

# A TRADE UNION GUIDE TO THE PSD REGULATION

- ➔ Make the best use of “Regulation (EC) 1370/2007 on public passenger transport by road and rail” for the benefit of public transport workers and passengers





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# FOREWORD



## Local Public Transport: Public Ownership or Private Competition?

Should our local bus, tram and metro services be owned and run as a public service by our elected local governments? Or should they be contracted out to private operators through a competitive tendering system?

The European Commission has been committed to the contracting out of public transport for several years, as well as a wide range of other public services such as gas, electricity, water, telecommunications and even health and social services. The Lisbon Strategy, signed in 2000, committed the European Union to “liberalise” the transport sector, and later that same year the EU Commission published its first proposal for a new EU Regulation on Public Service Obligations in Passenger Transport by Road and Rail. This proposal, if passed into law, would have forced local authorities to offer out to tender their publicly owned passenger transport operations.

Many unions had already experienced partial or total privatisation of this sector, often with seriously adverse effects on their members and the travelling public. The new private operators usually seek new ways to cut costs in their bid to increase profits. Trade unions reported loss of jobs, cuts in wages, longer hours and other attacks on their conditions. The situation was worst in countries like Great Britain where privatisation was accompanied by deregulation. In some other countries the damage was more limited where private operators were constrained by tight contracts, good level national sectoral collective agreements and national legislation helped to protect basic wages and conditions. Nevertheless trade unions in most of the countries across Europe shared a more or less common experience that privatisation by competitive tendering posed a serious threat to their members’ terms and conditions, and often too to the quality of service.



The European Transport Workers’ Federation (ETF), which represents the transport unions in Europe, resolved to campaign against the EU Commission’s proposal. Its Urban Public Transport Committee established a small ad hoc working party to analyse the Commission’s proposals and expose its flaws, to lobby the EU Parliament to oppose it, and to help build an alliance to defend the right of elected local governments to own and run their own public transport systems. It was becoming increasingly evident that the best public transport systems in Europe were indeed those that were still controlled and run by their municipal owners.

The ETF is pleased to report that our campaign was successful. It took three attempts by the EU Commission to get its proposal accepted. The final text, EU Regulation 1370/2007, which entered into force in December 2009, does allow “direct awards” by local governments to their own internal operator. Rail services can be broadly awarded directly. But it also has a lot to say about how public transport can be put out to tender if the privatisation route is chosen. In such cases, there are opportunities for trade unions to achieve better protection for their members’ terms and conditions when contracts change hands, as well as guarantee high standards of quality in the delivery of the service.

The ETF is justifiably proud of its work. We hope you find this guide useful.

Brussels, June 2010

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Transport Committee

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# 1. A NEW EU REGULATION FOR PUBLIC TRANSPORT SERVICES



On 3 December 2009 the new EU regulation on public passenger transport services by rail and road (Regulation (EC) No. 1370/2007) came into effect. Since then it is valid in all member states and it is mandatory in all its sections. At the same time, the previously applicable regulations, Regulation (EEC) 1191/69 and Regulation (EEC) 1107/70, have been annulled. What changed? What does this mean for the European trade unions in the urban public transport sector? What impact has this new regulation in the respective member state? How does it impact the extent and quality of transport offers, operators and finally employees' working conditions? But let us first take a brief look back at how this new regulation came about.

## 1.1 The long road to Regulation (EC) No 1370/2007

Following the launch of the "Lisbon Strategy" in 2000, the European Commission committed itself to submit public transport in the EU to competition. As a result, in 2000 the EU Commission submitted its first proposal for a new EU regulation on public service contracts in passenger transport by road and rail to the parliamentary deliberation procedures. Public transport was to be "liberalised" in the same way as a large portion of other public services such as gas, electricity or telecommunication. If it had been implemented, this draft would have resulted in open competitive tendering procedures in all local public transport. This would have included public transport companies in municipal ownership.

The first draft from the EU Commission shocked those European trade unions that are involved in organising public transport. Many ETF unions had already experienced partial or complete privatisation and competitive market conditions in this sector. For their (trade union) members, and also for



passengers, these experiences had been entirely negative. The new private operators quickly sought to reduce costs in the contracts they received in order to maximise their profits. Trade unions told of job destruction, wage cuts, longer working hours and other changes in working conditions. The prevailing profit motive severely undermined the existing quality and reliability of public passenger transport services. There were negative consequences particularly in Great Britain, where privatisation was accompanied by deregulation. However the consequences were far less serious in those countries where the new private operators were required to apply better employment conditions and higher social standards for employees. Here, among other factors, national laws helped to support employees by protecting wages and minimum labour conditions. Trade unions across Europe have learned that the privatisation of local transport and open competitive tendering represent a serious threat to their unions' achievements and that the quality of these services has frequently suffered as a result.

The European Transport Workers' Federation (ETF), which represents transport unions in Europe, has mobilised against the EU Commission's draft. It has not only analysed various Commission

proposals and identified their weak points, it has also sought allies to help implement its recommendations in the EU Parliament. It was particularly concerned with the self-administration rights of the national states (regions) and municipalities and the associated right to operate public transport with their own companies or administrations, because at this point it is indisputable that the best local transport systems in Europe are those that are controlled and operated by municipal owners. In addition, it has been shown that even in a deregulated local transport market such as Great Britain, public transport cannot function without state aid if it is going to fulfil its function of improving the quality of life for all citizens in its respective region. Thus, according to an official study<sup>1</sup>, at the present time state compensation payments for bus transport represent 1/3 of total expenditures for bus transport. Twenty years ago the proponents of deregulating bus transport in Britain would have denied such a figure and declared it to be impossible.

<sup>1</sup> Office of Fair Trade: Local bus services. Report on the market study and proposed decision to make a market investigation reference, Aug. 2009, esp. pp. 17-20; public money per passenger journey (Great Britain outside London) without special funding for "bus routes which are socially necessary but not commercially viable" (p.19).

All local transport systems which fulfil their function as a public service by providing sustainable local and regional mobility for citizens without access to private cars receive not inconsiderable compensatory payments and aid from the state. The ETF has striven to ensure that the competition for these compensatory payments is fair, social and transparent, not only for companies and citizens, but also for the employees. The ETF is glad that its political and parliamentary campaign to change the draft regulation was successful. Although it required three separate attempts spread over a total of seven years before the EU Commission's proposal, incorporating important amendments, was accepted by the EU Parliament and the Council, the ETF is still proud of these amendments.

## 1.2 What does Regulation (EC) No 1370/2007 regulate?

### a) Regulated competition for public service obligations in transport

The objective of Regulation (EC) No. 1370/2007 is "to guarantee safe, efficient and high-quality passenger transport services through regulated competition, guaranteeing also transparency and



## BOX 1 - CASE STUDY TOULOUSE:

### The urban and inter-city transportation back to public ownership

The Haute-Garonne (South-West France) inter-city transportation and the greater Toulouse area (the main town of this "département") urban transportation covering more than 1,200,000 inhabitants have shown that it is possible to reverse a privatization process, to impose an in-house operator and to restore a publicly-owned company or public utility. This process was successful because it could rely on the support of the elected political representatives, the people and the trade unions.

SEMVAT ("Société d'économie mixte des voyageurs de l'agglomération toulousaine") had been managing the collective transport network in Toulouse and its nearest suburbs since 1973. SEMVAT was an Institutionalised Public-Private Partnership transport (IPPP) in which 80% of the capital was publicly-owned and 20% was private (owned partly by TRANSDEV). In 2004, SEMVAT lost the tender which was then won by one single private company called Connex (now part of Veolia). This meant then that the whole network was privatized. But it did not last long. On 17 November 2005, after a tight political fight within Toulouse local authority between a right-wing mayor at the time and the left-wing general council (elected assembly at the level of the "département"), from 1 January 2006, an in-house operator was appointed by the managing Authority for the whole network. In addition, since the municipal elections held in 2008, the right wing majority has converted into a minority in the local authorities.

After losing the tender for the granting of the urban transportation network, SEMVAT survived until August 2006 thanks to its other activities, i.e. the inter-city regular transport services, the transport services of the "département" which had been entrusted to it following a call for tender organized by the Haute-Garonne General Council. An in-house operator or departmental public utility has since then taken up the provision of such transport services and taken on the SEMVAT employees.

performance of public passenger transport services, having regard to social, environmental and regional development factors”, as is stated in the explanatory statement of the new regulation.<sup>2</sup> In order to do this, it requires corresponding measures on the part of the “competent authorities of the Member States,” the Consideration continues, “to ensure that such services are provided”. It is also indisputable that “many inland passenger transport services which are required in the general economic interest cannot be operated on a commercial basis”.<sup>3</sup>

For this reason, the responsible authorities have laid out “public service obligations”, i.e. “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 assume to the same extent or under the same conditions without reward”.<sup>4</sup>

As a result, the purpose of this new regulation is to regulate “the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred **and/or** [emphasis added by the ETF] grant exclusive rights in return for the discharge of public service obligations.” (Art.1(1, p. 2)). This makes it clear that, as a “lex specialis”, Regulation (EC) No. 1370/2007 is aimed at establishing uniform competition rules for public passenger transport services as services of general economic interest (SGEI). It consistently links

public procurement law to state aid laws, since in all countries it has been shown that public passenger transport services cannot survive without the granting of financial compensation on the part of the public authorities.

Before presenting the contents of Regulation (EC) No 1370/2007 it is therefore necessary to begin by determining what the existing features of the national public transport market are and what financial and legal “basic structures” it follows (see Box 2).

The answers to the questions on the “basic structures” of the national public transport market give an indication on whether and to what extent the national public transport market is seen as a commercial business and to what extent it is considered as a service of general economic interest (a public service, SGEI).

## b) Types of public awards: Direct awards or competitive tendering

Regulation (EC) No. 1370/2007 entails three kinds of public awarding of contracts – and that is the difference to the other EU procurement directives – that can be freely selected when the corresponding conditions apply:

- **Direct award** (Regulation 1370/2007 Art. 5(2)): Allows a competent authority to award a contract directly without a tendering requirement;
- **Competitive award** (Regulation 1370/2007 Art. 5(3)): Provides for the organisation of public passenger transport via a competitive tendering procedure. It allows, however, that the

<sup>2</sup> See Consideration no. 4

<sup>3</sup> See Consideration no. 5

<sup>4</sup> Art. 2 (e)

## BOX 2 - QUESTIONS ON THE “BASIC STRUCTURES” OF THE NATIONAL PUBLIC TRANSPORT MARKET

1. Does the company receive compensatory payments to meet its public service obligations?
2. Does the company have any exclusive rights and are these linked to an obligation to provide transport and/or a timetable, and how is this regulated by national law?

**If the answer to one of these two questions is yes, Regulation (EC) No 1370/2007 must be applied, unless this is excluded under national law.**



competent authorities impose social and quality standards and the protection of workers in the case of change of operator. It also may limit and control sub-contracting.

- **Public service contracts concluded under the rules of the general public procurement legislation, Directives 2004/17/EC and 2004/18/EEC** (Regulation 1370/2007 Art. 5(1): This procedure gives less protection for social and employment conditions, and quality standards.

A direct award is defined as: “the award of a public service contract to a given public service operator without any prior competitive tendering procedure.” (Art. 2(h)). It may be granted to an internal operator (Art. 5(2)), a small or medium-sized enterprise (Art. 5(4)) or – without any restrictive conditions - a railway operator (Art. 5(6)).

When conducting a competitive tendering process in accordance with Art. 5(3) of Regulation (EC) 1370/2007, the procedure must fulfil the following four criteria:

- It must be open for all operators;
- It must be fair;
- It must be transparent, and
- It must fulfil the principle of non-discrimination.

Once these criteria are fulfilled, then “the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements”. These new procedures offer an opportunity to fulfil the special demands of public passenger transport services in generally complex local public transport systems while maintaining the above stated four principles.

Art 5(1) still allows the award of contracts using the procedures of the general procurement legislation,

Directives 2004/17/EC and 2004/18/EEC. This is the case when the competent authority chooses a service contract or a public service contract as defined in those directives. (Attention: There are different definitions of (public) service contracts in Regulation 1370/2007 and in the public procurement directives.) However, this is possible only “where such contracts do **not** take the form of service concession as defined in those Directives”. When the competent authority chooses a contract form that is a service concession<sup>5</sup> as defined in the public procurement legislation, the procedures of Regulation 1370/2007 can be applied and thus the provisions regarding quality and social standards.

The term “service concession” refers to a contract between a public franchiser and a company which contains the details and – possibly - the obligation to provide a service but makes no provision for remuneration of the franchiser. The economic risk entailed by a service concession lies with the contractor.

By including the three public award procedures described here, Regulation (EC) 1370/2007 fulfils both the principle of the free organisation of services of general economic interest as presented in Article 14 of the EC Treaty and also the principle of subsidiarity as presented in Article 5 of the European Treaty.

The ETF particularly welcomes the possibility of direct awards within Regulation (EC) 1370/2007, both in regard to road and rail. This represents a

<sup>5</sup> Directive 2004/17/EC, Art. 1 Abs. 3 lit.b): „A ‘service concession’ is a contract of the same type as a service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in that right together with payment.” and cf. Commission interpretative communication on concessions under Community law, EU Official Journal C 121, 29 April 2000





hard-won concession from the EU Commission. Despite strict regulations and/or preconditions, direct awards should not be regarded as a barrier but rather as an opportunity. Above all, they are an instrument that can be used to better link local and regional transport systems to municipal and regional political responsibility. Moreover, they are an instrument that can be used for preserving and protecting existing municipal transport networks along with their public service obligations.

Where competent authorities decide to organise the public transport networks via competitive tendering, the ETF urges its affiliates to ensure that the tendering provisions of Regulation 1370/2007, Art 5(3) are used, as those give the best opportu-

nity to insist in the protection of employment conditions and social standards for workers.

Be aware that some member state governments and private transport operators will welcome the provision in Art 5(1), which allows them to choose a tender procedure under the procurement directives 2004/17/EC and 2004/18/EEC. When choosing this procedure they immediately exclude the choice of direct awarding public service contracts to small and medium enterprises or railway operators. Direct awards to own operators would be possible only within the much stricter definitions of the Court of Justice of the European Union for an 'Inhouse-Award'. This allows them the opportunity to disregard important demands for social and quality standards as well as the protection of workers.

### c) The three types of direct award of public service contracts

#### Direct award to an internal operator (Art. 5(2))

The responsible local authority can operate its own bus, tram and underground services by itself or make a direct award to its own internal operator (Art. subset j). In this case, it must be ensured that the local authority shall maintain control over the internal operator "as over its own agency". In addition, the internal operator is subject to strict regulations:

- it may only be active within the territory of the local authority with the exception of arriving and departing services,
- it is prohibited from taking part in the open competitive bidding process for public transport services outside of the territory of the local authority, and
- if transport services are subcontracted, it must provide the bulk of transport services by itself.

As regards company law, a 100% ownership of the internal operator by the local authority or the regional authority is not mandatory, but there must be guarantees that the public authority can exert a "dominant influence" that "corresponds to the control over its own agencies". As a result, public-private partnership (PPP) forms are possible.

In member states without local competent authorities, the national authority takes over these



functions for a geographical area, which may not be the entire national territory (Art. 5, Abs. 2 lit. d).

An example of a direct award to an internal operator (see Box 3) is the direct award to the ÜSTRA company in Hanover. It is also an example of such an award going to a public company. ÜSTRA has thus changed its corporate strategy of previous years in order to meet the conditions for a direct award as an internal operator of the City of Hanover: It disposed of shares held by private companies and had sold its subsidiaries, which operated all over Germany, by the end of 2009.

The new regulations governing direct awards will in future facilitate a restoration of local transport companies to public ownership. Although the restoration of the local transport companies in Toulouse (Box 1) and Marseille (Box 13) in France was carried out before the entry into force of Regulation (EC) No 1370/2007, the new Regulation can facilitate the re-municipalisation of public transport as demonstrated by the example of Kieler Verkehrs-betriebe in Germany in 2009 (Box 5).

#### Direct awards to small and medium-sized companies (Art. 5(4))

Direct awards can also be made to small and medium-sized enterprises if the transport service to be awarded is small-scale and the contractual value does not surpass two million Euros, or the annual transport output does not surpass 600,000 km, or the company possesses fewer than



twenty-three vehicles. This regulation particularly ensures that the (numerous) small and medium-sized enterprises in the individual national local transport markets will be protected, particularly those that have suffered in recent years under the market displacement arising from competitive tendering. This regulation has been used, for example, by the county of Meissen in Germany, which in July 2009 announced the direct award to six small and medium-sized transport companies in the EU Official Journal.

#### Direct awards for rail services (Art. 5(6) i.c.w Art. 5(2)lit.d)

Finally, direct awards for rail service in urban, suburban and regional transport are possible for a maximum term of up to ten years. If “necessary economic assets are made available” to a large degree, then this term can even be extended to up to fifteen years. In direct awards for rail service,

### BOX 3 - CASE STUDY HANOVER: Direct award of a public service contract to ÜSTRA in Hanover, Germany

ÜSTRA in Hanover is the transport company of the City of Hanover which provides public transport on over 200 bus and tram routes for the Greater Hanover Area (GVH), employing about 1,900 people. In July 2008 on the basis of Regulation (EC) No. 1370/2007, the competent local authority announced the direct award for the ÜSTRA bus services as of 2010 in the Official Journal of the EU. In connection with the planned direct award ÜSTRA applied to Landesnahverkehrsgesellschaft Niedersachsen mbH (LNVG) for the route authorizations starting in 2010. In January 2009 LNVG granted ÜSTRA the route authorizations under the then applicable law for the period from 1 January 2010 to 9 December 2017.



## BOX 4 - CASE STUDY LUXEMBOURG: Direct award of a public service contract to the railway company CFL

The agreement negotiated in Luxembourg between the government and the CFL for the provision of public transport by road and rail (CFL Busse) for a term of 15 years (2009-2024) for the entire rail and bus network safeguards many CFL jobs with civil-service status.

In Luxembourg employees with civil-service status cannot be dismissed. Those joining CFL for the first time receive civil-service status.

During these 15 years new operators will have no opportunity to get a foothold. Thus the creation of precarious, poorly paid jobs will be prevented and social conflicts and social hardships avoided.

The transport company can set up a long-term personnel planning system while investing in new rolling stock and road vehicles well in advance.

the railway provider does not have to be in public hands or be an internal operator. An example of a direct award is the one made to the Société Nationale des Chemins de Fer Luxembourgeois (CFL), the national railway and bus operator of Luxembourg (see Box 4). This example is significant because it shows that the ETF has achieved by its interventions that the safeguarding of existing railway companies through a direct award without preconditions is possible, as in the case of CFL.

### d) The transition period until 3 December 2019: Let's make use of it!

The transition period until the full application of EU Regulation 1370/2007 is very long and ends on 3/12/2019 in the case that a member state remains inactive and does not adapt its national law to the new tendering procedure of Art. 5 of the Regulation. As from 3/12/2019 the awarding of contracts for public transport by rail and road must comply with Art. 5 of Regulation (EC) 1370/2007 in accordance with Art. 8(2). Two control instruments will be introduced for this transition period. They will simultaneously serve as adjustment instruments:

- “During this transition period the member states shall introduce measures in order to apply Art. 5 gradually.”
- “Within six months of the first half of the transition period, the member states shall submit a progress report to the Commission in which they shall present the implementation of the gradual award of public service contracts in accordance with Art. 5.”

The transition period is also a “litmus test” showing whether and how the previously different organisational forms of public passenger transport services in the member states can be merged. In particular, it remains to be seen what is meant by “gradually applying Art. 5” and “in accordance with Art. 5”.

Above all, the ETF affiliates should use this transition period to conduct a discussion on the utility of the new regulation, based on the proposed trade union action plan (see Chapter 3). At the centre of this discussion stand both the three fundamental procedural methods in the awarding of public passenger transport service contracts and the application of qualitative and social award standards.

## 1.3 Why does the ETF support 1370/2007?

As indicated above, in some national jurisdictions it may not be possible to apply Regulation (EC) No. 1370/2007, but instead the general public procurement legislation. Art. 5(1), sentences 2 and 3 contain a derogation clause:

“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 service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.”



The ETF recommends that this derogation clause should not be applied, as the non-application of Regulation (EC) No. 1370/2007 means that the other two new procedures for awarding contracts - direct award and “competitive award” - cannot be used either.

When municipalities nevertheless consider applying the general procurement legislation, it should be the task of the ETF trade unions to try and get those responsible to at least apply the “competitive tendering procedure” laid out in Art. 5(3) of Regulation (EC) No. 1370/2007. This would create the possibility to include workers protection clauses and social and quality standards as specified in Art 4(5) of this new Regulation within the competitive tendering procedure. This would make it possible,

for example to prevent social dumping caused by competitive tendering.

The ETF was powerless to prevent the co-existence of different regulations governing public procurement. Clearly Regulation (EC) No. 1370/2007 is a political compromise and will have to justify its own applicability. Every compromise harbours within it a danger and an opportunity. The danger is that the co-existence will create a state of legal uncertainty with possible legal disputes over abstract definitions (service contract vs. service concession). But the fact is that the (legal) starting point varies from one country to another. The success of Regulation (EC) No. 1370/2007 will also be influenced by the status of national law, which is another reason for ETF affiliates to get involved in this discussion.

## **BOX 5 - CASE STUDY KIEL:** **Joint press statement by BeNEX GmbH and the City of Kiel**

*Kiel, 27 February 2009*

**NBB and the City of Kiel sign re-municipalisation deal**

Today in Kiel representatives of the City of Kiel and Norddeutsche Bus-Beteiligungsgesellschaft mbH (NBB) signed an agreement on the repurchase of the NBB shares in Kieler Verkehrsgesellschaft (KVG).

In 2003 the City of Kiel sold 49 percent of the KVG shares to Norddeutsche Busbeteiligungsgesellschaft (NBB), a subsidiary of BeNEX GmbH and Vineta Verkehrsgesellschaft mbH. “KVG is now on a sound economic footing and is well-equipped for the future,” said Peter Steinhart, the managing director of BeNEX GmbH. “We wish the City of Kiel and especially the employees of KVG every success,” stressed Jürgen Ubben, the managing director of Vineta Verkehrsgesellschaft mbH.

“The repurchase of the shares is a very important matter both for the regional capital and for KVG’s employees: Now we can award the contract for transport services directly,” explained Kiel’s Mayor Angelika Volquartz. She thanked the NBB for the constructive negotiations and the KVG employees for their flexibility: “This was the only way we could achieve a workable compromise, so that we could have an efficient public transport system while at the same time safeguarding jobs.”





On the other hand, this uncertainty also provides an opportunity to examine its applicability during the transition period. During the transition period we will see the “implementation of the gradual awarding of public service contracts”, i.e. the awarding of public service obligations through the responsible local authority. Therefore EU Directive 1370/2007 should be regarded as

- an application of transparent rules for the provision of financial compensation and/or exclusive rights as well as
- the awarding of public service contracts in compliance with EU law.

Thus consistent application of Article 5(1), sentence 1 “*Public service contracts shall be awarded in accordance with the rules laid down in this Regula-*

*tion*” could already be the solution! After all, the types of awards listed there represent existing EU law. Moreover, they offer the local authorities the opportunity to use all their political competences in order to decide for themselves the quality and extent of public transport: by choosing the best awarding procedure and by imposing social and quality standards as they wish.

The definitions of social and quality standards contained in Consideration 17 of the new regulation (see box 6) are comprehensive and concrete, and enable trade unions to fight for real alternatives that are not present when applying awards according to Directives 2004/17/EC or 2004/18/EC, unless of course national regulations allow for the same alternatives.

## 1.4 The benefits of Regulation (EC) 1370/2007

The benefits that Regulation (EC) 1370/2007 represent in the light of what we have seen above are obvious and can be summed up as follows:

The competent authority can:

- award public passenger transport services to their own (municipal) company;
- freely decide on direct awards;
- directly award passenger transport service to small and medium-sized enterprises;
- directly and unconditionally award rail services for urban, suburban and regional transport;

### BOX 6 - ARGUMENTS FOR SOCIAL AND QUALITY STANDARDS: CONSIDERATION 17

In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.

(Regulation (EC) 1370/2007)

- select a competitive award procedure that matches the special situation of a local transport system;
- determine workers' protection rights and social and quality standards.

In return, the public authorities:

- receive transparent and uniform regulations covering financing streams in regard to financial compensation for passenger transport services and the granting of exclusive rights

(cf. Art. 4 and Art. 6, including appendix);

- when choosing direct awards, save the transaction costs for the invitation to tender and the administrative costs;
- can directly control their local public transport system and effectively exert local political will.

The benefits of Regulation (EC) 1370/2007 may become even more obvious once we take a closer look at the opportunities for social protection and standards in the next chapter.

## COMPARISON OF THE EU PUBLIC PROCUREMENT LEGISLATION

### Regulation no 1370/2007 on public transport and the general public procurement directives

Regulation EC no 1370/2007	Directive 2004/17 (EC) and Directive 2004/18 (EC)
Competitive tendering procedures with tendering standards, to determine how best to meet specific or complex requirements	cheapest offer
Direct award, if a „control similar to that exercised over its own department“ and within their own territory and permissible outskirts	„inhouse“-award, if a 100% company of the local authority and just in their own territory
Direct award to small and medium enterprises	not possible
Direct award for rail passenger services	not possible
Emergency measure	not possible
Limitation and control of subcontracting	not possible
Requirement of quality standards	not specifically regulated, only if supplementary national rules exist
Requirement of social standards	not specifically regulated, only if supplementary national rules exist
Duration of public service contracts	not regulated

## 2. OPPORTUNITIES FOR WORKERS' EMPLOYMENT AND SOCIAL PROTECTION, SOCIAL AND QUALITY STANDARDS



Sections 5 and 6 of Article 4 (see box 7) provide the essential legal basis on which the responsible local authority can extend standards in public service contracts to employment and social protection and to social and quality criteria. This Article is fundamental to the shaping of workplace and social protection within a public service contract. It is also fundamental to the prevention of social dumping caused by lowest-cost competitive tendering. In combination with Consideration 17 (see box 6) public authorities now have a legal anchor on which to impose social obligations on participants in a competitive tendering procedure and in public service contracts.

When there is a change of operator due to competitive tendering, Regulation 1370/2007 provides for a wider application of the protection of individual workers rights than as defined in Directive 2001/23/EC (see Consideration 16 in Box 8). In order to use these possibilities it is important that ETF affiliated unions make use of Consideration 17 in Regulation 1370/2007. This Consideration gives competent authorities the power to require specific social and quality standards in the tender specifications.

The ETF strives to ensure that workers' protection and social and quality standards are applied not only in the competitive tendering procedure, but – as a

### BOX 7 - PERMISSIBILITY OF SOCIAL AND QUALITY STANDARDS

#### Art. 4 (5)

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 previously taken on 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 to be linked to the services.

(Regulation (EC) 1370/2007)

#### Art. 4 (6)

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.

(Regulation (EC) 1370/2007)





matter of principle - also in the case of the direct award of public service contracts. That this has already been achieved is shown by the example of a direct award to the Luxembourg transport operator CFL (see Box 4).

The following clarifications are examples and are intended to provide suggestions on the basis of which the trade unions can conduct and expand the debate on quality and social standards.<sup>6</sup>

## 2.1 Examples for quality standards

The fact that local authorities will have the option to impose specific quality standards on the operators of local services, gives local trade unions a welcome opportunity to co-determine the quality of the public transport. After all, quality standards are fundamental to the “local public transport product”, both in terms of public service standards and for the number and quality of jobs provided. In competitive tendering it is not acceptable to select the cheapest operator without demanding any conditions. Supplementary demands for higher quality standards after the tender has been awarded always cost much more, as many examples show. To avoid this, quality standards should entail the following from the start of the contract:

- **Investments in new vehicles, infrastructure and equipment**

The maximum age of the vehicles – including trams and underground trains – as well as the service life of the equipment should be documented along with basic requirements. This can ensure that the facilities and equipment can be renewed and modernised as planned. Appropriately financed investments are always a sign of entrepreneurial sustainability.

- **Operational reliability**

The requirement for example that over 98% of journeys occur within a specific time window e.g. not more than one minute early or more than five minutes late, and minimum cancellations. Effective operational and supervision systems require a sufficient supply of back-up vehicles and reserve personnel, with rapid availability. If these quality specifications are not present, there will inevitably be regular failures of supply. If no palpable financial sanctions have been agreed upon, the operator will achieve “special profits” via these cost saving measures. Care needs to be taken that this quality standard is not realised at the cost of a deterioration in working conditions.

- **Cleaning and Maintenance**

Cleaning and maintenance should be an integral part of the local public transport company. Subcontracting of maintenance services should be excluded. Coordinated reporting procedures and maintenance programmes must be specified along with clear measurable standards of cleanliness. Here too, failure to live up to agreements must incur a system of financial sanctions which should be clearly laid out in the contract.

- **Continuous professional training and human resources development programmes**

High quality public transport requires well-trained and motivated personnel. They should be acquainted with all quality standards in regard to consumer protection and personnel security, health and safety at work, specific operational safety and vehicle safety knowledge and specific knowledge of the route network. Qualification certificates and a well-formulated human resources development programme must be included in the contract documents for enforcement purposes.

- **Security against assaults and vandalism**

The contract should specify comprehensively how the operator will ensure the safety of the transport

<sup>6</sup> DIN EN 13816 is not a sufficient quality standard in this regard, as it only describes the quality criteria without setting any standard of quality and contains no norms from the employees' point of view.

personnel and passengers, particularly regarding assaults and vandalism. It should specify how many security personnel are required, what assault protection equipment is needed (e.g. assault screens, emergency radios etc) and what psychological after-care support is provided to staff following an assault.

- **Precise description of the service (quality) to be delivered**

The contract should specify the route network and their frequency at specific times of the day, days of the week, along with the fares structure and the various ticket types. Although the network is normally described in a local transport plan, it is important to specify them even further and, if need be, to establish under what criteria adjustments and changes can be undertaken. The responsible authority must implement effective security systems and proactive monitoring and control procedures so that the “client-contractor relationship” does not reverse itself.

- **Restricting sub-contracting**

Art. 4(7) stipulates that the awards granted in a competitive tendering procedure must first depict the scope of subcontracts, whereby the designated operators must themselves provide a significant portion of the transport services. This is designed to ensure that the operators cannot entirely pass the provision of transport services to other companies in the form of subcontracts. If public service contracts are awarded directly to an internal operator, then the internal operator must provide the

largest share itself. Restricting granting awards to outsiders can also prevent the undermining of quality and social standards. It should also be laid down that the operator has to guarantee the social and quality standards employed by the external companies and shall be held liable if they are not respected.

- **Clear definition and previously determined and transparent compensation payment for public service obligations**

Defining the compulsory public service obligations in advance along with a transparent depiction of the public compensation payments will ensure effective quality control over a high-quality public transport network.

## 2.2 Protecting the rights of public transport workers in the event of change of operator

The competent authorities can determine that, following a change of operator due to competitive tendering, all employment contracts will be transferred to the new operator and that said operator has to apply the collective agreements currently operative in that location. This can be defined as the individual right of all employees, but the best protection measure is without doubt a collective agreement. The Regulation expressly permits other national laws and regulations to apply by saying in Consideration 16 that those are not excluded. Depending

### BOX 8 - WORKERS' PROTECTION: CONSIDERATION 16

Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council

Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfer of undertakings, businesses or parts of undertakings or businesses (1). This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights other than those covered by Directive 2001/23/EC and 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.

(Regulation (EC) 1370/2007)



## BOX 9 - CASE STUDY STOCKHOLM I

(see also Annex I and II)

### Ways to safeguard workers' jobs and rights within competitive tendering

In Sweden urban public transport has been open to competitive tendering since 1989 and for the railways since 1993. The Swedish trade unions managed to obtain binding national collective agreements for the bus sector as well as for the railway sector and gradually increased the terms of conditions for workers in public passenger transport to a good level. Remaining problem is the protection of workers' employment and achieved rights in the case of change of operator due to competitive tendering. In the city of Stockholm the trade unions can report a success story. With continuous lobbying of the city's government they have now managed to secure workers protection clauses including all acquired rights (like pension rights) in all tender calls made by AB Storstockholms Lokaltrafik (Local traffic of Greater Stockholm Ltd.).

#### Extract from the contract between the Stockholm competent authority "AB Storstockholms Local Traffic" and the operator Ekerö Bus Company"

##### 6. Personnel

##### 6.1 General

(....).

*The Traffic Operator shall follow the applicable labour market regulations, such as working hours regulations, overtime regulations, as well as, where applicable, appropriate collective agreements. The Traffic Operator shall, throughout the life of this agreement, apply at least the salary level that was in force at*

*the time of the transfer, unless the Traffic Operator makes another agreement with the employees.*

(...;)

##### 6.3 Working environment

*The Traffic Operator shall systematically plan, manage and exercise control over operations connected to the provision of traffic in such a way that a good working environment is assured in work-places and that the stipulated requirements relating to working environment*

*legislation in force at the time are conformed with. The Traffic Operator shall therefore strive, in cooperation with SL, to continually improve the personnel's working environment.*

*Systematic work shall be done on the working environment as a natural daily activity within a company ... This ... shall include all physical, psychological and social conditions that have an effect on the working environment.*

on the different conditions in the member states, different solutions are possible. In this way, not only are jobs and working conditions better protected, but industrial unrest among the employees of the former operator is also avoided. This helps to ensure stability and continuity of employment when providing high-quality transport services.

In some member states this can result in public transport workers having different work contracts: new employees and transferred employees with different historic terms of conditions inherited from their previous employment. Same working conditions can be achieved best by specifying in the tender specifications the particular collective agreement, which has to be respected by all bidders and which are applied equally to all transferred and future new employees. It also has to be

specified in the public service contract itself. Only by this method will we ensure that a two-tier workforce is avoided so that those workers who have lower terms of employment protected under the Acquired Rights Directive are able to enjoy the higher standards which apply to other workers<sup>7</sup>.

An example of how social standards can be used to safeguard jobs in the event of a change of operator or company takeover is the collective bargaining agreement concluded by AB Storstockholms Lokaltrafik (SL) (Local Traffic of Greater Stockholm Ltd.) in 2007 (see also Annex II and III).<sup>8</sup>

<sup>7</sup> cf. Kammer für Arbeiter und Angestellte (Hg.) Manual for tendering public transport, quality and social criteria, Wien, 2009;

<sup>8</sup> "Landstingsförbundet, Arbetsrättsenheten" Employment Regulations required by law relating to company transfer. Order number 1770, Landstingsförbundet, Printed papers.



## 2.3 Examples for social standards

Social standards as well as quality standards have to be defined in advance by the competent authorities in the published tender specifications as well as in the final public service contract.

- **Safeguarding of collective bargaining agreements**

The ETF recommends in cases where new staff are engaged or existing staff retained that the collective contracts and/or collective bargaining agreements between employers and unions should be retained in toto, as should trade-union rights of representation and any social benefit schemes that may be in place. Care should be taken to ensure that it is always the better collective contract and/or collective bargaining agreement that is retained. Regulation (EC) No. 1370/2007 offers a real possi-

bility of achieving greater protection for the rights of employees, for social standards and pay rates within the framework of collective bargaining agreements. The recent decision<sup>9</sup> by the European Court to curtail the basic right to strike does not apply to passenger transport services, as the said decision is based on Directive 96/71/EC, which does not apply to the Transport sector of the EC Treaty.

- **Quality Training Standards of transport company personnel**

The competent authorities can set quality training standards for the personnel including for the drivers, maintenance and service personnel. This may also include language skills, operational knowledge of the network and fares, customer care skills, knowledge of and competence in health and safety

<sup>9</sup> European Court, 3 April 2008 (Rüffert - C-346/06)



### BOX 10 - Extract from the Norwegian law that implements Regulation (EU) 1370/2007\*:

**“Act relating to Professional Transport Services by Motor Vehicle and Vessel” (the “Professional Transport Services Act”).**

(....)

**Section 8. The granting of a licence by competitive tender**

- (1) A licence pursuant to sections 6 and 7 may be awarded by tender.
- (2) The rules in sections 16-2 to 16-7 of the Working Environment Act, relating to the rights of employees in the event of transfer of ownership of undertakings shall apply correspondingly when the licence is awarded by tender, provided that the undertaking is operated with the same means of transport after the tender competition as before.
- (3) The licensing authority shall inform the parties that wish to participate in the competitive tender of the number of employees in the undertaking that currently holds the licence for the regular service the tender concerns, and of their age, seniority, pay and working conditions.
- (4) The licensing authority can request information as mentioned in (3) from the party holding a licence pursuant to sections 6 or 7.
- (5) The party that is awarded a licence by competitive tender must undertake to ensure that employees working directly on performance of the contract will be offered pay and working conditions that are not inferior to what follows from the current national collective wage agreement, or to that which is otherwise customary in the place and profession in question. A corresponding obligation also applies to sub-contractors.**
- (6) Subsections (2) to (5) shall also apply when the tender competition is carried out by a management company commissioned by the licensing authority.
- (7) The Ministry may lay down further regulations concerning tender competitions.

(\*) Norway is not member of the EU but must implement EU Internal Market legislation as a member of the European Economic Area



procedures including dealing with emergencies and dealing with aggressive passengers.

- **Additional examples for social standards**

The public authorities are basically free to go further and to determine that, when it comes to awarding public service contracts to passenger transport services, certain local, regional or national collective agreements and further social standards are to be applied by the respective operators. In this way it is possible for a certain desired wage and social standard to be uniformly set for the operator. Thus it is possible to properly ban social dumping among competing operators and to demand sufficient payment and working conditions. This would also represent a public recognition of the high quality and customer-focused work of employees in the public transport companies.

In contrast to the general public procurement legislation 2004/17/EC or 2004/18/EC, the new regulation, as we have seen, offers trade unionists a great many opportunities to adopt social and quality standards in the procedure to award public service contracts for passenger transport services.

A relatively long, ten-year transition period allows the trade unions from the individual member states the opportunity to demand the implementation of fair and equitable competition conditions in the awarding of public service contracts for passenger transport services. While Regulation (EC) No. 1370/2007 does not make quality rules mandatory, it opens up a number of possibilities to introduce fair, socially-minded and high quality competition rules that are appropriate to local transport systems. For this reason the ETF encourages a meaningful discussion within each member state as soon as possible with a view to influencing the methodology to be used when awarding future contracts and/or invitations to tender. To this end the ETF encourages affiliates to press for changes in national legislation where appropriate, e.g. by demanding new laws governing the awarding of contracts, and/or lobbying the competent authorities with regard to impending awards of contracts and/or invitations to tender.

**How trade unions can influence the process will be demonstrated in the final chapter where you will find a suggested action plan. Here we provide a campaigning check list for trade unions fighting for fair competition in local transport with proper employment protection measures. Hopefully this will stimulate new ideas for trades unions when planning action to achieve their goals.**

## **BOX 11 - CASE STUDY STOCKHOLM II:** **Social criteria 'good relationship with workers' representatives'**

In Stockholm the tender specifications for the public service contracts also require, under the head-line "Quality", the application of the collective agreement and "good relations to the workers' representatives". Bidders who can prove they respect these requirements get a higher score in the evaluation process.

SEKO, the trade union which organises railway, metro and tram workers, developed their own scoring system for candidates which they sent to politicians and local authorities. SEKO's "catalogue of points" stipulated the trade unions' requirements on what standards bidders have to meet if they want to get the highest number of points within the evaluation process.

This strategic clause made bidders keen to speak with the trade unions before sending their offer and SEKO managed to convince all bidders not to sub-contract services.

On the basis of "quality" and "respect of social requirements" as described, the Hong Kong company MTR won the tender for the Stockholm's underground.

### 3. A TRADE UNION ACTION PLAN FOR QUALITY PUBLIC TRANSPORT

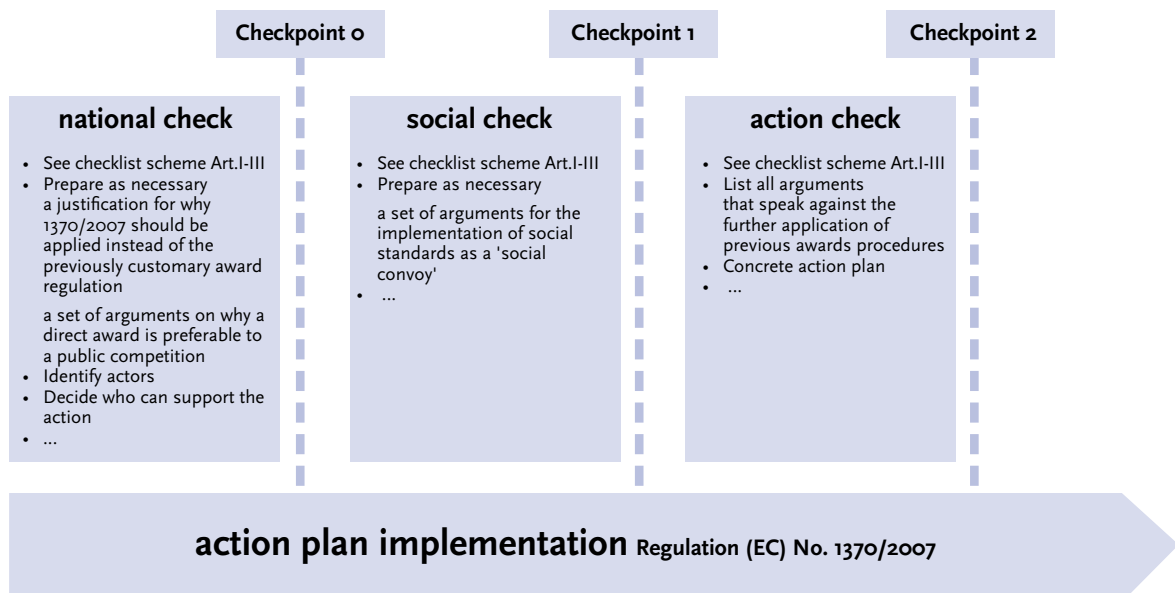


Previous deregulation in the transport markets in some member states has revealed that competitive tendering procedures have a negative impact on personnel. Thus it is important to note that in countries where open competitive tendering takes place or seems to be looming on the horizon, as in Austria, Germany or Poland, clear pressure has been applied to wages and working conditions. Bidders in competitive tendering procedures gain a competitive advantage by calculating on future

lower wages costs at the expense of public transport workers. For this reason, requiring high social standards in regulated competition is of paramount importance and can help prevent social dumping.

What can trade unions do to assert and implement fair and social competitive conditions on the local transport market? They must above all make use of the transition period for Regulation (EC) No. 1370/2007 until 2019!

#### ROADMAP FOR SOCIAL CONVOY





Since the new regulation applies both to the local authority responsible for public passenger transport services and to potential competitors, ETF affiliated unions must endeavour to state and implement their interests – first towards the operators of passenger transport services on the one hand and towards the competent authority as the responsible local authority for passenger transport services on the other hand. This is only possible with intensive preparation within the framework of an action plan (look at roadmap „social convoy“) and attention to the following principles:

- First of all, alongside the stipulations for Regulation (EC) No. 1370/2007 stated above, the existing national and complementary legal framework conditions must be comprehensively understood, along with knowledge and awareness of the structures of local and/or regional local transportation markets.
- Then it is necessary to find allies for the implementation of fair and social competitive conditions for public local transport services in order to convince the responsible local authorities that they should apply the package of fair and social standards that is most beneficial for employees on the one hand and for future passengers on the other.
- When it comes to fair awards procedures, deadlines with frequently lengthy lead times must be taken into consideration. This applies both to the new regulation and to every other

competitive procedure. As a result, before commencing the award procedure it is essential to conclude all the preparatory measures outlined above. Without these important measures the action plan for fair and social awards procedures for public passenger transport services cannot succeed. A coordinated and forward-looking time planning mechanism is thus of extraordinary importance.

### 3.1 A checklist for trade union representatives in Europe

In support of the recommended action plan for fair and socially responsible competition in public transport, the local and regional trade union representatives in the individual countries should follow the checklist below. It is designed for an extended union action campaign to assert and protect the employees' interests:

#### I. Preparatory work

1. List all national legal regulations supplementing Regulation (EC) 1370/2007;
2. Pay attention to special derogations, for example when currently only the Directives 2004/17/EC and 2004/18/EC are being applied for public passenger transport services. In this case, it is essential to examine what restrictions are in place to block the application of these general procurement directives;

## BOX 12 - CASE STUDY AMSTERDAM successful campaign against competitive tendering of city public transport

In 2002, the local government of Amsterdam decided to put its public transport out to competitive tendering. The trade union FNV Bondgenoten and the local Works Council in cooperation with the two major political parties within the community of Amsterdam started a campaign against privatisation of the local public transport and for safeguarding Amsterdam's public transport company. They collected signatures for a referendum among the citizens of Amsterdam and managed with this campaign to raise awareness of the privatisation plans of the city's government. They stimulated a debate among the local people on their ideas of a quality public transport service. As a result the city government decided to withdraw from its tendering plans. Fortunately a clause was found in Dutch national legislation, which states that in the four biggest cities of the Netherlands, the city government decides on whether or not to tender. Without public pressure this clause would have never been used.

3. Prepare a time-line of the duration of existing service contracts in passenger transport services. Find out when invitations for tender will be issued in the action plan (award registry). This information is often available through the Internet, e.g. the list of validity time for transport line approvals in the German states of North Rhine-Westphalia and Saxony;
4. Identification of the responsible local or regional authorities;
5. Identification of contact partners within the competent authority;
6. Decision on whether an action plan should be established;

7. Determination on how the work will be divided amongst the volunteer and full-time trade union representatives;
8. Establishment of the first benchmarks for an action plan;
9. Setting up a preliminary schedule;
10. etc.

## II. Preparation time for the action plan

The often extended lead times in award procedures mean that the action plan also requires a long preparation time. At a minimum, it should amount to:

### BOX 13 - CASE STUDY MARSEILLE: Victory of the public services

**M**arseille (South-East France) is one of the few major French towns operating its own municipal urban transport network. The Régie des Transports de Marseille (RTM), a public company is the in-house operator of the managing authority, Communauté Urbaine de Marseille Provence Métropole (CUM). RTM has some 3,000 employees serving over one million inhabitants in the whole greater Marseille area.

In 2005, the former CUM political majority under the leadership of the then right-wing mayor decided “to delegate part of this public service” (to delegate is the word used in French), more precisely the building and operation of two tram lines. The only company which submitted a bid following the call for tender was Veolia.

The right-wing authorities argued at the time that the European Investment Bank (EIB) had imposed the opening of the market to competitors to grant a low rate loan but the European Investment Bank denied having imposed such a requisite. It is believed the idea was to fragment the whole network and offer to the private sector the most profitable parts of it.

RTM employees decided to get organized and to resist. By the end of 2005 all French unions represented in the company decided to go on strike.

A court procedure launched by the municipality ruled that the strike was illegal and imposed the payment of penalties. Under such a pressure, the strike came to an end after 46 days.

Confronted with a major opposition to its projects, CUM decided to step back and to entrust the tram operation to a RTM/Veolia joint venture or economic interest grouping.

But the opponents to any form of privatization, i.e. CGT, CFDT and CUM left-wing and progressive officials decided to challenge the whole process through a legal procedure. On 6 July 2007, the proceedings amending RTM internal rules and adopting the principle of a delegation to the private sector were cancelled by the court. On 29 October, the Court of Cassation ruled that the strike held in autumn 2005 was legal. On 21 January 2008, another court declared null and void the decision to hand over the tram management to Veolia. The balance of power which was developed at the end of 2005 had a major impact throughout the whole period.

Eventually, CUM decided that RTM would be the only operator of the very broad transport network in Marseille which involves three modes, i.e. buses, metros and trams. Veolia, the multinational company, lost defeated by the employees and citizens. RTM, a public company, has kept the monopoly of the greater Marseille area urban transport network.

- Two years in the case of a possible direct award to an internal operator;
- One and a half years in the case of possible other direct award types;
- Two years in the case of a possible competitive tendering procedure in accordance with Art. 5(3);
- Six months in the case of a possible application of previously used awards on a competitive basis in accordance with Art. 5(1)

Attention: The lead times listed may vary considerably from one member state to another.

### III. Process-related activities regarding the action plan

1. Extend progress surveys of Part I as needed;
2. Determine which type of awards should be sought and pursued in regard to the action plan:
  - Direct award to internal operator
  - Direct award to small or medium-sized operator
  - Direct award to railway provider
  - Competitive tendering according to Article 5(3)
  - Competitive award procedure according to Article 5(1);
3. Identify actors: representatives of responsible local or regional authorities, local and regional politicians who codetermine and decide on local transport policy and its organization in political bodies;
4. Decide who can support the action: politicians, citizens' groups, passenger and consumer associations, environmental NGOs; etc.;
5. Examine the number of market participants (potential bidders) and, if necessary, their regional distribution;
6. Determine if necessary who the 5-8 most important market participants are;
7. Prepare an overview of national, regional, local, company regulations regarding workers' protection rights and collective agreement provisions;
8. Include trade union members;
9. Conduct research on the quality of the previous service;
10. Conduct research on deficiencies in the previous service;
11. Collect and record arguments for the application of Regulation (EC) No. 1370/2007;
12. Record preliminary considerations for benchmarks of a local and/or regional action plan;

13. Who can help (trade unions, unionised workers' representatives, associations, citizen groups, politicians, experts...)?

14. Develop an action plan and assign tasks;
15. Identify responsible persons and possible cooperation partners;
16. Develop a revised schedule;
17. Observe behaviour of action's participants;
18. Record minutes;
19. Discuss with representatives from political parties;
20. Discuss with local and regional administrations;
21. Discuss with other trade unions;
22. Discuss with the previous operator;
23. Discuss with passenger- and consumer groups and other local action groups;
24. Convene trade union assemblies;
25. Consider public relations work (information stands, flyers, public discussions...);
26. Record intermediate steps and results;
27. Prepare national campaigns within the trade unions as needed;
28. etc.

### IV. Action plan: Fair and socially responsible competition in local transport

1. Prepare as necessary a justification showing why Regulation (EC) No. 1370/2007 should be applied instead of the previously used public procurement legislation,
2. Prepare as necessary a set of arguments showing why a direct award is preferable to competitive tendering and privatisation;
3. List examples of direct awards for public transport services;
4. Prepare as necessary a set of considerations as to why a re-municipalisation might be contemplated;
5. List examples of re-municipalisation of public transport services (or other public services);
6. Consider the significance of public service obligations in view of the growing necessity of promoting sustainable mobility in congested areas;
7. Record benchmarks for quality standards regarding service quality, e.g. quality standards for vehicles and lines;
8. Do not forget to draw attention to the fact that these quality standards are related with the quality of the working conditions and qualifications of the relevant personnel when providing passenger



## Competitive tendering is a reality



Kriterien werden vom  
Besteller festgelegt ->  
Intervention dort



deine gewerkschaft

**vida**

menschen bewegen uns. wir bewegen menschen

9

transport services, possibly using concrete examples of quality standards for personnel (driving, maintenance, service personnel and general administration) - Suggestion: e.g. Training and qualification schemes;

9. List examples of quality standards;

10. Benchmarks for and/or definition of social standards to ensure workers' protection, particularly by ensuring the continued validity of existing collective agreements at the place of service, safeguarding jobs, safeguarding employment contracts within the case of change of operator; consideration of competing collective agreements and suggestions for a procedure, safeguarding and/or obligation to apply collective agreements, safeguarding of rights of workers' representation, etc ....;

11. Assemble arguments opposing the further application of previous awards procedures;

12. List all regulatory items in Regulation (EC) No. 1370/2007 (from "Direct awards" via transparency in awarding subcontracts all the way to cash flow transparency);

13. Find out who the contact person is or who is responsible for Regulation (EC) No. 1370/2007 and what degree of conceptualization is needed,

e.g. competent authority/ies, service contract, service concession, etc.;

14. Make a comparison and/or prepare an overview showing the advantages of Regulation (EC) No. 1370/2007 vis-à-vis previous national award practices in regard to public transport services;

15. Concrete action plan, including public relations work;

16. etc.

### V. What else must trade unionists pay attention to?

1. Include action plan in collective bargaining negotiations/campaign if need be;

2. Examine and if need be create prerequisites for action plan;

3. Include in trade union educational programme;

4. Qualify full-time trade union staff;

5. etc.

**THE ETF WISHES YOU GREAT SUCCESS WITH  
YOUR TRADE UNION ACTION PLAN !**

# ANNEX 1

## Extract from the contract between the Stockholm public transport authority and Ekerö Bus Company

AB Storstockholms  
Lokaltrafik  
[Local traffic of Greater Stockholm Ltd.]

Busstrafikupphandling E16 1(27)  
Ekerö  
[Purchasing department of Ekerö Bus Company E16]

21 05 2007

Traffic Agreement – main text

Between on the one part AB Storstockholms Local Traffic, company number 556013-0683, (below referred to as SL)

And on the other part

[specify]

(below referred to as 'Traffic Operator')

below referred to as 'the Partners',

have today made the following agreement (below referred to as 'Traffic Agreement – main text') with appendices (together referred to as 'Traffic Agreement') concerning the Ekerö traffic area.

(.....)

### 6 Personnel

#### 6.1 General

The Traffic Operator shall assume responsibility for the personnel of the former traffic operator who are involved in traffic-related work. The regulations in the law (1982: 80) on protection of employment and the law (1976: 580) on employee participation in decision-making in the workplace shall be adhered to in relation to the above. What is said here does not apply to employees who opposed such a transfer.

The Traffic Operator shall at all times have at its disposal the personnel, in terms of number and skills, required for carrying out traffic-related work. This means that the Traffic Operator shall recruit and train the personnel as may be necessary according to requirements.

The Traffic Operator shall follow the applicable labour market regulations, such as working hours regulations, overtime regulations, as well as, where applicable, appropriate collective agreements. The Traffic Operator shall, throughout the life of this agreement, apply at least the salary level that was in force at the time of the transfer, unless the Traffic Operator makes another agreement with the employees.



The personnel shall wear the Traffic Operator's uniform approved by SL when performing their duties.

The Traffic Operator's total personnel costs, including costs of possible service shortfall or equivalent which the Traffic Operator intends to buy from SL and then to supply its personnel, shall be covered by the Traffic Operator's basic indemnity according to point 14.1 below. SL consequently may not, by way of a separate/special supplementary agreement to the Traffic Agreement, replace the Traffic Operator in relation to costs relating to the Traffic Operator's purchase of service shortfall or equivalent.

Further provisions relating to the personnel are stipulated in appendix 15 as far as the transfer of the personnel before and in connection with the Traffic start-up as well as in the remaining appendices 6-7.

## **6.2 Discrimination**

In running the traffic network the Traffic Operator shall at all times comply with the anti-discrimination legislation in force.

## **6.3 Working environment**

The Traffic Operator shall systematically plan, manage and exercise control over operations connected to the provision of traffic in such a way that a good working environment is assured in workplaces and that the stipulated requirements relating to working environment legislation in force at the time are conformed with. The Traffic Operator shall therefore strive, in cooperation with SL, to continually improve the personnel's working environment.

Systematic work shall be done on the working environment as a natural daily activity within a company and shall be set up in such a way that it functions properly and gives the intended result in terms of continuing improvements in the working environment. This work shall include all physical, psychological and social conditions that have an effect on the working environment.

## **6.4 Certification of bus drivers**

All bus drivers who are in service at SL within the framework of running traffic operations according to the Traffic Agreement shall be certified according to SL TF's system of driver certification. This requirement shall be fulfilled at the latest one (1) year after the Traffic start-up. A certificate is valid for five (5) years, and after that period a new certification shall take place.

Further provisions relating to certification are stipulated in Appendix 6.

## ANNEX 2

### Description of the procedures regarding the personnel that have to be applied in SL-Traffic before the change of operator

1. SL Board's decision to change traffic operator.
2. The present traffic operator and the traffic operator who will take over the operation shall call their respective local trade union organizations for negotiations according to 11 § MBL. Examples of negotiation questions are which part of the company shall be transferred, timescale, practical procedures relating to the business and change of employer etc.
3. The traffic operator that is taking over shall carry out possible reporting negotiations with the opposite party with the aim of dealing with the negotiation questions about what terms of employment shall apply for the personnel who transfer. If there is disagreement about new terms of employment according to the law the former employer's terms of employment apply during a transition period of up to one (1) year.
4. Written 'inquiries' shall be sent out to the personnel by the present traffic operator/employer, as to whether the personnel accept the transfer of the company or oppose the change of employer. The answer must be returned within a 'reasonable time' (about 2 weeks).
5. As soon as the two-week deadline has expired, the present traffic operator shall inform the traffic operator that is taking over which members of the personnel wish to transfer, their personal tasks and job description and responsibilities. If an answer has not been received from certain individuals prompt inquiry shall be made in order to ascertain their point of view. The answer from any such 'late-comers' shall be forwarded to the traffic operator that is taking over as soon as possible.
6. The present traffic operator/employer shall find an alternative position for those members of the personnel who oppose the transfer, and shall call the local trade union for negotiations according to 11 § MBL (29 § LAS). The negotiation questions that shall then be dealt with are a proposal of transfer and determining whether there is a surplus of staff and consequent dismissal on grounds of lack of work. A warning may be sent to the Länsarbetsnämnden [approximate meaning is 'provincial labour committee/council']. The notice of dismissal shall be sent and the period of notice begins.
7. The traffic operator/employer that is taking over shall begin the recruitment process at the same time in order to fill any possible vacancies that may arise during the transfer. Contact is made with personnel who have declared themselves willing to transfer.
8. At the time of the transfer those members of the personnel who replied to the written question that they did not oppose the transfer shall move to the new employer via the automatic employment agreement. The present traffic operator/employer shall inform the traffic operator taking over the company of the respective employees' days of holiday due and the traffic operators between themselves shall settle the costs of holiday time that is carried forward.

Since a certain number of days work are still owed, the dismissed person can even move to the traffic operator who is taking over the company in order to work there for the rest of the period of notice.

9. At the latest, one month after the transfer the traffic operator taking over the company shall issue a certificate of employment to the personnel who have transferred. From the legal point of view there are no particular requirements relating to the form of an employment contract, and on transfer according to 6b § LAS the transfer of the employment contract takes place automatically (for those members of the personnel who did not state that they opposed the change of employer in response to the written 'inquiries').
10. However, the employee shall be informed in writing of changed terms of employment. This so called 'obligation to clarify' is stipulated in 6a § LAS, and a certificate of employment is a practical and established form for such information.



## ANNEX 3 - REGULATION (EC) 1370/2007

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## I

*(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)*

## REGULATIONS

**REGULATION (EC) No 1370/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL****of 23 October 2007****on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70**

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 <sup>(1)</sup>,

Having regard to the opinion of the Committee of the Regions <sup>(2)</sup>,

Acting in accordance with the procedure laid down in Article 251 of the Treaty <sup>(3)</sup>,

Whereas:

(1) Article 16 of the 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, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

(3) Article 73 of the Treaty constitutes a *lex specialis* in relation to Article 86(2). It establishes rules applicable to the compensation of public service obligations in inland transport.

(4) The main objectives of the Commission's White Paper of 12 September 2001 'European transport policy for 2010: time to decide' 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 traveller, such as pensioners, and to eliminate the disparities between transport undertakings from different Member States which may give rise to substantial distortions of competition.

(5) At the present time, many inland passenger transport services which are required in the general economic 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 grant 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. If Member States, in accordance with this Regulation, choose to exclude certain general rules from its scope, the general regime for State aid should apply.

<sup>(1)</sup> OJ C 195, 18.8.2006, p. 20.

<sup>(2)</sup> OJ C 192, 16.8.2006, p. 1.

<sup>(3)</sup> Opinion of the European Parliament of 14 November 2001 (OJ C 140 E, 13.6.2002, p. 262), Council Common Position of 11 December 2006 (OJ C 70 E, 27.3.2007, p. 1) and Position of the European Parliament of 10 May 2007. Council Decision of 18 September 2007.

- (6) Many Member States have enacted 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 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>(1)</sup>, does not deal with the way public service contracts are to be awarded in the Community, and in particular the circumstances in which they should be the subject of competitive tendering. The Community legal framework ought therefore to be updated.
- (7) Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the 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 public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called 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'.
- (8) Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements.
- (9) In order to be able to organise their public passenger transport services 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. In order to guarantee the 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 public service 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.
- (10) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to public passenger transport services by inland waterway, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. The organisation of public passenger transport services by inland waterway and, in so far as they are not covered by specific Community law, by national sea water is therefore subject to compliance with the general principles of the Treaty, unless Member States choose to apply this Regulation to those specific sectors. The provisions of this Regulation do not prevent the integration of services by inland waterway and national sea water into a wider urban, suburban or regional public passenger transport network.
- (11) Contrary to Regulation (EEC) No 1191/69, the scope of which extends to freight transport services, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. Three years after the entry into force of this Regulation the organisation of freight transport services should therefore be made subject to compliance with the general principles of the Treaty.
- (12) It is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings. This Regulation is based on the principles of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, of the freedom of Member States to define services of general economic interest, referred to in Article 16 of the Treaty, and of subsidiarity and proportionality referred to in Article 5 of the Treaty.
- (13) 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 governed by the rules and procedures applicable to public service requirements.
- (14) Where the competent authorities are responsible for organising 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 either to carry out themselves or entrust, in whole or in part, to a third party.

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

- (15) Contracts of long duration can lead to market foreclosure for a longer period than is necessary, thus diminishing the benefits of competitive pressure. In order to minimise distortions of competition, while protecting the quality of services, public service contracts should be of limited duration. The extension of such contracts could be subject to positive confirmation from users. In this context, it is necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator must 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. In addition, where 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.
- (16) Where the conclusion of a public service contract may entail a change of public service operator, it should be possible for the competent authorities to ask the chosen public service operator to apply the provisions of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of 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>(1)</sup>. This Directive does not preclude Member States from safeguarding transfer conditions of employees' rights other than those covered by Directive 2001/23/EC and 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.
- (17) In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards.
- (18) Subject to the relevant provisions of national law, any local authority or, in the 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 providing integrated public passenger transport services, collectively or through its members, should exercise the required control. In addition, a competent authority providing its own transport services or an 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 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 tramway, to an internal operator.
- (19) Subcontracting can contribute to more efficient public passenger transport and makes it possible for undertakings to participate, other 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. The selection of a subcontractor by the competent authority or its internal operator needs to be carried out in accordance with Community law.
- (20) Where 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 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.

<sup>(1)</sup> OJ L 82, 22.3.2001, p. 16.

- (21) Effective legal protection should be guaranteed, not only for awards falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors <sup>(1)</sup> and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts <sup>(2)</sup>, but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts <sup>(3)</sup> and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors <sup>(4)</sup>.
- (22) Some invitations to tender require the competent authorities to define and describe complex systems. These authorities should therefore have power, when awarding contracts in such cases, to negotiate details with some or all of the potential public service operators once tenders have been submitted.
- (23) Invitations to tender for the award of public service contracts should not be mandatory where the contract relates to modest amounts or distances. In this respect, greater amounts or distances should enable competent authorities to take into account the special interests of small and medium-sized enterprises. Competent authorities should not be permitted to split up contracts or networks in order to avoid tendering.
- (24) Where there is a risk of disruption in the provision of services, the competent authorities should have power to introduce emergency short-term measures pending the award of a new public service contract which is in line with all the conditions for awarding a contract laid down in this Regulation.
- (25) Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004, the Commission presented a proposal to amend Council Directive 91/440/EEC of 29 July 1991 on the development of the Community's railways <sup>(5)</sup> so as to guarantee access for all Community railway undertakings to the infrastructure of all Member States for the purpose of operating international passenger services. The aim of this Regulation is to establish a legal framework for compensation and/or exclusive rights for public service contracts and not the further opening of the market for railway services.
- (26) In the case of public services, this Regulation allows each competent authority, within the context of a public service contract, to select its operator of public passenger transport services. 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.
- (27) The compensation granted by competent authorities to cover the costs incurred in discharging public service obligations should be calculated in a way that prevents overcompensation. Where a competent authority plans to award a public service contract without putting it out to competitive tender, it should also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of service.
- (28) By appropriately considering the effects of complying with the public service obligations on the demand for public passenger transport services in the calculation scheme set out in the Annex, the competent authority and the public service operator can prove that overcompensation has been avoided.
- (29) With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react.
- (30) Directly awarded public service contracts should be subject to greater transparency.

<sup>(1)</sup> OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).

<sup>(2)</sup> OJ L 134, 30.4.2004, p. 114. Directive as last amended by Council Directive 2006/97/EC.

<sup>(3)</sup> OJ L 395, 30.12.1989, p. 33. Directive as amended by Directive 92/50/EEC (OJ L 209, 24.7.1992, p. 1).

<sup>(4)</sup> OJ L 76, 23.3.1992, p. 14. Directive as last amended by Directive 2006/97/EC.

<sup>(5)</sup> OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2006/103/EC (OJ L 363, 20.12.2006, p. 344).



- (31) 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. With a view to the gradual award of public service contracts in line with this Regulation, Member States should provide the Commission with a progress report within the six months following the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports.
- (32) During the transitional period, the application of the provisions of this Regulation by the competent authorities may take place at different times. It may therefore be possible, during this period, that public service operators from markets not yet affected by the provisions of this Regulation tender for public service 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, in the second half of the transitional period, tenders from undertakings, more than half the value of the public transport services performed by which are not granted in accordance with this Regulation, provided that this is applied without discrimination and decided in advance of an invitation to tender.
- (33) In paragraphs 87 to 95 of its judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH* <sup>(1)</sup>, 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 Treaty, provided that four cumulative conditions are satisfied. Where those 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 and is subject to Articles 73, 86, 87 and 88 of the Treaty.
- (34) Compensation for public services 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 which allow them to carry out their tasks. Such compensation 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 services of general interest within the meaning of the Treaty. Secondly, in order 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.
- (35) Compensation granted by the competent authorities in accordance with the provisions of this Regulation may therefore be exempted from the prior notification requirement of Article 88(3) of the Treaty.
- (36) This Regulation replaces Regulation (EEC) No 1191/69, which should therefore be repealed. For public freight transport services, a transitional period of three years will assist the phasing out of compensation not authorised by the Commission in accordance with Articles 73, 86, 87 and 88 of the Treaty. Any compensation granted in relation to the provision of public passenger transport services other than those covered by this Regulation which risks involving State aid within the meaning of Article 87(1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in Case C-280/00 *Altmark Trans GmbH*. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest.
- (37) The scope of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway <sup>(2)</sup> is covered by this Regulation. That Regulation is considered obsolete while limiting the application of Article 73 of the Treaty 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 for Article 73 of the Treaty to be properly applied to continuing developments in the sector without prejudice to this Regulation or Council Regulation (EEC) No 1192/69 of 26 June 1969 on common rules for the normalisation of the accounts of railway undertakings <sup>(3)</sup>. With a view to further facilitating the application of the relevant Community rules, the Commission will propose State aid guidelines for railway investment, including investment in infrastructure in 2007.
- (38) With a view to assessing the implementation of this Regulation and the developments in the provision of public passenger transport in the Community, in particular the quality of public passenger transport services and the effects of granting public service contracts by direct award, the Commission should produce a report. This report may, if necessary, be accompanied by appropriate proposals for the amendment of this Regulation,

<sup>(1)</sup> [2003] ECR I-7747.

<sup>(2)</sup> OJ L 130, 15.6.1970, p. 1. Regulation as last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

<sup>(3)</sup> OJ L 156, 28.6.1969, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

HAVE ADOPTED THIS REGULATION:

#### Article 1

#### Purpose and scope

1. The purpose of this Regulation is to define how, in accordance with the rules of Community law, 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 provided at lower cost than those that market forces alone 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 public service operators for 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. Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) <sup>(1)</sup>, national sea waters.

3. This Regulation shall not apply to public works concessions within the meaning of Article 1(3)(a) of Directive 2004/17/EC or of Article 1(3) of Directive 2004/18/EC.

#### 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 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;
- (f) 'exclusive right' means a right entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator;
- (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 a public service obligation or in connection with that period;
- (h) 'direct award' means the award of a public service contract to a given public service 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 public passenger transport services subject to public service obligations; depending on the law of the Member State, 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) 'internal operator' means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

<sup>(1)</sup> OJ L 364, 12.12.1992, p. 7.

- (k) 'value' means the value of a service, a route, a public service 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) 'integrated public passenger transport services' means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable.

### 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 shall do so within the framework of a public service contract.

2. By way of derogation from paragraph 1, public service obligations which aim at establishing 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 incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This shall be so notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.

3. Without prejudice to the provisions of Articles 73, 86, 87 and 88 of the Treaty, Member States may exclude from the scope of this Regulation general rules on financial compensation for public service obligations which establish maximum tariffs for pupils, students, apprentices and persons with reduced mobility. These general rules shall be notified in accordance with Article 88 of the Treaty. Any such notification shall contain complete information on the measure and, in particular, details on the calculation method.

### Article 4

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

1. Public service contracts and general rules shall:

- (a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned;

- (b) establish in advance, in an objective and transparent manner,
  - (i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and
  - (ii) the nature and extent of any exclusive rights granted,

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 incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;

- (c) 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, fixed costs and a suitable return on capital.

2. 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.

3. The duration of public service contracts shall be limited and shall not exceed 10 years for coach and bus services and 15 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 15 years if transport by rail or other track-based modes represents more than 50 % of the value of the services in question.

4. If necessary, having regard to the conditions of asset depreciation, the duration of the public service 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 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 specified in paragraph 3 in the outermost regions may be extended by a maximum of 50 %.

If justified by the amortisation of capital in relation to exceptional infrastructure, rolling stock or vehicular investment and if the public service contract is awarded in a fair competitive tendering procedure, a public service contract may have a longer duration. In order to ensure transparency in this case, the competent authority shall transmit to the Commission within one year of the conclusion of the contract the public service contract and elements justifying its longer duration.

5. 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 previously taken on 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 to be linked to the services.

6. 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.

7. Tender documents and public service contracts shall indicate, in a transparent manner, whether, and if so to what extent, subcontracting may be considered. If subcontracting takes place, the operator entrusted with the administration and performance of public passenger transport services in accordance with this Regulation shall be required to perform a major part of the public passenger transport services itself. A public service contract covering at the same time design, construction and operation of public passenger transport services may allow full subcontracting for the operation of those services. The public service contract shall, in accordance with national and Community law, determine the conditions applicable to subcontracting.

#### Article 5

#### Award of public service contracts

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 service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services, 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, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments. Where a competent local authority takes such a decision, the following shall apply:

- (a) for the purposes of determining whether the competent local authority exercises 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. In accordance with Community law, 100 % ownership by the competent public authority, in particular in the case of public-private partnerships, is not a mandatory requirement for establishing control within the meaning of this paragraph, provided that there is a dominant public influence and that control can be established on the basis of other criteria;
- (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 neighbouring competent local authorities, 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 point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service 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, points (a), (b) and (c) shall apply to a national authority for the benefit of a geographical area which is not national, provided that the internal operator does not take part in competitive tenders concerning the provision of public passenger transport services organised outside the area for which the public service contract has been granted;



- (e) if subcontracting under Article 4(7) is being considered, the internal operator shall be required to perform the major part of the public passenger transport service itself.

3. Any competent authority which has recourse to a third party other than an internal operator, shall 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 EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or where they concern the annual provision of less than 600 000 kilometres of public passenger transport services.

5. In the event of a 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 a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years.

6. Unless prohibited by national law, competent authorities may decide to make direct awards of public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies.

7. Member States shall take the necessary measures to ensure that decisions taken in accordance with paragraphs 2 to 6 may be reviewed effectively and rapidly, at the request of any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement, on the grounds that such decisions have infringed Community law or national rules implementing that law.

Where bodies responsible for review procedures are not judicial in character, written reasons for their decisions shall always be given. Furthermore, in such a case, provision must be made so that any alleged illegal measure taken by the review body or any alleged defect in the exercise of the powers conferred on it may be the subject of judicial review or review by another body which is a court or tribunal within the meaning of Article 234 of the Treaty and independent of both the contracting authority and the review body.

#### Article 6

##### Public service compensation

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

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

##### Publication

1. Each competent authority shall make public 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 distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted.

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 an annual provision of less than 50 000 kilometres of public passenger transport services.

Should this information change after its publication, the competent authority shall publish a rectification accordingly as soon as possible. This rectification shall be 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. In the case of a direct award of public service contracts for transport by rail, as provided for in Article 5(6), the competent authority shall make public the following information within one year of granting the award:

- (a) name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control;
- (b) duration of the public service contract;
- (c) description of the passenger transport services to be performed;
- (d) description of the parameters of the financial compensation;
- (e) quality targets, such as punctuality and reliability and rewards and penalties applicable;
- (f) conditions relating to essential assets.

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

#### Article 8 Transition

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 Directive 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 service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 4 of this Article shall not apply.

2. Without prejudice to paragraph 3, the award of public service contracts by rail and by road shall comply with Article 5 as from 3 December 2019. During this transitional period Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service 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. In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

- (a) before 26 July 2000 on the basis of a fair competitive tendering procedure;
- (b) before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure;
- (c) as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure;
- (d) as from 26 July 2000 and before 3 December 2009 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 for no longer than 30 years. 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.

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.

4. Without prejudice to paragraph 3, the competent authorities may opt, in the second half of the transitional period specified in paragraph 2, to exclude from participation in the award of contracts by invitation to tender those public service operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right granted in accordance with this Regulation represents at least half the value of all the public transport services for which they are receiving compensation or enjoy an exclusive right. Such exclusion shall not apply to public service operators running the services which are to be tendered. For the application of this criterion, no account shall be taken of public service contracts awarded by emergency measure as referred to in Article 5(5).

Where competent authorities make use of the option referred to in the first subparagraph, they shall do so without discrimination, exclude all potential public service operators meeting this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.

The competent authorities concerned shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender.

#### *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.

2. Without prejudice to Articles 73, 86, 87 and 88 of the Treaty, Member States may continue to grant aid for the transport sector pursuant to Article 73 of the Treaty which meets transport coordination needs or which represents reimbursement for the discharge of certain obligations inherent in the concept of a public service, other than those covered by this Regulation, and in particular:

- (a) 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) where the purpose of the aid is to promote either research into, or development of, transport systems and technologies which are 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.

#### *Article 10*

### **Repeal**

1. Regulation (EEC) No 1191/69 is hereby repealed. Its provisions shall however continue to apply to freight transport services for a period of three years after the entry into force of this Regulation.

2. Regulation (EEC) No 1107/70 is hereby repealed.

#### *Article 11*

### **Reports**

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 the Community, 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 the amendment of this Regulation.

#### *Article 12*

### **Entry into force**

This Regulation shall enter into force on 3 December 2009.

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

Done at Strasbourg, 23 October 2007.

*For the European Parliament*  
*The President*  
H.-G. PÖTTERING

*For the Council*  
*The President*  
M. LOBO ANTUNES

## ANNEX

**Rules applicable to compensation in the cases referred to in Article 6(1)**

1. The compensation connected with public service 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 by 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 incurred in relation to a public service obligation or a bundle of public service obligations imposed by the 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,

equals net financial effect.

3. Compliance with the public service obligation may have an impact on possible transport activities of an operator beyond the public service obligation(s) in question. In order to avoid overcompensation or lack of compensation, quantifiable financial effects on the operator's networks 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. 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 public authority intervention.



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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WORKERS' FEDERATION**