

## **QORTI TAL-APPELL**

### **IMHALLFIN**

**S.T.O. PRIM IMHALLEF JOSEPH AZZOPARDI  
ONOR. IMHALLEF JOSEPH R. MICALLEF  
ONOR. IMHALLEF TONIO MALLIA**

**Seduta ta' nhar il-Gimgha 14 ta' Dicembru 2018**

**Numru 26**

**Rikors numru 288/18**

**Virtu Ferries Limited (C 11553)**

**v.**

**Il-Ministeru ghat-Trasport, Infrastruttura u Progetti Kapitali, u  
Gozo Channel Operations Limited (C 76704) u Gozo Channel  
(Holdings) Co. Limited (C 21398) ghal kull interess li jista' jkollhom**

**Il-Qorti:**

Dan hu appell imressaq fil-11 ta' Settembru, 2018, mis-socjeta` rikorrenti Virtu Ferries Limited wara decizjoni datata 23 ta' Awwissu, 2018, moghtija mill-Bord ta' Revizjoni dwar il-Kuntratti Pubblici (minn hawn 'il quddiem imsejjah "il-Bord") fil-kaz numru 1179-5/2018.

Dan il-kaz hu marbut ma' sejha li hareg il-Ministeru ghat-Trasport, Infrastruttura u Progetti Kapitali "*for proposals for a public service concession contract for the provision of passenger and vehicle ferry services in Malta and Gozo*".

Permezz ta' din is-Sejha, il-Ministeru stieden operaturi interessati biex jaghmlu offerta sabiex jipprovdu servizz ghall-passiggieri u vetturi bejn ic-Cirkewwa u l-Imgarr Ghawdex permezz ta' bastiment konvenzjonali, kif ukoll sabiex jiprovdu servizz ghal passiggieri bejn il-Belt Valletta u Mgarr Ghawdex permezz ta' *Fast Ferry*. Addizzjonalment, permezz ta' din is-Sejha, operaturi interessati kienu mistiedna sabiex joffru servizz, permezz ta' *Fast Ferry*, bejn lokalitajiet ohrajn f'Malta.

Is-Sejha inharget mill-Ministeru sabiex l-istess Ministeru jonora l-obbligi tal-Istat Malti taht il-*Maritime Cabotage Regulations*.<sup>1</sup> Fil-qosor, il-*Maritime Cabotage Regulations* jirrikjedu illi servizzi ta' *cabotage* bhal dawk bejn Malta u Ghawdex jinfethu ghall-kompetizzjoni biex b'hekk kull min hu interessat li joffri dan is-servizz ikollu l-opportunita` jaghmel offerta. L-ghan ahhari tal-*Maritime Cabotage Regulations* huwa li jiftah, ghal kompetizzjoni genwina, swieq li qabel kienu maghluqin. Ghandu jinghad ukoll, illi s-Sejha nharget bhala "Service Concession", u ghalhekk

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<sup>1</sup> Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States.

inharget ai termini tar-Regolamenti dwar Kuntratti ta' Koncessjoni (L.S. 174.10).

Fl-20 ta' April 2018, is-socjeta` appellanti ghamlet talba quddiem il-Bord ta' Revizjoni tal-Kuntratti Pubblici sabiex titlob rimedji, ai termini tar-regolament 98 tar-Regolamenti, qabel l-gheluq tas-Sejha.

Fil-qosor, Virtu Ferries Limited talbet lill-Bord sabiex:

- i. Jiddikjara illi perjodu ta' tlett xhur bejn l-ghotja tas-Sejha u l-bidu tal-provvista tas-servizzi mertu tas-Sejha huwa perjodu qasir wisq (L-“Ewwel Talba”);
- ii. Jiddikjara illi l-informazzjoni moghtija fis-Sejha mhijiex sufficjenti biex parti interessata li taghmel offerta tfassal “*Implementation Plan*” kif mehtieg skont is-Sejha (“It-Tieni Talba”);
- iii. Jiddikjara illi kuntratt ta' hames snin, li jinghata lill-operatur li jirbah is-Sejha, huwa qasir wisq (“it-Tielet Talba”);
- iv. Jiddikjara illi l-informazzjoni moghtija fis-Sejha dwar l-impjegati tal-operatur kurrenti, mhijiex sufficjenti tenut kont l-obbligu, ta' min jirbah is-Sejha, li jimpjega lil dawn l-impjegati (ir-“Raba' Talba”);

- v. Jistabilixxi data għida għall-gheluq tas-sejha (“il-Hames Talba”).

F’decizjoni mogħtija fit-23 ta’ Awwissu 2018 il-Bord iddecieda kif gej:

*“In view of the above, this Board:*

*“i) Upholds Virtu Ferries Limited’s first contention and instructs the Ministry for Transport and Infrastructure to extend the start-up period to be “within five months from the award of the concessions”;*

*“ii) Confirms that the Contracting Authority gave sufficient information for the Appellants to compile an “implementation plan”, however due to the prevailing circumstances and for the sake of safeguarding the principle of equal treatment, this same Board instructs the Appellants to identify the issues which they should have done at a much earlier stage and provided the information requested is prudent and can be divulged, obtain the same from the Ministry;*

*“iii) Does not uphold the Appellant’s third grievance and confirms that the stipulated concession period of five years is considered to be appropriate and equitable;*

*“iv) Upholds Virtu Ferries Limited’s fourth contention and instructs the Ministry for Transport and Infrastructure to provide the frame-work of any collective agreements presently in force;*

*“v) Instructs the Ministry to issue a new closing date for the submission of offers, after taking into consideration the conclusions arrived at, by this Board”.*

Is-sentenza li ta l-Bord hija s-segwenti:

**“This Board,**

**“having noted this Call for Remedies filed by Virtu’ Ferries Limited, (herein after referred to as the Appellants), prior to the Closing Date of Competition on 20 April 2018 refers to the contentions made by the same Appellants with regards to the Request for Proposals for a Public Service Concession of reference 5/2018 issued by the Ministry for Transport and Infrastructure and listed as Case No 1179 in the records of the Public Contracts Review Board.**

**“Appearing for the Appellants: Dr Adrian Mallia**

**“Appearing for the Contracting Authority: Dr Steve Decesare**

**“Appearing for Gozo Channel: Dr Antoine Cremona**

**“Whereby, the Appellants contend that:**

**a) “The period stipulated in the “*Call for Proposals*” for the commencement of services, is three months from the date of award of the contract. In this regard, the Appellants maintain that taking into account the nature of the service being requested, this period is too short and will limit the scope for competition;**

**b) “The Request for Proposals stipulates that Bidders had to submit an implementation plan which depicts how the services will be taken over from the incumbent operator. The Appellants insist that the details requested in such a plan consist of information which could only be in possession of the current operator, so that prospective Bidders were being handicapped. In this regard, Virtu’ Ferries Limited maintain that adequate information should be available for new Bidders to compile a proper implementation plan;**

**c) “The Request for Proposals stipulates that the successful Bidder will be awarded a contract for five years. The Appellants insist that this short period of time will not allow any new operator to recoup his investment outlay, so that the present operator has an advantage over incoming new Bidders;**

**d) “Since one of the conditions laid out in the RFP is that the successful new Bidder will be required to employ all the employees of the current operator, the Appellants maintain that they have not been given all the necessary information, in this regard, to establish the real costs involved of such a requirement.**

**“This Board has also noted the Contracting Authority’s “*Letter of Reply*” dated 8 May 2018 and also its verbal submissions during the Public Hearing held on 15 June 2018, in that:**

**a) “The Ministry for Transport and Infrastructure maintains that the period dictated for the commencement of services of three months is not too short, as the time frame refers to the time lag between the award of the contract and the commencement of operations. In this regard, the Contracting Authority contends that, in order to submit their offer, the Appellants would have undertaken all the preparatory arrangements and entered into agreements to commence work, once they are awarded the concession;**

b) “The Ministry insists that it had provided all the opportunities for Bidders to be provided with considerable information regarding the conventional service being provided at present. In addition, each Bidder had the right and opportunity available to attend site visits, attend Clarification meetings and submit requests for Clarifications. In this regard, the Appellants did not avail themselves of such opportunities to request clarifications;

c) “Although the Appellants did not provide evidence that the concession period of five years does not allow new Bidders to recover their investment layout, the Contracting Authority refers to the regulations issued by the European Union which stipulates that Contracts exceeding six years in duration do not normally meet the proportionality requirement.

d) “The Ministry for Transport and Infrastructure insist that the information provided with regards to employees was considerably detailed enough to allow the prospective Bidder to establish the labour costs involved, however, no request, for further information in this respect, was made by the Appellants.

“This same Board also noted the testimony of the witnesses summoned by Virtu’ Ferries Limited namely,

- 1) “Mr Matthew Portelli;
- 2) “Mr Joseph Muscat

“This Board would make reference to the Preliminary Plea raised by Gozo Channel, (an interested party,) whereby the latter is contesting the validity of the Appeal submitted by the Appellants, in that, it is being claimed that Virtu’ Ferries are not to be regarded as “*prospective candidates*” and thus are not eligible to file such an Appeal. In this regard, this Board, after having considered all the facts and circumstances of this appeal, opines that Virtu’ Ferries Limited are being considered as “*prospective candidates*” for this Request for Proposal (RFP) and as such Appellants have all the rights at law to file such an appeal and same be considered, on its merits, by this Board.

“This Board would also refer to the “*Preliminary Plea*” duly raised by Virtu’ Ferries Limited whereby the Appellants requested that additional written submissions be made by same, to make good for the limited time available during the Public Hearing. In this regard, this Board decided that, since all the information regarding the issues raised by the Appellants in their objection, is in the possession of this Board, all the points mentioned therein will be duly considered so that there is no justifiable need for further written submissions relating to this call for remedy.

**“This Board, after having examined the relevant documentation and heard submissions made by all interested parties, including the testimony of the witnesses, opines that the issues which are to be considered are:**

- **“Commencement Period of Services;**
- **“Implementation Plan;**
- **“Concession Period;**
- **“Establishment of Labour Costs**

**1) “Commencement Period of Services**

**“This Board is cognizant of the fact that this Request for Proposals is not to be treated as a *“run of the mill tender”* and one must take into consideration the type of service being requested which consist of a national service to the public at large, so that such a service must be performed in a smooth and professional manner. On the other hand, the Contracting Authority must ensure that such a service be uninterrupted, (except due to inclement weather) and operated by competent candidates, so that, it is the duty of the Authority to stipulate reasonable conditions in the running of operations to the benefit of the public. In doing so, the Authority stipulated that upon the award of the contract, the successful candidate must commence operations within three months from date of contract and in this respect; the Appellants are claiming that such a period is too short.**

**“It is a norm and accepted practice that any prospective Bidder prior to the submission of his offer, especially in this type of service, would have carried out the necessary field work consisting of memorandum of agreements, projections etc, so that once the successful bid is awarded, the Bidder can finalise all the arrangements to commence operations. This Board also acknowledges the fact that although prior arrangements for the start-up of operations would have been considered and calculated by the prospective Bidder, the actual conclusion of agreements and other preparatory work will necessitate adequate time to actually implement the requested operational procedures.**

**“At the same instance, this Board is highly aware of the fact that the present operator of the conventional service, who will be the only other competing Bidder, has an advantage which, due to prevailing circumstances exist and which cannot be avoided. In this regard, this Board opines that such an advantage can only be suppressed by stipulating conditions that will offer the disadvantaged Bidder more accommodating remedies, such as a longer period for the start-up of operations.**

**“This Board also considers the fact that the two possible Bidders are both, at present, operating one of the two services being requested in the proposal, so that both Bidders require the availability of an additional service to be able to submit their offer. In this regard, both Bidders will have a level playing field if a more practical date for the start-up of operations is established for the benefit of all the bidders and in this respect, this Board opines that a more convenient date would be five months from the award of the contract. At the same instance, this Board is convinced that such an extension of start-up period will not have any negative effect on the concession itself.**

**2) “Implementation Plan**

**“With regards to the Appellants’ Second Contention, this Board notes that, through the Request for Proposals, the Ministry for Transport and Infrastructure, quite appropriately, stipulated that an *“implementation plan”* be submitted with the offer, such a plan would represent the procedures to be adopted by the successful candidate, in providing the required services to include also the transition period of handover. It is also an established procedure that the plan will address such issues as labour force, time tables, trips, locations, fares, etc. Virtu’ Ferries Limited’s claim in this regard, is that they are not in possession of adequate information to enable same to submit such a reliable plan.**

**“This Board would respectfully point out that the implementation plan is meant to illustrate the *“modus operandi”* of the operational services which the successful candidate will adopt for providing the service and the information contained therein should be based and established by the prospective Bidder himself. It is acknowledged that since there exist an already established conventional service in operation, relative information from such an activity is vital to assess and establish costs for the same type of service being requested and in this regard, this Board opines that it is the responsibility and obligation of the Authority to provide such information to enable the Appellants to formulate the basis of their calculations. At the same instance, this Board would also point out that such vital information which is requested by the Appellants has not been identified or itemised.**

**“It is a fact that, in this Request for Proposals, there are only two prospective competing Bidders and one has an advantage over the other in the running of conventional service between Malta and Gozo whilst the other competing Bidder is well proficient in the operation of *“fast ferry service”*. The Request for Proposals is requesting the service for the operation of both activities so that each prospective Bidder requires data and knowledge on the activity which he is not presently operating and in this respect, a**



form of level playing field is present. At the same instance, this Board opines that the Ministry should provide adequate information to the Bidders to enable the latter to submit plans on reliable information. Although this Board is justifiably convinced that any lacking information being claimed by the Appellants should have been obtained through a request for clarifications, this same Board suggests that Virtu' Ferries Limited should seek clarifications from the Ministry for Transport and Infrastructure so that the latter will provide the requested information which is pertinent enough and which can be prudently divulged.

3) "Concession Period

"With regards to Virtu' Ferries claim that the concession period, as stipulated in the proposal, is too short to recoup the investment involved, this Board would refer to the objectives of the Directive relating to concessions in that, it is specifically emphasised that if the period of concession exceeds five years, then *"the maximum duration of the concession shall not exceed the time that a concessionaire could reasonably be expected to take to recoup the investments made together with a return on invested capital taking into account the investment required to achieve the specific contractual objectives."*

"This Board would also point out that concession periods exceeding five years must be justified by the concessionaire in that, it has to be proved that the recoupment of investment can only be achieved through such period in excess of five years. In this respect, this Board notes that the Appellants did not put forward their justification for such a request.

"At the same instance, it should be pointed out that throughout the Directive, it is emphasized that the duration of a concession exceeding five years must comfort the Contracting Authority that such an extension is indispensable for the concessionaire to recoup the latter's investment outlay, as well as to obtain a return on his investment. In this regard, this Board would have expected to be presented with a financial report justifying the number of years, the Appellants require to recoup their outlay together with a return thereon and such a statement was not presented with the Objection.

"This Board also considers the fact that the proposal is not imposing the purchase of vessels and chartering is also allowed so that an option of reducing the investment cost is also present. In this particular case, from the documentation made available to this Board and submissions made by the parties concerned, this Board cannot find any justifiable reason as to why the concession period of five years should be extended and at the same instance, this same Board opines that the stipulated period reduces the risk

of market foreclosure so that competition and open market are safeguarded. In this regard, this Board does not uphold Virtu Ferries Limited's third contention.

4) **“Establishment of Labour Force Costs**

“With regards to the Appellants’ fourth contention, this Board would, first and foremost, point out that the Request for Proposals is not imposing upon the prospective concessionaire to take over all the labour force currently employed with the incumbent operator presently running the conventional service. The Request for Proposal is inviting prospective concessionaries to compile and establish the level of manpower which is estimated to be required for the proper running of a conventional and fast ferry service between Malta and Gozo.

“In this regard, this Board notes that the Ministry for Transport and Infrastructure published a schedule showing the level and costs of the labour force currently employed with the incumbent service provider of the conventional service, so that the information of the level and costs of the labour force for the latter, has been provided by the Contracting Authority.

“At face value, it would seem that the published information is adequate for the prospective Bidder to calculate the labour costs involved, however, this Board opines that, it is a known fact that such a labour force enjoys a collective agreement and through the latter document, there are denoted benefits, increments, etc, which are most important to include and assess in compiling future costs along the concession period of five years. This Board is aware of the fact that such an information has to be obtained from third parties, however, the Contracting Authority is under an obligation to give the necessary information and guidance to prospective concessionaires for the latter to be able to submit a viable proposal and at the same instance, create a level playing field for the two possible prospective Bidders. In this regard, this Board opines that the details of the collective agreement presently enjoyed by the employees of the incumbent operator of the conventional service, be made available to the Appellants and in this respect, this Board upholds the latter’s fourth contention”.

Is-socjeta` Virtu Ferries Limited appellat minn din id-decizjoni. L-aggravju tas-socjeta` appellanti huma tlieta u jikkonsistu fis-segwenti:

a. Fir-rigward tal-Ewwel Talba, illi l-Bord filwaqt li korrettament iddecieda li l-*“start up period”* qasir ta' tlett xhur ma kienx konformi mal-ligi, erroneament, arbitrarjament u kontra l-provvedimenti tar-Regolamenti 98 tar-Regolamenti ddecieda illi l-perjodu ghandu jkun ta' hames xhur (“l-Ewwel Aggravju”);

b. Fir-rigward tat-Tielet Talba (“it-Tieni Aggravju”) illi l-Bord skorrettament ikkonkluda illi terminu ta' hames snin huwa mehtieg biss f'cirkostanzi straordinarji, illi skorrettament ghabba lill-kumpanija appellanti bl-oneru tal-prova, u fl-ahhar illi ghamel apprezzament hazin tal-provi prodotti;

c. Fir-rigward tal-Hames Talba, il-Bord minkejja t-talba espressa tal-kumpanija appellanti u minkejja l-provvediment tar-Regolament 103 tar-Regolamenti, naqas milli jstabilixxi data gdida ghall-gheluq tas-Sejha (“it-Tielet Aggravju”).

Wara li semghet it-tratazzjoni tad-difensuri tal-partijiet u rat l-atti kollha tal-kawza u d-dokumenti esebiti, din il-Qorti sejra tghaddi ghas-sentenza taghha.

Ikkonsidrat:

Fil-kuntest tal-ewwel aggravju, minkejja illi l-Bord qabel illi “*mobilization period*” ta’ tlett xhur, fil-kuntest ta’ din is-sejha, mhuwix sufficjenti, iddecieda illi dan il-perjodu ghandu jkun ta’ hames xhur. Is-socjeta` appellanti tissottometti wkoll li l-Bord kellu s-setgha jwarrab jew inehhi z-zmien koncess, izda mhux ukoll li jissostitwixxi terminu hu, b’dan li ghandha tkun l-awtorita` li taghmel it-tibdiliet necessarji.

Din il-Qorti ma taqbilx ma’ din l-ahhar sottomissjoni tas-socjeta` appellanti. Il-Bord jista’ jwarrab klawkoli fis-sejha li jidhirli li mhux adegwati u jikkoregi klawkoli partikolari, u hu precizament dan li ghamlet. Huwa qies li t-terminu ta’ 3 xhur biex dak li jkun jibda joffri s-servizz huwa qasir, u wara li ghamel analizi tac-cirkostanzi qies li t-terminu ta’ hames xhur ikun aktar gust. Il-Bord qies li z-zewg kumpaniji li ressqo proposti huma t-tnejn involuti fl-operat ta’ “*ferry service*”, b’mod jew iehor, u li allura ma jkunx jehtigilhom zmien twil hafna biex jibdeu joperaw. Il-Bord qies ukoll li z-zmien koncess ma ghandux, minn naha l-ohra, ikun ta’ detriment ghall-awtoritajiet koncernati.

Din il-Qorti tara li l-Bord, f’dan il-kaz, ezercita d-diskrezzjoni tieghu b’mod li ta vantagg lill-kompetitur l-iehor li gia jopera servizz ta’ transport minn Malta ghal Ghawdex. Il-facilitajiet tal-port gewwa c-Cirkezza u l-Imgarr, Ghawdex, inbnew biex iservu vapuri ezistenti, u mhux facli li jigu akkwistati vapuri godda jew sekonda manu li jkunu addattati ghall-

facilitajiet prezenti. Biex il-kompetizzjoni tkun wahda hielsa, kull offerent irid jitqieghed f'pozizzjoni li jista' jwettaq il-kuntratt, u min ikun gia qed jopera f'dak is-suq m'ghandux ikun preferut u l-vantagg irid jigi newtralizzat.

Wiehed irid ifakkar li d-direttiva in kwistjoni kienet giet ippubblikata snin ilu, u d-dewmien ghall-implimentazzjoni tal-istess mill-awtoritajiet koncernati m'ghandux iservi biex, f'daqqa wahda, il-materja ssir urgenti u jigu ppregjudikati terzi. Kollox, irid jitqieghed fil-kuntest tieghu, u biex operatur gdid fis-sitwazzjoni jithalla jidhol fis-suq, kif iridu r-regoli ta' kompetizzjoni gusta, irid jinghata zmien adegwat biex jarma ruhu.

Is-socjeta` appellanti tirreferi ghas-sitwazzjoni fid-Danimarka fejn hemmhekk il-*mobilisation period* stabbilit kien ta' sentejn. Ma saretx prova ta' dan, pero`, u lanqas ma intwera li c-cirkostanzi fiz-zewg pajjizi huma simili. Din il-Qorti tara li s-socjeta` appellanti ghandha gia esperjenza fit-tragitt marittimu, ghalkemm fuq linja differenti. Din il-Qorti trid tara kif tibbilancja l-pretensjoni tal-awtorita` kontraenti li ghandha interess tara li s-servizz ta' "*fast ferry service*" jibda jopera kemm jista' jkun malajr, u l-interessi ta' terzi, bhas-socjeta` appellanti, li verament jitpoggew f'sitwazzjoni fejn ikunu jistghu jikkompetu.

Fid-dawl tal-premess din il-Qorti tara li l-*mobilisation period* ghandu jkun ta' sena.

Fil-kuntest tat-tieni aggravju, is-socjeta` appellanti tissottometti illi biex tkun f'pozizzjoni tirkupra l-investment li trid taghmel jekk tinghata l-kuntratt, iz-zmien tal-kuntratt ghandu jkun izjed minn 5 snin. Fuq dan il-punt, din il-Qorti tara li t-talba taghha ghal kuntratt ta' aktar minn hames snin imur, f'certu sens, kontra l-ispirtu tar-Regolamenti.

Ir-Regolamenti huma bbazati fuq id-Direttiva. Huwa car mill-qari tad-Direttiva li awtorita` kontraenti tista' taghzel perjodu iqsar minn dak li jista' jkun necessarju biex koncessjonarju jigbor l-investimenti necessarji u profit. Infatti, preambolu 52 tad-Direttiva jipprovdi hekk:

*“The duration of a concession should be limited in order to avoid market foreclosure and restriction of competition. In addition, concessions of a very long duration are likely to result in the foreclosure of the market, and may thereby hinder the free movement of services and the freedom of establishment. However, such a duration may be justified if it is indispensable to enable the concessionaire to recoup investments planned to perform the concession, as well as to obtain a return on the invested capital. Consequently, for concessions with a duration greater than five years the durations should be limited to the period in which the concessionaire could reasonably be expected to recoup the investment made for operating the works and services together with a return on invested capital under normal operating conditions, taking into account specific contractual objectives undertaken by the concessionaire in order to deliver requirements relating to, for example, quality or price for users. The estimation should be valid at the moment of the award of the concession. It should be possible to include initial and further investment deemed necessary for the operating of the concession in particular expenditure on infrastructure, copyrights, patents, equipment, logistics, hiring, training of personnel and initial expenses. The maximum duration of the concession should be indicated in the concession documents unless duration is used as an*

award criterion of the contract. Contracting authorities and contracting entities should always be able to award a concession for a period shorter than the time necessary to recoup the investments, provided that the related compensation does not eliminate the operating risk. (enfasi ta' din il-Qorti).

Mill-premess jidher li koncessjoni twila trid tirrizulta "indispensabbli", b'mod li anke jekk terminu itwal huwa gustifikat, l-awtoritajiet kontraenti dejjem ghandhom il-fakolta` li jaghtu koncessjoni ghall-perjodu iqsar. Il-Ministeru f'dan il-kaz hass li perjodu ta' hames snin huwa bizzejjed meta tqies li s-servizz tal-*fast ferry* huwa servizz gdid (li wiehed ghadu jrid jara kif jirnexxi, kemm ser jiswa lill-Gvern u jekk huwiex vjabli), li l-Gvern ta' Malta ghandu pjani jiet ghal mina bejn Malta u Ghawdex u li l-Gvern mhux qed jitlob investiment f'bastimenti godda. Jista', per eżempju, jaghti l-kaz li hames snin oħra s-servizz jigi kompletament illiberalizzat u l-Ministeru jew jimponi dak li jissejhu "*public service obligations*" fuq kull min jixtieq joffri s-servizz jew johrog sejha gdida ghall-servizz iktar limitat (per eżempju bi tnaqqis tan-numru ta' tragitti jew bastimenti, jew minghajr rekwiżit lis-Servizz Konvenzjonali ghandu jinkludi wkoll it-trasport ta' karozzi ghax dawn ikunu jistghu juzaw il-mina). Din hija l-prerogattiva tax-xerrej – f'dan il-kaz il-Ministeru – u s-socjeta` appellanti ma tistax tiddetta l-kundizzjonijiet tas-sejha biex ikunu iktar adattati ghaliha.

Huwa interessanti li fil-kuntest tal-Cabotage Regulation tal-1992, il-Kummissjoni Ewropea wara ghaxar snin ta' applikazzjoni tal-istess regolament harget komunikazzjoni biex ticcara l-interpretazzjoni tagħha

ta' certi provizjonijiet tal-istess. Dwar it-terminu tal-kuntratti tipprovdi hekk f'paragrafu 5, 5.2:

*“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”.*  
(enfasi ta' din il-Qorti)

Ma jidhirx, ghalhekk, li jkun konformi mal-hsieb wara r-Regolamenti li jkun hemm perjodu twil. Vera li jissemma z-zmien ta' sitt snin, pero`, ic-cirkostanzi tal-materja kif spjegati jindikaw gustifikazzjoni ghat-terminu ta' hames snin.

F'kull kaz, ma saret ebda prova tal-investment li hu necessarju skont dak li qed titlob is-sejha, u ma gie pprezentat ebda *business plan* biex tissostanzja l-htiega ta' perjodu twil. Tressaq rapport minn ditta ta' accountants li jitkellem fuq il-htiega li min jiehu l-kuntratt ikollu bzon terminu twil biex jirkupra l-investment, izda din kienet konkluzjoni fuq informazzjoni li ghandha s-socjeta` appellanti, u ma saretx investigazzjoni oggettiva jew analizi tas-suq. Ma tressaqx studju dwar il-projezzjoni tal-



investment u zmien ikkalkulat biex tingabar l-ispiza u jkun hemm profit adegwat, studju li ma jkunx marbut mal-htigijiet jew xewqat tal-offerent partikolari.

Il-prova f'dan il-kaz kienet tispetta lis-socjeta` appellanti. Is-sejha offriet kuntratt ta' hames snin li gie muri li hu terminu ragjonevoli u konformi mal-hsieb wara d-Direttiva u l-interpretazzjoni li tat il-Kummissjoni Ewropea, kif gia intwera. Jekk is-socjeta` appellanti xtaqet li t-terminu ikun itwal, hi kellha tiggustifika t-talba taghha u mhux thalli l-kaz fuq semplici argument.

Ghalhekk, hija l-fehma ta' din il-Qorti li t-tieni aggravju tas-socjeta` appellant ma jirrizultax gustifikat.

Fil-kuntest tat-tielet aggravju, hu minnu li r-Regolament 103 jghid li fid-decizjoni finali tieghu l-Bord ghandu jstabilixxi d-data tal-iskadenza gdida ghall-prezentazzjoni tal-offerti; dan ma sarx mill-Bord li halla f'idejn il-Ministru biex jaghmel dan. Din il-Qorti, ghalhekk, trid tiffissa z-zmien ghall-gheluq tas-sejha. Mehud skont ic-cirkostanzi l-Qorti tiffissa l-jum tal-Erbgha, 6 ta' Marzu, 2019, fil-11.00am bhala l-jum u l-hin ghall-gheluq tal-offerti.

Ghaldaqstant, ghar-ragunijiet premessi, tiddisponi mill-appell ta' Virtu Ferries Limited, billi tilqa' l-istess in parte billi:

(i) tilqa' l-ewwel aggravju u tvarja d-decizjoni tal-Bord fir-rigward tal-ewwel talba billi filwaqt li tikkonferma illi l-perjodu ta' tlett xhur huwa qasir wisq, tiddikjara li l-perjodu relattiv ghandu jkun ta' sena;

(ii) tichad it-tieni aggravju tas-socjeta` appellanti fir-rigward tat-tielet talba u tikkonferma d-decizjoni tal-Bord fir-rigward;

(iii) tilqa' t-tielet aggravju fir-rigward tal-hames talba, thassar id-decizjoni tal-Bord fir-rigward, u tiffissa l-jum tal-Erbgha, 6 ta' Marzu fil-11.00am ghall-gheluq tas-sejha.

L-ispejjez ta' dan l-appell jithallsu terz ( $\frac{1}{3}$ ) mis-socjeta` appellanti Virtu Ferries Limited, iz-zewg terzi ( $\frac{2}{3}$ ) mill-appellat Ministeru ghat-Trasport, Infrastruttura u Progetti Kapitali.

Joseph Azzopardi  
Prim Imhalled

Joseph R. Micallef  
Imhalled

Tonio Mallia  
Imhalled

Deputat Registratur  
mb