



## Reports of Cases

Case C-421/22

**'DOBELES AUTOBUSU PARKS' SIA and Others**

v

**Iepirkumu uzraudzības birojs,  
'Autotransporta direkcija' VSIA**

(Request for a preliminary ruling from the Augstākā tiesa (Senāts))

**Judgment of the Court (Fifth Chamber) of 21 December 2023**

(Reference for a preliminary ruling – Transport – Public passenger transport services by rail and by road – Regulation (EC) No 1370/2007 – Article 1(1) – Article 2a(2) – Article 3(1) – Article 4(1) – Article 6(1) – Contract for public passenger transport services by bus – Procedure for the award of a public services contract – Open, transparent and non-discriminatory tendering procedure – Specifications – Amount of compensation granted by the competent national authority – Indexation limited in time and categories of specific costs – Allocation of risks)

*Transport – Public passenger transport services by rail and by road – Regulation No 1370/2007 – Award of contracts for public passenger transport services by bus – Open, transparent and non-discriminatory tendering procedure – Compensation for the costs of passenger transport undertakings inherent in public service obligations – Arrangements for allocating costs – Margin of discretion of the competent national authorities – Possibility for those authorities to lay down a compensation scheme that does not automatically cover all the costs associated with the management and the operation of that service – Admissibility – No periodic indexation of costs – Infringement of the principle of proportionality – None*

*(European Parliament and Council Regulation No 1370/2007, Arts 1(1), 2a, 3(1), 4(1) and 6(1))*

(see paragraphs 41-44, 46-52, 54-56, 58, 59, operative part)

### Résumé

An open tendering procedure was launched in Latvia with a view to awarding the right to provide public passenger transport services by bus on the network of lines of regional interest for a period of 10 years.

'Dobeles Autobusu parks SIA' and several other Latvian companies active in the transport sector brought an action before the Iepirkumu uzraudzības biroja Iesniegumu izskatīšanas komisija (Complaints Review Board of the Public Procurement Supervision Office, Latvia) challenging the provisions set out in the tender specifications. According to the applicants, those specifications and the corresponding draft contract established an unlawful compensation mechanism for the service at issue, which did not provide for a full procedure for revising the price of that service in

the event of variations in costs having an effect on that price. As the Board dismissed their action, those companies brought an action before the Administratīvā rajona tiesa (District Administrative Court, Latvia). That court also dismissed their action, on the ground, in essence, that the State is not required to cover all the costs of the operators of a public transport service during the procedure for revising the fare chargeable under the contract for the service and that the indexation procedure provided for in the draft public procurement contract is not contrary to the requirements imposed by Regulation No 1370/2007 on public passenger transport services by rail and by road.<sup>1</sup>

Hearing an appeal on a point of law, the Augstākā tiesa (Senāts) (Supreme Court (Senate), Latvia), the referring court in the present case, decided to refer a question to the Court of Justice for a preliminary ruling in order to determine whether Regulation No 1370/2007 authorises a compensation scheme that does not provide for the periodic indexation of the fare chargeable under the contract having regard to increases in costs inherent in the provision of the service that are beyond the control of the tenderer.

By its judgment, the Court examines whether Member States may, in the context of public service contracts concluded following an open, transparent and non-discriminatory tendering procedure, establish a compensation mechanism that leads to the transfer of risks linked to changes in costs to a provider of passenger transport services, thereby bringing about a risk of undercompensation as a result of the increase in some of those costs. In that regard, the Court considers that Regulation No 1370/2007 does not preclude such a compensation scheme, which does not require the competent national authorities to grant the provider of that public service, subject to public service obligations, full compensation covering, by means of periodic indexation, any increase in the costs associated with the management and the operation of that service which are outside of its control.

### *Findings of the Court*

In the first place, the Court notes that, under Article 4(1) of Regulation No 1370/2007, public service contracts must, first, 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,<sup>2</sup> and, second, determine the arrangements for the allocation of costs connected with the provision of services.<sup>3</sup>

It is clear that the competent national authorities, in so far as they are responsible for setting the parameters for calculating the compensation due to a provider of a public transport service and for defining the arrangements for allocating the costs connected with the provision of that service, enjoy, in the context of a public service contract, a margin of discretion in devising the mechanism for such compensation. In particular, the Court states that the possibility of allocating the costs necessarily implies that those authorities are not required to compensate all the costs, but may transfer to the provider of that public service the risks associated with changes to some of those costs, irrespective of whether or not that provider can fully control such changes, since those fall within circumstances outside of that provider's control.

<sup>1</sup> 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, as amended by Regulation (EU) No 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22) ('Regulation No 1370/2007').

<sup>2</sup> The first subparagraph of Article 4(1)(b)(i) of Regulation No 1370/2007.

<sup>3</sup> Article 4(1)(c) of Regulation No 1370/2007.

It therefore follows from the wording of Article 4(1) of Regulation No 1370/2007 that the competent national authorities may, in the exercise of their margin of discretion, provide for a system of compensation which, by reason of the parameters for calculating such compensation and the arrangements for allocating the costs defined by those authorities, does not automatically guarantee the provider of the public transport service full coverage of those costs.

In the second place, after recalling that the purpose of Regulation No 1370/2007 is to define the conditions for the granting of compensation in order to guarantee a public passenger transport service that is both efficient and financially profitable,<sup>4</sup> the Court infers from this that any compensation scheme must seek not only to avoid overcompensation of costs, but also to promote greater efficiency on the part of the provider of a public transport service. A compensation scheme that guarantees, in all circumstances, the automatic coverage of all costs associated with the performance of a public service contract does not contain such an incentive for greater efficiency, since the provider in question is not required to limit its costs.

In contrast, a compensation scheme which, in the absence of periodic indexation, does not automatically cover all of those costs, but results in the transfer of certain risks to the public service provider, may contribute to the attainment of such an objective. Even with regard to costs that are beyond the control of the service provider concerned, the efficiency gains that it has acquired will enable it to strengthen its financial viability in order to meet those costs, which will help to ensure the proper performance of the obligations laid down by the public service contract.

In the third place, the Court states that, where a public service contract is awarded following a competitive tendering procedure, such a procedure has, in itself, the effect of minimising the amount of compensation due to the public transport service provider, thereby avoiding, by an automatic adjustment, not only excessive compensation but also insufficient compensation.

Any service provider that decides to take part in a tendering procedure with a view to performing a public service contract itself determines the terms of its tender in the light of all the relevant parameters and, in particular, the probable trend in costs that are likely to affect the provision of the service, thereby defining the level of risk that it is prepared to assume. It may therefore be presumed that if it is awarded the contract, the tender will provide it with a rate of remuneration for the capital employed that corresponds to the level of risk incurred. It follows that a compensation scheme linked to a public service contract awarded following an open, transparent and non-discriminatory tendering procedure, in itself, guarantees the provider of that public service coverage for its costs, also guaranteeing it appropriate compensation, the amount of which will vary according to the level of risk that the provider is prepared to assume.

Accordingly, the competent national authorities are therefore not required, in the context of a competitive tendering procedure, to automatically compensate, by means of periodic indexation, all of the costs borne by the provider of a transport service in connection with the performance of a public service contract, regardless of whether or not they are under its control, with the effect that that contract provides that provider of a transport service with appropriate compensation.

Moreover, the absence of a mechanism for periodic indexation of costs cannot, on its own, be regarded as constituting an infringement of the principle of proportionality. A provider of transport services that participates in a tendering procedure itself determines the terms of its tender and the level of risk that it is prepared to assume with regard to the compensation

<sup>4</sup> Article 1(1), Article 2a(2) and point 7 of the annex to Regulation No 1370/2007, read in the light of recitals 4, 7, 27 and 34 thereof.

arrangements set out in the public service contract, and in particular, the absence of such a mechanism. Therefore, if a competent national authority had to consider, in the context of a competitive tendering procedure, conditions that are unreasonable or are excessive in view of the risks to be assumed by the public service provider concerned, it would be unlikely that tenders would be submitted to it and the authority would have to amend those conditions in order to make them compatible with the principle of proportionality.

As regards the possibility that a provider of passenger transport services, in the hope of winning the contract, offers a fare chargeable under the contract that does not take sufficient account of a future increase in costs and which renders that provider of passenger transport services unable to perform the contract in an appropriate manner, that is inherent in every tender procedure. Therefore, that possibility does not justify that public service contracts concluded following an open tendering procedure always include a periodic indexation mechanism guaranteeing, automatically, full compensation for any increase in the costs connected with their performance, regardless of whether or not those costs are under the control of the service provider.