
DRAFT STATUTORY INSTRUMENTS

2023 No.

The Public Service Obligations in Transport Regulations 2023

PART 2

Content of public service contracts

Interpretation of Part 2

5. For the purposes of this Part—

- (a) subject to paragraph (b), “net financial effect” equals—
 - (i) costs incurred in relation to a public service obligation or a bundle of public service obligations imposed by the competent authority (whether contained in a public service contract, a general rule, or both), minus
 - (ii) any positive financial effects generated within the network operated under the public service obligation or obligations in question, minus
 - (iii) any receipts from fare or any other revenue generated while fulfilling the public service obligation or obligations in question, plus
 - (iv) a reasonable profit;
- (b) where, in the competent authority’s opinion, compliance with the public service obligation has a quantifiable financial effect on a public service operator’s other transport activities, such an effect must be taken into account when calculating the net financial effect under paragraph (a);
- (c) “reasonable profit” means, taking account of the amount of any capital or other resources (or both) invested by the public service operator and the risk, or absence of risk incurred by the public service operator by virtue of public authority intervention, having regard to the size and nature of the services, including by transfer of financial risk around any capital investment, revenue or operating expenditure—
 - (i) a level of profit that is within a normal range for the sector, or
 - (ii) where a level of profit that is within a normal range for the sector cannot be determined, the level of profit that would be required by a typical, well-run undertaking adequately equipped with the means to provide the service, and active in the same sector considering whether or not to provide the service in question.

Public service obligations

6.—(1) A competent authority must determine the specifications for public service obligations and the scope of their application taking into account—

- (a) the possibility of grouping cost-covering services with non-cost-covering services, and
- (b) the appropriateness of the specifications to the services concerned.

(2) The specifications determined in accordance with paragraph (1) must be consistent with any objectives set out in relevant public transport policies, and both the specifications and the related

compensation of the net financial effect on the operator of the public service obligations must be designed to—

- (a) achieve those objectives in a cost-effective manner, and
- (b) financially sustain the provision of public passenger transport services in the long term, in accordance with the requirements laid down in the relevant public transport policies.

(3) Subject to agreement of the competent authorities in whose geographical area the services are provided, public service obligations may concern cross-border public transport services, including those relating to local and regional transport needs.

Public service contracts and general rules

7.—(1) Subject to paragraph (2), where a competent authority grants an operator an exclusive right or compensation in return for the discharge of a public service obligation, it must do so by means of a public service contract.

(2) A public service obligation which aims to establish maximum fares for—

- (a) all passengers, or
- (b) certain categories of passenger,

may be effected by a general rule.

(3) In accordance with the principles set out in this regulation and in regulation 10 (public service compensation for directly awarded contracts), the competent authority must compensate the public service operator for no more than the net financial effect on the operator of complying with fare obligations effected by a general rule.

(4) A public service contract and a general rule must—

- (a) clearly set out the public service obligations with which the public service operator is to comply, and the geographical areas concerned,
- (b) establish in advance, in an objective and transparent manner—
 - (i) the parameters on the basis of which the compensation payment, if any, is to be calculated, and
 - (ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation,
- (c) in the case of a public service contract awarded other than under regulation 14 (awards of contracts under competitive procedure), determine the parameters in sub-paragraph (b) in accordance with regulation 10, so that no compensation paid to the public service operator exceeds the amount that is the net financial effect on that operator of discharging the public service obligation, and
- (d) determine the arrangements for the allocation of costs connected with the provision of services.

(5) The costs referred to in paragraph (4)(d) may in particular include—

- (a) costs of staff,
- (b) costs of energy,
- (c) infrastructure charges,
- (d) costs of maintenance and repair of public transport vehicles,
- (e) costs of rolling stock and installations necessary for operating the passenger transport services,
- (f) fixed costs, and

(g) costs of relevant finance.

(6) A public service contract or general rule must set out arrangements for determining how revenue from the sale of tickets should be allocated and the proportion of such revenue which may be—

- (a) kept by the public service operator,
- (b) repaid to the competent authority, or
- (c) shared between the public service operator and the competent authority.

(7) A public service contract must require the public service operator to provide the competent authority with the information essential for the subsequent award of the public service contract, while ensuring the protection of commercially sensitive information.

Subcontracting

8.—(1) A competent authority's tender documents and public service contracts must clearly indicate—

- (a) whether subcontracting is permitted, and
- (b) the extent, if any, to which the public service operator is permitted to subcontract.

(2) Where a public service contract provides that subcontracting is permitted, that contract must set out the conditions applicable to subcontracting.

(3) Except where paragraph (4) applies, a public service contract must require the public service operator to perform a major part of the public passenger transport services itself.

(4) Where a public service contract entrusts an operator with the design, construction and operation of public passenger transport services, that contract may permit the operator to subcontract the whole of the operation of those services.

Duration of public service contracts

9.—(1) Unless paragraph (2) or (3) applies, the duration of a public service contract must not exceed—

- (a) 10 years if the contract is awarded under regulation 17 (direct awards: rail), regulation 19 (direct award: rail due to structural and geographical characteristics) or regulation 20 (direct award: rail where operator manages the railway infrastructure);
- (b) 2 years if the contract is awarded, extended or imposed under regulation 16 (emergency measures);
- (c) 5 years, if the contract is awarded under regulation 18 (temporary direct award: rail);
- (d) for any other contract—
 - (i) if transport by either rail or other track-based modes, or any combination of rail and other track-based modes, represents more than 50% of the value of the public passenger transport services, 15 years;
 - (ii) otherwise, 10 years.

(2) Subject to paragraphs (3) and (4), a public service contract may have a duration of up to 50% longer than the applicable period prescribed under paragraph (1) if the public service operator provides assets—

- (a) which have an exceptionally long depreciation period justifying, in the opinion of the competent authority, such longer duration,
- (b) which are significant in relation to the overall assets needed to carry out the passenger transport services covered by the public service contract, and

- (c) which are linked predominantly to the passenger transport services covered by the contract.
- (3) A public service contract may have a longer duration than is prescribed under paragraphs (1) and (2) if—
 - (a) in the opinion of the competent authority a longer duration is justified by the amortisation of capital in relation to exceptional levels of investment in infrastructure, rolling stock or vehicles, and
 - (b) the public service contract is awarded in a fair competitive tendering procedure.
- (4) Paragraphs (2) and (3) do not apply to a contract made under regulation 16 (emergency measures) or regulation 18 (temporary direct awards).

Public service compensation for directly awarded contracts

- 10.**—(1) With the exception of a public service contract awarded under regulation 14 (award of contracts under competitive procedure), every public service contract awarded and general rule effected under these Regulations must, in order to demonstrate that overcompensation has been avoided, comply with this regulation.
- (2) The compensation paid to a public service operator must not exceed the amount that is the net financial effect on that operator of compliance with the public service obligation.
 - (3) The net financial effect must be assessed by comparing the situation where the public service obligation is met with the situation which would have existed if the obligation had not been met.
 - (4) In order to increase transparency and avoid cross-subsidies, where a public service operator engages in other activities as well as the compensated services subject to public transport service obligations, the accounts of the public services must be separate from those of the other activities and, where applicable, the accounts of each compensated service separated so as to meet at least the following conditions—
 - (a) the operating accounts corresponding to each of these activities must be separate and the proportion of the corresponding assets and the fixed costs must be allocated in accordance with generally accepted accounting practice and tax rules in force,
 - (b) no variable costs, contribution to fixed costs or profit connected with any other activity of the public service operator may be charged to the public service in question, and
 - (c) the costs of the public service must be balanced by operating revenue and payments from public authorities, without any transfer of revenue to another sector of the public service operator’s activity.
 - (5) The method of compensation must promote the maintenance or development of—
 - (a) effective management by the public service operator, and
 - (b) the provision of passenger transport services of an appropriately high standard of service quality.

Rail rolling stock

- 11.**—(1) Ahead of launching a competitive tendering procedure for a public service contract that requires the use of rolling stock, a competent authority must—
 - (a) assess whether measures such as those listed in paragraph (3) ought to be taken to ensure effective and non-discriminatory access to suitable rolling stock, and
 - (b) publish its findings on its website.
- (2) The assessment carried out under paragraph (1) must take into account the presence of rolling-stock leasing companies and any other sources of suitable rolling stock of which the competent authority is aware.

(3) Appropriate measures to ensure effective and non-discriminatory access to suitable rolling stock under paragraph (1)(a) may include—

- (a) the acquisition by the competent authority of the rolling stock used for the execution of the public service contract with a view to making it available to the selected public service operator at market price or as part of the public service contract;
- (b) the provision by the competent authority of a guarantee for the financing of the rolling stock used for the execution of the public service contract at market price or as part of the public service contract, including a guarantee covering the residual value risk;
- (c) a commitment by the competent authority in the public service contract to take over the rolling stock on predefined financial conditions at the end of the contract at market price;
- (d) cooperation with other competent authorities in order to create a larger pool of rolling stock.

(4) If the rolling stock is to be made available to a new public service operator, the competent authority must include in the tender documents any available information about the cost of maintenance of the rolling stock and its physical condition.