



Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 28 June 2016¹

Case C-292/15

**Hörmann Reisen GmbHv
Stadt Augsburg
Landkreis Augsburg(Request for a preliminary ruling**

from the Vergabekammer Südbayern (Public Procurement Board of the *Land* of Southern Bavaria, Germany))

(Public procurement — Public passenger transport services by omnibus — Regulation (EC) No 1370/2007 — Article 4(7) — Subcontracting — Requirement for the public service operator to perform a major part of the public passenger transport services itself — Scope — Article 5(1) — Contract award procedure — Award of the public contract in accordance with Directive 2004/18/EC)

1. Under Directive 2004/18/EC,² contracting authorities may restrict successful tenderers in their use of subcontracting only in very limited circumstances.³ That is consistent with EU public procurement law's objective of encouraging small and medium-sized undertakings to become involved in the public contracts procurement market and thus contribute to opening-up public procurement to competition. By contrast, in Regulation (EC) No 1370/2007⁴ defining how the competent authorities may act in order to guarantee the effective provision of public passenger transport services of general interest, the EU legislature laid down specific rules on subcontracting. Regulation No 1370/2007 allows the competent authorities to decide whether such services may or may not be subcontracted, so as to ensure the best use of public funds. If the former, the regulation nevertheless requires the selected operator to perform 'a major part' of those services itself ('the self-provision requirement'). In the present reference the Court has first to examine whether these specific rules apply to a contract for the provision of public passenger transport services by bus which, according to Regulation No 1370/2007, must be awarded in accordance with Directive 2004/18. The referring court also seeks guidance on the scope of the self-provision requirement in that regulation.

1 — Original language: English.

2 — Directive 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). The version of Directive 2004/18 relevant to the facts in the main proceedings is that last amended by Commission Regulation (EU) No 1336/2013 of 13 December 2013 (OJ 2013 L 335, p. 17). Directive 2004/18 has been repealed and replaced, with effect from 18 April 2016, by Directive 2014/24/EU of the European Parliament and the Council of 26 February 2014 on public procurement and repealing Directive 2004/18 (OJ 2014 L 94, p. 65).

3 — See, for an overview of the case-law and the underlying principles, my Opinion in *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2015:761, points 29 to 43.

4 — Regulation 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). Regulation No 1370/2007 replaced Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway (OJ, English Special Edition 1969(I), p. 276). As recital 6 of Regulation No 1370/2007 confirms, Regulation No 1191/69 contained no provision on the award of public transport services contracts.

Legal background

Directive 2004/18

2. Directive 2004/18 coordinates procedures for the award of public contracts above a certain value.⁵ It aims to ensure that the award of public contracts by the State, regional or local authorities and other bodies governed by public law entities ‘is subject to ... the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency’. It also aims to ‘guarantee the opening-up of public procurement to competition’.⁶ In order to encourage small and medium-sized undertakings to become involved in the public contracts procurement market, the directive contains provisions on subcontracting.⁷

3. Article 1(2)(a) defines ‘public contracts’ as ‘contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of [Directive 2004/18]’. Pursuant to Article 1(2)(d), ‘public service contracts’ are ‘public contracts other than public works or supply contracts having as their object the provision of services referred to in Annex II’, thus including ‘land transport services’.⁸ Under Article 1(4), a ‘service concession’ is ‘a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely in the right to exploit the service or in this right together with payment’.

4. Pursuant to the first paragraph of Article 25 (‘Subcontracting’), ‘in the contract documents, the contracting authority may ask or may be required by a Member State to ask the tenderer to indicate in his tender any share of the contract he may intend to subcontract to third parties and any proposed subcontractors’.

Regulation No 1370/2007

5. According to recital 9 of Regulation No 1370/2007, all competent authorities in the Member States must, in order to be able to organise their public passenger transport services ‘in the manner best suited to the needs of the public’, ‘be able to choose their public service operators freely, taking into account the interests of small and medium-sized enterprises, under the conditions [set out] in the regulation’. That recital further states that, ‘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’.

6. Recital 19 states in particular that ‘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’.

5 — At the material time, Directive 2004/18 applied to public service contracts such as that at issue in the main proceedings whose estimated value was at least EUR 207 000, net of VAT (Article 7(b), first indent, of Directive 2004/18).

6 — Recital 2.

7 — Recital 32.

8 — Annex II A, Category 2.

7. Article 1(1) states that the purpose of Regulation No 1370/2007 is ‘to define how, in accordance with [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’. To that end, the regulation ‘lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, [should] compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations’.

8. Pursuant to Article 1(2), Regulation No 1370/2007 applies 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’.

9. Article 2 contains the following definitions:

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

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

...

(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 ...’

10. Article 3(1) provides that, 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 must do so within the framework of a public service contract.

11. Article 4, entitled ‘Mandatory content of public service contracts and general rules’, provides in particular:

‘1. Public service contracts ... shall:

...

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

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

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

in a way that prevents overcompensation. ...

...

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 [EU] law, determine the conditions applicable to subcontracting.’

12. Article 5, entitled ‘Award of public service contracts’, states 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/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.’

13. Article 5(2) to (6) contains rules on the award of public service contracts which derogate from EU public procurement law. For example, ‘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’.⁹

14. Article 8(2) sets out a transitional period for implementing Article 5. Whilst the award of public service contracts by rail and by road is subject to Article 5 as from 3 December 2019, Member States are required gradually to comply with that provision during the transitional period in order to avoid serious structural problems.¹⁰ Article 8(2), second subparagraph, (3) and (4) of Regulation No 1370/2007 provide further details of that transitional requirement. However, it follows from the last sentence of Article 8(1) that Article 8(2) to (4) does not apply to public service contracts for public passenger transport services by bus to which Article 5(1) refers.

Factual background, procedure and questions referred

15. On 7 March 2015, Stadt Augsburg (the City of Augsburg) and Landkreis Augsburg (the rural district authority of Augsburg) (together ‘the contracting authorities’) published in the *Official Journal of the European Union* a contract notice inviting tenders for the provision of public passenger transport services by omnibus (‘Lech North bundle of routes’).¹¹ According to that contract notice, tenderers were entitled to award up to 30% of the transport services (measured in timetable kilometres) to subcontractors.

16. Hörmann Reisen GmbH is a small or medium-sized undertaking established in Germany and active in public transport. In order to participate successfully in that contract award procedure, it would have to make more extensive use of subcontracting than allowed in the contract notice.

17. Hörmann Reisen therefore contested the restriction on subcontracting before the Vergabekammer Südbayern (Public Procurement Board of the *Land* of Southern Bavaria, Germany). It argues that Article 5(1) of Regulation No 1370/2007 renders that regulation inapplicable in the main proceedings and that the restriction on subcontracting is incompatible with Directive 2004/18. The contracting

9 — Article 5(4).

10 — Article 8(2), first subparagraph.

11 — OJ 2015/S 47-81632.

authorities submit, on the contrary, that Regulation No 1370/2007 is applicable in the main proceedings and that Article 4(7) of that regulation authorised them to restrict subcontracting as they did. The self-provision requirement of at least 70% that they imposed is consistent with obliging the selected operator to perform ‘a major part’ of the public passenger transport services concerned.

18. Considering that the outcome of the proceedings before it turns on which EU rules apply to the contract award procedure at issue, the Vergabekammer Südbayern (Public Procurement Board of the *Land* of Southern Bavaria) stayed those proceedings and requested a preliminary ruling on the following questions:

- ‘(a) In the case of an award procedure under Article 5(1) of [Regulation No 1370/2007] in conjunction with [Directive 2004/18] or Directive 2014/24/EU, in principle are the provisions of those directives alone applicable, with the result that any provisions of [Regulation No 1370/2007] which derogate from those directives are not to be applied?
- (b) In the case of [such an] award procedure ..., is the permissibility of subcontracting therefore governed exclusively by the rules developed by the Court of Justice in connection with [Directive 2004/18] and by the provisions of Article 63(2) of [Directive 2014/24] or can a contracting authority, in derogation from the foregoing, stipulate a percentage rate of self-provision (measured in timetable kilometres), in accordance with Article 4(7) of [Regulation No 1370/2007]?
- (c) In the event that Article 4(7) ... is applicable to award procedures under Article 5(1) of [Regulation No 1370/2007] in conjunction with [Directive 2004/18] or [Directive 2014/24], does the determination of the self-provision rate lie within the discretion of the contracting authority, taking into account recital 19 of [that] Regulation ..., with the result that the requirement by the contracting authority of a self-provision rate of 70%, measured in timetable kilometres, is justifiable?’

19. Written observations have been submitted by Hörmann Reisen, the contracting authorities and the European Commission. No hearing was requested and none was held.

Assessment

Preliminary observations

20. The Vergabekammer Südbayern (Public Procurement Board of the *Land* of Southern Bavaria) is a ‘court or tribunal’ within the meaning of Article 267 TFEU and is therefore entitled to refer questions to the Court for a preliminary ruling.¹²

21. The contracting authorities and the Commission refer, in their written submissions, both to Directive 2004/18 and to Directive 2004/17/EC.¹³ Directive 2004/17, which is commonly referred to as the ‘sectoral directive’,¹⁴ would apply to a situation such as that in the main proceedings only if the contracting authorities themselves provided transport services within the meaning of Article 5 of that

12 — See, to that effect, judgment of 18 September 2014 in *Bundesdruckerei*, C-549/13, EU:C:2014:2235, paragraphs 20 to 23.

13 — Directive 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).

14 — See, for example, judgment of 10 April 2008 in *Ing. Aigner*, C-393/06, EU:C:2008:213, paragraph 26.

directive.¹⁵ However, the Court lacks sufficient information to determine whether that condition is met and, even if that were so, whether the facts are such that Article 5(2) of Directive 2004/17 excludes the application of that directive.¹⁶ Moreover, the questions referred do not mention Directive 2004/17. I shall therefore not consider that directive further in what follows.

22. Furthermore, the referring court seeks guidance from the Court on Articles 4(7) and 5(1) of Regulation No 1370/2007 in conjunction with either Directive 2004/18 or Directive 2014/24. However, according to settled case-law, the applicable directive is, as a rule, the one in force when the contracting authority chooses the type of procedure to be followed and decides definitively whether a prior call for competition needs to be issued for the award of a public contract. Conversely, a directive is not applicable if the period prescribed for its transposition expired after that point in time.¹⁷ Thus, the Court has recently held that to apply Directive 2014/24 before the expiry of the period prescribed for its transposition would prevent the Member States, as well as contracting authorities and economic operators, from benefiting from a sufficient period in which to adapt to the new provisions introduced by that directive.¹⁸ That is particularly relevant regarding subcontracting: here, Article 63(2) of Directive 2014/24 introduces significant changes compared to Article 25 of Directive 2004/18.¹⁹ In the case in the main proceedings, the contract notice was published on 7 March 2015, that is to say more than a year before the deadline for transposing Directive 2014/24. Accordingly, Directive 2014/24 is inapplicable *ratione temporis* in the main proceedings and I shall consider the referring court's questions only from the point of view of Regulation No 1370/2007 and Directive 2004/18.

23. The referring court provides no information on the value of the public service contract at issue. However, the contract notice published in the *Official Journal of the European Union* indicates that the contract was to cover approximately 639 000 kilometres of passenger transport services by bus.²⁰ It seems to me that the Commission is probably right in deducing that the value of the contract exceeds the threshold for triggering Directive 2004/18.²¹ That however is ultimately a matter for the referring court to verify.

24. By its first and second questions, the referring court essentially asks whether the public passenger transport services by bus which are the subject matter of the public service contract at issue are governed by the specific rules on subcontracting in Article 4(7) of Regulation No 1370/2007, even though that contract is to be awarded in accordance with Directive 2004/18. I shall therefore examine these questions together. The third question is distinct as it concerns the scope of the self-provision requirement in the second sentence of Article 4(7). I shall therefore address that question separately.

15 — That is, the 'provision or operation of networks providing a service to the public in the field of transport by railway, automated systems, tramway, trolley bus, bus or cable' (Article 5(1) of Directive 2004/17).

16 — It follows from Article 5(2) of Directive 2004/17, read in conjunction with Article 2(4) of Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (OJ 1993 L 199, p. 84), that the provision of bus transport services to the public is excluded from the scope of Directive 2004/17 where other entities are free to provide those services, either in general or in a particular geographical area, under the same condition as the contracting entities.

17 — See, most recently, judgment of 7 April 2016 in *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 83 and the case-law cited.

18 — Judgment of 7 April 2016 in *Partner Apelski Dariusz*, C-324/14, EU:C:2016:214, paragraph 86.

19 — Article 63(2) of Directive 2014/24 authorises contracting authorities to require 'certain critical tasks' to be performed directly by the tenderer itself or, where the tender is submitted by a group of economic operators, by a participant in that group. Unlike Article 25 of Directive 2004/18, it therefore expressly allows restrictions to be imposed on subcontracting. See my Opinion in *Wrocław — Miasto na prawach powiatu*, C-406/14, EU:C:2015:761, point 39.

20 — Point II.2.1. The contract notice also envisaged the (optional) possibility of awarding a public service contract covering approximately 834 500 kilometres.

21 — See footnote 5 of this Opinion.

Questions 1 and 2: Is a contract for public passenger transport services by bus or tram subject to the specific rules on subcontracting set out in Article 4(7) of Regulation No 1370/2007?

25. It is not in dispute that the contract at issue in the main proceedings concerns public passenger transport services by road within the meaning of Article 1(2) of Regulation No 1370/2007. Likewise, it is common ground that that contract concerns ‘public passenger transport services by bus’ within the meaning of Article 5(1) of that regulation.

26. The reference which Article 5(1) contains to the award procedures provided for in the public procurement directives excludes service concessions as defined in those directives.²² The Court has elsewhere inferred from those definitions that a *service contract* involves consideration which is paid directly by the contracting authority to the service provider while, in a *service concession*, the consideration for the provision of services consists in the right (either as such, or in conjunction with payment) to exploit the service.²³ Here, the contract notice published in the *Official Journal of the European Union* indicates that the successful tenderer is to receive payment on a monthly basis from the contracting authorities.²⁴ Although it is ultimately a matter for the referring court to verify, I consider that the Court should therefore proceed on the basis that that contract is *not* a service concession contract within the meaning of Directive 2004/18.

27. It follows that, pursuant to Article 5(1) of Regulation No 1370/2007, the contract at issue must be awarded in accordance with Directive 2004/18 rather than the specific award rules in Article 5(2) to (6) of that regulation or the transitional rules in Article 8(2) to (4) of the same regulation.²⁵

28. Does this mean that the specific rules on subcontracting in Article 4(7) of Regulation No 1370/2007 do not apply to that contract?

29. The answer to that question requires us to take a closer look at Article 5(1) of Regulation No 1370/2007. According to settled case-law, for the purpose of interpreting a provision of EU law it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part.²⁶

30. With regard, first, to the wording of Article 5(1), the first sentence of that provision indicates that contracts for public passenger transport services must be awarded ‘in accordance with the rules laid down in [Regulation No 1370/2007]’.

31. Whilst the second sentence derogates from the rule in the first sentence for public passenger transport services by bus or tram which do not take the form of service concessions contracts, the third sentence then clarifies the scope of that derogation: where a contract must be awarded in accordance with Directive 2004/17 or Directive 2004/18, ‘the provisions of paragraphs 2 to 6 of [Article 5] shall not apply’. The derogation in the second sentence of Article 5(1) thus exclusively concerns the specific rules on contract award procedures in those paragraphs. The third sentence would make no sense if the legislature’s objective was to remove contracts for the provision of public passenger transport services by bus or tram other than service concessions from the scope of the *other* provisions of Regulation No 1370/2007, including the rules on subcontracting in Article 4(7). In a situation such as that in the main proceeding, Article 4(7) thus constitutes a *lex specialis* in relation to the rules on subcontracting applicable under Directive 2004/18.

22 — See Article 1(4) of Directive 2004/18. Article 1(3)(b) of Directive 2004/17 contains a comparable definition.

23 — See, inter alia, judgment of 10 November 2011 in *Norma-A and Dekom*, C-348/10, EU:C:2011:721, paragraph 41.

24 — Point III.1.2 of the contract notice.

25 — Article 8(1), last sentence, of Regulation No 1370/2007: see point 14 of this Opinion.

26 — See, inter alia, judgments of 17 November 1983 in *Merck*, 292/82, EU:C:1983:335, paragraph 12, and 17 March 2016 in *Liffers*, C-99/15, EU:C:2016:173, paragraph 14 and the case-law cited.

32. Contrary to what Hörmann Reisen maintains, that interpretation is not inconsistent with the phrase ‘the operator entrusted with the administration and performance of public passenger transport services *in accordance with [Regulation No 1370/2007]*’ in Article 4(7).²⁷ The purpose of Article 5(1) is *not* to carve out a blanket exclusion of public passenger transport services by bus or tram from the scope of that regulation, but to specify a much more limited derogation. Regulation No 1370/2007 therefore governs the entrusting of such transport services to public service operators,²⁸ subject only to that limited derogation.

33. The context in which Article 5(1) features further supports that interpretation. The derogation for public service transport by bus or tram is found within a provision governing the ‘Award of public service contracts’. Regulation No 1370/2007 thus clearly distinguishes that issue from, *inter alia*, the ‘Mandatory content of public service contracts and general rules’, which is governed by Article 4.

34. Furthermore, the conclusion that I have reached is consistent with the scope of Regulation No 1370/2007 as defined in Article 1(2). That provision states, *inter alia*, that the regulation applies ‘to the national and international operation of public passenger transport services ... by road ...’. That wording, read together with the third sentence of Article 5(1), plainly confirms that the legislature’s intention was indeed not to carve out a blanket exclusion from the scope of Regulation No 1370/2007 for contracts for public passenger transport services by bus which are not service concessions contracts.

35. Lastly, that interpretation contributes to the regulation’s objective of enabling the competent authorities to provide services of general interest — such as the public passenger transport services by bus at issue in the main proceedings — which are more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.²⁹

36. As recital 9 of Regulation No 1370/2007 indicates, pursuing that objective presupposes that the competent authorities may choose their public service operators freely, taking into account the interests of small and medium-sized undertakings, under the conditions laid down in the regulation. Thus, whilst the EU legislature recognised that subcontracting can contribute to more efficient passenger transport, it also acknowledged that, 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’. Article 4(7) of Regulation No 1370/2007 therefore gives the competent authorities flexibility to decide whether, depending on the circumstances, subcontracting is capable of contributing to the most efficient provision of passenger transport services of general interest.³⁰

37. I see nothing in the regulation to suggest that the EU legislature intended to deprive the competent authorities of the same flexibility when they conclude contracts for the provision of public transport services by bus not taking the form of service concessions contracts.

38. I therefore conclude that Article 5(1) of Regulation No 1370/2007 must be interpreted as meaning that a public service contract for passenger transport services by bus, such as that at issue in the main proceedings, which does not take the form of a service concession contract as defined in Directive 2004/18 and which must be awarded in accordance with that directive, is governed by Regulation No 1370/2007 with the exception of the rules concerning the award of public service contracts in Article 5(2) to (6) thereof. Such a contract is thus subject to the specific rules on subcontracting set out in Article 4(7) of Regulation No 1370/2007.

27 — Emphasis added.

28 — Article 1(2).

29 — Article 1(1), first subparagraph.

30 — The second sentence of Article 4(7), however, limits that flexibility by requiring the selected operator to perform ‘a major part’ of the public passenger transport services itself. See points 39 to 47 of this Opinion.

Question 3: What is the scope of the self-provision requirement in the second sentence of Article 4(7) of Regulation No 1370/2007?

39. Article 4(7) sets out three general requirements concerning subcontracting. First, the competent authorities must indicate ‘in a transparent manner’ whether, and if so to what extent, subcontracting will be permitted. Second, if subcontracting does take place, the successful tenderer is nevertheless required to perform ‘a major part’ of the public passenger transport services entrusted to him in accordance with Regulation No 1370/2007. Third, the public service contract must determine the conditions applicable to subcontracting. By its third question, the referring court asks in essence whether the self-provision requirement in the second sentence of Article 4(7) represents a minimum and whether the competent authorities therefore enjoy a wide discretion to limit subcontracting further.

40. The expression ‘a major part’ is imprecise. It thus unquestionably leaves a certain margin to the competent authorities. Here, I would note that requiring the selected operator to provide *a* major part of the public passenger transport services is not the same as requiring him to provide *the* major part of them.³¹ As a result, I do not read the second sentence of Article 4(7) as requiring the selected operator himself to carry out ‘at least 50%’ of the services concerned. That reading seems to be confirmed by other language versions of Article 4(7).³²

41. Hörmann Reisen submits in essence that the requirement in Article 4(7) sets a *maximum level* of self-provision which competent authorities may impose. As recital 19 records, subcontracting is capable of contributing to more efficient public passenger transport services. Consequently, the competent authorities may not impose a self-provision requirement that represents *more* than ‘a major part’ of the services in question — for example, ‘most of’ or ‘the vast majority of’ those services. Hörmann Reisen therefore concludes that the minimum self-provision requirement at issue in the main proceedings (70%) is incompatible with the second sentence of Article 4(7) if that provision applies in these proceedings.

42. I do not agree. It follows from the wording of Article 4(7) and from that provision’s objective and legislative history that the self-provision requirement in its second sentence only sets a minimum.

43. First, the requirement laid down by the second sentence of Article 4(7) must be read together with the principle, set out in the first sentence, that tender documents and public service contracts must indicate whether subcontracting will be permitted (‘considered’ in the English text), *and, if so, to what extent*. That sentence suggests that the competent authorities enjoy a wide discretion to restrict subcontracting.

44. Moreover, the third sentence of Article 4(7) states that contracting authorities ‘may allow full subcontracting’ for the operation of contracts ‘covering at the same time design, construction and operation of public passenger transport services’.³³ As the third sentence is an exception to the rule in the second sentence, its wording tends to indicate that the latter sentence contains a minimum requirement only.

31 — The latter wording is used in Article 5(2)(e) of Regulation No 1370/2007. That provision however concerns the provision of public passenger transport services by an ‘internal operator’ and therefore does not appear relevant to the main proceedings.

32 — See, for example, the German version (‘einen bedeutenden Teil’), the Spanish version (‘una parte importante’), the French version (‘une partie importante’), the Italian version (‘una parte importante’), the Dutch version (‘een aanzienlijk deel’) and the Swedish version (‘en stor del’).

33 — I note that there is nothing in the order for reference (or indeed in the material available to the Court) to suggest that the public passenger service contract at issue in fact corresponds to that definition.

45. Furthermore, precluding the competent authorities from requiring selected public service operators to perform most or all of the public passenger transport services themselves would be inconsistent with the EU legislature's objective of granting these authorities flexibility in order to make the best use of public funds when organising their public passenger transport services.³⁴ It would also be difficult to justify in the light of competent authorities' (undoubted) right to exclude all forms of subcontracting (that right plainly follows from the phrase 'shall indicate ... whether ... subcontracting may be considered' in the first sentence of Article 4(7)).

46. Lastly, I am fortified in that interpretation by the legislative history of Regulation No 1370/2007. The second sentence of Article 4(7) stems from an amendment introduced by the European Parliament at the second reading stage of the procedure.³⁵ The European Parliament's Committee on Transport and Tourism justified it as follows: 'if all tests relating to deployment of vehicles and staff are passed on to subcontractors, who may in turn subcontract work, there is a risk of negative implications for existing social and quality standards. This can only be counteracted, if subcontracting does take place, by requiring the firm entrusted with a public service contract to perform the majority of the public passenger transport services itself ...'.³⁶ It seems clear to me that a contract notice requiring the selected public service operator to provide more than 'a major part' of the public passenger transport services itself — or indeed all of those services — is not capable of undermining that objective.

47. Against that background, I conclude that a contracting authority, in a situation such as that in the main proceedings, does not act in breach of the requirement in the second sentence of Article 4(7) of Regulation No 1370/2007 if it indicates in the contract notice that the successful tenderer will not be entitled to subcontract more than 30% of the public passenger transport services by bus (measured in timetable kilometres) entrusted to him by the public service contract.

Conclusion

48. In the light of the foregoing considerations, I suggest that the Court should rule to the following effect in answer to the questions raised by the Vergabekammer Südbayern (Public Procurement Board of the *Land* of Southern Bavaria):

- (1) Article 5(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 must be interpreted as meaning that a public service contract for passenger transport services by bus, such as that at issue in the main proceedings, which does not take the form of a service concession contract as defined in 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, and which must be awarded in accordance with that directive, is governed by Regulation No 1370/2007 with the exception of the rules concerning the award of public service contracts in Article 5(2) to (6) thereof. Such a contract is thus subject to the specific rules on subcontracting set out in Article 4(7) of Regulation No 1370/2007.

34 — See points 35 and 36 of this Opinion.

35 — European Parliament legislative resolution of 10 May 2007 on the Council common position for adopting a regulation of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, 13736/1/2006 – C6-0042/2007 – 2000/0212(COD) (JO 2008, C 76 E, p. 92).

36 — Recommendation of the Committee on Transport and Tourism of 4 April 2007 on the Council common position for adopting a regulation of the European Parliament and of the Council on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, 13736/1/2006 – C6-0042/2007 – 2000/0212(COD), Amendment 21. Whilst Article 4(7) uses the expression 'a major part of' instead of 'the majority of', that difference does not affect the view that I express in the last sentence of point 46.

- (2) It follows from the second sentence of Article 4(7) of Regulation No 1370/2007 that a competent authority may, in a situation such as that in the main proceedings, specify in the contract notice that the successful tenderer will not be entitled to subcontract more than 30% of the public passenger transport services by bus (measured in timetable kilometres) entrusted to him by the public service contract.