



EUROPEAN COMMISSION  
DIRECTORATE-GENERAL FOR MOBILITY AND TRANSPORT

Directorate A – Policy Coordination  
A 4 – Legal Issues & Enforcement

Brussels

MOVE.A.4

AK Wien-Umwelt und Verkehr

**Subject: Legal opinion about the "Revised interpretative guidelines" regarding  
PSO-regulation (1370/2007 & 2016/2338)**

Dear

Thank you for the e-mails you sent on 7 July to Mr Götz, head of Cabinet of Commissioner Adina Vălean, and to Mr Hololei, Director General of DG MOVE of the European Commission concerning the draft revised interpretative Guidelines on Regulation (EC) No 1370/2007. They have asked me to reply to you.

As to your statement that the Commission would like to use these guidelines to re-introduce its original proposals of the Fourth railway package that were not retained by the European Legislator I would like to assure you that these guidelines are not creating new rules or encroaching over the competences of the co-legislators.

The guidelines only reflect the Commission's interpretation of Regulation 1370/2007 and the applicable case-law. In this context, the Commission is in its role of "Guardian of the Treaties" and states how it intends to apply these rules.

On the question of direct awards of public service contracts, the guidelines only reflect the existing legislation. The Fourth railway package establishes the principle of open access rights and competitive tenders for the award of public service contracts. The legislation however also provides for limited possibilities of direct awards under certain conditions.

The European Court of Justice (in its judgement in Teleaustria) made it clear that the award of public contracts should comply with the fundamental rules of the Treaty, and in particular the principle of non-discrimination on grounds of nationality and the related principle of transparency.

Therefore, Article 5(3) on competitive award translates these fundamental principles into Regulation 1370/2007, which in itself is sufficient to conclude its primacy over direct award.

However, the very wording of this article concerns that it sets the general rules, while the other provisions on direct award are the exception:

“Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 3a, 4, 4a, 4b, 5 and 6.”

Thus the Commission takes the position that competitive award is the rule and direct award the exception, which therefore - in application of constant jurisprudence - has to be interpreted restrictively.

Yours sincerely,

Electronically signed

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