



Study on the implementation of Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road

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Draft

Introduction

1. Context of the study

Having efficient public services for EU citizens is an important goal of the European Union. Inland public transport having become structurally loss-making in the 1960s, Regulation 1191/69¹ and Regulation 1107/70² brought a set of rules easing carriers' burden of providing public transport by imposing the termination of public service obligations (hereafter, "PSO") or the right for compensation. In the 1990s, legislation was amended so as to introduce public service contracts (hereafter, "PSC") as a means to ensure adequate public transport services. However, this legislation allowed Member States to exclude from its application urban, suburban and regional passenger transport services.. In addition, the way PSC were to be awarded was not addressed by this legislation. Nonetheless, mandatory requirements for award procedures are foreseen by Public Procurement Directives for the sectors concerned by the application of such legislation. The application of the legislation led to some uncertainties and discrepancies as to the state aid regime applicable to PSC.³

Against this background, the European Commission proposed a new regulation in 2000, amended in 2002. However, a compromise could not be found. Hence the European Commission introduced a revised proposal in 2005, which became Regulation (EC) N° 1370/2007 on public passenger transport services by rail and by road (hereafter, "Regulation 1370/2007").

Regulation 1370/2007 relies on the principle of competition *off* the road or tracks, as opposed to competition *on* the road or tracks.⁴ As a general principle, an authority that decides to grant an operator an exclusive right and/or compensation in return of the discharge of public service obligations, concludes a PSC. In principle, such PSC is to be awarded after an open tender procedure. The Regulation foresees several derogations to this principle. First, local authorities can provide public transport services themselves, or directly award PSC to an internal operator. Second, where the public service is to be provided by a third party, the principle of public tendering enjoys three derogations, leading to PSC being awarded directly if: (i) the contract's scope is below determined ceilings (*de minimis rule*), particularly defined in case of small and medium undertakings (ii) in cases of emergency and (iii) for public transport by heavy rail. The Regulation sets out rules on the compensation for providing public transport services (with a view to avoiding over-compensation)

¹ Council Regulation (EEC) 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, [1969] OJ Spec Ed I-276.

² Council Regulation (EEC) 1107/70 of the Council of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway, [1970] OJ Spec Ed II-360.

³ See in particular Case T-157/01 *Combus* [2004] ECR II-917, noted by L. Hancher (2004) EStAL 455-460 and Case C-280/00 *Altmark* [2003] ECR I-7747.

⁴ See NEA, Study on 'contracting in urban public transport' [2008], commissioned by the European Commission.

and foresees a mandatory content of PSC. Regulation 1370/2007 enhances transparency by imposing upon competent authority publicity obligations.

Regulation 1370/2007 allows the adoption of general rules in lieu of PSC where PSO aim at establishing maximum tariffs for all passengers or for certain categories of passenger. Such general rules must also contain a mandatory content and avoid over-compensation.

Regulation 1370/2007 entered into force on 3 December 2009. However, the application of the principle of public tendering for the award of PSC can further be postponed until 3 December 2019 for contracts not subject to public procurement Directives, in order to allow Member States to ensure the transition. During this transitional period, Member States shall adopt measures gradually to comply with this principle. Contracts awarded before the entry into force of Regulation 1370/2007 may continue, without being concluded anew, for a certain period of time, determined according to the date of award (before 26 July 2000 or as from 26 July 2000 and 3 December 2009) and the award procedure (fair competitive tender or other), provided these contracts have been awarded in accordance with Community and national law.

2. Objectives of the study

Given the high complexity of Regulation 1370/2007 and the various implementing possibilities allowed, the European Commission commissioned a study in order to have a clear overview of the way Member States, and within Member States, competent authorities for the organisation of public transport, apply Regulation 1370/2007 and to give guidance on best practices in implementing Regulation 1370/2007.

Having a clear overview of the application of Regulation 1370/2007 includes the need to have a clear picture of the way Member States implement the provisions on the mandatory content of PSC and on compensation as well as the other features contained in PSC or, where they exist, the content of the general rules.

On the basis of such overview, best practices over the examined Member States will be identified.

Questionnaire

Please fill in the questionnaire electronically. Feel free to change the size of the tables according to your needs. You may wish provide additional comments under each answer. In case of non-availability of the requested data, use the abbreviation "n/a". Please mention in your answers the relevant references. Thank you in advance for your cooperation.

Reply of [insert the name of your institution, company, organisation] at [insert the date]

[Please specify which EU Member States and Regions/localities your organisation/company covers]

1. Please list the rewards that made you consider providing public transport services (e.g. exclusive right, compensation, contract, general rules, etc.) and explain why.

EPTO is the association of European Passenger Transport Operators and represents one of the leading transport services organisations in Europe, whose members are the largest public transport companies in Europe: Arriva, First Group, Go-Ahead, Grupo Barraqueiro, Keolis, National Express, Stagecoach, Transdev and Veolia Transport. Members operate a fleet of nearly 75.000 vehicles, employ nearly 250,000 people and carry 12 billion passengers every year in 22 EU countries.

In general EPTO members endorse the principle that competition in, or for, markets, is essential

In each case, the decision of members to operate in these markets is based on their assessment of the opportunities that exist to create and maintain a commercially-successful business that retains the support of its shareholders and its customers. In general terms, this will require an assessment of the level of risk and reward from entering, operating and remaining in a particular market, matched against existing or potential capital employed in the business.

Where "General rules" apply, we believe that operators should be properly compensated for carrying out the obligations set out in the rules; it is a weakness of Regn 1370 that, while there is a ceiling above which compensation cannot be paid, there is no comparable lower level or "floor". The risk is that if there is insufficient compensation for obligations which are set out in general rules, operators will either decline to work in a particular market, or will pass the costs of complying with the rules on to other groups (individual passengers where fares revenue is paid to operators; other public authorities where they are the only alternative source of income). EPTO fears that this might be used by an Authority to discourage bids from commercial enterprises enabling it to make a direct award. This could be avoided if Regn 1370 were to state the "no better or worse off" principle, when applying general rules and tariff obligations.

2. Please list the economical burdens, if any, that you carry in order to provide public transport services, and explain why. Please explain how these burdens are compensated (e.g. by the competent authority through exclusive right/compensation, etc. or internally through cross-subsidies from commercial activities, etc.).

Efficient and effective public services are best provided where there is recognition of the different skills and resources that each party involved in the process can bring to the delivery of services. For example, in bus services:

- the public authority should assess the transport needs of the area that it serves;
- the authority responsible for highway design and management should recognise and facilitate the importance of public transport in maintaining environmentally and economically sustainable mobility;
- The operator should have the professional skills and financial resources to manage the provision of services, including necessary investment in vehicles, plant and equipment and in the recruitment, training and retention of operating staff. The operator's skills may be used to design and promote networks, or may be used purely to run services; much depends on the skills, abilities and objectives of the public transport authority

Against this background, several models can be used to deliver transport services. We favour the use of competitive principles to secure good value for money and to give a focus to the operational competence of an operator. Competition can be both in the market and for the market ("on the road" or "off the road"). We take no position on which of these options is preferable, as much depends on the historical development of public transport in different Member States. It is our view that either option requires a competitive process which can secure value for money both for users and for public authorities.

We believe that the EU institutions should encourage authorities to avoid direct award of all forms of public transport, as a principle. We recognise that there needs to be a transitional phase during which a move from direct award to a fully competitive framework can be properly delivered. To that end, the EU should collect and publish information that supports the continuing liberalisation of public transport provision across the EU so as to ensure increasing value for money for public expenditure. The "burdens that we carry" (in the words of this question) depend crucially on what the public authority or regulatory regime of the relevant Member State requires. The costs to be recovered either from a public authority or directly from passengers will depend on the risk and reward balance over the period within which we have certainty of opportunity to make use of the assets in our businesses. Our expenditure is funded:

- from passenger revenue where services are run commercially;
- from national or local public authorities (and sometimes from passenger fares, depending on

the nature of the contract) where services are run under contract;

- From passenger revenue (and sometime from public authorities) where concessions are in place and where those concessions include specific obligations (following the principle No-better-no-worse-off).

We are able to provide substantial capital investment in vehicles, buildings, plant and equipment; Regulation 1370 presents no barriers to our continued involvement in this field, provided that public authorities recognise the financial hurdles inherent in funding investment and the need for a proper period during which returns can be earned. Contract periods need to give sufficient certainty that assets purchased solely or mainly for use on such contracts can be funded. We have examples of where substantial capital assets have been purchased for contracts lasting 5 years, only for a change of policy on the part of the contracting Authority which rendered the vehicles obsolete at the end of that contract period but before the end of their operational and depreciated life.

We oppose cross-subsidy from within other commercial activities as a way of supporting public transport. We believe that public funding for bus and rail services should be clear and transparent (and not funded, for example, by having other public services such as the provision of electricity or local heating included in the same business).

Cross subsidising is particularly obvious when public monopolies or ex-monopolies are operating all aspects of the transportation chain, especially in rail services:

This is the case for example in France, where mainline services branded as "Corail Intercités" are run by SNCF inside its monopolistic activities, and whose deficit is paid by the profits made on high speed (TGV) lines. This has allowed, until now, SNCF to run the entire system included contracted regional services paid entirely by the French regions, and where SNCF is totally compensated from its operating and investments costs, rolling stock being 100% subsidised by regional authorities. Here too, the "black box" and lack of transparency do not allow to know precisely what SNCF gets and the impact of regional financing on its budget.

A good way to avoid this cross-subsidy practices would be to go for competitive tendering for long distance lines which are necessary for territorial policies and social reasons, but which are not profitable, so that clear relationships and financing processes could be set up through public service contracts establishing compensation schemes paid to the operators by the competent authority.

3. Please list what are, in the view of your organisation, the best incentives for providing efficient public services (e.g. exclusive right, compensation, measures for modal shift, contract, general rules, market-based mechanisms, etc.) and explain why.

Competition provides the best mechanism to secure high quality, efficient and effective public transport services. The competitive framework should encourage suppliers to innovate, i.e. allow for operators to bring forward initiatives through the exercise of their professional skills (including the opportunity to use best practice from other areas).

Each public authority should determine what factors are of the highest importance in its own area, taking account of EU and national policies on the protection of the environment, economic vitality and efforts to secure improvements in the quality of life for all EU citizens. Within that context, authorities need to determine whether they wish to promote, for example, modal shift ahead of policies on social inclusion and what value and priority they give to each measure.

EPTO members have considerable experience of successful private public partnership contract commitments setting aims and obligations for both operators and the public authorities.

Once it is clear what objectives public bodies wish to pursue, operators can develop offers that will deliver those objectives; the competitive process will provide the best route to achieving value for money and efficiency. The interests of passengers and of local communities are not secured by direct award.

Each of the interventions proposed in this question will be appropriate to some extent: for example, an objective that seeks to reduce the costs of travel for poorer communities will be better served by targeted schemes to reduce travel costs for those users, delivered through general rules that compensate operators for the specific concession being offered.

EPTO members will usually favour net cost contracts, i.e. allocating revenue risks to the operator, as long as data on passenger ridership and revenue exists which properly reflects the revenue base. Net cost contracts cost less to monitor than gross contracts as the operator is incentivised to both collect the revenue and grow the patronage. EPTO is supportive of operator led initiatives within the framework of an agreed mechanism for consultation and delivery.

4. Please describe what is in the view of your organisation the best way to avoid cross-subsidisation between services rendered under PSO and non-PSO services, including the way costs should be allocated between both ranges of activities.

Services provided under PSO should always be based on clear and transparent contracts, awarded after a formal competition. The competition should not be open to operators in receipt of direct award.

Where publicly-owned businesses are competing, accounting principles should require full disclosure of the source and application of all funds from public sources, so that such operators do not receive a competitive advantage by having access to public sector funding that is not available to private sector companies. If a public authority wishes to provide such funds to support public transport services, it should make the same levels of funding available to all bidders on a fair and transparent basis.

Rules in Regn 1370 that restrict operators in receipt of direct award to operating in the area of the owning authority (the “reciprocity” rules) should be reviewed to establish whether there is any evidence that public sector companies are using subsidiaries or other mechanisms to circumvent the rules in the Regulation. In particular, it must be clear that invitations to tender must not be constructed in a way that favours an incumbent operator, particularly one owned by the public authority itself.

As mentioned above EPTO opposes opaque cross-subsidy from within other commercial activities as a way of supporting public transport. We believe that public funding for bus and rail services should be clear and transparent (and not funded, for example, by having other public services such as the provision of electricity or local heating included in the same business). We do especially oppose the so-called Stadtwerkemodell in Germany.

EPTO members believe that state aid to former public monopolies should stop as soon as possible. However state aid may be regarded as tolerable where it is open and under fair conditions accessible for all market participants. If state aid is granted it should be open to all, it should be granted in a transparent manner and its use should be monitored in a way that no intramodal competitive advantage is given to any party.

EPTO would like to stress that where new assets (mainly rolling stock) for urban, suburban and regional transport are desired by the transport authority but cannot be justified on objective commercial grounds it should be made a requirement of a public service contract and compensated through a PSR contract.

If the granting of state-aid is considered in relation to tendered services, it should be done by open and accessible procedure for all potential bidders in a transparent way - or to none, but always on equal terms to ensure a level playing field. This principle of openness of state aid and transparency – if given - should be one of the aims of the common principles.

If state aid has financed the purchase or renewal of assets, it should be clearly stated that at the end of a concession that the assets have to be handed over to the new operator and especially in the case of railways that the assets have to remain in the region for which they were financed.

5. What are in your opinion the weaknesses of or gaps in the current national regulatory framework, if any?

In general we do not yet have substantial evidence of such weaknesses, in view of the recent nature of the Regulation itself. Our areas of concern relate to:

- a. the extent to which a national authority can establish that an operator bidding for tenders in its territory does not offend the rules on reciprocity; it is not clear to us which authority would be empowered to take action (the national authority in whose area the operator is established or in whose area the contract is awarded, for example);
- b. How far there is transparency in organisations with direct award so as to establish that state subsidy for, for example, passenger services is not used to subsidise, directly or indirectly, other activities (such as running bus services or freight operations) and is not used to create artificial profits that are returned to the public sector owning body by way of “dividend”;
- c. EPTO members note the different regimes operating in different Member States. Some of these lead to non-economic situations arising from differences in the organisation of responsible public transport authorities or in the structure of their contracts:
 - The extent to which national regulations establish rules (such as those relating to being neither better off nor worse off, (as in the UK) for the implementation of the general rules and for fares compensation provisions (as in Portugal).
 - The extent to which national bodies (e.g. France) have been prepared to structure their regulatory frameworks to protect incumbent operators (e.g. RATP)
 - The extent to which national authorities appear unwilling to change legislation (e.g. France) so as to remove barriers that prevent regional authorities from inviting bidders for local and regional rail services.
- d. The extent to which large, state-owned rail businesses are able to fund the purchase of rolling stock on a speculative basis that can be used to bid for tenders in a way that is not open to other bidders, who can only fund purchases for new trains for contracts that have been awarded;
- e. Obstacles might also be found in the relationship with authorities who prove unwilling to cooperate with suppliers other than their in house operator. This risk is greatest at the end of the transition time of PSR. It could arise in both the provision of information and access to the operation to all potential bidders before a contract award and, after award, during the transition.
- f. A classical barrier in relation to claims on awarding of contracts are in some EU countries the levels of required evidence and the legal cost related to claims to start an inquiry and the cost risks to cover all legal expenses of all interested parties. .

EPTO members want the opportunity to compete in and for every market on a level playing field!

6. Which measures would you suggest to improve the situation?

- All measure mentioned above:
 - No direct award, competitive awarding
 - Contracting
 - Clear anti-state-aid regime
- Creation of easy-access principles for claims, i.e. lowering claim barriers
- Commission quickly taking action against member states who breach the Regulation
- Regularly review the implementation of 1370/2007 (annual basis)
- Publishing the findings of each annual review and where necessary, naming and shaming.

7. Should you have any other comment on the implementation of Regulation 1370/2007, please feel free to indicate it hereafter.

In many European countries public monopolies or ex-monopolies are profiting from a dominant situation which could impair the tendering process being implemented for public service contracts and distort fair competition principles.

In some cases in Germany it could be noted that decisions on the way of awarding of PSR contracts – tendering, negotiation or direct award - were linked to the offer of infrastructure upgrades and other investments by the internal infrastructure provider or other parts of the company.

This has happened in some cases in Northern Germany, Schleswig-Holstein and the choice of awarding procedure for the lot "Netz Ost". Shortly after the decision in favour of the incumbent railway its infrastructure division announced the electrification of the major railway line.

In another case a decision of the French Competition Authority from November 2009 has clearly given evidence that SNCF, especially on the issue of station management and intermodal operations, where it is concentrating lots of strategic functions (trains, buses, parking, stations operations) was profiting from a dominant position and had therefore to change and adapt its structure to ensure fair market access. The example of the tendering process of Bordeaux urban transport system in 2008/2009 has shown the role the main railway station management and development plans advocated by SNCF could play in the final decision of the transit authority to award the urban bus and tram contract to a subsidiary of the SNCF.

Return address

Please return this questionnaire at the following email address:

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Questions

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