



Comisión de las Islas ▶ Comissão das Ilhas ▶ Commissione delle Isole

Saarte Komisjon ▶ Kummissjoni ta'Gúejjer ▶ Ø Kommission

CONSULTATION ON THE 5th MARITIME CABOTAGE REPORT COMMENTS OF CPMR ISLANDS COMMISSION June 2009

INTRODUCTION

When addressing the issue of Island maritime transport, it is never unnecessary to recall two fundamental points.

The first one is obvious: unlike mainland regions, islands do not have the alternative of road or rail services, and the transport of goods by air is only marginal. Consequently, island maritime transport services, no matter what their individual reality, cannot be compared with mainland cabotage services. This point is, to a certain extent, acknowledged in Article 4 of Regulation 3577/92.

The second one, just as obvious, is that island situations in terms of maritime transport are diverse in the extreme, ranging from large islands located close to major international shipping routes, to mountainous islands with a multiplicity of harbours, to archipelagos, to small inshore islands, etc. not forgetting the special characteristics of the Outermost Regions. One could also add the great diversity of route length, the extreme variety of climatic conditions and the different nature of tourism-related traffic, etc. Each island is a case apart, each island is unique, and it would henceforth be inappropriate to apply a "one size fits all" approach to all island maritime services. What is expected from EU legislation is to provide a general framework which both meets the purposes laid out in the Treaties, and can be applied to islands with sufficient pragmatism and flexibility to take into account the needs of these communities, and the goal of territorial cohesion.

The purpose of the following note, based upon the findings of workshops organised by CPMR Islands Commission, as well as upon the observations received from a number of island authoritiesⁱ, is to comment on whether the existing framework provides enough pragmatism and flexibility to cater for island situations.

COMMENTS

a) The Directive's Geographical framework

Regulation 3577/92 rests upon a paradox which is that whilst it deals with the provision of maritime services within the EU, this legislation limits the definition of island cabotage as the carriage of passengers or goods by sea within the same Member State.

This situation (which is in contrast to the provisions in force for air transport services) seems to contradict the very notion of the Single European Market, for in good logic, one could have expected EU law to insist that the rules prevailing on island cabotage services should be applied without discrimination to all routes involving an EU destination, and not just to those within the same Member State.

This limitation has long been an hindrance to some islands (case of Bornholm), and one must welcome the fact that Community guidelines on State aid for maritime Transport (2004/C 13/03) somewhat relaxed this rule – albeit cautiously – by accepting that "if an international transport service is necessary to meet imperative public transport needs, PSOs may be imposed or PSCs may be concluded, provided that any compensation is subject to the abovementioned Treaty rules and procedures" (point 9).



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One may wonder if a bolder approach would not have been justified, with a radical rewriting of Article 1.c of Regulation 3577/92, and replacing the reference to a "same Member State" by a simple "within the EU". The regional authority of Bornholm also comments that in stead of merely tolerating the application of PSO or PSC between an island and another Member State, the EU should in fact actively encourage the development of such routes, if necessary through the use of Structural Funds.

This issue of the Regulation's geographical framework raises special difficulties in some Outermost Regions, whose maritime transport network is inextricably linked with those of neighbouring islands and countries which do not belong to the EU. In such context, it is not always easy to establish PSO or PSC on such "regional" routes (the term "regional" being in this context taken in its broadest acceptance, as encompassing a broad geographical zone covering EU regions and Third countries). An example is provided by Guadeloupe, which notes that the CARIFORUM-EC EPA agreement excludes maritime cabotage in the Community sense.

Guadeloupe suggests that, considering the fragility of potential operators, and the need to develop maritime cabotage within the Caribbean, the implementation of PSO and PSC should be coupled with Short Sea Shipping mechanism (which only provides for limited and temporary assistance). The specific regime of the Outermost Regions could be used as a legal basis for such a framework.

b) Should the PSO/PSC mechanism be retained?

The way maritime transport services are run in the various EU islands ranges from unfettered free competition on the one hand, to services directly managed by the local authorities on the other. In between, every possible configuration seems to exist: PSO (on some routes or on all routes), PSC (exclusive or non exclusive), or a mix of PSO and PSCⁱⁱ.

To draw a rough sketch, one could say that the largest islands, especially those which are close to major shipping lanes, tend to be more likely to benefit from open competition and less likely to require PSO or PSC of any sort, while the smaller ones are unlikely to attract effective competition, and will be highly dependent upon such mechanisms. However, this would be oversimplistic, for all islands, irrespective of their size or degree of isolation, have the need to retain the capacity of using such instruments to regulate their lifeline services.

To give but one example, even large islands located close to international shipping routes stand the risk of finding themselves suddenly "by-passed" by operators when the demand for shipping on such route is high, and the offer is low. This is because their freight volumes are small compared to intercontinental trade, and that it may be more profitable for operators to have quick rotations between main destinations rather than to waste time catering for such comparatively marginal markets. In the volatile context of the world shipping economy, having the capacity to implement PSO or PSC provides a necessary degree of safety.

There is henceforth a large degree of consensus amongst island authorities that the possibility to implement PSO or PSC on island routes should be retained, but there are serious questions on the best way to implement such mechanisms.



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c) Does the system lead to more competition?

The chief goal of Regulation 3577/92 has been to liberalize maritime services by fostering the introduction of competition on routes within a Member State, including on island cabotage routes, albeit through specific provisions.

Experience to this day shows that in many cases, the introduction of competition on island routes has met with very limited success. But for a few exceptionsⁱⁱⁱ regular services operated in the framework of island cabotage tend to be plied essentially by national operators and rarely by operators from other Member States. However, some joint capital ventures between shipping companies have been observed in the Mediterranean.

As a rough rule, the level of competition between national operators varies according to the size of the island and to its volume of traffic. On the larger routes, it is possible to witness competition between various operators, be it in the framework of a PSO without compensation (such as on the routes between Nice or Toulon and Corsicaiv, or on the routes between mainland Portugal and the Azores and Madeira), or even without PSO (such as in Crete). However, on the smaller routes, effective competition is much more limited, leading at times to no competition at all or to *de facto* monopolies. This has been the case – to quote a few examples – in Bornholm, in Gotland, in Orkney, or in the Outer Hebrides, where tendering processes have met with disappointing results.

But the overall level of traffic is not the only explanation why many island routes fail to attract competition. A well-known issue is the impact of seasonality, especially in islands with a large tourist industry, where routes which can easily sustain a number of operators during the relatively short season can hardly do so outside it, which is not conducive to a balanced all-year-round competition.

There are also a variety of natural and infrastructural factors. Some island routes have very specific characteristics, due to local bathymetry or weather, and thus require the use of *ad hoc* vessels (ice-breaking capacity in Åland, shallow-draft boats on inter-island routes in the Hebrides, etc.). Harbour infrastructures may be adapted to certain types of Ro/Ro ferries and not to others. Security requirements (such as those regarding the transport of dangerous goods) are also hard to meet, especially on the smaller island routes. All this means that one cannot always use vessels plying one route on another, and that an operator may have to invest in completely new ships if he wants to provide services on routes outside his usual environment.

Even more intricate are the hurdles related to the potential social and economic impact of a tendering process. Should the historic operator be replaced by a lower bidder, the public purse may perhaps benefit in the short term, but there is also the fear that a number of shipping-related jobs could be lost or relocated outside the islands – unless there are adequate provisions in the legislation covering the transfer of undertakings.

Though this may be regarded as part of the risks associated with a market-led economy, the potential impact upon communities which tend to be highly dependent upon shipping-related employment can be considerable. Not only can such an option prove difficult to implement socially or politically, but the advantage of paying a reduced subsidy may in the end be offset by higher costs in other fields, such as unemployment benefits. Such a prospect understandably puts public the authorities in charge of a tendering process in a very awkward position.



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d) A positive or a negative impact?

There is no simple reply to the question of whether the application of PSO and PSC has had a positive or a negative impact.

Globally, regional authorities of islands where such instruments have been used tend to agree that they are useful means to ensure better security and better quality of services. They are also a useful tool to enable public authorities to negotiate with shipping operators in a position of relative strength, and give them an element of control over the level of fares.

But this general appreciation needs to be mitigated by a number of criticisms, and exceptions are many.

The most difficult situation is that of islands where the lack of competition means that the only possible choice is the historical operator, which can then impose its own conditions. This can lead to much more expensive costs for the public authorities, which have no other alternative. In Bornholm, for example, the old State-owned company (since privatised) has been the only bidder. The level of subsidy has leapt from €11.3 mio/year to 16 mio after the tendering, and should rise to 26mio after 2011. Admittedly, the quality of service has been improved, but to considerable expense to the public purse. A similar experience happened in Gotland, which was unable to attract competitive tendering.

Attempts to introduce a higher level of competition by separating the ownership of vessels from the actual running of the services have not proved very satisfactory. In Scotland, the subdivision of State-owned CalMac into various companies, some owning the assets, some running the staff, and another providing the service, has proved extremely expensive to the national authorities without leading to any significant change in comparison with the previous situation^v.

However, the comment most frequently made by island authorities (Balearics, Gozo, Scotland, Bornholm, Gotland, Corsica, Sardinia...) is that the tendering system is excessively bureaucratic and expensive to run, and that it would gain both in being simplified, and in the duration of contracts being lengthened.

In Gotland's words: "...with a long tender procedure; combined with short contract periods, it's almost an everlasting process". Corsica underlines that the duration of PSC is presently too short, considering the cost of vessels which are considerable investments for operators.

This is perhaps why some islands (Shetland, Sardinia) have remarked that on balance, rather than having a PSC, they would prefer a PSO with open tendering to all operators meeting the specification. But if too short contract durations are a problem, so are those which are too long. Sardinia considers that the implementation of a PSC operated by Tirrenia since an excessively long period (over 20 years) has in fact thwarted competition without producing tangible benefits for users.

Strong debates have also taken place in some islands (in Scotland, in particular) on whether public tendering should be compulsory in all cases. The question may be raised on whether it is always beneficial to undertake a complex, lengthy and expensive tendering procedure when the historical operator is actually under public ownership, and when the lack of profitability of the routes is unlikely to attract competition.



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In that respect, it will be recalled that the ANAV Ruling of the European Court of Justice (Case C410-04, 6th of April 2006) stated that:

"Articles 43 EC, 49 EC and 86 EC, and the principles of equal treatment, non-discrimination on grounds of nationality and transparency do not preclude national legislation which allows a public authority to award a contract for the provision of a public service directly to a company of which it wholly owns the share capital, provided that the public authority exercises over that company control comparable to that exercised over its own departments and that that company carries out the essential part of its activities with the controlling authority."

The ANAV Ruling related to a matter of municipal transport services in Italy, but it would be useful if DGTREN could give some clarification about its application to Island cabotage services.

It will be noted that the complexity of tendering has been recognised by the Commission which has acted upon it, but so far only in the case of small island routes (under 300,000 pax/year). In such cases, it may be possible to apply a simplified procedure, involving "a simple call for expressions of interest without launching a formal tender, provided that a Community-wide announcement of the service - which is very easily organized - is maintained." vi

As for the impact of PSO or PSC on the level of fares paid by users, the response is equally mixed. If there are a number of cases where they have been kept stable or moderated, there are also some where they have actually gone up. Thus, Gotland mentions that fares have increased for some categories. The Balearic Islands indicate that on the inter-islands Ibiza to Formentera route, subject to a *de facto* monopoly, passenger fares have increased by 100% between 2004 and 2008. For a distance of 6 Nautical Miles, fares reach ϵ 24 when a similar distance by bus or train would cost respectively ϵ 0.90 and ϵ 1.20.

One must bear in mind that the way fares have evolved depends not only on the level of competition but also on the level of support granted by the public authorities. For example, the substantial lowering of fares on the routes to the Hebrides in 2008 was due to the experimental introduction of Road Equivalent Tariff (or RET) by the Scottish Government, and not in any way to increased competition.

How low should the fares be? Expressive formulas such as "territorial continuity" (in Corsica) or "Road Equivalent Tariff" (in Scotland), have been conceived to indicate that people travelling to or from islands should not be expected to pay more than people travelling similar distances on the mainland. But such concepts are primarily political, and their simplicity is relative, for fare levels may vary considerably according to which yardstick is being used (average train or bus fares for passengers; mere cost of petrol, or overall running costs for a vehicle, etc.). Thus, in some cases, and depending upon the option chosen, shorter routes may benefit greatly from such a policy, whereas longer ones may not. And in a few islands (such as some small inshore islands of the Baltic Sea or on the inter-island routes of the Åland archipelago) the radical approach has been taken to erase all distinction between road and sea transport, and provide services at little or no charge for the users, though at substantial costs for the public purse. Vii In the end, RET or Territorial continuity seem to rest not so much on a universally agreed and strictly applied criterion, but – to some extent at least – upon an equilibrium between what is regarded as the best possible deal for the users, and especially the islanders, and the most affordable one for the public finances.



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e) A matter of governance?

As shown by the various examples above, there is no "one-size-fits-all" answer to the provision of shipping services on island cabotage routes, and if a lesson must be drawn, it is that pragmatism and flexibility should be the rule.

Island regions are in no way adverse to competition, provided it is clear that the possibility of such competition exists, and that its consequence will be beneficial to their community. On the other hand, there is a certain reluctance to undertake complex and expensive tendering of services if this is unlikely to lead to positive changes. Defining what changes can be regarded as "positive" requires striking the right balance between elements such as quality and security of services, the level of fares paid by the users, the cost to the public purse, not forgetting the overall impact on the island's economy and society.

One important element in ensuring that this balance is found is to ensure that island authorities are closely associated with the provision of such services. However, the situation in that field varies in the various Member States, responsibility for overseeing maritime services being exerted at central government level in some cases and at regional or local level in others, which raises problems when those authorities have different agendas or conflicting priorities.

Though this matter is clearly an internal issue for Member States, it would be useful if, in accordance with the principle of subsidiary, future EU legislation emphasized more firmly the need to involve in the decision process those communities which are directly concerned by the provision of island cabotage services.

The present note does not claim to do anything more than to skim over a few problems encountered in the implementation of EU Regulation 3577/92, and to illustrate them with comments and examples provided by Island Regional authorities.

Further and more detailed work is certainly needed (for example to discuss the technicalities of the PSC tendering procedure, and to see how problems could be alleviated).

In that respect, CPMR Islands Commission would like to suggest:

- In the short term, that DG TREN commissions an in-depth comparative study on the scope and impact of EU Regulation 3577/92, and subsequent legislation on maritime transport, with regard to the provision of island services; such a study covering not just cabotage services in the national context, but also in the EU context, and even with Third countries when this is relevant.
- In the longer term, that some sort of consultative structure be set up, involving EU national and regional authorities, as well as other involved bodies (such as representatives of shipping operators or harbour authorities), so as to monitor the implementation of Regulation 3577/92 in the field of Island Cabotage, and consider possible improvements.

In both cases, CPMR Islands Commission wishes to underline that it is keen to establish a practice of active cooperation with the European Commission.





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FOOTNOTES

ⁱ Gotland, Åland, Bornholm, Western Isles, Orkney, Shetland, Corsica, Balears, Sardegna, Gozo, Azores, Guadeloupe.

ii One must add that PSO or PSC are not the only way to limit or reduce maritime fares, for there are also certain mechanisms which enable assistance to be given directly to users independently of the means of transport or choice of operator. For passenger traffic, social aid can be granted to certain categories of travellers (such as island residents), thus enabling them to benefit from a subsidized rebate. For the transport of goods, point 81 of the Guidelines on Regional Aids for 2007-2013 (2006/C54/08) also gives businesses located in Outermost Regions or in Regions with a low population density the possibility of receiving direct compensation covering part of their additional transport-related costs. It is worth recalling that a long-standing request by CPMR Islands Commission has been that this possibility should be extended to all islands, on the ground that the additional transport costs which beset island industries tend to be due not to the sole sea-crossing, but also to the imbalance of traffic flows (islands usually importing a lot, and exporting little). Because of this, industries located in islands often have to pay on their own for the whole return journey; whereas similar industries based on the mainland tend to benefit from much more competitive rates because road hauliers can rely on more balanced traffic flows, and share costs between users at both ends. This form of support has the advantage of covering the whole spectrum of additional costs - and not just those related to sea crossings -, and of being better targeted to suit local economic needs than a "blanket subsidy". It is CPMR's opinion that this mechanism is unlikely to lead to market distortions, since only clearly demonstrated overcosts can be covered. However, the above direct assistance mechanisms do not fall under the remit of Regulation 3577/92.

iii For example:

- the DOMs (French overseas *départements*), whose traffic is open to international competition;
- Åland, through its special customs and excise regime and its attractive position on the major shipping route between Finland and Sweden;
- Corsica Ferries in Corsica.
- iv However, island residents get a direct social subsidy on these routes.
- ^v Whether such separation can be conducive to more competition is debatable, for shipping operators tend to consider that the capacity to choose their own vessels, and to purchase and sell them at the best conditions, is an integral part of their trade, and may consequently be reluctant to limit their activity to the sole running of services.
- $^{\rm vi}$ Article 5.6 of the Communication on the interpretation of Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) /* COM/2003/0595 final */ and COMMISSION DECISION on the application of Article 86(2) of the Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest
- vii This policy costs €18 million per year to the authorities of Åland, whose 27,000 resident can use inter-island ferries at little or no cost. This is one of the largest budgets of the autonomous government, and discussions are taking place on whether this can be maintained, or whether some services should be privatised.