

II

(Preparatory Acts)

COMMITTEE OF THE REGIONS

63RD PLENARY SESSION, HELD ON 15 AND 16 FEBRUARY 2006

Opinion of the Committee of the Regions on the Revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road

(2006/C 192/01)

THE COMMITTEE OF THE REGIONS,

HAVING REGARD TO the Revised proposal for a Regulation of the European Parliament and of the Council on public passenger transport services by rail and by road (COM(2005) 319 final) — 2000/0212 (COD);

HAVING REGARD TO the Council's decision of 27 September 2005, under the first paragraph of Article 265 and Article 71 of the Treaty establishing the European Community, to consult it on this matter;

HAVING REGARD TO the decision of its President of 23 March 2005 to instruct the Commission for Territorial Cohesion Policy to draw up an opinion on this issue;

HAVING REGARD TO 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, as last amended by Regulation (EEC) No 1893/91;

HAVING REGARD TO the Proposal for a Regulation on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM(2000) 7 final, as amended by COM(2002) 107 final);

HAVING REGARD TO its opinion (CdR 292/2000 fin ⁽¹⁾) on the Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway COM(2000) 7 final — 2000/0212 (COD);

HAVING REGARD TO the judgment of the Court of Justice of 24 July 2003 in Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* and the judgment of the Court of Justice of 11 January 2005 in Case C-26/03 *Stadt Halle and RPL Recycling Park Lochau GmbH v Arbeitsgemeinschaft Thermische Restabfall- und Energiverwertungsanlage TREA Leuna*;

HAVING REGARD TO the draft opinion on this issue (CdR 255/2005 rev. 1) adopted on 2 December 2005 by the Commission for Territorial Cohesion Policy (rapporteur: **Mr Bernard Soulage**, First vice-president of the Regional Council of Rhône-Alpes (FR/PES));

adopted the following opinion at its 63rd plenary session, held on 15 and 16 February 2006 (meeting of 16 February).

⁽¹⁾ OJ C 253 of 12.9.2001, p. 9.

I. General comments

The Committee of the Regions:

believes that the creation of a level playing field and the **reduction in legal uncertainty** will help to promote public transport;

thinks that harmonisation and clarification of competition conditions in the provision of public transport services are necessary in order to ensure greater **transparency with regard to public service obligations** and the remuneration of services provided.

1. *With respect to contractual arrangements for public service obligations:*

1.1 **endorses** the recognition of the specific nature of public aid for the provision of **services of general economic interest** and the definition of public service contracts which clarify the rights and obligations of each party;

1.2 **welcomes** the neutrality of the regulation with regard to the **social and territorial objectives** pursued by each competent authority;

1.3 **supports** the principle of contractual arrangements, which recognises the role of public service obligations in meeting social and territorial cohesion objectives. **Public service contracts** make it possible to specify public service obligations and the costs they entail in a transparent manner.

2. *With respect to the organisation of services:*

2.1 **welcomes** the fact that, with due regard for the **subsidiarity principle**, the proposed regulation provides local and regional authorities with the necessary flexibility to respond more effectively to the specific or complex local requirements of public transport services, in line with their social and territorial cohesion objectives;

2.2 **reiterates** its commitment to the **principle of free administration** of local and regional authorities, which recognises their right to freely choose how to organise their public transport services; this is in line with legislation in most Member States;

2.3 **welcomes** the fact that the competent authorities are **free to choose the method of management**, which goes some way towards recognising the diversity of local requirements and production conditions;

2.4 **broadly supports** the rule concerning the **geographical jurisdiction** of internal operators (Article 5(2)), which will help to remove most of the suspicion surrounding 'incompatible' aid, while maintaining the possibility to use an internal operator; **believes** that the principle of geographical jurisdiction does not rule out the possibility for a local authority to

operate certain transport services which extend beyond its administrative boundaries;

2.5 **reaffirms** its favourable position towards opening up markets in the local public transport sector, in line with the principles of '**regulated competition**', which underlines the requirement to meet the needs of the most vulnerable members of society and job-seekers in less advantaged neighbourhoods while at the same time being environmentally sustainable;

2.6 **welcomes** the fact that the proposed regulation recognises the **responsibility of the competent authorities** for organising the provision of services on the basis of contractual arrangements. The competent authorities will be able to choose whether to base the operation of transport services on one or several contracts, and are free to determine how to allocate risk;

2.7 **welcomes** the **flexibility** allowed in competitive tendering: the public service contract procedure may involve negotiations (Article 5(3)) or be replaced by a direct award in the event of the disruption of services (Article 5(5));

2.8 **is surprised** that **inland waterway and maritime transport** in urban areas have been excluded from scope of the proposed new regulation. Similarly, it regrets that the proposed regulation does not apply to inland water transport services where such services are an integral part of the local public transport network.

3. *With respect to public transport providers:*

3.1 **notes** that the regulation does not restrict **private initiative** on passenger transport markets which have been deregulated at national level (without exclusive rights and without compensation);

3.2 **feels** that the nature of regulation is such that it will help to prevent the emergence of new monopoly positions in local public transport and will not exclude **SMEs** from the market;

3.3 **is satisfied with** the proposed balance between the **relative powers** of the competent authorities and large transport companies. In order to ensure good, efficient local transport it is important to have strong regional influence in planning and organising public transport. With commuter transport on the increase, a high degree of coordination of national and regional public transport tenders is also required;

3.4 **supports** the exclusion of long-distance and **regional rail transport** from the scope of Article 5 of the regulation;

3.5 **has doubts about the feasibility** of implementing the proposed rules to **determine fair compensation** for public service obligations. The difficulty (even impossibility) of determining fair compensation could become a source of legal uncertainty;

3.6 **points out** that no provision is made for **regulating direct awards in the regional** or long-distance **rail transport** sectors. Some companies will be able to operate on the basis of 'direct awards' in the regional and long distance sectors and at the same time take part in invitations to tender. A close eye needs to be kept on possible distortions of competition.

4. *With respect to the form and substance of the text:*

4.1 **is surprised** that nowhere in the proposal does the Commission explain why it has opted for a regulation, the most binding instrument of Community integration;

4.2 **notes** that, as situations vary widely across Member States, the draft regulation proposes **definitions which are quite loose in some cases**, but entrusts Member States with the responsibility of establishing more specific definitions in their respective territories. This applies particularly to the definition of urban areas (Article 2(m)), where the requisite transport zones rarely coincide with the authorities' geographical boundaries.

II. Recommendations

Amendments

Recommendation 1

Article 1(2)

Text proposed by the Commission	CoR amendment
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.	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.

Reason

As regards the scope of the regulation, the CoR regrets the modal approach adopted in the proposal, which underestimates the importance of promoting **intermodality** in integrated local transport policies. The CoR would like to see consideration given to intermodality issues in order to encourage authorities to award public service contracts based on multimodal transport systems (underground railway, trams, buses, funicular railway, inland waterways, parking services, car and bicycle hire, multimodal stations, information systems, etc.).

Recommendation 2

Article 2(j): Definitions

Text proposed by the Commission	CoR amendment
(j) 'internal operator' means a legally distinct entity over which the competent authority exercises complete control similar to that exercised over its own departments. For the purposes of determining whether such control exists, 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 have to be taken into consideration;	(j) 'internal operator' means a legally distinct entity over which the competent authority exercises control similar to that exercised over its own departments. For the purposes of determining whether such control exists, 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 have to be taken into consideration. <u>The status of internal operator precludes all participation by a private undertaking in the capital of the service provider of more than 33%. Direct award to an internal operator is also possible if, by derogation from Article 2 (j), the internal operator, for the purposes of restructuring, enters into cooperation with an external operator over which the authority does not exercise control. Once the directly-awarded contract in the case described above has expired, the internal operator can no longer be considered for a new direct award.;</u>

Reason

The CoR calls for a more precise definition of internal operator and of the rules governing the control exercised over an internal operator by the competent authority.

The initial recommendation is, in fact, in line with the precedent established by the judgment in the Stadt Halle case of 11 January 2005 (Case C-26/03), which, in paragraph 49, states that: '... the participation, even as a minority, of a private undertaking in the capital of a company in which the contracting party in question is also a participant excludes in any event the possibility of that contracting authority exercising over that company a control similar to that which it exercises over its own departments'.

The Stadt Halle ruling clearly means that participation by any private operator, irrespective of its level of involvement, in a local or regional public undertaking requires application of Community regulations in the area of public procurement, where red tape is extremely burdensome. In addition, it effectively calls into question the neutrality of ownership, as enshrined in Article 295 of the EC Treaty, and restricts the scope for action of public-private partnerships (PPP). The Stadt Halle judgment creates more problems for mixed-economy companies than it solves.

Therefore, the CoR asks the European legislative authorities not to accept that Community legislation be dictated by Community case law and to propose a maximum threshold below which the competent authority is considered to exercise control similar to that which it exercises over its own departments, in which case it would be exempt from the requirement for competitive tendering.

The purpose of the draft regulation is to create a regulated competitive market in the European Union. This cannot happen without functioning operators, whether they are public or private. The aid rules in the EC Treaty are intended to prevent state authorities from using public funds to distort competition in favour of certain businesses. However, they are not intended to force public enterprises out of the market. So that public-sector transport operators are able to prepare for the opening of the market, transitional provisions are needed. Otherwise, such operators will be at a disadvantage vis-à-vis private businesses due to 'burdens' associated with their public service obligation (such as standard wages and services at off-peak times and for certain population groups). Therefore, for a pre-defined transition period, public enterprises should be allowed to achieve competitiveness through private investment without this — during the transition period — automatically requiring a call for tenders. Otherwise public enterprises would be left with the choice between forced privatisation or doing without more efficient structures.

Recommendation 3

Article 2 (m): Definitions

Text proposed by the Commission	CoR amendment
<p>...</p> <p>(m) 'regional or long-distance transport' means a transport service which does not cater to the transport needs of an urban centre or conurbation or connect a conurbation with its suburbs.</p>	<p>...</p> <p>(m) 'regional or long-distance transport' means a transport service which does not cater to the transport needs of an urban centre or conurbation or connect a conurbation with its suburbs <u>which is not specifically urban or suburban.</u></p>

Reason

It would be regrettable if legal uncertainty were to arise in this area because of diverging interpretations of the derogation in Article 5(6). To improve the definition of regional or long-distance transport services, the CoR proposes either making clear in the text that Member States will themselves have to specify which services fall within the scope of Article 2(m), or choosing a definition which uses terms that have been tested in law. In the latter case, the CoR proposes that the definition based on geographical needs ('conurbation', 'urban centre', 'suburbs') be replaced by one that is service-based and which, inter alia, would be

consistent with the 'railway packages'. Directives 2001/13/EC (Article 1(2)(b)) and 2001/14/EC (Article 1(3)(b)) refer, in this connection, to 'urban or suburban rail passenger services'. A similar service-based classification has been used since 1991 in Regulation 1191/69 (Article 1(1), as amended by Regulation No 1893/91).

Recommendation 4

With respect to projects where the public procurement directives are applicable, the Committee of the Regions:

- **calls for** a clear priority rule to be set out — based on the principle that the more specific law takes precedence (*lex specialis*) — in respect of the provision of the present proposal for a Regulation vis-à-vis the rules laid down in the general Directives on public procurement;
- **would like to see** the inclusion in the present regulation of detailed provisions on **concession** contracts which clarify the arrangements governing them in relation to public procurement directives (93/37 and 2004/18);
- **calls for** more explicit treatment in Articles 5(1) and 8(1) of BOT (Built, Operate and Transfer) contracts. The regulation must clarify the legal conditions which apply where an exclusive right (and/or compensation) is associated with the construction of heavy infrastructure.

Recommendation 5

Article 4(6)

Text proposed by the Commission	CoR amendment
6. If necessary, having regard to the conditions of depreciation of assets, the duration of the contract may be extended by a maximum of 50% if the operator provides assets which are both significant in relation to the overall assets needed to carry out the transport services covered by the public service contract and are linked exclusively to the transport services covered by the contract.	6. If necessary, having regard to the conditions of depreciation of assets, the duration of the contract may be extended by a maximum of 50% if the operator provides assets which are both significant in relation to the overall assets needed to carry out the transport services covered by the public service contract and are linked exclusively to the transport services covered by the contract. <u>The duration of the contract may not be extended on the grounds of tangible or intangible investment where a secondary market exists or where the residual value of the investment on expiry of the contract can easily be estimated.</u>

Reason

The derogation in Article 4(6) concerning the depreciation of assets must not be such as to constrain competition by extending the duration of contracts without economic justification.

Recommendation 6

Article 4 (add a new paragraph)

CoR amendment
4.8 <u>Paragraphs 5 and 6 of this Article shall not apply in cases where the directives on the award of public contracts are applicable. In these cases, the maximum duration of the public service contract shall be set at thirty years from the effective date of the commencement of work.</u>

Reason

The CoR proposes that work and operating concessions be made the subject of a separate article, as the duration of the operation is a key factor for the economic balance of the project. In such cases, provision must be made for a derogation from the maximum duration of 22.5 years provided for in the proposed regulation.

Recommendation 7

Article 5(4)

Text proposed by the Commission	CoR amendment
4. The competent authorities may decide to award public service contracts directly where their average annual value is estimated at less than EUR 1 million or where they concern the annual provision of fewer than 300 000 kilometres of transport services.	4. The competent authorities may decide to award public service contracts directly where their average annual value <u>per undertaking</u> is estimated at less than EUR + <u>1½</u> million or where they concern the annual provision of fewer than 300 000 <u>500 000</u> kilometres of transport services.

Reason

The CoR proposes that a competent authority be expressly prohibited from making a direct award of several contracts to the same service provider where the total combined value of the contracts exceeds the threshold set in Article 5(4). This article must not be used to circumvent the requirement to organise an invitation to tender, but rather to avoid the transaction costs involved in an invitation to tender where the service which is contracted out is of a 'small scale' or where the competent authority offsets the competitive pressures associated with an invitation to tender by making a comparison between different 'small operators' active within its territory. In addition, the CoR suggests that each Member State fix the threshold value in line with national economic conditions.

Recommendation 8

Articles 8(2) and 8(3)

Text proposed by the Commission	CoR Amendment
2. Each competent authority shall ensure that: (a) at least half of its public service contracts for transport by coach and bus, by value, are awarded in accordance with this Regulation within four years of its entry into force; and (b) all of its public service contracts for transport by coach and bus are awarded in accordance with this Regulation within eight years of its entry into force.	2. Each competent authority shall ensure that: (a) the at least half of its public service contracts for transport by coach and bus, by value, are awarded in accordance <u>with Article 4</u> of this Regulation within four years of its entry into force; and (b) all of its public service contracts for transport by coach and bus are awarded in accordance <u>with Article 5</u> of this Regulation within eight years of its entry into force.
3. Each competent authority shall ensure that: (a) at least half of its public service contracts for transport by rail, by value, are awarded in accordance with this Regulation within five years of its entry into force; and (b) all of its public service contracts for transport by rail are awarded in accordance with this Regulation within ten years of its entry into force.	3. Each competent authority shall ensure that: (a) the at least half of its public service contracts for transport by rail, by value, are awarded in accordance <u>with Article 4</u> of this Regulation within five years of its entry into force; and (b) all of its public service contracts for transport by rail are awarded in accordance with <u>Article 5</u> of this Regulation within ten years of its entry into force.

Reason

As they stand at present, these two paragraphs will cause major difficulties for competent authorities wishing to entrust the operation of their transport network to a single operator. Within four or five years, they would be required to establish a public service contract and organise competitive tendering.

Recommendation 9

Article 8(5)

Text proposed by the Commission	CoR Amendment
5. For the application of paragraphs 2, 3 and 4, no account shall be taken of public service contracts awarded before the entry into force of this Regulation on the basis of a fair competitive tendering procedure, provided that they are of limited duration comparable to the durations specified in Article 4(5) of this Regulation. Such contracts may continue until they expire.	5. For the application of paragraphs 2, 3 and 4, no account shall be taken of public service contracts awarded before the entry into force of this Regulation on the basis of a fair competitive tendering procedure , provided that they are of limited duration comparable to the durations specified in Article 4(5) of this Regulation. Such contracts may continue until they expire.

Reason

Contracts established before the entry into force of the regulation and expiring before the end of the transition period for application of the regulation should be continued until they expire so as to avoid legal proceedings relating to compensation for losses.

Recommendation 10

Article 8(6) (delete)

Text proposed by the Commission	CoR Amendment
<p>The competent authorities may, in the second half of the transitional periods specified in paragraphs 2 and 3, exclude from participation in the award of contracts by invitation to tender those operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right awarded 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. For the application of this criterion, no account shall be taken of contracts awarded by emergency measure as specified in Article 5(5).</p> <p>Where competent authorities make use of this possibility, they shall do so without discrimination, exclude all potential operators fulfilling this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.</p> <p>They shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender.</p>	<p>The competent authorities may, in the second half of the transitional periods specified in paragraphs 2 and 3, exclude from participation in the award of contracts by invitation to tender those operators which cannot provide evidence that the value of the public transport services for which they are receiving compensation or enjoy an exclusive right awarded 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. For the application of this criterion, no account shall be taken of contracts awarded by emergency measure as specified in Article 5(5).</p> <p>Where competent authorities make use of this possibility, they shall do so without discrimination, exclude all potential operators fulfilling this criterion and inform the potential operators of their decision at the beginning of the procedure for the award of public service contracts.</p> <p>They shall inform the Commission of their intention to apply this provision at least two months before the publication of the invitation to tender.</p>

Reason

The article is particularly ambiguous and could lead to discrimination and disputes.

Brussels, 16 February 2006

The President
of the Committee of the Regions
Michel DELEBARRE