

# POSITION PAPER

## DOMESTIC PASSENGER MARKET OPENING IN THE CONTEXT OF THE 4RP

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## Introduction

CER supports market liberalisation measures as a principle. CER believes that introducing competition and market mechanisms generally contributes to increasing quality and productivity. In this context, non-discriminatory and transparent access to the European railway network has to be guaranteed. At the same time, CER wishes to stress that the opening of domestic passenger transport to competition must be adopted in a consistent manner in order to promote the integration of railway markets as well as fair competition between railway undertakings. In this context, experience has shown that liberalisation has contributed to a positive development of railway services in a number of countries. At the same time the development in other EU member states has shown that market opening alone is not sufficient and can, in some extreme cases, lead to serious problems. It is important to recall that the White Paper of 2001 rightly listed a number of accompanying conditions (infrastructure financing; establishing a level playing field between modes; cancellation of historic debts; proper compensation for public service obligations) for a sound rail development. These requirements of the White Paper have only partly been followed by sufficiently binding legislation and in many cases there has been a lack of appropriate political action and financing over the last 10 years.

It is against this background that CER believes that domestic passenger traffic liberalisation has to be implemented in a context where infrastructure and public service contracts are adequately financed while respecting the economic equilibrium of such contracts in accordance with existing EU legal requirements and without preventing the development of competition on the market.

There are significant variations in the current market structures and performances of national railway systems across European Member States. This is in particular the case with regards to financial means which play a very important role regarding the question of market opening.

In order to keep strengthening the position of the railways vis-à-vis other transport modes, a deeper integration of the rail transport market is necessary. This can only be achieved by establishing a fair level playing field of technical, economic and social conditions between all member states and all railway undertakings. This has to be realised.

As basic measures, the economic, technical, and social access conditions should be aligned across Member States. Among others, this firstly refers to the following:

- A strong, independent and effective regulator is established and ensures effective market rules are in place;
- Critical mass of harmonisation of technical standards and provisions including certification and authorisation procedures has been achieved for both rolling stock and infrastructure;
- Social conditions are addressed;
- Financial architecture and economies of rail systems across the European Union has been stabilised.

The alignment of these basic measures should be continuously monitored by the Commission.

Lastly, it is also important to ensure that future domestic market opening considers the already achieved domestic market openings through regulated open access and does not force these to be substantially modified.

## 0. Definitions

- 0.1 For the purposes of this paper, CER distinguishes between two types of individual services <sup>(1)</sup> on domestic passenger markets:

**Commercial services**, namely services that can be operated on a commercial basis, i.e. on a for-profit basis, without any need for public compensation; and

**Non-commercial services**, namely services that cannot be operated on a commercial basis, i.e. that require public compensation if they are to be delivered.

- 0.2 CER also distinguishes between two types of service provision:

**Open access (or “free services”)**, where operators may enter or exit the market at short notice and freely determine the characteristics of the services they offer;

**Publicly Procured Services**, where a competent authority obtains a bundle of services (a package of many services which in some cases may comprise both commercial and non-commercial services) from an operator for a period of time, typically several years.

**Publicly procured services can take the form of:**

- a. **Franchise contracts/Public Service Obligations (hereafter PSO for both)**, where the competent authority procures a bundle of services from an operator for a fixed period (typically several years), sets minimum service requirements, and grants either some form of exclusivity or protection, or some financial compensation, or some combination of protection and compensation. In some cases, where the bundle of services includes a large number of commercially viable services, the nature of such contracts may also see an element of payment from the operator to the competent authority.
- b. **In-house provision**, where, in line with Article 5.2 of Regulation (EC) No. 1370/2007, a competent authority provides a bundle of services, either itself or through an ‘internal operator’ in the sense of Article 2 (j) of the same Regulation.

- 0.3 The **division between the types of service provision** that may exist, namely between Open Access, Franchise contracts/Public Service Obligations, and in-house provision is the result of economic realities, the legal framework, and institutional and political decisions. CER’s position on how this division should be determined is covered in Paragraphs 1.4 and 1.5 in this paper.

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<sup>1</sup> Example: the train from city A to city B departing city A at 09.02 every morning is one individual service.

## 1. General principles supported by CER

### *Policy goals*

1.1 The goal of any reform of domestic rail passenger markets should be to support Member States, relevant competent authorities, and railway undertakings in achieving improvements in efficiency, competitiveness, service quality, and value-for-money, while guaranteeing continuity of service and contributing to social and territorial cohesion.

### *Role of competition*

1.2 CER considers that greater competition is one of several ways to encourage greater economic efficiency and service quality improvements.

### *Definition of Public Service Obligations*

1.3 Public Service Obligations should retain their existing definition as provided by Article 2(e) of Regulation (EC) No. 1370/2007.

### *Scope for open access*

1.4 Member States shall ensure that there is open access on their entire network (subject to paragraphs 1.6, 1.7 and Chapter 2 allowing for PPS including direct award of PPS).

### *Scope of PPS*

1.5 Publically Procured Services will be implemented where open access services cannot be viably operated. Competent Authorities determine the geographical size and scope of PPS. In all EU member states the principle of open tendering can be gradually adopted, provided:

- The fair level playing field is effective;
- The compatibility with the application of current article 5.2 and 5.6 of Regulation (EC) No. 1370/2007 is kept for specific cases determined by the Competent Authority.

Independently of the chosen award mechanism, the principles of transparency and non-discrimination must be applied when awarding PPS.

### *Interactions between open access competition and PPS*

1.6 Where it is applied, the extension of open access should be implemented in such a way as to forestall two types of risks. First, that open access entry would unduly damage the economic equilibrium of Publically Procured Services and, potentially, lead to negative effects on service quality and to a loss of economies of scope or scale. Second, that measures designed to prevent the first risk are not abused in order to unduly hamper market entry.

## *Award mechanisms for PPS*

1.7 Concerning Publically Procured Services, except where otherwise foreseen by national legislation, competent authorities should continue to be able to determine freely which award mechanism applies, namely competitive tendering, or direct award, or in-house provision by the competent authorities. In particular this means that Articles 5.2 and 5.6 of Regulation (EC) No. 1370/2007 should remain as they are.

1.8 Notwithstanding the application of general rules for maximum tariffs as foreseen in Article 3.2 of Regulation (EC) No. 1370/2007, every Public Service Obligation (PSO) must be the subject of a Public Service Contract (PSC) as indicated in Article 3.1 of the same Regulation.

## *Role of the Infrastructure Manager*

1.9 When further opening the market to competition, Member States should ensure that the Infrastructure Manager is able to safely and efficiently handle an increase in the number of railway undertakings operating on the network in a non-discriminatory manner, and is able to offer the necessary capacity.

## **2. Open access competition and its interactions with PPS**

2.1 All Member States should grant open access rights in accordance with Paragraphs 1.4 and 1.5. In some Member States, due to the situation of the infrastructure and other framework conditions, a transition period may be necessary. Therefore, EU legislation should impose clearly limited transition periods for phasing in the reform, e.g. less than 5 years.

2.2 Before the end of the transition period, in a manner analogous to Article 1.3(d) of Directive 2007/58/EC, Member States should not be obligated to grant open access rights to railway undertakings and their directly or indirectly controlled subsidiaries, licensed in a Member State where access rights of a similar nature are not granted. This transition measures should be without prejudice to the transition measures foreseen in Article 8.4 of Regulation 1370/2007/EC which should be kept in any revision of that Regulation.

2.3 CER recalls that railway markets should be commercially organised. In particular, therefore, open access should be organised according to the principles of commercial and entrepreneurial freedom.

## *Regulating the interaction between open access and PPS in general*

2.4 Open access, where it applies, and Publically Procured Services should work together as efficiently as possible, so as to maximise positive network effects and increase rail's modal share. Highly synchronised and politically desired network systems that are (mostly) ordered by transport authorities need to be safeguarded. However, it should also be recognised that features such as ticketing and timetabling are an important part of the commercial offers of railway undertakings.

2.5 Measures taken to regulate the interactions between open access competition and Publically Procured Services should not be used to restrict market entry under open access.

2.6 In order to support growth in rail traffic, Member States may take measures to support the articulation of timetabling between open access services and publically procured services, based on relevant cost-benefit analyses.

#### *Reduction of supply of services as a result of ‘cherry-picking’*

2.7 In cases where open access market entry may generate incentives for an operator in place to cease to offer certain existing services, and where these services risk not being offered by any other operator, Member States should intervene, where justified based on objective socio-economic criteria, to ensure that those services are kept or restored.

#### *Safeguarding the economic equilibrium of PPS*

2.8 Where Publically Procured Services and open access overlap on the network, Member States may ensure that the economic equilibrium of the relevant Publically Procured Services is safeguarded - by raising the level of compensation, and/or by limiting open access rights, and/or by charging a levy to all operators for the use of the relevant parts of the network.

#### *Safeguarding the commercial viability of open access services*

2.9 If a competent authority creates a new bundle of services (a PPS), or extends the scope of an existing one, the undertakings that provide existing open access services which may be affected by that decision may receive advance notice and, if justified, financial compensation.

### **3. Public Service Contracts: basic structural features**

3.1 Public Service Obligations in the meaning of Regulation 1370/2007/EC should retain their existing definition, namely:

*“a requirement defined or determined by a competent authority in order to ensure public passenger transport services in the general interest that an operator, if it were considering its own commercial interests, would not assume or would not assume to the same extent or under the same conditions without reward”*

*Art. 2(e) of Regulation (EC) No. 1370/2007*

3.2 The existing provisions on the permissible duration of public service contracts defined in Regulation (EC) No. 1370/2007 should remain unchanged.

3.3 CER calls upon the Commission to propose modifications to Articles 3.2, 4.1 (b) and 4.1 (c) of Regulation (EC) No. 1370/2007. These modifications should, in particular, explicitly prohibit **both** over- and under-compensation (Articles 3.2 and 4.1 (b)) *for rail PSOs* and should make the list of cost items under Article 4.1 (c) mandatory rather than voluntary. The Annex of Regulation (EC) No. 1370/2007 should likewise be amended -

specifying not only what level of compensation should not be exceeded, but also the minimum level of compensation.

#### **4. The handling of rolling stock**

4.1 No legislative provisions are needed to support access to rolling stock for open access services. The market for first- and second-hand rolling stock has gradually developed in the EU in recent years, such that suitable rolling stock will be materially available in the majority of cases. Recent examples illustrate how undertakings are able to secure rolling stock for open access services.

4.2 In the case of Publically Procured Services several solutions exist for railway undertakings, including leasing through rolling stock companies (ROSCOs), use of vehicles made available by the competent authority, or own procurement. Furthermore a competent authority could choose to issue a 'buy-back guarantee' to potential PPS operators so as to reduce the financial risk to them without having to make the initial investment itself. Any new legislation should ensure that all of these options are available to competent authorities in a flexible manner.

4.3 Rolling stock that is owned by the operator in place may be transferred if the PPS is subsequently awarded to another operator, provided that this occurs on a voluntary basis and on commercial terms.

#### **5. Transfers of staff and social standards**

5.1 For publically procured services, CER calls upon the Commission to provide enhanced clarity so as to make sure that social conditions are addressed by competent authorities in an appropriate manner. CER understands that the existing legislation allows for two possibilities:

- Requiring the transfer of staff from the old to the new operator the staff previously taken on to provide the services and requiring the application of social rights in the meaning of Directive 2001/23/EC relating to the transfer of undertakings, or
- Applying certain social standards for all employees involved in the service of the new operator (possibly related to a company collective agreement or a regional or national collective agreement for the respective market segment or sector, or to other existing legal regulations).

5.2 In the event of a tender for the award of the public railway passenger transport service, the competent authorities will need to rule promptly on the level of social protection that the new operator is to apply to workers, taking the collective sector contracts as reference, where such exist.



## 6. Specific issues relating to award processes

6.1 Competent authorities should allow for a reasonable amount of time between the initiation of the award process and the scheduled start of operations under the contract to be awarded. In particular, the amount of time needed for rolling stock procurement should be taken into account.

6.2 In case of direct award, the Public Service Contract should be the result of a genuine process of negotiation between the competent authority and the undertaking.

## 7. Powers and roles of other bodies

7.1 Removing barriers to market entry by ensuring timely and non-discriminatory decisions with respect to safety certification and authorisation of vehicles should be an essential component of the Fourth Railway Package. CER refers to its position paper on the future role of the European Rail Agency.

7.2 Where competitive tendering is applied, any bidder that feels aggrieved may obtain an opinion from either the competition authority or the regulatory body, dependent on the legislation in the relevant Member State, concerning the appropriateness of the tendering process.

7.3 The network of regulatory bodies should promote legal certainty and homogeneous interpretation of the relevant EU legislation across the Union.

## Disclaimer

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