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Mr John O'Mahony T.D.
Chairperson
Joint Committee on Transport and Communications
Leinster House
Kildare Street
Dublin 2

Report on the General Scheme of the Harbours (Amendment) Bill 2014

Dear John,

I refer to the Joint Committee's recent report in respect of the above Bill.

I would like to take this opportunity to thank the Committee for its work in examining the Bill and facilitating the stakeholder consultation meeting on the 24 September. I am particularly heartened that the Committee broadly supports the overall purpose of the Bill which as you know provides the legislative framework to some of the key recommendations of National Ports Policy.

Please find enclosed with this letter an individual response to each of the Report's identified 'Key Issues'. As you will see revised instructions have issued to the Office of the Parliamentary Counsel on foot of 'Key Issue 2' and Key Issue 6', while I believe that the substance of 'Key Issue 4' is also captured within those revised instructions.

I look forward to engaging further with the Committee during the parliamentary process.

Yours sincerely,

Paschal Donohoe T.D.
Minister for Transport, Tourism and Sport

Ministerial response to Joint Committee on Transport and Communications

Report on the General Scheme of the Harbours (Amendment) Bill 2014

Key issue 1 (Section 8.1 of the report refers)

On the basis of the Regulatory Impact Assessment (RIA) to the Draft Heads of the Bill, and in the interest of improving transparency, the possibility of clearly outlining which individual ports will fall under a particular transfer process could, perhaps, merit greater consideration. For example, the Bill could highlight which Head of the Bill, 7 or 12, will apply to each of the five named Ports of Regional Significance, enabling those port companies to have clearer direction as to their future ownership and governance structures.

Ministerial Response

An important theme of the Bill's proposals in the area of transfer is to provide a flexible framework to allow local authorities and port companies to work together to decide upon the most appropriate model of transfer. Therefore the Bill as currently drafted does not prescribe a particular model but rather establishes the legislative framework to allow for later transfer under whichever model is deemed most appropriate after completion of a due diligence process by the local authority in co-operation with the particular port company. I believe this to be a more sensible legislative approach as overly restrictive primary legislation may be too prescriptive for this on-going work between local authorities and ports.

Key Issue 2 (Section 8.2 of report refers)

A statutory obligation on the Minister of Transport, Tourism and Sport to consult with the relevant local authority in advance of making an order under Heads 11 and 12 of the Bill could be considered.

Ministerial Response

My officials have requested the Office of the Parliamentary Counsel to reflect the Committee's suggestion in respect of Head 11 (General Ministerial powers). It is now proposed that the relevant section will be amended to read as –

'The Minister may, in respect of a company transferred under section XX, after consultation with the Minister for the Environment, Heritage and Local Government and a local authority shareholder, give a direction in writing to such a company, requiring it to comply with policy decisions of a general kind made by the Minister in relation to'

[N.B. – drafting proposal subject to change]

Head 12 provides for the second of the two possible transfer methods and similar to the other method outlined in Head 7, as well as existing legislative precedents within the Harbours Acts, any order made under the eventual section can only be made with the consent of the Minister for the Environment, Community and Local Government.

I think this legislative formulation is the correct one and it is that statutory consent of the Minister for the Environment, Community and Local Government that provides the assurance that in each particular case no order will be made without the consent of the local authority.

Key Issue 3 (Section 8.2 of report refers)

It may be beneficial if statutory guidance was provided to the new port company. It could perhaps, for example, give greater clarity and direction to the Local Authority, were there in place appropriate legislative guidance on corporate governance of the port companies in advance of the proposed transfer of control.

Ministerial Response

Corporate governance oversight has been a key component of discussions between my Department's officials and officials from D/Environment, Community and Local Government. It is important to note that in those instances where a local authority assumes the shareholder function currently exercised by the Minister that the Harbours Acts will continue to apply to those companies with relevant amendments made to the Acts to reflect the new shareholder. This means that the final Bill will contain the necessary amendments, likely in the form of a Schedule to the Bill, and it is these amendments that will provide greater clarity as regards the role of a local authority shareholder.

In addition to the above legal clarity which the final Bill will provide, the Code of Practice for the Governance of State Bodies, which is applicable to these companies will continue to apply and provides detailed guidance on the oversight and governance functions and responsibilities.

I am aware of the importance of the transitional period between ports and local authorities and my Department is working closely with both across the coming period. I will continue to reflect on the nature of guidance across this period of transition.

Key Issue 4 (Section 8.2 of report refers)

Consideration could be given to stipulations that would ensure the financial consequences of any proposed direction from the Minister would be taken into account.

This could offset the current potential imbalance whereby a Minister may make a direction to a port company without having to provide any funding in respect of any financial costs of that direction.

Ministerial Response

As noted already under Key Issue 2, the proposed Ministerial power of direction will be amended in line with the Committee's suggestion to ensure that any such direction can only issue after consultation with the local authority shareholder. This statutorily required consultation will ensure that the full implications of any such direction are considered prior to any later issuance of a direction.

As is clearly stated in *National Ports Policy* the commercial port companies do not receive any Exchequer funding and are expected to operate as fully commercial ventures without recourse to the Exchequer.

Key issue 5 (Section 8.3 of this report refers)

The prohibition in respect of appointment of port users to port boards would appear to have a clear basis in regional ports where there exists the possibility of there being only a very small number of port users.

However, the Irish Exporters Association (IEA) considers that this prohibition (in the context of larger (tier 1/2) ports) may be too prescriptive and may limit flexibility by failing to recognise that there may be a larger pool of eligible talented/experienced individuals available amongst these port users.

Ministerial Response

I am clear that the principle of the current provisions of the Harbours Acts with regard to port users and boards is understood and accepted by all – no person should be allowed to serve on a board where they could potentially favour their own commercial interests.

The current restrictions were introduced in 2009 and have largely served the sector well. It is important to note that it is not a blanket prohibition *per se*, the restriction only applies to a person who has a significant commercial relationship with the particular port company to which it is proposed he/she will serve on that board. The importance of ensuring that our port companies' boards contain individuals with expertise in maritime transport services is well recognised. Indeed I am providing for that in legislation by introducing a statutory requirement that at least one director on every port company board be a person who has wide experience and competence in relation to maritime transport services (Head 19 refers).

I am therefore not convinced that the current prohibition is unduly restrictive and that together with the amendments introduced in Head 19 the issue is satisfactorily addressed.

Key Issue 6 (Section 8.3 of report refers)

Consideration could be given to the provisions in Head 19 of the Bill limiting Director terms in years rather than in terms. Because of the commitment in the National Ports Policy to stagger board appointments, situations could arise whereby a Director is limited to 6 years in office, which could perhaps, be considered overly restrictive.

Ministerial Response

My officials have requested the Office of the Parliamentary Counsel to reflect the Committee's suggestion in respect of Head 19 (Amendment of section 30 of the Principal Act) and its proposals in the area of directors' term limits.

The final Bill will now include a provision along the lines of –

'A director of a company shall not serve for more than a period of 10 years in total.'

[N.B. – drafting proposal subject to change]

While recent legislation does contain examples of term limits imposed by virtue of number of terms served (e.g. *Sport Ireland Bill 2014*), I accept the Committee's suggestion that in this instance a limitation imposed by virtue of years served is more appropriate and therefore the above amendment, in line with that used in s16 of the *State Airports (Shannon Group) Act 2014*, will be drafted.

Key Issue 7 (Section 8.4 of report refers)

In light of the continued decline of port traffic and throughput for smaller ports (globally and in Ireland) together with recommendations in the Report by the Review Group on State Assets and Liabilities (McCarthy Report) concerning the restructuring of state-owned ports into several competing multi-port companies, and the Irish position in relation to the proposed European Commission's revised TEN-T Regulation, that all existing ports in the Greater Dublin Area (Dublin, Dún Laoghaire and Drogheda) be included within the Dublin 'core' port; greater consideration could, perhaps, be given to the impact that any proposed transfer of control to differing county council structures would have on any future amalgamation of ports.

Ministerial Response

The Bill does not have any impact upon the existing Ministerial power in section 43 of the Harbours Act (as amended by section 1 of the Harbours (Amendment) Act 2000) to merge or amalgamate port companies.

As the Committee is aware, Recommendation 29 of the Report of the Review Group on State Assets and Liabilities stated –

'The Review Group recommends that the state-owned ports, including Rosslare, should be restructured into several competing multi-port companies, built around Dublin, Cork and Shannon Foynes. The Competition Authority should be consulted concerning the amalgamation process.'

I think it important to stress that the two recent comprehensive reviews of the Irish commercial ports sector – my own Department's review and development of *National Ports Policy* and the Competition Authority's *Competition in the Irish Ports Sector* report – did not agree with the Review Group's recommendation. There is no evidence that a series of amalgamations as proposed by the Review Group would lead to any greater efficiencies or improve competition in the sector. Indeed the Competition Authority warned against such a move in light of the dangers it posed to competitive conditions within the sector.

Therefore the issue of amalgamations does not form part of the current policy perspective.

Key Issue 8 (Section 8.4 of report refers)

Greater clarification on the policy position being taken with regard to the future status of European Commission-defined ‘core’ and ‘comprehensive’ port status, could, perhaps, be of benefit for the future planning of Irish ports. This is especially relevant to the ports in the Greater Dublin Area (GDA). Such clarification with regard to policy direction may also be relevant in the context of the proposals within this General Scheme to transfer two ports in the GDA to local authority control.

Ministerial Response

The status of ‘core’ and ‘comprehensive’ networks is governed at EU level by the Regulation on Union guidelines for the trans-European transport Networks (TEN-T) and its associated financing Regulation the Connecting Europe Facility (CEF) and therefore outside the scope of this Bill.

National Ports Policy clearly states that –

‘..Government expects the Ports of National Significance (Tier 1) to lead the response of the State commercial ports sector to future national port capacity requirements. There is also a role in this regard for the Ports of National Significance (Tier 2) to develop additional capacity to aid competitive conditions, within the unitised sectors in particular.’

Dublin Port Company is the designated Port of National Significance (Tier 1) within the Greater Dublin Area and the continued commercial development of the company is a key strategic objective of *National Ports Policy*.

Key Issue 9 (Section 8.5 of report refers)

Although Head 8 allows flexibility to new shareholders in considering future methods of infrastructure funding, including, for example, through the sale of an equity stake, consideration could, perhaps, also be given to whether or not there is any potential for privatisation of some of the ports of regional significance. As the ports sector does not receive any exchequer funding, the development of the ports sector is more dependent on private sector investment. Privatisation has been suggested in the Report by the Review Group on State Assets and Liabilities (McCarthy Report).

Ministerial Response

At this juncture I believe the approach adopted by the General Scheme of the Bill to be most appropriate. That approach provides the new local authority shareholder an opportunity to consider whether it wishes to bring in private investment through a sale of equity within the company subject to Ministerial consent. This opens up a new avenue for funding for consideration by those companies and their new shareholder, one that is not currently available.

The issue of privatisation within the Irish ports sector is in many ways a misnomer. The reality of the sector is that it largely already follows a public sector authority / private sector delivery model of service provision. As noted in the Committee's report this model is globally the most common model of port ownership and I am unconvinced thus far of any reason to move from it.