

Passenger transport by rail, road, inland waterway: competition, public service exigences and contracts (repeal. Regulations (EEC) No 1191/69 and (EEC) No 1107/70)

2000/0212(COD) - 20/07/2005 - Modified legislative proposal

The development of an increasingly competitive market for the inland public transport sector requires a regulatory framework for public service obligations which is transparent and which can prevent compensation from being classed as State aid. This paper looks at developments in the inland public transport sector over the last three decades and examines the principles governing services of general interest as well as the Altmark ruling delivered by the European Court of Justice in 2003. It presents a revised proposal to establish a framework regulating those interventions by the competent authorities – award of exclusive rights and compensation for public service obligations – which are most likely to affect competition and trade between the Member States.

The paper recalls that in July 2000, the Commission proposed a Regulation based on the principles of contractual relations between the authority and the operator and competitive tendering for public service contracts to make their award transparent and non-discriminatory. This proposal initially provided for a number of exceptions in which the public authority could, under certain conditions, decide to award public service contracts directly without an invitation to tender. The European Parliament adopted a position at first reading which contained more than 100 amendments. The most significant of these had the effect of protecting local public transport services from competition if the competent authority decides to provide the service itself on an exclusive basis. This position was determined by compliance with a reciprocity clause which the Commission accepted in its amended version of 2002 by including it for the transitional period. Discussions in the Council quickly showed that a sufficient majority was unlikely to emerge and that there was no real political will to see the proposal succeed. Given the vast differences between their respective attempts at opening up the market, the Member States soon expressed disagreement as to the actual extent of opening up inland transport.

The Member States had profound differences on the key elements of the proposal:

-certain States engaged at various stages in opening-up all or part of their inland public transport sectors were generally in favour of the proposal, although some regretted that it did not go far enough and left too many possibilities for the direct award of public service contracts;

-other States, especially some of those where there are still major public monopolies in the sector, were against the proposal and for the status quo;

-Member States were also divided on the scope of the Regulation and on the modes of transport that it should cover (only buses or all urban modes including trams and undergrounds? Should it apply to railways or not?).

The paper goes on to discuss the consequences of the Altmark judgment in the transport sector as well as regards public services in general, apart from inland transport.

The commission states that the new proposal is simpler and more flexible and that greater account be taken of the subsidiarity principle. The main points are as follows:

-The simplification concerns in particular the mechanisms for awarding public service contracts. One consequence is the disappearance of the formulas proposed in the 2002 proposal, which allowed public service contracts to be awarded on the basis of complicated mechanisms for comparing quality without a formal invitation to tender. The new proposal now provides for only two main methods of awarding contracts: invitations to tender and direct award.

-This same desire for simplification guided the drafting of the Annex on the rules applicable to compensation in the absence of an invitation to tender. This Annex aims to establish objective, transparent and realistic methods based on well established principles of Community law (no overcompensation or cross-subsidisation, separation of accounts, verification of costs, promotion of quality and efficiency).

-The objective of greater flexibility is seen in particular in the recognition of the competent authorities' option of providing public transport services themselves, or via an internal operator, without a competitive tendering procedure. This possibility is, however, strictly dependent on greater transparency and the establishment of precise criteria applicable to compensation for public service obligations. It is also subject to a condition concerning the geographical jurisdiction of the activity of the competent authority or its internal operator.

-Recognition of this option of self-provision (government operated system) of transport services, which can apply whatever the mode concerned (bus, tram, underground, railway, integrated services, etc.), is accompanied by the reduction of the list of exceptions to the obligation to put public service contracts out to competitive tendering (removal in particular of exceptions in favour of direct award of underground or light rail transit services). The exception concerning integrated services had already been abolished in the 2002 amended proposal following the request by the European Parliament. Accordingly, only regional and long-distance rail remain exempted from the obligation.

-The objective is also apparent in the flexibility proposed for the duration of contracts and in the extension of the transitional period for rail transport services.

-Greater recognition of the subsidiarity principle is seen in the approach to the definition of regional or long-distance transport and the maintenance of thresholds below which direct award is possible.

-The Commission is also giving the public authorities more freedom to organise competitive tendering in detail. For example, it has not fixed the list of selection criteria that the competent authorities have to observe when awarding public service contracts. It has also decided not to lay down, for the inland public transport sector only, specific rules on subcontracting or abuse of dominant position, which, as the discussions to date have revealed, would have created undue inflexibility.

-Similarly, the Commission has opted in its new proposal not to intervene in the definition of an adequate standard of public transport or passenger information. Its aim is to give greater recognition to the diversity of approaches in this area while establishing a coherent framework.

This new proposal, which reflects the Commission's desire to strengthen the principles of fairness, transparency and access to information, will guarantee legal certainty while preserving the specific characteristics of services in the general interest, an essential component of the European model.