**European Economic Regulation Law – M2 Droit européen / European Law**

**Pr. S. de La Rosa – 2023/2023**

**Chapter 4. – The process of opening up to competition network activities – the case of railway**

* **Main topics**

Overview of the diversity of policies overlapping with network issues

* Legal framework underlying the opening up to competition of rail activities
* Distinction between open access to rail and rail under PSO regulation
* Interpretation by the ECJ of the main concepts
* Legal consequences for EU Member States
* **Useful regulations**

 **REGULATION (EC) No 1370/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**of 23 October 2007**

**on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 71 and 89 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee[(1)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr1-L_2007315EN.01000101-E0001),

Having regard to the opinion of the Committee of the Regions[(2)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr2-L_2007315EN.01000101-E0002),

Acting in accordance with the procedure laid down in Article 251 of the Treaty[(3)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr3-L_2007315EN.01000101-E0003),

Whereas:

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| (1) | Article 16 of the Treaty confirms the place occupied by services of general economic interest in the shared values of the Union. |

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| (2) | Article 86(2) of the Treaty lays down that undertakings entrusted with the operation of services of general economic interest are subject to the rules contained in the Treaty, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. |

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| (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. |

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| (4) | The main objectives of the Commission’s White Paper of 12 September 2001‘European transport policy for 2010: time to decide’ are to guarantee safe, efficient and high-quality passenger transport services through regulated competition, guaranteeing also transparency and performance of public passenger transport services, having regard to social, environmental and regional development factors, or to offer specific tariff conditions to certain categories of traveller, such as pensioners, and to eliminate the disparities between transport undertakings from different Member States which may give rise to substantial distortions of competition. |

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| (5) | At the present time, many inland passenger transport services which are required in the general economic interest cannot be operated on a commercial basis. The competent authorities of the Member States must be able to act to ensure that such services are provided. The mechanisms that they can use to ensure that public passenger transport services are provided include the following: the award of exclusive rights to public service operators, the grant of financial compensation to public service operators and the definition of general rules for the operation of public transport which are applicable to all operators. If Member States, in accordance with this Regulation, choose to exclude certain general rules from its scope, the general regime for State aid should apply. |

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| (6) | Many Member States have enacted legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several public service operators are now providing public passenger transport services in more than one Member State. However, developments in national legislation have led to disparities in the procedures applied and have created legal uncertainty as to the rights of public service operators and the duties of the competent authorities. Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway[(4)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr4-L_2007315EN.01000101-E0004), 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. |

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| (7) | Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the Commission, the Council and the Member States, each in accordance with their respective powers, to ‘speed up liberalisation in areas such as … transport’. |

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| (8) | Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning in so far as these are compatible with Treaty requirements. |

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| (9) | In order to be able to organise their public passenger transport services in the manner best suited to the needs of the public, all competent authorities must be able to choose their public service operators freely, taking into account the interests of small and medium-sized enterprises, under the conditions stipulated in this Regulation. In order to guarantee the application of the principles of transparency, equal treatment of competing operators and proportionality, when compensation or exclusive rights are granted, it is essential that a public service contract between the competent authority and the chosen public service operator defines the nature of the public service obligations and the agreed reward. The form or designation of the contract may vary according to the legal systems of the Member States. |

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| (10) | Contrary to Regulation (EEC) No 1191/69, the scope of which extends to public passenger transport services by inland waterway, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. The organisation of public passenger transport services by inland waterway and, in so far as they are not covered by specific Community law, by national sea water is therefore subject to compliance with the general principles of the Treaty, unless Member States choose to apply this Regulation to those specific sectors. The provisions of this Regulation do not prevent the integration of services by inland waterway and national sea water into a wider urban, suburban or regional public passenger transport network. |

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| (11) | Contrary to Regulation (EEC) No 1191/69, the scope of which extends to freight transport services, it is not considered advisable for this Regulation to cover the award of public service contracts in that specific sector. Three years after the entry into force of this Regulation the organisation of freight transport services should therefore be made subject to compliance with the general principles of the Treaty. |

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| (12) | It is immaterial from the viewpoint of Community law whether public passenger transport services are operated by public or private undertakings. This Regulation is based on the principles of neutrality as regards the system of property ownership referred to in Article 295 of the Treaty, of the freedom of Member States to define services of general economic interest, referred to in Article 16 of the Treaty, and of subsidiarity and proportionality referred to in Article 5 of the Treaty. |

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| (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. |

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| (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. |

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| (15) | Contracts of long duration can lead to market foreclosure for a longer period than is necessary, thus diminishing the benefits of competitive pressure. In order to minimise distortions of competition, while protecting the quality of services, public service contracts should be of limited duration. The extension of such contracts could be subject to positive confirmation from users. In this context, it is necessary to make provision for extending public service contracts by a maximum of half their initial duration where the public service operator must invest in assets for which the depreciation period is exceptional and, because of their special characteristics and constraints, in the case of the outermost regions as specified in Article 299 of the Treaty. In addition, where a public service operator makes investments in infrastructure or in rolling stock and vehicles which are exceptional in the sense that both concern high amounts of funds, and provided the contract is awarded after a fair competitive tendering procedure, an even longer extension should be possible. |

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| (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[(5)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr5-L_2007315EN.01000101-E0005). 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. |

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| (17) | In keeping with the principle of subsidiarity, competent authorities are free to establish social and qualitative criteria in order to maintain and raise quality standards for public service obligations, for instance with regard to minimal working conditions, passenger rights, the needs of persons with reduced mobility, environmental protection, the security of passengers and employees as well as collective agreement obligations and other rules and agreements concerning workplaces and social protection at the place where the service is provided. In order to ensure transparent and comparable terms of competition between operators and to avert the risk of social dumping, competent authorities should be free to impose specific social and service quality standards. |

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| (18) | Subject to the relevant provisions of national law, any local authority or, in the absence thereof, any national authority may choose to provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering. However, this self-provision option needs to be strictly controlled to ensure a level playing field. The competent authority or group of authorities providing integrated public passenger transport services, collectively or through its members, should exercise the required control. In addition, a competent authority providing its own transport services or an internal operator should be prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory. Restrictions on the activities of an internal operator do not interfere with the possibility of directly awarding public service contracts where they concern transport by rail, with the exception of other track-based modes such as metro or tramways. Furthermore, the direct award of public service contracts for heavy rail does not preclude the possibility for competent authorities to award public service contracts for public passenger transport services on other track-based modes, such as metro and tramway, to an internal operator. |

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| (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. |

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| (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. |

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| (21) | Effective legal protection should be guaranteed, not only for awards falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors[(6)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr6-L_2007315EN.01000101-E0006) and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts[(7)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr7-L_2007315EN.01000101-E0007), but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts[(8)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr8-L_2007315EN.01000101-E0008) and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors[(9)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr9-L_2007315EN.01000101-E0009). |

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| (22) | Some invitations to tender require the competent authorities to define and describe complex systems. These authorities should therefore have power, when awarding contracts in such cases, to negotiate details with some or all of the potential public service operators once tenders have been submitted. |

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| (23) | Invitations to tender for the award of public service contracts should not be mandatory where the contract relates to modest amounts or distances. In this respect, greater amounts or distances should enable competent authorities to take into account the special interests of small and medium-sized enterprises. Competent authorities should not be permitted to split up contracts or networks in order to avoid tendering. |

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| (24) | Where there is a risk of disruption in the provision of services, the competent authorities should have power to introduce emergency short-term measures pending the award of a new public service contract which is in line with all the conditions for awarding a contract laid down in this Regulation. |

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| (25) | Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004, the Commission presented a proposal to amend Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways[(10)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr10-L_2007315EN.01000101-E0010) 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. |

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| (26) | In the case of public services, this Regulation allows each competent authority, within the context of a public service contract, to select its operator of public passenger transport services. Given the differences in the way Member States organise their territory in this respect, competent authorities may justifiably be allowed to award public service contracts directly for railway travel. |

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| (27) | The compensation granted by competent authorities to cover the costs incurred in discharging public service obligations should be calculated in a way that prevents overcompensation. Where a competent authority plans to award a public service contract without putting it out to competitive tender, it should also respect detailed rules ensuring that the amount of compensation is appropriate and reflecting a desire for efficiency and quality of service. |

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| (28) | By appropriately considering the effects of complying with the public service obligations on the demand for public passenger transport services in the calculation scheme set out in the Annex, the competent authority and the public service operator can prove that overcompensation has been avoided. |

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| (29) | With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react. |

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| (30) | Directly awarded public service contracts should be subject to greater transparency. |

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| (31) | Given that competent authorities and public service operators will need time to adapt to the provisions of this Regulation, provision should be made for transitional arrangements. With a view to the gradual award of public service contracts in line with this Regulation, Member States should provide the Commission with a progress report within the six months following the first half of the transitional period. The Commission may propose appropriate measures on the basis of these reports. |

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| (32) | During the transitional period, the application of the provisions of this Regulation by the competent authorities may take place at different times. It may therefore be possible, during this period, that public service operators from markets not yet affected by the provisions of this Regulation tender for public service contracts in markets that have been opened to controlled competition more rapidly. In order to avoid, by means of proportionate action, any imbalance in the opening of the public transport market, competent authorities should be able to refuse, in the second half of the transitional period, tenders from undertakings, more than half the value of the public transport services performed by which are not granted in accordance with this Regulation, provided that this is applied without discrimination and decided in advance of an invitation to tender. |

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| (33) | In paragraphs 87 to 95 of its judgment of 24 July 2003 in Case C-280/00 Altmark Trans GmbH[(11)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr11-L_2007315EN.01000101-E0011), the Court of Justice of the European Communities ruled that compensation for public service does not constitute an advantage within the meaning of Article 87 of the Treaty, provided that four cumulative conditions are satisfied. Where those conditions are not satisfied and the general conditions for the application of Article 87(1) of the Treaty are met, public service compensation constitutes State aid and is subject to Articles 73, 86, 87 and 88 of the Treaty. |

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| (34) | Compensation for public services may prove necessary in the inland passenger transport sector so that undertakings responsible for public services operate on the basis of principles and under conditions which allow them to carry out their tasks. Such compensation may be compatible with the Treaty pursuant to Article 73 under certain conditions. Firstly, it must be granted to ensure the provision of services which are services of general interest within the meaning of the Treaty. Secondly, in order to avoid unjustified distortions of competition, it may not exceed what is necessary to cover the net costs incurred through discharging the public service obligations, taking account of the revenue generated thereby and a reasonable profit. |

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| (35) | Compensation granted by the competent authorities in accordance with the provisions of this Regulation may therefore be exempted from the prior notification requirement of Article 88(3) of the Treaty. |

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| (36) | This Regulation replaces Regulation (EEC) No 1191/69, which should therefore be repealed. For public freight transport services, a transitional period of three years will assist the phasing out of compensation not authorised by the Commission in accordance with Articles 73, 86, 87 and 88 of the Treaty. Any compensation granted in relation to the provision of public passenger transport services other than those covered by this Regulation which risks involving State aid within the meaning of Article 87(1) of the Treaty should comply with the provisions of Articles 73, 86, 87 and 88 thereof, including any relevant interpretation by the Court of Justice of the European Communities and especially its ruling in Case C-280/00 Altmark Trans GmbH. When examining such cases, the Commission should therefore apply principles similar to those laid down in this Regulation or, where appropriate, other legislation in the field of services of general economic interest. |

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| (37) | The scope of Council Regulation (EEC) No 1107/70 of 4 June 1970 on the granting of aids for transport by rail, road and inland waterway[(12)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr12-L_2007315EN.01000101-E0012) 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[(13)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr13-L_2007315EN.01000101-E0013). With a view to further facilitating the application of the relevant Community rules, the Commission will propose State aid guidelines for railway investment, including investment in infrastructure in 2007. |

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| (38) | With a view to assessing the implementation of this Regulation and the developments in the provision of public passenger transport in the Community, in particular the quality of public passenger transport services and the effects of granting public service contracts by direct award, the Commission should produce a report. This report may, if necessary, be accompanied by appropriate proposals for the amendment of this Regulation, |

HAVE ADOPTED THIS REGULATION:

*Article 1*

**Purpose and scope**

1.   The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.

2.   This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)[(14)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R1370#ntr14-L_2007315EN.01000101-E0014), national sea waters.

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

*Article 2*

**Definitions**

For the purpose of this Regulation:

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

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| (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; |

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

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| (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; |

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| (e) | ‘public service obligation’ means a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward; |

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| (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; |

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| (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; |

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| (h) | ‘direct award’ means the award of a public service contract to a given public service operator without any prior competitive tendering procedure; |

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| (i) | ‘public service contract’ means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

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

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

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| (j) | ‘internal operator’ means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments; |

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| (k) | ‘value’ means the value of a service, a route, a public service contract, or a compensation scheme for public passenger transport corresponding to the total remuneration, before VAT, of the public service operator or operators, including compensation of whatever kind paid by the public authorities and revenue from the sale of tickets which is not repaid to the competent authority in question; |

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| (l) | ‘general rule’ means a measure which applies without discrimination to all public passenger transport services of the same type in a given geographical area for which a competent authority is responsible; |

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| (m) | ‘integrated public passenger transport services’ means interconnected transport services within a determined geographical area with a single information service, ticketing scheme and timetable. |

*Article 3*

**Public service contracts and general rules**

1.   Where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.

2.   By way of derogation from paragraph 1, public service obligations which aim at establishing maximum tariffs for all passengers or for certain categories of passenger may also be the subject of general rules. In accordance with the principles set out in Articles 4 and 6 and in the Annex, the competent authority shall compensate the public service operators for the net financial effect, positive or negative, on costs incurred and revenues generated in complying with the tariff obligations established through general rules in a way that prevents overcompensation. This shall be so notwithstanding the right of competent authorities to integrate public service obligations establishing maximum tariffs in public service contracts.

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

*Article 4*

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

1.   Public service contracts and general rules shall:

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

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| (b) | establish in advance, in an objective and transparent manner,

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| (i) | the parameters on the basis of which the compensation payment, if any, is to be calculated, and |

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| (ii) | the nature and extent of any exclusive rights granted, |

in a way that prevents overcompensation. In the case of public service contracts awarded in accordance with Article 5(2), (4), (5) and (6), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit; |

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| (c) | determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital. |

2.   Public service contracts and general rules shall determine the arrangements for the allocation of revenue from the sale of tickets which may be kept by the public service operator, repaid to the competent authority or shared between the two.

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

4.   If necessary, having regard to the conditions of asset depreciation, the duration of the public service contract may be extended by a maximum of 50 % if the public service operator provides assets which are both significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract and linked predominantly to the passenger transport services covered by the contract.

If justified by costs deriving from the particular geographical situation, the duration of public service contracts specified in paragraph 3 in the outermost regions may be extended by a maximum of 50 %.

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

5.   Without prejudice to national and Community law, including collective agreements between social partners, competent authorities may require the selected public service operator to grant staff previously taken on to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of Directive 2001/23/EC. Where competent authorities require public service operators to comply with certain social standards, tender documents and public service contracts shall list the staff concerned and give transparent details of their contractual rights and the conditions under which employees are deemed to be linked to the services.

6.   Where competent authorities, in accordance with national law, require public service operators to comply with certain quality standards, these standards shall be included in the tender documents and in the public service contracts.

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

*Article 5*

**Award of public service contracts**

1.   Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

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

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| --- | --- |
| (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; |

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| (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; |

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| (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; |

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| (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; |

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

3.   Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 4, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.

4.   Unless prohibited by national law, the competent authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 000 000 or where they concern the annual provision of less than 300 000 kilometres of public passenger transport services.

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

5.   In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take an emergency measure. This emergency measure shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The award or extension of a public service contract by emergency measure or the imposition of such a contract shall not exceed two years.

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

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

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

*Article 6*

**Public service compensation**

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

2.   At the written request of the Commission, Member States shall communicate, within a period of three months or any longer period as may be fixed in that request, all the information that the Commission considers necessary to determine whether the compensation granted is compatible with this Regulation.

*Article 7*

**Publication**

1.   Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible, the selected public service operators and the compensation payments and exclusive rights granted to the said public service operators by way of reimbursement. This report shall distinguish between bus transport and rail transport, allow the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted.

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

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

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| (b) | the type of award envisaged; |

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

Competent authorities may decide not to publish this information where a public service contract concerns an annual provision of less than 50 000 kilometres of public passenger transport services.

Should this information change after its publication, the competent authority shall publish a rectification accordingly as soon as possible. This rectification shall be without prejudice to the launching date of the direct award or of the invitation to tender.

This paragraph shall not apply to Article 5(5).

3.   In the case of a direct award of public service contracts for transport by rail, as provided for in Article 5(6), the competent authority shall make public the following information within one year of granting the award:

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| --- | --- |
| (a) | name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control; |

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| (b) | duration of the public service contract; |

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| (c) | description of the passenger transport services to be performed; |

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| (d) | description of the parameters of the financial compensation; |

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| (e) | quality targets, such as punctuality and reliability and rewards and penalties applicable; |

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| (f) | conditions relating to essential assets. |

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

*Article 8*

**Transition**

1.   Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directive 2004/17/EC or 2004/18/EC for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 4 of this Article shall not apply.

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

Within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. On the basis of the Member States’ progress reports, the Commission may propose appropriate measures addressed to Member States.

3.   In the application of paragraph 2, no account shall be taken of public service contracts awarded in accordance with Community and national law:

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| (a) | before 26 July 2000 on the basis of a fair competitive tendering procedure; |

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| (b) | before 26 July 2000 on the basis of a procedure other than a fair competitive tendering procedure; |

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| --- | --- |
| (c) | as from 26 July 2000 and before 3 December 2009 on the basis of a fair competitive tendering procedure; |

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| --- | --- |
| (d) | as from 26 July 2000 and before 3 December 2009 on the basis of a procedure other than a fair competitive tendering procedure. |

The contracts referred to in (a) may continue until they expire. The contracts referred to in (b) and (c) may continue until they expire, but for no longer than 30 years. The contracts referred to in (d) may continue until they expire, provided they are of limited duration comparable to the durations specified in Article 4.

Public service contracts may continue until they expire where their termination would entail undue legal or economic consequences and provided that the Commission has given its approval.

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

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

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

*Article 9*

**Compatibility with the Treaty**

1.   Public service compensation for the operation of public passenger transport services or for complying with tariff obligations established through general rules paid in accordance with this Regulation shall be compatible with the common market. Such compensation shall be exempt from the prior notification requirement laid down in Article 88(3) of the Treaty.

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

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| (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; |

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| (b) | where the purpose of the aid is to promote either research into, or development of, transport systems and technologies which are more economic for the Community in general. |

Such aid shall be restricted to the research and development stage and may not cover the commercial exploitation of such transport systems and technologies.

*Article 10*

**Repeal**

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

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

*Article 11*

**Reports**

After the end of the transitional period specified in Article 8(2), the Commission shall present a report on the implementation of this Regulation and on the developments in the provision of public passenger transport in the Community, assessing in particular the development of the quality of public passenger transport services and the effects of direct awards, accompanied, if necessary, by appropriate proposals for the amendment of this Regulation.

**ANNEX**

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

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| 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. |

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| 2. | The compensation may not exceed an amount corresponding to the net financial effect equivalent to the total of the effects, positive or negative, of compliance with the public service obligation on the costs and revenue of the public service operator. The effects shall be assessed by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met. In order to calculate the net financial effect, the competent authority shall be guided by the following scheme:costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority/authorities, contained in a public service contract and/or in a general rule,minus any positive financial effects generated within the network operated under the public service obligation(s) in question,minus receipts from tariff or any other revenue generated while fulfilling the public service obligation(s) in question,plus a reasonable profit,equals net financial effect. |

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| 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. |

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| 4. | Costs and revenue must be calculated in accordance with the accounting and tax rules in force. |

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| 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:

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| — | 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, |

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| — | 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, |

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| — | 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. |

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| 6. | ‘Reasonable profit’ must be taken to mean a rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of public authority intervention. |

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

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

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

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* **Cases**

**Doc. 1 - CJUE, 20 sept. 2018, *Stefan Rudigier*, case C-518/17**

**Doc. 2 - Case 2 CJUE, 13 oct. 2022, Liberty Lines Spa, aff. C-437/21**

**Case 1**

JUDGMENT OF THE COURT (Ninth Chamber)

20 September 2018 ([\*](https://curia.europa.eu/juris/document/document.jsf?text=&docid=205929&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2435417" \l "Footnote*))

(Reference for a preliminary ruling — Public procurement — Public passenger transport services by rail and by road — Regulation (EC) No 1370/2007 — Article 5(1) — Award of public service contracts — Article 7(2) — Obligation to publish certain information in the Official Journal of the European Union at least one year before the launch of the procedure — Consequences of non-publication — Annulment of the call for tenders — Directive 2014/24/EU — Article 27(1) — Article 47(1) — Directive 2014/25/EU — Article 45(1) — Article 66(1) — Contract notice)

In Case C‑518/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 29 June 2017, received at the Court on 28 August 2017, in the proceedings brought by

**Stefan Rudigier**

other party:

**Salzburger Verkehrsverbund GmbH,**

THE COURT (Ninth Chamber),

composed of C. Vajda, President of the Chamber, E. Juhász (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–        Mr Rudigier, by C. Casati, Rechtsanwalt,

–        the Austrian Government, by M. Fruhmann, acting as Agent,

–        the European Commission, by W. Mölls and P. Ondrůšek, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1        This request for a preliminary ruling concerns the interpretation of Article 7(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1).

2        The request has been made in proceedings brought by Mr Stefan Rudigier concerning an application for the annulment of a call for tenders by Salzburger Verkehrsverbund GmbH for the provision of passenger transport services by bus.

**Legal context**

***EU law***

 *Regulation No 1370/2007*

3        Recitals 20, 21, 29 and 30 of Regulation No 1370/2007 state:

‘(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 [EU] 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)      Effective legal protection should be guaranteed, not only for awards falling within the scope of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors [(OJ 2004 L 134, p. 1)] and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts [(OJ 2004 L 134, p. 114)], but also for other contracts awarded under this Regulation. An effective review procedure is needed and should be comparable, where appropriate, to the relevant procedures set out in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts [(OJ 1989 L 395, p. 33)] and Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors [(OJ 1992 L 76, p. 14)].

…

(29)      With a view to the award of public service contracts, with the exception of emergency measures and contracts relating to modest distances, the competent authorities should take the necessary measures to advertise, at least one year in advance, the fact that they intend to award such contracts, so as to enable potential public service operators to react.

(30)      Directly awarded public service contracts should be subject to greater transparency.’

4        Article 1 of Regulation No 1370/2007, ‘Purpose and scope’, provides:

‘1.      The purpose of this Regulation is to define how, in accordance with the rules of [EU] law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.

…

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. …

…’

5        Article 5 of that regulation, ‘Award of public service contracts’, provides in paragraph 1:

‘Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17 … or 2004/18 … 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 … or 2004/18 …, the provisions of paragraphs 2 to 6 of this Article shall not apply.’

6        Article 7 of the regulation, ‘Publication’, provides in paragraph 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.

…’

 *Directive 2014/24/EU*

7        Article 18 of Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65), ‘Principles of procurement’, provides in paragraph 1:

‘Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

8        Under Article 27 of that directive, ‘Open procedure’:

‘1.      In open procedures, any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting authority.

2.      Where contracting authorities have published a prior information notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:

(a)      the prior information notice included all the information required for the contract notice in section I of part B of Annex V, in so far as that information was available at the time the prior information notice was published;

(b)      the prior information notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

3.      Where a state of urgency duly substantiated by the contracting authority renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4.      The contracting authority may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with the first subparagraph of Article 22(1), and Article 22(5) and (6).’

9        Article 47 of the directive, ‘Setting time limits’, provides in paragraph 1:

‘When fixing the time limits for the receipt of tenders and requests to participate, contracting authorities shall take account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 27 to 31.’

10      Article 48 of the directive, ‘Prior information notices’, provides in paragraph 1:

‘Contracting authorities may make known their intentions of planned procurements through the publication of a prior information notice. Those notices shall contain the information set out in Annex V part B section I. They shall be published either by the Publications Office of the European Union or by the contracting authorities on their buyer profiles in accordance with point 2(b) of Annex VIII. Where the prior information notice is published by the contracting authorities on their buyer profile, they shall send a notice of the publication on their buyer profile to the Publications Office of the European Union in accordance with Annex VIII. Those notices shall contain the information set out in Annex V part A.’

11      Part B, section 1, of Annex V to the directive, to which Article 48 refers, provides that the prior information notice must contain inter alia information on the identity of the contracting authority, the main place of performance of the services, a brief description of the procurement, in particular the nature and extent of services, and, where the notice is not used as a means of calling for competition, the estimated date or dates for publication of a contract notice or notices in respect of the contract or contracts referred to in the prior information notice.

12      In accordance with Article 90(1) and Article 91 of the directive, entitled respectively ‘Transposition and transitional provisions’ and ‘Repeals’, the Member States were to comply with the directive at the latest by 18 April 2016, on which date Directive 2004/18 was repealed.

 *Directive 2014/25/EU*

13      Article 36 of Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), ‘Principles of procurement’, provides in paragraph 1:

‘1.      Contracting entities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.

The design of the procurement shall not be made with the intention of excluding it from the scope of this Directive or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators.’

14      Under Article 45 of that directive, ‘Open procedure’:

‘1.      In open procedures any interested economic operator may submit a tender in response to a call for competition.

The minimum time limit for the receipt of tenders shall be 35 days from the date on which the contract notice was sent.

The tender shall be accompanied by the information for qualitative selection that is requested by the contracting entity.

2.      Where contracting entities have published a periodic indicative notice which was not itself used as a means of calling for competition, the minimum time limit for the receipt of tenders, as laid down in the second subparagraph of paragraph 1 of this Article, may be shortened to 15 days, provided that all of the following conditions are fulfilled:

(a)      the periodic indicative notice included, in addition to the information required by Section I of Part A of Annex VI, all the information required by Section II of Part A of Annex VI, in so far as the latter information was available at the time the periodic indicative notice was published;

(b)      the periodic indicative notice was sent for publication between 35 days and 12 months before the date on which the contract notice was sent.

3.      Where a state of urgency duly substantiated by the contracting entity renders impracticable the time limit laid down in the second subparagraph of paragraph 1, it may fix a time limit which shall be not less than 15 days from the date on which the contract notice was sent.

4.      The contracting entity may reduce by five days the time limit for receipt of tenders set out in the second subparagraph of paragraph 1 of this Article where it accepts that tenders may be submitted by electronic means in accordance with the first subparagraph of Article 40(4) and Article 40(5) and (6).’

15      Article 66 of the directive, ‘Setting time limits’, provides in paragraph 1:

‘When fixing the time limits for requests to participate and the receipt of tenders, contracting entities shall take particular account of the complexity of the contract and the time required for drawing up tenders, without prejudice to the minimum time limits set out in Articles 45 to 49.’

16      Article 67 of the directive, ‘Periodic indicative notices’, provides in paragraph 1:

‘Contracting entities may make known their intentions of planned procurement through the publication of a periodic indicative notice. Those notices shall contain the information set out in part A, section I of Annex VI. They shall be published either by the Publications Office of the European Union or by the contracting entities on their buyer profiles in accordance with point 2(b) of Annex IX. Where the periodic indicative notice is published by the contracting entities on their buyer profile, they shall send a notice of the publication of the periodic indicative notice on a buyer profile to the Publications Office of the European Union in accordance with point 3 of Annex IX. Those notices shall contain the information set out in Annex VI Part B.’

17      In accordance with part A, section I, of Annex VI to the directive, to which Article 67(1) of the directive refers, a periodic indicative notice is to contain information inter alia on the identity of the contracting entity and the service to contact.

18      In accordance with Article 106(1) and Article 107 of the directive, entitled respectively ‘Transposition and transitional provisions’ and ‘Repeal’, Member States were to comply with the directive at the latest by 18 April 2016, on which date Directive 2004/17 was repealed.

 *Directive 89/665*

19      Article 1 of Directive 89/665, as amended by Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 (OJ 2014 L 94, p. 1) (‘Directive 89/665’), ‘Scope and availability of review procedures’, provides in paragraph 1:

‘This Directive applies to contracts referred to in Directive [2014/24] unless such contracts are excluded in accordance with Articles 7, 8, 9, 10, 11, 12, 15, 16, 17 and 37 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/24] …, decisions taken by the contracting authorities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of public procurement or national rules transposing that law.’

20      Under Article 2(1) of Directive 89/665:

‘Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for powers to:

(a)      take, at the earliest opportunity and by way of interlocutory procedures, interim measures with the aim of correcting the alleged infringement or preventing further damage to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a public contract or the implementation of any decision taken by the contracting authority;

(b)      either set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the invitation to tender, the contract documents or in any other document relating to the contract award procedure;

(c)      award damages to persons harmed by an infringement.’

21      In accordance with Article 2d(1) and (2) of that directive.

‘1.      Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting authority or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a)      if the contracting authority has awarded a contract without prior publication of a contract notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive [2014/24] …;

(b)      in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive [2014/24] …, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c)      in the cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a framework agreement and a dynamic purchasing system.

2.      The consequences of a contract being considered ineffective shall be provided for by national law.

National law may provide for the retroactive cancellation of all contractual obligations or limit the scope of the cancellation to those obligations which still have to be performed. In the latter case, Member States shall provide for the application of other penalties within the meaning of Article 2e(2).’

 *Directive 92/13*

22      Article 1 of Directive 92/13, as amended by Directive 2014/23 (‘Directive 92/13’), ‘Scope and availability of review procedures’, provides in paragraph 1:

‘This Directive applies to contracts referred to in Directive [2014/25] … unless such contracts are excluded in accordance with Articles 18 to 24, 27 to 30, 34 or 55 of that Directive.

…

Member States shall take the measures necessary to ensure that, as regards contracts falling within the scope of Directive [2014/25] …, decisions taken by contracting entities may be reviewed effectively and, in particular, as rapidly as possible in accordance with the conditions set out in Articles 2 to 2f of this Directive, on the grounds that such decisions have infringed Union law in the field of procurement or national rules transposing that law.’

23      Article 2 of Directive 92/13, ‘Requirements for review procedures’, provides in paragraph 1:

‘The Member States shall ensure that the measures taken concerning the review procedures specified in Article 1 include provision for the powers:

either

(a)      to take, at the earliest opportunity and by way of interlocutory procedure, interim measures with the aim of correcting the alleged infringement or preventing further injury to the interests concerned, including measures to suspend or to ensure the suspension of the procedure for the award of a contract or the implementation of any decision taken by the contracting entity; and

(b)      to set aside or ensure the setting aside of decisions taken unlawfully, including the removal of discriminatory technical, economic or financial specifications in the notice of contract, the periodic indicative notice, the notice on the existence of a system of qualification, the invitation to tender, the contract documents or in any other document relating to the contract award procedure in question;

or

(c)      to take, at the earliest opportunity, if possible by way of interlocutory procedures and if necessary by a final procedure on the substance, measures other than those provided for in points (a) and (b) with the aim of correcting any identified infringement and preventing injury to the interests concerned; in particular, making an order for the payment of a particular sum, in cases where the infringement has not been corrected or prevented.

Member States may take this choice either for all contracting entities or for categories of entities defined on the basis of objective criteria, in any event preserving the effectiveness of the measures laid down in order to prevent injury being caused to the interests concerned;

(d)      and, in both the above cases, to award damages to persons injured by the infringement.

…’

24      Article 2d of the directive, ‘Ineffectiveness’, provides in paragraph 1:

‘Member States shall ensure that a contract is considered ineffective by a review body independent of the contracting entity or that its ineffectiveness is the result of a decision of such a review body in any of the following cases:

(a)      if the contracting entity has awarded a contract without prior publication of a notice in the *Official Journal of the European Union* without this being permissible in accordance with Directive [2014/25] …;

(b)      in case of an infringement of Article 1(5), Article 2(3) or Article 2a(2) of this Directive, if this infringement has deprived the tenderer applying for review of the possibility to pursue pre-contractual remedies where such an infringement is combined with an infringement of Directive [2014/25] …, if that infringement has affected the chances of the tenderer applying for a review to obtain the contract;

(c)      in cases referred to in the second subparagraph of Article 2b(c) of this Directive, if Member States have invoked the derogation from the standstill period for contracts based on a dynamic purchasing system.’

***Austrian law***

25      Paragraph 26 of the Salzburger Vergabekontrollgesetz 2007 (Law of the Province of Salzburg on procurement review 2007) of 7 February 2007, in the version applicable to the main proceedings, headed ‘Annulment of decisions of the contracting authority’, states in paragraph 1:

‘The Landesverwaltungsgericht (Regional Administrative Court, Austria) shall annul a separately challengeable decision of a contracting authority made in the course of an award procedure if:

1.      it or a not separately challengeable decision preceding it infringes the right claimed by the applicant … and

2.      the unlawfulness has substantial influence on the outcome of the procurement procedure.’

**The dispute in the main proceedings and the questions referred for a preliminary ruling**

26      On 20 April 2016, by publishing a call for tenders in the *Official Journal of the European Union*, Salzburger Verkehrsverbund started an open procedure for the supply of bus passenger transport services in the Gasteinertal (Austria), comprising a number of bus routes with a total annual operation of approximately 670 000 km. The contract notice stated that the period for submitting a tender would expire on 8 June 2016.

27      The contract was to be concluded in the form of a service contract, not a service concession, and the services were expected to start on 11 December 2016.

28      Salzburger Verkehrsverbund did not publish the prior information notice referred to in Article 7(2) of Regulation No 1370/2007.

29      On 31 May 2016 Mr Rudigier brought an action before the Landesverwaltungsgericht Salzburg (Regional Administrative Court, Salzburg, Austria) for the annulment of the call for tenders, on the ground inter alia of an infringement of Article 7(2) of Regulation No 1370/2007.

30      By decision of 15 July 2016, the Landesverwaltungsgericht Salzburg (Regional Administrative Court, Salzburg) dismissed the action.

31      Mr Rudigier appealed on a point of law against that decision to the Verwaltungsgerichtshof (Supreme Administrative Court, Austria).

32      In support of his appeal, he submits that the Landesverwaltungsgericht Salzburg (Regional Administrative Court, Salzburg) did not examine the substance of the legal consequences of the failure to publish the information provided for in Article 7(2) of Regulation No 1370/2007, which should have been done at least one year before the launch of the invitation to tender procedure.

33      The Verwaltungsgerichtshof (Supreme Administrative Court) observes that there are no exceptions to the application of Article 7(2) of Regulation No 1370/2007 for transport services falling under Directive 2004/17 or Directive 2004/18, and that recital 29 of that regulation draws no distinction according to the rules applying to those public transport contracts. It concludes that the obligation to publish the required information should apply even where the services are covered by a contract subject to one of those two directives.

34      That court notes, however, that in the present case, unlike the case in which judgment was given on 27 October 2016, *Hörmann Reisen* (C‑292/15, EU:C:2016:817), which concerned subcontracting in connection with public procurement, neither Directive 2004/18 nor its replacement Directive 2014/24 lays down an obligation to provide prior information, as Article 7(2) of Regulation No 1370/2007 does.

35      That means that, if Article 7(2) were to be applied to contracts subject to one of those two directives, the award of service contracts for passenger transport by bus would be subject to stricter rules than the award of other services.

36      The referring court further observes that EU law does not lay down any penalty for failure to comply with the obligations under Article 27(2) of Regulation No 1370/2007.

37      It observes that a transport service operator might indeed, if that provision is not complied with, take advantage of his lead over his competitors. However, the objectives of transparency and non-discrimination pursued by that provision are complied with where the service in question is the subject of an award procedure, in that Article 47(1) of Directive 2014/24 provides, in the same way as Article 38(1) of Directive 2004/18 did, that the contracting authority is to fix the time limits for the procedure it is carrying out with account being taken of the complexity of the contract and the time required for drawing up tenders.

38      The referring court is consequently uncertain whether failure to comply with Article 7(2) of Regulation No 1370/2007 may entail the unlawfulness of a call for tenders in circumstances in which the contracting authority has otherwise complied with all the requirements of the public procurement directives.

39      The referring court observes that under Austrian law the contracting authority’s decision must be annulled only if the unlawfulness has substantial influence on the outcome of the procurement procedure. It considers that national legislation such as that at issue in the main proceedings appears to be consistent with EU law, in so far as it does not make it impossible to exercise a right derived from EU law or infringe the principle of equivalence, but it would like to have this confirmed.

40      It states that this last question is all the more justified in that, in the main proceedings, according to the contracting entity, Mr Rudigier had been aware for a long time of the forthcoming call for tenders, which means that all his claims should be dismissed, in so far as the breach of the law of which he complains causes him no injury.

41      In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1.      Is Article 7(2) of Regulation [No 1370/2007] also applicable in the case of the award of a service contract under the second sentence of Article 5(1) of that regulation for passenger transport services by bus in accordance with a procedure laid down in the procurement directives (Directive [2004/17] or [2004/18])?

2.      If Question 1 is answered in the affirmative:

Does a breach of the obligation to publish, at least one year before the launch of the invitation to tender procedure, the information mentioned in Article 7(2)(a) to (c) of Regulation … No 1370/2007 have the result that a call for tenders, made without such publication one year before the launch of the procedure but, under the second sentence of Article 5(1) of that regulation, in a procedure in accordance with the procurement directives, must be regarded as unlawful?

3.      If Question 2 is answered in the affirmative:

Do the provisions of EU law applicable to the award of public contracts preclude national legislation under which the annulment, as provided for in Article 2(1)(b) of Directive [89/665], of a call for tenders which is to be regarded as unlawful because of the failure to publish information in accordance with Article 7(2) of Regulation No 1370/2007 may be dispensed with if the unlawfulness did not have substantial influence on the outcome of the procurement procedure because the operator concerned was able to react in a timely manner and there was no adverse effect on competition?’

**Consideration of the questions referred**

***Preliminary observations***

42      It may be observed, as a preliminary point, that the call for tenders at issue in the main proceedings was published in the *Official Journal of the European Union* on 20 April 2016, two days after the expiry of the period for transposing Directives 2014/24 and 2014/25 into the national law of the Member States and the repeal of Directives 2004/17 and 2004/18 pursuant to Articles 90 and 91 of Directive 2014/24 and Articles 106 and 107 of Directive 2014/25.

43      It follows that it is Directive 2014/24 or Directive 2014/25 that is applicable in the main proceedings, not Directive 2004/17 or Directive 2004/18 as mentioned in the referring court’s questions (see, by analogy, judgment of 10 July 2014, *Impresa Pizzarotti*, C‑213/13, EU:C:2014:2067, paragraphs 31 to 33).

44      It should also be noted that those questions refer without distinction to Directive 2004/17 and Directive 2004/18. The referring court’s failure to identify the directive applicable in the main proceedings is not, however, such as to prevent the Court from answering the questions, as the answers to them can be formulated identically on the basis of Directive 2014/24 or of Directive 2014/25, which repealed and replaced Directive 2004/18 and Directive 2004/17 respectively.

***Question 1***

45      By its first question the referring court essentially asks whether Article 7(2) of Regulation No 1370/2007 must be interpreted as meaning that the obligation to provide prior information laid down in that provision applies to contracts for public transport services by bus which are in principle awarded in accordance with the procedures provided for by Directive 2014/24 or Directive 2014/25.

46      In this respect, the Court has held that, pursuant to Article 5(1) of Regulation No 1370/2007, for the purposes of awarding a contract for public passenger transport services by bus, only the provisions of Article 5(2) to (6) of that regulation do not apply, whereas the other provisions of the regulation remain applicable (judgment of 27 October 2016, *Hörmann Reisen*, C‑292/15, EU:C:2016:817, paragraph 41).

47      It follows that Article 7(2) of that regulation applies to public contracts for transport services awarded in accordance with the procedures laid down by Directive 2014/24 or Directive 2014/25.

48      That conclusion is borne out by the objective of Regulation No 1370/2007.

49      Regulation No 1370/2007, which refers only to public passenger transport services by rail and road, provides for methods of intervention in general schemes for public contracts, such as those governed by Directive 2014/24 or Directive 2014/25. That regulation thus contains special rules intended either to take the place of or to be added to the general rules of Directive 2014/24 or Directive 2014/25, depending on whether or not the applicable directive lays down rules in the fields governed by the regulation (see, to that effect, judgment of 27 October 2016, *Hörmann Reisen*, C‑292/15, EU:C:2016:817, paragraphs 44 to 47).

50      That interpretation of Article 7(2) of Regulation No 1370/2007 is supported by an examination of Article 48(1) of Directive 2014/24 and Article 67(1) of Directive 2014/25, which are partly comparable in function to Article 7(2).

51      In contrast to Article 48(1) of Directive 2014/24, read in conjunction with the provisions of part B, Section I, of Annex V to that directive, and Article 67(1) of Directive 2014/25, read in conjunction with the provisions of part A, Section 1, of Annex VI to that directive, the provisions of Article 7(2) of the regulation apply mandatorily to the contracting authority or entity and refer not only to the situation in which the contracting authority or entity intends to launch an invitation to tender procedure but also to that in which it intends to make a direct award of a contract. Moreover, publications made under those directives are not subject to the mandatory time limit of one year prior to the launch of the procurement procedure and do not necessarily have to be published in the *Official Journal of the European Union*.

52      Article 7(2) of Regulation No 1370/2007 thus imposes obligations that are more specific than those of Directives 2014/24 and 2014/25 and, as *lex specialis*, prevail over them (see, to that effect, judgment of 27 October 2016, *Hörmann Reisen*, C‑292/15, EU:C:2016:817, paragraph 47).

53      It follows that the answer to Question 1 is that Article 7(2) of Regulation No 1370/2007 must be interpreted as meaning that the obligation to provide prior information laid down in that provision applies to contracts for public transport services by bus which are in principle awarded in accordance with the procedures provided for by Directive 2014/24 or Directive 2014/25.

***Questions 2 and 3***

54      By its second and third questions, which should be considered together, the referring court essentially asks whether the unlawfulness resulting from breach or non-performance of the obligation to provide prior information in Article 7(2) of Regulation No 1370/2007 is such as to entail the annulment of a duly published call for tenders.

55      It should be recalled, as a preliminary point, that according to recital 21 of that regulation effective legal protection is required not only for awards falling within the scope of Directives 2004/17 and 2004/18, which were repealed and replaced by Directives 2014/25 and 2014/24 respectively, but also for other contracts awarded under the regulation. Moreover, an effective review procedure is needed and should be comparable to the procedures applicable under Directives 89/665 and 92/13, as appropriate.

56      Both Article 2(1) of Directive 89/665 and Article 2(1) of Directive 92/13 provide that the Member States are to ensure that their legislation makes it possible inter alia to set aside or ensure the setting aside of decisions taken unlawfully.

57      On the other hand, EU legislation on the award of public contracts does not lay down a general rule that the unlawfulness of an act or omission at a given stage of the procedure renders unlawful all subsequent acts in that procedure and justifies their annulment. Only in specific well-defined situations does that legislation provide for such a consequence.

58      Article 2d of Directive 89/665 and Article 2d of Directive 92/13 each provide that contracts must be considered ineffective if they are vitiated by the cases of unlawfulness listed in those provisions, which include the case of the contracting entity awarding a contract without prior publication of a notice in the *Official Journal of the European Union*, without this being permissible in accordance with Directive 2014/24 or Directive 2014/25 respectively.

59      If, however, the failure to publish a contract notice opening a tendering procedure in the *Official Journal of the European Union* must, as a general rule, lead to the contract in question being considered ineffective, that consequence is not provided for by the EU legislation on public procurement in the event of failure to comply with the obligation to provide prior information under Article 7(2) of Regulation No 1370/2007.

60      In so far as the EU legislature has not laid down a specific provision on breach of Article 7(2) of Regulation No 1370/2007, such a rule is a question of national law.

61      In the absence of detailed procedural rules laid down by EU law for giving effect to a right, in accordance with settled case-law of the Court, it is for the national legal system of each Member State to lay down procedural rules to ensure the safeguarding of rights which individuals derive from EU law. Those rules must not, however, be less favourable than those governing similar domestic remedies (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness) (see, to that effect, judgment of 5 April 2017, *Marina del Mediterráneo and Others*, C‑391/15, EU:C:2017:268, paragraph 32 and the case-law cited).

62      As regards the principal of equivalence, it should be recalled that compliance with that principle requires the rule in question to apply without distinction to actions based on infringement of EU law and those based on infringement of national law having a similar purpose and cause of action (judgment of 8 July 2010, *Bulicke*, C‑246/09, EU:C:2010:418, paragraph 26 and the case-law cited).

63      In the present case, it is for the referring court to examine whether or not that principle has been complied with.

64      As regards the principle of effectiveness, it should be recalled that the right economic operators derive from Article 7(2) of Regulation No 1370/2007 aims, first, as recital 29 of the regulation states in essence, to enable economic operators to react to the intentions of the contracting authority or entity, in particular the type of award the authority or entity intends to have recourse to (invitation to tender or direct award), and, second, to give economic operators time to prepare better for an invitation to tender.

65      It should be noted that compliance with the principle of effectiveness should be examined differently depending on whether the intention is to make a direct award or to call for tenders.

66      In the case of a direct award, the lack of prior information may lead to an economic operator being unable to raise objections before the award is made, which may definitively deprive him of the possibility of taking part in the procurement procedure. Such a situation may call in question the principle of effectiveness.

67      By contrast, where the breach of Article 7(2) of Regulation No 1370/2007 occurs in the context of the contracting authority or entity intending to launch a competitive procedure by means of a subsequent call for tenders in due form, such a breach does not in itself prevent an economic operator from being able to take part effectively in that competition.

68      As regards the referring court’s concerns that a breach of Article 7(2) of Regulation No 1370/2007 might lead to an economic operator who is already responsible for performance of the contract taking advantage of the lead he has over his competitors, it must be stated that, by fixing the time limits for the receipt of tenders, the contracting authority or entity must, whether on the basis of Article 47 of Directive 2014/24 or of Article 66 of Directive 2014/25, take account of the complexity of the contract and the time needed to prepare tenders.

69      If, however, an economic operator shows that, following the publication of a call for tenders, the lack of prior information caused it a significant disadvantage compared to the operator who is already responsible for performance of the contract and therefore has exact knowledge of all the characteristics of the contract, a breach of the principle of effectiveness can be established, entailing the annulment of the call for tenders. Such a disadvantage may also constitute a breach of the principle of equal treatment.

70      That must be assessed by the referring court, taking account of the relevant features of the case in question. In the present case, according to the order for reference, economic operators were afforded a period of 49 days from the publication of the call for tenders at issue in the main proceedings in which to reply to it, which exceeds the minimum periods prescribed by Directives 2014/24 and 2014/25. Moreover, the economic operator concerned in the main proceedings was in possession of information on the possibility of a call for tenders well before the call for tenders was published.

71      Furthermore, independently of a complaint in the circumstances envisaged in paragraph 69 above, an economic operator is entitled to bring a complaint against the contracting authority or entity on the ground that, in the contract documents, the period for submitting tenders was too short, in breach of Article 47 of Directive 2014/24 or Article 66 of Directive 2014/25, which require account to be taken of the complexity of the contract and the time needed to prepare tenders.

72      Consequently the answer to Questions 2 and 3 is that Article 7(2) of Regulation No 1370/2007 is to be interpreted as meaning that an infringement of the obligation to provide prior information laid down in that provision does not entail the annulment of the call for tenders concerned, provided that the principles of equivalence, effectiveness and equal treatment are complied with, which is for the referring court to ascertain.

**Costs**

73      Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

**Article 7(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 must be interpreted as meaning that**

–        **the obligation to provide prior information laid down in that provision applies to contracts for public transport services by bus which are in principle awarded in accordance with the procedures provided for by Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC or by Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC;**

–        **an infringement of that obligation to provide prior information does not entail the annulment of the call for tenders concerned, provided that the principles of equivalence, effectiveness and equal treatment are complied with, which is for the referring court to ascertain.**

**Case 2 – Liberty Lines – CJUE, 13 oct. 2022, Liberty Lines Spa, aff. C-437/21**

JUDGMENT OF THE COURT (Tenth Chamber)

13 October 2022 ([\*](https://curia.europa.eu/juris/document/document.jsf?text=%25221370%252F2007%2522&docid=267139&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=2432394#Footnote*))

(Reference for a preliminary ruling – Transport – Regulation (EEC) No 3577/92 – Articles 1 and 4 – Regulation (EC) No **1370/2007** – Article 1 – Direct award of public service contracts – Public services for high-speed maritime passenger transport – Treatment like railway transport services provided by sea)

In Case C‑437/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Council of State, Italy), made by decision of 21 April 2021, received at the Court on 16 July 2021, in the proceedings

**Liberty Lines SpA**

v

**Ministero delle Infrastrutture e dei Trasporti,**

intervening parties:

**Rete Ferroviaria Italiana SpA,**

**Bluferries Srl,**

THE COURT (Tenth Chamber),

composed of M. Ilešič, acting as President of the Chamber, I. Jarukaitis and Z. Csehi (Rapporteur), Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

–        Liberty Lines SpA, by A. Abbamonte, F. Di Gianni, C. Morace, G. Pregno and A. Scalini, avvocati,

–        the Italian Government, by G. Palmieri, acting as Agent, and by A. Berti Suman, procuratore dello Stato, and by F. Sclafani, avvocato dello Stato,

–        the European Commission, by G. Gattinara, P. Ondrůšek, G. von Rintelen and G. Wils, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

**Judgment**

1        This request for a preliminary ruling concerns the interpretation of EU law relating to the award of public service contracts in respect of public services for high-speed maritime passenger transport.

2        The request has been made in proceedings between Liberty Lines SpA and the Ministero delle Infrastrutture e dei Trasporti (Ministry of Infrastructure and Transport, Italy) (‘the MIT’), concerning the direct award of the high-speed maritime passenger transport service between the port of Messina (Italy) and the port of Reggio Calabria (Italy), in the Strait of Messina, to Bluferries Srl, without issuing a specific tender procedure.

**Legal context**

***European Union law***

 *Regulation (EEC) No 3577/92*

3        Article 1(1) of Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage) (OJ 1992 L 364, p. 7) provides:

‘As from 1 January 1993, freedom to provide maritime transport services within a Member State (maritime cabotage) shall apply to Community shipowners who have their ships registered in, and flying the flag of a Member State, provided that these ships comply with all conditions for carrying out cabotage in that Member State …’

4        Article 2 of that regulation provides that:

‘For the purposes of this Regulation:

1.      “maritime transport services within a Member State (maritime cabotage)” shall mean services normally provided for remuneration and shall in particular include:

…

(c)      “island cabotage”: the carriage of passengers or goods by sea between:

–        ports situated on the mainland and on one or more of the islands of one and the same Member State,

…’

5        Article 4 of that regulation provides:

‘1.      A Member State may conclude public service contracts with or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands.

Whenever a Member State concludes public service contracts or imposes public service obligations, it shall do so on a non-discriminatory basis in respect of all Community shipowners.

2.      In imposing public service obligations, Member States shall be limited to requirements concerning ports to be served, regularity, continuity, frequency, capacity to provide the service, rates to be charged and manning of the vessel.

Where applicable, any compensation for public service obligations must be available to all Community shipowners.

…’

 *Regulation (EEC) No****1370/2007***

6        Article 1 of Regulation (EC) No **1370/2007** of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), entitled ‘Subject matter and scope’, provides in paragraph 2 thereof:

‘This Regulation shall apply to the national and international operation of public passenger transport services by rail and other track-based modes and by road, except for services which are operated mainly for their historical interest or their tourist value. Member States may apply this Regulation to public passenger transport by inland waterways and, without prejudice to Council Regulation (EEC) No 3577/92 …, national sea waters.’

7        Article 2(h) of Regulation No **1370/2007** defines ‘direct award’ as ‘the award of a public service contract to a given public service operator without any prior competitive tendering procedure’.

8        Article 5(6) of that regulation provides:

‘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. …’

***Italian law***

9        The Decreto del Ministero dei Trasporti e della Navigazione, n. 138 T, recante rilascio a Ferrovie dello Stato – Società Trasporti e Servizi per Azioni la concessione ai fini della gestione dell’infrastruttura ferroviaria nazionale (Decree of the Ministry of Transport and Navigation, No 138 T, granting Ferrovie dello Stato – Società Trasporti e Servizi per Azioni the concession for the management of the national railway infrastructure) of 31 October 2000, in the version applicable to the dispute in the main proceedings (‘Decree No 138 T/2000’), provides, in Article 2(1)(e), that the object of the concession in question includes the rail connection by sea between the Italian mainland and Sicily and Sardinia, respectively.

10      Article 47 of decreto-legge n. 50 – Disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo (Decree-Law No 50, on urgent provisions in financial matters, initiatives in favour of territorial bodies, additional interventions in favour of areas affected by earthquakes and development measures) of 24 April 2017 (GURI No 95 of 24 April 2017 – Ordinary Supplement No 20), converted into law, with amendments, by legge n. 96 (Law No 96) of 26 June 2017 (GURI No 144 of 23 June 2017), in the version applicable to the dispute in the main proceedings (‘Decree-Law No 50/2017’), entitled ‘Interventions for rail transport’, provides, in paragraph 11‑*bis*:

‘In order to improve the flexibility of passenger rail connections between Sicily and the Italian mainland, the rail connection service by sea referred to in Article 2(1)(e) of [Decree No 138 T/2000] can also be provided by means of high-speed vessels whose operating model is linked to the rail transport service to and from Sicily, in particular on the outward and return journeys “Messina – Villa San Giovanni” and “Messina – Reggio Calabria”, to be implemented within the framework of the resources provided for by the legislation in force for the programme contract, “services part”, concluded between the State and Rete Ferroviaria [I]taliana SpA, without prejudice to the services provided for therein.’

11      Decreto legislativo n. 50 – Codice dei contratti pubblici (Legislative Decree No 50 on the Public Procurement Code) of 18 April 2016 (GURI No 91 of 19 April 2016 – Ordinary Supplement No 10), in the version applicable to the dispute in the main proceedings, refers, in Article 17(1)(i) thereof, to public passenger transport services by rail or by metro among the specific exclusions from public contract awards and service concessions.

**The dispute in the main proceedings and the question referred for a preliminary ruling**

12      By a notice published in the *Official Journal of the European Union* on 31 January 2015, the MIT launched an open procedure for the award of a public contract for the high-speed maritime passenger transport service in the Strait of Messina, between the port of Messina and the port of Reggio Calabria, for a period of three years. The estimated value of that contract was EUR 21 025 000. The public contract was awarded on the basis of the criterion of the most economically advantageous tender to Ustica Lines SpA, which subsequently became Liberty Lines.

13      The corresponding contract was concluded on 24 June 2015 and the provision of the service in question started on 1 October 2015. That contract also provided for the possibility for the MIT to extend its application for a further 12 months provided that the necessary financial resources were available and the contracting authority concerned was still interested in that service being provided.

14      On 14 September 2018, Liberty Lines informed the MIT that the contract would soon expire, stating that, if its application were not extended, it would no longer provide the service in question from 1 October 2018. The MIT did not reply to that communication.

15      However, from that latter date, the MIT decided to entrust, without any competitive tendering procedure, the provision of the service in question to Bluferries, wholly owned by Rete Ferroviaria Italiana (‘RFI’), which was already the provider of that service on the ‘Messina – Villa San Giovanni’ route, also in the Strait of Messina. The award of the contract in question was challenged by Liberty Lines before the Tribunale amministrativo regionale per il Lazio (Regional Administrative Court, Lazio, Italy).

16      In the course of the proceedings before that court, first, it became apparent that that award had been decided by the MIT: a note from the latter of 26 September 2018, signed by the minister concerned, stated that it was necessary, on the expiry of the contract concluded with Liberty Lines on 1 October 2018, to ensure the continuity of the maritime transport service in question and that, to that end, the ‘flexibility of rail connections between Sicily and the Italian mainland’ could be ensured by the ‘inclusion’ of the connection in question in the programme contract entered into between the Italian State and RFI. Second, on 8 October 2018, RFI replied to the MIT, asking it to discuss the ‘essential elements of the service award … with a view to its continuation’ and the need to ‘adapt’ that programme contract.

17      That court dismissed the action brought by Liberty Lines, finding, in essence, that Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243) and Regulation No **1370/2007** allowed for the direct award of public service contracts for rail transport by sea, such as that at issue in the main proceedings. Indeed, the service in question should be classified as a rail transport service, the award of which was not subject to the obligation to carry out any tendering procedure. The possibility of classifying the maritime transport service in question as a rail transport service results precisely from Article 47(11‑*bis*) of Decree-Law No 50/2017.

18      Liberty Lines appealed against that judgment to the Consiglio di Stato (Council of State, Italy), the referring court, claiming, inter alia, that there was no urgency justifying the use in the present case of a direct award, since the MIT had specifically created the situation at issue in the main proceedings by not extending the contract in question or launching a tendering procedure, and also the fact that the maritime transport service concerned could not be treated like a rail transport service, since Bluferries used hydrofoils, that is, vessels without the facilities necessary for the carriage of railway cars.

19      The referring court asks whether a provision such as Article 47(11‑*bis*) of Decree-Law No 50/2017 is compatible with EU law. In its view, that provision excludes the award of the high-speed maritime transport service for passengers at issue in the main proceedings, in an unjustified manner and without any adequate reasoning, in particular as regards the verification of the existence of a ‘market failure’, from the scope of the rules governing public contracts, which would result in an infringement of Regulation No 3577/92. Furthermore, that national provision seems to grant RFI, as the company managing the national railway infrastructure, a special or exclusive right to operate that transport service. That could give rise, again in favour of RFI, to a measure constituting State aid, which distorts or threatens to distort competition.

20      In those circumstances the Consiglio di Stato (Council of State) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Does [EU] law, and in particular the principles of free movement of services and of opening up to competition as far as possible in the field of public service contracts, preclude a legal provision such as Article 47(11-*bis*) of [Decree-Law No 50/2017] which:

–      treats high-speed maritime passenger transport between the ports of Messina and Reggio Calabria as equivalent to rail transport by sea between the Italian mainland and Sicily, as provided for in Article 2(e) of [Decree No 138 T/2000], or at least allows them to be treated as equivalent by law;

–      reserves or appears capable of reserving for [RFI] the rail connection service by sea between Sicily and the Italian mainland, even where this involves the use of high-speed vessels?’

**Consideration of the question referred**

21      As a preliminary point, first, it should be noted that the second part of the question referred for a preliminary ruling concerns, in essence, the effects on competition of the direct award at issue in the main proceedings in that it ‘reserves’, or ‘appears capable of reserving’, for RFI the maritime connection service between Sicily and the Italian mainland. Indeed, in the request for a preliminary ruling, the referring court states that the national provision at issue in the main proceedings could constitute, in favour of that company, a ‘State aid measure which distorts or is likely to distort competition’.

22      However, the referring court does not provide any information relating to the contract concluded in the context of the direct award of the service at issue in the main proceedings, in particular as regards the compensation that may be granted by the Italian authorities in the context of the implementation of that contract, although such information is necessary to enable the Court to give a useful answer to that second part.

23      In those circumstances, it is not necessary to examine the second part of question submitted for a preliminary ruling.

24      As regards, second, the first part of the question referred, it should be noted that, notwithstanding the fact that the referring court does not identify, in the question referred, the provisions of EU law which it considers capable of precluding the national provision referred to in that question, it is apparent from the grounds of the request for a preliminary ruling that that court considers that the high-speed passenger maritime transport services at issue in the main proceedings fall within the scope of Regulation No 3577/92 and that it asks whether that provision of national law, in so far as it exempts that category of services from the rules on the award of public contracts, infringes EU law.

25      However, according to the Italian Government, maritime transport services such as those at issue in the main proceedings also fall within the scope of Regulation No **1370/2007**, with the result that, in accordance with Article 5(6) of that regulation, it is open to the competent authorities to make direct awards of public service contracts for that type of transport.

26      In that regard, it should be noted that, under the first sentence of Article 1(2) of Regulation No **1370/2007**, that regulation applies to the national and international operation of public passenger transport services by rail and other track-based modes and by road. Furthermore, in accordance with the second sentence of Article 1(2) of that regulation, Member States may also make it applicable to passenger transport ‘by national sea waters’.

27      Thus, it is, in principle, possible for Regulation No **1370/2007** to be made applicable to maritime transport by high-speed vessels in circumstances such as those in the main proceedings, in which Article 47(11-*bis*) of Decree-Law No 50/2017 treats, under certain conditions, maritime transport by high-speed vessels in the same way as transport by rail.

28      However, it is also apparent from the terms of the second sentence of Article 1(2) of Regulation No **1370/2007** that that regulation is applicable to public passenger transport by national sea waters ‘without prejudice’ to Regulation No 3577/92, with the result that, in the event of conflict, the provisions of the latter regulation prevail.

29      Consequently, it must be held that, by its question, the referring court seeks to ascertain, in essence, whether Regulation No 3577/92, and in particular Article 1(1) and Article 4(1) thereof, must be interpreted as precluding a national provision whose purpose is to treat maritime transport services like rail transport services, where the effect of such treatment is to exclude the service in question from the application of the rules on public procurement which would otherwise be applicable to it.

30      In that regard, it must be noted that Article 1 of Regulation No 3577/92 clearly establishes the principle of freedom to provide maritime cabotage services within the European Union (judgments of 20 February 2001, *Analir and Others*, C‑205/99, EU:C:2001:107*,* paragraph 20, and of 9 March 2006, *Commission v Spain*, C‑323/03, EU:C:2006:159, paragraph 43).

31      Under the first subparagraph of Article 4(1) of that regulation, a Member State may conclude public service contracts with, or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in, inter alia, regular services to and from islands. The second subparagraph of that provision requires that, whenever a Member State concludes public service contracts or imposes public service obligations, it must do so on a non-discriminatory basis in respect of all EU shipowners.

32      In the present case, it is apparent from the order for reference that, although the high-speed maritime connection service for passengers in the Strait of Messina between the port of Messina and the port of Reggio Calabria was awarded, for the period from 1 October 2015 to 30 September 2018, following an open procedure and on the basis of the criterion of the most economically advantageous tender, the contract for the provision of the service in question from 1 October 2018 was not the subject of a competitive tendering procedure.

33      In that regard, it should be noted that the rules on public procurement are not the same depending on whether it is a question of public passenger transport services by navigable waterway or public passenger transport services by rail.

34      Indeed, it is only for public service contracts for transport by rail, with the exception of other track-based modes of transport, such as metro or tramway, that Article 5(6) of Regulation No **1370/2007** authorises, under certain conditions, a direct award, that is to say, as stated in Article 2(h) of that regulation, without a prior competitive tendering procedure.

35      Furthermore, as has been noted in paragraph 31 above, the first subparagraph of Article 4(1) of Regulation No 3577/92 provides that, where a Member State concludes public service contracts or imposes public service obligations, it must do so on a non-discriminatory basis in respect of all EU shipowners and, unlike Regulation No **1370/2007**, it does not provide for the possibility of awarding directly.

36      Thus, since Member States may apply Regulation No **1370/2007** to public transport of passengers by inland waterway, but only without prejudice to Regulation No 3577/92, contracts for public passenger transport by inland waterway cannot be concluded without a prior competitive tendering procedure, in accordance with the provisions of that latter regulation.

37      It follows that it cannot be accepted that a national measure effects a reclassification of certain services which does not take account of their actual nature and which leads to their being excluded from the application of the rules applicable to them.

38      Such a conclusion is of particular importance where such a reclassification results in a direct award of those services, without competitive tendering, which would otherwise be required.

39      In the light of all the foregoing considerations, the answer to the question referred is that Regulation No 3577/92, in particular Article 1(1) and Article 4(1) thereof, must be interpreted as precluding national legislation whose purpose is to treat maritime transport services like rail transport services, where the effect of such treatment is to exclude the service in question from the application of the rules on public procurement applicable to it.

**Costs**

40      Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

**Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage), in particular Article 1(1) and Article 4(1) thereof,**

**must be interpreted as precluding national legislation whose purpose is to treat maritime transport services like rail transport services, where the effect of such treatment is to exclude the service in question from the application of the rules on public procurement applicable to it.**