

EU REGULATION CLARIFIES SCOPE OF PUBLIC SERVICE OBLIGATIONS IN TRANSPORT SECTOR

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16th January 2008

After many years in the making the EU recently issued a new Regulation concerning special rights and the subsidisation of the rail and road transport sectors (Official Journal of the EU L 315 of 3 December 2007 - <http://eur-lex.europa.eu/J0>).

The Regulation will replace, albeit with limited scope of application, two of the oldest EU Regulations in force, i.e Regulations 1191/69 and 1107/70.

This Regulation builds on the special position of State aid in the transport sector whereby public authorities can either, grant exclusive rights, or compensate public service operators for costs incurred, when such operators discharge a so-called public service obligation ("a PSO"). In its 2003 judgement the European Court in the "Altmark" case ruled that where four specific conditions are met, compensation paid to finance a public service does not fulfil the requirements of State aid.

The corollary is that where any of the four conditions are not met, such PSO compensation constitutes State aid. If a PSO meets the requirements of the new Regulation then it need not be notified under State aid procedural rules.

A PSO is a requirement to ensure the provision of public transport services in the general interest, i.e a service which a transport service operator would not usually take up because running such a service is not so commercially viable.

When a public authority either grants such exclusive rights or provides for such PSO compensation this must be done through a "public service contract" ("a PSC").

A PSC must meet a number of requirements, most notably it must:

- include a definition of either the PSO or the exclusive right;
- specify the basis on which the compensation has to be calculated;
- define the arrangements for the allocation of costs connected with the provision of the services in question; and,
- establish arrangements for the allocation of revenue from the sale of tickets.

A PSC is limited to 10 years for coach and bus services and 15 years for rail services. A PSC must also allow for the possibility of subcontracting but with a requirement that the public transport service operator performs a major part of the transport service in question.

A PSC should generally be awarded directly according to the procedural rules set out in the new Regulation. In some limited cases, a PSC may be awarded under EU public procurement legislation (EU Directives 2004/17 and 2004/18). All service concession contracts are to be awarded under the procedural rules set out in the new Regulation.

Where there is a dispute concerning the award of a PSC, such a matter will be subject to review procedures whether the PSC has been awarded either directly or under EU public procurement legislation.

PSO compensation must meet a number of requirements, as set out in an Annex to the Regulation - overcompensation must be avoided.



PSO compensation for the operation of public passenger transport services or for complying with tariff obligations in accordance with the conditions of the new Regulation do not need to be notified to the European Commission.

Reimbursement for the discharge of a PSO falling outside the conditions of the new Regulation, notably those for so-called “transport coordination” needs, may still be provided, in particular for infrastructure costs under certain conditions, or, for R&D. But, the notification of such reimbursement, as State aid, will have to be made to the European Commission.

The new Regulation enters into force in December 2009 with a transitional period for freight until December 2012. As this legislation is in the form of a Regulation the EU Member States must apply it in their national systems as it is, i.e. there is no need for further implementing national rules.

Finally, it should be noted that the EU is also planning to issue official EU guidelines on State aid for the railways. To this end a consultation docu-

ment has been issued by the European Commission which it hopes will be adopted later this year (“Working Document - Preliminary Draft: Community Guidelines on State aid for railway undertakings” – http://ec.europa.eu/dgs/energy_transport/state_aid/consultation). Amongst other topics covered, including aid for debt cancellation, restructuring, transport co-ordination and guarantees respectively, the draft guidance also deals with PSO issues.

Footnotes:

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