

SEMINAR CONCLUSIONS

MARITIME AND AIR TRANSPORT IN THE ISLANDS OF THE EU 10/ 11 March 2005

Created on the initiative of the Islands Commission of the CPMR, and hosted by the Western Isles Region, the Stornoway seminar in March 2003 on maritime and air transport in the islands brought together participants from the Azores (Portugal), Bornholm (Denmark), Gotland (Sweden), the Minister of the Aegean and Island Issues (Greece), Gozo (Malta), the Western Isles, the Shetlands, the Orkneys, the regions of Argyll & Bute and the Highlands (Scotland). There was also representation from the European Commission (DG Transport), and Highlands and Islands Airports Ltd, HITRANS. Papers were presented on behalf of Sardinia and Corsica, who were absent.

Continuing the meetings on the theme of island transport held in Bornholm and Ajaccio in 2002 and 2003, this seminar focused mainly on issues raised by the implementation in the islands of Community legislation liberalising maritime and air transport. Most of the work concerned Public Service Obligations (PSO), their operation, and the pros and cons of the competition procedure. Several other points were also raised such as the question of the liberalisation of port and airport services, the Gotland experience with the creation of a “virtual” airline, the Gozo action to develop a helicopter service, etc.

The aim of the seminar was to provide an occasion for open exchanges between the participants, and particularly with the representative of the Commission. We will not report the details of what was said by the participants during the discussions here, but will focus on summarising the more striking points which arose out of the discussions.

More details on certain presentations can be found in the notes or Powerpoint presentations provided by several participants, and which will be posted on the www.eurisles.org site.

A - MARITIME TRANSPORT

Several islands (including Orkney and Bornholm) showed in their presentations that the public procurement tendering procedure given in Community legislation for the implementation of PSO has not, for various reasons, given good results, and seems to have created more problems than it has solved: drops in the quality of service, costs which are higher at the end of the day, conflicts, etc. In Corsica, there seems to be a movement towards reducing the field of PSO and increased use of social aids for passengers. The PSO procedure also raises serious concerns in the west of Scotland, where the historic company, Caledonian MacBrayne is considered as having to fulfil the public service mission without being subject to it.

Below is a summary of the main problems raised and the solutions envisaged.

1°) The problems raised

1.1 – Lack of awareness of the socio-economic consequences of opening up to competition

One of the main reasons for which the PSO tendering procedures raise serious concerns is the fact that certain social and economic elements have not been taken into account.

In the islands, and particularly in the smaller ones, the transport sector is traditionally one of the main employers. Island regions are generally in a fragile, even unfavourable, situation, in terms of income and employment, and economic development.

The replacement of the historical operator by a new one, chosen because it is “cheapest”, can have extremely severe consequences for the communities served if the new operator’s competitiveness comes from drastic cuts in staff or the use of infrastructures or outside services at the expense of those established locally. This can have a particularly painful impact on the social front, and seriously endanger the economic fabric of certain islands.

The public authorities are affected for several reasons. They not only have to cope with the social problems linked directly to the situation of the historical operator’s employees (unemployment, compensation payments, etc.), but also have to manage the negative effects caused locally (closure of certain infrastructures or services directly or indirectly linked to the activity, acute unemployment, emigration). The benefits of the savings made by choosing the cheapest operator from the purely tendering point of view risk being offset, if not wiped out, by the increase in costs that the public authorities will have to cope with in many other fields.

Unfortunately, Community legislation only considers the field of liberalisation of transport in the strictest sense of the term.

It does not provide for an operator to be selected on any criteria other than its cheapness as long as it complies with the specifications, and there is no approach enabling the overall socio-economic impact of a choice to be taken into account.

Similarly, the legislation does not include, in the tendering conditions, any obligations to employ staff from the historical operator, or for the successful candidate to have to provide financial compensation to cover redundancy, unemployment or retraining costs for these employees.

Finally, the legislation neither authorises nor imposes in a tender the recruitment of staff from a particular country, region or territory. The legislation can authorise, at most, the imposition of certain technical, non-discriminatory, constraints which, mechanically, will have positive repercussions on local employment.

The Community legislation is therefore open to criticism as it deals with the transport problem in isolation, without looking at the socio-economic environment to which these services are intimately linked – and without taking an overall approach to the cost/benefit ratio. It is true that it enables use of a simplified procedure of a show of interest – which is less cumbersome, cheaper, and leaves greater choice in the operator – in islands where the traffic is under 100 000 passengers a year, and therefore smaller, but this threshold is reached very soon.

Apart from these extreme cases, the islands, and particularly the least populated and more scattered islands which are less visited by tourists, find it difficult to see the interests of the indiscriminate application of the principle of competition, whereas this risks leading to undesirable socio-economic consequences.

Clearly, it is necessary to appreciate the risks of going too far in the other direction, which would exclude, under questionable pretexts, any elements of competition and would strengthen unjustified monopoly situations. It is possible to imagine, for example, a case where a historical operator could deliberately overstaff in order to blackmail the public authorities on employment and remove any risks of their dominant situation being brought into question.

The solution is not simple. It probably resides in the introduction into Community legislation of measures enabling a better balance between the advantages of opening the market to competition and the need to respect the objectives of economic, social and territorial cohesion that the Community has set itself.

I-2 – Duration of public service contracts

It should not be forgotten that the maximum duration of public service contracts in maritime transport is limited by Community legislation to 6 years, whereas the normal amortisation period of a ship can be of up to 20 years. This could discourage hesitant operators from investing in the purchase of new ships. The Commission is nevertheless afraid that longer periods would encourage a dominant position, and has noted that in certain countries (such as Greece) public service contracts are even shorter.

The practice whereby an operator could considerably reduce the amortisation period of a ship by basing it on the duration of the public service contract (an experience brought up by Bornholm) leads to considerable costs in the calculation of the compensation paid by the public authorities, and seems to be abusive.

1.3 – Various disturbances and the cost of the tendering procedure

The tendering process is also criticised as being a factor involved in various disturbances:

- the installation of a new operator on a service implies a “running-in” period, which is often manifested by various incidents and problems, i.e., at least momentarily, a lower quality of service in relation to what was previously provided by the historical operator;
- companies planning on investing in the island, and wishing to negotiate particular contracts with the transporter on large volumes and the long term, are faced, during the procedure, with a waiting period which is damaging to decision making;
- the cost of the tendering procedure is in itself very costly for both the operators and the public authorities.

On this last point, it seems that the Commission agrees to recognise the need for a certain proportionality between the nature of the PSO and the cost of the tendering procedure.

1.4 - Separation between the ownership of the fleet and the execution of the service

The practice of separating the ownership of the ships, which remains with the public authorities, and the execution of the service, which is open to competition, was raised.

Is this measure imposed by Community legislation given that the State-owned companies' ships were bought with public money? Or does it come solely from the choice of the public authority managing the tender, so as to reserve the possibility of acting as an operator of last recourse should the chosen operator fail?

The examples of Bornholm and Corsica, where private operators are in competition with public operators on PSO seem to suggest that Community legislation does not impose such a separation. This seems to be an exception rather than the rule.

2°) The solutions envisaged

2.1 – Is the Altmark procedure applicable?

The fears or dissatisfactions raised by the tendering procedure have led to certain questions being raised on the usefulness of this procedure, particularly in the perspective of the Altmark judgement (Case C-280/00 of 24 July 2003) authorising the granting of aid to a company carrying out a public service mission without recourse to tender, under certain conditions.

Is the Altmark judgement applicable to maritime or air transport with the islands?

According to the Commission, the judgement, which concerns State aid, does not dispense the public authorities from their obligations concerning the cabotage regulations. They should, in the case of a public service contract, organise a prior procedure which is open and non-discriminatory to select the contractor, even if under the judgement the compensation for public service obligations paid under the contract could be seen as not necessarily being state aid. It is only in the case of maritime lines with the islands where the traffic volumes are very low (100 000 passengers, i.e. 50 000 round trips) that the Commission concedes that it is more expedient to adopt a simplified procedure on the basis of the Altmark ruling. (Cf: *COMMISSION DECISION concerning the application of the measures of article 86 of the treaty to state aid in the form of public service compensation granted to certain companies responsible for managing service of general economic interest*).

During the Stornoway seminar, the representative from the Commission confirmed that in the case of Caledonian MacBrayne, which is in the headlines in Scotland, the tendering procedure would be applied.

On this point he stressed that the Altmark judgement would probably be uncomfortable, as the fourth condition imposed by the judgement when there is no tendering process is to ensure that *“the level of compensation needed has been determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately equipped so as to be able to meet the necessary public service requirements, would have incurred in discharging those obligations, taking into account the relevant receipts and a reasonable profit for discharging the obligations”*.

However, the particularity of maritime cabotage services with the islands is such that it is difficult to see on what basis such a comparison could be made.

In such a context, several options are open to islands considering the tendering procedure as prejudicial to their interests:

- bring the question of the field of application of the Altmark judgement before the European Court of Justice;
- dissociate the tenders of islands with low volumes of traffic which can benefit from the measures in the Altmark judgement;
- ask the Commission to raise the threshold of 100 000 passengers (a threshold of 300 000 passengers was mentioned by the European Parliament). This threshold could also be requested for air transport and not only maritime transport;
- ask for the modification of other legislation, such as maritime cabotage or employee rights in the case of transferral of companies.

2.2 - Dissociation of small services or “bundled” routes?

In the case of a network of maritime services involving an archipelago, wouldn't it be better to dissociate the cases of the smaller islands (<100 000 passengers/year, i.e. 50 000 round trips) which can benefit from PSO without the tendering procedure?

Or would it be better to focus on a global approach in “bundles”?

It was stressed that the fact of submitting an ensemble of routes (and not each route taken in isolation) for the same PSO has been accepted by the Commission, as long as this approach is justified by synergies, and does not result from discriminatory practices. But we must nevertheless appreciate that the corollary of a PSO covering a “bundle” of routes is precisely the tendering procedure.

2.3 – Modification of the legislation on Cabotage.

Article 4 of Council Regulation (EC) n° 3577/92 of 7 December 1992, concerning the application of the principle of free circulation of services to maritime services within Member States (maritime cabotage) specifies in point 2 that *“in imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel”*.

A solution could be to ask for a modification in the regulation to include a new reference authorising the inclusion of particular obligations, judged necessary for the PSO to contribute

to objectives of the economic, social and territorial cohesion of the Union as defined by article III-220 of the Treaty.

The modification of this regulation would have to be on the Commission's initiative, with the agreement of the Council and the Parliament in compliance with the joint decision-making procedure.

2.4 – Improved account of employee rights

Another possibility could be to use the possibilities provided by Council Directive 77/187/CEE of 14 February 1977, concerning "*the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses*", in order to safeguard the rights of the historical operator's employees.

For this it should be made sure that this directive, which according to its first article "*... shall apply to any transfer of an under-taking, business, or part of an undertaking or business to another employer as a result of a legal transfer or merger*" (article 1), applies in the same way to the transfer of a public service mission from one operator to another.

Finally point 1.3 which specifies that "*this Directive shall not apply to sea-going vessels*" should be abrogated. In practice the resulting provision creates a discriminatory situation between land operators and maritime operators.

This point merits discussion by specialist lawyers and, if necessary, its discriminatory nature brought before the European Court of Justice.

B – AIR TRANSPORT

Many points raised during discussions on PSO in the field of maritime transport were also raised, in similar terms, in that of air transport. In particular the taking into account of the socio-economic consequences of opening up to competition, the cost of implementing PSO, the reticence of operators to invest in very specific material for short-term contracts, or the appropriateness of having recourse to a tendering system for small services. For these points reference can be made to the previous chapter, below only new issues will be covered which are more specific to air transport.

1 – The Importance of Integrated Networks

The importance to the islands of being able to benefit from a well-integrated air service came out from several presentations.

1.1 PSO, ticketing and sales networks

It has been observed in certain cases that it can be difficult to ask an operator ensuring a public service mission to integrate the services it supplies with those of commercial operators who are operating with different priorities.

The example was given of a very small air line ensuring a public service mission in the Hebrides, the cheapest bidder for the tender, which is however not a member of the “Amadeus” network. It is therefore impossible to purchase tickets integrating flights with the national or international network: tickets have to be bought separately, directly from the operator, and without being able to go through a ticketing agency.

1.2 Tendering by “bundles” of routes

The problems encountered by Sardinia, where the European Commission is querying the overall offer covering 18 air routes between the island and the rest of Italy, were raised.

The fact of presenting a bundle of links in a tender is not in itself illegal, but this procedure must not cover discriminatory practices leading to distortions in competition.

This situation is not exempt from contradictions.

On the one hand, joint submission to the tender of a bundle including a large number of routes can favour the historical operator, which is well-implanted throughout the network, and discourage possible competition.

On the other hand, this practice can have positive effects. For instance, a larger market might attract larger operators who will create genuine competition between each other with a better rapport de force, providing users with access to a much larger network. More generally, it was considered that giving a bundle of routes to a single operator could generate scale economies and improved efficiency in the service.

Isn't the ideal solution a compromise: subdividing a service into small bundles, but allowing an interested operator to present simultaneously for all the bundles so as to use the benefits of synergies?

1.3 Helicopters

The importance of providing an integrated service between national flights and a regional island destination via a national airport is illustrated with the example of Gozo, where a helicopter service operating in the framework a PSO, directly connects the island to Valetta airport. This type of integration is particularly interesting in islands which are a big tourist destination.

2 - Definition of “residents” and social aids

Following the querying by the Commission of certain measures applied in Sardinia, the question of the definition of an island resident was raised. A reminder was given that under Community legislation such residents can be granted individual social aid, which does not come under State aid schemes.

In Sardinia, the notion of resident was extended to islander living on the mainland and their families, which seems to be considered as excessive.

Discussions highlighted the use of the residents’ social aid programme, which can be combined with PSO aid, and the imposition on a service of a “light” PSO (i.e. without grants for the operators) combined with higher residents-only aid.

3 – Airport slots

The question of the access of island air services to major national airports, where slots are the object of lively competition between commercial operators, was also raised. A reminder was given that Community legislation gives priority to lines covered by PSO. The problem therefore seems to be more national than Community; i.e. the desire – which varies from one country to another – of the national authorities to implement or not PSO on air links between islands or peripheral regions and these major airports.

4 – Notion of “final responsibility” of the service

In theory the fact that a public organisation concedes a public service mission to an external operator is meant to mean that the latter is ultimately responsible for the service. In practice, things are not as clear and it is easy to see that the transfer of responsibility is only very relative, and that the responsibility of the commissioner continues to be exercised. Two examples were provided: passenger compensation and the risk of operator failure.

4.1 – Passenger compensation

Measures recently adopted by the Commission to improve passengers who are victims of delays or cancellations have raised certain concerns from regional authorities directly responsible for PSO implementation.

A reminder was given that island services are particularly vulnerable to such events, particularly in islands where weather conditions are difficult, and where such incidents are not “exceptional”. An extensive interpretation of the obligation to compensate passengers who are victims of delays or cancellations could have severe financial repercussions on the operators, and it is likely that they will only accept to pay such compensation if the public authority reimburses them. On account of this, Community legislation could have significant budgetary implementations on certain island regions.

4.2 – The case of failure of the operator

Community legislation provides for a certain number of measures making it possible to ensure the reliability of operators from both a technical and a financial standpoint. Nevertheless, operators sometimes threaten to stop commercial activities suddenly, sometimes for reasons which have nothing to do with the economy of the service (e.g. a bankruptcy within the Group). Without any immediately available alternatives, the public authorities can sometimes be obliged to grant the failing operator extra financial support, if only to buy time to recover the situation. This will increase the cost of PSO proportionally.

5 – “Virtual” airlines

The participants were informed of the experience of the island of Gotland, where local entrepreneurs set up a virtual airline between the island and Stockholm. The capital required was raised through the pre-sale of tickets, then the most competitive operator was sought. Tickets for the airline were sold only over internet. After some initial difficulties, this company is operating well today providing tariffs which are substantially lower than those usually applied. Information on this company (in English and Swedish) can be found at <http://www.gotlandsflyg.se>.

C – MISCELLANEOUS QUESTIONS

1 – The Liberalisation of port and airport services

The participants were informed of the recent consultation carried out by DG TREN on the liberalisation of airport service, and the observations presented by the Islands Commission of the CPMR.

These measures mainly concern Community airports with large volumes of traffic.

In summary, the Commission's attention was drawn to the very particular nature of island airport traffic which cannot be compared to that of mainland airports, insofar as a substantial proportion of use of island airports comes from a captive traffic. The Commission was asked to apply these guidelines to the islands with a certain amount of flexibility.

The representative of the Commission presented the outlines of the project for the liberalisation of port services currently under study. This project, which aims to open up to competition various part services (loading and unloading of goods, passenger services, nautical services, etc.), gave rise to strong controversy, and was already rejected a first time in 2003.

In summary, these measures should concern Community ports with a traffic of more than 1.5 million tonnes of freight and/or 200 000 passengers (which concerns a substantial number of islands, particularly in the Mediterranean).

The Commission's new proposals, which will be presented soon, will be subject to the joint decision-making procedure.

The Islands Commission will study the Commission's proposals and put forward, if necessary, amendment proposals to its contacts in the European Parliament.

2 – PSO database

The participants agreed in hoping that the Commission would make available, if possible over internet, the details of PSO implemented in the Community territory, both for maritime and for air transport.

The island regions consider that access to this data will enable PSO commissioning bodies to learn from already existing practices and experiences, and therefore act with better knowledge and therefore with greater efficiency.

The Commission representative noted that no such database existed, only brief information being published in the Official Journal. More extensive information is only gathered by the Commission when a PSO poses problems, and there has to be an inquiry.

The Commission representative reminded the meeting of the existence of periodical reports on the application of regulation concerning maritime cabotage, the latest one dating back to 2002, and the next one being planned for the end of 2005.