

Opening of the market for domestic passenger transport services by rail: award of public service contracts. 4th Railway Package

2013/0028(COD) - 24/10/2016 - Commission communication on Council's position

The Commission adopted a communication on the position of the Council on the adoption of a Regulation amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail.

The general objective of the Commission proposal is to improve the quality of rail passenger services and to enhance their operational efficiency. This should improve the competitiveness and attractiveness of rail vis-à-vis other modes of transport and develop further the single European railway area.

To attain the general objective, the Commission proposed to introduce mandatory competitive tendering for public service contracts to intensify competitive pressure on domestic rail markets. These measures are accompanied by provisions to ensure favourable framework conditions for competitive tendering procedures, including rules on the access to rolling stock.

This proposal is part of a comprehensive package of six legislative proposals to deliver better quality and more choice in rail services in Europe.

Comments on the common position: the Commission considered that the Council position **supports the main objectives of the Commission proposal** of improving the quality and efficiency of public transport services by rail through introducing the principle of mandatory competitive tendering of public service contracts in rail. It equally supports proposed provisions ensuring favourable framework conditions for competitive tendering procedures.

Although the Council position does not go as far as the Commission would have wished on a number of points, it should be pointed out that it is a **meaningful step forward** compared to the current Regulation (EC) No 1370/2007 for a number of reasons:

Mandatory competitive award for public service contracts: the Council position upholds the Commission's proposal as it introduces mandatory tendering of public service contracts in rail as a general principle by eliminating the possibility to directly award the public service contract in rail without any further justification. Even though it allows for several exemptions, these exemptions are restrictive, precise and objectively formulated and contain some safeguards to prevent an abusive circumvention of the principle of competitive award.

Moreover, the text ensures that when directly awarded contracts are awarded under the exemption linked to specific market structures, the public service contracts will have to pursue the objectives of the proposal, i.e. the improvement of quality and efficiency of public transport services by rail.

Definition of public service obligations (PSOs): the Council position does not go as far as the Commission proposal, however, the Commission recognises that it still contains clearer rules on the definition and specifications of PSOs. The text also sets general criteria for competent authorities when defining PSOs, while allowing for flexibility when required.

Information to bidders: the Council position also ensures the fair and transparent provision of relevant information to all bidders, which safeguards equal treatment during the tendering procedure. This new provision is in line with the Commission's proposal.

Upper limits on the value of direct awards: the Council position sets these upper limits higher. However the Commission considered that they still correctly reflect the logic of permitting direct awards if the cost of organising a tender procedure outweighs the expected benefits.

Access to rolling stock: the Council position deleted the obligation for competent authorities to ensure that non-discriminatory access to rolling stock is guaranteed. On the other hand, it set up an obligation for competent authorities to assess in view of a competitive award procedure whether measures are necessary in order to ensure non-discriminatory access to rail rolling stock and to publish this assessment.

The Council position also offers a toolbox of measures that the competent authorities can use to ensure access by operators to the rolling stock.

Rights and social standards: the Commission noted that the Council position upholds relevant European Union and national social standards that must be respected when there is a change of public service operator executing a public service contract.

Entry into force: compared to the proposal, the Council position introduced a longer transition period postponing the deletion of the possibility of unconditional direct awards. This postponement will delay the beneficial effects of the new rules, however it will also allow Member States to prepare the market for these changes.

Directly awarded contracts based on the exception for rail transport: the Commission proposed that directly awarded contracts based on the exception for rail transport should expire at the latest by 31 December 2022. It regretted that the Council position allows these contracts to run until their expiry. That will mean that public service contracts for rail directly awarded before the end of the transition period could continue until December 2032, which is a long transition period. The Council position guarantees the protection of existing contractual rights.

In conclusion, the Commission considered that despite the shortcomings of the Council position, the introduction of new and clearer provisions described above will provide more legal certainty. In a spirit of compromise, **the Commission accepted the position adopted by the Council** thus allowed the European Parliament to adopt the final text in a second reading.