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RESOLUTION OF THE 8TH STANDING COMMITTEE

(Public works, communications)

(*Rapporteur* FLORIS)

approved at the session of 23 July 2013

ON THE

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING A FRAMEWORK ON MARKET ACCESS TO PORT SERVICES AND FINANCIAL TRANSPARENCY OF PORTS (COM(2013) 296 final)

pursuant to Article 144(1) and (6) of the Rules of Procedure

Sent to the President's Office on 24 July 2013

17TH LEGISLATURE - DRAFT LAWS AND REPORTS - DOCUMENTS

TABLE OF CONTENTS

The Committee,

Having examined, pursuant to Article 144 of the Rules of Procedure, the proposal for a regulation of the European Parliament and of the Council establishing a framework on market access to port services and financial transparency of ports (COM(2013) 296 final), which was submitted for our reasoned opinion as to its subsidiarity;

- whereas, as the proposal itself makes clear, it forms part of the strategy announced by the European Commission on 28 March 2011 in the White Paper entitled 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (COM(2011) 144 final) and is one of the main actions of the 'Single Market Act II - Together for new growth' (COM(2012) 573 final), which stresses the need for well connected infrastructure, efficient port services and transparent port funding;

- whereas the European Commission has identified the need for action to tackle instances of low quality levels in port services, ineffective governance and the resulting unattractiveness of the sector to investors and cited Article 100(2) of the Treaty on the Functioning of the European Union as the legal basis for its choice of a regulation as the legal instrument;

- whereas the measure applies to sea ports in the trans-European transport network (TEN-T), although the Member States will have the right to extend it to other sea ports;

- whereas European TEN-T ports display major organisational and structural differences, not only between countries but also within them, resulting from a complex series of geographical, historical, cultural, economic and social factors;

- whereas the proposal for a regulation outlines a uniform model of port organisation that is generally rigid and liable to have a significant impact on the organisation and operation of the various European ports in the TEN-T network;

- having regard to the technical report on the proposal sent by the Directorate-General for Ports at the Ministry of Infrastructure and Transport pursuant to Article 6(4) of Law No 234 of 24 December 2012;

- having regard to the comments made by the European Union Policy Committee;

expresses a negative opinion on the proposal, pursuant to Protocol (No 2) to the Treaty on the Functioning of the European Union, as it is not in line with the principles of subsidiary and proportionality for the following reasons:

a) Infringement of the principle of subsidiarity:

Adopting the proposal for a regulation in question is unnecessary.

The subject of the proposal, namely regulating market access to port services, does not lend itself to the establishment of a single organisational model to apply at all European ports. The explanatory memorandum to the proposal for a regulation itself recognises, indeed, that in Europe 'the port sector is very heterogeneous and characterised by a wide diversity in types and organisation' and stresses that the proposed regulation intends to respect that diversity and 'does not seek to impose a uniform model for ports'. However, this statement appears to be contradicted by the choice of a regulation which, as an immediately applicable and binding instrument, does not allow the legislative action to be sufficiently tailored to take due account

of the significant differences at operational and structural levels between the European Union's various port systems.

Without scope for such flexibility, the new rules in the proposed regulation would risk having counterproductive distorting effects on the performance of economies and infrastructure in the areas concerned, both between and within Member States. Indeed, it should be borne in mind that even the TEN-T ports to which the proposed regulation relates are marked by significant differences in terms of their size and their importance from the viewpoint of competition at national and Union level.

These issues could certainly be better regulated at national level or at least through soft law instruments that leave greater room for manoeuvre to the authorities of each Member State. To this should be added the fact that, in most cases, the Member States' national legislation on ports is already in line with the general principles of Union law; in fact, the Italian legal order is among those most compliant with these principles.

In consequence, the proposal for a regulation appears excessive and unnecessary, as it would have been sufficient - and more in line with the objectives set by the European Commission - to identify a series of general principles applicable to the national legislation of the various Member States by issuing guidelines or, at most, a directive (which is what the proposed measure is actually analogous to in practice).

Adopting the proposal for a regulation in question is not necessarily likely to bring value added at European Union level.

It is debatable whether adopting the organisational model in the proposed regulation would in itself allow the objectives of greater competitiveness, efficiency and transparency which TEN-T ports are meant to achieve to be reached more effectively than measures by the individual Member States. Indeed, those conditions are strongly influenced by the different operational and structural conditions of the various ports of Europe which, moreover, are often managed by public authorities, sometimes at regional or local level. These individual characteristics would not be eliminated simply by imposing a rigidly uniform model; indeed, without the necessary adjustments, such a model could accentuate the existing differences and create a series of distortions and unfair competitive advantages for certain countries or ports.

On the other hand, as already mentioned, the adoption of legal instruments, such as guidelines or directives, that offer greater flexibility to the Member States - albeit within reasonable limits and a general legislative framework - would allow the specific characteristics of the various national and local situations to be better managed and the objectives to be achieved in a more efficient, better balanced manner. To that end, it would be useful for the Member States also to have a more realistic period to adapt themselves to the new rules, as the deadline of 1 July 2015 for implementation of the proposal for a regulation provided for by Article 25 appears too short given the different starting points of the various Member States' national port legislation.

Lastly, as far as the legal basis for the proposal is concerned, we are not entirely convinced by the reference, to demonstrate that the proposal complies with the principle of subsidiarity, to Articles 58, 90 and 100 of the Treaty on the Functioning of the European Union. Paragraph 3.3 of the explanatory memorandum to the proposal states that those articles 'extend to ports the objectives of a genuine internal market in the context of the Common Transport Policy'. However, those provisions refer to liberalisation of maritime transport

services, which do not fall within the scope of the proposal for a regulation, and govern the activity of sea carriers rather than port operators.

They thus do not appear to apply directly to the port services sector, which only partly comes under the transport sector, given that evidently not all the operations that take place at ports are transport activities as such. In any case, it should be borne in mind that Article 59 of the Treaty states that 'in order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives.'

From this viewpoint, therefore, the proposal does not appear to be in line with the principle of subsidiarity. This is true as regards the 'necessity' criterion, as the objectives listed could be achieved more logically and effectively by means of legislative measures in the Member States within the framework of general principles established in guidelines or a directive. It is also the case as regards the criterion of 'EU value added'. That criterion cannot be deemed to be met, as the wide diversity in structural and functional terms between Europe's ports means that rigidly applying to all ports the uniform organisational model in the proposal for a regulation does not sufficiently guarantee greater competitiveness, efficiency and transparency. On the contrary, it could significantly distort operations at the various ports.

b) Infringement of the principle of proportionality:

For the same reasons as those referred to above, it must be held that the proposal for a regulation in question goes beyond what is necessary in order to achieve the objectives pursued. Indeed, even if it were hypothetically agreed that Union legislative intervention was appropriate, the instrument of a regulation appears excessive given, as has already been pointed out on several occasions, that the same aims could be achieved using soft law instruments (such as guidelines or directives). This conviction is reinforced when account is taken of the fact that the proposal mainly lays down general principles (albeit ones that are extremely relevant to the port sector), which would not appear to require the adoption of an instrument that is generally rigid such as a regulation in order to be effectively implemented in the Member States' national law.

Paragraph 3.4 of the explanatory memorandum to the proposal states that it is in line with the principle of proportionality because, as it concerns TEN-T sea ports only, 'it will avoid imposing unnecessary rules on very small ports which do not have a significant role for the European transport system'. While that statement is formally correct, it is not entirely convincing. The TEN-T network includes not only major ports but also others that are far less significant from the viewpoint of competition, whether at EU or national level, for which the proposed rules could be excessive.

Moreover, the proposal does not appear to be in line with the principle of proportionality as regards the power granted to the European Commission, on the basis of Article 21 thereof, to adopt delegated acts in the areas indicated in Article 14(5) (common classifications of vessels, fuels and types of operation and the associated principles for setting port infrastructure charges). Although that power includes certain procedural safeguards for the Member States, it is nevertheless too wide and risks allowing the Commission to accumulate tasks falling under the sovereignty of the Member States through a procedure which - as the report of the Ministry of Infrastructure and Transport states - 'does not appear to fully respect the privileges of the various parties involved in the decision-making and regulatory process established by the Treaties'.

Lastly, with reference to the substantive elements of the proposal for a regulation that are relevant in the context of political dialogue with the Union institutions, the Committee's observations within its remit are as follows:

- there are problems of interpretation and legal certainty in relation to so-called 'cargo handling services' to which Chapter II (Market access) of the proposal for a regulation does not apply. These should be clarified, as the definition given in Article 2 of the proposal for a regulation differs from that in use in Italian law. That fact, together with the reference to the provisions of the future directive on concessions for work and services and the reference in the proposal to TEN-T ports only (although with the possibility for the Member States to extend it to other ports), means that the rules are fragmentary and differ in the various segments of the port cycle. They are thus lacking in uniformity, clarity and certainty and could perhaps distort competition between ports both within and outside that network;

- as already highlighted and as also stated in the Ministry's report, there are doubts as to whether it is entirely logical or particularly effective in functional terms to extend the proposal for a regulation to all TEN-T ports, a category which includes not only major ports but also others that are undoubtedly far less significant from the viewpoint of competition at national or Union level;

- the proposal almost entirely overlooks security issues and the associated duties entrusted to the public authorities. This is a matter for some concern, as these duties are of vital public interest and their explicit mention is thus crucial. Specifically, the need to safeguard the security of shipping in port areas should be included among the grounds allowing the public authorities to limit the number of port service providers and to grant exclusive rights so as to safeguard that public interest;

- it is necessary to clarify the true scope of the articles on financial transparency in Chapter III, as they could have significant repercussions on the provisions in force in Italy. In particular, the European Commission has on various occasions taken the position that transfers of public funds to Italian port authorities for port infrastructure projects are State aid (although the Ministry of Infrastructure and Transport stresses that these are 'transfers between public authorities to carry out work on state property, with the funds remaining with the State as the 'owner' of public assets'). It should thus be reiterated that such transfers are not aid *per se* and do not entail competitive advantages for the port authority concerned, as such authorities do not operate as businesses in Italy;

- similarly, there needs to be a more in-depth analysis of how the proposal for a regulation will affect our national law, given that it defines as 'charges' both the fees paid by clients for the services of specific providers within the port itself and the 'charge' for using port infrastructure. Putting these concepts on the same footing fails to take account of the fact that, in various European legal systems (e.g. in Italy and Spain), the charges for using port infrastructure take the form of taxation in the true sense of the term, and thus come under the State's power of taxation;

- the provisions of the proposal for a regulation on institutional organisation of port management do not appear to give due consideration to the rather different arrangements in place in the various Member States. They could thus give rise to problems of interpretation and implementation, meaning that it would perhaps be appropriate for the European Commission to reconsider them. Specifically, as far as Italian law is concerned:

- the port managing body, to which the proposal for a regulation attributes exclusive responsibility for tasks regarding the administration and management of port infrastructure and services, largely overlaps with the port authority in Italy, but does not take account of the duties involving the technical and security-related supervision of shipping which are carried out by the maritime authorities in Italy;

- as far as the establishment of port users' committees is concerned, this has been conceived in a very broad manner, going further than the composition of the port committees provided for in Italian law. This runs contrary to the position that emerged following the reform of Law No 84 of 28 January 1994, which aimed to make port committees smaller in order to give more managerial clout to port authority chairmen and streamline the associated bureaucratic and procedural formalities;

- similar concerns arise as to the establishment of independent supervisory bodies, which risk weighing down the monitoring and checking processes already in place in Italian law (supervision by the Ministry of Infrastructure and Transport and the Ministry of Economic Affairs and Finance, checks by auditors and the Court of Auditors, possible intervention by independent bodies), without bringing clear benefits as compared to the current situation.

This document is to be understood as guidance to the Government within the meaning of Article 7 of Law No 234 of 24 December 2012.

OPINION OF THE 14TH STANDING COMMITTEE

(EUROPEAN UNION POLICY)

(Rapporteur: MOLINARI)

10 July 2013

The Committee,

having examined COM(2013) 296 final,

whereas it intends to establish a clear framework for access to the market of port services and common rules on financial transparency and the charges to be applied by managing bodies or providers of port services;

having regard to the proposal for a regulation of the European Parliament and of the Council on Union guidelines for the development of the trans-European transport network (TEN-T) (COM(2011 650 final), submitted by the European Commission in order to establish a long-term strategy for trans-European transport networks until 2030/2050;

having regard to the proposal for a regulation of the European Parliament and of the Council establishing the Connecting Europe Facility (CEF) (COM(2011) 665 final), a facility that should become the future funding instrument for trans-European energy, transport and telecommunication networks;

having regard to the proposal for a directive of the European Parliament and of the Council on the award of concession contracts (COM(2011) 897 final), which was adopted by the European Commission in order to establish rules on the tendering procedures for concessions with an estimated value of at least € 5 000 000 and which also concerns activities 'relating to the exploitation of a geographical area for the purpose of the provision of airports and maritime or inland ports or other terminal facilities to carriers by air, sea or inland waterway';

whereas the proposal forms part of the strategy announced by the European Commission on 28 March 2011 in the White Paper entitled 'Roadmap to a Single European Transport Area – Towards a competitive and resource efficient transport system' (COM(2011) 144 final) and is one of the main actions of the 'Single Market Act II - Together for new growth' (COM(2012) 573 final), which stresses the need for well connected infrastructure, efficient port services and transparent port funding;

having regard to the report on the proposal sent by the Directorate-General for Ports at the Ministry of Infrastructure and Transport pursuant to Article 6(4) of Law No 234 of 24 December 2012;

states, for matters within its remit, that it does not object to the proposal, highlighting the following points:

The legal basis has been correctly identified as Article 100 of the Treaty on the Functioning of the European Union (TFEU), on the basis of which the European Parliament and the Council,

acting in accordance with the ordinary legislative procedure, may lay down appropriate provisions for sea and air transport.

As far as the principle of subsidiarity is concerned, it is a cause for concern that a regulation has been chosen as the legal instrument for regulating port services and creating an appropriate framework for attracting investments to all ports in the TEN-T network. As stressed in the technical report sent by the Government, the adoption of guidelines or a directive would have allowed the objectives set by the European Commission, namely liberalisation of port services and transparency and efficiency in financial relations, to be met while being more in line with the principle of subsidiarity.

The European Commission is thus asked to provide clarifications as to whether it is really necessary to adopt a regulation - an instrument that is directly and fully binding in the Member States - including in terms of the value added of action at Union level. This should be looked at in terms of the proper implementation and application of uniform conditions of competition on the internal market in port services, which are largely managed by public authorities, often at regional or local level, and thus not suited to establishment of a common organisational model.

In order to prove that it has complied with the principle of subsidiarity, the European Commission cites Articles 58, 90 and 100 of the Treaty on the Functioning of the European Union, which 'extend to ports the objectives of a genuine internal market in the context of the Common Transport Policy'. However, those articles lay down that the free movement of transport services are to be regulated by the provisions of the Title on transport, in the context of a common transport policy. Meanwhile Article 59 of the Treaty specifies that 'in order to achieve the liberalisation of a specific service, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall issue directives'.

Despite the concerns mentioned above, the proposal for a regulation appears to comply with the principle of proportionality insofar as it does not go beyond the objectives pursued.

Attention is drawn to the following problem areas, which could lead to the rules on port services being applied in an uneven manner:

- the exemption, for 'cargo handling services' and 'passenger services', from Chapter II (Market access) and the transitional measures in Article 24, regulation of which is referred to the future directive on concession contracts;

- the fact that the proposal refers only to TEN-T ports. However, it should be pointed out that the proposal allows the Member States to exercise the right to apply the regulation also to other sea ports;

- the failure to refer to the public interest as regards the 'security of shipping' in ports. Such a reference is actually vital, including in the light of the impact of the new provisions on the applicable national rules;

- the definition of 'port infrastructure charge', which should be made clearer and tied in with the existence of different legal systems in the Union;

- the establishment of 'port users' advisory committees' and 'independent supervisory bodies', which would risk overlapping with the bodies already in place and thus run contrary to the desired optimisation of port governance.

We appreciate the provisions on financial transparency laid down in Chapter III, on the basis of which accounts should clearly indicate the financial relations between public authorities and managing bodies of ports that receive public funds. However, in order to demonstrate that they will be used in an efficient and appropriate manner, the European Commission is asked to take due account of, and make clear, the specific characteristics of the individual national legal systems as regards the definition of 'managing bodies of ports'. Part of the reason for this is that, in cases such as Italy, 'port authorities' do not act as businesses but rather as public authorities, which means that transfers of public funds for port infrastructure projects cannot be considered State aid.

Concerns also arise in relation to Article 21 of the proposal for a regulation, on the basis of which the European Commission is granted, 'for an indeterminate period of time', the power to adopt the delegated acts referred to in Article 14, that is 'concerning common classifications of vessels, fuels and types of operations according to which the infrastructure charges can vary and common charging principles for port infrastructure charges'. As stated in the report by the Ministry of Infrastructure and Transport, these matters 'should remain the responsibility of the Member State'.