'une partie d'un terminal était suffisante, avant qu'il ne soit convenu qu'un terminal entier serait cédé. En 2007, Terminal West Ltd a été retenu comme acheteur du terminal céréalier AUV d'Agricore.

Source : Bureau de la concurrence (2007), *La Commissaire de la concurrence approuve le choix de l'acheteur d'un terminal portuaire à Vancouver*, avril.

### **5.2. Résoudre les problèmes de tarification**

La tarification excessive fait partie des abus possibles étudiés dans la section 4. Si l'on ne peut intervenir sur le marché pour traiter ce problème directement en intensifiant la concurrence, une solution possible consiste à mettre en place une réglementation des prix. Cette méthode est efficace lorsque l'on a pu établir qu'un port ou un service portuaire constituait un monopole naturel, ce qui était le cas, par exemple, dans le port de Bunbury.

*« Le marché de la prestation de services de remorquage à Bunbury constitue un monopole naturel [...] L'offre de services de remorquage dont doit disposer le port est depuis longtemps relativement stable et il est peu probable qu'elle connaisse une augmentation sensible dans un avenir prévisible. Eu égard à sa taille, ce marché ne peut accueillir plus d'un opérateur de remorquage compte tenu des coûts nécessaires à la mise en place et à l'exploitation de services de remorquage dans le port. La prestation de tels services n'est donc pas ouverte à la concurrence [...] »<sup>29</sup>*

#### **5.2.1. Réglementation des prix**

Lorsque l'accès à un port ne pose pas de problème, la réglementation des prix peut néanmoins se justifier si le port ne subit qu'une faible pression concurrentielle. Une telle réglementation offre une solution immédiate aux problèmes de tarification de l'accès, même si une analyse détaillée est souvent nécessaire afin de s'assurer que les tarifs réglementés sont fixés au niveau le plus juste. L'encadré 19 présente un exemple réel de réglementation des prix.

<sup>29</sup>

Australian Trade Practices Reporter (2000) 41-752, 40,720

#### Encadré 42. Réglementation des tarifs portuaires dans le Queensland (Australie)

Le système australien comprend plusieurs autorités de régulation publiques dont chacune fixe la réglementation pour les ports situés dans des zones éloignées les unes des autres. Ainsi, l'Autorité de la concurrence du Queensland (QCA) détermine les conditions raisonnables et justes (y compris s'agissant des prix) d'accès aux terminaux des ports du Queensland. Tout d'abord, elle établit si les ports proposent des services qui doivent être qualifiés de monopoles du fait qu'il ne serait pas viable économiquement qu'une autre entreprise offre ces services. Si un port a été qualifié de monopole, la QCA réglemente ses tarifs, même si les ports peuvent volontairement prendre des engagements tarifaires.

Le niveau des prix plafonds a fait l'objet de débats. En 2007, la forte croissance de la demande de ressources, tirée par la Chine, a provoqué des queues de navires à l'entrée des ports. Ceux-ci ont refusé que les navires pénètrent dans les ports si les prix plafonds n'étaient pas relevés dans des proportions importantes. Ainsi, il a été décidé que le Dalrymple Bay Coal Terminal serait soumis à la réglementation en vertu du Queensland Competition Act. Ses recettes sont déterminées en fonction d'une méthode qui repose sur la base d'actifs régulés (BAR) et sur le coût moyen pondéré du capital (CMPC) (c'est-à-dire que les actifs qui servent à mener à bien les activités réglementées sont évalués et que l'entité est autorisée à dégager un bénéfice équivalent à ce que les investisseurs demandent au minimum). Cela rejoint la démarche analytique classique qui consiste à calculer un bénéfice net minimal (dépenses de fonctionnement, rendement du capital, dépréciation d'actifs) et à en déduire un prix plafond. Le CPMC est évalué à partir de données de marché et peut être actualisé en cas d'évolution de ces données dans le temps. Dans ses décisions, la QCA a eu recours au coût de remplacement net d'amortissements pour apprécier la BAR.

Source : Autorité de la concurrence du Queensland (2010), *Dalrymple Bay Coal Terminal 2010 Draft Access Undertaking*, septembre.

Dans le port de Singapour, les activités portuaires font elles aussi l'objet d'une régulation. L'Autorité maritime et portuaire de Singapour a une mission de délivrance des autorisations et de régulation. Elle délivre les autorisations pour les services et les installations portuaires et met en place des mécanismes de contrôle des prix qui prévoient des prix plafonds.

#### Encadré 43. La régulation des terminaux méthaniers en France

Trois terminaux méthaniers sont aujourd'hui en service en France : Fos Tonkin, Fos Cavaou et Montoir-de-Bretagne. Le premier et le dernier ces terminaux sont la propriété de Gaz de France (GdF) et ont été construits il y a plus de 20 ans.

La Commission française de régulation de l'énergie (CRE) s'occupe de la régulation de ces terminaux afin de mettre en place des tarifs à long terme qui contribuent à la sécurité des approvisionnements. Le montant des tarifs est fixé en fonction des recettes que l'opérateur est autorisé à percevoir, en tenant compte des charges d'exploitation, des dépréciations d'actifs et du coût du capital. La BAR est calculée en fonction du coût économique actuel.

La CRE exerce également une activité de régulation sur ces terminaux afin de les rendre plus accessibles, sachant que l'offre concurrentielle de services de terminaux méthaniers est limitée. La CRE a indiqué que :

*« pour favoriser le développement de nouveaux terminaux GNL, les investisseurs doivent avoir une priorité pour l'accès aux capacités des installations qu'ils ont développées, dans des conditions permettant un bon fonctionnement du marché. La CRE préconise qu'aucun fournisseur ne puisse avoir accès à plus des 2/3 de la capacité d'un nouveau terminal GNL en France, et que, tant que l'offre concurrentielle est insuffisamment développée, au moins 10 % de la capacité du nouveau terminal puissent être réservés à l'ensemble des fournisseurs, pour des contrats de court terme, dans des conditions non discriminatoires. »*

En 2009, peu de temps avant que le nouveau terminal de Fos Cavaou n'entre en service, la Commission a rendu une décision relative à des préoccupations portant sur le fait que GdF verrouillait l'accès du marché à ses concurrents. GdF a proposé des engagements pour apaiser ces inquiétudes, engagements qui ont été acceptés et rendus obligatoires par la Commission. GdF a proposé de céder des capacités à long terme pour les terminaux méthaniers de Montoir-de-Bretagne (une tranche d'un Gm<sup>3</sup>/an à partir d'octobre 2010) et de Fos Cavaou (deux tranches d'un Gm<sup>3</sup>/an et une tranche de 0.175 Gm<sup>3</sup>/an à partir de janvier 2011) à des tiers. Par conséquent, lorsque le terminal de Fos

Cavaou a été mis en service en 2010, GDF, Total et EDF avaient toutes les trois accès à ses capacités.

Source : Groupe de travail sur la régulation des terminaux méthaniers en France (2008), *La régulation des terminaux méthaniers en France*, avril et Commission européenne (2009), *Décision de la Commission du 3 décembre 2009 relative à une procédure d'application de l'article 102 du traité sur le fonctionnement de l'Union européenne et de l'article 54 de l'accord EEE*, Affaire COMP/39.316-Gaz de France.

### 5.2.2. Favoriser la puissance d'achat compensatrice

Une autre méthode pour réduire le risque de tarification excessive est de favoriser la puissance d'achat compensatrice. En augmentant le pouvoir de négociation des clients du port, il est possible de restreindre la capacité d'un port à pratiquer des tarifs excessifs. Les droits de port et les conditions d'accès peuvent faire l'objet d'une négociation entre le port et ses usagers, négociation dont le résultat peut être similaire à celui d'une concurrence réelle.

### 5.3. Résoudre les problèmes d'accès au marché

Afin de résoudre les problèmes de refus de vente, une autorité de régulation peut contraindre un port à laisser des clients accéder aux infrastructures. Cela peut prendre la forme d'obligations de transport, d'une charte d'accès, d'une séparation comptable d'un port verticalement intégré ou de règles d'équivalence mais, si cela est jugé nécessaire, il faut procéder à une séparation structurelle (voir la section 5.1.2).

#### 5.3.1. Réglementation de l'accès

La réglementation de l'accès peut contribuer à remédier à certains problèmes relatifs au refus de vente et aux inefficiences qui peuvent survenir en raison des goulots d'étranglement qui apparaissent lors de l'utilisation des infrastructures du fait que les capacités du port sont limitées : il ne peut s'occuper de tous ses clients sans retard et il n'existe pas de solution de remplacement. Comme la séparation structurelle (voir la section 5.1.2), la réglementation de l'accès peut contribuer à limiter le risque de discrimination lorsque le port est verticalement intégré et a des intérêts en aval.

Plusieurs mesures réglementaires peuvent être adoptées pour éviter les discriminations. En voici quelques-unes :

- On peut imposer une obligation de **transparence** simplement en s'assurant que le prestataire du port ou du terminal publie une offre de référence dans laquelle figurent des informations sur les prix et d'autres conditions qui régissent l'accès aux infrastructures et qu'il publie toute modification de ces conditions ainsi que les demandes supplémentaires d'accès en aval formulées par des tiers.
- Les discriminations peuvent également être éliminées via des obligations de **séparation comptable**, obligations qui permettent à l'autorité de régulation de surveiller les coûts sous-jacents des services d'accès, ainsi que les prix de transfert implicites qui sont facturés à la structure virtuelle avale de l'autorité portuaire.
- Une autorité de régulation peut également imposer à une autorité portuaire de publier une **charte d'accès**, laquelle exposera en détail les conditions opérationnelles, logistiques et financières qui régissent l'accès en aval, conditions qui comprendront des règles relatives aux procédures de résolution des conflits.
- De manière similaire, une autorité de régulation peut envisager de définir de manière plus précise les règles d'**équivalence** qui sous-tendent le principe de non-discrimination. Deux modèles

d'équivalence existent : l'équivalence de résultats et l'équivalence des moyens de départ<sup>30</sup>. L'équivalence de résultats impose que l'accès fourni à un client soit théoriquement équivalent au produit implicite que l'autorité portuaire fournit à ses services situés en aval, même si les systèmes et les procédures utilisées pour mettre à disposition le produit sont différents. L'équivalence de moyens de départ constitue une méthode beaucoup plus sévère, car elle impose à l'autorité portuaire d'utiliser les mêmes systèmes et procédures que ceux qui sont utilisés pour fournir un accès en aval à ses propres services maritimes. Des indicateurs clés de performance spécifiques peuvent être mis au point pour surveiller la mise en œuvre de l'équivalence de résultats ou de moyens de départ et les autorités portuaires peuvent se voir assigner des objectifs.

D'une part, obliger un port à accorder l'accès à un tiers, même en échange d'une juste rémunération, peut le dissuader d'investir et donc, *in fine*, être préjudiciable au consommateur. De plus, les concurrents en aval auraient un comportement parasite vis-à-vis d'investissements réalisés par l'entité dominante en amont, investissements qui n'auraient autrement pas été engagés. D'autre part, cependant, comme le montre l'affaire ENI examinée par la Commission européenne<sup>31</sup>, ne pas obliger un port à accorder l'accès à un tiers peut avoir un effet contraire et dissuader d'investir<sup>32</sup>.

#### 5.4. *Intégration verticale*

Dans certaines situations, l'abus de pouvoir de marché peut être limité par l'intégration verticale. Cela peut se produire lorsque l'opérateur portuaire est également le propriétaire des marchandises et que le produit fini est vendu sur un marché concurrentiel. Dans ce cas, l'entité verticalement intégrée n'a aucun moyen de manipuler le marché final, et ses services amonts seront incapables d'abuser de leur pouvoir de marché vis-à-vis de sa structure aval. C'est pourquoi nombre de chargeurs de vrac liquide (comme les compagnies pétrolières) possèdent également des terminaux portuaires. Cette solution éventuelle n'est possible que pour les plus gros usagers. Pour les autres, la possession d'un terminal risque de ne pas être rentable.

#### 5.5. *Association de mesures correctives*

Au sein d'un port, la solution peut consister à combiner plusieurs mesures correctives afin de résoudre tous les problèmes de concurrence relatifs aux différents services portuaires. L'encadré 21 présente le contexte général du port de Darwin, pour lequel il a été proposé d'adopter une série de mesures simples afin d'améliorer le fonctionnement du marché.

#### **Encadré 44. Contexte général du port de Darwin (Australie)**

En 2006, le Conseil des gouvernements australiens (COAG) a approuvé un programme de réformes en vertu duquel tous les ports devaient :

- être soumis à une régulation lorsque cela était visiblement nécessaire ;
- autoriser l'existence de concurrents pour la mise à disposition d'infrastructures portuaires et connexes y

<sup>30</sup> Voir Ofcom (2005), *Final statements on the Strategic Review of Telecommunications, and undertakings in lieu of a reference under the Enterprise Act 2002*, septembre.

<sup>31</sup> Voir F. Maier-Rigaud, F. Manca et U. von Koppenfels, *Strategic Underinvestment and Gas Network Foreclosure – the ENI case*, EU Competition Policy Newsletter, numéro 1, 2011.

<sup>32</sup> Sur ce point, consulter *2010 OECD Report on the Implementation of the 2001 OECD Council Recommendation on Structural Separation* et la bibliographie qui y figure.



compris en

- prévoyant de faciliter l'entrée de nouveaux fournisseurs ;
- autoriser l'accès en restant neutre sur le plan concurrentiel ;
- examiner l'intégration verticale afin de s'assurer qu'il n'y avait pas de conflits d'intérêts importants.

Ces dispositions visaient à garantir que les mesures concurrentielles et réglementaires étaient correctement dosées. On trouvera ci-dessous les principales caractéristiques du port de Darwin qui ont été étudiées dans le cadre de cette réforme.

Comme Darwin est un port isolé, la concurrence sur le marché des services d'infrastructures portuaires a été jugée limitée. Cela étant, aucun abus de pouvoir de marché n'a été mis en évidence, même si des accords relatifs à la tarification et à l'accès existaient. Malgré cela, le programme de réformes recommandait la mise en place de critères d'accès officiels et de principes généraux pour la détermination des tarifs portuaires.

Le marché des services d'acconage était ouvert à la concurrence. Le fait qu'il soit possible de louer du matériel et des zones d'amarrage y a contribué. Les mouvements de navires de marchandises n'étaient sans doute pas suffisants pour permettre à plusieurs entreprises de détenir le matériel nécessaire. Par conséquent, le recours à la location a favorisé la concurrence. S'agissant de l'acconage, la principale recommandation de l'étude était de rendre la procédure d'autorisation plus transparente.

Le marché du remorquage a été jugé similaire à celui de l'acconage : les barrières à l'entrée étant faibles, il n'était pas nécessaire de mettre en place une régulation stricte.

Le marché du pilotage était exposé à un conflit d'intérêts potentiel étant donné que la Darwin Port Corporation (DPC) proposait des services de pilotage alors qu'elle constituait également l'autorité de régulation des pilotes. L'étude a conclu que le fait que la DPC remplisse ces deux missions était acceptable à condition que les critères de délivrance des permis soient améliorés et qu'une procédure d'appel soit mise en place. Cette démarche visant à faciliter la concurrence au sein du marché a été jugée préférable à la mise en place d'un appel d'offres concurrentiel pour un contrat de pilotage car on a estimé que favoriser la concurrence au sein du marché engendrerait une pression concurrentielle plus forte et réduirait les charges administratives.

L'étude relevait que le manque de prévisions à long terme pour une zone du port risquait de nuire au développement de la concurrence. De ce fait, elle recommandait de mettre en place un processus de planification régulière qui comprendrait des annonces publiques des projets envisagés.

L'expérience menée dans le port de Darwin montre que plusieurs interventions différentes (ou aucune, dans le cas du remorquage) peuvent être nécessaires pour un port donné.

Source : Gouvernement du Territoire du Nord (2008), *Review of the Regulatory Framework for the Port of Darwin*.

## 5.6. Conclusion : solutions possibles

Lorsque des problèmes de concurrence se posent, plusieurs méthodes peuvent être appliquées afin de rendre la pression concurrentielle plus forte. Cependant, lorsqu'un port peut être considéré comme un monopole naturel, il est peu probable que la bonne méthode pour résoudre les problèmes consiste à agir directement sur la concurrence. Dans ce cas, la régulation constitue sans doute la meilleure démarche.

## 6. Conclusions

Les ports sont des infrastructures importantes qui facilitent les transports et le fonctionnement de l'économie. Certaines caractéristiques des ports, comme leur situation géographique unique, des besoins en matériel spécifique et une capacité limitée peuvent engendrer des problèmes de concurrence. Le présent document a examiné comment certains de ces problèmes pouvaient être étudiés.

La définition du marché sera différente dans chaque cas, mais en substance, que ce soit théoriquement ou à partir d'exemples connus, plusieurs conclusions peuvent être tirées.

- L'intensité de la concurrence entre les ports et les autres modes de transport est limitée, principalement à cause du poids et du volume de marchandises que le transport maritime peut prendre en charge.
- Un port considéré isolément sera souvent défini comme un marché distinct lorsque les besoins en infrastructures spécifiques rendent la substitution difficile.
- Sur le plan géographique, on peut estimer que des ports font partie du même marché si leur arrière-pays portuaire est en partie commun. En revanche, nombre de ports isolés constituent un marché à eux seuls.

S'agissant de l'appréciation du pouvoir de marché, il faut tenir compte de la concurrence existante comme de la concurrence éventuelle. La nature du marché portuaire, dans lequel certaines ports possèdent les caractéristiques d'un monopole naturel, a pour conséquence que la concurrence existante est souvent limitée. Cela signifie qu'il n'est pas rare de découvrir un pouvoir de marché. De fait, lorsqu'une démarche de définition du marché a conduit à définir un marché étroit, il est probable qu'il existe un pouvoir de marché.

La concurrentielle éventuelle n'a en général que peu d'effets sur le pouvoir de marché d'un port, principalement du fait de l'existence de barrières économiques à l'entrée importantes, barrières qui concernent les économies d'échelle. L'autre facteur remarquable qui peut atténuer le pouvoir de marché d'un port est la puissance d'achat compensatrice, laquelle peut exister étant donné que nombre de clients des ports interviennent sur un marché aval concentré.

Lorsqu'un pouvoir de marché existe, il convient de déterminer s'il en a été fait usage de manière préjudiciable.

Plusieurs solutions existent : on peut par exemple essayer de favoriser la concurrence existante ou éventuelle. De par la nature des ports, cette méthode n'est pas toujours applicable et, si nécessaire, des mesures réglementaires doivent être envisagées dans un cadre politique plus large.

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## CHILE

### 1. The Framework

Chile is situated in the South-West region of South America and has a coast line of 3,998 miles. It is an open economy that has followed a highly export oriented growth model during the past decades. Thus efficiency in maritime transport and hence development in port facilities is crucial for the competitiveness of our products.

In the mid-nineties, Chile faced significant constraints that prevented investment in development of new port facilities and the extension of existing ones. The main public ports at the time were owned by *Emporchi*, a state-controlled enterprise that was unable to attract investors to participate in the construction of new port facilities. Since the privatization wave of the late seventies, *Emporchi* was not the only port owner and manager. A few privately-owned ports began to challenge *Emporchi*'s business in some segments. Some of these privately-owned ports were for private use only, but some others allowed open or public use. In addition, long-term contracts between *Emporchi* and private parties for ports' management reduced the scope of activities *Emporchi* had performed in the past.

These restraints were seen as a threat to the Chilean growth model that was highly dependent on exports and foreign trade. Capacity of existing port facilities was considered insufficient and thus unable to support this growth model. Furthermore, the coastal morphology and the absence of natural harbours did not facilitate the construction of new ports at a reasonable cost. Facilities for supporting activities in ports, such as warehousing, were also scarce and due to their location –most of them in urban areas– there were limited alternatives for expansion.

In order to overcome this adverse scenario, the government designed a long-term program for developing state-owned ports. The purpose of the program was to attract investment and to promote intra-port competition as well as competition between ports. The program included submitting a bill to the Congress, which was finally approved as Act N° 19.542/1997 (hereafter, 'ports' Act'). The Act replaced *Emporchi* by 10 state-owned companies (hereafter 'port SOEs', or, in singular, 'port SOE'), each of them in charge of exploiting one state-owned port, mainly by means of private participation (concessions). Their main duty was to allocate by means of concessions port facilities (in particular, anchor fronts or terminals), among interested parties. Two concession regimes for terminals were applied: one allowing for vertical integration between the concessionaire of port services and the supporting services in the dock area (*mono-carrier* system), and the second allowing for different companies providing supporting services in the dock area (*multi-carrier* system).

This regulatory change has proved to be successful. Tenders for concessions began progressively in order to facilitate adaptation. In 2006 there were 10 state-owned ports for public use whose facilities had been granted in concession or were about to be granted, in addition to 15 privately-owned ports for public use and 11 privately-owned ports for private use.

In relevant cases and for the reasons mentioned above, port facilities have been considered crucial by competition authorities. In fact, port facilities in Chile present producers of exported goods with significant advantages, which are very difficult to duplicate. This highlights the importance of stimulating investment and competition in port services.

This contribution presents the provisions of the ports' Act and the subsequent regulations that attempted to remedy competition concerns present since the very design of the long-term program for developing state-owned ports (II). Section III mentions how these provisions have been enforced by Competition Authorities, followed by an overview of recent relevant case law around the assessment of ports' competitive impact (IV). Concluding remarks are presented in the final section (V).

## 2. Ensuring competition in the ports' Act provisions

The ports' Act and the subsequent regulation (*reglamento*) consider different provisions aimed at safeguarding competition principles in the sector of ports.

First, the provisions define a number of activities that can be performed by the private sector only, such as loading and unloading cargo and carrying it between the dock and the ship or vice versa. Several other activities, such as warehousing, are considered best to be performed by the private sector instead of the port's SOE itself (ports' Act, article 5).

Second, any form of participation by a private party in the exploitation of port facilities, whether by concession, lease, or by joint corporation with the port SOE, should be preceded by an open tender (ports' Act, article 7).

Third, the exploitation of anchor fronts is a major activity that the port SOE should perform through of private party, by granting concession for up to 30 years (ports' Act, article 14).

Fourth, article 21 of the ports' Act makes Competition Act explicitly applicable to port SOEs' conducts.

Fifth, the use of each anchor front is subject to internal regulation issued by the corresponding port SOE and approved by the Ministry of Transports. The internal regulation should be based on technical criteria, be objective and ensure compliance with non-discrimination principles. This internal regulation is included in the tender conditions (ports' Act, article 22).

Sixth, among other, the port SOEs boards' statutory functions include: to promote competition within the corresponding port; to ensure non-discrimination among the port users; to preserve and reinforce levels of productivity, efficiency and competitiveness in the port's management. (ports' Act, article 31).

Seventh, the ports' Act calls for additional regulation (*reglamento*) to define the aspects of tender design, with the aim to –according to the ports' Act– set up stable conditions for tender proceedings, facilitate competition and ensure fairness among port facilities concessionaires and between them and private port owners. (ports' Act, article 51).

Eighth, aiming to safeguard competition, the ports' Act considers three cases where the Competition Authority (formerly, the *Comisión Preventiva Central*, today, the Competition Tribunal or 'TDLC'<sup>1</sup>), should review the conditions of tenders called by port SOEs, when granting concession of an anchor front:

1. If in the corresponding administrative region, the only anchor front capable of supplying services to the largest ship model (*nave de diseño*) is about to be granted in concession, tender conditions for the concession should be reviewed by the Competition Authority (ports' Act, article 53);

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<sup>1</sup> TDLC stands for *Tribunal de Defensa de la Libre Competencia*.

2. If in the corresponding administrative region, the only anchor front capable of supplying services to the largest ship model (*nave de diseño*) is being operated under a multi-carrier scheme (i.e. various companies offering services in the dock area), and it is about to be granted in concession under a mono-carrier scheme, tender conditions should be reviewed by the Competition Authority (ports' Act, article 23);
3. If a concessionaire is interlinked with concessionaires of other anchor fronts capable of supplying services to the largest ship model (*nave de diseño*), in the same port or any other port in the same region, tender conditions should be reviewed by the Competition Authority (ports' Act, article 14).

The conditions determined by the Competition Authority should be abided by the port SOEs in the design of tenders.

The following section (III) describes cases where Competition Authorities have, as required by the Act, defined tender conditions aimed to reduce risks in competition associated with vertical or horizontal integration. A description of cases regarding competition and ports with broader considerations is contained in section IV.

### 3. Enforcing ports' Act competition provisions

In 1998, a year after the enactment of the ports' Act, three major port SOEs requested the Competition Authority to review the competitive conditions for the tenders of port facilities in the three main ports of the country. The request had been submitted by the port SOEs of Valparaíso, San Antonio and Talcahuano-San Vicente, jointly representing 60% of the total cargo transferred by Chilean ports. The three companies had decided that a mono-carrier scheme would be more appropriate than a multi-carrier scheme<sup>2</sup>.

The Competition Authority in charge at the time (*Comisión Preventiva Central*) reviewed the proposed tender conditions submitted by the port SOEs and issued a report (*Dictamen N° 1045, August 21<sup>st</sup>, 1998*). The authority considered that the proposed provisions of tender conditions ensuring equal access, non-discrimination and duty to deal by the concessionaire (i.e. preventing abuse of dominance) were already in the Act and the subsequent regulation and hence concluded that there was no need to repeat them in the tender terms. On the contrary, the authority was cautious and strict regarding vertical and horizontal integration caps, as detailed in what follows.

On horizontal integration, the Competition Authority set the following conditions: (i) If a business group owns more than 15% of the corporate concessionaire of an anchor front, the group or its members are not allowed to own directly or indirectly more than 15% of another corporate concessionaire of an anchor front in a public port of the same administrative region; and (ii) Business groups or its members owning private ports in more than 15% of the capital are not allowed to own directly or indirectly more than 15% of a corporation concessionaire of an anchor front in a public port of the same administrative region.

Parties involved are given a period to adjust to these conditions which should also be included in the bylaws of any corporate concessionaire. Port SOEs have the power to terminate the concession in case of infringement.

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<sup>2</sup> According to the ports' Act, in a mono-carrier scheme only one company is allowed to offer services in the dock area; in a multi-carrier scheme, several.



On vertical integration, the Competition Authority set the following limitation: The group of ‘relevant users’ cannot own more than 40% of political rights, economic rights or both in the corresponding corporate concessionaire. ‘Relevant users’ is a concept defined by the Competition Authority as, by and large, any user –or the business group it belongs to or any member of the latter– who transfers a significant amount of cargo in the corresponding administrative region and in the corresponding anchor front.

The corporate concessionaire's bylaws should include the aforementioned limitation and instruct the stockholders to divest shares, in case of exceeding the limits. Concessionaires should report to the port SOE every three months about their stockholder interlinks deemed relevant for these purposes. Port SOEs can unilaterally terminate the concession in case of infringement of these conditions, considered as a serious breach of the concession contract.

These provisions regarding restrictions on horizontal and vertical integration should last for the entire concession term, though they can be subject to revision after request of a concessionaire after the completion of 5 years of the concession contract. The revision of conditions, by the port SOE, should be preceded by a review by the Competition Authority, who should evaluate the current competition conditions in the market and the impact of potential reduction of the ownership limits.

As was likely to expect, the report of the Competition Authority was challenged by potential bidders of tenders for concessions already members of the ports and/or maritime services' industries. However, challenges were dismissed. It was understood that the *Comisión Preventiva* was acting not in its general jurisdiction as a Competition Authority, but under a special clause of the ports' Act that did not provide for appeal against the issued report<sup>3</sup>.

More than five years have passed since the first concessions were granted. In 2006, the concessionaire of San Antonio port SOE requested a revision of the limits on vertical integration. The Competition Tribunal was entitled to decide on the issue. It reduced the restriction, allowing the concessionaire's corporation to be owned by the group of relevant users by up to 60% (instead of the former 40% cap)<sup>4</sup>.

Beyond this first group of concessions in the ports of San Antonio, Valparaíso and Talcahuano-San Vicente, subsequent concessions were initiated by other port SOEs. Iquique (2000)<sup>5</sup>, Antofagasta (2002)<sup>6</sup> and Arica (2004)<sup>7</sup>, followed a quite similar path before the competition authorities.

Since the Competition Tribunal was established, in 2004, additional tenders for concessions have been subject to review, particularly in 2009<sup>8</sup>. In some cases, the TDLC has challenged the tender criteria for adjudication<sup>9</sup>.

<sup>3</sup> Challenges motivated the issuing of the following decision: *Comisión Preventiva Central, Dictamen N° 1046, September 1<sup>st</sup>, 1998*; *Comisión Resolutiva, Resolución N° 529, September 9<sup>th</sup>, 1998*; *Comisión Resolutiva, Resolución N° 530, September 30<sup>th</sup>, 1998*; and *Supreme Court, December 9<sup>th</sup>, 1998, docket number 3177-98*.

<sup>4</sup> *Tribunal de Defensa de la Libre Competencia, Resolución N°11, January 24<sup>th</sup>, 2006*.

<sup>5</sup> At the time of the tender for concession, no request was submitted before the Competition Authority. However, in 2004, the concessionaire and a stockholder submitted a consultation before the Competition Tribunal regarding whether the limitations contained in *Dictamen N° 1280* –basically the same as *Dictamen N° 1045*– were applicable in their case, allegedly, no. The Competition Tribunal dismissed the submission, ruling that limitations were in force and applicable. *Tribunal de Defensa de la Libre Competencia, Sentencia N°3, June 29<sup>th</sup>, 2004*.

<sup>6</sup> *Comisión Preventiva Central, Dictamen N° 1209, June 20<sup>th</sup>, 2002*.

<sup>7</sup> *Comisión Preventiva Central, Dictamen N° 1280, January 16<sup>th</sup>, 2004*.

## 4. Recent case law on competition and ports

### 4.1. Competition constraints in ports

In competition authorities' decision making, several elements have been identified as potentially limiting concessionaire's abuses. This section explores the significance of constraint mechanisms with a special focus on alternative modes of transport, use of ports located in nearby areas and competing terminals within a port.

#### 4.1.1. Alternative modes of transport

Substitution by alternative modes of transport have been explicitly analysed when a competition case regarding transportation services has been raised<sup>10</sup>. So far, alternative modes of transport are not considered as an effective constraint in the framework of analysis for assessing ports' market power.

For international exports cargo, considering the geographical location of Chile as well as the type and destination of products exported, it is unlikely that alternative modes of transport can substitute maritime transport in many relevant sectors. Hence, alternative modes of transport are not considered as an effective constraint to ports' market power. On the contrary, for cabotage, alternative modes of transport seem a likely constraint. However, there are no available cases to illustrate the point so far.

#### 4.1.2. Ports located in nearby areas (inter-port competition)

One of the aims of the ports' Act was to promote and reinforce competition among ports. From the point of view of users, a port has a scope of influence which may overlap with the scope of influence of another port. Being this the case, the likelihood of competition between these ports increases as does the effectiveness of reciprocal discipline. This is the case of San Antonio and Valparaíso as well as Talcahuano and San Vicente. In addition, sometimes there is a privately owned-public use port which scope of influence also overlaps with the others<sup>11</sup>.

The existence of an actual or potential competitive port restricting potential abuses by the port in question has been assessed in a few cases.

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<sup>8</sup> San Antonio port SOE requested a review twice in 2009, and others included Coquimbo port SOE and Valparaíso port SOE, both in 2009. *Tribunal de Defensa de la Libre Competencia, Informes N°3, N°4, N°5 and N°6, 2009.*

<sup>9</sup> For instance, imposing the lowest tariffs for users as the adjudication criteria, challenging broad discretion powers of the SOE to declare the tender void, and challenging the basis for calculating the rent to be paid by the concessionaire to the SOE, *Tribunal de Defensa de la Libre Competencia, Informe N°6, October 15th, 2009, section 9.2.*

<sup>10</sup> E.g. *Tribunal de Defensa de la Libre Competencia, Sentencia N° 55, June 21st, 2007*, discarding substitution of land and maritime transportation for air cargo transport, held that international cargo carried by air is particular in nature (light weight, small volume, need of expedient service) and different from cargo carried internationally by land or sea (Rc. 16°, 17°), upheld by the Supreme Court. *Tribunal de Defensa de la Libre Competencia, Sentencia N° 95, January 14th, 2010*, held that air transport from the continent to Eastern Island may be considered as an imperfect substitute for maritime transportation (Rc. 15°), upheld by the Supreme Court.

<sup>11</sup> This is the case, for instance, of *Ventanas* port, who's scope of influence overlaps with San Antonio's and Valparaíso's scopes of influence, even though *Ventanas* is oriented to bulk transfer rather than containers.

In *Sal Punta de Lobos* a salt producer challenged exclusionary conducts (mainly, sham litigation) by an incumbent who vertically integrated salt production and private port services –including facilities for salt transportation and warehousing. The Competition Tribunal’s condemnatory ruling in this case assessed the likelihood for the plaintiff to build an alternative port. An expert’s report submitted during the proceedings had identified no less than 6 locations available for building a new port for salt transportation. However, the TDLC taking into account the distance from the salt production sites, first reduced the alternatives to only two. Later, it totally discarded alternative ports, the main reason being the lack of production volumes significant enough to justify the costs of building an alternative port<sup>12</sup>.

In the case of *AES Gener vs. Electroandina*, these two power carbon generator companies discussed the access to carbon port facilities owned by one of them. The option of constructing another competitive port or using alternative ports was assessed during the trial. Parties settled before the issuing of the ruling by the TDLC. The TDLC only ruled on the price adjustment clause, under the request of the parties<sup>13</sup>.

The analysis performed by the TDLC when issuing reports, as required by the ports’ Act, demonstrates that the mere existence of a port which scope of influence overlaps with the scope of another is not a sufficient condition to guarantee effective competition. There are several additional criteria to consider such as the kind of cargo (containers vs. bulk), size of the ships available to anchor (panamax vs. post-panamax) and operational efficiency (i.e. volume of cargo transferred), which are crucial for identifying the real degrees of substitution. In this sense, evidence of substitution should be submitted for each case, in order to demonstrate, for instance, whether it is effective for users to switch ports along a relevant period of time. Capacity restrictions and the likelihood of new investment in order to extend capacity are also crucial factors for this task<sup>14</sup>.

#### 4.1.3. *Competing terminals within a port (intra-port competition)*

So far, intra-port competition has taken place mostly between the corresponding port SOE and the concessionaires. This is so, because only recently multiple anchor fronts have been granted in concession by the same port SOE<sup>15</sup>.

In order to guarantee a level playing field, the port SOE has the legal duty to not discriminate and to issue regulations for the use of each anchor front. In addition, the port SOEs’ boards have the legal duty to promote competition within the corresponding port among different terminals.

## 4.2. *Port facilities and market power*

Many decisions of the Competition Authorities have identified elements conferring market power to port services whether regarding a specific case or ports in general in Chile. Reasons around entry barriers are the most common.

<sup>12</sup> Tribunal de Defensa de la Libre Competencia, *Sentencia N° 47, December 5th, 2006* (Rc. 59°-72°)

<sup>13</sup> Tribunal de Defensa de la Libre Competencia, *Sentencia N° 36, January 31st, 2006*.

<sup>14</sup> For an illustration on these points, Tribunal de Defensa de la Libre Competencia, *Informe N°6, October 15th, 2009, section 8 and subsequent*, where degrees of competition between specific terminals of the ports of Valparaíso and San Antonio were assessed.

<sup>15</sup> In fact, port SOE San Antonio granted in concession in May 2011 a second terminal for 20 years. For this tender, the current concessionaire of the other anchor front in San Antonio was not allowed to participate, according to the TDLC’s report. The press highlighted the outcome of the tender since the incumbent and the new concessionaire each represent major business groups in Chile (Luksic/Claro and Matte/Angelini, correspondingly). El Mercurio, B6, Friday May 6<sup>th</sup> 2011.

#### 4.2.1. Entry barriers

The first decision of the Competition Authority under the new publicly-owned ports framework in 1998, identified the following entry barriers for ports' services in Chile: (i) scarcity of natural harbours; (ii) limited availability of areas for extension of supporting services in ports; (iii) the ability of optimizing ports' capacity by means of improving management, which reduces incentives to new entry<sup>16</sup>.

In particular, more recently, analyzing the entry conditions for new port services in the administrative region of Valparaíso (where San Antonio and Valparaíso ports are located) the TDLC held that the area has only a few natural harbours for building new ports and, even though it is technically feasible to adapt a new harbour for these purposes, this would imply very high costs (such as building a mole and dredging costs). These being sunk costs, trying to replicate incumbents' facilities was considered highly risky for potential entrants. Moreover, there was no specific project regarding construction of new ports for public use in the Valparaíso region. Thus, the entry of new competitors for port services by means of new ports was unlikely for the short and the medium-run, which was the relevant period for the purposes of constraining the market power of the would-be concessionaire in San Antonio. In addition there were no specific projects aimed at extending Valparaíso or San Antonio ports, other than the long run projects associated with the terminals already granted in concession or the investment projects of the terminals that were about to be granted in concession in San Antonio. Finally, the possibility of current privately-owned-privately-used ports to turn into publicly-used facilities was also discarded. All the above led the TDLC to conclude the existence of significant entry barriers and to reaffirm that the following tender for concession was the only opportunity for new entry. This justified a careful tender design aimed at ensuring effective *ex post* competition<sup>17</sup>.

In *Sal Punta de Lobos* a different kind of entry barrier was identified. Since port facilities in this case were considered as an essential facility for the production and distribution in salt market, the incumbent's abuse, in its right to petition, aimed at obstructing the construction and use of an alternative port, were considered as a strategic or artificial entry barrier raised by the incumbent with the sole purpose of deterring and retarding new entry<sup>18</sup>.

### 4.3. Harm to competition

In a previous OECD roundtable regarding *harm to competition* our contribution, based on the review of our case law, led us to conclude that Chilean competition authorities do not follow a single theory in terms of harm to competition. In case law, identifying harm to competition seems easier in cartels and exploitative abuses than in exclusionary conducts<sup>19</sup>.

Since most interventions by Competition Authorities regarding port services have taken place on an *ex ante* basis, the approach followed has been mainly structural rather than impact-based.

In this sense, avoiding or restricting vertical and horizontal integration as well as minimizing the risk of exploitative abuses by concessionaires against users, appear to be the underlying reasons of several decisions.

<sup>16</sup> *Comisión Preventiva Central, Dictamen N° 1045, August 21<sup>st</sup>, 1998, p.24.*

<sup>17</sup> *Tribunal de Defensa de la Libre Competencia, Informe N°6, October 15th, 2009, section 8.4.*

<sup>18</sup> *Tribunal de Defensa de la Libre Competencia, Sentencia N° 47, December 5th, 2006 (Rc. 75°-95°)*

<sup>19</sup> "Roundtable on the quantification of Harm to Competition by National Courts and Competition Agencies." Note by the Delegation of Chile, February, 2011.

#### 4.4. Remedies

As mentioned in the previous section, most competition law remedies have been imposed on an *ex ante* basis, being preventive and structural in nature. The most significant have been the vertical and horizontal integration caps described above<sup>20</sup>.

In *Sal Punta de Lobos* in spite of the settlement between the plaintiff and the defendant, the FNE's complaint continued and the TDLC issued a condemnatory ruling including fines and the request that the defendant notify the TDLC future acquisitions of ports with salt transfer facilities<sup>21</sup>.

In 2010, the TDLC issued a ruling regarding a complaint by a port user against the corresponding concessionaire and the port SOE. The plaintiff claimed to be affected by the establishment of an abusive system of priorities in port services that was contained in a guideline issued by the concessionaire. Unfortunately, the TDLC had to dismiss the complaint since the facts occurred beyond the statutory limitations period<sup>22</sup>. The decision on remedies in such a case could have been very interesting.

#### 5. Concluding remarks

A new wave of concessions has been initiated during 2011. San Antonio, Valparaíso and Talcahuano port SOEs are seeking to grant new terminals in concession.

In May, a second concession was allocated in San Antonio. This turns public-private intra-port competition into private-private intra-port competition, for the very first time.

The outcome was not similar to the last tender at Valparaíso. The latter failed to attract interested bidders due to concerns regarding the investment project design. Even if the incumbent concessionaire showed interest in extending its concession by committing to new investments, such an extension- and omitting a new tender- could be challenged in Court, since the purpose of the ports' Act is to promote intra-port competition, with different private parties participating as concessionaires.

Finally, Talcahuano is currently managing a tender for granting a new terminal in concession.

As this contribution describes, the role played by competition principles and Competition Authorities in the development of Chilean ports competitiveness has been very significant in the last fifteen years. Competition authorities' decisions have ensured a competitive structure for the port services restricting integration and preventing dominance abuses by concessionaires.

The role of private parties and competition in the future development of port services industry will certainly increase. Intra-port competition between private companies will become a reality, which will increase the likelihood of anticompetitive behaviour, whether unilaterally or collectively.

Thus, it is reasonable to expect in the future an increased involvement of competition authorities in monitoring and, eventually, prosecuting anticompetitive behaviour. A set of tasks not just limited to a structural or preventive approach will be needed, in order to achieve a close working partnership with port SOEs.

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<sup>20</sup> *Supra*, section III.

<sup>21</sup> *Tribunal de Defensa de la Libre Competencia, Sentencia N° 47, December 5th, 2006.*

<sup>22</sup> *Tribunal de Defensa de la Libre Competencia, Sentencia N° 96, January 21st, 2010, upheld by the Supreme Court.*

## ESTONIA

### 1. General points

In Estonia there are no special competition law provisions specifically aimed at regulating port activities. Thus, the rules of general competition law and the Competition Act are applied to ports similarly to undertakings in most other sectors of economy and industry. This means that the Competition Act can be applied on their activities and like any other undertaking a port will not be allowed to abuse its position on the market if it's market power is such that it considerably hinders normal competition on the market (market dominance).

According to article 13 of the Competition Act:

*An undertaking in a dominant position is an undertaking or several undertakings operating in the same market whose position enables it/them to operate in the market to an appreciable extent independently of competitors, suppliers and buyers. Dominant position is presumed if an undertaking accounts for at least 40 per cent of the turnover in the market or several undertakings operating in the same market if it/they account for at least 40 per cent of the turnover in the market.*

Undertakings with special or exclusive rights or in control of essential facilities are also considered undertakings in a dominant position.

Although it is not prohibited to become a dominant player on the market, abuse of the market power is prohibited according to the article 16 of the Competition Act.

The Competition Act also contains the definition of the undertaking controlling essential facility. According to the article 15 of the Competition Act an undertaking is deemed to control essential facilities or to have a natural monopoly if it owns, possesses or operates a network, infrastructure or any other essential facility which other persons cannot duplicate or for whom it is economically inexpedient to duplicate but without access to which or the existence of which it is impossible to operate in the goods market.

The Art 18 (1) 1) explicitly provides for an obligation of undertakings in control of essential facilities to permit other undertakings to gain access to the network, infrastructure or other essential facility under reasonable and non-discriminatory conditions for the purposes of the supply or sale of goods.

As for the definition of market then the market definition under Estonian legislation is the same as under EU law.

Article 3(1) of the Competition Act provides that:

*A goods market is an area covering, inter alia, the whole of the territory of Estonia or a part thereof where goods which are regarded as interchangeable or substitutable (hereinafter substitutable) by the buyer by reason of price, quality, technical characteristics, conditions of sale or use, consumption or other characteristics are circulated.*

This definition covers both product and geographical market.

## **2. Specific issues**

### **2.1 *Relevant markets and competitive constraints***

In regards to port activities the Estonian Competition Authority (hereinafter: the ECA) has investigated most of its cases between the years 2002 – 2006. During this period the ECA received numerous complaints on the activities of the Port of Tallinn – owner of a major cargo port in Estonia. As the result of these complaints the activities of the Port of Tallinn were under thorough investigation for many years which has resulted in an abundance of case-law regarding activities and market dominance of ports in Estonia. Please note that the ECA has only dealt with cargo ports and not with passenger ports as there have not been any cases nor complaints related to the latter.

The conclusion of these different port cases was always that the Port of Tallinn had dominant market power on the market for port services, except for one exceptional case which led to a different outcome. We will discuss the exceptional case below after we have explained the reasons for usual outcome of the cases.

Usually the Port of Tallinn has been regarded as an undertaking having a dominant position for the following reasons.

The Port of Tallinn is a land-lord type of a port which itself does not handle any cargo but only owns and develops port infrastructure. It then offers the infrastructure to the different operators for handling cargo and providing service for passengers.

In most of the cases the terminal operators (undertakings which have established a cargo terminal within or to the close vicinity of the port) have complained to the port's activities related to providing access to its infrastructure. As the terminals are costly to establish and operate but at the same time are very much connected to the closest port and cannot be moved away, then the terminal operators are heavily dependent of the closest port. In Estonia the only port with enough capacity and with a well-developed infrastructure is the Muuga Cargo Port belonging to the Port of Tallinn. Thus, the Port of Tallinn has been repeatedly found having essential facility in regards to terminal operators in Estonia (besides having a 100% market share on the market for port services). The analyses has also shown that even if it was possible (which is quite unlikely) then economically it is just not expedient for other persons (especially for the terminal operators) to duplicate the port infrastructure due to the economies of scale.

At the same time it is not possible to substitute a port with any other mode of transport in Estonia due to the location of the country and its role within the relevant transportation chains. The bulk of the cargo entering Estonia comes from Russia (mostly oil products, fuels and coal) and will then be transported through the country to other ports in Europe (mostly in the Netherlands). If the cargo was to be transported only by rail, it would never even enter Estonia but would be transported directly to its destination through other countries.

Still, as mentioned above there is one case where the Port of Tallinn was not found to have dominant market position. The case is quite exceptional but shows that in global scale a port might have very little market power as opposed to the standpoint of local operator. The case was initiated due to the intention of the Port of Tallinn to increase prices for services rendered for the cargo vessels. The geographical extent of the goods market and the position of the Port of Tallinn in the market turned out to be central in this case. In previous cases the ECA had submitted a viewpoint that infrastructures operating in the transit sector have the characteristics of essential facilities. The importance of this case lies in the conclusion that in

certain situations such infrastructures may not necessarily possess the characteristics of essential facilities after all and the port could be substituted by other ports within the geographic area.

Taking into account the content of the economic activities of the complainants, the ECA previously only investigated transit operations of oil products by the Port of Tallinn, therefore, the analyses was constrained to this one category of products. The income of Port of Tallinn from the transit of oil products is comprised of the fees accruing from terminals and the port dues accruing from ships. The applicants referred to the intended increase in the port dues accrued from ships.

Both the Port of Tallinn as well as the complainants operate as terminals and provide services in the logistic chain of transporting oil products from Russia to the western countries through Estonia. Many more undertakings exercising different functions participate in this chain, but for the purpose of this case four main logistic links in the chain had been identified: the railway, the terminals, the ports, the ships (oil-tankers).

Although terminals and ships buy services from the Port of Tallinn, in the end the services of all four units in the logistic chain are actually indirectly or directly bought by the owners of the cargo transported from Russia to the western countries. These owners are about five or six large Russian undertakings. During its investigation the ECA discovered that the owners of the cargo decided themselves from whom to buy the above mentioned services directly, which means that the use of different retailers has decreased. In general, the terminals operating in the port of Tallinn only provide terminal services to cargo owners and do not retail shipping services. It was thus apparent that cargo owners can choose among different transit corridors. Chains similar to the transit chain traversing the port of Tallinn are also traversing other ports on the eastern coast of the Baltic Sea. Although the cargo owners make their choices among various transit chains based on different criteria, they are mostly guided by the price. The cargo owner calculates the overall price of suitable transit chains by adding up the prices for using single units in the chains. At the time of the proceedings, the Port of Tallinn was the second biggest port on the eastern coast of the Baltic Sea in terms of total cargo revenue, and the biggest port in oil products operating approximately 20% of the oil transit traversing the region, the latter being important for the analysis of the case. The other larger ports are situated in the bordering regions of Estonia – mainly the region of St. Petersburg (ports in St Petersburg, Primorsk, Vyssotsk) and Latvia (ports in Riga, Liepaja, Ventspils). Thus, although the Port of Tallinn was the biggest port in terms of oil products on the eastern coast of the Baltic Sea, the ports in the neighbouring regions were altogether at least just as big or even bigger. It was also discovered that none of the Russian oil refining factories was situated so that it could only be serviced by the Port of Tallinn.

The ECA found it not to be possible to apply essential facilities doctrine in this case although the terminals as such lacked possibilities to duplicate the port infrastructure, whereas ships had no choice between different ports because the cargo they has to fetch was in a certain port in a certain terminal. The issue whether the cargo owners could choose an alternative port for transportation was regarded relevant in this matter.

It derives from the essence of market definition that first it is necessary to define the buyer, in relation to whom the substitutability of the product has to be assessed. The ECA decided that it was not justified to define a goods market based on a shipping undertaking, because the shipping undertaking did not make buying decisions between different ports independently and therefore such market definition would have created a misleading picture of the actual competitive situation on the market. Terminals did not buy directly nor indirectly the service of providing access to the port infrastructure for the ships, so, the terminals could neither be regarded as buyers. Therefore, the ECA established that the buyers on whose basis the goods market had to be defined were the cargo owners. In the view of the cargo owners other ports situated on the eastern coast of the Baltic Sea and transit chains traversing those are in the same goods market as the Port of Tallinn and the chains traversing it. The geographic market was thereby



considerably larger than Estonia encompassing several ports on the eastern coast of the Baltic Sea. The market share of the Port of Tallinn in this geographical market was found to be no more than 20-30%. In general, a market share of 20-30% is not considered to be indicative of a dominant position from the competition legislation aspect. Pursuant to article 13 (1) of the Competition Act dominant position is presumed if the market share accounts for at least 40%. The Port of Tallinn was, thus, found not to be an undertaking in the dominant position in the relevant market.

## **2.2. *Possible detrimental effects of market power***

Investigations conducted by the ECA in port sector have mostly concerned allegations about potential discriminatory behaviour by a port operator. Particular issues that the ECA has been involved with concern access to port infrastructure and conditions under which access to port infrastructure has been granted. The speciality of those cases is that the port has operated as a landlord type of port that maintains and develops the port infrastructure (berths, seawalls, lighthouses etc) and leases port territories to terminal operators, but does not have cargo handling operations of its own. Thus, there has not been any vertical integration issue.

In one of those investigations the ECA has analysed whether granting priority access to a new berth to certain terminal operators over other terminal operators active in that port has been discriminatory. In the course of the analysis the ECA considered how the selection procedure was organised, on which criteria the port based its decision to grant priority access to particular terminal operators on, whether those criteria were objectively founded and whether not having priority access to the new berth put the other terminal operator in a disadvantageous competitive situation for handling cargo in that particular port. The investigation in this case led the ECA to a conclusion that there was no abuse of market power by the port operator. The ECA noted that the fact that no public tender was organised for allotting the priority access to a new berth was not in itself an infringement of competition rules and that an undertaking in control of an essential facility may rely on other criteria when making the decision as long as those are objectively founded. In this case priority access to the new berth was given on the basis of additional cargo volumes proposed by terminal operators considering also which possibilities different terminals had for using other berths in the particular port. The ECA found that the claimant in this case itself had priority access to another berth in the same port (that was the best berth in the port prior to building of a new berth) and it had the possibility to increase its cargo volumes by using that berth more effectively.

Another issue that the ECA has investigated is allegedly discriminatory product handling charges and building title charges collected by the port operator from terminal operators in a given port. Product handling charges were collected by the port to cover costs related to maintaining and developing the port infrastructure (access roads, crane ways, railway access etc), except berths which were financed from quay charges paid by shipping companies. Building title charges were collected by the port operator for building titles granted to terminal operators for erecting and maintaining their terminal buildings on the port territory. In a situation where a port with significant market power applies different charges to different terminal operators competition between terminal operators may be distorted, since the costs of operating in a particular port are higher for certain operators, which also causes those terminals with higher input costs to price their services to clients higher. This raised two main issues for consideration for the ECA: 1) to what extent are two agreements concluded by a port with market power with different terminal operators equal, in terms of relevant costs and profits and 2) to what extent is competition between customers (e.g. terminal operators) distorted due to differences in charges.

In one case the ECA established that the port had abused its market power by asking one terminal operator product handling charges that were significantly higher than those applied to two other terminal operators. Due to economies of scale enjoyed by the port, product handling charges applicable to terminal operators were stipulated as scales were an increase in annual product volumes reduced average product

handling tariff per ton. Despite of significantly greater product volumes handled by a particular terminal operator, it was charged more than one of its competitors. The ECA established that with respect to different terminal operators there were significant differences in charge scales applied by the port that gave certain terminal operators a competitive advantage over one of their competitors that had to pay higher charges.

In another case involving allegations about discriminatory product handling charges and building title charges the ECA did not establish abuse of market power by the port. The ECA found that a port cannot be held liable for discrimination when it has used reasonable efforts to harmonise building title charges throughout the port in a situation where some terminal operators have historically been granted building titles on preferential terms by the state. Alternatively, the ECA discussed whether the port can be considered to possess market power at all when one is concerned with building titles granted for the use of land, considering that the geographical market may not be limited to the territory of the port.

Concerning product handling charges, the ECA found that charges applied to a particular terminal operator (complainant in the case) were not higher compared to those applicable to the only competing terminal operator in the port.



## FINLAND

### 1. Introduction

Sea transport and ports hold a significant role in the Finnish foreign trade. Therefore, it is essential for the Finnish economy that the ports function efficiently and effectively.

The following report analyses and discusses the Finnish port market's competitive environment. The report points out several factors that may contribute to ports' market dominance but also factors indicating effective competition are identified. In reference to the cases dealt by the Finnish Competition Authority (FCA) numerous actual and alleged abuses of dominant position are described and examined, as well. Lastly the report discusses regulatory issues and potential remedies for likely market failures.

The report is mainly based on the cases dealt by the FCA. However, to provide a broader view on the current market situation from different perspectives experts from the Ministry of Transport and Communications as well as from the Finnish Port Association were interviewed.

### 2. Market overview

The Finnish economy is very dependent on the ports, as approximately 80 percent (in tons) of the total foreign trade - 90 percent in export and 70 percent in import - is transported by sea. Also over 60 percent of cross border passenger transport are carried by boats.<sup>1</sup>

In some circumstances rail, road, air and sea transport may be substitutable. However, due to Finland's geographic location and long Baltic Sea coast line, sea transport is practically the sole mode for bulky products' foreign trade in Finland. Other modes of transport do not seem to be viable alternatives in freight transportation.

On the other hand, the long coast line in Finland also facilitates an opportunity to many competing ports (refer to annexes 1 and 2). There are 26 municipally owned and 30 industry owned ports in Finland, of which 48 are active in foreign trade to import and export commodities, raw materials and oil products.<sup>2</sup> Furthermore, most of the ports are located along the Baltic Sea coast but there are also several inland lake ports in Finland.<sup>3</sup> All municipally governed ports, and one of the privately owned ports, Port of Inkoo<sup>4</sup>, are

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<sup>1</sup> The Finnish Maritime Society (2011), [http://www.meriliitto.fi/?page\\_id=32](http://www.meriliitto.fi/?page_id=32)

<sup>2</sup> The Finnish Transport Agency, traffic statistics of foreign sea transport 2010, [http://portal.liikennevirasto.fi/portal/page/portal/f/liikennevirasto/tilastot/liikennemaarat/ulkomaan\\_merilii\\_kenne/mlt\\_ta\\_satamat\\_tavarat.htm](http://portal.liikennevirasto.fi/portal/page/portal/f/liikennevirasto/tilastot/liikennemaarat/ulkomaan_merilii_kenne/mlt_ta_satamat_tavarat.htm)

<sup>3</sup> The Finnish Transport Agency, "Transport Network" [http://portal.liikennevirasto.fi/sivu/www/e/transport\\_network](http://portal.liikennevirasto.fi/sivu/www/e/transport_network) and "The most important fairways in Finland" [http://portal.liikennevirasto.fi/portal/page/portal/f/liikenneverkko/vesivaylat\\_kanavat/Suom\\_tarkeimmat%20vesitiet\\_suomi\\_2009\\_lv.pdf.pdf](http://portal.liikennevirasto.fi/portal/page/portal/f/liikenneverkko/vesivaylat_kanavat/Suom_tarkeimmat%20vesitiet_suomi_2009_lv.pdf.pdf)

<sup>4</sup> Operated by Inkoo Shipping Ltd, <http://www.inkooshipping.fi/contacts.aspx>

open for all customers, whereas industry owned ports handle export and import according to their own business needs only.

Due to the large number of ports it seems that no single Finnish cargo port holds an exceptionally strong position in the market. Countervailing buying power *vis-à-vis* ports and service providers acts also a significant role in market functioning, as the main customers are large industry companies. Nevertheless, some ports' location, railway and road connections and/or area of specialisation may be sources of a (regional) dominant position. Competition concerns have emerged for example in form of discrimination and refusal to deal. Currently there is one case pending in the FCA and another one has been discussed without an official claim, yet.

Furthermore, the ports typically provide mooring and unmooring services and provide basic utilities, but in most of the cases other port services, such as stevedoring, logistics, tugging, piloting, cranes and ice braking are provided by third parties in Finland. It seems that less competition concerns emerge when services are provided by third parties compared to a market structure where port owners would provide all the auxiliary services, too. However, concerns of exclusive rights in port operations and a refusal to deal case in tugging services have been investigated by the FCA (see below for further details).

Concerning the Finnish passenger traffic the ports in the largest cities of Helsinki and Turku, as well as, port of Mariehamn (due to the tax exemption Åland holds) may possess a dominant position. According to three separate competition precedents the passenger ports in these cities have actually or allegedly engaged in price discrimination distorting competition between passenger shipping companies, and in excessive pricing to the detriment of consumers.

The cargo and passenger transport markets and technologies (e.g. containerisation) change continuously, and therefore a timely, case by case analysis of market definition, market power and effects of alleged abuses of dominant position or collusion are naturally needed if such a case is lodged in.

### **3. What competitive constraints do ports face?**

#### **3.1 Cargo Ports**

Despite the large number of ports in Finland most of the sea transport is highly concentrated in the 10 - 15 largest ports: 10 largest ports handle almost 80 percent of the total cargo and respectively 15 largest ports handle over 90 percent. Indeed, some ports are running with over capacity<sup>5</sup> and it is expected that, as the forthcoming revised Regional Act will force many municipally owned ports to be transformed from municipally governed departments into limited companies, consolidation will be necessary to improve ports' efficiency.<sup>6</sup> A merger between Port of Kotka and Port of Hamina in 2011 has been regarded as the first step towards consolidation.<sup>7</sup> More efficient operations are welcome, but naturally a more concentrated market may bring concerns of market power, as well.

<sup>5</sup> A news article in Kauppalehti on 23 May 2011 <http://www.kauppalehti.fi/5/i/talous/uutiset/plehti/juttu.jsp?direct=true&oid=2011/05/23/4243075> and on 20 May 2011 <http://www.kauppalehti.fi/5/i/talous/uutiset/plehti/juttu.jsp?direct=true&oid=2011/05/20/4243214> see also Port of HaminaKotka web page: <http://www.portofhamina.fi/fi/eng>

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.* As the turnover thresholds under the Finnish merger regulation were not met, the merger was not notified to the FCA.

In addition to the consolidation developments competition between ports may be reduced by ports' tendency to specialise in certain types of cargo. For instance, Port of Pori is well situated with deep passage in south western Finland where the sea is kept open a year through<sup>8</sup> and the port is specialised in chemicals having contemporary facilities, good railway access and the most powerful crane in Finland. Nevertheless, for instance Port of Kokkola in north and Port of HaminaKotka in south eastern Finland, both of which have abilities for different types of cargo and also have a railway access, obviously create competitive pressure *vis-à-vis* Port of Pori at least to some extent. Indeed, HaminaKotka is the main transit cargo port, as it has short rail and road connections to Russia.

Furthermore, regarding specialization, the paper industry also sets its own requirements and some ports, especially ports in HaminaKotka, Rauma and Kemi, have developed clean areas granting them an advantage to handle sensitive products, as well. Ports of Sköldvik and Naantali, owned by a Finnish oil refinery, handle practically all crude oil and oil products sea transport to and from Finland. Due to the large steel producer located in Raahe its port handles most of the imported ores and exported metal products though its position is not very significant considering the Finnish sea transport as a whole. Moreover, ports in Helsinki, Naantali, Turku and HaminaKotka deal with most of the general cargo import and export transport in which container and ro-ro transport are the most typical modes.

In a merger case Finnlines/Transfennica<sup>9</sup> the FCA considered preliminary<sup>10</sup> that container traffic had to be distinguished from ro-ro traffic. Because the ability of ro-ro vessels to load moving trailers cannot be utilized in container ships, both means of transport were not substitutable and also many destination ports did not possess the necessary infrastructure to unload containers. Therefore, it could also be concluded that, those ports having ability to handle containers gain market power, as the containerization trend<sup>11</sup> progresses. However, a case specific analysis is needed and it is also necessary to consider, as the OECD report (2008)<sup>12</sup> concludes, that, on the other hand, containerization has standardized the port services, brought ports closer substitutes and thereby increased competition between ports.

As the above examples describe, ports have specialized in certain types of cargo through which they may have gained competitive advantage or even (regional) market dominance. However, even if specialization investments may strengthen port's market position, entry barriers associated with specialization (supply side switching costs) and other market factors need to be considered on a case by case basis.

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<sup>8</sup> The Finnish coast freezes during the winter. There are 23 ports in Finland that kept open a year through with ice brakers.

<sup>9</sup> See for instance OECD Annual Report on Competition Policy Developments in Finland in 2000 <http://www.oecd.org/dataoecd/52/63/39553988.pdf> Note also that the preliminary estimate of the *geographical market* was that the German Baltic Sea traffic, the German North Sea traffic, the Benelux Countries' traffic, the British Isles' traffic, the Bay of Biscay traffic and the Polish traffic each formed their own market further divided into southbound and northbound traffic.

<sup>10</sup> Eventually, the parties cancelled the proposed merger and therefore it was unnecessary to conduct a complete market analysis. See Finnlines annual report 2000, page 3.

<sup>11</sup> OECD (2008), "Port Competition and Hinterland Connections", Joint transport research centre, Round Table, 10 - 11 April 2008, Paris. Discussion paper No 2008-19, Oct 2008. <http://www.internationaltransportforum.org/jtrc/DiscussionPapers/DP200819.pdf>

<sup>12</sup> *Ibid.*

### 3.2 Passenger Ports

It has been reasonable to distinguish passenger traffic port services from cargo port services in Finland, as port service facilities, customers and competitive environment differ between cargo and passenger ports. The major passenger routes from Finland are Helsinki - Tallinn; Helsinki - Mariehamn - Stockholm; and Turku - Mariehamn - Stockholm. Regular passenger traffic exists also between Helsinki - Pietari; Helsinki - Travemünde; Helsinki - Gdynia - Rostock; Naantali - Kapellskär and Vaasa - Umeå.

Passengers seem to prefer the ports in the two largest coastal cities Helsinki and Turku. Obviously, large customer base for ferry traffic and cruising in these cities itself, as well as, convenient feeding connections from other cities strengthen these ports' market position.<sup>13</sup> Furthermore, as Åland, an autonomous region of Finland, enjoys tax exemption since 1.7.1999, Port of Mariehamn in Åland has become an essential stopover port for passenger ferries and cruisers between Finland and Sweden to offer tax free sales on board.<sup>14</sup>

Passenger ferry traffic has historically been popular in Finland. However, it seems that nowadays people prefer increasingly other modes and destinations of travelling, as well, and therefore ferry companies and ports need to compete more tightly *vis-à-vis* alternative trips made by air and land.<sup>15</sup> Alternatively, passenger ships and ports may, to some extent, shift into cargo transport, if income from passenger traffic is insufficient.

### 3.3 Inland lake ports

As there are almost 200 000 lakes in Finland, there is also a vast amount of inland lake ports and transport by lakes in Finland.<sup>16</sup> In some circumstances domestic railway and road transport may be substituted by lake transportation. However, as the lakes freeze during the winter, they cannot be considered even as a potential alternative a year through. There have been some indications from the industry that fairway dues have been disadvantageous for lake transportations compared to toll free road transport. This issue might need further assessment from the competition neutrality perspective.

### 3.4 Port services

As noticed above, Finnish ports provide basically mooring and unmooring services and utilities, but auxiliary services are mainly provided by third parties to whom ports lease land areas.<sup>17</sup> The non-integrated market structure seems to provide a level playing field for shipping companies and port operators.

<sup>13</sup> The Market Court upheld the FCA's conclusion in its decision of 11 Oct 2002 that Port of Helsinki held a dominant position in regional passenger traffic port services during the investigated period of 1997-1999. The FCA has also investigated an alleged abuse of dominant position by Port of Turku, but eventually, no explicit conclusion was made about its market position in passenger port services.

<sup>14</sup> The FCA found also in its decision of 30.11.2004 that Port of Mariehamn held a dominant position during 1993-2000.

<sup>15</sup> Travel statistic by Statistics Finland,  
[http://pxweb2.stat.fi/Dialog/varval.asp?ma=020\\_smat\\_tau\\_101\\_fi&ti=15%2D74%2Dvuotiaiden+suomalai+sten+y%F6pymisen+sis%E4lt%E4neet+matkat+1991%2D2009&path=../Database/StatFin/lii/smat/&lang=3&multilang=fi](http://pxweb2.stat.fi/Dialog/varval.asp?ma=020_smat_tau_101_fi&ti=15%2D74%2Dvuotiaiden+suomalai+sten+y%F6pymisen+sis%E4lt%E4neet+matkat+1991%2D2009&path=../Database/StatFin/lii/smat/&lang=3&multilang=fi) .

<sup>16</sup> [http://www.lvm.fi/files/38\\_2003.pdf](http://www.lvm.fi/files/38_2003.pdf) pages 23 and 26

<sup>17</sup> Karvonen T and Tikkala H (2004), "Developing Port Functions and Renewing Port Legislation in Finland", Research report, Ministry of transport and communications Finland, 65/2004, page 49.

Competition in cargo handling services has increased especially in the largest ports, but it is still typical to most ports that one stevedoring company holds a monopoly or dominating market position.<sup>18</sup> According to a report published by the Ministry of Transport and Communications about 80 percent of ports have such a situation.<sup>19</sup> Notwithstanding the primary dominant cargo handling service provider there are typically also secondary logistics companies within a port or in its close neighborhood creating competitive pressure to some extent. The report suggests that small cargo flows in small ports and long traditions and ownership bases may be potential reasons for a concentrated services market within a port. Furthermore, the report points out that part of the problem may emerge from the fact that stevedoring is under ILO Dock Work Convention (No. 137) which is strictly applied by the national trade union and only registered employees are allowed in stevedoring. The port operators have also claimed (in 2004) that work time arrangements and the costs associated with them restrict competition. This latter issue has though somewhat diminished, as nowadays night shift work is considered as regular work time instead of overtime.

In relation to the above mentioned trade union issue it is noteworthy to mention also a judgment by the Court of Justice concerning collective action seeking to induce a Finnish ferry company Viking Line Abp to conclude a collective labour agreement with a trade union restricting the ferry company's right to freedom of establishment.<sup>20</sup> The Court concluded that such collective action, seeking to prevent shipowners from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals, must be considered to be at least liable to restrict an undertaking's exercise of its right of freedom of establishment. However, the Court also found that those restrictions may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective.

Primarily, a pilot is obligatory by law on vessels passing through the Finnish territorial waters. However, vessel and route specific exemptions can be granted. Currently, 60 percent of piloting is conducted under exemptions with route pilot certificates. The rest, 40 percent, is provided by a state monopoly Finnpiilot Pilotage Ltd.<sup>21</sup> Nevertheless, a working group appointed by the Ministry of Transport and Communications has concluded that in principle, there are no legislative<sup>22</sup> or practical obstacles to opening pilot activities to competition.<sup>23</sup> A first step towards more competitive environment has been taken by accepting English as a language in the route pilotage as of 1 July 2011 (previously only Finnish and Swedish were accepted). The working group expected that ports along with tugboat and fairway service companies might be interested in extending their service provision to pilotage. However, decisions of the demonopolisation will be assumingly made not until effects from the route pilotage reform will be revealed.

Long winter with freezing seas generate a specific need for ice breaking services in the Finnish shore and ports. Indeed, 23 of the foreign trade ports are kept open a year through. The ice braking providers are selected through a tender process arranged by the Finnish Transport Agency, which is responsible for ice breaking in Finland. As the market is very narrow and a new ice breaker costs circa 150 million euros

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<sup>18</sup> *Ibid*, see the English Description on page IV.

<sup>19</sup> *Ibid*.

<sup>20</sup> Judgment of the Court (Grand Chamber), Case C-438/05, 11.12.2007.

<sup>21</sup> [http://www.lvm.fi/c/document\\_library/get\\_file?folderId=1551284&name=DLFE-11726.pdf&title=Julkaisu%2010-2011](http://www.lvm.fi/c/document_library/get_file?folderId=1551284&name=DLFE-11726.pdf&title=Julkaisu%2010-2011) English summary on page V.

<sup>22</sup> In relation to the Constitution of Finland, EU state aid rules, the Public Procurement Act.

<sup>23</sup> *Ibid*. and <http://www.lvm.fi/web/en/topical/pressreleases/view/1229569>



coupled with a long procurement and manufacturing process it is not surprising that only a sole provider, state owned Arctia Shipping Ltd<sup>24</sup>, has been participating in tenders.<sup>25</sup>

The Finnish Transport Agency is also responsible for the maintenance and development of the Finnish fairways. These services are under gradual opening for competition but still the state owned Meritaito Ltd<sup>26</sup> is the largest provider.

Some tugboats are owned and operated by ports and minor independent tugging companies, but the tugging market in Finland has been dominated by Alfons Håkans Ltd. Indeed, already before the acquisition of Finntugs Ltd by Alfons Håkans Ltd these two companies<sup>27</sup> were found to hold a regional joint dominant position, as it was obvious that no other company had sufficient capacity to provide alternative services in certain regions. The Competition Council also concluded that, as the evidence supported the facts that on the demand side the need for tugging services may emerge suddenly and in the supply side it is time consuming and costly to switch tugboats to be operated away from their current operating area the market was regional and sufficient potential competition did not exist.<sup>28</sup> (See the abuse part of this case below.)

#### **4. What might constitute an abuse of market power in the ports sector?**

##### **4.1 Cargo ports - refusal to deal, discrimination and exclusive rights**

In November 2010 St. Peter Line Limited ("St. Peter Line") lodged a complaint concerning refusal to allow ro-ro cargo operations by Port of Helsinki in its South Harbour.<sup>29</sup> The plaintiff is primarily active in passenger services but is willing to extend its business to load trucks from another company's ships into its ships in Helsinki's South Harbour to be transported to Russia. However, Port of Helsinki, owned by the City of Helsinki, has due to its strategic plans decided not to increase South Harbour's cargo operations but to provide them in its other ports. Port of Helsinki justifies its decision also by claiming that St Peter Line's request would necessitate significant investments in dock ramps, potential dredging and new arrangements in winter docking. However, as the case is still pending it is premature to conclude whether Port of Helsinki's refusal to allow cargo operations in its South Harbour constitutes an abuse of dominant position.

According to the public procurement act municipally owned ports should tender the service providers if the number of providers is limited. However, just recently competition concerns have emerged, as Port of Helsinki has outsourced its mooring and unmooring as well as freshwater services for a sole provider, FL Port Services Ltd without a tender process. The company provides also a shuttle service inside the port

<sup>24</sup> Arctia Shipping Ltd is a specialised shipping company offering icebreaking, offshore services using multipurpose icebreakers, marine construction, oil-spill response and ferry services. <http://www.arctia.fi/english>

<sup>25</sup> [http://alk.tiehallinto.fi/julkaisut/pdf3/Its\\_2011-03\\_jaanmurtopalvelujen\\_kehittaminen\\_web.pdf](http://alk.tiehallinto.fi/julkaisut/pdf3/Its_2011-03_jaanmurtopalvelujen_kehittaminen_web.pdf)

<sup>26</sup> Meritaito Ltd is a Finnish state-owned company specialized in the maintenance and development of waterways and marine infrastructure. <http://www.meritaito.fi/www/en/meritaito/index.php>

<sup>27</sup> Alfons Håkans Ltd hold a 50 % stake in Finntugs Ltd at that time and the companies were found to be structurally, financially and strategically aligned.

<sup>28</sup> The Competition Council, 23/359/1998, 29.6.2000; The Supreme Administrative Court, no 2347/1/00, 25.1.2002.

<sup>29</sup> Case 1195/14.00.00/2010, pending in the Finnish Competition Authority.

area, which is considered to be expensive. The Ministry of Transport and Communications investigates the situation.<sup>30</sup>

Also in 1999 there were concerns of intended exclusive rights granted for a port operating company.<sup>31</sup> Such arrangements would have potentially constituted an abuse of dominant position. However, as the planned contracts did not eventually come into force and other container operators were also able to enter those ports, the cases were dismissed by the FCA.

#### **4.2 Passenger ports - excessive and discriminatory pricing**

Regarding passenger port services the FCA has dealt with discriminatory and excessive prices in three separate cases concerning Port of Helsinki, Port of Mariehamn and Port of Turku.

By quadrupling unexpectedly port's passenger fees in 1993, which was not proportional to the port's costs and harmed passenger shipping companies as well as consumers, Port of Helsinki was found to abuse its dominant position by excessive pricing. However, after the Supreme Administrative Court's judgment in August 1993, Port of Helsinki only doubled its fee, which eventually was not found to fulfill the criteria of excessive pricing based on the return on investment calculations conducted by the FCA.<sup>32</sup>

Port of Mariehamn in Åland was also allegedly engaged in excessive pricing but the FCA found that the evidence did not meet the excessive pricing criteria under the Finnish Competition Law even if Port of Mariehamn was very profitable at the time of investigations. However, concurrently Port of Mariehamn applied a price ceiling based on vessels' net tonnage in its docking fees, which discriminated passenger shipping companies. As such the price ceiling might not have been discriminatory, but as it was obviously designed to favour one shipper having significantly larger vessels and therefore distorted competition between the shipping companies, the pricing scheme was found to breach the competition rules. Additionally, Port of Mariehamn was not able to provide any objective reason why the ceiling was in 20 000 net tonnage as it was.<sup>33</sup>

Port of Turku applied also a net tonnage ceiling in its docking fees, but as the ceiling of 31 000 net tonnage was much higher than the one in Mariehamn and therefore it did not distort competition between the passenger shippers correspondingly, the FCA did not find it discriminatory.<sup>34</sup>

#### **4.3 Port services – discrimination, refusals to deal and monopoly provision**

As noticed above, primarily the Finnish ports are non-integrated so that ports provide basically land area and relevant utilities and therefore competition concerns have not emerged frequently. However, just recently (spring 2011) the FCA has been in discussions concerning a situation in which a municipally owned port seems to favour its own cranes *vis-a-vis* privately owned crane companies and thereby allegedly breaches competition rules by discrimination. The discussions have also indicated that the port leases only an unnecessary large land area for a crane company's office container, which, unnecessarily, raises costs and makes it more difficult to operate in that area. These discussions reveal that competition

<sup>30</sup> A written question to the Finnish government 189/2009 vp, [http://www.parliament.fi/faktatmp/utatmp/akxtmp/kk\\_189\\_2009\\_p.shtml](http://www.parliament.fi/faktatmp/utatmp/akxtmp/kk_189_2009_p.shtml)

<sup>31</sup> Case 953/61/96, 7.11.1997, Contracts between Port of Hamina Ltd and Steveco Ltd. Case 270/61/99, Contracts between Port of Kotka Ltd and Steveco Ltd.

<sup>32</sup> The Supreme Administrative Court, Case 3434/2/02, 1.3.2005.

<sup>33</sup> The Market Court, Joint cases 351/04/KR and 353/04/KR, 18.6.2008.

<sup>34</sup> The Finnish Competition Authority, Dnro 390/61/2001, 29.12.2006.

concerns may arise more easily when a (dominant) port is also active in port operation services. However, especially as no official claim is lodged, yet, it is premature to conclude whether the criteria of an abuse of dominant position are fulfilled in this specific situation.

Furthermore, tugging companies Alfons Håkans Ltd and Finntugs Ltd were found to breach competition rules by jointly applying discriminatory prices and refusing to assist in tugging if their rival was already providing its services. Such conduct tied customers and excluded rivals from regional port tugging market.<sup>35</sup>

#### 4.4 *Fairway dues*

In 2002 the European Commission issued a notification against Finland over the discriminatory rules on fairway dues in the form of different dues to the domestic and international vessels.<sup>36</sup> In 2004 the Commission commenced an action before the European Court of Justice against Finland for failure to fulfill its obligations. Despite it was argued that fees are cost oriented and the differences in fairway dues would enhance competition and efficiency in terms of optimized capacity<sup>37</sup>, Finland revised the act in 2006 in accordance with the non-discriminatory principles set forth by the Commission and the action was dropped.<sup>38</sup>

### 5. Regulation of port activities

As the above market description and the summaries of the Finnish port specific cases demonstrate, it seems that general competition rules are sufficient to address the potential competition concerns in the Finnish ports. This of course is dependent on the prevailing market structure and circumstances, which may change over time and from case to case.

It seems that in a market where ports are not involved in the port operations, or in other auxiliary services, fewer competition concerns emerge. Therefore, in a case where a port is integrated into services business and serious competition issues arise frequently it may be reasonable to impose regulatory measures, for instance in terms of price cap regulation, mandatory access, un-tied services, divestitures or structural separation if competition rules do not provide sufficient remedies. However, as in any regulation, adequate cost benefit analysis should be conducted to ensure that the efficiency gains outweigh the costs associated with regulatory administration and its planning.

Currently there are two written port specific acts in force in Finland: the one concerns municipal port orders and traffic dues (955/1976) and the other one concerns private commercial ports (1156/1994), but their content is relatively limited. Furthermore, from a competition perspective these acts themselves have been considered distortive at least for two reasons. Firstly, establishing or enlarging a private general port requires a license, which does not concern public ports. Secondly, municipally owned ports have a

<sup>35</sup> The Supreme Administrative Court, Case 2347/1/00, 25.1.2002.

<sup>36</sup> The European Commission Press Release, "Discriminatory charges on vessels: Commission presses ahead with proceedings against Finland", IP/03/1532, Brussels, 11 November 2003 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1532&format=HTML&aged=0&language=EN&guiLanguage=en> see also <http://www.edilex.fi/virallistieto/he/20050150> (in Finnish).

<sup>37</sup> Karvonen T and Tikkala H (2004), "Developing Port Functions and Renewing Port Legislation in Finland", Research report, Ministry of transport and communications Finland, 65/2004, page 27. [http://www.lvm.fi/files/65\\_2004.pdf](http://www.lvm.fi/files/65_2004.pdf).

<sup>38</sup> Act on Fairway Dues (1122/2005), <http://www.finlex.fi/fi/laki/kaannokset/2006/en20061122.pdf> and [http://www.tulli.fi/en/finnish\\_customs/publications/annual\\_reports/annual\\_report\\_2008.pdf](http://www.tulli.fi/en/finnish_customs/publications/annual_reports/annual_report_2008.pdf) page 10.

financial advantage, as part of the fees are charged under public law of which possible debts can be collected without a judgment which is needed when collecting commercial fee debts. However, the license process has not been applied in practice and also the fees charged under public law have lost importance, as the fees have been increasingly commercial, as municipally owned ports have become more commercially operated, as well. Therefore, the competition concerns emerging from these two laws have not eventually been very significant.

However, the Ministry of Transport and Communications is currently planning to cancel both of the above mentioned laws during the year 2011. Thus, all the ports, despite their ownership structure, would operate equally under the national and EU competition rules, and especially under international contracts regarding security, environment and work. The European Commission has also been preparing the "Port Services" directive, which aims to promote competition in the port services market. However, after the first proposal was rejected by the European Parliament in 2003 the current state of the directive's planning process is unclear.

In addition there is one more thing of which the Finnish ports, shipping companies and their customers have been concerned: It is feared that the new stricter restrictions on sulphur and nitrogen emissions from vessel fuels will weaken the competitiveness of Finnish exports industry in relation to competing countries.<sup>39</sup>

## **5. Conclusions**

The Finnish economy is considerably dependent on its ports, as 80 per cent of the foreign trade (in tons) is transported by sea. Sea transport and ports hold a significant position in passenger traffic, as well. It has been reasonable to distinguish cargo port services from passenger port services, as customers and business circumstances differ significantly from each other. There are competing cargo and passenger ports in Finland, but ports may gain market dominance especially through their location, specialization, and convenient rail and road connections. It seems that less competition concerns emerge in ports where services are provided by third parties and the port is not involved in providing auxiliary services. Generally, the competition rules seem to be sufficient to address emerging anti competitive practices in Finland.

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MKL 4/2009, "Suomen merikuljetusten toimintaympäristön muutokset".

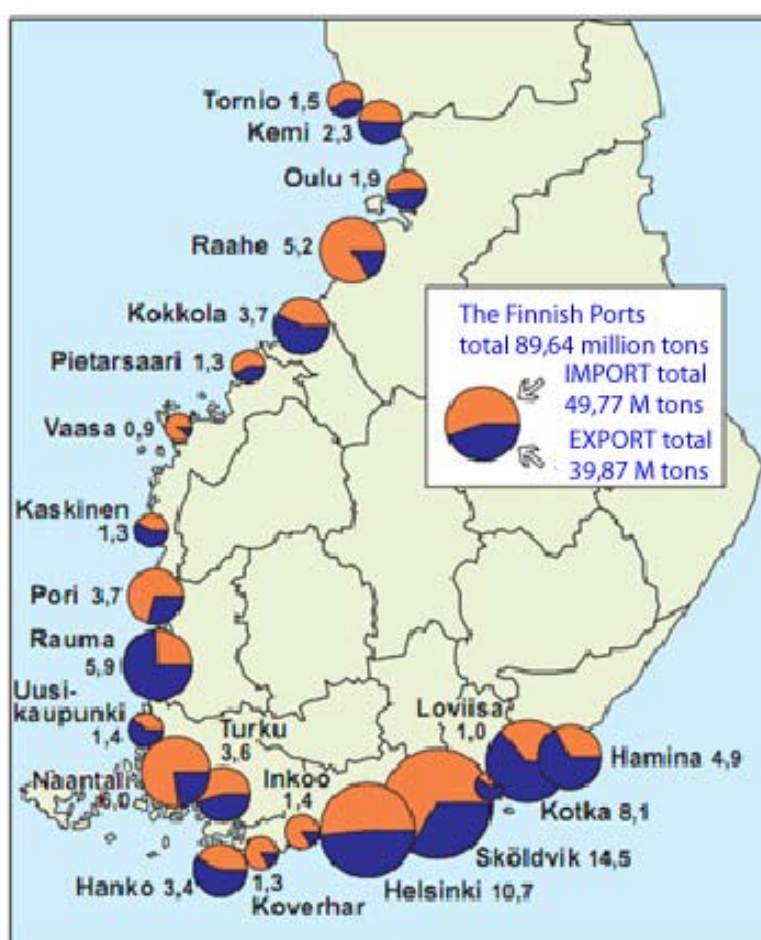
## ANNEX 1: THE FINNISH TRANSPORT NETWORK



Source: the Finnish Transport Agency, [http://portal.liikennevirasto.fi/sivu/www/e/transport\\_network](http://portal.liikennevirasto.fi/sivu/www/e/transport_network)



## ANNEX 2: THE LARGEST FOREIGN TRADE PORTS IN FINLAND.



Source: The Finnish Ministry of Transport and Communications and the Finnish Transport Agency (formerly Merenkululaitos, Tiehallinto and Ratahallintokeskus) "Suomen ulkomaankauppa tarvitsee toimivat kuljetusketjut", [http://rhk-fi-bin.directo.fi/@Bin/b373881336aab7b9bec0be0545905e61/1307305669/application/pdf/1567620/Ulkomaankaup\\_kuljetusreitit\\_liite.pdf](http://rhk-fi-bin.directo.fi/@Bin/b373881336aab7b9bec0be0545905e61/1307305669/application/pdf/1567620/Ulkomaankaup_kuljetusreitit_liite.pdf)



## FRANCE

### 1. Les caractéristiques du secteur portuaire en France : éléments de contexte pour appréhender les conditions de la mise en œuvre des règles de concurrence

#### 1.1. *Soumission des activités portuaires aux règles de la concurrence :*

Les activités portuaires sont le lieu de la rencontre entre la puissance publique et des opérateurs économiques mondialisés, qui conduit à tenir compte de l'existence de missions de service public dans le cadre de l'application des règles de concurrence.

En France, la présence de la personne publique dans ce champ d'activité a été marquée historiquement par une forte intervention, et par une réforme récente tendant à son retrait des activités portuaire de nature concurrentielles.

Au vu du constat de la dégradation de la part de marché des ports français en Europe<sup>1</sup>, tenant notamment à une sous-performance dans le traitement des conteneurs, et une insertion insuffisante dans les réseaux de desserte continentale, des réformes ont été adoptées, d'abord en matière sociale (fin du régime spécifique des dockers<sup>2</sup>), puis par une importante loi sur le secteur portuaire en 2008<sup>3</sup>, qui a eu pour principal objectif le recentrage des établissements publics portuaires (désignés « grands ports maritimes ») sur leurs missions régaliennes, et le transfert des activités d'exploitation de l'outillage portuaire à des entreprises de manutention.

Les ports maritimes exercent ainsi désormais, à titre principal, des missions de police portuaire, de sécurité et de sûreté, sur la portion de domaine public qui leur est affectée. Pour autant, il leur revient toujours d'y développer, aménager et gérer les infrastructures. En revanche, il leur a été imposé de remettre à des entités du secteur privé l'exploitation des services à caractère concurrentiel, dont celle de l'outillage de manutention.

En recentrant pour l'essentiel les ports sur des missions de service public administratif, et en les déchargeant des activités industrielles et commerciales, la loi a permis, dans le contexte français de la dualité des ordres de juridiction administratif et judiciaire, une relative clarification de la répartition des compétences, dès lors que l'exercice de prérogatives de puissance publique relève de la compétence du juge administratif, et les autres activités d'un établissement public industriel et commercial de celle du juge judiciaire<sup>4</sup>.

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<sup>1</sup> Rapport conjoint de l'Inspection générale des finances (n°2007-M-031-01) et du Conseil général des ponts et chaussées (n°005126-01) sur la modernisation des ports autonomes, juillet 2007 ; Rapport de la Cour des comptes « Les ports français face aux mutations du transport maritime : l'urgence de l'action », juillet 2006

<sup>2</sup> Loi n°92-496 du 9 juin 1992 modifiant le régime du travail dans les ports maritimes

<sup>3</sup> Loi n°2008-660 du 4 juillet 2008 portant réforme portuaire

<sup>4</sup> CE, 2 février 2004, époux Blanckeman/Voies navigables de France, et Tr.Confl., 29 décembre 2004, id.



Le droit de la concurrence s'applique à l'ensemble des activités économique, quelle que soit la qualité de l'opérateur. Plus spécifiquement, l'article L.410-1 du code de commerce soumet les personnes chargées d'une mission de service public aux règles de concurrence<sup>5</sup>. Il a en outre été jugé que le respect du droit de la concurrence s'impose à la personne publique dans ses missions de service public à caractère administratif<sup>6</sup>, et que l'exercice même des pouvoirs de police n'en est pas nécessairement exclusif<sup>7</sup>. Enfin, il est aujourd'hui imposé aux grands ports maritimes de conclure les conventions d'exploitation de terminal « à l'issue d'une procédure ouverte, transparente et non discriminatoire »<sup>8</sup>.

En conséquence, toutes les activités portuaires, qu'elles incombent en propre aux établissements publics portuaires ou aux entreprises qui interviennent sur ces sites, sont soumises par principe au respect des règles de concurrence. Mais si les activités de nature économique, quelle que soit la nature de l'opérateur, obéissent au droit de la concurrence et sont pleinement soumises à l'appréciation de l'Autorité (anciennement Conseil) de la concurrence, les activités portuaires mettant en œuvre des prérogatives de puissance publique échappent à sa compétence<sup>9</sup>, et il n'appartient qu'au juge administratif d'opérer un contrôle de légalité qui incorpore l'opposabilité des règles de concurrence<sup>10</sup>.

## **1.2. *Un environnement économique en mutation qui modifie le rôle des autorités portuaires et des opérateurs de manutention dans le jeu concurrentiel***

Le relatif décrochage des ports français dans la compétition avec les autres ports européens, auquel les réformes récentes ont cherché à remédier, s'inscrit dans le contexte d'une réorganisation du secteur portuaire marquée notamment par la croissance de la conteneurisation, et la formation de chaînes logistiques intégrées.

Il a été observé que le phénomène de conteneurisation du transport de marchandises, qui requiert une adaptation des terminaux accueillant ces navires et des services de manutention, a pu induire une standardisation des activités portuaires qui renforce la substituabilité entre les ports, tandis que l'accroissement de la taille des navires porte-conteneurs a pu entraîner la diminution du nombre d'escales<sup>11</sup>, concourant de plus fort à l'intensification de la concurrence interportuaire<sup>12</sup>. C'est en

<sup>5</sup> Les règles de concurrence « s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques, notamment dans le cadre de conventions de délégation de service public ».

<sup>6</sup> CE Sect., 26 mars 1999, société EDA

<sup>7</sup> Avis CE Sect. 22 nov. 2000, Sté L&P Publicité : « dès lors que l'exercice des pouvoirs de police administrative est susceptible d'affecter des activités de production, de distribution ou de services, la circonstance que les mesures de police ont pour objectif la protection de l'ordre public (...) n'exonère pas l'autorité investie de ces pouvoirs de police de l'obligation de prendre en compte le principe de liberté du commerce et de l'industrie et les règles de concurrence ».

<sup>8</sup> Code des ports maritimes, art. R105-2

<sup>9</sup> T. Confl., 18 oct. 1999, AdP et Air France c. TAT : « Si dans la mesure où elles effectuent des activités de production, de distribution ou de service, les personnes publiques peuvent être sanctionnées par le Conseil de la concurrence agissant sous le contrôle de l'autorité judiciaire, les décisions par lesquelles ces personnes assurent la mission de service public qui leur incombe au moyen des prérogatives de puissance publique relèvent de la compétence de la juridiction administrative pour en apprécier la légalité et, le cas échéant, pour statuer sur la mise en jeu de la responsabilité encourue par ces personnes publiques ».

<sup>10</sup> CE sect., 3 novembre 1997, société Million et Marais ; AJDA, 1998, p.250, note Olivier Guézou

<sup>11</sup> Port competition and hinterland connections, OECD/ITF Roundtable n°143, 2009

<sup>12</sup> « Il est donc désormais essentiel d'être choisi comme lieu d'escale de lignes régulières pour éviter la marginalisation » Cour des comptes, rapport 2006, ib.

considération de cette évolution que le Port du Havre, premier port français de marchandises, a adopté un programme de développement de ses terminaux à conteneurs dit « Port 2000 ». La réforme portuaire de 2008, qui a permis le renforcement des opérateurs de manutention en leur transférant l'entière exploitation des terminaux, prend également acte de cette tendance.

La mutation du secteur portuaire est par ailleurs marquée par la constitution de chaînes logistiques intégrées. Il est remarquable de constater que « *la concurrence a ces dernières années cessé d'être une concurrence entre sociétés d'armements et ports pour se muer en une concurrence entre chaînes logistique maritimes* »<sup>13</sup>. Un mouvement spectaculaire de concentration s'est opéré, d'abord horizontale, entre sociétés d'armement, puis verticale, les armateurs s'alliant avec des opérateurs de terminaux, voire des transporteurs terrestres – huit des 15 plus gros opérateurs de terminaux sont ainsi des filiales d'armateurs.<sup>14</sup>

La compétitivité d'un port ne dépend en conséquence pas seulement de l'attractivité de ses infrastructures, mais aussi de son insertion dans une chaîne de transport, dont on considère qu'elle a tendance à « sédentariser » les armements, les relations à long terme ainsi nouées les rendant moins enclins à changer de port.

Les autorités portuaires connaissent en conséquence une érosion relative de leur pouvoir de marché, puisqu'elles participent moins aux activités commerciales – la réforme précitée de 2008 est caractéristique de cette tendance. Le contrôle de la chaîne logistique, en ce compris les services portuaires, est en effet entre les mains d'autres acteurs que les ports. Le principal levier d'action tient aux pouvoirs qui leur restent dévolus, par l'exercice de leurs prérogatives de puissance publique : accorder des concessions pour l'exploitation du domaine public portuaire, et en déterminer la durée.

Or il est particulièrement intéressant de relever que chacune des caractéristiques de l'évolution récente du secteur portuaire a trouvé concrètement un écho dans la pratique décisionnelle de l'Autorité.

## **2. La pratique décisionnelle de l'Autorité, à la rencontre des spécificités du secteur portuaire**

### **2.1. Les règles de concurrence à l'épreuve de l'intervention de la puissance publique dans le secteur portuaire**

#### **2.1.1 Les contours de l'application du droit de la concurrence aux décisions des autorités portuaires :**

Le Conseil de la concurrence, à une période à laquelle aucune décision de justice n'était encore intervenue en France pour l'application au secteur portuaire des règles de concurrence, a eu l'occasion dès 2002<sup>15</sup> de se déterminer sur leur articulation avec les enjeux du service public propres à ce secteur.

Le Conseil avait été saisi d'une demande de mesures conservatoires par une entreprise de manutention portuaire, à l'encontre notamment du Port du Havre, en raison du refus de lui accorder l'autorisation d'exploiter une parcelle du domaine public portuaire, d'une part, et de l'application d'un tarif plus élevé que celui offert à ses concurrents pour l'utilisation de l'outillage portuaire, d'autre part – à une époque, antérieure à la réforme de 2008, où ces équipements étaient encore directement gérés par l'autorité portuaire.

<sup>13</sup> Eddy Van de Voorde & Thierry Vanelslander, document de référence 2009-2, OECD/ITF

<sup>14</sup> Eddy Van de Voorde & Thierry Vanelslander, ib.

<sup>15</sup> Décision n°02-D-15 du 1<sup>er</sup> mars 2002 relative à des pratiques relevées dans le secteur de la manutention des vrac solides au port autonome du Havre

Cette affaire a illustré le « double visage » que présentait l'autorité portuaire, une partie de son activité mettant en œuvre des prérogatives de puissance publique, tandis qu'une autre relevait du service public industriel et commercial.

En l'espèce, la décision du Port relative à la gestion du domaine public, relevant du seul contrôle du juge administratif, échappait à l'examen du Conseil de la concurrence. Au regard du second grief, le Conseil a en revanche retenu sa compétence en estimant – pour la première fois<sup>16</sup> – que la discrimination alléguée opérée par l'autorité portuaire quant à la fixation de la redevance due pour l'utilisation de l'outillage portuaire, « *dans des conditions qui ne diffèrent en rien de celles qui peuvent se rencontrer lorsque deux opérateurs privés nouent des relations contractuelles* », ressortissait à sa compétence.

La demande de mesures conservatoires ayant été rejetée, l'affaire a fait l'objet d'une décision au fond<sup>17</sup>, par laquelle la question décisive de la compétence a été précisée plus avant. Le Conseil a en effet confirmé que sa compétence s'étendait aux pratiques relatives aux tarifs des outillages publics de manutention gérés alors par le Port du Havre – activité de nature industrielle et commerciale – mais l'a rejetée quant aux pratiques tarifaires concernant l'utilisation des installations d'un terminal – activité administrative procédant d'une décision d'homologation, dont la légalité ne peut être soumise qu'au juge administratif.

Le Conseil a ainsi ouvert la porte à une sanction des pratiques anticoncurrentielles reprochées, y compris à l'encontre du Port du Havre, reconnu auteur d'un abus de position dominante par application de tarifs différents pour l'utilisation de son outillage public de déchargement selon que la manutention était confiée au concessionnaire du terminal pour le stockage et à ses sous-traitants, ou bien à leurs concurrents.

Ces pratiques ont été reconnues d'autant plus graves qu'elles émanaient d'un opérateur public chargé d'une mission de service public, dont les installations sont indispensables pour permettre aux entreprises de décharger des navires – rejoignant en cela l'appréciation de la Commission européenne<sup>18</sup> et de la Cour de justice de l'Union européenne quant aux obligations pesant sur les opérateurs portuaires exploitant une facilité essentielle.

En tranchant ces questions de compétence, le Conseil a placé dans le champ du diagnostic concurrentiel, aussi loin que le permet la dualité juridictionnelle, les décisions des établissements publics portuaires.

C'est enfin dans cette même perspective que le Conseil s'est prononcé en 2008<sup>19</sup>, sur saisine d'un opérateur de remorquage, en se disant incompétent à l'égard des décisions de police du Port du Havre mettant en œuvre des prérogatives de puissance publique, relatives en l'espèce à la délivrance ou au retrait d'un agrément des activités de remorquage.

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<sup>16</sup> Une décision antérieure du Conseil n°05-D-28 du 15 juin 2005 avait conclu à l'absence des pratiques anticoncurrentielles reprochées au Port de La Rochelle

<sup>17</sup> Décision n°07-D-28 du 13 septembre 2007 relative à des pratiques mises en œuvre par le port autonome du Havre et al., confirmée par CA Paris, 1<sup>ère</sup> ch. H, 5 novembre 2008, RG : 2007/17386

<sup>18</sup> Commission Européenne, Décision n°94/119/CE du 21 décembre 1993, installations du port de Rødby

<sup>19</sup> Décision n°08-D-18 du 30 juillet 2008 relative aux activités de remorquage par le port autonome du Havre et la SNRH

### 2.1.2. *L'héritage de l'intervention de la puissance publique dans les services portuaires :*

Ainsi qu'il a été évoqué plus haut, la gestion des activités portuaires a longtemps été marquée par une forte intervention de la puissance publique. L'Autorité de la concurrence a été conduite à apprécier les conséquences de cette situation dans une affaire où des pratiques anticoncurrentielles ont été mises en œuvre à la suite d'une longue période d'administration des prix dans la manutention portuaire en outremer, à La Réunion<sup>20</sup>.

L'Autorité a ainsi qualifié d'entente sur les prix la pratique litigieuse, ayant consisté pour les mises en cause à élaborer un tarif commun de prestations de manutention portuaire, mais elle a rappelé dans les motifs de sa décision le contexte légal, qui avait posé une exception à la libéralisation des prix de la manutention portuaire à La Réunion, sans qu'aucun texte ultérieur vienne « *donner de base légale à une quelconque intervention publique ni à aucun mode de détermination des prix dans ce secteur* ».

Si cette pratique ne peut aucunement être considérée comme la conséquence directe et nécessaire de cet attentisme normatif, l'administration des prix a néanmoins durablement imprégné le comportement des entrepreneurs de manutention et, dans ces circonstances, l'Autorité a reconnu « *l'existence de circonstances fortement atténuantes* » dont il a été tenu compte, de façon exceptionnelle, pour le calcul du montant des sanctions.

La décision de l'Autorité relève également, de manière incidente, que le choix de l'acconier appartient au transporteur maritime, qui en facture le prix à son donneur d'ordres « *sans apparaître aux yeux du transitaire ou du chargeur comme un élément de coût sur lequel pourrait s'exercer un choix* », le système en vigueur conduisant à une absence totale de mise en concurrence des manutentionnaires (§143). C'est assez dire que l'organisation de la chaîne logistique ne favorise pas la mise en concurrence effective des différents intervenants au transport, et notamment des opérateurs de services portuaires.

### 2.2. *Les règles de concurrence et l'intégration entre opérateurs de terminaux et armateurs :*

L'Autorité a rendu en 2010 une décision concernant de nouveau le Port du Havre<sup>21</sup>, qui s'inscrit dans le contexte de la mutation du secteur de la manutention portuaire, marquée par l'essor de la conteneurisation, et la prise de contrôle des opérateurs de terminaux par les grands armements, en vue de la formation de chaînes logistiques intégrées.

Le Port du Havre, dans le cadre du plan de développement de ses capacités d'accueil de navires porte-conteneurs « Port 2000 », a créé de nouveaux postes à quai, dont les premiers ont été attribués, antérieurement à la réforme de 2008, hors procédure d'appel d'offres, à des entreprises communes formées entre armateurs et entrepreneurs de manutention, parmi lesquelles la société TPO créée entre l'armateur AP Moller Maersk et le manutentionnaire Perrigault.

Sur saisine de la société AP Moller Maersk, et auto-saisine, l'Autorité a eu à sanctionner d'une part une entente de partage de capacité, et d'autre part une entente de partage de clientèle.

Les circonstances de l'entente de partage de clientèle étaient caractéristiques des liens qui s'établissent entre armateurs et opérateurs de manutention, puisqu'il s'agissait pour l'entreprise commune TPO, chargée des activités de manutention portuaire sur un terminal, de s'abstenir de traiter d'autres

<sup>20</sup> Décision n°11-D-01 du 18 janvier 2011 relative à des pratiques relevées dans le secteur de la manutention portuaire à La Réunion

<sup>21</sup> Décision n° 10-D-13 du 15 avril 2010 relative à des pratiques mises en œuvre dans le secteur de la manutention pour le transport de conteneurs au Port du Havre

conteneurs que ceux de sa société-mère, l'armateur AP Moller Maersk, et ainsi de mettre en œuvre, en concertation avec son autre société-mère, Perrigault, une pratique tendant à s'interdire de concurrencer les autres terminaux du Port du Havre.<sup>22</sup>

La stratégie consistant pour un armateur d'envergure mondiale à établir, à l'égard du premier port français de marchandises, une chaîne logistique intégrée, comprenant la création d'un opérateur de terminal à conteneurs, s'est donc heurtée en l'espèce aux intérêts de l'entrepreneur de manutention local « historique » avec qui il s'est allié à cette fin, lequel entendait figer la clientèle de ce nouvel entrant dans le secteur de la manutention, et le cantonner à fournir ses prestations au sein de la dite chaîne logistique alimentée par cet armateur.

S'agissant du grief d'entente de partage de capacité, tant la société TPO que les autres entreprises communes formées en vue de l'attribution des nouveaux postes à quai de « Port 2000 » ont été sanctionnées pour s'être accordées sur les modalités de cette répartition. Si cette forme d'entente de partage de marché, par répartition d'une surface d'exploitation disponible, est ordinairement considérée comme d'une particulière gravité (§467), seule une sanction de principe a cependant été prononcée, au vu notamment de « *la gravité très atténuée des pratiques compte tenu du rôle moteur joué par l'établissement portuaire* » (§484), les rencontres entre les opérateurs en vue de s'entendre sur une répartition de capacités ayant en effet été organisées à l'initiative du Port du Havre.

Si l'Autorité est allée « *aussi loin que possible pour stigmatiser l'attitude* »<sup>23</sup> du Port du Havre dans cette affaire, elle a cependant dû se déclarer incompétente pour connaître des pratiques qui lui étaient reprochées.

Les motifs de sa décision qualifient expressément de « très regrettable » le comportement de la personne publique qui invite des « entreprises privées à s'entendre pour se répartir des capacités dont l'attribution ne devrait obéir qu'à des considérations d'intérêt général appréciées par l'établissement portuaire lui-même » (§144). L'occasion a ainsi été saisie, dans le corps du raisonnement concluant à l'incompétence, de rappeler l'opposabilité des règles de concurrence à l'établissement portuaire, alors même qu'à l'époque des faits litigieux, le cadre légal n'imposait pas expressément le recours à une procédure d'appel d'offres. Force a été de constater que les réunions de concertation organisées par le Port étaient indissociables de la gestion du domaine public, et de la mise en œuvre de prérogatives de puissance publique pour l'organisation du service public, si bien que l'Autorité n'avait pas compétence pour statuer sur ce grief d'entente à la charge du Port du Havre.

Pour autant, et conformément à sa pratique décisionnelle<sup>24</sup>, l'Autorité conservait toute compétence à l'égard du comportement des entreprises mises en cause, détachable de la légalité des procédés mis en œuvre par le Port – dont en outre le rôle incitateur ne les a pas exonérées de toute responsabilité.

Cette décision a fait l'objet d'un recours<sup>25</sup>, sur le seul grief de partage de clientèle, devant la cour d'appel de Paris qui, considérant que la société TPO était dépourvue d'autonomie, et que les pratiques en

<sup>22</sup> Il s'agissait de l'application extensive, et abusive, d'une clause de non-concurrence actée entre les deux sociétés-mères, par laquelle il était prévu que Perrigault et le nouvel opérateur de manutention TPO ne s'intéressent pas à leur clientèle respective au Port du Havre – et ce alors que les deux entreprises se présentent comme ayant une réelle autonomie sur le marché, et que TPO était réputé opérer un terminal à conteneurs multi-utilisateurs (§50 à 54).

<sup>23</sup> L. Grard, Revue de droit des transports n°6, juin 2010, comm.132

<sup>24</sup> Décision n°09-D-10 du 27 février 2009 relative à des pratiques mises en œuvre dans le secteur du transport maritime entre la Corse et le continent

<sup>25</sup> CA Paris, ch. 5-7, 20 janvier 2011, RG 2010/08165

cause étaient « *l'expression d'un conflit opposant Perrigault et APMM* », a infirmé sur ce point la décision de l'Autorité – laquelle est en revanche définitive s'agissant du grief d'entente de partage de capacités. Un pourvoi est pendant devant la Cour de cassation.

Au moment même où les installations et l'offre de services portuaires se modernisent pour prendre en compte les fortes évolutions du secteur, des acteurs privés et publics ont ainsi pu être sanctionnés pour avoir de concert mis en œuvre et avoir fait perdurer des pratiques anticoncurrentielles. Dans un secteur d'activité marqué par une culture d'intervention publique, par une tradition forte de « discipline », parfois anticoncurrentielle, des acteurs historiques, et par une crise profonde, la diffusion de la culture de la concurrence n'est pas sans difficulté. Pour autant, il faut constater que le champ d'application du droit de la concurrence progresse, la part – résiduelle – d'activité qui en est soustraite ne l'étant que pour des motifs impérieux. Dans le secteur portuaire comme ailleurs, la pleine mise en œuvre de la règle du jeu concurrentiel ne pourra que valoriser les efforts de modernisation des opérateurs, et accompagner le regain de compétitivité généré par la formation d'acteurs mondiaux et de filières d'intégration verticale.



## GERMANY

### 1. Introduction

Ports are both, strategic gateways for supplies of goods and key economic clusters. With a view to the strategic importance of ports for the flow of goods, the European Commission issued a communication on a European Ports Policy in 2007, providing guidance for policymakers within the European Union.<sup>1</sup> Given the key role of ports as infrastructural nodes, competition issues in ports tend to have significant ramifications for the whole economy.

While the Bundeskartellamt has dealt with a number of merger cases and some abuse proceedings that concerned competition in ports, only few cases required an in-depth investigation.<sup>2</sup> The particular relevance of these cases lay in the strategic importance of the ports concerned for a specific region and for the domestic and international trade of goods. The fact that many ports and related facilities are (co-)owned by states or public entities, as well as the high development costs, requirements of administrative authorizations and the need for connecting infrastructures such as canals, railroads and motorways can complicate investigations in this sector. As a consequence, competition authorities investigating and trying to remedy competition problems in ports and port services can face particular challenges, as the Bundeskartellamt has experienced in the ongoing *Scandlines* case.<sup>3</sup>

This paper provides some insights gained from the relevant cases handled by the Bundeskartellamt as to (1) competitive constraints and market definition, (2) market power and its abuse as well as (3) appropriate remedies.

### 2. Competitive constraints and market definition

In the port-related cases that received more in-depth review by the Bundeskartellamt, market definition – both in terms of product and geography – was a key aspect. Other modes of transport are usually not easily interchangeable with sea transport. Air transport may in some cases be an alternative, but only for passengers travelling without a car and for the trade with light goods of high value. Accordingly, in both cases discussed below alternative modes of transport, including air transport, were not regarded as viable substitutes.

In 2004 *New Fruit Wharf NV*, a subsidiary of the Belgian *Sea-Invest Group*, intended to acquire control over fruit storage and handling capacities in the port of Hamburg.<sup>4</sup> Starting from a rather broad market for the “handling of cargo in sea ports”, in this case the relevant product market was defined as the market for “fruit cargo handling in sea ports”. This was because of the need for a special infrastructure due

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<sup>1</sup> European Commission, COM (2007) 616, available at [http://ec.europa.eu/transport/maritime/ports\\_en.htm](http://ec.europa.eu/transport/maritime/ports_en.htm)

<sup>2</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“; Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*“.

<sup>3</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“; in a preliminary ruling one of the key issues was that third-party access to the port was restricted due to specific rights provided for by the German General Railway Act (Allgemeines Eisenbahngesetz), OLG Düsseldorf, VI-Kart 1/10 (V), *Scandlines v Bundeskartellamt*.

<sup>4</sup> Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*“, para. 2.



to the risk of deterioration intrinsic to fruit storage and transportation.<sup>5</sup> The geographic market definition included all ports in the “Hamburg/Le Havre” range, i.e. Le Havre – Dieppe – Dunquerque – Zeebrugge – Antwerpen – Vlissingen – Rotterdam – Bremerhaven – Hamburg. Ports located on the Baltic Sea were not considered adequate substitutes because they lacked the necessary handling and storage infrastructure or were insufficiently connected to the “hinterland” for the predictable future.<sup>6</sup>

In another case the Bundeskartellamt addressed the issue of market definition in the context of ferry services provided in the Baltic Sea between the ports of Puttgarden in northern Germany and Rødby in southern Denmark. The ferry route Rødby – Puttgarden essentially links Denmark (and Sweden) with Germany and the rest of western/central Europe. There is no viable alternative to the ports of Rødby and Puttgarden, as due to their location (duration of crossing) and connection to further means of traffic they are able to offer services no other port can offer. *Scandlines GmbH* is the owner and operator of the port in Puttgarden and the only operator (through a subsidiary) of ferry services on the Rødby-Puttgarden route.

Following a complaint by two shipping companies, the Bundeskartellamt found that the port constituted an essential facility and that *Scandlines* infringed competition law by refusing to grant access to the complainants on reasonable, non-discriminatory terms.<sup>7</sup> In line with the market definition of the European Commission in Case 94/119/EC “*Port of Rødby*”<sup>8</sup> the Bundeskartellamt defined the relevant upstream market as “organization of port services in Puttgarden”, i.e. a single port,<sup>9</sup> because other ports in the region were not seen as viable alternatives.<sup>10</sup>

### 3. Market Power

Over the past decades policies have been developed for the de-monopolization and liberalization of sectors that for much of the twentieth century were regarded as natural monopolies or considered to be outside the scope of competition rules, and which were often under state control or ownership. It has been recognized that downstream competition is slow to emerge where service providers can only compete if they have access to important infrastructures such as telecommunication networks, electricity grids or ports. In such cases, control of the infrastructure generates a bottleneck situation where one company can prevent others from operating on the market by denying access to what is to be considered an ‘essential facility’. The ‘essential facilities’ doctrine has its origins in United States antitrust law<sup>11</sup> and was first applied in Europe by the European Commission in the case *Sealink/B&I – Holyhead*.<sup>12</sup> In Germany the essential facility issue has received close attention in the competition policy debate since the mid-1990s.<sup>13</sup>

<sup>5</sup> Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*“, para. 24.

<sup>6</sup> Bundeskartellamt, B9-101/04 „*Belgian New Fruit Wharf*“, para. 26.

<sup>7</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 45, 50.

<sup>8</sup> European Commission, OJ 1994 No. L 55/52 „*Port of Rødby*“, para. 7 et seq.

<sup>9</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 28 et seq.

<sup>10</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 29 et seq.

<sup>11</sup> *United States v Terminal Railroad Association of St. Louis*, 224 US 383 (1912); the scope of the essential facilities doctrine has been broadened more recently by the Department of Justice and the Federal Trade Commission as *amici curiae* in the *Verizon Communications v Law Offices of Curtis Trinko* case before the US Supreme Court, available at: <http://www.ftc.gov/ogc/briefs/02-682.pdf>

<sup>12</sup> European Commission, „*Sealink/B&I – Holyhead*“, OJ [1994] L 15/8.

<sup>13</sup> The topic was the subject of several conferences hosted by the Bundeskartellamt, including the 1997 International Conference on Competition and a competition experts meeting (‘*Professorentagung*’) in 1997; see Annette Klimisch and Markus Lange, Zugang zu Netzen und anderen wesentlichen Einrichtungen als Bestandteil der kartellrechtlichen Mißbrauchsaufsicht, WuW 1998, Issue 1, p. 15 et seq.

In 1998 a specific provision (cf. Section 19 (4) no. 4) was introduced into the German Act against Restraints of Competition.<sup>14</sup>

### 3.1. *Essential facilities and refusal to supply*

The Bundeskartellamt has applied the essential facility doctrine in the „*Scandlines*“ case. Since there were no suitable alternatives to the Rødby-Puttgarden route, the Bundeskartellamt considered *Scandlines* to be dominant on the relevant market for the “organization of port services in *Puttgarden*”. The Bundeskartellamt therefore dealt with the question of whether the port facilities were essential, i.e. whether they could be duplicated<sup>15</sup> and whether there was any objective justification for the refusal to grant the complainants access to the port.<sup>16</sup>

Following an in-depth investigation, the Bundeskartellamt concluded that the port facilities in *Puttgarden* could not be duplicated because it could be ruled out that the competent authorities would issue a construction permit within a reasonable time horizon and there were reasonable doubts as to whether a construction permit would be issued at all.<sup>17</sup> Furthermore, a duplication of the port facilities was excluded for practical, notably economic reasons. The long-term development plan for the region foresees a bridge to be built between Germany and Denmark within this decade which would ultimately lead to a significant reduction of the market capacity and thereby render the recoupment of the costs for the construction of a new port impossible.<sup>18</sup>

According to standing case law as well as the practice of the Bundeskartellamt, dominant companies are not required to grant access to essential facilities if there are capacity constraints which make it impossible to provide access. Although *Scandlines* argued that this was the case, expertise by a nautical expert confirmed that the port infrastructure was sufficient to allow access for a competitor without unduly interfering with the ferry operations of *Scandlines*.<sup>19</sup> It follows that if a dominant firm claims that all the capacity in an essential facility is being used, it is necessary to determine whether the claim is genuine or whether the argument is being used to deny access to a downstream competitor.

### 3.2. *Buyer power and public private partnerships*

In the „*Belgian New Fruit Wharf*“ case, the merging parties had horizontal overlaps and gained a significant market position on the market for “fruit cargo handling in sea ports” in the “Hamburg/Le Havre” range. The merger was cleared in the second phase of German merger control (following a preliminary investigation phase of four weeks). Other aspects taken into account were (i) countervailing

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<sup>14</sup> An English version of the Act against Restraints of Competition („ARC“) is available on the website of the Bundeskartellamt at: [http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120\\_GWB\\_7\\_Nouvelle\\_E.pdf](http://www.bundeskartellamt.de/wEnglisch/download/pdf/GWB/110120_GWB_7_Nouvelle_E.pdf)

<sup>15</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 33 et seq.

<sup>16</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 40 et seq.

<sup>17</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 33 et seq.

<sup>18</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 39.

<sup>19</sup> Bundeskartellamt, B9-188/05 „*Scandlines*“, p. 42.

buyer power,<sup>20</sup> (ii) the fact that the terminals were operated under a public-private partnership,<sup>21</sup> and (iii) future port developments in the Baltic Sea<sup>22</sup>.

The competitive pressure on *New Fruit Wharf* was not only exercised by competing ports with fruit handling/storage facilities but also by strong customers. The demand side for “fruit cargo handling in sea ports” consists essentially of the designated marketing organizations of the country of origin with significant buyer power. Given that fruit terminals are only profitable if they operate at high capacity levels, the threat of switching fruit imports to another port in the “Hamburg - Le Havre” range restricted the possibility of *New Fruit Wharf* to profitably raise prices beyond the competitive level.<sup>23</sup>

Another factor to be taken into account was the fact that the state of Hamburg continued to hold certain veto rights as a minority shareholder of the relevant port facilities. Since the city had no interest in losing customers to competing ports - for job security and regional development reasons - it was expected to not just aim at maximizing profits and thus have a moderating influence on the pricing policy of New Fruit Wharf.<sup>24</sup>

Finally, the planned development of fruit terminals in the Baltic ports in Gdansk (Poland) and Gdynia (Poland) as well as the planned improvement of other handling and forwarding infrastructures contributed significantly to remedy competition concerns with a view to the future. Although new market entries (i.e. the development of new port facilities) are generally difficult in this sector due to high sunk costs (i.e. economic barriers to entry) and long administrative planning procedures (i.e. legal barriers to entry), in this case the development of the Baltic ports was considered to be sufficiently likely and timely to allay any competition concerns.

#### 4. Remedies

The drafting of guidelines on the design and implementation of remedies in Germany is foreseen in the near future.<sup>25</sup>

##### 4.1. Mergers

The Bundeskartellamt has so far not imposed any remedies in merger control proceedings concerning ports or port related services. In order to avoid a situation where the Bundeskartellamt would have to act like a regulator, German law rules out a situation in which the Bundeskartellamt would have to monitor the behaviour of the merging parties on a continuous basis (cf. Section 40 (3) ARC). Therefore, in a relevant case, a clear-cut divestment of a viable business (e.g. port or terminals within a port) that would reduce a horizontal overlap to a degree that eliminates the competitive concerns would generally be regarded as the more effective and preferred remedy. The Model Remedy Clauses published by the Bundeskartellamt provide further guidance.<sup>26</sup>

<sup>20</sup> Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf“, para. 34.

<sup>21</sup> Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf“, para. 35.

<sup>22</sup> Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf“, para. 39.

<sup>23</sup> Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf“, para. 34.

<sup>24</sup> Bundeskartellamt, B9-101/04 „Belgian New Fruit Wharf“, para. 35.

<sup>25</sup> Bundeskartellamt, Activity Report 2009/2010, shortly available at: <http://www.bundeskartellamt.de/wEnglisch/Publications/Report.php>

<sup>26</sup> Bundeskartellamt, Clearance of a Merger Project subject to Remedies, available at: [http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter\\_englisch/0902\\_Obligations.pdf](http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_englisch/0902_Obligations.pdf)

#### 4.2. *Unilateral Conduct*

Remedies in unilateral conduct cases are an important, even integral, part of an enforcement action, and it is advisable to consider available remedies at an early stage in the proceedings. Not only when it comes to addressing competition issues in ports, the preferred remedy will be the one that accomplishes the goals of stopping anticompetitive conduct and restoring competitive conditions while minimizing the costs of remedy design and administration and the risks of curtailing efficient conduct. Against this background and in order to minimize administrative costs, the Bundeskartellamt issued a decision requiring *Scandlines* to grant access on non-discriminatory terms that were to be negotiated between the parties and presented to the Bundeskartellamt until a fixed date.<sup>27</sup> While this obligation was quashed by the competent appeal court on the ground that it was too vague, it was finally upheld by the German Federal Court of Justice.<sup>28</sup>

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<sup>27</sup> Bundeskartellamt, B9-188/05 „Scandlines“, p. 43 et seq.

<sup>28</sup> Federal Court of Justice, decision of 24.09.2002, KVR 15/01 „Fährhafen Puttgarden“; this decision was taken in an earlier proceeding concerning the same substantive issues.



## ITALY

### 1. Introduction.

Italian ports, although located in a privileged position in relation to major traffic routes of ships coming from the Far East, struggle to cope with international competition, especially with ports of Northern Europe. There are many explanations for this competitive disadvantage, such as the inadequacy of infrastructure networks, both inside and outside ports, the high fragmentation of the national port system and major organizational problems. The regulatory framework may also have played a role in hindering the efficiency of Italian ports.

This contribution will firstly present an overview of the Italian port system, focusing on competitive constraints in Italian ports.

The second part of the contribution will present the Italian legal framework concerning ports, with particular attention to the reform adopted in 1994, liberalizing the sector, and the advocacy interventions of the Italian Competition Authority.

Finally, some cases of competition infringements in ports assessed by the Italian Competition Authority will be presented.

### 2. Ports and maritime transport: overview of the Italian market

Italian ports show a limited degree of internationalization and at the moment they serve mainly domestic demand. According to a recent study on national ports by Italy's Central Bank, containers handled in Italian ports coming from exporters, or addressed to importers, were a minimum part of the overall traffic<sup>1</sup>.

The limited internationalization reflects some competitive disadvantages of the Italian ports, such as the inadequacy of overland infrastructures, in particular roads and railways towards continental Europe, slowness in customs' administrative controls, the dimension of the seabed, not deep enough *for full container ships*. In Italy, at the moment only the port of Trieste and the port of Gioia Tauro have sufficient dimensions to host big container ships. Finally, the efficiency of port logistics appears to be relatively low in comparison to the ports in Northern Europe.

According to data from the report on the activity of Italian Port Authorities<sup>2</sup>, in 2009 taking into account the first thirteen European ports in terms of traffic volumes, Italian ports accounted for about 11.3% of containers traffic in Europe, much less than the traffic of the solely port of Rotterdam, the first in Europe in 2009 with about TEUs 9.743.290.000, equivalent to about 20% of European traffic.

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<sup>1</sup> See BANCA D'ITALIA - Occasional Papers, *The Italian port system: a survey on competitiveness and development factors*, 2009, available in Italian at [http://www.bancaditalia.it/pubblicazioni/econo/quest\\_ecofin\\_2/qf\\_39](http://www.bancaditalia.it/pubblicazioni/econo/quest_ecofin_2/qf_39)

<sup>2</sup> See Ministero delle infrastrutture e dei trasporti, *Relazione sull'attività delle autorità portuali anno 2009*, available in Italian at <http://www.mit.gov.it/mit/site.php?p=cm&o=vd&id=1529>.

Italian ports of interest are essentially maritime and are located in three main areas: the northern Tyrrhenian Sea (Genoa, Savona, Livorno and La Spezia) the southern Tyrrhenian Sea (Naples and Salerno), the northern Adriatic Sea (Trieste, Monfalcone, Venice). Finally, within the category of transshipment ports, in which shipments are transferred from one carrier to another, the Italian ports of Cagliari, Taranto and Gioia Tauro. In particular, the port of Gioia Tauro holds a strategic position and has taken the place of the Malta seaport as the link for overseas traffic from/to US and the Far East.

### 3. The regulatory framework

Ports and seaport areas in Italy are public assets, which are state owned and unalienable<sup>3</sup>. They are part of the maritime State property and are subject to the rules provided for public goods by the Italian Civil Code.

Until the reform of 1994, the regulatory framework of ports presented several constraints to competition. In particular, there was no clear distinction between regulatory functions and economic activities in ports. Ports were managed by public bodies (Consorzi or Enti Portuali) which, in many circumstances, monopolised the provision of port services through undertakings controlled by the local port authority. Loading and unloading operations were monopolised by the so called “Compagnie Portuali” (Port companies, guild like workers’ organisations endowed with an exclusive right to carry out all port operations. Furthermore, tariffs for port services were determined on the basis of complex administrative proceedings, which did not provide any incentive to improve efficiency and quality of port services.

In 1991 this situation led to a pronouncement by the Court of Justice, that, after examining specifically the question of port operations in the Port of Genoa, stated that the exclusivity rights granted to “Compagnie Portuali” conflicted with the rules of the Treaty<sup>4</sup>. The Court declared the necessity for Italian legislative framework to be conformed to European competition law, and in particular stated that the monopolisation of port services was incompatible with the principles of competition<sup>5</sup>.

The Italian Competition Authority (also ICA), in March 1991, had already sent a report to Government and Parliament in order to signal the necessity of a revision of the monopoly regime of port services<sup>6</sup>. In 1992 the ICA also launched a fact-finding investigation (market study) on the Italian ports

<sup>3</sup> See the definition in the Italian Navigation Code, (R.D. 30 marzo 1942, n. 327).

<sup>4</sup> Court of Justice, Judgment 10 December 1991, C170/90, *Merci convenzionali porto di Genova spa c. Siderurgica Gabrielli spa*. In the judgement the Court concluded that the port undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question had occasion, as a result, either to demand payment for services which had not been requested, to charge disproportionate prices (infringements under Article 82(a) of the Treaty), to refuse to employ modern technology (which has the effect of limiting technical development within the meaning of Article 82(b)), thereby increasing the cost and length of operations, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers(18) (which is contrary to Article 82(c))

<sup>5</sup> Moreover, after the Port of Genoa Judgment also the European Commission, finding that Italy had not amended its legislation, on 31 July 1992 sent a Communication to Italian Government.

<sup>6</sup> Italian Competition Authority, Advocacy report on *Port services*, 27 March 1991, Bulletin no. 2/1991.

market and regulation<sup>7</sup>. Following the market study seven further advocacy reports were addressed by the ICA to the Parliament and Government on other specific port-related issues<sup>8</sup>.

In 1994 a general reform of the Italian ports was adopted with Law No. 84 of 28 January 1994, which repealed the Navigation Code's provisions in contrast with competition principles and introduced many innovations in the Italian port system:

- The reform established Port Authorities as new public bodies with autonomous budgets and finance, separating the regulatory function from the provision of services. Italian Port Authorities act as Landlord Port Authorities and they are responsible for planning the general development of ports and overseeing port operations. They cannot directly perform port operations and services, while they are in charge of granting access to port areas to private undertakings, according to the procedures laid out in the law.
- Cargo handling activities were liberalized and are now the strict preserve of private undertakings. These undertakings may operate in ports through authorizations granted by Port Authorities, based on specific technical, professional and financial requirements. Port Authorities enjoy some discretionary powers only in relation to the number of authorizations constrained by matter of space<sup>9</sup>. Tariffs were also liberalized.
- “Compagnie portuali” have been transformed in private companies providing their services on the market.
- The reform also liberalized general interest services in ports (illumination, cleaning, garbage gathering and disposal, the water services, maintenance and repair, maritime stations for passengers, IT services and other services relating to the industrial and commercial activities), allowing Port Authorities to grant concessions for these services through public competitive tenders<sup>10</sup>.

The formal separation between regulatory activities and economic services was the first step towards a more competitive regime in ports. However many problems were left unsolved as pointed out in many advocacy reports issued by the Authority after the reform.

Firstly, some of the norms aimed at allowing a “soft” transition to the new regulatory framework de facto perpetuated some of the restrictions that the reform wanted to eliminate. The undertakings authorised

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<sup>7</sup> Italian Competition Authority, IC/4, Indagine conoscitiva nel settore dei servizi portuali, 4 November 1992/ 16 October 1997.

<sup>8</sup> Italian Competition Authority, Advocacy report on *Port reform*, 16 September 1993, Bulletin no. 26/1993; Advocacy report on *Implementation of Art. 16 of Law 84/94*, 12 August 1994, Bulletin 32-33/1994; Advocacy report on *Port services tariffs*, 1 June 1994, Bulletin n. 21/1994.; Advocacy report on *Port services tariffs*, 14 March 1995, Bulletin 9/95; Advocacy report on *Port companies monopoly*, 13 June 1996, Bulletin n. 23/1996; Advocacy report on *Port companies monopoly*, 6 February 1997, Bulletin no. 4/97.

<sup>9</sup> The Administrative Courts in several occasions have overturned the decisions of Port Authorities denying authorizations to private enterprises independently from the verification of the above mentioned technical, professional and financial requirements. See, for instance, Regional Administrative Tribunal of Liguria, 31 March 2000. Regional Administrative Tribunal of Friuli Venezia Giulia, 27 luglio 2001, n. 490

<sup>10</sup> See Ministerial Decree (Ministero dei trasporti e della navigazione) 14 November 1994, n. 1163800.



to provide cargo services were obliged to hire, as a transitional measure, the workers of the former Port companies, which, at the same time, were now competing in the provision of cargo services <sup>11</sup>.

Furthermore, Law no. 84/94 left open the possibility for Port Authorities to create mixed enterprises companies (public-private companies) for the provision of public services in ports. In this situation, which in fact leads the private-public company to a dominant position, there is a risk of exclusionary practices against competitors. In this respect the ICA outlined in several advocacy reports that the private shareholder should in any case be selected through a public tender procedure, and that public services concessions should be assigned for a limited period of time <sup>12</sup>.

#### **4. The decision of the ICA concerning anticompetitive practices in ports**

Most of the decisions of the Italian Competition Authority concerning competition law infringements in ports were abuses related to denial of access to port infrastructures, which is a precondition for providing port services, both cargo-handling and technical-nautical services.

The Authority pointed out that the access to ports' essential facilities, subject to concession by Port or Maritime Authority, must be guaranteed in accordance with equality and non-discrimination principles.

After the reform of the regulatory framework some cases assessed by the Authority dealt with the hybrid role of Port Authorities as regulators and providers of services, taking advantage of their regulatory role to benefit their economic activities.

For example, in a case concerning the port of Venice, the Authority intervened after Nuova Italiana Coke complained that Provveditorato, the public agency responsible for regulating Venice harbour, had refused to grant access to Nuova Italiana Coke to the docks that the company managed itself, asking it instead to use the docks managed by Provveditorato. The dominant position of Provveditorato was assessed in view of its market share and the prerogatives vested in it by law as a regulatory body with authority over Venice harbour, while engaged in economic activities directly and through subsidiary companies. The refusal by the Provveditorato to authorise ships to dock at quays managed by Nuova Italiana Coke was deemed to be an abuse of dominant position because it had led to an unjustified restriction on that company's activities to the benefit of the harbour activities performed and provided by the Provveditorato itself <sup>13</sup>.

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<sup>11</sup> See below case A....BIS/Compagnia portuale di Brindisi.

<sup>12</sup> Italian Competition Authority, AS779, Comune di Santo Stefano di Camastra (ME), 2 November 2010, Bulletin n. 47/2010. Report on the creation of a tourist port and assignment of the relevant port services In October 2010, the ICA sent an advocacy report to the administration of Santo Stefano di Camastra with reference to the creation of a mixed public-private company aimed at creating port for tourists in the city, and offering the relevant port services. In general terms, in accordance with Italian and European case law, the ICA has constantly pointed out that PA shall choose their private partners through public tender procedures open to parties in competition. More specifically, the ICA stressed that the content of public procedures shall accurately include the service to be assigned as well as the precise contribution that the private party will be called to offer in the public-private company. Transparency of the tenders in a competitive contest is coherent with free competition in the European market, and is clearly recognised to be the only way to improve quality of services without making their costs raise.

<sup>13</sup> Italian Competition Authority, A85, Nuova Italiana Coke/ Provveditorato porto di Venezia, decision n. 32/11 of 4 August 1995, Bulletin n. 31-32/1995.

In another case, involving the Port company of Brindisi, the anticompetitive infringement was connected to the transitional provisions requiring companies providing cargo handling services to use Port companies' workforce.

The Authority ascertained that the Port Company had refused to supply its own labour force to a competing company, BIS (Brindisi Imbarchi Sbarchi Srl), and subsequently delayed the completion of hold-cleaning operations, supplying personnel without proper qualifications and skills. The Authority found no objective justification for refusing to supply the workers requested by BIS, and therefore considered the conduct of the Port Company an abuse of dominant position<sup>14</sup>.

In these, as in other cases, the relevant product market was usually defined on the basis of the services to be offered, while the geographical market was normally set within the concerned port area. This in view of the fact that for companies offering services such as maintenance services to ships in a port, the space in a port is not substitutable with space in other ports.

This analysis was carried out in two cases where an abuse of dominant position was ascertained with regard to Cantieri del Mediterraneo (CAMED), a company holding the dry dock concession for the port of Naples, and operating in the same port as a provider of nautical maintenance and repair services.

The ICA defined the product market as the market of dry docks and adjacent spaces strictly necessary to operate nautical maintenance and reparations within the docks. The geographical market was the Port of Naples.

The Antitrust investigation established that CAMED's practices could exclude other maintenance and repair providers operating in the Neapolitan port from an essential not duplicable infrastructure. The company delayed in confirming dry docks availability so that competitors could not schedule their own activities, thus preventing them from engaging in effective competition in the market of nautical reparations.

In addition to the 285,000 euros fine, the ICA's decision also requires CAMED to grant informational transparency about dry docks availability as to advance reservations, in order to provide its competitors a fair chance to schedule their activities<sup>15</sup>.

Substitutability among different ports might, instead, be considered when assessing services provided to ships, such as container movement services. The Authority carried out this type of analysis in a cartel case concerning such services in the port of Livorno.

The investigation started in December 2007 following a complaint by Cala Container Shipping Spa, a company active in sea transport of containers, which claimed that two operators (Sintermar and TDT) offering terminal services in the port of Livorno had simultaneously raised the prices for their services. In the port of Livorno Sintermar and TDT accounted for more than 90% of containers' movement.

The Authority examined different hypothesis on the definition of the relevant geographical market, considering substitutability among several ports in the geographic area (Livorno, La Spezia, Genova and Savona). Looking at container movements in these ports some degree of substitutability was found

<sup>14</sup> Italian Competition Authority, A416, BIS/ Compagnia portuale Brindisi, decision n 4092 of 11 July 1996, Bulletin n. 28/1996.

<sup>15</sup> Italian Competition Authority, A405, La nuova meccanica navale – Cantieri del mediterraneo, decision n. 20412 of 28 October 2009, Bulletin n. 44/2009 and Italian Competition Authority, Case A298, ONI + altri – Cantieri del Mediterraneo, decision n.11404 of 28 14 November 2002, Bulletin n. 46/2002.

between Livorno and La Spezia, although, since the inclusion of La Spezia in the relevant geographic market would not have significantly changed the assessment of the case, the question was left open<sup>16</sup>.

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Italian Competition Authority, I685, Costa Container Line / Sintemar - Terminal Darsena Toscana, decision n. 19462 of 19 January 2009, Bulletin n. 4/2009.

## MEXICO

### 1. Definition of relevant market in port's activity

This study examines the determination of the relevant market in port's activity for the Mexican case. The study is divided into four sections, the first one establishes the conceptual aspects of a port; the second section refers to the regulatory framework governing this sector; the third one addresses the issue of delimitation of the market by using two illustrative cases; and finally, the fourth section points to some conclusions on the subject.

### 2. The port as a network node and multi-product company

Ports have been defined traditionally as a liaison between the sea and land to transfer goods or persons. This perspective has been changing over time so that today, the port is recognized as part of a transportation network and, more specifically, as a network node subject to the interaction of ship and land transport.

The sea shipping, the port and the land transport constitute the basic elements of the transportation network of goods and people. The port, as a node offers a set of services designed to provide functionality to the network, for example, services for ships, goods and land transport. These characteristics make the port a multiproduct enterprise.

The port, as a multiproduct enterprise, requires the establishment of a set of facilities or means to the "production" of its services, therefore; in their interior a set of economic agents that offers different services with diverse facilities, such as, terminals and warehouses are located. These agents either handle a particular product (containers, grain, minerals, fluids, etc.) or ships and means of transport (trucks and rails).

#### 2.1. The service or port "product"

<sup>1</sup> The set of services offered by a port can be classified simply into ship's services and good's services.

- Ship's services:
  - Services for the use of port infrastructure: funding, port, berthing and wharfage.
  - Services to perform internal navigation: pilotage, lighterage, mooring and towing.
  - General services for ships, victualling, drinking water, fuel, communications and electricity, sanitation or waste and sewage disposal.
- Good's services

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<sup>1</sup> Such classification is used, for example, in article 44 of the Port's Law published in June 19, 1993 in the DOF (Official Newspaper, by its Spanish acronym).

- These services are related to the handling of goods, including: load, unload, storage and haulage.

Ships require different services to access a port, these are referred to as infrastructure services and assistance to ships for reaching a dock. The infrastructure services refer to the use of means created in a port so that vessels can access it (port's services) and remain there while loading or unloading goods (dockage and wharfage). Services for the ship's internal navigation are those that allow the ship to access, under the best security conditions, the docking area. These services need the guidance of a marine area expert, who should lead the ship to the dock (riding or practical), and a boat (trailer) to aid the ship perform the maneuvers ordered by the pilot. Once the ship is in the berthing area it should be ready for cargo maneuver activities that requires the ship to be secured to the dock (mooring ropes). Additionally, there are a number of services offered to the ship and its crew such as drinking water, communication, electricity, and others that are defined as general services.

The services related to the handling of the goods are the activities that take place among the ship, storage yard, and the vehicle that will take care of the exit / entry of goods to the port. These activities are conducted in a facility or port terminal constructed on the port surface, according to the types of goods to be handled, for example general cargo -containers, vehicles and others- agriculture, minerals and fluids. These terminals are supported by fixed (warehouses, pipelines) and mobile (cranes, vehicles) equipment, these elements constitute the port superstructure, in other words they stand on the infrastructure and allow handling the product in the port.

## **2.2. *Competition in port's markets***

Ports are often not homogeneous units in terms of the facilities located therein or in relation to goods being handled. It is important to consider that in the ports diverse services are carried out, different port terminals are available, which feature specific facilities, according to the goods they handle. For example, the container terminals tend to have gantry cranes and require space (patio); grain terminals have silos or storage facilities, fluid terminals have storage tanks and pipelines at dockside; mineral storage terminals are equipped usually with a mineral deposit area and a special location, in respect to other port terminals, to avoid the potential harm of mineral waste in other cargo.

In consideration of the above, facilities and equipment of different terminals are not substitutes. Usually, they are only used for certain types of cargo, this feature allows to have available a set of terminals that supply different markets. These markets are related to the type of goods handle in a port, therefore we can have different markets according to the merchandise handled.

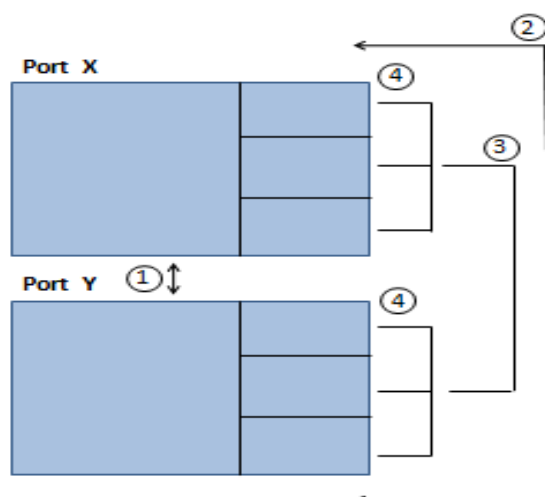
Generally speaking, the main port market players are shipping companies, the port manager (APIS for its Spanish acronym), port terminals, cargo owners and private land transportation.

- Shipping companies are those that transport goods between ports. These companies are sometimes integrated to other logistic activities of the cargo that may be related to the cargo owner.
- The port manager is responsible for the administration, development and security of the port, its entire area -land and sea- over which it has domain and, generally, in the Mexican case, that stated in its concession title. The APIs in Mexico play a dual role, they provide infrastructure and delegate services to private companies, and, when established in the concession, the operation of a terminal.

- The terminal operators are the units that move goods between the ship and the patio, or storage of cargo, for subsequent delivery by other means of transportation (truck or rail).
- The land transport companies, which are those that move goods between the place of origin or destination of a cargo and the port.
- The cargo owners usually hire private logistic agents sometimes linked to other activities, maritime or terrestrial; or large users, who hire various agents of the chain or transport network directly.

Considering the port's characteristics, in the sense, that they are part of a transport network, diverse services are offered, different goods with diverse facilities are supplied, and various economic agents concur in the market, it is pertinent to point out that the competition that arises often in the ports has different levels. In this regard, Haezendonck<sup>2</sup> (2001) points that four types of competition can be established, as shown in the figure below:

**Competition Types**



- Competition among ports at the entity or port authority level (1). This type of competition occurs when the ports or the entity that manage it compete with each other for public funds, for example, to develop port infrastructure. This issue is important for the government, when resources are scarce and must be assigned efficiently to the most profitable targets.
- Competition among ports at the merchandise level (2). This kind of competition occurs when port managers compete to attract new businesses to their ports. For example, trying to attract companies operating container terminals or other product to their ports.
- Competition at the level of terminals in different ports (3). This level of competition is characterized in that the cargo is disputed between terminals; the gain of a terminal is a loss to another. This kind of competition occurs on specific cargo, such as containers.

<sup>2</sup>

Haezendonck Elvira, Essay on strategy analysis for seaports, Garant Publishers. 2001.

- Intra-port competition (4). The port can capture the flow of goods or cargo, and these are disputed by terminals located inside the port. Such competition can increase the efficiency in handling cargo; however, the desire of a port to generate economies of scale, for example, may limit intra-port competition.

The competition types described above allow distinguishing different pressures that are faced by the port's economic agents. This paper will focus on the level of competition among terminals (3).

### 3. Regulatory Framework<sup>3</sup>

Until 1991 the ports were controlled by a government owned company under the Ministry of Communications and Transport (SCT for its Spanish acronym), known as Mexican Ports. This entity was responsible for the operation, management and billing of services in ports. The participation of private enterprises was almost zero. Between 1991 and 1993, the first signs of change in port management occurred, mainly with the entry of the first private companies to the port of Veracruz, one of Mexico's main ports.

From 1993, in a context of significant structural changes in various sectors of the Mexican economy, the Ports Act was published, and the following year its regulation.<sup>4</sup> These rules established a new model for Mexican ports which emphasized the issues of decentralization, privatization and competition.

Decentralization was intended to grant autonomy to the ports in its administration and finance, the government would only oversee the whole of the country's ports, and for this function the Integral Port Administrations (APIs) were created for each port. The privatization of the port industry would be open to participation by private investors, domestic and foreign, in the operation of terminals and port facilities. The privatization process also considered the promotion of competition between ports and between operators within the port, as well as, liberalization of tariffs for port services and the elimination of cross subsidies and barriers to market entry. The regulation of tariffs would be limited to cases where there was not enough competition between operators, with the intervention of the Federal Competition Commission in those cases where no tariff regulation was required.

In the new model, SCT is the port authority, in particular its General Coordination of Ports and Merchant Navy - with responsibilities for policy formulation, supervision, concessions and penalties in the port sector. On the other hand, the APIs are the port corporations established by the government with the task of managing and exploiting the Mexican ports. APIs are the holders of concessions granted by the SCT, and in many cases, are required to provide port services through private companies.

#### 3.1. Market Access to Port Services

The Ports Act (LP for its acronym in Spanish) establishes that the concessions to APIs will be granted through public tender or direct assignation.<sup>5</sup> SCT may establish in APIs' concession titles that port services for ships and goods may be provided by a third party, allowing in this way the entry of private agents for the provision of these services.<sup>6</sup> In the latter case, the APIs provide: i) partial cession contracts to private

<sup>3</sup> Taken from Paredes, Víctor (2007), *Privatización de los puertos en México*, CIDAC. Páginas 41-51.

<sup>4</sup> In the same year, 1993, the Navigation Law, the Federal Law of Federal Roads and Bridges and the Federal Law of Economic Competition were issued. These Laws shaped the rules for the port's sector development.

<sup>5</sup> Article 24, Ports Act.

<sup>6</sup> Article 27, Ports Act.

agents for the operation of terminals and port facilities and ii) permits for the provision of port services.<sup>7</sup> The former are awarded through public tenders and the latter are usually awarded directly, in particular, those services in which the APIs' master plan considers free entry of competitors, or those that provide areas of common use.

Overall, it can be argued that the LP provides that the SCT maintain regulatory functions, while the APIs are principally engaged in the management and development of port infrastructure (landlord) and, finally, private agents will be responsible for port services. Under this regime, until 2007 in Mexico 24 APIs have been constituted, or port companies, 23 public and 1 private.

### 3.2. *Prices*

Free pricing of port services is introduced, except in those cases where there is no *"port opposition or other transport modes that foster an environment of fair competition"* and where the SCT may establish price regulation.<sup>8</sup> This regulation requires the establishment of maximum prices (price-caps) and inflation adjustment mechanisms. The price regulation could be eliminated if the Federal Competition Commission considers that there is a fair competition environment.<sup>9</sup>

In relation to the whole of services that are regulated in ports, under the existing law, the so-called infrastructure services are set by the SCT in coordination with the Ministry of Finance and Public Credit (SHCP for its acronym in Spanish), as are the services that only offer the API.

The pilotage service is also regulated by the SCT. In all other port services tariff regulation or free tariff setting is common. The criterion followed by the SCT is that if the port faces no competition regulation of prices is established. This means that if SCT considers that there is only one company in the market there will be market regulation.

### 3.3. *Economic Competition*

The Ports Act bounds port operator's actions with the Federal Law on Economic Competition, for example, it states that the titles of concession, permits and authorizations granted in the framework of the Ports Act must conform to the provisions on economic competition.<sup>10</sup> Also, the actions of licensees, permittees, terminal operators, marinas and port facilities, and service providers will be subject to the provisions on economic competition, including cases in which price caps are set.<sup>11</sup>

This is particularly relevant in terms of competition since the granting of contracts to operate terminals or port facilities is conducted through public tenders; this mechanism is a relevant instrument for interested companies since it ensures market competition. On the other hand, if port companies merge with other established companies, for example, in an acquisition case, this would be a way to enter the market leading to greater or lesser competition. In any case, the Competition Commission assesses the effect on competition of a potential entrant in the market. This assessment is similar to an analysis on concentrations.

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<sup>7</sup> Article 20, Ports Act.

<sup>8</sup> Article 60, Ports Act.

<sup>9</sup> Article 62, Ports Act.

<sup>10</sup> Article 29, Ports Act

<sup>11</sup> Article 59, Ports Act



Also, the Port Act establishes the prohibition to incur in conducts that could harm competition, stating that in the common areas of ports, terminals, marinas and public facilities, port services will be provided to all requesting users permanently, uniformly and regularly; quality conditions, opportunities and price should also be offered assuring fair conditions and taking strict turns.<sup>12</sup> This implies that the Commission has specific powers to punish absolute and relative monopolistic practices.

#### **4. Relevant Market Definition in Port Activities**

In Mexico, the intervention of the CFC in the port sector has focused mainly on the port terminal operators (such as b services noted in paragraph 4) and to a lesser extent, port service providers (services, a.2). In this study we focus on port terminals for being CFC's area of expertise and on which we have a set of cases that may be illustrative to relevant market definition.

In the case of Mexico, having a landlord port model type, port terminals are responsible for the handling of cargo between the ship and the patio that connects with rail or truck services. The APIs, on the other hand, are those that offer infrastructure services (a.1 identified as in paragraph 4). This role separation between the terminal and the APIs (vertical separation) means that in cases on possible mergers of port terminals reviewed by the CFC, particular attention is paid to services provided by these units.

Depending on the type of competition port terminals face, according to the previously defined classification, two levels can be identified, the competition of terminals in different ports and intra port competition. In this context, the relevant market definition has the same conceptual elements that are used for any other market.

The settings or delimitation of relevant market does not happen in abstract, but relates to the investigations on monopolistic practices and mergers. It also requires the determination of competition conditions or substantial market power prevailing in a market. In either case, the need to determine whether an operator has or acquires substantial power arises. Within a context of substantial power assessment, defining relevant market is a tool that allows identifying actual competitors of a company involved in an investigation, such that these companies prevent the independent behavior of the investigated company and where competitors represent an effective competitive pressure.

The relevant market has two dimensions, product or service,<sup>13</sup> composed by services deemed substitutes between themselves, and the geographical dimension, which refers to locations or places where supply is located and where it is likely that consumers or users can satisfy their demand. These two concepts define what is known as relevant market.

##### **4.1. *Product or Service Dimension of the Market***

In determining the relevant service of port terminals, generally, the services offered by a terminal are the first issue to be considered. Port terminals are composed of active and specific equipment, for example, a grain terminal has silos and warehouses, whereas a fluid terminal has storage tanks; these features, as anticipated, determine that the terminals are not substitutes for each other so that each unit supplies a particular service according to the cargo handled.

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<sup>12</sup> Article 45, Ports Act

<sup>13</sup> Commonly, the term used is "product dimension", nevertheless, in the case of ports it is correct to use product or service dimension. The reason is because the ports generally offer services instead of products. In this document we use product or service dimension without distinction.

The relevant service in port terminals is usually a package of services. In the case of Mexican port terminals, units are permitted to carry out all operations for the transfer of goods between the ship and the area that links them with ground transportation - cargo handling, unloading, storage, loading and hauling (integrated service). The provision of this service is more efficient when performed by one agent and not several, one agent has the advantage of optimizing the travel time of the integrated service and incurs in less transaction costs to be met and agreed with several providers. Time optimization has benefits for both, ships and cargo owners, the former save time and the latter are taken care of as soon as possible.

The demand for port services is a derived demand and as such, may be affected by other types of transportation. Port services are demanded directly by shippers, who in turn are requested by cargo or commodity owners. This chain of demand may be affected or altered if it is eventually better to use other transportation networks. For example, if certain cargo may be handled through land transport rather than by the port.

To illustrate the effect of the existence of an alternative transportation mean other than the port, two cases are presented to describe how a possible increase service port terminal price, can lead consumers to consider alternative options.

#### 4.1.1. Case 1. Relevant service and the effect of transportation alternatives, case of corn and sorghum in Mexico

In Mexico, for example, the main grain consumption occurs in the center of the country (Mexico City) and the cities of Guadalajara and Monterrey. Grains (yellow corn and sorghum) are imported from United States Middle East region to each of the major cities, through port terminals or land. It is therefore possible to define three routes to the city, each route with two transport chains, one using a port (a) and one that does not use it (b):

##### Route 1:

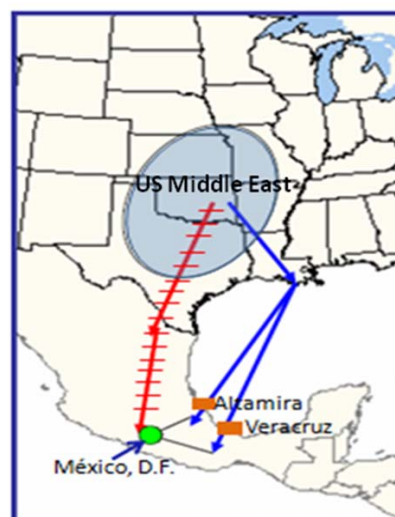
- US-Middle East ship transportation to Port of Veracruz, land transportation to Mexico City.
- US-Middle East Rail Transportation via Piedras Negras to Mexico City.

##### Route 2:

- Middle East US ship transportation to port of Tuxpan and Veracruz, land transportation to Mexico City.
- US-Middle East Rail Transportation via Laredo to the City of Guadalajara

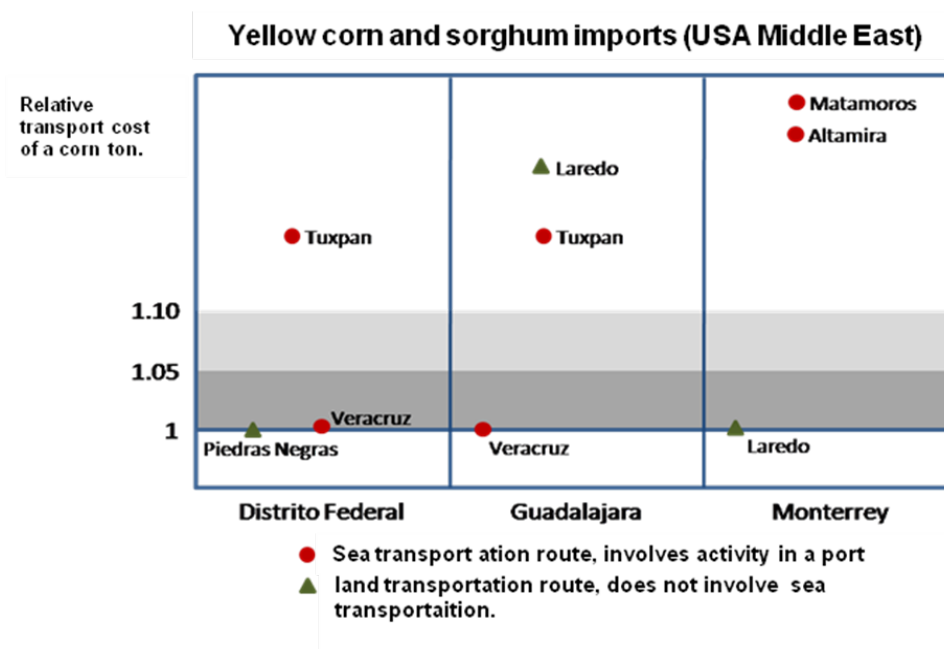
##### Route 3:

- US-Middle East ship transportation to Puerto Altamira, land transportation to Monterrey.
- US Middle East-Rail Transportation via Laredo to Monterrey.



If we define the relevant service in each port allowing the transfer of grain between the ship and some land transport in a port terminal, it is possible to evaluate what would happen if the terminal increases the price of their service. In this case, it is important to consider what would the cargo owners, who are finally the ones who evaluate alternatives, decide. An option might be to avoid the port, if the increase in price is consider excessive. In this case, another transport chain may be a feasible alternative for the end user if it is less expensive than the path that considers a port.

In the case noted as an example, an exercise considering the general prices for a ton of yellow corn and sorghum was carried out to evaluate the best alternative for each route, in order to determine if a port or a maritime- port- auto transport network would be used, or in its case, only auto transport. The estimation was carried out using data from 2006 and measures such as the cost of transporting one ton of grain from different origins and destinations, including the value of grain, maritime or ground transportation, if applicable, and port operations in place were estimated. With estimated costs a relative cost was constructed, this relative cost divides the cost of an alternative with the least cost alternative for each route. With this calculation the price difference between each transport option can be assessed, as shown in the following table:



Source: Prepared by the CFC on the basis of a study to identify the organization strategy for internment of grains through Mexican ports. Tekne. SCT.

The exercise had the following results: i) the importation of yellow corn and sorghum from the U.S. Middle east to Mexico city is more economically viable through the port of Veracruz or land transport, ii) the importation of yellow corn and sorghum to Guadalajara city is more economically viable through the port of Veracruz than for some land transport options, and iii) the import of grain to the city of Monterrey is best done by land than by the port of Altamira.

These findings can provide an example of how a port terminal may face competition from other transportation options.

## 4.2. *Geographic market dimension*

To determine relevant markets, goods or services that are substitutes for each other and their geographical scope must be defined, in other words, the area in which the supply or demand for those goods or services exists interchangeably, and where suppliers or customers can attend without incurring in significantly different prices.

In the ports sector it is common to distinguish two areas related to the geographic area of influence of a "Port A", the foreland and the hinterland. The foreland corresponds to the geographic area in which ports that are the origin or destination of goods that pass through Port A are located. The hinterland includes the internal geographic area or localities which are the origin or destination for goods handled in Port A. The concepts of hinterland and foreland, along with services for goods, are relevant for determining the geographic scope of the market, since they allow limiting the scope or influence of a port on the areas or territories in which the load's end users are located. From the point of view of the port users, regardless of the type of agent, the substitution between ports is explained by the costs of transporting goods from an origin and destination, i.e. the generalized cost.<sup>14</sup>

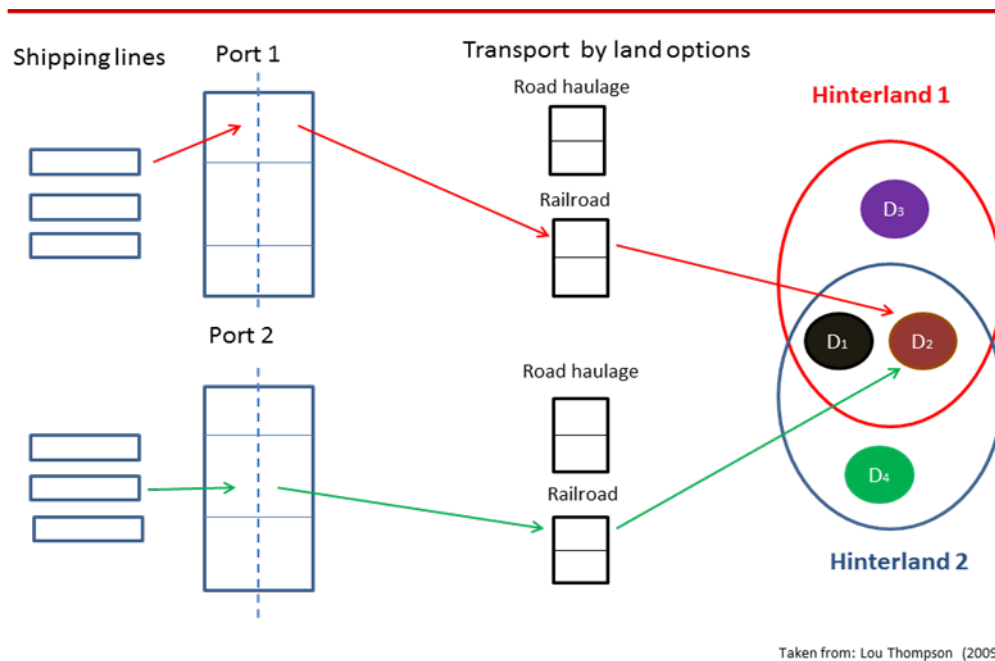
For example, if two ports are available (1) (2), with a container terminal in each port, both ports have trucking and railroad connection to the origin and destination of containers. Suppose that both ports also have a determined hinterland and a common overlap area. In this scenario, if the terminal in port (1) increases its prices, the user may evaluate another alternative, for example port (2). This decision not only depends on the price of terminal (2) but also the accessibility to the source or destination of the cargo; the user must assess the total or generalized cost. If port terminal (2) is a feasible alternative for the user, it can be concluded that the terminals of ports (1) and (2) belong to the same geographical area.

The previous exercise is valid only when port facilities are fully substitutable. Container terminals have similar technical conditions; the transport means are appropriate and have an offer that allows for the substitution of ship transportation.

This situation is shown in the following graph.

<sup>14</sup>

The generalized cost is defined as the sum of the rates at ports of origin and destination plus waiting costs in shipping ports plus maritime transport from port to port cost plus transport costs between the port and town of origin / destination of cargo.



Source: Thomson Lou; *Railway and Ports Organization in the Republic of South Africa and Turkey: The Integrator's Paradise?*; 2009.

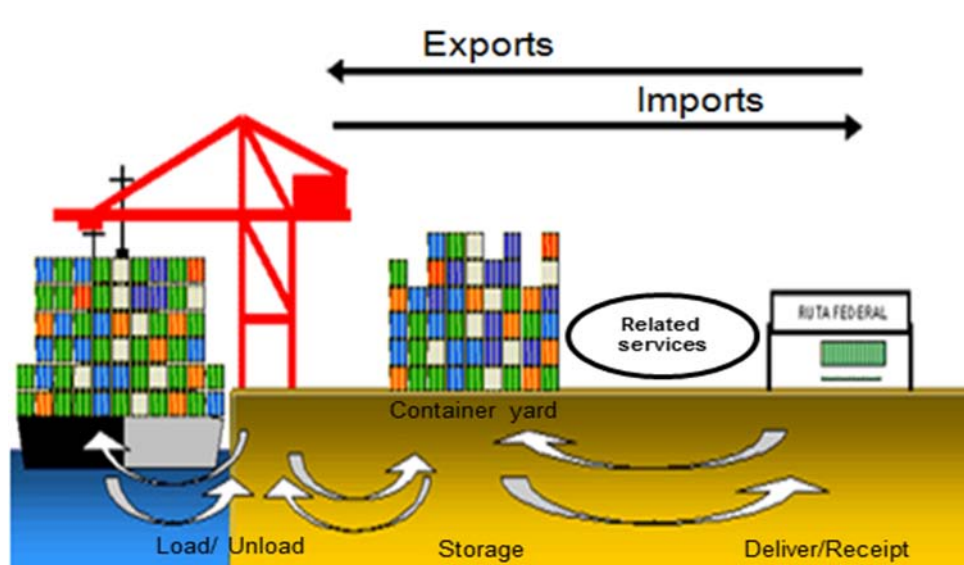
The previous graph, also illustrates another issue on the geographic delimitation of the market, the overlapping area (D1 and D2). This can be a factor for the competition level among ports and terminals of different ports. If users defined in hinterland 1 and 2 have a relevant weight, port terminals can compete to attract cargo to their terminals and from there to the common overlapping area. If we consider the example, from a network perspective, competition among transportation networks might be an important ingredient to dimension how competition can discipline a terminal.

Therefore, the geographic scope might be determined through the analysis of generalized costs of transportation of goods from different origins to different destinations.

#### 4.2.1. Case 2. Definition of the geographical dimension in container terminals

The CFC analyzed in 2009 the case of a company which we will refer to as Company X. This company has a container terminal at the port of Manzanillo (with an approximate area of 25 ha), located in the state of Colima, and wanted to purchase a new container terminal through a port tender. The possible transaction was analyzed by the CFC as if it were a merger, in order to assess whether the acquisition of a new terminal by company X would confer to it substantial market power.

The CFC considered as good or initial service a set or package of services that allow the movement of containers from the ship to land transportation. The container terminal companies in Mexico have the exclusive domain of the terminal and offer all the services required to move a container, for example, loading, unloading, storage, delivery and receipt of containers, as shown in Figure 1. This package of services was defined by the CFC as the initial service to configure the product dimension of the relevant market. The CFC found that the business practices between the terminal and the agent, or cargo logistical operator, often agree on a service package and one price that include the basic container maneuvers, so it was not appropriate to segment the different services of the terminal as if it were an independent product.



To determine the set of services belonging to the relevant market, the existing and potential alternatives for users were analyzed, considering an increase in the price of service determined by company X. To evaluate this effect the port of Manzanillo was considered, also, other mineral or grain terminals were located, however, this type of facilities are not technical substitutes of a container terminal since they have inadequate dock dimensions for container ships, such as, small size patios, they also lack the permissions to give container port services, and other factors that made these terminals not to be considered as viable alternatives or substitutes for container terminals.

Within the port two terminals were located, they offered services to containers, but did so in smaller areas (about 10 ha each of the terminals), with appropriate docks and common use, and less productive equipment, but attractive enough for ships. The available information on the movement of containers within the port showed a significant market share in 2006 and 2007, both terminals had handled about 600,000 TEUs together and the company X a figure slightly higher. This information and the opinions from shipping companies were crucial to incorporate minor terminals of this type with low productivity equipments as part of the relevant service.

### 4.3. *Market's Geographical Dimension*

#### Origin and Destination of Containers

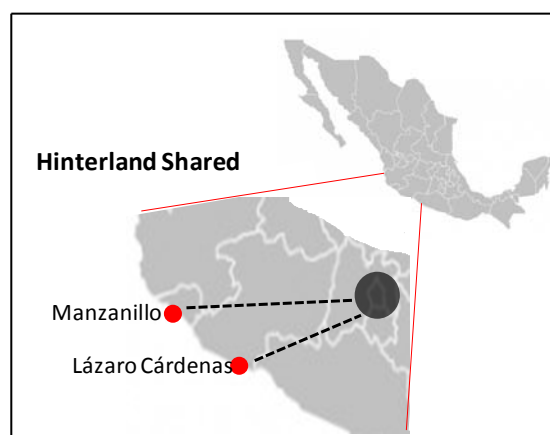
To determine the geographic market, the CFC evaluated the flow of containers the port of Manzanillo mobilized in 2007. Data from the origin-destination of the containers published by the Ministry of Communications and Transport was used. The analysis showed that around 60% of the containers had Mexico as origin-destination and were part of foreign trade activities; on the other hand, 40% were transshipment containers. These figures were an indication that two markets existed: one local and one international.<sup>15</sup>

The analysis of the containers' information that had as origin-destination Mexico, showed that the foreland (origin-destination containers a foreign port) was distributed among ports in Asia (65%), South America (26%) and Central America (8%), on the other side the hinterland (origin-destination containers

<sup>15</sup>

In this study we will refer only to the domestic market to illustrate the method for determining the geographic scope. The case of transshipment cargo will not be analyzed.

Mexico) focused on the Midwest states (68% in Mexico City, Queretaro and Mexico State) and to a lesser degree corresponded to other states (20% Jalisco, Nuevo Leon, Aguascalientes and San Luis Potosí).



### Choosing an alternate port

Once the foreland and hinterland of Manzanillo's port were identified, the same exercise was carried out for Lázaro Cardenas (LC) port, since it was the closest to Manzanillo (423km) and because it seemed as a potential competitor. The data showed a similar trend to Manzanillo's, almost all containers' trade was related to foreign trade, the main foreland was found in Asian ports (64%), and the center of the country (Mexico city and the State of Mexico) was the most important hinterland. The available information showed that Manzanillo and LC had a common area of influence, as illustrated in the chart below:

### The hypothetical monopolist

To determine the sources of pressure to Manzanillo's port, an exercise was carried out to assess if LC would be a viable alternative to users in the case of a price increase to users of Manzanillo's port. Two indicators were considered, the distances between the port of Manzanillo and LC with the main hinterland (the center of the country) and also estimation of the generalized price (port-city) to assess whether Lázaro Cárdenas could be considered as part of the geographic market.

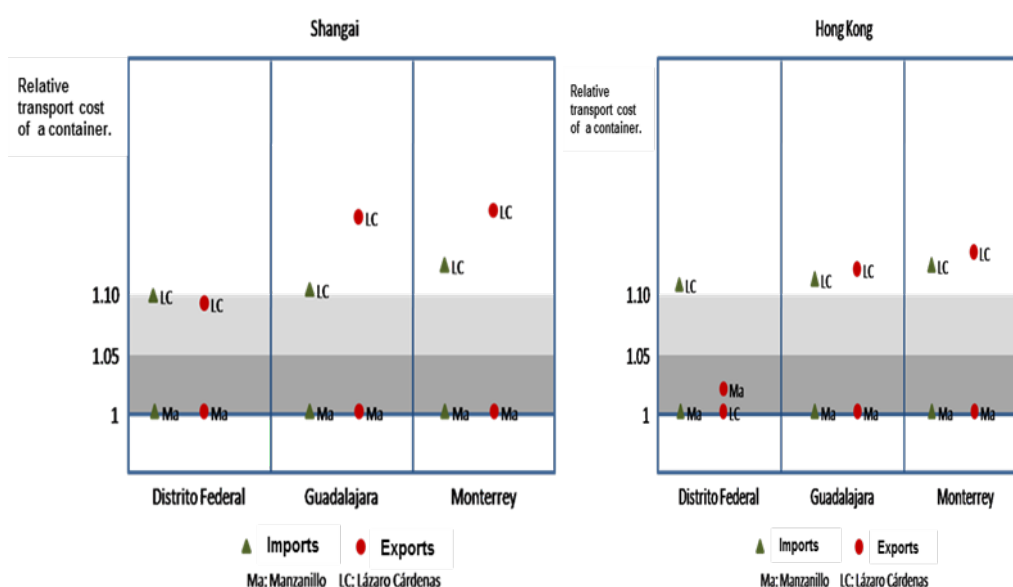
The distance analysis showed that cargo from / to Mexico City, Toluca, and Queretaro, both by rail or road, represented less travel distance for LC than for Manzanillo (values between 0.7 and 0.9), and were almost equal considering San Luis Potosí. On the other side, the advantage of Manzanillo over LC is obvious, in the case of containers from / to the city of Guadalajara, and to a lesser extent the city Monterrey and Aguascalientes, as shown in the chart below:

**Distance in routes matrix involving LC port and Manzanillo port**

Port:	Lázaro Cárdenas (km)		Manzanillo (km)		LC/Manz.	LC/Manz.
City:	Rail	Road	Rail	Road	Rail	Road
DF	863	602	950	791	<b>0.9</b>	<b>0.8</b>
Toluca	897	547	950	731	<b>0.9</b>	<b>0.7</b>
Queretaro	623	500	715	660	<b>0.9</b>	<b>0.8</b>
Guadalajara	896	500	353	300	2.5	1.7
Monterrey	1292	1249	1380	1086	0.9	1.2
SLP	792	700	774	806	<b>1.0</b>	<b>0.9</b>

An important aspect in distance analysis is the fact that both ports have access to adequate roads and railways. Ferromex is in charge of the railway that connects with Manzanillo and has access to the center of the country and the railway that connects with LC is owned by Kansas City Southern. This connection of the ports by different railway companies proved to be an additional element of rivalry between Manzanillo and LC.

Also an exercise on generalized prices was carried out. The cost of bringing a container from the ports of Shanghai and Hong Kong to three of the main cities in the country was estimated, at market prices. Mexico City was the main hinterland place; Monterrey and Guadalajara belong to a less important hinterland.



The table above, illustrates the comparison of prices for a 20-foot container. We estimated the relative price between the observed price and the lowest price found for each route, the container was considered either for export or import. The result shows that relative prices between Hong Kong and Shanghai or Manzanillo or LC show a price differential of around 10% when the city of origin or destination is the nation's capital. Otherwise, the differential is over 10% and Manzanillo is the best option in cases of Guadalajara and Monterrey.

The distance and generalized cost information showed that Manzanillo and LC could be seen as rivals in containers with origin/destination to the center of the country. The relative weight of the container's volume was estimated at more than 50% of the total of the containers from LC and Manzanillo with destiny/origin Mexican territory. The center of the country became an overlap area regarding the influence of the ports of Manzanillo and LC.

#### Competitor's opinion

Companies located in Manzanillo and LC noted that the ports of Manzanillo and LC compete in the container segment. The most important reference obtained is the claim that certain shipping companies changed their operations from Manzanillo to LC.

CFC's conclusion on the case is that container terminals located in Manzanillo and LC share a common influence area, feasible for users, and so they are located in the same geographic area.



## **5. Conclusion**

The port is not a homogeneous unit. Inside the port various activities for dissimilar companies are carried out. A key feature is that ports are multiproduct companies, which have different facilities and in many cases are specialized in one type of goods. In this context, defining the relevant market is somewhat influenced by the services performed by port terminals, rather than competition between ports, what occurs is a competition between terminals.

The port is a node in a transportation network. This characteristic has an effect on the definition of the market's geographic area, since what ended users (cargo owners) search for is to move goods from the place of origin to a destination. This main interest of end users is what is taken into account determining the area of influence of rival terminals.

Other transport means can be an alternative to port services offered by a port terminal dedicated to a particular product. Knowing the area of origin and destination, the goods, the end users of the load, transport means, may be relevant to obtain information to evaluate alternatives that may satisfy the final demand of the cargo. In the example, about the importation of grains the importance of how other transportation options may prevent the necessity of using a terminal in a port is illustrated.

The delimitation of the geographical scope of a market may be affected by the presence of terminals in different and rival ports. The degree of rivalry depends on the overlap area that of the terminals that are considered as substitutes. The use of indicators of origin-destination and generalized costs for users is a useful tool to set reasonable geographic areas, as shown by the container market example.

## NETHERLANDS

### 1. Introduction

In this paper, the Netherlands Competition Authority (hereafter: NMa) will give a brief summary of two reports that it has published on port related activities. The first report, which was published in 2005, concerns market definition and market power at the port of Rotterdam. More specifically, it examines whether the Havenbedrijf Rotterdam N.V. (hereafter: HbR) has market power with regard to its economic activities, and the likelihood of abuse of dominance.<sup>1</sup> The second report, published in 2008, concerns the distributive chain of transport from seaports to the hinterland.<sup>2</sup> The reports provide a Dutch perspective of the factors that can facilitate market power at ports and the conditions under which ports can be regulated. The second report also gives insight into the competitive constraints faced by undertakings operating in the sector for transportation by water in the Netherlands.

### 2. NMa-report on HbR (2005)

On 1 January 2004, the Rotterdam Municipal Port Management became a public limited liability company, HbR. The newly founded company remains totally under public ownership. The Dutch Ministries of Economic Affairs and Transport, Public Works and Water Management asked the NMa to investigate whether HbR had market power on one or more markets, and, if that would appear to be the case, whether there was a likelihood of abuse of dominance. The investigation was intended to enable the Dutch government to assess, in view of possible abuse of a dominant position by HbR, whether there was a need for additional specific rules on competition at the port, in addition to the already existing general rules.

In its investigation, the NMa examined the two main activities of HbR: i.) the supply of port infrastructure to ships that visit the Port of Rotterdam (for which HbR sets so-called port tariffs) and ii.) the supply of land to tenants of the port, by renting out parcels. With regard to the first activity, the supply of port infrastructure, the NMa came to the conclusion that HbR holds a monopoly position (and thus a dominant position). It was found that HbR does not compete with other port authorities at different ports. An increase of the port tariffs at a port hardly ever results in a customer's switching to another port. The main reason for this is that the port tariffs are a relatively small part of the total costs for the transport of goods from their origin to their final destination. The study found that other costs, for instance costs for transport by sea, transfer and hinterland transport, that cannot be influenced by HbR, are much more important for customers when choosing a port. For the assessment of the competitive position of HbR, it is therefore not important whether the Port of Rotterdam as a whole competes with other ports. What is

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<sup>1</sup> 24 – 05-2005, the NMa's report was based inter alia on the study commissioned in 2004 from Charles River Associates, Study on the Port of Rotterdam –Market Definition and Market Power, [http://www.nmanet.nl/nederlands/home/Actueel/Nieuws\\_Persberichten/NMa\\_Nieuwsberichten/2005/2005\\_Q2/Advies\\_NMa\\_aan\\_EZ\\_en\\_V\\_W.asp](http://www.nmanet.nl/nederlands/home/Actueel/Nieuws_Persberichten/NMa_Nieuwsberichten/2005/2005_Q2/Advies_NMa_aan_EZ_en_V_W.asp)

<sup>2</sup> 30 – 9- 2008, Ecorys Sectorstudie van zee- tot binnenvaart Marktwerving in het goederenvervoer over water  
[http://www.nmanet.nl/nederlands/home/Actueel/Nieuws\\_Persberichten/NMa\\_Nieuwsberichten/Nieuwsberichten\\_2008/2008\\_Q3/08-26\\_NMa\\_verhoogde\\_aandacht\\_voor\\_marktwerving\\_op\\_het\\_water.asp](http://www.nmanet.nl/nederlands/home/Actueel/Nieuws_Persberichten/NMa_Nieuwsberichten/Nieuwsberichten_2008/2008_Q3/08-26_NMa_verhoogde_aandacht_voor_marktwerving_op_het_water.asp)

important is whether HbR competes with other port authorities in other ports, when supplying port infrastructure for which it charges port tariffs. It was found that such competition does not exist.

With regard to HbR's second activity - the supply of land to tenants of the port, by renting out parcels - the NMa found that HbR's dominance was related to cargoes for which the Port of Rotterdam (as a whole) was dominant. HbR was thus unlikely to be dominant in relation to undertakings that deal with cargoes for which the Port of Rotterdam does not hold a dominant position. It was also established that HbR did not hold a dominant position in relation to undertakings that are active in non-port related activities. Such undertakings are not tied to the location of the Port of Rotterdam. HbR could only hold a dominant position in relation to port-undertakings that deal with one or more of four cargoes (ores and scrap, coal, crude oil and certain liquid bulk products) for which the Port of Rotterdam holds a dominant position. There are some exceptions where HbR competes with other ports (sometimes even in different parts of the world), in relation to particular undertakings with activities in the field of one or more of these four types of cargo. However, in most instances, the dominance of HbR in relation to undertakings dealing with these four cargoes is likely.

The report found that the lack of discipline from other port authorities on HbR, when it came to setting port tariffs, meant there was a strong likelihood that HbR could abuse its dominant position by charging extremely high (excessive) port tariffs, or by discriminating between customers which compete with each other. It must be stressed that the NMa merely issued an opinion about the theoretical chance that HbR could abuse its dominant position: the NMa did not investigate whether HbR actually had abused its dominant position, or would do so in the near future. With regard to the renting out of parcels, the NMa held that it was very unlikely that HbR could abuse a possible dominant position by charging excessively high rents or leaseholds, or that it would discriminate between customers. This is due to the constraints imposed by the use of long-term standard contracts with renegotiation clauses that restrict the pricing power of the port authority.

To discourage excessive or discriminatory port tariffs, a competition authority can make use of the general rules on competition or the legislator can establish sector-specific rules. The NMa generally holds a reserved position towards the adoption of sector-specific rules on competition. In light of this view, the NMa investigated whether the general rules on competition law (Dutch Competition Act) would suffice in relation to ports. With respect to the monitoring of the level of port tariffs of a more structural nature, the NMa was of the opinion that specific rules would be more suitable than the general rules of competition. Moreover, when adopting sector-specific rules a legislator may choose for a different method of assessment or a different material test (by which, if desired, stricter rules may be applied than in general competition law). Furthermore, the supervising of these rules may be simplified by imposing rules on intra-port structural separation, such as separate accounting. In addition to this, an advantage of sector-specific rules would be that the tariffs are monitored *ex ante*, which provides legal certainty on tariffs that are applied by HbR. With respect to the prevention of discriminatory tariffs however, the NMa deemed it unnecessary to adopt sector-specific rules. Nevertheless, if sector-specific rules for HbR would be adopted on the level of port tariffs of a more structural nature, the NMa was of the opinion that the legislator could then also consider including rules on the prevention of discrimination and other types of abuses.

Ultimately, the NMa suggested to the Government that measures be adopted to establish effective supervision of the level of the port tariffs in the Port of Rotterdam, either by sector-specific rules, or by other appropriate means.

### **3. Sector report: shipment of goods, via sea- and inland port (2008)**

In 2008 the NMa commissioned a research study on transportation by water in the Netherlands. The results were made public and compiled in the sector report "*Shipment of goods, via sea- and inland ports*".

The published report describes the chains of transportation of goods over water in the Netherlands and focuses on the interdependence of three defined chains.

- Container transport/haulage;
- Sand and gravel haulage;
- Tanker haulage.

The report sets out the level of competition in the sector, and more specifically, as follows, in these markets.

### **3.1      *Container chain***

Transport of containers is the fastest growing of these markets and is for the most part an international market. This international market is basically separate from the domestic (Dutch) market. The large container shipping companies with their deep-sea service lines (so-called Carrier Haulage) and dispatching agents (Merchant Haulage), are important buyers. These parties control the entire chain between seaports via inland ports, and organize transport to and from the user of the goods in the hinterland. Almost all the transport originates or has a destination overseas and will therefore be transported through a seaport.

Within the market for container transport, there is almost full and open competition. A large number of ships can be used and there are ample possible substitutes, both within the sea-going trade and otherwise (road, rail). Furthermore, there are many active dispatching agents who, however, do not offer the shippers a total service package. There is also a difference between the seaports and the inland ports. Within the seaports there are oligopolistic traits. Entry barriers are high and cross-connections between terminals and shipping companies make for limited switching possibilities for users. There are a large number of inland ports in the Netherlands and the distance between the ports is short, specifically in South Holland. Within certain regions, there is some measure of integration between the various inland ports.

### **3.2      *Sand and gravel chain***

The second chain investigated in the report, comprises the extraction of minerals and construction materials (especially sand and gravel) on location in rivers, lakes or offshore and transport from there to storage or to end-users (concrete plants and construction sites). Sand and gravel flows are largely domestic and have only limited connections with sea-harbours. This market has a direct relationship with the construction sector and the volume varies to a great extent over time.

Within the sand and gravel chain there are categories, each with its own specific features:

- Transport of industrial sand, (with gravel and cement as important raw materials for concrete products). The extraction of industrial sand is under fire from pressure groups. Public opposition against the current large-scale quarrying is growing and fewer licences are being granted. In the long run, it will be inevitable to have to import a quantity of the industrial sand. That will cause a shift for transshipments from the inland ports to the seaports.
- Transport of ‘filler’ sand, which is used for construction filling or levelling purposes (building sites, infrastructure). Filler sand is almost all quarried in the Netherlands. The amount of interest in offshore extraction, being only 30%, is limited.

The markets for industrial sand and filler sand are interchangeable. This is due to the fact that during extraction, different types of sand are brought to the surface (different sizes of grain). In the market for sand and gravel transport, there is vertical integration in the quarrying, processing and inland shipping transport, which allows market power for parties in the chain. This makes it an interesting segment for investigation from a competition standpoint. There are, however, sufficient large players who each try to realise as good a national coverage as possible. This prevents any one or two of the parties from controlling the market. This situation creates difficulties for the inland shipping sector. Various sources indicate that shippers in this market often sail under the cost price in order to contract a cargo.

### **3.3 *Tanker transport chain***

This chain covers transport to and from refineries and chemical industries on the waterfront. The goods transported are petroleum, oil products and chemical products. Most of the transport is related to seaports and for the most part concerns an international flow of goods. The inland transport flows are to (fuel) depots and between the chemical industries.

There are two markets for tanker shipping, each with its own specific features:

- Transport of mineral fuels. This market is characterized by considerable fluctuation in demand and supply, caused by the price of crude oil. This market is serviced in large by private inland shipping enterprises, which operate on the basis of spot contracts. Charters play an important role.
- Transport of chemicals. This market is more stable, since it services the continuous processes of the chemical industry, which are not subject to much short-term fluctuation. This market is primarily the domain of the shipping companies, who operate on the basis of forward contracts. The role played by freight loaders is less important. Shipping companies often contract the shippers directly.

There are limited possibilities for entry and withdrawal. The cost of investment in ships is considerable. Moreover, the ships cannot be used for any other kind of inland shipping transport. Ships for transporting mineral fuels can be used for any other fuels. However, ships for transporting chemicals can only be used for their specific product categories.

The study discerned strong concentration on the demand side of the inland shipping transport. Furthermore, oil companies and chemical concerns have a strong vertical integration, whereby they are often both the loading and the receiving party. In addition, the oil companies are a major supplier of furnace oil and lubricants. This means that the inland shipping companies, especially the small private enterprises, are generally in a weaker position compared to the other parties in the market. In tanker shipping there is monopolistic competition, where the providers probably have a little more market power than in the dry bulk carrier market.

The NMa considers the outcomes and results of the sector report a success. The report not only strengthened the NMa's information position on shipment of goods, it also created attention and awareness among undertakings in each sector studied. The report facilitated the fostering of a good network relationship between the NMa and undertakings concerned and established the NMa as a relevant party with whom undertakings and Government consult regarding developments in the sectors investigated.

#### **4. Conclusion**

The Port of Rotterdam is Europe's largest container port. The port is important for European export and import activities and it contributes significantly to economic activity in the Netherlands. In the light of the 2005 study, the NMa suggested to the Government that measures be adopted to establish effective supervision of the level of the port tariffs. No sector-specific regulation has been adopted. However, HbR has negotiated a covenant with some parties who are active at the port, that deals with port tariffs. The NMa has frequent contact with the sector and is following these developments closely. In this regard, the NMa would be interested to hear from other OECD members on this issue.

In relation to transportation by water more generally, the NMa will be issuing a second sector report later this year. Building on the results of the 2008 study, an analysis of the main chains of goods in the (sea)port of Rotterdam will be conducted. The purpose of the follow up study is again twofold; to improve the NMa's information position, and create awareness of the need for competition in the sector. The results of this sector study are foreseen to be published by the end of 2011.



## PORTUGAL

### 1. Introduction

The Portuguese Competition Authority (PCA) has investigated and condemned undertakings in two cases regarding anticompetitive practices in ports, one regarding price fixing by an Association of Shipping Agents, and the other regarding the existence of a cartel between towage service providers.

In both cases, the undertakings found guilty of the anticompetitive practices were active in significant Portuguese ports. The undertaking involved in the price fixing case represented over 80% of the shipping agents in the main national ports, and the cartel that was uncovered operated in the port which, at the time, accounted for 95% of the activity of specific maritime transport service provisions in the whole national port system.

The PCA imposed, in both cases, a fine on the undertakings and were successful in the judicial review process, albeit with a reduction in fine. The cartel case is still pending in the Portuguese Constitutional Court.

### 2. Price fixing in Ports - AGEPOR

On December 30, 2005, the Portuguese Shipping Agents' Association (AGEPOR) was fined €195 000 by the PCA for the anti-competitive practice of price fixing. It was found that AGEPOR, which represented more than 80% of the shipping agents operating in the main Portuguese ports, prepared and distributed a list of recommended maximum prices.

Shipping agents are the undertakings which, among other activities, provide services to goods importers/exporters and ship-owners/maritime carriers. In Portugal, there are 120 authorized shipping agents, of which 102 were AGEPOR associates in 2004. Between 2001 and 2004, AGEPOR represented over 80% of the shipping agents in the main national ports (Sines, Lisbon, Aveiro, Leixões, Viana do Castelo, Figueira da Foz, the Azores and Setúbal).

The investigation proved that the majority of the shipping agents, both members of AGEPOR and non-members, who were drawn in given AGEPOR's capacity to influence this market to a significant degree, followed the recommended fees, thus inhibiting the competitive interplay of prices in the market over a period of 4 years. In one case, a non-member's price for the service "*assistance to the crew outside port limits*" rose from €4.99 in 2001 to €106 in 2002, i.e. 21 times higher, thus aligning itself with the AGEPOR table.

In addition to the fine, the PCA decision required AGEPOR to immediately cease issuing price schedules and to inform all members of such cessation.

The decision was appealed to the Lisbon Commercial Court. The Lisbon Commercial Court upheld the PCA decision, albeit with a reduction in the fine to €130 000. Further appeal on the Lisbon Commercial Court decision was made to the Lisbon Appeals Court. The first instance decision was confirmed. This ruling was appealed by the defendant to the Constitutional Court, which, in 2009, declared



that it could not decide the appeal. The decision of the Lisbon Commercial Court was therefore not reversed.

### **3. Price fixing in towage services**

In April of 2007, the PCA found three towage companies that were active in the Port of Setúbal guilty of initiating a cartel, fixing prices, dividing customers and establishing a monitoring and compensation mechanism. This agreement was subject to alterations and adaptations throughout the period of its existence.

The economic activity of the undertakings involved was providing auxiliary maritime transport services, in particular tug services in the commercial port of Setúbal. It should be noted that, on account of its geographical position, the Port of Setúbal services important export industries that operate in the Setúbal peninsula, e.g. the vehicle sector, the iron and steel industry and the paper and paper-pulp industry. In addition, in the movement of roll-on/roll-off cargoes (which includes the loading and unloading of vehicles), this port represented around 95% of the movement in the whole national port system in 2005.

The investigation proved that, in the beginning of 2006, the three towage companies operating in that relevant market met, discussed and agreed on a common set of prices. Furthermore, they agreed on the terms to offer customers who attempted to change service provider in order to ensure that customers would not find more advantageous conditions. In the, however unlikely, event that customers would switch, the mechanism included an obligation where the new service provider would necessarily subcontract the former service provider to service that customer, under pre-set commercial conditions and prices.

Under the terms of the Portuguese Competition Act, the offence in question may lead to the imposition of a fine that, for each of the undertakings, may amount to a maximum of 10% of the previous year's turnover. In this case, the PCA decision required the immediate cessation of the practice and imposed fines on the three companies totalling €185 000. As an additional sanction, the Authority ordered the undertakings to publish the full version of the decision in the *Diário da República*, the National Journal, and an excerpt from the decision in a national newspaper.

An appeal was filed to the Lisbon Commercial Court, which upheld the PCA's decision, albeit with a reduction to the fine to be paid by two of the undertakings. Further appeal to the Lisbon Court of Appeal led to a decision from this court confirming the decision of the Lisbon Commercial Court. One of the undertakings filed a further appeal to the Constitutional Court, where proceedings are still pending.

## SLOVENIA

### 1. Introduction

In the light of recent antitrust procedure against the operator of the Port of Koper and legislative changes<sup>1</sup> in the field of port services, Competition protection office of the Republic of Slovenia (CPO) would like to highlight some issues regarding intra-port competition and, in particular, the relation between concepts of competition “for the market” and competition “within the market” dealt within the legislative process. Given that access to port infrastructure in the EU is not regulated (yet) and that the legislative initiative has been stopped twice so far, there seems to be a clear need for continuation of European Commissions efforts for delivering the Port services directive.

### 2. General overview:

The Port of Koper is the only seaport in the Republic of Slovenia and one of the northern Adriatic ports. It is a multipurpose port and it operates in 12 specialized terminals with different types of goods: general cargoes, timber, fruit, alumina, live stock, cars, minerals, passenger, cereals and fodder, energy, liquid cargo, containers and Ro-Ro. In terms of maritime throughput it is the fourth largest north Adriatic port<sup>2</sup> (15.4 million tones in 2010), but it should be pointed out that in the neighboring Port of Trieste the supply of oil through the pipeline to Bavaria alone represents about 75% of total turnover (around 35 million tones per year). The same goes for the Port of Rijeka, where oil accounts for more than 50% of total turnover. In terms of container traffic, the Port of Koper is the largest, surpassing 400.000 units per year. Regarding the number of towing services providers, according to our information, in neighboring ports of Trieste, Rijeka and Koper there is one service provider, and as to number of tug boats available per port<sup>3</sup> in Trieste there are 7, Rijeka 6 and Koper 4 tug boats.

Maritime throughput and traffic in European ports has increased considerably in the last years thus, allowing them, in general, to sustain more service providers and a higher level of intra-port competition. Terminals and other port infrastructure in the Port of Koper are, on the basis of the concession agreement, managed by the public limited company, Luka Koper d.d. (hereinafter: *Luka Koper*). The majority owner of *Luka Koper* is the Republic of Slovenia with 51% equity stake.

### 3. Abuse of dominant position by the operator of the port Of Koper

The port infrastructure is owned by the Republic of Slovenia and was at the time of the infringement operated solely by *Luka Koper* under a lease contract concluded with the owner in February 2000. *Luka Koper* is also 50% owner of the only company performing towing services in the port of Koper – *Adria Tow* d.o.o. (hereinafter: *Adria Tow*) and 100% owner of the only company performing mooring of ships in the port of Koper - *Luka Koper INPO* d.o.o. (hereinafter: *INPO*). Port services themselves were performed on the market and were not subject to any restrictions or authorization procedure.

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<sup>1</sup> Present and envisaged.

<sup>2</sup> Trieste 46,15 million tones, Venice 26,2 million tones, Ravenna 21,9 million tones and Rijeka 10.1 million tones.

<sup>3</sup> According to service providers tug boats can also be leased for a certain period of time in case of higher demand.

S5 vleka ladij d.o.o. (hereinafter: S5) is a company that is active in maritime port services. S5 made a complaint, regarding the refusal of *Luka Koper* to provide the berth place in the port of Koper for performing towing activities. The antitrust procedure was initiated on the grounds of this complaint and S5 was granted a role of the intervener in the case. The same company lodged another complaint regarding the refusal of *Luka Koper* to grant its workers the access to the Port of Koper in order to perform mooring activities. Based on those facts, CPO initiated ex officio procedure against *Luka Koper* for abusing its dominant position in the market for organization of port services.

### 3.1 *Relevant markets*

Three relevant markets were defined in order to examine the behavior of *Luka Koper*. The first market was the market for organization of port services, where *Luka Koper* enjoyed a legal monopoly. Second and third market, market for towing services and market for mooring services, constitute neighboring markets, which are separate from the first market, yet are affected by the actions of the dominant company on that market, in which *Luka Koper* held a de facto monopoly through its subsidiaries.

#### 3.1.1 *Market for towing services*

*Luka Koper* claimed that the ships of its subsidiary *Adria Tow* often had to relocate as a consequence of traffic in the port, and consequently it had no available space capacity in the port to meet the demands of S5. On the other hand, S5 stated it was ready to accept all conditions under which places are granted to *Adria-Tow*, including the movement to another location after the arrival of ships.

Furthermore, *Luka Koper* also stated that its daughter company *Adria - Tow* uses the port capacity according to the commitments related port safety regulation.

Several stakeholders<sup>4</sup> as well as the complainant stated that access to port and presence of tug boats within the port is a significant advantage for performing viable and continuous performing of towing activities. CPO conducted a survey among shipping agents which perceived *Adria - Tow* as the sole provider of towage in the port of Koper. According to the survey, Croatian and Italian companies are not regarded as potential competitors, namely Croatian because of the complex procedure of obtaining work permits<sup>5</sup> and Italian, because tugboats from neighboring ports of Trieste and Monfalcone need on average 1 to 1.5 hours to reach the Port of Koper. In view of the Union of Maritime Transport Agencies of Slovenia, competition in the area of towing services is desirable, *inter alia*, for stabilizing the prices of these services. In the meantime, the company *Adria Tow* was given *de facto* exclusive access to the port and had performed the towing services, for which the demand was on the increase over the last years.

The CPO noted that *Luka Koper* did not justify its refusal of access to port infrastructure. According to the file, *Luka Koper* did not even negotiate with S5 and did not offer access on equal terms as to *Adria – Tow*. After the decree entered into force (see para. 14) the existence of port capacity was also confirmed by the fact that, following a positive opinion by the concessionaire - *Luka Koper*, the Ministry of Transport offered a temporary contract for berthing of 2 tug boats in the Port of Koper to S5.

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<sup>4</sup> Companies performing agency services to ships, companies performing towing activities etc.

<sup>5</sup> Since Republic of Slovenia joined the European Union boats from the Member States are subject to control by the Administration of Shipping and the Maritime Police, on the other hand others must pass the customs control.

### 3.1.2 *Market for mooring services*

*Luka Koper* delayed its decision<sup>6</sup> to grant access to the workers of its competitor *S5* to the port in order to perform mooring activities, until the legal basis was changed and the services were included among the exclusive rights of the concessionaire (*Luka Koper*). Since mooring services can be provided, by the very nature of the service, only in the port, access to the port is of vital importance. Accordingly, the workers needed a permit to enter issued by *Luka Koper*. The delay was caused by unjustified demands of *Luka Koper* for explicit statement of worker's names that would perform the mooring activities and explicit statement of ships that mooring would be provided to, although such detailed information was not necessary for granting access. *Luka Koper* also stated that it delayed its decision because it knew that the new decree, under which the mooring services would be part of exclusive rights of the concessionaire, was going to be delivered, making a conclusion of a contract for a period of a month unreasonable.

As already mentioned, mooring services in the Port of Koper are also performed by *Luka Koper's* daughter company, in this case *INPO*.

### 3.2 *The decision on the case*

The CPO issued a decision concluding that the unjustified refusal of access to the port infrastructure by *Luka Koper* had the effect of excluding all competition on the markets for towing and mooring services in the port of Koper and therefore constituted a breach of Article 9 of Slovenian Competition Law as well as Article 102 of the TFEU<sup>7</sup>.

There was no appeal against the administrative decision. The CPO also initiated a separate procedure to pursue *Luka Koper* and its managing board for conducting a minor offence in order to set fines for the infringements. *Luka Koper* appealed the decision to a court of first instance, which has not yet ruled on this case.

It is worth mentioning that the infringements ended in 2008 when, with the decree<sup>8</sup> which entered into force at the time, the owner of the port infrastructure - the Republic of Slovenia, became also the port operator of the Port of Koper and was granted the authority to decide on access to the port infrastructure.

## 4. **Legislative amendments, temporary contracts and cpo advocacy activities**

### 4.1 *Decree on the administration of the freight port of Koper, port operations, and on granting concession*

On the 29th of July a new decree entered into force, which gave the authority to decide on access to the port infrastructure to its owner, the Government of the Republic of Slovenia and in its name to the Ministry of Transport, which by the decree became the operator of the Port of Koper. In line with the decree, a concession for performing certain services, other than public administrative services, can be granted. The concession was granted to *Luka Koper* regarding services of governing the port, cargo

<sup>6</sup> From 19.6.2008 when the request was filed till 29.07.2008 when the legal basis was changed.

<sup>7</sup> Since the infringement concerns the operator of the only seaport in Slovenia, it had an effect on all of the territory of Slovenia and had an effect on services provided by and for companies from other EU Member States, it had an effect on substantial part of common market.

<sup>8</sup> Decree on the administration of the freight port of Koper, port operations, and on granting concession for the administration, management, development and regular maintenance of its infrastructure – OG of the Republic of Slovenia No. 71/2008 and 32/2011.

handling and passenger traffic, performing of public service of maintaining of port infrastructure and development of port infrastructure.

According to the decree, mooring services represent part of cargo handling services and are therefore included among the exclusive rights of the concessionaire – *Luka Koper*. As regards the granting of port space for towing vessels - port operator can grant berths for vessels performing port activities and other services important for functioning of the port within available port infrastructure capacity, but prior opinion from the concessionaire has to be obtained.

Concession agreement therefore settled issues related to administration, management, development and regular maintenance of port infrastructure for a period of 35 years. The concession agreement *inter alia* stipulates that:

- the Republic of Slovenia grants to Luka Koper an exclusive right to carry out port operations of cargo handling, among other also mooring services, and maritime transport,
- port pilotage and towing are performed on the market basis under conditions ensuring freedom of access to the service, save where this would cause disturbances of smooth and continuous provisions of these services,
- port service providers should be granted free access to the implementation of these services, within the available capacity and
- Port operator can, within the available capacity, award a berth in port for vessels to provide port services or other economic activities necessary for the operation of the port.

#### **4.2. Temporary contracts**

After the decree entered into force, S5 filed another request for granting berths within the Port of Koper to the Ministry of Transport which, as mentioned above, was given the authority regarding the access to the port infrastructure. The Ministry of Transport offered temporary contracts to three towing companies, each being offered 2 places (vessels berthed side by side) and reasoned the decision as the quickest solution upon a fact, that at that time there was no legal basis for the selection or concession procedure upon which a single service provider would be selected. In order to establish a long term solution it would be necessary to adopt a regulation providing for a selection procedure with predetermined and non-discriminatory criteria, while ensuring smooth provision of towing service. Nevertheless, temporary contracts were not negotiable with an aim to ensure equal treatment of contracting parties. Accordingly, they were to be concluded just for a period until the final legal grounds for performing towing services in the Port of Koper are settled.<sup>9</sup>

The CPO reviewed temporary contracts and an opinion to the Ministry of Transport was transmitted, claiming that the contract duration of 6 months<sup>10</sup> is too short for a potential contractor to receive a fair return on investment, and therefore represents a too high entry barrier. Contractual provision declaring that the party has to start using the offered places in 14 days was also estimated to be too short for the potential service provider to start the business, and gives advantage to the active company in performing towing services in the port of Koper. S5 made similar remarks to Ministry of Transport and finally did not sign the contract.

<sup>9</sup> Art. 1 of the Temporary contract.

<sup>10</sup> Temporary contract is tacitly renewed after initial 6 month period, each time for a period of 3 months, if not canceled before by either contracting party.

Remarks of the CPO were commented by the Ministry of Transport only in the part concerning the starting period (14 days). According to the Ministry, the period was not considered to be restrictive since contracts were offered without the obligation of imminent conclusion, therefore potential contractors could accept the offer at any time they were capable of entering the market. Still, the opinion CPO remains that the 6 month temporary duration of the contracts represents the crucial part restricting the competitors to enter the market of towing services.

For the time being the offered berth places are still occupied on the grounds of the above mentioned temporary contracts.

### 4.3. *Maritime Code amendments*

After the solution of access to port space was solved by the above-mentioned temporary contracts, Maritime Code of the Republic of Slovenia was also revised (hereinafter: the *revised MC*) and, inter alia, included pilotage and towing services among optional commercial public services, consequently establishing grounds for concession procedure upon which a single service provider could be selected.

The CPO made significant competition advocacy efforts in the course of legislative procedure aimed towards a market based approach when dealing with access to the port infrastructure. Communication between the Ministry of Transport, which was preparing the *revised MC*, and the CPO was intense. Remarks which follow the text below were made regarding the nature of performing towing and piloting services.

#### 4.3.1. *Provisions regarding exclusivity of rights to perform port services*

According to the first proposal of the *revised MC*, services of pilotage and towing are ensured as a public service in case they are necessary for the safe and uninterrupted<sup>11</sup> provision of port operations in the port of Koper - therefore optional public service. When they are performed as a public service, other providers of these services may not perform them in the area the concession has been awarded (hereinafter: exclusivity clause).

Reasoning of the Ministry of Transport regarding the above mentioned changes was that towing and piloting services are essential and necessary for the safety of navigation in the Port of Koper. Constant presence of tugs is also needed for rapid intervention in maritime accidents in the port and to prevent accidents in case of fire fighting operations, which could lead to malfunction of the port and thus to significant economic harm. The Ministry of Transport also stated that, according to the Communication on European Ports Policy<sup>12</sup>, services of towage and pilotage are defined as technical-nautical services and are associated with port safety - therefore they constitute services of general economic interest. Restrictions on freedom to provide these services are acceptable for reasons of safety, but a transparent process in selecting a contractor must be ensured and the period of exclusive rights may not exceed a reasonable period to recover the investment. This follows the practice in other ports of EU Member States where these services are not strictly market based.

Another reasoning was that, according to the "old" legislative framework, under which these two services are performed on the market, continuous provision could not be assured since providers of these services were not subject to any obligation in this view. To avoid the Port of Koper to be left without adequate services, there needs to be a possibility for these two services to be provided as a public service on the basis of the concession.

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<sup>11</sup> Therefore not in all cases.

<sup>12</sup> COM(2007)616 final.

In its opinion on the first proposal of the *revised MC*, the CPO did not oppose to the fact that pilotage and towing services were included among optional commercial public services, but nevertheless pointed out that, from the perspective of competition law, it would be more appropriate if port services in question were not operated on exclusive basis. Such a solution would not harm the public interest of ensuring safe performance of the port services and the safety of the port itself. The exclusivity clause was estimated to be too restrictive, limiting entry of new entrants to the market and not justified by the public interest of security and continuous provision of port services.

In the second proposal of the *revised MC*, the exclusivity clause was removed, nevertheless towing and piloting services were defined as compulsory (initially optional) public services, therefore giving the power to decide on the number of service providers to the Government of the Republic of Slovenia, which should define it in the concession act. The Ministry of Transport reasoned this solution upon the fact that the number of service providers will anyway have to be objectively justified, also regarding the spatial capacity of the port and the number of tug boats required to perform the service: Ministry of Transport estimated that one service provider should ensure 5 tug boats since max. of 5 tugboats is required for servicing of large vessels and cooperation between tug boats has to be guaranteed to ensure the safety of navigation. This condition would not be achieved if towing services were performed by competing companies and thus implicitly proposing exclusivity in this field.

In the opinion on the second proposal of the act, the CPO assessed that the definition of towing and piloting services as compulsory public services is even stricter than in previous version of the proposed act. According to the opinion, the public interest of port safety, bearing in mind constitutionally guaranteed freedom of economic initiative and free competition<sup>13</sup>, was not sufficiently justified according to the test of proportionality.

The final version of the act, as in the first proposal, defined services in question as optional commercial public services, but again, against the CPO's opinion, included an exclusivity clause for commercial public services.

#### 4.3.2. *Provisions regarding the length of concession, conditions under which it is granted and transparency of the procedure*

Regarding the first proposal of the *revised MC*, the CPO also issued an opinion related to the absence of clear provisions about the length of the concession, conditions under which they were to be granted and that the concession procedure should be defined as transparent as possible.

In its response, the Ministry of Transport stated that the procedure and general principles for concessions are already sufficiently defined in the general act on public – private partnership and the criteria that the Government would have to follow, when defining the length of the concession in the concession act, is strict enough. Therefore, the length of the concession period at that time was not included in the second version of the *revised MC* and consequently the decision was left to the Government, whereas the obligation of defining maximum prices for towing and piloting services were included among the provisions of the *revised MC*.

The final version of the *revised MC* stipulated that, when service is provided under a granted concession, the Government with the concession act, *inter alia*, determines the maximum prices for the

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<sup>13</sup> The Constitution of the Republic of Slovenia – art. 74.

service and the maximum period, for which concession is granted – the latter cannot be longer than 15 years<sup>14</sup>, therefore taking into account the remarks made by the CPO.

## 5. Competition “for the market” vs. competition “within the market”

As it is evident from the timeline of events and legislative changes, the main issue in this case was competition “within the market” between providers of mooring and towing services. In the course of time, mooring services were included among exclusive rights of the concessionaire and concession was given to *Luka Koper* for a period of 35 years, whereas piloting and towing services were, with the changes of Maritime Code, defined as optional commercial public services and, when operated as a commercial public service, they are to be performed on exclusive basis by a single operator. With the revision of Maritime Code the concept of “competition for the market” was introduced also to towing and piloting services.

Currently, piloting and towing services are still performed on the market basis, but an option for their implementation on the basis of an exclusive concession is possible. Even though with limited length and a price cap, “exclusivity” solution was not regarded as optimal by the CPO. The opinion of the CPO that competition for the market is a second best option when competition is affected by the exclusion of continuing and open competition, was supported also in the case dealt by the Australian Competition Tribunal on Freight Handling Services at Sydney International Airport (2000)<sup>15</sup>. Nevertheless - in the opinion of the CPO, credible threat of entry and scale of throughput in port of Koper in correlation with number of tug boats serving in neighboring ports point towards conclusion that natural monopoly does not exist in the Port of Koper and exclusivity therefore is not sufficiently grounded.

Advocacy efforts made by the CPO were only partially successful. The CPO succeeded in regard of the length of concession, the price cap and the definition of public service as optional, but not in the sense of non exclusive performance of towing and piloting services. The exclusivity clause was generally reasoned by the Ministry of Transport with requirements for safe and uninterrupted provision of port operations. According to the Ministry of Transport cooperation and communication between tug boats also has to be guaranteed to ensure the safety of navigation in the port of Koper and this could not be achieved in case the towing services would be performed by several companies at the time.

During the legislative process, the CPO clearly stressed that performance of port services on a non-exclusive basis would not in any case harm public interest of ensuring safe performance of port services and the safety of the port itself. Namely, a Concession act, under which the concession is granted, can provide precise provisions about performance and safety requirements that the concessionaire has to meet, therefore giving all the power to define minimum service quality standards to the Government – without the need for exclusivity. CPO believes that the existence of natural monopoly in the port of Koper would give sufficient grounds for exclusivity and option of the “competition for the market”, either on the grounds of unavailable space in the port or on the grounds of too low economic output that would sufficiently support several service providers.

Port services could thus be generally performed on a non-exclusive basis preserving competition “within the market”. The latter could also be supported by the results of a survey conducted on behalf of the European Commission - Complementary economic evaluation study on the Commission proposal for a Directive on market access to port services<sup>16</sup> (hereinafter: the Study). Along with our view and according

<sup>14</sup> Art. 47 of revised MC.

<sup>15</sup> Judgment Federal Court of Australia - Stirling Harbour Services Pty Limited (ACN 008 767 600) v Bunbury Port Authority [2000] FCA 1381, Para 24.

<sup>16</sup> [http://ec.europa.eu/transport/maritime/studies/doc/2005\\_11\\_complementary\\_economic\\_analysis.pdf](http://ec.europa.eu/transport/maritime/studies/doc/2005_11_complementary_economic_analysis.pdf)



to the Study<sup>17</sup>, it is the fact, that the number of providers of towage services per port is somewhat higher<sup>18</sup> compared to pilotage and mooring<sup>19</sup>. According to the Study it appears difficult for most ports to have more than one operator, just because of the scale of operations which is generally simply too small to have more companies working effectively<sup>20</sup>. Nevertheless, the possibility of imminent new entry, available space and the scale of operations that are clearly sufficient in our case, are somehow pointing to the opposite.

## 5. Conclusion

Any clear cut judgment about the principle or type of regulation according to which port services are best operated in a given port, is certainly not an easy task at present. Nevertheless, the CPO believes that the legislative efforts of the European Commission (EC) towards the adoption of the “Port services directive” should continue. Clear guidance and transparency provisions would certainly bring positive effects to the markets in question.

Failure of previous legislative attempts by the EC seems also to be a result of the fact, that most port operators are state owned incumbents with their subsidiaries performing various port services. Consequently, port operators seem to have a very strong incentive to defend their – often privileged - interests<sup>21</sup>. Since the ownership structure of port operators and service providers generally leans towards state ownership, it is somehow easy to understand the opposition to the acceptance of the Port Directive put forward in the legislative procedure, as several or majority of the stakeholders within the legislative procedure actually represent the states (public entities) themselves and the outcome of the above mentioned legislative procedure was not such a complete surprise. Accordingly, adequate separation of different roles of port operators and port service providers could be made only through complete ownership unbundling or a very precise regulation of access to port services. It should also be borne in mind that the means used to accomplish the general interest mission (safety etc.) can limit the freedoms of the internal market only “*ultima ratio*” - to the extent necessary to guarantee the fulfillment of the mission<sup>22</sup>.

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<sup>17</sup> Study, page 20.

<sup>18</sup> Although in majority cases operated by a single operator.

<sup>19</sup> In most European ports supplied by only one company.

<sup>20</sup> Study, page 22.

<sup>21</sup> See also Study, page 11.

<sup>22</sup> COMMUNICATION FROM THE COMMISSION - Services of general interest in Europe, C 017, 19.1.2001, page 4, para 24.

## SPAIN

### 1. Introduction

The geographical configuration of Spain as a peninsula with 8,000 Km of coast has favoured the construction of marinas and trading and fishing ports, which have become strategic points for the development of different activities throughout the coast.

The port sector has a significant relevance for the Spanish economic and commercial activity. In particular, the international sea transport of merchandises increased by 47% between 2000 and 2008, and in 2009 the 46 ports of general interest in Spain handled around 76% of imports and 50% of exports.

In this context, port services are essential in the trading ports of the Spanish territory and have a direct impact on the cost of merchandise imports and exports and, in turn, on the commercial relationships between Spain and the rest of the world.

Moreover, in order to assess the relevance of the port sector we need to take into account the role of the ports as connection knots with other means of transport such as road transport or rail transport, since any merchandise that departs from or arrives to a port needs to use either of these means of transport.

Therefore, the introduction of competition in the port activities in order to increase their efficiency and their competitiveness must be a primary goal of the port policy. In this sense, the Spanish port regulation has progressed during the last few years<sup>1</sup> towards a process of liberalization of services and has encouraged the private initiative in line with the recommendations made by the Spanish Competition Authority (*Comisión Nacional de la Competencia*, CNC). In particular, progress has been made in the development of *intra port* competition, through the autonomous management of the ports, as well as in the strengthening of *inter port* competition, through the free provision of port services.

All this has shaped a port system that will be briefly explained in this paper in order to facilitate the understanding of some of the conducts recently analysed by the CNC. The implementation of the reforms initiated in 2003 and reinforced in 2010 has not finished yet. This is important because some of these conducts have been assessed by the CNC before the latest regulation modifications were passed and the CNC has to a certain extent influenced, via recommendation, these modifications.

### 2. The Spanish port system

The port sector is a regulated sector that has recently been partially liberalized. It is characterised by the following features:

- Property and management

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<sup>1</sup> Act 48/2003, of 26<sup>th</sup> November and Act 33/2010, of 5<sup>h</sup> August.

- Public ownership of the ports: at the Autonomic level (Autonomous regions) for marinas, fishing ports and non-trading ports in general and at the State level for ports of general interest<sup>2</sup>, which are usually those that carry out trading activities.
- Public ownership at the State level of port goods: the sea waters included in the service area of the ports, lands, public works and port facilities are goods of public domain. The occupation and use of this domain is subject to administrative authorization for periods of time under three years, and the facilities are detachable. For periods of time over three years administrative concessions are used with non-detachable facilities. In the latter case, public tender is compulsory under certain assumptions.
- Ports of general interest are managed by Port Authorities which are public entities whose boards include representatives from the Central Government, the Governments of the Autonomous regions, the municipalities, and the companies, trade unions and economic sectors relevant in the port domain. Infrastructures and public domain must be managed under profitability and efficiency criteria.
- Economic regime
  - The principle of economic self-sufficiency of the port system as a whole and of each of the Port Authorities governs the economic regime of the Spanish port system within a framework of autonomous economic and financial management.
  - Port fees and private revenues from the provision of trading services are part of the resources available to the port system.
  - Fees are calculated applying the principle of equivalence with the costs. There are different types of fees: for the occupation of the public domain; for trading, industrial or service activities; for the use of port facilities –the ship, the crossing, the merchandise, fresh catch, yachts, special use of the transit area– and for aids to shipping for the use of sea signposting.
  - The fees have a common structure and basic quantities for all Port Authorities, although the latter can apply corrective coefficients and discounts for the fees of the ship, the crossing and the merchandise according to their economic situation, which can favour *inter port* competition.
- Services
  - Access and provision: Ruled under the principle of free access to service provision in a framework of free and loyal competition among operators.
  - Kinds of services
    - General services –cleaning, lighting, policing, etc.- and the sea signposting are carried out by the Port Authority. The management of the general services can be entrusted to third parties when security is not at risk or they do not involve the exercise of authority.
    - Trading services –cranes, elevators, steelyard, merchandise reception, etc.– are provided under free competition after obtaining a permission from the Port Authority.

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<sup>2</sup> This paper focuses on these ports.

- Port services: technical-nautical –towing, tying, etc.-, service to the crossing, reception of the waste material and merchandise handling –cargo, stowage, etc.-. These services are carried out by the private initiative -with a non-exclusive licence for a limited term- and they are subject to certain obligations of public service and account separation. The provision of the service of “pilotage” is limited to one operator, which is granted a licence through a tender process.

In short, the current Spanish port system is characterized by public ownership and management of the ports, which must be carried out within a framework of economic self-sufficiency and free access to service provision. Although the management model described has progressed towards a more liberalised one, there are still some restrictions to competition, especially in the realm of stowage services, that can only be provided by stowage companies, and whose workers still enjoy special working conditions. In other cases in which service provision has been limited to one operator, such as the service of “pilotage”, at least competition *in* the market has been substituted by competition *for* the market through public tenders.

### **3. Enforcement of competition regulation in the port sector**

In this section two cases will be analysed. The first one involves a trade agreement in stowage services signed by shipping companies, cargo workers and trade unions that also regulated the working conditions in other sectors and which was considered an anticompetitive agreement with the effect to foreclose the market by the Spanish Competition Authority. In this case, proceedings were closed by imposing a fine.

The second case involves an agreement among road transport companies in Barcelona, brokers, shipping companies and Barcelona’s Port Authority whose object was to erect entry barriers in the port of Barcelona for independent transport companies. In this case, proceedings were closed through a *commitments decision*.

#### **3.1. The Stowage Companies Case**

Before the regulatory reform of 2003 each Port Authority had a *public-capital company* that provided stowage companies with the qualified workers that these companies were lacking for handling cargo. Therefore stowage companies provide cargo services through dockers, who are either temporarily hired through the public companies and subject to a special social security regime, or they belong to the stowage company’s staff, being thus subject to the general social security regime. The former enjoy more advantageous wages and working conditions that increase the cost of the service.

In 2003 cargo services started to liberalise through the transformation of *public-capital companies* into *port entities of economic interest* whose partners were meant to be the stowage companies. In 2010 further progress was made in liberalising these services by fostering these new entities and the remaining public-capital companies to transform into *limited liability companies* and obliging them to hire a certain percentage of workers of the general working regime. However, it is still compulsory for the stowage companies to integrate into the *limited liability companies*, who hold the exclusivity in the provision of qualified workers. These workers still enjoy special working conditions.

In this context, in 2007 the National Association of Stowage and Broker Companies (ANESCO) – which represents the interests of the stowage companies –, the State Coordinator of Port Workers (CETM) – which represents the interests of cargo workers – and two regional trade unions signed an agreement to regulate the working conditions in the stowage sector.

The Spanish Competition Authority opened proceedings in this case since it considered that the agreement established wages and working conditions that affected not only the stowage companies and cargo workers but went beyond and affected the working conditions of complementary services – trading services and services to the crossing, among others – that can be carried out by stowage companies and cargo workers but also by other kinds of companies, since these services are liberalised.

In 2009, the Spanish Competition Authority concluded that the companies that had signed the agreement were responsible of a collusive pact non-compatible with the Spanish Competition Act and they were fined. The CNC considered that the goal of the agreement was not only the defence of the social rights of cargo workers but that it also aimed at keeping the market of complementary services for the stowage companies by erecting entry barriers to other competitors that were not able to be represented in the negotiations. The goal of the agreement was therefore to foreclose the market for complementary services through the imposition to non-stowage companies – who were mainly active in this market – of the obligations established by the companies that signed the agreement.

According to the CNC, the agreement had also had a deterrent effect for potential competitors in the market for complementary services in the ports of general interest as they would have had to fulfil the conditions established in the agreement or even to face blockages from the signing parties.

The CNC decision was appealed before the revision court (*Audiencia Nacional*) and finally upheld in September 2010.

### 3.2. *Barcelona's port*

This case is about the access of independent transport companies to the facilities of Barcelona's port.

In 2007, the Mediterranean Association of Container Transport Companies (AMETRACI)<sup>3</sup> denounced a series of pacts between Barcelona's Port Authority (APB) and several associations of Barcelona's entrepreneurs of container road transport, brokers, shipping companies, international freight companies and the users of *Transporte de Cataluña* in order to organise the activity in the port.

The complainant was an association of transport companies, most of which were independent SMEs, whose activity was mainly (80%) focused in the port of Barcelona and which hired their services to transport companies that usually did not belong to the denounced associations.

The pacts designed a mechanism to grant an access authorisation to the port area and to allocate the parking space inside the port area. In particular, lorries had to obtain an authorisation from the APB to gain access to the port area. There were two kinds of authorisations. On the one hand, independent transport companies were granted an (E) authorisation for one single operation, which meant a form-filling and a payment every time they entered the port area. On the other hand, transport companies were granted a (P) two-year term authorisation with no fees. On top of this, the owners of P authorisations were favoured in the occupation of the buildings managed by the APB, of the parking space for lorries inside the port area and enjoyed priority access to communication equipment.

The Spanish Competition Authority opened proceedings against all the signing parties since it considered that this scheme had potential discriminatory effects *vis à vis* the independent transport

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<sup>3</sup> In 2008, the Spanish Competition Authority, following an accusation made by AMETRACI, fined several of the transport associations of this file for fixing tariffs for the provision of the service of container transport in the port of Barcelona.

companies and at the same time it could erect significant entry barriers in the port of Barcelona for potential operators.

After the statement of objections was issued, the signing parties of the agreements presented before the CNC an application to initiate a *commitments procedure*. This procedure, contemplated in the Spanish Competition Act, foresees that the Council of the CNC may resolve the termination of the sanctioning proceedings in matters of agreements and prohibited practices when the alleged offenders propose commitments that resolve the effects on competition derived from the conduct covered by the proceedings and public interest is sufficiently guaranteed.

The denounced companies presented commitments which, among other things, proposed the modification of the authorisation system to access the port and the separation of the entry authorisation from the availability of the parking space, increasing, at the same time, the rotation of the available parking space. However, there would still be two kinds of authorisations: a three-year term generic authorisation and a specific authorisation for punctual operations that would be granted to whoever had an administrative authorisation to carry out road transport activities, conditioned to the fulfilment of non-discriminatory requirements.

As far as the parking space in concerned, the parties proposed two kinds of seats: rotating seats (for hours) and guarding seats. The allocation of guarding seats to the owners of generic authorisations would be decided by drawing lots among the applicants before the end of the previous year.

The Spanish Competition Authority considered that these commitments were sufficient to resolve the competition problems detected and in March 2011 it resolved to close the case by a *commitments decision*.



## SWEDEN

### 1. Summary

- The great majority of the Swedish international trade has connections to the Swedish ports; therefore a well-functioning port industry is of great importance.
- Ports that are intended for commercial shipping are either owned by the State, a municipality or a private company. The most common owner of the port infrastructure is a local municipality. In difference to many other countries, the port administration and stevedoring are often integrated in Swedish ports.
- Ports face competitive constraints both from other ports and from the utilisation of other modes of transportation than shipping. The extent of substitutability is dependent on a number of factors, e.g. transportation infrastructure, the type of cargo and the distance to market.
- Ports can possess market power in relation to certain cargoes bound for certain markets. Ports have therefore been subject to investigation by the Swedish Competition Authority on a number of occasions. Potential abuses include excessive pricing and refusal to provide services.
- As a result of a collective agreement, there will only be one single company offering stevedoring services in most Swedish ports. This arrangement is referred to as The Stevedoring Monopoly.
- The Swedish Competition Authority has focused on municipal ports broadening their market scope. Municipal ports now offer services traditionally provided by the private market. Municipal ports allegedly take advantage of their market power and The Stevedoring Monopoly in the markets for e.g. forwarding shipping agents and shipbrokers.
- As of 1 January, 2010, the Swedish Competition Authority has received a complementary tool to deal with competition issues in regard to anti-competitive sales activities undertaken by the public sector. Since most Swedish ports are owned by municipalities or by companies controlled by municipalities this new provision will be of particular importance.
- As regards the new provision and the effects on competition, there is neither a *de minimis* rule applicable nor a requirement to establish a dominant position, unlike cases regarding anti-competitive agreements or abuse of a dominant position.

### 2. Ports in Sweden

#### 2.1. General description

Sweden has the longest coast of all EU Member States. In 2008 approximately 188 million ton goods were transported over the Swedish ports, equalling 85-90 per cent of the Swedish international trade.<sup>1</sup> This

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<sup>1</sup> Sjöfartens bok, Svensk Sjöfartstidning, 2009, p. 146 och Sjöfartens bok, Svensk Sjöfartstidning, 2010, p. 141.



requires smooth transitions between land and sea transportation.<sup>2</sup> Consequently, a well-functioning port industry is of great importance to the entire Swedish society.

There are about 50 public ports in Sweden. In addition to the public ports there are around 20 industrial ports and large private quays. A public port is open to everyone and all transportations, in difference to an industrial port that generally will only accept carriages from the port owner itself.<sup>3</sup> Some of the public ports will specialise in certain products, ships, ferries or specialise as multi-purpose ports.<sup>4</sup>

Ports that are considered to be of strategic importance to Sweden were identified in a Swedish Government Official Report in September 2007. These ports were to be prioritised by the State in future public infrastructure investments. The concept “Strategic Port” entailed *inter alia* that the Swedish Maritime Administration would be responsible for fairway service up to the quay and that piloting services would improve with a wait of maximum three hours, in difference to five hours in other ports.

Ports that are intended for commercial shipping are either owned by the State, a municipality or a private company. The port services are commonly carried out in a company or in municipal administration. In difference to many other countries, the port administration and stevedoring are often integrated in Swedish ports.

Regardless of how the port and stevedoring services are organised, the port infrastructure, including land and quays, is most commonly owned by a municipality. Since the municipalities commonly own the port infrastructure, the municipality also fund necessary larger investments. Capital costs are often covered by administrative fees. It is rare that port infrastructure is financed through tax revenue.

Ports face competitive constraints both from other ports and from the utilisation of other modes of transportation than shipping. The extent of substitutability is dependent on a number of factors, e.g. transportation infrastructure, the type of cargo and the distance to market.

Ports can possess market power in relation to certain cargoes bound for certain markets. Ports have therefore been subject to investigation by the Swedish Competition Authority (“SCA”) on a number of occasions. Potential abuses include excessive pricing and refusal to provide services.

## **2.2. The Stevedoring Monopoly**

In most Swedish ports there is only one single company offering stevedoring services. This is a result of a collective agreement between the employers’ organisation Ports of Sweden and the employees’ organisation The Swedish Transport Workers Union. This arrangement is referred to as The Stevedoring Monopoly.

The Stevedoring Company is responsible for the complete handling of the goods in the port, from arrival by land transport until the goods are stowed on board and *vice versa*. Only workers employed by a stevedoring company listed in the stevedoring agreement and that are members of Ports of Sweden are included by the collective agreement. The stevedoring agreement states that the collective agreement includes all work performed in the stevedoring company’s management, including e.g. loading and unloading, mooring and keeping count of incoming and outgoing goods.

<sup>2</sup> Konkurrensförutsättningar på Hamn- och Stuverimarknaden, the Swedish Competition Authority, March 2000.

<sup>3</sup> Swedish Government Official Report, SOU 2007:58, Hamnstrategi: Strategiska hamnoder i det svenska godstransportsystemet, p. 11.

<sup>4</sup> Sjöfartens bok, 2009, p. 146.

During the 1990-ties the SCA investigated complaints regarding port services and The Stevedoring Monopoly.<sup>5</sup> The complaints concerned the question whether or not the employers' organisation's decision to appoint the companies included by the collective agreement, in the foreword to this agreement involved an act that constituted an abuse of a dominant position. The SCA did, however, not find any proof of any conduct that could impede, limit or distort competition in the relevant market.

### **2.3. *Developments in the port sector***

During the last fifteen years, there has been great improvement in Swedish shipping and the port sector in relation to developing the logistics. For example the procedure for handling the documentation has been simplified and advanced data systems have been constructive.<sup>6</sup> According to a Swedish publication on shipping, Swedish port services and commerce have become appreciably more efficient during the last years. At the same time as the number of employees decreased the turnover per employee has increased.<sup>7</sup>

Recently, the SCA has focused on municipal ports broadening their market scope. Municipal ports now offer services traditionally provided by the private sector. Municipal ports allegedly take advantage of their respectively market power and The Stevedoring Monopoly in the markets for e.g. forwarding shipping agents and shipbrokers.

## **3. *Amendments to the Swedish Competition Act***

### **3.1. *Supplement to the Swedish Competition Act on public sales activities***

As of 1 January, 2010, complementary rules on anti-competitive sales activities by public entities were included in the Swedish Competition Act ("the Competition Act")<sup>8</sup>. These rules were adopted in order to address competition issues that may arise when the public sector competes with private undertakings on open markets.

This new rule is intended as a supplement to the two general antitrust prohibitions, i.e. on anti-competitive agreements and on abuse of a dominant position. In the event Article 101 and/or 102 TFEU also are applicable, these provisions must be applied in accordance with Regulation 1/2003.<sup>9</sup>

### **3.2. *Anti-competitive sales activities by public entities***

According to Chapter 3, Sections 27 and 32 of the Competition Act the Stockholm City Court ("the City Court") may, on application by the SCA, prohibit a certain *conduct* by the State, a municipality or a county council within a sales activity, or a certain *sales activity* by a municipality or a county council. A condition that has to be met is that the conduct or sales activity distort, by object or effect, the conditions for effective competition in the market, or impede, by object or effect, the occurrence or the development of such competition.

<sup>5</sup> See e.g. The Swedish Competition Authority case dnr 161/1999 (only available in Swedish).

<sup>6</sup> Konkurrensförutsättningar på Hamn- och Stuverimarknaden, p. 15 with reference.

<sup>7</sup> Sjöfartens bok, 2009, p. 146.

<sup>8</sup> SFS 2008:579. The act came into force 1 November 2008.

<sup>9</sup> See Article 2, Regulation 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 101 and 102 of the TFEU, OJ 2003 L1/1.

According to Chapter 3, Section 28 of the Competition Act, the City Court may also on application by the SCA prohibit a certain conduct or activity of another legal person if the State, a municipality or a county council directly or indirectly has a decisive influence over the legal person through ownership, financial participation, applicable rules or through any other means. In other words; it does not matter whether e.g. a municipality chooses to run the business itself or through a company, as long as the municipality keeps the decisive influence of the company.

However, there are some exceptions to the new rule. According to Chapter 3, Section 27 of the Competition Act, an injunction may *not* be imposed in relation to a *conduct* that may be justified by *public interest considerations*. Furthermore, a certain *sales activity* may not be prohibited if it is *compatible with law*.

The criteria for prohibition of a certain conduct or a certain sales activity are summarized in Figure 1 and Figure 2 respectively below.

**Figure 1: Overview of the criteria for prohibition of a certain conduct by public entities**

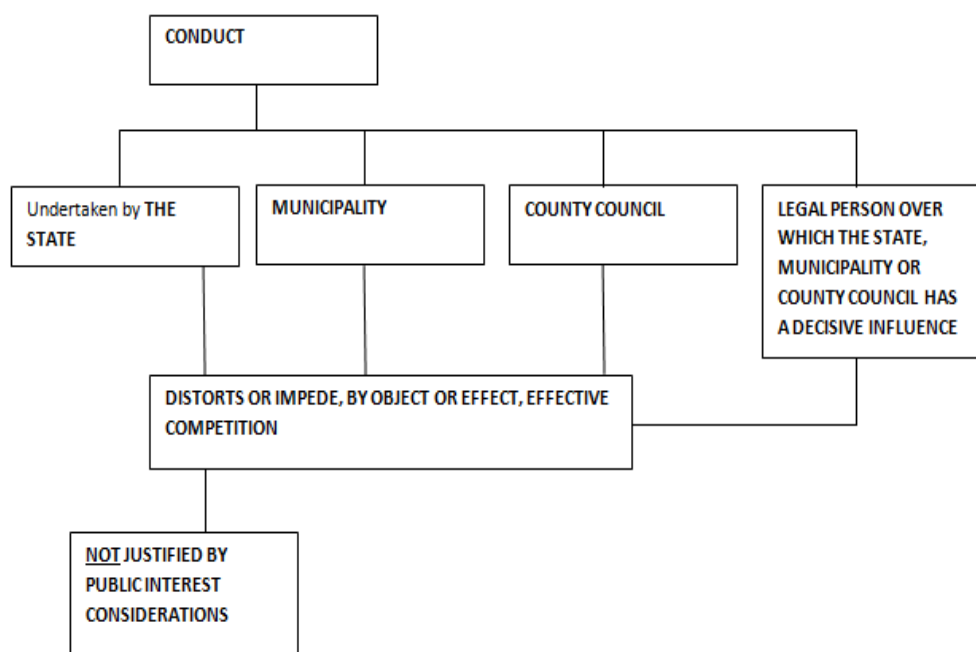
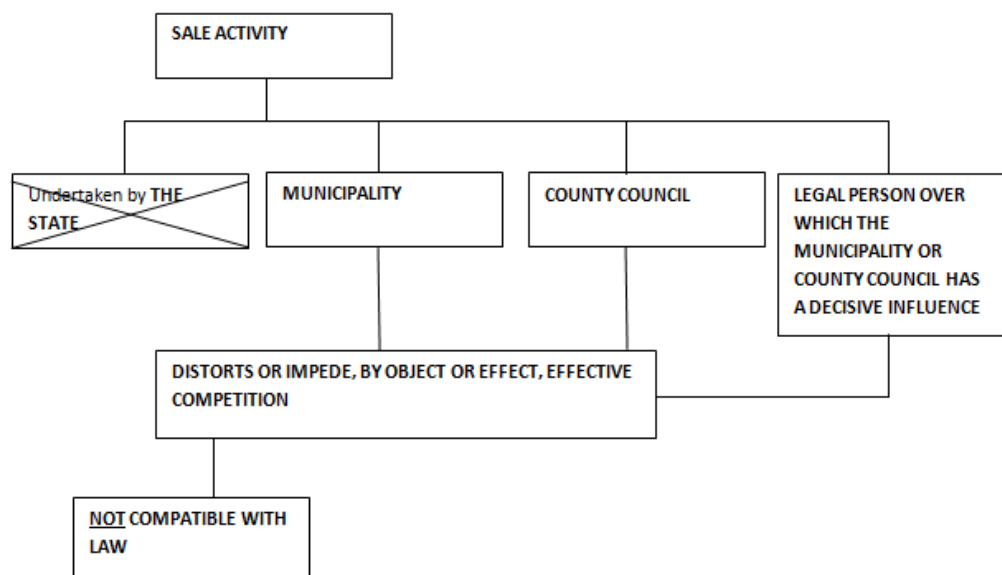


Figure 2: Overview of the criteria for prohibition of a sales activity by public entities



### 3.3. *The Local Government Act in relation to public sales activities*

As regards certain *sales activities* undertaken by a municipality, a county council or a legal person over whom a municipality or a county council has a decisive influence, the Swedish Local Government Act <sup>10</sup> (“the Local Government Act”) is of specific interest to determine whether or not the sales activity in question is compatible with law.

Local self-government has a longstanding tradition in Sweden. Self-government at a local and regional level is exercised, respectively, by municipalities and county councils. The rules of the game for municipalities and county councils are mainly laid down in the Local Government Act.

Chapter 2 of the Local Government Act regulates the powers of municipalities and county councils. According to Chapter 2, Section 1 municipalities and county councils may themselves attend to matters of general concern which are connected with the area of the municipality or county council or with their members and which are not to be attended to solely by the State, another municipality, another county council or some other body. The relevant question is whether or not it is appropriate, well adapted and reasonable that the public entity takes responsibility for the matter.

Furthermore, according to Chapter 2, Section 7 municipalities and county councils may only engage in business activities which are conducted without a view to make profit and under the condition that it is essentially concerned with providing communal amenities or services to the benefit of the members of the municipality or county council.

<sup>10</sup> SFS 1991:900. The Act came into force on 1 January 1992.

#### **4. Public sales activities in ports**

##### **4.1. *Complaints to the Swedish Competition Authority***

As has been mentioned above, the SCA has received several complaints during the years regarding the competitive situation in the port sector. Since the most common owner of a port's infrastructure in Sweden is a municipality, the new rule regarding anti-competitive sales activities by public entities is of special interest.

Since this new rule came into force the SCA has received complaints regarding ports, where the companies have all been fully or partially owned by a municipality.

The Authority gives priority to matters of broad public interest, for example sales activities that affect many companies in large parts of the country, and matters which to some extent involve principal issues. The SCA initiated further investigations based on the new rule in two cases.

The first case will be further described below. The second case was closed in December 2010. The SCA did not find proof that the questioned sales activities carried out by the public entity were likely to be incompatible with law, nor that any *conduct* carried out by the entity distorts or impedes the conditions for effective competition in the market.

##### **4.2. *The first port case***

In February 2010, the SCA received a complaint regarding *inter alia* the sales activities undertaken by a company ("the Company") partially owned by a subsidiary to a municipality. The SCA decided to further investigate the Company's sales activity in relation to the new rule regarding anti-competitive sales activities by public entities.

The Company is i mainly active as a forwarding shipping agency and as a shipbroker. Several private companies, who offer the same services in the port in question, complained to the SCA over the fact that the Company has advantages mainly based on its close connections to the owner; the municipality. The municipality owns the port and is indirectly the owner of a considerable percentage of the shares of the Company. Some competitors claimed that these fundamental differences in circumstances under which they act on the market lead to a distortion or impediment of the competition.

One question of vital importance is whether or not the Company may be regarded as a legal person in whom the municipality directly or indirectly has a decisive influence (Chapter 3, Section 28 of the Competition Act). If not, the rule regarding anti-competitive public sales activities does not apply.

Another crucial question is whether or not these activities can be regarded as compatible with the law. In lack of specific legislation regarding municipalities' activities as shipbrokers or as forwarding shipping agencies, the answer to this question is whether or not the activities are compatible with the Local Government Act.

Finally, a key question is whether or not these sales activities distort, by object or effect, the conditions for effective competition in the market, or impede, by object or effect, the occurrence or the development of such competition. In this context, it is worth noting that unlike cases regarding anti-competitive agreements or abuse of a dominant position, there is no *de minimis* rule applicable, neither a need to establish a dominant position. Instead, according to the preparatory work of the legislation, the impact on competition has to be "of some significance". The reason for not having a *de minimis* rule is that

one might not fully be able to take into consideration the fundamental differences between public and private legal persons.<sup>11</sup>

#### **4.3. *Preliminary assessment of municipalities' extended activities in ports and the legislation regarding anti-competitive sales activities by public entities***

Without predicting the outcome of the SCA's investigation regarding the first port case, some general remarks may be made as regard municipalities' extended activities in ports and the Swedish complementary legislation regarding anti-competitive sales activities by public entities.

It should be noted that at the same time as stevedoring and activities connected to the operation of a port's infrastructure have been referred to as compatible with the legislation and case law, no similar statement exists regarding activities such as forwarding shipping agency and shipbroker activities undertaken by a municipality or a company controlled by a municipality. Furthermore, neither does any specific legislation currently exist that allows municipalities to operate on the open market as forwarding shipping agencies or shipbrokers, nor have such activities become accepted in accordance with general practice in the market.

The starting point of the new Swedish provision regarding municipalities' business activities is that municipalities shall not, without any particular reason, engage in business activities in competition with the private sector. A decisive question in this regard is whether or not it is appropriate, well adapted and reasonable that a municipality enters into competition with private entities and acts e.g. as a shipping agency or as a shipbroker in a port.

Unlike the operation of the infrastructure of a port – which may be regarded as a matter of general concern - the services in question are not associated with great investment costs or financial risks that the industry is reluctant to take. Furthermore, in accordance with statements in the doctrine, if it seems abnormal to run a business without a view to profit, this indicates that the matter falls outside the competence of the municipality and is thus to be regarded as incompatible with law. Finally, it is doubtful whether the services in question are compatible with the Local Government Act.

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<sup>11</sup> See Government bill, prop. 2008/09:231, p. 37.



## SWITZERLAND

### 1. The Rhine and the Mannheim Convention

The Rhine is the longest river that flows into the North Sea and is the most important waterway in Europe (200 million tons of goods carried annually). It is the only inland waterway that links Switzerland to the sea. Switzerland has free access to the sea, which is guaranteed by the Mannheim Convention, an international agreement which settles the river traffic on the Rhine. It was signed in 1868, reviewed in 1963 and ratified by Switzerland, Germany, Belgium, France, the United Kingdom and the Netherlands. The fundamental principles of the Convention have already included the idea of a free and common transport market. The Convention established among others freedom of navigation on the Rhine, exemption of navigation duties, equal treatment of all boatsmen and fleets, and simplified customs clearance. Thus, Switzerland benefits from a guaranteed access to the sea under international law.

### 2. The port of Switzerland

The port of Switzerland, or Swiss Rhine Ports, is the only river port of the country and is situated along the Rhine, on the territory of two cantons: Basel country (Basel-Landschaft, BL) and Basel city (Basel-Stadt, BS). Given that inland waterways are not linked to the Rhine, goods coming up to the Swiss Rhine Ports in Basel by ship will have to leave the port by lorry or train. The Swiss Rhine Ports are strategic places for the movement of goods going south over the Alps, as they are the starting and terminus points of the European navigation on the Rhine.

#### 2.1. Merger

The port of Switzerland arose from the merger between the four ports of Basel: the ports of the cantons of BS (Kleinhüningen and St. Johann) and BL (Birsfelden and Auhafen Muttentz). The ports decided to strengthen their collaboration in order to consolidate their position on the market, to promote river traffic on the Rhine and to exploit their synergies. Since January 2008 the merger has been operational under the name "Swiss Rhine Ports". This merger has created a monopoly that allows economies of scale and decreasing running costs. Ports have been untied from cantonal administrations and became a public institution with its own legal entity. As a last step of this merger, both port railways of BS and BL have been brought together under the "Hafenbahn Schweiz AG" on January 2011. The company manages the port's network access. The surface area of the merged ports is about 1.3 million square meters, half on BL and half on BS side.

#### 2.2. Characteristics

In Switzerland transport by road remains the most used transport mode, with a share of about 54 percent of imported volume and 75 percent of exported volume on the transport market in 2009.<sup>1</sup> However, traffic on the Rhine is significant in the transportation of goods. In 2009 about 13 percent of the import volume went through the port of Switzerland. Boat transport is the fourth most important mode of transport

<sup>1</sup> Administration fédérale des douanes, *Rapport annuel. Analyse du commerce extérieur de la Suisse en 2009*, p. 24 and 26; available on the following website:  
<http://www.ezv.admin.ch/themen/00504/01530/index.html?lang=fr>.



behind pipeline (17 percent) and rail (16 percent). Regarding the exports, navigation represents 4 percent, behind rail that has 15 percent market share and airplanes with almost 5 percent. Boat transport is competitive; it allows carrying very important quantities of goods over long distances at low transportation and running costs.

The ports container traffic reached 99,048 TEU<sup>2</sup> in 2010, which was 26.5 percent higher than in 2009 (78,285 TEU).<sup>3</sup> About 13 percent of the imports and 3 percent of the exports in terms of value go through the Rhine ports.<sup>4</sup> Above all oil products, metals, chemical and agricultural produces are transhipped through the Swiss Rhine Ports. A growing share of transport and transshipment concerns consumer goods. However, for about 50 years, the quantity of goods transported on the Rhine has been constant whereas Swiss foreign trade (in quantity term) has increased at least 6 times during the same period. Therefore, the market share of foreign trade by waterway has decreased to about 10 percent.<sup>5</sup>

90 percent of the trade in the Swiss Rhine Ports concern imports and exports to and from Switzerland, and 10 percent pass in transit via rail and road networks. The interconnectedness of the port of Switzerland with road and rail networks is one of its strengths as it offers the best conditions required for a safe logistic chain. The port railways of the cantons of BS and BL have more than 100 kilometer of lines. In 2006 they allowed to carry more than 67 percent of the goods transhipped from and to the Rhine ports.<sup>6</sup> These ports are also well linked with road networks and airways (EuroAirport) and therefore became a complex transport hub, well integrated in the European transport networks.

### 2.3. *Competitive situation*

#### 2.3.1. *Elements of competition within the Swiss Rhine Ports*

When merging the ports of Basel, the cantons of BL and BS decided to keep their landownership rights (Rheinhafenvertrag<sup>7</sup>, §2). This implies a state monopoly. The merger of the four ports of Basel was not subject to notification to the Competition Commission because it did not reach the threshold-values for a merger control mentioned in the Cartel Act.<sup>8</sup> However, it is important to notice that the Cartel Act applies very well to the agreement of the cantons to form a monopoly. Such a natural monopoly could create problems in terms of price setting, access guarantees and granting of concessions.

The Swiss Rhine Ports manage the unbuilt terrains by giving construction rights lasting several decades to companies with specific logistic port activities. The board of directors has the competence to assign standard contracts regarding the utilization of terrains that are all based on the same criteria. The duration of the concessions is generally fixed between 40 and 50 years. The port authorities ensure that at

<sup>2</sup> TEU = twenty-foot equivalent units.

<sup>3</sup> Schweizerische Rheinhäfen, *Jahresbericht 2010*, p. 18.

<sup>4</sup> Swiss Federal Customs Administration, provisional figures for 2010; available on the following website: <http://www.ezv.admin.ch/themen/00504/index.html?lang=fr>.

<sup>5</sup> Office fédéral de la statistique (2010), *Mobilité et transports 2010*, p. 60.

<sup>6</sup> Conseil fédéral (2009), *Rapport sur la politique suisse en matière de navigation*, p. 6955.

<sup>7</sup> 955.400 Staatsvertrag über die Zusammenlegung der Rheinschiffahrtsgesellschaft Basel und der Rheinhäfen des Kantons Basel-Landschaft zu einer Anstalt öffentlichen Rechts mit eigener Rechtspersönlichkeit unter dem Namen "Schweizer Rheinhäfen" ("Ports Rhénans Suisses", "Swiss Rhine Ports") (Rheinhafenvertrag), came into force on the 1st January 2008.

<sup>8</sup> RS 251 Loi fédérale du 6 octobre 1995 sur les cartels et autres restrictions à la concurrence (Loi sur les cartels, LCart); <http://www.admin.ch/ch/f/rs/2/251.fr.pdf>.

least two enterprises are present in the port in all important segments (petroleum, containers, dry goods, metals).<sup>9</sup> This fact avoids a monopoly for a specific good. In addition to international companies, the port of Switzerland also hosts Swiss small and medium-sized enterprises. Certainly, the fact that the port authorities ensure that at least two enterprises are present for all important segments shows their willingness to promote competition. However, the competitive situation may not be guaranteed with only two competitors. The application of the call for tenders stipulated by the Internal Market Law<sup>10</sup> could contribute to solve the problem.

The price for the terrain rented is based on the market price. The price for using transshipment facilities has to cover infrastructure costs. The Swiss Rhine Ports are entitled to fix the fees that have to be paid per ton. This fee has to be approved by the cantons of BL and BS (Rheinhafenvertrag, §30). The fees, differentiated by categories of goods, have to be kept within the limits of CHF 0.45 (EUR 0.37) and CHF 2.90 (EUR 2.37) per ton, based on the consumer price index of December 2005. The Swiss Rhine Ports have the possibility to adapt the fees every two years. The Swiss Rhine Ports do not receive any public subsidies. This situation discriminates the port against the rail which benefits from federal subsidies.

The competitive situation between the different ports and terminals within the port of Switzerland is guaranteed by the fact that they have not shared the market by specializing on the handling of particular goods, apart from the port of Muttentz that has specialized in the transshipment and storage of heavy goods and fuel. This situation limits the individual market power of the companies active in the different parts of the port.

An open-access system guarantees the free access to railways managed by "Hafenbahn Schweiz AG" to all railway companies dealing with the transport of goods.

### 2.3.2. *Competition faced by the port*

As the Swiss Rhine Ports have the capacity to deal with different kinds of goods and different ways of loading ships (containers a.s.o.) - even if about 48 percent of the traffic concern petroleum and mineral oil products in 2010<sup>11</sup> -, they are ready to compete with other modes of transport, like railways and other ports. The road networks are less important, as the cost for long distance transport is higher and therefore not so interesting for customers. The situation with regard to rail networks is ambivalent, as railways are both competitors, for foreign trade, and partners, for hinterland trade through the multimodal platform. However the substitutability of different transport modes is not perfect and could lead to a monopoly/oligopoly situation for specific goods (for example for heavy goods).<sup>12</sup> Therefore it is difficult to judge to what extent competition among the different transport modes is effective.<sup>13</sup>

The port of Switzerland also faces competition from lower Rhine ports like Duisburg and Düsseldorf. This situation stems from the fact that the goods can be transported from Rotterdam to Duisburg by boat, and from there further south by train.

<sup>9</sup> 93 companies work in the Swiss Rhine Ports; see the website: <http://port-of-switzerland.ch>.

<sup>10</sup> RS 943.02 Loi fédérale du 6 octobre 1995 sur le marché intérieur (LMI); <http://www.admin.ch/ch/f/rs/9/943.02.fr.pdf>.

<sup>11</sup> Schweizerische Rheinhäfen, *Jahresbericht 2010*, p. 21.

<sup>12</sup> Regarding substitutability of modes of transport, see Competition Commission, *Droit et politique de la concurrence DPC 2004/4*, p. 993; available on the following website: <http://www.weko.admin.ch/dokumentation/00157/index.html?lang=fr>.

<sup>13</sup> Regarding market definition for transports, see the case "SBB Cargo/Hupac", in Competition Commission, *Droit et politique de la concurrence DPC 2011/1*, p. 208.

In order to develop their competencies and to increase logistic efficiency, and to strengthen thereby their position in the southern part of the Rhine, the Swiss Rhine Ports got involved in the initiative "Logistikcluster Region Basel". This project serves as a platform for the logistic industry. In 2010 after in-depth studies regarding needs and challenges of logistics sector, measures were taken, among others to form the trinational cooperation between the ports situated in the southern Upper Rhine: RheinPorts Basel-Mulhouse-Weil. It is a multimodal and logistic port hub. It was established in order to create a logistics competence center within Europe to develop quality transport and to face competition of other important European ports. With 12 million tons of goods transhipped annually, the RheinPorts are the second most important port facility on the Rhine.

The port of Switzerland considers that it faces strategic challenges. The ports of Anvers and Rotterdam are expanding and want to double their container capacities. A new terminal project is planned in Basel to be able to keep up with this development. Another reason is that terrain capacities are already limited and cannot meet the demand. Furthermore, 5 years from now, the transport network beyond the Alps with the opening of the new railway lines through the Alps will be much larger and therefore the strategic place of the Swiss Rhine Ports will have increased.

Finally, the competition situation faced by river ports is different from the one of maritime ports. As a matter of fact, the strongest competition arises with other modes of transport, as they transport goods over smaller distances parallel to rail and road, situation that opens transport alternatives.

## TURKEY

In Turkey there are 165 ports and quays and a vast majority of them are owned and managed by private enterprises. Independently of the ownership of the port, the supervision and the regulation of ports are under the control of various public authorities. However, there is not a central body or an independent regulatory commission which is specialized only in ports.

Ports play an important role in the foreign trade of Turkey as nearly 85-90 % of it is carried out through ports. Therefore, competitive and efficient ports are crucial for the whole Turkish economy.

The main competitive concern about the ports is the risk of abuse of dominant position via refusal to deal, excessive pricing, tying etc. However, in order to determine whether there is a violation of the Competition Act<sup>1</sup> it is vitally important to determine the relevant product and the geographic market.

In the context of ports, relevant product market is defined by taking into consideration the type of freight which is handled in the port and the type of vessel which anchor in the port. If the port services are only available for the cruise tourism, it is accepted that the relevant product market is “cruise oriented port services”.

In the decisions about the acquisition of Bodrum port, the Competition Board, the decision making body of the Turkish Competition Authority (TCA), defined relevant product market as the “cruise oriented port services” since the Bodrum port provided services only to the cruise ships.<sup>2</sup> With the same approach mentioned above the Competition Board defined relevant product market as the “dry bulk cargo-liquid bulk cargo and container handling services” in the decisions concerning the acquisitions of TCDD<sup>3</sup> Samsun, TCDD İskenderun, TCDD İzmir, TCDD Mersin and Ortadoğu Antalya ports<sup>4</sup>.

On the other hand, the substitution possibilities are taken into consideration while defining the relevant product market in the decisions of the Competition Board. Especially in ferry services, it is examined whether highways can be an alternative or not to the ferry shipping. However, because of the high oil prices, traffic and the condition of the highways, they can not make competitive pressure on ferry services and therefore highways are not considered as a substitute to the ports especially for the long-distance transportation.<sup>5</sup>

While determining the geographic market, the Competition Board takes two factors into consideration. The first factor is the hinterland of the port (the geographic regions which are served by the

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<sup>1</sup> Act No. 4054 on the Protection of Competition.

<sup>2</sup> Date and number of the decision of the Competition Board is as follows: 15.12.2008; 08-71/1150-447.

<sup>3</sup> State Railway Company, General Directorate of the State Railway Administration of Turkey.

<sup>4</sup> Dates and numbers of the decisions of the Competition Board are as follows:  
*TCDD Samsun port* (12.06.2008; 08-39/514-189), *TCDD İskenderun port* (20.10.2005; 05-70/967-261 and 02.12.2010; 10-75/1538-592), *TCDD İzmir port* (05.06.2007; 07-47/507-182), *TCDD Mersin port* (15.09.2005; 05-58/855-231) and *Ortadoğu Antalya port* (08.07.2010; 10-49/922-325).

<sup>5</sup> Date and number of the decision of the Competition Board is as follows: 09.01.2003; 03-03/25-7.

port) which is also called as the “static element” whereas the second factor is the catchment areas known as the “dynamic element”.

Regarding the first element, in its opinion<sup>6</sup> and final decisions<sup>7</sup> about the privatization of TCDD İskenderun port, TCDD Mersin port and TCDD Samsun port, the Competition Board determined geographic markets according to the hinterlands of these ports since these ports generally served the geographic regions around them which were connected to these ports with highways and railways.

In terms of the second element, which is the catchment areas, the size, the potential and the competitive power of the port with respect to other transit and hub ports are considered. The most significant criteria necessary for a port to be considered as a hub port are the depth of the water, the number and the size of quays of the port. As a result of their potential of being hub-ports, İzmir and Mersin ports are determined to belong to the same geographic market although they mostly serve different hinterlands.

In Turkey, it is generally accepted that a market share equivalent to or above 50 % is a significant indicator of dominance. This presumption is also valid for maritime and port services. However, the characteristics of the services, which are provided by the port, might change the market power analysis because different services require different investments, water depth and back space size. Although existence of one or two quays is adequate to operate in terms of liquid bulk cargo and dry bulk cargo handling services, container handling services require more water depth, longer and wider quays and costly equipment. Therefore, while high market share of a port, which handles only bulk cargo and dry bulk cargo, is not considered as an accurate sign of dominance, the assessment can be different for a port that provides container handling services. Since the container handling services require higher investment, potential competition is low for these services and high market shares are considered as the sign of dominance.

The pressure of potential competition may also change the approach of the Competition Board about the same issue. In the first opinion<sup>8</sup> of the Competition Board about the privatization process of TCDD Mersin port and TCDD İskenderun port, the Competition Board considered inter-port competition concerns and opined that the enterprise which would acquire the TCDD Mersin port should not acquire the TCDD İskenderun port since both ports were in the same geographic market and the market share of TCDD Mersin port was high in different segments especially in container handling services. After the completion of privatization process, TCDD Mersin port was acquired by PSA-Akfen Joint Venture. However, acquisition transaction involving TCDD İskenderun port could not be completed since the Council of State<sup>9</sup> annulled the decision of the Competition Board. After the annulment, Privatization High Council (PHC) requested opinion of the Competition Board regarding privatization of İskenderun port one more time. This time the Competition Board took into account the new port investment projects planned by public and private sectors and did not require a condition to ensure inter-port competition.<sup>10</sup> However, the TCA recommended PHC to put a requirement in the tender specifications for the successful bidder to make

<sup>6</sup> Opinion of the Competition Board is dated 06.05.2005 and numbered 05-31/376-M and available through: <http://www.rekabet.gov.tr/dosyalar/gorusler/gorus93.pdf>. See also the contribution of Turkey (DAF/COMP/GF/WD(2006)32) submitted to the Roundtable on Concessions held during Global Forum on Competition of 8–9 February 2006.

<sup>7</sup> See the decisions of the Competition Board in footnote 4.

<sup>8</sup> See the Opinion in footnote 6.

<sup>9</sup> The high administrative court against the decisions of the Competition Board.

<sup>10</sup> Opinion of the Competition Board is dated 18.3.2010 and available through: <http://www.rekabet.gov.tr/dosyalar/gorusler/gorus138.pdf>.

investment in container handling in order to develop the capacity of the port and enable competition between TCDD İskenderun port and Mersin port.

Because of the high entry barriers to the market especially in terms of legal procedures, it is possible that a port may be dominant in the market and may carry out practices that constitute abuse of a dominant position. However, there has been limited number of cases involving abuse of a dominant position since the port services were provided by the public until recently and the prices were regulated.

Although there were complaints about various ports involving allegations of abuse of a dominant position in the form of excessive pricing and refusal to deal, the Competition Board did not find any infringement of the Competition Act. There are only two decisions on abuse of dominance in the form of cross-subsidy. In one of them, the Competition Board concluded that Turkish Maritime Organization Inc. (TDİ) abused its dominant position by applying excessive price in the ferry services market on the line of Eskişehir-Topçular and it used its excessive profit to exclude their small-scaled competitors operating between the two sides of the Dardanelles.<sup>11</sup>

In order to enable competition in ports and prevent emergence of a dominant position after privatization of public ports, the Competition Board tried to enforce two kinds of remedies: “structural remedies” which are used to reestablish competition especially in the privatization process and the “behavioral remedies” that are used to ensure that port operators behave competitively.

In the context of structural remedies there are four options: i) constructing new quays in order to enable inter-port competition, ii) transferring operational rights of current quays to different enterprises in order to introduce intra-port competition, iii) enabling intra-terminal competition via distributing terminal services rights to different enterprises and finally iv) making short term agreements about the transfer of operating rights in order to sustain competition in terms of entering the market.

The Competition Board tried to adopt structural remedies while evaluating the privatization of İzmir and Mersin ports operated by TCDD. During the privatization process of Mersin and İzmir ports, the Competition Board recommended that the quays within the above-mentioned ports should be divided into different packages to ensure transfer to two different enterprises in order to enable intra-port competition.<sup>12</sup>

However, PHC argued that the separation of quays suggested in the opinion of the Competition Board was not feasible because of economic and technical reasons since the ports did not have sufficiently big quays that would allow two different enterprises to offer port services efficiently.

Alternatively PHC brought some behavioral remedies in order to prevent the abuse of dominance of the Mersin Port’s operator via abusive pricing and discriminatory behaviors. PHC put a provision in the agreement for the transfer of the operational rights of the port in order to prevent discrimination between the shipment and freight owners, which are in the same position. Moreover, in the same agreement, it had been stipulated to freeze the existing prices that were imposed during the privatization process for three years in order to prevent excessive pricing.

In another opinion of the Competition Board regarding the privatization of TCDD Samsun port, taking into consideration of Samsun port’s capacity in terms of ro-ro services, it was suggested that

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<sup>11</sup> *TDİ*, dated 24.06.2010 and numbered 10-45/801-264.

<sup>12</sup> See the Opinion in footnote 6.

operational rights of the port should not be transferred to a firm that was operating in the market for ro-ro services, in order to prevent a vertical integration that could be potentially harmful for competition.<sup>13</sup>

As mentioned above, since the biggest ports of Turkey were state owned until quite recently, there has been limited number of antitrust violations and therefore there have been few investigations by the TCA concerning ports. After the start of the privatization process the TCA played a proactive role and tried to build up a competitive port sector. While doing this, first of all the TCA paid strict attention to define geographic markets and tried to prevent concentration in the same geographic market and to enable inter-port competition. In addition, the TCA tried to adopt some structural remedies to prevent monopolization and vertical integration and aimed to improve the competitive capacity of the ports. Although the privatization of the ports has been realized very recently and there is still a long way to go, there is limited number of complaints involving the ports in terms of antitrust violations. This may be considered as a sign of the effective privatization process and the proactive role of the TCA. However, there is still no independent port authority to regulate and supervise the sector. Thus, it is possible to experience antitrust violations especially in terms of abuse of a dominant position.

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<sup>13</sup> Opinion of the Competition Board is dated 12.6.2008 and available through <http://www.rekabet.gov.tr/dosyalar/kararlar/karar2488.pdf>

## UNITED KINGDOM

### 1. Introduction

This paper provides responses from the UK competition authorities (the Office of Fair Trading (OFT) and the Competition Commission (CC)) to the questions set for the roundtable discussion on Competition Concerns in Ports and Port Services. It draws particularly on the authorities' experience of mergers in the port sector, and on work carried out by the OFT during 2010 as part of its 'Infrastructure Stock-take'.<sup>1</sup>

The aim of the OFT's Infrastructure Stock-take was to investigate forms of ownership across the UK economic infrastructure sectors – including energy, transport and water – and identify possible competition concerns. As part of the project the OFT carried out several case studies, one of which was in the port sector. The submission below reflects the views of industry participants and other stakeholders the OFT spoke to as part of the study.

This paper is structured along the broad headings set out in the questions, and covers:

- Some relevant background on ports in the UK
- Constraints on competition between ports
- The potential for market power
- Possible competition issues including potential for abuse of dominance; and
- Initial thoughts on remedies.

### 2. Context: The ports sector in the UK

There are more than 650 ports in the UK which have been granted statutory harbour authority powers. Of these, 120 are commercially active. The UK's geography, together with cost and environmental advantages of maritime transport over other modes of transport, has resulted in its ports industry being the largest in Europe in terms of freight tonnage. Forecasts prepared for the Department for Transport (DfT) suggest that (depending on the pace of recovery from the recent recession) demand for port services is likely to grow by an average of one per cent per year until 2030, with greater demand still in container and roll-on/roll-off (ro-ro) traffic.

There are 52 major ports<sup>2</sup> in the UK. Of these, the port of Grimsby and Immingham is the largest in the UK, and was the 6th largest cargo port in Europe in 2004 by volume handled. Other significant ports include the Port of Dover, which is an important route for roll-on roll-off (ro-ro) cargo and a major route

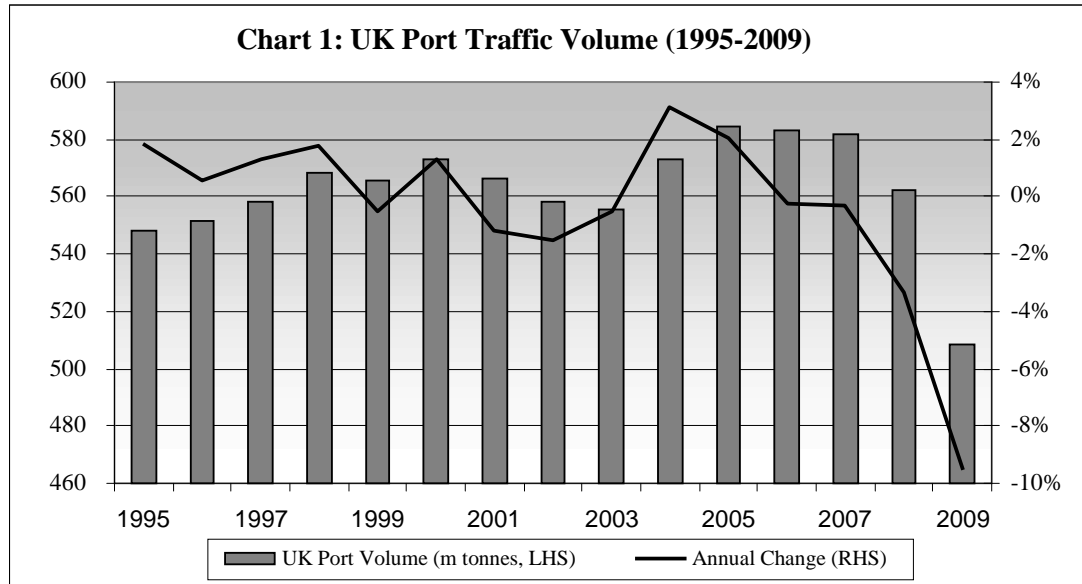
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<sup>1</sup> Further information on the infrastructure stock-take, including copies of the final report and case studies, is available on the OFT website at: <http://www.oft.gov.uk/OFTwork/markets-work/infrastructure-ownership/>

<sup>2</sup> Major ports are defined by DfT as ports handling at least 1 million tonnes of cargo in 2000.



for ferry passengers to mainland Europe, and the ports of Felixstowe and Southampton which are the UK's largest container ports.



Source: DfT

The UK's ports sector plays a crucial role in facilitating trade both internationally and domestically. Around 95 per cent of UK import and export trade by volume and 75 per cent by value pass through the UK's ports. The sector is an important contributor to domestic output and employment. A report by Oxford Economics<sup>3</sup> estimates that direct gross value added of the sector in 2007 was £7.7 billion or 0.5 per cent of UK GDP, while direct employment was 132,000 or 0.5 per cent of the total.

### 2.1. Companies and ownership structures

A striking feature of the UK ports sector is its diversity of ownership models. Most of the larger ports in the UK are now in private ownership, following several privatisation rounds since the 1980s. Ports under private ownership accounted for around 64 per cent of total volume in the UK in 2009.<sup>4</sup> However, there are also major ports owned by statutory corporations ('trust ports') and by municipal authorities.

The prevalence of the pure privately owned ports in the UK, where a private company owns the infrastructure and also acts as the harbour authority, is in contrast to the typical arrangements found in mainland Europe where the harbour authority functions are often retained by a public organisation. Across several large European ports such as Antwerp and Rotterdam, a public body retains the harbour authority functions and downstream operators often lease facilities from the public body<sup>5</sup>. In contrast, ports in the

<sup>3</sup> 'The economic contribution of ports to the UK economy', Oxford Economics for the UK Major Ports Group and the British Ports Association, Oxford Economics, 2009. An update of this report is expected shortly.

<sup>4</sup> DfT Maritime Statistics (2009):  
<http://www.dft.gov.uk/excel/173025/221412/221658/408152/section1to31.xls>

<sup>5</sup> Baird, A.J. (1995), 'Privatisation of trust ports in the United Kingdom: Review and analysis of the first sales', *Transport Policy*, Vol. 2, No. 2, pp. 135-143, 1995.

UK tend to be vertically integrated between port ownership and harbour operation – though with some competition at the port services level as described below, and often multiple tenants on port estate operating a wide range of transport, warehousing and manufacturing services.

Privately owned port companies in the UK include the following:

- Associated British Ports is the largest port company (in terms of volume handled) with around 23 per cent market share.
- Forth Ports was until recently the only publicly-listed ports company in the UK, but an agreed sale to Arcus Infrastructure Partners will shortly take it private.
- Hutchison Ports is a private company owned by Hutchison Whampoa, the world's largest port operator. Hutchison owns important container port facilities (Felixstowe, Thamesport) in the South-East of England.

Several major ports in the UK are managed as trust ports, which are governed by their own legislative framework and do not have shareholders. Large trust ports include:

- Port of Dover: The Port of Dover is a major port in ro-ro and international ferry traffic, carrying over 16 million passengers annually.<sup>6</sup>
- Milford Haven: The port of Milford Haven is the largest in Wales and a major route for oil and gas traffic into the UK.

Municipal ports, which are managed by local authorities, are typically smaller and predominantly run as leisure or fishing ports. Municipal ports accounted for approximately eight percent of volume in 2009. Important municipal ports include:

- Portsmouth: Portsmouth, owned by Portsmouth City Council, is the second largest ferry port in the UK and also handles bulk goods.
- Sullom Voe: The port of Sullom Voe is a major deep water harbour, handling oil tankers which transport oil from the Sullom Voe oil complex.

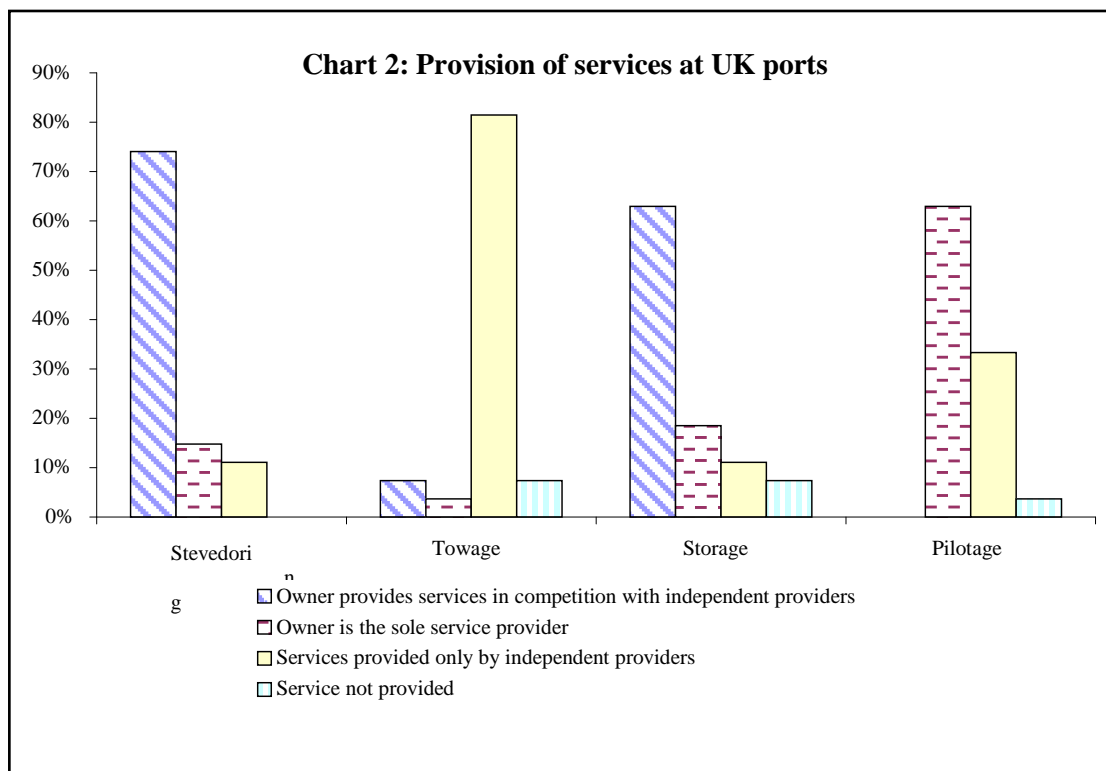
## **2.2. *Competition within ports***

It is important to distinguish between the provision of the infrastructure and the provision of supporting services and facilities located on the port. Providers of the port infrastructure compete with other port facilities to attract volumes to the port (inter-port competition), while competition in the provision of downstream services and facilities, such as berthing, loading/unloading of cargo or storage, can give rise to competition among these providers located within the same port (intra-port competition).

The ports sector in the UK has developed a wide range of services and service models. Moreover, the degree of vertical integration between port authorities and port service providers varies markedly across the different types of services described above and across different ports (Chart 2 below). In some cases a port authority will provide all services itself. In other cases, most port services are operated by third party service providers.

<sup>6</sup>

<http://www.doverport.co.uk>



Source: OFT Infrastructure Stock-take

### 3. Competitive constraints and market definition

The authorities have considered competitive constraints and market definition in a number of mergers in the port sector. The OFT also made some high-level observations about substitutability as part of the Infrastructure Stock-take.

#### 3.1. Product market

The OFT considers that although ports are part of the wider transport sector and demand-side substitution between modes of transport may occur along the transportation chain, this is likely to be limited by a variety of factors such as the economic and environmental advantages that maritime transport presents over other modes. Examples of competition between maritime transport and other modes of transport in the UK include that offered by the Channel Tunnel for ro-ro traffic travelling through the port of Dover.

It is noteworthy that the degree of demand-side substitution between maritime transport and other modes of transport is likely to be higher in relation to passenger transport services, where such alternatives exist. However, the degree of competitive constraint posed by other forms of transport would necessitate an assessment of the closeness of these modes across the competitive dimensions such as pricing, availability of services, convenience, speed of travel etc.

The OFT has typically concluded that there are separate product markets in the operation of port facilities, according to the type of freight being transported<sup>7,8</sup>. This is for reasons of limited demand-side

<sup>7</sup>

OFT (2005), 'Anticipated acquisition by Peel Ports Limited of the Mersey Docks and Harbour Company'.

substitution across these categories, owing to differing requirements in terms of the infrastructure (for example specialist lifting equipment), the natural properties of certain facilities (for example depth of berthing), or the necessity for specially trained staff. Supply-side substitution has also been found to be limited across these categories, particularly where there is a need for significant investment in supporting infrastructure (for example oil storage facilities located near the port facility).

### **3.2. *Geographic market***

Geographic markets around ports vary across product groups. The geographic market is likely to be most restricted for dry bulk goods, since these are typically low value or bulky goods, where access to a port facility which is close to the final destination of the goods may be desirable. The OFT has, in previous merger analysis, concluded that the geographic market for dry bulk goods is likely to be 30 miles around the port<sup>9</sup>. This is due to so-called 'land miles' (transport cost per tonne per unit of distance) being more costly than 'sea miles'.<sup>10</sup>

Developments in the technology employed by shippers and facilities can serve to widen the geographic market for certain products. For example developments in containerisation and vessel capacity, together with growth in international trade, have increased the geographic market for container traffic. A particularly important development has been that of trans-shipment, where goods or containers make an intermediate stop at a hub port, allowing them to be moved to smaller vessels and distributed to ports which are closer to the final destination of the product.

However, the geographic market for certain port facilities could be sub-national or regional, particularly where products (such as dry bulk) are costly to transport relative to value (for example the transportation of aggregate materials). The OFT has previously defined the Humber estuary as a distinct geographic market in the provision of ro-ro short shipping services in past merger investigations<sup>11</sup>.

## **4. *Market power at ports***

The ports sector exhibits certain characteristics which could potentially create market power and as such result in anti-competitive outcomes such as monopolistic pricing or worsening of other competitive factors (such as quality or choice in the services offered at ports). The next part of this note discusses some of the potential causes and outcomes of ineffective competition in the provision of port facilities, citing examples from the UK experience.

### **4.1. *Cross-ownership of port facilities***

The larger ports in the UK are in private ownership, following several privatisation rounds under the Ports Act 1991 which allowed for privatisation of ports previously managed under a trust port structure. Limited recent consolidation has also occurred, with for example Peel Ports' takeover of the Manchester

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<sup>8</sup> The distinct segments are for facilities handling dry bulk goods (such as coal and agricultural products), liquid bulk (such as crude oil and liquefied natural gas), unitised containers and roll-on/roll-off (ro-ro) and passenger transport.

<sup>9</sup> OFT (2002), 'Acquisition by Peel Ports Ltd of Clydeport plc', ME/1656/02.

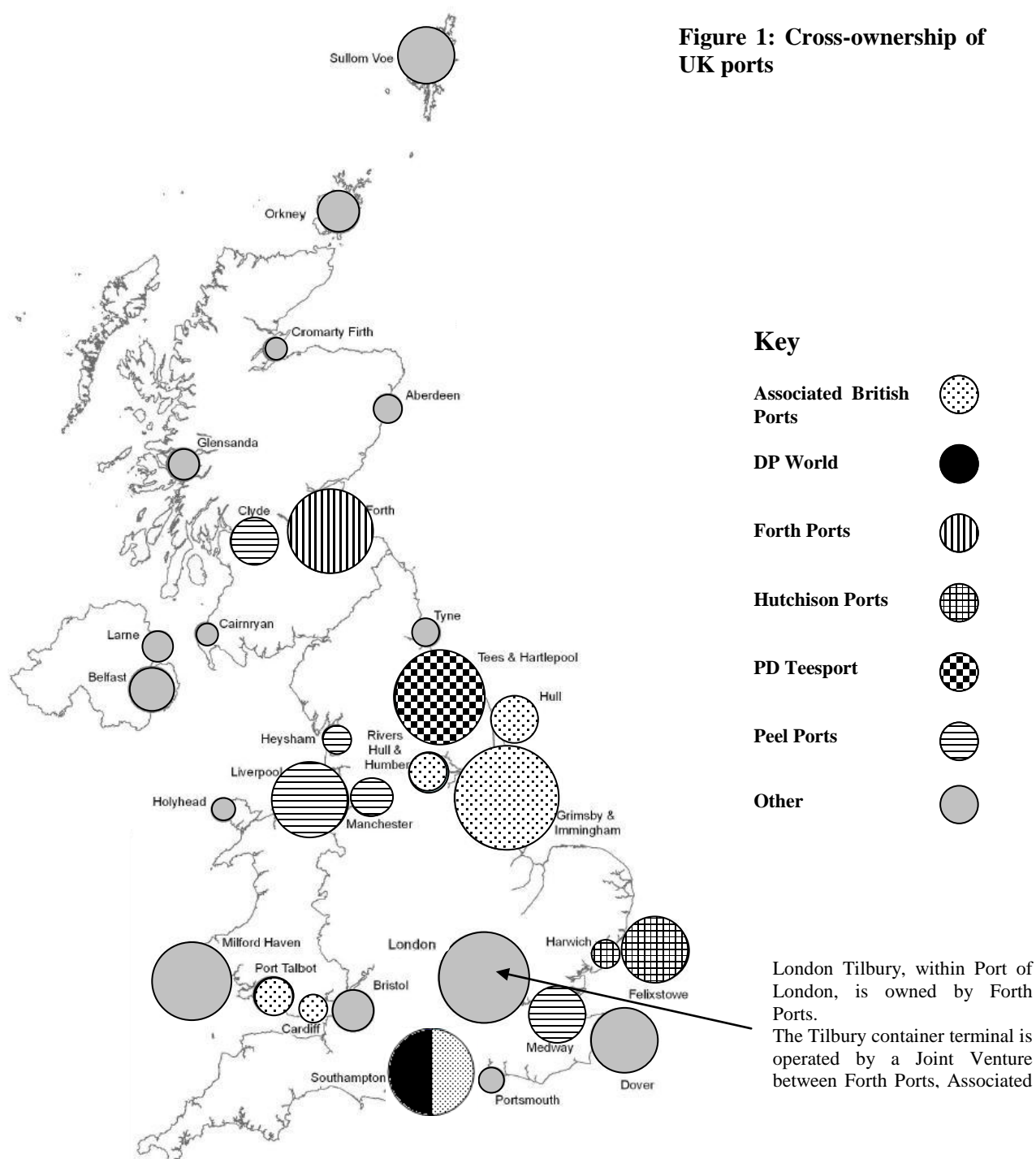
<sup>10</sup> The same conclusion would not necessarily be true of containers or ro-ro. For example, land miles may still be more costly per tonne, but considerations of whole-vessel costs and drivers' time respectively may affect the overall balance.

<sup>11</sup> OFT (2006), 'Acquisition by Montauban of Simon Group plc', ME/2500/06.

Ship Canal<sup>12</sup>. Figure 1 below shows the degree of cross-ownership by private port companies of the major ports in the UK.

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<sup>12</sup> OFT (2005), 'Anticipated acquisition by Peel Ports Limited of the Mersey Docks and Harbour Company', ME/1735/05.

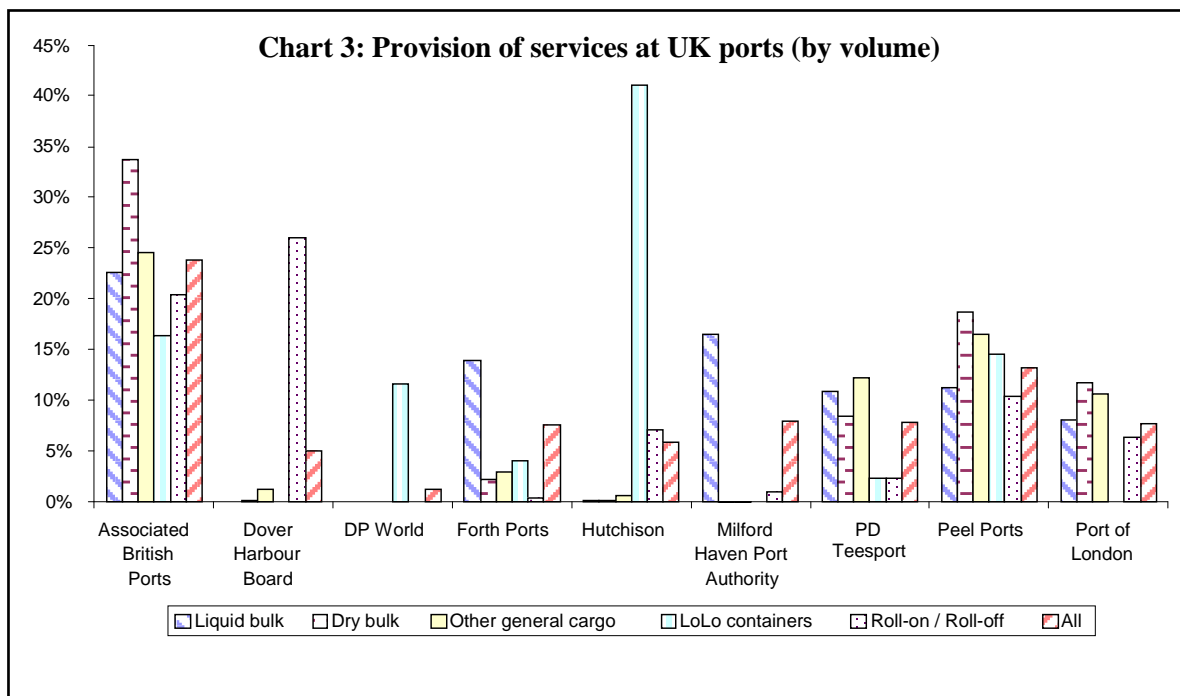


Source: OFT Infrastructure Stock-take

**Notes:** (1) The size of each circle in the map represents the total tonnage handled by the port(s), with each of the ports in the map handling at least three million tonnes per annum. (2) The Port of London Authority serves over 70 independently owned terminals and port authorities. (3) The Port of Southampton is operated by a joint venture between Associated British Ports and DP World.

Of concern to the OFT would be situations in which port users face limited choices in the number of port facilities to/from which they could operate. The level of economic rent that the port owner can extract from users is a function of the price differential from the next best alternative port<sup>1</sup>.

The degree to which port users are able to switch between alternative facilities varies according to the type of product which is travelling through the port. Chart 3 below shows the degree of cross-ownership by the major port companies in the UK, according to the broad product categories previously described.



Source: OFT Infrastructure Stock-take

In the UK, inter-port competition is typically viewed as significant, supported by the mix of ownership structures of port facilities, which includes privately owned, trust and municipal ports<sup>2</sup>. Inter-port competition is considered to be particularly effective in containerised traffic, which is viewed as a market which is supra-national<sup>3</sup>.

#### 4.2. *Entry conditions and buyer power in the UK ports sector*

Entry in the ports sector is likely to be restricted for several reasons:

- Suitable sites on which port facilities can be built are limited. Desirable features include sufficient depths to handle larger ships and access to land-based transport connections such as motorways or railway lines.
- Capital costs are significant, given that port facilities require extensive supporting infrastructure. In the UK, port entry and expansion can also incur capital investment costs in developing the

<sup>1</sup> Ibid, as in paragraph 18.

<sup>2</sup> <http://www.dft.gov.uk/pgr/shippingports/ports/portspolicyreview/portspolicyreviewinterimreport>

<sup>3</sup> <http://www.dft.gov.uk/pgr/shippingports/ports/modern/modernportsaukpolicy?page=3>

supporting land transport infrastructure, particularly where the development is expected to have a significant impact on existing users (following the developer pays principle).

- Regulatory and planning costs can be significant, as indicated in submissions to a House of Commons Transport Select Committee inquiry on ports.<sup>4</sup> For example, the cost of a planning application for a port the size of Bristol was estimated at around £5 million.<sup>5</sup> Submissions received by the OFT suggest that the transfer of the powers to grant Harbour Revision and Empowerment Orders to the Marine Management Organisation should reduce the burden the system imposes.<sup>6</sup>

Although difficult, entry in the ports sector is not impossible. For example, the Humber Sea Terminal, which was developed as a new port and opened in 2000, now operates six ro-ro river berths<sup>7</sup> and handled around 8.6 million tonnes of cargo in 2009.<sup>8</sup> ABLE UK has also announced its plans for a £400 million development of a Humber port and marine energy park.<sup>9</sup>

Expansion in the ports sector is likely to be easier than entry, since development on operational port land by a statutory undertaking or its lessee (typically the Statutory Harbour Authority) can be permitted under The Town and Country Planning (General Permitted Development) Order 1995.<sup>10</sup> Development rights can also be obtained through Harbour Revision Orders (where the harbour authority does not already exist) or Harbour Empowerment Orders, which can be granted by the Marine Management Organisation.<sup>11</sup>

The Draft National Policy for Ports highlights several examples where there are plans for capacity development in container ports:<sup>12</sup>

- Felixstowe South: consent granted in February 2006 could provide capacity for an estimated further 1.6 million teu.<sup>13</sup> Hutchison Ports, the owner of Felixstowe, is aiming to focus on the growing trend for using larger container ships for cargo from the Far East by raising its deep water capacity.<sup>14</sup> The first phase of development has already been undertaken.

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<sup>4</sup> House of Commons Transport Committee, page 28.

<sup>5</sup> Ibid.

<sup>6</sup> The authority to grant Harbour Revision or Empowerment Orders was transferred from DfT to the MMO on 1 April 2010. See: <http://marinemanagement.org.uk/works/harbour/index.htm>

<sup>7</sup> [http://www.simonports.co.uk/operations\\_hst\\_ro-ro\\_facilities.html](http://www.simonports.co.uk/operations_hst_ro-ro_facilities.html)

<sup>8</sup> DfT Maritime Statistics (2009).

<sup>9</sup> ABLE UK Ltd Press Release 8th July 2010.  
<http://www.ablehumberport.com/pdfs/ABLE%20UK%20Ltd%20Press%20Release%208th%20July%202010.pdf>

<sup>10</sup> <http://www.legislation.gov.uk/ukxi/1995/418/schedule/2/made>

<sup>11</sup> [http://marinemanagement.org.uk/works/harbour/documents/harbour\\_guide.pdf](http://marinemanagement.org.uk/works/harbour/documents/harbour_guide.pdf)

<sup>12</sup> DfT (2009), 'Draft National Policy Statement for Ports'. Available here: <http://www.dft.gov.uk/consultations/closed/portsnps/npsports.pdf>

<sup>13</sup> 'Twenty-foot equivalent unit', the standard measure of container capacity. Around two thirds of containers are 40' long, and are classed as 2 teu each.

<sup>14</sup> <http://www.portoffelixstowe.co.uk/publications/journal/frmfuturedevelopment.aspx>



- Bathside Bay (Harwich): consent granted March 2006, would provide capacity for an estimated 1.7 million teu. Harwich is also owned by HPUK.
- London Gateway (LG): consent granted June 2007 would provide capacity for an estimated 3.5 million teu. LG is owned by DP World and is a major development in deep sea container capacity. It is likely to be a key route into London and the South East.<sup>15</sup>
- Bristol: applied for capacity which would allow an estimated 1.5 million teu. This development will allow the capacity to handle Ultra Large Container Ships, which can handle up to 14,000 teu.<sup>16</sup>
- Teesport and Mersey also have consents for container development, and the Port of Dover has a ro-ro terminal application pending with the DfT.

Finally, countervailing buyer power may constrain the behaviour of port operators with market power. If shipping companies hold significant market positions, they may be able to negotiate effectively with the port operator or switch ports with relative ease. For example, shipping companies that specialise in long-distance container shipping may be less affected by the cost or inconvenience of travelling further to a port and could use this to strike a more favourable deal.

## 5. Potential Competition Concerns

### 5.1. *Higher charges for accessing port infrastructure*

Port infrastructure may exhibit elements of monopolistic power such that prices for access may be set at levels above those that would prevail under effective competition. This is particularly likely in situations where users of the port infrastructure, whether these are downstream service providers or consumers accessing the port infrastructure, face limited choice in the port facilities that are available to them.

In the UK there is no independent sector regulator for ports, and (unlike regulation of airports, for example) there is no statutory framework for setting price controls on port access charges. Nevertheless, there are a number of regulations which apply to port activities.

The Harbours Act 1964 (the Act) is the main governing legislation in the ports sector and includes certain provisions relating to the charges at certain ports and port activities within these. The Act provides a 'reasonableness' test as to the level and application of certain port charges. The Act states provides for interested parties to lodge a written objection in relation to ship, passenger and goods dues imposed by a harbour authority to the Secretary of State (SoS).

In practice, appeals against port charges under section 31 of the Harbours Act have been few in number. In the past six years the SoS has decided on five section 31 appeals, all of which have been unsuccessful (Portland, Bridlington, Langstone, Bembridge and Brightlingsea). The Department for Transport is currently considering several further section 31 appeals.

This relative lack of appeals under Section 31 might reflect that competition is working well in the ports sector. For example, the DfT's recent interim review of ports policy noted that 'The fact that appeals under this provision have been few, and largely limited to small-scale users, provides further reassurance

<sup>15</sup> [http://www.londongateway.com/portal/page/portal/LONDON\\_GATEWAY/Home](http://www.londongateway.com/portal/page/portal/LONDON_GATEWAY/Home)

<sup>16</sup> <http://dsct.bristolport.co.uk/proposal>

that there is, at present, no large-scale abuse of local monopoly power.<sup>17</sup> However, some port customers also said that the process for appealing against port-related charges under the Harbours Act 1964 may dissuade port users from lodging appeals.

The DfT is currently considering cases brought forward under the provisions of the Act, in relation to the port of Dover. Norfolkline, SeaFrance and P&O Ferries brought complaints forward in relation to privatisation plan for the port of Dover and proposed price increases for accessing the port.

## 5.2. *Vertical integration at ports*

In situations where inter-port competition is ineffective, intra-port competition can act to reduce monopolistic rent-seeking<sup>18</sup>. Therefore the degree of competition between service providers at port facilities becomes an important consideration, particularly in light of the fact that these services can account for a significant proportion of overall costs of transporting goods through ports (estimated as high as 70-90 percent of total costs).<sup>19</sup>

In the UK, whereas port operation is typically a monopoly activity within a given port, the provision of some port services (such as loading and stevedoring) is competitive, with several operators providing services (see paragraphs 8 and 9, and chart 2 for a short overview of typical arrangements).

The various services models operating in UK ports have been driven by several factors, including:

- the abolition of the National Dock Labour Scheme in 1989 making third party provision commonplace, often in competition with port authority provision.
- the size of the port, which may restrict the number of service providers that can operate profitably (sometimes to one).
- the search for revenue streams on the part of port authorities, which has meant that port authorities typically tend to provide a proportion of these services.
- the type of product travelling through the port. For example, liquid bulk requires specialised infrastructure and staffing, meaning customers perform the range of activities involved.

In the Infrastructure Stock-take, the OFT found that market participants generally thought that the diversity of arrangements in port service provision between different ports reflects different commercial decisions in each case on how port services might best be provided. Smaller ports will tend to have less competition in the provision of port services (because of economies of scale), while a range of different models is used at larger ports. Port owners also argued that they benefit from a competitive downstream port services sector, which is more likely to attract customers to the port.

The OFT has also considered whether the provision of certain services by the (upstream) port owners in competition with other firms would provide the owner with the ability and incentive to foreclose competitors, since they control access to the port side. For example, third party providers of stevedoring or

<sup>17</sup> See: <http://www.dft.gov.uk/pgr/shippingports/ports/portspolicyreview/portspolicyreviewinterimreport>

<sup>18</sup> Ibid, as in paragraph 18

<sup>19</sup> Trujillo, L and Nombela, G. (2000), 'Multiservice infrastructure', The World Bank. Available here: <http://rru.worldbank.org/Documents/PublicPolicyJournal/222Truji-10-24.pdf>

storage services are only able to compete in the market if the port operator provides access to the dockside facilities. In principle this type of foreclosure could raise significant competition concerns.

The OFT would be concerned about the vertical relationship between port owners and port service providers where there is a lack of competition between ports (that is, if the port owner has a degree of market power). It would also need to be shown that the port operator has an incentive to foreclose competition in port services. Indeed, port operators we spoke to strongly argued that having competitive provision of port services made their ports more attractive to customers. Finally, we recognise that there can be efficiency benefits for port operators in also providing port services (particularly at smaller ports).

### 5.3. *Ownership structures/competitive neutrality*

As noted above, there is a wide range of different ownership models in the UK ports sector. These fall into three broad categories – commercially-owned ports, trust ports and municipal (that is, local authority-owned) ports.

The trust ports model is of particular interest because it is unique to the ports sector. Trust ports are not trusts in the normal legal sense. Rather they are independent statutory corporations, created and governed by their own unique legislation, controlled by an independent board and having a responsibility to a wide spectrum of stakeholders. PwC's Trust Port advice for the DfT noted:

*'A trust port can be compared to an heirloom. It is a valuable asset presently safeguarded by the existing board. They have a duty to hand it on in the same or better condition to succeeding generations. Boards have an obligation to transact port business in the interest of the whole community of stakeholders openly, accountably and with commercial prudence.'*<sup>20</sup>

Trusts ports do not have shareholders or pay dividends. They are run for the benefit of their stakeholders, which vary in composition between ports but typically include port users, employees, local businesses, local residents and public bodies such as local authorities. As such, they are accountable in principle to their stakeholders, but those stakeholders have neither control nor power of sanction over the trust port boards.<sup>21</sup>

However, trust ports are self-financing, and hence need to generate sufficient revenue to cover their costs and finance any investment they undertake. The DfT's *Modernising Trust Ports* paper states that 'The Government expects trust ports to be operated efficiently and effectively, and to generate a commercially acceptable rate of return....In pursuing that target level of return, it is in the interests of all stakeholders that a trust port should set its dues.... and charge for its services at commercial and competitive rates, neither exploiting its status as a trust port to undercut the market nor abusing a dominant position in that market.'<sup>22</sup> The guidance also sets the framework for appointment to the Board of directors. It sets the requirement for open competition in the appointment to the board and the phasing out of any remaining reserved seats on trust port boards.

<sup>20</sup> 'Trust Port Advice Final Report', PwC, 8 May 2007.  
<http://www.dft.gov.uk/pgr/shippingports/ports/trust/pwctrustportadvice.pdf>

<sup>21</sup> PwC (2007).

<sup>22</sup> <http://www.dft.gov.uk/pgr/shippingports/ports/trust/goodgovernancesecondedition.pdf>

An independent report commissioned by the DfT recommended strengthening governance procedures around trust ports. It also recommended a 'stakeholder dividend', to be clearer on how revenue earned by the port was being channelled back to stakeholders.<sup>23</sup>

The broad definition of a trust port's obligations, together with the fact that each is created and governed by their own unique legislation, might result in disparities in commercial focus between trust ports. An interesting question, on which the OFT received mixed evidence in the Infrastructure Stock-take, is whether trust ports might have a greater or lesser incentive to invest compared with privately owned ports. On the one hand, some market participants suggested that trust ports, by virtue of the fact that they did not pay out dividends, tended to invest more. In other cases, market participants suggested that a lack of fully commercial incentives meant that there were weaker incentives for expansion and development of facilities, subject to being able to earn enough to cover the port's operating costs.

## 6. Cases in the ports sector

The OFT notes that although the economic regulation of UK ports is restricted to the provisions of the Harbours Act 1964, and that the UK does not have a sector-specific regulator for its ports, the sector has received some scrutiny under the powers of the OFT and the Competition Commission.

Of the merger cases examined by the OFT and the CC, the majority have involved downstream port operations. Mergers raising competition concerns at Phase 1 have included those resulting in overlaps in the provision of towage services<sup>24</sup> and the provision of ferry transport services<sup>25</sup> - see case summaries below. Mergers cases involving the upstream supply of port infrastructure have typically been cleared on grounds of significant buyer power<sup>26</sup> and lack of overlap between the parties' facilities<sup>27</sup>.

The OFT has also conducted a study of the market for the provision of ferry services under part 4 of the Enterprise Act 2002. The market study concluded that despite the market exhibiting certain features that could prevent, restrict or distort competition, there was limited evidence of actual consumer detriment<sup>28</sup>.

During the infrastructure stock-take<sup>29</sup> the OFT received several submissions which suggested that the entry by port owners in the provision of downstream services such as stevedoring, provided these with the ability and incentive to foreclose downstream competitors.

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<sup>23</sup> PwC (2007).

<sup>24</sup> OFT (2006), 'Anticipated acquisition by SvitserWijismuller A/S of Adsteam Marine Limited', ME/2520/06; CC (2007), 'SvitserWijismuller A/S and Adsteam Marine Ltd: A report on the proposed acquisition by SvitserWijismuller A/S of Adsteam Marine Ltd'.

<sup>25</sup> CC (2004) Stena AB and P&O (partial clearance); OFT (2010), 'Completed acquisition by Stena Line (UK) Limited of DFDS Seaways Irish Sea Ferries Limited and related assets' E/4790/10. CC (2011) Stena AB and DFDS A/S.

<sup>26</sup> OFT (2001), 'Proposed acquisition by Mersey Docks and Harbour Company of Heysham Port Limited', ME/1089/01.

<sup>27</sup> OFT (2005), 'Anticipated acquisition by Peel Ports Ltd of the Mersey Docks and Harbour Company', ME/1735/05.

<sup>28</sup> OFT 2009, 'Isle of Wight Ferry Services: Market study findings and consultation on proposed decision', OFT1096.

<sup>29</sup> Ibid paragraph 43.

On the evidence gathered in the stock-take, the OFT did not see a case for general changes in the structure of port services – for example through structural separation. Instead, the OFT indicated a preference for taking targeted enforcement action, should there appear to be evidence of anti-competitive foreclosure resulting from abuse of a dominant position.

The OFT notes that the implementation of blanket structural remedies to the ports sector might pose difficulties, given the varied nature of ports and the activities that take place within them. For example, a requirement for the introduction of competition in the provision of downstream services could result in higher prices (or more generally worse outcomes for consumers) in cases where there are efficiencies resulting from vertical integration. On the other hand, there might be specific cases where a more structural remedy is appropriate, based on the potential effects of foreclosure.

In relation to port charges themselves, there would be advantages in greater clarity over what would be considered 'excessive' prices under Section 31 of the Harbours Act. This may be possible within the existing statutory framework through greater transparency and guidance over the assessment of prices.

### Case summaries

#### **SvitzerWijismuller A/S and Adsteam Marine Ltd**

(<http://www.competition-commission.org.uk/inquiries/ref2006/adsteam/index.htm> )

In February 2007, the UK Competition Commission (the CC) reported on the proposed acquisition of Adsteam Marine Ltd (Adsteam) by SvitzerWijismuller A/S (Svitzer). The parties overlapped in the provision of harbour and customer terminal towage services in the UK.\*

The CC found that at a national level the merger would bring together the two major providers of harbour and customer terminal towage in the UK. However, the CC found that prices of towage in one port did not constrain prices in another port and that the most likely constraint on prices in ports where there is only one operator was the threat of new entry. The CC therefore concluded that the relevant geographic market was local, restricted to individual ports serviced by fleets of tugs.

The CC found that in Liverpool, the sole port where Svitzer and Adsteam both offered harbour towage services, the two companies competed with each other for customers. The CC's analysis of discount rates and tariff increases both in Liverpool and in other ports led the CC to conclude that competition (where two or more operators were present in a port) was a stronger constraint on harbour towage pricing than the threat of entry into single operator ports.

The CC concluded that the proposed acquisition of Adsteam by Svitzer could be expected to give rise to a substantial lessening of competition in the market for harbour towage services in Liverpool because the merger would result in the loss of competition in Liverpool, and the CC did not expect a new source of competition to replace the lost competition within a short time frame. The CC concluded that the merger was expected to result in prices for harbour towage in Liverpool higher than they would be if the present level of competition continued.

Since the area of competitive overlap was limited to the port of Liverpool, the CC concluded that divestiture of either Adsteam's or Svitzer's Liverpool operation to a suitable purchaser was the appropriate remedy. The CC concluded that SvitzerWijismuller should be allowed to decide which business to divest. Adsteam's Liverpool operation was divested on 29 March 2007 before SvitzerWijismuller completed the acquisition of Adsteam. The CC accepted final undertakings on continued separation of the Liverpool operations on 30 April 2007.

\* Harbour towage is a common term applied to regular inshore assisting and 'push-pull' operations. In general, harbour towage consists of all services necessary to ensure ships' safe arrival and departure to and from ports, and the safe moving of floating objects inside the defined port area. The CC used the phrase "customer terminal towage" to refer to the case where the shipper, as opposed to the owner of a terminal, contracts for towage services

#### **Stena AB and P&O (2004)**

[http://www.competition-commission.org.uk/rep\\_pub/reports/2004/487stena.htm](http://www.competition-commission.org.uk/rep_pub/reports/2004/487stena.htm)

On 5 February 2004, the Competition Commission ('CC') decided to block the transfer by The Peninsular and Oriental Steam Navigation Company ('P&O') of its Liverpool / Dublin ferry route in the Irish Sea to Stena AB ('Stena') as the transfer of this route was expected to result in a substantial lessening of competition ('SLC'), and would give Stena scope to increase prices to some customers of ferry services on the Irish Sea. However, the CC also decided that the transfer of P&O's Fleetwood / Larne ferry route in the Irish Sea to Stena was not expected to result in an SLC.

During the investigation, the CC held a number of hearings with both Stena and P&O, as well as 17 hearings with other interested parties from Great Britain and Ireland. Evidence was received from other ferry companies, freight and travel customers, ports, trade associations, trade unions, consumer bodies, government departments, MPs, the Scottish Executive and the Welsh Assembly. Some hearings were held in Belfast and Dublin, where the inquiry Group also toured the ports and observed Stena's and P&O's operations. The CC also commissioned two independent customer surveys.

The CC found that, post merger, Stena's market share on the central corridor of ferry routes in the Irish Sea would more than double, giving Stena a market share significantly larger than its nearest rival. The four main competitors on this corridor would be reduced to three. The lack of transparency of pricing in the freight ferry market, coupled with Stena's enhanced market power, would give Stena scope to increase prices to some customers.

The CC explored possible remedies, including a package of behavioural remedies proposed by Stena. However,

after a consultation period, the CC decided that the only effective remedy to the SLC identified was to block Stena's acquisition of P&O's Liverpool / Dublin route.

The CC also found that the transfer of P&O's Fleetwood / Larne route would result in Stena replacing P&O as the largest ferry operator on the northern corridor of ferry routes in the Irish Sea, but that P&O would remain as a competitor, with a larger market share than Stena currently enjoyed. The CC concluded that the transfer of this route would not be expected to result in an SLC.

**Stena AB and DFDS A/S (2011)**

[http://www.competition-commission.org.uk/inquiries/ref2011/stena\\_dfds\\_merger\\_inquiry/index.htm](http://www.competition-commission.org.uk/inquiries/ref2011/stena_dfds_merger_inquiry/index.htm)

On 25 May 2011, the Competition Commission (CC) provisionally cleared the completed acquisition by Stena AB (Stena) of two Irish Sea ferry services from DFDS A/S (DFDS).

Stena and DFDS both operated ferry services on the Irish Sea on a variety of routes. They transported both freight and passengers. In December 2010, Stena (i) bought from DFDS the vessels and assets associated with the routes operated by DFDS between Liverpool and Belfast, and between Heysham and Belfast; and (ii) closed the route Stena was operating between Fleetwood and Larne. All these routes lie in the same 'diagonal' corridor of routes across the Irish Sea.

The CC looked carefully at Stena's decision to close Fleetwood/Larne - reviewing internal documents, examining the route's usage and profitability (including the particular characteristics of Fleetwood port, which restricted the type of vessel which could use it, and the age of the vessels being used by Stena) and taking evidence from range of market participants. The CC decided that Stena's withdrawal from that route was probably inevitable, irrespective of its acquisition of the other routes. The CC therefore concluded that there was no loss of direct competition on this 'diagonal' corridor of routes across the Irish Sea resulting from the acquisition.

The CC then examined whether the acquisition meant a loss of competition between the former DFDS routes (Heysham/Belfast and Liverpool /Belfast) and Stena's other services on the Irish Sea. It has found the evidence suggests that whereas routes within particular 'corridors' compete with each other, such competition is weaker with regard to more distant routes; that Stena will continue to face a direct competitor in each of the corridors in which it operates, following the acquisition; and that there is scope for accompanied freight users (i.e. where the freight is accompanied by a dedicated driver) using these routes to switch to alternative services, which mainly carry unaccompanied freight.

The CC has therefore provisionally concluded that the acquisition has not resulted in a substantial lessening of competition (SLC) for the supply of freight and passenger ferry services either between the North-West of England and Northern Ireland (the 'diagonal routes') or for Irish Sea ferry services in general. The CC must publish its final report on the acquisition by 25 July 2011.

## UNITED STATES DOJ AND FTC

### 1. Introduction

This submission begins in Part 2 with a description of U.S. ports, their ownership and management structure, and some ongoing developments in this sector. Part 3 outlines general competition concerns that affect infrastructure markets such as ports, and discusses the application of competition and economic principles in the analysis of operational and restructuring issues related to ports. Part 4 summarizes the statutory federal antitrust exemption for marine terminal operators and the role of the Federal Maritime Commission in regulating U.S. ports.

### 2. The U.S. Ports System

America's ports play an important role in handling merchandise trade moving to and from other ports around the world. Each year, these ports handle exports produced at U.S. factories and farms and imports of goods such as automobiles, machinery, electronics, apparel, shoes, toys, and food. American households depend on the nation's container seaports for everyday items, and American businesses depend on these seaports for facilitating the exchange of merchandise with trading partners around the world.<sup>1</sup>

There are 183 commercial deep draft ports in the U.S., dispersed along the Atlantic, Gulf of Mexico, Pacific, and Great Lakes coasts. Included in that number are the seaports of Alaska, Guam, Hawaii, Puerto Rico, Saipan, and the U.S. Virgin Islands. These ports are geo-economic entities, with a precise geographic location and fixed capital assets. They have diverse management structures, ranging from large landlord ports composed of multiple terminals operated by competing Marine Terminal Operators (MTOs) to small privately-owned ports.

There is no single national port regulatory authority in the U.S. Instead, regulatory authority is distributed throughout all three levels of government: federal, state, and local.

The U.S. Constitution grants the federal government exclusive jurisdiction over the navigable waters of the U.S., including its deep draft channels and harbors – authority delegated primarily to the Coast Guard and the U.S. Army Corps of Engineers. But federal jurisdiction over harbors stops at the water's edge. "Port authorities" in the U.S. are instrumentalities of state or local government established by enactment or grants of authority by state legislatures. Neither Congress nor any federal agency has the power to appoint or dismiss port commissioners or staff members, or to amend, alter, or repeal a port authority charter. Certain port activities are subject to federal law and jurisdiction, particularly those pertaining to foreign and interstate commerce.

The term "port authority" is not restricted to autonomous or semi-autonomous, self-sustaining public bodies. In fact, some port authorities are subject to certain state controls; many more are integral administrative divisions of state, county or municipal government.

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<sup>1</sup> U.S. Department of Transportation, Maritime Administration.



There are also numerous commercial ports and terminals where no “port authority” exists – ports in which facilities are all privately owned and that frequently serve as bulk shipping facilities adjacent to a large industrial enterprise, such as an iron ore company or an electrical utility. There are also privately-owned and -operated ports that provide public services that are in most ways similar to those offered by public seaport terminals. Examples include the Port of Seaside, Maine, which is owned by the Bangor & Aroostook Railroad; and Benicia, California, where the port is owned by a private shareholder-owned corporation, Benicia Port Holdings. Some port authorities own facilities in two or more ports. The South Carolina State Ports Authority, for example, owns and operates marine terminal facilities in the ports of Charleston, Georgetown, and Port Royal, South Carolina, which are located across 100 miles of the Atlantic coast. The basic distinction is that a “port” is a geo-economic entity whereas a “port authority” is a government entity.

Technological innovations over the past half-century have led to a decrease in cargo handling costs at many container ports. Of those innovations, containerization has led to the largest reductions in general cargo handling costs at ports. The advent of containerization facilitated a shift in how and where general cargo products are shipped, and in response to those changes, billions of dollars have been spent by container lines on new ships, by ports on their intermodal infrastructure, and by marine terminal operators on berths and equipment.

In container liner trades, cargo units have been standardized along the lines of the twenty-foot equivalent unit (TEU) intermodal container, and this standardization has allowed ports and liner companies to invest in mechanized systems and equipment to automate the cargo transport process and raise productivity.<sup>2</sup> By automating the process, containership operators have been able to speed the loading and unloading of vessels, increasing the amount of time a vessel is at sea rather than in port, and allowing the vessel operator to benefit from increasing economies of scale.

### 3. Identifying Competition Issues in the Ports Sector<sup>3</sup>

Ports, like other infrastructure sectors, are often characterized by capital stocks of sufficiently high fixed and sunk costs that their economies of scale are not exhausted at existing and forecast levels of demand, rendering duplication of facilities potentially costly and inefficient. Economists and other experts have responded to this issue with three broad categories of solutions:

- Separate the “natural monopoly” portions of a sector from those activities that may be efficiently opened up to competition; that is, continue some sort of regulation of the natural monopoly portions – for example, the price of access – while allowing competition to replace regulation for the remaining activities. The paradigmatic example of this strategy was the 1982 breakup of AT&T as the result of an antitrust suit brought by the U.S. Department of Justice,<sup>4</sup> but there are many other examples worldwide in many other sectors, such as railways.<sup>5</sup> An important detail is

<sup>2</sup> Stopford, Martin. *Maritime Economics: 3<sup>rd</sup> Edition*. Routledge: New York (2009), 508.

<sup>3</sup> See generally Russell Pittman, *Competition Issues in Restructuring Ports and Railways, Including Brief Consideration of these Sectors in India*, EAG 09-6 (November 2009), available at <http://www.justice.gov/atr/public/eag/251856.pdf>. The discussion in this part focuses on port/terminal commercial relationships with cargo owners, and not on other types of users such as steamship lines, stevedoring companies, etc.

<sup>4</sup> Brennan, Timothy J., "Why Regulated Firms Should Be Kept Out of Unregulated Markets," *Antitrust Bulletin* 32 (1987), 741-793.

<sup>5</sup> Newbery, David M., *Privatization, Restructuring, and Regulation of Network Utilities*, Cambridge, MA: MIT Press, 1999.

whether the “separation” is to be complete or would only require increased transparency of operations within an enterprise that remains vertically integrated.<sup>6</sup>

- Seek innovative ways to create competition among vertically integrated providers, where the economies of scale in the capital stock either have been reduced by technical change (telecoms) or persist in some aspects of scale but not others (railways). In railways, where economies of system size are typically exhausted before economies of density,<sup>7</sup> most of the countries in the Americas have chosen to rely upon competition among integrated providers competing at common points rather than seeking vertical restructuring and access by competing train operating companies to a common track.<sup>8</sup>
- Finally, and alternatively, renew strenuous attempts to achieve efficient operations within the traditional context of government ownership or government regulation. The literature on “incentive regulation” has constituted a spirited attempt to correct some of the well documented flaws of older systems of regulation without jettisoning regulation altogether.<sup>9</sup>

Increasingly, experts have recognized that competition may take unexpected forms. Railways face competition from motor or water carriers for many commodities. Cable television providers are increasingly offering telecommunications services, as are internet service providers; correspondingly, telecommunications services providers have begun offering cable television services. In the case of ports, it may be inefficient and unnecessary to create additional competition among terminals *within a single port* if there is competition *among ports*.

### 3.1. *Competition in a Systems Context*

Seaports are one component of a vertical chain that carries a product from producer to customer. This chain may include inland transport from producer to port, the multiple port services themselves, water transport, port services at the destination port, and inland transport to the final customer – as well as intermediate terminals at various stages for freight consolidation, plus agents offering to arrange particular steps, such as freight forwarders and third party logistics providers. Together these components constitute a system.

Competition analysis begins with market definition and analysis of the choices faced by both goods producers and goods customers. In defining the relevant market for a particular port, the issue on the producer side is whether that port has market power vis-à-vis that producer: is the producer forced to pay what the port charges if the producer is to sell its product, or does the producer enjoy other, economic alternatives? Such alternatives might be other ports, but they might also be other types of customers for the goods produced.

<sup>6</sup> Pittman, Russell, "Vertical Restructuring (or Not) of the Infrastructure Sectors of Transition Economies," *Journal of Industry, Competition and Trade* 3 (2003), 5-26. On structural separation more broadly, see OECD Recommendation of the Council Concerning Structural Separation In Regulated Industries, available at <http://www.oecd.org/dataoecd/24/49/25315195.pdf>.

<sup>7</sup> Savignat, M.G., and C. Nash, "The Case for Rail Reform in Europe – Evidence from Studies of Production Characteristics of the Rail Industry," *International Journal of Transport Economics* 26 (1999), 201-217.

<sup>8</sup> Pittman, Russell, "Options for Restructuring the State-Owned Monopoly Railway," in Scott Dennis and Wayne Talley, eds., *Railroad Economics (Research in Transportation Economics, v. 20)*, Boston: Elsevier, 2007.

<sup>9</sup> Laffont, Jean-Jacques, and Jean Tirole, *Competition in Telecommunications*, Cambridge, MA: MIT Press, 2000.

### 3.2. *Market Definition on the Goods Producer Side*

In the case of iron ore, for example, an important commodity for ports, a miner and processor of iron ore who wishes to export its product may be economically “captive” to one port, or may have several other ports among which to choose, depending upon his location, upon the internal transport options potentially serving alternative ports, upon the terminal facilities available at these alternative ports (including whether he owns one such terminal himself), and upon the ability of alternative ports to serve as intermediaries to its ultimate customers – for example, the steel producers of another country. There may also be other economic options, such as other customers. For instance, there may be steel producers within his country or within a neighboring country that are economically reached by land transport who would pay a price for iron ore comparable to the (net) price received from those at the end of the sea voyage.

These possibilities are examined for important producers in the hinterland of the port to determine whether the particular port constitutes a market from their standpoint and whether a terminal owner would be able to exercise market power within the port. If a particular port is not a market from a competition standpoint, there is no concern about one firm controlling a large share of the traffic passing through that port. Returning to the systems context, if the iron ore producer can substitute economically between one vertical transport chain (system) that uses terminals in port X and another that uses terminals in port Y, then the question of competition at the level of individual terminals within a single port loses much of its importance.

One useful source of information for market definition may be “natural experiments.” For example, one study found that

*In the summer of 1997, the Union Pacific (UP) railroad ... experienced a severe shortage of intermodal rail cars and locomotives in the [Southern California] region. This equipment shortage and the resulting backlog of containers for departure from the Ports of Los Angeles and Long Beach reached such a critical level that UP took the unprecedented step of chartering an APL ship – to transport containers from these ports, through the Panama Canal, destined for the Port of Savannah.<sup>10</sup>*

Similarly, another study found that when congestion in the ports of Los Angeles and Long Beach threatened to delay the delivery of imports to large US retailers as the Christmas season of 2004 approached, “some diverted their cargo to other West Coast ports or to all-water routes [i.e., through the Panama Canal]. From July through mid-November 2004, over a hundred ships were diverted to Oakland [California], Manzanillo [Mexico], and other ports....”<sup>11</sup>

A market definition exercise for different producers of the same commodity seeking to ship from a particular port, or for producers of different commodities seeking to ship from the port, may yield different answers regarding the scope of the relevant market. For example, containers may travel to the port as easily by motor carrier as by rail carrier, so in a region better served by roads than by rail, a producer using containers may enjoy more economic options – a broader relevant market – than a producer of a bulk good like iron ore that typically travels by rail. A terminal owner may be able to discriminate across different producers, exercising market power to “captive” shippers and offering competitive prices to those with

<sup>10</sup> Talley, Wayne K., *Port Economics*, London: Routledge, 2009.

<sup>11</sup> Bonacich, Edna, and Jake B. Wilson, *Getting the Goods: Ports, Labor, and the Logistics Revolution*, Ithaca: Cornell University Press, 2008.

more options. Thus the presence of some users of a particular port with multiple port options may offer little or no protection from monopoly abuses affecting other users who lack such options.<sup>12</sup>

### 3.3. *Market Definition on the Goods Buyer/Customer Side*

This market definition exercise for a port is then performed from the standpoint of the buyer/receiver of goods, with the same corresponding questions and issues raised. A steel mill receiving iron ore shipped via bulk freighter, a grain processor receiving wheat carried by bulk container, a large retailer receiving consumer goods carried by container – each of these may have very different sets of economic alternatives to a particular port, but in each case the same group of questions is asked: If the port charges monopoly prices, can the sender reach the receiver economically via another port? If a single port or a group of ports charges monopoly prices, can the receiver obtain the same goods via land transport, from domestic or other international producers? Market power and potential abuse by a port or group of ports vis-à-vis a single important receiver will not likely be tempered by the presence of other receivers who have more options (i.e., whose relevant supply markets are broader).

### 3.4. *Intraport and Interport Competition*

An important consideration in defining the relevant market is whether there is *intraport* competition – competition among different terminal operators within the port – or whether *interport* competition is sufficient to protect goods producers and buyers from anticompetitive behavior by the port in question.<sup>13</sup>

If all significant customers enjoy economic alternatives for their outputs, whether other ports or other kinds of options – which is another way of saying, if the port is not an economic market from the standpoint of any significant customer – then no single terminal owner can have market power in that port alone, and the terminals of the port may be placed under the control of a single private owner with no risk of monopoly abuses to follow. However, if this is not the case – if for certain exporters or importers of iron ore or petroleum or grain or manufactured goods carried in containers, the port is the only economic alternative – then the port constitutes an economic market, and restructurists may want to seek to create intraport competition: different terminals within the port offering the same services competing for the business of carriers serving importers and exporters.

Similarly, if, rather than a single port, it is a group of ports that constitutes an economic market from the standpoint of significant customers, the structure of that market becomes relevant. The issue is whether one firm may end up controlling sufficient terminal capacity for particular commodities in that group of ports – for example, in one broad area of one coast of a particular country – that it holds a position of market power over senders and receivers of those commodities.

<sup>12</sup> ABA Section of Antitrust Law, *Market Definition in Antitrust: Theory and Case Studies*, Chicago: American Bar Association (2010).

<sup>13</sup> Notteboom, Theo E., "Consolidation and contestability in the European container handling industry," *Maritime Policy & Management* 29 (2002), 257-269.  
De Langen, Peter W., and Athanasios A. Pallis, "Analysis of the Benefits of Intra-Port Competition," *International Journal of Transport Economics* 33 (2006), 1-17.  
Phang, Sock-Yong, "Competition Law and the International Transport Sectors," *Competition Law Review* 5 (2009), 193-213.  
Talley, Wayne K., *Port Economics*, London: Routledge, 2009.  
ABA Section of Antitrust Law, *Market Definition in Antitrust: Theory and Case Studies*, Chicago: American Bar Association (2010).

Whether the focus of the competitive inquiry is intraport or interport competition, three ongoing international trends should be noted. The first is the continuing worldwide improvement in inland freight transport, tending to gradually increase the ability of users to substitute among ports economically and thus to reduce the focus on intraport as compared with interport competition.<sup>14</sup> The second is the growth – both internal and through merger – of large multinational terminal operating firms.<sup>15</sup> This is notably a trend regarding container terminals, the fastest growing area of port operations.<sup>16</sup>

The third trend is vertical rather than horizontal. Increasingly over the past few years, ocean shipping lines have been – in addition to horizontally integrating – vertically integrating into the ownership and operation of container terminals, while bulk producers of iron ore, coal, and petroleum have been vertically integrating into the ownership and operation of the specialized bulk terminals used for their products.<sup>17</sup> In a market with a small number of competitors – frequently the case now regarding container terminals, bulk goods terminals, and ocean shipping lines – could control by one competitor of an important facility such as a port terminal be used anticompetitively, by either denying access to the facility to competitors or allowing access under unfavorable terms?

#### 4. Antitrust Exemption for Ports

Mergers involving port facilities are subject to the U.S. antitrust laws. The Shipping Act of 1984,<sup>18</sup> however, provides antitrust immunity to certain joint conduct of “marine terminal operators” (MTOs), defined as entities “engaged in the United States in the business of providing wharfage, dock or warehouse, or other terminal facilities in connection with a common carrier.”<sup>19</sup> For this reason, the U.S. antitrust agencies have had relatively little enforcement experience in the ports sector. The Federal Maritime Commission (FMC), an independent federal agency responsible for administering the Shipping Act, has jurisdiction over the practices and agreements of MTOs. Agreements between MTOs or between MTOs and common carriers to “discuss, fix, or regulate rates or other conditions of service” or to “engage in exclusive, preferential, or cooperative working arrangements, to the extent the agreement involves ocean transportation in the foreign commerce of the United States,” must be filed with the FMC, and 45 days after filing, automatically receive an exemption from the U.S. antitrust laws, unless the FMC successfully

<sup>14</sup> McCalla, Robert J., Brian Slack, and Claude Comtois, "Dealing with globalization at the regional and local level: the case of contemporary containerization," *The Canadian Geographer* 48 (2004), 473-487.  
Notteboom, Theo E., "Consolidation and contestability in the European container handling industry," *Maritime Policy & Management* 29 (2002), 257-269.

Cwinya-ai, Robert Ongom, "International (Global) Competition in the Modern Maritime Transport Industry – The Politics of Port Business and Its Influence on Other (Rail, Road) Modes of Transportation of Goods," 2009.

<sup>15</sup> Talley, Wayne K., *Port Economics*, London: Routledge, 2009.

<sup>16</sup> UNCTAD, *Review of Maritime Transport 2010*, p. 18.

<sup>17</sup> Haralambides, Hercules E., Pierre Cariou, and Marco Benacchio, "Costs, Benefits and Pricing of Dedicated Container Terminals," *International Journal of Maritime Economics* 4 (2002), 21-34.

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<sup>18</sup> 46 U.S.C. §§ 40101 *et seq.*

<sup>19</sup> § 40102(14). MTOs which do not serve common carriers have no ability to assert the immunity from the antitrust laws available to those which do serve common carriers under the Shipping Act.

convinces a court that the agreement is likely, by a reduction in competition, to result in an unreasonable reduction in transportation service or an unreasonable increase in transportation cost. While the public can comment on the effects of a proposed agreement, there is no third party standing to bring suit to enjoin the implementation of a filed agreement.<sup>20</sup>

The FMC cannot deny or modify filed agreements, but must seek a judicial injunction in order to prevent the effectiveness of a filed agreement. The FMC can delay the effectiveness of a filed agreement if it seeks additional information from the parties necessary to analyze its competitive effects. This process, adopted in 1984, was modeled on the Hart-Scott-Rodino merger review procedure.

Under a proceeding before the agency, the FMC can take administrative action to ensure compliance with Shipping Act provisions, including a requirement that an MTO may not:

- Agree with another MTO or with a common carrier to boycott, or unreasonably discriminate in the provision of terminal services to, a common carrier or ocean tramp;
- Give any undue or unreasonable preference or advantage or impose any undue or unreasonable prejudice or disadvantage with respect to any person; or
- Unreasonably refuse to deal or negotiate.<sup>21</sup>

The FMC can enforce these statutory provisions with civil penalties.<sup>22</sup> Injured parties can file complaints with the FMC, which can award reparations for actual injuries.<sup>23</sup>

With respect to agreements filed by MTOs and/or common carriers, if the FMC determines that an agreement “is likely, by a reduction in competition, to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost,”<sup>24</sup> the FMC may seek to enjoin the operation of the agreement by bringing a suit for injunctive relief in the federal district court for the District of Columbia. The FMC has done so on one occasion, when it sought in 2009 to block the operation of an agreement between the Ports of Los Angeles and Long Beach that involved discussion and potential coordination of their respective “Clean Truck Programs,” which were intended to reduce air pollution caused by trucks used to transport cargo to and from the ports. The FMC alleged that the agreement was likely to reduce competition, increase transportation costs, and decrease transportation service. The district court denied a motion for a preliminary injunction, ruling that the FMC had failed to show that trucking companies would gain market power or that competition between the ports would be reduced, and had failed to show a likelihood of irreparable harm and a balance of equities and public interest in its favor.<sup>25</sup> The case was eventually dismissed.

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<sup>20</sup> §§ 40301(b), 40307.

<sup>21</sup> § 41106.

<sup>22</sup> § 41107.

<sup>23</sup> §§ 41301, 41305. Note, however, that the Supreme Court has held that the Eleventh Amendment provides sovereign immunity to the states, and thus to port authorities that are arms of the state, from suits by private parties before the FMC. *FMC v. So. Carolina Ports Authority*, 535 U.S. 743 (2002).

<sup>24</sup> § 41307(b).

<sup>25</sup> *FMC v. City of Los Angeles*, 607 F.Supp.2d 192 (D.D.C. 2009).

## **5. Conclusion**

Ports constitute an important infrastructure in the U.S. economy. Traditional competition analysis, including examination of competition in a systems context from the perspective of both goods producers and customers, generally illuminates competition issues relating to the sector. However, a statutory antitrust exemption for certain agreements filed by ports with the FMC removes those agreements from the reach of the antitrust laws, and places them instead within the FMC's regulatory jurisdiction.

## EUROPEAN UNION

### 1. Overview

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.

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.

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.

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.<sup>1</sup> 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.<sup>2</sup>

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.

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.

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**

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

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<sup>1</sup> 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.

<sup>2</sup> Case No COMP/JV.55 *HUTCHISON / RCPM / ECT*, Commission decision of 3 July 2001.

port facilities and services for cargo vessels in which it faced strong competition from other ports in the Oresund region.<sup>3</sup>

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.<sup>4</sup> In one decision the Commission also identified a separate market for stevedoring services for 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.<sup>5</sup>

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 transshipment traffic. The Commission acknowledged that the two markets are linked because deep-sea container vessels carry both hinterland and transshipment 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 transshipment traffic, they can not compete with them on hinterland traffic. Furthermore, unlike handling hinterland traffic, handling transshipment traffic does not require road / rail infrastructure and a hinterland linkage.

On the other hand, the Commission did not follow the industry's distinction between transshipment relay and transshipment feeder traffic.<sup>6</sup> 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. pricewise).

## 2.2. *Geographic market*

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,

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<sup>3</sup> 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.

<sup>4</sup> Case No COMP/M.5093 *DP WORLD / CONTI 7 / RICKMERS / DP WORLD BREAKBULK / JV*, Commission decision of 18 November 2008.

<sup>5</sup> 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.

<sup>6</sup> 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.

Northern Europe and the Mediterranean.<sup>7</sup> 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.<sup>8</sup>

The geographic market for stevedoring services for transshipment traffic was considered wider. The Commission has distinguished between the Mediterranean market and Northern European market 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,<sup>9</sup> distance from key shipping routes, distance from "transshipment markets" (such as Scandinavia / the Baltic countries, Spain / Portugal and United Kingdom / Ireland), and capacity limitations that restrict switching.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

### 2.3. *The competitive analysis in the merger cases*

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.

<sup>7</sup> 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.

<sup>8</sup> 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.

<sup>9</sup> The minimum depth of water a ship or boat can safely navigate.

<sup>10</sup> *Ibid.*

<sup>11</sup> Case No COMP/M.5093 *DP WORLD / CONTI 7 / RICKMERS / DP WORLD BREAKBULK / JV*, Commission decision of 18 November 2008.

<sup>12</sup> Case No IV/39.689 *Sea Containers v Stena Sealink*, Commission decision of 21 December 1993, paragraphs 10-13.

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.

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 light of their current market shares in terms of capacity and spare capacity.<sup>13</sup> 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 transshipment traffic (which as explained above are in separate product markets) and because the calculation of capacity is very complicated and consequently estimations diverge significantly.<sup>14</sup>

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<sup>15</sup> and consortia,<sup>16</sup> 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.

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.

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

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

<sup>15</sup> 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.

<sup>16</sup> Consortium 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.

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<sup>17</sup> 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,<sup>18</sup> the Commission found that there is no concern that the expanded port of Rotterdam will enjoy a special advantage in attracting extra large vessels, noting that such vessels call in all the main ports in Northern Europe.<sup>19</sup>

### 3. Competition between ports: access to port services

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<sup>20</sup> or frustrates a competitor's plan to open a new ferry service.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

<sup>17</sup> 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.

<sup>18</sup> Case No COMP/M.3576 *ECT / PONL / EUROMAX*, commission decision of 22 December 2004.

<sup>19</sup> 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.

<sup>20</sup> Case C-242/95 *GT-Links v DSB* [1997] ECR I-4449.

<sup>21</sup> Case No IV/39.689 *Sea Containers v Stena Sealink*, Commission decision of 21 December 1993 and the ICG/CCI Morlaix case reported in the 25<sup>th</sup> Report on Competition Policy, paragraph 43; 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.

<sup>22</sup> See Robert O'Donoghue and A Jorge Padilla *THE LAW AND ECONOMICS OF ARTICLE 82 EC* (Hart Publishing, 2006) page 425.

<sup>23</sup> Case C-163/96 *Criminal proceedings against Silvano Roso* [1998] ECR I-533.

- Abuse of dominant position by a company holding a monopoly in a certain port service (e.g. mooring,<sup>24</sup> piloting<sup>25</sup> or docks work<sup>26</sup>) and overcharging its clients with respect to the services provided.

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 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.<sup>27</sup>

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.

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."<sup>28</sup> 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.<sup>29</sup> However, it was held that not all port services are of general economic interest.<sup>30</sup> 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.

<sup>24</sup> Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori di Porto di Genova* [1998] ECR I-3949.

<sup>25</sup> Commission decision 97/745/EC regarding tariffs for piloting in the Port of Genoa, of 21 October 1997.

<sup>26</sup> Case C-179/90 *Merci convenzionali porto di Genova v Siderugica Gabrielli* [1991] ECR I-5889.

<sup>27</sup> See for example Case C-343/95 *Diego Calì & 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.

<sup>28</sup> Case 10/71 *Ministère public luxembourgeois v Muller* [1971] ECR 723.

<sup>29</sup> Case C-266/96 *Corsica Ferries France v Gruppo Antichi Ormeggiatori di Porto di Genova* [1998] ECR I-3949.

<sup>30</sup> In Case C-179/90 *Merci convenzionali porto di Genova v Siderugica Gabrielli* [1991] ECR I-5889, it was held that dock work consisting of loading, unloading, transshipment, 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.

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**

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.

## BULGARIA

The submission from the part of the Bulgarian Competition Authority is centered around the legislative steps undertaken to encourage intra port competition in the provision of port services in Bulgaria (I), current competition concerns for Bulgarian ports (II), the CPC` s practice on competition concerns in ports (III) and remedies to address competition concerns (IV).

### 1. **Legislative provisions to encourage intra port competition in the provision of port services in Bulgaria**

Historically port services have been provided in Bulgaria as well as in many other countries within the framework of legal monopolies of public nature. The main concerns with such monopolies are related to excessive pricing and refusals to grant access to infrastructure (under the essential facilities doctrine). Furthermore port users may be deprived of technical development, quality and diversity in the provision of port services.

Following the *Commission's Green Paper on Sea Ports* issued in 1997 and during the pre – accession period for Bulgaria to the EU, Bulgarian legislator adopted in 2000 a new *Law on the Maritime Space, Inland Water Routes and Ports*. The purpose of the law was to open ports to competition in order to increase their efficiency, technical development, to introduce more market orientated pricing, diversification and better quality of services. To encourage opportunities for private initiative in investment and competition the law introduces the *Land Lord System* in the management of ports.

The five ports of national significance (2 sea ports and 3 Danube ports) are administrated by state owned undertakings. They own the territory and aquatory of the ports. The port` s infrastructure is managed by another state owned undertaking “Port Infrastructure”.

Port services (technical nautical including pilotage, towage and mooring; cargo services; passenger services) and supporting activities in the different terminals of the ports shall be provided by specialised operators. Operators are granted access to the market for port services trough awarding procedures and contracts. The port` s managing bodies are not involved in the organization of the competitions and in the selection procedure. Port` s managing bodies provide the services until concessions are granted. When they provide services they are treated the same way as competitors. Port services accounts shall be separated from the accounts of its other activities.

Contracts with operators are concluded for the provision of services that are not dependant on the use of port territory or infrastructure. When the provision of port services is related to the use of port territory and infrastructure, at least two independent operators are determined by competition except where there is only one candidate. These operators receive access to the market under the terms of concession.

### 2. **Competition concerns in Bulgarian ports**

The introduction of intra port competition (including inter terminal competition) shall be beneficial for the creation of effective competitive constraints to port services` operators. According to economic theory and to the CPC practice excessive pricing and other abusive practices may be an issue mainly in cases where intra port and/ or inter port competition is imperfect. Market power of operators primarily



depends on the definition of the relevant product and geographic market. In some cases a product may be the service provided itself because of the lack of substitutes but in other cases the market may be defined broadly depending on the nature of the service and the alternatives for the provision of the same or similar service including intra port and inter port competitive constraints.

Competitive constraints for Bulgarian national ports are *greater* because of the still low level of modernization, limited capacity and lack of ability to handle certain cargos. The process of privatization through concessions is still ongoing. Bulgarian ports face main competition constraints from the ports of Thessaloniki and Constantza with excellent infrastructure and access to more countries in Eastern Europe. Inter port competition between national ports is not to be underestimated as all national ports have similar infrastructure that allows them to provide different types of services. The location of national ports is such as it does not offer a specific preferential to none of them in terms of port users' choice for example in terms of lower generalized transport costs. Furthermore the local or eventually regional importance of the national ports make in some cases overland transports an alternative for the shipping of goods – this is the case with the Bosphorus' new railway tunnel and bridge relating the Black sea side by motorway.

National ports may still be differentiated because port users choose an operator on the bases of the complexity of price and the quality of the service as well as a choice of an appropriate logistic scheme. In this sense the price is not the only one criterion to determine port users' choice of operator. The range of services they offer the quality of these services and of course their prices depending on the introduction of intra port competition and modernization of the ports may turn to be crucial for each of the national ports to exercise competitive constraint on the others. The possibility for an operator to exercise market power depends not only of the competitive constraints it faces but also of factors like the bargaining power of different port users, the opportunities to differentiate prices to them and the share of the port services in the total port costs. A concern in terms of access to services may be the existence of specialized oil terminals that are currently operated by vertically integrated undertakings active on the market for wholesale and retail trade with fuels.

### **3. The CPC practice on competition concerns in ports**

The CPC practice on competition concerns in ports is from the period where ports were still operated from only one undertaking – a state owned company. This was the period of time immediately after the adoption of the new *Law on the Maritime Space, Inland Water Routes and Ports*. On the bases of the law the state owned companies provide services in the ports on the bases of contracts with the Ministry of transport until they are consigned to private operators under concessions. Up to the present moment 6 terminals of national ports are conceded. Generally entry barriers are considered by the CPC to be surmountable. Each operator that receives a concession is granted access to the market for the provision of port services. A concern in the case might be the fact that concessioners need to make considerable long – term non – movable investments in order to satisfy requirements related to the need of development of the infrastructure and in some cases to the requirements of reconstruction of infrastructure if they are willing to provide efficient and competitive service to port users. The limited level of multiplication of service providers in national ports may still be relevant for competition concerns in the behavior of “traditional” operators as well as the behavior of new entrants in the face of the operators that have been granted terminal concessions.

In the case where state owned companies provide services in the port the CPC consider that they are subject to national antitrust law as they operate autonomously of the state. This is the case because they were found to determine their commercial behavior independently of the state and to consequently to be subject to the national antitrust law.

The CPC consider that even if the state owned companies may have a dominant position in the ports (including all terminals) this is a transitional situation in the light of the tendency terminals to be conceded to private operators.

The CPC practice is related to abuses of dominant position related to excessive pricing and direct imposition of prices (A) and to refusal to grant access to port infrastructure considered to be essential facility for the provision of a service (B).

### **3.1. *The cases on the excessive pricing and indirect imposition of prices***

In 2003 the CPC fined the operator of a ferry terminal part of national port Vidin to charge excessive prices for the provision of the service of ferry platforms and ro – ro matches to its main customer. The relevant geographic market was the port of Vidin because of the lack of alternative infrastructure for the Vidin - Kalafat – Vidin freight. The customer was significant as it responded for a substantial part of the turnover of the ferry terminal but it did not possess substantial bargaining power in respect of the operator because of the lack of substitutes for the service provided by the port of Vidin. The ferry terminal was first operated by the customer (a state owned shipping company and the main Bulgarian ship owner) but removed from its capital by decision of the Minister of Transport and transferred in the capital of the state owned company that operated Vidin port. The price for the service provided by the new owner of the terminal was indicated in the Protocol for the transaction. Subsequently the price was unilaterally changed by the terminal operator.

The CPC found after the commission of an expert's report that the new price charged for the service was excessive. The CPC did not accept the price calculation presented by the operator. The expert's report showed that the cost price was padded through the inclusion in its calculation of a padded amount of direct and indirect costs. The price was further written up with 30 % profit margin. The profit margin was not discussed in the case but the mechanism used to determine the price of the service was established to be unjustified. The CPC in its decision pointed out on the bases of the expert's report what will be the minimum market price to be charged for one match including a margin profit of 30 %. The CPC decision was confirmed by the Supreme Administrative Court. The customer relying on the CPC's decision was allowed by a civil court to recover the amount overcharged on the price established by the expert's report.

Subsequently in 2006 the CPC fined again the operator of Vidin port for the infringement of direct imposition of prices for the same service on the same customer. The price for the service provided by the operator was fixed in USA dollars. Because of constant exchange rates decreases the operator decided to readjust the price charged to be paid in euro. It was established that calculated in the Bulgarian national currency the price charged in the second case was the same as the one found by the CPC in its previous decision to be excessive. The CPC found the dominant undertaking to use different methodologies to sustain a determined price for the service in order to guarantee in all cases profitability of the service. In the second case it was shown that the margin profit of 30 % and the strategy was used to cross - subsidize other unprofitable port services.

In both cases the operator of the ferry terminal was able to abuse its dominant position over a longue period because there were no alternatives for the customer to ensure the freight Vidin - Kalafat –Vidin.

### **3.2. *Refusal to grant access to port infrastructure considered to be essential facility for the provision of a service***

Both cases that will be presented are related to the provision of the service of garbage collecting and ballast ship waste disposal. This is not a port service under the meaning of Bulgarian law. It is provided by undertakings that received authorization under the strict condition of the Law for waste management.

The state owned company administering the sea port of Burgas was fined in 2003 for refusing access to the territory and aquatory of the port to a provider of the service of garbage collecting and ballast ship waste disposal. The state owned company was at the time alone responsible for the provision of port services. It also provided the service for garbage collection in cooperation with a private company. By abusing its position on the dominated market for access to port infrastructure it foreclosed a real competitor from access to the downstream market for provision of the service of garbage collection where both undertakings were competitors. The provider of the service disposed of the necessary authorization under Bulgarian law to provide the service and the port territory and aquatory was an essential facility for the provision of the service of garbage collecting.

The facts were similar in a previous case of 2001 where the CPC decided that the operator of the other national sea port – Varna abused its dominant position by refusing to grant access to a waste incinerator. The operator provided the service itself too. In the case the incinerator was considered to be essential facility for the provision of the service. The incinerator was owned by the undertaking that managed the port. On the territory of the city of Varna there were another two incinerators that were not possible to be used by the service provider because of limitations prescribed by law – ship waste had to be incinerated on the territory of the port of mooring of the ship. Furthermore that was the only one incinerator that fulfilled the legislative requirements to be used for the purpose of ship waste incineration on the territory of the port of Varna (including all its terminals). Building another incinerator on the territory of the port was considered to be economically unjustifiable.

#### **4. Possible remedies for competition concerns in Bulgarian ports**

National ports are important centers for the benefit of the entire transport sector having more than 60 % of the Bulgarian import - export economy passing through them. They are still of local importance because of the still low transit traffic through them. Restructuring and privatization of terminals is crucial to attract new investments that will make ports more efficient and competitive in order to attract transit traffic. In this respect the introduction of intra port competition between operators is expected to lead to wider range of services of better quality but also to more competitive prices for port users. Furthermore intra - port competition and investments in modernization, reconstruction and development of the terminals will be beneficial not only to port users but is expected to encourage inter port competition especially at local (national) level.

Nevertheless the potential of intra port competition depends to a large extent on the assets required to provide services, the space available in the port and the volume of traffic.

Bulgarian law takes into account the fact that the potential for competition in the provision of port services depends on factors as the above mentioned. They have to be established by independent expert report and subsequently the number of port services operators in a terminal may be limited according to the objective conditions within it or within the port.

Further regulation may be necessary in such cases where for example the number of operators for a service within the port is limited depending on the port size. The remedies discussed below are related to main competition concerns identified by the CPC up to the present moment.

First under Bulgarian law prices charged for the port services provided by the operators are not regulated by law and they are public and published on the web sites of the ports. Recently the acquisition of port terminals by private undertakings through concessions have been notified to the CPC under national merger law provisions. The terminals are considered to be a part of undertaking (the port being controlled by the port authority) and the concession represent an acquisition of control on part of undertaking. In some cases the turnover thresholds were not satisfied especially because of the turnover of the terminals. In

other cases the concentrations were found not to raise competition issues. The State in the face of the national company Port Infrastructure includes in the concession contracts provisions that impose on the operators the obligation not to commit abuse of dominant position in the determination of the prices they charge for port services as well as to provide services to port users at the same price level they pay for the same services.

Second in some cases essential facilities access regulation may be a successful tool to approach the problem related to the capacity of the port “to allow competition”. Port services as well as port infrastructure may be treated as essential for market access. For example Bulgarian law prescribe that infrastructure necessary for the performance of services may be object to concession but this is not the case for common infrastructure used by all operators.



## INDONESIA

### Introduction

As an archipelagic state, seaports are strategic transportation infrastructure points for Indonesia. This is because seaports are not only serving as domestic and international sea transportation points, but they are also related to Indonesian social, politic, security and defence aspects. The products provided by seaport operators are generally related to services used by shipping companies and goods consignors/consignees. In addition to that, seaport operators also interact with terminal operators and also relevant service providers. This paper is aimed at describing briefly the profile of seaport and seaport terminal operations in Indonesia as well as the aspects related to business competition.

### The structure of seaports in Indonesia

Before 2008, seaports in Indonesia were operated by a state-owned enterprise (PELINDO) appointed under the Government Regulation No 1 Year 1969. The operational area of PT. Pelindo was then divided into 4 areas, respectively operating several public seaports commercially. Meanwhile, seaports which had not reach commercial scale, were operated by Technical Units (UPT) under the supervision of the Department of Transportation. Below is the profile of seaports operated by PT. PELINDO:

Type of Seaport	Seaport Management/Operational Office	Total Number	International (strategic)	Local
<b>A. Public</b>	<b>1) COMMERCIAL SEAPORT</b>			
	PELINDO I (Belawan)	27		
	PELINDO II (Tanjung Priok)	29		
	PELINDO III (Tanjung Perak)	32	85	27
	PELINDO IV (Makassar)	24		
	Subtotal	112		
<b>B. Special</b>	<b>2) NON-COMMERCIAL SEAPORT</b>			
	Seaport Office (Government)	523	10	513
	Special Seaports for Industrial, Mining, Fishery, Agricultural, Forestry and Other Purposes	1412	45	1367
<b>Total</b>		2047	140	1907

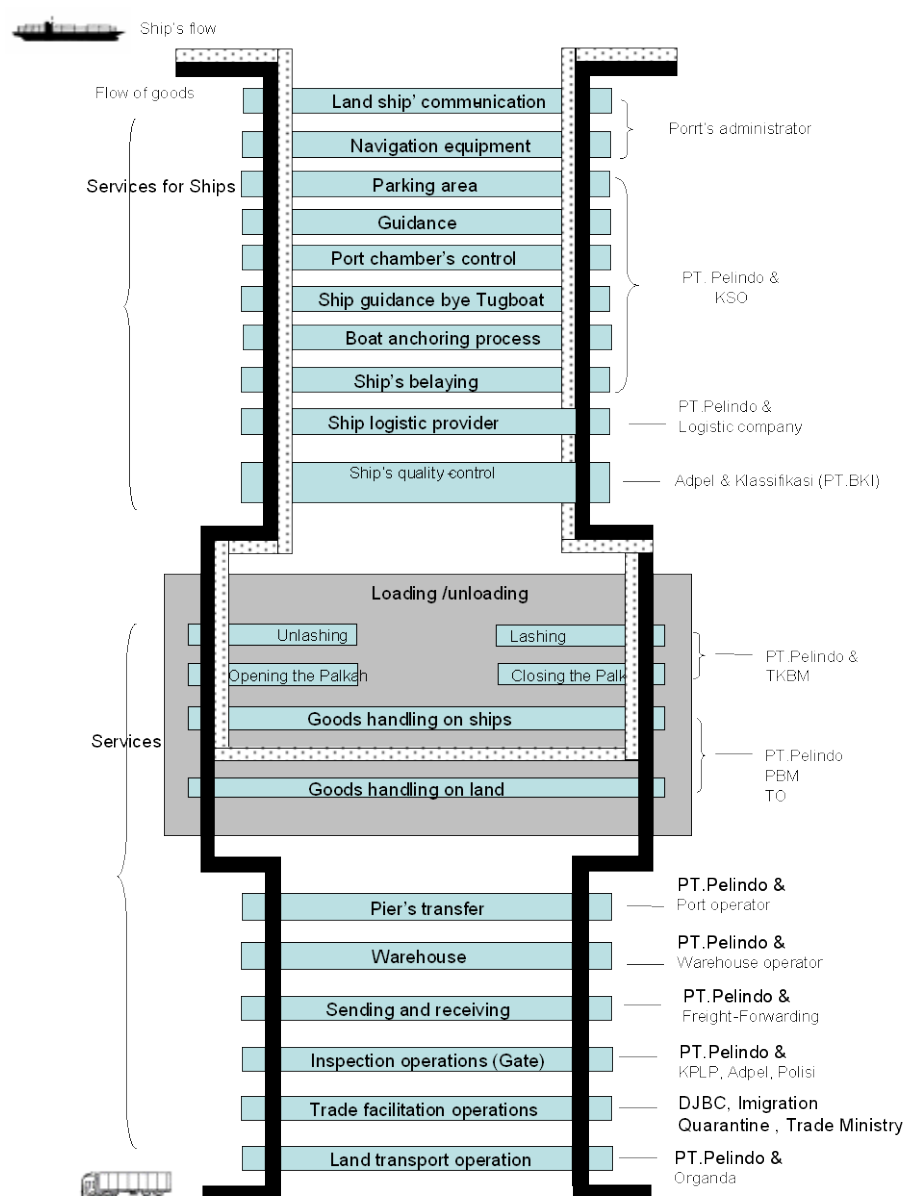
In addition to public seaports, there are also special seaports operated for private interest and are not allowed to serve public interest. Several large-scale companies, such as PT. Krakatau Steel and PT. Indofood, are operating special seaports for supporting their operational activities. Such special seaports are generally located close to the sites of factories or business units of those companies.

For shipping lines focused on *merchant-shipping* services, the types of cargo transported generally include break-bulk cargo, general cargo, dry-bulk cargo, liquid-bulk cargo, and containerized cargo, which is divided into dry-container and reefer container. Such cargo handling operations stimulate the production of ships specifically based on the aforementioned groups of commodities. Such special ships ultimately

lead to derivative orientation of the existing seaports. In other words, the type of a seaport will be determined based on the criteria of cargo to be transported. The aforementioned five typical types of cargo will always become references for the traffic in seaports, especially commercial seaports in Indonesia. Several docks with focus on similar commodities are then localized in an area, which is called a terminal. Large-scale seaports (Classes I and II), which constitute the business units of PT. Pelindo I up to IV, have five types of terminals, namely general cargo terminal, dry-bulk terminal, liquid-bulk terminal, break-bulk terminal, and container terminal. Meanwhile, industrial seaports usually have the same functions as the aforementioned five terminals.

The criteria of seaport service coverage are generally determined based on the movement of cargos the chain of trades. The position and the scale of traffic of a seaport may determine whether the seaport is within a local, national or international circulation. Seaports functioning as hubs usually obtain inputs of cargo and ships from the surrounding seaports, which serve as feeders for those seaports, either with local (province/district), national or international orientation. Such spatial roles are not determined based on regulations, but they are rather driven by the logics of trade which have the dimension of SCM (Supply-Chain Management). In general, Indonesian seaports serve as feeders for hub ports in Singapore and Tg. Pelepas, Malaysia. At the aforementioned hub ports, cargos or containers are then transferred to larger vessels (mother vessels) for the purpose of cross-ocean transportation. It is also the case with imports, where cargos will be unloaded at the hub ports to be further transported using smaller ports in Indonesian territory. Such condition is caused by several factors, including the limited capacity of seaports in Indonesia, the low volume of cargo traffic, as well as technical aspects, namely the depth of sea which does not allow mother vessels to come to international public seaports in Indonesia.

The following is the structure of seaport industry in Indonesia in general, including description of the available products and relevant services.



Seaport-related services can be classified into 2 groups, namely services for ships, which in this matter are the responsibility of the Seaport Authority and PELINDO, as well as terminal operators. The second one is services for cargo, which in principal comprise warehouse rental, stevedoring, inspection and trucking. The provision of those services involves PELINDO and other service providers, such as terminal operators, stevedorers, as well as land transportation business actors. The inspection and quarantine functions are the responsibility of the Customs and Excise as well as the Department of Trade.

### Relevant market for seaport services

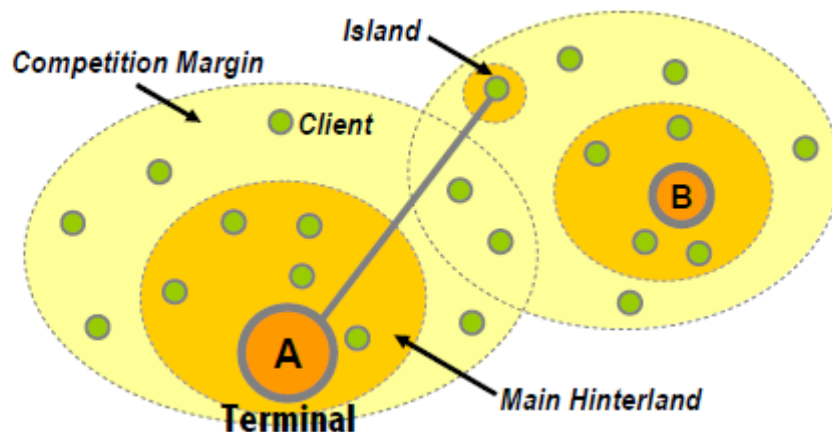
In the perspective of product market, public seaports do not have significant competitors, especially for the modes of land and air transportation. The specifications and characteristics of sea transportation, which can accommodate large volume of cargo and have integrated domestic and international routes, are the main considerations for the consignors/consignees. The use of land and air transportation is limited to



specific characteristics of goods and is generally in small volume and the shipment must be conducted within relatively tight schedule/short time. The mode of land transportation can be a substitute for inter-city and inter-insular domestic routes, despite the significant obstacles, namely the availability of ferry transportation, land infrastructure and sub-standard bridges.

From the aspect of the types of commodity being transported, sea transportation is more reliable because it can transport various types of cargo in containers, including general cargo, liquid cargo as well as mining and petrochemical products. Almost all shipping lines provide vessels that can transport such various cargos. The mode of land transportation also provides transportation services which are relatively similar to those provided by the mode of sea transportation, especially for containers and general cargo. However, for the transportation of petrochemical and other liquid products, transportation service providers other than sea transportation provide relatively limited choices. Mining products, especially coal, are generally transported by using trucks and railway network which are integrated with break bulk ships. With regard to railway, mine operators are generally cooperating with the railway operator, namely PT. Kereta Api Indonesia, by using the existing railway network and or developing their own railway networks in cooperation with PT. KAI. Several types of special commodities, such as documents, packages and other light cargos, are generally transported by using railways and airplanes. Airplanes are usually used for light products which require short delivery time in the form of business documents.

From the geographical aspect, coverage areas of seaports are defined as hinterland and foreland (Rodrigue and Noteboom, 2000). Such concept is explained in the following illustration:

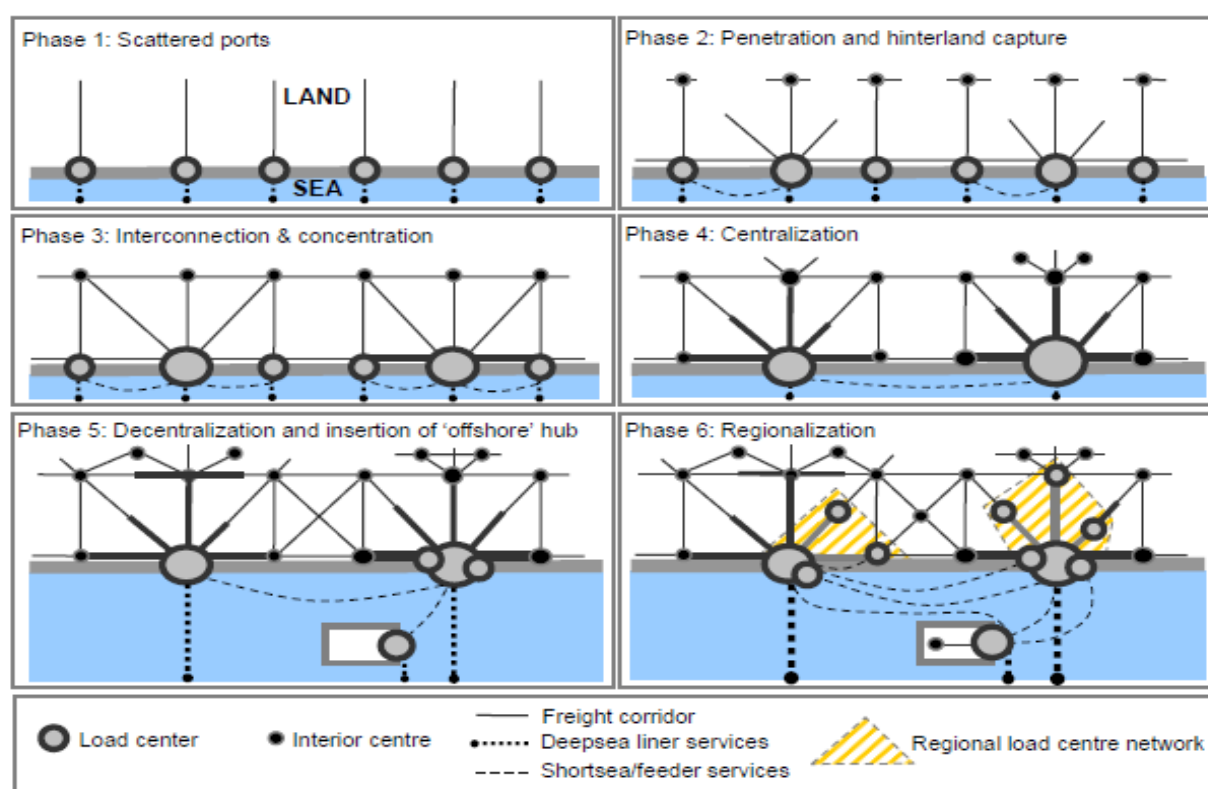


In the coverage areas or hinterland of two seaport terminals, there is an overlapping area. Such area is the area where clients or shippers can choose to use the services provided by either terminal A or B. In such competition margin area, there is no significant difference in the transportation and logistic costs as well as the level of quality of the services provided by the two seaport operators. However, there is a possibility that a shipper in a certain location chooses a terminal which is relatively far from the closest hinterland terminal, due to very significant difference in the quality of services.

Seaports in Indonesia are generally located close to business cities. There is no condition where two or more public and international seaports are located in the same hinterland. The location of a consignor or consignee determines the selection of a loading or unloading seaport. The shipment of goods through a seaport, which is then combined with land transportation until the goods arrive at the location of the consignee, will be far more expensive than conducting the unloading activity at the closest seaport to the location of the consignee. As an illustration, for an importer located in East Java, it will be more economical and efficient if the shipment and the unloading activities are conducted at Tg Perak seaport (SBY) than at Tg Priok or Tg Perak and subsequently use trucks/trains for delivering the goods to the

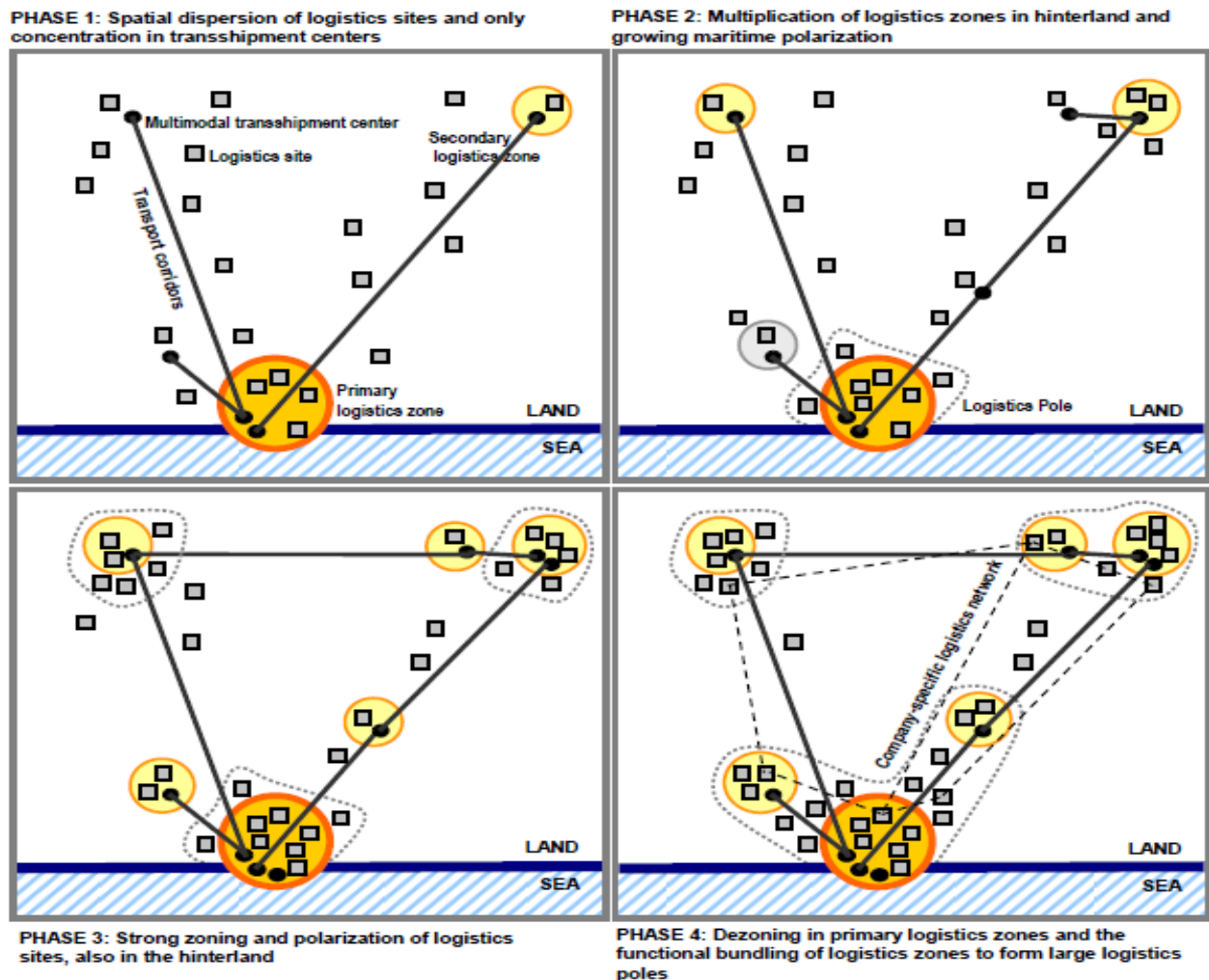
importer's location. This has not taken into account the factors of time and schedule, as shipment by using land transportation will certainly add more time for the importer. In such condition, the high costs of land transportation, uncertain schedules as well as various risks related to land transportation make it difficult for the margin competition area of two hinterlands to develop. In other words, seaports having different hinterlands are competing with each other.

In order to avoid accumulation of activities and cargo traffic through one or two seaports in a certain hinterland, the concept of port regionalization may be the solution. Below is an illustration of the development of port regionalization:



For the case of Indonesia, the most feasible development of port regionalization may be between public and special seaports located in the same hinterlands, such as the combination of Tanjung Priok seaport and Cigading seaport in Serang which are designed specifically for the loading and unloading activities of PT. Krakatau Steel. However, there are regulations and policies that must be addressed first, especially provisions on special seaports which are not allowed to serve public interest.

In addition to that, seaport locations are also integrated with railway networks and trucks for facilitating the traffic of goods to the locations of consignees/consignors. Below is an illustration of multi-mode logistic service provision that can be developed:



Referring to the aforementioned illustration, the form of interaction between the mode of sea transportation through seaports and the mode of land transportation, such as trains and trucks, is complementary rather than substitution. Considering the condition in Indonesia where several container terminals (dry ports) and line 2 warehouses are still in the phases of development, several seaports in Indonesia are still in phase 1.

There are significant constraints to the enhancement of the capacity of the existing international seaports, such as Tanjung Priok in Jakarta. Limited land and shallow water make things difficult for the seaport operators to improve the performance of the seaports. For the purpose of development, the regional government in cooperation with the central government will construct a new terminal in Tg Priok located on reclaimed land on the north coast. The terminal is still within the hinterland of Tg Priok and close to the existing terminal. In addition to that, the increasing trend of container stacking leads to the development of dry ports or container yards outside seaport area (line 2). Those container yards are managed by private operators, while the rates are determined by seaport authority based on types, structures and rate classes as set forth by the Minister based on the GR No. 61 of 2009.

### Potential abuse of market power

It can be concluded that seaport and terminal operators have market power, due to the characteristic of natural monopoly in relation to the coverage of hinterland and foreland. In Indonesia, PELINDO is

practically controlling and operating all seaport terminals in Indonesia, which is conducted by dividing them into 4 groups (Pelindo 1-4). Therefore, the potential abuse of market power and collusion among seaport and terminal operators in Indonesia is relatively large. The development of new seaports and terminals is believed to be able to reduce the accumulation of goods and slow operational performance of the existing seaports. In the perspective of competition, the development of new seaports can be an alternative for shipping lines and or consignors/consignees insofar as they share the same hinterland with the existing seaports. Indonesia is currently in the process of developing several new public seaports and terminals which are located adjacent to or share the same hinterland with the existing seaports/terminals.

In relation to the provision of seaport and terminal-related services, such as stevedoring, loading/unloading and forwarder, important factors which constitute the main attention are the arrangement for business licenses, determination of tariff and service quality standards. Limited availability of land makes the mechanism of competition in the market unfeasible to be applied in seaport and terminal services. In this regard, the technical ministry in Indonesia applies the mechanism of limited licensing for business actors to become terminal service providers. Meanwhile, the supervision and coordination functions are assumed by terminal operator, which is currently still controlled by PELINDO. In several cases, PELINDO conducts the revocation of business license and re-selection of stevedoring service providers, which are related to the improvement of performance and service quality.

The rates are generally regulated by the technical ministry, namely the Department of Transportation. Regulations of the aforementioned ministry are further elaborated in the form of operations implemented by PELINDO and relevant business actors by referring to the company regulations. The basic principle of the rate regulations is the determination of rates based on negotiations and agreements between service providers and customers. Whereas the government's function as the regulator is to determine the classifications of rates based on types, structures and classes. The mechanism applied in the field is negotiation between the association of customers and the association of service providers and or PELINDO.

The process of negotiation between service providers and customers always becomes a headline in mass media. The determination and or changes of rates for seaport and terminal services often become the subjects of debates. Based on such matters, it can be concluded that the rate determination process will always become a difficult negotiation process. The negotiation power of seaport business entities is certainly stronger than the negotiation power of the seaport service users, because of various factors explained above. In this regard, there is a potential abuse of market power by seaport business entities.

The position of seaport service users generally depends on the policy of shippers, namely the consignors and consignees. In a condition where the rates increase, there is a big possibility that such increase will be charged to shippers, either directly or indirectly. In Indonesia, regulations on new rates are merely in the forms of rate structures and classes, and there are not yet regulations on the maximum limits of rates. KPPU has given recommendations to the government on the application of the maximum limits of rates which is combined with the minimum service quality standards. The government has not made any significant response on the aforementioned recommendations.

### **The issue of Competition (Conduct)**

In the provision of seaport and terminal services, there is an issue of competition which is in the form of vertical constraint. Currently, PELINDO as seaport operator, which function has also been transformed into terminal operator, is practically controlling, either directly or indirectly, the majority of terminals existing in public seaports in Indonesia. In general, the control is in the forms of shareholding by PELINDO in subsidiaries operating the terminals and direct management by PELINDO.

Vertical integration also exists between shipping companies and forwarding agents, which is aimed at efficiency in the management and handling of cargos or goods of shippers. In seaport business, the handling and delivery of cargos are closely related to the process of goods loading and unloading from ships to warehouses in seaports and shippers. They form an integral unit in order to ensure efficiency, security and delivery time. In the actual practice, several shipping companies engage in agency cooperation with forwarders which are connected in a global shipping business network. This facilitates the traffic of information and shipping documents between the relevant business actors. Some shipping companies also have cooperation with more than one or two forwarders considering the extensive coverage of the shipping network and the high traffic of goods.

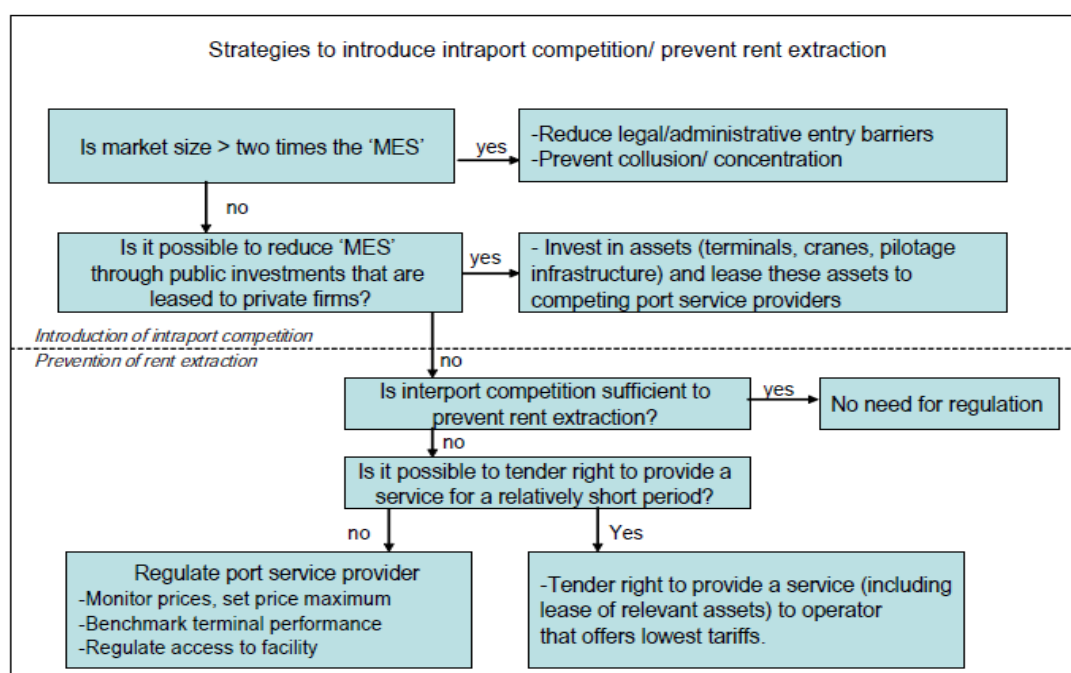
In the management of seaports and terminals, there is an issue of market control and limitation. In 2003, KPPU handled the case of JICT where in the cooperation agreement on the establishment of joint venture for the operation of container terminal, PT JICT, between PELINDO and Hutchinson, there was a clause on the limitation of competition (**DECISION OF CASE NO. 04/KPPU-I/2003 JAKARTA INTERNATIONAL CARGO TERMINAL**). The aforementioned clause explicitly required no issuance of new license for the development and construction of new terminal/seaport insofar as the turnover of the existing terminal was still below a certain amount from the existing total capacity. The panel of the Commission was of the opinion that the aforementioned clause was against business competition because it was hampering the market and also led to the abuse of dominant position. After the appeal and cassation processes, KPPU decision finally had a permanent legal force after being confirmed by the Supreme Court in 2004.

In 2004, KPPU also handled a case related to market control by the operator of BELAWAN seaport in Medan specifically for dry bulk terminal (**DECISION OF CASE NO. 01/KPPU-L/2004 STEVEDORING SERVICES FOR OIL PALM KERNELS IN BELAWAN SEAPORT**). In the aforementioned terminal, PELINDO applied the latest technology using conveyor belt operated only by a subsidiary of PELINDO engaging in stevedoring services. The vertical integration applied by PELINDO and its subsidiary as stevedoring service provider had been proved to hamper the entry of other business actors to provide stevedoring services for oil palm kernels by using manual handling process or other alternative processes. Such behavior also limited the choices for exporters of oil palm kernels in using stevedoring services in the dry bulk terminal of BELAWAN seaport. The panel of the Commission considered the behavior demonstrated by PELINDO and its subsidiary as violating the principles of business competition as set forth in the business competition law.

In addition to the aforementioned two cases, some aspects of seaport and terminal service provision often come into the attention of KPPU. One of them is related to the potential tacit collusion in the provision of stevedoring and forwarder services in several seaport terminals. KPPU will continuously monitor the development and dynamics of business competition in the provision of the aforementioned services, and at the same time intensify preventive advocacy to the relevant business actors.

### **Remedies: regulations and policies**

By adopting the scheme proposed by Langen and Palis, the following is the analysis phase for the strategy to introduce intraport competition in order to prevent abuse of market power:



Based on the aforementioned scheme, the factor of minimum efficient to scale plays a role in the selection of the correct alternative policy. The alternatives for government intervention, namely through tender and or price regulation, access to facilities as well as service quality standards, can be taken in a condition where the market mechanism, especially interport competition, fails to provide the best alternative.

In addition, ADB (2000) provided strategic phases for the reform and restructuring of the seaport industry. Most of those phases have been applied in Indonesia. As mandated in Law No 28 of 2008 concerning Shipping, the transformation of the seaport structure, by establishing a seaport authority and the transformation of PELINDO to become a terminal operator are the initial steps for the reform of seaports in Indonesia. Seaport authority functions more as a regulator and supervisor and it ensure the availability of seaport standard facilities in accordance with the ISPS standards.

It seems that the models of structural separation and divestment of terminal operators cannot be adopted in Indonesia at present. All seaports as well as terminals operating commercially are under de facto and de jure control of PELINDO and or its subsidiaries. The emergence of new business actors can be expected only for the development of new terminals and or seaports. However, considering that almost all points for seaports in every hinterland have already been taken, there is a little possibility that new investors would emerge. The biggest opportunity is the development of the existing seaports or terminals, where new investors can enter through tender process. However, on paper, PELINDO has relatively bigger possibility to participate in and win the aforementioned tenders for the operation of new terminals considering the supports of its experience and relation to the existing seaport network.

Furthermore, it is expected that in the near future regulations will be issued on the principles for the granting of concessions and the appointment of business actors as the providers of terminal services and other relevant services. Regulations on the granting of licenses and concessions must be in line with the basic principles of competition, namely transparency, non-discriminatory and efficient. In addition, regulations are also required on the stipulation of the minimum service standards that must be complied with as terminal operators and providers of relevant services. The introduction of such standards should be related to evaluation and supervision of the implementation of the concession system. In addition, it is also

necessary to provide confirmation regarding price cap for the provision of terminal services and relevant shipping services. This is to anticipate potential abuse of market power owned by terminal operators.

Regulations on vertical integration are also required. There are facts in the field that PELINDO has de facto involvement in activities as terminal operator and in the provision of supporting shipping services. Conceptually, vertical integration intended for efficient and effective business activities may be allowed insofar as they do not have substantial negative impacts on competition. In this regard, vertical integration in shipping and seaport services is expected to minimize transactions costs, reduce operational time for goods/cargo handling, ensure security and service quality standards which will certainly be beneficial for shippers.

In order to prevent substantial constraints to competition, especially vertical restraint, regulations are required on access to essential facilities, especially for the use of seaport facilities and terminals, which are strategic and vital for shipping companies, relevant seaport and shipping service providers, such as stevedoring, trucking and forwarder as well as for shippers. Transparent regulations on access to important facilities in seaports are expected to be able to ensure equal business opportunities for shipping and seaport services, which are not integrated to terminals.

### **What next?**

As an archipelagic state, seaports have an important role for Indonesian economy. As explained above, the development of competition model, such as interport, in Indonesia is relatively difficult. In this regard, regulatory reform and seaport institutional restructuring have higher priorities for Indonesia, like what has been implemented recently, namely the formation of seaport authority which will supervise shipping companies and seaport operators, as well as the transformation of PELINDO as one of seaport operators in Indonesia. After achieving clear regulatory and institutional systems with regard to seaports, seaports in Indonesia are expected to be able to evolve towards the next phase, namely port regionalization with a combination of transportation modes in order to support the goods logistic system.

The main theme related to competition is how to anticipate the abuse of market power and potential occurrence of vertical constraints to competition. The potential for the abuse of market power is large because of the hinterland factor, and it is of an economic scale. In addition, the actual facts in the field indicate a trend of the provision of integrated services, from the arrangement for documents up to the handling of cargo and shipment. In this regard, the strengthening of regulations on pricing, quality standards and assurance of access to key seaport facilities combined with the supervisory function are absolutely required. KPPU has conducted intervention on various market failures and also behaviors which hamper competition in the seaport and terminal industry. In the future, the synergy between the supervisory function in seaports as well as the supervision conducted by KPPU will be able to contribute to the improvement of the performance of seaport services and will also have positive impacts on the national economy.

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DECISION OF CASE NO. 04/KPPU-I/2003 JAKARTA INTERNATIONAL CARGO TERMINAL

DECISION OF NO. 01/KPPU-L/2004 STEVEDORING SERVICES FOR OIL PALM KERNELS IN BELAWAN SEAPORT





## ROMANIA

### 1. Introduction

The Romanian Competition Council (hereinafter referred as **RCC**) pays special attention to all means of transport and the transport sector ranks second, after the energy sector, on the *List of sectors essential to the Romanian economy from competition point of view*.

Romania features an important sea opening, the advantages of which should be exploited to the maximum. The Port of Constanta has gradually become one of the main distribution centers servicing Central and East Europe. It is by far the most important Romanian sea port, from the point of view of passenger and commodities traffic, more than 90% of the commodities handled in a year at the level of all Romanian maritime ports being loaded and unloaded here. The railway network in the Port of Constantza has excellent connections with national and European railway networks. Each terminal has direct access to the railway system. The port railway network is more than 440 km long.

From 1978 the extension of Constantza South Port started, which supposed a 5 km extension of the North breakwater and the building of a new breakwater, 5,560 km long, in the Southern part of the port, thus creating a port area of 3,629 ha and occupying 6.5 km of the sea side. The Port of Constantza has a road network connected to the national and European road network by the 10 port gates. The Port of Constantza is connected to the national pipe network, likewise ensuring the connection with the main Romanian refineries.

Assessing the relative importance of sea ports in EU27, based on the indicator ‘tones of commodities handled in sea port / capita’, calculated for the main ports, we notice that in 2008, the indicator for Romania was 2.2 tones/capita, while the EU27 average (Italy excepted) was 7.3 tones / capita. Despite the relatively low importance of maritime transport of commodities in our country, volumes of commodities loaded/unloaded in Romanian ports has grown in a sustained manner since 2006 and peaked in 2008; the most important increase was that of container traffic.

However, the world economic crisis was felt in 2009, the volumes of loaded-unloaded commodities dropping in the first three quarters by more than 30% against the same period of 2008.

### 2. Institutional organization in the naval transport field

Maritime transport infrastructure in Romania is composed of maritime ports, river-maritime ports and inland waterways.

Maritime transport infrastructure in Romania is composed of the following elements:

- Maritime ports;
- River-maritime ports;
- Inland waterways.

- Maritime ports.

### **2.1. *Maritime ports;***

Along the Romanian Black Sea shore there are three commercial maritime ports: Constantza, Mangalia and Midia. These ports have rail and road connections.

Furthermore, they are directly connected with the Danube-Black Sea Canal, which ensures the connection with the Danube, the Poarta Alba-Midia Navodari Canal and indirectly with “Mihail Kogalniceanu” Airport located at 20 km from Constantza.

### **2.2. *River-maritime ports.***

In Romania, the Danube River has a length of 1,075 km, approximately 44% of its whole navigable length. The Romanian Danube is divided into two structurally different sectors: the River Danube and the Maritime Danube. Several of the ports situated along the Maritime Danube, namely Galati, Braila, Tulcea and Sulina, allow the access of both river and maritime vessels, so they also serve international sea trade.

### **2.3. *Inland waterways***

The inland waterway network presently has a length of 1,700 km and is comprised of:

- The Danube from Bazias to Sulina;
- Secondary navigable branches of the Danube;
- Navigable canals.

The state authority in the field of maritime transport and waterways is the Ministry of Transport. Under its subordination or coordination there are a series of public institutions, autonomous companies and national companies with the role of authorities in the field and sector in which they function.

The ministry, through the General Directorate for Naval Transport undertakes activities of regulation, authorization, coordination, inspection, control, surveillance and certification of infrastructure of maritime transport and inland waterways, of vessels, of naval transport activities and their related and ancillary activities as well as of the staff performing these activities.

The naval transport infrastructures may belong to the public domain, territorial-administrative units or may be private property.

In Romania, the Government through the Transport and Infrastructure Ministry awarded the concession of the naval transport infrastructures representing public property of the state to the port administrations, namely the Administration of the Maritime Ports SA Constanta (APM), Administration of Navigable Canals S.A Constanta (ACN), the Administration of the Ports on Fluvial Danube SA Giurgiu (APDF), the Administration of the Ports on Maritime Danube SA Galati (APDM) SA and AFDJ-SA Galati Autonomous Regie.

There are a few exceptions, namely Sulina, Turnu Magurele and Zimnicea ports, which are administrated by local authorities.

Port administrations but for AFDJ-SA Galati Autonomous Regie are joint stock companies under the coordination of the Ministry of Transport and Infrastructure. Apart from their administrative function, port

administrations undertake as well a port authority function. In exercising the port authority function, port administrations have been assigned to undertake activities of national public interest namely port services, the maintenance and reparation of the transport infrastructure and of the assets in public property of the State or under their own patrimony, together with the exploitation of the navigable canals as well as security, safety and environmental port conditions.

For instance, APM-SA Constanta National Company fulfills the port authority function for Constantza, Midia, Mangalia ports and touristic port Tomis Marina, providing for its users a wide range of services such as: traffic control, pilotage services, towage, mooring/unmooring, electric power and fresh water supply, ship waste collection, fire extinction, depollution.

From competition law viewpoint, port administrations are undertakings that cover their expenditures from the tariffs and royalties charged for the use of port infrastructure and for the works and services provided by them pursuant to the provisions laid down in the government's decision on setting up port and trade national companies. The tariffs' level has to be set such as they may ensure a responsible management of the foreseen financial means and a profitable activity for the company.

Taking into consideration the essential facilities nature of a port, port companies are bound to provide third parties with free and non-discriminatory use of the naval transport infrastructure that was leased to them through concession.

The renting out of port parcels of land by port companies to tenants is by law required to take place by means of concession contracts or lease contracts. Concession contracts for renting out of port parcels of land are offered by port companies for longer term periods in case private firms undertake to future investments, so that they would be able to recover their investments costs and for not more than 5 years, in the absence of an obligation of investments undertaken by the private firms. In any situation, the lifespan of the concession contract for the renting out of port parcels of land cannot exceed the time period for which the port infrastructure was awarded by the state to the port company through concession.

According to their statutory provisions, the port companies set the level of their tariffs for all facilities and services framed within their activities with the approval of their Board of Directors that also comprises several representatives of the Ministry of Transport.

The negotiation of the contractual conditions and services' tariffs provided by the port administrations to their customers are settled between the contracting partners. Every year, port companies publish a list of the port tariffs as well as of the rebates for some cargo types/vessel types which are granted on a non-discriminatory basis to all ports users.

### **3. Choosing maritime transport as a transport alternative**

In specific cases (if commodities can be sent in containers, need transportation on long distances and fast delivery is not required), maritime transport can compete with air transport. However, if commodities are sent in small quantities, have high value and require fast delivery, transport service buyers prefer air transport, even though they must pay a price which is much higher than for maritime transport.

As regards railway and road transport, they do not usually compete with maritime transport. Distances which can be covered, as well as the volumes of commodities which can be transported with one shipment via the road or railway are definitely lower than the distances which can be covered and high volumes which can be transported on water. Whenever the distance to be covered by a commodity may be covered as well by another means of transport, maritime transport will be selected only given the much lower cost associated.

Due to the diversity and range of shipped commodities, as well as the long distances to be covered, maritime transport is highly segmented.

The strong segmentation of maritime transport depending on the particularities of the shipment (tramp shipping or liner shipping, the type of load (solid bulk, liquid bulk, container commodities or non-container commodities) and the type of ships, makes it necessary to define a multitude of relevant markets. Thus, one will define distinct relevant markets for tramp and liner shipping as well as different relevant markets for the transportation of solid bulk commodities, liquid bulk commodities, special commodities, general commodities. For example, in the sector of specialized maritime transport, separate assessments should be carried out for each of its components (i.e. maritime transport of cars, maritime transport of liquefied gas, maritime transport of foodstuff and others).

In the case of tramp shipping, the relevant market is defined for each separate category of commodities, and the geographic market is usually a global one. In the case of liner shipping services, the relevant market is defined depending on the specifics of the shipping (in containers, specialized etc.), and the relevant geographic market is usually represented by the ports connected to that line.

Within each segment, RCC will identify one or several relevant markets, in compliance with the methodology set out in the *European Commission Notice on the definition of relevant market for the purposes of Community competition law* and the *Guidelines of the Competition Council on defining the relevant market*. Also, the *EC Guidelines on enforcing art. 81 of the EC Treaty* (currently art. 101) to maritime transport services will be considered; these guidelines set out the principles followed by the Commission in order to define markets and assess cooperation agreements within maritime transport services directly affected by the amendments brought by the EC Regulation no. 1419/2006, namely liner, cabotage and tramp shipping services.

As regards the national regulations, all maritime transport services have to comply with the competition rules governed by the *Competition Law 21/1996, republished*, the only exemption is that of consortia, specific to liner shipping, similarly to the EC competition law.

#### **4. Some features of the Romanian market of transport services**

In May 2010, the RCC finalized an investigation on maritime transport services. The analysis made within the investigation mainly targeted the market on maritime transport services, but some related markets were also treated such as port handling services, ship agency services, pilotage services and towage services. The sector inquiry was started in February 2009.

The decision to open an investigation in this sector was motivated first of all by the important potential of the maritime transports in the national economy. Secondly, RCC considered the important role played by the maritime transports at community level, this mean of transport representing the main mean of achieving the EU imports and export.

The study showed that the maritime transport services market in Romania is a competitive market, mainly due to the high number of transport operators (foreign ship owners who provide bulk shipping as well as large liner shipping companies), relative to the volume of commodities dispatched at the level of the Romanian maritime ports (low concentration of the market).

The local demand for maritime transport, observing the traditional features of the demand for maritime transport, is represented by the companies from sectors such as energy, extraction (coal and ferrous and non-ferrous ore extraction and preparation and others), agriculture and forestry, processing industries (steel industry, oil and chemical industry, light industry or the food sector and others), but also by companies from the construction sector and trade.

As regards the maritime transport offer available at the level of Romanian maritime ports, this is almost fully represented by foreign ship owners and large foreign liner shipping companies. The presence of Romanian ship owners in the maritime transport offer is almost undetectable, given the reduction in the number of the Romanian flagged commercial vessels.

## **5. Findings at the level of Romanian sea ports**

Due to the peculiarities of Romanian maritime ports (transit ports, the low volume of goods, lack of established ship-owners, etc.), the shipping market is characterized by opacity and information asymmetry. A very important role in curbing this asymmetry of information is played by maritime agents, ship brokers and shipping companies, by means of which representatives of the offer and demand meet. Also, the ports administrations have not yet taken action in order to render this market more transparent, for example by publishing the trends of freights on regional markets.

Another specific issue is the dependence of the Romanian maritime ports' freights and tariffs of external factors such as freights in the region and tariff policies adopted in the major shipping companies in the world, due to lack of a competitive national commercial fleet and ultimately, of a local freights markets.

As concerns the ancillary services to naval transport such as the pilotage, the towage, the ship agency services, stevedoring and others, aspects very briefly touched upon because the focus of the sector inquiry was maritime transport, in general, the study revealed a series of possible disruptions. Thus, the main conclusion with respect to the ancillary services was that some of these activities are carried out by port administrations in monopoly conditions, while others are carried out by private companies in competitive conditions.

According to the legal framework, pilotage services required for a ship to enter and exit a port safely can be directly provided by port authorities, awarded in concession to a third party or they can be offered by private firms that are licensed by the port authority.

Again, in the case of towage, it is possible to have private firms providing services for these operations or tugs and their operators may be directly hired by the port authority.

In the case of pilotage of vessels, it was found that in the ports of Constanța, Midia and Mangalia, which are under the administration of APM, there are distinct legal regimes for the same service. There are thus areas where the pilotage service was concessioned by the Ministry of Transport to a single operator (more specifically, in Area 1 of Constanta Port and in Midia Port), but also areas where the service is performed in competition by various operators that have concluded agreements with APM (in area 2 of Constanta Port and Mangalia Port).

Apart from the group of safety services related to berthing which include pilotage, towing and tying, another important group of ancillary services to naval transport generically labeled as cargo handling was as well covered by the survey conducted by RCC during the sector inquiry. The legal regime for cargo handling services provides for specialized firms to supply these services, using equipment such as cranes and surface transport elements.

The signals received from some of the actors in these markets suggested that in specific situations, port operators holding monopoly positions for operating a specific category of commodities tie the provision of stevedoring with the purchasing of a different service such as the ship's agency.

Naturally, if the stevedoring and the ship agency services would be carried out by private companies in a competitive environment, every ship owner whose ship calls at the Port of Constanta, for example,

would be able to choose the maritime agent to represent him in the relation with the port authorities and assist his ship until leaving the port. Also, depending on the commodities to be loaded or unloaded, every ship owner would be able to choose the port operator to provide the stevedoring.

However, at the level of the stevedoring services, the fewer port operators specialized in handling certain categories of goods and the large quantities of goods (over 70% or 90%) handled by some of them may suggest the existence of dominant or even monopolistic positions in the markets of these services.

The results of this sector inquiry determined the RCC to open a new sector inquiry into the ancillary services, with a particular attention to stevedoring services and ship's agency services in order to identify and sanction alleged anticompetitive practices. Moreover, the RCC has communicated to the Ministry of Transport and Infrastructure its points of view on the aspects identified on pilotage market calling for a standardization of the legal regime in all three ports under the administration of APM.

## RUSSIAN FEDERATION

There is high level of competition between the stevedoring companies within the geographic borders of the Far East Sea Basin in the Russian Federation (except for the ports of the Kamchatka, Chukotka, Magadan and Sakhalin Regions that do not have rail and road connection with the central regions of the country), There is also a high level of competition between the stevedoring companies in ports (in-port competition) and among ports, both Russian and foreign (inter-port competition) in the European part of the Russian Federation.

At present time, 264 marine terminal operators that handle and store goods are operating in the port services market (the Northwestern Basin – 85 operators, the South Basin – 68 operators, the Far East Basin – 111 operators).

Despite the high level of competition in the port services market, not all operators are in equal competitive conditions. About 40% of marine terminal operators are still included in the Register of Natural Monopolies (port services were added to natural monopolies by the Federal law № 147 of 19.07.1995 "On natural monopolies") and, therefore, tariffs on their services are established by the state. However, other operators can independently change their tariffs in response to supply and demand changes.

Unequal competitive conditions caused the necessity to create equal competitive conditions and competition development in the port services sector. In this regard, in 2007 the FAS Russia proposed to terminate state tariffs regulation for cargo handling at sea and river ports, except for the Far North areas ports that do not have rail and road connection with the central regions of the country.

Furthermore, in order to justify this position, the FAS Russia pointed at the following aspects that can ultimately lead to the restriction of competition in the port services market:

- regulation discourages private investments in constructing of new ports and upgrading of existing ones, as investors (banks) can not calculate the return on capital investments, that depends on size of the tariff set by a regulating authority. If tariffs are regulated, there is no guarantee that the obtained profit can cover capital investments.
- regulation of tariffs do not allow stevedoring companies to buy up-to-date equipment that will be quickly paid off, at the expense of short-term increase of tariffs at favorable market conditions.
- cost-based approach for tariffs regulation stimulates the natural monopoly subject to increase costs with as the profit increases proportionately under the same profitability standard.
- regulation of tariffs do not allow large stevedoring companies processing strategic cargo traffic in Russia to respond more flexibly to changes in the demand and supply in the market, that as a result leads to the defeat in the struggle with foreign stevedores.

As a result, at present time, two decisions to change state regulation were made (non-application of price regulation) with regard to 25 subjects of natural monopolies in the river ports operating in the European part of the Russian Federation except for the Far North areas and similar areas.



In addition, basing on the FAS Russia proposal, an experiment in temporary termination of direct price regulation of cargo loading, unloading and storage services in the Port of "St. Petersburg Large Port" is carrying out. The Port is not yet removed from the Register of Natural Monopolies in transportation.

The pilot project on non-application of state price regulation is applied to 12 subjects of natural monopolies operating in the Port that provide cargo loading, unloading and storage services.

Monitoring of the situation is carried out based on the following quarterly submitted following indicators of regulated and unregulated activities: tariffs, work load, income, costs, profitability, total cost of services, share of transport services in the cargo value (two latter indicators are chosen as criteria for efficiency of the project).

If this pilot project is successful, the termination of state regulation of tariffs for companies that provide loading, unloading and storage of goods is likely to be held not only in the "St.Petersburg Large Port", but also in other ports of the Russian Federation, except for ports that do not have rail and road connection with central regions of the country.

It should be noted that due to upcoming deregulation of economic entities tariffs in ports, the importance of certain draft Resolutions of the Government of the Russian Federation increases, (these draft Resolutions were developed by the FAS Russia and are currently submitted for approval of the Government of the Russian Federation):

- "On the procedure of non-discriminatory access to services of natural monopolies in ports and transport terminals"; and
- "On the procedure of non-discriminatory access to services of natural monopolies on the use of inland waterways infrastructure".

In addition, the Order "On approval of forms, terms and periodicity of information disclosure by natural monopolies subjects, operating in the services markets in transport terminals, ports and services for inland waterways infrastructure use, as well as the rules of filling these forms" is elaborated. According to the Order, subjects of natural monopolies shall provide all the information about their ports activities to the FAS Russia.

Besides industry deregulation, the FAS Russia proposes creation of municipal and private berths as another tool for competition development in the port services market.

In 2008, during agreement of the draft Federal Law "On sea ports in the Russian Federation", the FAS Russia provided its proposals on the reasonability of private berths existence in Russia.

There are few private berths in the country and the municipal berths do not even exist. This fact is explained by the ban on privatization, disposal of berths and docks to private ownership or transferring them to municipal ownership as well as the ban on disposal of land as a part of land aimed at ensuring marine and river ports activity or allotted for their development.

The transfer of federal berths even to municipal ownership could dramatically increase the interport competition, which would provide the minimum tariffs for the PRR and the attractiveness of other services usually provided at the ports, but would also contribute to the development of transport hub and associated sectors of the economy.

Despite the extensive measures taken by government agencies, to improve competition in port services, there are cases of restriction of competition in some ports.

For example, in 2010-2011, the FAS Russia initiated a number of cases of violation of antimonopoly law against operators of the port stevedoring companies.



## **CHINESE TAIPEI**

### **1. Introduction to Chinese Taipei Ports**

In preparing the present submission, the Fair Trade Commission (hereinafter “the Commission”) consulted with the competent authority, the Ministry of Transportation and Communications (hereinafter “the MOTC”), which is responsible for the development and administration of transportation and communications. This paper will illustrate the issues related to the competitive constraints on ports, factors facilitating the market power at ports, and remedies for addressing competition issues at port, as well as a case example of how the Commission deals with issues related to concerted actions engaged by launch operators.

Chinese Taipei currently operates seven international and four domestic commercial ports. The international ports are Keelung, Taichung, Kaohsiung, Hualien, Taipei, Su-ao, and Anping, and the domestic ports are Budai, Penghu, Kinmen and Matsu.

In light of port operations and management reform trends in advanced countries, the MOTC undertook port reform program in accordance with the principle of separation of port management and port operations. The establishment of Maritime and Port Bureau is scheduled for 2012 to oversee navigation and port management, along with the Port Corporation, Ltd. to administer related planning and operation of the ports. The Corporation will take an integrated approach to planning and operations with consideration of each port’s distinctive characteristics and needs. Adopting a port cluster approach, it will undertake overall planning accommodating regional development to maximize resources and facilitate the development of free trade zones, and generate maximum synergy from co-ordination and integration.

In 2010 the amount of cargo handled by Chinese Taipei’s international ports was 655.4 million revenue tons, and container handled totaled 12.74 million TEU, an increase of 8.2 and 8.77 percent compared with the record in 2009, respectively. With container handled of 9.18 million TEU and transit container volume of 46.67 percent, Kaohsiung port was the world’s twelfth-largest container port in year 2010.

### **2. Competitive Constraints on Ports**

#### **2.1 *Product market perspective***

As an island isolated from other land masses, 99.5 percent of importing and exporting in Chinese Taipei is via marine transport. Apart from small quantities of valuable, small items and timeliness goods that must be delivered quickly via air cargo, containers are delivered by inland transport north to south for comparative time and cost savings over sea transit shipments. The different mode of transport among marine, air, and inland transport sectors has a low degree of competition and has few substitutions.

#### **2.2 *Geographic market perspective***

A port’s geographical location is an inherent condition. A well situated port will become a distribution center for the surrounding region, helping boost competitiveness. Taking the examples of major worldwide ports, Chinese Taipei’s Port of Kaohsiung is situated at the junction of Northeast and Southeast Asian

shipping networks, while Singapore and Korea's Busan are hubs for Southeast and Northeast Asia, respectively. Geographic location has a direct impact on a port's competitiveness.

The industry level in port hinterlands has a significant impact on port competitiveness and is a key factor supporting port volume and operational performance. Industry clustering can bring about exponential growth of cargo throughput. For instance, in co-ordination with nearby industry the Kaohsiung and Taichung ports have been developed into centers for energy, heavy industry, and petrochemical raw material imports, and the storage and transfer of petroleum products.

Chinese Taipei's international commercial ports differ in such aspects as geographical location, shipping route arrangement, terminal operation type and hinterland industries. Each port operates and plans its development in accordance with the status granted by the Cabinet. As bulk and general cargo operations are administered at ports in close proximity to areas of demand or points of origin, competition between ports is low; however, a certain degree of competition exists among domestic port groups for container operations. Following the future establishment of the Port Corporation, Ltd. an integrated approach to planning and development from the perspective of a single company will be adopted to prevent redundant allocation of resources.

In addition, a high degree of competition exists between ports within close proximity to each other in a given region with similar developmental conditions. Taking the example of Kaohsiung port, with the successive completion and operation of deep water wharfs in China, Cai Mep in Vietnam, and Laem Chabang in Thailand, some mother ships bound for Europe and the Americas now check straight through, bypassing transshipment at Kaohsiung Port. This has already had an impact on the Kaohsiung port's transit container volume. A port's geographical market can expand to other areas along with number and frequency of rotations deployed by carriers. With numerous carriers operating at a port, the greater density of the rotations the more opportunities shippers could link to other countries and regions, raising willingness to use port services and increasing competitiveness.

### **2.3 Other Perspectives**

In addition to the competition constraints on ports as above-mentioned, the level of customer overlap, regulated measures by the port's host country government, and transnational terminal alliances all influence port competition.

Interference or restrictions measures placed by the governments of certain emerging countries can influence port development and distort port competition. For instance, extensive investment of state resources to prop up a specific port while restricting development of other ports; or restrictions placed on a certain type of investors, such as setting ratios for foreign operators or proportion of investment to protect local corporations, can result in unfair competition. Consequently, regulated measures placed by the host country government can damage competition.

Conversely, port competitiveness can be amplified through alliances among transnational terminal operators. Currently numerous port operation groups, such as Hutchison Port Holdings (HPH), the Port of Singapore Authority (PSA), and Dubai Ports World (DP World), have expanded hinterland and customer service coverage beyond national borders through cross-investment and establishment of corporate alliances. The strength of operators can thus have a substantial impact on a portion of the shipping volume and competitiveness in the port market.

## **3. Factors Facilitating Market Power at Ports**

International port market power: China and Southeast Asian countries are currently aggressively investing in the development of new ports or making improvements to facilities at existing ports (such as

adding deepwater docks and using highly efficient loading and unloading equipment). Due to the heavy hinterland freight movement some major international shipping companies call at these ports, adversely impacting the container volume of Kaohsiung Port's Europe-bound routes. This intense competition among East Asian ports restricts the market power of affected ports. However, a single operator exercising decision-making power over the operation of different ports could raise such an operator's market power.

Market power among competing terminals in a port: In order to prevent the market power of port operators from hindering fair competition, an appropriate inter-port and intra-port competitive environment, comprehensive public facilities in ports, and timely government intervention can facilitate reasonable rates and reduce monopolies or oligopolies. Further, competitive mechanisms can reduce shippers' costs, limit the market power of individual businesses, and potentially increase port competitiveness, while effectively lessening unfair competition resulting from port operators' market power.

Taking the example of Chinese Taipei's international commercial ports, eight shipping lines (three of domestic and five of foreign registry) currently lease dedicated container terminals at Kaohsiung Port. In order to raise the utilization rate of container terminals, shipping lines aggressively work to solicit containers to load and unload at their own terminals to maximize economy of scale. At Keelung Port, competition exists between the Harbor Bureau and private lessees, both of which administer container loading and unloading operations.

In addition, apart from seeking comprehensive internal infrastructure, port functions such as transportation connection and related information, clearance and trade systems should feature comprehensive measures to accommodate port development for maximum synergy. Finally, while opening the market to free competition is a good way to raise efficiency, simply allowing the market mechanism to operate with abandon without government supervision is liable to result in trust situations due to the scarcity of port resources. For example, government intervention in transnational terminal operator alliances and concerted action among launch operators can help maintain market order and preserve sufficient competition.

#### **4. Remedies for Addressing Competition Issues at Port**

Government authorization and control over ports, transparent port operator solicitation information, inter-port divestiture, allowing independent ownership of individual docks/piers/terminals, and untying of services can strengthen intra-port competition and improve the port's capacity to provide services.

Improving inter-port competition can be achieved through such methods as providing a transparent and open market environment, and establishing protocols governing co-operation between international ports. Providing an international information exchange platform for the sharing of information and reduction of information asymmetry among ports is advantageous to market competition. Competition among domestic ports can be regulated as necessary by a country's government. As for competition between international ports, a promotion exchange of inter-port may reduce the negative impact on competition. With this in mind, standard norms governing co-operation between international ports should be established, to prevent inappropriate alliances from causing injustice.

#### **5. A Concerted Action Case**

The Commission's experience in handling cases concerning ports has largely consisted of concerted action engaged by launch operators. Taking an example for illustration. Launch operators in Kaohsiung Port met together to reach a meeting of minds over joint operation of a rotating launch schedule for transporting harbor pilots and joint sharing of revenues. This conduct restricted the services offered,

affected the market function in Kaohsiung Port outer-port launch transport service market, and therefore violated Article 14 of the Fair Trade Act prohibiting concerted actions.

Seven operators, including Kaohsiung Port Logistical Services Co., Ltd. (KHS), have acquired the permission to operate outer-port launch services. Enterprises involved in this concerted action case accounted for a total of 100 percent market share in Kaohsiung Port outer-port launch transport service market.

The Kaohsiung Harbor Bureau has not formulated related regulations governing outer-port launch rates, nor does it set launch rate standard any longer. Currently, operators continue to charge for their services with reference to the Transportation Launch Rate Table set in 2002 upon Kaohsiung Harbor Bureau consultation with relevant trade associations, shippers and operators. Nevertheless, such rate standards merely serve as reference, leaving room for price competition between the operators and shipping businesses in the market.

Outer-port launch transport operators could either adopt various price or non-price competition strategies based on situations in actual market supply and demand to attract trading counterparts, or seek collaborative partners. However, in view of the high refund rate to attract customers and ruthless price war practiced by operators, prior to commencing operation in 2009 KHS undertook to reduce price competition among operators, convening meetings among launch operators to discuss joint dispatch of launches at Kaohsiung Port in order to stabilize the market through collective operation, establish a consolidated dispatch center to facilitate mutual oversight, and prevent operators from soliciting passengers on their own. Further, revenue apportionment was jointly established and operators exceeding a set proportion of revenues were expected to refrain from competing for customers with other operators.

The KHS and six other operators met together to discuss and jointly determine a rotating transportation schedule and joint revenue distribution, according to which operators would transport harbor pilots and divide revenues as apportioned in a revenue sharing arrangement. This compelled operators autonomously soliciting passengers to allocate their revenues to other operators, while operators less aggressive about soliciting customers received profits from their competitors. Simply by running shifts on a rotating basis launch operators would be less willing to make efforts to attract customers through favorable price or non-price conditions and customers' freedom to determine with whom to transact would be diminished.

The Commission made a decision that such a concerted action eliminated the willingness of the seven operators to attract customers through various competitive strategies, and that given the lack of other competitors in the market, the mechanism for adjusting market supply and demand was prevented from working. Accordingly, the concerted action sufficiently affected the supply and demand functions of Kaohsiung Port outer-port launch transport service market and therefore violated Article 14 of the Fair Trade Act. Pursuant to the Article 41 of the same Act, the Commission issued a cease-and-desist order to seven operators and imposed administrative fines amounting to a total of NT\$ 5 million.

## COMPETITION IN PORTS AND PORT SERVICES

*Contribution by Mr. Thierry Vanelslander*

### 1. Introduction<sup>1</sup>

Within the globalised economy, the port and maritime industry is typically a highly competitive sector. This is due to the many different players, the large volumes for transportation, and the long distances to be covered because of the considerable spatial separation of production and consumption. The nature of this competitive playing field has, moreover, changed quite substantially in recent years. Whereas in the past shipping companies and ports primarily vied among each other, competition is now increasingly unfolding between entire logistics chains. The success of market players no longer depends entirely on their own competitive strength, but rather on that of the chain to which they belong.

It is within this new competitive context that we should see the increasingly concerted efforts by those market players to tighten their grip on the maritime logistics chain, be it horizontally (e.g. through alliances between shipping companies or port authorities) or vertically (e.g. through partial or complete takeovers of terminal operating companies (TOCs) by shipping companies).

In general, competition is good for society resulting in lower prices, more output and better services. However, in the presence of economies of scale and scope, production by a single firm will lead to lower average costs than production by many, smaller companies. This natural monopoly can result in an abuse of market power because the monopolist can generate additional profits by raising the price and reducing the output. To avoid this abuse of market power, a regulator can intervene by designing mechanisms which will prevent the monopolist to take advantage of his dominance.

Regulation makes sense in the case of market failure, when there is a natural monopoly, and when it can improve sector performance. This implies that the consumer surplus will go up, production will be more cost-efficient, the range of services offered will be wider, prices will reflect the equilibrium between supply and demand, quality will improve, the rate of innovation will go up, etc. As a consequence, it might become easier to attract capital to the sector and boost investments.

This paper focuses specifically on the horizontal integration processes involving players in the port and maritime industry. It first defines the current port context. Next, it considers the different forms of port competition, and identifies the economic forces that drive such movements by the principal actors (shipping companies, TOCs, port authorities, logistic service providers). Subsequently, attention is directed at port organisational forms and how they may generate competition concerns. Section 5 summarizes the recent picture of integration movements, for the purpose of drawing up a typology. On this basis, an indication is provided in the next section of possible future evolutions insofar as further horizontal integration is concerned. Finally, this contribution considers how public administrations and port authorities might respond effectively to such integration processes.

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<sup>1</sup> This paper was prepared by Hilde Meersman, Eddy Van de Voorde and Thierry Vanelslander from the Department of Transport and Regional Economics of the University of Antwerp.



## 2. The port setting

To understand the nature of competition in the port sector, it is necessary to start with a correct positioning of a port. This will help to delimit the different types of port activities and their relevant markets.

The new transportation service that is offered to customers in the port and maritime industry is referred to generically as the “maritime logistics chain” (Meersman, Van de Voorde and Vanelslander, 2009). As this name suggests, competition is no longer unfolding at the level of individual ports or shipowners but rather at that of logistics chains connecting origins and destinations.

Successful maritime logistics chains are like well-oiled machines in which every nut and bolt is perfectly attuned. Consider the case of seaports. Modern seaports are crucially important nodes in international supply chains and their associated networks. The success of the logistics chain as a whole depends on the competitive strength of the seaports it encompasses, while the success of seaports hinges crucially on the competitive strength of the logistics chains running through them. A similar reasoning applies to the other maritime transport players, including shipowners, port undertakings and hinterland transport providers. Clearly, then, the competitive strength of a port or any other maritime player does not depend exclusively on their own infrastructure and organisation; it is also affected by a variety of other market forces.

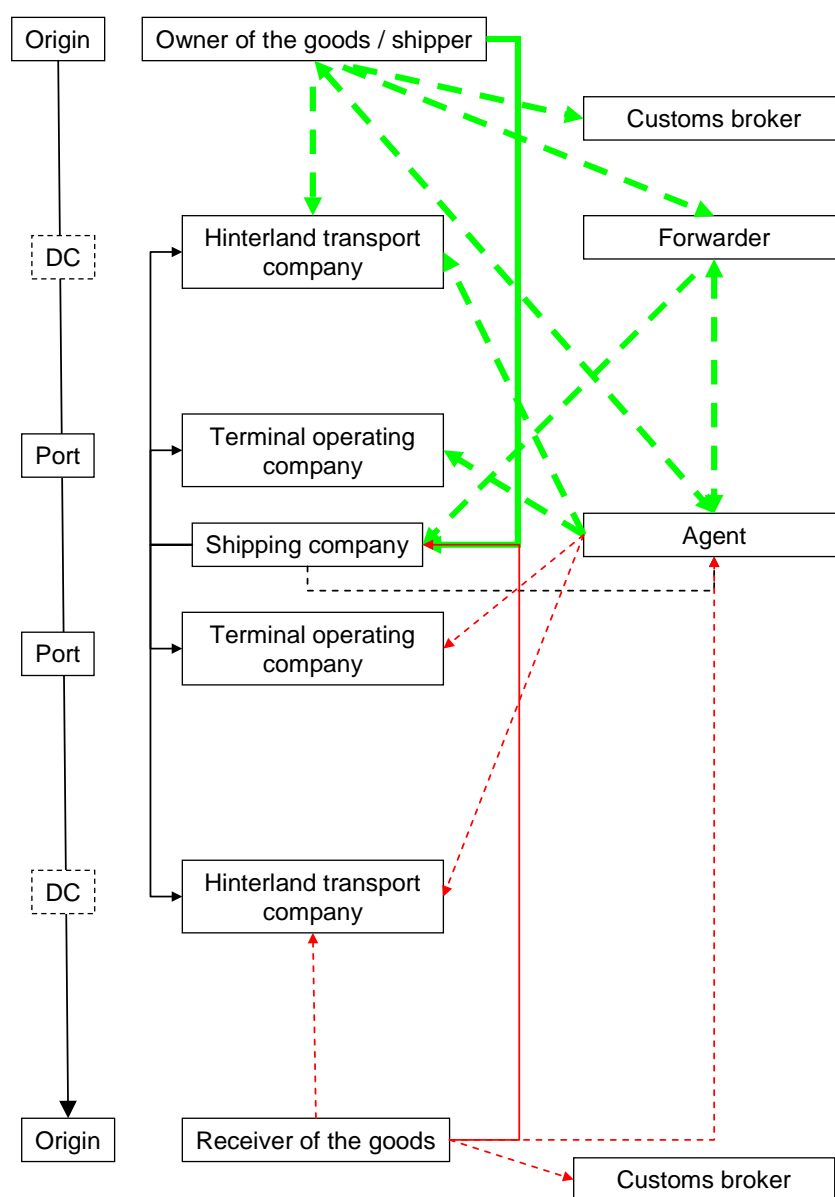
Roughly speaking, a maritime logistics chain consists of three large sections: the purely maritime activities, goods handling in the port, and hinterland transport services. The formation of chains depends on three important elements: the maritime connections, the goods-handling operations (usually involving large volumes), and the distribution towards the hinterland. Figure 1 provides a schematic overview of such a logistics chain. Depending on the goods category concerned and the type of chain management applied, this structure may become more complex and possibly involve different ports of call.

Seaports, as an integral part of the maritime supply chain, are themselves made up of various links. These are often managed and operated by different actors, but may also display a degree of integration.<sup>2</sup> A port encompasses more than the port authority as the governing body, the shipping companies as its principal customer, and TOCs as the main suppliers of throughput services. There are numerous other, smaller players involved in port activities, as is shown in figure 2. Modern seaports are important nodes in the logistics chain and therefore the focus has shifted to so-called value-added activities, an indication that the perception of seaports is becoming more and more complex. This has led to the involvement of a large amount of actors which interact in a variety of ways and for whom the coordination of their activities is crucial to guarantee a smooth and efficient flow of goods and documents.

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<sup>2</sup> Hence any aggregate-level decision within the port structure triggers a chain reaction. This can occasion bottlenecks at lower levels that are not immediately visible.

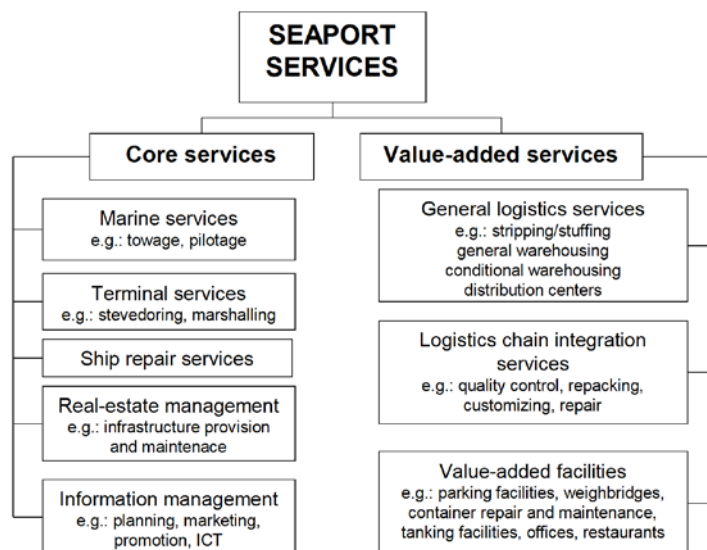
Figure 1: Typical structure of a maritime logistics chain



Source: Meersman, Van de Voorde and Vanelander, 2010

Yet, hitherto, there has been a lack of insight into the relative importance, the negotiating strength and the market power of each of those actors. What is required is a genuine understanding of the mutual relationships, the financial participations, and, as the case may be, forms of managerial control.

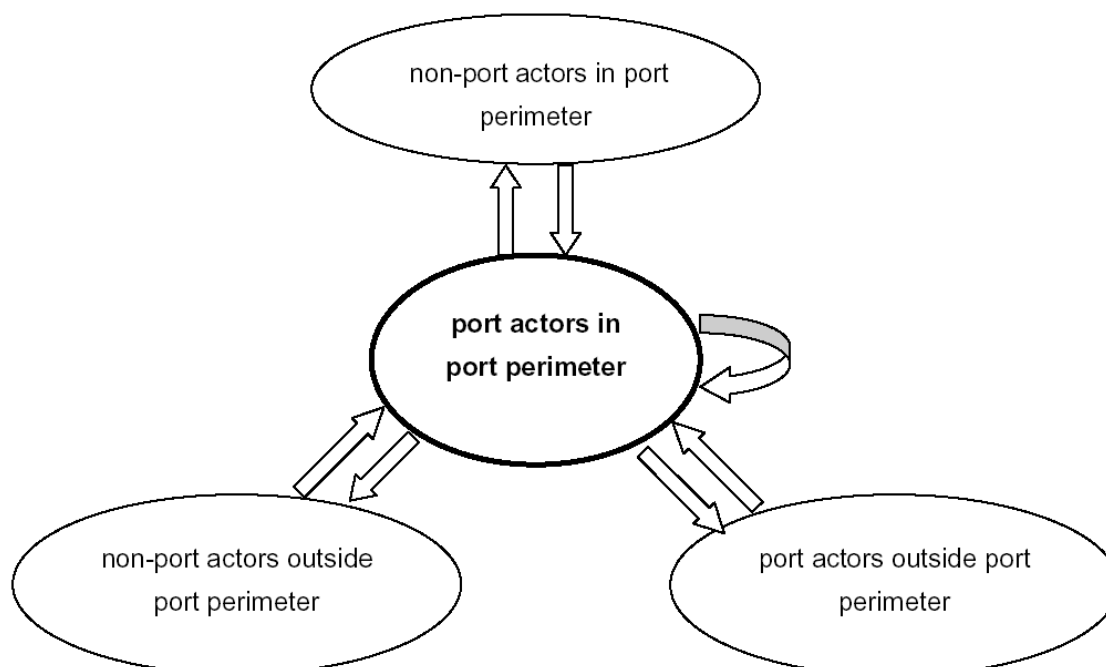
Figure 2: Principal roles of seaports according to the World Bank



Source: own representation on the basis of World Bank, 2001

A study by Coppens *et al.* (2007) considers these issues in greater depth. It takes a bottom-up approach, and offers a sector analysis based on a regional input-output table linked to microeconomic data. In this manner, the principal clients and suppliers of all port players are effectively identified (cf. figure 3).

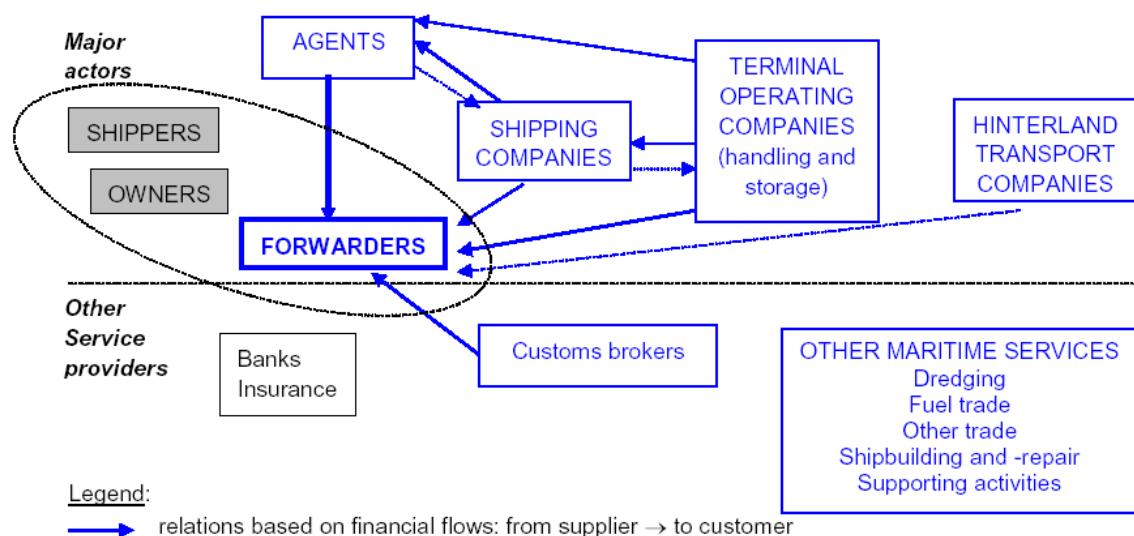
Figure 3: Relationships between port actors



Source: Coppens *et al.*, 2007

The empirical research by Coppens *et al.* (2007) focuses on the port of Antwerp. By way of illustration, Figure 4 provides an overview of the financial flows between the various players. In the case of Antwerp, the significance and, even more so, the sensitivity of the forwarders is very apparent: many of the financial flows are generated through mediation of this activity. Consolidation results in substantial cargo flows via Antwerp. Shipping companies base their decisions regarding shipping routes and schedules on the volume of cargo involved. Obviously, the role of a number of other port players should not be underestimated either.<sup>3</sup>

**Figure 4: Interactions between port-related players and their size**



Source: Coppens *et al.*, 2007

This kind of disaggregated analysis can help explain how the largest players (i.e. shipping companies, TOCs...) will, in the longer term, try to increase their control over logistics chain, e.g. through acquisitions of smaller but strategically important players. There have already been examples of agents who became takeover targets, and terminal operators, too, may be expected to undergo or actively seek further integration with, for example, shipping companies. However, this integration is likely to be more flexible than it has been in the past: horizontal integration, i.e. integration between companies belonging to the same industry, will be achieved through alliances rather than through mergers, while vertical integration, i.e. forms of closer cooperation between parties across the logistics chain, will tend to consist in joint ventures and dedicated handling.<sup>4</sup> Section 4 will deal with this in greater detail.

### 3. Port competition

Traditionally, port competition is regarded as competition between and within ports. Verhoeff (1981) considers four levels which result in different potential markets for different types of port services:

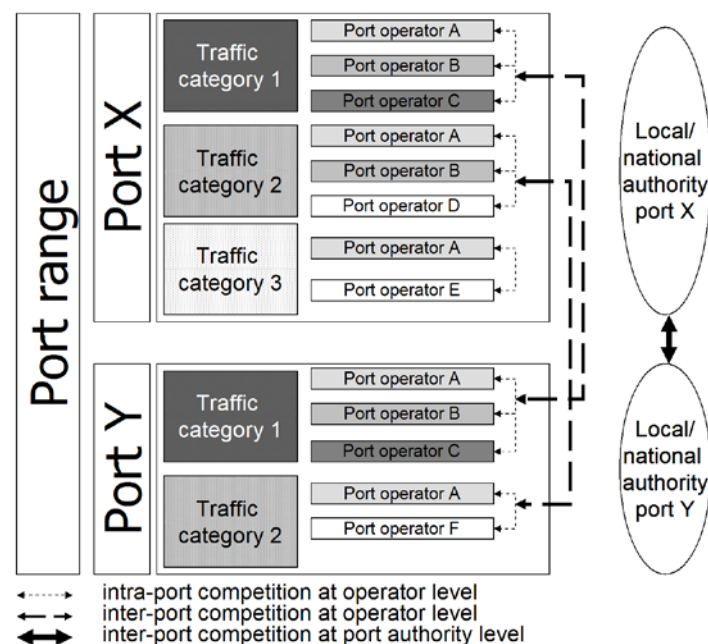
<sup>3</sup> This holds even more so for other ports, as Antwerp is typically a forwarder-driven ports. Coppens *et al.* (2007) compares the situation in Antwerp with that in a number of other ports, resulting in a typology that distinguishes between forwarder-driven, agent-driven and transshipment-driven ports.

<sup>4</sup> One should not overlook the importance of non-port groups or even non-transport groups who acquire control of activities in seaports, with a primary focus on short-term financial gain rather than long-term sustainability of those activities. In this sense, activities are incorporated selectively into the portfolio of the financial groups concerned, on the basis of the risks involved, the potential for profit-making, and the possibility of cashing in on value added.

- competition between port undertakings focuses on activities of specific service providers in a port such as towing, stevedoring, warehousing, etc.,
- competition between ports for traffic in a certain range,
- competition between port clusters which are groups of ports in each other's vicinity with common geographical characteristics, and
- competition between port ranges which group ports located along the same coastline or with a large common hinterland.

Van de Voorde & Winkelmanns (2002) consider three levels or types of port competition which are illustrated in Figure 5. The first one is the intra-port competition at operator level between operators within a given port with regard to a specific traffic category. The inter-port competition at operator level occurs between operators from different ports mainly within the same range and serving more or less the same hinterland. And finally there is the inter-port competition at port authority level focusing on the utility mission of seaports. There is an additional, higher level of port competition, which is the one of the logistics chains. Ports will try to become a node in the most successful logistics chains and take advantage of the cost effectiveness of this chain to increase their market share and improve their economic impact. It is especially at this level that modern port competition plays.

**Figure 5: Different levels of port competition within a port range**



Source: based on Van de Voorde, E. and W. Winkelmanns, 2002, p.12

A number of publications quantify the number of container-handling players in specific geographic areas. Some reports group ports into sub-continent, most of which include several ranges. This does not necessarily reflect the way the market actually functions. Take as an example the Mediterranean sub-continent and focus on the Western-Mediterranean range. It is clear that this range does not cover the

correct players for container traffic which is bound for Eastern Spain through domestic delivery, since the Northern-African terminals and also the non-Spanish terminals in Southern-European do not fit there. Neither will the range cover the correct players for traffic which is bound for Southern Europe through regional delivery, since the Northern-African terminals do not fit there. Moreover, terminals in the Atlantic and Hamburg-Le Havre range are most probably competitors which are often not taken into account. For transshipment traffic, the Western-Mediterranean range will most probably not be sufficiently large to cover all competing terminals: also terminals from other Mediterranean ranges will compete for this type of traffic.

The multi-product multi-actor character of the modern ports moreover requires a dynamic view on port competition. This multi-product character can be a consequence of demand as well as supply characteristics.

From the demand side, it can be seen that cargo either has outbound, inbound or transshipment status. Each of these status types represents a different product. A specific terminal may be subject to high willingness-to-pay for inbound containers, while demand for outbound containers is low, or vice versa. Cargo-handling production functions may equally differ among inbound, outbound and transshipment cargo, depending partly on the characteristics of terminal operations.

There are however more container-handling products to be distinguished among, based on characteristics summarized in table 1 for containers. These characteristics can apply to outbound, inbound as well as transshipment containers.

From the supply side, it can be seen that different operating conditions in time can lead to different products constrained in time. Special operating conditions can for instance consist of different wages for night work, holiday work, etc.

At a terminal, several products can be processed sequentially, even under equal operating conditions. This implies that a terminal can be a multi-product environment. Different products may require different terminal settings, elements of which in turn change at different moments in time.

But several products can also be processed simultaneously. At one berth at a terminal for instance, a crane or other equipment can handle one type of product at a certain point in time, while, at a separate berth at the same terminal, a separate crane handles a different type of product. Depending on terminal configuration and work organization, common superstructure may be used for the two berths simultaneously. At the same ship, two cranes can process containers with different product status. Again, common superstructure may simultaneously be used. Also at the same ship, one crane may apply double-cycling (also called back-loading): unloading a container in one cycle and use the reverse cycle, which would be unproductive under single-cycling, for loading a container<sup>5</sup>. Finally, twin spreaders allow to process containers of different product types at the same time. In each of the previous cases, joint production occurs, with the possibility of economies of scope. If at a terminal other types of cargo than containers are handled simultaneously with containers, involving use of joint inputs, there also is joint production, with possibly economies of scope. Normally, no direct interference with other than cargo-handling products occurs.

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<sup>5</sup> Single-cycling stowage strategies are these: first unload all containers to be unloaded, and then load, or unload from some bays, while loading to others, with separate cranes or other equipment.

**Table 1: Container characteristics delineating different container-handling products**

<b>Container Characteristic</b>	<b>Typology</b>
Container destination	Containers with different destinations may be subject to different demand conditions. A distinction in impact can be made for instance between transshipment, intra-continental and intercontinental container flows.
Container dimension	Twenty-foot equivalent unit containers (TEUs) impose handling requirements but have willingness-to-pay that are both different from those imposed by forty-foot equivalent unit containers (FEUs). High cube containers have even different dimensions <sup>6</sup> , and are gaining importance in total traffic. Half-height containers <sup>7</sup> are less used: they typically contain heavy loads.
Container security	Secure containers can bring down terminal security expenses.
Container state	Damaged containers require different (un-)loading processes than containers in normal shape.
Cargo nature	Examples of special requirements and treatment are climatisation, refrigeration, cooling <sup>8</sup> , heating. Furthermore, there are cargoes that need to be ventilated or vented, and also dangerous or fragile cargo. Handling requirements will normally differ in each of these cases, and willingness-to-pay may alter too.
Cargo weight	Containers may be empty, which will have an impact on their associated willingness-to-pay. If containers are loaded, their payload may differ, impacting mainly on handling productivity.
Vessel characteristics	Vessel type will limit the techniques available for (un-)loading a vessel. One can distinguish among the lift-on/lift-off (lo/lo), roll-on/roll-off (ro/ro) and stowage/roll-on/roll-off (sto/ro) techniques <sup>9</sup> .
Vessel size	Container vessels are classified as first to fifth-generation ships according to their size.
Hinterland transport modes	Containers may be delivered to or received from the hinterland via either road, rail or waterways. The specific mode used for a specific container will impose different requirement on the intermodal sea-land exchange.
Handling / quality requests	Requests from shipowners and / or shippers involve handling speed, FCL-LCL <sup>10</sup> or reverse status change, container orientation, loading specifications concerning location in the ship, and partial self-handling.

An issue of particular interest is compatibility of container-handling products. It is well known that not all vessel types are compatible with all sea ports: the largest vessels are only able to enter a limited number of ports whose draught is large enough. Conversely, not all terminal infrastructure and

<sup>6</sup> High cube containers measure 20' x 8' x 9.5' or 40' x 8' x 8.5', whereas standard containers measure 20' x 8' x 8.5' (TEU) or 40' x 8' x 8.5' (FEU)

<sup>7</sup> Half-height containers measure 20' x 8' x 4.25' or 20' x 8' x 4.30'

<sup>8</sup> Cooling is keeping temperature low but not under -4° Celsius. The term 'refrigeration' is used where temperature goes under -4° Celsius.

<sup>9</sup> Under lo/lo, containers are lifted on and off the vessel vertically. In case of ro/ro, the containers go on the vessel horizontally. Sto/ro finally is a combination of both: containers are driven on or off the vessel in some way or another, and on the vessel itself they are lifted on or off through some kind of crane.

<sup>10</sup> FCL = Full Container Load, LCL = Less than Container Load

superstructure settings allow handling all types of vessels. Both compatibility problems derive from the fact that container-handling is embedded in a network setting. The first problem determines market power of the container-handling terminal, the second determines supply options to be chosen. Ship standardization leads to standardization on the container-handling operations side, and also determines the number of players within a certain market. Standardization of handling operations itself enables the container-handling terminal to control the number of competitors.

An interesting twist is the distinction between terminals and operators. Once the condition of several terminals competing in the same product market is fulfilled, it is of particular importance to know whether the terminals are operated by different companies or not. If the companies having decision power are the same, competition will be of a totally different nature compared to when several companies own terminals. In the former case, there will normally be a tendency to co-ordinate activities over the terminals one owns and to modify the terminal's activity goal according to company goals, for instance in order to obtain overall profit maximization. A further interesting twist is the multi-market or even global presence of many container-handling companies. Global presence may generate the tendency to co-ordinate activities over companies, but not so in container handling. Both issues get further attention later in this thesis.

#### **4. Port organisation and regulation**

The market power of port authorities has changed dramatically over the last few decades. Ports are important nodes in supply chains, but their role is determined rather by the big shipping companies and the powerful terminal operators that are active in it, than by the port authorities that govern them.

Moreover, over the past decades, evolutions in port privatisation had as major target to stimulate competition and improve efficiency at the different levels. All ports have, in the course of time, undergone a profound evolution, physically and in terms of organisation.

These changes have come in response to new needs and new demands from customers, i.e. shipping companies and terminal operators. But also as a consequence of a more general privatisation and deregulation wave. From the late 1980s on there was a wave of port reforms towards a larger involvement of the private sector in the financing and management of ports and port operations. Suykens and Van de Voorde (1998, p. 254) summarise a number of socioeconomic and technological pressures which induced governments to introduce organisational change to seaports. Society in general, and therefore also transportation as a derived economic activity, has been tending towards less public involvement in operational matters. This trend was strengthened by, for example, European transport policy, which aimed at eliminating state aid that distorts competition, including in the domain of transportation. Technological changes partly imposed by the rise of a global economy, forced container-handling activities to increase productivity in order to remain competitive.

Specific reasons for a shift away from predominant public involvement in container-handling operations are that public port operators were usually barely cost-effective, that they relied on old technologies, responded hardly at all to customer requirements, provided only limited services, offered limited capacity and exhibited little labour discipline (Asian Development Bank, 2000). The ultimate goal of this deregulation wave was to stimulate competition in order to improve the productivity and efficiency in the port sector.

In a survey of empirical work on efficiency measurement in the port industry Gonzalez and Trujillo (2007, p. 28) come to the conclusion that



*“...there is no agreement on whether shifting from a public to a private property system improves efficiency... However, the evidence shows that changes in regulation, introduced by port reforms, have had positive effects on all activities and countries analyzed.”*

The involvement of national or regional governments in the port sector has a long tradition. More recently, in 2004 the European Commission launched a White Paper on Services of General Interest COM(2004) and declared its intention to examine European Union legislation in order to ensure the transparent award of service concessions. Ensuing, a consultation on the procurement aspects of public private partnerships (PPP) was launched. Also in 2004, the European Commission published a Green Paper on Public Private Partnerships COM(2004). Equally, the Commission launched a debate on the desirability of adapting the Community rules on public procurement and concessions, so as to accommodate the development of public-private partnerships (PPPs). In its port policy, the European Commission started introducing its striving for more private involvement in the port sector through its 1997 Green Paper on seaports and maritime infrastructure. The main conclusion of the paper was that “a regulatory framework should be developed at Community level aiming at a more systematic liberalisation of the port services market in the main ports with international traffic. The aim of this framework would be to establish a level playing field between and within Community ports while ensuring compliance with port and maritime safety standards.”

In 2001, the European Commission summarized the results of a debate on its 1997 Green paper, as follows:

- - Seaports are to be better integrated into the Trans-European Transport Network
- - A systematic approach is needed to regulate access to the market of port services
- - Public financing of sea ports and port infrastructures

This resulted in the same year in a proposal for a directive on Reinforcing Quality Service in Sea Ports: A Key for European Transport, the so-called first Port Package. Key intentions were to create a level playing field as to competition between ports, to clearly define and apply state aid rules, and to set up a transparency directive on market access rules and financing. This first attempt was rejected by the European Parliament, which proves that resistance to far-reaching liberalisation is heavy.

In 2004, the European Commission undertook a second attempt to liberalisation, focusing this time on market access to port services. This second Port Package proposed to define the conditions under which access to the market could be limited, and opened the door for self-handling to take place. Again, the proposal was rejected. The main criticisms to both proposals were that they focused too much on a one-size-fits-all approach, they only dealt with intra-port competition, the role they left for port authorities was limited and rather bureaucratic, and they did not offer enough legal certainty.

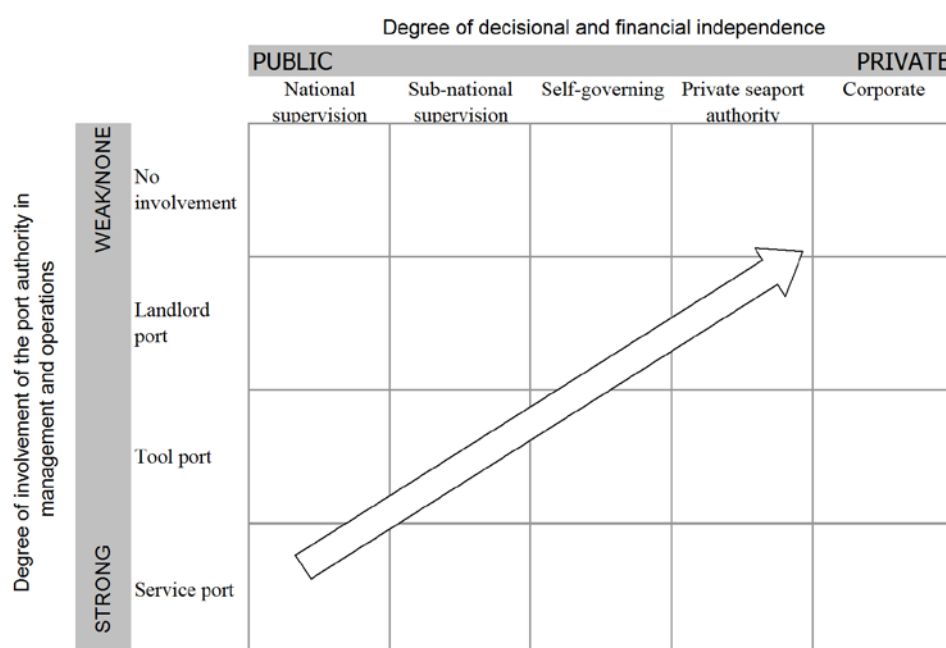
Regulation has always been justified by strategic, social and/or economic interests. Strategically countries are eager to control their gateways to the rest of the world. Historically, ports played a crucial role in the defence, safety and development of a region. They were indispensable for the conquest and exploration of new regions and were links to large trading areas. Even today, ports are crucial for the development of a region as is illustrated clearly by the situation of the landlocked developing countries. Their lack of territorial access to the sea and high transit costs continue to impose serious constraints on their overall socio-economic development.

From an economic point of view, port regulation was mainly justified by the argument that the port industry had the characteristics of a natural monopoly with large sunk infrastructure costs and economies

of scale (Pilsbury *et al.*, 2010). However, following the evolutions in other utility industries, the possibility of unbundling port services increases competition in the port industry and changes the role of the regulator.

Partly as a result of the above type of regulation, and partly because of market developments, different port organisational forms can be distinguished among. The main dimensions for distinguishing between port organisational types are the degree of decisional and financial independence on the one hand and the degree of involvement of the port authority in the commercial management and day-to-day operations (Op de Beeck, 1999, pp. 35–48; Bichou and Gray, 2005). Decisional and financial independence of the seaport authority institution are a function of the degree of public involvement, which corresponds to the institutional setting in which the port is embedded. Op de Beeck (1999, pp. 11–23 and 50–73) considers a number of alternatives for each of the two dimensions which are represented in figure 6.

**Figure 6: Seaport organisation matrix**



Source: own table, based on a.o. Op de Beeck, 1999, pp. 11–23 and 50–73

With respect to decisional and financial independence, five port organisational types are distinguished:

- Seaports under direct national jurisdiction are incorporated into a national government department. The seaport is often used as an instrument to realise a more general national policy objective. Profits are not necessarily reinvested in port infra- and superstructure but can be retained to cross-subsidise other public sectors. Losses will be borne by the government.
- Seaports under sub-national jurisdiction are fully dependent from a lower-level government which can be at a state, provincial or local level.
- In self-governing public seaports, the port authorities have some power to regulate, control and improve the seaport's operations, development and financial undertakings. Their independence from the public authorities is reflected in the fact that the seaport commissioners and director are

appointed rather than elected. In order for it to be ‘autonomous’, the seaport authority should at least be able to regulate labour in the port.

- Shares are found in corporate seaports which allow limited liability and easy transfer of ownership. Shares can be owned by the government and/or the private sector. Major goals of corporate seaports are of a commercial nature, although in the case of a government corporation socio-economic interests can also impact the management and decision process.
- Fully privately owned and operated non-corporate seaports are totally independent from any public government. They are subordinate to laws on private enterprises. They often are a subsidiary of an industrial undertaking. Such a seaport may also be part of a company exploiting a complementary mode of transport.

With respect to the degree of involvement of the port authority in the commercial management and day-to-day operations of a port, especially in the cargo-handling activities, four port organisational types are distinguished:

- A service port owns and operates all the port assets, infrastructure as well as superstructure and is traditionally fully public. The port authority takes care of all the operations, although it is frequently the case that the cargo handling activities are managed and organised by a separate public entity.
- A tool port also owns the port infrastructure and superstructure, but the actual cargo handling is executed by private cargo handling companies.
- In a landlord port there is no intervention of the port authorities in the organisation and management of the cargo handling operations. The port authority is responsible for the infrastructure and acts as a regulator. The infrastructure is leased to private companies or industries which will provide and maintain the necessary superstructure. The lease can take different forms. (Asian Development Bank, 2000, p. 20) A land lease grants the concessionary the right to use and operate a port area on payment of a fixed amount. In the case of a lease to operate and manage, the management and operation of a seaport site, its equipment and administration are transferred to a management company, against a share of cargo handling charges. A lease to build makes the lessee financially responsible for all infra- and superstructure improvements and constructions, transferring these to the lessor, usually the port authority, upon termination of the lease contract, but allowing the lessee to earn a toll on facilities constructed.
- In a fully privatised port there is no direct government interference, although there can be an official port regulator to control monopolistic behaviour.

The landlord port type turns out to be the dominant type at present. In such system, one of the few trump cards left to port authorities is their concession policy. Concessions are, in economic terms, a very efficient way of dealing with natural monopolies such as port infrastructures. The conceding entity needs, however, to introduce some rules in order to regulate the market properly and to introduce competition whenever possible (Aronietis *et al.*, 2010). Port authorities can differentiate themselves through various concession characteristics: services covered, duration, ownership, price, payment terms, throughput, value added and investment requirements, award criteria, renegotiation terms, exclusiveness, etc.

At the same time, concessions are more and more considered to be cost or revenue elements. From the terminal operator’s side, they appear to be important selection criteria when deciding to locate a terminal at a certain location in a specific port. From the port’s side, concessions are an increasing source of income,

especially as further liberalization forces port authorities to be financially self-sustaining, and as other sources of income are under pressure.

As a matter of fact, concessions are commonly used in the port sector today, since they relieve governments of substantial operational risks and financial burdens and simultaneously allow governments to keep ultimate ownership of the port land and the responsibility for licensing port operations and construction activities. On this account, governments remain in a position where they can safeguard public interests.

Generally speaking, a concession is a legal arrangement in which a firm obtains from the government the right to provide a particular service under conditions of significant market power. A concession can be defined as an arrangement whereby a private party – the concessionaire – leases assets from a public authority for a given, usually extended, period and has responsibility for new fixed investments during the period and for providing services associated with the assets. In return, the concessionaire receives specified revenues from the operation of the assets. At the end of the contracted period the assets revert to the public sector or a new concession is awarded (Aronietis *et al.*, 2010).

On the supply side, choices made by governments and container-handling companies among others will determine the attractiveness of a certain container terminal. For a terminal, demand and market structure will be substantially influenced by government's decision to assign the port a domestic, transit or hub role, and plan and design the port accordingly.

Among all port selection criteria, pricing turns out the most important criterion. Pricing by ports and operators within ports is historically determined, is often quite complex and, as such, is sometimes perceived as archaic. Debates on overt or covert subsidies, captive markets and the need to constantly dredge and deepen maritime access routes undoubtedly raise questions concerning potential distortion of competition and/or abuse of monopolistic power.

Generally, port pricing currently differentiates according to the following main criteria (Adler *et al.*, 2003):

- vessel types and destination;
- location of operations in the port territory;
- total time of service use (processing time); and
- season.

In most European ports, pricing of an additional vessel is based on the sum of several pricing elements, each containing several constituent factors. Some components are shown in Table 2.

**Table 2: port dues and tariffs: determining factors**

Harbour dues/ Tonnage dues	type of vessel; gross ton <sup>11</sup> (with maxima); liner or non-liner shipping; origin and destination of the vessel; place of berth in port; vessel entering or leaving the port; cubic metre indicator; weight of goods or number of containers loaded/discharged; valid for a period.
Berth dues/Quay dues	type and length of vessel; type and weight/unit of loaded/discharged goods; route of the vessel; berthing time; gross ton; use of quay or buoy; cubic metre indicator; public or private quay; valid for a period.
Towage	location, distance and duration of towage; length of vessel; gross ton (with maxima); type and number of tugs used.
Pilotage	point of arrival of pilot; draught and length of vessel; gross ton; distance of pilotage.
Mooring and unmooring	length and location of vessel.
Traffic control fees	length of vessel.
Reporting of vessel	gross tonnage or deadweight of the vessel; location of vessel.
Maritime police	gross ton.
Port / Terminal security	per container or per weight of goods.
Waste disposal dues	main engine capacity; cubic metre indicator.
Passenger fees	number of passengers.

Source: Meersman *et al.* (2006)

<sup>11</sup> “Gross ton: quantity without dimension, used as unit of ship’s capacity, as shown in the international certificate of measurement issued in the country of registration in accordance with the stipulations of the International Treaty on Ship’s measurement, drawn up in London on June 23, 1969.

It is important to point out that discounts (e.g. for frequent users or for passenger ships) and surcharges (e.g. night and weekend shifts) apply on most tariffs. Table 2 is based on current pricing practice in some European ports and should be seen as a summary of individual case studies.

This differentiation does not reflect the actual costs incurred by the port operations and does not recover costs, thus creating severe inefficiencies such as congestion as well significant financial loss.

Traditional port pricing is characterised by (Strandenes, 2004):

- non-transparency (tonnage charges, cargo charges, specific charges,...);
- favouring regional and coastal shipping;
- favouring exports; and
- differentiated cargo charges.

## 5. Actual market structure, cooperation and concentration

The scientific literature on market structure in seaports is fairly limited. Ferrari and Benacchio (2000) conclude that in container handling, an equilibrium à la Stackelberg prevails. This situation is true for a number of container-handling markets but certainly not for all of them, and moreover has changed during recent years as terminals in the same market approach each other's size.

Observing that in container-handling markets, a limited number of terminals are competing, who do not differ too much in size, and observing that there is no real trace of collusion, a combination of within-market Cournot competition and between-market Bertrand competition seems to occur.

Table 3 illustrates the existence of Cournot competition with a case where container-handling terminals compete in quantities, whereas table 4 illustrates the existence of Bertrand competition in prices.

**Table 3: Examples of quantity competition in container handling**

Date	Terminal	Move	Goal
2005	China – Ningbo – Jintang project	Competing with neighbouring Shanghai	Compete with Shanghai head to head, instead of being complementary to them (as originally planned)

Source: World Cargo News Online

To the rule that in container handling no collusion is found, two exceptions were encountered: at Port Klang in Malaysia in 2002, Westport and Northport unified handling charges in order to concentrate on competition with primarily PSA; PSA and PTP too were said to be involved in rate talks in 2003.

Supplier profits are normally strongly in line with entry barriers, except when rents are capitalized, inefficiency features, part of the benefits are non-monetary, limit pricing is practised, or government regulation is present (Berechman *et al.*, 1994). An overview of entry barriers in container handling is given in table 5.

As ports are links in logistics chains, it does not always make sense to consider the terminal or port as an isolated entity. Resolving a pressure point in one link may simply transfer the problem to another. In this manner, productivity improvement in one section of the logistics process can actually increase cost

elsewhere (Valleri and Van de Voorde, 1996, p. 127). Increasing the capacity of vessels, for example, will spread the cost of sailing over more containers, but at the same time it requires a greater processing capacity and thus the deployment of more substantial means at the terminal. Otherwise, the bottleneck will simply be shifted from the maritime route to the port and hinterland section of the transport chain.

**Table 4: Examples of price competition in container handling**

Date	Terminal	Move	Goal
2005	Italy - PSA Sinport Voltri Terminal Europe	Attracting Grand Alliance and giving P&O Nedlloyd equity stake at bargain price	Attract Grand Alliance traffic previously handled at Eurogate facilities (MCT Gioia Tauro, CICT Cagliari and LSCT La Spezia), and keep Eurogate out of Voltri
2004	Singapore – PSA Terminals	Improve service quality	Lessen congestion and regain traffic lost to Tanjung Pelepas
2004	Hong Kong - Kwai Chung -CT 1 - 9	Slashing container-handling charges	Capture mid-stream traffic Fill underutilized berths
2004	Hong Kong - Kwai Chung	Offering price discounts up to 30%	Fill traffic void
2002	China - Hutchison Shanghai Container Terminals	Cutting fees by 5%	Fend off competition from neighbouring Shanghai terminals; Price still 12% higher than at Waigaoqiao port
2002	Singapore - PSA Terminals	50% discount on empty boxes handling charges, for 12 months	Attract traffic from Port Klang among others
2002	Port Klang Northport and Westport terminals	Improve service quality	Diversify from PSA Singapore service and be able to compete in prices
2002	Singapore - PSA Terminals	Slashing charges after Maersk and Evergreen moved the bulk of their traffic to Tanjung Pelepas	Regain traffic lost to Tanjung Pelepas; Tanjung Pelepas terminals seem to be perfect substitutes for Singapore terminals; Tanjung Pelepas had slashed charges and attracted large customers from PSA

Source: World Cargo News Online

The port and maritime industry has undergone a dynamic evolution in recent years. In this context, we refer explicitly to Heaver *et al.* (2001) and Frémont (2010), where the various forms of cooperation, concentration and integration in the industry are discussed in greater detail. The proposed configuration continues to apply today, even though some players appear to seek partnerships more actively than others do. Table 6 provides an updated overview of the great variety that exists in types of cooperation in the port and maritime industry. We restrict ourselves to shipping companies, TOCs, port authorities and hinterland operators.

**Table 5 Entry barriers in container handling**

<b>Barrier category</b>	<b>Barrier</b>	<b>Impact</b>
Company structure	Vertical integration	Vertical integration implies better knowledge and control of inputs and outputs
Economic	Economies of scale	Operations; management
	Fixed costs	Input prices (eventually oligopsony); sunk costs; capital cost
Financial	Advertising intensity	Advertising creates strategic advantage
	Capital requirements	150m USD / 1m TEU is on average required, including infrastructure as well as superstructure
	Royalty payment	Substantial lump-sum lease payments before any revenue is generated
	R&D intensity	R&D (also in terms of market screening or experience) provides knowledge about most efficient technologies and market structure
	Risk	Risk is harder to bear for entrants who already spent a lot of capital in investing
Legal	Legal claims on scarce terminal areas and legal limits on terminal size	Long-term lease contracts make terminal space a very scarce resource; terminal size is limited by public legislation, which is some form exogenous capacity limitation in the sense of Mas-Colell <i>et al.</i> (1995)
Market	Acceptance	Being established in a market creates more trust and willingness from economic and political stakeholders
	Access to inputs	Being familiar with a market implies better access to inputs and often leads to superior control over essential resources
	Brand loyalty / Reputation	Established good relationship decreases incentive to change supplier
	Concentration	Concentration increases profitability and therefore cash reserves; concentration also increases strength of co-ordinated action against entrants
	Long-term / Multi-terminal contracts	Longer terms and inclusion of multiple terminals in contracts allow to bind customers more tightly
	Product differentiation	Being present in several markets means controlling a larger part of the business

Source: Vanelslander (2005)



**Table 6: Strategic cooperation within the maritime sector (with examples)**

Actors	Shipping companies	Terminal operating companies	Port authorities	Hinterland operators	Hinterland terminal operators
Shipping companies	<ul style="list-style-type: none"> <li>* Vessel sharing agreements</li> <li>* Joint-ventures</li> <li>* Consortia</li> <li>* Alliances</li> <li>* Mergers/acquisitions</li> <li>* Conferences</li> </ul>	<ul style="list-style-type: none"> <li>* Joint-ventures</li> <li>* Dedicated terminals</li> <li>* Share</li> <li>* Management contracts</li> </ul>		<ul style="list-style-type: none"> <li>* Carrier haulage</li> <li>* Shuttle trains</li> <li>* Block trains</li> </ul>	<ul style="list-style-type: none"> <li>* Inland terminal share</li> </ul>
Terminal operating companies	<ul style="list-style-type: none"> <li>* Ship repair</li> <li>* Container manufacturing &amp; leasing</li> </ul>	<ul style="list-style-type: none"> <li>* Mergers/acquisitions</li> <li>* Joint-venture</li> </ul>	<ul style="list-style-type: none"> <li>* Total port operation</li> <li>* Pilotage</li> <li>* Towage</li> </ul>	<ul style="list-style-type: none"> <li>* Rail transport operation</li> <li>* Rail construction</li> </ul>	<ul style="list-style-type: none"> <li>* Inland terminal share</li> </ul>
Port authorities		<ul style="list-style-type: none"> <li>* Joint-ventures</li> </ul>	<ul style="list-style-type: none"> <li>* Alliances</li> </ul>	<ul style="list-style-type: none"> <li>* Rail transport operation</li> </ul>	<ul style="list-style-type: none"> <li>* Inland terminal share</li> </ul>
Hinterland operators	<ul style="list-style-type: none"> <li>* Block trains and capacity sharing</li> <li>* Acquisitions</li> </ul>	<ul style="list-style-type: none"> <li>* Joint-ventures</li> </ul>		<ul style="list-style-type: none"> <li>* Alliance</li> </ul>	<ul style="list-style-type: none"> <li>* Inland terminal share</li> </ul>
Hinterland terminal operators		<ul style="list-style-type: none"> <li>* Share</li> </ul>			

Source: own processing of data from various shipping companies, stevedores and port authorities; based on Heaver *et al.* (2001)

Table 5 suggests that there are indeed many possibilities for horizontal and vertical integration within and between the various actors in the industry. The various port actors usually manage one or several links in the logistics process. The fact that goods-handlers, shipping companies and port authorities tend to hold different views on productivity is due to the specific inputs and outputs in their part of that process. However, it is not always possible to ascertain unequivocally for each actor what precisely their input and output status is, as there are inevitably company-specific factors to take into account. A terminal operator, for example, may service several shipping companies. Conversely, a shipping company may call at different terminals in the same port.

Within ports, there has been an important structural evolution: traditional stevedoring firms are increasingly developing into more complex terminal operating companies, as a lack of working capital induces mergers, takeovers and externally funded expansion projects. External capital is sometimes also provided by shipping companies. Port authorities, for their part, initially chose to watch rather passively from the sideline as these evolutions unfolded but are getting more actively involved in the cooperation and concentration evolution.

Table 7 shows that in the terminal operating business, merging groups have been more successful in increasing market share and obtaining good financial results. The top company in 2009, PSA, noted a

market share of 9.5% with a worldwide throughput of more than 45 million TEU, on a total throughput by all operators of 215 million TEU. Note that 2009 was the height of the world's economic crisis. Also note that the measurement is done based on equity. If equity would not be taken into account, HPH would overrun PSA as the world's leading operator. The top 4 companies together represent 65% of the worldwide market. However, the picture is mixed depending on the company considered. It is striking that HPH has obtained a turnover which is relatively a lot higher than that of PSA, whereas its throughput is quite a lot lower. The difference in EBITDA is striking too. A similar difference between turnover and Earnings balance can be found between DP World and APM Terminals.

**Table 7. Top 4 global terminal operators by equity stakes – financial results and market share (2009)**

	Turnover	Earnings	Throughput	
	million USD	million USD	TEU	share
PSA	2,733.59	790.50	45.0	9.5
HPH	4,312.08	1,342.37	32.2	6.8
DP World	2,821.00	1,072.00	31.5	6.7
APM Terminals	3,021.00	738.00	31.1	6.6

\* TEU figures based on capital shares

Source: Drewry Shipping Consultants (2010)

The reasons for respectively horizontal cooperation and vertical cooperation are often quite different. In the case of horizontal cooperation, the companies' optimal shape depends on the benefits of scale and scope. These are present for as long as large-scale production and service provision results in economies. Such scale and scope effects are instrumental to companies' merger and diversification strategies. They also affect pricing, entry and exit behaviour, and whether or not a long-term sustainability of the competitive advantage is feasible. The question arises whether recent horizontal mergers in the maritime and port industry have confirmed the existence of economies of scale and scope. The past decade saw two evolutions: on the one hand, shipping companies have become ever larger through mergers, takeovers and organic growth, which has led to greater concentration; on the other, there has been closer cooperation through strategic alliances. In both cases, the purpose was clearly to benefit optimally from economies of scale and scope within the boundaries set by antitrust legislation.

TOC involvement in hinterland operations is rather limited. As shown in Table 8, just three of the top-20 genuine TOCs hold stakes in hinterland transport firms and only two are involved in hinterland terminals. Vertical hinterland transport integration occurs through intermodal services (Eurogate), logistics (HPH) and rail track investment (APM Terminals). HPH is involved in inland terminal operations at DeCeTe Duisburg, TCT Willebroek, MCT Moerdijk, TCT Venlo and Shenzhen Hutchison Inland Container Depots (SHICD). DP World participates in such operators at Lahore, Duisburg and Germansheim.

**Table 8: TOC involvement in hinterland operations, 5 May 2011**

Rank	Operator	Hinterland transport operator	Hinterland terminal operator
1	HPH		
2	APM Terminals		
3	PSA		
4	DP World		
7	Eurogate		
9	SSA Marine		
13	HHLA		
14	Dragados		
19	ICTSI		

Source: own processing based on company websites

Remarkably, there is just one example of an inland terminal operator with a stake in a port terminal, namely Duisport in Antwerp Gateway (DP World).

Next to market power effects, co-operation may also have operational impacts. Vanelander (2005) summarizes the operational effects that co-operation may have, as in table 9. These are cost decreases or benefits to terminal operators, which may be passed on to the customer and therefore to society.

Concentration not only unfolds at the level of terminals and operators, but also among entire ports, as was previously shown also in Zhang (2009). Table 10 shows the league of the world's most important seaports, compared between 2002 and 2007. The reason that 2007 was chosen, is that the years after were years with strong crisis impact, which would makes the autonomous development. It turns out that volumes handled at the biggest world ports have grown faster than on average.

Port authorities participating in inland terminals are a relatively recent phenomenon, but which also impacts on port competition. Moreover, this kind of vertical integration would appear to be restricted to Europe, as Table 11 shows.

**Table 9: Operational fields affected by economic effects of mergers and acquisitions**

<b>Operational field</b>	<b>Size effect</b>
Administration	Fixed administrative costs can be spread over larger volume; possibility of standardization and automation
Contracting	Bargaining power in negotiating; avoiding intermediaries
Equipment	Sufficient equipment volumes to bargain input prices; equipment can be used more efficiently
Handling operations - technology	Possibility to standardize within constraints imposed by shipping companies; product specialization is efficient
ICT	ICT setup, installation and maintenance costs can be spread over larger volume; possibility of standardization; e-commerce more efficient and more attractive in larger network; sufficient volume to have in-house development, installation and maintenance of systems
Labour	In-house training is efficient due to job specialization
Marketing	Fixed administrative costs can be spread over larger volume; more terminals means more attractive network; possibility of standardization; sufficient volume to do promotion with own staff
R&D	Technology development costs can be spread over larger volume; sufficient volume to have knowledge in house
Security	Fixed security costs to be spread over larger volume; possibility of standardization and automation; security provision can efficiently be provided in house

Source: Vanelslander (2005)

**Table 10: The world's largest ports in 2002 and 2007**

<b>2002</b>		<b>2007</b>	
<b>Port</b>	<b>Cargo turnover (million metric tonnes)</b>	<b>Port</b>	<b>Cargo turnover (million metric tonnes)</b>
Singapore	335.2	Shanghai	561.4
Rotterdam	321.9	Singapore	483.6
Shanghai	238.6	Ningbo-Zhoushan	471.6
South Louisiana	196.4	Rotterdam	401.1
Hong Kong	192.5	Guangzhou	341.3
Houston	161.2	Tianjin	309.4
Chiba	158.9	Qingdao	265.0
Nagoya	158.0	Qinhuangdao	246.0

Gwangyang	153.4	Hong Kong	245.4
Ningbo	150.0	Busan	243.5

Source: AAPA, 2009

**Table 11: Port authority involvement in inland terminals**

Port Authority	Hinterland terminal involvement
Antwerp, Rotterdam and Amsterdam	Duisburg?
Rotterdam in	Maashaven Wanssum
Hamburg Port Rail	
Le Havre	Terminal Trimodal (JV 49% (Crédit agricole immobilier) with Projenor 25,5% and Caisse régionale du Crédit agricole de Normandie-Seine 25,5%)

Source: port websites

## 6. Future market power and competition in the port sector

There is a clearly discernible trend towards tighter control over the maritime supply chain. What this implies in the longer term is a further evolution towards vertical integration, besides the horizontal integration whose primary purpose was to achieve an increase in scale.

This means that the negotiation framework will change for both the public administrations and the port authorities. Inevitably one will enter a setting with fewer, but larger and therefore more powerful actors.

If we approach these negotiations as a ‘game’, the following framework presents itself:

- The port authorities provide capacity, primarily through time-restricted concessions to TOCs and at a given price. The purpose of the port authorities may vary from profit maximisation to maximisation of throughput, and to maximisation of employment (Suykens and Van de Voorde, 1998).
- Public authorities contribute to the development of infrastructure, and it is in their interest that this infrastructure should be used. The objective of the public administration is to create wellbeing through value added and employment.
- The TOCs are granted concessions for a certain period of time by the port authorities. Their focus is on maximising port calls and throughput volumes through bilateral negotiations with shipping companies. The primary purpose is undeniably profit maximisation. A terminal may be controlled entirely by a TOC or part of the capital may be in the hands of other, external, parties such as shipping companies. There is also room for specific types of agreement, e.g. in relation to so-called ‘dedicated terminals’.
- Shipping companies in the broad sense want available capacity at reasonable, competitive rates. This holds not only within the port, but also in relation to transport to and from the hinterland. Again, the primary purpose is profit maximisation.

- Shippers of goods are increasingly demanding a generalised service, with a view to acquiring and retaining access to providers and markets. A typical example is the growing demand for ‘door-to-door’ services. Shippers expect their service providers, including shipping companies, to contribute to an improved performance on the part of their supply chain. This means that the time ships and goods spend in port, as well as port productivity, have become crucial to the commercial success of the ever-larger vessels.
- An increasingly important role is played by the forwarders, who are keen to gain greater control of the supply chain and hence tend to adopt strategies similar to those pursued by the shipping companies.

The position of the public authorities is clear to see. They are contributors to investments in port infrastructure and as such strive for an acceptable ROI from a welfare economics perspective. This is measured in terms of job creation and other forms of value added. In other words, it is in the public authorities’ interest that throughput capacity should be effectively utilised. Hence the interests of the public authorities and the TOCs largely coincide, as do those of the port authorities for that matter.

So which position do TOCs tend to adopt? Here one should distinguish between a situation with and without excess throughput capacity. In the latter case, where the TOC is already achieving quite a high capacity utilisation rate, it may either give preference to a long-term relationship with its client or opt to translate the mechanism of supply and demand into a higher price per unit of throughput. At the same time, the question arises of whether TOCs necessarily have a vested interest in the supply of new, additional throughput capacity. This additional capacity may after all be assigned to a competitor (cf. the danger of market dominance).

In the case where there is already sufficient available capacity, the question arises of which customers to attract, at what price, and under which conditions. A shipping company that is indeed trying to gain tighter control of the maritime supply chain may demand a so-called dedicated terminal, with potentially important consequences for the terminal operator and, in the second instance, also for the port authorities and the public administration. There have been recent examples of underused dedicated terminals, including in Flanders (cf. Flanders Container Terminal at Zeebrugge). Moreover, a dedicated terminal always entails the risk of too great a dependency on a single client, even if a market leader.

In the past period, the direct involvement of port authorities in commercial activities in the maritime logistics chain has declined. Their market power, and hence that of the public authorities behind them, has waned. In fact, port authorities and port undertakings control the maritime supply chain only to a very limited extent. Nonetheless, the above analysis suggests that, given their mutual interest in attracting customers and volume, cooperation between the public authorities, port authorities and TOCs is called for. Such cooperation could revolve around new port infrastructure, pricing, taxation and other benefits for potential customers.

The question of who will eventually come to hold the greatest market power cannot be answered unequivocally, as much depends on the port involved. At main ports such as Rotterdam and Antwerp, dedicated terminals are already in operation, though more often than not under a joint venture between a shipping company and a TOC. From this observation we draw the following conclusions:

- The shipping companies and TOCs involved are inclined towards a strategy of ‘if you can’t beat them, join them’. Rather than to engage in a fierce competitive struggle, they opt for cooperation. As a direct consequence, the relative market power of the port authorities and public administration is in decline;

- A dedicated terminal may generate greater revenue, but it will of course need to be shared. At a 50/50 terminal, the TOC will, unlike in the past, have to relinquish 50% of the generated profit to the shipping company involved. The main benefit for the TOC, and hence for the port authority, is a stronger guarantee that the goods flow will be retained or even increased in the future.

It should be kept in mind that, as it stands, the port authorities have a very strong trump card up their sleeve in the negotiating game between shipping company and TOC, namely the power to grant concessions and to determine their duration. Once a concession has been granted, the port authority's market power declines considerably. Hitherto, it has proven hard for them to penalise concession holders failing to hit the targets specified in their business plans. Consequently, there is an economic incentive for port authorities to award long-term concessions (e.g. 30 years), but in conjunction with mandatory interim objectives agreed upon beforehand with the concession holder<sup>12</sup>.

In the recent past, some shipping companies have taken long-term decisions to expand their fleets. This can be observed from table 12: shipping capacity on order is about 28% of the existing fleet, and about 13% in number of ships. This increase leads to concentration of market power in hands of the top 25 companies to 87%. At aggregate level, this holds a real danger of generating overcapacity, which would inevitably lead to further rationalisation and cost reduction through partnerships, takeovers and mergers. Such movements may, or will even, have an impact in terms of shipping companies' ports of call, loops and frequency of service.

In the short to medium term, overcapacity will on the other hand result in lower freight rates and lower ROI, putting additional pressure on market players elsewhere along the logistics chain. Over a slightly longer time horizon, a lack of operating capital may give rise to cooperation agreements that go beyond dedicated terminals.

Shipping companies will undoubtedly retain a degree of dominance. In the case where a shipping company has, through a process of vertical integration, gained control of the container terminal where its vessels are loaded and unloaded, it will of course find it relatively easy to determine in which links of the chain the greatest cost savings may be achieved by distributing resources differently so that the productivity level of the different links is modified. What is required then is for the various links to be geared to one another in a manner that maximises productivity in those links offering the greatest potential for cost reduction. This way, the shipping company will be able to increase the productivity of the chain as a whole.<sup>13</sup>

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<sup>12</sup> The strategy proposed here is certainly 'cleaner' than that previously adopted by some port authorities in an effort to enhance their competitive position. An example that comes to mind is that of the port authority of Rotterdam, which in 1999 acquired a 35% stake in terminal operator ECT. Such action, be it temporary or not, raises the spectre of conflict of interest, not in the least because the port authority continues to hold power of decision when it comes to the granting of further concessions.

<sup>13</sup> In the case where a shipping company has not engaged in vertical integration, the impact of each action depends on the prevailing relationship between shipping lines and terminal operators. Shipping companies will, in any case, try to keep the tightest possible control over the generalised cost associated with calling at a given port. And if this should prove difficult, they will no doubt look out for the most expedient response, i.e. switching to an alternative port that is able to contribute to the lowest generalised cost.

**Table 12: Container shipping capacity developments, 6 May 2011**

Parent/main No		Operated fleet		Order book	
		Ships	TEU	Ships	TEU
1	Maersk Line	600	2,258	55	441
2	MSC	465	1,966	53	561
3	CMA CGM	389	1,264	23	208
4	Evergreen	165	612	20	176
5	Coscon	142	590	36	297
6	Hapag-Lloyd	135	588	10	131
7	APL	146	588	22	204
8	CSAV	148	574	12	99
9	Hanjin	110	517	15	155
10	China Shipping	142	489	14	122
11	MOL	97	411	10	57
12	OOCL	88	409	13	141
13	NYK	101	402	2	9
14	Hamburg Süd	117	383	24	150
15	Yang Ming	84	338	16	102
16	"K" Line	78	329	8	59
17	ZIM	98	329	14	156
18	Hyundai	60	303	5	65
19	PIL	135	255	22	68
20	UASC	58	237	8	105
21	Wan Hai	90	194	14	38
22	HDS Lines	24	89	0	0
23	TS Lines	44	87	0	0
24	Sea Consortium	54	60	0	0
25	MISC	23	59	1	9
*	> 4,000 TEU no charter	-	-	59	392
<b>Total Top 25</b>		<b>3,593</b>	<b>13,329</b>	<b>456</b>	<b>3,743</b>
World liner fleet		5,978	15,277	613	4,125
Share Top 25		60%	87%	74%	91%

Source: Dynaliners

Table 13 shows that such vertical integration by shipping companies is indeed unfolding at a quick pace, especially in the container market. The number of terminal ventures involving CMA-CGM, for example, was due to increase by almost half in 2009. Maersk, the biggest shipping company and maritime terminal operator, was developing twelve new ventures to add to its existing network of sixty-five integrated terminals. In total, shipping companies have 225 terminal ventures, adding another 54 in 2009.



**Table 13: Container shipping company involvement in terminals: importance and developments**

Rank	Operator	TOC	Hinterland transport operator	Hinterland terminal operator
1	Maersk	APM Terminals		
2	MSC			
3	CMA-CGM	Terminal Link		
4	Evergreen			
5	Hapag Lloyd			
6	APL			
7	CSAV			
8	Cosco	Cosco Pacific		
9	Hanjin			
10	China Shipping			
11	MOL			
12	NYK			
13	Hamburg Süd			
14	OOCL			
15	K-Line			
16	ZIM			
17	Yang Ming			
18	Hyundai			
19	PIL			
20	UASC			

Source: Drewry Shipping Consultants + shipping company websites

It is interesting to observe from Table 9 that the largest shipping companies are assuming the role of terminal operator, as is apparent from their ranking as TOCs. Maersk, Cosco and MSC are clearly important players in this market. Moreover, very few shipping companies have seen their ranking drop in the period considered.

All parties in the logistics chain share a single common interest: to ensure that their maritime supply chain is as efficient and as cheap as it can possibly be. After all, the user, who, depending on the contract, is either the shipper or the recipient, will always give due consideration to the total cost faced.

The implied message for the public and port authorities is clear to see: they must create the right circumstances for the port(s) under their control to contribute to the lowest possible generalised cost for the relevant maritime supply chain. The tools for achieving this are equally obvious: maintaining sufficient available capacity, including in hinterland transportation services; ensuring a relative low cost and low charges in comparison with competing ports; offering maximum flexibility with regard to operational and administrative procedures that consume time and hence increase cost.

Scale increases and expanding ports have also consequences for the hinterland connections. Especially in densely populated areas where the hinterland traffic interacts with other freight and passenger traffic, the scale advantages generated at the maritime side might get fully lost due to congested or

inappropriate hinterland connections. As a consequence a port with good and reliable hinterland connections will have a strong competitive advantage, as shown also by Giuliano and O'Brien (2009).

## 7. Future market power and competition in the port sector

The involvement of port authorities in commercial activities within the logistics chain is declining. Consequently, the market power of those port authorities and, as the case may be, the public authorities that control them is also decreasing<sup>14</sup>. In other words, managerial control over the maritime logistics chain now lies only partly with the ports and the undertakings located in those ports.

According to Estache & Trujillo (2009), the question is not so much whether the port authorities will survive, but rather how views on the management of ports will develop. There are, after all, various new reasons why port authorities may continue to play a role, even if it may be a very different one from today's. They will certainly continue to play an important facilitating role, including in relation to infrastructure and intermodal integration, and perhaps also in respect of superstructure.

In the current negotiation game between shipping companies and terminal operators, those same port authorities do however hold a strong trump card: they have the power to grant concessions and to determine their duration. Once a long-term concession has been awarded, they lose much of their market power, though. It has, for example, hitherto proven very hard to penalise concession holders who fail to achieve the objectives of their business plan. Consequently, there is an economic incentive for port authorities to award long-term concessions (e.g. 30 years), but in conjunction with mandatory interim objectives agreed upon beforehand with the concession holder<sup>15</sup>.

Otherwise, the negotiating strength of port authorities has become quite limited, certainly when compared to that of the major shipping companies, who often join forces in strategic alliances, and terminal operators, among whom the past decade has seen a concentration trend towards a limited number of global players. If port authorities wish to enhance their market power, they must proceed proactively and cooperate intensely to attain common or parallel goals. This may be achieved through cross participation in one another's capital. From that moment, every tonne or TEU that is loaded or unloaded generates profit for each participating port authority. Ruinous competition between port authorities can thus be avoided. Moreover, the negotiating strength of those port authorities will be significantly enhanced, not only because cooperation implies that they are effectively a larger player, but also because it will be

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<sup>14</sup> The question of where market power actually resides cannot be answered unequivocally, as the situation varies from port to port. In the case of such mainports as Rotterdam and Antwerp, it is already the case that terminals are given in concession, albeit mostly under a joint venture between a shipping company and a terminal operator. From this, we draw the following conclusions:

1. The shipping companies and terminal operators involved appear to adhere to the saying 'If you can't beat them, join them'. Rather than engaging in an all-consuming competitive struggle, they prefer to collaborate. The immediate effect is, however, a new decline in the relative power of port and public authorities;
2. Revenues from a dedicated terminal may be higher, but now they need to be divided. In the case of a 50/50 terminal, the operator must, unlike in the past, give up 50% of profits to the shipping company. On the other hand, terminal operators thus acquire greater certainty that freight flows will be retained or may even increase in the future

<sup>15</sup> The proposed strategy is in any case purer than that previously applied by some port authorities in an effort to enhance their competitive position. A case in point was the move by the port authority of Rotterdam in 1999 to acquire a 35% stake in terminal operator ECT. Such action, be it temporary or on a more permanent basis, raises the spectre of conflict of interest, not in the least because the port authority continues to hold power of decision when it comes to the granting of concessions.

much harder for shipping companies and terminal operators to play port authorities off against one another. Furthermore, such cooperation would undoubtedly result in less excess capacity.

However, the concentration waves in the port and shipping sector and the reduced power of the port authorities bring with it the danger of limited competition which requires still the intervention of a regulator. Economists generally distinguish between economic and social regulation. The former is the control of prices, service quality, and entry conditions in specific sectors. The latter is the regulation of risks to health, safety, and the environment.

The role of the regulator in the port sector is clearly summarised in the Port Reform Toolkit of the World Bank (2001, pp.267-268)

*Ensuring the efficient and competitive functioning of a port in a context of limited or weak competition is the purpose of economic regulation of ports.*

Although this is a clear formulation, in practice the story is more complicated due to the different levels at which competition plays in the port sector. Each level may require a specific regulatory mechanism. The competition between terminal operating companies within a port plays mainly at the level of the concession policy which has to be fair, transparent and open towards all the companies. Once the concession is granted and when there is for instance only one single terminal operating company, there should be control mechanisms to avoid the abuse of market power of the natural monopolists. Traditionally the economic regulatory mechanisms are designed to reduce, remove or compensate for barriers to entry, to regulate tariffs and prices, and to guarantee a good quality of service.

Europe has a relatively long tradition of public regulation and intervention in seaports. Nevertheless, it is surprising that the Treaty of Rome, establishing the European Economic Community, makes no mention of seaports. However, according to a subsequent judgment by the European Court of Justice (4 April 1974) in a dispute between the European Commission and the French government, the general stipulations of the Treaty are applicable to maritime transport. Consequently, many port-related issues (e.g. rules of competition, subsidising...) may be approached from the perspective of these general stipulations. With the 1992 reform of the Treaty, with a view to the creation of the European single market, it was stipulated that maritime transport was subject to the terms of the Treaty.

In addition, seaport policy is also a function of industrial policy. Whatever the European Commission decides in that field has direct consequences for port policy (e.g. energy policy, agricultural policy, social policy, taxation, transport policy, maritime policy...). In recent time, the European Commission has devoted much closer attention to transport in general and seaports in particular. On 10 December 1997, the European Commission published a 'Green Paper on Seaports and Maritime Infrastructure'. The purpose was to launch a debate on seaports and their efficiency, their integration into multimodal networks and the rules of competition that should apply.

In early 2001, the European Commission issued a draft guideline concerning access to the market of port services. The purpose was to ensure the right to free entrepreneurship in the port services sector, in accordance with the basic treaties of the European Union. However, in November 2003, the European Parliament rejected the proposed compromise. In 2004, an amended guideline was put forward that strove to regulate goods-handling, towage, pilotage, mooring and unmooring. But again, the proposal was rejected. No subsequent, explicit action was taken, apart from a wide-ranging stakeholder consultation, six workshops which the Commission held and a communication from the Commission (Commission of the European Communities, 2007) which gives an overview of planned initiatives and which seeks to promote greater dialogue between all stakeholders.

## 8. Conclusion

The port sector has been subject to a wave of privatisation, deregulation and re-organisation with consequences for competition within as well as outside the sector. In recent years, it had to face increased cooperation and merger activities driven by the search for scale economies and control over the logistics chain.

The largest players, i.e. the shipping companies, drive competition and they benefit maximally from evolutions in global trade. Within the shipping sector, there has been a spectacular scale increase and a far-reaching concentration movement. A similar concentration trend exists among terminal operating companies, where one can witness the entry of foreign capital in what were originally local or national companies. This implies greater market power for terminal operators because shipping companies now face global terminal operators who are operating in origin as well as destination ports.

Next to horizontal integration, a trend of vertical cooperation and merger activity is clearly present. Shipping companies are participating strongly in port-related activities in various ways, ranging from contractual agreements to full integration. The resulting concentration may entail abuses of market power, which may hamper and counteract the advantages of the deregulation process. As shipping companies and terminal operating companies continue to grow in size, the relative market power of port authorities is declining. Their remaining tools are the provision of freight-handling capacity, the concession policy and the port dues. However they can take a more active position in the concentration movement by joining forces in strategic alliances of their own.

The concentration waves in the port and shipping sector and the reduced power of the port authorities bring with it the danger of limited competition which requires still the intervention of a regulator to reduce, remove or compensate for barriers to entry, to regulate tariffs and prices where necessary, and to guarantee a good quality of service.

In order to understand how port competition may evolve further, greater insight is required into the maritime context as a whole. In which direction will the maritime sector move in the foreseeable future? Which position should port authorities adopt? Will players presently acting within the port perimeter, such as terminal operating companies, be able to survive independently? These are crucially important questions to the sector and its players, yet all are shrouded in uncertainty. Moreover, the market is not static, but extremely dynamic. One may therefore reasonably assume that each market player will try to anticipate on likely strategic moves by other players.

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## SUMMARY OF DISCUSSION

*By the Secretariat*

### 1. Introduction

The Chairman, Professor Alberto Heimler, opened the roundtable by stating that, over the past 20 years, there have been many abuse cases in the EU concerning ports. Over time, many changes have taken place in the ports sector. For example, technological developments in transport services have meant that competition between ports has increased substantially. Also, port authorities are increasingly only responsible for the running of the port, and are less active in transport services, limiting many of the sources of abuse of the past. Finally, except in some jurisdictions, workers' special and exclusive rights have been eliminated and the market for port services has generally opened up, at least by eliminating regulatory protection. Previously, ports were often considered as having market power. In the light of new developments, this view may need to change.

The chair then introduced the four experts who participated in the roundtable discussion—Enno Eilts and Andrew Meaney of Oxera, who are two of the authors of the background paper to this roundtable discussion; Dr Thierry Vanelslander from the University of Antwerp, one of the authors of another paper for the roundtable, which provides a complementary analysis on the interface between the maritime industry and ports; and Kurt Van Dender of the International Transport Forum of the OECD.

In terms of organisation, the chair proposed to organise the discussion under three main topics. The first topic addressed the geographic scope within which competition between ports occurs. The second considered regulatory reform in the ports sector and how it has affected competition within and between ports. The third topic addressed national experiences with antitrust enforcement, including some evaluation of the reasons for the decline in port cases in the last decade.

### 2. The geographic scope of the relevant markets

With reference to the background paper, the Chairman cited an example of ports that Austrian importers use. With no direct access to the sea, this country uses a number of other countries' sea ports as entry and exit points for goods that are destined for or originate from overseas. With regard to market definition, the Chairman asked whether ports that are as far apart as Rotterdam and Trieste would operate in the same geographic market.

Mr Eilts started his intervention by saying that the key aspect when determining the geographic scope of a market for port services was whether service providers at different geographic locations were substitutable. However, before addressing the geographic scope over which a certain service can be provided economically, the relevant product and customer market need to be defined. Diverse services such as towage, pilotage and container-handling might constitute different markets. Therefore, with regard to port services, there might not be a single market, but many. Each of these markets potentially differ in their geographic scope.

Referring back to the Austrian example, Mr Eilts pointed out that geographic market definition based in the hypothetical monopoly test, which is traditionally applied by competition authorities and



practitioners, would not start from a particular geographic region, such as Austria, but from the port(s) in question, such as Rotterdam or Trieste. With regard to the substitutability of service providers at these ports, the question is over what geographic range goods can economically be transported. Where there is a substantial overlap between different ports' hinterlands, these ports are likely to operate in the same geographic market.

The Chairman then turned to Dr Vanelslander, referring to his paper, which addressed the issue of competition between ports and related developments in the maritime industry. In this context, the chair asked Dr Vanelslander to provide an overview of the possible options available for competition in port services in the near future.

In his intervention, Dr Vanelslander explained that port competition increasingly spans entire logistics chains. Actors in such chains include shipping companies, terminal operating companies, and hinterland transport companies. Secondary services that do not form part of this chain are pilotage and towage.

In terms of future developments, Dr Vanelslander stated that he expects further privatisation and deregulation. He said that the role of port authorities is likely to decrease in terms of control and will focus on providing an appropriate level of capacity. Horizontal concentration will increase in terms of the largest shipping companies handling a greater proportion of goods transported. Vertical integration is also likely to increase, for example, in terms of shipping companies becoming terminal- and hinterland-transport operators. Also, greater capacity will be required, together with quicker turn-around times and greater degrees of specialisation.

The Chairman then commented on the Chinese Taipei written submission. This submission stated that the country's port of Kaohsiung is situated at the junction of Northeast and Southeast Asian shipping networks, which are also served by the port of Singapore and South Korea's port of Busan, suggesting that Kaohsiung competes with Singapore in the south and Busan in the north. At the same time, and partly in contradiction of this statement, the submission continued that the clustering of industry close to the port was a key factor supporting port volume and operational performance. The Chairman asked Chinese Taipei whether it considered the relevant market to be international, domestic or both.

The delegate of Chinese Taipei explained that competition in port services is both domestic and international in scope. On the one hand, ports function as distribution channels for exports, which creates a domestic dimension. The government of Chinese Taipei will create additional ports in an attempt to increase competition between its domestic ports. On the other hand, ports can function as hubs, creating an international dimension. In this regard, the delegate of Chinese Taipei considered that the country's ports not only compete with the ports of Singapore and Busan, but also with the ports of Shanghai and Hong Kong. The government of Chinese Taipei seeks to increase the international competitiveness of its ports by comprehensively reforming the sector. For example, the government seeks to create port authorities that are government-owned but operated by private companies, including shipping companies.

Next, the Chairman mentioned Mexico's submission. The Mexican Federal Competition Commission (CFC) had been in charge of determining whether the acquisition of a new terminal by a company that already controlled a terminal in the port of Manzanillo would lead to a substantial lessening of competition. The CFC assessed the competitive constraints facing the port of Manzanillo by looking at competition within the port and competition originating from the port of Lázaro Cárdenas, 423 kilometres (263 miles) away. The Chairman asked how the overall assessment was carried out.

The delegate of Mexico stated that the CFC had first considered delineation of the affected product markets before defining the geographic scope of these markets. In this regard, the authority had found that

the relevant product market was that of container-handling services, including loading, unloading, storage, and delivery and receipt of containers.

For this product market, the CFC had then considered the set of existing and potential alternatives available to customers, when faced by a price increase for container-handling services. With regard to containers moved through the port of Manzanillo that originated from or were destined for locations in Mexico, the CFC had analysed the distances between the ports and the domestic origins or destinations. The authority had carried out the same exercise with regard to the port of Lázaro Cárdenas and found that there was an overlap in the catchment areas of the two ports. This analysis suggested that the ports of Manzanillo and Lázaro Cárdenas could be seen as rivals for the provision of container-handling services.

The Chairman then turned to the U.S. submission, which cited the Mexican port of Manzanillo as being substitutable for the ports of Los Angeles and Long Beach. Although a proper relevant market evaluation was not undertaken in that reported matter, a natural experiment took place where the closure of one harbour led to diversion of goods to other ports.

The U.S. delegate provided additional information on this natural experiment. In this particular example, the Los Angeles and Long Beach ports were congested and, consequently, shippers used other West Coast ports as an alternative, including the port of Manzanillo. However, the U.S. delegate explained that, while informative, this natural experiment does not replace the hypothetical monopolist test, which is necessary when determining the scope of a market. At most, such an experiment could indicate that other ports were more distant competitors than the port to which most of the traffic intended for the congested ports was diverted. But it could not be concluded from this natural experiment alone that the ports in question operated in the same geographic market as the congested ports.

The submission of Switzerland discussed the competition between different ports along the river Rhine, such as Düsseldorf or Duisburg and the Swiss port of Basel. In this regard, the Chairman asked whether the relevant market was ever formally defined.

The delegate of Switzerland stated that despite being an alpine country with no direct access to the sea, competition in ports and port services was still important as 13% of Switzerland's imports arrive by waterway.

Noting that a formal market definition exercise with regard to the services provided by the port of Basel has not been conducted, the Swiss delegate suggested that the port faces two kinds of competitive constraints. First, it faces constraints from other modes of transport, notably rail and road. For example, along the more than 800-kilometre (500-mile) route between Rotterdam and Switzerland, there are ample opportunities to switch between river and other forms of transport, for example, in Düsseldorf or Duisburg. This gives rise to the second competitive constraint, which stems from other ports along the Rhine.

Referring to the Russian submission, the Chairman noted that the Russian port of St Petersburg has been deregulated on an experimental basis and queried whether this originated from a competition assessment of the wider sector. The Chairman also queried how the success or failure of the experiment would be measured and, if deemed to have been successful, whether all Russian ports would be deregulated.

The Russian delegate started his intervention by confirming that the direct price regulation of port services—such as loading, unloading and storage of cargo—had been temporarily terminated in the port of St Petersburg. The idea of deregulating the port had generated from the idea of decreasing the degree of state interference in the economy more generally and of opening up markets to competition. Ports had been considered an ideal platform for this experiment. While the developments at the port of St Petersburg were

being closely monitored, it was too early to consider whether or not the deregulation experiment was successful. However, if the experiment does prove to be a success, other ports are also likely to be deregulated.

Next, the Chairman turned to the submission by the Netherlands. The country's competition authority (NMa) published a report in 2005 on HbR, the company in charge of the management of the Rotterdam port, which concluded that the company did not compete with other port authorities in supplying port infrastructure. The Chairman asked whether this was a general statement or merely a reference to some customers which were unable to switch. The Chairman further queried why the NMa's suggestion to regulate port tariffs had not been acted upon by the government.

The Netherlands delegate responded to the Chairman's first question by stating that port tariffs only account for a small proportion of the overall cost of transport. Consequently, tariffs only play a minor role when choosing between different ports. This information informed the NMA's conclusion that the port of Rotterdam did not compete with any other harbour authority. With regard to the question of why the NMa's suggestion to regulate port tariffs had not been acted upon by the government, the Netherlands delegate stated that it would seem that the sector and the government saw the way forward in self-regulatory measures rather than sector-specific regulation.

Turning to the German submission, the Chairman noted that it referred to a merger decision by the Bundeskartellamt in which a subsidiary of the Belgian company Sea-Invest wanted to acquire control over a fruit storage and handling terminal in the port of Hamburg. In this case, the market was defined as fruit cargo handling in sea ports. The Chairman asked whether, in the case of such a narrow market, price regulation would be required.

The German delegate started his intervention by stating that the case referred to by the Chairman had been cleared since no material competition concerns had arisen from it. While the Bundeskartellamt had defined a rather narrow product market—that of fruit cargo handling—it had found the geographic scope of this market to be rather wide, covering the entire Hamburg–Le Havre range. This meant that sufficient inter-port competition remained post-acquisition.

However, even though no competition concerns arose in this particular case, the question of whether regulation of ports and port services was needed remained. Such regulation could be required where a port or port facility was found to be an essential facility. In this regard, the German delegate cited the example of the owner-operated port of Puttgarden, from which ferry services are provided to neighbouring Denmark.

### **3. Regulatory reform of ports and port services**

Next, the Chairman introduced the discussion topic of regulatory reform of ports and port services. He noted that Europe is a region in which several such reforms have taken place. However, these reforms were not instigated by the European Commission, which has been relatively silent on issues of regulatory reform and liberalisation of ports and port services, compared with its work on regulatory reform in many other infrastructure industries. Instead, many of the reforms in Europe originated from judgments of the European Court of Justice (ECJ). Following this introduction, the Chairman asked the delegate from Italy to explain the nature and reasons for the reforms that took place in Italy in 1994 and to assess the impact of these reforms on competition.

The Italian delegate described his country's regulatory reforms (which were triggered by an ECJ decision on the port of Genoa) as having separated the regulatory role from the performance of economic services with regard to ports and port services. The reforms had established port authorities that were

public bodies in charge of planning general developments and overseeing operations. Cargo-handling activities had been liberalised such that private undertakings could enter the market to provide services. The reforms had also limited the occurrence of exclusive rights.

During the transition period following these reforms, there had still been some port authorities involved in providing economic services and had been cases where this caused obstacles for new entrants. Some of these cases had then been pursued under abuse of dominance legislation. In general, however, Italy believes that the reforms have been successful in opening up competition within ports, although the delegate identified that competition among ports is now something that Italy may wish to consider and address.

Turning to the UK, the Chairman noted that, while much of the country's infrastructure is regulated, the ports sector remains untouched by regulation due to a view that port services are fairly competitive. The Chairman asked the UK delegate if this competitiveness was achieved through reform, or a market development.

The UK delegate acknowledged that the UK ports sector looks somewhat different to other UK sectors because there is no independent sectoral regulator. There is, however, national legislation governing access and pricing, but this legislation pre-dates the privatisation of ports in the UK during the 1990s. The lack of a sectoral regulator is historically due to a view that the ports sector is competitive. In answering the Chairman's question, the delegate stated that most of the competition has emerged through the market rather than through reform.

However, one of the concerns for the UK competition authorities is the degree of vertical integration between port owners and port service providers. In particular, the risk of downstream foreclosure is a concern. If such a case were to be presented to the competition authorities, they would first look at it in the context of abuse of dominance legislation. Despite its concern about vertical integration, the UK is aware that there is a question as to whether vertical separation is needed in the long term, or whether it may create costs and reduce efficiency.

Next, the Chairman highlighted the case of Chile, where in 1997 the state-owned port manager (Emporchi) was split into ten smaller state-owned port authorities, each in charge of a single port. The Chairman wanted to know if these ports are vertically integrated or whether the port managers simply run concessions and assign tasks (ie, behave like landlords). Additionally he asked if this horizontal split was accompanied by any vertical separation.

The Chilean delegate explained that the aim of the reform had been to encourage both private investment for infrastructure development at ports, and private management to increase service efficiency. The reforms limited the role of the state-owned companies to monitoring compliance and running the process of allocating concessions.

Provisions within the Chilean Ports Act specify that some activities can only be carried out by private companies, unless there is no private sector company willing to provide the services. Several other activities (eg, warehousing) can be performed by either the private sector or the state-owned company. However, any issuing of concessions should be conducted by an open tender with concessions lasting up to 30 years. The Ports Act also achieved substantial vertical separation between infrastructure ownership and the provision of port services.

The Chairman indicated that no delegate from Indonesia was in attendance for budgetary reasons, but drew attention to its submission, which considered a new law to remove vertical monopoly in a similar manner to that of Chile.

Next, the Chairman addressed Turkey, where the competition authority had had the opportunity to evaluate the privatisation plan of the Port of Izmir and the Port of Mersin, and impose competition-enhancing measures. The Chairman asked why the idea of creating competition between these two ports had not been accepted, and why no vertical separation had emerged.

The Turkish delegate responded that, with respect to the privatisation of the Ports of Izmir and Mersin, the Turkish Competition Authority (TCA) wished to encourage intra-port competition. To make this possible, the TCA recommended that for these two ports, the areas used for container handling and the back spaces should be privatised by splitting them into two and that two separate parts should be sold to separate undertakings. However, this was not feasible for economic and technical reasons. It therefore recommended that the operation of the two ports be conducted by two different operators. The recommendation was accepted. The TCA further intended to prevent vertical integration and recommended that the operating rights should not be transferred to liner transport services or ship broker services. This recommendation was also accepted.

The Chairman then turned to Spain, which encouraged a process of port liberalisation. The Chairman asked the Spanish delegation to explain whether port authorities are still active in the operation of ports in Spain. Additionally, he asked if the reference to accounting separation in Spain's submission implied that port authorities are also active in carrying out port activities.

The delegate clarified that Spanish port authorities do operate some port services. Legally, however, their main role is to control and manage port services to ensure that they are carried out according to high standards. The reference to accounting separation in Spain's submission refers to private companies that perform several port services and must therefore provide separate accounts for each of their activities. Port authorities are also required to submit to accounting separation if they cover more than one port.

In Spain a new piece of regulation is trying to foster economic independence for each port, with the goal that they should each cover their costs. However, this new system has not fully achieved the goal of port self-sufficiency since a solidarity system exists across all the ports. The solidarity system is very complex and does not allow real financial transparency or responsibility for each port authority in order to set their prices and tariffs. The Spanish competition authority, Comisión Nacional de Competencia, has tried to limit this to impose more competition, but some characteristics have been retained despite the new regulation.

The Chairman noted that the provision of pilotage services in Spain is limited to one operator. A pilotage representative was in attendance and the Chairman asked if there was scope for competition in pilotage services, and if not, why not?

The Chairman of the French Maritime Pilots Association and vice-Chairman of the International Maritime Pilots Association explained his view as to why competition between pilotage organisations within a port is inconsistent with ensuring safety and environmental protection. He stated that due to their key role in safety, the judgements and decisions of pilots must be independent of commercial pressures.

Around the world a number of attempts at introducing competition among pilotage services have been trialled, some of which have been identified as contributing to maritime accidents. These trials, according to the representative, generally led to bad-quality and dangerous pilotage and did not lead to reduced prices.

The Chairman commented that the advocates of competition do have in mind consumer welfare and safety, and that competition should not be seen to disregard safety. In the Chairman's opinion, competition in pilotage would not necessarily bring lower standards of professionalism.

Responding to the Chairman's invitation for comments, Andrew Meaney posed a question to the pilotage representative. He asked that if there is a market failure, such that competition is not consistent with the safety requirements needed for pilotage, then should the regulation of pilotage be via the port authority or the competition authority.

First, the representative from the pilotage association clarified that in response to the Chairman's comment, he was not against competition, but that a single provider was needed. In response to Mr Meaney's question he answered that regulation could be local, regional or national, as long as it was by a competent authority.

The next intervention was by a delegate from the Business Industry Advisory Committee (BIAC). Although unable to provide a unified view from the business community, he offered the view of another stakeholder, APM Terminals, a global terminals operator. The APM Terminals representative stated that the transport of goods is a global industry that moves through a chain of unconnected market participants. Balancing the need for a large scale of infrastructure to achieve efficiencies is a difficult trade-off against avoiding natural monopolies.

APM Terminals' view is that governments and regulators should seek to establish robust and coherent concession terms upfront and a stable regulatory framework, rather than ongoing attempts to correct perceived market failures. This is important for ensuring private sector participation, given that these entities contribute long-term investments and take on operational and commercial risk. Without certainty, private sector participation will be reduced.

From the APM Terminals representative's perspective the ports market does work and there is substantial intra-and inter-port competition. He had only two concerns. First, ports are not end-destinations and the supporting infrastructure (rail, road and waterways) is often under public control. Second, port operations are labour-intensive and it is desirable to ensure that governments try to limit misaligned and overly restrictive labour practices to stop them from preventing inter-port competition or restricting the functioning of markets.

#### **4. Antitrust enforcement in port services**

The Chairman invited Kurt van Dender of the Research Center of the OECD International Transport Forum to provide a brief description of recent major changes in maritime transport and to address the question of whether ports can exercise market power.

Mr van Dender characterised the maritime sector as not one traditionally associated with intense competition, because ports enjoy market power from their location and the services they provide, strongly unionised labour, etc. However, Mr van Dender identified three major changes in the port sector: containerisation; integration of hinterland networks; and deregulation. These changes in maritime transport have increased competition and eroded ports' market power.

The Chairman moved the discussion to particular countries and introduced the first delegate from Slovenia. This country's submission raised an abuse of dominance case involving Luka Koper, the manager of the Port of Koper, which had refused access to a towing company. Luka Koper had tried to justify its refusal by claiming that the required capacity to accommodate the towing company was unavailable. The Chairman asked how the Slovenian competition authority (CPO) had been able to dismiss the argument and concluded that there was indeed an abuse of dominance.

The Slovenian delegate stated that the only argument that would justify refusal of access was the lack of spare capacity. However, Luka Koper had provided documents showing that there was in fact capacity

available to accommodate the towing company at the port. Consequently the conclusion of the case was that the statements by Luka Koper had been unjustified and that an abuse had therefore occurred.

The Chairman continued the discussion with a Bulgarian case, in which the state-owned company managing the Port of Burgas had refused access to a competitor in the market for ship disposal of garbage. The Chairman inquired what the reason had been to refuse access.

The Bulgarian delegate explained that the argument presented in the case did not relate to a lack of spare capacity. Usually the disposal of garbage was taken care of by an independent firm, but in this case the port operator provided the service and had refused access to the infrastructure to independent firms. The port had also issued regulations for port access that were not clear and objective for independent operators, therefore restricting access.

The Chairman referred to a suggestion by the European Union that conferences and consortia between liner shipping companies do not exert customer power over ports. He questioned whether this meant the ports' market power is hardly disciplined by the possibility that shippers might switch between ports, because of the complexity of schedules, timetables and terminal services.

The delegate from the European Union explained that cases involving conferences and consortia tended to be older merger cases, in which ports had said there was no market power concern. The European Commission had not found this to be a convincing argument because conferences only regulate ocean prices. It was found that this was not a sufficient negotiating platform with a port. Consortia, on the other hand, do regulate the port of call for members, but it was the Commission's view that the constraints on the consortia meant that they did not actually have customer bargaining power.

The Chairman followed up by asking why there had been fewer cases of this type more recently. He wondered if it was because the cases had been increasingly dealt with by national authorities or if it was because of increased competition. The delegate from the European Union responded that they were seeing fewer complaints, in particular in antitrust, but still received plenty of merger cases.

Turning to the delegate from the USA, the Chairman asked whether, in a market with a small number of competitors (frequently the case for container terminals, bulk goods terminals, and ocean shipping lines), control of an important facility (eg, a port terminal) by one competitor could be used anti-competitively, by either denying competitors access to the facility or allowing access under unfavorable terms? The Chairman also asked whether the essential facilities doctrine is back in the thoughts of the USA authorities.

The delegate explained that the US authorities have not recently filed any enforcement actions involving ports, but noted some US courts have recognized the essential facilities doctrine, which has been applied in some private cases and might be invoked in certain circumstances involving ports.

The Chairman referred to the Portuguese submission as providing a new perspective on something we always fear. In the Port of Setúbal competition between three different towage companies was created but these companies subsequently formed a cartel that fixed prices, allocated customers and established a compensating mechanism. The Chairman asked why this was necessary in a relatively transparent market.

The Portuguese delegate explained that the case was opened in 2007 to condemn the cartel that had been created in 2006. The cartel was closed straight away, which the Portuguese authorities took into consideration when setting the fines. The Portuguese delegate pointed out that once the cartel ended prices did fall.

She then referred to a similar case concerning the Portuguese Shipping Agents' Association, AGEPOR, which represents 95% of shipping agents in Portugal and which was the subject of a case in 2005 in which it was found to be setting minimum and maximum prices for services.

Next, the Chairman introduced the French submission, which referred to a decision made by the country's Competition Authority in April 2010. This case illustrates a change in concentration—a large owner (Maersk) had been linked to local handling operator (Perrigault). These two companies set up a company—called TPO—for handling activities at the Port of Le Havre. The joint venture (TPO) subsequently put into practice the policy of sharing customers between its two parents and also of only handling containers belonging to its parent company. This restricted competition between the terminal where TPO operated and other terminals within the port.

The Competition Authority found that in effect this no-competition clause was an objective restriction. Perrigault was enhancing its capacity by using TPO as a sub-contractor, which again was an objective restriction on competition. TPO therefore lost business by being forbidden to work for any container or ship that was not a Maersk client (more than 80% of the port's traffic was lost). The Competition Authority decided that TPO was not able to contract with new clients. The Appeals Court affirmed the Competition Authority's finding and also the materiality of the restrictive practice.

With reference to Romania, the Chairman pointed out that the country's competition authority had undertaken a number of market studies regarding port services, concluding that competition is functioning reasonably well in Black Sea ports. The market definition adopted refers only to Romanian ports. The reports show that the Ministry has allowed a number of competitors to enter also into port services. The Chairman asked whether the competition authority had played any role in this, and, if not, what prompted the Ministry to do so.

The Romanian delegate confirmed that in 2009 the Romanian Competition Council (RCC) undertook a market study into maritime transport services. One concern highlighted in this study was the ambiguity of the legal framework regarding towing and pilotage services. It was found that in some areas the pilotage service was concessioned to one operator, but there were also areas where the service was performed in competition by multiple operators. As a consequence of these findings, the RCC began discussions with the Ministry about these services.

In the context of excessive pricing issues, the Chairman referred to the submission by Estonia. In one particular case, the Estonian Competition Authority (ECA) had established that a port had abused its dominant position by finding that the charges applied to one terminal operator were higher than those applied to two other operators. The Chairman asked what the reason for discrimination was.

The Estonian delegate outlined that the case concerned the Port of Muuga, the largest cargo port in Estonia. The port's authority, which itself was not active in cargo handling, had charged one of the port's three terminal operators significantly higher cargo handling fees than the other two operators. The discrimination aspect was that all three operators were competing for the same clients. The differences in fees created an uneven playing field for the operators when competing downstream. The ECA had looked for an economic justification for the pricing based on costs, but could not find one.

The Chairman then introduced the submission from Finland, where the competition authority dealt with three excessive pricing cases in the ports of Helsinki, Mariehamn and Turku. One of these, Helsinki, was a pure excessive pricing case in which the authority calculated the return on investment and concluded that it was excessive. The Chairman queried how the authority had identified the standard of reference in this instance and why the Court had not found the arguments of the competition authority conclusive.



The Finnish delegate explained that the Port of Helsinki case had emerged when the port suddenly increased passenger fees. The Finnish Competition Authority (FCA) had taken multiple approaches to identify a standard of reference. It had examined passenger fees charged compared with other domestic and European ports and found that the Port of Helsinki charged high prices compared to other ports. The authority had also calculated the weighted average cost of capital (WACC) for the Port of Helsinki and found that the port's actual levels of profitability were well in excess of this measure. The Court, however, concluded that because of the sensitivity of WACC calculations to the required assumptions, there was insufficient evidence for excessive pricing.

Referring to Sweden, the Chairman pointed out that new provisions were added to the toolkit available to the country's competition authority in order to block anti-competitive practices by public sector entities. These provisions are important for establishing competitive neutrality and the Chairman thought that they might represent an example for other jurisdictions. In this context, the Chairman asked the Swedish delegation to briefly describe these new provisions and discuss how they have been applied to a shipping service case where both privately and municipal-owned companies were present.

The Swedish delegate started his intervention by outlining the difference between private and public sector companies. Public sector companies cannot be declared bankrupt and are funded by taxes. Public sector companies operate in the market under different conditions to those of the private sector and this can cause market distortions. Complaints arise about public interventions when public sector companies are either operating below cost, charging excessive prices, refusing access to essential facilities or carrying out both activities as a state monopoly and activities that are subject to competition. This last concern is relevant to Swedish ports. The competition authority has been focusing on municipal ports broadening their scope and taking advantage of the monopoly in stevedoring services.

A relevant case arose in February 2010 with a complaint about the services of a competitor that was partially owned by a subsidiary to a municipality. The competition authority decided to investigate the sales activity under the new amendment. The company involved was mainly a forwarding agency and a ship broker and it was claimed by operators providing similar services at the port that the company's main advantage came from its close relationship with the municipality. The Swedish delegate explained that, in such cases, the competition authority needs to consider whether the municipality has decisive influence over the company and whether sales activity distorts competition in the market. It is worth noting that there is no *de minimis* rule or dominant position rule applicable. Distortion of the market is defined where existing competitors cannot compete on equal terms. An impediment to competition occurs when a private alternative exits or does not enter the market as a result of the conduct of the public entity or by the mere presence of the public entity in the market. The distinction between a distortion and an impediment to competition affects the type of investigation undertaken. If there is an impediment then the authority looks at the market, and if there is a distortion then the authority considers the conditions for the public body and compares it with the private counterpart.

The Chairman asked whether the Swedish intervention opened the possibility of state aid investigations at the local level. In response the Swedish delegate explained that the amendment should not be applied to the aid itself but the conduct of the public body.

Mr Meaney made an intervention which raised two general points. First, that there is a need to have a structure and analytical framework in which to assess the sorts of issues raised during the roundtable, in the manner that the hypothetical monopolist test is a framework for addressing the market definition question. Second, that there appears to be a distinction between competition authorities with local powers viewing ports on a local basis, and, alternatively, viewing ports in the context of wider international logistics chains. If ports are viewed at a very local level, with narrowly defined markets, then some of the wider horizontal or vertical integration issues might be missed.

The Chairman summarised the roundtable by saying that there are of course different markets in the ports sector and that there is both competition between logistics chains and between ports. He continued by noting that the local issues that had just been referred to are also important, although many ports are in fact quite large such that these issues are not all that local. The cases discussed throughout the roundtable had raised a number of competition concerns and the cause of many of these was integration between regulatory and operational functions. Vertical separation may be one way of eliminating these conflicts of interest. Other interventions made during the event referred to cases of excessive pricing and the Chairman accepted that these are very difficult cases; typically it is not straightforward to determine a standard of reference for the level at which prices become excessive. There is further work to be done in identifying the appropriate standard and other OECD roundtables will continue to examine this issue.



## **COMPTE RENDU DE LA DISCUSSION**

*Par le Secrétariat*

### **1. Introduction**

Le Président, Alberto Heimler, ouvre la séance en déclarant que, s'agissant des ports, il y a eu de nombreux cas d'abus de position dominante dans l'Union européenne ces 20 dernières années. Au fil des ans, le secteur portuaire a connu de nombreux changements. L'évolution des techniques dans le domaine des services de transports s'est par exemple traduite par un renforcement notable de la concurrence entre les ports. En outre, les autorités portuaires ne sont de plus en plus souvent responsables que de la gestion du port et interviennent moins dans les services de transport, ce qui constituait une des causes importantes d'abus de position dominante dans le passé. Enfin, sauf dans certains pays, les droits spéciaux et exclusifs des travailleurs ont été supprimés et le marché des services portuaires s'est en règle générale ouvert, notamment grâce à la suppression des protections offertes par la réglementation. Auparavant, on estimait que le pouvoir de marché était détenu par les ports. Au vu des dernières évolutions, il conviendrait peut-être de revenir sur cette idée.

Le Président présente ensuite les quatre experts qui participent à la table ronde : Enno Eilts et Andrew Meaney, qui travaillent chez Oxera et sont deux des auteurs du document de référence pour cette discussion ; Thierry Vanelslander, de l'université d'Anvers, l'un des auteurs d'une autre note rédigée pour cette table ronde, note qui offre une analyse complémentaire sur les relations entre l'industrie maritime et les ports ; Kurt Van Dender, qui travaille au Forum international des transports de l'OCDE.

Le Président propose de structurer la discussion autour de trois thèmes principaux. Le premier porte sur la zone géographique concernée par la concurrence entre les ports. Le deuxième concerne la réforme de la réglementation du secteur portuaire et la manière dont celle-ci a modifié la concurrence entre les ports et en leur sein. Le troisième thème est l'expérience des différents pays en matière de lutte contre les infractions au droit de la concurrence, y compris leur appréciation des raisons de la baisse du nombre d'affaires relatives aux ports observée ces dix dernières années.

### **2. La portée géographique des marchés en cause**

S'appuyant sur le document de référence, le Président cite l'exemple des ports utilisés par les importateurs autrichiens. N'ayant pas d'accès direct à la mer, l'Autriche se sert de plusieurs ports maritimes d'autres pays comme point d'entrée et de sortie pour les marchandises en provenance ou à destination d'outre-mer. S'agissant de la définition du marché, le Président demande si des ports aussi éloignés que Rotterdam et Trieste interviennent sur le même marché géographique.

M. Eilts commence son intervention en indiquant que l'élément essentiel permettant de déterminer la portée géographique d'un marché des services portuaires est le fait de savoir si des prestataires de services dont la localisation géographique diffère sont ou non substituables. Toutefois, avant de s'intéresser à la zone géographique dans laquelle une prestation définie peut être exécutée à un coût compétitif, il convient de définir le marché pertinent des produits et des clients. Des services différents, comme le remorquage, le pilotage ou la manutention de conteneurs peuvent constituer des marchés distincts. Par conséquent,

s'agissant des services portuaires, il peut y avoir non pas un seul, mais de nombreux marchés. Chacun d'entre eux est susceptible d'avoir une portée géographique différente.

Revenant sur l'exemple autrichien, M. Eilts souligne que la définition du marché géographique basée sur le test du monopole hypothétique, test classiquement utilisé par les autorités de la concurrence et les spécialistes, ne partirait pas d'une zone géographique particulière, comme l'Autriche, mais du ou des port(s) en question, par exemple Rotterdam ou Trieste. Pour ce qui est de la substituabilité des prestataires de services dans ces ports, la question qui se pose est de savoir dans quelle zone géographique les marchandises peuvent être transportées à un coût compétitif. Lorsqu'il y a un chevauchement important entre les arrière-pays portuaires de ports différents, ces ports interviennent probablement sur le même marché géographique.

Le Président se tourne ensuite vers M. Vanelslander en faisant référence à sa note, laquelle aborde la question de la concurrence entre les ports et des évolutions que cela entraîne pour l'industrie maritime. Sur ce point, il lui demande d'indiquer dans les grandes lignes comment la concurrence des services portuaires pourrait évoluer dans un proche avenir.

Au cours de son intervention, M. Vanelslander explique que la concurrence entre les ports s'étend de plus en plus fréquemment à toute la chaîne logistique. Parmi les acteurs de cette chaîne, on peut citer les armateurs, les opérateurs de terminaux et les entreprises de transport intérieur. Les services secondaires qui ne font pas partie de cette chaîne sont le pilotage et le remorquage.

S'agissant des évolutions futures, M. Vanelslander s'attend à de nouvelles privatisations et à une déréglementation accrue. Il estime que la mission de contrôle des autorités portuaires va sans doute se réduire et qu'elles se consacreront davantage à faire en sorte que les capacités portuaires soient suffisantes. La concentration horizontale va s'intensifier, en ce sens que les plus gros armateurs géreront une plus grande proportion des marchandises transportées. L'intégration verticale va sans doute également s'accroître : des armateurs vont, par exemple, également devenir opérateurs de terminaux et se chargeront du transport intérieur. En outre, des capacités plus importantes seront nécessaires, ainsi que des rotations plus rapides et un niveau de spécialisation plus élevé.

Le Président évoque ensuite la contribution écrite remise par le Taipei chinois. Ce texte explique que Kaohsiung, un des ports du pays, est situé à la jonction des réseaux de transport maritime de l'Asie du Nord-Est et de l'Asie du Sud-Est, réseaux qui sont également desservis depuis Singapour et Busan (Corée du Sud), ce qui laisse à penser que Kaohsiung est en concurrence avec Singapour au sud et Busan au nord. En parallèle, ce qui contredit en partie cette affirmation, le texte poursuit en indiquant que le regroupement de plusieurs industries dans une zone proche du port a grandement contribué au volume de trafic et à la performance opérationnelle du site. Le Président demande au Taipei chinois s'il considère que le marché pertinent est international, national ou les deux à la fois.

Le délégué du Taipei chinois explique que la concurrence dans les services portuaires est aussi bien nationale qu'internationale. D'une part, les ports servent de canaux de distribution pour les exportations, ce qui leur donne une dimension nationale. Le gouvernement du Taipei chinois va d'ailleurs créer de nouveaux ports pour tenter d'accroître la concurrence entre ses ports nationaux. D'autre part, les ports peuvent jouer le rôle de plateforme, ce qui leur donne une dimension internationale. À cet égard, le délégué du Taipei chinois considère que les ports du pays ne sont pas seulement en concurrence avec ceux de Singapour et de Busan mais également avec les ports de Shanghai et de Hong-Kong. Le gouvernement du Taipei chinois cherche à accroître la compétitivité internationale de ses ports en réformant ce secteur en profondeur. Il s'attache par exemple à créer des autorités portuaires à capitaux publics, mais qui sont gérées par des entreprises privées, y compris par des armateurs.

Le Président évoque ensuite la contribution du Mexique. La Commission fédérale mexicaine de la concurrence (CFC) a été chargée de déterminer si l'acquisition d'un nouveau terminal par une entreprise qui contrôlait déjà un terminal dans le port de Manzanillo entraînerait une diminution substantielle de la concurrence. La CFC a évalué les pressions concurrentielles qui pesaient sur le port de Manzanillo en examinant la concurrence au sein du port et celle qui résulte du port de Lázaro Cárdenas, distant de 423 kilomètres. Le Président demande comment l'évaluation globale a été effectuée.

Le délégué du Mexique explique que la CFC s'est tout d'abord attachée à définir les marchés de produits concernés avant de s'intéresser à la portée géographique de ces marchés. Sur ce premier point, cette autorité a conclu que le marché de produits pertinent était celui des services de manutention des conteneurs, y compris le chargement, le déchargement, l'entreposage, la livraison et la réception des conteneurs.

Pour ce marché de produits, le CFC a ensuite étudié l'ensemble des autres solutions existantes ou éventuelles qui s'offrent aux clients quand ils sont confrontés à une hausse du prix des services de manutention des conteneurs. S'agissant des conteneurs qui transitent par le port de Manzanillo et qui sont en provenance ou à destination du Mexique, la CFC a étudié la distance qui sépare les ports des lieux de provenance ou de destination. Cette autorité a procédé au même exercice pour le port de Lázaro Cárdenas et a conclu qu'il y avait un chevauchement entre les zones de chalandise de ces deux ports. Cette étude donne à penser que les ports de Manzanillo et de Lázaro Cárdenas peuvent être considérés comme concurrents pour les services de manutention des conteneurs.

Le Président passe alors à la contribution des États-Unis, contribution qui indique que le port mexicain de Manzanillo est substituable aux ports de Los Angeles et de Long Beach. Bien qu'il n'y ait pas eu d'évaluation du marché pertinent en bonne et due forme établissant ce fait, une expérience grandeur nature s'est mise en place : la fermeture de l'un des ports a entraîné un transfert des marchandises vers d'autres ports.

Le délégué des États-Unis fournit des informations supplémentaires sur cette expérience. Dans ce cas particulier, les ports de Los Angeles et de Long Beach étaient congestionnés et, par conséquent, d'autres ports de la côte ouest ont été utilisés, y compris le port de Manzanillo. Cependant, le délégué des États-Unis explique que même si elle est instructive, cette expérience grandeur nature ne remplace pas le test du monopole hypothétique, lequel est nécessaire pour déterminer la portée géographique d'un marché. Tout au plus, la seule indication apportée par une telle expérience est que d'autres ports étaient des compétiteurs plus lointains que le port vers lequel le trafic détourné du port congestionné s'est dirigé. Cette expérience seule ne permet donc pas de conclure que les ports en question interviennent sur le même marché géographique que le port congestionné.

La contribution de la Suisse aborde la concurrence entre les différents ports situés le long du Rhin, comme Düsseldorf ou Duisbourg, et le port suisse de Bâle. À ce sujet, le Président demande si le marché pertinent a été défini explicitement.

Le délégué de la Suisse déclare que, bien le pays soit alpin et sans accès direct à la mer, la concurrence entre les ports et les services portuaires n'en est pas moins importante étant donné que 13 % des marchandises importées par la Suisse arrivent par voie navigable.

Après avoir indiqué que, s'agissant des services fournis par le port de Bâle, le marché n'avait pas été défini de manière précise, le délégué de la Suisse avance que le port est soumis à deux types de pressions concurrentielles. Il subit tout d'abord la concurrence d'autres modes de transport, notamment le rail et la route. Ainsi, le long des 800 et quelques kilomètres qui séparent Rotterdam de la Suisse, il existe bien des possibilités de remplacer le fleuve par d'autres moyens de transport, par exemple à Düsseldorf ou à

Duisbourg. Cette caractéristique donne lieu à la deuxième pression concurrentielle, qui résulte de l'existence des autres ports situés le long du Rhin.

Faisant référence à la contribution russe, le Président relève que le port de Saint-Petersbourg a fait l'objet d'une dérèglementation à titre expérimental et demande si cette décision résulte d'un bilan concurrentiel effectué sur un secteur plus large. Il demande également comment le succès ou l'échec de l'expérience sera évalué et, dans l'hypothèse où elle serait jugée concluante, si tous les ports russes feront l'objet d'une dérèglementation.

Le délégué de la Russie commence son intervention en confirmant qu'il a été mis fin temporairement à la réglementation directe des prix des services portuaires — comme le chargement, le déchargement et l'entreposage des cargaisons — dans le port de Saint-Petersbourg. L'idée de déréglementer le port a pour origine la volonté de réduire le degré d'intervention de l'État dans l'économie d'une manière plus générale et d'ouvrir les marchés à la concurrence. Il a été jugé que les ports constituaient un cadre idéal pour cette expérience. Même si l'évolution du port de Saint-Petersbourg est suivie avec attention, il est encore trop tôt pour dire si cette expérience a été ou non un succès. Néanmoins, si elle s'avère concluante, il est probable que d'autres ports feront l'objet d'une dérèglementation.

Le Président porte ensuite son attention sur la contribution des Pays-Bas. En 2005, l'autorité de la concurrence de ce pays (la Nma) a publié un rapport sur HbR, la société qui est chargée de la gestion du port de Rotterdam, rapport qui concluait que cette entreprise n'était pas en concurrence avec d'autres autorités portuaires s'agissant de la mise à disposition d'infrastructures portuaires. Le Président demande s'il s'agit d'une affirmation générale ou si cela ne concerne que quelques clients qui n'ont pas la possibilité de changer de fournisseur. Il demande également pourquoi la suggestion émise par la Nma, à savoir réglementer les tarifs portuaires, n'a pas été reprise par les pouvoirs publics.

Le délégué des Pays-Bas répond à la première question du Président en indiquant que les tarifs portuaires ne représentent qu'une petite part du coût global du transport. Par conséquent, ils ne jouent qu'un rôle secondaire lorsqu'il s'agit de faire un choix entre différents ports. C'est cet élément qui a amené la NMA à conclure que le port de Rotterdam n'était en concurrence avec aucune autre autorité portuaire. S'agissant de la question de savoir pourquoi la suggestion de la NMA de réglementer les tarifs portuaires n'avait pas été reprise par les pouvoirs publics, le délégué des Pays-Bas déclare qu'apparemment le secteur concerné et l'État préfèrent des mesures d'autodiscipline à une réglementation spécifique du secteur.

Évoquant maintenant la contribution allemande, le Président relève qu'elle fait référence à une décision de concentration rendue par le Bundeskartellamt qui concerne la société belge Sea-Invest, laquelle voulait prendre le contrôle d'un terminal d'entreposage et de manutention de fruits du port de Hambourg. Dans cette affaire, le marché a été défini comme étant la manutention des cargaisons de fruits dans les ports maritimes. Le Président demande si, dans le cas d'un marché si étroit, une réglementation des prix serait nécessaire.

Le délégué de l'Allemagne commence son intervention en indiquant que l'affaire à laquelle le Président faire référence a fait l'objet d'un non-lieu au motif qu'elle ne présentait pas de réels problèmes de concurrence. Même si le Bundeskartellamt a défini un marché de produits un peu étroit, — celui de la manutention des cargaisons de fruits — il a conclu que la portée géographique de ce marché était assez large car elle couvrait l'intégralité de l'axe Hambourg — Le Havre. Cela signifiait que, à l'issue de cette acquisition, la concurrence entre ports demeurerait suffisante.

Cependant, même s'il n'y a pas de problème de concurrence dans ce cas particulier, la question de savoir s'il faut réglementer les ports et les services portuaires demeure. Une telle réglementation peut être nécessaire lorsqu'un port ou une installation portuaire s'avère être une infrastructure indispensable. À cet

égard, le délégué de l'Allemagne a cité l'exemple du port de Puttgarden, géré par son propriétaire, port qui propose des services de transport par ferry à destination du Danemark voisin.

### **3. La réforme de la réglementation des ports et des services portuaires**

Le Président introduit ensuite le thème de discussion suivant : la réforme de la réglementation des ports et des services portuaires. Il note qu'en Europe plusieurs réformes de ce type ont été mises en place. Toutefois, elles ne l'ont pas été à l'instigation de la Commission européenne, laquelle a été plutôt silencieuse sur la question de la réforme de la réglementation et de la libéralisation des ports et services portuaires eu égard à son action en faveur des réformes de la réglementation dans d'autres industries d'infrastructure. De fait, nombre de réformes en Europe trouvent leur origine dans des arrêts de la Cour de justice de l'Union européenne (CJUE). Après cette introduction, le Président demande au délégué de l'Italie d'expliquer la nature et les raisons des réformes menées dans le pays en 1994 et d'évaluer l'impact de ces réformes sur la concurrence.

Le délégué de l'Italie indique que les réformes de la réglementation adoptées par son pays (réformes qui ont pour origine un arrêt de la CJUE relatif au port de Gênes) ont séparé le rôle lié à la réglementation de celui de la prestation de services marchands s'agissant des ports et des services portuaires. Ces réformes ont institué des autorités portuaires, organismes publics chargés de préparer les évolutions générales et de surveiller l'exploitation des ports. Les activités de manutention du fret ont été libéralisées de sorte que des entreprises privées peuvent pénétrer le marché afin d'offrir leurs services. Ces réformes ont également limité l'existence des droits exclusifs.

Durant la période de transition qui a suivi l'adoption de ces réformes, certaines autorités portuaires ont continué à offrir des services marchands, ce qui a parfois engendré des obstacles pour de nouveaux entrants. Certaines de ces affaires ont fait l'objet de poursuites judiciaires au titre de la législation sur l'abus de position dominante. Cependant, d'une manière générale, l'Italie estime que ces réformes ont permis l'ouverture à la concurrence au sein des ports, même si le délégué indique que l'Italie va peut-être juger utile d'aborder et de traiter la question de la concurrence entre ports.

Se tournant vers le Royaume-Uni, le Président relève qu'alors que la plupart des infrastructures du pays font l'objet d'une réglementation, le secteur portuaire n'est pas soumis à une telle réglementation car on estime que les services portuaires sont suffisamment concurrentiels. Le Président demande au délégué du Royaume-Uni si cette compétitivité résulte de réformes ou d'une évolution du marché.

Le délégué du Royaume-Uni confirme que le secteur portuaire apparaît quelque peu différent d'autres secteurs du pays car il ne comporte pas d'autorité de régulation sectorielle. Cela étant, l'accès et les tarifs sont régis par une législation nationale, mais celle-ci est antérieure à la privatisation des ports du Royaume-Uni dans les années 90. L'absence d'autorité de régulation sectorielle s'explique par le fait que le secteur portuaire est considéré comme concurrentiel. Pour répondre à la question du Président, le délégué indique que la concurrence résulte principalement du marché et non des réformes.

Cependant, le degré d'intégration verticale entre les propriétaires des ports et les prestataires de services portuaires, et notamment le risque d'éviction sur le marché en aval préoccupe les autorités de la concurrence du Royaume-Uni. Si une affaire de ce type devait être présentée à ces autorités, elles l'examineraient en premier lieu sous l'angle de la législation sur l'abus de position dominante. En dépit de ses inquiétudes concernant l'intégration verticale, le Royaume-Uni est conscient que la question se pose de savoir si la séparation verticale est nécessaire à long terme ou si elle risque d'engendrer des coûts et de diminuer l'efficacité économique.



Le Président souligne l'exemple du Chili, où, en 1997, le gestionnaire portuaire détenu par l'État (Emporchi) a été scindé en dix autorités portuaires publiques plus petites, chacune d'entre elles n'étant en charge que d'un seul port. Le Président souhaite savoir si ces ports sont verticalement intégrés ou si les gestionnaires portuaires se contentent d'exploiter une concession et de répartir les tâches (autrement dit, s'ils se comportent comme des propriétaires). Il demande également si cette séparation horizontale s'est accompagnée d'une séparation verticale.

Le délégué du Chili explique que l'objectif de ces réformes était d'encourager à la fois les investissements privés afin de développer les infrastructures portuaires et la gestion privée afin d'améliorer l'efficacité des services fournis. Depuis que ces réformes ont été adoptées, le rôle des entreprises publiques se résume à la vérification du respect de la réglementation et au fait de mener à bien la procédure d'attribution des concessions.

Les dispositions de la loi chilienne sur les ports précisent que certaines activités ne peuvent être effectuées que par des entreprises privées sauf si aucune société privée ne souhaite assurer ces services. Plusieurs autres tâches (par exemple, l'entreposage) peuvent être accomplies soit par le secteur privé, soit par l'entreprise publique concernée. Cependant, toute attribution de concession doit faire l'objet d'une adjudication ouverte et la durée maximale de concession est de 30 ans. La loi sur les ports a également abouti à une nette séparation verticale entre la propriété des infrastructures et la prestation de services portuaires.

Le Président indique que, pour des raisons budgétaires, aucun délégué de l'Indonésie n'est présent mais attire l'attention sur la contribution de ce pays, contribution qui se penche sur une nouvelle loi visant à supprimer les monopoles verticaux d'une manière comparable à ce qui a été fait au Chili.

Le Président s'adresse ensuite à la Turquie, pays où l'autorité de la concurrence a eu l'occasion d'évaluer le projet de privatisation des ports d'İzmir et de Mersin et a imposé des mesures visant à améliorer la concurrence. Le Président demande pourquoi l'idée d'établir une concurrence entre ces deux ports n'a pas été retenue et pourquoi aucune séparation verticale n'a eu lieu.

Le délégué de la Turquie répond que, s'agissant de la privatisation des ports d'İzmir et de Mersin, l'autorité turque de la concurrence souhaitait encourager la concurrence intra-portuaire. À cette fin, elle recommandait que pour ces deux ports, les zones géographiques utilisées comme terminaux à conteneurs et espaces arrières devraient être privatisées en étant scindées en deux afin que deux parties distinctes soient vendues à deux entreprises différentes. Cela n'était toutefois pas faisable pour des raisons économiques et techniques. Elle recommanda par conséquent que l'exploitation des deux ports soit confiée à deux entreprises différentes. Cette recommandation a été acceptée. L'Autorité de la concurrence a également cherché à empêcher l'intégration verticale et a recommandé que les droits d'exploitation ne soient pas transférés à des entreprises qui proposaient des services de transport maritime de ligne ou des services de courtage maritime. Cette recommandation a également été retenue.

Le Président se tourne alors vers l'Espagne, pays qui a encouragé la libéralisation portuaire. Il demande à la délégation de l'Espagne d'indiquer si les autorités portuaires participent encore à l'exploitation des ports espagnols. Il lui demande également si l'allusion à la séparation comptable dans la contribution espagnol sous-entend que les autorités portuaires effectuent également des activités portuaires.

Le délégué confirme que les autorités portuaires espagnoles réalisent certaines activités portuaires. Toutefois, juridiquement, leur rôle consiste principalement à contrôler et à gérer les services portuaires afin de garantir qu'ils sont effectués selon des règles très strictes. Dans la contribution de l'Espagne, la référence à la séparation comptable concerne les entreprises privées qui proposent plusieurs services portuaires différents et doivent donc présenter des comptes séparés pour chacune de leurs activités. Les

autorités portuaires sont elles aussi tenues de se soumettre à des règles de séparation comptable si elles ont la responsabilité de plusieurs ports.

En Espagne, une nouvelle réglementation cherche à favoriser l'indépendance économique de tous les ports, afin que chacun d'entre eux puisse couvrir ses coûts. Toutefois, ce nouveau régime n'a pas permis de parvenir à une indépendance complète des ports car il existe un mécanisme de solidarité entre l'ensemble des installations portuaires. Ce mécanisme est très complexe et empêche les ports d'atteindre une transparence financière et une responsabilité réelles afin qu'ils puissent fixer librement les différents prix et tarifs. L'autorité espagnole de la concurrence, la Comisión Nacional de Competencia, a essayé de limiter ce mécanisme afin d'instaurer davantage de concurrence, mais certaines caractéristiques ont été conservées en dépit de la nouvelle réglementation.

Le Président relève qu'en Espagne les services de pilotage ne sont assurés que par un seul prestataire. Un représentant des pilotes est présent et le Président lui demande s'il peut y avoir un intérêt à instaurer une concurrence dans les services de pilotage, et sinon, pour quelle raison.

Le Président de la Fédération française des pilotes maritimes, qui est également vice-président de l'Association internationale des pilotes maritimes, explique pourquoi, selon lui, la concurrence entre les organisations de pilotage au sein des ports n'est pas compatible avec la sécurité et la protection de l'environnement. Il déclare qu'en raison de leur rôle essentiel en matière de sécurité, les appréciations et les décisions des pilotes ne doivent pas être soumises à une quelconque pression commerciale.

De par le monde, plusieurs tentatives visant à instaurer une concurrence entre services de pilotage ont eu lieu. Il est apparu que certaines d'entre elles ont contribué à des accidents de mer. Selon le représentant des pilotes, ces expériences ont conduit à une qualité insuffisante et à un pilotage dangereux et ne se sont pas traduites par une baisse des prix.

Le Président fait remarquer que les partisans de la concurrence ont le souci du bien-être et de la sécurité du consommateur et qu'il ne faut pas considérer que la concurrence néglige la sécurité. Selon le Président, la concurrence dans le secteur du pilotage n'entraînerait pas nécessairement une baisse de qualité des services rendus.

Le Président l'ayant invité à présenter ses observations, Andrew Meaney pose une question au représentant des pilotes : il lui demande si, dès lors qu'il y a une défaillance du marché, de sorte que la concurrence n'est pas compatible avec les exigences de sécurité du pilotage, le contrôle du pilotage doit être assuré par l'autorité portuaire ou par l'autorité de la concurrence.

Tout d'abord, en réponse aux remarques du Président, le représentant des pilotes précise qu'il n'est pas hostile à la concurrence, mais qu'il ne doit y avoir qu'un seul prestataire. S'agissant de la question posée par M. Meaney, il estime que le contrôle peut être local, régional ou national, dès lors qu'il est assuré par une autorité compétente.

L'intervenant suivant est le délégué du Comité consultatif économique et industriel (le BIAC). N'étant pas en mesure de donner un point de vue unique pour les entreprises, il donne l'avis d'un autre acteur concerné, APM Terminals, un opérateur de terminaux d'envergure mondiale. Le représentant d'APM Terminals déclare que le transport de marchandises est un secteur d'envergure mondiale qui fait intervenir une chaîne d'intervenants indépendants les uns des autres. Il est difficile de disposer de grandes infrastructures, lesquelles permettent de réduire les coûts, sans qu'il y ait de monopole naturel.

APM Terminals estime que les États et les autorités de régulation doivent chercher à établir à l'avance des conditions de concession solides et cohérentes plutôt que d'essayer en permanence de remédier aux supposées défaillances du marché. C'est un élément important pour garantir la participation du secteur

privé étant donné que celui-ci contribue aux investissements à long terme et assume des risques commerciaux et d'exploitation. En l'absence de sécurité juridique, la participation du secteur privé diminuera.

Selon le représentant d'APM Terminals, le marché portuaire fonctionne correctement et fait l'objet d'une réelle concurrence, tant au sein des ports qu'entre eux. Il n'a que deux sujets de préoccupation. Tout d'abord, les ports ne sont pas des destinations finales et les infrastructures complémentaires (le rail, la route et les voies navigables) sont souvent contrôlées par les États. Deuxièmement, les opérations portuaires nécessitent beaucoup de main-d'œuvre ; les États devraient donc chercher à limiter les pratiques inadéquates et trop restrictives en matière d'emploi afin que celles-ci ne nuisent pas à la concurrence entre ports et n'affectent pas le fonctionnement des marchés.

#### **4. La lutte contre les pratiques anticoncurrentielles dans les services portuaires**

Le Président invite Kurt van Dender, membre du centre de recherche du Forum international des transports de l'OCDE, à présenter brièvement les changements importants survenus dans les transports maritimes dans une période récente et à répondre à la question de savoir si les ports peuvent exercer un pouvoir de marché.

M. van Dender indique que, dans le secteur maritime, la concurrence n'a jusqu'à présent pas été intense, car les ports jouissent d'un pouvoir de marché grâce à leur emplacement et aux services qu'ils proposent, à une main-d'œuvre très syndiquée, etc. Cela étant, M. van Dender relève trois évolutions importantes qu'a connues le secteur portuaire : la conteneurisation, l'intégration des réseaux de transport terrestre et la déréglementation. Ces changements dans le transport maritime ont accru la concurrence et sapé le pouvoir de marché des ports.

Le Président fait à présent porter la discussion sur des pays spécifiques et fait intervenir le premier délégué de la Slovaquie. La contribution de ce pays mentionne une affaire d'abus de position dominante dans laquelle était impliqué Luka Koper, le gestionnaire du port de Koper, gestionnaire qui avait refusé l'accès à une société de remorquage. Luka Koper avait essayé de justifier son refus en avançant qu'il ne disposait pas de capacités suffisantes pour accueillir l'entreprise de remorquage. Le Président demande comment l'autorité slovaque de la concurrence (la CPO) a réussi à rejeter cet argument et à conclure qu'il y avait bien eu abus de position dominante.

Le délégué de la Slovaquie déclare que le refus d'accès ne peut se justifier que par une insuffisance des capacités disponibles. Or, Luka Koper avait fourni des documents montrant qu'en réalité il y avait suffisamment de capacités disponibles pour accueillir la société de remorquage dans le port. Par conséquent, il a été conclu que les affirmations de Luka Koper étaient sans fondement et que l'abus de position dominante était établi.

Le Président poursuit la discussion avec une affaire survenue en Bulgarie, affaire dans laquelle l'entreprise publique qui gère le port de Bourgas a refusé l'accès à un concurrent sur le marché de la récupération des déchets des navires. Le président demande quelle a été la raison avancée pour refuser l'accès à l'entreprise en question.

Le délégué de la Bulgarie explique que l'argument présenté dans cette affaire ne portait pas sur un manque de capacités disponibles. En général, la récupération des déchets est effectuée par une entreprise indépendante alors que, en l'espèce, c'est le gestionnaire du port qui assurait ce service et avait refusé l'accès des infrastructures à des sociétés indépendantes. Le port avait en outre établi une réglementation relative à l'accès au port qui n'était ni claire ni impartiale pour les prestataires indépendants, ce qui lui permettait de restreindre cet accès.

Le Président évoque alors une remarque formulée par l'Union européenne, à savoir que les conférences maritimes et les consortiums établis entre les compagnies maritimes de ligne n'exercent pas un pouvoir en tant que clients sur les ports. Il demande si cela signifie que le pouvoir de marché des ports est à peine limité par la possibilité que les chargeurs puissent changer de port, du fait de la complexité de l'enchaînement des tâches, des horaires et des services de terminaux.

Le délégué de l'Union européenne explique que les cas qui concernent les conférences maritimes et les consortiums sont en général des affaires de concentration anciennes dans lesquelles les ports avaient affirmé qu'il n'y avait aucun problème de pouvoir de marché. La Commission européenne n'avait pas jugé cet argument convaincant car les conférences maritimes ne fixent les prix que pour la partie strictement maritime des trajets. Il a été estimé que cela ne constituait pas un élément de négociation suffisant vis-à-vis d'un port. En revanche, les consortiums déterminent les ports d'escale pour leurs membres, mais, selon la Commission, les contraintes qui pèsent sur les consortiums font que ceux-ci ne disposent pas réellement d'un pouvoir de négociation en tant que clients.

Le Président poursuit en demandant pourquoi il y a eu moins d'affaires de ce type dans une période récente. Il demande si cela est dû au fait que les affaires sont de plus en plus souvent traitées par les autorités nationales ou si la raison en est que la concurrence s'est accrue. Le délégué de l'Union européenne répond que celle-ci reçoit moins de plaintes, notamment pour infraction au droit de la concurrence, mais continue à examiner un grand nombre d'opérations de concentration.

Se tournant vers le délégué des États-Unis, le Président lui demande si, sur un marché qui compte peu de concurrents (ce qui est souvent le cas pour les terminaux à conteneurs, les terminaux vrac et les lignes de transport maritime), le contrôle d'une installation importante (par exemple un terminal portuaire) par un concurrent peut servir à faire obstacle à la concurrence, soit en empêchant les concurrents d'accéder à l'installation, soit en y autorisant l'accès dans des conditions défavorables. Le Président demande également si les autorités américaines estiment que la théorie des infrastructures essentielles reprend de l'importance.

Le délégué explique que les autorités américaines n'ont pas récemment déposé d'actions répressives concernant des ports, mais précise néanmoins que les cours de justice américaines ont reconnu le concept des installations essentielles, qui a été utilisée dans des cas privés et qui peut être invoquée dans certains cas concernant des ports.

Le Président évoque la contribution portugaise en indiquant qu'elle offre une nouvelle perspective sur une éventualité que nous redoutons constamment. Dans le port de Setúbal, une concurrence entre trois entreprises de remorquage différentes a été instaurée mais, par la suite, ces sociétés ont formé un cartel qui a fixé les prix, s'est réparti les clients et a mis en place un mécanisme de compensation. Le Président demande pourquoi cela était nécessaire sur un marché relativement transparent.

La déléguée du Portugal explique que la procédure a été ouverte en 2007 afin de condamner le cartel qui s'était constitué en 2006. Celui-ci a été dissous immédiatement, ce dont les autorités portugaises ont tenu compte lorsqu'elles ont fixé le montant des amendes. La déléguée souligne que, dès qu'il a été mis fin à l'entente, les prix ont chuté.

Elle fait ensuite état d'une affaire similaire qui concernait l'AGEPOR, l'association portugaise des agents maritimes, association qui représente 95 % des consignataires au Portugal et qui a fait en 2005 l'objet d'une enquête qui a conclu qu'elle fixait des prix minimums et maximums pour les prestations effectuées.

Le Président aborde ensuite la contribution française, laquelle évoque une décision rendue par l'autorité de la concurrence de ce pays en avril 2010. Cette affaire est un exemple d'évolution de la concentration des entreprises : un gros armateur (Maersk) était allié à un entrepreneur de manutention local (Perrigault). Ces deux sociétés avaient créé une entreprise — baptisée TPO — afin d'effectuer les activités de manutention sur le Port du Havre. L'entreprise commune (TPO) a mis en œuvre une politique de partage de clientèle entre ses sociétés mères et s'est abstenue de traiter d'autres conteneurs que ceux de sa société mère. Ces pratiques restreignaient la concurrence entre le terminal où TPO exerçait ses activités et les autres terminaux du port.

L'Autorité de la concurrence a conclu que, de fait, cette clause de non-concurrence constituait un réel obstacle à la concurrence. Perrigault renforçait ses capacités en se servant de TPO comme sous-traitant, ce qui portait à nouveau réellement atteinte à la concurrence. Par conséquent, TPO a perdu des clients, car il lui était interdit d'intervenir sur un conteneur ou un navire pour tout autre client que ceux de Maersk (il perdit plus de 80 % du trafic du port). L'Autorité de la concurrence a estimé que TPO n'avait pas la possibilité de passer des contrats avec de nouveaux clients. La cour d'appel a confirmé la décision de l'Autorité de la concurrence ainsi que la réalité de cette pratique restrictive de concurrence.

Évoquant à présent la Roumanie, le Président souligne que l'autorité de la concurrence de ce pays a effectué plusieurs études sur le marché des services portuaires et a conclu que la concurrence fonctionne relativement bien dans les ports de la mer Noire. La définition du marché retenue ne porte que sur les ports roumains. Les rapports montrent que le ministère a également autorisé plusieurs concurrents à entrer sur le marché des services portuaires. Le Président demande si l'autorité de la concurrence a joué un rôle sur ces questions et sinon, ce qui a poussé le ministère à agir ainsi.

Le délégué de la Roumanie confirme qu'en 2009, le Conseil roumain de la concurrence a effectué une étude du marché des services de transport maritime. Un des sujets de préoccupation qui se dégageait de cette étude était l'ambiguïté du cadre juridique relatif aux services de remorquage et de pilotage. Cette étude a permis d'établir que dans certaines régions, les services de pilotage étaient concédés à un seul opérateur, alors que dans d'autres, ces prestations faisaient l'objet d'une concurrence entre plusieurs entreprises. Partant de ce constat, le Conseil roumain de la concurrence a engagé des discussions avec le ministère au sujet de ces services.

S'agissant des problèmes de tarification excessive, le Président mentionne la contribution de l'Estonie. Dans une affaire spécifique, l'autorité estonienne de la concurrence a conclu qu'un port avait abusé de sa position dominante car elle a pu établir que les tarifs appliqués à un opérateur de terminaux étaient plus élevés que ceux qui étaient acquittés par deux autres opérateurs. Le Président demande quelle était la cause de cette situation discriminatoire.

Le délégué de l'Estonie souligne que cette affaire concernait le port de Muuga, le plus grand port de marchandises du pays. L'autorité portuaire, qui ne s'occupait pas elle-même de la manutention, avait appliqué à l'un des trois opérateurs de terminaux du port des tarifs sensiblement plus élevés qu'aux deux autres opérateurs. Le caractère discriminatoire venait du fait que les trois opérateurs étaient en concurrence pour les mêmes clients. Les différences de tarifs créaient une situation inéquitable entre les opérateurs en aval. L'autorité estonienne de la concurrence avait recherché si la tarification se justifiait par les coûts et avait conclu que non.

Le Président aborde ensuite la contribution de la Finlande, pays où l'autorité de la concurrence a traité trois affaires de tarification excessive qui concernaient les ports d'Helsinki, de Mariehamn et de Turku. Dans l'une d'entre elles (Helsinki) il ne s'agissait que d'un problème de tarification excessive : l'autorité de la concurrence a calculé le retour sur investissement et a conclu qu'il était excessif. Le Président

demande comment cette autorité a établi la norme de référence en l'espèce et pourquoi le tribunal n'a pas jugé concluants les arguments de l'autorité de la concurrence.

Le délégué de la Finlande explique que l'affaire du Port d'Helsinki est apparue lorsque ce dernier a brutalement augmenté ses tarifs passagers. L'autorité finlandaise de la concurrence a retenu plusieurs approches pour établir la norme de référence. Elle a comparé les tarifs passagers à ceux qui étaient pratiqués dans d'autres ports finlandais et européens et a conclu que le Port d'Helsinki appliquait des prix plus élevés que d'autres ports. Elle a également calculé le coût moyen pondéré du capital (le CMPC) pour le Port d'Helsinki et a conclu que les niveaux réels de rentabilité du port étaient bien supérieurs à cette valeur. Cependant, en raison de la sensibilité du calcul du CMPC aux hypothèses retenues, le tribunal a conclu qu'il n'y avait pas suffisamment de preuves pour établir l'existence d'une tarification excessive.

Mentionnant à présent la Suède, le Président souligne que l'autorité de la concurrence de ce pays dispose de nouveaux leviers pour empêcher que les entités du secteur public aient recours à des pratiques anticoncurrentielles. Ces dispositions peuvent contribuer de manière importante à établir une neutralité concurrentielle et le Président pense qu'elles peuvent constituer un exemple pour d'autres pays. À ce titre, le Président demande à la délégation de la Suède de présenter ces nouvelles dispositions et de montrer comment elles ont été appliquées dans une affaire de services de transport maritimes dans laquelle étaient impliquées à la fois des entreprises privées et des sociétés municipales.

Le délégué de la Suède commence son intervention en exposant les différences qui existent entre les entreprises du secteur public et celles du secteur privé. Les entreprises du secteur public ne peuvent être déclarées en cessation de paiement et sont financées par les impôts. Elles interviennent sur le marché dans des conditions différentes de celles qui s'appliquent au secteur privé, ce qui peut engendrer des distorsions de concurrence. Des plaintes relatives à l'intervention des pouvoirs publics sont déposées lorsque des entreprises du secteur public interviennent à un tarif inférieur au coût de revient, pratiquent des tarifs excessifs, refusent l'accès à des infrastructures essentielles ou mènent à la fois des activités en tant que monopole d'État et des activités soumises à la concurrence. Ce dernier cas de figure s'applique aux ports suédois. L'autorité de la concurrence s'est intéressée aux ports municipaux qui élargissent leur périmètre d'activité et tirent parti de leur monopole dans les services d'acconage.

En février 2010, une affaire de ce type est apparue lorsqu'une plainte relative aux services d'un concurrent qui était en partie détenu par une entreprise municipale a été déposée. L'autorité de la concurrence décida d'enquêter sur l'activité de vente de cette entreprise en vertu des nouvelles dispositions légales. La société concernée était essentiellement une entreprise de transit et un courtier maritime, or, les opérateurs qui proposaient des prestations similaires sur le port avançaient que le principal privilège de cette société provenait de sa relation étroite avec la municipalité. Le délégué de la Suède explique que, dans ce type d'affaire, l'autorité de la concurrence doit établir si la municipalité a une influence décisive sur l'entreprise et si l'activité de vente fausse la concurrence sur le marché. Il convient de relever qu'aucune règle *de minimis* ou de position dominante ne s'applique. Il y a distorsion du marché lorsque des entreprises effectivement concurrentes ne peuvent lutter à armes égales. Il y a entrave à la concurrence lorsque qu'un concurrent quitte le marché ou n'entre pas sur celui-ci en raison du comportement de l'entité publique ou de la simple présence de l'entité publique sur le marché. La nature de l'infraction (distorsion ou une entrave à la concurrence) a une incidence sur le type d'enquête effectuée. S'il y a entrave, l'autorité étudie le marché, s'il y a distorsion, l'autorité examine les conditions dont bénéficie l'organisme public et les compare à celles de son équivalent privé.

Le Président demande si les nouvelles dispositions suédoises ouvrent la possibilité d'une enquête sur les aides d'État à l'échelle locale. Le délégué de la Suède répond que les nouvelles dispositions ne s'appliquent pas à l'aide elle-même mais au comportement de l'organisme public.

M. Meaney intervient pour aborder deux points d'ordre général. Tout d'abord, il estime qu'il faudrait disposer d'un cadre structurel et analytique permettant d'apprécier le type de problème posé au cours de la table ronde, de la même manière qu'existe le test du monopole hypothétique, lequel sert à définir un marché. Ensuite, il remarque qu'il semble y avoir une différence entre les autorités de la concurrence qui disposent de compétences locales et examinent les ports à l'échelle locale et celles qui analysent ce secteur dans le cadre de chaînes logistiques plus vastes. Si les ports sont examinés à un niveau très local, avec des marchés étroitement définis, le risque existe de passer à côté de certains problèmes d'intégration horizontale ou verticale plus importants.

Le Président résume les débats de la table ronde en indiquant que le secteur portuaire comporte bien entendu plusieurs marchés et que la concurrence s'exerce à la fois entre les chaînes logistiques et entre les ports. Il poursuit en relevant que les problèmes locaux qui viennent d'être évoqués sont également importants, même si un grand nombre de ports sont en réalité d'une taille telle que ces problèmes ne sont pas tous strictement locaux. Les affaires abordées tout au long de cette table ronde ont posé plusieurs problèmes de concurrence et nombre d'entre eux résultaient de l'intégration entre les missions de contrôle et les missions d'exploitation. La séparation verticale peut être une solution pour supprimer ces conflits d'intérêts. Au cours de cette table ronde, certains intervenants ont mentionné des affaires de tarification excessive et le Président reconnaît qu'il s'agit de cas très difficiles : il n'est en général pas aisé de définir une norme de référence afin de fixer le niveau au-dessus duquel les prix sont excessifs. Des travaux supplémentaires seront nécessaires pour définir la norme adéquate et d'autres tables rondes de l'OCDE se pencheront à nouveau sur cette question.