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Study on the Implementation of the European Regulation (EC) N° 1370/2007 on public passenger transport services by rail and by road of 23 October 2007

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Public transport is essential to the daily life of Europeans. Fully sustainable, public transport limits congestion in towns and damage to the environment. It is a decisive influence both on the quality of life and competitiveness. It contributes to social and territorial cohesion within the European Union (EU). Investment in public transport is now often considered essential.

And yet, the lack of clear legal arrangements has discouraged investment in this sector. The former Community framework dated back to 1969 and clearly no longer responded to current needs. Over the last 40 years mobility needs have increased and the organization of communities has evolved. The increasing number of cases concerning public transport brought before the European Court of Justice is a source of legal and economic insecurity. The solution has become muddled, and therefore paralysing for local authorities and transport companies.

The new Regulation 1370/2007 on public passenger transport services by road and rail that the European Parliament and the Council have adopted on 23rd October 2007[1] aims at setting a clear legal framework, which should give authorities the means to define and finance public transport services suited to their needs.

Together with the clear need to improve the efficiency and quality of services, it is based on an approach that is simpler and more flexible and that leaves more space to transparency and subsidiarity. In particular, this new Regulation makes the conclusion of public service contracts between the authority and the operator almost everywhere mandatory. It defines the rules for the introduction of competition but it also introduces the recognition that competent authorities have the option of providing public transport services themselves, or via an internal operator, without a competitive tendering procedure. However, this possibility is strictly dependent on greater transparency, precise criteria applicable to the calculation of the amount of compensation and geographical limitation of the activity of the internal operator.

This Regulation has entered into force in December 2009, except for the rules concerning the awarding of contracts which will only come in force ten years later and will cover all modes of land passenger transport (train, metro, bus, tram). It was widely expected and will offer a wide range of choices to be made and possibilities for organizational set-ups.

The following study will provide a thematic analysis of the new European legal framework in the context of major transport authorities, members of EMTA. In order to do so the study will provide:

- A short reminder about the former Regulation which remained in force until December 2009 and as often as required a comparison between the former situation and the new legal framework;
- An analysis on the way the subsidiarity principle is implemented in the new Regulation (including definition of public service obligations, definition of competent authorities, options concerning organizational forms of the public transport services);
- A part dedicated to the obligation to sign a contract between authority and operator;

[1] OJ L 315, 3.12.2007, p. 1.

- A part dedicated to the minimum content of the contract laid down by the new Regulation (this major part of the study will include transparency issues, duration, calculation of compensations, social conditions…);
- A part dedicated to the rules concerning the award of the contract (this major part of the study will include conditions for direct award to an internal operator and articulation with public procurement Directives);
- An analysis of the transitional period mechanisms (including reciprocity issue).

As a matter of fact, some Member States have already opened to competition their transport markets, or parts of their markets and have a large experience in contract related issues. With varying approaches in place among EMTA members, and with differences in the extent of implementation to date, a range of experiences are available for study. In order to discuss and evaluate the pros and cons of the various options offered by this new legal framework the study will also provide an analysis of a selected number of local situations related to the main thematic issues. These examples, best practices or case studies will illustrate in a concrete way the main impacts of the new Regulation in order that public authorities avoid major mistakes and apply best practices broadly across the E.U.

1

1 Short analysis of the former Regulation

In sectors such as air or maritime passenger transports, since 1992 Community legislation already requires competitive tendering for public service contracts.

In inland transport, Community legislation was restricted to imposing strict methods of calculation for the amount of public service compensation pursuant to Article 73 of the Treaty.

This Article was mainly implemented by Regulation (EEC) No 1191/69[2] on public services in transport by rail, road and inland waterways[3].

The economic environment of the inland public transport sector has changed profoundly since the adoption of this Regulation in 1969, especially with the development of a real international market for the provision of public transport services.

The new Regulation 1370/2007 has been adopted in order to take into account the evolutions in this sector; it replaced Regulation 1191/69 and Regulation 1107/70 that remained in force until December 2009. That is why, before the analysis of the new Regulation, it appears important to have a brief overview on Regulation 1191/69.

1.1 A Regulation aiming at solving mainly under compensation issues in a monopoly context

Regulation 1191/69 was first drafted to tackle a situation in which railway operators were expected to fulfil public service obligations without being able to say "no" and without receiving compensation. It was an unusual piece of Community legislation because it defined situations under which Member States were required to pay state aid. Its objective was to ensure that operators received a proper level of compensation, while at the same time ensuring respect for Community state aid law. It therefore laid down a set of rules to ensure that competent authorities paid neither too much, nor too little compensation. These rules, defined in 1969, were to be found in sections II-IV of the Regulation.

1.2 A Regulation where contracts were not compulsory

At first, Regulation 1191/69 only allowed for a single type of public intervention in public transport. This was the maintenance (or creation) of an imposed public service obligation. The Regulation was modified in 1991. Regulation 1893/91 expanded the Regulation to deal with situations in which the operator could say "no": that is to say, freely agreed public service contracts. In case a contract was signed between the authority and the operator the rules in sections II-IV that avoided operators receiving too little compensation were therefore no longer needed. If an operator thought the compensation offered was too low, he needed not agree to the contract. By contrast, the rules in sections II-IV that prevented operators from receiving too much compensation were still needed. If an operator received more compensation than allowed by these rules, this was overcompensa tion. Whether the context was an imposed public service obligation or an agreed public service contract made no difference – too much compensation was still too much.

In the urban and regional public transport sector, Regulation 1191/69 provided a derogation to contract obligation[4]. This derogation progressively appeared to be scarcely compatible with the transparency and non-discrimination required by an increasingly open market. That is one of the main reasons why Regulation 1191/69, modified in 1991, has been considered outdated.

[2] Regulation (EEC) No 1191/69 of the Council of 26 June 1969 (OJ L 156, 28.6.1969, p. 1) on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway. Regulation last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p.1).

[3] Article 73 of the Treaty was also implemented by Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway.

[4] Reg. 1191/69, Article 1(1) and (5) for urban, suburban or regional services.

The new Regulation 1370/2007 makes public service contracts almost compulsory as soon as exclusive rights or financial compensations are awarded. Former rules preventing operators from receiving too little compensation have disappeared. Rules preventing operators from receiving too much compensation remain and are to be found in Article 4 and in the new Regulation Annex. In this specific area, the 1969 Regulation clearly inspired the new Regulation. This similarity between rules preventing operators from receiving too much compensation in the former and in the new Regulation was recently confirmed by the European Commission itself in the final decision the Commission adopted concerning state compensation system for Danske Statsbaner[5].

Danske Statsbaner (DSB) is the incumbent rail operator in the Danish passenger transport sector. The company operates a major part of the Danish rail network on the basis of public-service contracts, which were concluded with the Danish Ministry of Transport without prior public tendering.

The DSB case involved existing transport aid that had been abolished prior to the entry into force of Regulation 1370/2007. In this case the European Commission based the assessment of already abolished existing aid on Regulation 1370/2007 rather than on Regulations 1191/69 and 1107/70.

On the basis of Regulation 1370/2007, the European Commission has checked that the compensation paid by the government was limited to what was strictly necessary to cover costs related to various public service obligations. However, the Commission notes that even if the compatibility of the aid in the present case would have been assessed on the basis of the regulations in force at the time when the aid was granted, namely Regulations 1191/69 and 1107/70 the material outcome would be the same.

This confirms that Regulation No 1370/2007 broadly follows the Commission's previous practice in the field.

1.3 A Regulation that left the competitive tendering or direct award question unsolved

The 1969 Regulation, amended in 1991, did not state how public service contracts should be awarded and, in particular, if they should be put out to competitive tendering.

Until recently, given the absence of international competition, the EU had scarcely been concerned by how public service contracts were awarded for inland public transport. In 2003, the Court of Justice judgment in the Altmark Trans GmbH case[6] confirmed, among other things, that an international market for the provision of local transport services[7] was developing. It became fundamental that the new Regulation cover market forces, including for regions and towns, to ensure transparency in the award and execution of public service contracts. The purpose of such rules was to free compensations granted without competitive tendering from suspicion of State aid.

1.4 Short summary of the main rules in Regulation 1191/69, as modified in 1991

The scope

a) The Regulation applied when an authority established a public service obligation in public transport.

[5] See point 398 in Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)). OJEU 11 January 2011, p.1
http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2011:007:SOM:EN:HTML

[6] Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH.*

[7] *Altmark judgment, points 77 to 82*

b) There was no exemption for in-house service providers. Under Community law, in-house service providers were undertakings[8]. They fell under the scope of Regulation 1191/69, which applied to *"transport undertakings which operate services in transport by rail, road and inland waterway"*[9]. In the context of Regulation 1191/69, the "*contract*" concept was interpreted to include agreements between authorities and service providers, who did not have the same legal personality – even if these agreements could not be legally binding.

The definition of public service obligations

c) The Regulation laid down three types of public service obligation: the obligation to operate, the obligation to carry and the tariff obligation[10].

This list was exhaustive[11]. Authorities could only intervene in the provision of public transport, if the requirements could be expressed in one of these three ways. These were the only requirements for which they could pay compensation.

Concerning tariff obligation, authorities were allowed to define reduced fares for certain routes or certain passenger categories. However, authorities could only set reduced fares for all passengers if they retained fare revenues themselves.

If an authority wished to set fares for all passengers without retaining the fare revenues, this obligation fell outside the provisions of Regulation 1191/69. Article 2 (5), concerning tariff obligations, only covered fares applied to "*certain categories of passenger… or on certain routes*". It referred to "*special tariff provisions*". It did not cover "*obligations arising from general measures of price policy applying to the economy as a whole*", nor "*measures taken with respect to transport rates and conditions in general with a view to the organisation of the transport market or a part thereof*". Therefore, Article 2 (5) did not cover fare obligations affecting all passengers. However, fare obligations covering all passengers remained potentially compatible with Community law because they were subject to Regulation 1107/70[12]. Compensation could be paid if it fulfilled the conditions laid down in the Altmark case. If not, payments required prior notification to the Commission.

The use of public service contracts and imposed public service obligations

d) Public service obligations normally had to be incorporated in a public service contract. It had to define provided service quality and penalties in case of failure to comply with the contract.

[8] See the Court's ruling in *Höfner*, C-41/90, point 21
[9] Art. 1(1), first subparagraph
[10] Art. 2(3)-2(5)
[11] Art. 2(2): "*Public service obligations within the meaning of paragraph 1 consist of the obligation to operate, the obligation to carry and tariff obligations.*"
[12] Article 3 of Regulation 1107/70 states:
"Without prejudice to the provisions of… Council Regulation (EEC) No 1191/69…, Member States shall… [not] impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article [73] of the Treaty except in the following cases or circumstances:
… 2) … where payments are made to rail, road or inland waterway undertakings as compensation for … tariff obligations not falling within the definition given in Article 2(5) of Regulation (EEC) NO 1191/69".

e) As an alternative to public service contracts, public service obligations could be imposed on an operator if the obligation affected only urban, suburban or regional services. In addition, a tariff obligation in favour of specific passenger categories could be imposed for any type of service. Member States had to keep the Commission informed of compensation payments made for imposed public service obligations.

The compensation calculation

f) The Regulation laid down rules for calculating "economic disadvantage". The main points were:

   i. For each service subject to an obligation to operate, the economic disadvantage was the cost of providing the service minus the revenue earned.

   ii. Allocating rules for shared asset costs, shared overhead costs and shared revenues were set in advance.

g) Having calculated the amount of economic disadvantage, authorities assessed whether the operator's costs reflected *"efficient management of the undertaking and the provision of transport services of an adequate quality"*. If not, they adjusted the amount downward to reflect this.

h) In case of imposed public service obligations, the payment of compensation was compulsory. The payment equalled the amount of economic disadvantage, adjusted if necessary for poor efficiency or low quality.

i) In case of public service contracts, the amount of compensation followed the terms of the contract. However, it could not exceed the amount of economic disadvantage, adjusted if necessary for poor efficiency or low quality. To do so would have meant overcompensation.

j) The amount of compensation payment had to be derived from rules set in advance. Retrospective deficit compensation was not permitted. For imposed public service obligations, compensation payment had to be set for at least a year in advance, paid in instalments and adjusted immediately after the closure of the operator's annual accounts.

Accounting requirements, treatment of profits and losses

k) Operators had to set up separate accounts for each individual public service contract or imposed public service obligation.

l) Operators could earn a reasonable profit in fulfilling public service obligations. Any further profit had to remain within the relevant account and could not be used for other purposes.

m) A service could be subject to a public service obligation that did not cause economic disadvantage. If conditions changed and such

a service incurred a loss, the operator could require that the authority either ended the obligation or paid compensation.

n) If a service already subject to compensation incurred a loss, the authority could not make ad hoc payments to cover the loss. The operator could not cross-subsidise the service from another account.

o) There was one partial exception to these rules. If all activities of an undertaking were subject to public service obligations, it did not need setting up separate accounts. It could use profits as it wished. It could cover losses on one service using profits from another.

1

2

2 Scope of Regulation 1370/2007

New Regulation 1370/07 has entered into force on 3 December 2009. This study first tries to clarify the bodies and situations to which the new Regulation applies.

2.1 To whom the Regulation rules are addressed

2.1.1 Competent authorities

The purpose of the new Regulation is to define how competent authorities may act in the field of inland public passenger transport in order to ensure that such services are provided. That is why most of the Regulation rules are addressed to competent authorities.

Article 2 b) defines the competent authority: "competent authority" is any public authority or group of public authorities of a Member State or of Member States, which has the power to intervene in public passenger transport in a given geographical area, or any body vested with such authority.

Given the principle of subsidiarity and the large diversity of institutional organisations in the Member States, it was impossible and irrelevant to define, at European level, which entity was to be the competent authority for the different inland public transports. The result is that Regulation 1370/2007 does not seek to amend institutional arrangements by which Member States arrange for delivery of transport services.

The Regulation only sets a framework. Every Member State is free to decide which entity is best suited to be competent authority for the various public transports, for instance according to perimeters or transport modes.

Regulation leaves Member States a very large freedom to define the competent authority, local or not:

- Member States are free to let municipalities, counties, regions or other public entities be competent authority, depending on the various type of transport, urban, regional, interurban… In Belgium, bus, tram and underground transport are under responsibility of each of the three regions; in Sweden, each of the 21 "County Councils" is partly responsible for local and regional public transport together with municipalities; etc.

- Member States can let a group of public authorities be competent authority. It can be a group of municipalities, a region and municipalities… In France, for instance, municipalities are responsible for organising and setting the fares for urban transport services. However, in more than 80% of cases, they transfer this power to groups of municipalities, which may either be specially set up to handle urban transport services or be in charge of other activities. For groups of municipalities, the combined territories of these municipalities becomes the urban transport area within which the urban transport services are coordinated. The group can even be international with cross-border members, for instance municipalities of two or more Member States.

- Member States are also free to create ad hoc bodies vested with the power to intervene in public passenger transport in given geographical areas, that are not national. In London, for instance, responsibility lies with the Greater London Authority (GLA) but the services are managed via an agency of the GLA, Transport for London, which is responsible for all transport within the greater London area, except suburban rail services. Its role includes franchising of local bus services within London, traffic management and specification of routes and frequencies.

2.1.2 Rules addressed specifically to Member States

Only very few Regulation rules are directly and specifically addressed at Member State level:

- Member States may decide to apply the Regulation to inland waterways services[13].
- Member States may exclude general rules establishing financial compensations for certain maximum tariffs[14] from the scope of the Regulation.
- Member States shall ensure that decisions on public service contract award can be reviewed efficiently and rapidly[15].
- When requested by the Commission, Member States shall communicate any information that the Commission considers necessary to determine whether the compensation granted is compatible with Regulation[16].
- During the transition period, Member States must take measures to gradually comply with the awarding rules as defined in Article 5. They shall provid the Commission with a progress report on the matter[17].

2.1.3 Rules addressed to the competent local authority

The notion of competent local authority is only used for the award of a public service contract to an internal operator, i.e. Recital 18, Articles 2 (j) and 5 (2). This notion ensures that bus, tram or metro service contracts cannot be created and directly awarded to internal operators covering the entire national area.

Article 2 c) gives the following definition of the competent local authority: "competent local authority" means any competent authority whose geographical area of competence is not national.

This issue will be further discussed in section 4.4 on direct award.

2.2 Circumstances under which the Regulation rules must apply

Since December 3rd 2009, competent authorities have no choice but to apply the new Regulation to transport services meeting the three following mandatory criteria. The new Regulation applies to:

- national and international operation of public passenger transport services by rail and by road

[13] Article 1(2) [14] Article 3(3) [15] Article 5(7) [16] Article 6(2) [17] Article 8(2)

- subject to public service obligation
- and requiring the granting of financial compensations and/or exclusive rights.

2.2.1 National and international operation of public passenger transport services by rail, by other track-based modes or by road

2.2.1.1 National and international operation

The expression "national services" stands for any type of transport service provided on national territory, independently of the covered area and service name. This includes local, urban, suburban, inter-urban or long distance transport. Contrary to different versions produced during the legislative process, the finally adopted text makes no difference between the types of transport covering different areas. According to the finally adopted text, the distinction between urban, regional, interurban and long distance transport is not relevant. Rules for urban, regional or long distance public transport are theoretically the same. Nevertheless, some rules of the new Regulation are specific for a given transport mode. For instance, bus and rail transport having different contract lengths and the Regulation foresees a specific regime for granting heavy rail contracts.

In the new Regulation, international services have been added to cover developing cross-border services. The exploitation and award of these services is submitted to exactly the same European rules as any local transport. A public transport service between Strasburg and Kehl will fall under the scope of this Regulation just as the urban public transport services in Strasburg[18]. The definition of the competent authority in Article 2 b) even includes the possibility to create an authority formed by two or more authorities from different Member States.

2.2.1.2 Public passenger transport services

Definition of "public passenger transport": This definition in Article 2 a) clarifies the fact that only services of general economic interest provided to the public on a non-discriminatory and continuous basis are subject to the Regulation. This definition is likely to lead to certain interpretation issues, as it seems to exclude certain types of transport services.

Are school buses and services dedicated to specific passenger categories concerned by the Regulation?

According to a strict interpretation of this definition, transport services such as school buses and transport services dedicated only to a specific category of passengers probably do not fall under the scope of the new Regulation. School buses, for instance, are not accessible to other passengers, and it would be difficult to pretend

[18] The existence of international public transport services was recently confirmed by Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)). OJEU 11 January 2011, p.1. See point 265. http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2011:007:SOM:EN:HTML

that they are operated on a non-discriminatory basis. Moreover, some of these services are operated on a non-continuous basis; they satisfy a specific need for transport at a certain moment. The organisation of such services therefore escapes from the new Regulation, which means that rules on minimum content and duration of contracts, for instance, do not apply to school bus services. The award of contracts to operate such services should therefore remain subject to public procurement Directives, which are globally stricter and more detailed in terms of competition than the new Regulation. The analysis would be the same for transport services dedicated to specific categories of passengers, e.g. passengers with reduced mobility, blind pupils and specific worker categories.

Furthermore, even if Article 2 a) of the Regulation were interpreted to mean that school buses and dedicated transport services fall under the scope of the new Regulation, the award of such contracts still remains submitted to public procurement Directives in most cases, in accordance with Article 5 (1), as these contracts usually are not conceived as service concessions (this issue is developed in section 4.1 below).

Taxi service: First of all, it must be stressed that contrary to bus, tram and metro, taxi transport is never explicitly mentioned in the new Regulation. Therefore, the potential applicability of Regulation to certain taxi activities has to be inferred by Regulation analysis. There are three markets for taxi service:

- Private transport service: The private customer orders and uses the taxi service under a private relationship. The customer pays for the total service. The new Regulation does not at all apply to this situation and has no impact on the rules applicable to this type of activity.

- Transport service for certain types of passengers only: The public authority organises and buys taxi transport service reserved for certain categories of passengers, e.g. persons with reduced mobility, blind children, local civil servants finishing work late at night, etc… That service is not accessible to all. The new Regulation does not seem to apply to this situation, which is similar to that of school buses. Thus, the award of such taxi service contracts must follow public procurement Directives.

- Taxi service available to all, organised and partly or totally financed by the competent local authority: The authority organises taxi service offered on regular basis to all potential passengers without discrimination. Anyone can use this service. Take for instance a city replacing night bus service with far too few passengers by regular taxi service. Or a city extending a tramline by regular taxi service, which is particularly interesting

with the current extension of transport perimeters to less and less densely populated zones. The authority establishes public service obligations, for instance in terms of frequency, quality or tariffs, which it compensates to the taxi company.

Though taxi service is not explicitly mentioned in the text, it is transport service by road and should as such be submitted to public service contracts awarded according to the new Regulation. Do note that the award of such contracts in most cases still remains submitted to public procurement Directives, according to Article 5(1), as most of them are not conceived as service concessions. Even if the award of such contracts should fall under Article 5 of the new Regulation, competent authorities can award them directly due to their low value, without competitive tendering. The thresholds defined in Article 5 (4) are actually quite high. Competent authorities will always have the possibility to tender these public taxi contracts, but will only have to do so if the annual value lies above 2 000 000 € (the threshold issue is developed in section 4.6 below).

Service operated out of historical interest or tourist value:
The new Regulation does not apply to service operated for historical or tourist reasons. Such service is usually linked to specific infrastructures and obviously operated for other purposes than public passenger transport (Recital 13 and Article 1 (2)). Take for instance certain funicular or ski lift services.

Freight transport service:
Some freight transport services may be considered services of general economic interest. Nevertheless, and contrary to the situation with Regulation 1191/69, they can never be subject to the application of the new Regulation. Regulation 1191/69 remains applicable to freight transport for the three years after application of the new Regulation, until December 3rd, 2012. Beyond that date, the general principles of the Treaty (Recital 11 and Article 10 (1)) should apply to the organisation of freight transport service.

2.2.1.3 Transport services by rail and by road

Does the Regulation apply to new technologies? The title and Article 1 of the Regulation refer to rail and road transport service. It obviously includes bus, trams, metro and heavy rail, which are explicitly mentioned in the text. Nevertheless, the expression "other track-based modes", found in Recital 18, Articles 1 (2), 4 (3) and 5 (6), makes it clear that this list is not exhaustive. As long as all criteria are met, the new Regulation should be applied to any inland public transport mode, such as taxis or any new technology, e.g. trams on tires.

About inland waterways: The situation of inland waterway transport differs from that of bus or rail transport. Market opening for inland waterway activities, both freight and passenger transport, is already

subject to Community legislation[19]. Frameworks harmonising restrictions to the market, such as in Article 5 of the new Regulation, are of no interest for the inland waterway market.

That is why the new Regulation does not cover organising public transport service by inland waterways, contrary to Regulation 1191/69. Public passenger transport by inland waterways is covered by specific European legislations or by general principles of the Treaty (Article 73 of the Treaty is then directly applicable), unless Member States choose to apply the new Regulation to service by inland waterways and national seawater.

How Member States should express such a choice is not mentioned in Recital 10 and Article 1 (2) of the new Regulation. It appears that this choice can be made at Member State level. In order to prevent legal uncertainty, this choice could then be clearly and accurately embodied in national legislation.

If a Member State chooses to apply the new Regulation to inland waterways and national sea water, this service could either be integrated in a wider urban, suburban or regional public passenger transport network or be submitted to a separate contract. In both cases, the new Regulation would apply to contract content and award.

This flexibility offers a wide range of possibilities in cities where inland waterways are an important part of the public transport network, e.g. Lisbon, Amsterdam or Venice.

For national seawater transport service, Member States can only apply the new Regulation if there is no prejudice to Regulation 3577/92 of 7 December 1992 on maritime cabotage.

2.2.2 Services with public service obligations (PSOs)

2.2.2.1 Definition of PSOs

The definition of a PSO is found in Article 2 e) of the Regulation. It is:

A requirement defined or determined by a competent authority…

The competent local authority defines a list of specific public service obligations that the operator will have to fulfil and for which he will be fairly compensated. These obligations must be clearly mentioned in a public service contract. PSOs are treated differently from general obligations, which can be defined at a different level. For instance, a national or a regional law fixing specific urban transport tariffs is not considered to be a PSO. This type of measure falls under the general rules defined in Article 2 (l) of the Regulation.

... in order to ensure public passenger transport service in the general interest…

Any public intervention in the provision of public transport must have "general interest" as goal. Regulation 1191/69 laid down

[19] Regulation (EEC) No 3921/91 of 16 December 1991 laying down the conditions under which non-resident carriers may transport goods or passengers by inland waterway within a Member State (OJ L373/1 of 31.12.1991) and Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services (OJ L 175/7 of 13.07.1996)

three types of public service obligation: the obligation to operate, the obligation to carry and tariff obligation. As already mentioned, this list was exhaustive. Note that the new Regulation only refers to the concept of general interest, which is neither defined in the Treaty, nor in secondary legislation. In the new Regulation, Article 1 (1) gives examples of objectives that any public intervention in the provision of public transport should follow: "to guarantee the provision of services which are among other things more numerous, safer, of a higher quality or provided at a lower cost than those that market forces alone would have allowed". The expression "among other things" makes it clear that this list is not exhaustive and that other objectives may be followed.

... that an operator, if it were considering its own commercial interest, would not assume or would not assume to the same extent or under the same conditions without reward.

This part of the definition remains unchanged compared to the PSO definition in Regulation 1191/69. Do note that to set the scope of the rules adopted, the Regulation does not choose profitability in itself as criterion, just like in 1969. The existence of public service obligations conditions compensation. In other words, the question is not whether the service is profitable or not, because many services can be operated in a profitable way under specific conditions (for example limiting the service to peak hours). The issue is whether the service is submitted to PSOs, which may make it unprofitable, and therefore requires compensation. The European Commission recently confirmed the possibility to include profitable lines in a public service contract in its Decision concerning state compensation system for Danske Statsbaner (DSB, the Danish railway company)[20].

2.2.2.2 Examples of PSOs

The large freedom that competent authorities enjoy in defining the PSOs, which are required on their territory, is a good example of how the principle of subsidiarity is implemented in the new Regulation. Nobody better than the competent authority can define priorities on a specific territory, while taking the various elements of context into account: historical, geographical, economical, legal, social, environmental, linked to society… The new Regulation does not set any list of PSOs that competent authorities have to follow, nor implement.

The following list provides examples of possible public service obligations:

a) Defining standards of continuity, frequency, regularity and capacity for services that the operator must provide

b) Defining standards in terms of quality, information, clean vehicles and stations…

c) Defining standards in terms of environmental protection (emissions, noise…)

[20] See point 263 and 266 in Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)). OJEU 11 January 2011, p.1
http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2011:007:SOM:EN:HTML

d) Defining standards in terms of minimal working conditions
e) Defining standards in terms of passenger rights
f) Defining standards in terms of needs of persons with reduced mobility
g) Defining standards in terms of passenger and employee security
h) Defining "additional services" that the operator must provide
i) Requiring the operator to maintain assets in good condition, according to certain standards
j) Requiring the operator to specify fares and conditions for transport and to carry anyone, who pays the fare and fulfils the conditions
k) Defining reduced fares to be applied on certain routes
l) Defining maximum tariffs for certain passenger categories
m) Defining maximum tariffs for all passengers

2.2.2.3 The Amsterdam example

Stadsregio Amsterdam, the competent authority in the Amsterdam region, provides an interesting example of how public service obligations are defined and how the process is timed.

Stadsregio Amsterdam has a *staged approach* with policy documents leading to public service contracts:

- In 2008, the Regional Council assessed a *political long-term perspective* on public transport development in the City region for mid term (2020). This document sets general policy goals (modal share of public transport, sustainability, developing supply, accessibility for target groups) and suggests a program for infrastructure and quality enhancement at the different network levels.

- This strategic view is *transformed into a demand package with coherent functional details* in a Schedule of Requirements (SoR) for the different suburban and urban public transport service concessions.

- The standards and parameters in the SoR then are the *back-bone for detailed specified requirements*, with specific standards and marks in the tender documents.

As every transport company must deliver provisions within the boundaries according to Dutch law, most of the requirements in the SoR relate to obligations for reference network, minimum of lines, capacity, service hours (first and last service), headway, punctuality,

vehicle capacity and characteristics, quality, passenger information, cleanliness and safety, security and accessibility.

From the current tendering in the regional concession of Waterland, the SoR gives minimum requirements for:

- Public transport interchange,
- Route network hierarchy and structure,
- Areas requiring local services plus connections.

At least the following districts/locations must have local bus services to/from the area:

- All areas having more than 1,000 inhabitants and a population density of more than 20 inhabitants per hectare according to the CBS/BCR Neighbourhood Code Register,
- Business districts with more than 2,000 employees and an employee density of more than 40 employees per hectare,
- Healthcare institutions.

Coverage

The MRA (Metropol Regio Amsterdam) routes and local routes provide a dense network in the Waterland Concession Area neighbourhood. This means that at least 95% of homes covered by local routes should be closer than 400 metres (as the crow flies) to a bus stop serviced by the MRA and/or a local route.

Service hours

The Service hours for the MRA and the local routes are given in the table below.

<table>
<tr><th>Working Days</th><th>Saturday</th><th>Sunday</th></tr>
<tr><td>Early morning:
Start of services on route - 07:00 hours</td><td colspan="2" rowspan="4">During the day:
Start of services on route - 07:00 hours</td></tr>
<tr><td>Morning rush-hour:
07:00 - 09:00 hours</td></tr>
<tr><td>During the day:
09:00 - 16:00 hours</td></tr>
<tr><td>Evening rush-hour:
16:00 - 18:00 hours</td></tr>
<tr><td>Evening:
18:00 - end of services on route</td><td colspan="2">Evening:
18:00 hours - end of services on route</td></tr>
</table>

Connections

A connection is realised when two buses on routes that connect according to timetable, both simultaneously remain at the connection stop for at least one minute. Bus/train connection is realised when, according to timetable, the bus arrives at the station at least 3 minutes and no sooner than 10 minutes before the connecting train arrives. A train/bus connection is realised when the bus leaves at least 3 minutes and no later than 10 minutes after the connecting train, has arrived. In that case, the bus driver shall wait for connecting passengers if a delayed train arrives at the station when the bus is supposed to leave.

Regular service and holiday service

Each annual timetable of the concessionaire may distinguish between two types of service: regular service and holiday service. Holiday service may not run outside the recognised summer holidays and Christmas holidays for secondary school. The concessionaire must fully comply with this Schedule of Requirements both during regular service periods and holiday service periods, continuing the same routes and the same service hours.

2.2.3 Public passenger transport services requiring financial compensations and/or exclusive rights

Just like for Regulation 1191 from 1969, the main purpose of the new Regulation is to set methods to calculate compensation and allocate exclusive rights corresponding to the PSOs that competent authorities are allowed to define. The compensation granted according to these methods is exempt from the obligation of notification to the Commission without prior verification of their possible State aid characteristics. Thus, if neither compensation, nor exclusive right is awarded, the new Regulation does not apply.

According to Article 2 e), public service compensation means "any benefit, particularly financial, granted directly or indirectly by a competent authority from public funds during the period of implementation of a public service obligation or in connection with that period". This definition is important. Any form of public money allocated to the operator for fulfilling PSOs is thus considered. Indirect compensations, such as tax reductions and other forms of benefit, are also covered by this definition.

This does not mean that all public transport services covered by the Regulation must include financial compensation. The scope of the Regulation also includes financial benefits, which operators receive when they are granted exclusive rights. These benefits may be sufficient to compensate for the public service obligations set by the competent authority in the contract. Additional financial compensation may not be needed.

According to Article 2 f), exclusive right means "a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator". This definition covers any form of exclusive access to certain markets, by law or in deeds, as well as all types of network organisation the authority may decide:

- Exclusive rights for the whole network
- A route per route, or line per line, exclusive rights system

- A mode per mode exclusive rights system: one operator for metro service, one for bus service…
- An area per area exclusive rights system: one operator for the North of the city, one for the South…

In some cases the granting of time slots may also be considered equivalent to the granting of an exclusive right: For example, if on an open market, a competent authority gives a four hours slot to an operator without any other operator being able to operate transport services during this time slot, this could be considered as an exclusive right. Of course, in case of complaint, the European Commission would certainly analyze the nature and the organization of the transport service: In the case of urban or suburban route, with numerous departures, let's say one every three or four minutes, the award of such a four hours time slot would probably be considered discriminatory or non proportionate and therefore equivalent to an exclusive right. On the other hand, if this system is concerning a long distance transport service (interregional for example) with one departure every two hours, the award of a four hours time slot could be considered proportionate to a security or to a Regulation of timetables objective.

2.2.4 Table 1 on Regulation application

In conclusion the new Regulation applies to all inland public transport services submitted to public service obligations that require financial and/or the award of an exclusive right. The following table illustrates the main possibilities regarding the applicability of the Regulation in the urban transport sector:

Case	Inland passenger transport	PSO	Financial compensation	Exclusive right	Application of regulation 1370/07
1	Yes	Yes	Yes	Yes	Yes
2	Yes	Yes	No	Yes	Yes
3	Yes	Yes	Yes	No	Yes
4	Yes	No	No	No	No
5	Yes	Yes but only general rules establishing maximum tariff	Only for these tariff obligation available without discrimination	No	Yes application of Article 3(2)
6	Yes	Yes but only general rules establishing maximum tariff for pupils, students, apprentices and PRM[21]	Only for these tariff obligation available without discrimination	No	No application of Article 3(3)

[21] RPRM: Persons with reduced mobility

Cases 1 and 2 show that the Regulation applies for the situations most often met in the urban transport sector. The competent authority defines PSOs which entail costs for the operator and compensates the fulfilment of these obligations through the award of an exclusive right and financial compensations (Case 1) or through the award of an exclusive right only (Case 2).

Case 3 shows that in an open market, without exclusive rights, the Regulation still applies, as long as the authority defines public service obligations requiring financial compensations.

Case 4 illustrates the typical deregulated market. The competent authority does not define any PSO entailing costs for the operator. No financial compensation and no exclusive rights are awarded. In that case, the Regulation does not apply, as clearly stated in Recital 8.

Cases 5 and 6 show that the Regulation foresees specific rules (Article 3 (2) in Case 5 and Article 3 (3) in Case 6) for introducing social tariffs on open markets (markets without exclusive rights).

3

3 Public service contracts

3.1 The Regulation makes the conclusion of public service contracts almost everywhere mandatory

3.1.1 Compensation and/or exclusive right shall be granted within the framework of a public service contract.

Article3 (1) states that either financial compensation or exclusive right trigger the obligation to sign a public service contract: "Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in discharge of public service obligations, it shall do so within the framework of a public service contract."

Contrary to the previous legal situation, the new Regulation makes public service contracts the main tool for organizing urban, suburban or regional transport.

3.1.2 Table 2 on situations in which the signature of a public service contract is needed

Case	Inland passengers transport services	PSO	Financial compensation	Exclusive right	Application of regulation 1370/2007	Consequences
1	Yes	Yes	Yes	Yes	Yes	Contract is mandatory, award according to Article 5. Concerning compensations no notification is needed
2	Yes	Yes	No	Yes	Yes	Contract is mandatory, award according to Article 5. Concerning compensations no notification is needed
3	Yes	Yes	Yes	No	Yes	Contract is mandatory, award according to Article 5. Concerning compensations no notification is needed

3.1.3 No contract is needed in deregulated markets

As already mentioned, the Regulation makes contracts compulsory in controlled competition markets and in closed markets which represent the large majority of cases in the European Union.

Nevertheless, recital 8 of the Regulation clearly states that typical deregulated systems (see case 4 in Table 3 below) remain out of the scope of the new Regulation: "Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements".

The best example will be found in bus services in UK outside London. Outside London, more than 80% of bus services are operated by purely commercial companies, who decide what services to run and what fares to charge. This is a free market for the supply of bus services. Operators are not subject to any public service obligation entailing costs. There is no financial compensation and no exclusive right. Operators are only subject to a minimum access to the market criteria (meeting safety and operator suitability criteria, and registering services and timetables with the Traffic Commissioner).

3.1.4 Application of Article 3(2)

Beyond the case of typical deregulated markets, and under certain conditions the Regulation makes it also possible for authorities to define and compensate tariff obligations without having to sign a contract.

Thanks to Article 3 (2), which is a derogation to Article 3 (1), public authorities will have the possibility to intervene on tariffs and partly finance public transport even on deregulated markets.

Strict conditions must be fulfilled in order to apply Article 3 (2):

1. The application of Article 3 (2) is strictly limited to obligations establishing maximum tariffs. Public authorities will have the possibility to set maximum tariffs for all passengers (for example the tariff of the standard one trip ticket) or to set maximum tariffs for certain categories of passengers (pupils, elderly people, students, people with reduced mobility, unemployed…). The public authority is free to define social priorities. As soon as any other type of obligation entailing costs for the operator is defined by the competent authority (quality, additional services, information, frequency…) the market can no more be considered deregulated and a public service contract has to be signed.

2. The maximum tariffs have to be established through a general rule. General rules are defined in Article 2 (l) of the Regulation as "measures which apply without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible". It mainly means that:
   - The tariff obligation can be established at a level that is not the competent authority level. It can for example be a regional or a national law applicable to all transport networks in the region or in the country;

- All public passenger transport services of the same type covered by the measure will have to apply the maximum tariff and will have access to the financial compensations. The expression "all public passenger transport services of the same type" in Article 2 (l) is a bit ambiguous as it does not clearly state whether the number of operators concerned can be limited or not. In other words, the question is to know whether the access to the compensations for the tariff obligation can be limited to "all public passenger transport services of the same type" present on the market at the moment the measure is taken for example. In the consultant's opinion this would be a misinterpretation. It appears much more in line with the logic of the Regulation to interpret the expression "all public passenger transport services of the same type" as covering all *potential* public passenger transport services of the same type. The obligation to apply the maximum tariff and the access to the compensation cannot be limited to a certain number of operators. If all potential operators including new comers don't have access to the compensation for the tariff obligation then the measure becomes discriminatory and leads to a form of exclusive right.

3. In accordance with the principles of the Regulation and especially of the Annex, the operators will be compensated for the net financial effect generated in complying with the tariff obligation in a way that prevents overcompensation. *Therefore the compensation will not have to be notified.*

   Article 3 (2) (see case 5 in Table 3 beyond) is likely to be used in Member States where part of the market is deregulated and where nevertheless authorities still want to intervene on tariffs. It could be the case in UK or in Finland where part of the market is deregulated (see case study 1).

3.1.5 Application of Article 3 (3)

Article 3 (3) (see case 6 in Table 3 beyond) was introduced in the Regulation at the request of Germany. It gives to Member States the possibility to exclude from the Regulation's application certain compensation for tariff obligations. The objectives of Article 3 (3) are very close to the ones of Article 3 (2).

Strict conditions must be fulfilled in order to apply Article 3 (3):

1. The application of Article 3 (3) is also strictly limited to obligations establishing maximum tariffs but contrary to Article 3 (2), these tariff obligations may not be in favour of all passengers. The tariff obligations have to be dedicated to certain categories of passengers which are strictly listed in the text:
   - Pupils,
   - Students,
   - Apprentices,
   - And people with reduced mobility.

Contrary to Article 3 (2), the tariff obligation cannot for example be in favour of unemployed people.

2 Just like for the application of Article 3 (2), the maximum tariffs have to be established through a general rule. Therefore it also means that the measure can be decided at a level which is not the competent authority level and that the access to the financial compensations must be opened to all operators *(from the consultant's point of view and as already explained in section 3.1.4 this once again meaning "all potential operators").*

3 Contrary to Article 3 (2), the general rule establishing the tariff obligations and the way they will be compensated shall be notified to the European Commission.

Article 3 (3) seems to be specifically designed for the German situation; in other Member States it seems more advisable to use Article 3 (2) to define tariff obligations in deregulated markets.

3.1.6 Table 3 - Situations in which the signature of a public service contract is not needed

Case	Inland passengers transport services	PSO	Financial compensation	Exclusive right	Application of regulation 1370/2007	Consequences
4	Yes	No	No	No	No	No Contract. No notification as there is no compensations.
5	Yes	Yes but only through general rules establishing maximum tariff	Only for these tariff obligation available without discrimination	No	Yes Application of Article 3 (2)	No contract. No notification long as tariff obligations are not overcompensated, in accordance with Article 4,6 and the Annex.
6	Yes	Yes but only general rules establishing maximum tariff for pupils, students apprentices and PRM[21]	Only for these tariff obligation available without discrimination	No	No Application of Article 3 (3)	No contract. Notification of the compensation system following Article 88 of the Treaty is Compulsory. European Commission shall declare the aid compatible

[21] RPRM: Persons with reduced mobility

3.2 Public service contracts may have various names or forms

Article 2 (i) of the Regulation provides a definition of public service contracts, which is partly very surprising.

In the framework of the new Regulation a public service contract is one or more legally binding act expressing the agreement between a competent authority and an operator to entrust to that operator the management and operation of public passenger transport services subject to public service obligations.

More surprisingly, and in order to take into account the various legal situations and traditions in the Member States, this definition is very large and includes very different types of legal acts. It has clearly been drafted in order that no legal situation escapes the scope of the Regulation because the relationship between the authority and the operator is not formally and strictly expressed in the form of a contract.

Therefore the definition considers that the public service contract may also consist of a decision taking the form of an individual legislative or regulatory act. In Germany for example, part of public road passenger transport is based on licenses under public law issued by the Land authority. These licenses describe the obligations for the operator in charge of the transport operations, including transport routes, schedules and fares. In return, the operator receives an exclusive right protecting him from competition on its route. These licenses don't have the name or the traditional form of a contract, nevertheless after the entry into force of the Regulation they might be considered as public service contracts in the sense of the Regulation.

The definition also includes decisions adopted by the competent authority and containing the conditions under which the authority itself provides the services or entrusts the provision of the services to an internal operator. In other words, the decision through which an authority decides to provide the transport services in-house or with an internal operator is considered a public service contract.

This definition is very different from the definition of public service contract contained in Article 14 (1) and (2) of former Regulation 1191/69. According to the former definition it seems clear that a "decision adopted by the competent authority and taking the form of an individual legislative or regulatory act containing the conditions under which the competent authority entrusts the provision of (transport) services to an internal operator" could absolutely not be considered a public service contract.

This difference between Article 14 of former Regulation and Article 2 i) may cause difficulties and require interpretation especially in the context of Article 8 (3) of the new Regulation (concerning the transition period, see section 7 of this study). This Article states that, in the application of the transition period, which ends in 2019, no account shall be taken of public service contracts awarded in accordance with Community and national law. These contracts may continue beyond the end of the transition period and in most cases until they expire according to various modalities depending on the date and the conditions of award (cf. Art 8 (3) points a), b), c) and d)). The question whether an unilateral act of legislative or regulatory nature adopted before the entry into force of the new Regulation could be considered a public service contract and therefore benefit from the exception planned in favour of public service contracts in Article 8 (3) of Regulation 1370 / 2007 is still opened.

3.3 The Regulation defines a minimum mandatory content of the public service contract

3.3.1 Transparency concerning public service obligations

Article 4 (1) a) of the Regulation states that public service contracts (and general rules) shall clearly define the public service obligations with which the operator is to comply and the geographical area concerned.

In most of existing public service contracts it is difficult or impossible to distinguish public service obligations i.e. the requirements that the operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward.

The calculation of the amount of compensations and the award of exclusive rights are depending on the fulfilment of these public service obligations. Therefore and in order to be perfectly in line with the new Regulation it is important that new contracts define and describe as clearly as possible the nature of the PSOs.

In practice and in most cases, this will require a specific effort in the drafting of the contract that is supposed to distinguish the reference services from the PSOs. The Regulation does not provide any formal obligation concerning the way the PSOs shall be described. Nevertheless, Article 4 (1) a) seems to disqualify any drafting approach that would be too global or that would make impossible to analyze the costs and benefits linked to the fulfilment of the PSOs.

It seems that even if this may appear a bit theoretical, the best would be to dedicate a Chapter of the contract to the definition of the list of PSOs (see section 2.2.2.) the operator will have to comply with.

3.3.2 Transparency concerning arrangements for allocation of costs and revenues

According to Articles 4 (1) c) and 4 (2) new public service contracts will have to establish the arrangements for the allocation of costs and revenues.

Concerning costs the Regulation provides an opened list. The arrangements may concern in particular:

- the cost of staff,
- energy,
- infrastructure charges,
- maintenance and repair of public vehicles,
- rolling stock and installations necessary for running public transport services
- fixed costs and a suitable return on capital

Authorities and operators will have to find an agreement and clearly state the way they will allocate production risks. The purpose is to establish who carries the risk on possible variations of the cost of operating and producing

the services? These costs may vary and reveal higher or lower than what was expected at the moment the contract was signed. The operator can directly influence only few of these costs. Most of the time the operator has very little influence on the variation of these costs, that is why the new Regulation makes it compulsory to establish in advance who will support and to which extent the additional costs or benefits due to variations of production costs. The contract may also include indexation clauses in order to clarify how variations of costs will impact compensation (see section 3.4.1).

Concerning revenues from the sale of tickets the new public service contracts shall establish and describe whether these revenues will be "kept by the public service operator, repaid to the competent authority or shared between the two". In other words, in case revenues are higher or lower than expected at the beginning of the contract, who will benefit from the additional profit or make the additional loss.

With this obligation to define operating costs and revenues, the Regulation defines the minimum level of transparency of the contract. Nevertheless and even if this is not mentioned in the Regulation, the contract should also reflect the arrangements concerning other types of risks that may exist:

- Arrangements concerning investments risks in order to determine who carries the risk on the property and value of assets (infrastructures and vehicles) This relates essentially to the residual value of the assets at the end of the contract period;
- Arrangements concerning risks out of any additional incentives;
- Arrangements concerning any specific risks linked to the complexity of the transport network or of technological solutions.

This obligation to determine in the contract the way risks will be allocated is essential:

First, it illustrates the fact that risk can be allocated and shared in various ways between a transport authority and a transport operator and it allows establishing a simplified typology of contracts:

- The operator bears no risk: simple management contract ;
- The operator bears the cost risk: simple gross-cost contract
- The operator bears the cost risk and the revenue risk: simple net-cost contract

Second, in the case of contracts dealing with the provision of public passenger transport services by bus or tram the way risks are allocated will determine if the award of such contracts fall under public procurements rules or under Article 5 of the new Regulation. In the following chapters (see section 4.1 below) we will see that the award of bus or tram contracts is submitted to the regime of the Public Procurement Directives unless they qualify as concessions.

This "concession" qualification depends primarily on the level of risk transferred to the operator by the contract.

3.3.3 Transparency concerning the duration of contracts

3.3.3.1 No minimum duration

The possibility to insert in the Regulation a requirement for a minimum duration of contracts was discussed during the legislative process: the idea was that contracts which are too short (less than two or three years for example) could cause problems concerning continuity of provision of services, investments and personnel. At the end, this idea was not adopted.

As a result, the durations established in the Regulation are only maximum durations, nothing prevents operators and authorities to conclude a public service contract for a shorter duration. It seems also that nothing would prevent a Member State to adopt a national legislation imposing shorter durations for public service contracts, as it seems to be the case for example in Italy.

3.3.3.2 Contracts have a maximum duration in principle

The adoption of contract duration limits ensures a periodic review of contract terms. This preserves service quality and makes sure that transport services adequately answer passengers' needs. The purpose is also to avoid that contracts are awarded for a period longer than necessary, which would diminish the supposed benefits of competitive pressure.

Article 4 (3) requires authorities and operators to conclude a contract of limited duration:

- Public service contracts shall be limited and not exceed 10 years for coach and bus services,
- Public service contracts shall be limited and not exceed 15 years for services by rail and other track-based modes.
- In case of a mixed contract (for example a contract for the provision of bus and tramway services), contract shall according to Article 4 (3) be limited to 10 years if road transport represents more than 50% of the value of the services in question. The contract shall be limited to 15 years if rail transport represents more than 50% of the value.

Article 5 (5) introduces a first exception. In the case of emergency measure, the duration of directly awarded contracts or of formal agreements to extend a public service contract is strictly limited,

whatever transport mode is concerned:

- The award or extension of a public service contract by emergency measure shall not exceed 2 years.

Article 5 (6) introduces another exception for transport services by train according to the way the contract has been awarded:

- Directly awarded train contracts (without tendering) shall not exceed 10 years. Other rail contracts such as metro or tramways contracts are not concerned by this 10-year limit.

3.3.3.3 Possibilities to extend the duration of contracts by a maximum of 50%

In order to take into consideration certain specific situations where contracts of longer duration may be required, Article 4 (4) first and second sentences of the Regulation provides two possibilities to extend contracts duration by a maximum of 50%.

These two possibilities are opened:

- "If necessary, having regard to the conditions of asset depreciation, (...) if the public service operator provides assets which are both significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract and linked predominantly to the passenger transport services covered by the contract".

  This possibility to have longer duration contracts does not require any European prior validation nevertheless in order to be in line with the Regulation the assets provided by the operator have to *be significant and linked predominantly* to the services covered by the contract, which means that assets used mainly for the production of services which are not covered by the contract should not be used to justify a longer contract duration. For example, in the case of an urban transport contract, new vehicles used partly in order to provide the services covered by the contract and mainly on other lines (like tourism services or interurban services) should not be used to justify the award of contracts lasting more than 10 years.

- "If justified by costs deriving from the particular geographical situation (...) in the outermost regions".

  Operators may also have to sustain specific costs linked directly to specific geographical situations in outermost

regions, as specified in Article 299 of the Treaty. The Regulation also considers that in such situation longer contract durations are thereby justified. This possibility to have longer duration contracts does not require any European prior validation

These two possibilities lead to:

- Contracts of a maximum extended duration of 15 years (10 + 5) for coach or bus services;
- Contracts of a maximum extended duration of 22 years and half (15 + 7,5) for services by rail and other track-based modes;
- Contracts of a maximum extended duration of 15 years (10 + 5) for train contracts which have been directly awarded (according to Article 5 (6));
- The possibilities to extend the contract's duration do not apply to contracts awarded by emergency measure (according to Article 5 (5)).

3.3.4 Transparency concerning social standards

Many public services have historically been provided by public sector organizations given monopoly status by law. These organizations have often offered high wages and attractive working conditions. Competition means that change is needed. What protection do employees have and what measures are available to authorities?

3.3.4.1 Competent authorities may ask the new operator to apply the provisions of Directive 2001/23/EC

The conclusion of a public service contract may entail a change of public service operator. Article 4 (5) of the Regulation gives to competent authorities the possibility to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, business or parts of undertakings or businesses[22]. The reference to Directive 2001/23/EC represents another good example of the importance given to the subsidiarity principle in this Regulation. Competent authorities are not obliged to ask for the respect of Directive 2001/23/EC. It's a choice given to competent authorities.

[22] OJ L 82, 22.3.2001, P. 16.

This directive aims at protecting workers in case of transfer of company further to operations of legal transfers or mergers of companies.

It insures in particular that following the transfer, the new business manager (the transferee) shall continue to observe the terms and conditions agreed in any collective agreement on the same terms applicable to the former employer (the transferor) under that agreement, until the date of termination or expiry of the collective agreement or the entry into force or application of another collective agreement.

All current contracts of employment must be transferred to the transferee: permanent employment contracts, fixed-term contracts, and apprenticeship contracts. They must be maintained on the same conditions of payment, seniority and paid leave rights, acquired or under acquisition at the date of transfer. Contracts of temporary work (interim) are not transferred except when the temporary work company is a part of the transferred company.

Member States may limit the period for observing such terms and conditions with the proviso that it shall not be less than one year.

The application of this Directive thus insures the workers the preservation of their working conditions during a period which varies according to the transpositions in the various Member States but which cannot last less than one year.

Article 4 of the Directive specifies that the transfer cannot constitute a motive or grounds for dismissal by the transferor or the transferee. They can however proceed to dismissals for economic reason or if a reorganization of the company imposes and justifies it.

A rticle 7 of the Directive specifies that the transferor and transferee must inform the representatives of their respective employees affected by the transfer. Information includes:

- the date or proposed date of the transfer,
- the reasons for the transfer,
- the legal, economic and social implications of the transfer for the employees,
- any measures envisaged in relation to the employees.

The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

Where the transferor or the transferee envisages measures in relation to his employees, not only shall they inform, they shall also consult the representatives of this employees in good time on such measures with a view to reaching an agreement.

3.3.4.2 Member States may transfer conditions of employees' rights

The choice of the authority to ask for the application of Directive 2001/23/EC does not constitute an obstacle to the respect of other national social standards other than those covered by this Directive. National labour legislation and universally applied collective agreements apply to all employers. Every Member State is free to safeguard transfer conditions of employees' right including social standards established by:

- National law,
- Regulations or administrative provisions,
- Collective agreements or agreements concluded between social partners.

In any case, where public service operators are required to apply Directive 2001/23/EC and/or to comply with certain social standards, public service contracts as well as tender documents (in case the contract is tendered) will have to be transparent on that subject.

According to Article 4 (5) of the Regulation, the contract shall list the staff concerned and give details on their contractual rights and on how the employees are linked to the service.

In the context of Directive 2001/23/EC, it is up to national legislations, if they wish it, to take measures to guarantee to the transferee the exactness of the information on the transferred company. Any negligence of the transferor as for this information cannot prevent the transfer such as it is defined in the Directive.

3.3.5 Transparency concerning quality standards to be respected

Article 4 (5) of the Regulation gives to competent authorities the possibility

to require public service operators to comply with certain quality standards. These standards shall be included in the tender documents and in the public service contract.

In the case where the competent authority establishes quality standards the contract should also clarify:

- The way these quality standards will be monitored and controlled (reports provided by the operator regarding reliability, punctuality, conditions in which the authority will access relevant information…);
- The consequences in case of non-compliance with quality standards, in case of non perfo rmance, possibility to ask for a plan of action in case of persisting failure, possibility to include a financial incentive system (for example the introduction of a bonus/malus system).

3.3.5.1 Monitoring key performance indicators: The Amsterdam example

The specified requirements in the SoR (Schedule of Requirements, see section 2.2.2.3) are set to define quality levels and aim at securing a level of performance on quality of public services in transport that are valued as essential by passengers. In Dutch public transport, there is a general understanding that the mark for quality of performance ultimately is customer satisfaction.

In line with this notion, Stadsregio Amsterdam focuses on a number of so called Key Performance Indicators (short: KPIs). These are quality standards for a number of items that define whether or not a minimum service quality is achieved by the operators and perceived by the users. In the three bus concessions outside of the Amsterdam City network, consultant research teams (independent entities) perform quarterly independent monitoring research on KPIs. Quarterly checks or samples are carried out randomly. Prerequisite for the validity of these observations is that these random checks are carried out in a way that gives a representative picture of the total network performance (every day of the week; under and after rush hours).

If faults are assessed and the operator fails to meet expected quality levels, administrative fines are given for a range of quality failures. The monitored elements and the assessment methods are explicitly agreed on. The standard levels to be met are specified in the contract. They cover:

1. service reliability, failure to show up (trip cancellation)
2. punctuality (maximum deviation of departure times)
3. use of the correct vehicle type
4. low entry/wheelchair access
5. bus age
6. correct use of low gas emissions engine
7. availability of information display
8. staff friendliness (courtesy)
9. communication of service information passenger safety (vehicle fitting, driving style)

Within the Amsterdam City concession, the monitoring builds on a quarterly performance database. It stocks an elaborate level of information per network line, from reliability and speed to punctuality. At least 95% of the trips are checked. Operator management reports are delivered to Stadsregio Amsterdam the transport authority, which randomly checks the report outcomes. In addition to these reports, mystery guests will check staff courtesy, information availability and any element determining service quality as perceived by customers but cannot be adequately verified by camera in the buses.

The operator earns a bonus for every (part of) percentile of performance within the KPI standard and is penalised for every percentile outside of the allowed margins of the KPI–service standard. In the three regional bus concessions outside of Amsterdam,city bonus can be earned only by a higher customer satisfaction score (based on national system: the "KpVV monitor"). The urban bonus (for compliance with KPIs in bus, tram and metro) is granted to the operator for every percentile of performance that stays within the allowed maximum deviation standard. Moreover, the in-house operator GVB can earn a bonus for customer satisfaction (only when the score of year x exceeds that of year x-1) on the nine different elements of customer satisfaction in this "KpVV monitor":

- probability to get a seat,
- cleanliness,
- staff friendliness,
- driver's skill,
- communication of travel information,
- information about route (in case of delay),

- headway
- travel speed,
- punctuality.

3.3.6 Transparency concerning subcontracting

The Regulation also requires that the possibility to subcontract part of the transport service be detailed not only in the final contract, but also when publishing competitive award documents. Potential operators must take part in competitive tendering with full knowledge of facts.

The Regulation also imposes certain limitations regarding the amount of services that the operator may subcontract. The rules are slightly different depending on whether the contract has been tendered out or not (see section 4.3.4.3 for tendered contracts and section 4.4.8 for directly awarded contracts).

3.4 The Regulation requires transparency concerning the granting of exclusive rights and the calculation of financial compensations.

Regulation 1370/2007 defines precise rules concerning the way public service obligations have to be compensated. In any case the amount of compensation has to be calculated in a way that prevents overcompensation. But the Regulation makes a clear difference between the case where the contract has been tendered out and the case where the contract has been directly awarded without tendering procedure. In this last situation the Annex of the Regulation which states that compensation may not exceed an amount corresponding to the net financial effect of the fixed public service obligations is to be applied.

In accordance with Article 9 of the Regulation all "public service compensation for the operation of public passenger transport services (...) paid in accordance with this Regulation shall be compatible with the common market. Such compensation shall be *exempt from the prior notification requirement* laid down in Article 88 (3) of the Treaty".

3.4.1 Compensation calculation for tendered contracts

According to Article 6 (1) first sentence of the Regulation all public service contracts awarded after a tendering procedure have to comply with the provisions laid down in Article 4 of the Regulation. In particular the contract should include:

- The public service obligations the recipient undertaking has to discharge and the geographical area concerned;
- The nature and extent of any exclusive right granted;
- The arrangements for the allocation of costs (including a suitable return on capital) and revenues ;

- The parameters on the basis of which the compensation payment is to be calculated. For example:
  - parameters dependent on the number and type of vehicles (capital costs, vehicle leasing...),
  - parameters dependent on service kilometres and vehicle type operated (material and labour costs, vehicle maintenance, energy...),
  - parameters dependent on service hour and type of staff (labour costs operations),
  - parameters dependent on other costs (overhead, replacement services ...),
  - parameters for compensation of risk and return...

In order to take into account possible significant cost changes, the contract should also include an indexation clause for compensation parameters, including prices for energy, staff, infrastructure usage, common prices... The composition and the weighting of the price indexation clause should be revised periodically (for instance every year).

In other words, the amount of compensation will not exceed the amount of the parameters set out in advance multiplied by the quantities taking into account the arrangements for the allocation of costs and revenues and the nature and extent of exclusive rights granted (for example certain costs related to the discharge of public service obligations may be partly compensated by the allocation of an exclusive right to operate certain highly profitable lines).

3.4.2 Compensation calculation for directly awarded contracts

According to Article 6 (1) second sentence of the Regulation all public service contracts awarded directly in accordance with Article 5 (2) (internal operator), 5 (4) (contracts under thresholds), 5 (5) (emergency contracts) or 5 (6) (railway services) shall not only comply with the provisions laid down in Article 4 of the Regulation, but they shall also comply with the rules for the calculation of the amount of compensation laid down in the Annex.

According to the Annex the final level of the actual compensation may not exceed the net financial effect caused by compliance with the public service obligation.

3.4.2.1 Rules for calculating "the net financial effect"

Annex 1 require that all compensation connected to a public service contract which has been directly awarded, cannot exceed "an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator." It is further explained

in the Annex that the net financial effect is calculated by taking into account:

a) The costs incurred in relation to the public service obligations carried out under the contract (depending on the arrangement for the allocation of costs);

b) Minus any positive effect generated within the network (for instance if the implementation of the public service obligation has a positive impact on costs structure or leads to a higher number of passengers and therefore more fare revenues, this positive effect has to be taken into account);

c) Minus receipts from tariff (depending on the arrangement for the allocation of revenues);

d) Minus any other revenue generated while fulfilling the public service obligation (revenues from publicity placed on rolling stock and stations, leasing of premises or other revenues related to the services);

e) Plus a reasonable profit.

f) The amount of compensation payments must be derived from rules that were fixed in advance. Compensation payments may for example be fixed for a year in advance; paid by instalments; and adjusted immediately after the closure of the operator's annual accounts.

g) In calculating the amount of compensation, the competent authority must assess whether the operator's costs reflect "effective management (…) and the provision of passenger transport services of a sufficiently high standard".

This means that the amount of compensation may not exceed what is necessary to cover the costs incurred in discharging the public service obligations, taking into account a reasonable profit for discharging those obligations.

3.4.2.2 Example: How to calculate the compensation for a reduced tariff obligation?

Concerning tariff obligation this net financial should be calculated as follows:

1 The difference between the income the operator earned with the obligation and the income that he would have earned without the obligation.

2. The estimate of what would have been earned without the obligation must be adjusted to take into account the elasticity of the demand i.e. the fact that lower fares lead lead to a higher number of trips (positive effect on revenue).

3. The calculation shall also take into account any extra capacity that had to be provided, and any other effect on the operator's costs (negative effect on costs).

4. Plus a reasonable profit.

3.4.2.3 Reasonable profit

Reasonable profit means a usual rate of return on capital that is normal for the transport sector in a given Member State and that takes into account of the risk or the absence of risk incurred by the transport operator by virtue of public authority intervention.

In the DSB case[23], the European Commission considered that a Return on Equity in the order of 6% could be considered as a reasonable profit considering that this percentage was comparable to the Return on Equity of DSB's competitors in Denmark.

The Commission even considered consistent with the Regulation a method for adjusting the profit level according to the operator's performance in terms of management and quality of service. The introduction of this adjustment method may lead this percentage to a higher level (in the order of 6% to 12%) in order to enable DSB (the operator) to keep part of the benefits related to a reduction of costs calculated in passengers/kilometres and related to an increased number of passengers measured in passengers/kilometres.

The European Commission considered that this mechanism based on the reduction of unit costs and on the increase of the number of passengers was perfectly in line with point 7 of the Annex which states that: "The method of compensation must promote the maintenance or development of effective management by the public service operator (...) and the provision of passenger transport services of sufficiently high standards".

3.4.3 Organization of payments

The Regulation does not define precise rules concerning how payments have to be organized, different solutions are therefore possible.

[23] See points 352 to 358 in Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)). OJEU 11 January 2011, p.1
http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2011:007:SOM:EN:HTML

Example of possible organization of payments:

- Contractual payments consist of monthly advance payments and a final billing at the end of each reference year. In that case the advance payments are calculated by 1/12 of the expected compensation sum per year,
- In the final billing the advance payments based on planned quantities and revenues are compared to actual quantities and revenues,
- Possible differences result in a 13th payment or in a recovery by the competent authority. Recovery or additional compensation payments are charged against the subsequent monthly payment after the final account.
- After the annual financial statement is established and within (x) months after a contractual year, the transport operator establishes a report proving to the competent authority that the compensation payments granted have not exceeded the net financial effect in the sense of the Annex of Regulation 1370/2007. If the overcompensation control shows that the actual payments have exceeded the maximum compensation allowed, the transport operator has to pay back the corresponding sum to the competent authority within (x) months.

4

4 Rules for the award of public service contracts

The Regulation gives competent local authorities a free choice between competitive tender and direct award of contracts. This part of the study clarifies the rules and conditions for competitive tendering or directly awarding public transport contracts.

4.1 Coordination with public procurement procedures

The rules on public service contract award, as defined by Article 5 of the Regulation, do not apply to all transport contracts. Since the beginning of the 90ies, public procurement Directives[24] (ex Council Directives 92/50; 93/36; 93/37 and 93/38) rule the purchase by Public Authorities of certain specific transport services. These contracts are excluded from Regulation rules for contract award and for the transition period.

In Article 5 (1), Regulation foresees that transport contracts, which already comply with public procurement Directives, remain covered by these. The modalities for contract award foreseen in Articles 5 (2) to 7 of the Regulation therefore do not apply to these contracts.

In the same way, Article 8 (1) states that the transition period foreseen the by Regulation do not apply to contracts already ruled by public procurement Directives.

4.1.1 Consequences of Article 5 (1) of the Regulation

Contracts that already comply with the rules for award defined by the public procurement Directives represent a minority of contracts awarded for inland public transport:

- Public procurement Directives do not cover award of contracts for train and metro transport. These are the services covered by CPC classification numbers 711 and 72. They fall within Annex XVII B of directive 2004/17/EC and Annex II B of directive 2004/18/EC. This means, following art. 32 of directive 2004/17/EC and art. 21 of directive 2004/18/EC, that contracts for these services are subject, as far as these two directives are concerned, to certain information requirements but not to mandatory tendering.
- Public procurement Directives do not cover award of contracts that are service concessions[25].

Thus, the only contracts for which public procurement Directives still determine the award are public contracts for bus and tram transport when these contracts do not constitute service concessions.

In practice, Article 5 (1) of the Regulation has the impact summarised below:

- For contracts conceived as public procurements and concerning buses and trams, the award still complies with public procurement Directives. Thus, Articles 5 and 8 of the Regulation don't apply to them.

[24] Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ L 134, 30.4.2004, p. 1).
Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114).

[25] See Directive 2004/17/EC, Article 18 and Directive 2004/18/EC, Article 17.

- All heavy rail (trains) and metro contracts, as well as bus and tram contracts that are service concessions, must be awarded according to Article 5 of the Regulation.
- Apart from Articles 5 and 8, the other articles of the Regulation apply to all public transport service contracts, whether they are covered by public procurement Directives or not (this is notably the case for Article 4 on minimum contract content and duration).

4.1.2 *Table summarizing the applicable text (public procurement Directives or Article 5 of Regulation 1370/07) in every situation*

Coordination with public procurement directives procedures	
Award rules defined in Art.5 of the Regulation apply to	Public procurement directives apply to
• Al train or metro contracts • Any contract that takes the form of a service concession contract, mode concerned • Importance of the *risk* criteria to distinguish concession contracts from simple public service contracts	• Classical contracts for the public procurement of transport services by bus or by tram (For example Euro/Km based, subcontracting) • work concession contracts

4.1.3 *Why do public procurement Directive still apply for the award of certain public transport contracts*

The question remained all through the legislative procedure, whether awarding conditions according to Regulation should apply to all public transport contracts, including contracts already covered by public procurement Directives, or not. The European Commission was against letting Article 5 of the Regulation apply to contracts covered by public procurement Directives. The two main reasons were:

First, the European Commission considered that the Regulation should not invite to regression in implementing the single market. Transport contracts with awarding conditions covered by public procurement Directives are in fact submitted to strict and detailed awarding rules. As will be seen below, on the contrary, the Regulation offers a large flexibility for public authorities to choose their contract-awarding mode and limits competitive tendering rules to respecting the principles of non-discrimination and transparency. There was no ground for such flexibility to apply for classical public service purchasing contracts, which for long have been submitted to stricter rules. In other words, the Regulation was by no means to invite open public transport markets to regression.

Second, applying the awarding rules according to Regulation to all public transport service contracts was contrary to the public procurement deal concluded under the World Trade Organization. The deal is binding for the EU. It sets detailed and harmonised procedures at European level for public transport contract awarding. Today, these detailed and harmonised procedures figure in the public procurement Directives, but not in Regulation 1370/2007.

These are the main reasons for which applying the flexible rules foreseen by Regulation 1370/2007 to contracts, whose awarding conditions already were covered by public procurement Directives has been refused.

4.1.4 Identification of service concessions

Public procurement Directives do not apply to service concessions.

The following characteristics help identifying service concessions:

- Article 1(4) of Directive 2004/18/CE defines a service concession as "a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment". In other words, a service concession is characterised by the fact that the operator bears a risk, as his income at least partially depends on earnings from exploitation. A contrario, for public service procurement, the operator bears practically no risk, as his compensation for service delivery is independent from his earnings from exploitation.
- The Commission's communication on concessions (OJ C 121, 29.4.2000) states, "the exploitation criterion is vital for determining whether a service concession exists. Application of this criterion means that there is a concession when the operator bears the risk involved in operating the service in question (establishing and operating the system), obtaining a significant part of revenue from the user, particularly by charging fees in any form. As in the case of works concessions, the way in which the operator is remunerated is a factor that helps to determine who bears the exploitation risk.

  Similarly, service concessions are also characterised by a transfer of the responsibility of exploitation.

  Finally, service concessions normally concern activities whose nature and purpose, as well as the rules to which they are subject, are likely to be the State's responsibility and may be subject to exclusive or special rights."

For public transport contracts, the two last conditions are likely to be met.

Exploitation risk is the real criterion for distinguishing public transport concessions from other public contracts, which are submitted to public procurement Directives. Assessing if and to what extent exploitation risk is on the operator requires a close analysis of how the operator is remunerated. That is why public service contracts absolutely must offer the minimum transparency required by Regulation.

Additionally, the responsibility and competencies distribution between authorities and operators also gives important information. Operators won't accept bearing exploitation risks without having more responsibility

4.2 Competent authorities have a free choice between competitive tendering and direct award of the public service contract

The big novelty introduced by Regulation 1370/07 is defining how public transport contracts are awarded.

Until this Regulation came into force, only contracts covered by public procurement Directives had accurate awarding rules.

As seen above, the previous Regulation 1191/69 did not at all deal with whether public transport contracts should be put out to competitive tendering or not. Thus, according to European law, until the new Regulation came into force, any contract that was not covered by public procurement Directives only had to comply with general principles of community law, e.g. among others the principle of legal security, the principle of non-discrimination or the right to a fair trial.

This framework with only general principles of community law has led to a large diversity of situations across the European Union. The Regulation clearly breaks with the previous situation, as it sets clear rules for how competent authorities may award public transport contracts.

Quite the contrary of what is written too often, it is erroneous to say that this Regulation opens public inland transport to market forces. It is closer to reality to say that the Regulation organises free choice for competent authorities to manage and award public transport contracts.

The fundamental thing to keep in mind about this Regulation is that competent authorities have a free choice. The principle of leaving competent authorities a free choice was introduced by the European Parliament and taken over by the European Commission during the legislative procedure. This principle implies that competent authorities may choose between either producing public transport services themselves or through internal operators or awarding the contract(s) to a third party other than an internal operator. In the latter case, in theory, the competent authority must use competitive tendering.

However, Regulation does not offer these two options identically, or symmetrically. At the end of the transition period, i.e. at the latest starting December 3rd, 2019, competent authorities will always have the possibility to put public service contracts out to competitive tendering, whatever the transport mode or type of service. At the same time, direct award of public service contracts will systematically have to respect various limits, conditions and counterparts.

Regulation 1370/2007 thus very clearly favours putting public transport contracts out to competitive tendering.

4.3 Competitive tendering of the contract

4.3.1 Starting 2019, a systematic possibility for all Member States and all transport modes

When compared with the other paragraphs in Article 5 of the Regulation, Article 5 (3) shows that after the transition period, whatever the situation, competent authorities may award public service contracts by competitive tendering.

Starting December 3rd, 2019, no national legal text can object to competent authorities awarding public transport contracts by competitive tendering whatever the transport mode, be it bus, tram, metro or train.

Such was the sense of the European Commission's answer to a parliamentary question from Mr Gilles Savary[26]. The question was on heavy railroad sector (trains) and compatibility between Regulation and a French law (the so-called LOTI law), which gives legal monopoly to historical operators.

On this question, the European Commission's answer is relatively clear: once the transition period is over, no national legislation can forbid competent authorities from using competitive tendering to award public transport service contracts, neither by law nor in deeds.

Thus, starting December 3rd, 2019, French law cannot forbid the award of regional railroad transport contracts by competitive tendering. Competent authorities (in France, the regions) won't be compelled by law to award contracts directly to historical operators (the SNCF) anymore. The law may still allow direct award but cannot forbid a region to use competitive tendering, to award regional public railroad transport service contracts anymore, neither by law nor in deeds.

This conclusion applies to all transport modes: after 2019, no national text can forbid awarding public service contracts by competitive tendering.

National laws might allow other awarding conditions, e.g. direct award to internal operators. But they won't be able to forbid competent authorities to put public service contracts out to competitive tendering, whatever the circumstances.

If after December 3rd 2019, against Regulation 1370/2007, a national law still forbade competitive tendering for a public transport service contract, the directly applicable character of European Regulations should allow the competent authority to directly make use of the competitive tendering possibility offered by Regulation, circumventing the prohibition set by the national text.

4.3.2 *Procedure and principles to respect under the Regulation*

Article 5 (3) of the Regulation defines the awarding conditions for public service contracts by competitive tendering. Do immediately note that the Regulation prescribes very little about the tendering procedure that authorities should follow.

Thus, contrary to how public procurement Directives operate, the Regulation imposes no tendering procedure details.

Article 5 (3) of the Regulation only states that the adopted procedure must:

- Be open to any operator,
- Be fair,
- Respect the principles of transparency and of non-discrimination.

This particularly flexible approach is due to that some Member States already have set up national rules about awarding conditions for contracts covered by Article 5

[26] Written question P-0563/09

of the Regulation, in particular for service concession contracts. In France, for instance, the so-called "Sapin" law[27] defines the conditions for awarding public service concessions.

This approach, concentrating on the big principles without setting procedure details, prevents accurate rules set at European level from contradicting rules that already might have been set by Member States. Whatever rules apply as contracts are put out to competitive tendering, the European Commission or the communitarian judge may check that the big principles given in Article 5 (3) of the Regulation are respected.

4.3.3 Negotiating while tendering

Concerning the procedure, do also note that the Regulation gives an important detail in the last sentence of Article 5 (3). The competitive tendering procedure chosen by the competent authorities may, after invitation to tender, lead to:

- Pre-selection,
- Negotiation.

In particular, Recital 22 of the Regulation justifies that competent authorities may use pre-selection and negotiation by the complexity surrounding certain public transport contracts, for instance when tenderers must come up with technologically innovating solutions to meet with requirements given by tendering procedure documents. However, the wording of Recital 22 and Article 5 (3) show that competent authorities may use short-listing and negotiation without having to prove that transport services covered by the contract have specific complexity.

The award procedure may involve a pre-selection or a negotiation phase, but pre-selection or negotiation is of course not mandatory:

For example, in the Netherlands, although the Dutch national law on tender of services permits pre-selection and competitive dialogue, provided selection criteria are non discriminatory, in Stadsregio Amsterdam this has not yet occurred or been applied.

In the Northeast of Barcelona the Entitat Metropolitana del Transport recently launched a tendering procedure for the award of urban bus services. According to the Spanish legislation on contracts of the public administration the award of the 6 years contract will be based on a rating procedure with no negotiation phase.

Whatever the circumstances, whether there is short-listing or negotiation or not, the principles given by Article 5 (3) must be respected.

4.3.4 Transparency rules

Regulation gives no details about how to run the competitive tendering procedure. This leaves a certain liberty to the Member States and competent authorities.

However, Regulation clearly sets transparency requirements that competitive tendering procedures absolutely must respect. These rules apply to:

- Publication and communication of necessary elements informing about the public service contracts that are going to be put out to competitive tendering;

[27] Law No. 93-122 of 29 January 1993, on corruption prevention and transparency in public procurement procedures.

- Compulsory social norms and quality standards, when applicable;
- Possibility to subcontract.

4.3.4.1 Publication

According to Article 7 (2), competent authorities must publish the intention to put public service contracts out to competitive tendering at least one year before launching the tendering procedure.

Do note that Article 5 of the Regulation does not mention this obligation. It does therefore not benefit of the ten-year transition period defined by Article 8 of the Regulation. The obligation to publish is thus required since the Regulation came into force on December 3rd, 2009.

Article 7 (2) states that the information must be published at least in the Official Journal of the European Union, except for contracts with yearly delivery of less than 50 000 kilometres of public transport service.

The Regulation very briefly describes what information has to be published one year before launching the competitive tendering procedure. The minimum requirement is:

- The name and address of the competent authority;
- The type of contracting considered (direct award or tendering);
- The services and areas potentially covered by the contracting.

Competent authorities may naturally give more information on the nature and extent of future contracts.

The nature of information to publish does not seem troublesome. However, do pay attention to difficulties that might arise from the one-year delay before launching competitive award procedures. As Regulation sets only very few procedural obligations, it seems essential to scrupulously respect the few that it does set. *Do note that disregarding publication conditions might jeopardize the full competitive award procedure*. The principles of transparency or of equal treatment would not be respected.

4.3.4.2 Social norms and quality standards

As seen in section 3.3.4 and 3.3.5 on minimum contract content, Regulation imposes public service contracts to be transparent on social norms and quality standards.

However, Articles 4 (5) and 4 (6) states that social norms and quality standards must be clarified as soon as competitive tendering documents are published, i.e. when the procedure is launched. Thus, right from the start of the procedure, operators taking part in the tenders must know what obligations they will meet.

Recital 17 explains and illustrates the contents of social norms and quality standards. Do check it and measure the quantity of information

to deliver to potential operators when publishing competitive award documents: "Competent authorities are free to establish social and qualitative criteria (…) for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreements obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided".

4.3.4.3 Subcontracting

Article 4 (7) imposes transparency concerning subcontracting. It also limits the transport service that may be subcontracted and imposes that the operator himself executes "a major part" of it. No doubt that the European Commission must clarify this notion. In the present state of the Regulation, this notion seems more flexible than the "the major part", written in Article 5 (2) e) and limiting subcontracting in the case the public transport contract has been directly awarded to an internal operators.

If a public service contract deals not only with transport service management, but also with conception and implementation of this service, then, and only then, the contract may allow for complete subcontracting of the transport service execution.

Do note that Regulation does not prevent the contract from fixing a minimum percentage of the transport service offer that must be subcontracted by the operator. It is important that this percentage respect the conditions set in Article 4 (7).

As for the awarding conditions of subcontracted services, Recital 19 and Article 4(7) of the Regulation refer to community law. This means that, as long as they are seen as public procurement (which generally is the case), subcontracting contracts are submitted to the public procurement Directive and to documents complying with national law, according to which these Directives have been transposed.

For subcontracting, public procurement Directives consider two cases:

- The operator has been granted his exclusive right directly, without competitive tendering (which is the case for internal operators);
- The operator has been granted his exclusive right after competitive tendering.

In the second case, the operator subcontracts. Being an awarding power, he does not have to put his subcontracting contracts out to competitive tendering.

4.4 Direct award to an internal operator of metro, tram and bus services

The Regulation offers a fair balance between market opening and local authorities' right to produce the public transport services themselves or to award contracts directly to internal operators for the provision of such services. However, the conditions and counterparts, defined in Article 5 (2) of the Regulation, are strict. They require greater transparency, accurate compensation criteria, geographical activity limitation for internal operators, etc.

4.4.1 First condition: Direct award allowed by national law

The first sentence of Article 5 (2) is very clear on the subject. It starts with: "Unless prohibited by national law [...]". Direct award to internal operators is thus permitted provided that the Member State law allows it – and this is a sine qua non condition.

If national law forbids direct award to internal operators, Regulation cannot overcome this interdiction. In other words, competent local authorities cannot use Article 5 (2) of the Regulation to award public service contracts directly to internal operators, if the national legislative context (e.g. national law or a regional text) forbids according public transport contracts by direct award.

Thus, for countries having opened public transport markets to competition, Regulation cannot be used to return to less competition.

National legal framework can either exclude direct award to internal operators or give this option. It is very important to understand that national legal framework cannot impose direct award as the only possible way to award public transport service contracts. Direct award may be offered as an option, in parallel with competition, but national framework cannot impose direct award as only possibility to competent local authorities.

4.4.2 Second condition: Control

The internal operator status as defined by Regulation, Articles 2 j) and 5 (2), must be respected.

An internal operator must be a "legally distinct entity over which a competent local authority (...) exercises control similar to that exercised over its own departments".

Article 5 (2) a) of the Regulation defines a set of clues to check if the competent local authority really controls his internal operator. In particular: Is it represented in administration organs? Who decides about strategic and individual management? Who influences decisions?

The control condition must be estimated for the situation taken as a whole and with respect to various elements. No element can be an absolute criterion for control efficiency on its own.

4.4.2.1 The ownership issue

There is no strict obligation for public authorities to hold 100% of the internal operator capital.

When it comes to ownership, Regulation is more flexible interpreting public procurement Directives, than the recent precedent of the European Court of Justice.

Public procurement Directives covering bus contracts, for instance, are not against in house exploitation and direct award of the transport service, as long as conditions set by the Court of Justice are respected. These conditions are those given by Regulation: the internal operator must have a geographically limited activity and must be controlled by the competent authority. Recent judgments confirmed this once more: Stadt Halle, Parking Brixen or Anav of April 6th, 2006 (Case C-410/04). The Court of Justice was very strict on the control issue (see the Stadt Halle C-26/03 judgment in this respect) and particularly on ownership, in order to assess control.

Court judgment in particular states:

(Point 49) "In accordance with the Court's case-law, it is not excluded that there may be other circumstances in which a call for tenders is not mandatory, even though the other contracting party is an entity legally distinct from the contracting authority. That is the case where the public authority which is a contracting authority exercises over the separate entity concerned a control which is similar to that which it exercises over its own departments and that entity carries out the essential part of its activities with the controlling public authority or authorities (see, to that effect, Teckal , paragraph 50).

It should be noted that, in the case cited, public authorities wholly owned the distinct entity. By contrast, the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting authority in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments."

The Court reaffirmed this in its Coditel judgment of November 13th, 2008[28] It then confirmed that if a private company has shares in the capital of the controlled company, there is failing qualified control similar to that, which the contracting authority exercises on its own departments:

(Point 30): "(...) it should be borne in mind that, where a private undertaking holds a share of the capital of a concessionaire, this precludes the possibility for a concession-granting public authority to exercise over that concessionaire a control similar to that which it exercises over its own departments."

Regulation here diverts from case-law and clearly adopts a more flexible position, as Article 5 (2) a) states that "100% ownership by the competent public authority, in particular in the case of public-private

[28] Case C-324/07

partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria".

Practically speaking, this flexibility allows for public-private partnerships of French SEM-type (Société d'Economie Mixte) to be granted internal operator status and thus to be directly contracted. However, national French law (LOTI) enforces competitive tendering for the SEM and public service contracts cannot be directly awarded to them.

4.4.3 *Third condition : Geographical limitation of the internal operator and possibility to operate outgoing lines*

To reduce competition distortion further, internal operators and all their transport activities are confined to the territory and to the transport services on which the awarding local authority is competent.

Article 5 (2) b) requires that internal operators' activity and any bodies influenced by the internal operators be geographically confined within the competent authority's territory. To benefit from direct award, internal operators are neither to deal with transport activities extending beyond the authority's territory, nor to take part in competitive tendering organised beyond that territory.

4.4.3.1 The restriction applies to internal operators and to their subsidiaries and holdings

The restriction applies not only to the internal operator himself, but also to any entity, whatever its legal form, over which the internal operator has an influence.

Article 5 (2) b) deliberately has a very broad wording: "the internal operator and any entity over which this operator exerts even a minimal influence".

This wording should be enough to prevent internal operators from creating subsidiaries or holdings, for instance, to circumvent the prohibition to operate other transport services.

4.4.3.2 The restriction does not apply to outgoing lines

However, Article 5 (2) b) of the Regulation allows internal operators to operate "outgoing lines or other ancillary elements (...) which enter the territory of neighbouring competent local authorities".

Even the confinement clause has been given flexibility to grant for reality of public transport organisation in big cities. Internal operators may thus operate services beyond their competent authority territory, to a certain extent. Operated services must then comply with the conditions set by Regulation, i.e. simultaneously:

- Connect the internal operator's territory to a neighbouring territory;

- Be secondary and not the main purpose of the public service contract. Whether the service is secondary or not can be judged when comparing its value with the total value of the transport service covered by the internal operator contract.

In Belgium, for instance, Regulation does not seem opposed to STIB, the internal Brussels region operator, operating certain lines that connect the Brussels region with Walloon and Flemish regions. Indeed, these services connect the Brussels region territory to a neighbouring territory and can be judged secondary, when considering the total value of the public service contract between the Brussels region and the STIB.

4.4.3.3 The restriction does not apply for internal operators who are to be submitted to competitive award procedures

Article 5 (2) c) of the Regulation allows internal operators to take part in public transport markets two years before their definitive submission to competitive award procedures.

Member States, whose public transport organisation is opening to competitive award procedures, asked for such a disposition to be introduced.

Two years before the end of public service contracts that they have been directly awarded, internal operators may be freed from prohibition to take part in tendering procedures outside of the competent authority's territory, if they are going to be in competitive tendering for the award of their next public service contract.

An internal operator who will be in competitive tendering at the end of his contract and risks losing all or part of the services that he was awarded directly until then. During the two years before he is submitted to competitive tendering, he can thus diversify his activities and start playing in other markets elsewhere in his own Member State or at international level. The decision to submit an internal operator to competitive tendering must obviously be definitive. If the authority should decide to undo such a decision, all activities exterior to the internal operator's competent authority's territory must clearly be questioned.

4.4.3.4 Does the restriction apply within the European Union only or internationally ?

The wording of Article 5 (2) b) seems to answer the question: "The condition (...) is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, (...) and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority".

At close reading of this article, the principle of internal operator confinement defined by Regulation seems to prevent the operator from participating in competitive tendering outside of the competent local authority's territory.

In other words if, after 2019, a public transport operator should be granted direct award of bus, tram or metro services in virtue of being an internal operator, he could neither take part in competitive markets within the European Union, nor outside of it, e.g. in China or in central America.

A more flexible interpretation of the principle of internal operator confinement could naturally be attempted. The issue will certainly be raised and may lead to an interpretation of the text. However, the balance of the text seems to lie in the direct award of public service contracts to internal operators, provided that public money spent outside competitive tendering by no means is used for competitive tendering, neither where it already exists, nor where it develops, neither in the European Union, nor in the rest of the world.

4.4.3.5 Does the restriction apply to operational activity only or also to consulting, engineering etc.?

Article 5 (2) b) mentions "public passenger transport activity" and "the provision of public passenger transport services" and only seems to deal with operational activity. Regulation therefore does not seem to forbid internal operators to develop further activities, such as consulting and engineering.

On this specific issue, Regulation may reasonably be given a flexible interpretation. Large public operators could then continue using direct award, without giving up certain development forms, in which they have long been engaged. They would be prevented from operating transport services, but could proceed with consulting and engineering activities.

4.4.4 Forth condition : Contract award by competent local authority

Only competent local authorities may directly contract internal operators. Competent local authorities are defined in Article 2 c) (see section 2.1.3).

When specifying competent local authorities, Regulation prohibits direct award to internal operators whose activity covers the full national territory of a Member State.

Direct award to internal operators only concerns transport services operated at local level, e.g. at urban, suburban, interurban or regional level. This clarification clearly aims at preventing internal bus, tram or metro transport operators from growing national, with activities covering the full national territory.

4.4.4.1 Missing competent local authority

However, having direct award of bus, tram and metro services to internal operators done exclusively by competent local authorities

raises a problem for Member States, where there is no competent local authority and where the responsibility for organising local public transport services is held at central level, e.g. at the Ministry of Transports. Such a situation may for instance occur in Ireland or in Portugal.

For situations where there is no competent local authority,Regulation adds in Article 5(2) d): "in the absence of a competent local authority, points a), b), and c) shall apply to a national authority for the benefit of a geographical area which is not national, provided that the internal operator does not take part in competitive tenders concerning the provision of public passenger transport services organized outside the area for which the public service contract has been granted".

Do note that Article 5 (2) d):

- Can only be resorted to in absence of competent local authority;
- Requires internal operator control by the authority;
- Requires internal operator confinement.

4.4.4.2 Award by a group of authorities

As seen above, Regulation reserves competent local authorities the right to directly award bus, tram and metro services to internal operators. However, Article 5 (2) of the Regulation gives a group of authorities the possibility to become a competent local authority. Regulation offers this possibility provided that the group of authorities delivers integrated public passenger transport services.

Thus, competent local authorities may group to deliver integrated public transport services and to award public service contracts directly to internal operators. Apparently, such groups of authorities are only in accordance with Regulation provided they operate on neighbouring geographical zones. This disposition may for instance apply when a group of neighbouring municipalities or a group made up by one region and several municipalities delivers integrated services.

Article 5 (2) of the Regulation allows one of the authorities to exercise the necessary control on the internal operator. In other words Regulation does not impose the internal operator to be controlled by the whole group: "in the case of a group of authorities at least one competent local authority exercises control similar to that exercised over its own departments".

4.4.5 Fifth condition: Compensation calculation according to Annex

Article 6 (1) of the Regulation states that any compensation related to contracts, that are directly awarded to internal operators according to Article 5 (2), must be calculated not only according to the dispositions in Article 4 of the Regulation, but also according to the calculation rules set in the Regulation Annex.

These rules are analysed in section 3.4.2 above.

4.4.6 *Sixth condition: Publication*

Article 7 (2) of the Regulation imposes the same rules on information and previous publication to all competent authorities, whether they submit public service contracts to competitive tendering or award them directly to internal operators.

If a competent local authority decides to award a public service contract directly to an internal operator, Article 7 (2) imposes that it publish its intention to award the public service contract directly at least one year before contracting.

Here again, the competent local authority must publish the following information in the Official Journal of the European Union:

- The name and address of the competent authority;
- The type of contracting considered (direct award or tendering);
- The services and areas potentially covered by the contracting.

4.4.7 *Seventh condition: Motivation for direct award*

Article 7 (4) requires that competent authorities that choose to award public service contracts directly, without competitive tendering, motivate their decision. The motivation is not necessarily made public.

However, Article 7 (4) gives any interested party the right to see the elements motivating the competent authority's decision for direct award: "When so requested by an interested party, a competent authority shall forward to it the reasons for its decision for directly awarding a public service contract".

4.4.8 *More restrictive subcontracting rules*

When public service contracts are directly awarded to internal operators, Article 5 (2) e) of the Regulation states that the operator, that has received the public service contract, must handle "the major part of the public passenger transport service itself".

"The major part" allows for different interpretations. It seems to mean that the operator himself operate at least 50% of the value of the services defined by the public service contract.

This disposition prevents direct award to internal operators from being circumvented: the internal operator must not become an "empty shell" that subcontracts the full service operation.

Subcontracting often is the answer to a real economic necessity and subcontracted services are sometimes cheaper than services produced by the operator holding the public service contract. Do note that Regulation is not opposed to contracts setting a minimum percentage of the transport service offer to subcontract by the operator. It is important that this percentage respect the high limit set by Regulation in Articles 4 (7) and 5 (2) e).

Recital 19 and Article 4 (7) of the Regulation refer to community law for how subcontracted services are to be awarded. This means that subcontracting contracts,

provided they are treated as public procurement (which almost always is the case), are submitted to public procurement Directives and to national legal documents, according to which these Directives have been transposed.

For subcontracting, public procurement Directives distinguish two cases:

- The operator has been granted exclusive rights after competitive tendering;
- The operator has been granted exclusive right directly, without any competitive tendering (which is the case for internal operators).

In the latter case, the operator subcontracts and, being the contracting authority, must put his subcontracting contracts out to competitive tendering (provided the value of these contracts lies above the thresholds set by the Directives, of course).

4.5 Direct award of rail services

4.5.1 A specific scheme restricted to the award of heavy rail service contracts (trains)

Article 5 (6) of the Regulation defines an awarding scheme for railway transport contracts. This scheme applies neither to metro transport service contracts, nor to tram transport service contracts.

Article 5 (6) offers particularly flexible award modalities. That is why European institutions in charge of checking Regulation application probably will be restrictive on how Article 5 (6) is applied. In particular, competent authorities will probably not be able to use Article 5 (6) when awarding rail-bound service whose purpose is close to that of metro or tram (e.g. tram-train service and certain trains with optic guiding).

For railroad transport stricto sensu, Article 5(6) of the Regulation does not impose putting public service contracts out to competitive tendering. For public service contract award, by application of the principle of subsidiarity, the new Regulation lets competent public authorities freely choose between competitive award procedures and direct award procedures with no competitive tendering. However, these contracts must be the subject of competitive tendering if national law prohibits direct award of railroad transport contracts.

4.5.2 Railroad transport contracts can be awarded by competitive tendering

Competent public authorities may choose to award public railroad service contracts by competitive tendering. Article 5 (3) states that they then must organise award procedures that are open, transparent, fair and non discriminatory and that allow for negotiation after reception of the tenders.

The maximum duration of contracts awarded by competitive tendering is 15 years, with prolongation possibilities as seen above in sections 3.3.3.2 and 3.3.3.3. After the transition period, any national legislation that by law or in deeds forbade competitive tendering of rail transport service would be absolutely contrary to Regulation. That is how the European Commission answered Gilles Savary's parliamentaryquestion[29] on the LOTI law's compatibility with Regulation (see section

[29] Written question P-0563/09

4.3.1. above). It will be impossible for national texts to prevent competent authorities, for instance regional, from awarding railroad contracts by competitive tendering after 2019.

4.5.3 *Railroad transport contracts can be awarded directly, without competitive tendering*

Unless national law is against it, competent public authorities may choose to award public railroad service contracts directly.

In other words, if national legislation imposes competitive tendering for railroad contracts, Regulation does not permit disregarding the competitive tendering obligation. If national legislation does not impose competitive tendering, then the authority may choose to award contracts directly to operators of its choice. These can of course be historical operators. A priori, nothing in Article 5 (6) prevents authorities from awarding contracts directly to other potential operators. However, it is unlikely that authorities use direct award in favour of private operators.

If not prohibited by national law, competent authorities absolutely have the possibility to award railroad contracts directly. However, if they opt for direct award, without putting contracts out to competitive tendering, they must respect certain counterparts.

4.5.4 *Shorter term contracts*

For directly awarded railroad contracts, the duration must be shorter. Maximum duration is 10 years, with possible prolongations as mentioned above. This disposition enforces the principles of transparency and of democracy. An authority that chooses to award without competitive tendering can't lock the market for too long. Regularly, normally every 10 years, the authority must revaluate the situation and take a new decision, either to proceed with direct award or to use competitive tendering.

4.5.5 *Compensation calculated according to Annex*

Article 6 (1) of the Regulation states that any compensation related to railroad contracts, that are directly awarded according to Article 5 (6), must be calculated not only according to the dispositions in Article 4 of the Regulation, but also according to the calculation rules set in the Regulation Annex.

These rules are analysed in section 3.4.2 above.

4.5.6 *Increased transparency*

If a competent authority directly awards a railroad transport contract according to Article 5 (6), Article 7 (3) of the Regulation states that it must make certain information public within one year of the direct contract award, to ensure reinforced transparency. This information deals with the type of contracting parties, the purpose and duration of the contract, the compensation parameters, the quality goals and the main assets. But Regulation does not mention how the information is to be made public.

Article 7 (4) states that if any interested party asks for it (competitors, users' associations…), the competent authority must accept to say what motivated his decision to award the railroad contract directly.

Article 7 (2) states that at least one year before the award of a new public service contract and by publication in the Official Journal of the European Union, public authorities must announce the direct award of future public service contracts and their purpose.

4.5.7 *Railroad transport contracts falling under Article 5(6) are less restrictive*

All together, direct award procedures for railroad contracts (Article 5 (6)) are less restrictive than direct award procedures to internal operators (Article 5 (2))

In short, after the transition period:

- National legislation can prohibit direct award. Competent authorities must then award railroad contracts by competitive tendering.
- Unless national legislation prohibits direct award, regional or other competent authorities may award public railroad service contracts directly, without competitive tendering, for instance to the historical operator, provided that the reinforced transparency conditions are respected and that the contract duration is shorter.
- National legislation cannot forbid competent authorities to use competitive tendering, neither by law nor in deeds. Whatever the situation, competent authorities will have the option to put contracts out to competitive tendering.

This direct award, according to Article 5 (6), is clearly less restrictive than direct award to internal operators, according to Article 5 (2). In particular, it is free from two conditions set by Article 5 (2), control by the competent authority and confinement. *The operator receiving a direct award according to Article 5 (6) can be totally independent from the authority. He may even take part in competitive tenders for the award of other public service contracts, be it other railroad contracts or contracts of other nature, e.g. urban transport contracts by bus or metro.*

The only limit to an operator, who has been awarded a railroad contract directly, lies in applying the reciprocity clause given by Article 8 (4). And yet, application of this reciprocity clause is limited in time. It only applies during the second half of the transition period (2014-2019) and its wording makes it particularly difficult to implement.

4.5.8 *Case Study I: Remaining issues related to opening up competition of the regional railway transport market – at the example of France*

If it is to succeed, opening up competition needs to be economically reasonable and regionally viable but obviously also fair for all potential operators.

Current situation in France

In France, since the "SRU" (Solidarity and Urban Renewal) law was introduced on 13 December 2000, the regions conclude regional rail transport public service contracts with SNCF (the publicly owned national railways operator). French law (loi LOTI of 30 December 1982, Internal Transport Reform Act) makes it compulsory to directly award these contracts to SNCF, without a tendering procedure. These contracts are concluded for durations of five to ten years, depending on the different

regions. Such contracts include SNCF commitments on operational costs, commercial revenues and quality, but also include profit and loss-sharing mechanisms.

In a recent answer to a parliamentary question[30] the European Commission stated that before the end of the transition period laid down in Article 8 (2) of Reg. 1370/2007, the French law (loi LOTI) will have to be modified in order to allow French regions the possibility to choose between directly awarding and tendering the public service contract. There would be no obligation for regions to tender their regional railway services but a direct award to SNCF would no longer be the sole, possible solution.

Discussions are ongoing at national level concerning the possibility for regions to experiment with tendering for regional railway lines and on the mechanisms to open up competition.

A recent law of 2009 already creates an independent regulatory body called "ARAF" (Autorité de Régulation des Activités Ferroviaires)[31].

Remaining issues

In France, where, as previously mentioned, the opening up of the regional passenger rail transport market has to be prepared, the objective of the ongoing discussions is to find pragmatic and transparent solutions to the following questions:

a) Access to rolling stock

Issues relating to rolling stock, whose life cycle exceeds the duration of PSO contracts, are fundamental to competitively tendered railway services in the future.

In France, the current rolling stock was initially financed by SNCF to ensure regional railway transport. Since 1997 this rolling stock has been partially, then completely financed by the regions. As a result, the regional passenger railway rolling stock in every French region is currently financed in a variety of ways, including binding contractual agreements between the SNCF and the regions which include a "return clause", which obliges SNCF to return the respective rolling stock to the regions at the end of the PSO contract period.

To date, all rolling stock used for passenger rail transport in French regions is owned by SNCF, with the exception of the stock recently leased by regions where the stock is the property of the financial institution, which rents it to the region that in turn makes it available to the railway operator.

In France, the ongoing discussions on regional passenger rail transport market opening include the need to establish financing and ownership solutions in a number of different cases, discussed below.

Leased rolling stock. The competent authority renting the rolling stock to the financial institution should theoretically be able to make the leased rolling stock available to the new operator.

SNCF-owned rolling stock. This situation is more complicated since the vast majority of the current French rolling stock is SNCF-owned (either completely financed by SNCF or, after 1997, completely or partially financed by the competent authority).

[30] See the answer given by the European Commission on 25.02.2009 to Parliamentary Question P-0563/09FR

[31] Law of 8 December 2009 on the organization and the Regulation of railway transports.

- For rolling stock 100% financed by SNCF solutions have to be found on case by case basis but it does not seems that SNCF is obligated to make it available to newcomers. The rolling stock does not constitute an essential facility in the sense of the Directive 2001/14 so that the incumbent operator is not obliged to make it available to the next operator. In Germany, the DB has refused to make its rolling stock available to newcomers and in most cases, the newcomers themselves had to make the investments necessary for the operation of the services. However, it is worth underlining that competition law must be respected particularly regarding any possible abuse of a "dominant position"[32]. For example, the European Commission considered that the refusal of the Italian incumbent operator to supply locomotives to a newcomer on the "open access" market constituted an abuse of its "dominant position" . This decision was based on the fact that it was impossible for the newcomer to find inter-operable rolling stock through any other means and consequently to get access to the market. In all cases the planned time between contract signature and the start of operations will have to be sufficiently long to permit the newcomer to obtain the necessary rolling stock.
- When the rolling stock has been partially financed by the competent authority and when a "return clause" is included, the competent authority should be able to reclaim the rolling stock under the terms negotiated with the incumbent operator and to make it available to the new operator.
- Even in the absence of a "return clause" the competent authority should be able to make the rolling stock available to newcomers. The recent Community guidelines on State aid for railway undertakings[33] seem to point to this interpretation as they specify that "the rolling stock must remain exclusively assigned to the specific region (…)" where the rolling stock has been wholly or partially financed by the region.

Future investment in rolling stock. It is possible that the introduction of competition generates the creation of new railway services and thus a need for rolling stock. As outlined in the JASPERS working paper no 2 "EU funding of rail rolling stock" of 2008 competent authorities have various options to promote the acquisition and utilisation of new rolling stock. Among them are:

- Directly purchase new rolling stock which will be placed at the disposal of the operator (the authority may organise its own tendering procedure for the acquisition and the financing of the rolling stock or it may include its needs for rolling stock in a tendering procedure organized in common with other authorities etc),
- Lease rolling stock from financial institutions or from Rosco's (Rolling Stock Companies). Rosco's have first been established in the UK and they are now present in other European countries especially in Germany. Rosco's specialise in leasing own railway rolling stock to railway operators or public entities. In this case operators and competent authorities are no longer responsible for rolling stock investment and the associated risks linked to possible residual value at the end of the contract. It also reduces delivery delay and maintenance risks.

[32] Decision of the Commission of 27 August 2003, relating to a proceeding pursuant to Article 82 of the EC treaty (2004/33/EC).
[33] Community guidelines on State aid for railway undertakings, OJ C184 of 22.7.2008

- Determine contractual conditions forcing the operator to invest in rolling stock. The operator will then have the responsibility for future investments and will have the choice to purchase or lease the vehicles. In Germany, most regions have determined conditions that compel new operators to use new vehicles (or to reduce costs in certain cases to acquire second hand rolling stock) while DB keeps its own vehicles.

b) Access to rolling stock maintenance facilities

Questions related to the maintenance of rolling stock are crucial in any discussion about opening the French regional railway services to competition. These questions have a direct impact on the delivery of the services, particularly on the availability of the fleet, the punctuality and overall quality of the passenger services.

To date SNCF undertakes all maintenance of rolling stock used for the passenger services, even where SNCF is not the owner.

In the future, the region will have the possibility to integrate maintenance into the call for tender concerning the delivery of services or to plan a separate call for tender covering maintenance.

If the region chooses the first option, the rolling stock could be maintained in a number of different ways: the operator may decide to leave maintenance to a third company such as the rolling stock manufacturer or the operator may directly undertake the maintenance. The solution chosen by the operator will certainly depend on various parameters:

- The type of rolling stock,
- The nature of the maintenance to be undertaken,
- location of the existing maintenance centre,
- duration of the public service contract,
- The property of the rolling stock etc.

In this context, the access to a maintenance centre for the railway companies is fundamental, since the construction of new centres is difficult to implement given the high cost and lack of suitable sites in the vicinity of stations. However, a maintenance centre staff is no service that the SNCF must offer. Another issue is the capacity and opening hours of these maintenance centres, which may have to change if the centres are shared between several railway companies. At the moment, every French region has at least one maintenance centre and certain regions are currently studying the possibility of new maintenance centres.

c) Access to stations and to their services

As competition opens up within both regional and international railway services the question of open, non-discriminatory access to stations and to station equipment for railway companies and their travellers becomes essential.

The access to stations is mentioned in the Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification as part of the minimum access package to be

supplied to railway undertakings. This access shall be non discriminatory and include passenger stations, their buildings and other facilities.

However equipment and services in stations do not all have the same status: Directive 2001/14/EC distinguishes three types of services offered to railway undertakings.

- Minimal services. These services must be supplied in a transparent and non-discriminatory way to any railway undertaking. They constitute the essential facilities that the infrastructure manager is obliged to supply.
- Additional services. Where the infrastructure manager offers any additional services they shall be supplied upon request to a railway undertaking.
- Ancillaryservices[34] . Railway undertakings may request a further range of ancillary services from the infrastructure manager or from other suppliers. The infrastructure manager is not obliged to supply these services.

In France, SNCF is the station manager

In France, in the context of the transposition of the Directive 91/440, the law of 13 February 1997 created RFF (Réseau Ferré de France)[35] and organized the separation between infrastructure management (entrusted to RFF) and transport operations (SNCF). However, stations have been excluded from this transfer to RFF and as a result, SNCF remains the delegated infrastructure manager in charge of stations while RFF is only responsible for the station platforms.

To separate its station manager activities and its railway operator activities, SNCF recently created a new business sector directly under the responsibility of its President called "Gare et Connexions" (Stations and Connections). This sector covers the management and operation of passenger stations (approximately 3 000 stations on the national network) and also the maintenance and development of these stations. These activities are executed by a total of 13 000 staff in the group. Since 2010, SNCF "Gare et Connexions" benefits from an accounting separation within the SNCF.

Situation in other European countries

In Germany, passenger stations are managed and owned by the company DB Station and Service AG, which is a subsidiary company of the holding company of the DB AG group. Another subsidiary company, DB Netz AG, is in charge of the management of the railway network.

In Italy, a subsidiary company of Ferrovie dello Stato, FS Sistemi Urbani, manages the 116 main stations of the country but leaves the operation to two subsidiary companies : Grandi Stazioni manages the 13 main stations and Centostazioni the 103 others. The infrastructure manager, RFI (itself a subsidiary of Ferrovie dello Stato), manages the 2 087 other Italian stations.

In the United Kingdom, the infrastructure manager Network Rail which is a non-profit private company, is the owner of the 2 514 stations. In general the management of the stations is delegated to Station Facility Owners (SFO).

[34] As mentioned in Annex II of Directive 2001/14/EC ancillary services may comprise:
a) access to telecommunication network; b) provision of supplementary information; c) technical inspection of rolling stock.

[35] Law 97-135 of 13 February 1997, OJ of 15.02.1997 carrying creation of railroad network of France with the aim of the revival of the railroad transport.

Sweden has a system, which completely separates the incumbent railway operator, Statens Järnvägar (SJ), the infrastructure manager, Bankverkert, and the stations manager, Jernhusen AB. The station manager is independent from the incumbent and from the infrastructure manager and is placed under the responsibility of the Ministry of Business and Industry.

Specific problems related to the management and possible transition

In France essential facilities include:

- Provision and the maintenance of buildings, of surfaces receiving people and equipment, as well as services necessary for passenger reception;
- Passenger access to trains via the provision of adequate equipment;
- Operational management of the station and the access of trains to the station,
- Provision of information to passengers concerning access to trains.

The minimum service that SNCF must provide to all operators is a set of indivisible services benefiting all passengers (signalling systems, lost-and-found, general information centres, indication of tracks, waiting areas, and toilets). Other services include those that railway undertakings may need, such as the lease of premises needed for services beyond minimum service level. These different services have distinct tariffs.

The lack of detail in the EU Directive and in the relevant transposing French legislation make it impossible to establish a list of all the various minimal, additional and ancillary services which could be offered to non SNCF railway undertakings. This is still subject to discussions but a pragmatic approach would have to be taken concerning the minimal services, which depend upon various factors such as building configuration, the level and quality of available equipment, etc.

In countries that already have opened their railway services or parts of their railway services to competition, newcomers have met concrete difficulties concerning the non-discriminatory access to stations and their related services. Examples below may illustrate this:

- Newcomers were often allocated the most distant and the least accessible platforms (in France, this would be the responsibility of RFF (Réseau Ferré de France, the infrastructure manager) and not SNCF);
- The information concerning the trains of the newcomers was not correctly disseminated in the station;
- The basic services offered to the passengers in station were not ensured (e.g. waiting rooms or toilets were locked etc.);

The access to stations and to their services has a significant impact on the quality of the services offered to the passengers and as such, potential railway undertakings interested in the competitive opening of part of the French regional market are being consulted in context of the ongoing discussions. They have already identified a number of issues that will have to be tackled:

- Necessity of a multiannual pricing strategy for the services in station. This multiannual pricing already exists in the airport sector and is fundamental for railway undertakings wishing to answer calls for tender.

- A system of performance rewards and\or penalties could also be included in the contracts between the station manager and the railway undertakings, particularly in case of disruption in the supply of services.
- Given the large number of parties involved (SNCF, RFF, other railway undertakings, municipalities, the region, shopkeepers etc.) it would be wise to establish "station committees" in order to inform and discuss the needs of each party involved.

It appears that complex concrete difficulties will have to be solved but opening up competition could also be an opportunity to develop new services. For example, in the UK certain suburban stations which were busy only in the morning and afternoon rush hours, developed additional services such as the installation of day-nurseries or supermarkets which increased the attractiveness of stations.

d) Social aspects

Social aspects constitute the main and the most sensitive remaining issue being currently discussed in France. In the future, in case an operator other than SNCF is selected and is in charge of part of regional railway services, what would happen in terms of transfer conditions of employee's rights ? In particular :

- How to identify and list the staff concerned ?
- How to manage the pension funds issue ?
- How to manage the wages issue ?
- How to manage the social benefits or the seniority issue etc. ?

In the French case, these issues have already been tackled in a different part of the public transport market : as a matter of fact in 2006 more than ninety per cent (Paris excluded) of the urban networks (bus, tram, metro) were operated following the tendering of a public service contract. This experience will certainly be useful in the framework of the current discussions, but the opening up of regional railway services will nevertheless involve a specific approach considering in particular that SNCF staff benefit from a State employee's status.

In order to find solutions to these questions the analysis of the German experience appears to be the most relevant.

In 1994, the creation of the BEV (Bundeseisenbahnvermögen) played a crucial part in the German railway reform and was the financial basis of the dynamic strategy of DB AG. Specific the entire cumulated debt (around 35 billion euro) of the former Deutsche Bundesbahn and of the former Deutsche Reichbahn (freight and passenger transport) were transferred to the BEV as well as social costs. The latter also inherited responsibility for the retirement pension funds of these two companies (45 billion euro for the period 1994-2002, around 210,000 beneficiaries). Finally, responsibility for the State employees was also transferred to the BEV (108 000 agents in 1994 and not more than 42 000 or 40 000 full time equivalents in 2006).

The BEV continues to pay them according to the civil servant salary scale, while DB AG reimburses the BEV on the basis of the salary scale of the collective agreement

applicable to DB AG. According to the 2007 financial law, foreseen incomes amount to 1.8 billion euro (mainly DB AG reimbursements for the salaries and contributions), while expense should amount to 7.6 billion euro (5 billion for retirement pension funds, 1.6 for salaries, the rest for diverse aids) that is to say a debit balance amounting to 5.8 billion euro. In any case, since 1994 all hiring occurs under private law employment contracts.

Solutions adopted in Germany are not necessarily transposable to France or other European countries but it remains that thanks to the creation of the BEV, DB AG has been financially able to face the opening up to competition of the regional railway transport market.

4.6 Direct award of low value contracts (below thresholds)

4.6.1 One general threshold value

Article 5 (4) first paragraph gives the value below which competent authorities may directly award public service contracts. This threshold value is set to 1 million euro a year. It is also expressed in number of kilometres annually produced, 300,000 kilometres a year.

This disposition relies on the fact that small contracts may, if wished by the authorities, be excluded from market forces. Such small contracts can thus be awarded directly to any operator of any size.

4.6.2 A specific threshold for contracts awarded to small or medium-sized enterprises

During negotiations with the Council, certain Member States made the threshold issue a central negociation issue. Germany, in particular, insisted on the necessity to allow family businesses to survive and wanted to treble the threshold value. The Commission and certain Member States judged this unacceptable, as it seriously-would have reduced the size of the market.

The European institutions reached a compromise by adding a second paragraph to Article 5 (4).

The second paragraph of Article 5 (4) was thus added specifically in favour of small or medium-sized enterprises: if a contract is awarded to a small or medium-sized enterprise, then and only then the threshold values are doubled. Contracts worth less than two million euro annually or concerning less than 600 000 km produced annually may thus be awarded directly.

There remained to find a means of identifying companies of the sector that could claim to be small or medium-sized enterprises. The eventually selected criterion was the number of "vehicles being operated". It was set to 23, after negotiation.

Eventually, and once this specific threshold value in favour of small or medium-sized enterprises was created, the thresholds seem relatively high. They will probably be interpreted in a restrictive way. In particular, the notion of "vehicle being operated" might be manipulated to allow enterprises that are neither small, nor medium-sized, to be granted particularly favourable thresholds.

Finally, direct award of low value contracts according to Article 5 (4) requires no particular counterpart:

- The duration of these contracts is not limited in any way. They can last 10 years for road services and 15 years for railroad services (tram, metro or train);
- No control condition, nor confinement condition, is required.

4.6.3 Compensation calculated according to Annex

Just like for all the contracts awarded directly, Article 6 (1) of the Regulation states that any compensation related to contracts, that are directly awarded according to Article 5 (4), must be calculated not only according to the dispositions in Article 4 of the Regulation, but also according to the calculation rules set in the Regulation Annex.

These rules are analysed in section 3.4.2 above.

4.6.4 Publication

Just like for all directly contracts[36] , Article 7 (2) (see section 5.1.1) imposes that authorities publish the intention to directly award low value contracts at least one year before the direct award.

Contracts with yearly delivery of less than 50 000 kilometres of public transport service are not concerned by this publication obligation.

4.6.5 Limits for the award of low value contracts

Contracts for less than 50,000 km/year	Contracts for less than 300,000 km/year or with an annual value inferior to EUR 1,000,000	Contracts for less than 600,000 km/year or with an annual value inferior to EUR 2,000,000
Direct award is possible	Direct award is possible	Only the direct award to SME (less than 23 vehicles) is possible
Publication is not compulsory	Publication one year in advance is compulsory	Publication one year in advance is compulsory

4.7 Direct award of contracts in emergency situations

Article 5 (5) gives to competent authorities the possibility to directly award a public service contract or to extend the duration of an existing contract "in the event of a disruption of services or the immediate risk of such a situation".

[36] Except contracts in emergency situations, see section 4.7.2.

It is to the competent authority to assess whether there is an emergency situation i.e. a disruption of services or an immediate risk of such a situation. Obviously this decision will be subject to the possible review defined in Article 5 (7).

4.7.1 An emergency contract directly awarded for a very limited period of time

Article 5 (5) states that "the award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years".

4.7.2 A direct award not subject to prior publication

Article 7 (2) imposes that authorities publish the intention to directly award public service contracts. Very logically, this is not to be applied in the case of direct award or extension of existing contract in emergency situation (Article 7 (2) last sentence).

4.7.3 A direct award not subject to the reciprocity principle

The reciprocity clause introduced in Article 8 (4) (see section 7.3) offers competent authorities the possibility, during part of the transition period, to keep undertakings protected on their domestic market from their markets. This clause is not to be applied to an operator who has been awarded directly a public service contract in an emergency situation Article 8 (4) last sentence.

4.7.4 Compensation calculated according to the Annex

Just like for all the contracts awarded directly, Article 6 (1) of the Regulation states that any compensation related to contracts, that are directly awarded according to Article 5 (4), must be calculated not only according to the dispositions in Article 4 of the Regulation, but also according to the calculation rules set in the Regulation Annex.

These rules are analysed in section 3.4.2 above.

5

5 Publication and information obligations that competent authorities must respect

With increased transparency as one of its main goals, the new Regulation imposes several publication and information obligations, mainly on competent authorities.

5.1 Before awarding a new public service contract

Article 7 (2) imposes that authorities publish their intention to directly award a low value contract.

Article 7 (2) states that the information must be published *at least one year before the invitation to tender or one year before the direct award.*

Article 7 (2) states that the information must be published *at least in the Official Journal of the European Union*, except for contracts with yearly delivery of less than 50,000 kilometres of public transport service.

The Regulation very briefly describes the information that has to be published one year before launching the competitive tendering procedure. *The minimum requirement is:*

- The name and address of the competent authority;
- The type of contracting considered (direct award or tendering);
- The services and areas potentially covered by the contracting.

As already mentioned (see section 4.7.2), the obligation to publish information on how the contract is awarded does not apply to contracts directly awarded in emergency situations according to Article 5 (5) of the Regulation.

Further, as mentioned below (see section 7.3), the competent authority must inform potential operators when it decides to apply the reciprocity principle, referred to in Article 8 (4) of the Regulation at the beginning of the award procedure. The competent authority must also inform the European Commission of its intention to apply this provision at least two months before publishing the invitation to tender.

5.2 During the contract

Article 7 (1) states that once a year, each competent authority must publish once a year an aggregated report on the public service obligations for which it is responsible, the selected operator and the compensation payments and exclusive rights granted.

The report shall distinguish transport by bus and transport by rail.

Its purpose is to allow for assessment and monitoring of performance, quality and financing of the public transport network.

This obligation to publish a report every year implies that relevant information is provided to the competent authority which is responsible for the publication. Therefore, the availability and transmission of information is a fundamental part of public service contracts.

5.2.1 Examples of contractual clauses

Quality monitoring and documentation

- As part of the contract evaluation, the transport operator shall provide the competent authority with reports on the reliability and punctuality of trains, buses… for the first half-year and for the complete year.
- The competent authority will assist the transport operator in fulfilling the reporting obligations. It may provide guidelines, templates, software programs or similar monitoring and documentation tools.
- The competent authority may gain access to any relevant information and data.

Reporting obligation of the Parties

- The competent authority abides by the reporting and publication rules stipulated in Regulation (EC) No. 1370/2007. The transport operator provides reports so as to enable the competent authority to comply with its obligations and gives access to the necessary data. The reporting obligations and the types, structure and frequency of reports are set out in (relevant article or Annex) and shall be reviewed and updated according to practical needs.
- The reports delivered by the transport operator shall also be used to calculate compensations and to monitor contractual obligation fulfilment.
- The Parties must adapt their reporting system in case of new legislation.

5.3 After direct awards

In addition to the annual report referred to in the previous section 5.2, the new Regulation makes it compulsory to publish certain information for direct contract awards.

5.3.1 After direct award of any public service contract and on demand of any interested party

Article 7 (4) states that if any interested party asks for it (competitors, users' associations…), the competent authority must accept to say what motivated his decision to award the public service contract directly.

In this case the information regarding the motivation of the direct award is not to be published but “forwarded” to the interested party who requested it.

5.3.2 After direct award of railroad services according to Article 5 (6)

If a competent authority directly awards a railroad transport contract according to Article 5 (6), Article 7 (3) of the Regulation states that it must publish given information within one year of the award to ensure reinforced transparency. This publication obligation is compulsory without any interested party asking for it. The required information deals with the type of contracting parties, the purpose and duration of the contract, the compensation parameters, the quality goals and the main assets. However, the Regulation does not mention how the information is to be published.

6

6 Legal protection and review procedures

6.1 A protection similar to that offered by the public procurement Directives

As for the workings of legal protection, the legal department of the Council wrote Recital 21 and Article 5 (7) and the three institutions agreed to their consequences and appropriate wording.

The goal was not to leave any loophole in the legal protection and to ensure that the workings of legal protection for contracts covered by Regulation are comparable to those offered by the public procurement Directives.

Regulation states that certain contracts still are awarded under procedures defined by the public procurement Directives (Directives 2004/17/CE and 2004/18/CE). The appeal and revision procedures defined in Directives 89/665/CEE and 92/13/CEE already cover the award of these contracts and give an appropriate legal protection. Regulation forces Member States to take the necessary steps so that contracts, whose award is not covered by the public procurement Directives, also get similar legal protection. These contracts can be directly awarded to an internal operator according to Article 5 (2), put out to competitive tendering according to Article 5 (3) or directly awarded according to Articles 5 (4), 5 (5) or 5 (6). It is fundamental that persons, who have a stake in how these contracts are awarded, be just as well covered as persons, who have a stake in how contracts covered by the public procurement Directives are awarded.

Recital 21 is very useful in case of dispute, as it states that this revision procedure must be efficient and comparable to that of the public procurement Directives. The European Commission could use Recital 21 if a Member State foresees a legal protection that is insufficient or inferior to that guaranteed for contracts covered by the public procurement Directives.

6.2 Protection coverage

Article 5 (7) states:

- That this legal protection covers any person having or having had an interest to act, i.e. an interest to get a certain contract;
- That this legal protection may be entrusted to a body (called review body) that has no legal character;
- That if the review body lacks legal character, its decisions are motivated in writing;
- That if the review body lacks legal character, the Member States must set up an independent legal control for illegal measures alleged by the review body and for any irregularity alleged in how the review body works.

6.3 Protection liabilities

Article 5 covers these legal protection dispositions. They thus benefit from the transition period foreseen by Article 8 (2) of the Regulation. They cannot be required before December 3rd, 2019, even if Member States progressively must take appropriate measures until then.

7

7 Transition period

Regulation 1370/2007 applies since 3 December 2009. However, Article 8 of the Regulation provides for a 10 year transition period: the application of Article 5, including the principle of competitive tendering for the award of public service contracts, may be postponed until 3 December 2019 (Article 8 (2)) for contracts that are not subject to public procurement Directives (Article 8 (1)), to allow for progressive transition of the Member States. The Regulation also gives specific transition rules for public service contracts awarded before its application (Article 8 (3)).

7.1 Rules limited to the application of Article 5, i.e. on the award of public transport contracts

According to Article 8 (2) of the Regulation, "the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transition period Members States shall take measures to gradually comply with Article 5 (…)".

Thus, the 10-year transition period only applies for the award procedure as stated in Article 5 and not for other provisions of Regulation 1370/2007, such as the mandatory content of PSC (public service contract) or compensation rules.

Provisions of the Regulation 1370/2007 other than Article 5 are applicable as of 3 December 2009.

The Commission confirmed this in its recent DSB decision[37]. On 24 February 2010, the Commission stated that compensation granted under public service contracts applicable before Regulation 1370/2007 also was subject to Regulation, since the valid legislation is that applying at the time of examination.

7.1.1 Contracts covered by public procurement Directives

Article 8 (1) clarifies the fact that the 10 year transition period does not apply to contracts whose award is covered by public procurement directives: "Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 4 of this Article shall not apply".

In other words, contracts covered by public procurement Directives had to comply with these Directives even before Regulation 1370/2007 was adopted. The adoption of a new Regulation with a 10-year transition period does not suspend the application of the Public Procurement Directives.

Section 4.1 of this study (and Table in Section 4.1.2 in particular) identifies which contracts are to be awarded under public procurement directives and which are under Article 5 of the new Regulation.

7.2 Status of existing contracts

For contracts awarded before application of the new Regulation, a specific article with strict conditions has been adopted enabling certain contracts awarded before 26 July 2000 (date of the first EU Commission proposal) or awarded between 26 July 2000 and 3 December 2009 to continue even after 3 December 2019, the end of the transition period. Article 8 (3) is an answer to the "pacta sunt servanda" principle.

[37] Commission Decision of 24 February 2010 concerning public transport service contracts between the Danish Ministry of Transport and Danske Statsbaner (Case C 41/08 (ex NN 35/08)). OJEU 11 January 2011, p.1 http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2011:007:SOM:EN:HTML

As regards Article 8 (3):

- contracts awarded before 26 July 2000 on the basis of a fair competitive tendering procedure may continue until they expire (art. 8 (3) (a));
- contracts awarded before 26 July 2000 on the basis of a procedure other than a fair competitive tendering may continue until they expire, but no longer than 30 years (art. 8 (3) (b));
- contracts awarded between 26 July 2000 and 3 December 2009 on the basis of a fair competitive tendering procedure may continue until they expire, but no longer than 30 years (art.8 (3) (c));
- contracts awarded between 26 July 2000 and 3 December 2009 on the basis of a procedure other than a fair competitive tendering may continue until they expire, provided they have a limited duration comparable to the duration specified in Article 4 (art.8 (3) (d)).

In some countries, existing contracts have already been secured for the maximum transition period allowed in Article 8 (3) of the Regulation. In France for instance, for the Ile de France region, expiration dates for current public service contracts have been set by law[38] : to 31 December 2024 for road transport services, to 31 December 2029 for tramway services and to 2039 for metro services and other guided means of transport (e.g. suburban trains)[39].

7.3 Reciprocity principle, difficult to enforce and of limited impact

Article 8 (4) introduces a reciprocity principle. During the transition period, this clause allows for the specificity of different market opening levels and different Regulation implementation rhythms in the Member States. It permits competent authorities to protect domestic market undertakings from the markets.

However, in reality, the application of the reciprocity principle is extremely limited:

- *Limited in time,* as it only applies during the second half of the transition period, from 3 December 2014 to 3 December 2019;
- *Limited in scope*, as competent authorities only may apply it to "those public service operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right granted in accordance with this Regulation represents at least half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right" to liberate them from tendering procedures.

Limited in time and extremely difficult to apply, the reciprocity clause appears to be mere "window dressing", rather than an efficient way to prevent operators from being protected from competition at home while benefiting from it elsewhere during transition.

[38] Law No. 2009-1503 of 8 December 2009 « *relative à l'organisation et à la régulation des transports ferroviaires et portant diverses dispositions relatives au transports* », published in the Official Journal of the French Republic of 9 December 2009.

[39] On this French Law see parliamentary question E-6628/2009 and the answer of the European Commission:
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2009-6628+0+DOC+XML+V0//EN
See also a second parliamentary question E-8155/2010 and the answer of the European Commission :
http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2010-8155+0+DOC+XML+V0//EN

In case a competent authority decides to apply the reciprocity clause, it shall do so without discrimination: it is not possible to exclude one operator protected on its domestic market and to accept another benefitting from the same protection. In case a competent authority decides to apply the reciprocity clause, all protected operators shall be excluded and informed at the beginning of the procedure.

Furthermore, a competent authority intending to apply the reciprocity clause must inform the European Commission of its decision at least two months before inviting to tender. This means that the decision to apply the reciprocity clause must be taken prior to tendering. In other words, competent authorities cannot decide whether they want to apply the reciprocity clause or not after receiving answers from protected operators.

7.4 Case study II: The award of a new regional rail contract in the Catalan region during the transition period

Introduction to Barcelona case study

While the Spanish Constitution gives to the State the competency on rail and ground transportation services that run across more than one Spanish Autonomous Community, the Statute ruling the Catalan Autonomous Community as major law (Organic law 6/2006) says that Generalitat de Catalunya (i.e. the Catalan public Administration) has the exclusive competence on passenger and goods transportation by road, rail and cable across the Catalan territory. This competence encompasses the activities of regulation, planning, management, coordination and tariff setting.

The Catalan rail law 4/2006 dated 31 March states that the Rail System of Catalunya is composed of all services that have origin and destination within the Catalan territory, even though they run on infrastructures belonging to or connected with those of the Spanish State administration.

On the basis of the existing legal framework and of an agreement reached by the Spanish State – Generalitat de Catalunya Bilateral Commission in July 2009, Generalitat de Catalunya is entrusted with the role of rail authority for the Barcelona commuter train services (Cercanías) since 1st January 2010 (see Royal Decree 2034/2009 dated 30th December 2009). Following the aforementioned agreement between the Spanish State and Generalitat de Catalunya, RENFE-Operadora[40] keeps being the operator of the Barcelona commuter train network in 2010 under the Contract programme for the 2006-2010[41] period signed between the State and the company, in which Generalitat has subrogated itself in the position of the Spanish public Administration with respect to the Barcelona commuter train system. RENFE-Operadora may continue being the Barcelona commuter train service operator if Generalitat de Catalunya and RENFE-Operadora agree upon and sign a new contract for the 2011-2015 period (otherwise, RENFE-Operadora would cease being nominated operator on 31st December 2011)

The following case study describes the rules following the entry into force of Regulation 1370/07 that the Catalan region will have to respect in the drafting and the award of this new contract for regional rail services. The present study

[40] RENFE-Operadora is the national historical operator of rail services in Spain.

[41] Contract programme ("Contrato-programa" in Spanish) for the 2006-2010 period: 5- year agreement between the State Administration and the national rail operator that specifies overall conditions of the rail services to be provided and the related subsidies to be delivered by the State.

decided to consider only the hypothesis where the region directly awards the contract to the historical operator (RENFE).

Relevant rules that the region will clearly have to apply in any case :

- Scope of the Regulation : Article 1 (2)

This situation clearly enters into the scope of Regulation 1370/2007

- Compulsory public service contract: Article 3 (1)

In 2011, the Catalan region is going to grant to RENFE financial compensations for the discharge of public service obligations and an exclusive right to operate regional rail services. It is mandatory that the relationship between the Catalan region and RENFE be a public service contract.

- Mandatory content of the public service contract : Article 4 (1), (2), (5), (6) and (7)

This public service contract will have to respect the mandatory content defined in Article 4 of the Regulation:

- The contract shall define clearly the public service obligations which RENFE will be to comply with;
- The contract shall define clearly the geographical area concerned;
- The contract shall establish in advance, in an objective and transparent manner the parameters on the basis of which the compensation payment, if any, is to be calculated and the nature and extent of any exclusive right granted in a way that prevents overcompensation;
- The contract shall determine the arrangements for the allocation of costs connected with the provision of the services;
- The contract shall determine the arrangements for the allocation of revenue from the sale of tickets;
- In case the authority requires the operator to comply with certain social standards, the public service contract shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services;
- In case the authority requires the operator to comply with certain quality standards, these standards shall be included in the public service contract;
- The contract shall indicate whether and if so to what extent subcontracting may be considered. This subcontracting possibility shall in any case respect the limits defined in Article 4 (7) of the Regulation.

Control of the calculation of the amount of compensation: Application of Article 6 (2)

- At the written request of the Commission, obligation to communicate all the information that the Commission would consider necessary to determine whether the compensation granted is compatible with the Regulation.
- Publication of annual report: Application of Article 7 (1)

Obligation for the region to publish once a year an aggregated report to assess performance, quality and financing of the public transport network.

- Information : Application of Article 7 (4)

When so requested by an interested party, the region shall forward to it the reasons for its decision for directly awarding a public service contract.

The question of the application of Article 5 concerning the way public service contract are to be awarded and of the application of other Articles linked to Article 5 is much more ambiguous.

The contract between the Catalan region and RENFE is going to be awarded during the transition period defined in Article 8(2). During this period, which ends on 3rd December 2019, "Member States shall take measures to gradually comply with Article 5 (…)". In other words, during this transition period there is no obligation to award public service contracts in the respect of the conditions defined in Article 5. Any contract awarded without complying with Article 5 would have to end at the latest on 3rd December 2019. At this date a new contract complying with the Regulation including Article 5 would have to be awarded.

In principle, during this transition period the Catalan region is free to award to RENFE a regional rail public service contract without complying with Article 5 of the Regulation. It could also be more than one contract, for example the region could award a first contract from 2011 to 2015, and a second one from 2015 to 3rd December 2019 without respecting Article 5 of the Regulation.

This being said, the Catalan region has to consider the fact that Article 5 (6) of the Regulation offers the possibility to directly award public service contracts where they concern rail (trains). This application of Article 5 (6) is possible as long as certain rules and counterparts defined in other Articles and in the Annex of the Regulation are respected.

The Catalan region has two options:

- First option : the region chooses to award directly the public service contract and to comply with Article 5 (6) of the Regulation ;
- Second option : the region decides to award directly without respecting Article 5 of the Regulation.

The Catalan region will have to take a decision and to make clear if the contract to RENFE is awarded in compliance with Article 5 (6) or not, because consequences will be different.

Consequences in the case the Catalan region chooses to directly award the regional rail public service contract and to comply with Article 5 (6) of the Regulation :

- Direct award to RENFE : Application of Article 5 (6)

Unless prohibited by national law, the region may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways.

- Duration of the contract : Application of Article 5 (6)

The contract may last up to 10 or even 15 years, if the operator provides assets which are significant and linked predominantly to the transport services covered by the contract, as mentioned in Article 4 (4). For example, the region could award a contract lasting from 2011 to 2021 or even 2026 (if conditions of Article 4 (4) are met). Other example, the region could award a first contract lasting from 2011 to 2015 and a second one from 2015 to 2025 or even 2030 (if conditions of Article 4 (4) are met).

- Legal protection : Application of Article 5 (7)

The Member State shall take the necessary measures to ensure efficient and rapid legal protection for any person having or having had an interest in obtaining a particular contract.

- Calculation of the amount of compensation : Application of Article 6 (1) second sentence and of the Annex.

The compensation in return for the discharge of public service obligations will have to be calculated in accordance with the principles set out in the Annex. Basically, the main principle set out in the Annex is that the authority may not compensate in a way that exceeds the amount corresponding to the net financial effect of the compliance with the public service obligation.

NB : This approach is different from the one developed in the Altmark case.

- Publication before the award : Application of Article 7 (2)

Obligation for the region to take the necessary measures to ensure that, at least one year before the direct award the following information at least is published in the Official Journal of the European Union :

  - The name and address of the competent authority;
  - The type of award envisaged;
  - The services and areas potentially covered by the award.

NB : Problem is that if the Catalan region wants to award directly the new contract in January 2011 in compliance with Article 5 (6), this publication in the OJEU should have occurred at least in January 2010. If this has not been the case, one solution could be to extend the duration of the ongoing contract and to award a new contract one year after publication in the OJEU.

- Publication and increased transparency in the specific case of a directly awarded rail contract in compliance with Article 5 (6) : Application of Article 7 3)

If the Catalan region chooses to award directly the contract and to comply with Article 5 (6), the Regulation asks for an increased transparency : the region will have to make

public the following information within one year of granting the award :

a) name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control;

b) duration of the public service contract;

c) description of the passenger transport services to be performed;

d) description of the parameters of the financial compensation;

e) quality targets, such as punctuality and reliability and rewards and penalties applicable;

f) conditions relating to essential assets.

Consequences in the case the Catalan region chooses to directly award the regional rail public service contract but not to comply with Article 5 (6) of the Regulation :

- Direct award : No application of Article 5 (6) but compliance with the general principle of the Treaty

In the case the region would chose not to apply Article 5 during the transition period, the direct award of a regional rail public service contract to RENFE is possible, in so far as such a direct award is of course not prohibited by national law and in so far as it is not covered by any other specific Community law. In this case study it appears that Spanish law does not prohibit such a direct award and that the award of regional rail public service contract is not covered by any other specific Community law (this situation is not covered by Public procurement Directives and is not covered by the so called rail package). In such a case, if the region chooses not to apply Article 5 (6) of the Regulation, the direct award would therefore only be subject to compliance with the general principles of the Treaty, including any relevant interpretation by the Court of Justice of the European Community.

- Duration of the contract : Application of Article 8 (2)

In the case the region would chose not to apply Article 5 during the transition period, any contract will have to end at the latest on 3rd December 2019. For example it could be a contract lasting from 2011 to 3rd December 2019 or a first contract lasting from 2011 to 2015 and a second from 2015 to 3rd December 2019.

- Calculation of the compensation amount: No application of the Annex, probable application of the criteria defined in the Altmark case.

The rules laid down in the Annex are applicable to compensation connected with public service contracts awarded directly in accordance with Article 5 (2), (4), (5) or (6). In the case the region would chose not to apply Article 5 during the transition period, any compensation granted in relation to the provision of public passenger transport services which would not be covered by the Regulation and which risks involving State aid within the meaning of Article 87 (1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in the Case C-280/00 Altmark Trans GmbH.

- Legal protection : No application of Article 5 (7)

- Publication and transparency : No application of Article 7 (2) and (3)

NB: These articles Just like the Annex, are not part of Article 5, which is the subject of the transition period, but closely depend on the application of Article 5. It is difficult to imagine that the European Commission will ask competent authorities that don't apply Article 5 to comply with the Article 7 (3) or with the Annex during the transition period. The analysis is probably a bit different concerning Article 7 (2) and I would advise competent authorities to comply with it during the transition period even if they don't respect Article 5 of the Regulation.

Conclusion:
Competent authorities have during the transition period, the possibility not to apply the rules defined in Article 5 of the Regulation. Nevertheless it appears that such a choice opens a lot of legal uncertainties. As already mentioned in this study, the possibility to award directly railway contracts is dependent on few counterparts (especially compared to the direct award to an internal operators).

In order to award directly railway contracts during the transition period, it appears that the safer solution is to follow the rules laid down in Article 5 (6) of the Regulation.

8

8 Conclusion

Regulation 1370/2007 represents a remarkable step forward in the public transport sector, in particular, in that it reconciles the freedom to organize of local authorities with fair competition between the various operators.

It obviously also represents an important step towards more transparent, quality oriented and efficient public transport services.

Nevertheless it appears throughout this study and throughout the first experience of implementation, that a large number of provisions in this Regulation are raising interpretation problems.

It is of fundamental importance that in the coming months and years EU Institutions bring the necessary answers to these questions in order to enable this Regulation to reach the legal certainty objective it was adopted for.