RESOLUTION OF THE FLEMISH PARLEMENT

concerning 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) – reflections on subsidiarity

(adopted on 19 July 2013)

EXPLANATORY PREAMBLE

The European Commission justifies the drafting of a European legislative proposal concerning the port policy on the premise that Member States cannot, in se, assure a uniformly level playing field within the European port sector. In this regard, the European Commission points to the pronounced international dimension of the port sector, the fact that many streams of goods are crossing Member State borders, and, closely related to this, the fact that ports located on the same European corridor often fall within the jurisdiction of other Member States. In other words, the European Commission, in justification of the draft regulation, focuses primarily on fair competition practices *among* ports. At the same time, the European Commission does, indeed, recognize the specificity of European ports and the tradition of local embedment.

There are, indeed, reasons for attempting to realize greater equality among Member States, and specifically among port authorities in various Member States. In terms of market access and (transparent) financial streams, there are significant differences. From the Flemish perspective, however, we note that today a robust Flemish legal framework already exists, legitimized by Europe, imposing upon the four Flemish port authorities/ port administrations a set of equal and uniform regulations concerning transparency and non-discriminatory treatment of parties using the port facilities and ensuring that enterprises, active participants in port activities, can operate within, and conform to, normal market conditions, and this equally amongst and within Flemish ports. From this Flemish context, questions might conceivably be asked concerning the compatibility of a European port regulation with the subsidiarity principle, or at least concerning the proportional character of directly intervening European rules and regulations pertaining to market access, financing, and the discretionary competences of local port authorities.

The European draft regulation is contextually rather to be seen as a blend between an instrument of direct binding force within the Member States (Regulation) and a European judicial framework that requires transposition at the Member State level (Directive). On the one hand, this fact could or might be prejudicial to the objective of creating a more level playing field amongst the European ports while, on the other hand, it could offer room within Flanders to further legitimize the existing competences and freedoms in the Flemish Legal Port Framework that have been assigned to the port authorities and implement the future European provisions in a workable manner, taking into account the specific Flemish context.

The freedom to define public administration tasks

The principle of free market access as stipulated in the draft regulation needs to be adhered to and fulfilled, without prejudice to the freedom to (continue to) organize as a public administration body - in casu the port authority of the Government of Flanders with respect to tasks that essential fall within its remit and competence – certain given tasks whether or not as a true administration prerogative. Likewise vis-à-vis activities that pertain to the provision of certain services which, qua their functional description fall within the scope of application of the draft regulation, the competent authority ought to retain the discretionary freedom to qualify and organize these, if necessary, as essential tasks of a general interest. In other words, in case there are well-founded reasons with bearing on the general interest, the authority involved must also be able to organize these services as non-economic activities, that is to say, be able to take the reasoned decision that there does not exist a market or that a market ought to be created for the service or the activity in casu.

The draft regulation does not explicitly excludes this, yet nonetheless appears to start from at least the implicit premise that the services within her sphere of application are to be qualified as economic services, in other words, services that on a relevant market are being offered, at a price, by one or several players. In that latter sense, the draft regulations appears contradictory to the freedoms established in the EU Convention and attendant protocol; cf. specifically:

Protocol 26 – last paragraph:

"*The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest*."

It deserves recommendation to have the draft regulation explicitly framed within the higher, already existing legal norms. Only to the extent that the already mentioned essential freedom of choice for territorial competent authorities be recognized, the draft regulation can be expected to pass the test of the subsidiarity principle.

Within the Flemish context, it is to be noted that port authorities are by law designated as public authorities that are exclusively competent to engage in and perform the management of port operations – including therein the organisation of port-related services.

The freedom to implement a commercial strategy

In addition, the autonomy of the Flemish port authorities to plot, within the bounds of the valid legal framework and in agreement with their own statutes, their tariff policies must be safeguarded. This principle appears to be contained within article 14.3 of the draft regulation.

At the same time however, the following two provisions appear to rather dilute and weaken this principle, though it is explicitly embedded in the Flemish Port Law.

On the one hand, article 14.4, does in effect stipulate that differentiation in tariffs can only be justified on the grounds of a very limited number of criteria (frequency, efficient use of infrastructure facilities, short sea shipping, efficient environmental performance). It is highly questionable whether all legitimate reasons for differentiation that are present from the perspective of an economic strategy that wishes to react and interact flexibly

with opportunities, can be accommodated within these categories. Certainly when a sufficient degree of transparency vis-à-vis the tariff policy is guaranteed, this might for that reason be regarded as excessive interference on the part of Europe into the manner in which port authorities formulate their tariff policies. Directly related to this, it is necessary that the mutual cohesion be explained between the principal autonomy wielded by the port authorities to determine structure and level of the port tariffs (art. 14.3) versus the narrow differentiation criteria (art. 14.4). Art. 14.4 must not unreasonably dilute the basic principle. In order to avoid this, it ought to be clarified that the contrast between objectively different categories of maritime traffic can truly be part of the autonomous competence of port authorities towards establishing the framework of port infrastructure tariffs.

On the other hand, article 14.5 in conjunction with article 21 allocates a broad delegating competence to the European Commission in the matter of concretizing the way in which differentiation modalities are being applied. This not only threatens added dilution of the mentioned autonomy but, likewise, an important legislative task is being passed on to an executive body such as the EC (Democratic deficit). Certainly in the matter of tariff policy, substantially delegated competences on the part of the EC seem unacceptable.

The figure of the 'independent supervisory body'

The broad supervisory competences that, in accordance with article 17, are being allocated to the independent supervisory body that is to be installed by Member States with a view to enforcing compliance with the regulation may, on the one hand, prejudice the territorial management autonomy that within the Flemish legal framework has been assigned to port authorities and, on the other hand, contain the threat of a strong bureaucratic culture of complaints. The Flemish supervisory mechanism, via the port commissariat, should, on the basis of the draft regulation, in any event be broadened by a law. In this case, especially the question arises concerning the proportionality of the European demands vis-à-vis a system that has proven its worth and merit.

Within this context, it is to be noted that the European Commission, on the one hand, cherishes the ambition to regulate the European port landscape in a uniform manner while, on the other hand, it is shifting the supervision on the compliance *and* the enforcement almost entirely to the Member State level. For what concerns the latter point, reference is made to article 20, which offers the Member States a very broad degree of freedom to provide for a fitting regime of sanctions. Looked at from the perspective of the subsidiarity principle, this rather strikes one as an imbalance.

RESOLUTION

The Flemish Parliament,

- following an analysis of 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), and following an exchange of views with the managing directors of the Flemish ports concerning this proposal in the Mobility and Public Works Committee on 27 June 2013;

- expresses its opinion that the proposal is in compliance with the Subsidiarity Principle as meant in article 5 (3) of the Treaty of the European Union, provided that the following considerations be duly taken into account:

1. the proposal for a regulation needs, in principle, to maintain intact the 'good practice' of the Flemish port administration already legitimized by the European Commission ;
2. the regulation must not detract from the essential freedom enjoyed by the authorities, including the Flemish port authorities, to organize port operations as public administration activities in case there are well-founded reasons that regard and affect, the general interest;
3. the port authorities must in the process in no way be deprived of the possibility to develop a flexible economic strategy, particularly for what concerns their tariff policies;
4. for what concerns the supervisory body, the Member States and the Flemish Region must be offered sufficient opportunity to implement the above in a fitting and proportionate manner without allowing the possibility of this developing into a bureaucratic complaints culture;

- requests the European Commission to take account of the above-mentioned considerations within the context of the political dialogue;

- requests the Government of Flanders, in its negotiations about 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 the ports (COM(2013) 296), to take due account of the above-mentioned considerations.