

Signature of guidelines



Ministry of Regional Development

National Strategic Reference Framework 2007-2013

**Guidelines for financing from operational programmes for entities under the
public service obligation in the sector of local collective transport**

(Approved)

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**Minister of Regional
Development**

Warsaw, ____ July 2008

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1. Chapter – Legal basis

1. These guidelines (hereinafter the “Guidelines”) have been issued under article 35 section 3 item 11 of the Act on Development Policy Principles of 6 December 2006.
2. The matters presented in these Guidelines are regulated at the Community level by the following normative acts:
 - a) The Treaty establishing the European Community (consolidated text OJ C 321 E/1 from 29.12.2006 r.), hereinafter referred to as “EC Treaty”;
 - b) 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 L 156/1969), as amended in Council Regulation (EEC) No 1893/91 of 20 June 1991 (OJ L 169/1991), hereinafter referred to as “Regulation No 1191/69”;
 - c) 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 L 315/2007), hereinafter referred to as “Regulation No 1370/2007” (Regulation No 1370/2007 will enter into force on 3 December 2009); and
 - d) Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999, hereinafter referred to as “Regulation No 1083/2006”.
3. The matters presented in these Guidelines are regulated at the national level by the following normative acts:
 - a) The Act on Municipal Self – Government of 8 March 1990 (Journal of Laws of 2001, no 142, item 1591), hereinafter referred to as the “Act on Municipal Self – government”;
 - b) The Act on District Self – Government of 5 June 1998 (Journal of Laws of 2001, no 142, item 1592), hereinafter referred to as the “Act on District Self – Government”;
 - c) The Act on Voivodship Self – Government of 5 June 1998 (Journal of Laws of 1998, no 142, item 1590), hereinafter referred to as the “Act on Voivodship Self – Government”;

- d) The Act on Municipal Economy of 20 December 1996 (Journal of Laws of 1997, no 9, item 43), hereinafter referred to as the “Act on Municipal Economy”;
- e) The Act – Commercial Companies Code of 15 September 2000 r. (Journal of Laws of 2000, no 94, item 1037, as amended) Kodeks spółek handlowych, hereinafter referred to as the “Commercial Companies Code”;
- f) The Act – Public Procurement Law of 29 January 2004 (Journal of Laws of 2007, no 223, item 1655), hereinafter referred to as the “Public Procurement Law”;
- g) The Act on Development Policy Principles of 6 December 2006 (Journal of Laws of 2006, no 227, item 1658, as amended), hereinafter referred to as the “Act on Development Policy Principles”;
- h) The Act on Public Finances of 30 June 2005 (Journal of Laws of 2005, no 249, item 2104, as amended), hereinafter referred to as the “Act on Public Finances”.
- i) The Act on the transparency of financial relations between public bodies and public undertakings as well as on financial transparency of certain other undertakings of 22 September 2006 (Journal of Laws of 2006, no 191, item 1411, as amended), hereinafter referred to as the “Act on transparency of financial relations”;
- j) The Act on the form of government of Capital City of Warsaw of 15 March 2002 (Journal of Laws of 2002, no 41, item 361);
- k) Council of Ministers’ Regulation¹ on detailed method of calculating of value of state aid granted in various forms of 11 August 2004 (Journal of Laws of 2004, no 194, item 1983, as amended).

The above list only includes the basic legal regulations governing issues which are the subject of the Guidelines and should not be treated as an exhaustive enumeration.

2. Chapter – Definitions

4. For the purpose of the Guidelines:

- a) notification – means obligation to inform European Commission of a plan of granting of state aid in the meaning of art. 88(3) of EC Treaty.

¹ In Polish legal system it is a kind of implementing act issued on the basis of an act.

- b) operator – means a municipality acting in the form of budgetary establishment, municipal company or external entrepreneur.
- c) tender – means an open, restricted or negotiated procedure as well as competitive dialogue on the condition that all prerequisites of application of these modes as established in Public Procurement Law are satisfied.
- d) external entrepreneur– means an individual or a legal person as well as an organizational unit without legal personality (hereinafter the “external entrepreneur”)
- e) municipal council – means also city council.
- f) compensation or remuneration – means benefit received by the operator discharging the service in return for costs related to the service.
- g) asset – means any commodity or service, in particular rolling stock and infrastructure co-financed from Operational Programme.
- h) (public) service – means a public service discharged in the sector of local collective transport.
- i) village mayor – means also a mayor or president of the city

3. Chapter – Introductory remarks

- 5. The Guidelines are not an legal act generalny binding. In case of doubts they should be interpreted and applied in accordance with rules of national and Community law.
- 6. In light of community legislation, one of the major obligations of the Member States is to guarantee public transportation services to be provided by public or private undertakings which are fit for such purposes and use public passenger transport equipment.
- 7. In accordance with interpretation of art. 295 of EC Treaty presented in jurisprudence of the European Court of Justice and the Court of First Instance it is irrelevant from Community law point of view whether services of public passenger transport are discharged by public or private undertakings. Following that the Guidelines are based on the rule of neutrality in regard to system of ownership of property, as mentioned in art. 295 of EC Treaty.

8. The requirement to guarantee public transport is linked with the so-called 'public service obligation'. The key normative act regulating obligations to provide public services at the Community level is Regulation no. 1191/69 which will be repealed by Regulation no. 1370/2007 on 3 December 2009.
9. A public service obligation means an obligation which a given operator would not assume (or would not assume to the same extent or under the same conditions) if it were considering its own commercial interest, and which must be assumed from the perspective of public authorities by reason of public interest. The operator assumes this obligation (voluntarily or compulsorily) in exchange for a certain compensation to cover its loss incurred in discharging public service obligations.
10. In accordance with the Polish law, under article 7 section 1 item 4 of the Act on Municipal Self – Government, the obligation to meet the citizens' needs for local collective public transport is a one of municipal tasks (fitting in the notion of public passenger transport). In order to ensure that this task is performed, municipalities may exercise their rights under community legislation to oblige the operators to provide the public service in local transport.
11. Municipalities perform their tasks in the form of a budgetary establishment or through commercial companies under the municipalities' control (municipal companies) or may entrust these tasks to private entities based on civil law contracts. Hence, municipalities may order services from or impose an obligation to provide public services (which directly relates to the performance of a municipal task) upon these entities, i.e. a budgetary establishment, a municipal company, or a private entity, which then become an operator within the above meaning. Municipality may perform its tasks with assistance of other municipality (inter-municipal agreement) or associations of municipalities.
12. Municipalities ensure performance of the public service obligation (i.e. orders public passenger transport services) by way of:
 - a) imposing the public service obligation upon the operator in an imperious act or
 - b) executing a civil law contract with such an operator.
13. Proper discharge of the public service obligation within the scope of passenger transport may require use by the operator of infrastructure used in urban or suburban collective

transport (in certain instances, this infrastructure must be purchased or modernized), or purchase (or modernization) of rolling stock, i.e. collective transport means.

14. The operator may apply for funds to co-finance the purchase (modernization) of the rolling stock or infrastructure from the relevant Operational Programmes.
15. Financing is granted on the basis of contract for project financing referred to in article 5 item 9 of the Act on Development Policy Principles. The amount of co-financing calculated as the share of funds from the EC budget (and in part from the state budget in some instances) is laid down in the relevant Operational Programmes. The remaining amount of funds for the project (i.e. own funds) may be national public funds (funds from the budget of the relevant territorial self – government unit) or private funds.

4. Chapter – Scope of application of the Guidelines

16. Guidelines apply to those activities of the below-mentioned national and regional operational programmes which provide for subsidies for entities which perform the obligation to provide public services in the sector of local transport. Guidelines do not regulate discharging of public services in the above – mentioned sector in reference to entities which do not apply for financing from Operational Programmes.
17. Guidelines apply to the “National Strategic Reference Framework 2007-2013” adopted by the Council of Ministers on 29 October 2006 and available at the official website of the Ministry of Regional Development www.mrr.gov.pl“.
18. Guidelines also apply to national operational programmes for which the Ministry of Regional Development is the managing institution and to regional operational programmes for which the voivodship’s self – government boards are the managing institutions while the Ministry of Regional Development is the coordinating institution. The list of these programmes includes the following operational programmes:
 - a) national Operational Programme “Infrastructure and Environment”, approved in Decision (EC) No C/2007/6321 of 7 December 2007, available at the official website of the Ministry of Regional Development www.mrr.gov.pl;

- b) national Operational Programme “Development of Eastern Poland 2007-2013”, approved in Decision (EC) No K (2007) 4568 of 1 October 2007, available at the official website of the Ministry of Regional Development www.mrr.gov.pl;
- c) Regional Operational Programmed for Dolnośląskie Voivodship 2007-2013;
- d) Regional Operational Programmed for Kujawsko-Pomorskie Voivodship 2007-2013;
- e) Regional Operational Programmed for Lubelskie Voivodship 2007-2013;
- f) Regional Operational Programmed for Lubuskie Voivodship 2007-2013;
- g) Regional Operational Programmed for Łódzkie Voivodship 2007-2013;
- h) Regional Operational Programmed for Małopolskie Voivodship 2007-2013;
- i) Regional Operational Programmed for Mazowieckie Voivodship 2007-2013;
- j) Regional Operational Programmed for Opolskie Voivodship 2007-2013;
- k) Regional Operational Programmed for Podkarpackie Voivodship 2007-2013;
- l) Regional Operational Programmed for Podlaskie Voivodship 2007-2013;
- m) Regional Operational Programmed for Pomorskie Voivodship 2007-2013;
- n) Regional Operational Programmed for Śląskie Voivodship 2007-2013;
- o) Regional Operational Programmed for Świętokrzyskie Voivodship 2007-2013;
- p) Regional Operational Programmed for Warmińsko-Mazurskie Voivodship 2007-2013;
- q) Regional Operational Programmed for Wielkopolskie Voivodship 2007-2013; and
- r) Regional Operational Programmed for Zachodniopomorskie Voivodship 2007-2013.

All the above operational programmes, hereinafter jointly referred to as the “Operational Programmes”, are available at the official website of the Ministry of Regional Development www.mrr.gov.pl.

19. Guidelines are addressed to all institutions participating in the performance of the Operational Programmes, i.e. managing institutions, intermediary institutions, implementing/second degree intermediary institutions and beneficiaries.

5. Chapter – Aim and subject of the Guidelines

20. The aim of these Guidelines is to lay down the rules for subsidies granted to operators under the Operational Programmes for the purchase (or modernization) of assets. Regardless of a change of Community laws on discharging of public service Guidelines are also aimed to ensure fluent accomplishment of projects co-financed from Operational Programmes

21. As it is presumed that providing the operators with funds for the purchase of assets as an element of remuneration/compensation in some cases under Regulation no. 1191/69 or after 3.12.2009 on general terms laid down in Regulation no. 1370/2008 is in line with the common market principles and thus does not require a notification, the support may according to this procedure, be given quickly and no additional administrative encumbrances arise in connection with the notification requirement – either on the part of the operators or the public authorities and community authorities.

22. Due to the advantages indicated, these Guidelines lay down in detail the principles of entrusting a public service obligation on operators (or determining in civil law actions the operators' obligations to provide public services) in the light of community regulations, taking into account the Polish legal environment and the Polish business environment.

6. Chapter – Discharging of public services in local collective transport

6.1. Subchapter – General remarks

6.1.1. Section – Remarks of technical nature

23. Comments made herein on municipalities will apply to associations of municipalities (związek międzygminny) (within the meaning of article 64 of the Act on Municipal Self – Government) accordingly, comments on municipal councils will apply to association meetings accordingly, while comments on village mayors will apply to association boards accordingly.

24. The comments on municipality provided in this section refer accordingly to the inter-municipal agreement (within the meaning of article 64 of the Act on District Self – Government).

25. In the cities where special organizational units managing local transport operate (boards of city transport), these units perform tasks of municipality organs to the extent entrusted to them and on the basis of rules stemming from binding laws.

6.1.2. Section – Relations between Regulation no 1191/69 and Regulation 1370/2007

26. The fundamental community law affecting discharging of services before 3.12.2009 is Regulation No 1191/69. After this date the services should be in accordance with art. 8(2) and art. 12 of Regulation no 1370/2007 gradually being subject to provisions of that act..

27. In accordance with art. 17(2) of Regulation no 1191/69 entrusting of discharging of the service through an imperious act and payment on this basis of adequate compensation is exempted from notification. Services entrusted on the basis of civil contracts are subject to notification unless other exonerating conditions apply (see point 145 and following points).

28. To services which will have been contracted under an imperious act or a civil law contract after 3.12.2009, in the scope consistent with Polish law, Regulation no 1370/2007 has to be applied. The precise date will be determined based on the date on which the imperious act comes into force or based on the contract execution date in case of civil law contracts.

29. In the confines of art. 9(1) of Regulation No 1370/2007 entrusting of discharging of services in accordance with this Regulation and payment on this basis of adequate compensation is exempted from notification (see point 145 and following points).

30. It is assumed in in the Guidelines in accordance with Polish law, that discharging of services by municipal companies enjoying the status of internal operator stems from imposition on such a company of obligation through an imperious legal act (resolution of municipal council or founding acts of the company). The notion of internal operator is embedded in jurisprudence of the European Court of Justice (hereinafter the “ECJ”). Moreover after 3.12.2009 this notion will be specified for the sector of public services in transport. For the sake of avoidance of dubious cases it is assumed in the Guidelines that the status of internal operator may be assigned only to municipal companies wholly owned by municipalities.

31. . For the sake of greater clarity and coherence of provisions of Regulation No 1370/2007 with provisions of Regulation No 1191/69 concerning calculation of compensation it is recommended in this respect to base on the rules established in Regulation No 1370/2007. Further provisions of the Guidelines, unless it is expressly said that the given provision applies only after 3.12.2009, apply to the period before this date as well.
32. Regulation No 1370/2007 gives a very broad definition of a 'public service contract' since it covers not only civil law contracts within the meaning of the Polish law but also normative and administrative acts, as well as those imperiuos acts that contain conditions under which the competent authority itself provides the services or entrusts the provision of such services to an internal operator. In order to avoid doubts which the addressees of the Guidelines could have in connection with the use of the term 'contract' to describe a relationship which is typical of public law, these Guidelines will use the term 'Decision' for all 'public service contracts' which include normative and administrative acts as well as other imperiuos acts, and the term 'public service contract' will only be used for civil law contracts.

6.1.3. Section – Duration of contracts concluded before 3.12.2009

33. Public service contracts concluded before 3.12.2009 remain valid under conditions and for periods as indicated in art. 8 item 3 of Regulation 1370/2007.

6.2. Subchapter – Entrusting the public service obligation

6.2.1. Section – Budgetary establishment

6.2.1.1. Subsection – General remarks

34. The task of meeting citizen needs for local collective transport may be performed by a municipality on its own acting as a budgetary establishment.
35. A budgetary establishment is formed by the municipal council in a resolution in accordance with the Act on Public Finances. When forming a budgetary establishment, the municipal council adopts (also in a resolution) the statute of the budgetary establishment which set out inter alia the objects and purpose for which the establishment was formed, as well as the assets of the establishment.

6.2.1.2. Subsection – Procedure for entrusting of the public service

36. The public service obligation is imposed on a budgetary establishment by way of incorporating in its statute a provision defining the purpose and objects of the budgetary establishment.
37. If the public service obligation is to be imposed on a new budgetary establishment formed for this purpose, the municipal council should provide in its statute that the purpose of the budgetary establishment is to meet the citizens' needs for local collective transport by providing public services. The statute must specify which assets will be transferred to the budgetary establishment.
38. If the public service obligation is to be imposed on an already existing budgetary establishment, the municipal council should amend the statute. The amended statute must provide that the purpose of the establishment is to meet citizen needs for local public transport by providing public services.

6.2.1.3. Subsection – Detailed scope of the public service obligation

39. The scope of the public service obligation imposed on a budgetary establishment is set out in detail in its statute or the by-laws adopted by the municipal council. Alternatively, the municipal council may impose on the head of the municipality the obligation to set out in detail the scope of the public service obligation to be performed by the budgetary establishment.
40. A relevant internal act in law constitutes the Decision within the meaning of point 32 of the Guidelines.
41. A relevant internal act in law will specify in particular:
 - a) the scope of the public service obligation,
 - b) its duration and territorial scope,
 - c) transportation routes,
 - d) transportation frequency parameters for every route,

- e) fares for each type of transport services on every route, including fare discounts for persons entitled to such discounts under relevant laws,
- f) obligations of the budgetary establishment towards service recipients and the rules of using public services provided by the establishment.

42. After 3.12.2009 r. a relevant internal act of law should contain elements required by art. 4(1–4) of Regulation 1370/2007 (see points 72 – 74).

6.2.1.4. Subsection - Operator selection process

43. Settling that the entity responsible for provision of service is budgetary establishments results from internal and independent decision of the municipality.

6.2.2. Section – Municipal company

6.2.2.1. Subsection – General remarks

44. The task of meeting citizen needs for local collective transport may be performed by a municipality acting through a limited liability company or a joint-stock company, hereinafter the “municipal company” on the condition that it has a status of internal operator within the meaning of relevant provisions of law and and case law of the European Court of Justice.

45. Municipal companies carry out business under the Code of Commercial Companies yet are primarily governed by the provisions of the Act on Municipal Economy and other specific laws.

46. The municipality establishes a municipal company in a resolution adopted by the municipal council (or by joining an existing company). Tasks of the municipality in local collective transport are performed also by municipal companies established by law or in other specific procedure.

47. The tasks carried out by a municipal company are financed from the company’s equity. The municipality must provide assets to the municipal company it established so that the company can carry out municipal tasks. Financing can be provided to municipal companies based on the mechanisms envisaged in law, i.e. through share capital increase, additional payments, or shareholder loans. The municipality may also provide the municipal company with funds under civil law contracts between them.

6.2.2.2. Subsection – Procedure for entrusting of the public service

48. The public service obligation is imposed on a municipal company through an imperious act in a municipal council resolution establishing the company. The resolution must provide that the purpose of the company will be to carry out municipal tasks of meeting citizen needs for local collective transport. The articles of association of a municipal company should also provide that the purpose of the company is to carry out municipal tasks of meeting citizen needs for local collective transport. The purpose of the company should be reflected in a detailed description of its scope of activity.
49. If allowed in specific laws imposition of obligation on municipal company may stem from other imperious legal act (in particular it may be a result of transformation of municipal enterprise and stem from bestowing of articles of association to such a company in accordance with art. 15(1) of the Act on Municipal Economy.
50. The municipality which established the municipal company (hereinafter the “parent municipality”) does not have to execute a separate service contract with the municipal company in order to entrust this company with the task of meeting citizen needs for local collective transport in the territory of this municipality. The executory contract, as mentioned below, is not a (public procurement) contract because it does not contain a fundamental element for public procurement contract, which is payable obligation with the object of supplies, services or works.

6.2.2.3. Subsection – Detailed scope of the public service obligation

51. The scope of the public service obligation imposed on a municipal company is set out in detail in a municipal council resolution establishing the company, articles of association or other internal act of the company (plan, strategy, by-laws) adopted by the shareholders’ meeting of the municipal company.
52. The documents, as mentioned in preceding point, specify in particular:
- a) the scope of the public service obligation,
 - b) its duration and territorial scope,
 - c) transportation routes,

- d) transportation frequency parameters for every route, fares for each type of transport services on every route, including fare discounts for persons entitled to such discounts under relevant laws,
- e) obligations of the company towards service recipients, and the rules of using public services provided by the company.

53. The resolution on establishment of the company, determining the purpose of business of the company, constitute together with articles of association the Decision within the meaning of point 32 of the Guidelines.

54. Without prejudice to documents mentioned in point 52 of the Guidelines, the parent municipality may conclude a contract (hereinafter the “executory contract”) with the municipal company it established, defining in detail the scope of the company’s public service obligation (i.e. the obligation to perform municipal tasks). The contract cannot provide for separate imposition of the obligation to perform municipal tasks (since this obligation arises at an earlier date – it is imposed on the company in an imperious act when the municipal company is established and the purpose of its business is defined). The executory contract does not constitute a public services contract within the meaning of community regulations.

55. The executory contract does not constitute a public service contract within the meaning of art. 14(1) of Regulation 1191/69.

56. The executory contract may provide for the municipal company’s liability towards the municipality in connection with non-performance or improper performance of the company’s particular obligations. The contract may also provide for detailed rules of compensating the municipal company for the loss sustained in connection with providing public services.

57. After 3.12.2009 r. executory contracts should have been concluded. These contracts should contain elements required by art. 4(1–4) of Regulation 1370/2007 (see points 72 – 74).

6.2.2.4. Subsection – Operator selection process

58. A tendering procedure is not required to select a municipal company to provide services in the parent municipality (such company provides services for the municipality in the performance of an obligation under a legal title other than a contract).

59. After 3.12.2009 Regulation No 1370/2007 expressly allows, unless prohibited by national law, to award public service contracts in specific procedure, i.e. directly (without tendering), to an internal operator. The precondition is possessing of status of an internal operator (with exception of rail transport where this procedure may be employed also in relation to external entrepreneur). In case of bus and tram transport direct award is allowed by the Regulation only if public service contracts (which is valid also for imperious acts relating to the municipal company) allocate the risk related to the contract on the company – the contract has the nature of service concession contract (within the meaning of the Community law)². In the remaining cases (contracts not being service concession contracts), direct award is justified in jurisprudence of ECJ.

60. In accordance with art. 2 of the Act on Municipal Economy the municipal company cannot provide services in a municipality other than the parent municipality unless it is based on inter-municipal agreement or the service was entrusted to the company by territorially competent association of municipalities. In accordance with the art. 2 municipal company should perform tasks related with economy of its parent municipality. Performing of public services beyond the territory of the parent municipality can not be considered to be an element of municipality economy unless in a given circumstances it can be proved that the performing of service is indispensable for ensuring of proper performance of the service on its own territory. With above-mentioned exceptions taking up by municipal company of performance of services on the territory of other municipality results in loss of the status of an internal operator – in such a case this company provides services according to general principles, i.e. as an external entrepreneur.

² Revenues of the company related to provision of service origin at least partially from exploitation of a right determined in the contract (for instance revenues from tickets) and are not certain (the company bears a risk) and the municipality does not warrant that in case of realisation of the risk it will cover losses of the company. Compare art. art. 1 item 3 letter „b” Directive 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 L 134/1 of 30.04.2004) and section 2.1 and 2.2 of Commission Interpretative Communication on Concessions under Community Law of 29.04.2000 (2000/C121/2).

6.2.3. Section – External entrepreneur

6.2.3.1. Subsection – General remarks

61. A municipality may entrust the performance of its tasks to an external entrepreneur.
62. The tasks are entrusted based on a civil law contract executed according to general principles. A contract executed in order to perform tasks of 'meeting citizen needs for local public transport' takes the form of public service contract within the meaning of art. 14 (1) of Regulation No 1191/69 as well as art. 2 letter "i" of Regulation No 1370/2007.

6.2.3.2. Subsection – Procedure for entrusting of the public service

63. An external entrepreneur assumes the public service obligation under a contract concluded with the municipality for the performance of tasks related to meeting citizen needs for local public transport.
64. An external entrepreneur assumes the public service obligation, as mentioned in point 66, for the compensation (remuneration).
65. Imposition of service obligations upon an external entrepreneur under an imperious act (a normative act issued by the municipality or an administrative act) is not allowed at present under the Polish law.

6.2.3.3. Subsection – Detailed scope of the public service obligation

66. The scope of obligation of performing of the public service discharged by an external entrepreneur is set out in detail in the public service contract. The contract must include provisions concerning the way of calculation of compensation consistent with points 108 – 134.
67. In accordance with article 14(2) of Regulation No 1191/69, a public service contract must cover the following points:
- a) the nature of the service to be provided, notably the standards of continuity, regularity, capacity and quality;
 - b) the details of financial relations between the parties;

- c) the rules concerning amendment and modification of the contract;
- d) the period of validity of the contract;
- e) the penalties in the event of failure to comply with the contract;
- f) the owner of the assets used to provide transport services, in particular the rolling stock and infrastructure.

68. Without prejudice to the requirements laid down in Regulation No 1191/69 it is recommended that a public service contract also cover the points which are described in Regulation 1370/2007 as obligatory elements of such contracts within the scope in which they are not contradictory with elements defined in point 67.

69. The external entrepreneur assumes the public service obligation in exchange for a remuneration referred to in article 14(2) of Regulation No 1191/69 (price of the services).

70. Regulation No 1191/69 does not provide the maximum term for which public service contracts may be awarded. Regarding provisions of Regulation No 1370/2007 it is, however, recommended that this period, before 3.12.2009, be:

- a) no longer than 10 years for bus, coach and trolleybus services and 15 years for tramway and metro services
- b) no longer than 15 years, in case of contracts relating to several modes of transport (for instance, bus and tramway services) under condition that transport by track-based modes (tramways or metro) represents more than 50% of the value of the contracted services.

In justified circumstances, the periods given in letters "a" and "b" may be extended by a maximum of 50%. In relation to contracts concluded after 3.12.2009 the above-mentioned periods should be strictly observed.

71. In relation to contracts concluded before 3.12.2009 r. the above-mentioned periods may be extended up to 30 years, provided the contract was awarded to the operator on the basis of a tender in accordance with the Public Procurement Law (on the basis of transitional provisions of art. 8 (3) of Regulation 1370/2007).

72. In accordance with Regulation No. 1370/2007, public service contracts must:

- a) define the public service obligations and the geographical areas concerned,
- b) establish, in an objective and transparent manner, the parameters on the basis of which the compensation, if any, is to be calculated and the nature and extent of any exclusive rights granted in a way that prevents overcompensation,
- c) determine the arrangements for the allocation of costs connected with the provision of services,
- d) determine the arrangements for the allocation of revenue from the sale of tickets (whether the revenue may be kept by the operator, municipality or shared between the two),
- e) determine the service quality standards,
- f) indicate whether, and if so to what extent, subcontracting may be considered and
- g) indicate the owner of the assets used to provide transport services, in particular the rolling stock and infrastructure.

73. In accordance with art. 142 (2) of Public Procurement Law periods of conclusion of public service contracts, as mentioned above, are subject to 4 year limitation unless exceptions from art. 142 (2) apply.

6.2.3.4. Subsection – Operator selection process

74. The external entrepreneur is selected in accordance with the rules set out in the Public Procurement Law, in principle based on a tender organized after the municipal council adopts a resolution authorizing the village mayor to hold a tender and conclude a contract with the external entrepreneur for performing local public transport tasks.

75. After 3.12.2009 Regulation No 1370/2007 allows to conclude the public service with an external entrepreneur without a tendering procedure in two instances. This possibility does not apply to entrepreneurs operating in the bus, trolleybus and tram sector providing services on the basis other than service concession contract. To these entrepreneurs apply directives enumerated in art. 5 (1) of Regulation No 1370/2007 (as to the notion of service concession contract see point 59).

76. The first case, applicable in accordance with art. 5 (4) of Regulation No 1370/2007 under condition that national law allows this (such a case does not take place at present), is when the average annual value of the contract is estimated at less than EUR 1,000,000 or when the annual provision of transport services is less than 300,000 kilometres. Under Regulation No 1370/2007, if a public service contract is directly awarded to a small or medium-sized enterprise operating not more than 23 vehicles, these thresholds may be increased to an average value estimated at less than EUR 2,000,000 and 600,000 kilometres, accordingly.
77. The second case, applicable directly in national legal system on the basis of art. 5 (5) of Regulation no. 1370/2007, concerns disruption of services or the immediate risk of such a situation. In such circumstances, the municipality may take one of three emergency measures, i.e. a measure in the form of a direct award or an agreement to extend a public service contract or a requirement imposed on the entrepreneur to provide certain public services (in the scope of its competence). The application of an emergency measure may not exceed two years. At present art. 5 (5) is to a large degree consistent with art. 67 (1)(3) of Public Procurement Law. It is recommended to apply art. 5 (3) consistently with that provision.

6.3. Subchapter – Equipping with assets

6.3.1. Section – General remarks

78. Proper discharge of the public service obligation within the scope of passenger transport may require purchase (or modernization) of assets used in urban or suburban public collective transport.
79. Comments on the rolling stock made in this subchapter apply to other assets accordingly while comments on purchase apply to modernization accordingly.
80. The rolling stock used to provide public services may be:
- a) purchased directly by the municipality and handed over to the operator or
 - b) purchased directly by the operator.

6.3.2. Section - first scenario – rolling stock remains municipal property

6.3.2.1. Subsection – General remarks

81. If the municipality imposes a public service obligation upon the operator (or awards a public service contract to the operator), it may make its own rolling stock available to the operator for the purpose of providing services.
82. If the municipality does not have any rolling stock to make available, it may purchase such rolling stock and use its own funds in accordance with the principles of financing from the Operational Programmes.

6.3.2.2. Subsection – Budgetary establishment

83. A budgetary establishment performing municipal tasks is equipped with assets provided by the municipality. The assets, including rolling stock, are handed over to be managed by the budgetary establishment based on an internal decision of the municipality (municipal council's resolution).

6.3.2.3. Subsection – Municipal company

84. Rolling stock can be handed over to the operator based on a civil law contract, gratuitously or against payment (lease, tenancy or letting for use). The term of such a contract cannot be longer than the term of the public service contract.
85. If the municipal company concluded an executory contract with the municipality, the contract should include the terms on which the rolling stock is handed over (and, in such a case, there is no need to execute a separate contract for rolling stock hand-over). Alternatively, the rolling stock may be handed over under a separate contract which should, however, account for the terms agreed in the executory contract and make clear reference to that contract.
86. The hand-over of the municipal rolling stock to the operator under a civil law contract affects the amount of compensation (see comments in subchapter 6.5), which should be reflected in the executory contract.

6.3.2.4. Subsection – External entrepreneur

87. If the municipality awards a public service contract to an external entrepreneur, it may make its rolling stock available to the entrepreneur for the purpose of providing services.
88. The rolling stock hand-over principles should be set out in the public service contract. The hand-over of municipal rolling stock to the operator affects the amount of compensation (see comments in subchapter 6.5).
89. If it consistent with Public Procurement Law rolling stock can be handed over to the operator based on a separate civil law contract, gratuitously or against payment (lease, tenancy, letting for use). In such a case, the lease, tenancy or letting for use agreement must clearly interrelate with the public service contract concluded between the municipality and the operator. The duration of the lease, tenancy or letting for use agreement cannot be longer than the duration of the public service contract.

6.3.3. Section – Second scenario – rolling stock becomes the property of the operator

6.3.3.1. Subsection – Budgetary establishment

90. The provisions of this section do not apply to a budgetary establishment (the assets of a budgetary establishment, being an operator, are identical with the assets of the municipality).

6.3.3.2. Subsection – Municipal company

91. If the municipality imposes a public service obligation upon a municipal company, it may make its own rolling stock available to the company for the purpose of providing services. Alternatively, the municipal company may acquire rolling stock by using its own funds.
92. The municipality may hand over the rolling stock to the municipal company for instance in the form of an in-kind contribution (in exchange for the company's shares). The hand-over of rolling stock to the municipal company in the form of an in-kind contribution affects the amount of compensation (see comments in subchapter 6.5).

93. In-kind contributions to a municipal company can be made upon establishing the company (contribution is made in kind to cover the share capital) or thereafter, in connection with a share capital increase.
94. A municipal company may purchase rolling stock by using own funds and apply for financing thereof from the Operational Programmes. Purchase of rolling stock by the municipal company itself and financing obtained from the Operational Programmes affect the amount of compensation if the municipal company receives compensation from the parent municipality (see comments in subchapter 6.5).

6.3.3.3. Subsection – External entrepreneur

95. An external entrepreneur may purchase rolling stock by using its own funds and apply for financing from the Operational Programmes.
96. Purchase of rolling stock by an external entrepreneur itself and financing obtained from the Operational Programmes affect the amount of compensation which the external entrepreneur receives from the parent municipality (see comments in subchapter 6.5).

6.4. Subchapter – Application for financing

97. An operator providing public services may apply for community funds to finance the purchase (or modernization) of assets used in urban or suburban public transport.
98. The cost eligibility period starts on 1.01.2007 and ends on 31.12.2015. The eligibility period means a period within costs which are eligible for financing from Operational Programmes can be borne. Cost borne beyond this period are not eligible.
99. A detailed description of the financing application procedures under the Operational Programmes is available at the official website of the EU structural funds in Poland www.fundusze-strukturalne.gov.pl (for Regional Operational Programmes the description is also available at the websites of the voivodships concerned).
100. To start the financing procedure, the applicant must first complete and sign a financing application form available at website www.fundusze-strukturalne.gov.pl (in the case of Regional Operational Programmes – also on the websites of particular voivodships).

101. If the operator providing public services is a budgetary establishment, the financing application form should be signed by the village mayor. In order to sign and file the application form, the head of the village mayor does not have to hold any authorization in the form of the municipal council's resolution.
102. If the operator providing public services is a municipal company, the financing application form should be signed by:
- a) the village mayor if the financing of the rolling stock is to be granted to the municipality; the municipality will be a party to the agreement for financing (once financing is received and the rolling stock is purchased, the municipality will hand over the rolling stock to the municipal company) or
 - b) the management board of the municipal company if financing is to be granted directly to the municipal company and the municipal company will be a party to the agreement for financing.
103. If the operator providing public services is an external entrepreneur, the financing application form should be signed by:
- a) the village mayor if the financing of the rolling stock is to be granted to the municipality; the municipality will be a party to the agreement for financing (once financing is received and the rolling stock is purchased, the municipality will hand over the rolling stock to the external entrepreneur); or
 - b) an entity authorized to represent the external entrepreneur (for instance, the management board for a limited liability company or a joint-stock company) if financing is to be granted directly to the external entrepreneur purchasing the rolling stock; the external entrepreneur will be a party to the agreement for financing.
104. If the entity applying for financing is a municipality which intends to provide public services by acting as a budgetary establishment, the municipality should attach inter alia the budgetary establishment's statute and the appropriate internal law act setting out the scope of the obligation to provide public transport services to the application form.
105. If the entity applying for financing is a municipality which intends to provide public services through its municipal company or a municipal company which intends to provide

public services to the parent municipality, the financing application form should be filed together with inter alia the documents confirming the detailed principles on which the municipal company provides public services (i.e. resolution on establishing the company, the articles of association and the executory contract) and the financing model showing that the compensation will not exceed the amount, calculated in accordance with the Annex to Regulation No 1370/2007, given that the municipal company receives funds from the relevant Operational Programme. If rolling stock is to be handed over to the municipal company based on a contract other than the executory contract, such contract must also be attached (the contract may be a conditional contract).

106. If the entity applying for financing is a municipality which intends to entrust public services to an external entrepreneur or an external entrepreneur, the financing application form should be filed together with inter alia the public service contract executed with the external entrepreneur. This contract should include the principles for calculating compensation if financing is obtained from the relevant Operational Programme directly by the entrepreneur and the principles of hand – over of the rolling stock or other assets if the financing from Operational Programme was received by the municipality. If the tendering procedure has been completed but the public service has not been already concluded, the application must be accompanied by a document presenting key elements of the prospective contract consistent with specification of essential terms of the contract. If the municipality has not chosen an operator in an adequate procedure, the application must be accompanied by a timetable of actions related to choice of an operator and a document presenting essential terms of intended contract.

107. Receiving of financing from Operational Programme as a part of compensation paid on the basis of public service contracts which did not envisaged that and were concluded before commencing of application for financing is admissible on condition that contract is accordingly amended in accordance with Public Procurement Law. Receiving of financing is allowed only if principles of performing of public services are consistent with the Guidelines, including the principles for calculating compensation.

108. As regards large projects within the meaning of art. 39 of Regulation No 1083/2006, when filling in part G of application form for confirmation of assistance³ applicant should omit a table and issue a statement that aid is granted in accordance with principles determined in

³ As determined in EC Regulation Nr 1828/2006.

Regulation No 1191/69 and Regulation No 1370/2007 and in the framework of these regulations it is compatible with common market and is not subject to notification.

6.5. Subchapter – Compensation

6.5.1. Section – General guidelines for calculation of amount of compensation

109. Due to the ambiguities relating to the manner of calculating compensation, as laid down in Regulation No 1191/69, it is recommended that calculation of compensation paid to budgetary establishments and internal operators before 3.12.2009 is made according to the rules set out in the Annex to Regulation No 1370/2007 and the recommendations presented hereinbelow. After 3.12.2009 the rules determined in the Annex should be, with due regard to recommendations given below, strictly observed in respect to provision of services by municipality itself (budgetary establishment), by directly chosen internal operator and in extraordinary cases described in points 76 and 77.
110. In relation to an external entrepreneur before, as well as after 3.12.2009, it is recommended that compensation (remuneration) paid respects rules of Annex to Regulation No 1370/2007 and recommendations given below.
111. The asset provided to the operator in view of the public services to be rendered by the operator constitutes a part of compensation.
112. Assets provided to the operator in view of the public services to be rendered by the operator, if any other entrepreneurs operating on a given market are denied (real or potential) access on equal basis to these assets (e.g. a closed bus depot), constitutes a part of compensation.
113. Assets provided to the operator in view of the public services to be rendered by the operator, if other entrepreneurs operating on a given market are granted on equal basis (real and potential) access to such infrastructure (e.g. a public road or bus stops in some cases) does not constitute a part of the compensation.
114. In relation to projects, in which assets financed from Operational Programmes constitute a part of the compensation (so they are under regime of Regulation No 1191/69 and Regulation No 1370/2007), art. 55 items 1 – 5 of Regulation Nr 1083/2006 does not apply.

115. Compensation rules applies to budgetary establishments as far as they are consistent with laws regulating their finances.
116. The calculation of costs of services under a public services contract should account for all costs in connection with these services, both fixed and variable costs, including inter alia:
- a) all the costs related to transport operating activities (including depreciation costs) calculated in accordance with accountancy rules;
 - b) costs related to the use and maintenance of the necessary technical infrastructure if they are incurred by the operator;
 - c) financing costs in direct connection with the provision of services (including cost of financing investment purchases for the purpose of the provision of services)
 - d) the income tax, since the anticipated profit used to calculate the return on equity is calculated based on profit after taxation.
117. The operator's petty costs which are customarily connected with passenger transport services but could not have been specified directly in the public service contract (such as for instance ticket control costs and other unforeseen costs), if the operator incurs such costs, should be reasonably allocated to calculate compensation as the operator's normal costs.
118. Costs of the provision of public services will cover various categories and kinds of costs, depending on the type of activity (buses, metro, trams). In each case, relevant explanations for the included cost items should be provided.
119. Costs of additional services that are not connected with public services (such as tourist services, employee transport at the request of industrial plants, services provided to sports clubs, etc.) should not be included in the calculation unless they are required under separate provisions of law or are specified in documents regulating the rules of providing public services.
120. Revenue from the provision of additional services, as mentioned in preceding point, should by the same rules be also excluded from the calculation of compensation.
121. Operators may generate non-tariff revenue being in direct connection with the use of assets which are used for provision of services under the public service contract. Such revenue may be generated as a result of economic initiative undertaken by the operator, yet

without any effect on the quality of the service rendered (e.g. revenue from the sale of advertising space). Consideration of such revenue should be regulated in the public service contract. Revenue of this kind should be included in the calculation.

122. The notion of 'network' in the context of calculating due compensation should be understood as a network of transport connections, and does not stand for a physical network of bus stops or other objects (such as tramway subgrade).

123. Calculation of network effects (i.e. financial effects generated by the operator as a result of concluding a public service contract) should only concern an operator which consequently to the conclusion of a public service contract obtained a positive effect on the profitability of the whole of its operations (e.g. higher profitability of services not covered by the contract). This also concerns any benefits acquired by the operator as a result of the use of means of transport to render services not covered by the public service contract.

124. The network effects taken into account for the purpose of calculating the amount of compensation refer to the the connection network serviced by the operator, and do not relate to the effects that the public service contract has on the activities of other operators and on the local transport system.

125. Transport tariffs usually provide for numerous discounts for various passenger groups (infant/child/youth, elderly people, etc.) reflecting the transportation policy adopted by public authorities and stated in relevant provisions of law. In addition to such discounts, the operator may also offer trade discounts to certain customers if the sale and distribution of tickets depends on the operator. Such discounts are usually intended to generate larger passenger traffic. If the requirement to apply such discounts stems from the provisions of law, they should be specified in the public service contract or otherwise the costs of such discounts should not be included in the calculation, for instance, by assuming theoretically 100% value of revenues from the services under discounts.

126. When calculating the compensation, the operator's 'reasonable profit' cannot be equated with the net financial profit earned in the financial year, as reported in the income statement as part of the operator's statutory financial statements. The net financial result in a given financial year may be affected by non-recurrent accounting events unrelated with the cash flow which could trigger abnormal changes in the amount of compensation and have effect on the level of profit earned. The most adequate manner of calculating the operator's profit

on the invested capital is the annual average return on capital throughout the term of the public service contract.

127. It is recommended that the rate of return on the capital invested by the operator be reviewed based on analysis of cash flows to the owners of the operator company over the whole period covered by the public service contract. The operator's profit may be reviewed based on the calculation of cash flow to and from the owner of the operator company in connection with the public service business, taking into account the invested capital and the investment value (of the part of operations covered by the public service contract) after termination of the public service contract. Such calculation such be carried out on regular basis based on the operator's up-dated financial figures in order to review the level of the operator's profit throughout the term of the public service contract. In order to arrive at initial financial forecasts for the need of concluding a public service contract, the net financial profit earned in each financial year may serve as a good approximation of the level of profit on equity.
128. The recommended rate of return on equity for transport ventures is 6% (six percent) in real terms.
129. The method of calculating compensation may be used for verifying the validity of granting assistance from EU funds. The calculation should demonstrate that the operator will not be overcompensated as a consequence of granting EU assistance (e.g in case a service contract has already been concluded). In the case when granting a maximum amount of assistance would result in possible occurrence of overcompensation, the value of assistance from EU funds should be reduced by the real value of overcompensation which would occur over the whole period covered by the contract. Alternatively (where it is feasible and justified), the compensationed to the operator can be reduced to the allowable level.
130. The amount of compensation is usually reviewed annually by the authority contracting the services based on the financial figures for the previous year. The rules for compensationments should account for (a) making adjustments to payments at the end of a given year for overcompensation (and crediting overcompensation, if any, against the compensation for services provided in the next period); and (b) imposing penalties if the operator failed to provide the required standard of services.

131. VAT should be included in the calculations in accordance with the tax regulations and eligibility to be co-financed from the EU funds.

132. Public service contracts should promote enhanced effectiveness of transport management by the operator. This can be achieved for instance by curbing the operator cost indices. Any mechanisms promoting enhanced effectiveness should be clearly defined and explained in the public service contract.

133. Transfer to municipal company of means for discharging of obligation to provision of service through share capital increase, additional payments or shareholder loans should be, when determining a compensation, taken into consideration in the part in which they are destined for discharging of service.

134. Capital increase described in preceding point it should taken into consideration in such a way that amount of compensation should be reduced by amount of gross grant equivalent calculated in accordance with section 4(3) of Council of Ministers' Regulation of 11.08.2004 concerning specific method of calculating of value of state aid granted in various forms (Journal of Laws of 2004, no 194, item 1983, as amended). The increase of capital in above-mentioned scope is legal aid and does not require notification.

135. The benefits enumerated in point 133 which are not destined for discharging of service are subject to general rules of granting of state aid⁴.

6.5.2. Section – Examples of calculating compensation if the rolling stock is owned by the municipality

136. Example 1. Purchase of rolling stock by the municipality is co-financed from the Operational Programmes. The rolling stock is made available to the operator under a public service contract (the example is given in Annex No II to the Guidelines).

137. Example 2. Purchase of rolling stock by the municipality is co-financed from the Operational Programmes. The rolling stock is made available to the operator under a tenancy agreement executed with the operator (the example is given in Annex No II to the Guidelines).

⁴ Assessment of legality of such benefits should be carried out on the basis of EC communication titled: *Application of Articles 92 and 93 [now 87 and 88] of the EEC Treaty to public authorities' holdings* (Bulletin EC no 9 of 1984).

6.5.3. Section – Examples of calculating compensation if the rolling stock is owned by the operator

138. Example 3. The operator purchases and pays for the rolling stock with the use of its own funds. No financing from the Operational Programmes (the example is given in Annex No II to the Guidelines).
139. Example 4. Purchase of the rolling stock by the operator is co-financed from funds under the Operational Programmes (the example is given in Annex No II to the Guidelines).

6.5.4. Section – Examples of calculating compensation if the transport operator manages relevant infrastructure

140. Example 5. The tramway system operator manages the transport and relevant infrastructure. The infrastructure is owned by the municipality. The purchase of rolling stock by the operator is co-financed from EU funds under the Operational Programmes. Modernisation/extension of infrastructure by the operator is co-financed from EU funds under the Operational Programmes (the example is given in Annex No 1 to the Guidelines).
141. Example 6. The tramway system operator manages the transport and relevant infrastructure. The infrastructure is owned by the operator. The purchase of rolling stock by the operator is co-financed from EU funds under the Operational Programmes. Modernisation/extension of infrastructure by the operator is co-financed from EU funds under the Operational Programmes (the example is given in Annex No 1 to the Guidelines).

6.6. Subchapter – State aid and notification requirements

6.6.1. Section – Compensation and state aid

142. Compensation paid as consideration for provision of public service is subject to assessment under art. 87 of EC Treaty, because operators receiving financing carry out economic activity and for this sake are undertaking within the meaning of Community law.
143. In cases indicated in this subchapter compensation does not constitute state aid and is not subject to notification or may be released from obligation of notification regardless the fact that it constitutes state aid within the meaning of art. 87 of the EC Treaty on the

condition that compensation is calculated and paid in accordance with provisions of Regulation No 1191/69 and after 3.12.2009 accordingly with Regulation No 1370/2007.

144. To the extent in which assets financed from Operational Programmes constitute a part of compensation, these assets are released from obligation of notification

6.6.2. Section – No state aid within the meaning of art. 87 of EC Treaty

145. The auxiliary criteria in determining if a given aid is not prohibited aid, as mentioned in art. 87(1) of EC Treaty and is compatible with common market principles are the criteria indicated in the judgment of the ECJ in the Altmark case (24.07.2003, C-280/00)⁵.

146. Determination of an operator in a tender, in accordance with all procedures (in particular with due respect to publication requirements) warrants that flow of public means is not state aid because this does not lead to “distortion or threat of distortion of competition by favouring of certain undertakings or the production of certain goods” within the meaning of art. 87(1) of the EC Treaty.

147. Assets provided to the operator in view of the public services to be rendered by the operator, if other entrepreneurs operating on a given market are granted on equal basis (real and potential) access to such infrastructure (e.g. a public road or bus stops in some cases) does not constitute state aid within the meaning of art. 87(1) of the EC Treaty.

6.6.3. Section – Aid compatible with common market on the basis of Regulation No 1191/69 or Regulation No 1370/2007 not requiring notification

148. In relation to operators to which provision of services was entrusted in imperious way (budgetary establishment, municipal company being an internal operator) it is assumed that

⁵ First, the recipient undertaking must actually have public service obligations to discharge, and the obligations must be clearly defined. Second, the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner. Third, the compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit. Finally, where the undertaking which is to discharge public service obligations, in a specific case, is not chosen pursuant to a public procurement procedure which would allow for the selection of the tenderer capable of providing those services at the least cost to the community, the level of compensation needed must be determined on the basis of an analysis of the costs which a typical undertaking, well run and adequately provided with means of transport, would have incurred.

means transferred to the operator by municipality constitute compensation which is state aid within the meaning of art. 87(1) of the EC Treaty.

149. Means (compensation) transferred to the operators to which provision of services was entrusted in imperious way are compatible with common market on the basis of art. 73 of EC Treaty and does not require notification on the condition that compensation was calculated in accordance with all principles stemming from Regulation No 1191/69 or after 3.12.2009 from Regulation No 1370/2007 (within a scope envisaged in this regulation – see point 150).

6.6.4. Section – Aid not covered by release from obligation to notify under Regulation No 1370/2007

150. After 3.12.2009 Regulation No 1370/2007 release from obligation to notify, as mentioned in preceding section, does not apply to cases where the contract does not allocate the risk related to provision of services on the company and the company is financed on the basis of “gross” compensation (receives on the basis of contract remuneration from the municipality as consideration for executed services measured in kilometers). In these cases after that date general rules on public procurement (see point 59) and state aid apply. In these cases, regarding bus and tram services, it will be still possible to apply the notion of internal operator as determined in jurisprudence of ECJ and to directly award contracts to them⁶. However, due to no applicability of Regulation No 1370/2007 in such cases (see its art. 5(1)), conclusion of public service contract must be assessed at an angle of occurrence of state aid, because release from obligation to notify mentioned in art. 9(1) of Regulation No 1370/2007 does not apply.

151. The contract described in preceding point may be released from obligation to notify only if Altmark criteria are satisfied. Therefore only strict observance of rules of calculation of compensation determined in Regulation No 1370/2007 and the Guidelines as well as due care of effective management of undertaking may ensure that compensation paid will not constitute state aid. Only individual notification will ensure legal certainty in this respect. Assessment of compatibility of the contract with art. 87(1) of EC Treaty will be carried out on

⁶ In accordance with art. 5(1) of Regulation No 1370/2007 choice of entities from tram and bus sector is made in such a case on the basis of rules stemming from community directives on public procurement (2004/17/EC and 2004/18/EC), so in Polish realities on the basis of Public Procurement Law (where these directives are implemented). Of course ECJ jurisprudence concerning these directives is fully applicable.

the basis of Community framework on state aid in the form of public service compensation (2005/C 297/04).

6.6.5. Section – Aid subject to notification

152. As regards an external entity which was selected in a way other than by tender based on objective and transparent criteria, even if the remuneration due is calculated in accordance with all the rules set out in Regulation no. 1191/69 and Regulation no. 1370/2007.
153. The above pertains also to situation where an asset is transferred or made available to an external entrepreneur providing public service on the basis of the contract which was previously concluded and did not envisage such a possibility at the time of conclusion.
154. If the compensation paid to the operator, to which provision of services was entrusted in imperios way, is in excess of what results from the application of the rules set in Regulation no. 1191/69 or Regulation no. 1370/2007 (also if the compensation has not been proportionally reduced in connection with the asset being provided), this does not imply that it is consistent with the common market principles and is thus subject to notification requirement.

6.7. Subchapter – Publication requirements

155. After 3.12.2009 each municipality must publish certain information pertaining to public service obligation in the Official Journal of the European Union in accordance with art. 7 of Regulation 1370/2007.
156. The above obligation apply also to budgetary establishments to the extent provided in art. 7(1) of Regulation No 1370/2007. If the municipality provides services exclusively with help of budgetary establishment it can be assumed that running the business of the establishment with observance of proper laws on public finances (rule of openness, obligatory publications in relations to budget of the municipality and its implementation) ensures fulfillment of the obligation.
157. In the case of municipal company, the publication obligation arises when the provision of services is entrusted to the company.

158. In accordance with art. 7(1) of Regulation No 1370/2007 the municipality intending to award contract for a service is obliged to publish in the Official Journal of European Union a year in advance information on:
- a) the name and address of the municipality,
 - b) the type of award envisaged,
 - c) and the services and areas potentially covered by the award.
159. Should the information change after its publication, the municipality must publish a rectification accordingly. The rectification is without prejudice to the launching date of the direct award or the invitation to tender.
160. The obligation to publish information applies if a public service contract concerns an annual provision of no less than 50,000 kilometres of public services.
161. The municipality executes publication obligations as described in Regulation 1370/2007 without prejudice to other obligations of similar nature resulting from other legal acts.

6.8. Subchapter – Transparency of financial relations

162. Municipalities providing a service with assistance of public undertaking within the meaning of art. 2 item 1 point 4 of Act on the transparency of financial relations, i.e. with assistance of budgetary establishment or municipal company, as well as private undertaking providing service entrusted by municipality are obliged to observe provisions of this act.
163. In particular, in accordance with art. 3 of Act on the transparency of financial relations, public undertaking shall maintain its accountancy and documents concerning its legal and economic situation, in a way presenting reliably and clearly:
- a) public funds made available to the undertaking,
 - b) actual use of these funds,
 - c) direct and indirect organizational and financial relations between the undertaking and public authorities.

164. Additionally, Ponadto, in accordance with art. 8 of the above-mentioned Act, the undertaking (also private one), providing other kind of business than provision of public service, is obliged to:

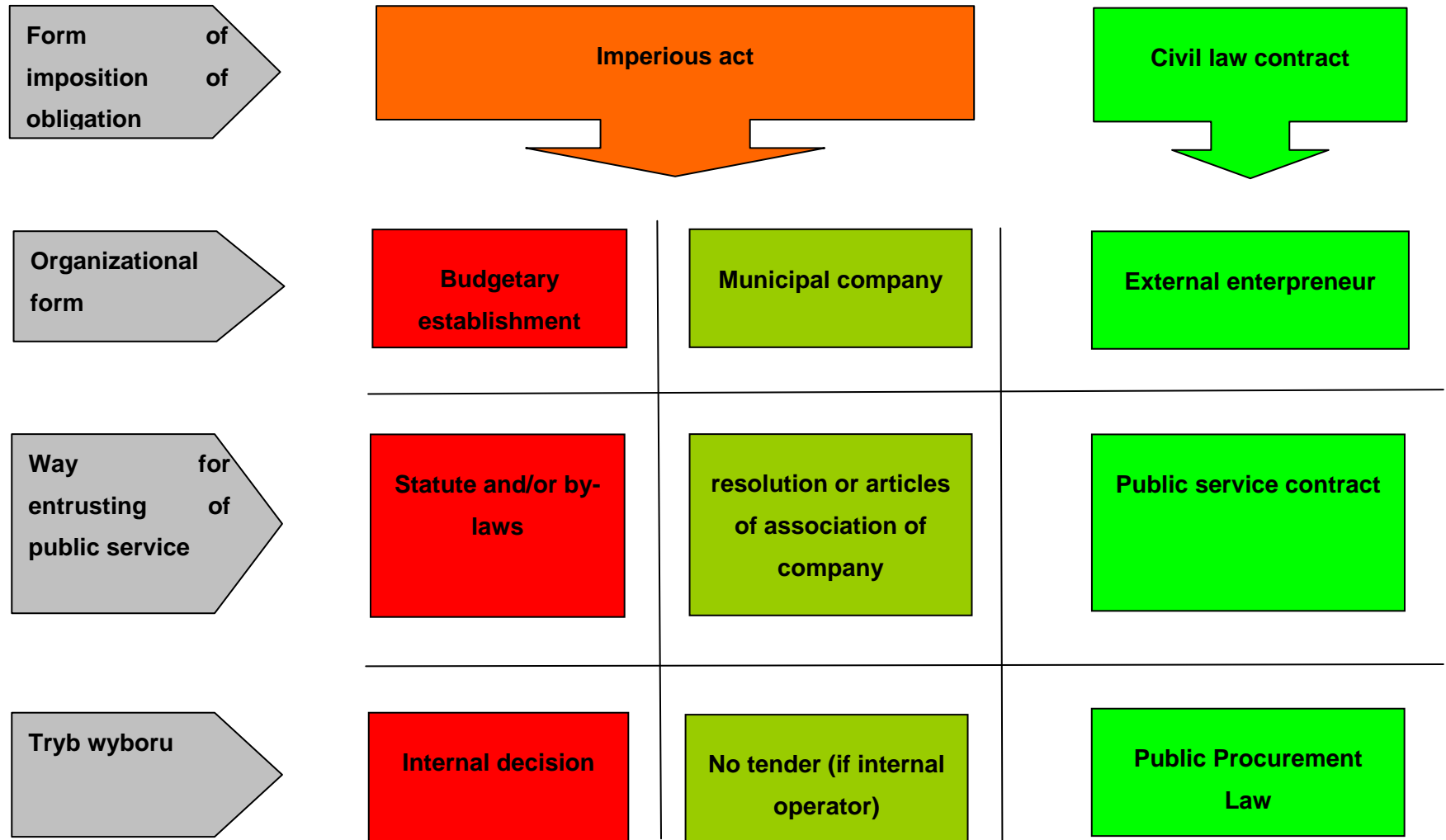
- a) maintaining of separate accounts for provision of public services and for any other businesses, including proper assignment and allocation of costs and revenues on the basis of consistently applied and objectively justifiable cost accounting principles and
- b) clear determination in documents mentioned in art. 10 of Act of 29 September 1994 on accountancy (consolidated text Journal of Laws of 2002, no 76, item 694, as amended), rules of maintaining of separate accounts and principles of assignment and allocation of costs mentioned in letter "a" above.

165. The obligations mentioned in points 163 – 164, in accordance with art. 13 item 1 points 1, 2 i 4 of Act on the transparency of financial relations does not apply to:

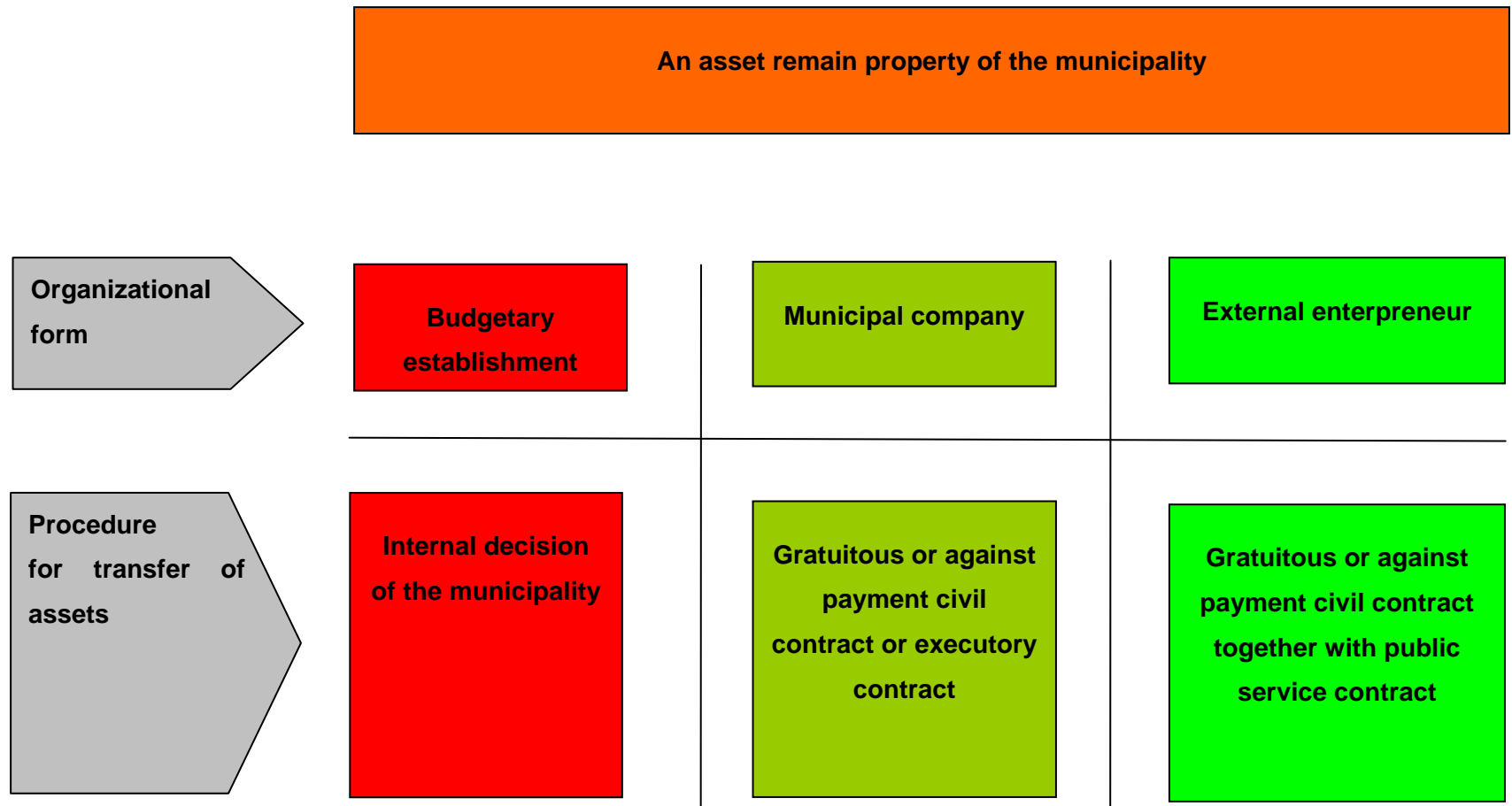
- a) undertakings, as regards services the supply of which is not liable to affect trade between Member States to an appreciable extent;
- b) undertakings whose total annual net turnover over the period of the two financial years preceding any given year in which it enjoys a special or exclusive right or provides entrusted to them services of general economic interest or other tasks is less than 40 mln euro;
- c) undertakings which have been entrusted with the operation of services of general economic interest or other tasks if the compensation received from public funds was awarded on the basis of rules of openness, transparency and non-discrimination.

6.9. Annex I – Graphs

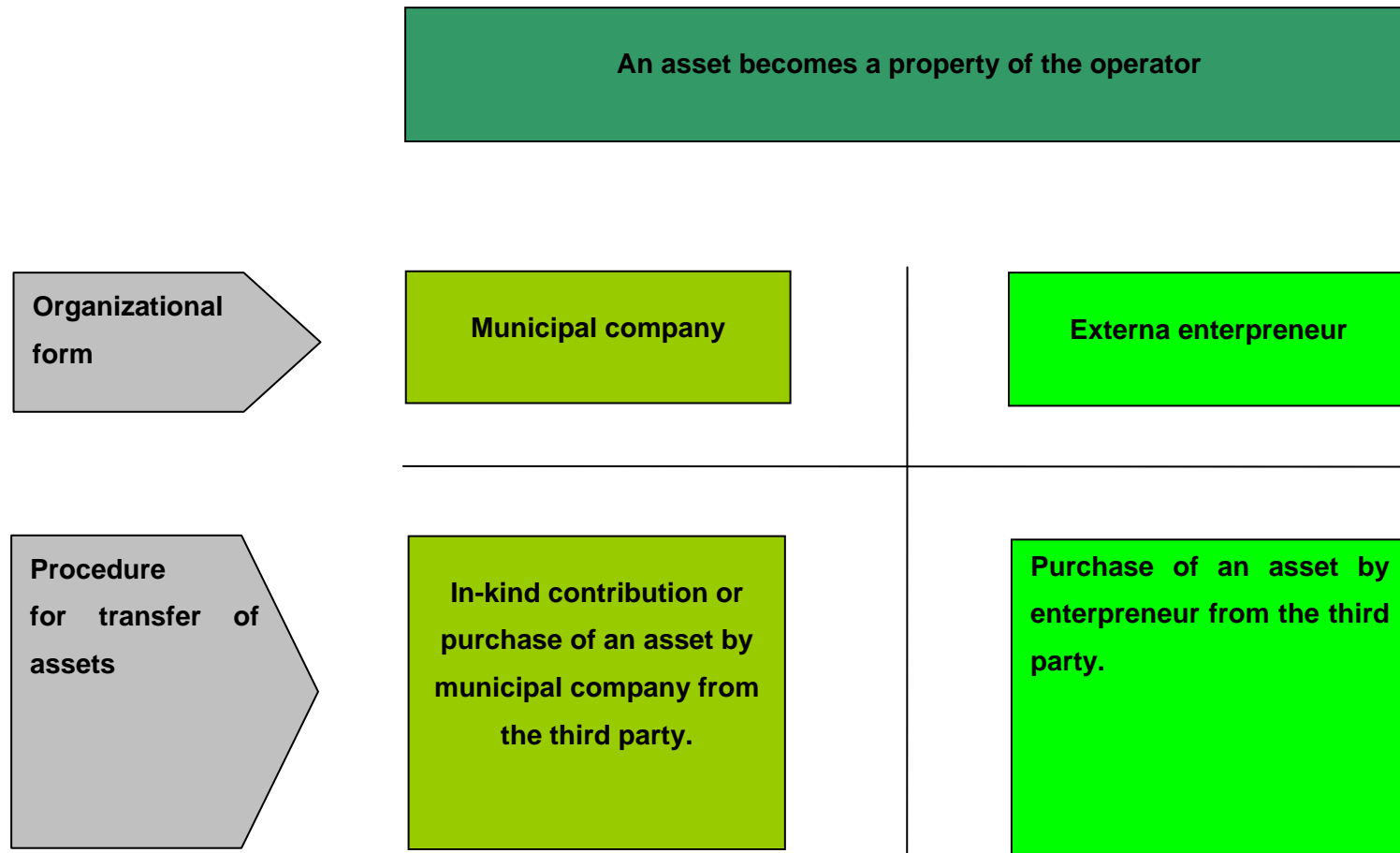
6.9.1. Entrustment of services before 3.12.2009 depending on organizational form of an operator



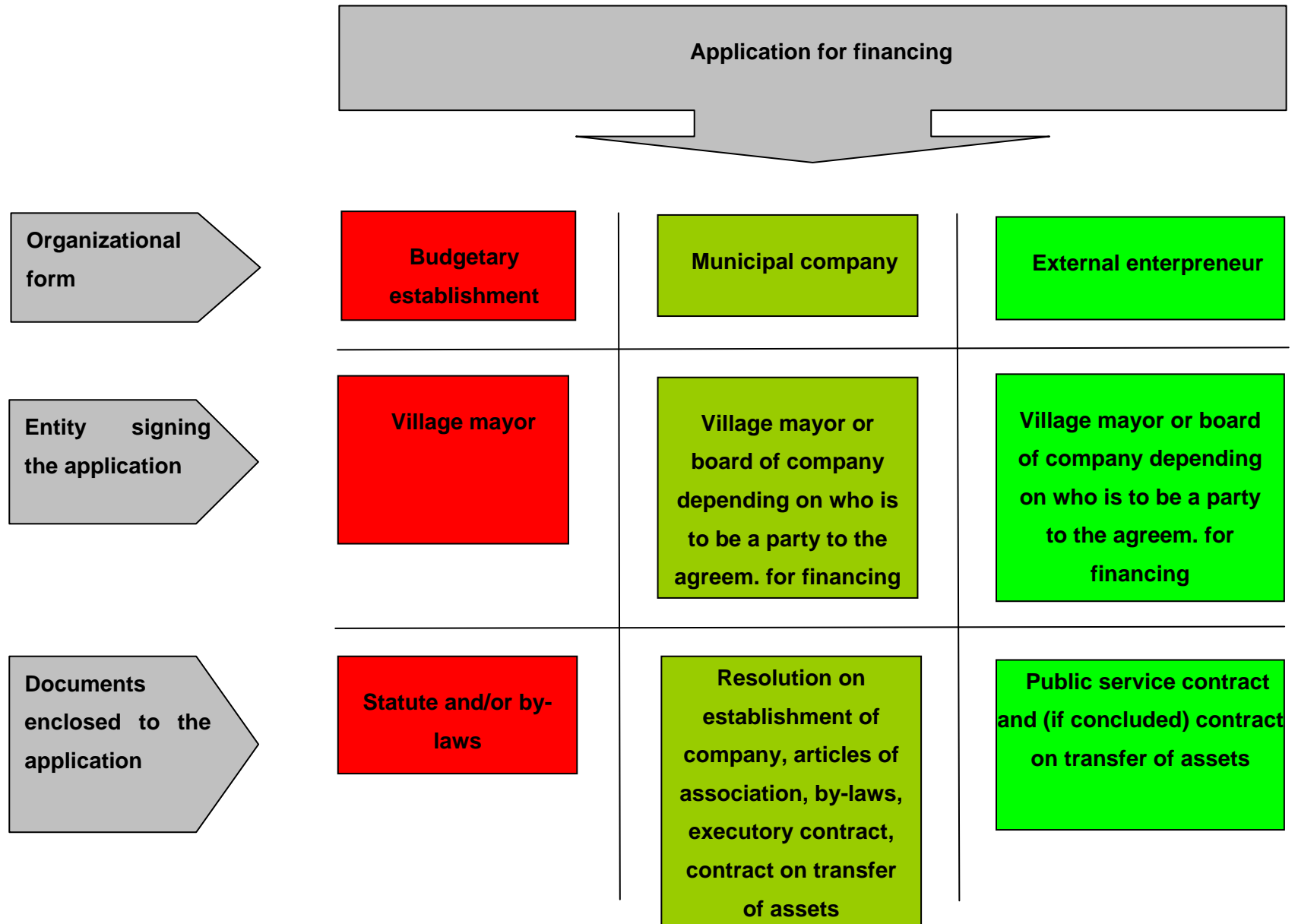
6.9.2. *Equipping with assets (rolling stock, infrastructure)*



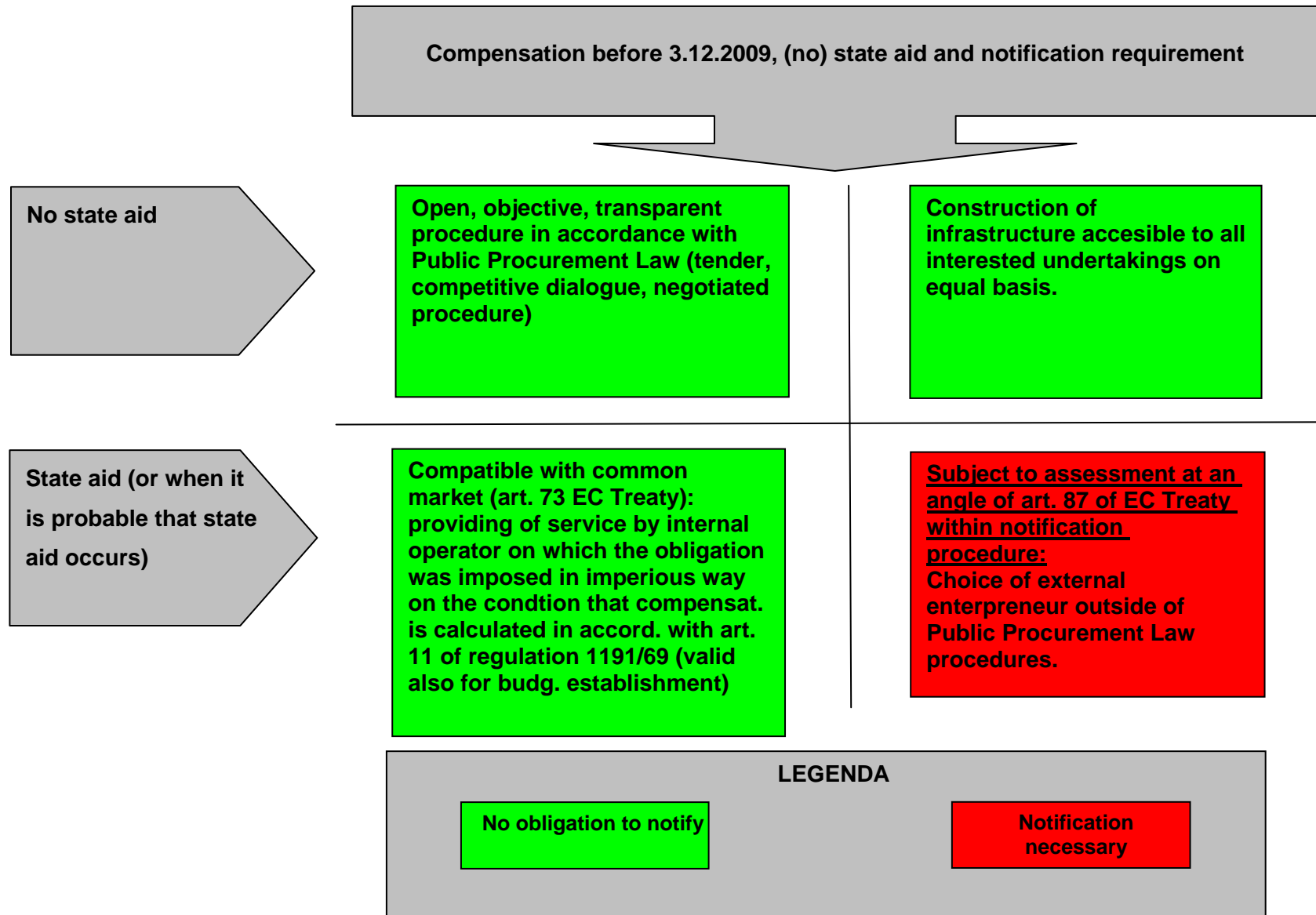
6.9.3. *Equipping with assets (rolling stock, infrastructure).*



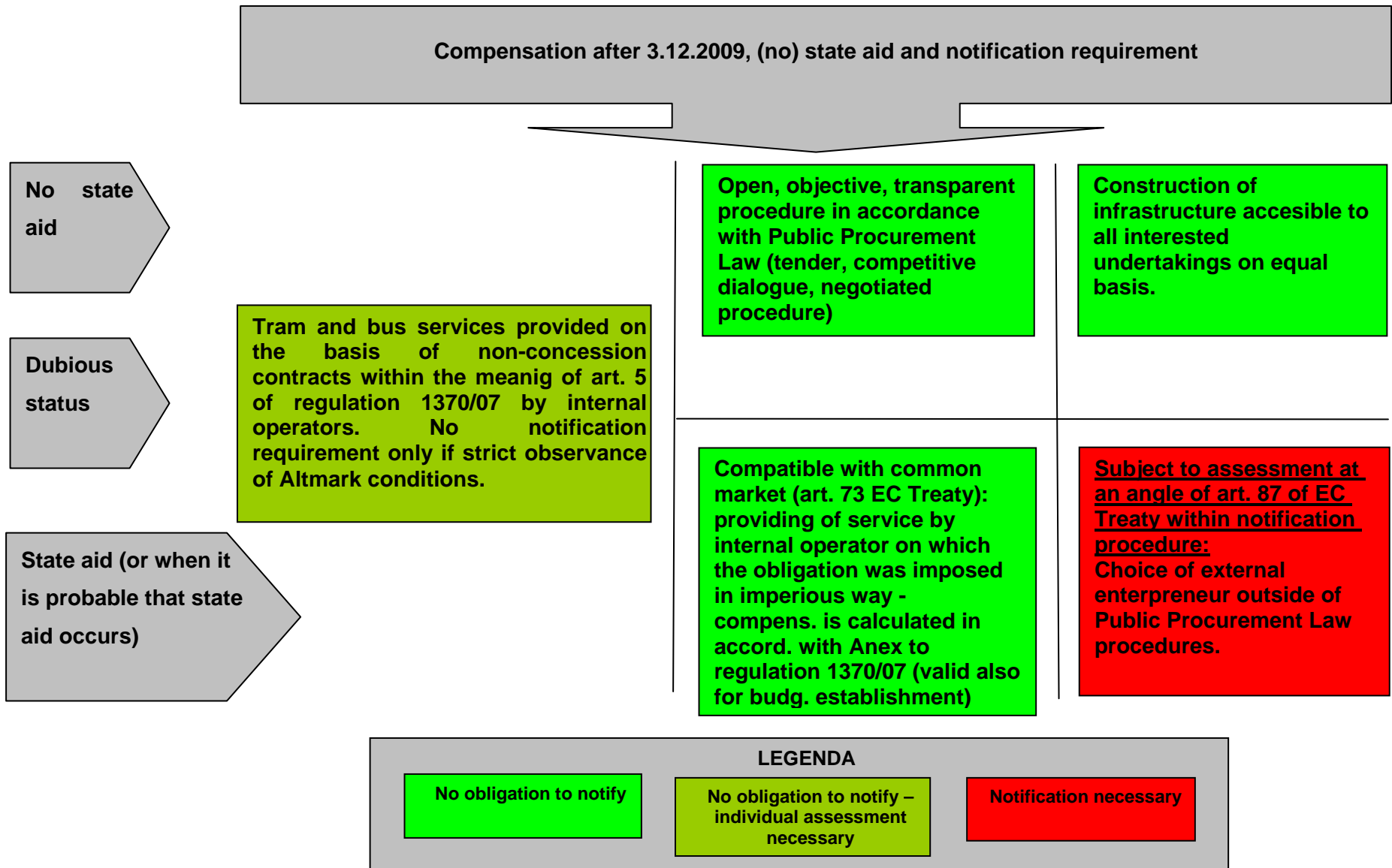
6.9.4. Applying for financing



6.9.5. Compensation before 3.12.2009, (no) state aid occurrence and notification requirement



6.9.6. Compensation before 3.12.2009, (no) state aid occurrence and notification requirement



6.10. Annex II – Examples of compensation calculation

6.10.1. Section – General remarks

1. The following examples are aimed to illustrate the way the compensation for the extra costs of the public service obligation (PSO) imposed on the operator that provides urban transport services is calculated.
2. For the clarity of the calculation a number of simplifying assumptions has been made. In each real case the assumptions taken should be clearly stated to support calculation of compensation supporting application for notification of Public Service Contract (PSC) to appropriate public authority. The set of assumptions for the examples should not be taken as a sufficient set of assumptions in order to develop any future calculation of compensation, because in each case the assumptions will refer to different issues and should be taken at the more detailed level (all items of the calculation should be explained)
3. Examples illustrate calculation of the maximum compensation according to EU Regulation No. 1370/2007. The maximum compensation in real case will be a reference level for verification of the actual level of compensation for the operator.
4. Annex II should be read in conjunction with Subchapter 6.5, which points out few guideline notes on the calculation of compensation that may help in understanding the calculation instructions of EU Regulation No. 1370/2007.
5. Please note that data used in these examples are for illustration purposes only and do not necessarily reflect a real situation. Values used in examples should not be in any case interpreted as guidelines with respect to eligible level of cost, transport work, etc.
6. Specific numerical assumptions and all calculations are presented in the tables supplementing this Annex II.

6.10.2. Section – General assumptions to presented examples

7. Examples illustrate the approach to the financial calculation of the compensation under Public Service Contracts in the presence of EU grant-funding of investment projects. Financial projections illustrate calculation of the compensation according to the

Regulation 1370/2007 supported by simplified (and different than for statutory purposes) projections of the profit & loss account, balance sheet, cash-flow statement and verification of the rate of return on capital for the operator in the period of PSC.

6.10.3. Section – Examples of bus transport projects

6.10.3.1. Subsection – The context for Examples 1, 2, 3 and 4

8. An organiser of the bus transport (The City) has assessed its public transport needs and decided to provide citizens with bus services in a quantity of 2.3 million vehicle-kilometres per year. It was concluded that 44 buses are required to secure such level of the service. The City has decided to achieve this goal through 8-year Public Service Contract with a bus operator (The Operator). The City considers various institutional structures of the project (defined further in the Annex).

6.10.3.2. Subsection General assumptions

9. The following assumptions have been made with respect to Examples 1, 2, 3 and 4:
 - a) The City sales tickets and is not a registered VAT entity, so it may reclaim VAT connected with the purchase of fixed assets.
 - b) The only revenue of the Operator is the compensation under PSC.
 - c) The time horizon of the projection matches the duration of the PSC.
 - d) The Operator provides only services under PSC, does not run any other transport and non-transport related business activity.
 - e) Network effects are ignored.
 - f) The goal of the calculation is to find such compensation that generates return on equity of the operator at required level. The return on equity was estimated as net financial profit divided by average equity balance in each annual period. Verification of the return to equity owner over the entire period of the public service contract on a cash flow basis was also presented.

- g) The normal profit is defined as a return on equity of the Operator equal to 6% in real terms. It was assumed that this level of return will be achieved every year.
- h) It was assumed that the net profit is fully (100%) retained in the company (i.e. is not distributed to shareholders) thus increasing the equity balance. It is assumed that these funds will be reinvested in the business as needed (fixed assets upgrades or major repairs), however for the sake of simplicity they are presented as increased balance of cash.
- i) There is no effect of penalties due to operator's underperformance.
- j) Impact of VAT payments on operator's balance sheet is ignored. In particular the need for funds to pay VAT on initial capital expenditures has been ignored.
- k) All amounts in the presented examples are stated in Polish zloty (PLN).
- l) The analysis is in real prices.

6.10.3.3. Subsection – Definition of examples and key assumptions

10. Example 1 – EU grant to the City and assets provided to the Operator under PSC

Institutional structure: The City purchases the rolling stock. The rolling stock is provided to the Operator under the PSC to render public services. No separate asset lease agreement is concluded between the City and the Operator. (This structure has not been broadly applied in Poland, it is however feasible).

Financing structure: 50% - EU grant to the City; 50% - the City budget. The Operator puts additional capital needed to assure the liquidity of the venture.

Additional assumptions: the Operator does not depreciate assets in their books as the assets are the property of the City.

11. **Example 2 – EU grant to the City and assets leased to the Operator for lease payment**

Institutional structure: The City purchases the rolling stock. The busses are provided to the Operator under the asset lease agreement. (This structure has not been broadly applied in Poland, it is however feasible).

Financing structure: 50% - EU grant to the City; 50% - the City budget. Assets are leased to the Operator under a lease payment that will allow for the recovery of the cost of asset purchased by the City. The Operator puts additional capital needed to assure the liquidity of the venture.

Additional assumptions:

- a) the Operator does not depreciate assets in their books as the assets are the property of the City.
- b) The City leases assets on to recover full value of the investment in fixed assets. Duration of lease agreement matches duration of the PSC.

12. **Example 3 – No EU grant**

Institutional structure: The City contracts public services. Operator provides rolling stock.

Financing structure: 100% of asset value funded by the Operator (20% - equity provided by the Operator; 80% - a commercial loan taken by the Operator). The Operator puts additional capital needed to assure the liquidity of the venture.

Additional assumptions: VAT on asset purchase is fully reclaimed by the Operator

13. **Example 4 – EU grant to the Operator**

Institutional structure: The City contracts public services. Operator provides rolling stock co-financed from EU funds. Two separate processes take place, (1) application by the Operator for EU grant and (2) procurement of services through a PSC.

Financing structure: EU grant is received by the Operator at 50% of the new assets value. Another 50% of the investment is financed by commercial loan taken by the Operator. The Operator puts additional capital needed to assure the liquidity of the venture.

Additional assumptions:

- a) VAT on asset purchase is fully reclaimed by the Operator
- b) EU grant covers 50% of asset value net of VAT

6.10.4. Section – Examples of tram projects

6.10.4.1.Subsection – The context of Examples 5 and 6

14. The City organises the public tram transport of 200 thousand vehicle-kilometre per year to be delivered with 60 tram vehicles. It was assessed that 20 tram vehicles have to be replaced with new ones because of old age and poor technical condition. At the same time the tram infrastructure modernisation project will be carried on. Both projects may be co-financed with EU funds. Operator is the only tram operator in the City and has been operating tram services for many years. In order to provide tram services the City intends to conclude public service contract with the operator for 10 years.

6.10.4.2.Subsection – General assumptions

15. The following assumptions have been made with respect to Examples 5 and 6:

- a) The City sales tickets and is not a registered VAT entity, so it may reclaim VAT connected with the purchase of fixed assets.
- b) The only revenue of the Operator is the compensation under PSC.
- c) The time horizon of the projection matches the duration of the PSC.
- d) The Operator provides only services under PSC, does not run any other transport and non-transport related business activity.
- e) Network effects are ignored.

- f) The goal of the calculation is to find such compensation that generates return on equity of the operator at required level. The return on equity was estimated as net financial profit divided by average equity balance in each annual period. Verification of the return to equity owner over the entire period of the public service contract on a cash flow basis was also presented.
- g) The normal profit is defined as a return on equity of the Operator equal to 6% in real terms. It was assumed that this level of return will be achieved every year.
- h) It was assumed that the net profit is fully (100%) retained in the company (i.e. is not distributed to shareholders) thus increasing the equity balance. It is assumed that these funds will be reinvested in the business as needed (fixed assets upgrades or major repairs), however for the sake of simplicity they are presented as increased balance of cash.
- i) There is no effect of penalties due to operator's underperformance.
- j) Impact of VAT payments on operator's balance sheet is ignored. In particular the need for funds to pay VAT on initial capital expenditures has been ignored.
- k) All amounts in the presented examples are stated in Polish zloty (PLN).
- l) The analysis is in real prices.

6.10.4.3. Subsection – Definition of examples and key assumptions

16. Example 5 – Operator gets the EU grant for rolling stock and manages the infrastructure owned by the City

Institutional structure: Operator of the tram system owns rolling stock and manages the necessary infrastructure. The infrastructure is owned by the City.

Financing structure: Operator gets the EU grant accounting for 50% of the new rolling stock investment. The remaining part is financed by the bank loan (30%) and equity (20%). At the same time the City is the beneficiary of EU grant for infrastructure accounting for 85% of the investment. The remaining part is financed by the City budget.

Additional assumptions:

- a) VAT on asset purchase is fully reclaimed by the Operator
- b) EU grant covers 50% of asset value (rolling stock) net of VAT
- c) EU grant covers 85% of asset value (infrastructure) net of VAT

17. Example 6 – Operator gets the EU grant. Operator manages and owns the infrastructure.

Institutional structure: Operator of the tram system owns and manages both, the infrastructure and the rolling stock.

Financing structure: Operator gets the EU grant accounting for 50% of the new rolling stock investment and 85% of the infrastructure investment. The remaining part of the rolling stock investment is financed by the bank loan (30%) and equity (20%). The remaining part of the infrastructure investment is financed by the Operator (equity).

Additional assumptions

- a) VAT on asset purchase is fully reclaimed by the Operator
- b) EU grant covers 50% of asset value (rolling stock) net of VAT
- c) EU grant covers 85% of asset value (infrastructure) net of VAT