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COMMUNICATION FROM THE COMMISSION

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)

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Summary

Drawing on the experience gained during twenty years' practical application of Regulation (EEC) No 3577/92, the Commission has decided in the interests of transparency and legal certainty to update and amend its interpretation of the provisions of the Regulation. This Communication amends and replaces the previous Commission's interpretative communications of 2003[1] and 2006[2].

This Communication is being presented for information purposes only, to help explain the Regulation. It indicates how the Commission intends to apply the Regulation. It does not set out either to revise the Regulation or to encroach on the Court of Justice's jurisdiction in matters of interpretation.

This Communication starts by specifying the scope of the freedom to provide services in the maritime cabotage sector. It indicates who enjoys that freedom and recalls which services the Regulation covers.

It goes on to specify the extent of the derogations to the freedom to provide services, as provided for in the Regulation. There are three such derogations. Firstly, Member States have the power to impose manning rules on board ships smaller than 650 gt and vessels performing island cabotage services between two ports on their territory. Secondly, Member States may impose public service obligations and conclude public service contracts in order to ensure an adequate scheduled transport service to, from and between islands. Lastly, Member States may ask the Commission to adopt safeguard measures to remedy a serious disturbance of the internal market.

The Communication also provides an overview of transitional measures for the application of this Regulation in respect to Croatia since its accession to the Union.

Finally, the Communication provides guidance on application of Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70[3] to maritime cabotage services.

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[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the interpretation of Council Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) of 22.12.2003, COM(2003)595.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions updating and rectifying the Communication on the interpretation of Council Regulation No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) of 11.5.2006, COM(2006)196.

[3] OJ L 315, 3.12.2007, p. 1.

1. INTRODUCTION

Council Regulation (EEC) No 3577/92 (hereinafter the *'Regulation')* applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)[4], which was adopted when the internal market was created, is now over twenty years old. Since its entry into force on 1 January 1993, maritime cabotage has undergone gradual liberalisation.

Since 1993, the Commission has reported several times on the economic and legal progress of this liberalisation[5]. It has also addressed the problems of interpretation raised by the Regulation in its interpretative communications of 2003 and 2006.

The fifth report on the implementation of the Regulation[6] highlights the need to further clarify certain aspects of the Commission's guidance on the application of this Regulation.

The present Communication updates and amends the previous guidance in order to bring it in line with the recent EU law and case-law of the Court of Justice and to better reflect the changes in the Commission's understanding of certain provisions of the Regulation. This concerns in particular the Commission's interpretation of the provisions of the Regulation on manning (point 4 of this Communication) and the duration of public service contracts (point 5.5.2 and section 5.7 of this Communication).

This Communication merely presents the Commission's interpretation of the Regulation for information purposes. It does not set out to revise the Regulation or to encroach on the Court of Justice's jurisdiction in matters of interpretation. It does not prejudge the application of State aid rules.

2. THE OPENING OF THE MARITIME CABOTAGE MARKET

2.1. Freedom to provide maritime cabotage services

Article 1 of Regulation (EEC) No 3577/92 liberalised maritime cabotage in the countries where that economic sector was reserved for nationals. Freedom to operate between two ports in the same Member State is ensured to all Union shipowners.[7]

Member States cannot make this freedom subject to any restrictions, except in duly justified cases. For this reason, Member States might not introduce any scheme of prior authorisation unless (1) such scheme is justified by overriding reasons in the public interest (e.g. ensuring safety of ships and order in port waters), (2) is necessary and proportionate to the aim pursued and (3) is based on objective, non-discriminatory criteria which are known in advance to the shipowners concerned.[8]

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4 OJ L 364, 12.12.1992, p. 7.

5 COM(95)383, COM(97)296, COM(2000)99, COM(2002)203.

6 COM (2014)231.

7 For the beneficiaries of the freedom to provide services, see point 2.2.

8 Joined Cases C-128/10 and C-129/10 *Naftiliaki Etaireia Thasou* [2011] ECR I-1887, paragraphs 43 *et seq.*

Member States should demonstrate that all the above conditions are met in order to be able to establish any regimes affecting the exercise of freedom to provide maritime cabotage services by the beneficiaries of the Regulation.[9]

However, the Commission considers that in order to monitor the cabotage market, Member States may ask shipowners to supply advance information on the services they intend to provide. Such information may help Member States to better assess the real transport needs.

Finally, the Commission does not believe Member States can require companies to have a representative on their territory.

2.2. The beneficiaries of the freedom to provide services

Article 1 of the Regulation stipulates who the beneficiaries are of the freedom to provide maritime cabotage services. They are *'Community shipowners'* (1) who have their ships registered in a Member State and flying the flag of that Member State (2), provided that they comply with the conditions for carrying out cabotage in that Member State (3).

The above conditions imposed by the Regulation merit closer attention. The question also arises on the opening of the market to vessels which do not comply with the conditions listed above.

2.2.1. The concept of 'Community shipowner'

Article 2(2) of the Regulation distinguishes three types of '*Community shipowners'*.

> *'(a) nationals of a Member State established in a Member State in accordance with the legislation of that Member State and pursuing shipping activities;*
>
> *(b) shipping companies established in accordance with the legislation of a Member State and whose principal place of business is situated, and effective control exercised, in a Member State; or*
>
> *(c) nationals of a Member State established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their ships are registered in and fly the flag of a Member State in accordance with its legislation.'*

The matter which has raised the most queries is the definition of the concept of *'control'* to which the Regulation refers in two of the three categories of *'Community shipowner'*.

The Regulation states that *'Community shipowners'* include *'shipping companies established in accordance with the legislation of a Member State and whose principal place of business is situated, and effective control exercised, in a Member State'* (Article 2(2)(b)). The Commission considers that the concept of *'effective control in a Member State'* means in this context that the major decisions are taken and the day-to-day management performed from a place in the Union territory and that management board meetings are held in the territory of the Union.

Also included among *'Community shipowners'* are *'nationals of a Member State established outside the Community or shipping companies established outside the Community and controlled by nationals of a Member State, if their ships are registered in and fly the flag of a Member State in accordance with its legislation'* (Article 2(2)(c)). The Commission considers that the concept of *'control by nationals of a Member State'* referred to in that Article means

[9] See also sections 4-6 of this Communication.

that the Union nationals have the possibility of exercising decisive influence on the shipping company, for example, if the majority of the company's capital or the majority of the voting rights is held by Union nationals, or if the Union nationals can appoint more than half of the members of that shipping company's administrative, management or supervisory body.[10]

2.2.2. The conditions of registration in a Member State and access to national cabotage

The Regulation does not list the Member State registers for which the conditions of registration and of access to national cabotage are met. Such a list would in any event be liable to change over time.

The condition of registration in a Member State assumes that the register in question is located in a territory in which the Treaty and the laws deriving from it apply. Accordingly, ships entered in the registers of the Dutch Antilles, the Isle of Man, Bermuda or the Cayman Islands are not among the beneficiaries of the Regulation.[11]

By contrast, ships registered in Gibraltar are among the Regulation's beneficiaries as the Treaty applies to that territory.[12] Ships registered in Gibraltar are entitled to have access to maritime cabotage under the same conditions as any ship registered in a Member State.

The Regulation also provides that for a ship from a Member State to be able to carry out cabotage in another Member State it must first comply with all the conditions for carrying out cabotage in the Member State in which it is registered. This requirement is also applicable to vessels registered in and flying the flag of a land-locked Member State.

Accordingly, ships which do not enjoy access to national cabotage are not entitled to access to the markets of the other Member States either. Similarly, ships which enjoy conditional access to the national market may have similar conditions placed upon them if they wish to operate in another Member State. For example, if registration in the second register X of a Member State is subject to the condition that the ship operate at least half the year on international routes, the ship entered in that register X will not be able to demand broader access to cabotage in the other Member States (it will not be entitled to provide scheduled services there all year round).

2.3. Opening up the market to ships which are not among the Regulation's beneficiaries

Several Member States have opened up their markets more fully than the Regulation requires, whether *erga omnes* or by means of wavers and individual authorisations. Certain Member States with so called *'open coast'* policies allow that also vessels registered in and flying the flag of a third country provide maritime cabotage between the ports located in their territory. In addition, some Member States foresee individual authorisations to carry out maritime cabotage for vessels which are not among the beneficiaries of the Regulation or general

[10] For more guidance see also the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), OJ C 95, 16.4.2008, p.1.

[11] By and large, these territories form part of the overseas countries and territories subject, by virtue of Article 355 of the Treaty, to special arrangements for association with the Member States.

[12] Article 355(3) of the Treaty stipulates that *'the provisions of this Treaty shall apply to the European territories for whose external relations a Member State is responsible'*.

waivers from the requirements laid down by the Regulation for vessels registered in and flying the flag of a third country in case no vessels registered in a Union Member State are available.[13] Such practices do not infringe Union law.

3. THE SCOPE OF REGULATION (EEC) NO 3577/92

Article 2(1) of Regulation (EEC) No 3577/92 indicates that the Regulation applies to maritime transport services (the carriage of passengers or goods by sea) within a Member State. It goes on to provide an indicative list of the types of cabotage service covered by the Regulation.

According to the Court, despite the non-exhaustive nature of the list of maritime cabotage services in Article 2(1) of the Regulation, the services falling within its scope are, firstly, normally provided for remuneration, and secondly, as the essential characteristics of the examples in that article illustrate, serve the purpose of transporting passengers or goods by sea between two places in the territory of a single Member State.[14]

Since the Regulation entered into force, four main questions have been raised regarding Article 2 (1). What does *'carriage by sea'* and *'between ports'* mean? Do pleasure craft fall within the scope of the Regulation? Does the cabotage leg of an international cruise service fall within the scope of the Regulation? Should feeder services be considered as cabotage or as international services? These questions are addressed individually below.

3.1. Definition of 'carriage by sea between ports'

The Regulation does not define the term *'carriage by sea'*. According to the Court, in order to interpret this term account must be taken of the objective of that provision, which is to implement freedom to provide services for maritime cabotage under the conditions and subject to the exceptions which it lays down.[15]

Accordingly, the distinction between the *'internal waters'* and *'territorial sea'* in terms of international law (United Nations Convention on the Law of the Sea of 10 December 1982, *'Montego Bay Convention'*) was considered by the Court as irrelevant for the purpose of defining *'sea'* under the Regulation.[16] As a consequence, the term *'carriage by sea'* should include also transport services that operate on the sea waters on the landward side of the baseline of the territorial sea *('internal waters')* that States may draw in accordance with that Convention.

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[13] For an overview of national regimes on maritime cabotage see Table 3 of the Commission staff working document accompanying the fifth report on the implementation of the Regulation referred to in footnote 6.

[14] Case C-251/04 *Commission of the European Communities v Hellenic Republic* [2007] ECR I-67, paragraphs 28-29.

[15] Case C-323/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-2161, paragraph 24.

[16] Ibidem, paragraph 25.

Therefore, in line with the opinion of the Advocate General,[17] the Commission considers that for the purpose of applying the Regulation not only cabotage transport services carried out through open sea but also those operated in sea areas such as bays, estuaries[18], fjords and inlets should be considered as the *'carriage by sea'*.

In line with the Court's case-law the term *'port'* encompasses infrastructure, albeit small-scale, the function of which is to enable goods to be loaded and unloaded or passengers to be embarked and disembarked for conveyance by sea.[19] Therefore, any infrastructure, even not permanent, which serves the purposes of sea transport by allowing goods to be loaded and unloaded or passengers embarked or disembarked, meets this definition.

The Commission would point out that the carriage of passengers by boat by sea is subject to Regulation (EEC) No 3577/92 even when the service takes place within a single *'port system'* as defined by the legislation of the Member State concerned (e.g. the crossing of an estuary by sea)[20]. Similarly, the remunerated carriage of passengers by boat by sea for touristic purposes starting and ending in the same port with the same passengers is covered by the Regulation, since such service is provided for remuneration and serves the purpose of transporting passengers by sea in the territory of a single Member State.

3.2. Pleasure craft

Regulation (EEC) No 3577/92 only covers maritime services *'normally provided for remuneration'*. Accordingly, most pleasure craft activities fall outside its scope.

3.3. Cruise services

Cruise services do fall within the scope of Regulation (EEC) No 3577/92 when they are provided within a Member State (see Articles 3(1) and 6(1) of the Regulation)[21]. The question is whether the cabotage leg of an international cruise service also falls within the scope of the Regulation.

The Commission takes the view that the Regulation only applies when passengers are embarked and disembarked in the Member State where the cabotage leg takes place.

A cruise service starting in Member State X or a third country and ending in a third country or Member State X and calling at ports in a Member State Y does not come under Regulation (EEC) No 3577/92 if no passengers embark and disembark in ports of Member State Y. In that case, it is Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries which applies[22].

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17 Opinion of Advocate General Tizzano delivered on 10 November 2005 in Case C-323/03 referred above.

18 River valley inundated by the sea.

19 Case C-323/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-2161, paragraph 33.

20 Ibidem, paragraph 34.

21 Case C-17/13 *Alpina River Cruises*, not published yet.

22 OJ L 378, 31.12.1986, p. 1.

3.4. Feeder services

Feeder services (also known as relay of international cargo) are services by which a carrier unloads goods from a vessel that has sailed from a point of departure in order to transfer the same goods on to another vessel which continues the journey to a port of destination. The service is normally carried out under a through bill of lading. The question has been raised whether such services should be considered as international services falling within the scope of Regulation (EEC) No 4055/86 (which does not impose any flag requirement) or as cabotage services falling within the scope of Regulation (EEC) No 3577/92 (where there is a flag requirement).

In cases where the feedering consist in pre- or onward transportation between two ports of the same Member State X of cargo (a) with destination in a Member State Y or in a third country, or (b) coming from a Member State Y or a third country, Member State X could reserve such feeder services for Union-flagged vessels. In fact, in all the Member States where cabotage services are reserved for Union flagged vessels in accordance with Regulation (EEC) No 3577/92, feeder services are considered to be cabotage services (with the exception of France[23] and Portugal), whereas in the rest of the Member States, feedering is free.

It should be noted, however, that allowing a company to perform feeder services for the carriage of international cargo following or preceding an international voyage may lead to substantial savings in the cost of transport and contribute to a better efficiency of services offered. For this reason, certain aspects of feedering are increasingly the subject of negotiations in trade agreement discussions. The Commission therefore takes the view that this issue requires further examination in cooperation with Member States.

4. MANNING RULES

Questions of manning have traditionally been the responsibility of the flag States. The rules vary greatly from one register to another. For instance, some Member States impose strict nationality conditions requiring all crew members to be Union nationals. Others merely reserve the posts of master and chief officer for Union nationals. These different nationality requirements translate into major differences in cost from one register to another.

To avoid distortion of competition on the most sensitive routes, Article 3 of the Regulation provides that *'host'* Member States may impose their own manning rules on ships carrying out island cabotage. Host Member States may also decide the manning rules applicable to small ships (ships smaller than 650 gt). In practice, six Member States have chosen to avail themselves of these provisions of the Regulation.

However, so as not to void the principle of freedom to provide services of its content, the Regulation stipulates that the rules of the flag State will continue to apply to cargo ships over 650 gt carrying out island cabotage where the voyage concerned follows or precedes a voyage to or from another State *('consecutive cabotage'*).

These provisions raise two sets of questions regarding the extent of the host State's competence.

[23] Administrative note of 9 February 2007 on the interpretation of Article 257 of the French Customs Code.

The first relates to the content of those manning rules for which the host State is responsible, while the other concerns the boundary between the competence of the host State and that of the flag State in the case of consecutive cabotage.

The question has also been raised whether it is the host State's rules or the flag State's rules which apply to cruise liners carrying out island cabotage. The Court has confirmed the Commission's interpretation that for cruise liners exceeding 650 gt the manning rules are the responsibility of the flag State, irrespective whether the cruise liner carries out island or mainland cabotage[24]. The host State is not allowed to apply its own legislation concerning manning to cruise liners exceeding 650 gt. It may apply it only to the cruise liners smaller than 650 gt.

4.1. The content of the manning rules which may be imposed by a host State

The Regulation does not specify which *'matters relating to manning'* are the responsibility of the host State. Some people claim the host State's competence is unlimited (the Regulation refers to *'all'* manning rules). The Commission takes a more restrictive approach. It believes the host State's competence needs to be limited in order to safeguard the principle of freedom to provide services, in respect of which that competence is a derogation.

The Commission considers that host States are, among others, competent to specify the required proportion of Union nationals on board ships carrying out island cabotage (and ships smaller than 650 gt). A Member State may therefore require the crews of such ships to be composed entirely of Union nationals. Member States may also require the seafarers on board to have social insurance cover in the European Union. In terms of working conditions, they may impose the minimum wage rules in force in the country. As regards the rules on safety and training (including the languages spoken on board), the Commission considers that Member States may do no more than require compliance with the Union or international rules in force (STCW and SOLAS Conventions), without disproportionately restricting the freedom to provide services.

In line with Article 9 of the Regulation any Member State wishing to avail itself of the possibility to apply its own rules to matters relating to manning should consult the Commission. The scope and content of envisaged measures will be subject to a case-by-case analysis in the light of the above mentioned principles of necessity and proportionality.

4.2. Consecutive cabotage

Article 3(3) of the Regulation stipulates that *'from 1 January 1999, for cargo vessels over 650 gt carrying out island cabotage, when the voyage concerned follows or precedes a voyage to or from another State, all matters relating to manning shall be the responsibility of the State in which the vessel is registered (flag State)'*.

The Court ruled that a voyage which follows or precedes the cabotage voyage means in principle any voyage to or from another State, whether or not the vessel has cargo on board[25].

Contrary to what has been noted by the Commission in its interpretative Communication of 2003, the Court considered that flag State rules apply not only where goods actually are carried during the international leg of the voyage which follows or precedes the cabotage leg

[24] Case C-288/02 *Commission of the European Communities v Hellenic Republic* [2004] ECR I-10071.

[25] Case C-456/04 *Agip Petroli SpA v Capitaneria di porto di Siracusa and Others* [2006] ECR I-3395, paragraphs 15-25.

of the voyage but also when this voyage is made in ballast (without cargo on board). As a consequence, the Commission cannot accept that Member States continue to apply the host State's rules where the international voyage which follows or precedes the island cabotage is in ballast.

However, this should not mean that shipowners are allowed to set up a fictious international voyage without cargo on board in order to avoid the application of Article 3(2) in favour of Article 3(3), thus circumventing the Regulation[26].

It is for the national courts to verify in accordance with the rules of evidence of national law whether such abusive practices have taken place.

The manning rules applicable where the ship concerned is fulfilling public service obligations are specified in point 5.3.2.2.

4.3. Revision of the manning rules

According to the Regulation, definitive manning arrangements were to be adopted by the Council before 1 January 1999 on the basis of a Commission proposal following a detailed examination of the economic and social consequences of the liberalisation of island cabotage.

The Commission presented a report on the matter to the Council on 17 June 1997, and a proposal for a regulation on 29 April 1998[27]. The proposal was for a generalisation of the flag State's responsibility for manning issues. The host State would have retained responsibility for ships smaller than 650 gt and for determining the required proportion of Union nationals in the crews of ships carrying out scheduled passenger and ferry services (including mixed services and scheduled cruise services). Seafarers from third countries on board such ships were to have been subject to the same working conditions as residents of Member States.

The Commission proposal failed to win the approval of the Member States. The Commission therefore proposed that it be withdrawn on 11 December 2001. The Commission currently has no plans to present a new proposal. Accordingly, the rules laid down in Article 3 of the Regulation will not be amended in the short term.

However, on the occasion of preparation of the fifth report on the implementation of the Regulation the Commission became aware that the lack of an easy access by the shipowners to the legislation of the host State on manning requirements often impedes the further development of island cabotage. In order to remedy this problem, the Commission encourages Member States which apply Article 3(2) of the Regulation to appoint a focal point that shipowners can contact in order to obtain information on the applicable host State rules relating to manning.

5. PUBLIC SERVICE

The maritime transport of passengers and goods is vital for the inhabitants of Europe's islands. That is why a special set of rules was drawn up to protect some of these maritime links not adequately served by the market.

The Regulation offers Member States a framework to organise in a compatible way market intervention through restrictions on market access relating to public service obligations on

[26] Ibidem, paragraph 23.

[27] COM (1998)251 final.

maritime services. In addition, the provision of public funding to compensate for the costs of providing public service must comply with the EU State aid rules. The purpose of this Section is to further clarify, where necessary, the conditions laid down by the Regulation and the State aid rules with the objective of rendering public intervention compatible with general Treaty rules.

5.1. Geographical scope of public service links

According to the wording of Article 4(1) of the Regulation, public service links have to serve routes to, from or between islands.

The Regulation does not contain a definition of an *'island'*. The Commission considers that application of Article 4 should be limited to those islands that can be reached only by sea or air and which have no permanent land links with the European mainland. Accordingly, a peninsula which remains permanently linked to the mainland by road or rail (such as Peloponnese) cannot be considered as an *'island'*[28].

In line with the opinion of Advocate General Tizzano, the possibility of applying Article 4(1) can be extended to services provided between places in an analogous situation to that of islands (e.g. banks of long fjords or estuaries with which there are no direct road links) where there is the same need of ensuring the adequacy of maritime transport services[29].

A study carried out on behalf of the Commission[30], shows that long estuaries or fjords which lead to a detour of about 100 km by road[31] may be treated as islands for the purposes of this section as they may cause a similar problem by isolating conurbations from each other.

5.2. Island cabotage routes on which public service obligations may be imposed

It is for the Member States (including regional and local authorities where appropriate) and not the shipowners to determine which routes require public service obligations. In particular, public service obligations may be envisaged for regular (scheduled) island cabotage services in the event of market failure to provide adequate services.

According to the conditions laid down by the Regulation, Member States may impose public service obligations in order to *'ensure the adequacy'* of regular maritime transport services to a given island (or in relation to an estuary), where Union shipowners, if they were considering their own commercial interest, would not provide services of an adequate level or under the same conditions[32]. Trade should otherwise remain free.

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[28] Case C-288/02 *Commission of the European Communities v Hellenic Republic* [2004] ECR I-10071, paragraph 42.

[29] Opinion of Advocate General Tizzano delivered on 10 November 2005 in Case C-323/03 referred above, points 39-45.

[30] Study on Small Islands and Estuaries (2002), ICF Consulting.

[31] The ratio between the distance around the estuary and the distance across should be around 10 or greater.

[32] See Recital 9 and Article 2(4) of the Regulation. See also the judgement in Case C-205/99 *Analir v Administración General del Estado* [2001] ECR I-1271, paragraphs 31 *et seq*.

When imposing public service obligations for services described in Article 4(1) of the Regulation, Member States must limit their intervention to the essential requirements referred to in Article 4(2) and fulfil the requirement of non-discrimination as laid down by Article 4(1) of the Regulation in respect of all Union shipowners interested in serving the route. This requirement must be strictly observed when deciding on the content of the obligations to be fulfilled and during the administrative procedure resulting in the selection of an operator of a given service or establishing the amount of compensation.

5.3. The obligations that may be imposed

5.3.1. The distinction between public service obligations and public service contracts

A distinction is made in Regulation (EEC) No 3577/92 between *'public service obligations'* (see Article 2(4) and Article 4(2) of the Regulation) and *'public service contracts'* (see Article 2(3)).

Public service contracts are the instrument normally used to enshrine public service obligations where a horizontal approach applying to all shipowners intending to serve a given route may not be sufficient to meet the essential transport needs, in particular general conditions concerning the quality of a given service.

Article 4(2) of the Regulation sets out an exhaustive list of requirements that may be introduced when public service obligations are imposed. Article 2(3) of the Regulation provides only an indication of the scope of public service contracts; Member States may go further. In practice, quality requirements are often part of public service contracts, but cannot be introduced as part of public service obligations. With regard to public service obligations, the requirement relating to the shipowners' *'capacity to provide the service'* may include an obligation related to their solvency as well as the requirement that they have no outstanding tax and social security debts[33]. The Commission takes the view that the obligation to use a fast ferry may also fall within this category.

When public service obligations are imposed, the requirements relating to the regularity and frequency of the service may be met collectively – and not individually – by all the shipowners serving the same route[34].

Member States can impose public service obligations and conclude public service contracts only if they have determined, for each route in question, that the regular transport services would be inadequate (i.e. they would not be provided to the extent or under the conditions defined by the public authorities as appropriate) if their provision was left to market forces alone. Moreover, the public service obligation or contract must be necessary and proportionate to the aim of ensuring the adequacy of regular transport services to and from the islands[35]. In other words, Member States may not subject to public service obligations and public service contracts services which are already provided satisfactorily and under conditions, such as price, continuity and access to the service, consistent with the public

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[33] Case C-205/99, cited above, paragraphs 45 to 51.

[34] If an island needs to be served 4 times a week and two shipowners are willing to participate in the trade, each of them should only commit himself to operating twice a week or, respectively, once and three times a week.

[35] Joined Cases C-128/10 and C-129/10 *Naftiliaki Etaireia Thasou* [2011] ECR I-1887, paragraph 54.

interest, as defined by the State, by the undertakings operating under normal market conditions[36].

The Commission recalls that although Member States have a wide margin of discretion in defining the need of public service and the extent of such service, the decision of Member States in this respect is subject to the Commission's control of manifest error of assessment[37].

5.3.2. The principle of non-discrimination.

Pursuant to the principle of non-discrimination laid down by the Regulation, Member States must not set obligations that are tailor-made for a given shipping company and that would prevent other Union shipowners from entering the market or apply obligations with that effect.

In particular, the Commission would draw the attention of Member States to the problems raised by the following two types of provisions.

5.3.2.1. The taking-over of vessels

Firstly, the question has been raised whether a Member State, when putting a public service contract out to tender, could require the successful bidder to take over vessels and crews from the previous operator. The Commission takes the view that, in most cases, such an obligation would infringe Regulation (EEC) No 3577/92 as it would be discriminatory. It would prevent Union shipowners from bidding with their own vessels and would give an advantage to the incumbent operator should the latter be a candidate for its own succession.

However, the Commission can agree that where serving an island requires the use of a vessel with a design so special that it cannot be easily found or sold on the market or used for another purpose, it will be less restrictive of the freedom to provide services for there to be a requirement that that vessel be taken over than for the service to be awarded to a single shipowner with a contract that would be long enough to allow the full amortisation of a purpose-built vessel. In such cases, the vessel could be leased – under very clear conditions set out in detail in the tender documents – by successive operators from a vessel-owning company set up for that purpose. An obligation for the new service provider to take the ship over directly from its predecessor would also be conceivable.

Where Member States' authorities themselves own vessels or have them otherwise at their disposal, these may be placed at the disposal of all potential service operators under the same non-discriminatory terms.

5.3.2.2. Manning conditions

Secondly, questions have also been raised in relation to the manning conditions that may be imposed under public service obligations and contracts.

The Commission takes the view that rules that may be imposed under public service obligations and contracts (Article 4 of the Regulation) should be limited to the requirements

[36] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4), point 48.

[37] Case T-17/02 *Fred Olsen* [2005] ECR II-2031, paragraph 216 and Commission Decision 2013/435/EU of 2 May 2013 on State aid SA.22843 (2012/C) (ex 2012/NN) implemented by France in favour of Société Nationale Maritime Corse-Méditerranée, OJ L 220, 17.8.2013, p. 20–45.

that are essential for the public service needs and do not go beyond what is necessary to achieve it. This will need to be examined on a case-by-case basis.

The Commission notes that Member States may decide to impose under public service obligations and contracts the same rules as those imposed by host Member States on any vessel participating in an island cabotage service (Article 3(2) of the Regulation). These rules are specified in Section 4 of this Communication.

5.4. The procedure for imposing public service obligations and concluding public service contracts

Member States have several administrative means at their disposal for imposing *'public service obligations'*, applied to all operators of a given route, such as a declaration regime, a licensing system or an authorisation system. Member States may also impose public service obligations by concluding public service contracts with one or a limited number of operators.

The Court of Justice in Case C-205/99 stated that a procedure as restrictive as an authorisation procedure is acceptable provided that it is necessary (where *'a real public service need arising from the inadequacy of the regular transport services under conditions of free competition can be demonstrated'*), proportionate to the aim pursued and based on objective, non-discriminatory criteria which are known in advance to the undertakings concerned. Companies should also be given the right to appeal against any decision taken against them[38].

5.4.1. Applicable public procurement rules

When the competent authority of a Member State concludes a public service contract, it has to respect the applicable procurement rules. On 26 February 2014 the Council and the European Parliament adopted a new Directive on the award of service concession contracts (hereunder Concessions Directive)[39]. On the same date, the Council and the European Parliament also adopted Directive 2014/24/EU and Directive 2014/25/EU (hereunder Public Procurement Directives)[40].

According to the Commission's experience, most of public service contracts awarded in application of Article 4 of the Regulation constitute *'service concessions'* in the meaning of the public procurement legislation. In particular, by means of such contract the competent authority entrusts the provision of the maritime cabotage service to a shipowner for a certain period of time. The shipowner is obliged to provide the transport service stipulated in the contract, usually against a financial compensation from the authority[41]. The shipowner in principle bears the operating risk (if this is not the case, such a contract qualifies as a public contract in the meaning of Public Procurement Directives), encompassing the risk related to

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[38] Case C-205/99, cited above. See also Joined Cases C-128/10 and C-129/10 *Naftiliaki Etaireia Thasou* [2011] ECR I-1887, paragraphs 52 *et seq.*

[39] 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

[40] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p.65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC OJ L, 28.3.2014, p.243.

[41] See also Case C-205/99, cited above, paragraphs 63 and 65.

the demand for his transport services, since the competent authorities usually do not guarantee in the public service contract that the shipowner would recoup all the investments made or the costs incurred in performing his contractual obligations.

For the award of public service contracts falling within the scope of Concessions Directive the competent authority must treat all shipowners equally and without discrimination and is required to act in a transparent and proportionate manner in order to ensure genuine competition[42]. Moreover, the Directive lays down, among others, an obligation to publish the concession notice and the relevant contract award notice in the *Official Journal of the European Union*[43]. It also establishes a number of obligations with respect to the selection and award criteria and sets out procedural guarantees aimed at ensuring transparency and equal treatment, notably during negotiations between the competent authority and tenderers.

Regarding the award of public service contracts that fall within the scope of Public Procurement Directives, it should be stressed that the new Directives abolish the distinction between prioritary and non-prioritary services. Waterborne transport services were defined in public procurement Directives 2004/17/EC and 2004/18/EC as non-prioritary and were subject only to a limited number of requirements (on technical specifications and award notice). Under the new Public Procurement Directives the award of public service contracts falling within the scope of these Directives is in principle subject to all requirements established therein.

In cases of contracts below the thresholds for application of Concessions Directive or Public Procurement Directives a selection and award procedure is nonetheless required to meet the Treaty requirements of non-discrimination and equal treatment that imply an obligation of transparency. According to the Court of Justice, the latter consists in ensuring, for the benefit of any potential tenderer a degree of advertising sufficient to enable the services market to be opened up to competition and the impartiality of the procedures to be reviewed[44].

5.4.2. Choice of the award procedure

Article 4 of Regulation 3577/92 requires that in awarding public service contracts Member States should not discriminate between shipowners.

The Commission takes the view that, in general, the awarding of public service contracts risks to discriminate between operators, as normally only one operator on a given route is granted the contract. It therefore considers that launching an open tender procedure is in principle the easiest way to ensure non-discrimination. An award procedure involving negotiation with the potential bidders may comply with the principle of non-discrimination provided that the negotiations between the adjudicating authority and companies having submitted bids in the

[42] Articles 3 and 30.

[43] Articles 31-33.

[44] See the Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 2), Commission interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (OJ C 179, 1.8.2006, p. 2), Case C-324/98 *Teleaustria and Telefonadress v Telekom Austria* [2000] ECR I – 10745, paragraph 60.

tender are impartial, fair and transparent[45]. The Commission believes that a direct award fails to respect the principle of non-discrimination and transparency enshrined in Article 4 of the Regulation. Likewise, any tender procedure which is designed in such a way as to unduly restrict the number of potential bidders does not comply with the principles of non-discrimination and transparency.

Moreover, in order to ensure the compliance with these principles, the period between the launching of the tender procedure and the date from which the operation of the transport services has to start, should be of appropriate and reasonable length. The Commission considers that too short periods that do not sufficiently reflect the needs of cabotage service to be awarded (e.g. regarding the size of the market, requirements of quality or frequency) might favour the incumbent shipowner in breach of the principle of equal treatment.

The Commission would also point out that the choice of the award procedure has implications for the assessment in the light of State aid rules of any financial compensation granted for discharging the public service contract. In particular, in order not to constitute State aid such compensation has to respect the four conditions laid down by the Court in the *Altmark* judgment[46]. In accordance with the fourth *Altmark* criterion, the compensation offered must either be the result of a public procurement procedure which allows for selection of the tenderer capable of providing those services at the least cost to the community, or the result of a benchmarking exercise with a typical undertaking, well run and adequately provided with the necessary means. The Commission considers that the simplest way for public authorities to meet the fourth *Altmark* criterion is to conduct an open, transparent and non-discriminatory public procurement procedure[47]. As a consequence, provided that remaining conditions laid down in the *Altmark* judgement are met, such procedure will also generally exclude the existence of State aid[48].

The Regulation does not require the Member States to notify every public service contract they conclude. Where the contract involves compensation for the costs of providing a public service, it may need to be notified to the Commission in advance in accordance with the State aid rules (point 5.6 of this Communication gives more details in this respect). The notification obligation laid down by Article 9 of the Regulation only refers to acts with a broader scope such as a general legal framework for cabotage services.

5.5. Market access and competition on public service routes

By imposing public service obligations, Member States intervene in the conditions of market access on certain routes, which may distort competition if not done in a non-discriminatory way. Such interventions may be considered both legitimate and lawful in view of the aim

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[45] See also point 66 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4).

[46] Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg* v *Nahverkehrsgesellschaft Altmark GmbH* (‘*Altmark*’) [2003] ECR I-7747.

[47] Points 63-64 of the Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest (OJ C 8, 11.1.2012, p. 4)

[48] Ibidem, points 65-68.

pursued (to ensure the adequacy of regular-scheduled- transport services to, from and between islands). Any intervention in relation to a public service obligation should remain proportionate to the aim pursued. Should it go beyond what is strictly needed, it would unnecessarily restrict a freedom which is essential for the proper functioning of the internal market. The Commission wishes to address three topics related to this issue.

5.5.1. Exclusivity

Granting exclusivity to a shipowner on a public service route normally allows Member States to achieve the least financial burden to the community but it restricts the traditional freedom of trade in the maritime transport sector.

A fair balance should be established between the two principles.

In duly justified cases exclusivity may be considered the only adequate instrument to meet the essential transport needs, when granted for a limited period of time and on the basis of an open, fair and non-discriminatory Union-wide award procedure.

The Commission stresses, however, that in many cases, less restrictive measures than exclusivity may be taken in order to avoid *'market skimming'* and to diminish the amount of financial compensation needed. An operator contractually bound to fulfil public service obligations all year round, without an exclusive right, might suffer from the behaviour of another operator who, in the absence of any public service obligations could enter the market only for the more profitable months of the year and seriously reduce the first operator's earnings.

The Commission considers that light public service obligations may be imposed on all operators of the same route in parallel to a public service contract concluded with one operator[49]. For example, a condition could be set according to which any shipowner entering a route where a public service contract is in force which imposes all year round services will have to operate all year round as well.

5.5.2. Duration of public service contracts

The Regulation does not set any maximum duration for public service contracts. However, it follows from Article 1 and Article 4 of the Regulation that public service contracts should have a limited duration in order to allow regular and open prospecting of the market.

If a public service contract is a concession, according to Article 18 of Directive 2014/23/EU on the award of concession contracts in case of contracts with a duration greater than five years, the maximum duration of the concession must *'not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made in operating the works or services together with a return on invested capital taking into account the investments required to achieve the specific contractual objectives'*.

With a view to complying with the principle of proportionality in any market intervention, Member States should choose the least distortional means, also in terms of duration, to meet the essential maritime transport needs. All Union shipowners should be regularly given the opportunity to apply for the operation of a given service (on this matter, see also point 5.6 below).

[49] On the possibility for a Member State to impose public service obligations in parallel to a public service contract, see also Case C-205/99, paragraphs 60 to 71.

In its interpretative Communication of 2003 the Commission indicated that a public service contract of a period of more than six years does not normally meet the proportionality requirement.

However, the Commission's experience since 2003 has shown that in some cases the six years limit puts shipowners off bidding as they consider this duration to be too short to recoup the investments in the operation of the service. Likewise, public authorities also claim that contracts of short duration might discourage shipowners from making more substantial investments, thus hampering innovation and possible improvements in the quality of the service. It should also be underlined that the preparation of selection procedure for awarding maritime cabotage public service contracts might take a certain time.

For this reason the Commission believes that public service contracts lasting more than five (in case the contract is a concession in the meaning of Concessions Directive) or six years can meet the proportionality requirement provided that (1) they are justified by objective criteria, such as the need to recoup the investments made in operating the maritime cabotage service under normal operating conditions (e.g. investments in vessels or infrastructure) (2) and they do not lead to the market foreclosure.

Without prejudice to a case-by-case analysis, according to the Commission's experience and the information provided by the public authorities, contracts of a maximum duration of 12 years could be justified in order to enable the depreciation of a significant part of costs of an average new ferry, while allowing the proper functioning of the market. In the Commission's opinion contracts of a significantly longer duration (e.g. that would allow the full amortisation of a new vessel with a return on the invested capital) could hamper the benefits of competitive pressure on the cabotage market [50](see also section 8 below).

5.5.3. Bundled routes

Member States often wish to group public service routes to and from different islands into a single bundle in order to generate economies of scale and attract operators. Bundles as such are not contrary to Union law provided that bundling does not lead to discrimination and does not lead to undue market distortions.

The most appropriate size of bundles should be decided by taking account of the best synergy to be made in meeting essential transport needs.

5.6. Public subsidies granted to compensate for public service obligations

The Regulation applies in the same way whether subsidies are granted or not. However, when compensation for public service obligations and contracts is granted, this must be done in compliance with the Treaty State aid rules as interpreted by the Court of Justice and with the rules contained in the Commission's package of instruments governing State aid for the provision of Services of General Economic Interest (SGEI).

That package consists of the following instruments:

[50] In Case C-323/03 *Commission of the European Communities v Kingdom of Spain* [2006] ECR I-2161 the Court ruled that a national measure which reserves maritime transport services to a single undertaking by a means of an administrative concession for duration of 20 years, renewable for the period of 10 years constitutes a restriction on freedom to provide services (paragraph 44).

(a) a Communication[51] that clarifies the key concepts underlying the application of the State aid rules to public service compensation, as well as the conditions (so called Altmark[52] criteria) under which public service compensation does not constitute State aid;

(b) a Commission Regulation on de minimis aid for the provision of SGEI[53], providing that public service compensation in an amount not exceeding EUR 500 000 over any period of three fiscal years is deemed not to constitute aid, provided that the conditions set out in that regulation are fulfilled.

(c) a Decision [54] that sets out the conditions under which State aid in the form of public service compensation is compatible with the internal market and exempt from the requirement of notification.

(d) a Framework for State aid in the form of public service compensation[55] that sets out the conditions under which compensation subject to the notification requirement[56] may be declared compatible with Article 106(2) TFEU.

(e) The Commission has also published a Guide on the application of the EU rules on State aid, public procurement and the internal market to services of general economic interest, and in particular to social services of general interest[57], to provide further guidance on the application of the SGEI rules.

5.7. The case of 'small islands'

Procedures for concluding public service contracts in the maritime sector may be over-complicated when it comes to organising services for small islands, which normally only attract local operators.

In order to reconcile this specificity with the need to comply with the principles of transparency and non-discrimination, which it considers can be achieved only through open,

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[51] Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest - OJ C 8, 11.1.2012, p. 4.

[52] Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH.

[53] Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest (OL L 114, 26.4.2012, p.8).

[54] Decision on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest (OJ L 7, 11.1.2012, p. 3).

[55] Communication from the Commission on European Union framework for State aid in the form of public service compensation, OJ C 8, 11.1.2012, p. 15.

[56] That is when the public service compensation does not meet the Altmark criteria, is not covered by the SGEI de minimis regulation and is not block exempted under the Decision

[57] SWD(2013) 53 final/2, available at http://ec.europa.eu/competition/state_aid/overview/new_guide_eu_rules_procurement_en.pdf

fair and non-discriminatory award procedures, the Commission takes the view that, without prejudice to Union procurement and State aid rules where applicable, the selection of a suitable operator entrusted to serve a small island could be carried out following a simple call for expressions of interest without launching a formal tender, provided that a Union- wide announcement of the service – which is very easily organised – is maintained. The Commission takes the view that a longer duration of contracts, of 12 years, might be acceptable.

Regulation (EEC) no 3577/92 does not provide for a definition of small islands. For the purpose of this Communication, experience, and particularly a study carried out on behalf of the Commission[58], shows that *'small islands'* could be understood to mean islands where the total annual number of passengers carried by sea to and from the island is around 300 000 or fewer. The threshold of 300 000 passengers refers to a one-way count, i.e. a passenger travelling to the island and back counts twice. As far as outermost regions are concerned, this threshold only applies to trade within the region (and not trade between an outermost island and the mainland).

The simplified rules may in principle apply to the carriage under public service contracts of both passengers and goods to and from a *'small island'*. However, goods trade, which can normally be organised under competitive conditions, should be excluded wherever there is a risk of unjustifiable market distortion.

Where the same operator serves several small islands, the total number of passengers carried by that operator in the context of the public service should be taken into account when determining whether the threshold is reached.

6. SAFEGUARD MEASURES

Article 5 of the Regulation stipulates that Member States may request the Commission to adopt safeguard measures *'in the event of a serious disturbance of the internal transport market due to cabotage liberalisation'*. Article 2(5) provides that such measures may be applied for a maximum of one year where problems appear on the market which *'are likely to lead to a serious and potentially lasting excess of supply over demand, are due to, or aggravated by, maritime cabotage operations, and pose a serious threat to the financial stability and survival of a_significant number of Community shipowners, provided that the short-term and medium-term forecasts for the market in question do not indicate any substantial and lasting improvements'*.

This provision has been applied only once, in Spain, when the Regulation first entered into force[59].

It should be stressed that individual instances of shipowners on a given route going bankrupt are not sufficient to warrant the application of this clause.

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[58] Study on Small Islands and Estuaries (2002), ICF Consulting.

[59] Commission Decision 93/396/EEC of 13 July 1993 on Spain's request for adoption by the Commission of a prolongation of safeguard measures pursuant to Article 5 of Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) , OJ L 173, 16.7.1993, p. 33.

The cabotage reports published since the Regulation entered into force show that liberalisation of cabotage has not caused any other serious disturbance of the internal transport market. It is unlikely that it would cause such a disturbance now, given that most services have been liberalised.

7. TRANSITIONAL MEASURES

Article 6 of the Regulation lays down a number of temporary derogations from the implementation of this Regulation. The derogations set out by this Article expired in 2004. Upon the accession of Croatia, which became an EU Member State on 1 July 2013, Article 6 of the Regulation was amended in order to ensure some temporary derogations for Croatia[60].

In line with the new Article 6(4) public service contracts to and between Croatian islands concluded before the date of Croatia's accession may continue to apply until 31 December 2016.

According to Article 6(5) cruise services carried out between Croatian ports by ships smaller than 650 gt have been reserved until 31 December 2014 to ships registered in, and flying the flag of, Croatia, which are operated by shipping companies established in accordance with Croatian law, and whose principal place of business is situated, and effective control exercised, in Croatia.

Finally, Article 6(6) lays down additional safeguard measures until 31 December 2014 regarding cruise services between ports of a Member State other than Croatia carried by the Croatian vessels smaller than 650 gt. The Commission may, upon a request by a Member State, decide within 30 days that such Croatian vessels shall not carry out cruise services between ports of certain areas of a Member State other than Croatia where it is demonstrated that the operation of these services seriously disturbs or threatens to seriously disturb the internal transport market in the areas concerned.

If after the period of 30 working days from the request the Commission has taken no decision, the Member State concerned can apply safeguard measures until the Commission has taken its decision. In the event of an emergency, the Member State may unilaterally adopt provisional measures for no more than three months and inform the Commission thereof. The Commission may abrogate the measures or confirm them until it takes its final decision.

8. APPLICATION OF REGULATION (EC) NO 1370/2007 TO MARITIME CABOTAGE

Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70[61] was adopted on 23 October 2007. According to Article 1(2) this Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road. The same Article provides that *'Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92, national sea waters'*.

[60] Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, Article 18 and Annex V, point 7 (1), OJ L 112, 24.4.2012, p. 21.

[61] OJ L 315, 3.12.2007, p. 1.

As Regulation (EC) No 1370/2007 does not provide for a definition of *'national sea waters'* nor is this term defined in any Union or international acts, the Commission has been faced with questions of application of this Regulation to maritime cabotage services.

First of all, the Commission would point out that Regulation (EC) No 1370/2007 is not automatically applicable to public passenger transport by national sea waters, but applies only in those cases where a Member State makes it expressly applicable.

Secondly, the majority of public service contracts and obligations in maritime cabotage cover transport of both passengers and freight carried out by means of mixed passenger/cargo ferries, while Regulation (EC) No 1370/2007 may be applied only to public transport of passengers and not freight. Thus, Member States may not apply Regulation (EC) No 1370/2007 to such mixed public service contracts involving transport of freight.

Finally, Member States may apply Regulation (EC) No 1370/2007 to public transport of passengers by national sea waters to the extent that it does not prejudice the application of Regulation (EEC) No 3577/92. Therefore, in case a conflict of provisions of these two regulations exists, Regulation (EEC) No 3577/92 should supersede the conflicting provision of Regulation (EC) No 1370/2007. The latter might complete Regulation (EEC) No 3577/92 when there is no contradiction between them.

Certain provisions of Regulation (EC) No 1370/2007 that appear to affect the application of Regulation (EEC) No 3577/92, in particular the provisions on direct award of contracts, exclusivity or contract duration, are briefly discussed below[62]. This assessment of simultaneous application of the two regulations addresses only the most recurrent questions which the Commission received since the entry into force of Regulation (EC) No 1370/2007 and does not cover all its provisions in an exhaustive manner.

Regulation (EC) No 1370/2007 requires that public service contracts should be awarded through a fair, open, transparent and non-discriminatory competitive tendering procedure[63]. However, Regulation (EC) No 1370/2007 provides for some exceptions to this general principle such as for instance in Article 5(4) which states that the competent authorities may award a public service contract of small value or to a small or medium-sized operator directly without a competitive tendering procedure. The Commission considers that such direct award is in principle contrary to the principle of non-discrimination between shipowners laid down in Article 4(1) second sentence of Regulation (EEC) No 3577/92. Therefore, the Commission believes that in applying Regulation (EC) No 1370/2007 Member States may not award public service contracts regarding the passenger transport by national sea waters directly, without following a procedure which ensures the compliance with the principles of non-discrimination, transparency and impartiality (see section 5.4 and 5.7 for simplified rules in case of 'small islands').

Pursuant to Article 3(1) and 2(f) of Regulation (EC) No 1370/2007 Member States may grant an operator an exclusive right in return for the discharge of public service obligations. Recital 8 of this Regulation recalls that passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning insofar as these are compatible with Treaty requirements. The exclusivity

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62 See also the Communication from the Commission on interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road, OJ C 92, 29.3.2014, p. 1.

63 Article 5(3) of Regulation (EC) No 1370/2007.

is exceptional in maritime cabotage as in principle less restrictive measures might be taken by Member States to meet the public transport needs (see paragraph 5.5.1 of this Communication). Therefore, the Commission considers that Member States may not introduce exclusivity on the basis of Article 3(1) of Regulation (EC) No 1370/2007 to public transport of passengers by national seawaters routes which have not been subject to exclusive rights pursuant to Regulation (EEC) No 3577/92.

Article 4(3) first sentence of Regulation (EC) No 1370/2007 states that the maximum duration of a public service contract shall be *'10 years for coach and bus services and 15 years for passenger transport services by rail or other track-based modes.'* The Regulation does not provide for any modalities of application of this Article to contracts of public transport of passengers by national seawaters. Instead, it states in the second sentence of the same Article that the duration of public service contracts relating to several modes of transport shall be limited to 15 years if transport by rail or other track-based modes represents more than 50% of the value of the services in question. The Commission considers that in case a Member State decides to apply Regulation (EC) No 1370/2007 to public transport of passengers by national seawaters it should limit the duration of public service contracts relating to several modes of transport- including by national sea waters- to 15 years maximum provided that the conditions established in Article 4(3) second sentence are met.

It seems that applying Regulation (EC) No 1370/2007 to passenger transport services by national seawaters might in some cases be useful where those services are integrated into a wider urban, suburban or regional public passenger transport network (e.g. in the context of integrated local transport services involving estuaries or within a lagoon).

Each time a Member States decides to apply this Regulation to public passenger transport by national sea waters it should analyse whether any provisions of its respective national legislation do not prejudice application of Regulation (EEC) No 3577/92. The Commission would also point out that in line with the obligation stemming from Article 9 of Regulation (EEC) No 3577/92 Member States should consult the Commission before adopting any measures applying Regulation (EC) No 1370/2007 to public passenger transport by national sea waters[64].

[64] On the obligation of consultation see Case C-323/03 *Commission v Kingdom of Spain* [2006] ECR I-2161, paragraphs 69-70.