



COMMISSION OF THE EUROPEAN COMMUNITIES

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**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251(2) of the EC Treaty

concerning the

**common position adopted by the Council with a view to the adoption of a Regulation of
the European Parliament and of the Council on public passenger transport services by
rail and by road**

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(Text with EEA relevance)

1. BACKGROUND

Date of transmission of the revised proposal to the European Parliament and the Council (COM(2005) 319 final – 2000/0212(COD))	22.7.2005
Date of the opinion of the Committee of the Regions	16.2.2006
Date of the opinion of the European Economic and Social Committee	17.5.2006
Date of the opinion of the European Parliament (first reading) of the initial proposal COM (2000) 7	14.11.2001
Date of adoption of the common position	11.12.2006

2. PURPOSE OF THE COMMISSION PROPOSAL

The proposal aims to replace a Regulation adopted in 1969 that today still constitutes the Community regulatory framework applicable in the public passenger transport sector¹. The economic environment of the public passenger inland transport sector has changed profoundly since 1969. This Regulation is now outdated and constitutes a source of legal uncertainty that is already reflected in an increase in disputes.

Given the unsuitability of the Community legislative framework and with a view to boosting the effectiveness and quality of services, the Commission presented, in September 2000, a

¹ Regulation (EEC) No 1191/69 of the Council of 26 June 1969 (OJ L 156, 28.6.1969, p. 1) on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway. Regulation last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p.1).

proposal for a Regulation of the European Parliament and of the Council² to replace the Regulation of 1969.

Following the opinion of the European Parliament in November 2001 (first reading), the Commission presented an amended proposal in February 2002. However, particularly in light of the widely differing experience of opening up the markets in the Member States, the Council did not have the opportunity to continue its work on this matter.

In order to solve these difficulties, reconcile the different positions on this issue expressed in the European Parliament and the Council, and take into account the judgment of the Court of Justice of the European Communities in the *Altmark* case³, in July 2005 the Commission adopted a revised proposal for a Regulation, replacing the amended proposal of 2002.

The main thrust of the proposal is to simplify the legislative approach, introduce greater flexibility into the organisation of public transport services and take greater account of the principles of subsidiarity and transparency.

The proposal regulates the ways in which competent authorities may intervene in the inland public passenger transport sector. To that end, it lays down the methods for paying compensation for public service obligations and awarding exclusive rights in the sector. The proposal generalises the rules for the conclusion of contracts and increased transparency in the relations between public authorities and transport operators. At the same time, at the request of the European Parliament, the proposal acknowledges for the first time the free choice of local authorities as regards the organisation of public transport. It establishes a clear framework for the possibility of competitive tendering for public service contracts and for competent authorities to run the services themselves or have them run by an internal operator.

3. COMMENTS ON THE COMMON POSITION

The common position, adopted by qualified majority, makes certain adjustments considered acceptable by the Commission as they do not undermine the goals of legal certainty, transparency, subsidiarity and flexibility guiding the Commission's proposal.

The Council has extended possibilities for the direct award of rail contracts to all **rail transport** services with the exception of underground railway and tram services, while at the same time limiting in principle the duration of such contracts to 10 years.

As requested by Parliament, the Council took into account the specific situation of SMEs and revised the level of **thresholds applicable to SMEs only**, enabling the direct award of public service contracts with an annual value of not more than EUR 1.7 million or relating to a maximum of 500 000 km per year to firms operating no more than 20 vehicles. The reason for this adjustment in favour of SMEs is the specific structure of the market for local transport services subject to the specific rules of the "Transport" chapter of the Treaty. In the view of the Commission, these arrangements cannot be expanded further.

² COM(2000) 7 final - 2000/0212 (COD), as amended by COM(2002) 107 final.

³ Judgment of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747.

In agreement with the position of Parliament and the proposal from the Commission, the Council confirmed the **principle** that **local authorities** were **free to choose** to launch an invitation to tender or to use an internal operator, particularly for bus, tram and underground railway services. In addition, in order to take into account certain specific features and to avoid producing a text that would be difficult to apply, the Council has adjusted the conditions in which authorities are permitted to operate public transport services either themselves or via an internal operator.

The Council has also decided to enhance **transparency** for contracts awarded directly.

The Council has confirmed the introduction of the **principle of reciprocity** requested by Parliament, but as per the proposal from the Commission and in accordance with the case law of the Court of Justice of the European Communities, this clause has a time limitation and forms part of a process of gradual liberalisation. It is therefore of a strictly transitional nature.

Lastly, the Council reached agreement on the arrangements applicable to **existing contracts** and on the need to make provision for a longer **transitional period** for the application of the provisions that apply specifically to the procedures for the award of contracts. On this point, the transitional period will last for 12 years after the entry into force of the Regulation.

4. DETAILED COMMENTS ON THE COMMON POSITION

The references below are to recitals and articles of the common position.

4.1 Amendments of the European Parliament accepted by the Commission and incorporated in full or in part in the common position

Purpose and scope

The principles of amendments 1, 5, 132, 21, 22 and 31, which state the objectives of the Regulation, particularly in terms of general interest (the improvement of transport on the basis of social and environmental factors, tariffs, the protection of individuals with reduced mobility, regional development policy, etc.), are included in recitals 4 and 13a and in the first subparagraph of Article 1(1).

The principles of amendments 2 and 3, which relate to the underlying principles of the Regulation, are included in recitals 1, 7 and 9.

Amendment 6, which specifies the situation of the deregulated markets, is included in recital 6b.

The part of amendment 23 which excludes historical trains from the scope of the Regulation is included in Article 1(2).

Definition

Amendment 25 is included in Article 2(n) in that it includes a single information service, ticket scheme and timetable in the definition of integrated services.

Relationship to public procurement law

Amendment 8, which states that the public procurement Directives do not apply to contracts that constitute service concessions, is included in Articles 5(1) and 8(1).

Duration of contracts

Amendments 15 and 54 call for the extension of the maximum duration of the contracts to 8 years for transport by road and to 15 years for transport by rail. In its revised proposal, the Commission includes the durations proposed by Parliament in recital 12 and Article 4(5) and has incorporated into Article 4(6) the possibility for contracts of a longer duration to be concluded in certain circumstances. The common position increased the maximum theoretical duration of road contracts from eight to ten years and has expanded the possibilities for concluding longer contracts. At the same time, Article 5(6) limits to ten years the theoretical duration of rail contracts that have been awarded directly.

Procedures for the award of public service contracts

Amendment 61, which undoubtedly represents the central element of the position adopted by the European Parliament at first reading, gives the competent authorities the choice of:

- allowing competitive tendering for the award of public service contracts; or
- providing the public transport services themselves, either directly or via an internal operator, on the condition in particular that they do not compete for the award of other public service contracts.

The principles of this amendment establishing **the principle of free choice for the competent authority**, together with amendments 12, 14 and 29, are included in recital 15 and Article 5(2).

The Council made some clarifications with regard to the conditions in which competent authorities may provide public transport services either themselves or via an internal operator:

- in the first subparagraph of Article 5(2) and in Article 5(2)(d), the common position adjusts the concept of competent local authority in order to also authorise groups of authorities and to take into account situations in which there is no competent local authority for transport;
- in Article 5(2)(a), the common position alters the concept of control by relaxing the criterion relating to ownership of the capital by the competent authority. Consequently, some firms with mixed capital (or institutionalised public-private partnerships (PPPIs)) may be regarded as internal operators and thus be eligible for the direct award of public service transport contracts. The Regulation nonetheless requires that the activities of the internal operator be confined to a specific geographical jurisdiction. In the view of the Commission, this specific approach to transport is justified, on the basis of the "Transport" chapter of the Treaty, by public transport's specific needs, and in no way prejudices the approach that may be adopted in other areas of activity. The Commission also considers that, even in the case in point, the solution cannot diverge further from the current interpretations in Community case law of the provisions of the Treaty that relate to the freedom of establishment (Article 43 EC) and the free movement of services (Article 49 EC). In particular, the Regulation maintains the essential general rule whereby the

competent authority must exercise over the internal operator a control similar to that which it exercises over its own departments. In the case of public transport, control is assessed in relation to the criteria laid down in the Regulation. In addition, the Regulation points out that any use of outsourcing by the internal operator must be carried out in compliance with the rules laid down in the Treaty.

- In Article 5(2)(b), the common position relaxes the principle of confining the internal operator, so that it is free to operate certain outgoing routes.
- In Article 5(2)(c), the Council lays down arrangements for internal operators to compete shortly before their domestic market is definitively opened up to competitive tendering.

The principle of amendment 7, which moderates the positive assessment of the use of competitive tendering for public service contracts, is included in recital 6a via the wording "if the appropriate safeguard clauses are in place".

As regards the rules for the tendering procedure, the principle of amendment 80, which allows for negotiations between the competent authority and the tenderers, is included in recital 17 and in Article 5(3). Amendment 81, which requires the competent authority to provide adequate access to information, is included in recital 23 and in Article 7(2).

Transparency

The principles of amendment 82 and 83, which reinforce the obligation incumbent on Member States and competent authorities to periodically submit reports on the implementation of the Regulation, are covered by recital 24 and by Articles 7(1) and 8(2).

In addition, in accordance with Parliament's request in amendment 95, Article 11 makes provision for the submission, after the end of the transitional period, of a Commission report evaluating in particular developments in the quality of public transport services.

Distortion of competition

The principles of amendments 67, 68, 91 and 94, which aim to prevent distortions of competition which might favour operators directly awarded public service contracts, are included in Article 5(2)(b) and in Article 8(6), which introduces the principle of reciprocity during the transitional period.

Emergency measures

Parliament's amendments 70, 78, 85 and 86 allow competent authorities to award contracts directly in emergency situations, e.g. if the operator goes bankrupt. This concern is reflected in Article 5(5).

Safeguard clauses

The Commission and the Council have followed Parliament's amendments 71 and 72 removing the provisions obliging operators to outsource a part of their services or eliminating certain dominant operators from tender procedures.

General rules on tariffs

The principles of amendments 130, 76, 77 and 124 on the arrangements for general rules to establish maximum tariffs are included in recital 5 and in Article 3(2). For services that receive only financial compensation in return for their tariff obligations, Article 3(3) of the common position makes it possible not to apply the Regulation and to apply instead the Treaty's rules on State aid, which would impose the obligation to notify these payments.

Compensation for public service obligations

The principle of amendment 13, which relates to the compensating of operators, is included in the second subparagraph of Article 1(1) and in item 2 of the Annex.

Amendment 19, which is intended to enable operators to use loans obtained on liberalised markets to supply public transport services, has been included in the common position. The prohibition of such revenue transfers, as laid down in item 5 of the Annex, applies only to revenue obtained on non-liberalised markets.

The principles of amendments 89 and 96 on how to compensate in the context of public service contracts awarded directly without an invitation to tender, are included in Article 4(2) and Article 6 and in the Annex.

Transition

The principles of amendments 90, 92 and 93, which aim to extend the transitional period and to relax the arrangements for ongoing contracts are included in Articles 8(2), 8(5) and 10(1). Article 12 stipulates that the Regulation will enter into force three years after its publication in the OJ. At the end of this 'entry into force' period, a 12-year transitional period for the application of the provisions relating to the award of public service contracts will commence. The provisions also relax the arrangements for ongoing contracts so that the organisation of public transport can gradually be brought into line in all the Member States.

4.2 Amendments of the European Parliament rejected by the Commission and not incorporated in the common position

Scope

Amendment 23 restricts the scope of the Regulation to local transport. Such a position would lead to the Regulation of 1969 (and its accompanying legal uncertainty) remaining in force for some areas of inland transport. Therefore, the scope retained is "Public passenger transport by rail and by road".

Procedures for the award of public service contracts

Amendments 9, 62, 63, 65 and 120 relate to the specific conditions for competitive tendering for certain types of transport services: integrated transport services, underground railway and light rail transit, and new lines created at the initiative of operators. The purpose of these amendments is no longer valid as the common position retains the principle of free choice for competent authorities. This principle covers integrated transport services, underground railway and light rail transit services, and new lines. It is no longer necessary to make provision for specific exceptions in these cases. Consequently, these amendments have not been included.

Amendment 64 eliminates the obligation incumbent on the competent authority to announce one year in advance its intention to launch competitive tendering or to award a public service transport contract directly. Since the principle of free choice must be accompanied by an adequate level of transparency, the Commission and the Council judged it necessary to maintain this access to information requirement via recital 23 and Article 7(2).

Amendment 69 on the so-called "quality comparison" procedure was not included in either the Commission's revised proposal or the common position.

Relationship to public procurement law

Parliament's amendment 24 makes the Regulation's provisions prevail over the application of the "public procurement" Directives. This would contravene the Community's commitments in respect of the WTO Public Procurement Agreement. The common position does not include this idea of the primacy of the Regulation over the public procurement Directives. However, in the interests of clarity, Article 1(3) introduced by the Council states that the Regulation does not apply to public works concessions.

Definitions

Amendments 107 and 119 add to the definition of exclusive rights. These additions do not have any real connection to the definition in question and have not been included.

The purpose of amendment 26 on the definition of inland waterways is no longer valid as this sector has been removed from the scope of the Regulation. In any case, recital 8 and Article 1(2) reflect the removal of inland waterway transport from the scope of the Regulation on account of the low transport volumes concerned and specify which arrangements apply to this sector.

Amendment 27 constitutes a drafting change to the definition of the operator and has not been included.

The purpose of amendment 28 on the definition of short-distance public transport is no longer valid as this concept is no longer used in the common position.

Amendment 30 introduces a specific definition of persons with reduced mobility which is not included in the common position.

Public service contracts

Amendments 33, 34, 35, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 116, 127 and 131 amend and add to the list of criteria that the authorities must take into account when awarding public service contracts.

The purpose of these amendments is no longer valid since neither the Commission nor the Council retained the approach of drawing up a list of criteria for compulsory awards. Such a list could quickly become outdated or even counter-productive.

The approach that has been retained, which better complies with the principle of subsidiarity, enables competent authorities to have complete freedom to determine all of the elements that must be taken into consideration when awarding a contract, and in this way to determine their public transport priorities. However, recital 13a states that the authorities may establish

quality standards for areas such as working conditions, passengers' rights, environmental protection and the needs of persons with reduced mobility.

Amendments 108, 55, 56, 57, 58 and 59 impose the inclusion in public service contracts of certain provisions concerning contract termination, the obligation to provide an annual activity report, maintenance of assets, a system of penalties and arrangements for addenda. These amendments have not been included as such provisions fall under the principle of subsidiarity and the balance of the contract to be established between the parties.

For the same reasons, amendments 133 and 134, which require the selected operator to maintain employees' rights, have not been included by the Commission and the Council. Nevertheless, as regards worker protection, recital 13 and Article 4(7) stipulate explicitly that the authorities may, in the context of an invitation to tender, require prospective operators to maintain certain rights of existing staff.

Review procedures

The object of amendments 8, 84, 85, 86 and 87, which relate to review procedures in response to decisions taken by the competent authority, is not covered since the common position no longer lays down specific procedures in this area.

Operators from third countries

The object of amendments 4, 20, 74 and 125, which relate to the conditions of access and the rules of establishment applicable to operators from third countries, was not included since this aspect is not dealt with specifically either in the Commission proposal or in the Council's common position. Consequently, these amendments have not been included.

4.3 Amendments of the European Parliament rejected by the Commission and incorporated in full or in part in the common position

Small and medium-sized enterprises

Amendments 17 and 19 are intended to guarantee that the specific interests of SMEs on the local transport market are taken into account. These amendments were not included in the Commission proposal but are clearly reflected in Article 5(4) of the common position, which establishes a specific threshold at a higher level that applies solely to contracts awarded to SME, which are defined in the same Article as firms operating no more than 20 vehicles. It should be recalled that this provision takes account of the particular structure of the local transport market, in which SMEs sometimes play a crucial role. In addition, the transport sector is subject to the specific rules of the "Transport" chapter of the Treaty.

4.4 New elements

Scope

Recitals 8a and 29 and Article 1(2) relate to the removal of public goods transport services from the scope of the Regulation and specify which arrangements apply to this sector.

Transparency

Article 7(3) introduces the obligation for the competent authority to publish specific information in the case of the direct award of transport services by rail.

Article 7(4) obliges the competent authority to provide, at the request of any interested party, its reasons for the direct award of a public service contract.

Compatibility with the Treaty

Article 9(2) specifies the arrangements that apply to aid provided in response to the need for coordination of transport services or which corresponds to reimbursement for the discharge of certain obligations inherent in the concept of public service, other than those that fall under the Regulation. Consequently, Article 10(2) makes provision for the repeal of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway.

5. CONCLUSIONS

The Commission considers that the common position adopted by qualified majority on 11.12.2006 does not affect the objectives or the approach of its revised proposal, and can therefore support it.