

*courtesy translation – only the Italian text is authentic*

**Regulatory measures for drawing up tender notices for the award of maritime passenger transport services to, from and between islands, and contracts to be included in tender specifications pursuant to Article 37 (2) (f) of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011, as amended.**

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## Definitions

For the purpose of these regulatory measures, the following definitions shall apply:

- (a) *AE — Awarding Entity*: public body, or entity delegated by a public body, that is entrusted with the responsibility of awarding a public service contract to a ShC, and is in charge of the management, monitoring, verification and control of the contract;
- (b) *Authority*: Transport Regulation Authority (ART);
- (c) *CA — Competent authority*: public body, or entity delegated by a public body, that is entrusted with transport network planning and service scheduling in accordance with existing legislation. This may be the AE where it is also the entity awarding the public service contract to the ShC;
- (d) *Consumer associations*: recognised associations pursuant to the criteria laid down in Article 137 of Consumer Code (Legislative Decree No 206/2005) and other consumer protection associations that concluded a memorandum of understanding with the AE, as well as representatives of maritime season-ticket holders through appropriate representative Committees;
- (e) *DRSCR — Debt Service Coverage Ratio*: economic and financial indicator of debt coverage to measure corporate financial strength. It indicates the available cash flow to meet the annual interest and repayment of debt capital, including depreciation fund payments;
- (f) *EU shipowners*: entities carrying out shipping activities or ShCs complying with the requirements of Article 2 (2) of Regulation (EC) No 3577/92;
- (g) *Horizontal PSO*: obligations referred to under (n) that are not attributable to a PSC and are applied, in the absence of compensation, to all shipowners that intend to serve a given route;
- (h) *LLCR — Loan Life Coverage Ratio*: economic and financial indicator of debt maturity coverage that measures the sustainability of a given level of indebtedness;
- (i) *MA — Maritime Authorities*: entities referred to in Law No. 84/1994 and Article 16 of Navigation Code;
- (j) *NIC — Net invested capital*: relevant capital for the purpose of applying the reasonable profit margin;
- (k) *IO — Incumbent Operator*: company or group of companies governed by public or private law providing maritime transport services and related ancillary and support services on the basis of an expiring public service contract or an expired public service contract that has been extended, which is subject to a new awarding procedure by the competent AE;
- (l) *PSA — Port system authority*: public body with legal personality as referred to in Article 6 of Law No 84/1994 as amended by Legislative Decree No 169/2016;
- (m) *PSC — Public service contract or Agreement*: agreements and contracts concluded between the AE of a Member State and an EU shipowner as referred to in the first sentence of Article 37 (2) (f) of Decree-Law No 201/2011, in Article 2 (3) of Regulation (EEC) No 3577/92 and Article 19 of Legislative Decree No 422/1997;
- (n) *PSO — Public service obligations*: “obligations which the Community shipowner in question, if he were considering his own commercial interest, would not assume or would not assume to the same extent or under the same conditions”, as referred to in Article 2 (4), concerning the requirements as strictly identified under Article 4 of Regulation No 3577/92;
- (o) *Reasonable profit margin*: “rate of return on capital (85) that would be required by a typical company considering whether or not to provide the service of general economic interest for the whole duration of the period of entrustment, taking into account the level of risk”, as referred to under paragraph 61 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 (2012/C 8/02);
- (p) *ShC — Shipping Company*: company or group of public or private companies providing maritime transport services and related ancillary and support services on the basis of a public service contract;

- (q) *Territorial continuity*: with reference to these measures, any public intervention pursuant to existing legislation, that is aimed at ensuring appropriate sea connections to, from and between islands, in order to reduce the natural handicaps of insularity;
- (r) *WACC — Weighted Average Cost of Capital* (of financing sources) that is commonly estimated by applying the *Capital Asset Pricing Model (CAPM)*.

## Measure 1 — Purpose and scope

1. The present document lays down regulatory measures for drawing up tender notices for the award of maritime passenger transport services to, from and between islands, and contracts to be included in the tender specifications pursuant to Article 37 (2) (f) of Decree-Law No 201 of 6 December 2011, converted, with amendments, into Law No 214 of 22 December 2011 (hereinafter: d.l. no. 201/2011), establishing the Authority (hereinafter: ART), as amended by the second sentence of Article 48 (6) (b) of Decree-Law No 50 of 24 April 2017, converted, with amendments, into Law No 96 of 21 June 2017 (hereinafter: d.l. no. 50/2017), to Article 37 (3) (b) of Decree-Law No 201/2011, as well as to Article 48 (7) (a), (b), (c) and (e) of the above d.l. no. 50/2017.
2. The Measures contained herein shall apply to the transport of passengers by sea, from, between and to islands, both of national interest (connections with the main islands), and regional and local interest, even where it is carried out together with the transport of goods. The Measures do not differentiate among different services, if it is not explicitly indicated. The measures under Title II and Title III shall not apply to the award of services of a lower value than the amount of the Community thresholds referred to in Article 35 (1) (b) and (c) of Public Procurement Code as referred to in Legislative Decree No 50 of 18 April 2016, as amended (hereinafter: lgs.d. no 50/2016). Excluded from the scope of Measure 4 are the shipping companies (hereinafter: ShCs) that hold a single public service contract (hereinafter: PSC) of a lower value than the amount of the above-mentioned thresholds and that do not perform open-market services.
3. The scope of application of these Measures is defined by reference to Article 4 of Council Regulation (EEC) No 3577 of 7 December 1992 (hereinafter: Reg. no. 3577/92) that covers maritime cabotage and, by way of derogation from the principle of freedom to provide services, allows to conclude PSCs exclusively in relation to connections from, between and to islands. In accordance with the principle of non-discrimination laid down in Article 4, these contracts shall be awarded exclusively by open or restricted tendering procedure.
4. Subject to the application of the measures provided for herein are competent authorities (hereinafter: CAs) for planning activities, awarding entities (hereinafter: AE), ShCs holding a PSC.
5. The award of maritime transport services, whether based on a concession or a contract, is subject to the application of the relevant provisions set out in lgs.d. no 50/2016. The provisions of the Measures shall apply, except where otherwise provided, for both contractual arrangements, as specified in Table 1.
6. Subject to the provisions of paragraph 7 of this Measure, the measures provided for herein shall apply to the award of services for which the relevant tender notice is published, or, in the case of a restricted procedure, the letters of invitation are sent, on a later date following that of their entry into force that corresponds to the date of publication of the relevant decision concerning their approval.
7. Measure 4 on regulatory accounting and accounting separation applies from the date of entry into force of these Measures, that corresponds to the date of publication of the decision concerning their approval.

Table 1 —Application of the Measures depending on the type of award (Contract/Concession)

TYPE OF AWARD	Measure	Subject of regulation	Phase
Contract/Concession			
•	2	Awarding lots and market test	PRE-TENDER
•	3	Availability of port calls	
•	4	Regulatory accounting requirements	
•	5	Minimum information	TENDER NOTICE (KEY ELEMENTS)
•	6	Participation requirements	
•	7	Awarding criteria	
∅	8	Determination of compensation and AE's Business Plan	
○	9	Risk matrix	
∅	10	Reasonable profit margin	
○	11	Tenderers' Business Plan	
•	12	Deadline for submission of tenders	
•	13	Selection Boards	
•	14	Transfer of personnel	
∅	15	Minimum content of contracts	SERVICE CONTRACTS
∅	16	Duration of contract	
•	17	Monitoring of contractual performance	
○	18	Verification of economic and financial equilibrium	
∅	19	Objectives of effectiveness and efficiency and incentive system	

## Legend

• = regulatory measure applied regardless of the type of award chosen;

∅ = regulatory measure applied in a differentiated manner depending on the type of award chosen;

○ = regulatory measure applied only to concession.

## **Title I – PRELIMINARY PHASE, REGULATORY ACCOUNTING AND ACCOUNTING SEPARATION REQUIREMENTS**

### **Measure 2 — Procedure for market test and definition of awarding lots**

1. If the CA, within the framework of its planning responsibilities, identifies outstanding mobility needs which may be met through maritime services and, in any case, before awarding the PSC by tendering procedure, it shall carry out the following preliminary activities:
  - a) defining of public service requirements;
  - b) market test, aimed at determining whether there is a total or partial economic interest of the operators in the provision of the open-market service, in the absence of compensation;
  - c) identifying the less restrictive instrument to the freedom of trade in the maritime sector for the protection of public service requirements.
2. The CA shall lay down the public service requirements through desk analysis of current and potential demand, surveys and/or simulations carried out directly or on the basis of available data and information, after consultation with the users of the surveyed transport services and/or their associations, in order to identify one or more origin-destination relations (hereinafter: O-D) which require maritime transport services, time-slots of interest to users in different periods of the year/week/day and the users' maximum willingness to pay.
3. As part of the activities referred to in paragraph 2 above, the CA may involve other stakeholders concerned such as, but not limited to, Port System Authorities (PSA) and Maritime Authorities (AM), as well as any economic operators interested in the freight service, if any.
4. Having laid down the public service requirements, the CA conducts an appropriate consultation for market test purposes, by providing the operators with the outcome of the analyses referred to in paragraph 2 above, including, in particular, O-D relations, time slots and average frequency in different periods of the year/week/day identified in the analysis of demand, information on the procedures of allocation of port calls, in addition to the relevant willingness of users to pay. The CA shall notify the Authority of start and end dates of the consultation at least fourteen days before the scheduled start date, by attaching the relevant publicly available documents concerning the public service requirements identified. The CA shall take appropriate measures to ensure that consultation procedures do not distort competition and do not result in undue advantages for participating companies in the case of a subsequent tendering procedure.
5. Where the market test shows an interest by the ShCs to fully cover the service provision requirement in the absence of compensation, through services that are either already in operation, to be re-scheduled or launched, the CA shall take no action, subject to the provisions of paragraph 7.
6. Where, even if there is a partial interest by the ShCs, it appears that it is impossible to fully cover the service provision requirement in the absence of compensation, the CA shall assess whether it is possible to apply a horizontal approach to the imposition of public service obligations on all the shipowners concerned (hereinafter: horizontal PSO). For this purpose, the CA shall publish a notice in the section 'Transparent Administration' of the AE's website, without prejudice to give further publicity to the request for expressions of interest on the service performance, by providing the operators concerned with a document containing at least the information listed in Table 1 of Annex 1, as well as an appropriate period of at least 60 days for the submission of the expressions of interest.
7. Where, as a result of the market test, the CA identifies a charging system for existing services or for those proposed that is not appropriate compared to the willingness to pay of specified user categories, e.g. island residents, it shall evaluate, including in combination with the imposition of horizontal PSOs, the use of subsidies for the demand, in the form of direct compensation of the difference between the full price of the open-market services offered and a pre-determined price that is regarded as socially fair. Direct compensation of the demand shall be recognised according to non-discriminatory procedures and

shall be compatible with the social aid scheme for the transport of residents of remote areas provided for by existing legislation.

8. If, as a result of the market test, it is found that the public service requirements cannot be satisfied with the instruments referred to in paragraphs 6 and 7, before launching the procedures for awarding of the service through PSC, the CA shall identify the tender lot(s) corresponding to a production threshold, usually expressed in terms of vessel/NM, in order to ensure maximum participation in the procedure and selection of the most efficient shipowner.
9. Upon conclusion of the market test, the CA shall submit to the Authority a report on its outcome. Beside the description of the procedure following the communication to the Authority, the report shall highlight the reasons for the choice to meet public service requirements, taking into account the need to ensure both efficient use of public resources and freedom of trade in the maritime sector. Further, the report shall give evidence of the port calls available for the operators involved in the market test procedure and of any capacity constraints.
10. The Authority shall deliver its opinion on the compliance of the market test procedure with the measures set out herein within 45 days of receipt of the report referred to in paragraph 9 above, unless time limits are suspended.

### **Measure 3 — Availability of port calls**

1. In order to make the information on port calls publicly available, as laid down in paragraph 4 of Measure 2, the CA carries out an *ad hoc* survey, including by involving the relevant PSAs and MAs, by means of requests aimed at verifying the criteria and procedures for port call allocation, their availability and any capacity constraints.
2. In the framework of the procedures under Measure 2 and in compliance with the responsibilities of PSAs and MAs as provided for in the Navigation Code, as well as with the provisions of Law No 84 of 28 January 1994, as amended, the CA shall check and implement all the activities aimed at ensuring, including through agreements with the competent PSAs and MAs, for each port served, the availability of calls for the performance of the service on the days and/or in the slots provided for by the schedule of operations included in the information available to tender participants (Table 2, Annex 1).

### **Measure 4 — Regulatory accounting and accounting separation requirements of ShCs**

1. The ShC shall adopt the regulatory accounting formats (income statements, balance sheets and technical data) referred to in Table 6 of Annex 1, and allocate, on the basis of the following criteria, the income statement and balance sheet items, in line with the financial statements, to each maritime passenger transport PSC subject to PSOs.
2. The regulatory accounting formats in respect of each PSC for maritime passenger transport, where the ShC holds several PSCs or operates several activities, shall be supplied separately from:
  - a) other PSCs for maritime passenger transport;
  - b) other services of general economic interest;
  - c) other commercial activities related to maritime transport, passengers and/or freight;
  - d) other commercial activities, other than those referred to under (c) above.
3. The regulatory accounting formats shall be drawn up, for the profit and loss accounts, by identifying the negative and positive income statement items, (i) for each route operated, (ii) for each maritime transport service contract and (iii) for all the activities carried out by the ShC, as reported in the annual financial statements, by providing for their reconciliation.
4. For regulatory accounting purposes, the income statement items relating to the management of maritime services pertaining to each PSC shall be:
  - a) of direct and exclusive relevance of the cost centre represented (i) by each maritime route operated under the PSC itself and (ii) by each PSC;



- b) attributable to several operated maritime routes; in this case, they must be allocated on the basis of specific drivers.
- 5. The regulatory accounting formats shall differentiate, for balance sheet accounts, the balance sheet items, assets and liabilities, (i) for each maritime transport PSC and (ii) for all the activities operated by the ShC, as shown in the annual financial statements, by providing for their reconciliation.
- 6. For regulatory accounting purposes, the balance sheet items relating to the management of the maritime services pertaining to each PSC shall be:
  - a) of direct and exclusive relevance of the cost centre represented by each PSC;
  - b) attributable to several PSCs; in this case, they should be allocated on the basis of specific drivers.
- 7. The ShC shall provide for direct and exclusive allocation of income statement and balance sheet items which, on the basis of documentary evidence, may be objectively and exclusively allocated to the relevant PSC.
- 8. In general terms, each PSC may be attributed only the income statement and balance sheet items which, in the light of the relevance criterion, are attributable to the ordinary production process.
- 9. For the income statement and balance sheet items that are related to a number of cost centres, the allocation to each of them is carried out in an objective and analytical manner on the basis of drivers chosen for their suitability to measure the consumption of resources or the allocation of assets under a PSC, by applying causality and relevance principles based on FDC (Fully Distributed Costing) methodology. The drivers used shall be described in any detail, both methodological and quantitative, in the explanatory report to the regulatory accounting.
- 10. The income statement items (including indirect costs related to the central structure) and balance sheet items that are attributable to the ShC's organisational units as a whole, as well as those that may not be otherwise attributed to the different cost centres based on relevant and objective drivers, are allocated to the cost centres in proportion to what has been previously allocated directly and pro-quota.
- 11. Every year the ShC shall transmit electronically the regulatory accounting and reporting formats relating to the technical data of the previous year, as referred to in Table 6 of Annex 1, together with an explanatory report, within 60 days as of the approval of the annual accounts, in accordance with the template made available by the Authority online.
- 12. The regulatory accounting and reporting formats referred to in Table 6 of Annex 1, together with the explanatory report, shall also be sent to the AE for its monitoring.
- 13. The regulatory accounting formats and the explanatory report shall also be accompanied by a certification, drawn up by an audit firm or statutory auditor, that is independent from the ShC that was awarded the PSC, as identified in accordance with paragraph 14, attesting its compliance with the criteria set out herein. The documentation referred to under this paragraph shall be submitted to the Authority and the AE within the time limit set out under paragraph 11.
- 14. The audit firm and statutory auditor shall be identified by the ShC at its own expense, for a period of up to three years, on the basis of fit and proper requirements, including independence, also with respect to the audit firm certifying the ShC's financial statements. This mandate may be extended, subject to prior verification that the company concerned still holds the necessary requirements.

## **Title II — TENDER NOTICE**

### **Measure 5 — Provision of minimum information to tender participants**

1. In order to increase the number of participants in the awarding procedure, the AE shall provide, throughout the phases of the procedure, the information referred to in Table 2 of Annex 1, that is the minimum information set.
2. The minimum information to provide to the participants referred to in paragraph 1, with particular reference to the quality of the public transport service to be awarded, are identified also on the basis of the outcome of the consultation of all stakeholders referred to in paragraph 4 of above Measure 2.

### **Measure 6 — Participation requirements**

1. The AE shall lay down in the tender dossier the conditions for participation of the ShCs concerned.
2. Among the requirements for financial fitness, in compliance with the provisions of Article 48 (7) (b) of d.l. no. 50/2017, the AE sets out the obligation for the participants in the awarding procedure to hold a net worth of at least 15% of the annual fee established as basic tender compensation.
3. Where the AE lays down eligibility requirements for tender participation in addition to those required under the legislation in force, in order to ensure maximum participation of the ShCs in the tendering procedures, such requirements shall be laid down, in particular, in accordance with the following general principles:
  - (a) relevance and proportionality with respect to the service to be awarded;
  - (b) reciprocity and non-discrimination, by ensuring equal treatment in case of a substantial level playing field, in order to protect all potential tenderers, as provided for by Article 4 of Reg. no. 3577/92.
4. With reference to paragraph 3 above, the AE shall appropriately quantify and harmonise tender requirements, especially those concerning economic and financial standing and technical and operational capacity, so as to:
  - a) avoid over-sizing of the technical and economic parameters of reference, that would lead to substantial barriers to the participation of potentially interested parties;
  - b) reconcile the specific requirements imposed on the ShCs concerned with the subjective characteristics of tenderers (single or multiple operators), without prejudice to the prohibition to discriminate against an economic operator as to the location in a given territory;
  - c) verify the impact of any restrictive clauses on competition, with particular reference to the AE's choice to provide in the tender procedure for the limitation of the maximum number of lots of services to be awarded to one ShC.

### **Measure 7 — Awarding criteria**

1. In order to award the contract to the most economically advantageous tender, the AE shall set out in the tender dossier:
  - a) the targets pursued in order to meet the identified public service requirements and to gradually improve the ShC's performance throughout the duration of the contract, as referred to in paragraphs 2 and 3 below;
  - b) the awarding criteria, that are linked to the a.m. targets, by differentiating between technical and economic parameters pursuant to paragraphs 4 and 5 below;
  - c) the ways these criteria are assessed and the relevant weighting and scoring systems.
2. The AE shall set out the targets referred to in paragraph 1 (a) above with particular reference to at least the following ones:
  - a) effectiveness, in terms of use of the service (*load factor*);



- b) efficiency, in terms of operating costs of the service (operation, maintenance) and related revenues and productivity (labour costs, distances);
  - c) quality, in compliance with the minimum quality standards laid down by the Authority's Decision No 96/2018 of 4 October 2018 (hereinafter: ART decision no 96/2018) and other standards laid down in the PSC on the basis of surveys on expected and perceived quality or in accordance with the "Service Quality Charter".
3. Concerning the features of the service to be awarded, the AE may identify further targets so as to properly monitor the contract performance, e.g. in terms of:
- a) management of the service (tickets sold by type, etc.);
  - b) environmental and social sustainability (pollutant emissions, energy consumption, ashore/aboard security, accident density, etc.);
  - c) integration of transport systems (intermodality, integrated or multi-operator fares, etc.).
4. The AE shall lay down the awarding criteria referred to in paragraph 1 (b) above, in accordance with the general transparency principles of the awarding procedure, proportionality and cost-effectiveness in respect to the characteristics of the services to be awarded, equal treatment and non-discrimination to the benefit of all potentially operators concerned, so as to:
- a) ensure that the assessment of the technical offer of each competitor is not affected by exclusively economic parameters;
  - b) ensure the relevance of the criteria to the nature, scope and characteristics of the service to be awarded;
  - c) take account of the above contractual management targets, in particular with regard to characteristics of vessel and service offered, e.g. in terms of:
    - i. environmental impact (marine pollution reduction through the adoption of liquid/solid waste treatment systems, reduced air emissions through maintenance/management procedures, use of low-impact propulsion systems, LNG or hybrid, noise reduction outside and inside ships, reduction of fuel consumption);
    - ii. accessibility of users (including for persons with reduced mobility);
    - iii. on-board and ground equipment, including for safety purposes (service monitoring systems, navigation control/stabilisation systems);
    - iv. characteristics of supply (average age of vessels, revamping, ship capacity, regularity, punctuality, accident rate, supply of additional transport);
    - v. on-board and ground services aimed at improving delivered and perceived quality (reception and assistance, commercial accessibility and electronic ticketing, cleaning and comfort of ships, user information channels);
    - vi. initiatives to improve travel conditions (e.g. adoption of systems for rate integration with different modes and operators, preferential charges);
    - vii. immediate and direct accessibility of users to complaint-handling systems.
5. The AE shall establish the criteria referred to under (c) in accordance with the principle of proportionality, in order to avoid to discriminate against tender participants and discourage the participation of potentially interested ShCs.
6. The AE shall lay down the above awarding criteria, also taking into account the methods of risk allocation among the parties, pursuant to Measure 9.
7. The AE shall set out the procedures for assessment of individual technical criteria on the basis of appropriate reasons, by establishing, where possible, algorithms for the calculation of the scores to be adopted by the selection board, as referred to in Measure 13 below.
8. The AE shall verify that the selection board's conduct complies with the pre-determined assessment procedures and criteria, with particular reference to the clarification of the appropriate reasons for the awarded scores.

## **Measure 8 — Criteria for calculating the basic tender compensation and drawing up the AE's Business Plan**

1. For the purpose of determining the basic tender compensation for PSOs, the AE shall draw up a business plan, i.e. EA's BP, that is broken down for all years of the award, in accordance with the formats 1-4 in Table 3 of Annex 1. The BP will include the assumed risk allocation between the AE and ShC, as referred to in Measure 9 below and take into account the continuous process of gradual improvement of effectiveness and efficiency.
2. The AE's BP is aimed at estimating an appropriate compensation for the basic tender compensation, so as to ensure the economic and financial equilibrium throughout the contract period and the comparison with the bids submitted by tender participants.
3. In the drafting of the BP, the AE shall refer to the criteria set out in the Commission's package of instruments governing State aid for the provision of SGEI (SGEI package<sup>1</sup>), as well as to the provisions of the Public Procurement Code.
4. In compliance with the principles and criteria referred to in paragraph 3 above, the value of the compensation resulting from the application of the BP shall be estimated by taking into account the costs and revenues of a typical company, that is efficiently managed and has adequate resources, and by considering the risk allocation referred to in Measure 9.
5. The AE may decide to retain the revenues (gross cost contracts) or to provide for revenue collection by the contracting company (net cost contracts). In the case of net cost contracts, the revenue-related business risk is fully allocated to the ShC. In the case of services for which fare integration is provided between services awarded to different operators, the AE may opt for gross cost contracts.
6. In drawing up the BP, the AE takes into account, in particular, the costs relating to the perimeter of the awarded services, the revenues associated with demand estimates and current fare system, as well as the planned inflation throughout the contract period, according to the latest available Economic and Financial Document.
7. In the tender phase the AE shall notify only the basic tender compensation resulting from the BP, in addition to the macro-headings referred to in Table 2 (b) of Annex 1, and provide the tender participants with the formats used for its calculation, in order to enable them to draw up a BP in support of the sustainability of the submitted tender (Measure 11).
8. The principles and instruments referred to in the above paragraphs shall apply to all services that are awarded through concession. In order to pursue management efficiency and reduction of public expenditure, the AE extends the application of these principles and the use of the BP, for a correct calculation of compensation, also to service contracts, within the framework of their administrative discretion.

## **Measure 9 — Criteria for risk identification and allocation in the concession award**

1. For the purpose of drawing up the BP as referred to in Measure 8, the AE shall identify and assess the risks associated with the operation of the awarded service and, in the case of a concession, it shall:
  - (a) set out the matrix, based on the format provided in Table 4 of Annex 1, which allocates the risks to each contractual party (AE and ShC);
  - (b) identify, depending on the characteristics of the awarded service and on the basis of specified criteria, additional risks supplementing the matrix referred to under (a) above.

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<sup>1</sup> The so-called "2011 SGEI package", which replaced the former 2005 package, consists of the following instruments: 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; 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; 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; Communication from the Commission on the European Union framework for State aid in the form of public service compensation.

2. Concerning the nature and level of the different risks identified, and their allocation to each contracting party, the AE shall specify in the tender dossier any mitigation measures of the allocated risks.
3. At the end of each regulatory period, the AE shall assess whether the risks allocated still remain with the parties and whether it is appropriate to review the mitigation measures or other elements of the risk matrix.
4. The risk matrix drawn up by the AE is an integral part of the awarding procedure dossier for the purpose of ensuring adequate publicity and transparency and is one of the essential enclosures of the related PSC. The matrix provides the references to the PSC that regulates the contractual obligations associated with the risks identified.

### Measure 10 — Determination of reasonable profit margin

1. For the purposes of drawing up the BP, and in case of its revision or updating, the AE shall request the Authority, that provides therefor within 30 days as of the request, to indicate the value of the rate of return on net invested capital (NIC), to be granted to the ShC for the provision of the service subject to PSOs in the contract period, as a reasonable profit margin. The AE shall take this value as a reference for the maximum threshold in the case of contract awarding.
2. The NIC rate of return, as referred to in paragraph 1, is determined by the Authority by applying the Weighted Average Cost of Capital Method (WACC), according to the following formula:

$$R = g \cdot \frac{R_d \cdot (1-t)}{1-T} + (1-g) \cdot \frac{R_e}{1-T} \quad (1)$$

where:

$g$  (*gearing*) % of financial debt;  
 $R_d$  allowed cost of debt;  
 $t$  IRES tax rate (*tax shield*)<sup>2</sup>;  
 $T$  income tax rate (IRES + IRAP)<sup>3</sup>;  
 $(1-g)$  % of equity;  
 $R_e$  nominal rate of return on equity.

### Measure 11 — Business plan of tenderers

1. The AE shall lay down rules for the drafting of a BP by the tender participants concerning projections of costs, revenues, investments and cash flows, for the duration of the contract, in order to support the sustainability of the submitted tender and the pursuit of the economic and financial equilibrium of the contracts. The BP shall take into account the criteria laid down in Measure 8 and the formats in Table 3 of Annex 1 that include:
  1. Profit and Loss Account;
  2. Net Invested Capital (NIC);
  3. Calculation of fee;
  4. Regulatory financial plan;
  5. Financial Statement.
2. The BP shall be drawn up by each tenderer in accordance with the guidelines provided for by the AE, that undertakes to guarantee maximum confidentiality. The formats referred to under (1) - (5) of Table 3 of Annex 1, are drafted for the entire tender lot, while, in respect of each connection, it is also provided for an *ad hoc* profit and loss account (Format 1). The BP shall be accompanied by an explanatory report of the formats including, in particular, the description of supply and demand input data, the assumptions

<sup>2</sup> Currently 24%.

<sup>3</sup> Currently 28.82 % on the basis of current IRAP tax rate (4.82 %).

underlying the submitted tender and the method of calculation of the values with an explanation of the relevant formulas, including drivers for allocation of common and general costs.

3. The cost-effectiveness of the compensation resulting from the BP of the tenderers shall be verified on the basis of the requirements set out in Format 4. Where the tender requires the submission of an investment plan, the AE shall include in the BP formats appropriate indices to assess the financial sustainability of the proposal (e.g. DSCR, LLCR), and ensure they are clearly specified.
4. The AE shall lay down rules for the preparation of a BP by the ShC, at the end of each regulatory period, in accordance with the formats of Table 3 of Annex 1, for the purpose of verifying the economic and financial equilibrium in accordance with Measure 18.

### Measure 12 — Deadline for submission of tenders

1. In order to ensure maximum participation of operators, the time limit for the submission of tenders may not be less than 110 days from the publication of the tender notice or the submission of the invitation to tender, and shall be determined in the light of the complexity of the schedule of services and the evaluation of any investments, including, where appropriate, the acquisition of the vessel.
2. The AE may provide for a shorter time limit for the submission of tenders than the estimates referred to in paragraph 1 and, in any case, in compliance with the limits laid down by law, where the AE itself provides to the participants the necessary vessels for the performance of the service.

### Measure 13 — Criteria for appointment of selection boards

1. The AE entrusts an *ad hoc* designated selection board with the technical and economic evaluation of the tenders.
2. The procedure for appointing the selection board is carried out in compliance with the provisions of Article 77 of lgs.d. no 50/2016 and is aimed at screening persons with adequate professional skills and competence, including with regard to the assessment of the tender BP, as well as with particular experience in the planning of transport networks and in the scheduling, management and monitoring of maritime transport services.
3. Following the appointment of the selection board, the AE shall publish in the relevant section of its website concerning the tender, the *résumés* attesting the competence and professional skills of the members of the selection board.
4. In the first three years following the date of conclusion of the PSC, the successful tenderers may not entrust the members of the selection board with any tasks or functions.
5. The AE shall ensure the effective application of this Measure by providing for dissuasive and adequate actions for the purposes set out in Article 42 of lgs. d. no 50/2016 on conflict of interest.
6. The provisions of this Measure shall also apply where the AE avails itself of another contracting authority pursuant to Article 27 (12c) of Legislative Decree no 50/2017. In this case, the provisions contained in this Measure which include the tasks assigned to the AE as the contracting authority shall be understood as referred to the entity through which the AE awards the service.

### Measure 14 — Transfer of personnel

1. The AE provides for *ad hoc* regulation concerning the social clause in the tender dossier, taking into account the comparability of the awarded services (e.g. in terms of O-D relations, production volume, contract performance conditions, and associated PSO) with those pertaining to the existing PSC. If the volume of the services to be awarded is lower than that covered by the existing PSC, the above regulation shall take into account the actual staffing requirements required by the new service.
2. With a view to the preparation of the social clause by the AE, the IO shall provide the AE with a list of its personnel, including the information referred to in Table 2b of Annex 1 (cf. "Transfer of personnel"). This list is drawn up by the IO, by ensuring that the personnel identified is consistent with the regulatory

accounting formats referred to in Annex 1, Table 6 (cf. Format 3 — “Personnel List”), that are drawn up in accordance with the criteria under Measure 4.

3. The social clause provides for the personnel to be taken over by the contracting ShC on the basis of the organisational requirements required by the performance of the new contract.
4. This is without prejudice to any negotiations between the parties, that are consistent with the relevant regulatory framework, concerning appropriate harmonisation procedures in case of different treatment for specified qualifications/duties, voluntary retirement or exit arrangements, conclusion of specific derogation agreements between the contracting ShC and the trade unions.
5. Upon submission of the tender, each participating economic operator expressly agrees on the social clause as laid down by the AE in the relevant dossier; non-acceptance of the clause is a ground for exclusion of the bid from the tendering procedure; the mere acceptance of the personnel take-over obligations cannot be a criterion of evaluation of the technical offer.
6. The social clause provisions are laid down in the PSC concluded with the contracting ShC, which also specifies the rights and obligations of the personnel transferred from the IO; to this end, the tender dossier and the PSC shall:
  - a) specify that the non-compliance with the obligations set out in the social clause during the performance of the contract is a ground for its termination;
  - b) provide for appropriate and consistent penalties and termination clauses.

## **Title III — FORMAT OF CONTRACTS**

### **Measure 15 —PSC format and minimum content**

1. The AE shall draft the PSC that is attached to the dossier governing the awarding procedure on the basis of the contract format referred to in Table 5 of Annex 1, which is defined based on the legislation currently in force and on the measures adopted by the Authority by Decision No 96/2018 concerning minimum quality standards and relevant penalty system, as well as in respect of the type of award chosen (contract or concession).

### **Measure 16 — Duration of the PSC**

1. In the case of concession award, the AE shall establish the duration of the PSC for a period generally not exceeding 5 years, that may be extended, in compliance with the principle of proportionality, for the period necessary for the recovery of the investments by the concessionaire, pursuant to Article 168 of lgs.d. no 50/2016. In no case may the duration exceed the maximum period of 12 years.
2. In case of contract award, the duration of the contract may not exceed 9 years.

### **Measure 17 — Monitoring of contractual performance**

1. The AE shall establish an adequate qualitative and quantitative monitoring system of the contractual performance, including responsibilities, monitoring procedures and timing, reporting and transmission of documents, data and information on the economic, technical, management and qualitative performance of the PSC, including the contractual objectives relating to effectiveness and efficiency, that are monitored by the ShC and verified by the AE.
2. In order to ensure the ongoing monitoring of performance and contractual objectives, the AE shall also regulate the following in the PSC:
  - a) type of information that the ShC shall provide to the AE, specifying the relevant procedures and timing, including on a continuous basis and/or real-time, as well as the associated penalties in case of non-compliance;
  - b) type of report/final figures on development of performance to be provided by the ShC to the AE, along with the relevant procedures and timing, and the associated penalties in case of non-compliance;
  - c) any obligations for the ShC to carry out regular surveys on demand and/or quality of the service, by ensuring the impartiality of the body in charge of the surveys, including the procedures for publication of the relevant results and for the involvement of users, in accordance with the provisions of the “Service Quality Charter”;
  - d) verification activities falling within its remit, in terms of applicable procedures for inspections, frequency of inspections, size of surveyed sample, any requirements for disclosure to the ShC, procedures to check the data/information submitted by the ShC and possible hearing of the parties.
3. The AE holds the information referred to in paragraph 2 above and, in order to ensure maximum transparency in the management of the PSC, it is published and made accessible/re-usable under a “Data Access Plan”, that is set out by the AE as an integral part of the PSC, in accordance with ART Decision no 96/2018; the AE shall assess whether economic data relating, in particular, to individual elementary cost items, may be disclosed on account of their commercial sensitivity, pursuant to the provisions of the above-mentioned regulatory decision.



### Measure 18 — Verification of economic and financial equilibrium in the concession award

1. The awarded BP shall ensure the economic and financial equilibrium of the contract and the sustainability of management throughout the entire contract period. The AE splits up this period into regulatory periods of up to 5 years.
2. At the end of each regulatory period, the AE shall verify that the compensation paid, on the basis of the BP adopted at the beginning of the regulatory period, is consistent with the provisions of the updated BP, that includes the ex-post items of income and expense as valued on the basis of updated estimates.
3. For the purpose of carrying out the verification referred to in paragraph 2 above, the AE shall set a time limit for the preparation of an updated BP by the ShC, on the basis of the formats referred to in Table 3 of Annex 1, that allows comparison with the values of the previous BP for the purpose of identifying any over- or under-compensation. Over-compensation occurs when the amount resulting from the updated BP is lower than that determined on the basis of the previous BP. On the contrary, under-compensation occurs when the updated amount is higher than the previous one.
4. The verification referred to in paragraph 2 impacts on both the regulatory period subject to verification and the following regulatory period. Indeed, the AE, in respect to the results of the verification referred to in paragraph 2, without prejudice to the provisions under Measure 19, shall provide for the following:
  - (a) in case of overcompensation: recovery of overpayments made in the previous years of the regulatory period covered by the verification referred to in paragraph 2 above, and reduction in the compensation for the following regulatory period;
  - (b) in case of under-compensation: increase in compensation, where this is provided for by the PSC, or re-definition of perimeter of services or of fare system, to an extent that is in line with the lower payments, only as of the following regulatory period, and by excluding, in any case, the possible extension of the contract beyond the established deadline.
5. The AE shall make the adjustments referred to in paragraph 4 (b) above, only in the case of under-compensation due to the variation of BP items associated with non-allocated risks to the ShC.

### Measure 19 — Objectives of effectiveness and efficiency and incentive system

1. In compliance with the principles of transparency and non-discrimination, the AE shall provide for incentive systems in the tender dossier to pursue objectives of effectiveness and efficiency by improving the performance offered by the tenderers.
2. The increases in effectiveness and efficiency referred to in paragraph 1 are in no way attainable to the detriment of service quality.
3. In the framework of the incentive system referred to under 1 above, and in the context of the verification of the economic and financial equilibrium referred to under Measure 18, the AE identifies the variation of items of income and expense relating to a risk allocated to the ShC, as previously identified by the AE on the basis of the provisions of Measure 9.
4. Having verified the decrease in costs and/or increase in revenue referred to in the previous paragraph, the AE grants the ShC a premium as a “one-off” fee, that is deducted from the recovery of the payments referred to in paragraph 4 (a) of Measure 18 and retained by the ShC itself.
5. The AE grants the premium referred to in the previous paragraph for the best performance achieved by the ShC compared to the tender, with reference to the minimum quality standards laid down in ART Decision No 96/2018, and any additional quality indicators that are provided for by the AE in the tender dossier.
6. In the cases referred to in paragraph 4 above, the AE grants a premium  $X_{C,R}$  that is calculated on the basis of the following formula:

$$X_{C,R} = \alpha_Q \cdot \Delta I_{C,R}$$

with:

- $\alpha_Q$  = coefficient as defined by the AE ranging from 0 to 1, that represents the fee granted to the ShC in respect of the quality increases referred to in paragraph 5, as verified ex post;
- $\Delta I_{C,R}$  = actual savings achieved by the ShC in terms of reduced costs and increased revenue observed in the regulatory period subject to verification, that is calculated as the difference between  $\Delta R$  and  $\Delta C$ , corresponding, respectively, to the variations of the total items of income and expense covered by the incentive system, as shown in the BP at the end of the regulatory period subject to verification, and the BP concerning the previous regulatory period:

$$\Delta I_{C,R} = \Delta R - \Delta C \text{ with } \Delta I_{C,R} > 0$$

7. The incentive scheme referred to above applies to concession awards, without prejudice to the possibility for the AE to define objectives of effectiveness and efficiency as well as appropriate incentive systems also for contract awarding.