



Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

24 October 2019*

(Reference for a preliminary ruling — Regulation (EC) No 1370/2007 — Public passenger transport services — Rail transport — Public service contracts — Direct award — Obligation to publish a prior information notice in relation to the direct award — Scope)

In Case C-515/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy), made by decision of 4 July 2018, received at the Court on 6 August 2018, in the proceedings

Autorità Garante della Concorrenza e del Mercato

v

Regione Autonoma della Sardegna

intervener:

Trenitalia SpA,

THE COURT (Tenth Chamber),

composed of, I. Jarukaitis, President of the Chamber, E. Juhász (Rapporteur) and C. Lycourgos, 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:

- Autorità Garante della Concorrenza e del Mercato, by S. Gattamelata, avvocato,
- Regione autonoma della Sardegna, by S. Sau and A. Camba, avvocatessa,
- Trenitalia SpA, by L. Torchia and F.G. Albisinni, avvocati,
- the Italian Government, by G. Palmieri, acting as Agent, and by F. Sclafani, avvocato dello Stato,
- the Austrian Government, by G. Hesse, acting as Agent,

* Language of the case: Italian.

– the European Commission, by W. Mölls and G. Conte, acting as Agents,

having decided, after hearing the views of 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) and (4) 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 between the Autorità Garante della Concorrenza e del Mercato (Italian Competition Authority; ‘the Authority’) and the Regione autonoma della Sardegna (Autonomous Region of Sardinia; ‘the Region of Sardinia’), concerning the direct award of a public service contract for the transport of passengers by rail to Trenitalia SpA by the Region of Sardinia.

Legal context

European Union law

- 3 Recitals 25, 29 and 30 of Regulation No 1370/2007 state:

‘(25) Public passenger transport by rail raises specific issues of investment burden and infrastructure cost. In March 2004, the [European] Commission presented a proposal to amend Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways [(OJ 1991 L 237, p. 25)] 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.

...

(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 1 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 2(h) of that regulation defines ‘direct award’ as ‘the award of a public service contract to a given public service operator without any prior competitive tendering procedure’.
- 5 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. In derogation from Article 4(3), such contracts shall not exceed 10 years, except where Article 4(4) applies.’

6 Article 7(2) to (4) of the same regulation provides:

‘2. Each competent authority shall take the necessary measures to ensure that, at least 1 year before the launch of the invitation to tender procedure or 1 year before the direct award, the following information at least is published in the *Official Journal of the European Union*:

- (a) the name and address of the competent authority;
- (b) the type of award envisaged;
- (c) the services and areas potentially covered by the award.

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

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

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

3. In the case of a direct award of public service contracts for transport by rail, as provided for in Article 5(6), the competent authority shall make public the following information within 1 year of granting the award:

- (a) name of the contracting entity, its ownership and, if appropriate, the name of the party or parties exercising legal control;
- (b) duration of the public service contract;
- (c) description of the passenger transport services to be performed;
- (d) description of the parameters of the financial compensation;
- (e) quality targets, such as punctuality and reliability and rewards and penalties applicable;
- (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.’

7 Regulation No 1370/2007 was amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22). Given that the amending regulation entered into force on 24 December 2017, it is not applicable to the facts of the case in the main proceedings.

Italian law

- 8 Article 61 of legge n. 99 — Disposizioni per lo sviluppo e l'internazionalizzazione delle imprese, nonché in materia di energia (Law No 99 — Provisions for the development and internationalisation of undertakings, including in the energy sector) of 23 July 2009 (GURI No 176 of 31 July 2009), provides:

'Authorities responsible for the award of service contracts may, including where derogations from sectoral rules apply, have recourse to the provisions of Article 5(2), (4), (5) and (6), and of Article 8(2) of [Regulation No 1370/2007]. The exclusion under Article 18(2)(a) of [decreto legislativo n. 422 — Conferimento alle regioni ed agli enti locali di funzioni e compiti in materia di trasporto pubblico locale, a norma dell'articolo 4, comma 4, della legge 15 marzo 1997, n. 59 (Legislative Decree No 422 — Conferment of duties and powers in the area of public transport at local level to the regions and local bodies, under Article 4(4) of Law No 59 of 15 March 1997), of 19 November 1997 (GURI No 287 of 10 December 1997, p. 4)] shall not apply to undertakings, in Italy or abroad, which have been awarded service contracts within the meaning of [Regulation No 1370/2007].'

- 9 Decreto legislativo n. 50 — Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonché per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture (Legislative Decree No 50 implementing Directives 2014/23/EU, 2014/24/EU and 2014/25/EU on the award of concession contracts, on public procurement and on procurement by entities operating in the water, energy, transport and postal services sectors, and reforming the existing provisions in relation to public works, service and supply contracts), of 18 April 2016 (GURI No 91 of 19 April 2016), constitutes the new Codice dei contratti pubblici (Public Procurement Code).

- 10 Article 4 of that code provides:

'The award of public works contracts, public service contracts and public supply contracts exempted wholly or partly from the objective scope of this Code shall observe the principles of economy, efficiency, impartiality, equal treatment, transparency, proportionality, publicity, environmental protection and energy efficiency.'

- 11 Article 17(1)(i) of that code provides:

'The provisions of this Code shall not apply to contracts and service concessions concerning public passenger transport services by rail or metro.'

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

- 12 On 29 December 2015, the Region of Sardinia published, in accordance with Article 7(2) of Regulation No 1370/2007, a prior information notice concerning the direct award of public transport services by rail.
- 13 Following that publication, the region received, in addition to the proposal from the incumbent operator, Trenitalia, two expressions of interest from operators active in that sector. Against that background, one of those operators asked the Region of Sardinia to indicate a formal framework within which the competitive tendering procedure would be conducted and requested additional documentation containing more detailed information.

- 14 Believing that it did not have to open a competitive tendering procedure, the Region of Sardinia, following negotiations with Trenitalia, directly awarded to the latter, by decisions of 27 June and 17 July 2017, the local public passenger transport services by rail for the period from 1 November 2017 to 31 December 2025.
- 15 Having received information on alleged flaws in that procedure for direct award, the Authority brought an action against that award before the Tribunale amministrativo regionale per la Sardegna (Regional Administrative Court, Sardinia, Italy).
- 16 Before that court, the Authority claims that direct awards must be guided by the general principles of equal treatment, non-discrimination and transparency. The Authority notes that recitals 29 and 30 of Regulation No 1370/2007 provide for the advertisement of the intention to award public service contracts, so as to enable potential public service operators to react and, in cases of direct award, to give greater transparency. In addition, the Authority states that, since the purpose of Article 7(2) of that regulation is to give interested parties the opportunity to prepare a proposal for submission as part of the procedure for direct award, the Region of Sardinia should have asked the incumbent operator to furnish all data in its possession concerning levels of demand, number of employees, rolling stock and so on, in order to make that information available to other operators who have expressed their interest.
- 17 According to the Authority, a regional authority which intends directly to award a public service contract for the transport of passengers by rail must make available to potentially interested economic operators all the information needed to prepare a commercial offer. In addition, it should make a comparative analysis of the offers submitted following the publication of the prior information notice under Article 7(2) of Regulation No 1370/2007 and give reasons for choosing the operator to which it awards the contract.
- 18 In contrast, according to the Region of Sardinia, supported by Trenitalia, all the procedural requirements for direct award have been met and making a comparative analysis or putting into competition any offers or expressions of interest made would go against the very nature of the procedure for direct award, as provided for by Regulation No 1370/2007.
- 19 In those circumstances, the Tribunale amministrativo regionale per il Sardegna (Regional Administrative Court, Sardinia) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- ‘(1) Must Article 7(2) of Regulation No 1370/2007 be interpreted as meaning that the competent authority which intends directly to award a contract must take the necessary steps to publish or communicate to all operators potentially interested in operating the service the information necessary to allow such operators to submit a serious and reasonable offer?
- (2) Must Article 7(4) of Regulation No 1370/2007 be interpreted as meaning that, before directly awarding the contract, the competent authority must carry out a comparative assessment of all bids to operate the service which may have been received following publication of the prior information notice under that Article 7(4)?’

Consideration of the questions referred

- 20 By those questions, which must be examined together, the referring court asks, in essence, whether Article 7(2) and (4) of Regulation No 1370/2007 must be interpreted as meaning that national authorities which intend directly to award a public service contract for the transport of passengers by rail are required, first, to publish or communicate to interested economic operators all the

information necessary in order to enable them to submit a sufficiently detailed offer which may be subject to a comparative assessment and, second, to carry out such a comparative assessment of all bids which may have been received following publication of that information.

- 21 Article 7(2) of Regulation No 1370/2007 provides that each competent authority is to take the necessary measures to ensure that, at least 1 year before the launch of the invitation to tender procedure or 1 year before the direct award, the information expressly referred to in that provision at least is published in the *Official Journal of the European Union*. According to that provision, the minimum information is the name and address of the competent authority, the type of award envisaged and the services and areas potentially covered by the award.
- 22 Article 7(4) of that regulation requires that, when so requested by an interested party, a competent authority must forward to that interested party the reasons for its decision for directly awarding a public service contract.
- 23 In order to ascertain whether, as the Authority claims, those provisions require the competent authority to publish or communicate as much information as is necessary in order to carry out a comparative assessment of any bids received and to carry out an effective competitive tendering procedure, it is necessary, in accordance with settled case-law, to consider not only the wording of those provisions but also their context and the objectives of the legislation of which they form part, since the origins of those provisions may also provide information relevant to their interpretation (see, to that effect, judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 29 and the case-law cited).
- 24 As regards, to begin with, the wording of those provisions, it should be noted that their wording neither requires the publication or communication of information on the intended award allowing a bid to be drawn up which may be subject to a comparative assessment, nor provides for a comparative assessment of any bids received following publication of that information.
- 25 First, Article 7(2) of Regulation No 1370/2007 merely lists the information that the competent authority is required to publish in the *Official Journal of the European Union* at least 1 year before the direct award. Moreover, that information alone does not allow preparation of a bid which may be subject to a comparative assessment. Suffice it to mention, in that regard, that the only information referred to in that provision concerning a public service contract for the transport of passengers by rail that a competent authority intends to award directly, is the ‘services and areas potentially covered by the award’. That information does not enable an interested operator to determine the specific characteristics of the intended contract.
- 26 Second, as regards the obligation to communicate the reasons for the decision to award the contract directly, referred to in Article 7(4) of Regulation No 1370/2007, it should be noted that it cannot be inferred from the text of that provision that that obligation refers not only to the reasons leading the competent authority to make a direct award but also to the quantitative or qualitative evaluations of any bids the competent authority received.
- 27 Next, as regards the context of the provisions of Article 7(2) and (4) of Regulation No 1370/2007 and the objectives pursued by the regulation of which they form part, it must be noted, first, that that regulation establishes the rules regarding the grant of public service contracts for the transport of passengers by rail and by road, whether granted directly or by means of a competitive tendering procedure.
- 28 Article 2(h) of that regulation seeks to distinguish between two schemes for awarding public service contracts for the transport of passengers by rail and by road by defining the term ‘direct award’ as the award of a public service contract to a given public service operator without any prior competitive tendering procedure.

- 29 As a result, 'direct award' excludes any prior competitive tendering procedure.
- 30 If the provisions of Article 7(2) and (4) of Regulation No 1370/2007 were to be understood as introducing a publicity scheme substantially identical to that of a competitive tendering procedure and as requiring a comparative assessment of any bids received, such an interpretation would lead to the procedure for direct award being equated to a competitive tendering procedure and would thus ignore the important differences that Regulation No 1370/2007 provides for in their regard.
- 31 It should be borne in mind, in that respect, as is stated in recital 25 of Regulation No 1370/2007, that 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.
- 32 It should be noted, second, that in accordance with recital 30 of Regulation No 1370/2007, that regulation seeks to establish a greater level of transparency as regards public service contracts awarded directly and, according to recital 29 thereof, the publicity measures provided for in Article 7(2) of the same regulation seek to enable potential public service operators to react.
- 33 It follows that the information published under Article 7(2) of Regulation No 1370/2007 must allow an economic operator to object, from the moment referred to in that provision, to the very principle of making a direct award as intended by the competent authority (see, to that effect, judgment of 20 September 2018, *Rudigier*, C-518/17, EU:C:2018:757, paragraphs 64 and 66). Therefore, although it is necessary to ensure the effectiveness of such a right to object, the fact remains that an objection to the very principle of the direct award of a public service contract may be made by an economic operator without requiring the competent authority, as a precondition, to publish or communicate to the interested economic operators all the information that is necessary in order to allow them to submit a serious and reasonable bid.
- 34 Lastly, the origin of Article 7(2) and (4) of Regulation No 1370/2007 also confirms the literal interpretation of that provision.
- 35 In that regard, as the Austrian Government noted in its written observations, the EU legislator did not adopt a proposition submitted by the Commission during the course of preparatory work relating to Regulation No 1370/2007 seeking to further open up competition. The Commission had particularly envisaged that, in the case of directly awarded contracts, other potential operators would be able, during the 6 months following publication of the prior information notice, to submit to the competent authority, as an option, an offer to challenge the results previously achieved by the operator to whom the direct award was intended to be made. According to that proposal, the competent authority would have to consider those offers and publish the reasons for its decision to accept or reject them (Article 7(2) of the Amended 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(2002) 107 final of 21 February 2002 (OJ 2002 C 151 E, p. 146))).
- 36 However, the EU legislator opted for a version of Article 7(2) and (4) of Regulation No 1370/2007 which makes no mention of any obligation to comparatively assess any bids received after the publication provided for in Article 7(2).
- 37 In the light of all the foregoing, the answer to the questions referred is that Article 7(2) and (4) of Regulation No 1370/2007 must be interpreted as meaning that competent national authorities which intend directly to award a public service contract for the transport of passengers by rail are not required, first, to publish or communicate to any interested economic operators all the information necessary in order to enable them to submit a sufficiently detailed offer which may be subject to a comparative assessment and, second, to carry out such a comparative assessment of all bids which may have been received following publication of that information.

Costs

- 38 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:

Article 7(2) and (4) 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 competent national authorities which intend directly to award a public service contract for the transport of passengers by rail are not required, first, to publish or communicate to any interested economic operators all the information necessary in order to enable them to submit a sufficiently detailed offer which may be subject to a comparative assessment and, second, to carry out such a comparative assessment of all bids that may have been received following publication of that information.

[Signatures]