Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

13 February 2025*

(Reference for a preliminary ruling – Transport – Public passenger transport services by rail and by road – Regulation (EC) No 1370/2007 – Public passenger transport services by bus – Point (c) of the third subparagraph of Article 5(2) – Award of public service contracts – Award of a contract for the provision of public transport services by bus – Award in the form of a service concession contract – Direct award by a competent local authority to an internal operator – Article 5(3) – Competitive tendering procedure – Award of a contract for the provision of public transport services by bus by another competent authority – Participation of the internal operator – Conditions)

In Case C-684/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the administratīvā rajona tiesa (District Administrative Court, Latvia), made by decision of 15 November 2023, received at the Court on 15 November 2023, in the proceedings

'Latvijas Sabiedriskais Autobuss' SIA

v

Iepirkumu uzraudzības birojs,

'Autotransporta direkcija' VSIA,

THE COURT (Tenth Chamber),

composed of I. Jarukaitis, President of the Fourth Chamber, acting as President of the Tenth Chamber, E. Regan (Rapporteur) and Z. Csehi, Judges,

Advocate General: T. Ćapeta,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– 'Latvijas Sabiedriskais Autobuss' SIA, by A. Hartpenga, advokāte,

* Language of the case: Latvian.

– ‘Autotransporta direkcija’ VSIA, by A. Caune, valdes priekšsēdētājs, and T. Vectirāns, valdes loceklis,

– the Latvian Government, by E. Bārdiņš, J. Davidoviča and K. Pommere, acting as Agents,

– the European Commission, by P. Messina and I. Rubene, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of point (c) of the third subparagraph of Article 5(2) and Article 5(3) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (OJ 2007 L 315, p. 1), as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 (OJ 2016 L 354, p. 22) (‘Regulation No 1370/2007’).

2 The request has been made in proceedings between ‘Latvijas Sabiedriskais Autobuss’ SIA, a company incorporated under Latvian law, and the Iepirkumu uzraudzības birojs (Office of Public Procurement Oversight, Latvia) (‘the OPPO’) and ‘Autotransporta direkcija’ VSIA (‘ATD’), a public undertaking responsible for organising public transport services in Latvia, concerning the grant of the right to provide public transport services by bus on the network of routes of regional interest in the city of Ventspils (Latvia).

Legal context

European Union law

Regulation No 1370/2007

3 Recitals 6, 7 and 18 of Regulation No 1370/2007 state:

‘(6) Many Member States have enacted legislation providing for the award of exclusive rights and public service contracts in at least part of their public transport market, on the basis of transparent and fair competitive award procedures. As a result, trade between Member States has developed significantly and several public service operators are now providing public passenger transport services in more than one Member State. However, developments in national legislation have led to disparities in the procedures applied and have created legal uncertainty as to the rights of public service operators and the duties of the competent authorities. Regulation (EEC) No 1191/69 of the Council of 26 June 1969 on action by Member States concerning the obligations inherent in the concept of a public service in transport by rail, road and inland waterway [(OJ 1969 L 156, p. 1)], does not deal

with the way public service contracts are to be awarded in the [European] Community, and in particular the circumstances in which they should be the subject of competitive tendering. The Community legal framework ought therefore to be updated.

(7) Studies carried out and the experience of Member States where competition in the public transport sector has been in place for a number of years show that, with appropriate safeguards, the introduction of regulated competition between operators leads to more attractive and innovative services at lower cost and is not likely to obstruct the performance of the specific tasks assigned to public service operators. This approach has been endorsed by the European Council under the Lisbon Process of 28 March 2000 which called on the [European] Commission, the Council [of the European Union] and the Member States, each in accordance with their respective powers, to "speed up liberalisation in areas such as … transport".

…

(18) Subject to the relevant provisions of national law, any local authority or, in the absence thereof, any national authority may choose to provide its own public passenger transport services in the area it administers or to entrust them to an internal operator without competitive tendering. However, this self-provision option needs to be strictly controlled to ensure a level playing field. The competent authority or group of authorities providing integrated public passenger transport services, collectively or through its members, should exercise the required control. In addition, a competent authority providing its own transport services or an internal operator should be prohibited from taking part in competitive tendering procedures outside the territory of that authority. The authority controlling the internal operator should also be allowed to prohibit this operator from taking part in competitive tenders organised within its territory. …'

4 Article 1 of Regulation No 1370/2007, entitled 'Purpose and scope', states, in subparagraph 1 of paragraph 1 thereof:

'The purpose of this Regulation is to define how, in accordance with the rules of Community law, competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest which are among other things more numerous, safer, of a higher quality or provided at lower cost than those that market forces alone would have allowed.'

5 Article 2 of that regulation, entitled 'Definitions', provides:

'For the purpose of this Regulation:

…

(b) "competent authority" means any public authority or group of public authorities of a Member State or Member States which has the power to intervene in public passenger transport in a given geographical area or any body vested with such authority;

(c) "competent local authority" means any competent authority whose geographical area of competence is not national;

…

(h) “direct award” means the award of a public service contract to a given public service operator without any prior competitive tendering procedure;

(i) “public service contract” means one or more legally binding acts confirming the agreement between a competent authority and a public service operator to entrust to that public service operator the management and operation of public passenger transport services subject to public service obligations; depending on the law of the Member State, the contract may also consist of a decision adopted by the competent authority:

– taking the form of an individual legislative or regulatory act, or

– containing conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator;

(j) “internal operator” means a legally distinct entity over which a competent local authority, or in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments;

…’

6 Article 5 of that regulation, entitled ‘Award of public service contracts’, provides:

‘1. Public service contracts shall be awarded in accordance with the rules laid down in this Regulation. However, service contracts or public service contracts as defined in Directives 2004/17/EC [of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (OJ 2004 L 134, p. 1),] or 2004/18/EC [of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (OJ 2004 L 134, p. 114)] for public passenger transport services by bus or tram shall be awarded in accordance with the procedures provided for under those Directives where such contracts do not take the form of service concessions contracts as defined in those Directives. Where contracts are to be awarded in accordance with Directives 2004/17/EC or 2004/18/EC, the provisions of paragraphs 2 to 6 of this Article shall not apply.

2. Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or, in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments.

…

Where a competent local authority takes such a decision, the following shall apply:

…

(b) the condition for applying this paragraph is that the internal operator and any entity over which this operator exerts even a minimal influence perform their public passenger transport activity within the territory of the competent local authority, notwithstanding any outgoing lines or other ancillary elements of that activity which enter the territory of neighbouring competent local authorities, and do not take part in competitive tenders concerning the provision of public passenger transport services organised outside the territory of the competent local authority;

(c) notwithstanding point (b), an internal operator may participate in fair competitive tenders as from two years before the end of its directly awarded public service contract under the condition that a final decision has been taken to submit the public passenger transport services covered by the internal operator contract to fair competitive tender and that the internal operator has not concluded any other directly awarded public service contract;

…

3. 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. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. …

…

5. In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take emergency measures.

The emergency measures shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The period for which a public service contract is awarded, extended or imposed by emergency measures shall not exceed 2 years.'

Directive 2014/23/EU

7 Article 5 of Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts (OJ 2014 L 94, p. 1), entitled 'Definitions', states:

'For the purposes of this Directive the following definitions apply:

(1) "concessions" means works or services concessions, as defined in points (a) and (b):

…

(b) "services concession" means a contract for pecuniary interest concluded in writing by means of which one or more contracting authorities or contracting entities entrust the provision and the management of services other than the execution of works referred to in point (a) to one or more economic operators, the consideration of which consists either solely in the right to exploit the services that are the subject of the contract or in that right together with payment.

> The award of a works or services concession shall involve the transfer to the concessionaire of an operating risk in exploiting those works or services encompassing demand or supply risk or both. The concessionaire shall be deemed to assume operating risk where, under normal operating conditions, it is not guaranteed to recoup the investments made or the costs incurred in operating the works or the services which are the subject matter of the concession. The part of the risk transferred to the concessionaire shall involve real exposure to the vagaries of the market, such that any potential estimated loss incurred by the concessionaire shall not be merely nominal or negligible;

…'

8 Article 10 of that directive, entitled 'Exclusions applicable to concessions awarded by contracting authorities and contracting entities', provides, in paragraph 3 thereof:

'This Directive shall not apply to concessions … for public passenger transport services within the meaning of Regulation (EC) No 1370/2007.'

Latvian law

9 Article 8 of the Sabiedriskā transporta pakalpojumu likums (Law on Public Transport Services) of 14 July 2007 (*Latvijas Vēstnesis*, 2007, No 106) provides, in paragraphs 2 and 3 thereof:

'2. The contracting authority shall organise the award of contracts for public transport services in accordance with the Publisko iepirkumu likums (Law on Public Procurement) or the legislative provisions governing the award of concessions, unless otherwise provided for in this Law.

3. The contracting authority may award the right to provide public transport services directly, without following the procedure for the award of public transport service contracts referred to in paragraph 2 of this article, in the cases and in accordance with the detailed rules laid down in Regulation No 1370/2007. …'

The dispute in the main proceedings and the questions referred for a preliminary ruling

The public contract at issue in the main proceedings

10 On 19 May 2021, ATD, as contracting authority, launched an open tendering procedure for the award of the right to provide public transport services by bus on the network of routes of regional interest, in the context of which tenders were to be submitted until 30 August 2021 ('the public contract at issue in the main proceedings'). The applicant in the main proceedings submitted a tender in the context of that tendering procedure, including for the 'Ventspils' lot.

11 By decision of 7 December 2022 ('the decision of 7 December 2022'), ATD rejected that tender and awarded the public contract at issue in the main proceedings to a company the entire capital of which is held by the municipality of Ventspils, namely Ventspils reiss PSIA ('VR').

The directly awarded public service contract

12 On 13 January 2012, the municipality of Ventspils, as the competent local authority, directly awarded VR, in its capacity as an internal operator, a public service contract for the provision of public transport services by bus in the city of Ventspils, which was due to expire on 31 December 2023 ('the directly awarded public service contract').

13 On 27 September 2019, that municipality decided to bring forward the expiry date of that contract to 30 September 2021 and to organise a tendering procedure relating to the right to provide public transport services in the city of Ventspils. However, that contract provided that its duration could be extended in the cases provided for in Article 5(5) of Regulation No 1370/2007.

14 On 31 March 2021, the municipality of Ventspils launched a tendering procedure for the provision of public transport services by bus in that city.

15 On 2 September 2021, on account of the delay in the tendering procedure, that municipality decided, on the basis of Article 5(5) of Regulation No 1370/2007, to extend the directly awarded public service contract until the conclusion of a new contract or, at the latest, until 30 September 2022.

16 On 10 September 2021, the tendering procedure was interrupted, following a decision by the OPPO, on account of the need to amend the tender specifications.

17 On 19 September 2021, the municipality of Ventspils launched a new tendering procedure for the provision of public transport services by bus in that city.

18 On 22 September 2022, on account of the delay in the public procurement procedure, that municipality decided, on the basis of Article 5(5) of Regulation No 1370/2007, to once again extend the directly awarded public service contract until the conclusion of a new contract or, at the latest, until 30 September 2023.

19 On 1 June 2023, that tendering procedure was interrupted, following a decision by the OPPO, on account of the need to eliminate inconsistencies in the tender specifications.

The national court proceedings relating to the public contract at issue in the main proceedings

20 The applicant in the main proceedings challenged the decision of 7 December 2022 before the OPPO, claiming that ATD should have excluded VR from the public contract at issue in the main proceedings, on the ground of infringement of the two-year period laid down in point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007, during which that internal operator may be allowed to participate in such a competitive tendering procedure.

21 By decision of 6 February 2023, the OPPO upheld the decision of 7 December 2022, on the ground that all the conditions set out in point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 were satisfied on the date set for the submission of tenders, namely 30 August 2021. According to the OPPO, the extension until 30 September 2023 of the directly awarded public service contract took place in accordance with Article 5(5) of that regulation, in order to ensure the continuity of the public transport service in the municipality of Ventspils. As regards the question of the possible existence of unlawful State aid, the OPPO found that it should

be assessed not in the context of an open and transparent procurement procedure, such as the public contract at issue in the main proceedings organised by ATD, but in the context of the decisions taken and contracts concluded by that municipality.

22 The applicant in the main proceedings brought an administrative appeal before the administratīvā rajona tiesa (District Administrative Court, Latvia), which is the referring court, against the decision of 6 February 2023.

23 According to that applicant, the OPPO disregarded the fact that the extension of the directly awarded public service contract, which was done by way of emergency measures under Article 5(5) of Regulation No 1370/2007, is equivalent to the conclusion of a new contract awarded directly, in breach of point (c) of the third subparagraph of Article 5(2) of that regulation.

24 Furthermore, the applicant in the main proceedings does not dispute that, at the time of submission of the tender, which took place between 19 May and 30 August 2021, the period of two years preceding the end of the directly awarded public service contract, laid down in the latter provision, was complied with, since the end of that contract had been brought forward to 30 September 2021. However, that applicant claims that it was necessary to re-examine the situation at the time when the decision to award the public contract at issue in the main proceedings was taken. At that time, namely 7 December 2022, the expiry of the directly awarded public service contract had been postponed until 30 September 2023, with the result that the tender was in fact submitted outside the two-year period, for the purposes of that provision, which began to run, as a result of that deferral, only on 30 September 2021.

25 The applicant in the main proceedings also submits that the shortening, by the municipality of Ventspils, of the duration of the directly awarded public service contract, followed by the extension, on several occasions, of that contract so that VR could participate in the tendering procedure organised by ATD, constitutes a practice which is, in itself, contrary to the objective pursued by Regulation No 1370/2007, which is to reduce distortions of competition resulting from the authorisation granted to such service providers to participate in tendering procedures and to organise public transport services outside the territory of the competent local authority concerned. The applicant in the main proceedings also asks whether that municipality had the right to decide to extend the directly awarded public service contract, given that the extension or delay of a tendering procedure cannot, in general, be regarded as a case of emergency for the purposes of Article 5(5) of that regulation.

26 The OPPO and ATD maintain that the ‘principle of fair competition’ was not breached, since the performance of the public service contract concluded following the award of the public contract at issue in the main proceedings was not to begin to run until 1 July 2024, with the result that VR would not receive payment both for the performance of the directly awarded public service contract and for the performance of the public service contract concluded under the public contract at issue in the main proceedings.

27 In that context, the referring court considers that it is for it to assess the conditions for the application of point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 in the context of a competitive tendering procedure, within the meaning of Article 5(3) of that regulation.

28 That court notes that Advocate General Saugmandsgaard Øe considered, in his Opinion in Joined Cases *Mobit and Autolinee Toscane* (C-350/17 and C-351/17, EU:C:2018:869, points 89 to 104), that the failure to comply with the requirement to confine the activities of the internal operator, laid down in point (b) of the third subparagraph of Article 5(2) of Regulation No 1370/2007, cannot affect a competitive tendering procedure, within the meaning of Article 5(3) of that regulation. Although that reasoning could be transposed to point (c) of the third subparagraph of Article 5(2) of that regulation, the fact remains, according to the referring court, that, first, the Court did not examine, in the judgment of 21 March 2019, *Mobit and Autolinee Toscane* (C-350/17 and C-351/17, EU:C:2019:237), the relationship between point (b) of the third subparagraph of Article 5(2) and Article 5(3) of that regulation and, second, whether the full effectiveness of the restrictions laid down in points (b) and (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 could be affected if compliance with them were not to be reviewed in the context of the competitive tendering procedure.

29 It follows from recital 18 of Regulation No 1370/2007 that the direct award of a public service contract relating to passenger transport must be strictly controlled in order to ensure a level playing field. The direct award of such a contract should therefore be regarded as an economic advantage to which any operator is not entitled under normal market conditions, accordingly that advantage and the related payments have effects on competition. For that reason, point (b) of the third subparagraph of Article 5(2) of that regulation prohibits internal operators from participating in competitive tendering procedures outside the territory of the competent local authority. That said, in order to promote the opening-up of the public transport services market, that regulation provides, in point (c) of the third subparagraph of Article 5(2) thereof, for an exception to that prohibition, subject to compliance with a number of conditions, focusing on the waiver of the provision of a directly awarded service. Decisions concerning the future organisation of the internal operator's economic activities have an impact on the price proposed by the tenderer. It is therefore essential, in order to ensure a level playing field, that the conditions set out in the latter provision be reviewed in competitive tendering procedures.

30 Therefore, the referring court considers that it is necessary to ask the Court, in the first place, whether it is necessary to review, in the context of the procedure laid down in Article 5(3) of Regulation No 1370/2007, the conditions set out in point (c) of the third subparagraph of Article 5(2) of that regulation, relating to the participation of an internal operator in a tendering procedure.

31 If that question were to be answered in the affirmative, the Court would, in the second place, have to examine the interpretation of the conditions set out in point (c) of the third subparagraph of Article 5(2) and their application to the facts of the case in the main proceedings. It follows from that provision that an internal operator may participate in an open tendering procedure provided, first, that the directly awarded service contract expires within two years, second, that a final decision has been taken to submit the passenger transport services covered by that contract to a fair competitive tendering procedure, and, third, that the internal operator has not concluded any other directly awarded public service contract.

32 In the present case, it is necessary, first of all, to clarify when all the conditions set out in point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 for the participation of an internal operator in a competitive tendering procedure must be complied with. Given that such participation is confirmed by a tender submitted by the tenderer and that decisions concerning

the future organisation of the economic activities of the internal operator are likely to have an impact on the price offered by that tenderer, the relevant conditions should be respected at the time of submission of the tender.

33 That said, the facts of the case in the main proceedings show that the situation may subsequently change. Accordingly, in the present case, the duration of the directly awarded public service contract was extended several times on the basis of Article 5(5) of Regulation No 1370/2007, exceeding in total the two-year period from the submission of the tender, with the result that the question arises as to whether ATD, as the contracting authority, should have verified, at the time of the award, whether the conditions of point (c) of the third subparagraph of Article 5(2) of that regulation were still satisfied at the time of submission of the tender and whether, therefore, VR, in its capacity as an internal operator, should have been excluded from the tendering procedure.

34 The referring court agrees with the interpretation proposed by the applicant in the main proceedings, according to which, in the context of a competitive tendering procedure, account must also be taken of changes in factual circumstances which occurred after the tender was submitted. It cannot be ruled out that the conditions set out in point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 are formally satisfied only at the time of submission of the tender, in particular in the light of the interdependence between the competent local authority and the internal operator. However, that court is inclined to agree with the position taken by ATD and the OPPO, according to which changes in factual circumstances after the submission of a tender must be considered from the point of view of whether they affect fair competition between tenderers.

35 The referring court therefore considers that it is necessary to determine whether point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 must be interpreted as meaning that the contracting authority, when it decides to award a public contract, is required to ascertain whether all the conditions set out in that provision are satisfied at the time of submission of the tender, including by taking into consideration circumstances arising after the submission of the tender which may affect fair competition between tenderers.

36 In the third place, the referring court considers that it is necessary to refer to the Court a question as to whether, as the applicant in the main proceedings submits, the extension of a directly awarded public service contract must be treated in the same way as the conclusion of a new directly awarded public service contract, within the meaning of point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007. Given that the extension of the period of performance of the contract takes place in the context of an existing contract, without amending the other clauses, the referring court doubts whether the condition set out in that provision, requiring that 'the internal operator has not concluded any other directly awarded public service contract', can be interpreted in such a broad manner.

37 In those circumstances, the administratīvā rajona tiesa (District Administrative Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 5 of Regulation No 1370/2007 to be interpreted as meaning that, in the course of the public tendering procedure referred to in paragraph 3 of that article, the requirements laid down in [point (c) of the third subparagraph of paragraph 2] of that article for the participation of an internal operator in the tendering procedure must be verified?

(2) If the answer to Question 1 is in the affirmative, is [point (c) of the third subparagraph of Article 5(2)] of Regulation No 1370/2007 to be interpreted as meaning that the contracting authority, when it decides on the award of the contract, is required to verify whether all the requirements set out in that provision are met at the time of submission of the tender, while also taking into account circumstances arising after submission of the tender which may influence fair competition between the tenderers?

(3) If the answer to Question 1 is in the affirmative, is [point (c) of the third subparagraph of Article 5(2)] of Regulation No 1370/2007 to be interpreted as meaning that the extension of the period for performance of a service contract that was concluded previously amounts to another directly awarded public service contract within the meaning of that provision?'

Consideration of the questions referred

Preliminary observations

38 It should be recalled that Regulation No 1370/2007, as is apparent from the first subparagraph of Article 1(1) thereof, contains, as regards public passenger transport services by rail and by road, special rules providing for methods of intervention in general schemes for public contracts (see, to that effect, judgments of 27 October 2016, *Hörmann Reisen*, C-292/15, EU:C:2016:817, paragraphs 44 to 46, and of 20 September 2018, *Rudigier*, C-518/17, EU:C:2018:757, paragraph 49), which were established, at the time of entry into force of that regulation, by Directives 2004/17 and 2004/18, now replaced respectively by Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (OJ 2014 L 94, p. 243), and Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (OJ 2014 L 94, p. 65).

39 In that regard, Article 5 of Regulation No 1370/2007 lays down, in paragraphs 2 to 6 thereof, specific rules for the award of 'public service contracts', within the meaning of Article 2(i) of that regulation, relating to passenger transport by rail and by road, by giving the 'competent authority', as defined in Article 2(b) thereof, the freedom to choose between a 'direct award' procedure, within the meaning of Article 2(h) of that regulation, which is governed by Article 5(2) thereof, and a competitive tendering procedure, as referred to in Article 5(3) of that regulation.

40 However, as is apparent from the second and third sentences of Article 5(1) of Regulation No 1370/2007, the award of a public service contract for passenger transport by bus or tram is governed, where that contract does not take the form of a service concession contract, not by the special rules laid down in Article 5(2) to (6) of that regulation, but by the general public procurement rules established by Directives 2014/24 and 2014/25 (see, to that effect, judgment of 27 October 2016, *Hörmann Reisen*, C-292/15, EU:C:2016:817, paragraphs 36 to 41).

41 As the Court has already held, contracts for public passenger transport services by bus and by tram, where those contracts do not take the form of service concessions contracts, had already been made fully subject to the general rules on the award of public contracts laid down by Directives 2004/17 and 2004/18 prior to the adoption of Regulation No 1370/2007 (see, to that effect, judgment of 21 March 2019, *Verkehrsbetrieb Hüttebräucker and Rhenus Veniro*, C-266/17 and C-267/17, EU:C:2019:241, paragraph 73).

42 By contrast, 'service concession' contracts, as defined in point 1(b) of Article 5 of Directive 2014/23, relating to public passenger transport services by rail and by road covered by Regulation No 1370/2007, are expressly excluded from the scope of that directive by Article 10(3) thereof.

43 It follows that a public service contract for the transport of passengers by bus, such as that at issue in the main proceedings, falls within the provisions of Article 5(2) and (3) of Regulation No 1370/2007, to which the three questions referred for a preliminary ruling by the referring court relate, only if it constitutes such a service concession contract. Consequently, those questions must be answered on the basis of that premiss, which it is, however, for that court to verify.

The first question

44 By its first question, the referring court asks, in essence, whether point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 must be interpreted as meaning that the contracting authority must, where an internal operator, to which a public service contract has previously been directly awarded by a competent local authority, participates in a competitive tendering procedure, within the meaning of Article 5(3) of that regulation, verify that operator's compliance with the conditions set out in point (c) of the third subparagraph of Article 5(2) in order to determine whether that operator is entitled to participate in that procedure.

45 It should be borne in mind that point (b) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 prohibits an 'internal operator', within the meaning of Article 2(j) of that regulation, to which a 'competent local authority', as defined in Article 2(c) of that regulation, has directly awarded a public service contract, from participating, in accordance with a so-called 'geographical limitations' requirement, in a competitive tendering procedure outside the territory of that local authority.

46 However, point (c) of the third subparagraph of Article 5(2) of that regulation provides that, notwithstanding that prohibition, an internal operator may participate in competitive tendering procedures subject to three conditions, namely, first, that that participation takes place during the two years preceding the end of the directly awarded public service contract, second, that a final decision has been taken to subject the passenger transport services covered by that contract to fair competitive tendering and, third, that the internal operator has not concluded any other directly awarded public service contract.

47 In order to answer the question referred, it is therefore necessary to determine whether compliance with the conditions set out in point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 is required in the context of a competitive tendering procedure, as referred to in Article 5(3) of that regulation, with the result that an internal operator should be excluded from such a procedure in the event of infringement of one of those conditions.

48 According to settled case-law, for the purposes of interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part (see, to that effect, judgment of 21 December 2023, *DOBELES AUTOBUSU PARKS and Others*, C-421/22, EU:C:2023:1028, paragraph 40 and the case-law cited).

49 As regards, in the first place, the wording of the relevant provisions of Regulation No 1370/2007, it should be noted that, according to its unambiguous wording, Article 5(2) of that regulation sets out, as is apparent from its first and third subparagraphs, the applicable provisions, where a competent local authority decides to 'directly award' public service contracts for passenger transport to an 'internal operator', as defined in Article 2(j) of that regulation. The conditions set out in those provisions include those set out in point (c) of the third subparagraph of Article 5(2).

50 By contrast, Article 5(3) of Regulation No 1370/2007 applies, according to the equally clear wording of the first sentence of that provision, where a competent authority 'has recourse to a third party', rather than one of its own internal operators in a direct award procedure, and '[awards] public service contracts on the basis of a competitive tendering procedure'. The second sentence of that provision expressly requires that that procedure be 'open to all operators', without any reference being made to the conditions set out in the third subparagraph of Article 5(2) of that regulation or similar conditions appearing in Article 5(3).

51 It follows, first, that the competent authorities, when they intend to award a public service contract for passenger transport falling within the scope of that regulation, are required to have recourse either to the direct award procedure or to the competitive tendering procedure and, second, that, where those authorities opt for the latter procedure, they must open it to all operators, including internal operators coming under other competent authorities which have been directly awarded a contract by those authorities.

52 It is thus apparent from the wording of the relevant provisions of Regulation No 1370/2007 that point (c) of the third subparagraph of Article 5(2) thereof lays down conditions for the validity of direct award procedures only, with the result that the participation of an internal operator which has benefited from such a direct award in a competitive tendering procedure, within the meaning of Article 5(3) of that regulation, in breach of one of the conditions set out in point (c) of the third subparagraph of Article 5(2) of that regulation, is capable only of affecting the validity of that direct award, but not that of its participation in the competitive tendering procedure. The latter provision is therefore irrelevant for the purposes of the application of Article 5(3).

53 That interpretation is supported, in the second place, by the context of point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007.

54 That provision, in so far as it specifies, as is apparent from paragraphs 45 and 46 of the present judgment, the prohibition laid down in point (b) of the third subparagraph of Article 5(2) of that regulation, contributes, in conjunction with the latter provision, to determining the scope of the requirement laid down therein that the internal operator's activities be limited geographically.

55 It is apparent from the wording 'the condition for applying this paragraph is that', introducing point (b) of the third subparagraph of Article 5(2), read in the light of recital 18 of that regulation, that that requirement is a condition for the validity of direct award procedures only, in order to ensure a level playing field, in particular where a national authority decides to entrust the provision of public passenger transport services to an internal operator.

56 In the third place, the interpretation set out in paragraph 52 of the present judgment, in so far as it allows any internal operator which has been directly awarded a contract to participate in competitive tendering procedures, is also consistent with one of the objectives pursued by Regulation No 1370/2007, which is, as is apparent from recitals 6 and 7 thereof, to increase the use of those procedures for the provision of public passenger transport services. According to

settled case-law, it is the concern of EU law to ensure the widest possible participation by tenderers in a call for tenders (judgment of 8 December 2022, *BTA Baltic Insurance Company*, C-769/21, EU:C:2022:973, paragraph 36 and the case-law cited).

57 In that regard, while it is true that some internal operators might be deterred from participating in competitive tendering procedures, since such participation could be penalised by the invalidity of the direct awards which they received, the fact remains, however, that the effectiveness of competitive tendering procedures is thereby preserved, since any internal operator fully retains the right to participate in those procedures.

58 Furthermore, it should be noted that Article 5(3) of Regulation No 1370/2007 requires that any competitive tendering procedure be not only 'open to all operators', but also fair, and that it 'observe the principles of transparency and non-discrimination'. As the Commission has rightly pointed out, it is therefore for the competent authorities to adopt all the measures necessary to ensure compliance with those requirements in accordance with the principle of proportionality, by allowing any internal operator which was directly awarded a contract to demonstrate that its tender is fair, transparent and non-discriminatory.

59 Consequently, the answer to the first question is that point (c) of the third subparagraph of Article 5(2) of Regulation No 1370/2007 must be interpreted as meaning that the contracting authority is not required, where an internal operator, to which a public service contract has previously been directly awarded by a competent local authority, participates in a competitive tendering procedure, within the meaning of Article 5(3) of that regulation, to verify that operator's compliance with the conditions set out in point (c) of the third subparagraph of Article 5(2) in order to determine whether that operator is entitled to participate in that procedure.

The second and third questions

60 In view of the answer given to the first question, there is no need to answer the second and third questions.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Tenth Chamber) hereby rules:

Point (c) of the third subparagraph of Article 5(2) of Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70, as amended by Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016,

must be interpreted as meaning that the contracting authority is not required, where an internal operator, to which a public service contract has previously been directly awarded by a competent local authority, participates in a competitive tendering procedure, within

the meaning of Article 5(3) of Regulation No 1370/2007, as amended by Regulation 2016/2338, to verify that operator's compliance with the conditions set out in point (c) of the third subparagraph of Article 5(2) in order to determine whether that operator is entitled to participate in that procedure.

[Signatures]