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Annex A to Decision no. 57/2018

**Methodologies and criteria to ensure equitable and non-discriminatory access
to port infrastructures. First regulatory measures.**

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FOREWORD

Pursuant to Article 37 (2) (a) of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, establishing the Transport Regulation Authority within the framework of the regulatory activities of public utilities services pursuant to Law No 481 of 14 November 1995, the Transport Regulation Authority (hereinafter: ART) *“ensures, according to methods that encourage competition, management production efficiency and cost containment for users, businesses and consumers, as well as equitable and non-discriminatory access to rail, port, airport and toll motorway infrastructures, [...], as well as with respect to national, local and urban mobility of passengers and freight, including that related to stations, airports and ports”*.

On account of the existing context, including relevant legislation, by Decision No 40/2017, the Authority initiated a proceeding for the adoption of regulatory measures concerning the methodological framework and criteria to be applied to the national port system to ensure equitable and non-discriminatory access to the relevant infrastructures.

By Decision No 156/2017 of 22 December 2017 a public consultation was launched on initial regulatory measures concerning methodologies and criteria to ensure equitable and non-discriminatory access to port infrastructure and a hearing was held on 8 February 2018 where interested parties presented their comments to the Authority's Board.

In the exercise of its responsibilities in the area of port infrastructures the Authority adopted initial regulatory measures, as set out below, in order to ensure equitable and non-discriminatory access to these infrastructures and contribute, in accordance with methodologies that promote competition, to improving the efficient management thereof and to containing costs for users, businesses and consumers.

METHODOLOGIES AND CRITERIA TO ENSURE EQUITABLE AND NON-DISCRIMINATORY ACCESS TO PORT INFRASTRUCTURES. FIRST REGULATORY MEASURES.

1. Purpose and scope of the measures

- 1.1 These initial regulatory measures set out principles and criteria aimed at ensuring equitable and non-discriminatory access to the port infrastructures within the remit of the Port System Authorities established pursuant to Article 6 of Law No 84 of 28 January 1994, as referred to in Annex A to the a.m. Law.
- 1.2 The concessions for construction and management of infrastructures referred to in Article 18 of Law No 84/1994, which are subject to the provisions of Legislative Decree No 50 of 18 April 2016 (Code of public contracts) (hereafter: Code), fall outside the scope of these measures.

2. Concessions for port areas and docks

- 2.1 Port areas and docks covered by a concession, including the infrastructure that is essential for carrying out port operations and services as referred to in paragraph 4.1, are first identified on the basis of the strategic port planning guidelines as defined in the planning documents referred to in Article 5 of Law No 84/1994.

- 2.2 The intended use of port areas and docks is identified with regard to the objectives pursued, in accordance with methods for qualitative and quantitative analysis that are in line with national and international best practices.
- 2.3 The supply of operating areas for non-concession holders referred to in Article 18 (2) of Law No 84/1994 shall be guaranteed in accordance, *inter alia*, with the principles of transparency, equity and non-discrimination.
- 2.4 Pending the adoption of the port system master plan, any transitional derogations to the existing port master plan shall be expressly defined in advance, by identifying the relevant criteria and procedures, in compliance with the principles of transparency, equity and non-discrimination, and by providing for the adoption of clear and reasoned measures in the case of acceptance or rejection of the applications received.
- 2.5 The scope of the concession and the relevant work programme shall allow for a clear and objective determination of the authorised activities, including in terms of type of traffic and volumes thereof; under no circumstances may limitations be imposed on the activities of the undertaking unless they are justified. The concession also identifies any obligations related to the management of essential infrastructures.
- 2.6 The duration of the concessions and the level of the fees shall be adequately proportional to the commitments in terms of volumes and type of investment and traffic contained in the work programmes, taking into account the level of infrastructure of port areas, docks and any additional elements referred to in paragraph 2.11.
- 2.7 Concessions shall be awarded without delay through a public tendering procedure, that is initiated *ex officio* or at the request of a party, after publication of a notice, so as to enable the operators concerned to be effectively and widely informed. In particular, due regard shall be given to the principles of cost-effectiveness, efficacy, impartiality, equal treatment, transparency, non-discrimination, proportionality, environmental protection and energy efficiency, by identifying at least:
- (a) appropriate procedures and deadlines to ensure actual participation in the procedures. In particular, a time-limit of no less than 30 days from the date of publication of the notice should be provided to receive the applications for the award of the concessions;
 - (b) maximum duration of the concession;
 - (c) pre-determined criteria for selecting the applications, including weightings, such as weights and scores of the technical and economic elements that enhance, in particular, the investment plans and the work schedule for their realisation, the objectives to be achieved and the ability to provide a complete cycle of operations;
 - (d) criteria and procedures for carrying out any intermediate updates for longer concessions.
- 2.8 The notices referred to in paragraph 2.7, shall include, *inter alia*, in a clear and detailed manner:
- (a) the subjective participation requirements, including those of a technical, economic and financial nature, to be identified in an accurate, objective, transparent, equitable and non-discriminatory manner, that are to be held by the applicants for the award of the concession pursuant to Article 18 of Law No 84/1994; concerning the grounds for exclusion, Article 80 of the Code shall apply, subject to their compatibility;

(b) the procedures for the award of expired concessions to a new concessionaire, as well as other issues that are linked to the economic treatment at the end of the concession, such as evaluation criteria and identification of any relevant compensation.

- 2.9 The outcome of the awarding procedures shall be promptly communicated to the participants and made public in the same manner as the notices referred to in paragraph 2.7.
- 2.10 Penalties, grounds for termination or withdrawal of the concession, including the relevant criteria, procedures and time limits, to be determined in advance, as well as the associated controls, shall be expressly identified in the concession documents and made public.
- 2.11 In accordance with the principles of equity and non-discrimination, taking into account the development goals of each port and without prejudice to the provisions laid down for regulatory accounting under measure 5, the concession fees shall consist of:
- a fixed component, that is proportional to the size of the areas concerned and take into account the location, condition and level of infrastructure of the areas concerned, as well as the constraints/advantages that objectively derive therefrom, and the degree of participation in the construction of port infrastructures; this component may be revised, if the level of infrastructure of the areas concerned should change during the term of the concession contract;
 - a variable component, that is determined on the basis of incentive systems aimed at pursuing better production, energy and environmental efficiency of the operations and at improving service levels, in particular related to transport and intermodal integration of the port. This should include annual updates on the basis of the results achieved. In particular, incentive parameters shall be used, such as traffic actually handled, both in terms of vessel and quantity and nature of freight, taking into account the development of the relevant market. Service quality indicators shall be applied, e.g. average storage time of freight in storage areas, level of efficiency of cargo modal shift operations, share of freight modal shift by rail, level of energy and environmental efficiency of the entire port cycle, level of productivity per unit of port area under the concession.
- 2.12 The principles of transparency, equity and non-discrimination shall be in particular complied with in determining the criteria to identify the most significant initiatives referred to in Article 18 (4) of Law No 84/1994 and the possible content of the agreements replacing the State concession.

3. Authorisations to provide port operations and services

- 3.1 Without prejudice to the relevant provisions issued by the Minister for Infrastructure and Transport pursuant to Article 16 (1) of Law No 84/1994, the identification of port operations and services shall include the predetermination and publication, to be periodically updated, of both the list of activities subject to the authorisations referred to in Article 16 and of the necessary elements to objectively identify which activities that are not already included in the list may in any case fall thereunder.
- 3.2 The assessment of the requirements set out in Article 16 (4) (a) of Law No 84/1994 and its implementing decrees for the purpose of issuing authorisations to provide port operations and services shall be carried out with particular regard to the compliance with the principles of transparency, non-discrimination and proportionality, on the basis of indicators, and minimum values for those indicators, which are set in advance and are appropriate to ensure the quality level that is deemed essential for the activity to be carried out.

- 3.3 Any limitations to the number of providers of port operations and services, as specifically identified, shall be clearly and objectively justified and shall comply with the principle of proportionality. They shall be made public before being adopted, by ensuring that interested parties may submit any observations according to procedures and time limits that ensure their actual participation in the proceeding.
- 3.4 When assessing the requests for authorisations, the application of the principles of transparency, equity and non-discrimination shall be ensured by determining in advance qualitative and quantitative indicators that are related to the criteria laid down pursuant to Article 16 (4) of Law No 84/1994, including with reference to the work programmes proposed by the parties concerned, and by giving due account thereof in the relevant measures. These indicators shall, in particular, be applied in the determination of the ranking lists if the applications for authorisation exceed the number of the authorisations that can be granted; these lists shall be made public by ensuring full and timely information thereof.

4. Oversight on charging for port operations and services

- 4.1 In the oversight of the application of the charges for port operations and services, particular attention shall be paid to those that require the use of an essential infrastructure, i.e. an infrastructure for which the conditions of (i) shareability, (ii) non-substitutability, (iii) non-duplicability at socially sustainable costs have been collectively verified.
- 5.** Verification procedures on incentive systems related to concession fees and regulatory accounting criteria for verification of charging for port operations and services requiring the use of essential facilities.
- 5.1 The incentive systems related to concession fees are regulated and made public by the Port System Authorities and are accompanied, *inter alia*, by appropriate procedures for the qualitative and quantitative monitoring, including in terms of accounting, of the commitments presented in the work programmes.
- 5.2 The eligibility of operating and capital costs for determination of the charges for port operations and services requiring the use of essential facilities is subject to the compliance by the concessionaires and authorised operators, with the following general criteria:
- *relevance*: costs and other negative economic components are considered eligible if, and in so far as, they are related to the port operations and services charged;
 - *proportionality*: costs and other negative economic components are considered eligible if, and in so far as, it is verified that they are adequate to the specified purposes. Proportionality is assessed on a case-by-case basis, with respect to planned targets, historical patterns and impact of multiannual commitments in the concession period;
 - *accrual principle*: costs and other negative economic components are eligible if they are referred to the relevant accrual period;
 - *allocation to the income statement*: operating costs and other negative economic components are eligible if, and in so far as, they are allocated to the income statement of the year in question;
 - *separation*: the different elements included in each cost item shall be reported separately;

- *comparability of values*: the values reported in the regulatory accounting shall be comparable with the items included in the business and investment plans;
- *verifiability of data*: the costs indicated in the regulatory accounting shall be verifiable through reconciliation with the data from general accounting and financial statements.

5.3 The following investments which may be provided for in the operating and work programmes, and entered into the financial statements following their realisation, acquisition or contribution shall be eligible for determining the charges referred to in paragraph 4.1:

- investments in assets that may be transferred free of charge to the awarding entity upon expiry of the concession period, which are strictly necessary for carrying out the port activities;
- investments in assets that may be transferred to the awarding entity against payment of a takeover charge which takes into account the investment that has not been amortised yet.

5.4 In order to verify the incentive systems provided for in the measure referred to in paragraph 2.11 and the compliance with the principles and criteria set out in the measures referred to in paragraphs 5.1, 5.2 and 5.3, the regulatory accounting shall indicate the separate allocation of the income statement and balance sheet items referred to each asset subject to verification, and shall allow for full reconciliation of these items with the official financial statements, taking into account the existence of non-regulated assets, if any.

6. Final provision

6.1 The measures provided for in this Decision shall enter into force upon their publication on the website of the Transport Regulation Authority.