

POSITION PAPER

The Economic Equilibrium Test

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EXECUTIVE SUMMARY

Article 11 of Directive 2012/34/EU foresees the execution of an economic equilibrium test, to be carried out by the regulatory body upon request, in order to determine whether and to what extent a prospective open access service may be detrimental to a Public Service Contract in place. In that case and on that basis, the regulatory body is tasked with issuing a decision that may impose limitations to the rights of access of the open access operator. The Commission's proposal in the context of the Fourth Railway Package confirms this approach in general terms.

CER considers that the economic equilibrium test should be based on an adequate economic methodology, enabling projections of passenger flows and passenger revenues as compared to a baseline without the entry of the new service. Based on these projections, the regulatory body should then focus the analysis on two key questions: whether the new service is mainly revenue-generating or mainly revenue-abstracting, and whether the revenue loss that is projected for the Public Service Contract is or is not substantial.

An open, transparent, and collaborative approach is recommended with respect to how the regulatory body develops and improves the methodological tools needed for the economic equilibrium test.

Last but not least, a parsimonious approach with respect to information requirements and the full respect of commercial confidentiality are essential.

1. INTRODUCTION

Article 11 of Directive 2012/34/EU foresees the execution of an economic equilibrium test, to be carried out by the regulatory body upon request, in order to determine whether and to what extent a prospective open access service may be detrimental to a Public Service Contract in place. In that case and on that basis, the regulatory body is tasked with issuing a decision that may impose limitations to the rights of access of the open access operator. The Commission's proposal in the context of the Fourth Railway Package confirms this approach in general terms. In this paper, CER expresses its views concerning selected aspects of the practical implementation of the economic equilibrium test. These views concern both the implementation of the existing provision of Directive 2012/34/EU and the probable future implementation of the corresponding provision from the Fourth Railway Package.

2. ECONOMIC CONCEPTS

CER considers that the analysis of economic equilibrium should focus on the economic impact of the new service on the Public Service Contract (PSC) as a whole and over the entire time-scale of the PSC, not on individual services or sub-periods of the PSC.

The economic equilibrium of a PSC should be considered to be compromised by a new service when the new service has a substantial negative impact on:

- the profitability of services operated under the PSC, and/or
- the net cost for the Competent Authority awarding the PSC

Furthermore, the regulatory body should also take into account the benefits to customers in the short- and medium-term.

An assessment of economic equilibrium should be made for each PSC that would credibly be affected by the new service (unless no assessment is requested).

In order to take into account the benefits to customers in the short and medium term, one should seek a balance between the possible benefits of Open Access (OA) entry and the possible losses to the PSO contract in place.

Concretely, OA entry ought to proceed unhindered if:

1. The OA service is mainly revenue-generating rather than revenue-abstracting, i.e. its net benefit in terms of new rail sector revenues exceeds losses of revenues incurred by PSO contracts in place; new rail sector revenues should be understood as revenues deriving from passenger flows that are either taken from other modes or that constitute entirely new travel flows; and

2. The loss for the PSC, if any, is not substantial. That loss should be an estimate of the total decrease in revenue for the PSC operator assuming the OA entry occurs, as compared to a baseline scenario without the OA entry, other things assumed equal. One would then need to assess what “substantial” means. For this assessment, the regulatory body may define a threshold. In addition, total rail passenger volume, e.g. in terms of passenger-kilometres, may also be defined as a criterion in the assessment.

CER considers that the Member State should be obligated to apply compensation mechanisms, so as to ensure that the Competent Authority compensates the PSC operator for the losses incurred as compared to the baseline without the OA entry until the date of expiry of the PSO contract.

The Member State should be free to decide that the compensation shall be partly or wholly financed from a levy on passenger services in the sense of Article 12 of Directive 2012/34/EU, without prejudice to other possible applications of that article.

Assessment methodology

CER believes that the principles of the methodology for the economic equilibrium assessment should be developed by the regulatory body and published on its website, and that this responsibility should not be constrained by any other entity.

The principles of the methodology should be clear, pre-determined, transparent and non-discriminatory. They should take into account the results of a stakeholders' consultation and exchanges of information with other regulatory bodies.

The economic equilibrium assessment should be carried out on the basis of case-by-case economic analyses rather than through simple application of predetermined thresholds.

The assessment methodology should evolve over time, in particular in the light of experience gained by the regulatory bodies. In particular, the regulatory bodies should seek to improve the predictive performance of their methodologies, notably based on comparisons between economic equilibrium assessments, which are by definition ex-ante assessments, and ex-post assessments of what actually occurred after OA entry. However, such ex-post assessments shall have no legal validity and shall not bind the regulatory body or any other legal or moral person in any way.

The methodology should include quantitative approaches and should be able to account for both revenue abstraction and revenue generation, i.e. the regulatory body should be able to estimate or simulate both the potential shift of revenue from the PSC to the OA services, and the potential shift to rail from other modes or due to new travel demand.

The methodology should be developed by the regulatory bodies, also in cooperation and consultation with each other through the Network of Regulatory Bodies, as well as based on cooperation and exchange of information, data, and recommendations with the sector and with Ministries of Transport.

Without prejudice to the need to safeguard commercial confidentiality, the regulatory body should be prepared to share technical details of the methodology with potential applicants in order to improve the transparency and predictability of its assessments.

3. REDUCING COMMERCIAL UNCERTAINTY FOR OA OPERATORS

Without prejudice to the protections provided to PSC operators, including compulsory compensation mechanisms, CER considers that operators of prospective OA services should have the right to request a binding economic equilibrium assessment outside of the timeframe foreseen in the current legislation. It should be possible for such an operator, as part of its internal business case analyses, to request and obtain within a reasonable period an assessment specifying what access restrictions, if any, a service it wishes to launch would face in future.

In sum, the regulatory body should also carry out the economic analysis and issue its reasoned decision following a request from the railway undertaking seeking access, provided that the request is submitted not more than a reasonable number of years before the intended start of service. The decision of the regulatory body should then be binding on all parties concerned for a reasonable number of years after its notification, or until the expiry date of the public service contract, whichever is sooner.

Information requests and confidentiality

Regulatory bodies should apply a principle of parsimony in the design of their information and data requests: regulatory bodies should request no more data or information than what is strictly necessary for a credible assessment of economic equilibrium that can be carried out within a reasonable time frame.

Furthermore, it is essential that regulatory bodies respect the confidentiality of business secrets.

Disclaimer

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