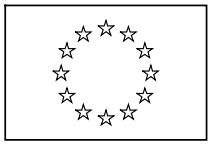

COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 22.12.2003
COM(2003) 595 final

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 (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)

TABLE OF CONTENTS

Summary

Drawing on the experience gained during ten years' practical application of Regulation (EEC) No 3577/92, the Commission has decided in the interests of transparency to publish its interpretation of the provisions of that Regulation.

This Communication is being presented for information purposes only, to help explain the Regulation to all parties who wish to make use of it. 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.

The Communication's layout mirrors that of the Regulation.

It 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 vessels performing island cabotage services between two ports on their territory. Secondly, Member States may impose public service obligations on shipowners 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.

1. INTRODUCTION

Council Regulation (EEC) No 3577/92 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)[1], which was adopted when the internal market was created, is now ten years old. Since its entry into force on 1 January 1993, maritime cabotage has undergone gradual liberalisation. Certain services were exempted from the application of the Regulation for a number of years. Since 1 January 1999 virtually all maritime cabotage services have been liberalised. Only two types of island cabotage service still qualify for derogations in Greece: scheduled passenger and ferry services, and services performed by vessels of less than 650 gt.

Since 1993, the Commission has reported several times on the economic and legal progress of liberalisation[2], but has not addressed the problems of interpretation raised by the Regulation. Many such problems have been raised. This is witnessed by the dozens of enquiries the Commission has received from Member States, and from natural and legal persons. It is also apparent from the infringement proceedings the Commission has had to institute against Member States whose legislation it believed ran counter to the Regulation. Several of these issues have been referred to the Court of Justice of the European Communities.

With the experience afforded by several years of implementation, the Commission believes it would be useful to indicate how it intends to interpret the provisions of the Regulation.

The Commission's first concern is transparency. It has assumed positions on issues relating to the implementation of the Regulation on many occasions, but always on a bilateral basis. Yet the questions certain persons raise are often of direct interest to others.

The Commission's second concern is clarification. Some of the Regulation's provisions are not altogether clear to anyone who does not apply them on a daily basis. This Communication is intended to help explain the text of the Regulation to both those who apply it and those who hope to rely on it.

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. If a future judgement of the Court of Justice contradicts the Commission's analysis, the Commission will of course comply with it without delay.

For ease of reading, this Communication follows the order of the provisions in the Regulation. Only some of the provisions are reproduced, so readers are advised to refer to the text of the Regulation.

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1 OJ L 364, 12.12.1992, p. 7.

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

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 offered to all Community shipowners.[3]

The Commission considers that this freedom may in no circumstances be subjected to schemes of prior authorisation, in particular schemes coupled with restrictive conditions[4]. At the very most, Member States may ask shipowners to supply advance information on the services they intend to provide. Similarly, the Commission does not believe Member States can require companies to have a representative on their territory.

The standstill clause in Article 7 of the Regulation, which remains valid even though the Article of the Treaty to which it refers has been deleted, in principle prohibits Member States from introducing restrictions on the freedom to provide services which did not exist before the Regulation entered into force.

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 (2) and flying the flag of that Member State (3), provided that they comply with the conditions for carrying out cabotage in that Member State (4).

Conditions (1), (2) and (4) imposed by the Regulation merit closer attention. The question also arises of 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 shipowner.

"(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."

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[3] For the beneficiaries of the freedom to provide services, see point 2.2.

[4] See, however, the rules set out in Sections 4 and 5.

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 Community territory and that management board meetings are held in the territory of the Community.

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 that the majority of the company's capital is held by Community nationals.

The condition that the ship should be registered in a Member State also warrants clarification.

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 Kerguelen (French Austral and Antarctic Territories) register or the registers of the Dutch Antilles, the Isle of Man, Bermuda or the Cayman Islands are not among the beneficiaries of the Regulation[5].

By contrast, ships registered in Gibraltar are among the Regulation's beneficiaries as the Treaty applies to that territory[6]. Nonetheless, ships entered in this register could be refused access to Community cabotage if it were established that they were not effectively subject to the Treaty and to the Community law derived from it.

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.

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

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5 By and large, these territories form part of the overseas countries and territories subject, by virtue of Article 299(3) of the Treaty, to special arrangements for association with the Member States.

6 Article 299(4) 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".

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)[7].

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*, by means of bilateral agreements or by means of individual authorisations. Such practices do not infringe Community 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.

Since the Regulation entered into force, four main questions have been raised regarding its scope. 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? Do services provided by vessels such as tugs 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. Pleasure craft

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

3.2. 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). 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/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 join or leave the cruise in 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

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[7] On this point, see the Fourth Commission report on the implementation of Council Regulation 3577/92 applying the principle of freedom to provide services to maritime cabotage (1999-2000) COM(2002) 203 pp. 5 and 6.

transport between Member States and between Member States and third countries which applies[8].

3.3. Maritime versus port services

Do services provided by vessels such as tugs fall within the scope of Regulation (EEC) No 3577/92? The text of the Regulation itself does not answer this question. To clarify the status of a number of services normally provided near the coast (e.g. towing, pilotage, dredging), it is useful to recall the general legal framework applying to the provision of services.

In the Services Chapter of the Treaty, Article 49 provides that "restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended". However, that Article does not apply to "services in the field of transport". Article 51(1) of the Treaty provides that "freedom to provide services in the field of transport shall be governed by the provisions of the Title relating to transport". The Transport Title of the Treaty indicates that, in respect of sea transport, it is for the Council to decide on any appropriate provisions that may be laid down (see Article 80(2) of the Treaty).

Thus far, the Council has adopted two Regulations applying the principle of freedom to provide services to the maritime transport sector: Regulation (EEC) No 4055/86 concerning trade between Member States and between Member States and third countries and Regulation (EEC) No 3577/92, which concerns trade within Member States. Both Regulations apply to the carriage of passengers and goods by sea.

A proposal for a Directive applying the principle of freedom to provide services to port services is also under discussion in the Council and the European Parliament[9]. It applies to the technical-nautical services of pilotage, towage and mooring provided for port users, either within the port area or on the waterway access to and from the port or port system[10].

Accordingly, of the various services provided near the coast, those such as dredging which are not services "in the field of transport" come under Article 49 of the Treaty, while services "in the field of transport", such as towing, come under the above-mentioned legislation based on Article 80(2) of the Treaty.

To sum up, as regards "services in the field of transport", technical-nautical services provided within the port area as defined by the draft Directive would be subject to that Directive. Technical-nautical services involving the deep-sea carriage of goods or passengers, outside the port area, are subject to Regulation (EEC) No 4055/86 and Regulation (EEC) No 3577/92. In practice, this mainly concerns the towage of ships following a breakdown or the towage of rigs into position.

The Commission would point out that the carriage of passengers by boat 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

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8 OJ L 378, 31.12.1986, p. 1.

9 COM(2002) 101 final.

10 The scope of the draft Directive also includes cargo handling and passenger services.

crossing of an estuary by sea). Similarly, the Commission takes the view that the carriage of passengers by boat for touristic purposes starting and ending in the same port is covered by the Regulation.

3.4. Feeder services

Feeder services 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 February 1996, the Commission consulted the Member States on this issue. The consultation revealed that in all the Member States where cabotage services are reserved for Community flagged vessels in accordance with Regulation (EEC) No 3577/92, feeder services are considered to be cabotage services (the sole exception is Portugal), whereas in the rest of the Member States, feedering is free. The Commission therefore considered that Member States could reserve feeder services for Community-flagged vessels.

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 by the same company may lead to substantial savings in the cost of transport.

The Commission therefore takes the view that this issue will require further examination.

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Having clarified the scope of the freedom to provide maritime transport services as established by the Regulation (EEC) No 3577/92, the Commission will now examine the derogations to this freedom introduced by the Regulation.

The Regulation provides for three types of derogation. Freedom to provide island cabotage services may be limited by the imposition of manning rules (see Section 4 below) and public service obligations (see Section 5) by the Member States concerned. Freedom to provide services may also be temporarily suspended in the event of a serious disturbance of the internal transport market (see Section 6).

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 Community nationals. Others merely reserve the posts of master and chief officer for Community nationals. These different nationality requirements translate into major differences in cost from one register to another.

To limit intra-Community 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, five 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.

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 Commission considers the Regulation to be very clear on this point: for cruise liners, the manning rules are the responsibility of the flag State (see Article 3(1) of the Regulation). This matter has been referred to the Court of Justice.

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 competent to specify the required proportion of Community 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 Community 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. However, 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 Community or international rules in force (STCW and SOLAS Conventions), without disproportionately restricting the freedom to provide services.

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 Commission takes the view that flag rules must apply only where goods actually are carried during the international leg of the voyage which follows or precedes the national leg of the voyage.

Were this not the case, shipowners could circumvent the rules of the host State by adding a fictitious international voyage to their island cabotage journey. That is why the Commission has accepted that Member States may continue to apply the host State's rules where the international voyage which follows or precedes the island cabotage is made in ballast. The Commission nonetheless considers that the flag State's rules may apply to Community ships which carry out an island cabotage voyage after having performed an operationally and commercially independent voyage to or from another State and which, in making their way to the port of loading for the island cabotage voyage, perform a journey in ballast which is sufficiently short and inconsequential for the island cabotage voyage in practice to indeed follow or precede an international voyage.

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 have been 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[11]. The proposal was for a generalisation of the flag State's responsibility for manning issues. The host State retained responsibility for ships smaller than 650 gt and for determining the required proportion of Community 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.

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 or funding relating to public service obligations on maritime services. The purpose of this Section is to

[11] COM(1998) 251 final.

further clarify, where necessary, the conditions laid down by the Regulation 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 and between islands. Long estuaries or fjords which lead to a detour of about 100 km by road[12] 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) to determine which routes require public service obligations[13]. 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 Community shipowners, if they were considering their own commercial interest, would not provide services of an adequate level or under the same conditions[14]. Trade should otherwise remain free.

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 Community 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

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12 The ratio between the distance around the estuary and the distance across should be around 10 or greater.

13 It is not for shipowners to set public service obligations.

14 See Recital 9 and Article 2(4) of the Regulation. See also the judgement in Case C-205/99 (reference to the Court under Article 234 of the Treaty by the Tribunal Supremo, Spain, for a preliminary ruling in the proceedings pending before that Court between Asociación Profesional de Empresas Navieras de Líneas Regulares (Analir) and others and Administración General del Estado), paragraphs 31 *et seq*., [2001] ECR I-1271.

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[15]. 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[16].

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 Community shipowners from entering the market or apply obligations with that effect.

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

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 Community 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 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

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15 Case C-205/99, cited above, paragraphs 45 to 51.

16 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 itself to operating twice a week or, respectively, once and three times a week.

also be conceivable. It has to be stressed that this obligation cannot be extended to the crew (taking over the on-board personnel should of course remain an option for the bidder).

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 the type of manning rules that may be imposed by host Member States on any vessel participating in an island cabotage service (Article 3(2) of the Regulation) and the type of rules that may be imposed under public service obligations and contracts (Article 4 of the Regulation) should in principle be the same. These rules are specified in Section 4 of this Communication.

Indeed, Member States would be likely to infringe the principle of non-discrimination laid down by Regulation (EEC) No 3577/92 should they go beyond what is acceptable under Article 3 of that Regulation when they impose public service obligations[17].

However, the Commission considers that Member States may lawfully impose their own manning conditions on board vessels operating on public service routes even when the island cabotage voyage is followed or preceded by a voyage to or from another Member State. Article 3(3) of the Regulation should not apply to routes where public service obligations are imposed.

5.4. The procedure for imposing public service obligations

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, 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[18].

It must be stressed, however, that it would be difficult for a Member State to introduce an authorisation system after the entry into force of the Regulation without infringing the standstill provision laid down by Article 7 of the Regulation. In

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[17] The Commission nonetheless takes the view that, in some exceptional cases, a condition which cannot be accepted under Article 3 of the Regulation, but which is essential for the public service, will be acceptable under Article 4 of the Regulation if it is duly justified and proportionate to the goal pursued. This will need to be examined on a case-by-case basis.

[18] Case C-205/99.

principle, only Member States which had an authorisation system in force before the entry into force of the Regulation may continue to implement it.

When the competent authority of a Member State concludes a public service contract, it also has to respect the applicable procurement rules. Procurement law entails, at the minimum, a sufficient degree of publicity, in order to ensure an effective competition, as well as the organisation of a transparent and non-discriminatory selection procedure proportionate to the aim to be achieved[19]. In addition, for the award of contracts falling within the scope of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts[20], technical specifications must comply with certain rules and there is an obligation to publish the relevant contract award notice in the *Official Journal of the European Union*.

The Commission takes the view that, in general, the awarding of public service contracts risks to discriminate between operators, as normally only one operator of a given route is concerned. It therefore considers that launching an open Community-wide invitation to tender is in principle the best way to ensure non-discrimination (on these matters, see also point 5.6 below[21]).

The Commission does not require the Member States to notify every public service contract they conclude (should the contract involve public compensation, reference is made to point 5.7 of this communication). 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 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 burden to the community but it restricts the traditional freedom of trade in the maritime transport sector.

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19 See the Commission interpretative communication on concessions under Community law (OJ C 121, 29.4.2000, p. 2), as well as the judgement in Case C-324/98 *Teleaustria and Telefonadress v Telekom Austria* [2000] ECR I - 10745; see also point 5.3.2 above.

20 OJ L 209, 24.7.1992, p. 1.

21 In principle, an independent authority should be responsible for the whole procedure. However, the Commission recognises that, in some cases, it might be sufficient for only the final part of the procedure (evaluation of the bids and adoption of the final decision) to be entrusted to an independent body.

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 Community-wide award procedure.

Exclusivity may also be awarded in a way which always restricts access for additional services under non-discriminatory conditions while safeguarding the performance of the operator providing the services meeting the essential transport needs under exclusive rights.

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 State aid 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[22]. 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. With a view to complying with the principle of proportionality in any market intervention, the least distortional form to meet the essential transport needs should be chosen. All Community 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).

In the Commission's view, a contract of a period of more than 6 years does not normally meet the proportionality requirement.

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 Community law provided that bundling does not lead to discrimination.

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

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[22] 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.

5.6. The case of "small islands"

The Commission's attention has been drawn to the fact that cumbersome procedures for concluding public service contracts in the maritime sector are 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, fair and non-discriminatory award procedures, the Commission takes the view that, without prejudice to Community procurement 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 Community-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.

For the purpose of this Communication, experience, and particularly a study carried out on behalf of the Commission, 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 100 000 or fewer. 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 is taken into account when determining whether the threshold is reached.

5.7. Public subsidies granted to compensate for public service obligations

The Regulation applies in the same way whether subsidies are granted or not. However, when State aid is granted in order to compensate for public service obligations, Member States have to grant it in compliance with Community legislation and in particular Regulation (EEC) No 3577/92 and the Treaty State aid rules as interpreted by the Court of Justice.

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[23].

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.

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.

[23] 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.