III

(Preparatory Acts)

COUNCIL

COMMON POSITION (EC) No 2/2007

adopted by the Council on 11 December 2006

with a view to the adoption of Regulation (EC) No …/2007 of the European Parliament and of the Council of … on public passenger transport services by rail and by road and repealing Council Regulations (EEC) No 1191/69 and (EEC) No 1107/70

(2007/C 70 E/01)

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 pinion of the European Economic and Social Committee [1],

Having regard to the opinion of the Committee of the Regions [2],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

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, insofar 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 travellers, 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 terms of 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.

(6) Many Member States have introduced legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several public service operators are now providing public passenger transport services in more than one Member State.

[1] OJ C 195, 18.8.2006, p. 20.
[2] OJ C 192, 16.8.2006, p. 1.
[3] 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 and Position of the European Parliament of … (not yet published in the Official Journal).

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 ([1]), 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 so-called 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 insofar as these are compatible with Treaty requirements.

(9) 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. To guarantee application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a public service contract between the competent authority and the chosen public service operator define 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 is therefore subject to compliance with the general principles of the Treaty, unless Member States choose to apply this Regulation to that specific sector. The provisions of this Regulation do not prevent the integration of inland waterway services 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 subject to compliance with the general principles of the Treaty.

(12) It is irrelevant 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.

(15) Contracts of long duration can lead to the closing of the market for a longer period than is necessary, thus diminishing the benefits of competitive pressure. To minimise distortions of competition while protecting the quality of services, public service contracts should be of limited duration. It is, however, necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator has to invest in assets for which the depreciation period is exceptional and, because of their special characteristics and constraints, in the case of the outermost regions as specified in Article 299 of the Treaty. 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.

([1]) 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).

(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.

(17) In keeping with the principle of subsidiarity, competent authorities are free to establish quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility or environmental protection.

(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 the direct award of public service contracts where they concern transport by rail with the exception of other track-based modes such as metro or tramways. Furthermore, the direct award 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.

(21) Some invitations to tender require the competent authorities to define and describe complex systems. These authorities should therefore be empowered, when awarding contracts in such cases, to negotiate details with some or all of the potential public service operators after tenders have been submitted.

(22) 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.

(23) Where there is a risk of disruption of the provision of services, the competent authorities should be empowered to introduce emergency short-term measures pending the award of a new public service contract which is in line with all awarding conditions of this Regulation.

(24) 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 [2] 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.

---

(1) OJ L 82, 22.3.2001, p. 16.

(2) OJ L 237, 24.8.1991, p. 25. Directive as last amended by Directive 2004/51/EC of the European Parliament and of the Council (OJ L 164, 30.4.2004, p. 164).

(25) 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.

(26) 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.

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

(28) 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.

(29) Directly awarded public service contracts should be subject to enhanced transparency.

(30) 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 six months after the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports.

(31) During the transitional period, the introduction 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.

(32) In paragraphs 87 to 95 of its judgment of 24 July 2003 in Case C-280/00 Altmark Trans GmbH ([1]), 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 these conditions are not satisfied and the general conditions for the application of Article 87(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 73, 86, 87 and 88 of the Treaty.

(33) 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, 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.

(34) 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.

(35) This Regulation replaces Regulation (EEC) No 1191/69; that Regulation 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 aids 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.

([1]) [2003] ECR I-7747.

(36) 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 [1] 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 [2]. 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 2006.

(37) 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 can, if necessary, be accompanied by appropriate proposals for modifying this Regulation,

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 at a 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.

3. This Regulation shall not apply to public works concessions within the meaning of Article 1(3)(a) of Directive 2004/17 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 [3] or of Article 1(3) of Directive 2004/18 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 [4].

Article 2

Definitions

For the purpose of this Regulation:

(a) 'public passenger transport' means passenger transport services of general economic interest provided to the public on a non-discriminatory and continuous basis;

(b) 'competent authority' means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

(c) 'competent local authority' means any competent authority whose geographical area of competence is not national;

(d) 'public service operator' means any public or private undertaking or group of such undertakings which operates public passenger transport services or any public body which provides public passenger transport services;

(e) 'public service obligation' means a requirement defined or determined by a competent authority in order to assure 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;

(1) OJ L 130, 15.6.1970, p. 1. Regulation last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).
(2) OJ L 156, 28.6.1969, p. 8. Regulation as last amended by the 2003 Act of Accession.
(3) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Commission Regulation (EC) No 2083/2005 (OJ L 333, 20.12.2005, p. 28).
(4) OJ L 134, 30.4.2004, p. 114. Directive as last amended by Commission Regulation (EC) No 2083/2005.

(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 States, the contract may also consist of a decision adopted by the competent authority:

— taking the form of an individual legislative or regulatory act, or

— containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;

(j) '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;

(k) '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;

(l) '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:

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

(ii) establish in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment is to be calculated in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs 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;

(iii) 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 ten years for coach and bus services and fifteen years for passenger transport services by rail or other track-based modes. The duration of public service contracts relating to several modes of transport shall be limited to fifteen years if transport by rail or other track-based modes represents more than 50 % of the value of the services in question.

4. If necessary, having regard to the conditions of depreciation of assets, 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. To ensure transparency in this case, the competent authority shall transmit to the Commission within one year after 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 be transparent as to whether or not subcontracting may be considered. The public service contract shall, in accordance with national and Community law, determine the conditions applied to subcontracting.

Article 5

Award of public service contracts

1. 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 Directive 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 (hereinafter referred to as an internal operator). 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.

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 million 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 and medium sized enterprise operating not more than 20 vehicles, these thresholds may be increased to either an average annual value estimated at less than EUR 1,7 million or when they concern the annual provision of less than 500 000 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.

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 conform to 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 allow the performance, quality and financing of the public transport network to be monitored and assessed.

2. Each competent authority shall take the necessary measures to ensure that, at least one year before the launch of the invitation to tender procedure or one year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

(a) the name and address of the competent authority;

(b) the type of award envisaged;

(c) the services and areas potentially covered by the award.

Competent authorities may decide not to publish this information where a public service contract concerns 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 after the granting of the award:

(a) name of the contracting entity and its ownership;

(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;

(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 the direct award of 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 … (*). 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. For 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 … (**) on the basis of a fair competitive tendering procedure;

(d) as from 26 July 2000 and before … (**) 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 aids for the transport sector pursuant to Article 73 of the Treaty which meet the needs of coordination of transport or which represent 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.

(*) 12 years after the date of entry into force of this Regulation.
(**) The date of entry into force of this Regulation.

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 shall be repealed. Its provisions shall however continue to apply in relation to freight transport services for a period of three years after the entry into force of this Regulation.

2. Regulation (EEC) No 1107/70 shall be 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 modifying this Regulation.

Article 12

Entry into force

This Regulation shall enter into force on … (*).

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

Done at Brussels,

For the European Parliament
The President
…

For the Council
The President
…

(*) Three years following publication of the Regulation in the Official Journal.

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,

   = 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 the intervention by the public authority.

7. The method of compensation must promote the maintenance or development of:

   — effective management by the public service operator, which can be the subject of an objective assessment, and

   — the provision of passenger transport services of a sufficiently high standard.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

— The Commission submitted the revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road, known as the Public Service Obligations proposal, on 20 July 2005 ([1]). Before this revised proposal, the Commission put forward two other proposals: on 27 July 2000, the original proposal ([2]) and, on 21 February 2002, an amended proposal ([3]).

— On 14 November 2001, the European Parliament voted its opinion in first reading on the basis of the original Commission proposal of July 2000 ([4]). The European Parliament decided to treat the proposal of July 2005 as a revised version of the initial proposal of July 2000 and, consequently, will examine this proposal only at second reading.

— The Council, at its meeting on 9 June 2006, reached a political agreement on the revised proposal, with the Czech, Greek, Luxembourg and Maltese delegations abstaining from the vote. On 11 December 2006, the Council adopted its Common Position.

— In carrying out its work, the Council took account of the opinions of the European Economic and Social Committee ([5]) and of the Committee of the Regions ([6]).

II. EUROPEAN PARLIAMENT AMENDMENTS

As the first reading in the Parliament was based on the Commission's initial proposal of 2000 and the Common Position of the Council on the significantly modified proposal of 2005, the Council cannot make references to individual parliamentary amendments in this statement of its reasons. As an alternative, the Council will address Parliament's first reading in general terms and in relation to the key elements of the Common Position.

III. ANALYSIS OF THE COMMON POSITION

1. General

The legislative framework for Public Service Obligations currently in force dates from 1969 and was last amended in 1991 ([7]). The Council considers that in today's European market for public passenger transport services, where operators are no longer exclusively national, regional or local, a new set of rules is needed. These rules must reduce distortion of competition by establishing non-discriminatory conditions of competition amongst operators, by enhancing transparency and by guaranteeing legal certainty for both operators and authorities involved in public passenger transport. The ensuing level playing field will promote safe, efficient and high-quality public passenger transport services.

The Commission proposals of 2000 and 2002 did not achieve the necessary majority in the Council, the main reason being the vast differences among Member States on the introduction of further competition in public passenger transport. Moreover, Member States wanted to await the judgment pending in the ALTMARK case ([8]), on how provisions on State aid apply to public services in general, and to public transport in particular. A more pragmatic approach by both the Commission and the Member States was needed to pave the way for Council's Common Position. The Commission put more emphasis on subsidiarity, which led to a proposal that was simpler and more flexible than its previous proposals, and the Member States, after several years of experience with different models of organising public transport, were better able to acknowledge their respective benefits and drawbacks. Finally, the ALTMARK judgment clearly underlined the need to modernise Community legislation on public passenger transport.

([1]) OJ C 49, 28.2.2006, p. 37.
([2]) OJ C 365E, 19.12.2000, p. 169.
([3]) OJ C 151E, 25.6.2002, p. 146.
([4]) OJ C 140E, 13.6.2002, p. 164.
([5]) OJ C 195, 18.8.2006, p. 20.
([6]) OJ C 192, 16.8.2006, p. 1.
([7]) 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 (OJ L 156, 28.6.1969, p. 1) as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).
([8]) 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 its Common Position, the Council strikes a balance amongst several interests: the ability for authorities to determine the way they organise public transport themselves, the wish to introduce more competition in the public transport sector by awarding public service contracts through tendering procedures — also called 'regulated competition' — and the need to achieve a new legislative framework that takes account of the specificities of existing public transport systems while providing sufficient time for these systems to adapt to the new rules. The Council has also introduced modifications to the Commission proposal with a view to facilitating its implementation in practice.

2. **Key policy issues**

2.1. *Scope*

The Council specifies the scope of the Regulation as covering those public passenger transport services by rail and by road for which competent authorities, when imposing or contracting for public service obligations, compensate operators for the costs incurred and/or grant exclusive rights in return for the discharge of public service obligations. In the light of the evolving European market for public transport, the Council holds that restricting the scope to local transport, as proposed by the Parliament, would no longer be appropriate.

Furthermore, unlike the 2000 and the 2002 proposals, which included public passenger transport by inland waterways in its own right, the Commission's 2005 proposal was restricted to rail and road. The Regulation would only apply to inland waterway services that are part of a wider public transport system. Now, the Council has returned to the spirit of the preceding proposals by including in its Common Position a provision allowing Member States, if they so wish, to apply the Regulation to public passenger transport services by inland waterway.

In the Common Position, the Council clarifies the sort of contracts to which the Regulation applies. Firstly, it points out that contracts for public passenger transport services by bus or by tram must be awarded in accordance with the procedures of the Public Procurement Directives unless such contracts take the form of service concession contracts. In so doing, the Council clarifies the approach proposed by the Commission, which leaves authorities the choice of the applicable regime. If a public service contract entails a risk for the operator, the Regulation applies, and if not, the Public Procurement Directives ([1]) apply. Because of this freedom of administrative choice, the Council prefers the Commission's approach to the proposal of the Parliament, which was that the Regulation should apply to all contracts for public passenger transport. Secondly, the Common Position explicitly excludes public works concessions from the scope of the Regulation, stating that the Public Procurement Directives provide the applicable regimes for this kind of contract.

Finally, with a view to enhancing flexibility for authorities, in its Common Position, the Council allows them to exclude from the scope of the Regulation general rules on financial compensation for public service obligations which set maximum tariffs for pupils, apprentices and persons with reduced mobility.

2.2. *Direct award*

The Council considers that a system offering competent authorities the freedom to choose between competitive tender and direct award is the best guarantee of improved public transport quality and efficiency. In that light, in its Common Position, the Council maintains the four derogations whereby authorities may award contracts directly, as proposed by the Commission, but introduces several modifications as regards the exact modalities.

([1]) Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ L 134, 30.4.2004, p. 114) or Directive 2004/17 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services (OJ L 134, 30.4.2004, p. 1).

2.2.1. Internal operators

The Council welcomes the Commission proposal to allow competent authorities, which choose not to put their public transport services out to tender, to provide these services themselves or to award them directly to a third party over which they exercise control similar to that exercised over their own departments — the so-called 'internal operator'. The Council agrees with Parliament's first reading and the Commission's revised proposal that, in order to avoid the risk of distortion of competition, an internal operator should in principle not participate in tendering procedures outside the area of the authority from which it received its direct award.

While supporting the overall concept of an internal operator in its Common Position, the Council adds several provisions to the Commission proposal in order to take the specificities of national and local transport systems into account:

— Acknowledging national responsibilities for the organisation of public transport, Member States retain the power to prohibit local authorities, by law, from making use of the possibility of awarding public service contracts directly on their territory,

— In addition to the definition of 'competent authority', it underlines that a 'competent local authority' covers both an individual authority and a group of authorities offering interconnected transport services,

— The basis for determining 'control' by the authority over the internal operator, as proposed by the Commission, has been retained, while specifying that full public ownership is not a mandatory requirement for such control,

— Clarification of the issue of territorial restriction on an internal operator to avoid having to restrict public transport services which cross the borders of administrative territories, contrary to the interests of passengers,

— Internal operators whose directly awarded public service contracts are about to expire are allowed to participate — if certain conditions are fulfilled — in competitive tenders so that they can prepare for operating in a competitive environment,

— If no local competent authorities exist, national authorities can conclude public service contracts with an internal operator.

2.2.2. Minor contracts

Council leaves unchanged the thresholds below which public service contracts may be directly awarded as proposed by the Commission in the light of Parliament's first reading. Authorities may refrain from a competitive tendering procedure if the average annual value of the contract remains below EUR 1 million or if the contract concerns the provision of less than 300 000 kilometres of public passenger transport services per year. Furthermore, in the spirit of the Parliament's interest in small businesses, the Council introduces additional thresholds for small and medium sized enterprises operating not more than 20 vehicles. In this case, direct awards are allowed if the average annual value of the public service contracts remains below EUR 1,7 million or if less than 500 000 kilometres of public passenger transport are provided. Finally, in acknowledgement of national responsibilities for the organisation of public transport, the Common Position gives Member States the ability to choose to prohibit authorities on their territory from making use of the possibility of granting direct awards in the case of minor contracts.

2.2.3. Emergency situations

The Council supports the Commission proposal — which was inspired by Parliament's first reading — to award contracts directly in the event of a disruption of services or an immediate risk of such a situation. However, considering the time needed to organise the award of new public service contracts, the Council has chosen to allow emergency measures for a period of two years instead one year as proposed by the Commission. Furthermore, in order to reflect practice, in the Common Position, it is specified that emergency measures can take the form of a direct award, a formal agreement to extend a public service contract or a requirement to discharge certain public service obligations. In the latter case, the public service operator has the right of appeal.

2.2.4. Heavy rail

In view of the special position of public passenger transport services by rail, the Council allows authorities to award public service contracts directly in the case of all heavy rail, unless prohibited by national law. Moreover, by extending the possibility of direct award from regional and long-distance rail, as proposed by the Commission, to all heavy rail, including (sub)urban rail and integrated networks, the Council avoids the difficulties which could arise if a distinction needs to be made between long-distance and regional, on the one hand, and (sub)urban rail, on the other hand. As regards this extension of direct award to all heavy rail, the Swedish delegation, joined by the Italian delegation, made a statement for the minutes (Annex I) when the TTE Council reached its political agreement on 9 June 2006.

2.3. *Duration of contracts*

As regards the duration of public service contracts for coaches and buses and for rail and other track-based services, the Council balances, on the one hand, the need for an amortisation period that is financially sound, and, on the other hand, contract durations providing incentives for new operators. For rail and other track-based modes the Council has kept the proposed duration of 15 years. For coach and bus services, the Council has extended the contract duration proposed by the Commission from eight to 10 years. In so doing, the Council follows the Commission proposal as amended in the light of the first reading in the Parliament, with the exception of an additional contract duration of two years for bus transport. As a way of counter-balancing the extension of direct award to all heavy rail, the initial duration of directly awarded heavy rail contracts is not allowed to exceed 10 years.

Furthermore, the Council has kept, with some changes, the Commission proposal to allow the duration of public service contracts to be extended by a maximum of 50 % where necessary for investment. In addition, the Council allows a 50 % extension for contracts in the outermost regions if justified by the costs deriving from a particular geographical situation.

Finally, in exceptional cases, the Common Position allows the duration of a contract to be extended by even more than 50 %. Such extension must be justified by the amortisation of capital in relation to exceptional infrastructure, rolling stock or vehicular investment. Moreover, the public service contract must be awarded in a fair competitive tendering procedure and the authority allowing the longer duration must forward the contract and the elements justifying its longer duration to the Commission within one year of conclusion of the contract.

2.4. *Social standards and quality of service*

Unlike the 2000 and the 2002 proposals, the Commission's revised proposal of 2005 leaves the definition of social and quality criteria for public passenger transport services to authorities, in keeping with the principle of subsidiarity. The Council supports this approach.

Council specifies and extends the provision in the Commission's proposal on the transfer of social rights. The provision in the Commission proposal allowed authorities to decide whether the selected public service operators would be obliged to grant staff taken on previously to provide services the same rights they would have been entitled to if there had been a transfer within the meaning of Directive 2001/23/EC. Considering this a matter of subsidiarity, the Council, like the Commission, does not see the need to make this provision on employees' rights compulsory, as suggested by Parliament in its first reading. However, the Council does add to this provision the obligation that authorities, in setting such requirements, must act within the constraints set by national and/or Community law. Furthermore, with a view to increasing transparency, the Council incorporates in its Common Position the obligation that, if authorities require public service operators to comply with certain social standards, tender documents and public service contracts must list the staff concerned and give transparent details of their contractual rights as well as the conditions under which employees are deemed to be linked to the services.

With a view to simplifying the Regulation and in keeping with the principle of subsidiarity, in its revised proposal, the Commission chose not to set a list of quality criteria to be used by authorities when awarding public service contracts. In its Common Position, the Council follows the Commission's reasoning that authorities should continue to be responsible for setting quality standards. However, with a view to increasing transparency, the Council introduces the obligation that, if quality standards are set, authorities must include these standards in their tender documents and in their public service contracts.

2.5. *Transparency*

With a view to enhancing transparency, the Council welcomes the proposal of the Commission requiring competent authorities to conclude a public service contract where exclusive rights and/or compensation are granted in return for the discharge of public service obligations. Furthermore, transparency concerning the award and the content of public service contracts is essential to avoid the risk of distortion of competition, in particular if the contract is awarded directly. The Parliament acknowledged the importance of improving transparency in the public passenger transport sector at several junctures during its first reading.

With a view to further increasing transparency in the public transport sector and as a counterbalancing measure to the extension of the possibility of direct award to all heavy rail, the Council introduces the following measures in its Common Position:

— An obligation for authorities to forward, at the request of any interested party, their reasoned decisions relating to a directly awarded public service contract. The Czech delegation stated in the TTE Council of 9 June 2006 that it rejected this provision and added to the minutes the statement which appears in Annex II,

— An obligation for authorities to make public, in the case of directly awarded public service contracts for transport by rail, certain information within one year of granting the award.

While supporting the Commission proposals on publicity, the Council introduces several modifications with a view to improving their practical applicability and reducing unnecessary bureaucracy:

— Authorities are required to submit an aggregated report on their public service contracts instead of a detailed report as proposed by the Commission,

— Authorities must announce the award of a public service contract at least one year in advance in the Official Journal. Minor contracts are exempted from this obligation,

— Authorities are required to publish rectifications if there is a change in the information announced on the award of a public service contract,

— Emergency measures are exempted from advance announcement,

— The initial period within which Member States must communicate to the Commission the information necessary for determining whether the compensation granted is compatible with the Regulation is extended from 20 working days, as proposed by the Commission, to three months.

2.6. *Transition*

With a view to providing authorities and operators with sufficient time to adapt to the new legislative framework, the Council makes several modifications to the transitional arrangements proposed by the Commission. First of all, the Regulation enters into force three years after the publication of the Regulation. Twelve years thereafter, public service contracts by rail and by road need to be awarded in accordance with the Regulation. Secondly, the Council replaces the distinction made in the Commission proposal between transition periods for transport by road, on the one hand, and by rail, on the other hand, with one single transitional arrangement. In the light of the extension of the possibility of direct awards in the case of heavy rail, the Council considers a longer transition period for public transport by rail than for public transport by road no longer justified. Thirdly, instead of a two-phased transition period, Council chooses a gradual approach allowing authorities to determine for themselves, to a certain extent, how to manage the transition to the new set of rules for awarding contracts. Within six months after the first half of the transition period, Member States have to provide the Commission with progress reports. On the basis of these reports, the Commission will assess whether additional measures are needed to avoid disruptions in the supply of public transport.

As regards contracts concluded before the entry into force of the Regulation, the Common Position provides for a transitional arrangement that is very much in line with the proposals the Parliament put forward in first reading. The Council seeks a balance between, on the one hand, respecting the principle '*pacta sunt servanda*' and, on the other hand, avoiding closure of markets for too long a period. A distinction is made between:

— contracts awarded on the basis of a fair competitive tendering procedure and contracts awarded on the basis of another awarding procedure,

— contracts awarded before 26 July 2000 — when the Commission submitted its initial proposal on Public Service Obligations — and contracts awarded after that time.

For the in total four categories of contracts, the Council proposes individual expiry arrangements. For exceptional cases where termination of a public service contract would entail undue legal or economic consequences, the Common Position provides for continuation until expiry, provided the Commission has given its approval.

In its Common Position, the Council maintains the provision of the Commission proposal whereby, in the second half of the transition period, if operators 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 the Regulation represents at least half of the value of all their public transport services, then authorities may refuse to allow them to participate in the tender procedures they organise. To this provision the Council adds that authorities are not allowed to prevent operators which are already running the services which are to be put out to tender from participating in the tender procedure. After intensive discussions, the Council decided not to take up a clause allowing authorities to deny participation in a tendering procedure to operators which had received all or part of their contracts as a direct award. The Council does not find such a reciprocity clause appropriate in the light of the jurisprudence of the Court of Justice. The Court sets strict conditions for applying reciprocity clauses, considering them only admissible in the context of a gradual liberalisation process and provided they are of a transitional nature and restricted in time.

2.7. *Other significant issues*

Other significant issues introduced in the Council's Common Position are:

— Council follows the Commission proposal not to lay down, for the inland public transport sector, specific rules on subcontracting. However, Council seeks to increase transparency by incorporating in the Common Position the requirement that tender documents and public service contracts must clearly show whether subcontracting is possible. Moreover, the contract must determine the conditions applied to subcontracting in accordance with national and Community law,

- The Commission proposed to repeal Regulation (EEC) No 1191/69 and Regulation (EEC) No 1107/70 completely. As certain provisions of these two Regulations are still in use, the Council's Common Position provides for a phasing out of Regulation (EEC) No 1191/69 and for inclusion of certain specific provisions of Regulation (EEC) No 1107/70 in the new Regulation on Public Service Obligations,
- Council adapts the provision on reporting by the Commission on developments in the provision of public passenger transport in Europe in the light of its Common Position requiring in particular an assessment of the quality of public passenger transport services and the effects of direct awards,
- Council makes some changes to the Annex to the draft Regulation with a view to improving the calculation of the compensation allowed in the case of directly awarded contracts to make it more easily applicable in practice.

IV. CONCLUSION

Unable to find an agreement on the 2000 and 2002 Commission proposals on Public Service Obligations, the Council has succeeded in achieving a Common Position on the basis of the Commission proposal of 2005. The Commission drew up this revised proposal in the light of Parliament's first reading of its initial 2000 proposal, with a view to reconciling the positions of the three institutions. As the Common Position broadly follows the approach of this revised proposal, the Council considers it a good basis for the second reading talks with the Parliament.

ANNEX I

STATEMENT BY SWEDEN JOINED BY ITALY FOR INCLUSION IN THE MINUTES OF THE COUNCIL OF 9 JUNE 2006

Re: item 9: Revised Proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road

POLITICAL AGREEMENT

In reaching a political agreement on a common position on the Regulation on public passenger transport services by rail and by road, Sweden wants to put forward the following position:

1. As agreed by the Council at its meeting on 5 December 2005, the main aim of this Regulation is to establish a legal framework for compensation for public service contracts, rather than the opening of the market for railway services. This is why the option of direct award for railway services is retained in this Regulation.
2. The Decision by the Council to allow continued direct awards for rail passenger services does not preclude the right of initiative of the Commission to make any future legislative proposal on the opening of the domestic rail passenger market that the European Parliament and the Council would then consider.
3. Any future proposal for opening the market for domestic rail passenger services will need to be based on a reasoned determination of whether this should take the form of open access to the rail network for all operators, or competitive tender for public service contracts or exclusive rights, or both.
4. In the absence of harmonised legislation on the opening of national markets for rail passenger services, Sweden is of the opinion that Member States retain the right to apply measures of reciprocity insofar as these measures are in accordance with Community law.

ANNEX II

STATEMENT OF THE CZECH REPUBLIC FOR INCLUSION IN THE MINUTES OF THE COUNCIL OF 9 JUNE 2006

Re: item 9: Revised Proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road

POLITICAL AGREEMENT

The Czech Republic is fully aware that optimum transparency in awarding public service contracts is one of the main objectives of the proposal for a Regulation on public passenger transport services by rail and by road. In that regard the Czech Republic has no objection to requiring that the competent authority notify any interested party on request of a decision on its part leading to the direct award of a public service contract, and that it demonstrate that it has acted in accordance with the relevant articles of the Regulation, including setting compensation levels in line with the rules set out in the Annex to the Regulation. However, the Czech Republic cannot agree to the current wording of Article 7(4) (9840/06), since in its opinion it reduces the legal certainty of all parties involved in direct award. The Czech Republic is worried above all that an aggrieved interested party might contest a given reasoned decision in order to force a comparison between the directly awarded contract and its own alternative bid. In some cases this might subsequently prevent a public service contract from being awarded directly; the Czech Republic finds this wholly unacceptable.

Because of this reservation the Czech Republic cannot endorse political agreement on this proposal in Council and is therefore abstaining from the vote.