



Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS

delivered on 5 October 2023¹

Case C-390/22

Obshtina Pomorie

v

‘ANHIALO AVTO’ OOD

(Request for a preliminary ruling from the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria))

(Reference for a preliminary ruling – Transport – Regulation (EC) No 1370/2007 – Public passenger transport services by rail and by road – Article 4(1)(b)(i) – Mandatory content of public service contracts and general rules – Determination in advance, in an objective and transparent manner, of the parameters for calculating public service compensation – Additional conditions laid down in national legislation for the payment of that compensation – Reference to general rules to set the parameters on the basis of which that compensation payment is calculated)

I. Introduction

1. Regulation (EC) No 1370/2007,² which lays down a common set of rules for the payment of compensation for public service obligations in the field of public passenger transport by rail and by road, provides, in Article 4(1)(b)(i), that public service contracts and general rules are to establish in advance, in an objective and transparent manner, the parameters on the basis of which the public service compensation payment, if any, is to be calculated.

2. Is the failure to pay in full the compensation due to a public service operator for the discharge of a public service obligation, on the ground that the funds corresponding to that compensation have not been provided for in the law on the budget of that State and paid to the competent authority concerned, compatible with that provision? That, in essence, is the principal question referred by the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria).

¹ Original language: French.

² 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). Under Article 12 of Regulation No 1370/2007, it entered into force on 3 December 2009.

3. The request for a preliminary ruling has been made in the context of a dispute between Obshtina Pomorie (Municipality of Pomorie, Bulgaria) and the company ‘ANHIALO AVTO’ OOD (‘Anhialo’) concerning the grant of public service compensation due under a public service contract concluded for the provision of public passenger transport services by bus.

4. Although the Court has already had an opportunity to interpret Article 4(1)(b)(i) of Regulation No 1370/2007 in its judgment of 8 September 2022, *Lux Express Estonia* (C-614/20, EU:C:2022:641), the present case will require the Court to rule, for the first time, on whether or not a Member State may introduce conditions in addition to those already laid down in that regulation relating to the payment of public service compensation.

II. Legal context

A. European Union law

5. Article 1 of Regulation No 1370/2007, entitled ‘Purpose and scope’, states, in paragraph 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.’

6. Article 2 of that directive, entitled ‘Definitions’, provides:

‘For the purpose of this Regulation:

...

(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;

...

(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;

...

(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;

- (h) “direct award” means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;
- (i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:
 - taking the form of an individual legislative or regulatory act, or
 - containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;

...

- (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;

...’

7. Article 3 of that regulation, entitled ‘Public service contracts and general rules’, provides, in paragraphs (1) and (2):

‘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.’

8. Article 4 of that regulation, entitled ‘Mandatory content of public service contracts and general rules’, reads as follows, in paragraph 1 thereof:

‘Public service contracts and general rules shall:

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

(c) determine the arrangements for the allocation of costs connected with the provision of services. ...'

9. Article 5 of Regulation No 1370/2007, entitled 'Award of public service contracts', states:

'1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. ...

...

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.

...'

10. Article 6 of that regulation, entitled 'Public service compensation', provides, in paragraph 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.'

11. The annex to that regulation ('the Annex'), entitled 'Rules applicable to compensation in the cases referred to in Article 6(1)', states, in paragraphs 2 and 3:

'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. [...]

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.'

B. Bulgarian law

1. The Law on road traffic

12. Article 4 of the final provisions of *Zakon za avtomobilnite prevozi* (Law on road traffic)³ of 17 September 1999, in the version applicable to the dispute in the main proceedings, states, in paragraphs (1) and (3) thereof:

‘(1) The State budget of the Republic of Bulgaria shall each year include expenditure to:

1. subsidise passenger transport on unprofitable bus routes in urban areas and transport in mountainous and other regions, on a proposal from the Minister for Transport, Information Technology and Communications;
2. compensate for the loss of revenue resulting from the application of the fares provided for in legislative acts in respect of certain categories of passengers.

...

(3) The conditions and procedures for granting the funds referred to in paragraph 1, and also the conditions and procedures for issuing transport documents for the transport of certain categories of passengers provided for in legislative acts, shall be determined in an order adopted by the Council of Ministers on a proposal from the Minister for Transport, Information Technology and Communications.’

2. The 2005 Ordinance

13. *La Naredba n° 3 za usloviata i reda za predostavyane na sredstva za subsidirane na prevoza na patnitsite po nerentabilni avtobusni linii vav vatreshnogradskia transport i transporta v planinski i drugi rayoni* (Ordinance No 3 on the conditions and procedure for granting funds to subsidise passenger transport on unprofitable bus routes in urban transport and transport in mountainous and other areas)⁴ of 4 April 2005 (‘the 2005 Ordinance’), provided, in Article 1(1):

‘This Ordinance lays down the conditions and procedures for granting subsidies provided for in the central budget for urban passenger transport and inter-urban passenger transport in the country’s sparsely populated mountain and border areas.’

3. The 2015 Ordinance

14. *La Naredba za usloviata i reda za predostavyane na sredstva za kompensirane na namalenite prihodi ot prilaganeto na tseni za obshtestveni patnicheski prevozi po avtomobilnia transport, predvideni v normativnite aktove za opredeleni kategorii patnitsi, za subsidirane na obstestveni patnicheski prevozi po nerentabilni avtobusni linii vav vatreshnogradskia transport i transporta v planinski i drugi rayoni i za izdavane na prevozni dokumenti za izvarshvane na prevozite* (Ordinance on the conditions and procedure for granting funds for compensating losses of revenue due to the application of tariffs for public passenger transport by road which are

³ DV No 82 of 17 September 1999.

⁴ DV No 33 of 15 April 2005.

provided for in legislative acts in respect of certain categories of passengers, and for subsidising public passenger transport on unprofitable bus routes in urban transport and transport in mountainous and other areas and for issuing transport documents for the provision of transport services)⁵ of 29 March 2015 ('the 2015 Ordinance'), provides, in Article 1(1) and (2):

'(1) This Ordinance sets out the conditions and procedures for granting the funds provided for in the central budget to compensate and subsidise transport operators which fulfil public service obligations for free and reduced-price passenger transport and for urban and inter-urban passenger transport in mountainous and other sparsely populated areas of the country.

(2) The funds referred to in paragraph 1 shall constitute public service compensation for public passenger transport within the meaning of Regulation [No 1370/2007] and shall be granted subject to the conditions and procedures laid down by that Regulation and the national legislation in force.'

15. Article 2(1) of that ordinance reads as follows:

'The funds referred to in this Ordinance shall be granted up to the amount specified in the Law on State budget for the year concerned.'

16. Under Article 3(1) and (4) of that ordinance:

'(1) The funds covered by this Ordinance shall be granted in the form of targeted transfers from the central budget by means of the electronic budget payment system (SEBRA system). To this end, limits shall be set for municipalities which have complied with the legal procedure for awarding public passenger transport services under Regulation No 1370/2007 and the provisions of Law on public procurement or the Law on concessions, subject to the principles of openness and transparency, free and fair competition, and equal treatment and non-discrimination.

...

(4) The mayors of the municipalities shall remunerate the transport operators on the basis of the transport services actually provided.'

17. Article 55(1) and (2) of that ordinance states:

'1. Subsidies for passenger transport shall be granted to transport operators through municipal budgets, up to an amount not exceeding the sum corresponding to the net financial effect of performing the public service obligation.

2. The net financial effect shall be obtained by adding the costs incurred in relation to the public service obligation imposed by the competent authority and 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 in question, minus receipts from tariff or any other revenue generated while fulfilling the public service obligation in question, plus a reasonable profit.'

⁵ DV No 51 of 7 July 2015.

18. Article 56 of the 2015 Ordinance provides:

‘(1) Subsidies shall be granted only to transport operators with which the municipality concerned has concluded contracts which meet the requirements laid down in Regulation No 1370/2007.

(2) The contracts shall necessarily cover the following conditions:

1. the parameters on the basis of which the subsidy is calculated;
2. the nature, extent and scope of any exclusive right granted and the duration of the contract;
3. the mechanisms for determining the costs directly connected with the provision of services, such as staff costs, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and installations necessary for operating passenger transport services, and also the share of indirect costs connected with the provision of services;
4. the mechanisms for allocating the revenue from the sale of tickets, which may either remain with the public service operator, be paid to the competent authority, or be shared between the two;
5. the amount of the reasonable profit;
6. the obligation on mayors of municipalities and transport operators to carry out effective checks on passenger regularity on subsidised urban and inter-urban transport routes.

...

(4) Where transport operators fail to comply with the terms of the contracts, the mayors of the municipalities may reduce the amount of subsidies and may also suspend the grant thereof.’

III. The main proceedings, the questions referred for a preliminary ruling and the procedure before the Court

19. By decision of 14 August 2013, the governor of the Burgas Region (Bulgaria) gave his consent for the mayor of the Municipality of Pomorie to award, for a period not exceeding six months, the operation of public bus transport in accordance with the schedules specified in that decision, in particular as regards the bus route between the towns of Pomorie and Kableshkovo (Bulgaria) and Pomorie urban bus routes Nos 1 and 2. The public service contract was to be concluded by direct award under Article 5(5) of Regulation No 1370/2007 as an emergency measure to remedy the interruption of the public passenger transport service on the routes concerned due to the expiry of previously concluded contracts and, at the same time, the termination of a tender procedure for the award of a new public service contract.

20. On 1 November 2013, on the basis of that decision the Municipality of Pomorie, as the competent authority, and Anhialo, as the public service operator, concluded a contract under which that operator was entrusted with the operation of the public passenger transport service in respect of the bus routes concerned (‘the contract at issue’). Article 2 of that contract stated that the term of the contract was to run until the competent authority concluded the procedure laid down in the law on public procurement. In addition, under Article 5 of that contract, that

authority undertook to pay the operator, within the time limits set by the Ministry of Finance, the funds corresponding, where applicable, to a subsidy, in accordance with the national legislation in force, and to compensation for free and reduced-price travel for certain categories of eligible citizens, pursuant to that legislation.

21. It is established that Anhialo provided the transport services provided for in the contract at issue. On 15 January 2019, that contract was terminated following a procedure conducted under the Law on public procurement. For the period from 1 January 2016 to 31 December 2018, in respect of which Anhialo claimed payment of the compensation due under the contract at issue, the Municipality of Pomorie paid it the sum of 3 690 Bulgarian leva (BGN) (approximately EUR 1 886 on the date concerned), which corresponds to the total amount of the funds set and paid by the central budget of the Republic of Bulgaria to that municipality as subsidies for urban and inter-urban transport.

22. Contesting the amount of that sum, Anhialo brought an action before the Rayonen sad Pomorie (District Court, Pomorie, Bulgaria). A court-commissioned expert report on accounting established the net financial effect, within the meaning of the Annex to, and Article 55 of, the 2015 Ordinance, for that company for the years 2016 to 2018, which amounted to approximately BGN 86 000 (approximately EUR 43 800 on the date concerned). It is also clear from that expert report that the organisation of that company's accounts allowed for a precise breakdown of costs and revenues according to subsidised and non-subsidised activities, in accordance with the requirements laid down in the Annex. Before this court, Anhialo requested payment of the part of the amount due which remained unpaid, that is to say BGN 24 931,60 (approximately EUR 12 700 euro on the date concerned).

23. By judgment of 8 November 2021, the Rayonen sad Pomorie (District Court, Pomorie) upheld that action. That court considered in particular that the purpose of public service compensation, within the meaning of Regulation No 1370/2007, is to offset the net negative financial effect by reimbursing the operator for the cost of providing the public service and that, as the contract in question was concluded in 2013, the Municipality of Pomorie cannot claim that Anhialo was not entitled to public service compensation on the ground that that contract does not contain the mandatory conditions referred to in Article 56(2) of the 2015 Ordinance. In the view of that court, having regard to the date of adoption of that ordinance, the requirement which it laid down to state necessarily the parameters on the basis of which the subsidy is calculated could not apply to the contract at issue and, given that Anhialo provided the public transport service for which that contract was concluded, it is entitled to a subsidy and the competent authorities are required to grant it public service compensation in accordance with Regulation No 1370/2007.

24. The Municipality of Pomorie brought an appeal against that judgment before the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria), the referring court, arguing that the conditions laid down in the 2015 Ordinance are also contained in Regulation No 1370/2007. Since that regulation has direct effect from its adoption, that is to say 23 October 2007, it follows that the requirements under Article 4(1) thereof were in force from that date and that the fact that they are not included in the contract at issue means there is no basis for paying a subsidy. The Municipality of Pomorie also referred to Article 5 of the contract at issue, from which it concluded that its obligation to pay subsidies is not unconditional, but dependent on fulfilment of the conditions laid down in national law. Thus, it cannot be criticised for the fact that, since no subsidy was paid to its budget from the central State budget, no public service compensation

was paid to the transport operators. That municipality added that it did not have the legal authority to determine the amount of compensation and subsidies itself, but only to distribute those allocated to it in a targeted manner.

25. Anhialo argued before the referring court that Article 56(2) of the 2015 Ordinance is a provision of a substantive nature and that, as such, does not have retroactive effect. Consequently, the lawfulness of the contract at issue cannot be examined in the light of that ordinance. Regulation No 1370/2007 lays down the irrevocable right of the public service operator to public service compensation and that regulation does not expressly prohibit the payment of public service compensation in the event that the public service contract does not formally meet the requirements which it lays down. The objective of that regulation is to ensure the transparency of the mechanism for determining public service compensation and to avoid overcompensation, without depriving operators of the compensation which they are due. Anhialo also stressed that, according to the findings made by the court-commissioned expert report on accounting, it had complied with all the requirements laid down in Regulation No 1370/2007 and the 2015 Ordinance with regard to public service compensation. In the view of that company, having regard to Article 3(1) of that ordinance the grant of subsidies from the central State budget depends solely on the municipality concerned and its compliance with the statutory requirements relating to the award of public service contracts. Therefore, the Municipality of Pomorie, which is required to provide public transport in its territory, always owes the full amount of the public service compensation to the public service operator concerned, regardless of whether a subsidy was granted or not.

26. The referring court notes that the 2015 Ordinance was adopted on the basis of the Law on road traffic, in particular Article 4(1) of the final provisions thereof, and that Article 2(1) of that ordinance provides that the funds are to be granted up to the amount specified in the Law on State finance for the year concerned. That court adds that, at the same time, Article 56(1) of that ordinance provides that subsidies are to be granted only to public service operators with which the municipality concerned has concluded contracts which comply with the requirements laid down in Regulation No 1370/2007 and that the other paragraphs of Article 56 set out additional requirements concerning the content of contracts concluded with operators. As interpreted by the competent national authorities, the national law lays down, for the payment of public service compensation, the requirements that it must have been provided for in the Law on the State budget for the year concerned and paid to the competent authority. If that is not the case, the authority cannot lawfully pay that compensation to the public service operator, even if the public service contract has actually been performed.

27. However, Regulation No 1370/2007, in particular Article 6(1) thereof, does not contain such requirements as regards the payment of public service compensation. Consequently, the referring court seeks to ascertain whether that regulation permits a Member State to introduce, by way of national legislation or internal rules, additional requirements and restrictions in relation to the payment of public service compensation to an operator for the discharge of a public service obligation.

28. Furthermore, the contract at issue does not define the parameters on the basis of which the public service compensation payment is calculated, but makes a reference in that regard to national law. In the view of the referring court, since Article 4(1)(b)(i) of Regulation No 1370/2007 mentions ‘public service contracts and general rules’, the use of the conjunction ‘and’ could be interpreted as meaning that it is sufficient if the parameters on the basis of which the compensation payment is calculated are defined in general rules, that is to say those adopted

within the framework of the 2015 Ordinance and, previously, the 2005 Ordinance. Another possible interpretation is that those parameters must necessarily be set, not only in general rules, but also in the public service contract, within the meaning of that regulation.

29. In those circumstances, the Okrazhen sad – Burgas (Regional Court, Burgas) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Do the provisions of Regulation [No 1370/2007] permit a Member State to introduce, by way of national legislation or internal rules, additional requirements and restrictions in relation to the payment of compensation to a transport undertaking for the discharge of a public service obligation which are not provided for in that regulation?
- (2) Does Article 4(1)(b)(i) of Regulation [No 1370/2007] permit the payment of compensation to the transport undertaking for the discharge of a public service obligation where the parameters on the basis of which the compensation payment is to be calculated were not established in advance in a public service contract, but in general rules, and the net financial effect or the amount of compensation due was determined in accordance with the mechanism provided for in that regulation?’

30. Written submissions were lodged by the Municipality of Pomorie, the Bulgarian Government and the European Commission. The latter two interested parties also presented oral argument at the hearing held on 21 June 2023.

IV. Analysis

A. The first question referred for a preliminary ruling

31. By its first question, the referring court asks, in essence, whether Regulation No 1370/2007 must be interpreted as precluding a Member State from adopting provisions under which public service compensation, within the meaning of that regulation, may only be granted to a public service operator if the funds corresponding to that compensation have been provided for in the law on the budget of that State for the year concerned and paid to the competent authority.

32. As a preliminary point, it should be recalled that, under the second paragraph of Article 288 TFEU, a regulation is of general application and directly applicable in all Member States. Accordingly, by virtue of the very nature of regulations and of their function in the system of sources of EU law, the provisions of regulations generally have immediate effect in the national legal systems without its being necessary for the national authorities to adopt implementing measures. In so far as the implementation of certain provisions of a regulation so require, Member States may adopt implementing measures for a regulation provided that (i) they do not thereby obstruct its direct applicability or conceal its nature as an act of EU law, (ii) they specify that they are acting in exercise of a discretion conferred on them under that regulation, and (iii) they adhere to the parameters laid down thereunder.⁶

⁶ See judgment of 22 January 2020, *Ursa Major Services* (C-814/18, EU:C:2020:27, paragraphs 33 and 34 and the case-law cited).

33. In that regard, it is by referring to the relevant provisions of the regulation concerned, interpreted in the light of its objectives, that it may be determined whether they prohibit, require or allow Member States to adopt certain implementing measures and, particularly in the latter case, whether the measure concerned comes within the scope of the discretion that each Member State is recognised as having. It should also be recalled that any provision of EU law that satisfies the conditions required to have direct effect is binding on all the authorities of the Member States, that is to say, not merely the national courts but also all administrative bodies, including decentralised authorities, and those authorities are required to apply it.⁷

34. As regards the relevant provisions of Regulation No 1370/2007 in the present case, it should be noted that, under Article 1(1) of that regulation, its purpose 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 and that, to this end, that 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.

35. Consequently, Regulation No 1370/2007 governs the award to a public operator of ‘public service compensation’, defined in Article 2(g) of that regulation as 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. As stated in recital 34 of that regulation, ‘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’.

36. Furthermore, Article 3(1) of Regulation No 1370/2007 states 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 is to do so within the framework of a public service contract. Article 4(1) thereof states that public service contracts and general rules are to (a) clearly define the public service obligations with which the public service operator is to comply, and the geographical areas concerned; (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, and (c) determine the arrangements for the allocation of costs connected with the provision of services.

37. In that respect, so far as concerns Article 4(1)(b)(i) of Regulation No 1370/2007, the Court has held that, as regards the expression ‘if any’, it is apparent from the context of that provision that that expression refers to the possibility for the competent authorities, provided for in the second subparagraph of Article 1(1) and in Article 3(1) of that regulation, to choose, in the context of a public service contract, to grant operators, in addition to or instead of exclusive rights, compensation in return for the discharge of public service obligations.⁸

⁷ See judgment of 22 January 2020, *Ursa Major Services* (C-814/18, EU:C:2020:27, paragraphs 35 and 36 and the case-law cited).

⁸ See judgment of 8 September 2022, *Lux Express Estonia* (C-614/20, EU:C:2022:641, paragraphs 73 and 74).

38. In addition, under Article 5(5) of Regulation No 1370/2007, the competent authority may take an emergency measure, which may be carried out in the form of a ‘direct award’, which is defined, in Article 2(h) of that regulation, as the award of a public service contract to a given public service operator without any prior competitive tendering procedure. In such a scenario, that regulation lays down additional requirements relating to public service compensation.⁹

39. First, Article 4(1)(b) of Regulation No 1370/2007 states that, in the case of public service contracts awarded in accordance with, inter alia, Article 5(5) of that regulation, the parameters on the basis of which the compensation payment, if any, is to be calculated, are to 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.

40. Second, Article 6(1) of Regulation No 1370/2007 provides that all compensation connected with a general rule or a public service contract is to comply with the provisions laid down in Article 4 of that regulation, irrespective of how the contract was awarded and all compensation, of whatever nature, connected with a public service contract awarded directly in accordance with, inter alia, Article 5(5) or connected with a general rule is also to comply with the provisions laid down in the Annex. It states, in paragraph 2, that ‘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’. Paragraph 3 of that annex states that ‘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’ and that, ‘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’.

41. It is thus clear from the wording of the relevant provisions of Regulation No 1370/2007 that, as regards public service compensation, that regulation seeks, above all, to prevent overcompensation in favour of the public service operator,¹⁰ which would result in the unjust enrichment thereof. It should be noted that the case in the main proceedings does not concern the situation of overcompensation but, on the contrary, a lack of compensation, which is also mentioned in paragraph 3 of the Annex, where the operator is required to comply with its public service obligations, in accordance with the public service contract, without receiving any reward. In order to avoid these two types of situations, a public service contract must include the parameters for calculating the public service compensation payment, which must be set in advance in an objective and transparent manner and, in addition, as regards contracts which are awarded directly, the amount of compensation must be determined in the light of the net financial effect for the public service operator. It also follows from those provisions that, as the Court has pointed out, Regulation No 1370/2007 requires the competent authorities to grant compensation for the financial burdens resulting from public service obligations.¹¹

⁹ In that regard, recital 27 of Regulation No 1370/2007 states that 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. Furthermore, according to recital 30 of that regulation, directly awarded public service contracts should be subject to greater transparency.

¹⁰ In that connection, recital 27 of Regulation No 1370/2007 also states that 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.

¹¹ See judgment of 8 September 2022, *Lux Express Estonia* (C-614/20, EU:C:2022:641, paragraph 71).

42. In this case, it is apparent from the order for reference that Anhialo and the Municipality of Pomorie concluded the contract at issue by direct award pursuant to Article 5(5) of Regulation No 1370/2007. It is not disputed, moreover, that that company discharged the public service obligations under that contract. However, that municipality did not pay it the full amount of the public service contribution to which it was entitled, as established by a court-commissioned expert report. In that regard, the national court points out that, as interpreted by the competent national authorities, the national legislation lays down, in respect of the payment of public service compensation, the requirements that it must have been provided for in the law on the State budget for the year concerned and paid to the competent authority. In this case, however, for the period in question, the Municipality of Pomorie paid to Anhialo only the sum of BGN 3 690 (approximately EUR 1 886 on the relevant date),¹² corresponding to the total amount of the funds set and paid by the central budget of the Republic of Bulgaria to that municipality as subsidies for urban and inter-urban transport.¹³

43. Therefore, in a case such as that in the main proceedings, it must be observed, first, that the parameters on the basis of which the public service compensation payment is to be calculated are not established in advance, in an objective and transparent manner. That amount depends on the funds allocated by the State budget, which may vary from year to year, and according to criteria which are not connected to the performance of the public service contract which the public service operator has concluded. However, as stated in recital 9 of Regulation No 1370/2007, 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.

44. Second, as regards more specifically public service contracts which have been awarded directly, the condition that the funds must be set and paid by the central budget in order for the operator to be granted a public service contribution does not take account of the net financial effect on costs incurred and revenues generated in discharging a public service obligation, as required by Article 6(1) of Regulation No 1370/2007 and the Annex. However, a public service contract cannot have the effect of limiting public service compensation, the logic of which is 'remunerative',¹⁴ to the amount granted to the authority concerned from the State budget once that obligation has been determined in a contract.

45. I would add that, as the Bulgarian Government and the Commission have pointed out, a Member State, if its budgetary capacity does not permit it to do so, may decide, in respect of the future, to limit the award of public services or even not to conclude public service contracts. On the other hand, in respect of the past, where the contract has been performed by the public service operator, as in the case in the main proceedings, it seems clear to me that the operator is entitled to public service compensation in return for the public service obligations to which it has been subject, in accordance with Regulation No 1370/2007. In addition to the application of that

¹² At the hearing, it was not disputed that, in the present case, the lack of payment in full of compensation due for a public service obligation is definitive.

¹³ In its written observations, the Bulgarian Government submits that, in the event of a shortfall in the compensation funds allocated to a municipality by the central budget, the municipality could make up the shortfall with funds from the municipal budget. However, as that situation was not the subject of the questions referred by the national court for a preliminary ruling, it will not be considered further here.

¹⁴ See, to that effect, Opinion of Advocate General Campos Sánchez-Bordona in *Lux Express Estonia* (C-614/20, EU:C:2022:180, points 39 to 42).

regulation, it must be recalled that the principle of legal certainty, which is one of the general principles of EU law, requires, particularly, that rules of law be clear, precise and predictable in their effects.¹⁵

46. Furthermore, generally, Article 2(e) of the regulation, a ‘public service obligation’ is 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. In the absence of appropriate public service compensation, no operator would be disposed to provide such services of general interest. An approach consisting in linking the payment of a particular public service compensation with the payment of a grant awarded by the Member State to the competent authority, under circumstances such as those in the main proceedings, is likely to lead to non-compensation or under-compensation, which may compromise the very existence of those public service contracts and the public service obligations connected with them.

47. In those circumstances, in the light of the case-law cited in points 32 and 33 of this Opinion, it must be concluded that the national legislation concerned does not fall within the margin of discretion conferred on each Member State for the purpose of adopting measures implementing a regulation, in this case Regulation No 1370/2007, as regards determination of the public service compensation to which a public service operator is entitled.

48. In the light of the foregoing considerations, I propose that the first question should be answered to the effect that Regulation No 1370/2007 must be interpreted as precluding a Member State from adopting provisions under which public service compensation, within the meaning of that regulation, may be granted to a public service operator only if the corresponding funds have been provided for in the law on the budget of that State for the year concerned and paid to the competent authority.

B. The second question referred for a preliminary ruling

49. By its second question, the referring court asks, in essence, whether Article 4(1)(b)(i) of Regulation No 1370/2007 must be interpreted as permitting the payment of public service compensation to a public service operator where the parameters on the basis of which that compensation payment is calculated are not laid down in a public service contract but are set in advance in general rules which determine the amount of that compensation in accordance with the provisions of that regulation.

50. As a preliminary point, it should be noted that Article 2(1) of Regulation No 1370/2007 defines ‘general rule’ as 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.

51. In order to answer the question, it should be recalled that, according to the Court’s settled case-law, in interpreting a provision of EU law it is necessary to consider not only its wording but also its context and the objectives pursued by the legislation of which it forms part.¹⁶

¹⁵ See judgment of 27 April 2023, *BVAEB (Amount of retirement pension)* (C-681/21, EU:C:2023:349, paragraph 51 and the case-law cited).

¹⁶ Judgment of 4 May 2023, *Bundesrepublik Deutschland (Court electronic mailbox)* (C-60/22, EU:C:2023:373, paragraph 49 and the case-law cited).

52. In the first place, as regards the *wording* of Article 4(1)(b)(i) of Regulation No 1370/2007, that provision states that public service contracts ‘and’ general rules are to establish in advance, in an objective and transparent manner, the parameters on the basis of which the compensation payment, if any, is to be calculated in a way that prevents overcompensation. It seems clear to me that, by using the conjunction ‘and’, the EU legislature intended to include ‘general rules’ among the elements for determining the amount of compensation. In other words, the wording of that provision does not require that all the parameters for calculating the public service compensation be defined in a single document, but merely that those parameters be determined in advance, in an objective and transparent manner.

53. In the second place, so far as concerns the *context* of Article 4(1)(b)(i) of Regulation No 1370/2007, it should be noted that Article 2(i) of that regulation defines ‘public service contract’ as 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. That provision further states that, depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority taking the form of an individual *legislative or regulatory* act, or containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator. To that effect, recital (9) of the regulation states that the form or designation of the contract may vary according to the legal systems of the Member States.

54. Thus, in view of the differences between the legal systems of the Member States, the EU legislature has chosen to confer on the concept of ‘public service contract’, within the meaning of Regulation No 1370/2007, a broad and flexible meaning,¹⁷ including acts of a contractual nature but also other types of acts of a different nature,¹⁸ recognising the combination of a general legal act assigning the management of services to an operator and an administrative act detailing the requirements relating to the services to be provided and specifying the applicable method for calculating the compensation.¹⁹ That context thus supports the interpretation that the parameters for calculating public service compensation payment may be determined by reference to general rules of a legislative or regulatory nature, provided that those rules establish those parameters in advance, in an objective and transparent manner.

55. In the third place, as regards the *objectives* pursued by Regulation No 1370/2007, as is apparent from recitals 9 and 30 thereof, the objective of transparency is of particular importance in establishing the parameters for the calculating the public service compensation payment. However, in order to achieve that objective, it does not appear necessary for all the parameters for calculating the public service compensation payment to be contained in the contract concluded between the competent authority and the public service operator. Provided that the general rules relating to the parameters for calculating the compensation payment are established in advance in an objective and transparent manner, as required by Article 4(1)(b)(i) of that regulation, and comply with the conditions set out in the Annex, a public service operator may determine the amount of compensation it is likely to receive. In addition, in the application

¹⁷ See, in legal literature, Vieu, P., ‘À propos de l’intégration de l’Europe des transports. Observations sur l’interprétation et l’application de la norme européenne : le cas du règlement OSP’, *RTD eur.*, 2010, n° 2, pp. 297 to 331, in particular p. 320.

¹⁸ See, in legal literature, Franco Escobar, S.E., ‘Las compensaciones económicas por obligaciones de servicio público en el transporte regular de viajeros por carretera’, *Financiación de las obligaciones de servicio público: ayudas públicas a las telecomunicaciones, televisión, correos y transporte aéreo, marítimo y terrestre*, Tirant lo Blanch, 2009, Madrid, pp. 201 to 230, in particular p. 211.

¹⁹ See, in that connection, Communication from the Commission on interpretative guidelines concerning Regulation No 1370/2007 (OJ 2014 C 92, p. 1), in particular paragraph 2.2.1.

of that provision, those general rules must be easily accessible for the operators concerned. That is the case, *inter alia*, where those rules are published in the Official Journal of the Member State concerned.

56. Therefore, I propose that the second question should be answered to the effect that Article 4(1)(b)(i) of Regulation No 1370/2007 must be interpreted as permitting the payment of public service compensation to a public service operator where the parameters on the basis of which that compensation payment is calculated are not laid down in a public service contract but are fixed in advance, in an objective and transparent manner, in general rules which determine the amount of that compensation in accordance with the provisions of that regulation.

V. Conclusion

57. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Okrazhen sad – Burgas (Regional Court, Burgas, Bulgaria) for a preliminary ruling as follows:

- (1) 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 precluding a Member State from adopting provisions under which public service compensation, within the meaning of that regulation, may be granted to a public service operator only if the corresponding funds have been provided for in the law on the budget of that State for the year concerned and paid to the competent authority.

- (2) Article 4(1)(b)(i) of Regulation No 1370/2007

must be interpreted as permitting the payment of compensation to a public service operator where the parameters on the basis of which that compensation payment is calculated are not laid down in a public service contract but are fixed in advance, in an objective and transparent manner, in general rules which determine the amount of that compensation in accordance with the provisions of that regulation.