

**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**

(2000/C 365 E/10)

(Text with EEA relevance)

COM(2000) 7 final — 2000/0212(COD)

(Submitted by the Commission on 26 July 2000)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

sustainable development, social integration, environmental improvement and regional balance.

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

Having regard to the proposal from the Commission,

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

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

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 road, rail and inland waterway is one of the primary Community objectives under the common transport policy.
- (2) Competent authorities in the Member States have recourse to three main mechanisms in pursuing this objective: the conclusion of public service contracts with operators, the granting of exclusive rights to operators and the laying down of minimum standards for public transport operation.
- (3) It is important to clarify the legal position of such mechanisms with respect to Community law.
- (4) 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 waterway<sup>(1)</sup> establishes a Community regulatory framework for public passenger transport, implementing this Article of the Treaty and indicating how competent authorities in the Member States can ensure adequate transport services which contribute to

(5) 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, the application of Community rules on the freedom of establishment, and 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.

(6) 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.

(7) Studies carried out on behalf of the Commission<sup>(2)</sup>, 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 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.

(8) It is important to update the Community legal framework in order to ensure the further development of competition in the provision of public passenger transport services and to take into account the new legal approaches which Member States have 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 the Commission, Council and the Member States, each in accordance with their 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.

<sup>(1)</sup> 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).

<sup>(2)</sup> '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.

- (9) 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 the protection of the general interest in terms of adequate quality and availability of public transport. In securing this general interest, it is important for consumers and interested parties to have at their disposal integrated information about the services available.
- (10) Freedom of establishment is a basic principle of the common transport policy and requires that operators of a Member State established in another Member State be guaranteed effective access to the public transport market of that State in a transparent way and without discrimination.
- (11) 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 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.
- (12) 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 for public transport operation. According to the principles of Community law, competent authorities are required to apply 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 lay down minimum criteria for public transport operation in ways that take account of specific national or regional circumstances, whether legal or factual.
- (13) Studies and experience show that competitive tendering for public service contracts 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.
- (14) 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 contracts<sup>(1)</sup> and Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors<sup>(2)</sup>. Where 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.
- (15) Tendering of public service contracts should not be compulsory where safety standards in the provision of rail services or the coordination of a metro or light rail network would be endangered. 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.
- (16) Tendering for public service contracts should also 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.
- (17) Taking into account the specific, commercially viable nature of certain parts of the public transport market, it should also be possible for competent authorities 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. 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.
- (18) Where authorities grant an exclusive right but where no direct financial compensation is involved, they should be able to grant it by means of a simplified procedure that nonetheless provides for non-discriminatory competition between operators.
- (19) It should be possible for authorities to compensate operators for the cost of complying with minimum criteria for public transport operation, provided that this compensation can be fairly calculated and is not at such a high level that it detracts from the pressure on operators to focus primarily on the requirements of passengers.

(<sup>1</sup>) OJ L 209, 24.7.1992, p. 1; Directive as last amended by Directive 97/52/EC (OJ L 328, 28.11.1997, p. 1).

(<sup>2</sup>) OJ L 199, 9.8.1993 p. 84; Directive as last amended by Directive 98/4/EC (OJ L 101, 1.4.1998, p. 1).

- (20) 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.
- (21) 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. To minimise the distortion of competition while protecting the quality of services, public service contracts should normally, therefore, be limited to this duration. However, longer periods 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.
- (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 is 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.
- (23) 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 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 businesses <sup>(1)</sup>.
- (24) It is necessary that the procedures introduced according to this Regulation are transparent and that appeals procedures against decisions of the competent authorities are in place. 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 procedures <sup>(2)</sup>.
- (25) 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 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.
- (26) 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.
- (27) 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.
- (28) 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.
- (29) 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.
- (30) 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.
- (31) Regulation (EEC) No 1191/69 is superseded by this Regulation and should therefore be repealed.

<sup>(1)</sup> OJ L 61, 5.3.1977, p. 26; Directive as amended by Directive 98/50/EC (OJ L 201, 17.7.1998, p. 88).

<sup>(2)</sup> OJ L 83, 27.3.1999, p. 1.

(32) Council Regulation (EEC) No 1107/70 of 4 June 1970 on the grant of aid for transport by rail, road and inland waterway<sup>(1)</sup>, 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

##### Scope

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.

##### 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 and 93/38/EEC.

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

##### 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 which such a State power has been assigned;
- (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;

(e) 'operator' means an undertaking that provides public passenger transport services and that is established under public or private law; or a part, which provides public passenger transport services, of a public administration;

(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 asset to the operator, 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) 'public passenger transport' means transport offered to the general public on a continuing basis;

(h) '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 an operator forming part of the same public administration with the supply of services;

(i) 'public service requirement' means a requirement adopted by a competent authority in order to secure adequate public passenger transport services;

(j) 'value' of a public passenger transport service, route, contract, compensation scheme or market 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.

<sup>(1)</sup> 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).

## CHAPTER II

**ENSURING THE QUALITY OF PUBLIC PASSENGER  
TRANSPORT***Article 4*

1. In applying this Regulation, competent authorities shall secure adequate public passenger transport services that are of high quality and availability, by concluding public service contracts in accordance with Chapter III or by laying down minimum criteria for public passenger transport operation in accordance with Chapter IV.

2. 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) consumer protection factors including the accessibility of the services, in terms of their frequency, speed, punctuality, reliability, the extent of the network and the service information that is provided;
- (b) the level of tariffs for different groups of users and the transparency of tariffs;
- (c) integration between different transport services, including integration of information, ticketing, timetables, consumer rights and the use of interchanges;
- (d) accessibility for people with reduced mobility;
- (e) environmental factors, including local, national and international standards for the emission of air pollutants, noise and global warming gases;
- (f) the balanced development of regions;
- (g) the transport needs of people living in less densely populated areas;
- (h) passenger health and safety;
- (i) the qualifications of the staff; and
- (j) how complaints are handled, disputes between passengers and operators are resolved and service shortfalls are redressed.

3. Operators of public passenger transport services shall make available, 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. 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 granted under this Regulation, they shall comply with the following requirements:

- (a) Contracts shall be put out for competitive tender, except as provided for in Articles 7 and 8.
- (b) Contracts shall provide that the operator is 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 years. However, the duration of the contract may take into account the payback period, where:
  - (i) the contract makes the operator responsible for providing railway rolling-stock, other vehicles of a particularly technically advanced nature, 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.

In such cases, the contract 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.

(d) Contracts 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 and complaints received.

#### Article 7

##### Direct award of public service contracts

1. Competent authorities may decide, on a case-by-case basis and subject to paragraph 3, to directly award public service contracts for rail, metro or light 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 paragraph 3, to directly award public service contracts for metro or light rail services if 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.

5. Competent authorities may decide, on a case-by-case basis, to directly award public service contracts for services with an estimated average annual value of less than EUR 400 000. 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.

No requirement for a given amount of services shall be split up in order to avoid tendering.

6. 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.

#### Article 8

##### Award of public service contracts following quality comparison

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:

- (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.

#### Article 9

##### Safeguards

1. 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 is not affiliated. This requirement to subcontract may not extend to more than half the value of the services covered by the contract.

2. A competent authority may decide not to award public service contracts to any operator that would, as a consequence, have more than a quarter of the relevant market for public passenger transport services.

3. Where a public service contract includes an exclusive right, the 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. 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.

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 FOR PUBLIC PASSENGER TRANSPORT OPERATION

#### Article 10

Without prejudice to public service contracts concluded in accordance with Chapter III, competent authorities may lay down general rules or minimum criteria to be adhered to by all operators. Those 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. Such general rules or minimum criteria may include compensation for the cost of complying with them, 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.

#### 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), that define the authority's minimum requirements;
- (b) award criteria, taking into account the criteria in Article 4(2), 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.

#### Article 13

#### Transparency

1. Notices, 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 or more, or EUR 800 000 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;
  - (b) the terms of any general rules for public transport operation they have laid down; and
  - (c) the information they hold, under the terms of public service contracts, about operators' services, tariffs and numbers of passengers.

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 each year:

- (a) a summary for the previous year 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 year and for which compensation was provided, and of the amount of compensation paid.

#### Article 14

##### Appeals

1. Member States shall ensure that operators and other interested parties have the right to appeal to a public body against decisions and preliminary decisions of competent authorities under this Regulation. This body shall be independent, in its organisation, funding, legal structure and decision-making, from any competent authority concerned and from any operator.

2. Appeal bodies shall have the power to request relevant information from competent authorities, undertakings and any third party involved within the Member State concerned. This information shall be supplied without undue delay.

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.

4. Subject to paragraph 5, decisions of appeal bodies shall be binding on all parties covered by such decisions.

5. Member States shall take measures necessary to ensure that decisions taken by appeal bodies are subject to judicial review.

#### 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. 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 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 to another activity.

3. Operators receiving compensation for compliance with minimum criteria 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 to an activity not subject to the rule or criteria in question.

#### 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.

3. Until the date on which the schemes, contracts and arrangements referred to in paragraphs 1 and 2 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.

#### Article 18

#### Operators from countries listed in Annex II

For the purposes of this Regulation and without prejudice to Article 9(4), operators from the countries listed in Annex II shall be treated as Community companies, in accordance with the terms and conditions of the agreement between each such country and the Community. 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 Communities*.

#### 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 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 consequences for passengers, and shall propose amendments to the Regulation if necessary. The report shall include an examination of the operation of the exemption established in Article 7(4).

#### 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.

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#### 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 others 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.

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#### 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.

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