

European Institute of Public Administration - Institut européen d'administration publique



The Regulation 1370/2007

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Current EU legal framework – Article 93 TFEU

Aids shall be compatible with this Treaty

- if they meet the needs of coordination of transport or
- if they represent reimbursement for the discharge of certain obligations inherent in the concept of a public service.

enforcement



Regulation 1370/07 as from 3 December 2009

Altmark, C-280/00

■ Criteria

- public service obligation (PSO) well defined
- parameters of public service compensation (PSC) predetermined
- aid covers only extra costs of PSO
- costs not higher than those of typical undertaking or public tender chooses the beneficiary with lowest price offered

If above criteria are met, PSC is not state aid

PSO Regulation 1370/2007 - Introduction

- Extends the scope to national and international operation of public passenger services;
- Applies only to public service obligations;
- Provides clear definition about “public contract”, “public service operator”, “direct award”;
- Permits local authorities to provide services or to directly award contract to an internal operator;
- Principle of neutrality as regards ownership of transport operators
- Applies detailed rules on compensation payments;
- Provides exemption from notification

Compensation may or may not constitute state aid
[it is not state aid if it satisfies Altmark criteria]

Scope

- National and international operations
- Rail, buses, other rail track based modes (metro, tramway)
- Freight transport: No. Regulation 1191/69 still in force for 3 more years
- Coordination of transport: No. Article 93 TFEU applies
- Public work concessions: No
- Historical interest and tourist value services: No
- Inland waterways: No but MS may still decide to apply it

Public contract - Definition

- Recital 9: the form or designation of the contract may vary according to the legal systems of the Member States
- Extremely wide definition
 - not restricted to purely civil law instruments
 - may take the form of legislative or regulatory act
 - may take the form of a decision by a competent authority to provide the services itself or entrust them to an internal operator

Imposed obligations + rights of defence

- Law, as the main legal basis, covers PSO in transport, and
- It grants exclusive right to an undertaking to provide the services, specifying PSO in as much as minimum levels and the compensation mechanisms, and
- It also provides for rights of defence, such as:
 - right of access to a specific route
 - right to terminate contract
 - right to calculate price adjustments for PSO
 - opt-out clauses for specific routes
 - possible profit sharing arrangements
 - dispute resolution mechanism

The above can be covered under the Regulation

Public Service Obligation & Compensation: Definitions

- Public service obligation means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an 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
- 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

Content of Public Contract

- Definition of public service
- Determination of parameters for the calculation of compensation
- Repartition of costs and revenues
- Duration of contract
- Quality criteria
- Subcontracting

Well-Defined PSO

- Member States are free to define the services of general economic interest (SGEI)
- Commission's role is confined to prevent "manifest error"
- Examples of not well-defined PSOs
 - a service is adequately provided by the market;
 - policy objective is too broad or vague;
 - obligations are either too general or not legally binding;
 - no clarification of extra costs involved in the presumed public service.

Duration of contract

- General rule:
 - 10 years for buses and 15 years for rail or other track-based modes
- Exceptions:
 - general rule + 50% if the undertaking provides significant assets
 - general rule + 50% in outermost regions
 - 15 years for combined transport
 - longer duration for contracts under fair tendering procedures (exceptional infrastructure, rolling stock or vehicular investment) - Commission to be informed

Award of contracts – General principle & Direct award

- Public service contracts shall be awarded on the basis of a competitive tendering procedure [Article 5(3)]
 - principle of transparency and equal treatment
- Direct award is allowed for:
 - contracts with < EUR 1million annual value, or with <300 000km/year
 - in case of SMEs (no more than 23 vehicles) contract with < EUR 2million annual value, or with <600 000km/year
 - emergency measures
 - railways, if national law permits, and with the exception of tram and metro
 - 10 years contract
 - internal operator

Award of contracts – Methods per transport mode

Article 5(1): “Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with [those] Directives, the provisions [of internal operator] shall not apply”

cont.

According to the Regulation:

- Contracts can be awarded via competitive tendering procedure for trains or metro
- Contracts can be awarded to all transport modes if in the form of concessions
- Bus or tram ordinary contracts must be awarded pursuant to public procurement directives

Public contracts & Service concessions

Internal Operator -Principles

- Unless prohibited by national law a competent authority is free to choose to entrust its own public passenger transport services in the area it administers to an internal operator without competitive tendering – thus, public procurement directives do not apply

Questions:

- What is the meaning of internal operator?
- How does the concept of internal operator apply in respect of different transport modes? and
- How does it apply to public contracts and service concessions?

Internal operator - Concept

- A legally distinct entity over which the contracting authority exercises control which is similar to that it exercises over its own departments
- The entity carries out the essential part of its activities with the controlling authority [Teckal (C-107/98)]

Internal Operator – Different transport modes

- Unless prohibited by national law direct award to internal operator is allowed for trains, metro and tram
- Recital 18: “Restrictions on the activities of an internal operator do not interfere with the possibility of directly awarding public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. Furthermore, the direct award of public service contracts for heavy rail does not preclude the possibility for competent authorities to award public service contracts for public passenger transport services on other track-based modes such as metro and tramways, to an internal operator”

cont.

- Direct award is allowed in the form of service concessions for all transport modes
- Direct awards to busses is not allowed under the Regulation. However this is allowed directly from the Jurisprudence (Teckal, C-107/98 and Stadt Halle, C-26/03)

Internal operator – Tendering procedures

- The internal operator shall not take part in competitive tenders concerning the provision of public passenger transport services organised **outside** the territory of the competent local authority [Article 5(2)b]
- Recital 18: “The authority controlling the internal operator should be allowed to prohibit this operator from taking part in competitive tenders organised within its territory”

Internal operator 1st condition - control

- Entity wholly owned by a contracting authority
 - sole ownership is a strong indicator of control, but
 - restrictions on voting powers limits the exercise of control (Carbotermo, C-340/04)
- Entity owned jointly by several contracting authorities
 - each situation should be assessed *in casu*
 - control structure should be assessed as a whole (Asemfo, V-295/05)
- Entity owned jointly by contracting authority and private parties (Stadt Halle, C-26/03)
 - private capital investment pursues different objectives
 - no control similar to that exercised to its own departments

cont. 2nd condition – essential part of activities

- All those activities that the entity carries out as part of a contract awarded by the contracting authority regardless of who the beneficiary is or regardless of who makes the actual payments (Carbotermo, C-340/04)
- “Essential part” does not imply automatically more than 50%, but a close functional relationship between the parties

Compensation

- Compensation granted for the discharge of public service obligations is compatible aid and exempted from notification
- Member States may exclude from the scope of the Regulation general rules that determine maximum tariffs for certain categories of passengers (e.g. pupils, students, apprentices and persons with reduced mobility) – notification is required

Compensation - Method

Annex to the Regulation

- (+) costs incurred in relation to public service obligations
- (-) any financial effects generated within the network
- (-) receipts from tariffs or any other revenues
- (+) reasonable profit

= equals net financial effect = maximum allowable compensation

Final provisions

- It applies as from 3/12/2009
- Regulation 1191/69 is repealed but continues to apply to freight transport services for a period of 3 years after 3/12/2009
- Regulation 1107/70 is repealed – Article 93 EC directly applicable
- Transitional period of 10 years (up to 12/2019) for gradual introduction of tendering obligation not subject to public procurement directives “in order to avoid serious structural problems in particular relating to transport capacity”

cont.

Existing contracts that have been concluded:

- Before 26/7/2000 with fair competitive tendering - valid until expiry
- Before 26/7/2000 with other procedure or from 26/7/2000 to 3/12/2009 with fair competitive tendering – valid until expiry but for no longer than 30 years
- From 26/7/2000 to 3/12/2009 with other procedure - valid until expiry if their duration is in accordance with the Regulation
- Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval

Annex – Award procedures per transport mode

	<i>As from 3 December 2009</i>	<i>As from 3 December 2019</i>
Rail	<ul style="list-style-type: none"> •General principles of law apply if service concession •Direct award to internal operator via jurisprudence •Ordinary Contracts 	<ul style="list-style-type: none"> •Service concession and public contracts via competitive tendering of Article 5(3) •Direct award via Article 5(6) •Direct award to internal operator via Article 5(2)
Metro	<ul style="list-style-type: none"> •General principles of law apply if service concession •Direct award to internal operator via jurisprudence •Ordinary Contracts 	<ul style="list-style-type: none"> •Service concession and public contracts via competitive tendering of Article 5(3) •Direct award to internal operator via Article 5(2)
Bus/Tram	<ul style="list-style-type: none"> •PPDs apply if public contract •General principles of law apply if service concession •Direct award to internal operator via jurisprudence 	<ul style="list-style-type: none"> •PPDs apply if public contract •Service concession via competitive tendering of Article 5(3) •Direct award to internal operator via Article 5(2)



Do You Have Any Questions?

We would be happy to help.