



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 24 May 2006**

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**Interinstitutional File:  
2000/0212 (COD)**

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**9839/06**

**LIMITE**

**TRANS 142  
CODEC 544**

**REPORT**

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From: Council Secretariat  
To : Transport Attachés  
No. prev. doc. : 9442/06 TRANS 125 CODEC 488  
No. Cion prop. : 11508/05 TRANS 155 CODEC 657

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Subject : Revised proposal for a regulation of the European Parliament and of the Council on public passenger transport services by rail and by road

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Delegations will find in Annex the text of the draft Proposal for a Regulation on public passenger transport services by rail and by road, the so-called Public Service Obligations proposal, as it stands after the examination of document 9442/06 by Coreper at its meeting of 24 May 2006.

New Presidency proposals in the body of the text are put in **bold and underlined** and deleted text is indicated by [...].

In the recitals no new proposals have been introduced after the Coreper meeting. As before, text in the recitals that differs from the initial Commission proposal is in **bold** and deleted text is indicated by [...]; changes to the recitals introduced after the Attaché meeting of 17 May are underlined.

General scrutiny reservation: all Member States and the Commission.

Parliamentary scrutiny reservation: DE, DK, FR, MT and UK.

2000/0212 (COD)

Revised proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**  
**on public passenger transport services by rail and by road<sup>1</sup>**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 71 and 89 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee,

Having regard to the opinion of the Committee of the Regions,

Whereas:

- (1) Article 16 of the EC Treaty confirms the place occupied by services of general economic interest in the shared values of the Union.
- (2) Article 86(2) of the Treaty lays down that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance of the particular tasks assigned to them.
- (3) Article 73 of the Treaty constitutes *lex specialis* in relation to Article 86(2). It establishes rules applicable to the compensation of public service obligations in inland transport.

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<sup>1</sup> DE and UK requested an impact assessment of the revised proposal. The Commission considered the assessments of the two preceding Public Service Obligations proposals to be a sufficient base for discussion, as these proposals were more far-reaching than the current one.

- (4) The main objectives of the **Commission's [...] White Paper**<sup>2</sup> are to guarantee safe, efficient and high-quality **passenger** transport services through regulated competition guaranteeing also transparency and performance of public **passenger** transport services, having regard to social, environmental and regional development factors, or to offer specific tariff conditions to certain categories of travellers and to eliminate the disparities between transport undertakings from different Member States which may give rise to substantial distortion of competition.
- (5) At the present time, many inland **passenger** transport services which are required in terms of general interest cannot be operated on a commercial basis. The competent authorities of the Member States must be able to act to ensure that such services are provided. The mechanisms that they can use to ensure that public passenger transport services are provided include the following: the award of exclusive rights to **public service** operators, the granting of financial compensation to **public service** operators and the definition of general rules for the operation of public transport which are applicable to all operators.
- (6) Many Member States have introduced legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several **public service [...] operators** are now providing **public passenger transport** services in more than one Member State. However, developments in national legislation have led to disparities in the procedures applied and have created legal uncertainty as to the rights of **public service** operators and the duties of the competent authorities. Regulation (EEC) No 1191/69 does not deal with the way public service contracts are to be awarded in Europe, and in particular the circumstances in which they should be the subject of competitive tendering. The Community legal framework ought therefore to be updated.
- (6a) 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 insofar as these are compatible with Treaty requirements.**

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<sup>2</sup> 11932/01 (COM(2001) 370 final).

- (7) To be able to organise their public transport service in the manner best suited to the needs of the public, all competent authorities must be able to choose their **public service** [...] operators freely, [...] **taking into account the interests of Small and Medium sized Enterprises**, under the conditions stipulated in this Regulation. To guarantee application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a contract between the competent authority and the chosen **public service** operator **defines** the nature of the public service obligations and the agreed **reward** [...]. The form or designation of the contract may vary according to the legal systems of the Member States.
- (8)<sup>3</sup> Contrary to what was laid down in Regulation (EEC) No 1191/69, the scope of which extended to public **passenger** transport services by inland waterway, it is not considered advisable for this new Regulation to cover the award of public service contracts in that specific sector. The organisation of public **passenger** transport services by inland waterway is therefore subject to compliance with the general principles of the Treaty. **Member States are free to integrate inland waterway services into a wider urban, suburban or regional public passenger transport network [...].**
- (8)bis Contrary to what was laid down in Regulation (EEC) No 1191/69, the scope of which extended to freight transport services, it is not considered advisable for this new Regulation to cover the award of public service contracts in that specific sector. The organisation of freight transport services should therefore be subject to compliance with the general principles of the Treaty.**
- (9) It is irrelevant from the viewpoint of Community law whether such **passenger** transport services are operated by public or private undertakings. This Regulation is based on the principle of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, on that of the freedom of Member States to define services of general interest, referred to in Article 16 of the Treaty, and on those of subsidiarity and proportionality referred to in Article 5 of the Treaty.

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<sup>3</sup> Scrutiny reservation: DE

- (10) Some services - often linked to specific infrastructure - are operated mainly for their historical interest or tourist value. As the purpose of these operations is manifestly different from the provision of public passenger transport, they need not therefore be concerned by the rules and procedures applicable to public service requirements.
- (11) **Where the competent authorities are responsible for the organisation of the public transport network, apart** from the actual operation of the transport service, this may cover a whole range of other activities and duties that the competent authorities must be free to either carry out themselves or entrust, in whole or in part, to **a public service operator**.
- (12) Contracts of long duration can lead to the closing of the market for a longer period than is necessary, thus diminishing the benefits of competitive pressure. To minimise distortion of competition while protecting quality of services, public service contracts should in principle be of limited duration. It is however necessary to make provision for [...] **extending contracts by a maximum of half its initial duration** where the **public service operator** has to invest in assets for which the depreciation period is exceptional **and - because of their special characteristics and constraints - in the case of the outermost regions as specified in Article 299 of the Treaty establishing the European Community.** **In addition, in case a public service operator makes investments in infrastructure or in rolling stock and vehicles which are exceptional in the sense that both concern high amounts of funds, and provided the contract is awarded after a fair competitive tendering procedure, an even longer extension should be possible.**

- (13) Where the conclusion of a public service contract may entail a change of **public service** operator, the competent authorities must be able to ask **the chosen public service operator** to apply the provisions of Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses.<sup>4</sup> **This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights [...] other than those covered by Directive 2001/23/EC, thereby - if appropriate - taking into account social standards established by national laws, regulations or administrative provisions or collective agreements or agreements concluded between social partners.**
- (13a) **In keeping with the principle of subsidiarity, competent authorities are free to establish quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with a reduced mobility or environmental protection.**
- (14) Studies carried out and the experience of States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, introduction of regulated competition between [...] operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to the **public service** operators. This approach is endorsed by the European Council under the so-called Lisbon Process of 28 March 2000 calling on the Commission, the Council and the Member States, each in accordance with their respective powers, to “speed up liberalisation in areas such as ... transport”.

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<sup>4</sup> OJ L 82, 22.3.2001, p. 16.

(15)<sup>5</sup> Subject to the relevant provisions in national law, any local authority **or in absence thereof any national authority**, may choose to provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering. However, this self-provision option needs to be strictly controlled to ensure a level playing field. **The competent authority or group of authorities collectively or through its members, should exercise the required control.**<sup>6</sup> **In addition, a competent authority providing its own transport services or its internal operator should be prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory. Restrictions on the activities of an internal operator do not interfere with the possibility of direct award of 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 for heavy rail leaves unaffected the possibility of competent authorities to award to an Internal operator contracts for public passenger transport services on other track-based modes such as metro and tramway.**<sup>7</sup>

(15a)<sup>8</sup> **Subcontracting can contribute to a more efficient public passenger transport and enables the participation of other undertakings than the public service operator which was granted the public service contract. However, with a view to the best use of public funds, competent authorities should be able to determine the modalities for subcontracting their public passenger transport services, in particular in the case of services performed by an internal operator. Furthermore, a subcontractor should not be prevented from taking part in competitive tenders in the territory of any competent authority [...].**

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<sup>5</sup> Scrutiny reservation: DE

<sup>6</sup> Reservation: UK

<sup>7</sup> DE proposes to replace this sentence with the following: “The possibility of competent authorities to award to an internal operator contracts for public passenger transport services shall be given in any mode within the scope of this regulation, including cases when heavy rail services have already been awarded directly.”

<sup>8</sup> Scrutiny reservation: DE

- (16) Where, on the other hand, a public authority chooses to entrust a general interest service to a third party, it must select the **public service** operator in accordance with Community law on public contracts and concessions, as established by Articles 43 to 49 of the EC Treaty, and the principles of transparency and equal treatment. In particular, the provisions of this Regulation are to be without prejudice to the obligations applicable to public authorities by virtue of the directives on the award of public contracts, where public service contracts fall within their scope.
- (17) Some invitations to tender require the competent authorities to define and describe complex systems. Authorities should therefore be empowered, when awarding such contracts, to negotiate details with some or all of the potential **public service** operators after tenders have been submitted.
- (18) Invitations to tender for the award of public service contracts should not be mandatory where the contract relates to modest amounts or distances. **Competent authorities should not split up contracts or networks in order to avoid tendering.**<sup>9</sup>
- (19) Where there is a risk of disruption of the provision of services, the authorities must be empowered to introduce emergency short-term measures pending the award of a new public service contract.
- (20) Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004 the Commission presented a proposal to amend Directive 91/440/EEC so as to guarantee access for all Community railway undertakings to the infrastructure of all the Member States for the purpose of operating international passenger services.

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<sup>9</sup> Reservation: MT.  
UK supported by EE, NL and SE proposed to insert such reference in Article 5.4.



- (21) In the case of public services, this Regulation allows each competent authority, within the context of a public service contract, to select its **public service** operator of public passenger transport services. For these reasons, and given the differences in the way Member States organise their territory in this respect, competent authorities may justifiably be allowed to award public service contracts directly for [...] railway travel. The Commission will continue to monitor developments in the provision of public passenger transport closely, especially access to rail infrastructure in Europe; it will produce a report on this subject two years after this Regulation is adopted. In addition, it will present a report on the implementation of this Regulation no later than two years after it enters into full application.
- (22) The compensation granted by Member States may in no case exceed the amounts required to cover the costs incurred in discharging each public service obligation. Where a competent authority plans to award a contract without putting it out to competitive tender, it must also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of services.

**(22a) By appropriately considering any effect of complying with the public service obligations on the demand of public passenger transport services in the calculation scheme of the Annex, the competent authority and the operator can prove that overcompensation has been avoided.**

- (23) With a view to the award of public service contracts, the competent authorities must take the necessary measures to advertise the fact at least one year in advance, so that potential **public service** operators are able to react.
- (24) Given that competent authorities and **public service** operators will need time to adapt to the provisions of this Regulation, provision should be made for transitional arrangements which take account of the specific characteristics of the various modes of transport.

- (25) During the transitional period, the introduction of the provisions of this Regulation by the competent authorities will probably take place at different times. It may therefore be possible, during this period, that operators from markets not yet affected by the provisions of this Regulation tender for contracts in markets that have been opened to controlled competition more rapidly. In order to avoid, by means of proportionate action, any imbalance in the opening of the public transport market, competent authorities should be able to refuse tenders from undertakings performing a majority of their activity in markets that will be opened in future but are not yet open, provided that this is applied without discrimination and decided in advance of an invitation to tender.
- (26) In its *Altmark Trans GmbH* judgment, the Court of Justice of the European Communities ruled that compensation for public service does not constitute an advantage within the meaning of Article 87 of the EC Treaty, provided that four cumulative conditions are satisfied (judgment of 24 July 2003 in Case C-280/00, paragraphs 87 to 95, ECR I-7747). Where these conditions are not satisfied and the general conditions for the application of Article 87(1) of the Treaty are met, public service compensation constitutes State aid which is subject to the provisions of Articles 73, 86, 87 and 88 of the Treaty.
- (27) Compensation for public service may prove necessary in the inland passenger transport sector so that undertakings responsible for public services operate on the basis of principles and under conditions allowing them to carry out their tasks. Insofar as such compensation takes the form of State aid, it may be compatible with the Treaty pursuant to Article 73 under certain conditions. Firstly, it must be granted to ensure the provision of services which are indeed services of general interest within the meaning of the Treaty. Secondly, to avoid unjustified distortions of competition it may not exceed what is necessary to cover the net costs incurred through discharging the public service obligations, taking account of the revenue generated thereby and a reasonable profit.
- (28) Compensation granted by the Member States in accordance with the provisions of this Regulation may therefore be exempted from the prior notification required by Article 88(3) of the Treaty.

- (29) This Regulation replaces Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway;<sup>10</sup> that Regulation should therefore be repealed. **Any compensation granted in relation to the provision of public passenger transport services other than those covered by this new Regulation which risk to involve State aids in the sense of Article 87, paragraph 1 of the Treaty is subject to the provisions of Articles 73, 86, 87 and 88 of the Treaty, including any relevant interpretation by the European Court of Justice and especially the ruling in case C-280/00 Altmark Trans GmbH. When examining such cases the Commission should therefore apply principles similar to those laid down in this new Regulation or where appropriate other legislation in the field of services in the general economic interest.**
- (30)<sup>11</sup>The scope of Regulation (EEC) No 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway<sup>12</sup> is covered by this Regulation. The earlier Regulation is **considered** obsolete **while limiting the application of Article 73 without granting an appropriate legal basis for authorising current investment schemes, in particular in relation to investment in transport infrastructure in a public private partnership**. It should **therefore** be repealed in order that Article 73 of the Treaty may be properly applied to continuing developments in the sector without prejudice to this Regulation or Regulation (EEC) No 1192/69 of the Council of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings.<sup>13</sup> **In view of increasing legal certainty the Commission will propose State aid guidelines for railway investment including investment in infrastructure in the term of 2006.**

HAVE ADOPTED THIS REGULATION:

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<sup>10</sup> OJ L 156, 28.6.1969, p. 1, as last amended by Regulation (EC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

<sup>11</sup> Scrutiny reservation: DE

<sup>12</sup> OJ L 30, 15.06.1970, p. 1; Regulation last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

<sup>13</sup> OJ L 156, 28.06.1969, pp. 8 to 20.

*Article 1*  
*Purpose and scope<sup>14</sup>*

1. The purpose of this Regulation is to define how, in accordance with the rules of Community law, the competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or at a lower cost than those that mere market forces would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities when imposing or contracting for public service obligations compensate operators for the costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

2. This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value.
- 3.<sup>15</sup> This Regulation shall not apply to public works concessions in the sense of Article 1.3 of Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts or of Article 1.3(a) of Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services.

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<sup>14</sup> PT requested the possibility for Member States to apply the provisions of the Regulation on public passenger transport by inland waterways.

<sup>15</sup> Scrutiny reservation: DE, MT

*Article 2*  
*Definitions*

For the purpose of this Regulation:

- (a) “public passenger transport” means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;
- (b) “competent authority” means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;
- (c) “competent local authority” means any competent authority whose geographical area of competence is not national;
- (d) “public service operator” means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services;
- (e) “public service obligation” means a requirement defined or determined by a competent authority in order to assure 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;
- (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 operator;

- (g) “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 the public service obligation or in connection with that period;
- (h) “direct award” means the award of a contract to a given operator without any prior competitive tendering procedure;
- (i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of services subject to public service obligations; depending on the law of the Member States, the contract may also consist of a decision adopted by the competent authority:
- taking the form of an individual legislative or regulatory act, or
  - containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;
- (j) [...]
- (k) “value” means the value of a service, a route, a contract, or a compensation scheme for public passenger transport corresponding to the total remuneration, before VAT, of the public service operator or operators, including compensation of whatever kind paid by the public authorities and revenue from the sale of tickets which is not repaid to the competent authority in question;
- (l) “general rule” means a measure which applies without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible;
- (m) [...]

### *Article 3*

#### *Public service contracts and general rules*

1. Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it must do so within the framework of a public service contract.
2. By way of derogation from paragraph 1, public service obligations which aim to establish maximum tariffs for all passengers or for certain categories of passenger may also be the subject of general rules. In accordance with the principles set out in Articles 4 and 6 and in the annex, the competent authority shall [...] compensate the public service operators for the net financial effect - **positive or negative** - on costs and revenues incurred in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This is notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.<sup>16</sup>

### *Article 4*

#### *Mandatory content of public service contracts and general rules*

1. Public service contracts and general rules must clearly define the public service obligations with which the public service operator must comply, and the geographical areas concerned.
2. Public service contracts and general rules must establish in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment must be calculated in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6) these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs and revenues incurred in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit.

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<sup>16</sup> Scrutiny reservation: [FI](#)

3. Public service contracts and general rules shall determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, and fixed costs and a suitable return on capital.
4. Public service contracts and general rules shall determine the arrangements for the allocation of revenue from the sale of tickets which may be kept by the public service operator, repaid to the competent authority or shared between the two.
- 5.<sup>17</sup> The duration of contracts shall be limited and shall not exceed ten<sup>18</sup> years for coach and bus services and fifteen years for passenger transport services by rail or other track-based modes. The duration of public service contracts relating to several modes of transport shall be limited to fifteen years if transport by rail or other track-based modes represents more than 50% of the value of the services in question.
6. If necessary, having regard to the conditions of depreciation of assets, the duration of the contract may be extended by a maximum of 50% 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 are linked predominantly to the passenger transport services covered by the contract.

If justified by costs deriving from the particular geographical situation, the duration of public service contracts in the outermost regions may be extended by a maximum of 50%.

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<sup>17</sup> Scrutiny reservation: PT  
EL, LU, SI: 20 years for rail; SI flexible on percentage put as condition for extension of a contract

ES: 15 years for road;

MT: 12 years for road;

EE, NL, SE: shorter duration.

<sup>18</sup> Reservation: UK



If justified by the amortisation of capital in relation to exceptional infrastructure, rolling stock or vehicular investment and if the contract is awarded in a fair competitive tendering procedure, a public service contract may have a [...] **longer** duration<sup>19</sup> [...]. **To ensure transparency in this case, the competent authority shall transmit to the Commission within 1 year after the conclusion of the contract, the public service contract and elements justifying its longer duration.**

7. Without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff taken on previously to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC. Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed linked to the services.
- 7(a) Where competent authorities in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts.

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<sup>19</sup> Reservation IT

8. Tender documents and public service contracts shall be transparent as to whether or not subcontracting may be considered. The public service contract shall in accordance with national and Community law, determine the conditions applied to subcontracting.

### *Article 5*

#### *Award of public service contracts*

- 1.<sup>20</sup> Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, contracts for the provision of passenger transport services by bus or tram shall be awarded in conformity with the procedures provided for under Directives 2004/17/EC or 2004/18/EC on the award of public contracts, to the extent that such contracts do not take the form of service concessions contracts as defined in these Directives. Where contracts are to be awarded in conformity with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of the present Article shall not apply.
- 2.<sup>21</sup> Unless prohibited by national law, any competent local authority- irrespective whether it is an individual authority or a group of authorities - may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority exercises control similar to that exercised over its own departments (referred to in this Regulation as an internal operator).
- (a) For the purposes of determining whether the competent local authority exercises such control, factors such as the degree of representation on administrative, management or supervisory bodies, specifications relating thereto in the articles of association, ownership, effective influence and control over strategic decisions and individual management decisions shall be taken into consideration<sup>22</sup>.

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<sup>20</sup> Scrutiny reservation: DK.

LU requested exclusive applicability of the Regulation to public passenger transport services.

<sup>21</sup> EL and MT suggested to introduce the possibility of direct award to third (private) parties applying a geographical restriction.

<sup>22</sup> CZ, DK, LU and SI suggested that a competent local authority, holding at least 51% of the shares of an operator, would be sufficient for considering it an internal operator.

- (b) The condition for applying this paragraph 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 - notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of a neighbouring 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.
- (c) Notwithstanding subparagraph (b), an internal operator may participate in fair competitive tenders as from 2 years before the end of its directly awarded contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract.
- (d) In the absence of a competent local authority, subparagraphs (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 organised outside the area for which the contract has been granted.
- (e) Where subcontracting may be considered, as referred to in Article 4 (8), the internal operator shall be obliged to provide a significant share of the passenger transport services itself.

3. Any competent authority which has recourse to a third party other than an internal operator, must award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.
4. Unless prohibited by national law, the competent authorities may decide to award public service contracts directly **either** where their average annual value is estimated at less than 1 million euro [...] **or** where they concern the annual provision of less than 300.000 kilometres of public passenger transport services.

In case of a **contract directly awarded to a** small and medium sized enterprise operating not more than [...] **vehicles** the **above mentioned** thresholds may be increased to **either** an average annual value estimated at less than [...] million euro [...] **or** less than [...] kilometres of public passenger transport services.<sup>23</sup>

Under this paragraph a single public service operator may [...] **not** cumulate directly awarded contracts above a maximum of [...] million euro and of [...] kilometres of public passenger transport services per year.<sup>24</sup>

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<sup>23</sup> DE suggests a threshold in kilometres of services provided thereby suggesting a threshold of 1 million kilometres, and a corresponding threshold in euro.

AT, EL, FI, LU, MT supported the DE suggestion.

EE, ES, PL, SE, UK expressed interest in using only a kilometre-threshold but thought 1 million kilometres would be excessive. EE, IT, LV, NL, SE, SK and UK indicated some flexibility on the thresholds higher than 300.000 km.

BE, IT supported the Presidency text but were prepared to look at new proposals

FR could support an increase in kilometre-threshold but could not yet give a position on the exact amount.

Commission suggested 500.000 km.

<sup>24</sup> Reservations: EL, FI and FR

5. In the event of the disruption of services or the immediate risk of such a situation, the competent authority may take an emergency measure. This emergency measure shall take the form of a direct award or of a formal agreement to extend a public service contract or of an imposition to provide certain public service obligations. The public service operator shall have the right to appeal the decision to impose the provision of certain public service obligations. The award or extension of a contract by emergency measure or the imposition of such a contract shall not exceed 2 years.
- 6.<sup>25</sup> Unless prohibited by national law, competent authorities may decide to award public service contracts directly where they concern transport by rail, with the exception of other track-based modes such as metro or tramways<sup>26</sup>. **In derogation to Article 4(5), such contracts shall not exceed 10 years, except where Article 4(6) applies.**<sup>27</sup>

28

## *Article 6*

### *Public service compensation*

1. All compensation connected with a general rule or a public service contract must conform to the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule must also conform to the provisions laid down in the annex.

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<sup>25</sup> EE, HU, IT, LV, SE, SK and UK, requested the possibility for competent authorities to prohibit operators which have received a direct award for performing heavy rail services, to take part in tendering procedures they organise.  
UK supported by EE, IT, SE and SK, suggested to add the following sentence: "any operator in receipt of such an award may be excluded from taking part in competitive tenders organised outside the territory of the awarding competent authority."

<sup>26</sup> IT, SE, SK and UK prefer not to allow direct award in the case of (sub)urban rail.

<sup>27</sup> Reservation CZ (maximum 12 years), DE, EL, FR, HU, LU and SI.

<sup>28</sup> MT suggests a new paragraph 7: "Unless prohibited by national law, competent authorities may decide to award public service contracts directly where they concern transport by bus in geographic locations where no other mode of public transport is available."

2. At the written request of the Commission, Member States shall communicate, within a period of three months or any longer period as may be fixed in that request, all the information that the Commission considers necessary to determine whether the compensation granted is compatible with this Regulation.

#### *Article 7*

#### *Publicity*

1. Each competent authority shall publish once a year an aggregated report on the public service obligations for which it is responsible, the selected public service operators and the compensation payments and exclusive rights granted to the said public service operators by way of reimbursement. This report shall allow the performance, quality and financing of the public transport network to be monitored and assessed.
2. Each competent authority shall take the necessary measures to ensure that at least one year before the launch of the invitation to tender procedure or one year before the direct award the following information at least is published in the Official Journal of the European Union:
  - (a) The name and address of the competent authority;
  - (b) The type of award envisaged;
  - (c) The services and areas potentially covered by the award.

Competent authorities may decide not to publish this information where a public service contract concerns the annual provision of less than 50.000 kilometres of public passenger transport services.

In the event this information changes after its publication, the competent authority shall publish as soon as possible a rectification. This rectification is without prejudice to the launching date of the direct award or of the invitation to tender.

This paragraph shall not apply to Article 5(5).

3. <sup>29</sup>In the case of direct award of public service contracts for transport by rail as provided for in Article 5.6, the competent authority shall publish the following information within one year after the granting of the award:
- a) contracting entity and its ownership;
  - b) duration of the contract;
  - c) description of the passenger transport services to be performed;
  - d) description of the parameters of the financial compensation;
  - e) quality targets;
  - f) conditions relating to essential assets.
4. **Upon request of any interested party a competent authority shall transmit its decision related to the direct award of a public service contract.**<sup>30</sup>

*Article 7a<sup>31</sup>*

*Obligation to motivate*

[...]

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<sup>29</sup> FR supported by DE, suggested introducing "Without prejudice to professional secrecy..." at the beginning of the sentence. UK, IT opposed.

<sup>30</sup> UK, supported by EE and NL, suggested to add: “, including the reasons for this decision.”

<sup>31</sup> Reservation: BE, CZ, DE, EL, FR, LU, MT, PL.

Scrutiny reservation: DK, FI, SK.

EE, IT, NL and UK consider Article 7a a useful instrument to enhance transparency.

*Article 8*  
*Transition*

- 1.<sup>32</sup> Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, contracts for the provision of passenger transport services by bus or tram shall be awarded in conformity with the procedures provided for under Directives 2004/17/EC or 2004/18/EC on the award of public contracts, to the extent that such contracts do not take the form of service concessions contracts as defined in these Directives. Where contracts are to be awarded in conformity with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of the present Article shall not apply.
  
2. Without prejudice to paragraph 5, the award of public service contracts by rail and by road shall comply with Article 5 of this Regulation within 8 years after its entry into force<sup>33</sup>. During this transition period Member States shall take measures to gradually comply with Article 5 of this Regulation in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transition period Member States shall provide the Commission with a progress report, highlighting the implementation of gradual award of contracts in line with Article 5. On the basis of the Member States progress reports, the Commission may propose appropriate measures addressed to Member States.

3. [...]

4. [...]

4.bis [...]

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<sup>32</sup> Scrutiny reservation: DK.

LU requested exclusive applicability of the Regulation to public passenger transport services.

<sup>33</sup> FI: longer transition period.

EL, CY, FR, LU, MT: 10 years after entry into force.

EE, IT, NL, UK, SE: maintain 8 years after entry into force.



5. For the application of paragraph 2, no account shall be taken of public service contracts awarded in conformity with Community and national law
- a) before July 2000 on the basis of a fair competitive tendering procedure;
  - b) before July 2000 on the basis of a procedure other than a fair competitive tendering procedure;
  - c) after July 2000 and before publication<sup>34</sup> of this Regulation on the basis of a fair competitive tendering procedure<sup>35</sup>;
  - d) after July 2000 and before the publication<sup>36</sup> of this Regulation on the basis of a procedure other than a fair competitive tendering procedure,

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire but no longer than for a duration of 30 years<sup>37</sup>. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4 of this 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.

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<sup>34</sup> CZ, DE, EL, FR suggested "entry into force" instead of "publication" with a view to taking account of negotiations in the process of being concluded at the moment of publication.

<sup>35</sup> Scrutiny reservation: PT

<sup>36</sup> CZ, DE, EL, FR suggested "entry into force" instead of "publication" with a view to taking account of negotiations in the process of being concluded at the moment of publication.

<sup>37</sup> FR suggested duration of 35 years.

6. Without prejudice to Article 8.5, the competent authorities may, in the second half of the transitional periods specified in paragraph 2, exclude from participation in the award of contracts by invitation to tender those 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. For the application of this criterion, no account shall be taken of contracts awarded by emergency measure as specified in Article 5(5).

Where competent authorities make use of this possibility, they shall do so without discrimination, exclude all potential operators fulfilling this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.

They shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender<sup>38</sup>.

#### *Article 9*

#### *Compatibility with the Treaty*

1. Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules 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.

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<sup>38</sup>

Reservation: IT.

See also footnotes Article 5.6 and Article 11.

EE proposed to create a database providing relevant information about the operators and their contracts.

FR requested the deletion of Article 8.6 considering the provision illogical and legally doubtful. DE requested the deletion of this provision in order to avoid potential administrative burden. CZ supported DE and FR.

2.<sup>39</sup> **Without prejudice to the provisions of Articles 73, 86, 87 and 88 of the Treaty, Member States may continue to take co-ordination measures which involve the granting of aids pursuant to Article 73 of the Treaty and in particular:**

**(a) (ex Art. 3(1)b of 1107) until the entry into force of common rules on the allocation of infrastructure costs, where aid is granted to undertakings which have to bear expenditure relating to the infrastructure used by them, while other undertakings are not subject to a like burden. In determining the amount of aid thus granted account shall be taken of the infrastructure costs which competing modes of transport do not have to bear;**

**(b) (ex Art. 3(1)c of 1107) where the purpose of the aid is to promote either:**

**- research into transport systems and technologies more economic for the Community in general ; or**

**- the development of transport systems and technologies more economic for the Community in general.**

**Such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies.**

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<sup>39</sup> Presidency proposal in response to footnotes 39 and 40 to Article 10.

*Article 10*

*Repeal<sup>40</sup>*

1. Regulation (EEC) No 1191/69 is hereby repealed.
2. Regulation (EEC) No 1107/70 is hereby repealed.<sup>41</sup>

*Article 11*

*Reports*

1. After the end of the transitional period specified in Article 8(2), the Commission shall present a report on the implementation of this Regulation and on the developments in the provision of public passenger transport in Europe, assessing in particular the development of the quality of public passenger transport services and the effects of direct awards accompanied, if necessary, by appropriate proposals for modifying this Regulation.

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<sup>40</sup> Reservation: AT, DE, IT and PT.

<sup>41</sup> DE proposes to replace this paragraph with the following: “Article 3 para 1 lit. a), lit. d), and Article 3 para 2 of Regulation (EEC) No 1107/70 is hereby repealed. Article 3 sentence 1 of Regulation (EEC) No 1107/70 will be replaced by:  
„Without prejudice to the provisions of Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings, and of Council Regulation (EEC) No 1191/69 of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway, Member States shall [ ... ] take coordination measures [ ... ] **or** impose obligations inherent in the concept of a public service which involve the granting of aids pursuant to Article 87 of the Treaty [ ... ] **in particular** the following cases or circumstances:”

<sup>42</sup>2. [...]

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<sup>42</sup> EE, IT, LV, SE, SK, UK proposed to insert new paragraphs 2, 3 and 4:

- "2. [*Taken from Article 8.2 second paragraph*] Within six months after the first half of the transition period Member States shall provide the Commission with a progress report, highlighting the implementation of gradual award of contracts in line with Article 5. On the basis of the Member States progress reports, the Commission may propose appropriate measures addressed to Member States.
3. [*Taken from Article 8.6*] Without prejudice to Article 8.5, [...] in the [...] transitional **period** [...] specified in paragraph 2 [...] operators which cannot provide evidence that the value of the public transport services for which they **and any parent or subsidiary companies** are receiving compensation or enjoy an exclusive right granted [...] **by direct award** represents [...] **no more than** half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right **may be excluded from participation in the award of contracts by invitation to tender. Such exclusion will not apply to operators running the services which are to be tendered.** For the application of this criterion, no account shall be taken of contracts awarded by emergency measure as specified in Article 5(5).

Where competent authorities make use of this possibility, they shall do so without discrimination, exclude all potential operators fulfilling this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.

[...]

4. **On the basis of the report referred to in paragraph 2, the Commission may bring forward a proposal to disapply paragraph 3 for the remainder of the transitional period."**

FR supported by DE, DK and NL opposed these proposals fearing an increase of legal uncertainty.

*Article 12<sup>43</sup>*

*Entry into force*

This Regulation shall enter into force two years following its publication in the Official Journal of the European Union.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Parliament*

*The President*

*For the Council*

*The President*

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<sup>43</sup> Scrutiny reservation: FI

Rules applicable to compensation in the cases referred to in Article 6(1)<sup>44</sup>

1. The compensation connected with contracts awarded directly in accordance with Article 5(2), (4), (5) or (6) or with a general rule must be calculated in accordance with the rules laid down in this Annex.
2. The compensation may not 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. The effects shall be assessed comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect the competent [...] authority shall be guided by the following scheme:
  - Costs generated in relation to a public service obligation or a bundle of public service obligations imposed by competent authority/authorities, contained in a public service contract and/or in a general rule,
  - minus any positive financial effects generated within the network operated under the public service obligation(s) in question,
  - minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,
  - plus a reasonable profit.
- 3.<sup>45</sup> Compliance with the public service obligation may have an impact on possible activities of an operator beyond the public service obligation(s) in question. In order to avoid overcompensation or lack of compensation any quantifiable financial effect on the operator's entire **network** shall therefore be taken into account when calculating the net financial effect.

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<sup>44</sup> Scrutiny reservation: DE, MT

<sup>45</sup> FR suggests to replace point 3 with the following text: “Compliance with the public service obligation may have an impact on **demand for transport services over the entire network concerned** [...]. In order to avoid overcompensation or lack of compensation any quantifiable financial effect on the operator's entire **network concerned** shall therefore be taken into account when calculating the net financial effect.”

4. Costs and revenue must be calculated in accordance with the accounting and tax rules in force.
- 5.<sup>46</sup> In order to increase transparency and avoid cross-subsidies, where a public service operator not only operates compensated services subject to public transport service obligations but also engages in other activities, the accounts of the said public services must be separated so as to meet at least the following conditions:
  - the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with the accounting and tax rules in force;
  - [...] all variable costs, an appropriate contribution to the fixed costs and a reasonable profit connected with any other activity of the public service operator may under no circumstances be charged to the public service in question;
  - the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator's activity.
6. Reasonable profit must be taken to mean a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of the intervention by the public authority.
7. The method of compensation must promote the maintenance or development of:
  - effective management by the public service operator, which can be the subject of an objective assessment, and
  - the provision of passenger transport services of a sufficiently high standard.

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<sup>46</sup> Reservation: UK