

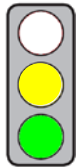
AWARDING PUBLIC CONTRACTS FOR PASSENGER TRANSPORT SERVICES

cepPolicyBrief No. 2013-21 of 27 May 2013

KEY ISSUES

Objective of the Regulation: The Commission wants to change the rules on the award of public contracts for passenger transport services, and in particular stipulate tendering procedures for rail transport generally.

Affected parties: Rail companies, rail users, local authorities.



Pro: (1) The extension of mandatory competitive tendering for rail transport results in lower public expenditure.

(2) The planned upper limits on contract volumes reduce barriers to market access particularly for small competitors.

Contra: The unconditional possibility for local authorities to provide passenger transport services themselves may destroy the savings potential of the competitive tendering procedure.

CONTENT

Title

Proposal COM(2013) 28 for a **Regulation** of the European Parliament and of the Council amending Regulation (EC) No. 1370/2007 concerning the **opening of the market for domestic passenger transport services by rail**

Brief Summary

► Background

- EU railway law consists of several legislative acts which have been issued in a number of “packages” and which, to a certain extent, build upon one another (see [cepBackground](#))
- The 4th Railway Package is intended to increase the quality and efficiency of rail services and further develop the Single European Railway Area. It contains a total of six legislative proposals.
- Regulation (EC) No. 1370/2007, which is to be amended here, regulates the conditions for “services of general interest” in public passenger transport (Art.1 (1)). It applies to national and international passenger transport by rail and road (Art. 1 (2)).

► "Public service contracts" and "public service obligations"

- The competent local authority may impose “public service obligations” on the operator of transport services which are “in the general interest”, and in return grant the operator compensation and/or exclusive rights. Both must be regulated in a “public service contract” - hereinafter referred to as: “Contract” (Art. 3 (1)).
- “Public service obligations” are requirements which are in the general interest and would not be assumed by a private operator “considering its own commercial interests” (Art. 2 e).

► Mandatory competitive tendering for all public passenger transport Contracts

- Public service contracts for passenger transport generally have to be awarded on the basis of “competitive tendering”, Art. 5 Abs. 3). Passenger transport by rail is currently excluded from this (former Art. 5 (6)), so that Contracts can be awarded directly to a specific operator (“direct award”, Art. 2 h). This exemption is to be lifted.
- This should increase competitive pressure as well as the “quantity and quality” of services on the rail transport market.
- Mandatory tendering applies to rail transport as from 3 December 2019 (Art. 8 (2)). Contracts awarded directly prior to that date will remain valid only until 31 December 2022 at the latest (Art. 8 (2a)).

► Exceptions to mandatory competitive tendering

- Exception 1: The local authority may provide public passenger transport services itself or award Contracts directly to an entity over which it exercises control (Art. 5 (2)).
- Exception 2: Contracts may be awarded directly where the average annual value is (Art. 5(4))
 - less than EUR 1,000,000 generally,
 - less than EUR 5,000,000 for rail transport or
 - less than EUR 2,000,000 for “small or medium-sized enterprises” operating not more than 23 road vehicles.

- Exception 3: Contracts may be awarded directly where the annual provision of passenger transport services is (Art. 5(4))
 - less than 300,000 km generally,
 - less than 150,000 km for rail transport or
 - less than 600,000 km, for "small or medium-sized enterprises" operating not more than 23 road vehicles.
- Exception 4: Contracts may be awarded directly for up to two years in the event of a disruption of services or the immediate risk of such a situation. Alternatively, in this case, the local authority may agree an extension of the Contract with the operator. It may also impose public service obligations on the operator. (Art. 5 (5))
- In order to increase competition for rail transport, competent authorities may (Art. 5 (6))
 - award Contracts covering parts of the same network or package of routes to different railway operators and
 - limit the number of Contracts awarded to one operator.

► **Public transport plans**

- The competent authorities must establish public passenger transport plans covering all "relevant" transport modes for the territory for which they are responsible (new Art. 2a (1)).
- These plans must contain, in particular, (new Art. 2a (1)):
 - the political objectives and means of implementation,
 - the "basic requirements" to be fulfilled by the public transport offer e.g. connections, times of operation, frequency of services,
 - quality standards, e.g. features of stops and of rolling stock, punctuality, cleanliness,
 - principles of tariff policy.
- The public service obligations and the award of public service contracts must "be consistent" with the plans (new Art. 2a (2)).

► **Content, duration and scope of public service passenger transport contracts**

- In particular, the Contract must define (Art. 4 (1) and (2)):
 - the geographical area concerned,
 - the public service obligations,
 - the parameters for calculating the compensation payment and
 - the allocation of revenue from the sale of tickets as between the operator and the public authority.
- The Contract has a maximum duration of (Art. 4 (3))
 - 10 years for bus transport services,
 - 15 years for rail transport services and
 - 15 years for combined services if transport by rail represents more than 50 % of the Contract value.
- The duration of the Contract may be extended, "having regard to the conditions of asset depreciation", by up to 50 % if the operator provides a significant proportion of the necessary equipment (Art. 4 (4)). This may be the case e.g. where the period of amortisation of the investment provided is longer than the duration of the Contract.
- The volume of a Contract for rail transport must not be more than 10 million kilometres per year. In addition, it must not exceed one third of the total transport volume of the respective Member State (new Art. 2a (6) b)).

► **Access to rolling stock**

- All operators shall have a right to "effective and non-discriminatory access" to "suitable" rolling stock (new Art. 5a (1)).
- In order to ensure that this is so, competent authorities must assume the "residual value risk of the rolling stock" (new Art. 5a (2)) if
 - no company is leasing rolling stock at "commercially viable" conditions and
 - the operator requests it in the course of the tendering procedure.
- Assuming the residual value risk may take place such that the competent authority (new Art. 5a (2))
 - acquires the rolling stock and makes it available to the selected operator "at market price",
 - provides a guarantee for the financing of the rolling stock "at market price" or
 - commits to take over the rolling stock at the end of the Contract "at market price".
- If the rolling stock is transferred to a new operator, the competent authority must provide "detailed information" in the tender documents about the cost of maintenance of the rolling stock and about its physical condition (new Art. 5a (3)).

Main Changes to the Status Quo

- ▶ Previously, competent authorities could award contracts for rail transport directly. Now, in principle, they must put them up for tender.
- ▶ A new requirement is that the competent authorities must establish public passenger transport plans.
- ▶ A new requirement is the maximum volume for public service rail transport contracts.
- ▶ A new requirement is that the competent authorities must assume the residual value risk of rolling stock.

Statement on subsidiarity by the Commission

According to the Commission, national regulations are an obstacle to the single European railway area. Measures are therefore necessary at EU level. [SWD(2013) 11, p. 3]

Policy Context

see [cepBackground](#)

Legislative Procedure

30 January 2013 Adoption by the Commission

Open Adoption by the European Parliament and by the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorate General: DG Mobility and Transport

Committees of the European Parliament: Transport and Tourism (leading), Rapporteur Matthieu Grosch (EVP Group, B);

Federal Ministries: Transport (leading)

Committees of the German Bundestag: EU Affairs (leading); Internal Affairs; Economy; Finance; Transport

Decision mode in the Council: Qualified majority (acceptance with majority of the Member States and with 255 of 345 votes; Germany: 29 votes)

Formalities

Legal competence: Art. 91 TFEU (Transport)

Form of legislative competence: Shared competence (Art. 4 (2) TFEU)

Legislative procedure: Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

Mandatory competitive tendering for public passenger transport services reduces public expenditure. Extending the tendering process to include rail transport is therefore appropriate because the competent authorities can choose the lowest offer for the same specified service.

Authorities are not subject to market competition and therefore the incentive is not sufficiently urgent for them to choose the services with the lowest price possible. Mandatory competitive tendering thus contributes to ensuring the best possible use of public resources. At the same time, it hinders corruption whereby officials receive personal advantage in return for the award of the contract. In addition, competition in the internal market is strengthened because operators from other Member States gain access to the market. Authorities can only select domestic operators if they submit the lowest offer in financial terms.

The unconditional possibility for transport authorities to provide transport services themselves could destroy this savings potential however. The authorities should therefore also be obliged to take part in a tendering procedure and only be allowed to provide passenger transport services themselves if their offer is the lowest.

The exception permitting smaller contracts to be awarded directly saves costs for the authorities and the operators.

The upper limits specified for contract volumes – 10 million km or one third of the total contract volume – reduce the barriers to market access for small competitors as they do not have to invest so much capital or take such a large commercial risk. However, they may result in the loss of the economies of scale which arise from awarding large contracts.

The new obligation, whereby authorities have to assume the "residual value risk of the rolling stock", may be appropriate in itself, in some cases. Where the duration of a contract - generally 15 years - and the average amortisation of rolling stock – approx. 30 years – do not coincide, this can pose a financing problem for competitors who do not have their own rolling stock and thus represents a barrier to market access. However,

leasing companies already exist in the EU for rolling stock. With the parallel proposal for opening up the market for passenger transport by rail, these companies will be able to offer their vehicles throughout the EU [COM(2013) 29; see [cepPolicyBrief](#)]. Irrespective of this, the assumption of the residual value risk should not be based indiscriminately on there being a lack of leasing possibilities under "commercially viable conditions". Since it is not defined when these conditions exist and who is to determine them, this leaves broad scope for interpretation which in turn gives rise to legal uncertainty and may result in leasing companies, who are charging reasonable risk premiums, being pushed out of the market by the authorities. Instead, in order to facilitate competition, the authorities should have to assume the residual value risk in the case of differentiated rail systems with special technical requirements – e.g. an additional power rail rather than overhead cables. Leasing companies generally do not offer rolling stock for these systems because they cannot be used on other rail networks and the residual value risk is therefore too high for such companies.

Impact on Efficiency and Individual Freedom of Choice

Public transport plans are an important part of forward-looking transport planning and allow operators to be better informed about the basic direction of transport policy. However, the requirement for Contracts to be consistent with transport plans reduces legal certainty for public service transport operators because transport plans are designed for the long term and have to be relatively broadly formulated, containing e.g. only minimum standards. If the concrete requirements in a Contract exceed those in the plan, there is a risk of legal action, for example, by inferior bidders, who only fulfil the minimum requirements of the plan, but have submitted a lower offer.

Impact on Growth and Employment

Negligible.

Impact on Europe as Business Location

Negligible.

Legal Assessment

Legislative Competency

Unproblematic. The EU is empowered to issue rules in order to realise a common transport policy, particularly those relating to international transport and other "appropriate provisions" (Art. 91 (1) TFEU). This includes the legislation referred to here.

Subsidiarity

Unproblematic.

Proportionality

Unproblematic.

Compatibility with EU Law

The obligation upon transport authorities, when the rolling stock is transferred to a new public service operator, to provide "detailed information" about the cost of maintenance of the rolling stock and about its physical condition (Art. 5a (3)) is disproportionate in the current form. On the one hand, the authority is not qualified to provide new operators with information since it is the previous operator rather than the authority that has such information. The Regulation does not, however, impose a corresponding duty of disclosure on the previous operator. On the other hand, "detailed information" of this sort may include confidential business information belonging to the previous operator, the disclosure of which – particularly in a commercial situation – is not necessarily justified by the new operator's need for information.

Compatibility with German law

Unproblematic.

Conclusion

Mandatory competitive tendering for public passenger transport services reduces public expenditure. Extending the tendering process to include rail transport is therefore appropriate. The unconditional possibility for transport authorities to provide passenger transport services themselves could destroy this savings potential however. The planned upper limits on contract volumes reduce the barriers to market access particularly for small competitors.