

# Transport procurement—limited publication obligations for direct awards (Autorità Garante v Regione Autonoma)

25/10/2019

**Public Law analysis:** This preliminary ruling concerned the interpretation of various provisions in Regulation 1370/2007/EC of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road. The Court of Justice interpreted Article 7 of Regulation 1370/2007/EC of the European Parliament and of the Council relating to the publication requirements in respect of the ‘direct award’ of contracts narrowly so as limit the amount and nature of information that a contracting authority is required to publish and communicate in advance of such an award being made. Written by Jonathan Lewis, barrister, at Henderson Chambers.

*Autorità Garante della Concorrenza e del Mercato v Regione Autonoma della Sardegna*, Case [C-515/18](#)

## What are the practical implications of this case?

[Regulation 1370/2007/EC](#) of the European Parliament and of the Council reflects the fact that public passenger transport by rail raises specific issues of investment burden and infrastructure cost. The Court of Justice has taken a common-sense approach by interpreting narrowly the publication obligations of contracting authorities under [Regulation 1370/2007/EC](#) of the European Parliament and of the Council when they wish to award public service contracts for rail directly, that is without a competitive tendering procedure. In such circumstances, contracting authorities need only publish the information specifically listed in [Article 7](#) of Regulation 1370/2007/EC of the European Parliament and of the Council (which is in any event fairly detailed in respect of direct awards (Article 7(3)), and sufficient information to enable economic operators to object in principle to the direct award of a contract. They do not need to publish sufficient information so as to enable potentially interested operators to prepare a commercial offer for the contract. Further, they are not required to carry out a comparative assessment of all bids which they may receive following publication.

## What was the background?

In December 2015, the Region of Sardinia (a competent authority under the Regulation) (Region) published a prior information notice concerning the direct award of a public service contract for the transport of passengers by rail in the Official Journal of the European Union (OJEU). A direct award is the award of a public service contract to a public service operator without any prior competitive tendering procedure (under [Article 2\(h\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council). [Article 5\(6\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council gives competent authorities, unless prohibited by national law, the discretion to make direct awards of public service contracts where they concern transport by rail (with some exceptions and limitations).

In response to the OJEU publication, the Region received a proposal from the incumbent, Trenitalia SpA, and expressions of interest from two other operators, one of which sought further information. The Region awarded the contract to Trenitalia SpA. However, the Italian Competition Authority brought an action in respect of various alleged flaws in the procedure. It maintained that the Region had not complied with its publication obligations set out in [Article 7](#) of Regulation 1370/2007/EC of the European Parliament and of the Council, especially considering the principles of equal treatment, non-discrimination and transparency.

[Article 7](#) of Regulation 1370/2007/EC of the European Parliament and of the Council sets out various publication requirements of contracting authorities. [Article 7\(2\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council requires competent authorities, at least one year before the launch of the invitation to tender procedure or the direct award, to publish as a minimum its name and address, the type of award and the services and areas potentially covered in the OJEU. Article 7(3) set out a list of six matters to publish a year in advance of granting a direct award. [Article 7\(4\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council requires a competent authority, when requested by an interested party, to forward the reasons for its decision for directly awarding a public service contract.

The Italian Competition Authority’s case was that the purpose of [Article 7\(2\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council is to give interested parties the opportunity to prepare a

proposal for submission as part of the procedure for direct award. Hence, it argued that the Region should have asked the incumbent operator to furnish all data in its possession concerning levels of demand, number of employees, rolling stock and so on, in order to make that information available to other operators who have expressed their interest so that they could make a commercial offer. The Region maintained that this went against the very nature of the procedure for direct award.

### What did the court decide?

The Court of Justice found for the Region. The essential issues were whether [Articles 7\(2\)](#) and [\(4\)](#) of Regulation 1370/2007/EC of [Regulation 1370/2007/EC](#) of the European Parliament and of the Council must be interpreted as meaning that authorities which intend directly to award public service rail contracts are required, first, to publish or communicate to interested economic operators all the information necessary in order to enable them to submit a sufficiently detailed offer which may be subject to a comparative assessment and, second, to carry out such an assessment of all bids which may have been received. The Court of Justice held that they should not be so interpreted.

Its starting point was that it not only had to consider the wording of those Articles but their context and the objectives of [Regulation 1370/2007/EC](#) of the European Parliament and of the Council (at para [23]). The wording of the provisions did not require publication of that level of information (at para [24]). It noted that the information expressly specified by [Article 7\(2\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council alone does not allow for the preparation of a full bid and would not enable an interested operator to determine the specific characteristics of the intended contract (at para [25]).

The Court of Justice found no basis to infer from the wording of [Article 7\(4\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council that the authority had to provide anything more than the reasons for making a direct award (at para [26]). It held that if [Article 7\(2\)](#) and [\(4\)](#) of Regulation 1370/2007/EC of the European Parliament and of the Council were to be interpreted as introducing a publicity scheme substantially identical to that of a competitive tendering procedure, such an interpretation would lead to the procedure for direct award being equated to a competitive tendering procedure and would thus ignore the important differences that [Regulation 1370/2007/EC](#) of the European Parliament and of the Council provides for in their regard (at para [30]).

In reaching this conclusion the Court of Justice noted that recital 25 established that [Regulation 1370/2007/EC](#) of the European Parliament and of the Council was concerned with establishing a framework for compensation and/or exclusive rights and not for the further opening of the market for railway services (at para [31]). Finally, it noted that greater level of transparency referred to in recital 30 was achieved by enabling an economic operator to object to the very principle of making a direct award, which could be achieved without publication of the further information proposed by the Italian Competition Authority.

### Case details

- Court: Court of Justice
- Judge: M Campos Sánchez-Bordona
- Date of judgment: 24/10/2019

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