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28 MAY 2012

STATE AID DAYS, WARSAW

SGEI in transport – Reg. 1370/2007

› LEGISLATIVE BACKGROUND

- › **REG 1190/69**
- › **DOES NOT DEAL WITH AWARD PROCEDURES**
- › **VERY UNCLEAR RULES – IF ANY – REGARDING PSO COMPENSATION**

SGEI and transport – Reg. 1370/2007

- **THE JUDGMENT IN <u>T-157/01 – DANSKE BUSVOGNMÆND</u>**

- **PAR. 73**

  - **“Article 14 of Regulation No 1191/69 defines a ‘public service contract’ as a contract concluded in order to provide the public with adequate transport services, and which is to provide for, in addition to its duration, all of the transport service details, including ‘the price of the services … ,**

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› **which shall either be added to tariff revenue or shall include the revenue, and details of financial relations between the two parties' (Article 14(1) and (2)(b)). Thus, <u>this purely contractual system does not provide either for compensation for achievement of an imposed objective or for a public service obligation within the meaning of Article 2 of Regulation No 1191/69</u>."**

SGEI and transport – Reg. 1370/2007

› **AS A CONSEQUENCE:**

› **THE CONTRACT SUM COULD NOT BE SEEN AS PSO-COMPENSATION**

THE <u>ALTMARK-JUDGMENT</u>

GENERAL RULES OF THE TREATY NOT APPLICABLE – REG 1191/69 CONSIDERED TO BE EXHAUSTIVE

SGEI and transport – Reg. 1370/2007

- **<u>SCOPE OF THE REG.</u>**
  - **ART. 1, PAR. 3**
    - **NATIONAL AND INTERNATIONAL**
    - **PASSENGER TRANSPORT SERVICES**
    - **RAIL, OTHER TRACK-BASED MODES OF TRANSPORT**

SGEI and transport – Reg. 1370/2007

- **I. E. NOT OBLIGATORY TO APPLY THE REG. AS REGARDS INLAND WATERWAYS**

- **PUBLIC SERVICE CONTRACTS VS. GENERAL RULES – <u>ART. 3</u> OF THE REG.**

- **ART. 3 (1): PSO-CONTRACT MUST BE ENTERED INTO IN THE CASE OF EXCLUSIVE RIGHTS AND/OR WHEN PSO-COMPENSATION**

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› **ART 3 (2)**

› **POSSIBILITY TO APPLY ”GENERAL RULES”, I.E. MAXIMUM TARIFFS FOR ALL OR CERTAIN CATEGORIES OF PASSENGERS**

ART. 4

<u>MANDATORY</u> CONTENT OF PSO-CONTRACTS AND GENERAL RULES

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- **CLEAR DEFINITION OF PSOS**
- **COHERENT SYSTEM INCLUDING PROFITABLE ROUTES?**
  - **YES, CONFIRMED IN COMMISSION-DECISION IN DSB**
  - **(24 February 2010 - C 41/08 (NN 35/08) - Public service contracts between the Danish Ministry of Transport and Danske Statsbaner (DSB) (OJ 2011 L 7, p. 1)**

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- **THE <u>PARAMETERS</u> ON THE BASIS OF WHICH THE COMPENSATION IS TO BE CALCULATED (ART. 4 (1) (B), ART. 6 AND ANNEX)**
- **OVERCOMPENSATION MUST BE PREVENTED**
- **UNCLEAR WHETHER (OR HOW) THIS APPLIES IN THE CASE OF A TENDERING PROCEDURE**
- **PRESUMPTION OF NO OVERCOMPENSATION – BUT CAN IT BE REBUTTED AND WHEN?**

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- **NET FINANCIAL EFFECT OF COSTS INCURRED AND REVENUES GENERATED MAY BE COMPENSATED**

- **GUIDANCE IN THE ANNEX**

- **OBVIOUSLY INCLUDING A ”<u>REASONABLE PROFIT</u>” – NORMAL RATE OF RETURN IN THE SECTOR – PROBLEM OF BENCH-MARKING (HIGHLIGHTED IN THE DSB-CASE)**

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- **METHOD OF COMPENSATION MUST (ACCORDING TO THE ANNEX)**
- **<u>PROMOTE</u> THE MAINTENANCE OR DEVELOPMENT OF**
- **(1) EFFECTIVE MANAGEMENT**
- **(2) HIGH STANDARD**
- **I.E. NO EFFICIENCY REQUIREMENT AS SUCH**

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- **AGAIN HIGHLIGHTED IN THE DSB-DECISION**
- **<u>EXCLUSIVE RIGHTS</u> – AS A PART OF THE COMPENSATION.**
- **MAY BE LIMITED TO ”SPECIAL RIGHTS”, I.E. LIMITED TO EG. OFF-PEAK HOURS**
- **COMPENSATION AS REGARDS EXISTING CONTRACTS (DSB-DECISION APPLIES THE REG.!)**

SGEI and transport – Reg. 1370/2007

- **<u>DURATION</u> OF THE CONTRACTS**
- **ART 4 (2-4)**
- **10 YEARS (BUS AND COACH)**
- **15 YEARS (TRAIN OR TRACK AND COMBINED TRANSPORT)**
- **MAY BE PROLONGED BY 50 PER CENT IF ”NECESSARY” DUE TO ASSET DEPRECIATION**

SGEI and transport – Reg. 1370/2007

› **POSSIBILITY OF OBLIGATION TO TAKE OVER EXISTING PERSONNEL**

SGEI and transport – Reg. 1370/2007

- **AWARD PROCEDURES**
  - **AS A GENERAL RULE A <u>TENDERING</u> PROCURE SHOULD BE APPLIED, CF. ART. 5 (3)**
  - **POSSIBILITY OF <u>NEGOTIATION</u> AFTER CALL FOR TENDER**
  - **TWO MAJOR EXCEPTIONS:**
  - **I. <u>”INTERNAL OPERATOR”</u> (ART. 5(2)).**

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ONLY SERVICES AT A <u>LOCAL LEVEL</u> (IE. NOT ENTIRE NATION)

- **PRINCIPLE OF ”<u>GEOGRAPHICAL LIMITATION</u>” OF THE INTERNAL OPERATOR**

- **CANNOT PARTICIPATE IN COMPETITIVE TENDERS OUTSIDE THE TERRITORY OF THE LOCAL AUTHORITY (OR STATE BODY, CF. ART. 5(2)(D))**

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- **COVERS <u>SUBSIDIARIES</u> OF THE INTERNAL OPERATOR**
- **EVEN A MINIMAL INFLUENCE (ART. 5(2)(B))**
- **RISK OF CONTRIBUTING TO THE <u>LIMITATION</u> OF COMPETITION?**

SGEI and transport – Reg. 1370/2007

- **II. <u>SECOND MAJOR EXCEPTION:</u>**
- **<u>HEAVY RAIL</u> (NOT METROS OR TRAMWAYS), CF. ART. 5 (6)**
- **NO GEOGRAPHICAL LIMITATION APPLIES**
- **NO OBLIGATION FOR THE OPERATOR TO BE ”INTERNAL”.**
- **BACKGROUND: THE INVESTMENT BURDEN**

SGEI and transport – Reg. 1370/2007

› **<u>ENTRY INTO FORCE AND TRANSITIONAL PERIOD</u>:**

› **EIF: 3 DECEMBER 2009 (ART. 12)**

<u>TRANSITIONAL PERIOD</u> AS REGARDS THE AWARD PROCEDURE (ART 8).

PSO CONTRACTS ENTERED INTO 3 DECEMBER 2019 OR LATER – OBLIGATION TO ”GRADUALLY COMPLY” (VERY UNCLEAR)

SGEI and transport – Reg. 1370/2007

- **COMPENSATION IN ACCORDANCE WITH THE REG. IS <u>NOT TO BE NOTIFIED</u> (ART. 9 (1))**

- **<u>REINTRODUCTION</u> OF THE TREATY PROVISIONS, CF. ART. 9(2) – CF THE ALTMARK-JUDGMENT.**

- **GUIDELINES HAVE BEEN PUBLISHED BY THE COMISSION (INCLUDING INVESTMENT IN INFRASTRUCTURE)**

SGEI and transport – Reg. 1370/2007

- **CONCLUSION:**
- **HARD TO SAY BEFORE THE END OF THE TRANSITIONAL PERIOD**
- **DOES HOWEVER SEEM TO INTRODUCE MUCH-NEEDED CLARIFICATION**

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