



16 September 2025

**Public Contracts Review Board
Department of Contracts
Notre Dame Ravelin
Floriana VLT2000**

Dear Sirs,

Re: Concession Agreement for the Public Service Concession for the Provision of Passenger Ferry Services Between Malta and Comino dated 25 October 2019 (the Concession)

1. We have been instructed by **Ian Azzopardi** holder of identity card numbered 472277M trading as Bluewaves Watersports and Blue Waves Marine Company Limited (C98678) (the **Claimants**) to file this application to declare the Concession ineffective in terms of Regulation 113 of the Concession Contracts Regulations (**CCR**). The respondents to this application are Transport Malta and Comino Ferries Co-op Ltd.

A. Executive Summary

2. The Claimants seeks the nullity and ineffectiveness of the Concession. The Concession has been substantially modified because Transport Malta did not carry out contractual oversight and enforcement and because the conditions of the market were altered. Consequently, the economic balance in the Concession shifted in favour of the Concessionaire.
3. On this basis, the Concession should have been subject to a new tender procedure, and therefore, should be declared ineffective.

4. The Claimants bring forward 4 key grounds:
 - a. First, no ECO Vessels have been employed by the Concessionaire although this was an express obligation in the Concession (**D.1**);
 - b. Second, the berthing facilities at Blue Lagoon were not upgraded by Transport Malta (**D.2**);
 - c. Third, Government changed the parameters of the market *ex post* through restrictions it imposed on the Concessionaire's competitors (**D.3**); and
 - d. Fourth, the Concessionaire is not offering trips to Santa Marija Bay in Comino although this was an express obligation in the Concession (**D.4**).

5. The Claimants further reserve any right for compensation to which they might be entitled in terms of the law and any right to demand the imposition of any penalty on Transport Malta for its conduct.

6. The Claimants will set out this application as follows:
 - a. First, the Claimants will provide an overview of the factual background, including, the parties involved, the key terms of the Concession, the Concessionaire's vessels, the infrastructure at Blue Lagoon, the scheme implemented by Government in 2025 and the Concessionaire's schedule (Section B).
 - b. Second, the Claimants will set out the key legal principles underpinning substantial modifications and declarations of ineffectiveness (Section C).
 - c. Third, the Claimants will set out their case as to why the Concession should be declared ineffective (Section D).

B. Factual Background

B.1. The Parties

7. The Claimants offer maritime passenger transport services between Malta and Comino and between Malta and Gozo. The Claimants transport passengers to Blue Lagoon in Comino, amongst other locations.

8. Comino Ferries Co-Op is a co-operative established under the Co-operative Societies Act (the **Concessionaire**). The Concessionaire offers scheduled maritime transport services between Malta and Comino and between Malta and Gozo.

9. "Scheduled services" refers to those ferry services which operate according to a pre-established schedule, so that passengers know that every so often a boat departs or arrives at a particular time at the port.

10. According to Form B of the Co-operatives Societies Act, dated 18 June 2019, attached to the Concession, the Co-operative's members are:
 - a. Captain Morgan Leisure Limited, represented by Julian Zammit Tabona
 - b. Royal Cruises Company Limited, represented by Mark Anthony Bajada
 - c. Midas Shuttle Service Ltd, represented by Loreto Xuereb
 - d. JGS Cruises Ltd, represented by Joey Camilleri
 - e. Joseph Xuereb (0345179M)
 - f. Johnnie Spiteri (0025276G)
 - g. Samuel Camilleri (0111686M)
 - h. Daniel Camilleri (0047193M)
 - i. Annette Bajada (0020081G)
 - j. Diane Xuereb (0508293M).

11. More recently, the Claimants learnt that the composition of the members of the Concessionaire changed and are currently:
 - a. Captain Morgan Leisure Limited, represented by Julian Zammit Tabona
 - b. Royal Cruises Company Limited, represented by Mark Anthony Bajada
 - c. Daniel Refalo
 - d. Alfred Refalo
 - e. Johnnie Spiteri (0025276G).

12. The Authority for Transport in Malta (**Transport Malta**) is a body corporate with separate legal personality from the Government of Malta.¹ It is responsible, amongst other things, for the regulation of the transport of passengers by sea within territorial and internal waters of Malta. Further, Transport Malta has the function and power:
- a. *to provide, maintain, develop, improve and operate ports in Malta and any of their facilities, and to provide, maintain and operate therein and in the approaches thereto adequate and efficient services, and facilities as it may from time to time consider necessary or advantageous for the proper, safe and efficient functioning of such ports or as the Authority may otherwise deem it proper to provide in the public interest and to clean and clear any port or the approaches thereto;*²
 - b. *to promote the transport facilities of Malta and in particular the use of its ports and civil aviation facilities and the registration under the Malta flag of aircraft, ships, boats, yachts and vessels;*³
 - c. *to implement any European Community obligation relating to any matter falling within its functions.*⁴

B.2. The Concession

13. On 27 May 2019, Transport Malta issued a *Request for Proposals for a Public Service Concession Contract for the Provision of Passenger Ferry Services between Malta and Comino* with reference number TM_RFP001/2019 (**RfP**).⁵ Submissions to the RfP were to be made by 28 June 2019, but this term was extended to 2 July 2019. Transport Malta issued 6 sets of clarifications in connection with the RfP.

¹ Authority for Transport in Malta Act, Chapter 499 of the Laws of Malta, Article 12(1).

² *ibid*, Article 8(e).

³ *ibid*, Article 6(1)(c).

⁴ *ibid*, Article 6(1)(l).

⁵ C-2, Request for Proposals dated 27 May 2019.

14. Only the Concessionaire submitted an offer to the RfP. Transport Malta recommended the award of the RfP to the Concessionaire on 2 August 2019—just a month after the closing of the deadline for submission of bids.⁶
15. On 25 October 2019, Transport Malta and the Concessionaire signed the Concession with a commencement date for 25 January 2020.⁷
16. The Concessionaire was bound to “commence Operations in accordance with Schedule 1 of this agreement by the 25th January 2020 or within three (3) months from the signing of the Agreement, whichever comes first.”⁸ Therefore, the Concession came into effect on 25 January 2020.⁹
17. The Concession was for a term of 15 years¹⁰ from the date of signing and will expire on 25 October 2034.¹¹

(i) Transfer of Operational Risk

18. The Concession fell within the scope of the CCR. To do so, the Concession must involve the transfer of operational risk to the Concessionaire. The law expressly requires:

The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject-matter of the concession. The part of the

⁶ C-10, Schedule of Award dated 2 August 2019.

⁷ C-1, Concession Agreement.

⁸ *ibid*, Clause 16.1.

⁹ It must be said that in Q1 2020, a class of operators attempted to stop the coming into force of the Concession Agreement through a precautionary warrant of prohibitory injunction. The First Hall Civil Court in *Barbarossa Excursions Limited et vs Awtorità għat-Trasport f'Malta* rejected such a request, but did uphold a request to stop the coming into force of a Port Notice. The decision was issued on 14 February 2020 and bears reference 109/2020/1. In any case, this warrant of prohibitory injunction has since been revoked on 30 August 2024. However, the coming into force of the Concession was never suspended by a court order.

¹⁰ C-1, Concession Agreement, Clause 15.1.

¹¹ 15 years from 25 October 2019, being the date of signing.

*risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible.*¹²

19. The Claimants presume that Transport Malta carried out preliminary studies confirming that the Concessionaire will be bearing an operational risk.
20. The Concession does require the Concessionaire to make considerable investments, as shall be seen below, in consideration for the exclusivity rights given for 15 years.

(ii) ECO Vessels

21. The Concessionaire was bound to *immediately* employ “a minimum of one (1) brand new Eco vessel within the first year of operation from the signing of this Agreement and another brand new Eco vessel within eighteen (18) months of operation from the signing of this Agreement to operate this service with the specifications outlined in Schedule 6 to this Agreement (“the Vessels”).”¹³ The Concession also required that the ECO Vessels “are capable of a substantial reduction in emissions and higher propulsion efficiency than a conventional vessel having the same carrying capacity and characteristics”.¹⁴
22. Further, the ECO Vessels needed to be able to carry a minimum of 175 passengers.¹⁵
23. In fact, in Schedule 6 of the Concession, the Concessionaire indicated that it will employ 2 ECO Vessels which were to be built in 2020.¹⁶

¹² CCR, Regulation 2(1).

¹³ C-1, Concession Agreement, Clause 4.1.

¹⁴ C-5, Clarification Note 3, Reply to Question 4.

¹⁵ C-2, Request for Proposals dated 27 May 2019, page 16.

¹⁶ C-1, Concession Agreement, Schedule 6, page 35.

(iii) Concessionaire's Competition

24. As aforesaid, the Concession granted the Concessionaire "*the **exclusive right to provide scheduled passenger ferry services between Ċirkewwa/Marfa and Comino [...] from and to Landing Places indicated in the site plans***".¹⁷ The infrastructure at Blue Lagoon in Comino is one such Landing Place.
25. But, the Concession did not exclude: (i) the provision of other passenger ferry services to Comino or (ii) the provision of scheduled passenger ferry services to Comino from "*alternative routes not including the routes set out in the RFP*".¹⁸ The Concessionaire was expected to offer scheduled passenger ferry services on an exclusive basis, while dozens of other operators could have offered non-scheduled passenger ferry services to Comino, specifically Blue Lagoon, or even scheduled passenger ferry services using an alternative route.
26. While the provision of scheduled passenger ferry services on each of the routes designated in the Concession constitute a separate and distinct market, nevertheless, there is a degree of demand-side substitutability, in particular, with non-scheduled passenger ferry services to Comino. A passenger is likely to travel to Comino using a non-scheduled passenger ferry service, but then return to Malta or Gozo using the Concessionaire's scheduled passenger ferry service.
27. The Concessionaire was expected to compete with operators offering non-scheduled passenger ferry services to Comino, and thus, the Concessionaire was facing a "*real exposure to the vagaries of the market*".

¹⁷ C-1, Concession Agreement, Clause 1.1. See also C-4, Clarification Note 2, Question 1.3: "**Question 1.3 3.** *Will both existing or future private ferry service operators be permitted to operate a scheduled ferry service and unscheduled service to Comino?* **Reply to Question 1.3** *Yes, other operators operating other routes to Comino shall be allowed to operate as long as such Passenger Ferry Service does not stop to embark or disembark passengers from the same berthing points indicated in the RFP, that is only the chosen Passenger Ferry service provider with whom the Contracting Authority shall enter into a concession agreement shall be allowed to offer such Passenger Ferry Service between Ċirkewwa and Comino.*"

¹⁸ C-8, Clarification Note 6. See also C-4, Clarification Note 2, Reply to Question 1.3.

(iv) Investment in the Berthing Facilities

28. Further, Transport Malta was bound to invest in the berthing facilities, in particular, the berth at Blue Lagoon. This is so because: (i) Transport Malta expressly committed to do so in the RfP;¹⁹ and (ii) the RfP constituted an integral part of the Concession and has the same binding effect.²⁰
29. The berthing facilities were not exclusively allocated to the Concessionaire. But, the Concessionaire was granted priority berthing rights. Therefore, the Concessionaire's vessels would take priority over the vessels operated by third parties.

(v) Santa Marija Bay

30. The Concession imposed a timetable on the Concessionaire. The Concessionaire was required to depart and arrive at specific locations, amongst other, at Santa Marija Bay in Comino, according to a minimum schedule.

B.3. Concessionaire's Vessels

31. Based on the Concessionaire's website,²¹ the Concessionaire operates the following vessels:
- a. Awesome I
 - b. Awesome II
 - c. Awesome III
 - d. Awesome IV
 - e. Babella I
 - f. Babella II
 - g. Midas I
 - h. Midas Express

¹⁹ C-2, Request for Proposals, Section 4, Clause 3, page 27. ("Following the investment to the berthing facilities by the contracting authority, the successful Proponent will take responsibility for any berthing facilities pursuant to this RFP process [...]")

²⁰ C-1, Concession Agreement, Clause 201.1.

²¹ C-11, Comino Ferries Co-Op Website, About Us <<https://cominoferries.com/about-us/>>.

- i. Royal I
 - j. Royal II
32. None of these vessels are ECO Vessels and all were built prior to 2020. None of them can carry 175 passengers.

B.4. The Jetty at Blue Lagoon, Comino

33. Pursuant to Transport Malta's obligation to invest in the berthing facilities, on 20 May 2020 Transport Malta submitted a development planning application with the Planning Authority in order to install a demountable Pier structure instead of the present concrete quay in the Blue Lagoon.²² The reference of that application is PA/04833/20.
34. Transport Malta's external consultants acknowledged, in documentation submitted to the Planning Authority, that the current infrastructure at Blue Lagoon *"is by far too small to cater for such large volumes of people visiting the island today"*.²³ The same document concludes that the infrastructure is necessary such that *"[a]ll water taxis and other vessels will have a designated mooring location adequacy distant from the designate swimming zone, thus avoiding having any vessels maneuvering close to the swimmers"*.²⁴ This echoes the obligations undertaken by Transport Malta itself to invest in the berthing facilities.²⁵
35. However, the Environment and Resources Authority, as consultee in the planning process, raised various issues with the proposed development.
36. In March 2025, it was publicly reported that Transport Malta and Infrastructure Malta formally withdrew the development planning application at issue.²⁶

²² C-12, Development Planning Application.

²³ C-13, Doric Studio, Project Description Statement, page 2.

²⁴ *ibid*, page 4.

²⁵ See above paragraph 15.

²⁶ C-14, Malta Today, Plans for 136-metre Blue Lagoon pier abandoned, 18 March 2025 <https://www.maltatoday.com.mt/environment/planning/134082/plans_for_136metre_blue_lagoon_pier_abandoned>; C-15, Screenshot from Planning Authority Website.

B.5. The 2025 Scheme

37. In February 2025, the Minister responsible for Tourism declared that the Government plans to cap visitors to Blue Lagoon, Comino.²⁷
38. On 26 February 2025, Transport Malta issued an expression of interest for the operation of commercial transport services to Blue Lagoon (**EOI**).²⁸ The objective of this EOI was to determine the interest from the private sector and gather information to support the Authority in formulating a regulatory framework governing passenger ferry services to Blue Lagoon. Further, Transport Malta reserved the right to “*determine the maximum number of operators and/or trips permitted as part of its regulatory mandate.*”²⁹ Operators were instructed to submit their response on an online form.³⁰
39. On 25 April 2025, Transport Malta issued a Port Notice³¹ listing the commercial vessels which are permitted to carry passengers to Blue Lagoon, Comino. This Port Notice followed the EOI. The Port Notice further provided that:

any passenger wishing to go ashore is to purchase a QR code from the Access Management System (AMS). The AMS is a web-based platform that allows visitors to reserve a free QR code for timed access to the Blue Lagoon, ensuring sustainable visitor management.

*Access to the AMS can be obtained by visiting the following website:
www.blcomino.com.*

²⁷ C-16, Times of Malta, Watch: Comino capping to start from summer: ‘Plan is to reduce numbers by half’ <<https://timesofmalta.com/article/watch-comino-capping-start-summer-plan-reduce-numbers-half.1105601>>.

²⁸ C-17, Expression of Interest.

²⁹ *ibid.*

³⁰ C-18, EOI Response <<https://forms.office.com/Pages/ResponsePage.aspx?id=9dnNNLhdvEmsugH2XMpoDVG5-8hfRY5EoEuX0IzAQYIUQU5DSEw1NTZKQzFPT09GRzFMRUhYT0E0MC4u>>.

³¹ C-19, Port Notice 3 of 2025.

On-Site Access and Entry includes showing the QR code to the Authority's gatekeepers who will scan it and issue a wristband for the time slot that has been booked.

The Authority's gate keepers will be placed at key locations in the Blue Lagoon area to ensure an orderly process.

40. This Port Notice was followed by a Local Notice to Mariners issued on 28 April 2025.³² But, the Port Notice was revoked on 3 May 2025.³³
41. On 16 May 2025, Transport Malta issued yet another Port Notice³⁴ which was substantially identical to the Port Notice of 25 April 2025. This Port Notice was followed by a Local Notice to Mariners issued on 16 May 2025.³⁵
42. Government decided to cap visitors to Blue Lagoon to 12,000 per day. These were split over 3 slots: (i) 07:00 – 13:00; (ii) 13:30 – 17:30; (iii) 18:00 – 22:00.³⁶ Each prospective visitor, or rather passenger, has to book a QR code with the allocation still available for a given slot.
43. But, on the other hand, passengers being carried by the Concessionaire are not subject to such limitations. First, the capping of 4,000 per slot does not apply equally the Concessionaire. The Concessionaire enjoys from a reserved capacity in each slot. Second, the QR Code is automatically allocated to the passenger when purchasing the ticket with the Concessionaire. This is confirmed by the Concessionaire's own marketing which states: "*Important Notice: Travel Tip: Comino Ferries is the official ferry to Blue Lagoon, Comino. Your boarding pass includes entry to Comino — no extra QR needed.*"³⁷
44. As of 16 May 2025, Transport Malta has altered the conditions of carriage of passengers into Blue Lagoon. The Concessionaire has been granted additional rights over its competitors, being,

³² C-20, Local Notice to Mariners No. 49 of 2025.

³³ C-21, Revocation of Port Notice.

³⁴ C-22, Port Notice 5 of 2025.

³⁵ C-23, Local Notice to Mariners No. 63 of 2025.

³⁶ C-24, Team Blue Lagoon, FAQs <<https://blcomino.com/faqs/>>.

³⁷ C-11, Comino Ferries Co-Op Website, About Us <<https://cominoferries.com/about-us/>>.

operators offering (i) non-scheduled passenger ferry services; and (ii) scheduled passenger ferry services on alternative routes, which are not part of the Concession.

B.6. Concessionaire's Schedule

45. To date, according to the schedule operated by the Concessionaire, the Concessionaire is not offering transport services to or from Santa Marija Bay in Comino.³⁸ The Concessionaire offers its services to and from Marfa, Ċirkewwa in Malta, Blue Lagoon in Comino, and Mġarr in Gozo.

C. Ineffectiveness of Contracts and Substantial Modifications

46. The main objective of the EU public procurement acquis is the dismantling of national barriers between Member States to guarantee the free movement in internal market even in the instances where government purchases. The Courts of Justice of the European Union has advocated this objective by developing and expanding the so-called fundamental general principles of public procurement which emerge from the EU Treaties: equal treatment, transparency, non-discrimination, proportionality, self-limitation, and promotion of genuine competition. These principles are now enshrined in the law as statutory duties on contracting authorities as per Regulation 60 of the CCR.
47. The premise, in its simplest form, is that if a contracting authority procures only after the issue of a properly advertised open, non-discriminatory and fair competitive tender which is transparently administered and evaluated—that contracting authority would comply with its core statutory obligations.

(i) Substantial Modification

48. A contracting authority also cannot substantially modify a concession agreement, which was awarded following a competitive tender process, "*without a new concession award procedure*".³⁹ This stands to reason. It would have been pointless for the legislator to require that concessions

³⁸ C-25, Comino Ferries Schedule.

³⁹ CCR, Regulation 85(1).

are awarded by way of a competitive tender process, but then allow such concessions, after being tendered, to be modified.

49. In fact, *"any modification carried out against [the CCR] shall be deemed to be founded on unlawful consideration and the concessionaire shall have no right for compensation with respect to that modification unless he shows that he was unaware about such irregularity"*.⁴⁰ As a matter of law, a contracting authority may terminate a contract at any time which has been modified substantially without a new concession award procedure.⁴¹
50. A change to a contract may considered as a "substantial modification", for example, where it *"changes the economic balance of the concession in favour of the concessionaire in a manner which was not provided for in the initial concession"*.⁴²

(ii) Non-Compliance with Contractual Obligations

51. Further, a contracting authority is duty bound to ensure that the conditions of a contract are honoured by the concessionaire, and if the concessionaire is in default, the contracting authority should take all necessary steps, including termination and seeking damages.⁴³ The contracting authority's duty to enforce the conditions of contract is founded from the statutory duty to treat all bidders equally.⁴⁴
52. In certain cases, a concessionaire's failure to comply with a material obligation of the contract, and the contracting authority's failure to police it, is tantamount to a substantial modification. This is so, in particular, because *"the economic balance of the concession [is changed] in favour of the concessionaire in a manner which was not provided for in the initial concession"*.

(iii) Declaration of Ineffectiveness

⁴⁰ *ibid*, Regulation 90.

⁴¹ *ibid*, Regulation 94(1)(a).

⁴² *ibid*, Regulation 85(5).

⁴³ *Medbiologix Company Limited vs Ultramap Ltd et*, Court of Appeal (14 March 2024) [Ref. 625/23/1], para 36.

⁴⁴ CCR, Regulation 60(1).

53. The application for the declaration of ineffectiveness is a relatively recent addition within the EU public procurement acquis, but one which is fully compatible and consistent with the main objective of maintaining free movement and which provides a sanction where contracting authorities award public contract in breach of their statutory obligations to treat bidders equally, to act transparently and to promote genuine competition.
54. This remedy was introduced by *Directive 2007/66* [...] with regard to improving the effectiveness of review procedures concerning the award of public contracts and the recitals of that Directive explained the rationale behind its introduction:

(13) In order to combat the illegal direct award of contracts, which the Court of Justice has called the most serious breach of Community law in the field of public procurement on the part of a contracting authority or contracting entity, there should be provision for effective, proportionate and dissuasive sanctions. Therefore a contract resulting from an illegal direct award should in principle be considered ineffective. The ineffectiveness should not be automatic but should be ascertained by or should be the result of a decision of an independent review body.

(14) Ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete. [...]

55. The recitals of this Directive are self-explanatory: the declaration of ineffectiveness of a public contract has been designed to be the tool which allows interested parties to open up competition where contracting authorities have closed it by way of a direct order.
56. In the case of the CCR, it is not possible to award a concession through a negotiated procedure without prior publication. Yet, there were instances in the past where Government awarded a concession directly without a competitive tender process.⁴⁵

⁴⁵ For example, *Godwin Cutajar et vs Awtorità għat-Trasport f'Malta et*, Court of Appeal (27 October 2021) [Ref. 229/21/1].

57. Further, the declaration of ineffectiveness may be resorted to where a concession is substantially modified without a new competitive tender process.
58. It is further submitted that a concession which has been substantially modified without a competitive tender process is null and void *ex tunc* as a matter of Maltese law.

D. The Concession is Ineffective

59. The Claimants are putting forward an application for a declaration of ineffectiveness of a concession contract, namely, the Concession, inclusive of any addenda or side letters.
60. The Claimants argue that the Concession is ineffective because: no ECO Vessels have been employed by the Concessionaire (**D.1**); the berthing facilities at Blue Lagoon were not upgraded by Transport Malta (**D.2**); Government changed the parameters of the market *ex post* (**D.3**); and the Concessionaire is not offering trips to Santa Marija Bay in Comino (**D.4**).

D.1. First Ground: No ECO Vessels have been employed by the Concessionaire

61. The Concession should be declared ineffective because the Concessionaire has failed to employ 2 ECO Vessels.
62. To date, none of the vessels operated by the Concessionaire constitute ECO Vessels. Therefore, the Concessionaire is in default of this material obligation in the Concession. The Claimants also presume that Transport Malta has not attempted to enforce this material obligation.
63. The employment of the 2 ECO Vessels was a material obligation imposed on the Concessionaire, and presumably, part of Transport Malta's *ex ante* assessment on the transfer of operational risk onto the Concessionaire. If the Concessionaire is freed from this obligation, this would remove the transfer of operational risk and change the economic balance of the Concession in favour of the Concessionaire. This would constitute a substantial modification which would have required a fresh competitive tender process.

64. Further, Transport Malta, as a contracting authority, is bound to enforce all material obligations of the Concession pursuant to the general principles of public procurement law and principles of good administration.

65. Therefore, for the above-mentioned reasons and others that may be brought in due course, the Concession should be declared ineffective.

D.2. Second Ground: Berthing Facilities were not upgraded by Transport Malta

66. The Concession should also be declared ineffective because Transport Malta has failed to invest in the berthing facilities at Blue Lagoon, Comino.

67. As explained, Transport Malta had undertaken to invest in the berthing facilities at Blue Lagoon. It presumably did so because: (i) the Concessionaire has been granted priority berthing rights over such facilities; and (ii) on that basis, the current berthing facilities at Blue Lagoon are not adequate to cater for the Concessionaire and other operators transporting passengers to Blue Lagoon.

68. But, Transport Malta completely abandoned this undertaking. To date, the berthing facilities at Blue Lagoon remain the same.

69. Given Transport Malta's failure, the Concessionaire has been granted *de facto* exclusivity to the berthing facilities at Blue Lagoon. This was not something that was originally envisaged in the RfP or in the Concession.

70. This removes the transfer of operational risk and changes the economic balance of the Concession in favour of the Concessionaire. This would constitute a substantial modification which would have required a fresh competitive tender process.

71. Therefore, for the above-mentioned reasons and others that may be brought in due course, the Concession should be declared ineffective.

D.3. Third Ground: Government changed the parameters of the market

72. The Concession should also be declared ineffective because Government changed the parameters of the market *ex post*.
73. Just 5 years in the Concession, Government decided to alter the conditions and parameters of the markets in which the Concessionaire operates.
74. The Concessionaire has been given preferential treatment, and in certain respects, immunity from Government's legislative and policy choice of restricting numbers at Blue Lagoon.
75. While on the other hand, Government has elected to restrict all other operators, whether of non-scheduled passenger ferry service or scheduled passenger ferry service on alternative routes, by imposing a collective cap on the passengers which may be transported to Blue Lagoon and certain requirements on QR codes.
76. This change in the law and policy fundamentally alters the transfer of operational risk which was meant to have been transferred to the Concessionaire. The Concessionaire has been shielded from "*the vagaries of the market*" and the economic balance has been tilted in its favour.
77. This would constitute a substantial modification which would have required a fresh competitive tender process.
78. Therefore, for the above-mentioned reasons and others that may be brought in due course, the Concession should be declared ineffective.

D.4. Fourth Ground: No Trips to Santa Marija Bay

79. The Concession should be declared ineffective because the Concessionaire is not offering trips to and from Santa Marija Bay in Comino.

80. To date, according to the schedule operated by the Concessionaire, the Concessionaire is not offering transport services to or from Santa Marija Bay in Comino.⁴⁶ The Concessionaire offers its services to and from Marfa, Ċirkewwa in Malta, Blue Lagoon in Comino, and Mġarr in Gozo.
81. The Concession expressly required the Concessionaire to include, within its schedule, trips to Santa Marija Bay in Comino.⁴⁷
82. The inclusion of Santa Marija Bay within the Concessionaire's schedule was a material obligation imposed on the Concessionaire, and presumably, part of Transport Malta's *ex ante* assessment on the transfer of operational risk onto the Concessionaire. If the Concessionaire is freed from this obligation, this would remove the transfer of operational risk and change the economic balance of the Concession in favour of the Concessionaire. This would constitute a substantial modification which would have required a fresh competitive tender process.
83. Further, Transport Malta, as a contracting authority, is bound to enforce all material obligations of the Concession pursuant to the general principles of public procurement law and principles of good administration.
84. Therefore, for the above-mentioned reasons and others that may be brought in due course, the Concession should be declared ineffective.

E. Right for Compensation and Penalty

85. The Claimants reserve any right for compensation to which they might be entitled in terms of the law and any right to demand the imposition of any penalty on Transport Malta for its conduct.

⁴⁶ C-25, Comino Ferries Schedule.

⁴⁷ C-1, Concession, Schedule 1.

THEREFORE, for the above-mentioned reasons and for other reasons which will be brought during the proceedings, the Claimants humbly demand that this Honourable Board declares that the Concession, inclusive of any addenda or side letters, signed between Transport Malta and the Concessionaire is ineffective.

Yours sincerely,

Ganado Advocates



Adv. Clement Mifsud-Bonnici



Adv. Calvin Calleja

Adv. Laura Spiteri

Service:

1. **Transport Malta Malta Transport Centre, Triq Pantar, Hal Lija LJA 2021, Malta**
2. **Comino Ferries Co-Op Ltd, Triq Il-Marfa, Ċirkewwa**