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REPORT

From:	Presidency
To:	Permanent Representatives Committee (Part 1) / Council
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Subject:	Preparation of the Council meeting (<u>Transport</u>, Telecommunications and Energy) on 5 June 2014 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 (First reading) <i>- Progress report</i>

Introduction

1. On 23 May 2013, the Commission transmitted the above proposal to the Council and the European Parliament¹.
2. The general objectives of the proposal are to contribute to fairer conditions of competition and reduce legal uncertainties in view of encouraging efficient port services and investments.

¹ The proposal was accompanied by a communication from the Commission, "Ports: an engine for growth" (doc. 10160/13).

3. The proposed Regulation seeks to establish (a) a clear framework for access to the market of port services; and (b) common rules on the financial transparency and charges to be applied by managing bodies of ports or providers of port services.
4. The Regulation would apply to the provision of specific categories of port services and to all seaports listed in the Regulation on the trans-European Transport Network Guidelines².
5. The Commission proposal addresses the following issues:
 - Market access facilitation to port services in a fair, reasonable and non-discriminatory way. The principle of freedom to provide services would be applicable to port services under conditions which allow Member States and managing bodies of ports to impose minimum requirements for the provision of port services and limitations of the number of providers of port services if necessary.
 - Financial transparency in the use of public funds and transparency rules to port service charges and port infrastructure charges. Where a managing body of a port benefits from public funds, there would be a transparent accounting in order to keep information, showing the effective and appropriate use of those funds, at the disposal of the national competent authorities and the Commission. Where port service providers have not been subject to an open public tendering procedure or are internal operators, the charges for the service should be transparent, non-discriminatory and set according to normal market conditions.

² Regulation (EU) No 1315/2013 of the European Parliament and of the Council of 11 December 2013 on Union guidelines for the development of the trans-European transport network and repealing Decision No 661/2010/EU (OJ L 348, 20.12.2013, p. 1).

- General provisions: A port users advisory committee would be set up in every port and consulted regularly on the structure and level of charges. The proposal also contains rules on consultation of stakeholders by the managing body of the port on broader strategic issues such as the connection with the hinterland. Finally, each Member State would have to ensure that an independent supervisory body monitors and supervises the application of the Regulation and cooperation mechanisms between the different national independent supervisory bodies are also established.

Work in the Council

6. The Commission presented its proposal to the Transport, Telecommunications and Energy (TTE) Council on 10 June 2013.
7. The examination by the Shipping Working Party began in October 2013, during the Lithuanian Presidency. The Shipping Working Party made an in-depth analysis of the impact assessment during two meetings (3 and 31 October). This impact assessment discussion was supported by the indicative checklist developed to examine Commission impact assessments in the Council, in the context of the consideration of Commission proposals and in line with the report on the examination of impact assessments within the Council³, and constituted one of the three pilot projects conducted by the current Presidency trio on that checklist⁴.
8. The work continued in the Shipping Working Party during the Hellenic Presidency. Several meetings were dedicated to the proposal from February to April 2014. It should be noted that only Chapters I (Subject matter, scope and definitions) and II (Market access) were examined article-by-article, whereas Chapters III (Financial transparency and autonomy) and IV (General and final provisions) were discussed in more general terms and in principle.

³ Doc. 8406/13 + COR 1.

⁴ Interim results of the pilot project are presented in doc.16628/13.

Work in the European Parliament, other Union bodies and national parliaments

9. The committee responsible of the European Parliament, the Committee on Transport and Tourism (TRAN), appointed Mr Knut Fleckenstein (S&D-Germany) as rapporteur for the proposal. The rapporteur submitted his draft report on 11 November 2013. However, due to lack of time and to the fact that several key questions remained open, TRAN decided not to vote on the report before the elections to the European Parliament. On its part, the Committee on Employment and Social Affairs (EMPL) voted its opinion on the proposal on 9 January 2014 (rapporteur: Philippe De Backer, ALDE-Belgium).
10. The European Economic and Social Committee adopted an opinion on 11 July 2013⁵. The Committee of the Regions adopted an opinion on 28 November 2013⁶.
11. Seven national parliaments submitted a reasoned opinion on the proposal (Belgium, Spain, France, Latvia, Malta, Poland and Sweden).

⁵ OJ C 327, 12.11.2013, p. 111.

⁶ Not yet published in the Official Journal.

The position of Member States in relation to the proposed Regulation

Based on the examination of the above proposal by the Shipping Working Party:

12. The majority of Member States supports the general objectives of the proposal towards the provision of qualitative and efficient port services, the creation of legal certainty, the achievement of a level playing-field and to attract investment, by improving market access and transparency of financial relations. Many Member States welcomed the Commission's cautious approach and stated their will to improve the drafting of the proposal in order to make it more balanced and proportional to the already competitive nature of the sector (e.g. competition from third countries) and to provide the necessary flexibility taking into account the individual and specific characteristics of ports (varying size, the different ways of managing ports (private/public) and in general diverse local conditions).
13. In the view of some Member States, the proposal does not fully respect the principles of subsidiarity and proportionality in respect to the diversity of the seaports in Europe. Closely linked to the question of subsidiarity is the choice of the legal instrument. A majority of Member States consider that a directive would be more appropriate than a regulation. Some Member States consider that "soft law", e.g. guidelines, would suffice. However, the Presidency noted that a decision on the legal form could be taken after the discussion on substance and not before the completion of the first article-by-article examination of the text.
14. A majority of Member States plead for simpler, more coherent and less cumbersome procedures throughout the proposal.

15. As regards the scope vis-à-vis the provision of services, given that cargo handling and passenger services, are excluded from Chapter II of the proposal, doubts have been expressed related to the remaining added value of the proposal. On the other hand, many Member States have proposed additional exclusions of port services, first and foremost of services related to safety aspects (pilotage) and to port infrastructure (dredging). Concerns have also been voiced about the fact that the diversification of the sector has not been properly taken into account, especially as regards smaller seaports covered by the Regulation on the trans-European Transport Network Guidelines and competitive, unsubsidised ports. It has been suggested that either only seaports which are part of the core network (i.e. mostly larger ports) be included in the scope or any TEN-T seaport that receive public funds.
16. Many Member States have asked for more flexibility as regards the procedural framework when ensuring compliance with the minimum requirements for the provision of port services and as regards the possibilities to limit the number of providers and specially in the case of a single provider. In addition, for the limitation of the number of port services it has been asked to add considerations for safety, security and environmental sustainability.
17. Although Member States support the principle of consulting the port users and relevant stakeholders, it should be left to the ports or to the Member States to decide on the nature and timing of this consultation. With regard to the national independent supervisory bodies, the majority of Member States expressed concerns about the risk of creating additional administrative burdens and about the functioning of the supervision mechanism.
18. Several Member States expressed concerns as regards the impact of the proposed regulation on the autonomy and commercial freedom of ports. This is particularly the case for the provisions on port infrastructure charges and as regards the consequences for already concluded contracts. A broad majority of Member States is against the proposed right of the Commission to harmonise port infrastructure charges through delegated acts.

19. Some Member States have pointed out that it is important to clarify the State aid regime in ports. Furthermore, the proposal should be read and re-evaluated in conjunction with the new concessions Directive⁷.

20. Finally, it should be noted that several Member States have referred to the draft report by the EP rapporteur as containing improvements of several aspects of the proposal.

Commission's remarks in relation to the discussion on the proposed Regulation

21. The Commission explained the reasons which led to choose the form of a Regulation, notably the need to have a level playing-field and that a Regulation can be a framework which does not necessarily contain more detailed rules than a Directive. The Commission noted that the question of the legal form should be dealt with at a later stage once the discussions on the substance have sufficiently progressed.

22. The Commission has expressed its willingness to work constructively with Member States to address concerns and perceived problems, in order to avoid that the proposal creates undue interferences with the commercial freedom of ports, in particular as regards port charges. As concerns the access to the market of port services, the need and possibility to take into account safety issues could be highlighted.

23. With regard to administrative burdens, the Commission has pointed out that there is no need to create a new supervisory body; the Member States would be able to use an existing structure, as long as the main goal – to ensure that effective mechanisms are in place to handle complaints – is reached. The aim of the provisions on consultation of port users is to ensure that appropriate mechanisms exist; however, it might not be necessary to specify the detailed corresponding procedure. Those two aspects could, in the Commission's view, be clarified and there is room for improving the proposal.

⁷ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ L 94, 28.3.2014, p. 1).

Conclusion

24. The Permanent Representatives Committee/Council are invited to take note of the progress made on the examination of the proposed Regulation.
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