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from : For the Secretary-General of the European Commission
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to : Mr Javier SOLANA, Secretary-General/High Representative

Subject : 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

Delegations will find attached Commission document COM(2002) 107 final.

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 21.2.2002
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2000/0212(COD)

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

(presented by the Commission pursuant to Article 250(2) of the EC Treaty)

EXPLANATORY MEMORANDUM

A. Principles

1. In September 2000, the Commission submitted a proposal for a Regulation of the European Parliament and the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway (COM (2000) 7 final – 2000/0212 (COD)) for adoption by the co-decision procedure laid down in Article 251 of the Treaty establishing the European Community.
2. On 14 November 2001, the European Parliament adopted a series of amendments at its first reading. The Commission gave its position on these amendments.
3. In the light of this, the Commission drafted this amended proposal.
4. The objectives of the Commission's original proposal were:
 - a) to stimulate more efficient and attractive public transport, through the use of controlled competition and other measures¹;
 - b) to promote legal certainty for authorities and operators².

¹ Controlled competition is associated with more efficient and attractive public transport.

The table compares trends in public transport in 30 large EU cities during the 1990s. Cities using controlled competition attracted most new passengers. They also had the best financial performance.

	Annual rate of change in numbers of passenger trips	Annual rate of change in the proportion of operating costs covered by fares
Cities using controlled competition	+ 1.8%	+ 1.7%
Cities without competition in public transport	- 0.7%	+ 0.3%
Cities using deregulation without significant control by public authorities	- 3.1%	+ 0.3%

Similarly, the two Member States that made most use of controlled competition in heavy rail – the UK and Sweden – were those where passenger numbers grew fastest between 1994 and 1999.

The advantages of controlled competition compared with deregulation are also shown by a comparison between London and the rest of England. Between 1986 and 2000, the number of trips on local buses in London (using controlled competition) increased by 13%. In the rest of England (under deregulation) the number of trips on local buses fell by 34%.

² The development of an international market in the operation of public transport means that the requirements of Community competition law must now apply to the public transport sector. In other sectors, the application of Community competition law has put the organisation of the sector – and in particular, the use of exclusive rights – into question. The principles on which these judgements are based apply equally in the public transport sector. Already the Court is considering cases that affect public transport, although these cases do not concern exclusive rights. The alternative to the adoption of a regulation by the Parliament and Council is not 'business as usual' – it is the likelihood of reform of the sector on the basis of court judgements.

The two objectives are linked. Legal uncertainty hinders efforts to plan better public transport.

5. The same principles guide the amended proposal. It incorporates new provisions which reinforce these objectives or achieve them in a simpler way.

B. Explanation of the amendments

Recitals

The Commission amends the recitals to clarify the logic of the regulation and reflect changes.

The new text accepts Parliament amendments 1, 2, 3, 5, 6, 7, 13, 14, 15 (in part), 17, 20, 21 and 132 (some with revised wording). It does not accept amendments 4, 9, 12, 18, 19, 120 and 133.

New recitals 20-26 clarify the relationship between this regulation and the public procurement directives. They include Parliament amendment 8.

Article 1 – purpose and scope

The Commission accepts Parliament's amendment 22 in part. This underlines that the regulation aims to improve public transport.

The regulation continues to apply to the whole public transport sector. Parliament amendment 23 would limit it to local transport. The Commission does not accept this.

The Commission accepts the part of amendment 23 that excludes historic rail. Public transport is not the main purpose of historic rail services.

Article 2 – relationship to public procurement law

The public procurement directives³ lay down competition rules for some contracts. These rules are stricter than those in the regulation.

Article 2 continues to give priority to the rules in the public procurement directives, where they apply.

Parliament amendment 24 would give priority to the rules in the regulation. But this contravenes the Community's commitments under the Government Procurement Agreement of the World Trade Organisation. The Commission does not accept it.

The competition rules in the public procurement directives do not apply to all contracts. They do not apply to:

- service concessions
- contracts for heavy rail, metro and inland waterway

³ Directives 92/50/EEC, 93/36/EEC, 93/37/EEC and 93/38/EEC

- some cases where the operator is closely linked to the authority for which the service is provided, or is a body ‘governed by public law’.

Therefore, these are the contracts that will be covered by the competition rules in the regulation.

Parliament amendment 8 aims to clarify which contracts are covered by the competition rules in the regulation, and which by the rules in the public procurement directives. The Commission accepts the need for clarification. As well as accepting this amendment, it amends articles 2 and 3(j)(ii); adds new recitals 20-26; and adds a new article 3(i) defining concessions in public transport.

Article 3 – definitions

For consistency with the deletion of original article 7(4), the Commission deletes original article 3(d).

New article 3(d) defines ‘inland waterway’, accepting the principle of Parliament amendment 26.

Under Community state aid rules, compensation for the fulfillment of public service requirements may include a reasonable profit for the operator. The Commission amends article 3(f) to make this clear.

New article 3(g) defines ‘people with reduced mobility’, accepting Parliament amendment 30 in principle.

To support amendments to article 2, the Commission adds article 3(i) and amends article 3(j)(ii) (previously article 3(h)) – accepting Parliament amendment 29 in principle.

The Commission does not accept Parliament amendments 25, 27, 28 and 107/119.

Article 4 – competent authorities' duties

Under this article, previously article 4(1), authorities must make sure – in applying the regulation - that their area has adequate public transport.

Parliament amendment 31 gives more depth to the concept of adequate transport. At the same time, it defines this as an objective to be aimed at, not a result that must under all circumstances be achieved.

The Commission amends the paragraph along these lines.

Article 4a - criteria

Article 4a(1), previously article 4(2), lists factors that contracts should take into account. Parliament amendments 33-40, 43 and 45-48 reinforce protection for consumers and the environment. The new text incorporates them (revising some wordings).

Amendments 41, 44 and 127 require contracts to take into account prevailing employment conditions and the health and safety of employees. The Commission accepts this, clarifying the first point.

The Commission does not accept amendments 49, 116 and 131.

Community public procurement law presently prohibits the use as award criteria of some of the factors in article 4a(1). To maintain this position, the Commission amends article 2, adding article 4a(1) to the list of rules which will not apply when contracts are subject to the competition procedures in the public procurement directives.

National borders are often an obstacle to regional public transport links. Amendments 40, 47, 61 (part) and 84 show Parliament's concern about this. The Commission adds new article 4a(2) to help authorities develop cross-border regional transport.

Article 4b - passenger information

The Commission accepts Parliament amendment 108 in principle. This improves information for people with reduced mobility under article 4b, previously article 4(3).

Article 6 – award of public service contracts

The Commission amends the introductory phrase, and adds a new concluding sentence, to show how the different parts of the regulation fit together.

Parliament amendment 54 increases the standard maximum duration of contracts from five years to eight years (bus) and fifteen years (rail). The Commission amends article 6(c) to accept this.

Long contracts are needed to pay for long-lived investment. Particularly in rail, investments can take longer than fifteen years to pay for themselves. Parliament amendment 54 would solve this problem by making new operators indemnify their predecessors. However, this favours incumbents. It also limits the transfer of risk to operators. The Commission does not accept this part of the amendment. Instead the new text, like the original, provides for even longer rail contracts where this is necessary for investment. Competent authorities can still introduce non-discriminatory indemnity provisions if they wish.

Article 6a - contents of public service contracts

Parliament amendments 51 (part) and 55-59 promote good practice in contracting. New article 6a incorporates these amendments (with revised wordings).

Article 6a (1)(d) brings rules for the geographical extent of contracts into the main text (this was previously a recital).

Article 7 – direct award of public service contracts

Article 7(2) of the original proposal allows competent authorities to award contracts for light rail and metro services without competition where this is the most efficient approach.

Parliament amendments 62 and 63 widen the basis for this exception.

The Commission revises article 7(2), and adds a new article 7(3), to accept this in part.

The Commission accepts Parliament amendment 65, deleting the exception from competition for certain 'integrated services' in article 7(4) of the original proposal.

The Commission accepts Parliament amendment 66. This increases the general ‘de minimis’ exception in article 7(4), previously 7(5), from an annual value of €400 000 to €1 000 000. It increases the exception for small networks from €800 000 to €3 000 000. The second change will particularly affect rural areas.

The Commission adds new article 7(6) to show how the different parts of the regulation fit together.

Summary of the provisions for direct award	
Heavy rail	<ul style="list-style-type: none"> - If national or international rail safety standards could not be met in any other way - If the annual value of the contract is less than €1 000 000 - If the annual value of the whole network is less than €3 000 000, and it is awarded in a single contract
Metro	<ul style="list-style-type: none"> - If the size or technical uniqueness of the system means that the incumbent would have a significant advantage under competitive tendering - If direct award will lead to public money or publicly financed assets being used more efficiently - If the annual value of the contract is less than €1 000 000 - If the annual value of the whole network is less than €3 000 000, and it is awarded in a single contract
Light rail	<ul style="list-style-type: none"> - If direct award will lead to public money or publicly financed assets being used more efficiently - If the annual value of the contract is less than €1 000 000 - If the annual value of the whole network is less than €3 000 000, and it is awarded in a single contract
Bus and inland waterway	<ul style="list-style-type: none"> - If the annual value of the contract is less than €1 000 000 - If the annual value of the whole network is less than €3 000 000, and it is awarded in a single contract

Article 7a – safeguards for directly awarded contracts

To ensure that the exceptions in articles 7(1) to 7(3) serve the interests of passengers, the new text has three safeguards:

- competent authorities must make their decisions in a way that permits public debate (new article 7a(1), previously 7(3))
- as part of this, competitors can come forward with an alternative plan of their own (new article 7a(2))
- competent authorities must review the operator’s performance every five years (new article 7a(3)).

The Commission does not accept Parliament amendment 64. This would delete new article 7a(1).

Article 7b - emergency action

Parliament amendments 70, 78, 85 and 86 permit competent authorities to award contracts directly in emergencies – for example, when the operator goes bankrupt. The Commission accepts these in principle and groups them in a new article 7b.

Article 8 – quality comparison

The Commission amends article 8(1) to show how the different parts of the regulation fit together.

Quality comparison is a less transparent procedure than calls for tender. It should not give indirect access to large sums of public money. It should not allow a single operator to ‘lock up’ a whole public transport network.

The Commission rejects Parliament amendment 69, which would undermine these principles.

It also adds a new article 8(2).

Without this, the changes to article 10 would permit unlimited access to public money for contracts awarded through quality comparison.

Article 9 – safeguards

Public transport markets sometimes end up dominated by a few operators. Articles 9(1) and 9(2) enable competent authorities to resist this.

The Commission does not accept Parliament amendments 71 and 72, which delete these provisions. Instead, the new text makes them more precise – including Parliament amendment 79 in principle and in part.

Article 9(3) extends authorities’ ability to protect employees when contracts change hands. The Commission’s original proposal limited this to cases where there is an exclusive right. The new text removes that limitation. The Commission does not accept Parliament amendment 134, which would make this provision compulsory.

Under the Treaty, competent authorities can insist that operators establish themselves in the Member State in question. However, operators from other countries should still be able to tender without being established. Article 9(4) sets rules for this. The new text makes them more precise. The Commission does not accept Parliament amendment 74, which would make establishment compulsory.

Article 10 – general rules

Competent authorities can make general rules that apply to all operators – for example, to carry elderly people at half fare. They can reimburse operators for the cost of complying with these rules.

Article 10 sets out conditions for doing this.

Parliament amendments 77 and 130 remove some of these conditions. The Commission accepts this (130 with simpler wording).

It is important that compensation for general rules is paid in a way that promotes quality and efficiency. The new text therefore includes a requirement in article 10(4) for general rules to

incorporate standards of quality and reliability. This paragraph also includes the principle of Parliament amendments 76 and 124.

Article 11 - notification

This article is needed to save trouble for authorities. Without it, Member States would have to notify the Commission before giving aid to operate public transport. In accordance with Article 89 of the Treaty, this exception from the state aid rules has to take the form of a regulation (not a directive).

Article 12 – award procedures

The new text makes these provisions more precise. It includes Parliament amendments 79 (in part) and 80.

Article 13 – transparency

The Commission amends article 13(1) to show how the different parts of the regulation fit together.

For consistency with the amendment to article 7(4), the Commission accepts Parliament amendment 81, increasing the thresholds for publication in article 13(2).

The Commission accepts Parliament amendment 82. This increases the detail of the information made public under article 13(3).

The Commission simplifies the reporting procedure in article 13(5). This includes the principle of Parliament amendment 83.

To support the amendment to article 19(2), the Commission adds a new article 13(6).

Article 14 - appeals

The Commission simplifies this procedure. It includes Parliament amendment 84 in principle, and 87.

Article 15 – accounting

Operators should not be able to improve their competitive position by misusing compensation granted for the provision of public services elsewhere. Article 15 aims to ensure this. As a response to Parliament's concern about the question of reciprocity, the new text reinforces its provisions. It includes Parliament's amendments 79 (in principle and in part) and 88. It recognises that operators should be able to make a reasonable profit.

Article 17 – transitional measures

Parliament amendments 90 and 93 extend the transition period from three to eight years. The Commission partly accepts this. It adds new article 17(4) to require competent authorities to implement the regulation in two steps, beginning four years after the regulation enters into force and finishing after eight.

Some Member States already use fair competition to award contracts. Some of these contracts have longer durations than article 6(c) permits. Parliament amendment 92 allows such contracts to run their natural course. In article 17(1), the Commission accepts this principle.

Special status for local, publicly owned operators

Parliament's most far-reaching amendment is 61, creating a new article 8. This would protect local public transport services from competition, if the competent authority decides to provide the services itself.

In its report to the Laeken European Council on Services of General Interest⁴, the Commission recognises that "as a general rule, Community law leaves it up to the Member States to decide whether they provide public services themselves, directly or indirectly (through other public entities), or whether they entrust their provision to a third party".

However, the amendment adopted by Parliament goes further. It would permit competent authorities to grant themselves exclusive rights to provide local public transport. Such exclusive rights distort competition and could still be challenged under the competition rules of the Treaty.

The Commission therefore responds to amendment 61 by including new articles 17(2) and (3). These permit competent authorities to decide to provide bus services themselves for a long transition period of eight years, without the obligation to start the phasing out of these arrangements after four years. Beyond that period, authorities may only continue these arrangements on condition that no exclusive right is awarded. This means that other operators will then be free to offer additional, commercially viable services to the citizens of the area. Authorities should in such cases introduce appropriate general rules to protect quality and integration. Such a continuation of arrangements would need the approval of the Commission.

Reciprocity

Structural reciprocity clauses, applied in circumstances where Community law does not require market opening, are not compatible with the non-discrimination provisions of the Treaty.

By contrast, Community law may insist on market opening, but permit a step by step transition to this. In these cases, to avoid imbalance in market opening, a 'transitional reciprocity clause' is acceptable under Community law. This should not be a general approach and should only be used exceptionally.

Recognising Parliament's concern on this point, the new text includes a transitional reciprocity clause in article 17(7).

No reciprocity clause can be found in Community public procurement law. To maintain this position, the Commission amends article 2, adding article 17(7) to the list of rules which will not apply when contracts are subject to the competition procedures in the public procurement directives.

⁴ COM (2001) 598 final

Article 18 – operators from third countries

The Commission amends the article, and deletes annex II, to show more clearly how the different parts of the regulation fit together, accepting the principle of Parliament amendment 125.

Article 19 – monitoring

Article 19(2) provides for the Commission to report on the application of the regulation, five years after it enters into force.

Parliament amendment 95 adds to the subjects this report will cover. The Commission accepts this in principle.

To make this report, the Commission will need information. The Commission adds article 13(6) to provide for this.

Annex I – rules governing compensation in the absence of competitive tendering

The Commission simplifies these rules. This reflects the principle of Parliament amendments 89 and 96.

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

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 71 and 89 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the Economic and Social Committee²,

Having regard to the opinion of the Committee of the Regions³,

Acting in accordance with the procedure laid down in Article 251 of the Treaty,

Whereas:

- (1) The development of the highest possible standards of public service in the provision of passenger transport by rail, road, ~~rail~~ and inland waterway is, **as a means of boosting the use of sustainable forms of transport**, one of the primary Community objectives under the Common Transport Policy. **The Common Transport Policy moreover aims to achieve a substantial shift to sustainable transport modes. The European Council of Gothenburg of 15 and 16 June 2001 placed modal shift at the heart of the Community's sustainable development strategy.**
- (2) **Many socially necessary transport services are currently unable to operate on a commercial basis.** Competent authorities in the Member States ~~have recourse to three main mechanisms in pursuing this objective: the conclusion of public service contracts with operators;~~ **should be able to intervene to secure the provision of these services. Mechanisms that competent authorities can use to secure the provision of public passenger transport services include: the granting of awarding** exclusive rights to operators; **granting financial compensation to operators;** and ~~the laying down of minimum standards~~ **general rules** for public transport operation, **applicable to all operators.**

¹ OJ C

² OJ C **221/04 (7.8.01) p.31.**

³ OJ C **253/09 (12.9.01) p.9.**

- (3) **Competent authorities in the Community provide public passenger transport services in different ways: by acting themselves directly, by acting indirectly through companies they control, or by entrusting provision to third parties, public or private.**
- (34) It is important to clarify the legal position of such mechanisms **and ways of providing services** with respect to Community law. **Competent authorities should ensure that their actions are in compliance with the rules and principles of the Treaty that aim to ensure equal treatment and fair competition between undertakings.**
- (45) In relation to inland transport, Article 73 of the Treaty refers to the discharge of certain obligations inherent in the concept of public service. Council Regulation (EEC) No 1191/69 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 waterway⁴ establishes a Community regulatory framework for public passenger transport, implementing ~~this~~ **that** Article of the Treaty and indicating how competent authorities in the Member States can ensure adequate transport services which contribute to sustainable development, social integration, environmental improvement and regional balance.
- (56) Many Member States have introduced legislation providing for the award of fixed-duration exclusive rights and public service contracts, in at least part of their public transport market, on the basis of open, transparent and fair award procedures. In the light of those developments, **in** the application of Community rules on the freedom of establishment, and **in** the application of Community public procurement rules, significant progress has been made towards Community/EEA-wide market access in public transport. As result, trade between Member States has substantially developed and several public transport operators are now providing services in more than one Member State.
- (67) However, the opening of the market on the basis of national legislation has led to disparities in the procedures applied and has created legal uncertainty as to the rights of operators and the duties of competent authorities.
- (78) Studies carried out on behalf of the Commission⁵, and the experience of States where competition in the public transport sector has been in place for a number of years, show that, with appropriate safeguards, the introduction of ~~regulated~~ **controlled** competition between Community operators in this sector leads to more attractive services at lower costs and is not likely to obstruct the performance of the specific tasks assigned to the operators.
- (89) It is important to update the Community legal framework in order to ensure the further development of **controlled** competition in the provision of public passenger transport services and to take into account the new legal approaches which Member States have

⁴ OJ L 156, 28.6.1969 p. 1; Regulation as last amended by Regulation (EEC) No 1893/91 (OJ L 169, 29.6.1991, p. 1).

⁵ ~~'Improved structure and organisation for urban transport operations of passengers in Europe' Isotope consortium, CEC, 1998; 'Examination of Community law relating to the public service obligations and contracts in the field of inland passenger transport', submitted to the European Commission by NEA Transport research and training, 1998.~~

- introduced in regulating the provision of public passenger transport services. This is in line with the conclusions of the European Council of Lisbon of 28 March 2000 ~~where~~ **at which** the Commission, Council and the Member States, each in accordance with ~~their~~ **its** respective powers, were asked to ‘speed up liberalisation in areas such as transport’. The updating of the Community legal framework will offer an opportunity to ensure that the smooth opening of the market is guaranteed at Community level and that basic elements of competitive procedures in all Member States are harmonised.
- (10) **Procedures should be based on the principle of neutrality with regard to the rules governing property ownership under Article 295 of the Treaty, the principle of freedom to define services of general interest under Article 16 of the Treaty, and the principle of proportionality under Article 5 of the Treaty.**
- (911) Article 16 of the Treaty establishes the need to ensure that services of general economic interest operate on the basis of principles and conditions which enable them to fulfil their missions. The development of competition should therefore be accompanied by Community rules that ~~guarantee~~ **promote** the protection of the general interest in terms of adequate ~~quality and availability~~ **in all regions of high-quality, reasonably priced public transport, accessible to people with reduced mobility and providing full social coverage. The term "reduced mobility" does not automatically imply any form of medical impairment.** In securing this general interest, it is important for consumers and interested parties to have at their disposal integrated information about the services available.
- (12) **Environmental protection requirements should be integrated into the application of this Regulation to ensure that, when assessing the adequacy of public passenger service networks, defining selection and award criteria, and awarding public service contracts, competent authorities take environmental factors into account, in particular rational energy use and local, national and international standards and norms, especially those concerning the emission of air pollutants, noise and greenhouse gases.**
- (4013) Freedom of establishment is a basic principle of the common transport policy and requires that **all** operators of a Member State **legally** established in another ~~a~~ Member State be guaranteed effective access to the public transport market of that State in a transparent way and without discrimination.
- (414) The Treaty lays down specific rules with regard to restrictions on competition. Article 86(1) of the Treaty, in particular, obliges ~~the~~ Member States to adhere to ~~these~~ **those** rules with regard to public undertakings and undertakings which have been granted exclusive rights. Article 86(2) of the Treaty subjects undertakings entrusted with the operation of services of general economic interest to these rules, under specific conditions.
- (15) **In observing the requirements of the Treaty in the public passenger transport sector, in particular those requirements relating to services of general economic interest and exclusive rights, Member States should be able to use a range of approaches.**
- (16) **Passenger transport markets which are deregulated and in which there are no exclusive rights should be allowed to maintain their characteristics and way of functioning, insofar as these are compatible with Treaty requirements.**

- (17) **As an alternative to deregulation, competent authorities should be able to choose controlled competition for services of general economic interest. This can take the form of competition for the award of exclusive rights; or the assignment of particular tasks to publicly-owned operators in a context where other operators are also free to provide services, but where all operators are constrained by quality and integration requirements.**
- (1218) In order to ensure the application of the principle of non-discrimination and the equal treatment of competing operators, it is essential to define basic common procedures that must be followed by competent authorities in concluding public service contracts or laying down ~~minimum criteria~~ **general rules** for public transport operation. According to the principles of Community law, competent authorities are required to ~~apply~~ **observe a** mutual recognition of technical standards and proportionality of selection criteria in implementing these procedures. In accordance with the principle of subsidiarity, such basic common procedures should nevertheless leave it open for competent authorities in the Member States to conclude public service contracts or ~~to~~ lay down ~~minimum criteria~~ **general rules** for public transport operation in ways that take account of specific national or regional circumstances, whether legal or factual.
- (1319) Studies and experience show that competitive tendering for public service contracts **can in many cases** be ~~is~~ an effective way of achieving the benefits of competition in terms of cost, efficiency and innovation without obstructing the performance of the specific tasks assigned to the operators in the general public interest.
- (1420) Mandatory tendering rules for the conclusion of certain contracts are laid down by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts⁵, **Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts**⁶, **Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts**⁷ and Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors⁸.
- (1421) Where **the mandatory tendering rules in these directives** ~~such rules~~ are applicable, those aspects of this Regulation that deal with the requirement for contracts to be tendered, and with the methods by which the selection of operators should be conducted, do not apply.
- (22) **Where the tendering rules in these directives are not compulsorily applicable, this Regulation should apply in full.**

⁵ OJ L 209, 24.7.1992, p. 1; Directive as last amended by **Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p.1)** ~~97/52/EC (OJ L 328, 28.11.1997, p. 1)~~.

⁶ **OJ L 199, 9.8.1993, p. 1; Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).**

⁷ **OJ L 199, 9.8.1993 p. 54; Directive as last amended by Commission Directive 2001/78/EC (OJ L 285, 29.10.2001, p. 1).**

⁸ OJ L 199, 9.8.1993 p. 84; Directive as last amended by **Commission Directive 98/4/EC 2001/78/EC (OJ L 285, 29.10.2001, p.1)** ~~(OJ L 101, 1.4.1998, p. 1)~~.

- (23) The tendering rules in those directives do not have to be applied to public service concessions. To help competent authorities apply this Regulation correctly, it is therefore necessary to define the concept of public service concessions as it relates to public passenger transport. Taking into account the Commission's interpretative communication on concessions under Community law⁹, a concession consists of the award to an operator of the right to exploit a particular service, together with the associated economic risk.
- (24) The tendering rules in those directives do not have to be applied when a competent authority decides to entrust an operator forming part of the same administration with the supply of services. They do not have to be applied when a competent authority decides to entrust with the supply of services an operator over which it exercises a control which is similar to that which it exercises over its own departments and which, at the same time, carries out the essential part of its activities with the controlling authority or authorities. They do not have to be applied to public service contracts which concern exclusively heavy rail, metro or inland waterway services, and not bus or light rail services.
- (25) The tendering rules in Directives 92/50/EEC and 93/38/EEC do not have to be applied when an authority awards a contract to an operator on the basis of certain exclusive rights, provided that the exclusive right is compatible with the Treaty and the operator is itself a State, a regional or local authority, a body governed by public law or an association formed by one or more of such authorities or bodies.
- (26) The tendering rules in Directive 93/38/EEC do not have to be applied when an authority awards a contract to an operator which is affiliated, as defined in that Directive, to the competent authority.
- (27) Certain rail services in Member States are operated mainly for reasons of historical preservation or recreation. They include certain services which use steam-powered locomotives, narrow track gauges or lines not connected to the public rail network. Even though they may receive incidental financial support from public bodies, these operations clearly have a purpose other than the provision of public passenger transport and should therefore not be affected by rules and procedures applying to public service requirements.
- (1528) Tendering of public service contracts should not be compulsory where safety standards would be endangered in the provision of heavy rail services.
- (1529) Tendering should also not be compulsory where ~~or the coordination of a metro or light rail network would be endangered.~~ the age, complexity or specific technical features of a metro network make it impossible to tender single lines or groups of lines without the likelihood of the incumbent operator becoming the only realistic tenderer and thereby establishing a de facto monopoly.
- (30) Where authorities consider that the savings that could reasonably be anticipated from awarding a contract for the provision of metro or light rail services following a competitive procedure would be outweighed by additional costs,

⁹ OJ C 121, 29.4.2000, p. 2.

- tendering should similarly not be compulsory. In assessing this, competent authorities should be able to take into account the cost of maintaining coordination between the operator and the manager of the infrastructure; the cost of maintaining coordination between the operator and the authority; and the costs of tendering and managing the contract. This condition will normally be considered to be fulfilled where the operating costs of the operator to whom direct award will be made are compatible with those of comparable operators, including in particular those whose contracts have been awarded by competitive tender.**
- (15) ~~Interested parties should nevertheless have the opportunity to comment on plans to award contracts in this way, in time for their views to be taken into account. Where rail contracts awarded in this way are fully integrated with bus services, it should be possible for the bus services to be included in the same contract.~~
- (4631) Tendering for public service contracts should also **likewise** not be compulsory where the contract has a low value. This value should be higher for the tendering of a whole network ~~than for the tendering of a part of a network or of a single route.~~
- (4732) Taking into account the specific, commercially viable nature of certain parts of the public transport market, ~~it should also be possible for~~ competent authorities **should be empowered** to facilitate new initiatives that arise from the market and that fill gaps not currently served by any operator, by granting an exclusive right to provide services on a particular route, where this is at the operator's request **and does not require financial compensation for operating cost losses**. It is not inappropriate for this grant to be made without tendering, provided that it is for a strictly limited period only and is not renewable.
- (4833) Where authorities grant an exclusive right but where no direct financial compensation is involved, they should be able **permitted** to grant it by means of a simplified procedure that nonetheless provides for non-discriminatory competition between operators.
- (34) **The provisions of this Regulation applicable to operators should also apply in those cases where public transport services are provided by a public administration which does not have a legal personality distinct from that of the public administration that is acting as the competent authority. Any other arrangement, by not applying these provisions to cases where the State acts in an entrepreneurial capacity, would not ensure the non-discriminatory application of Community law. The application of this approach should not, however, prevent the continuation of competent authorities' role in providing transport services, either themselves or through operators that they control, where this is in the public interest.**
- (35) **Competent authorities that provide bus services themselves, or through operators that they control, should be permitted to continue these arrangements until the end of a long transitional period.**
- (36) **Moreover, beyond the end of the transitional period, competent authorities should be able to make proposals to the Commission for the continuation of the direct provision of bus services, and to provide financial compensation to ensure the provision of socially necessary services, without the need for a competitive**

- tendering procedure, provided that other operators are able to offer supplementary services within the limitations required by non-discriminatory general rules.
- (37) However, if an authority wishes, for transport policy reasons, to exclude all other operators from offering transport services in the same area, this should be done in a way that minimises the restriction of competition. A fair competitive tendering procedure for the award of an exclusive right would normally be considered to satisfy this requirement.
- (38) In the case of heavy rail, however, Council Directive 91/440/EEC¹⁰ of 29 July 1991 on the development of the Community's railways requires railway undertakings to be managed independently of the State. It therefore rules out the direct provision of heavy rail services by public authorities.
- (39) Competent authorities are responsible for network management; that is, activities, other than the supply of public passenger transport to passengers, that contribute to the provision of a network of integrated public passenger transport services. These activities may include laying down general rules for public passenger transport operation; publicising the network and providing information for users and potential users; coordinating service timetables; designing and administering integrated ticketing schemes, including arrangements for reimbursement between operators; coordinating or providing security and inspection arrangements; organising services to react to short-term changes in demand or disruptions; providing or managing infrastructure; or providing rolling stock. Authorities should be permitted to carry out these functions themselves, to delegate them to publicly-owned operators or other agencies, or to include some or all of them in contracts awarded by way of a competitive procedure.
- (1940) ~~It should be possible for Authorities~~ should be permitted to compensate operators not only for the cost of complying with ~~minimum criteria~~ general rules for public transport operation, but also for the costs or income losses arising from activities that boost the use made of public transport, provided that this compensation can be fairly calculated and is ~~not at such a high level that it detracts from~~ accompanied by requirements that place the pressure on operators to focus primarily on the requirements of passengers. In order to ensure transparency, simplified contract award procedures and the direct award of exclusive rights for innovative services should only be used if the amount of compensation payable for compliance with general rules is small in relation to the total value of the service.
- (2041) ~~The provisions of this Regulation applicable to operators should also apply in those cases where public transport services are provided by a public administration which does not have a legal personality distinct from that of the public administration that is acting as the competent authority. Any other arrangement, by not applying these provisions to cases where the State acts in an entrepreneurial capacity, would not ensure the non-discriminatory application of Community law.~~ Passengers and the

¹⁰ OJ L 237, 24.8.1991, p. 25; Directive as last amended by Directive 2001/12/EC of the European Parliament and of the Council, OJ L 75, 15.3.2001, p.1.

- wider community should have the opportunity to comment on plans to directly award contracts, in time for their views to be taken into account.
- (42) Where a competent authority proposes to award a contract without competition, potential operators who would thereby be excluded from tendering for services should have the opportunity to make alternative proposals. If such a proposal is made, the authority should consider it and give reasons in writing for accepting or rejecting it.
- (43) In order to protect the interests of passengers and the wider public interest, operators that receive contracts by direct award should have to justify the trust placed in them in particular by regularly demonstrating that their performance in terms of attracting passengers and carrying out their services with the support of public money is in line with that of comparable operators and the operator's own previous performance. Under-performance should call into question whether the operator is successfully fulfilling the public service requirements laid on them or whether an alternative arrangement would achieve better results for passengers and for the wider public interest.
- (44) Where authorities are faced with the risk of a breakdown in the provision of services, they should have the power to put in place short-term emergency measures pending the award of a new public service contract.
- (2145) ~~Studies and experience show that where services are provided under public service contracts whose duration is limited to five years, the performance of the specific tasks assigned to the operators need not be obstructed.~~ there are disadvantages to public service contracts that are either too short or too long in duration. Contracts of short duration can create problems in terms of the continuity of provision, investment and stability of staffing. Contracts of long duration can lead to the closing of the market for a longer period than is necessary, entailing a diminishing effect on the benefits of competitive pressure. To minimise the distortion of competition while protecting the quality of services, public service contracts should normally, therefore, be limited to ~~this duration~~ no more than eight years for bus services and fifteen years for rail and inland waterway services. This will give the competent authorities the flexibility required for adapting contract periods to local circumstances.
- (2146) However, provision may be necessary for longer periods ~~contracts may be necessary~~ where the operator has to invest in infrastructure, railway rolling-stock or other vehicles that are tied to specific, geographically defined transport services and that have long payback periods longer than the standard contract period. Alternatively, competent authorities should be permitted to set up leasing schemes for vehicles and rolling stock or non-discriminatory indemnity arrangements that do not give an advantage to either an incumbent or an incoming operator.
- 22 ~~In accordance with the principle of non-discrimination, competent authorities should ensure that public service contracts do not cover a wider geographical area than required by the general interest and in particular, by the need to provide integrated services to significant groups of passengers who habitually use more than one link in the public transport network during the same journey.~~

- (47) Contracts should contain provisions that protect competent authorities and passengers from poor performance by operators. They should if necessary also contain incentives to operators to improve the service provided to the public. Contracts may be subject to variation in line with provisions agreed by the contracting parties but, in order to ensure transparency, increases in the value of the contract should not be excessive.
- (48) The integration of services across the boundaries of competent authorities is of significant importance to passengers who need to use services for which more than one operator or authority is responsible. Within Member States, national rules or procedures can ensure that authorities work in co-operation. Where neighbouring authorities are separated by a national border, there is no authority competent to ensure that such authorities work in co-operation. In many cases such co-operation can be achieved bilaterally. However, where this is not the case, an authority should be empowered to make proposals for the extension of its integrated systems to a second authority, and for there to be a presumption that these proposals will be accepted unless the second authority has good reason for rejection.
- (2349) Where it is appropriate for competent authorities, in pursuing the general interest, to protect employees in situations where the conclusion of a public service contract may lead to a change of operator, they should have the power to require operators to apply the relevant provisions of Council Directive ~~77/187/EEC~~ of 14 February 1977 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses¹¹.
- (50) In giving effect to this Regulation, competent authorities should ensure that all operators comply fully with the social obligations established by relevant European and national law and with the provisions of any generally-applicable collective agreements. These should be applied without discrimination. It is also appropriate for competent authorities to be able to require operators awarded public service contracts to comply with other social obligations, including those laid down in collective agreements in force in the place where the services are to be provided, provided that those obligations are compatible with Community law.
- (51) Competent authorities may require all operators providing services in their territory to be established in the Member State to which that authority belongs, except where Community law provides otherwise. Operators should meet all the licensing requirements of the Member State. In order to ensure non-discrimination, operators should not be excluded from tendering procedures because they are not yet established in the Member State or have not yet obtained the necessary licences.
- (52) The provisions of this Regulation should permit competent authorities to ensure that small and medium sized enterprises have the opportunity to continue to secure market shares in local transport services. This should be achieved in

¹¹ OJ L 82, 22;3.2001, p. 16. OJ L 61, 5.3.1977, p. 26; Directive as amended by Directive 98/50/EC (OJ L 201, 17.7.1998, p. 88.-).

particular through limiting contracts to proportionate geographical size and through implementing measures that control the development of oligopoly in markets open to controlled competition.

(53) **The tendering of high-value contracts requires competent authorities to define and describe complex systems. Therefore, authorities should be empowered, when awarding such contracts, to negotiate details with some or all of the potential operators after tenders have been submitted. This process should be non-discriminatory.**

(2454) It is necessary that the procedures introduced ~~according to~~ **under** this Regulation are transparent and that appeals procedures against decisions of the competent authorities are ~~in place~~ **available**. Authorities should also keep records of their decisions for a period of ten years, in line with the limitation period laid down in Article 15 of Council Regulation (EC) No 659/1999 on State aid procedures¹².

(2555) Regulation (EEC) No 1191/69 provides that operating costs and revenues, overheads, assets and liabilities relating to the fulfilment of public service requirements need to be accounted for separately. This requirement should be retained, in a modernised **and reinforced** form, in particular to ensure that authorities obtain value for money from public expenditure and that payments made by way of compensation are not misused to distort competition. **It is appropriate to accept a reasonable profit as part of an operator's costs. Competent authorities should be permitted to require guarantees from operators and for these guarantees to be provided where appropriate by third parties, provided that in doing so the operator or third party is not misusing funds provided to it by a public body for a different purpose.**

(2656) Compensation payments which exceed the net costs incurred by an operator as a result of fulfilling a public service requirement are liable to be examined under Community rules on State aids. It is therefore appropriate for the Community to lay down rules establishing when compensation may be considered not to be excessive. Competitive tendering for the conclusion of contracts is an efficient way of ensuring that compensation is not excessive, provided that the results of the tendering reflect fair and realistic market conditions.

(2757) Regulation (EEC) No 1191/69 exempts compensation paid pursuant to its provisions from the State aid notification procedure laid down in Article 88(3) of the Treaty; this Regulation establishes new and detailed provisions, designed for the specific circumstances of the public passenger transport sector, including modernised requirements for separate accounting, to ensure that compensation is compatible with Community State aid rules. ~~In~~ addition, it establishes new detailed procedures permitting the Commission to monitor these payments. It is therefore appropriate to continue to exempt compensation paid pursuant to the provisions of this Regulation from the State aid notification procedure.

(2858) With a view to improving the operation of this Regulation in the light of experience, the Commission should report on ~~the impact of Community legislation and the application of this Regulation.~~ **In order to comply with this requirement, it will be**

¹² OJ L 83, 27.3.1999, p. 1.

necessary for Member States to provide the Commission with certain information.

- (2959) As competent authorities in the Member States and operators will need time to adjust to the provisions of this Regulation, provision should be made for the use of transitional arrangements. **Moreover, there should be provision for long transitional arrangements for existing bus services provided directly by an authority or an operator that it controls.**
- (60) **During the transitional period, it is likely that competent authorities will apply the provisions of this Regulation at different times. It could therefore be possible, during that period, for operators originating in markets not yet affected by the provisions of this Regulation to tender for contracts in markets that had been opened to controlled competition at an earlier stage. To avoid imbalance in the opening of the public transport market, competent authorities should be able to refuse tenders from undertakings operating in markets that will be opened in future but are not yet open, provided that this is applied without discrimination and decided in advance of a call for tenders.**
- (3061) As a result of the Community's international obligations, access to the public transport markets of the Member States has, in some circumstances, been granted to certain third-country operators; this Regulation does not restrict this access. **Where the terms of these agreements permit operators from third countries to establish themselves in the Member States, those operators should comply with the legal provisions applicable in the territory in which the service is to be performed, including obligations relating to workforce, materials and management. This Regulation should not grant any additional rights to third country operators.**
- (3462) Regulation (EEC) No 1191/69 is superseded by this Regulation and should therefore be repealed.
- (3263) Council Regulation (EEC) No 1107/70 of 4 June 1970 on the **granting** of aids for transport by rail, road and inland waterway¹³ includes a provision regarding reimbursement for the discharge of obligations arising from the provision of a public service. That provision, which expressly anticipates the entry into force of new Community rules, is now redundant and should be deleted,

HAVE ADOPTED THIS REGULATION:

CHAPTER I

Scope and definitions

Article 1

Purpose and scope

- 1. The purpose of this Regulation is to improve the efficiency and attractiveness of public passenger transport in the Community as part of an integrated transport**

¹³ OJ L 130, 15.6.1970, p. 1; Regulation as last amended by Regulation (EC) No 543/97 (OJ L 84, 26.3.1997, p. 6).

policy committed to sustainable mobility, with due consideration for town planning, regional development and the environment, and to promote legal certainty for competent authorities' interventions in public passenger transport.

2. This Regulation shall apply to national and international operation of public passenger transport by rail, road and inland waterway. It lays down the conditions under which competent authorities may compensate transport operators for the cost of fulfilling public service requirements and under which they may grant exclusive rights for the operation of public passenger transport. ~~due regard being had to the pursuit of legitimate public service objectives within a framework of regulated competition.~~
3. **This Regulation shall not apply to rail services whose principal purpose is historic preservation and the provision of recreational facilities.**

Article 2

Relationship to public procurement law

This Regulation shall be without prejudice to the obligations on competent authorities which flow from Directives 92/50/EEC, **93/36/EEC, 93/37/EEC** and 93/38/EEC.

Where ~~either~~ **one** of those Directives makes the tendering of a public service contract mandatory, Articles **4a(1), 6(+a), 7, 7a, 7b,** 8, 12, 13(1), **and 13(2), and 14 and 17(7)** of this Regulation shall not apply to the award of that contract.

The provisions of this Regulation shall apply in full to the award of all other public service contracts, including all public service concessions.

Article 3

Definitions

For the purposes of this Regulation, the following definitions shall apply:

- (a) **'competent authority'** means any State body with the power to intervene in public passenger transport markets, or any other body ~~to~~ **in** which such a State power has been assigned **invested**;
- (b) **'direct award'** means the award of a contract to a given operator following a procedure in which no other operator can participate;
- (c) **'exclusive right'** means the entitlement on the part of an operator to operate a particular type of passenger transport services on a particular route or network or in a particular area, to the exclusion of other potential operators;
- (d) ~~'integrated services' means rail and bus services provided together, directly by an operator, under the terms of a single public service contract; by a single body of employees having the same contractual status; included in a single operating account; and having a single information service, ticketing scheme and timetable;~~ **'inland waterway' means rivers, canals and lakes suitable for the passage of vessels;**
- (e) **'operator'** means an undertaking ~~that provides public passenger transport services and that is established under public or private law; or a part, that~~ **which provides public passenger transport services, or that part of a public administration which provides public passenger transport services;**

- (f) **‘payback period’** ~~of an asset for an operator~~ means the period during which it is estimated, using appropriate discount rates, that the cost of ~~the~~ **an** asset to ~~the~~ **an** operator, **taking into account the risks involved in the investment and** net of any resale value, will exceed the net income that the operator will have received on account of the asset, in particular from passengers and from public authorities;
- (g) ‘people with reduced mobility’ means anyone who has a particular difficulty when using public transport, including elderly people, disabled people, people with sensory impairment and wheelchair users, pregnant women, people accompanying small children or people with heavy or cumbersome baggage;**
- (gh) ‘public passenger transport’** means transport offered to the general public on a continuing basis;
- (i) ‘public service concession’ means a public service contract that grants an operator the right to exploit a particular service, together with the associated economic risk. Consequently :**
- (i) most of the operator’s remuneration is obtained from users, particularly by charging fees;**
- (ii) the operator bears most of the financial consequences of changes in tariffs and of fluctuations in the number of users;**
- (iii) where the authority sets maximum tariffs, the operator has a discretion to set tariffs below that level;**
- (iv) where the authority sets minimum levels of service, the operator has a discretion to provide higher levels of service;**
- (hj) ‘public service contract’** means any legally enforceable agreement between a competent authority and an operator for the fulfilment of public service requirements.

For the purposes of this Regulation, a public service contract is also:

- (i) an agreement that is embodied in a legally enforceable decision, undertaken with an operator’s prior consent, through which a competent authority entrusts the operator with the supply of services; or
- (ii) the terms that are attached to a decision, taken by a competent authority, to entrust **the supply of services to** an operator forming part of the same public administration ~~with the supply of services,~~ **or an operator over which the authority exercises a control which is similar to that which it exercises over its own departments and which, at the same time, carries out the essential parts of its activities by order of the authority;**
- (ik) ‘public service requirement’** means a requirement adopted by a competent authority in order to secure adequate public passenger transport services;
- (jl) ‘value’** of a ~~public passenger transport~~ service, route, contract, compensation scheme or market **for public passenger transport** means the total remuneration, net of VAT, received by the operator or operators, including in particular financial compensation

from the public sector and any income from passengers that is not passed on to the competent authority in question.

CHAPTER II

Ensuring the quality of public passenger transport

Article 4

Competent authorities' duties

1. — In applying this Regulation, competent authorities shall **aim to** secure adequate **consumer-oriented** public passenger transport services that are of high quality **and reasonably priced, providing integration, continuity, safety and full social coverage and availability**, by concluding public service contracts in accordance with Chapter III or by laying down ~~minimum criteria~~ **general rules** for public passenger transport operation in accordance with Chapter IV.

Article 4a **Criteria**

21. In assessing the adequacy of public passenger transport services, in defining selection and award criteria, and in awarding public service contracts, competent authorities shall take into account at least the following criteria:
- (a) **the overall quality of the service provided to consumers and specific** consumer protection factors including the accessibility of the services in terms of their frequency, speed, punctuality, reliability, the extent **and capacity** of the network and the service information that is provided;
 - (b) the level of tariffs for different groups of users **set by the authority or operator** and the transparency of tariffs;
 - (c) integration between different transport services, including integration of information, ticketing, timetables, consumer rights and the use of interchanges, **including integration between different operators and with services for which neighbouring authorities are responsible;**
 - (d) accessibility for people with reduced mobility;
 - (e) environmental factors, including **rational use of energy and** local, national and international standards **and norms, notably those pertaining to** ~~for~~ the emission of air pollutants, noise and global warming gases;
 - (f) **the specifications and condition of the vehicles, vessels and rolling stock, infrastructure, and other assets to be used in the provision of the service, and the arrangements for the maintenance and renewal of those assets;**
 - (~~fg~~) the balanced development of regions, **including integration between local, regional and long-distance transport systems;**
 - (~~gh~~) the transport needs of people living in less densely populated areas;

- (i) the transport needs of people living in border regions including the integration across national borders of information, timetables, ticketing and services in general;
 - (h*j*) safety and passenger health and safety of employees and passengers;
 - (i*k*) the qualifications of the staff and the internal training provided by operators;
 - (l) the pay and other employment and social conditions that are in force in the Member State, region or locality in which the services are to be performed, including any specific conditions that the authority itself has agreed to apply;
 - (j*m*) how complaints are handled, disputes between passengers and operators are resolved and service shortfalls are redressed; and
 - (n) the cost of providing the services.
2. For the purposes of point (i) of paragraph 1, competent authorities responsible for local and regional public passenger transport services, information services, or ticketing schemes on one side of a national border may make proposals to extend these services and schemes to areas on the other side of the border.

Competent authorities receiving such proposals shall consider them, and shall inform the Commission if they reject them.

Article 4b
Passenger information

3. — Operators of public passenger transport services shall make available **in accessible formats and within a reasonable timescale,** on request, complete and up to date information about the services' ~~timetables, their tariffs and their~~ accessibility for people with different types of mobility handicap **with reduced mobility, their timetables and their tariffs.** The only charge they shall make shall be to cover the marginal administrative cost of providing the information.

CHAPTER III

Public service contracts

Article 5
Compulsory use of public service contracts

A public service contract shall be concluded for the payment of all financial compensation for the cost of complying with public service requirements, including compensation taking the form of the use of assets where such use will be charged below market rates, but excluding compensation paid for compliance with general rules for public passenger transport operation in accordance with Article 10.

A public service contract shall also be concluded for the award of all exclusive rights.

Article 6
Award of public service contracts

Where public service contracts are **required to be** granted under ~~this Regulation~~ **the provisions of Article 5**, they shall comply with the following requirements:

- (a) Contracts shall be put out for competitive tender **in accordance with Article 12**, except as provided for in Articles 7, **7b** and 8.
- (b) Contracts shall provide that the operator is **shall be** responsible, at least, for the cost of supplying the services to which a public service contract relates, including in particular the costs of staffing; energy; and the maintenance and repair of vehicles and rolling-stock.
- (c) Contracts shall be limited in time and shall last for no longer than ~~five~~ **eight years for bus services and fifteen years for rail and inland waterway services**. However, the duration of the contract may take into account the payback period ~~where~~ **if**:
 - (i) the contract makes the operator responsible for providing **heavy railway, light rail or metro** rolling-stock, other vehicles of a particularly technically advanced nature, **vessels**, or infrastructure, provided that such assets are tied to specific, geographically defined transport services; and
 - (ii) those assets have a payback period for the operator that is longer than ~~five years~~ **the duration of the contract otherwise permitted under the provisions of this paragraph**.

In such cases, the contract **duration** shall also take into account the relative economic importance of the value of the assets in question in comparison with the total estimated value of the services covered by the contract.

Services subject to contracts may, at the same time, be the subject of financial compensation for the cost of complying with general rules in accordance with Chapter IV.

Article 6a
Contents of public service contracts

~~(d)~~**1. Public service c**Contracts shall

- (a) require operators to furnish competent authorities with the information necessary to monitor and evaluate their performance and the performance of the transport network as a whole. In particular, they shall require operators to furnish competent authorities, on an annual basis and separately for each route, with information on the services provided, the tariffs charged and the number of passengers carried, the number of and complaints received, and any safety-related problems or incidents. This information shall be provided separately for each route. However neighbouring routes may be grouped together for this purpose provided that the group has an aggregate annual value of less than EUR 3 000 000;**

- (b) contain provisions to ensure the maintenance of any public assets made available to operators, including tunnels, railway infrastructure, bus and rail stations and interchanges, depots, workshops, vehicles, vessels and rolling stock. They shall, in particular, specify the obligations of the operator, the competent authority and other agencies regarding the maintenance of these assets;
 - (c) clearly specify the penalties that shall be applied in the event of failure to comply with the requirements set out in the contract, and the timetable and procedure for applying them. These penalties may include premature termination of the contract; and
 - (d) not cover a wider geographical area than is required by the general interest, and, in particular, by the need to provide services to significant groups of passengers who habitually use more than one link in the public transport network during the same journey.
2. Contracts may include a system of bonuses and penalties based on the operator's performance as measured by quantitative data, customer surveys, independent monitoring and inspection or other means. Contracts may also provide for guarantees from the operator or third parties.
 3. Contracts may make provision for the negotiation or imposition of changes to their content. If such changes lead to higher financial compensation or new exclusive rights, the competent authority shall however initiate a new contract award procedure in accordance with the provisions of this Regulation if the cumulative annual value of all such changes exceeds one fifth of the annual value of the services covered by the original contract.
 4. The content of contracts shall not be changed unless their terms provide for this.

Article 7

Direct award of public service contracts

1. Competent authorities may decide, on a case-by-case basis and subject to ~~paragraph 3~~ Article 7a, to directly award public service contracts for ~~rail, metro or light~~ heavy rail services if national or international rail safety standards could not be met in any other way.
2. Competent authorities may decide, on a case-by-case basis and subject to Article 7a, to directly award public service contracts for metro services either to themselves or to an operator they control if:
 - (a) the size or technical uniqueness of the system means that the incumbent operator would have a significant advantage under competitive tendering; or
 - (b) this is conducive to greater efficiency in the use of public money or publicly financed assets.
23. Competent authorities may decide, on a case-by-case basis and subject to ~~paragraph 3~~ Article 7a, to directly award public service contracts for ~~metro or light~~ rail services either to themselves or to an operator they control if this is conducive to greater

efficiency in the use of public money or publicly financed assets. any other arrangement would entail additional costs for maintaining coordination between the operator and the manager of the infrastructure, and if those costs would not be offset by additional benefits.

~~3. Competent authorities intending to award a contract under the provisions of paragraph 1 or 2 above shall publish, at least one year beforehand and in accordance with Article 13, their preliminary decision to do so and the evidence and analysis on which they have based this preliminary decision.~~

~~4. Where an operator, on the date on which this Regulation enters into force, directly provides integrated services, and where the conditions in paragraph 1 or 2 are fulfilled, the competent authority may include the operator's non-rail services, including bus services in the public service contract that will be directly awarded to the operator, provided that the Member State in question gives its approval and informs the Commission of this, with reasoned justification including appropriate comparative performance indicators.~~

~~54.~~ Competent authorities may decide, on a case-by-case basis, to directly award public service contracts for services **with having** an estimated average annual value of less than EUR 400 000 **1 000 000**. If a competent authority incorporates all its public service requirements in a single public service contract, it may decide to directly award this public service contract provided that it has an estimated average annual value of less than EUR 800 000 **3 000 000**.

No requirement for a given amount of services shall be **Competent authorities shall not** split up **contracts or networks** in order to avoid tendering.

~~56.~~ If an operator proposes a new initiative that will provide a service where none exists, the competent authority may award the exclusive right to provide this new service directly to that operator, provided that the service will not be subject to financial compensation under the terms of any public service contract.

No service may be the subject of the direct award of a public service contract under the terms of the first subparagraph more than once.

6. All financial compensation under the terms of directly awarded contracts shall comply with the rules in Article 16 and Annex I.

Article 7a

Safeguards for directly awarded contracts

1. Competent authorities intending to directly award a contract under the provisions of Article 7(1), (2) or (3) shall publish, at least one year beforehand and in accordance with Article 13, their preliminary decision to do so and the evidence and analysis on which they have based this preliminary decision.

2. In the case of contracts to be directly awarded in accordance with the provisions of Article 7(1), (2) or (3), other potential operators may, during the six months following publication in accordance with paragraph 1, submit to the competent authority an alternative offer to challenge the results previously achieved by the operator to whom the direct award is intended to be made, and to propose

alternative ways to achieve the objectives of the new contract. The competent authority shall consider these offers and publish in accordance with Article 13 its reasons for its decision to accept or reject them.

3. Competent authorities shall ensure the efficiency and effectiveness of services included in contracts directly awarded under Article 7(1), (2) or (3).

To this end, they shall, in particular:

- (a) review, at least once every five years, trends in the unit costs and usage rates of these services in relation to the operator's own previous performance, standards of performance in the industry as a whole and the performance of comparable services provided by other operators;**
- (b) assess the results of the review and decide whether they justify the decision to award the contract without competition or whether there is clear evidence of significant underperformance;**
- (c) in cases of clear evidence of significant underperformance, decide on the steps they will themselves take to bring about an improvement of performance and require the operator, under the terms of the contract, to do the same;**
- (d) undertake a new review of cases referred to in point (c) within three years of the initial review. If this new review does not find clear evidence of a significant improvement in performance, the authority shall terminate the contract. It may only award a new contract for the relevant services following a competitive tendering procedure in accordance with Article 12;**
- (e) publish, in accordance with Articles 13(1) and (2),**
 - (i) the information referred to in Article 13(3);**
 - (ii) the results of the reviews;**
 - (iii) their assessment of the results;**
 - (iv) their own plans, and those of the operator, to improve performance in cases of significant underperformance.**

Article 7b
Emergency Action

A competent authority may take emergency action to secure the provision of adequate public passenger transport services if:

- (a) no tenders that meet the specified requirements have been submitted in response to an invitation to tender;**
- (b) a judicial decision or a decision of an appeal body concerning the award of a contract prevents a new contract being put in place in accordance with the provisions of this Regulation prior to the expiry of the existing arrangements;**

- (c) an operator's consistent failure to meet the standards laid down in a public service contract leads, under the provisions of the contract, to its premature termination;
- (d) an operator cannot fulfil the terms of a public service contract because of insolvency; or
- (e) an operator intends to discontinue the provision of a service that is not the subject of a public service contract.

Competent authorities may require operators to give them up to six months notice before discontinuing the provision of any public passenger transport service they operate.

The emergency action shall take the form of the direct award or agreed extension of a public service contract.

The award or extension of a contract through emergency action shall be for no longer than the competent authority needs in order to organise a new contract award procedure in accordance with the provisions of this Regulation, and for one year at the most, except where emergency action has been taken under subparagraph (a) and the new award procedure once again elicits no tenders that meet the specified requirements.

Article 8

Award of public service contracts following quality comparison

1. A competent authority may, without tendering, award a public service contract for a service that is limited to an individual route and that will not be subject to financial compensation under the terms of any public service contract, provided that, **following the procedures in Article 12:**
 - (a) a notice has been published inviting proposals; and
 - (b) on that basis the authority has selected, by means of a comparison of the quality of the proposals received, the operator or operators that will provide the best service to the public.
2. **An operator awarded a contract under the terms of Article 7(5) or paragraph 1 may receive compensation for complying with general rules that have been laid down in accordance with Article 10 and affect the services covered by the contract. In any one year, the amount of this compensation shall be no more than one-fifth of the value of the services covered by the contract.**

Article 9

*Safeguards **for authorities***

1. **In order to ensure that alternative potential providers of public transport services have a chance to remain in existence or that the implementation of controlled competition does not prevent the participation of small and medium enterprises,** a competent authority may require the selected operator to award subcontracts, for a defined proportion of the services covered by the contract, to third parties to which ~~it~~ **neither the competent authority nor the operator** is ~~not~~ affiliated. This requirement to subcontract may not extend to more than half the value

of the services covered by the contract. **The competent authority shall not nominate the subcontractors.**

2. A competent authority may decide not to award public service contracts to any operator that **already has or** would, as a consequence, have more than a quarter of the value of the relevant market for public passenger transport services. **Member States may, in particular, lay down for the purposes of this provision that:**

(a) for light rail, metro, inland waterway and local and regional bus services, the relevant market shall be the regional market for public passenger transport; and

(b) for heavy rail and longer distance bus services, the relevant market shall be the national market for that mode of public passenger transport.

This paragraph shall be without prejudice to the right of competent authorities to decide to award contracts for the whole of the territory for which they are responsible to a single operator, subject to the provisions of Article 6a(1) (d).

This paragraph shall be without prejudice to the procedures and decisions of Community and Member State competition authorities.

3. ~~Where a public service contract includes an exclusive right, the~~ **A** competent authority may require the selected operator to offer to staff previously engaged in providing the services the rights that they would have enjoyed if a transfer had occurred within the meaning of Directive ~~77/187/EEC~~ **2001/23/EC**. The authority shall list the staff and give details of their contractual rights.
4. Competent authorities may require the selected operator to establish itself in the Member State in question, except where Community legislation adopted pursuant to Article 71 of the Treaty lays down the freedom to provide services. However, competent authorities awarding public service contracts shall not discriminate against potential operators established in other Member States on the grounds that they are not yet established in the Member State in question or have not yet been granted a licence to operate services. **Competent authorities may require potential operators to apply for a licence and to comply with any other reasonable requests to demonstrate that they are in a position to obtain the requisite licences. Competent authorities shall allow sufficient time between the award of contracts and the service commencement date for the selected operator to establish itself and obtain any necessary licence.**
5. Where competent authorities apply any of the conditions in paragraphs 1 to 4, they shall inform potential operators of all the relevant details at the start of the public service contract award procedure.

CHAPTER IV

~~Minimum criteria~~ **General rules for public passenger transport operation**

Article 10

1. ~~Without prejudice to public service contracts concluded in accordance with Chapter III, e~~ **Competent authorities may lay down general rules to be adhered to by all**

operators. These rules or criteria shall be applied without discrimination to all transport services of a similar character in the geographical area for which the authority is responsible.

2. General rules may include:

- (a) requirements for operators to use vehicles, vessels, rolling stock or infrastructure that meet defined standards of quality, environmental impact, accessibility or appearance;**
- (b) requirements for operators to participate in integrated systems of ticketing, timetabling or information; or**
- (c) restrictions, applied without discrimination between operators, on the total number of vehicles using a particular section of road, for reasons of public safety or environmental protection.**

3. General rules may lay down tariff obligations, setting maximum tariffs for some or all trips.

4. Such General rules or ~~minimum~~ criteria may include compensation for the cost of complying with them, **calculated in accordance with Article 16 and Annex I**, provided that:

- ~~(a) if the rule or criterion limits tariffs, it does so only for certain categories of passengers;~~
- ~~(b) in any one year, the amount of compensation for complying with general rules or minimum criteria that is received by any operator in the area covered by the rule or criterion in question shall be no more than one fifth of the value of that operator's services in that area; and~~
- ~~(c) compensation is available to all operators on a non-discriminatory basis;~~

and

- (b) the general rule in question refers to quality and reliability standards for the services it affects, and to appropriate penalties that shall be imposed on operators that fail to comply with these standards.**

CHAPTER V

Procedural issues

Article 11 Notification

Compensation paid in accordance with this Regulation shall be exempt from the notification procedure laid down in Article 88(3) of the Treaty.

Article 12
Award procedures

1. The procedure adopted for competitive tendering or quality comparison shall be fair, open and non-discriminatory.
2. The procedure shall include publication in accordance with Article 13.
3. In the case of competitive tendering, the procedure shall include:
 - (a) selection criteria, taking into account the criteria in Article 4(2)**a(1)**, that define the authority's minimum requirements;
 - (b) award criteria, taking into account the criteria in Article 4(2)**a(1)**, that define the grounds on which the authority will choose among offers meeting the selection criteria; and
 - (c) technical specifications setting out the public service requirements that the contract will cover and identifying any assets to be placed at the disposal of the successful tenderer, with the relevant terms and conditions.

There shall be an interval of at least 52 days between the despatch of the call for tenders and the latest date for receipt of tenders.

4. Competent authorities shall include in the information which they supply to potential operators the relevant information they hold, under the terms of public service contracts, about operators' services, tariffs and numbers of passengers during the previous five years.
- 5. Competent authorities shall require potential operators to describe how they plan to provide the services being tendered for, including the deployment of personnel and assets.**
- 6. In the case of tenders for contracts having an estimated annual value of more than EUR 3 000 000, competent authorities may negotiate with potential operators on the tenders they have submitted. Authorities may not, as a result of post-tender negotiations, accept an offer that, in relation to the award criteria referred to in paragraph 3(b), is less favourable than an offer that was submitted by any other tenderer and that complies with the selection criteria referred to in paragraph 3(a).**

Article 13
Transparency

1. **Calls for tender, invitations for proposals under quality comparison procedures, information on new general rules and associated compensation payments, preliminary decisions to directly award contracts as required by Article 7a(1), and other notices and decisions and preliminary decisions** made in accordance with this Regulation shall be published in an appropriate manner, stating, in the case of decisions and preliminary decisions, the reasons on which they are based.
2. Competent authorities shall send to the Office for Official Publications of the European Communities, by the most appropriate channels, notices and decisions

relating to public service contracts and compensation schemes having an estimated annual value of, respectively, EUR 400 000 **1 000 000** or more, ~~or~~ **and** EUR 800 000 **3 000 000** or more, for publication in the *Official Journal of the European Communities*.

The higher threshold value cited in the first subparagraph shall apply only if a competent authority has incorporated all its public service requirements in a single public service contract.

3. Competent authorities shall make available on request:
 - (a) the terms of any public service contracts they have awarded **including, for directly awarded contracts, the manner in which compensation is calculated in accordance with Article 16 and Annex I;**
 - (b) the terms of any general rules for public transport operation they have laid down, **including details of tariff obligations and the method for determining the rate of compensation;** and
 - (c) the information they hold, under the terms of public service contracts, about operators' services, tariffs ~~and~~, numbers of passengers **and the general trend in the quality of service.**
4. Authorities shall keep, for at least ten years, a record of every public service contract award procedure sufficient to permit them to justify their decisions at a later date. They shall make available, on request by interested parties, summaries of these records.
5. Member States shall forward to the Commission, by the end of the month of ~~March~~ **June** ~~each~~ **in every even-numbered** year:
 - (a) a summary ~~for~~ **relating to** the previous **two calendar** years of the number, estimated value and duration of the public service contracts that competent authorities have awarded, distinguishing between rail, bus and inland waterway services and between contracts awarded following tendering, quality comparison and direct award; and
 - (b) a summary of the scope and content of the general rules ~~or minimum criteria~~ that were in force during the previous **two calendar** years and for which compensation was provided, and of the amount of compensation paid;
 - (c) **the findings of any performance reviews conducted under the provisions of Article 7a(3) during the previous two calendar years.**
6. **For the purposes of policy analysis and review, including the report laid down in Article 19(2), the summary referred to in paragraph 5, subparagraph (a) shall provide details of:**
 - (a) **usage levels;**
 - (b) **customer satisfaction;**

(c) workforce numbers and changes in working patterns and employment conditions; and

(d) the cost of providing the services, distinguishing between:

(i) financial compensation provided under the terms of this Regulation, including compensation for compliance with general rules; and

(ii) any other relevant private or public investment, including investment in infrastructure, vehicles, vessels and rolling stock, that is not covered by the terms of this Regulation.

*Article 14
Appeals*

1. Member States shall ensure that operators and other interested parties have the right to appeal to a public **or judicial** body against decisions and preliminary decisions of competent authorities under this Regulation.
2. This **The** body referred to in paragraph 1 shall be independent, in its organisation, funding, legal structure and decision making, from of any competent authority concerned and from any operators involved and shall have the power to request relevant information from any relevant party, take binding decisions and award damages.
3. ~~Appeal bodies shall be required to determine any complaints and to take action to remedy the situation within a maximum period of two months from receipt of all information.~~ **Where the body is not judicial in character, its decisions shall be subject to judicial review.**
4. ~~Subject to paragraph 5, decisions of appeal bodies shall be binding on all parties covered by such decisions.~~ **The provisions for the implementation of the appeals procedure shall be determined by the Member States.**
5. ~~Member States shall take measures necessary to ensure that decisions taken by appeal bodies are subject to judicial review.~~ **For cross-border services, the competent authorities involved shall agree on the appeal body that shall have jurisdiction.**

*Article 15
Accounting provisions*

1. Services subject to public service contracts concluded with a particular competent authority shall be treated as a separate activity for accounting purposes and shall be operated as a separate accounting division, distinct from any other activities in which the undertaking engages, whether or not those activities are related to passenger transport.
2. Individual contracts directly awarded under Articles 7(1), (2) or (3), and any contracts with an annual value of more than EUR 3 000 000, shall each be operated as a separate accounting division.

- ~~23.~~ Each accounting division shall meet the following conditions:
- (a) the operating accounts shall be separate;
 - (b) the proportions of overheads, assets and liabilities pertaining to each activity shall be attributed according to their actual use;
 - (c) the cost accounting principles according to which separate accounts are maintained shall be clearly established;
 - (d) for each activity, expenditure shall be balanced by **the aggregate of the** operating revenue from the services in question and payments from public authorities in compensation for the cost of fulfilling the public service requirements in question, without any possibility of transfer **from or** to another activity. **This compensation may allow for a reasonable profit for the operator.**
- ~~34.~~ Operators receiving compensation for compliance with ~~minimum criteria~~ **general rules** for transport operation in accordance with Article 10 shall, in their accounts, identify separately the costs they incur in complying with the general rule ~~or criteria~~ in question; the additional revenue they earn as a result of complying with the rule ~~or criteria~~; and the compensation paid. The compensation paid and the additional revenue earned shall balance the costs incurred, without any possibility of transfer **from or** to an activity not subject to the rule ~~or criteria~~ in question. **This compensation may allow for a reasonable profit for the operator.**
- 5. Operators of services for which the contract was directly awarded under the terms of Article 7(1), (2) or (3) or Article 17(3) shall make their accounts public in a form which permits verification of their compliance with the provisions of this Article and with Articles 7a(1) and (3), 8(2) and 16.**

CHAPTER VI

Final provisions

Article 16 Compensation

Except in the case of public service contracts awarded through competitive tendering, competent authorities shall on no account provide more compensation or apply less stringent procedures than are required by the rules in Annex I.

Article 17 Transitional measures

- ~~1. Member States shall take the necessary measures to ensure that schemes, contracts or arrangements implemented otherwise than in compliance with the provisions of this Regulation cease to be valid within three years of its entry into force.~~
- ~~2. Where an operator, on the date on which this Regulation enters into force, is required by the terms of a public service contract to invest in rail infrastructure, and where the payback period of this infrastructure still has more than three years to run, the~~

competent authority may add up to three years to the transitional period of three years fixed in paragraph 1, taking into account this payback period and the relative economic importance of the assets in question in comparison with the total estimated value of the services covered by the contract.

- 1. Public service contracts awarded, before this Regulation enters into force, following a procedure consistent with Directives 92/50/EEC, 93/36/EEC, 93/37/EEC or 93/38/EEC, or any other fair competitive procedure, may last for the period laid down in the contract, provided that this is finite and reasonable.**
- 2. A competent authority that provided a given bus service itself, or through an operator it controls, before this Regulation entered into force, may continue to provide this service, without a competitive award procedure, during the eight years following the Regulation's entry into force.**
- 3. In exceptional circumstances, without prejudice to the requirement for a contract in Article 5 and the rules on contract duration in Article 6(c), and subject to the prior approval of the Commission, competent authorities may extend the time limit referred to in paragraph 2, provided that:**
 - (a) they apply Article 7a;**
 - (b) the contract does not award an exclusive right;**
 - (c) any compensation for tariff obligations is applied in accordance with Article 10.**
- 4. Without prejudice to paragraphs 1, 2 and 3, each competent authority shall ensure that:**
 - (a) at least half of its public service contracts, by value, have been awarded in accordance with the provisions of this Regulation within four years of the Regulation's entry into force; and**
 - (b) all its public service contracts within eight years.**

In applying the provisions and calculating the proportions referred to in the first sub-paragraph 2, competent authorities shall take no account of either public service contracts that have been directly awarded after 1 February 2003 in accordance with the provisions of Articles 7(1), 7(2), 7(3) and 7(45), or contracts subject to the provisions of paragraphs 1, 2 and 3.

- 5. Member States and competent authorities shall take the necessary measures to ensure that schemes, contracts or arrangements implemented otherwise than in compliance with the provisions of this Regulation, other than those referred to in paragraph 1, cease to be valid in time to permit competent authorities to comply with the provisions of paragraphs 2 and 4.**
- 36. Until the date on which the schemes, contracts and arrangements referred to in paragraphs 1 and 2 4 cease to be valid, each of them shall continue to be subject to those provisions of Regulation (EEC) No 1191/69 that applied to it before this Regulation entered into force.**

7. Competent authorities may, during the transition periods defined in paragraph 4, exclude operators that are the beneficiary of exclusive rights or financial compensation for the operation of public transport services, awarded otherwise than in accordance with the provisions of this Regulation, from participating in contract award procedures.

When competent authorities apply the first subparagraph, they shall do so without discrimination, shall exclude all potential operators fulfilling this condition, and shall inform potential operators of their decision at the start of the public service contract award procedure.

They shall inform the Commission of their intention to apply this provision at least two months before the call for tenders or request for proposals under the quality comparison procedure is published.

Operators shall be exempted from the provisions of the first subparagraph if they can demonstrate that the value of the public transport services that they operate in accordance with this Regulation exceeds the value of those that are the subject of exclusive rights or financial compensation awarded otherwise than in accordance with this Regulation.

Article 18

Operators from third countries

For the purposes of this Regulation and without prejudice to Article 9(4), operators from ~~the~~ **third countries party to agreements with the Community that give operators from those countries the right to establish themselves in the Member States** listed in Annex H shall be treated as Community companies, in accordance with the terms and conditions of the agreement between each such country and the Community **undertakings**. ~~The Commission shall update the Annex, as changes in the Community's international obligations require, by publishing a notice in the 'L' series of the *Official Journal of the European Commission*.~~

Article 19

Monitoring by Commission

1. Member States shall consult the Commission on any laws, regulations or administrative provisions that are necessary for the ~~implementation~~ **application** of this Regulation.
2. The Commission shall prepare a report within five years of its entry into force on how this Regulation has been applied in the Member States, and the **quantitative and qualitative** consequences for passengers, **staff, public authorities and the communities they serve**, and shall propose amendments to the Regulation if necessary. The report shall include an examination of the operation of the exemptions established in Article 7.

Article 20

Repeal and amendment

1. Regulation (EEC) No 1191/69 is repealed.
2. Article 3(2) of Regulation (EEC) No 1107/70 is deleted.

Article 21
Entry into force

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Communities*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President

ANNEX I

Rules governing compensation in the absence of competitive tendering

- ~~1. Where a competent authority compensates an operator financially for fulfilling a public service requirement in accordance with this Regulation, and where the compensation is not derived from a public service contract awarded by competitive tendering, the amount of this compensation shall not exceed the net financial effect of fulfilling the public service requirement as calculated in accordance with the rules in this Annex.~~
- ~~2. The net financial effect shall be the sum of:
 - ~~(i) the effects of fulfilling the public service requirement on the operator's expenditure (costs avoided minus extra expenditure incurred); and~~
 - ~~(ii) the effects of fulfilling the public service requirement on the operator's income (extra income earned minus income foregone).~~~~
- ~~3. The net financial effect shall be determined taking into account the effects of fulfilling the public service requirement on the operator's activities as a whole.~~
- ~~4. The net financial effect shall be calculated by comparing the situation in which the public service requirement is fulfilled with the situation that would have occurred if the requirement had not been fulfilled and the operation of the services affected by the requirement had instead been determined on a commercial basis.~~
- ~~5. For the situation that would have occurred if the public service requirement had not been fulfilled (the benchmark case) estimates of tariff rates, passenger figures, and costs should be calculated.~~
- ~~6. The benchmark case may be calculated:
 - ~~(i) by using data on the situation before the operator began to fulfil the public service requirement, if circumstances have not changed to a degree that makes it an unreliable guide to present day tariff rates, passenger figures, and costs; or~~
 - ~~(ii) by comparison with data for comparable services that are operated on a commercial basis; or~~
 - ~~(iii) by estimating costs and demand for the services.~~

~~The calculation of the benchmark case should take due consideration of trends affecting the relevant transport market.~~~~
- ~~7. Calculation of the effects on revenues of fulfilling a public service requirement shall take into account, in particular, changes in tariffs and in passenger figures. The calculation shall take into account the effect of fulfilling the requirement, and the resulting changes in the quality, quantity and price of services supplied, on the demand for transport services. This assessment shall not be limited to the impact on the segment of the network on which the requirement is directly fulfilled, but shall include effects on other parts of the network.~~

- ~~8. Calculation of the effects on costs of fulfilling a public service requirement shall be analogous to the calculation of the effects on revenues. Where the requirement covers only some of the services that an operator provides, joint costs such as overheads shall be allocated between these services and the other in proportion to the value of each set of services.~~
- ~~9. Costs resulting from the fulfilment of public service requirements shall be calculated on the basis of efficient management of the operator and the provision of transport services of an adequate quality.~~

~~The amount of compensation shall be fixed in advance for the duration of the contract or compensation scheme, with the exception that the contract or scheme may provide for the amount of compensation to be adjusted based on predetermined factors. Compensation amounts shall in any case remain fixed for a period of at least one year.~~

~~Compensation for complying with public service requirements may only be given where the operator in question, if it were considering its own commercial interests, would not, in the absence of this compensation, fulfil the requirement or would not fulfil it to the same extent or under the same conditions.~~

- 1. The rules in this Annex apply to all financial compensation awarded for the fulfillment of public service requirements in accordance with this Regulation, other than those awarded following competitive tendering. This includes compensation paid for compliance with general rules in accordance with Article 10. The rules do not apply to exceptions from some or all of the financial effect of an excise duty on fuels.**
- 2. The amount of compensation shall not exceed the difference between the extra cost to the operator of providing the service and the extra income earned by the operator from the service, taking into account the operator's activities as a whole, including profitable services.**
- 3. The following may be included in the calculation of the extra cost to the operator:**
 - (i) the additional direct costs associated with fulfilling the public service requirement;**
 - (ii) a proportionate share of the operator's overheads, assets and liabilities drawn on in providing the service;**
 - (iii) a reasonable profit;**
 - (iv) any income foregone as a result of the application of the public service requirement.**
- 4. The following shall be included in the calculation of the extra income earned by the operator:**
 - (i) additional income earned by the operator from passenger fares and other activities directly connected to the service such as advertising and on-board refreshment facilities;**

(ii) any costs avoided through the provision of the service.

5. In the case of compensation for tariff obligations laid down in accordance with Article 10(3) that affect most or all trips, compensation shall be paid at the same rate per trip to all operators of services that have a similar character. This rate shall be based on an estimate of the obligation's average financial effect on all operators affected by it.

6. Costs resulting from the fulfillment of public service requirements shall be calculated on the basis of efficient management of the operator and the provision of transport services of an adequate quality.

The amount of compensation shall be fixed in advance for the duration of the contract or compensation scheme. Contracts and schemes may, however, include procedures for the adjustment of the amount of compensation based on specific predetermined factors or circumstances. Compensation amounts shall in any case remain fixed for a period of at least one year.

Compensation for complying with public service requirements may only be given where the operator in question, if it were considering its own commercial interests, would not, in the absence of this compensation, fulfil the requirement or would not fulfil it to the same extent or under the same conditions.

ANNEX II

~~Countries from which operators shall be treated as Community companies for the purposes of this Regulation in accordance with Article 18.~~

~~Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia.~~