

SUBMISSION TO THE JOINT COMMITTEE ON TRANSPORT AND COMMUNICATIONS ON THE GENERAL SCHEME OF THE HARBOURS (AMENDMENT) BILL 2014

Introduction

The Chartered Institute of Logistics and Transport in Ireland (“the Institute”) is the independent professional body for people engaged in logistics and all modes of transport. The Institute is part of an international body with 30,000 members worldwide. As a professional body, the Institute does not lobby on behalf of any sectoral interest, but seeks to take an independent, objective and considered view on matters of public policy.

The Institute welcomes the opportunity to make a submission to the Joint Committee on Transport and Communications in respect of the Harbours (Amendment) Bill 2014.

Ports as Commercial State Bodies

The regional ports which it is proposed to transfer to local authority ownership and control are currently commercial State bodies. This status gives them a large degree of commercial freedom and also means that they are not subject to the detailed controls on staffing, pay and finances which apply to non-commercial State bodies. The Institute considers that the ports being transferred, and particularly those that will remain as independent companies under Head 7, should continue to have the commercial freedom afforded to other State commercial companies, which include their Tier 1 and Tier 2 competitor ports. The larger regional ports in particular must be able to compete for business without unnecessary constraints being placed on them and they should be subject to no greater State control than the Tier 1 and Tier 2 national ports.

It is not clear whether the transfer of the ports to local authority ownership will enable them to retain their existing freedom from detailed controls on staffing, pay and finances and we recommend that the Joint Committee takes evidence from the relevant Departments. It should also explore whether different controls are likely to apply where different ownership models are applied, as provided for in Heads 7 and 12. Head 7 provides for the continued existence of the port company but now under local authority ownership, while Head 12 provides for the dissolution of the port company and its integration into the relevant local authority. It seems certain that port companies which are integrated into local authorities will become subject to the full range of Government controls on local authorities.

Port Companies

Head 6 lists the five port companies proposed to be transferred to local authority ownership and control. Two transfer models are provided for – in Heads 7 and 12 as described above. The Regulatory Impact Assessment indicates that it has already been agreed that Drogheda, Dun Laoghaire and Galway should continue as port companies in the ownership of the relevant local authorities – that is the Head 7 transfer process. If this decision has already been taken, the Bill should be amended to explicitly provide for this. This could be done by including text in the current Head 7 which makes it clear that it will be used to give effect the transfer of these port companies. A possible text might be along the following lines:

“This Head shall apply to Drogheda Harbour Company, Dun Laoghaire Harbour Company and Galway Harbour Company.”.

As currently drafted either transfer option can be applied to the five named companies at the discretion of the Minister and a simple amendment would remove any doubt.

Governance of Transferred Port Companies

It is not clear which, if any, of the provisions of Part 2 of the Harbours Act 1996 will apply once the port companies are transferred to local authority ownership. These provisions relate to the corporate governance of port companies and cover matters such as the contents of the memorandum and articles of association, composition of the board, appointment of the chief executive, borrowing, accounts and audit. The Institute is anxious to ensure that the commercial mandate of these companies is protected and enhanced, that they will operate at arm’s length from their local authority owners and that they will be structured and governed in a way which does not act as an impediment to potential future private investment.

It will also be important to ensure continuing good corporate governance and effective performance oversight of these companies. To give an example: it would be beneficial to a continuing commercial mandate and to good corporate governance of these companies to apply the existing statutory provisions in section 30 Of the Harbours Act 1996 relating to the composition of the board together with the modifications proposed in Head 19(2) and to retain the power of the board to appoint the chief executive. The Joint Committee might explore during its hearings what the Government’s intentions are in this regard and it would be particularly helpful to obtain a clearer picture as to what provisions of existing harbours legislation will continue to apply to the transferred port companies.

Where port companies are dissolved and absorbed into local authorities it will also be important that arrangements are put in place to enable port operations to continue on a commercial basis.

Superannuation Arrangements for Dissolved Port Companies

The notes to Head 13 indicate that the local authorities will become “the employer” for the purposes of the superannuation of the staff of the dissolved port companies being absorbed into local authorities. It is not clear what the implications of this are for staff and local authorities. Are the existing superannuation schemes well funded? Will local authorities incur financial liabilities in respect of these schemes and are they in a financial position to honour them? The notes to Head 18 indicate that it is not intended that any of the liabilities of the dissolved Dundalk Port will transfer to Louth County Council and that “any such liability (eg. pensions) shall remain the responsibility of Dublin Port Company”. Will other local authorities be treated on a similar basis where significant pension or other financial liabilities arise?

Presumably the port companies transferred to local authority ownership and which remain as separate companies will have sole responsibility for their own superannuation schemes and the local authorities which own them will not assume any contingent liability?

Ministerial Powers of Direction

Head 11 proposes to give the Minister very wide general powers of direction in relation to port companies transferred to local authority ownership. These powers could potentially be used to impose substantial financial obligations on the companies and their local authority owners, for example in a direction relating to “the development of harbours” or safety, security or navigation. There is also a long standing policy of the State not providing financial aid to port companies and there could be EU State aid implications if aid was provided.

The proposed power of direction is a significant policy departure. If the Minister were to issue a direction at present he would be doing so as owner of the port companies and would therefore have a direct concern for the financial consequences. However he will have no such constraint when these companies are in local authority ownership. The Joint Committee might explore if these provisions are really necessary. At a minimum, the Head might be amended to require the Minister to consider the potential financial consequences of any proposed direction, to consult with the port companies before making a direction and to obtain the consent of the Minister for the Environment, Community and Local Government to any direction.

Port Ceasing to Operate

Head 8 prevents the disposal of shares in a local authority owned port without the prior written approval of the Minister. However there is nothing in the law which would prevent a local authority deciding to cease the provision of port services. It could, for example, decide to cease the handling of commercial cargo and operate instead as a leisure port. This could have potential implications for national ports

policy. The Joint Committee may wish to explore whether the Minister should retain some residual powers in this regard as the powers of direction under Head 11 cannot be exercised in relation to the performance of functions in particular circumstances. The exercise of any residual power should of course have to take account of the commercial and financial realities faced by a local authority in reaching a decision on the future of a port.

Pilotage Services

Head 12(2) provides for the designation of a local authority as a specified person to organise and ensure the provision of pilotage services. This will require appropriate marine command expertise and experience which is unlikely to exist within local authorities. It may be appropriate to consider the amalgamation of pilotage districts which would facilitate a sharing of resources and expertise and encourage more uniform pilotage control and standardised pilotage bye-laws nationwide. Such arrangements already apply to the Port of Cork and Bantry and to the Port of Dublin and Dundalk. Similar merged pilotage districts could be envisaged in respect of the regional ports under consideration in the General Scheme: for example, Galway and the Shannon Foynes, New Ross and Waterford and Dun Laoghaire and Dublin Port.

Transfer Provisions

The provisions of Heads 14 and 16 are only relevant to port transfers implemented under Head 12 and these Heads should be amended to make this clear.

Dundalk Harbour

In 2011 the functions of Dundalk Harbour Commissioners were transferred to Dublin Port and the harbour is currently operated under licence from Dublin Port. Head 18 provides for the transfer of the Harbour to Louth County Council. However the notes to the Head talk about its possible future transfer to the local authority and this creates a measure of uncertainty about the future status of Dundalk. The Joint Committee could usefully explore this during its hearings on the General Scheme and seek greater clarity on the future status of the Harbour, including any conditions which would have to be fulfilled before its transfer to local authority and control.

Port Company Boards

The Institute welcomes the proposals in Head 19 providing for the appearance of the Chairperson designate of a port company before the relevant Oireachtas Committee, specifying particular skills for board members and requiring broad gender balance.

The proposal to limit directors to a maximum of two terms is unduly restrictive and should be reconsidered. Much more important than term limits is that there are adequate arrangements in place for the selection of board members, that the membership of boards is regularly renewed and that the performance of the board as a whole and of its individual members is regularly evaluated.

The Minister currently has discretion to appoint directors for a maximum term of five years but there is nothing to stop the Minister making appointments for shorter terms and this is sometimes done for public appointments. There is also a commitment in the National Ports Policy to the staggering of board appointments to provide for a more managed turnover of directors. This means that initially at least some directors will have to be appointed for shorter terms of say three or four years. If it is proposed to include limits on the length of service of board members, we strongly suggested that they be expressed in years rather than terms. It is desirable that chairpersons should have served on the board for a period before assuming the chair and we therefore suggest that any limits imposed on chairpersons should take this into account. The limits should apply to worker directors in the same way as all other board members.

The Irish Stock Exchange requires listed companies to apply the UK Financial Reporting Council's Corporate Governance Code (September 2012) and the Irish Corporate Governance Annex. These documents contain a number of provisions which have relevance to consideration of this issue:

- Companies should have formal, rigorous and transparent procedures for the appointment of board members.
- They should ensure that plans are in place for orderly succession so as to maintain an appropriate balance of skills and experience and to ensure progressive refreshing of the board.
- The board should undertake a formal and rigorous annual evaluation of its own performance and that of individual directors.
- The guidance documents contain no provisions on term limits but state that any term beyond six years for non-executive directors should be subject to particularly rigorous review and that those who have served more than nine years should be subject to annual re-election.

Subhead 19(6) should be much more clearly expressed. It appears from the explanatory notes that it is intended to address potential conflicts of interest for board members and to include a modified provision which would preclude persons, or employees of persons, who provided a significant commercial service to a port company within the previous three years. While we support measures to prevent

board members with material conflicts of interest from being appointed, the existing provisions in the Harbours (Amendment) Act 2009 are ill-conceived and should not be retained in the new legislation. For example, it is generally accepted that 12 months is an appropriate maximum period to preclude former employees from taking up a new employment which involves a material conflict of interest. Yet under the existing provisions in the 2009 Act, somebody no longer employed by a company which provided significant commercial services to a port company would be precluded from board membership for three years. Any employee or former employee of a company which provided significant commercial services to a port company would be precluded from board membership even if that person had no direct working relationship with that port company or potentially even if they worked in another jurisdiction.

We suggest that the provision be reconsidered and that a more appropriate approach be adopted which relates directly to the individual being considered for appointment to the board. The test should be whether the person being considered for appointment has or could be perceived to have a material conflict of interest if appointed to the board. This is a more appropriate test and will avoid the unnecessary exclusion of persons well qualified to serve on the board. It would also be a wider test than the “significant commercial services” test.

Dublin Port Pilotage Limits

Having read the explanatory notes, it is still unclear what precisely is proposed in Head 25. The Joint Committee should seek clarification from the Department during any hearings on the draft General Scheme.

Observations on the Regulatory Impact Assessment

The RIA gives no real consideration to the financial circumstances of both the port companies to be transferred and the local authorities to whom they are to be transferred. Will the ports be a financial burden on the local authorities? Have the local authorities the capacity to provide, or generate from other sources, any investment finance that might be required for the future development of these ports or to cover pre-existing deficits? This is particularly important since it is Government policy not to provide funding to commercial ports and because the ports to be transferred may not be in sufficiently robust financial health to generate the necessary investment finance from internal resources alone. It is noteworthy from Appendix A of the RIA that four of the five ports to be transferred incurred net losses in recent years.

The National Ports Policy did not respond adequately to the proposals in the report of the Review Group on State Assets and Liabilities suggesting the development of multi-port companies. This does not appear to have been considered as an option in the RIA and it also appears that there is an intention at some future date to reverse the transfer of Dundalk Harbour to Dublin Port. While the Institute is not advocating port amalgamations per se, it would be useful to gain an understanding of the Government's reasons for rejecting the Review Group's advice. We understand that there are a number of countervailing issues which could come into consideration, including the risk that port amalgamations could have negative implications for competition, a factor mentioned by the Competition Authority's recent study *Competition in the Irish Ports Sector*. As against that, amalgamation might provide more ready access to finance and expertise for a struggling regional port.

The National Ports Policy also did not adequately respond to the recommendation in the Review Group's report that privatisation of ports be considered, ideally after any restructuring. This might have been worth considering for some of the regional ports, particularly as a way of leveraging investment. The list of options addressed in the RIA includes "potential for private investment" This does not appear to encompass full privatisation and in any event these two potential forms of private participation could have quite different policy implications and legislative requirements.

Rosslare Europort

The Ministerial statement accompanying the publication of the draft General Scheme stated that the Bill will not affect Rosslare Europort as it is not subject to the Harbours Acts. The 2013 Ports Policy Statement undertook to publish a pathway for the port by the end of last year following receipt of advice from an external consultancy study. The Joint Committee might explore with the Department what, if any, conclusions have been reached in relation to the future ownership and development of Rosslare Europort. The Institute accepts that the ownership arrangements for the port are complex, deriving from the Fishguard Bay Railway and Pier Act 1893 and involving both the Irish and United Kingdom administrations. However an early and definitive statement by Government clarifying future intentions for the port would be most welcome.

Competition Authority Study

Do any of the recommendations of the Competition Authority's study of the ports sector require a legislative response? For example, Recommendation 4 of that study suggests that the Department of Transport, Tourism and Sport "should mandate the promotion of effective intra-port competition as a key objective for port authorities

that is imposed by legislation or regulation as appropriate”. How is it proposed to give effect to this recommendation?

**Chartered Institute of Logistics and Transport
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