

**Case C-390/22**

**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice**

**Date lodged:**

14 June 2022

**Referring court:**

Okrazhen sad Burgas (Bulgaria)

**Date of the decision to refer:**

7 June 2022

**Appellant:**

Obshtina Pomorie

**Respondent:**

‘Anhialo auto’ OOD

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**Subject matter of the case in the main proceedings**

Appeal against judgment No 260207 of the Rayonen sad Pomorie (District Court, Pomorie) of 8 November 2021, by which the Obshtina Pomorie (municipality of Pomorie) was ordered to pay to the undertaking ‘Anhialo auto’ OOD the sum of 24 931.60 leva (BGN), representing part of the amount due under a contract of 1 November 2013 by which the municipality had commissioned the undertaking with the operation of public passenger transport.

**Subject matter and legal basis of the request**

Interpretation of EU law; Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Do the provisions of Regulation (EC) No 1370/2007 permit a Member State to introduce, by way of national legislation or internal rules, additional requirements and restrictions in relation to the payment of compensation to a

transport undertaking for the discharge of a public service obligation which are not provided for in that regulation?

2. Does Article 4(1)(b)(i) of Regulation (EC) No 1370/2007 permit the payment of compensation to the transport undertaking for the discharge of a public service obligation where the parameters on the basis of which the compensation is to be calculated were not established in advance in a public service contract, but in general rules, and the net financial effect or the amount of compensation due was determined in accordance with the mechanism provided for in Regulation (EC) No 1370/2007?

### **Provisions of European Union law and case-law relied on**

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): recitals 5, 9, 27 and 28 and Articles 1, 2, 4 and 6

### **Provisions of national law relied on**

Zakon za avtomobilnite prevozi (Law on road traffic): Paragraph 4 of the Final Provisions

Naredba za usloviata i reda za predostavyane na sredstva za kompensirane na namalenite prihodi ot prilaganeto na tseni za obshtestveni patnicheski prevozi po avtomobilnia transport, predvideni v normativnite aktove za opredeleni kategorii patnitsi, za subsidirane na obshtestveni patnicheski prevozi po nerentabilni avtobusni linii vav vatreshnogradskia transport i transporta v planinski i drugi rayoni i za izdavane na prevozni dokumenti za izvarshvane na prevozite (Ordinance on the conditions and procedure for granting funds for compensating losses of revenue due to the application of tariffs for public passenger transport by road which are provided for in legislative acts in respect of certain categories of passengers, for subsidising public passenger transport on unprofitable bus routes in urban transport and transport in mountainous and other areas and for issuing transport documents for the provision of transport services (adopted by Decree No 163 of the Ministerski savet [Council of Ministers] of 29 March 2015, Darzhaven vestnik [State Gazette; ‘DV’] No 51 of 7 July 2015, last amended by DV No 18 of 4 March 2022; ‘the Ordinance’): Articles 1, 2, 3, 55 and 56.

Naredba No 3 ot 4. april 2005 za usloviata i reda za predostavyane na sredstva za subsidirane na prevoza na patnitsite po nerentabilni avtobusni linii vav vatreshnogradskia transport i transporta v planinski i drugi rayoni (Ordinance No 3 of 4 April 2005 on the conditions and procedure for granting funds to subsidise passenger transport on unprofitable bus routes in urban transport and transport in mountainous and other areas (DV No 33 of 15 April 2005, repealed by DV No 57 of 28 July 2015): Articles 1 and 3

**Succinct presentation of the facts and procedure in the main proceedings**

- 1 By decision of the Oblasten upravitel na Oblast Burgas (Governor of the Burgas Region) of 14 August 2013, the Mayor of the municipality of Pomorie was given consent to make a direct award of a contract, within the meaning of Article 5(5) of Regulation No 1370/2007, for the provision of bus transport services on routes specified in the decision, for a maximum period of six months.
- 2 On the basis of that decision, a contract for the operation of public transport services on the defined bus routes was concluded between the municipality of Pomorie and the undertaking 'Anhialo auto' on 1 November 2013. The contract was concluded by way of a direct award made in accordance with Article 5(5) of Regulation No 1370/2007 as an emergency measure to overcome the disruption of public passenger transport services on the routes referred to due to the expiry of the existing contracts with contractors and, at the same time, the termination of a tender procedure for the award of new contracts for public transport services.
- 3 Article 2 of the contract states that the term of the contract is to run until the conclusion of the procedure under the Zakon za obshtestvenite porachki (Law on public procurement).
- 4 Article 5 of the contract provides that the contracting authority undertake to transfer funds to the contractor if provision is made for such funds for the purposes of subsidisation under the applicable national law and for providing compensation free and reduced fares groups of citizens under the applicable national law.
- 5 The contract was terminated on 15 January 2019 following the conclusion of the procedure conducted under the Law on public procurement.
- 6 The undertaking takes the view that the municipality of Pomorie failed to pay it the amount of BGN 86 497, which corresponds to the subsidies owed to it under the contract of 1 November 2013 and the applicable legislation, for urban transport services for the period from 1 January 2016 to 31 December 2018. It brought an action in respect of part of that amount, namely BGN 24 931.60, before the District Court, Pomorie.
- 7 Before that court, the undertaking argued that compensation within the meaning of Regulation No 1370/2007 had been provided for in respect of its discharge of a public service obligation. The company stated that, throughout the term of the contract, it had provided the information required by law for the purpose of determining the amount of compensation due. The net financial effect and the amount of the compensation payments were determined in accordance with the mechanism provided for in Regulation No 1370/2007.
- 8 The defendant – the municipality of Pomorie – contested the action. It submitted that, according to Article 56(1) of the Ordinance, 'subsidies shall be granted only to transport undertakings with which the municipality concerned has concluded

contracts which comply with the requirements of Regulation No 1370/2007'. However, according to the defendant, the applicant's contract does not comply with those requirements. Moreover, the Ministerstvo na finansite (Ministry of Finance) granted a subsidy of BGN 3 690 for the period at issue, which was paid in full to the applicant undertaking. As the municipality of Pomorie did not receive any further subsidisation from the central budget, it also did not pay any subsidies to the transport undertakings and was not responsible for that.

- 9 It is common ground in the present case that the applicant undertaking provided the services as contractually agreed.
- 10 On the basis of the expert report on accounting which was commissioned by the court in the proceedings, the net financial effect for the applicant, as provided for in Regulation No 1370/2007, was determined in accordance with the rules laid down in the annex to that regulation ('Rules applicable to compensation in the cases referred to in Article 6(1)') and those laid down in Article 55 of the Ordinance. In fact, it was determined that the net financial effect for the undertaking was BGN 25 469 for 2016, BGN 36 624 for 2017 and BGN 23 290 for 2018. The expert report also established that the organisation of the undertaking's accounts allows for a precise breakdown of costs and revenue according to subsidised and non-subsidised activities, in accordance with the requirements arising from the annex to the regulation.
- 11 The District Court also found that, during the period at issue, in respect of which the applicant claims payment of compensation, the municipality of Pomorie paid the undertaking the amount of BGN 3 690, which corresponds to the total amount of funds allocated and paid to the Municipality of Pomorie from the central budget of the Republic of Bulgaria for subsidies for urban and interurban transport services.
- 12 The District Court, Pomorie stated that Regulation No 1370/2007 regulates how competent authorities may act in the field of public passenger transport to guarantee the provision of services of general interest and, in that respect, also lays down the conditions under which competent authorities, when imposing or contracting for public service obligations, compensate public service operators for costs incurred and/or grant exclusive rights in return for the discharge of public service obligations.
- 13 That court stated that the purpose of the compensation was to offset the negative net financial effect (loss) by reimbursing the public transport undertaking for the cost of providing the public service. As the contract was concluded in 2013, the District Court considered that the defendant's objection that the applicant was not entitled to a subsidy because the contract did not contain the mandatory conditions set out in Article 56(2) of the Ordinance was incorrect. In fact, the Ordinance was adopted by a decree of the Ministerski savet (Council of Ministers) of 29 March 2015, with the result that the requirements for contracts laid down in the

Ordinance, including the requirement that they contain the rules on compensation, could not be applicable to the contract at issue.

- 14 The District Court took the view that the applicant is entitled to a subsidy under Regulation No 1370/2007 since it actually provided the public service which was the subject of the contract concluded.
- 15 For the reasons set out above, and on the basis of the expert report [on accounting] that the court introduced in the proceedings, that court upheld the undertaking's action against the municipality of Pomorie.
- 16 The municipality has brought an appeal against that judgment before the Okrazhen sad Burgas (Regional Court, Burgas) – the referring court.

**The essential arguments of the parties in the main proceedings**

- 17 The appellant – the municipality of Pomorie – submits that the conclusions drawn by the court of first instance regarding the applicable provisions of substantive law are incorrect.
- 18 The municipality argues that the conditions laid down in the Ordinance are also regulated in Regulation No 1370/2007. It submits that that regulation, in turn, has had direct effect since its adoption (23 October 2007), with the result that the requirements under Article 4(1) had already been introduced in 2007. The fact that they are not included in the contract at issue militates in favour of there being no entitlement to a subsidy and, consequently, of the action being unfounded.
- 19 The municipality also cites Article 5 of the contract concluded, from which it concludes that its obligation to pay subsidies is not unconditional – as was assumed in the judgment under appeal – but dependent on fulfilment of the statutory conditions.
- 20 It also argues that, due to the fact that its budget was not subsidised by means of funds from the central budget, no subsidies were paid to the transport undertakings either, a circumstance for which it cannot be criticised. The contracting municipality does not have the legal authority to determine the amount of compensation and subsidies itself, but merely compulsorily distributes the funds allocated to it in that regard.
- 21 The applicant undertaking (respondent in the appeal before the referring court) considers that the appeal is unfounded.
- 22 It argues that it is unlawful to take into account the lack of conformity of a contract concluded in 2013 with an ordinance adopted two years later, on 29 June 2015. Article 56(2) of the Ordinance is substantive in nature and therefore does not have retroactive effect. Since the contract at issue was concluded before the Ordinance entered into force, the requirements of the Ordinance as to the content

of the contract cannot apply to the latter. Entitlement to the subsidies depends on whether the relevant public passenger transport services were provided, that is to say, whether the service in question was actually provided, and not on the existence of certain elements in the contract.

- 23 The undertaking also submits that Regulation No 1370/2007 regulates an irrevocable right of the public transport undertaking, namely the right to compensation, and that it is impermissible to limit that right or to derogate from it altogether. Although that regulation provides for requirements for contracts for the award of public passenger transport services, it does not contain an express prohibition on the payment of compensation in the event that the contracts do not formally meet the requirements. The objective of the regulation is to ensure the transparency of the procedure for calculating compensation and to avoid overcompensation, but not under any circumstances to deprive transport undertakings of the compensation to which they are entitled.
- 24 Furthermore, the undertaking submits arguments asserting that the objection that the State, and not the municipality, is responsible for the payment of the subsidies is unfounded. In fact, under Article 3(1) of the Ordinance, the municipalities are exclusively responsible for ensuring that contracts for the award of public passenger transport services comply with Regulation No 1370/2007. The granting of subsidies from the central budget depends solely on the municipality concerned, namely on the question as to whether it complied with the statutory requirements when awarding public transport services. Therefore, the municipality always owes the full amount of compensation to the transport undertaking concerned, irrespective of whether or not the State has granted a subsidy to that municipality.

#### **Succinct presentation of the reasoning in the request for a preliminary ruling**

- 25 In the present case, it has been established that it is not in dispute that a contract for the operation of public passenger transport services was concluded between the applicant undertaking and the municipality of Pomorie and that the transport undertaking duly performed the contract. The latter was concluded as an ‘emergency measure’ in accordance with Article 5(5) of Regulation No 1370/2007.
- 26 National law, namely Paragraph 4(1) of the Final Provisions of the Law on road traffic, stipulates that, each year, the State Budget of the Republic of Bulgaria is to provide for expenditure for the following: 1. subsidisation of passenger transport on unprofitable bus routes in urban transport and transport in mountainous and other areas, on a proposal from the Minister na transporta, informatsionnitate tehnologii i saobshteniata (Minister for Transport, Information Technology and Communications); 2. compensation for loss of revenue from the application of transport tariffs provided for in respect of certain groups of passengers in legislative acts.

- 27 The Ordinance was adopted on the basis of that law. Under Article 2(1) of the Ordinance, funds are to be made available up to the amount specified in the Zakon za darzhavnia byudzhnet (Law on the State budget) for the year in question. At the same time, Article 56(1) provides that subsidies are to be granted only to transport undertakings with which the municipality concerned has concluded contracts which comply with the requirements of Regulation No 1370/2007. The subsequent paragraphs set out additional requirements for the content of contracts concluded with transport undertakings.
- 28 An interpretation of the provisions of national law which were introduced by the Law on road traffic and by the abovementioned Ordinance leads to the conclusion that the competent authorities are to grant compensation to transport undertakings up to the amount allocated and made available to them from the State budget for the year in question. Furthermore, additional requirements have been imposed on the accountability of transport undertakings vis-à-vis the competent authorities.
- 29 On the other hand, EU law, and in particular Regulation No 1370/2007, does not provide for such requirements and restrictions in relation to the payment of compensation to public service operators.
- 30 According to Article 6(1) of the regulation, all compensation connected with a general rule or a public service contract is to comply with the provisions laid down in Article 4, irrespective of how the contract was awarded. All compensation, of whatever nature, connected with a public service contract awarded directly in accordance with Article 5(2), (4), (5) or (6) or connected with a general rule is also to comply with the provisions laid down in the Annex.
- 31 A comparison of the provisions of the national law and those of EU law leads to the conclusion that the national law provides for an additional requirement for the payment of compensation, namely that the latter has been provided for in the Law on the State budget for the year in question and is made available to the competent authority. If that is not the case, the authority cannot lawfully pay it to the transport undertaking, even if the public service contract has actually been performed.
- 32 For the reasons set out above, it is necessary to obtain an answer to the question as to whether the provisions of Regulation No 1370/2007 permit a Member State to introduce, by way of national legislation or internal rules, additional requirements and restrictions in relation to the payment of compensation to a transport undertaking for the discharge of a public service obligation.
- 33 The contract concluded between the parties does not define the parameters on the basis of which the subsidy is to be calculated. For that reason, the municipality of Pomorie takes the view that the contract at issue does not comply with the requirements of national law (the Ordinance; Ordinance No 3 of 4 April 2005, which was in force at the time of conclusion of the contract at issue, contained a similar provision) or of Regulation No 1370/2007.

- 34 The undertaking rejects those arguments and asserts that the compensation constitutes an irrevocable right of the transport undertaking once it has duly provided the services. Moreover, the compensation was determined *ex post facto*, in accordance with the provisions of the regulation. The undertaking refers to the objectives set out in the regulation and the fact that the latter does not expressly prohibit the payment of compensation in the event that the contracts do not formally comply with the statutory requirements.
- 35 Article 4 of Regulation No 1370/2007 establishes the mandatory content of public service contracts and sets out general rules. The contract between the parties in the main proceedings constitutes a public service contract, having regard also to the interpretation of that concept in Article 2(i) of Regulation No 1370/2007.
- 36 Therefore, it can be inferred from Article 4(1)(b)(i) of Regulation No 1370/2007 that the contract between the parties must establish the parameters on the basis of which the subsidy is to be calculated. It is apparent that, in view of the need to avoid overcompensating the transport undertaking, the conjunction ‘and’ is used in Article 4(1) in reference to the need for those parameters to be regulated: [it reads] ‘*Public service contracts and general rules shall ...*’. That provision could be interpreted as meaning that it is sufficient if the parameters on the basis of which the compensation is to be calculated are defined in general rules. The panel seised of the present case takes the view that the provisions of the Ordinance and the earlier Ordinance No 3 of 2005 constitute such general rules.
- 37 Another possible interpretation is that the parameters must be defined not only in general rules but also in the contract concluded between the parties (as a public service contract within the meaning of the regulation).
- 38 For the reasons set out above, the referring court considers that an interpretation of the abovementioned provision of Regulation No 1370/2007 is necessary so as to allow for the correct application of EU law in the resolution of the dispute between the parties. In particular, an interpretation is required in relation to the question as to whether Article 4(1)(b)(i) of Regulation No 1370/2007 permits the payment of compensation to the transport undertaking for the discharge of a public service obligation where the parameters on the basis of which the compensation is to be calculated were not established in advance in a public service contract, but in general rules, and the net financial effect or the amount of compensation due was determined in accordance with the mechanism provided for in Regulation No 1370/2007.