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LEGISLATIVE ACTS AND OTHER INSTRUMENTS

Subject:	Position of the Council at first reading with a view to the adoption of 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 - Adopted by the Council on 17 October 2016

REGULATION(EU) 2016/…
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of …

amending Regulation (EC) No 1370/2007
concerning the opening of the market
for domestic passenger transport services by rail

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[1],

Having regard to the opinion of the Committee of the Regions[2],

Acting in accordance with the ordinary legislative procedure[3],

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1 OJ C …, …, p. ….
2 OJ C …, …, p. ….
3 Position of the European Parliament of 26 February 2014 (not yet published in the Official Journal) and position of the Council at first reading of 17 October 2016 (not yet published in the Official Journal). Position of the European Parliament of ... (not yet published in the Official Journal).

Whereas:

(1) Rail transport has the potential to grow and increase its modal share and to play a major role in a sustainable transport and mobility system, creating new investment opportunities and jobs. However, the growth of passenger transport services by rail has not kept pace with the evolution of other modes of transport.

(2) The Union market for international passenger transport services by rail has been open to competition since 2010. In addition, some Member States have opened their domestic passenger services to competition, by introducing open access rights, or tendering for public service contracts, or both. The opening of the market for domestic passenger services by rail should have a positive impact on the functioning of the Single European Railway area, leading to better services for users.

(3) In its White Paper on transport of 28 March 2011 the Commission announced its intention to complete the internal market for rail services, abolishing technical, administrative and legal obstacles which impede entry to the railway market.

(4) The completion of the Single European Railway Area should further the development of rail transport as a credible alternative to other modes of transport, inter alia in terms of price and quality.

(5) A specific objective of this Regulation is to enhance the quality, transparency, efficiency and performance of public passenger transport services by rail.

(6) Services at cross-border level provided under public services contracts, including public transport services covering local and regional transport needs, should be subject to the agreement of the competent authorities of the Member States on whose territory the services are provided.

(7) Competent authorities should define specifications of public service obligations in public passenger transport. Such specifications should be consistent with the policy objectives as stated in public transport policy documents in the Member States.

(8) Specifications of public service obligations in public passenger transport should, where possible, generate positive network effects, inter alia in terms of improved quality of services, social and territorial cohesion or the overall efficiency of the public transport system.

(9) Public service obligations should be in line with public transport policy. However, this does not entitle the competent authorities to receive a specific amount of funding.

(10) When preparing public transport policy documents, relevant stakeholders should be consulted in accordance with national law. Those stakeholders might include transport operators, infrastructure managers, employee organisations and representatives of users of public transport services.

(11) For public service contracts that are not awarded on the basis of a competitive tendering procedure, the fulfilment of public service obligations by the public service operators should be appropriately compensated in order to ensure the long-term financial sustainability of public passenger transport services in accordance with the requirements laid down in public transport policy. In particular, such compensation should promote the maintenance or development of effective management by the public service operator and the provision of passenger transport services of a sufficiently high standard.

(12) Within the framework of establishing the Single European Railway Area, Member States should ensure an adequate level of social protection for the staff of public service operators.

(13) With a view to an appropriate integration of social and labour requirements into procedures for the award of public service contracts for public passenger transport services public service operators should, in the performance of public service contracts, comply with obligations in the field of social and labour law that apply in the Member State where the public service contract is awarded and that result from laws, regulations and decisions, at both national and Union level, as well as from applicable collective agreements, provided that such national rules, and their application, comply with Union law.

(14) Where Member States require staff taken on by the previous operator to be transferred to the newly selected public service operator, such staff should be granted the rights to which they would have been entitled if there had been a transfer within the meaning of Council Directive 2001/23/EC[1]. Member States should be free to adopt such provisions.

[1] Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).

(15) Competent authorities should make available to all interested parties relevant information for the preparation of offers under competitive tendering procedures, while ensuring the legitimate protection of confidential business information.

(16) The obligation of a competent authority to provide all interested parties with information essential for the preparation of an offer under a competitive tendering procedure should not extend to the creation of additional information where such information does not exist.

(17) In order to take into account the diversity in the territorial and political organisation of Member States, a public service contract may be awarded by a competent authority that consists of a group of public authorities. In such circumstances, there should be clear rules setting the respective roles of each of the public authorities in the awarding process of the public service contract.

(18) Considering the diversity of administrative structures in Member States, in the case of contracts for the provision of public passenger transport services by rail directly awarded by a group of competent local authorities, the determination which local authorities are competent regarding ‘urban agglomerations’ and ‘rural areas’ remains at the discretion of the Member States.

(19) Public service contracts for public passenger transport services by rail should be awarded on the basis of a competitive tendering procedure, except for those cases set out in this Regulation.

(20) Procedures for competitive tendering of public service contracts should be open to all operators, should be fair and should respect the principles of transparency and non-discrimination.

(21) In exceptional circumstances, where public service contracts for public passenger transport services by rail are awarded on the basis of a competitive tendering procedure, new contracts may temporarily be directly awarded in order to ensure that services are delivered in the most cost-effective way. Such contracts should not be renewed to cover the same or similar public service obligations.

(22) Where only one operator expresses interest following the publication of the intention to organise a competitive tendering procedure, competent authorities may enter into negotiations with that operator to award the contract without further publication of an open tendering procedure.

(23) The *de minimis* thresholds for directly awarded public service contracts should be adapted to reflect the higher volumes and unit costs in public passenger transport services by rail compared to other modes of transport covered by Regulation (EC) No 1370/2007 of the European Parliament and of the Council[1]. Higher thresholds should also apply to public passenger transport services where rail represents more than 50 % of the value of the services in question.

(24) The establishment of the Single European Railway Area requires common rules on the award of public service contracts in this sector, whilst taking into account the specific circumstances of each Member State.

[1] 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, 3.12.2007, p. 1).

(25) Where certain conditions related to the nature and structure of the railway market or the railway network are fulfilled, competent authorities should be entitled to award public service contracts for public passenger transport services by rail directly where such a contract would result in an improvement in the quality of services or cost-efficiency, or both.

(26) Competent authorities may take measures to increase competition between railway undertakings by limiting the number of contracts that they award to one railway undertaking.

(27) Member States should ensure that their legal systems provide for the possibility to assess decisions of the competent authority to award public service contracts for public passenger transport services by rail directly on a performance-based approach by an independent body. This might be done as part of a judicial review.

(28) When preparing competitive tendering procedures, competent authorities should assess whether measures are necessary to ensure effective and non-discriminatory access to suitable rail rolling stock. Competent authorities should make the assessment report publicly available.

(29) Certain key features of upcoming competitive tendering procedure for public service contracts need to be fully transparent to enable a better organised market response.

(30) Regulation (EC) No 1370/2007 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1370/2007 is amended as follows:

(1) In Article 1(2), the following subparagraph is added:

'Subject to agreement of the competent authorities of the Member States on whose territory the services are provided, public service obligations may concern public transport services at cross-border level, including those covering local and regional transport needs.'.

(2) In Article 2 the following point is inserted:

'(aa) "public passenger transport services by rail" means public passenger transport by rail, excluding passenger transport by other track-based modes, such as metros or tramways;'.

(3) The following Article is inserted:

'*Article 2a*
Specification of public service obligations

1. The competent authority shall lay down specifications for public service obligations in the provision of public passenger transport services and the scope of their application in accordance with Article 2(e). This includes the possibility to group cost-covering services with non-cost-covering services.

When laying down those specifications and the scope of their application, the competent authority shall duly respect the principle of proportionality, in accordance with Union law.

The specifications shall be consistent with the policy objectives stated in public transport policy documents in the Member States.

The content and format of public transport policy documents and the procedures for consulting relevant stakeholders shall be determined in accordance with national law.

2. The specifications of the public service obligations and the related compensation of the net financial effect of public service obligations shall:

(a) achieve the objectives of the public transport policy in a cost-effective manner; and

(b) financially sustain the provision of public passenger transport, in accordance with the requirements laid down in the public transport policy in the long term.'.

(4) Article 4 is amended as follows:

(a) in paragraph 1, points (a) and (b) are replaced by the following:

'(a) clearly set out the public service obligations, defined in this Regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned;

(b) establish in advance, in an objective and transparent manner,

(i) he parameters on the basis of which the compensation payment, if any, is to be calculated, and

(ii) the nature and extent of any exclusive rights granted, in a way that prevents overcompensation. In the case of public service contracts not awarded according to Article 5(1), (3) or (3b), these parameters shall be determined in such a way that no compensation payment may exceed the amount required to cover the net financial effect on costs incurred and revenues generated in discharging the public service obligations, taking account of revenue relating thereto kept by the public service operator and a reasonable profit;';

(b) the following paragraphs are inserted:

'4a. In the performance of public service contracts, public service operators shall comply with obligations applicable in the field of social and labour law established by Union law, national law or collective agreements.

4b. Council Directive 2001/23/EC* shall apply to a change of public service operator where such a change constitutes a transfer of undertaking within the meaning of that Directive.

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* Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses (OJ L 82, 22.3.2001, p. 16).';

(c) paragraph 6 is replaced by the following:

‘6. Where competent authorities, in accordance with national law, require public service operators to comply with certain quality and social standards, or establish social and qualitative criteria, those standards and criteria shall be included in the tender documents and in the public service contracts. While respecting Directive 2001/23/EC, such tender documents and public service contracts shall, where applicable, also contain information on the rights and obligations relating to the transfer of staff taken on by the previous operator.’;

(d) The following paragraph is added:

‘8. Public service contracts shall require the operator to provide the competent authority with the information essential for the award of public service contracts, while ensuring the legitimate protection of confidential business information. Competent authorities shall make available to all interested parties relevant information for the preparation of an offer under a competitive tendering procedure, while ensuring the legitimate protection of confidential business information. This shall include information on passenger demand, fares, costs and revenues related to the public passenger transport covered by the competitive tendering procedure and details of the infrastructure specifications relevant for the operation of the required vehicles or rolling stock to enable interested parties to draft well informed business plans. Rail infrastructure managers shall support competent authorities in providing all relevant infrastructure specifications. Non-compliance with the provisions set out above shall be subject to the legal review provided for in Article 5(7).’.

(5) Article 5 is amended as follows:

(a) in paragraph 2, the introductory wording is replaced by the following:

‘Unless prohibited by national law, any competent local authority, whether or not it is an individual authority or a group of authorities providing integrated public passenger transport services may decide to provide public passenger transport services itself or to award public service contracts directly to a legally distinct entity over which the competent local authority, or, in the case of a group of authorities at least one competent local authority, exercises control similar to that exercised over its own departments.

In the case of public passenger transport services by rail, the group of authorities referred to in the first subparagraph may be composed only of local competent authorities whose geographical area of competence is not national. The public passenger transport service or the public service contract referred to in the first subparagraph may only cover the transport needs of urban agglomerations or rural areas, or both.

Where a competent local authority takes such a decision, the following shall apply:’;

(b) paragraph 3 is replaced by the following:

‘3. Any competent authority which has recourse to a third party other than an internal operator, shall award public service contracts on the basis of a competitive tendering procedure, except in the cases specified in paragraphs 3a, 4, 4a, 4b, 5 and 6. The procedure adopted for competitive tendering shall be open to all operators, shall be fair and shall observe the principles of transparency and non-discrimination. Following the submission of tenders and any preselection, the procedure may involve negotiations in accordance with these principles in order to determine how best to meet specific or complex requirements.’;

(c) The following paragraphs are inserted:

‘3a. Unless prohibited by national law, as regards public service contracts for public passenger transport services by rail awarded on the basis of a competitive tendering procedure, the competent authority may decide to temporarily award new contracts directly where the competent authority considers that the direct award is justified by exceptional circumstances. Such exceptional circumstances shall include situations where:

– there are a number of competitive tendering procedures that are already being run by the competent authority or other competent authorities which could affect the number and quality of bids likely to be received if the contract is the subject of a competitive tendering procedure, or

– changes to the scope of one or more public service contracts are required in order to optimise the provision of public services.

The competent authority shall issue a substantiated decision and shall inform the Commission thereof without undue delay.

The duration of contracts awarded pursuant to this paragraph shall be proportionate to the exceptional circumstance concerned and in any case shall not exceed 5 years.

The competent authority shall publish such contracts. In doing so, it shall take into consideration the legitimate protection of confidential business information and commercial interests.

The subsequent contract that concerns the same public service obligations shall not be awarded on the basis of this provision.

3b. In application of paragraph 3, competent authorities may decide to apply the following procedure:

Competent authorities may make public their intentions to award a public service contract for public passenger transport services by rail by publishing an information notice in the *Official Journal of the European Union*.

That information notice shall contain a detailed description of the services that are the subject of the contract to be awarded, as well as the type and the duration of the contract.

Operators may express their interest within a period fixed by the competent authority which shall not be less than 60 days following the publication of the information notice.

If after the expiration of that period:

(a) only one operator has expressed its interest in participating in the procedure to award the public service contract;

(b) that operator has duly proved that it will in fact be able to provide the transport service complying with the obligations established in the public service contract;

(c) the absence of competition is not the result of an artificial narrowing of the parameters of the procurement; and

(d) no reasonable alternative exists,

the competent authorities may start negotiations with this operator in order to award the contract without further publication of an open tendering procedure.';

(d) Paragraph 4 is replaced by the following:

'4. Unless prohibited by national law, the competent authority may decide to award public service contracts directly:

(a) where their average annual value is estimated at less than EUR 1 000 000 or, in the case of a public service contract including public passenger transport services by rail, less than EUR 7 500 000; or

(b) where they concern the annual provision of less than 300 000 kilometres of public passenger transport services or, in the case of a public service contract including public passenger transport services by rail, less than 500 000 kilometres.

In the case of a public service contract directly awarded to a small or medium-sized enterprise operating not more than 23 road vehicles, those thresholds may be increased to either an average annual value estimated at less than EUR 2 000 000 or to an annual provision of less than 600 000 kilometres of public passenger transport services.';

(e) The following paragraphs are inserted:

'4a. Unless prohibited by national law, the competent authority may decide to award public service contracts for public passenger transport services by rail directly:

(a) where it considers that the direct award is justified by the relevant structural and geographical characteristics of the market and network concerned, and in particular size, demand characteristics, network complexity, technical and geographical isolation and the services covered by the contract, and

(b) where such a contract would result in an improvement in quality of services or cost-efficiency, or both, compared to the previously awarded public service contract.

On that basis, the competent authority shall publish a substantiated decision and shall inform the Commission thereof within one month of its publication. The competent authority may proceed with the award of the contract.

Member States for which, on... [the date of entry into force of this amending Regulation st11198], the maximum annual volume is less than 23 million train-km and which have only one competent authority at national level and one public service contract covering the entire network shall be deemed to fulfil the condition set out in point (a). Where a competent authority of one of those Member States decides to award a public service contract directly, the Member State concerned shall inform the Commission thereof. The United Kingdom may decide to apply this subparagraph to Northern Ireland.

Where the competent authority decides to award a public service contract directly, it shall lay down measurable, transparent and verifiable performance requirements. Such requirements shall be included in the contract.

The performance requirements shall in particular cover punctuality of services, frequency of train operations, quality of rolling stock and transport capacity for passengers.

The contract shall include specific performance indicators enabling the competent authority to carry out periodic assessments. The contract shall also include effective and deterrent measures to be imposed in case the railway undertaking fails to meet the performance requirements.

The competent authority shall periodically assess whether the railway undertaking has achieved its targets for meeting the performance requirements as set in the contract and shall make its findings public. Such periodic assessments shall take place at least every five years. The competent authority shall take appropriate and timely measures, including the imposition of effective and deterrent contractual penalties if the required improvements in quality of services or cost-efficiency, or both, are not achieved. The competent authority may at any time wholly or partially suspend or terminate the contract awarded under this provision if the operator fails to meet the performance requirements.

4b. Unless prohibited by national law, the competent authority may decide to award public service contracts for public passenger transport services by rail directly where they concern operating only passenger rail services by an operator which manages simultaneously the entire or the major part of the railway infrastructure on which the services are provided, where that railway infrastructure is excluded from the application of Articles 7, 7a, 7b, 7c, 7d, 8, 13 and Chapter IV of Directive 2012/34/EU of the European Parliament and of the Council* in accordance with Article 2(3)(a) or (b) of that Directive.

By way of derogation from Article 4(3), the duration of directly awarded contracts pursuant to this paragraph and paragraph 4a of this Article shall not exceed 10 years, except where Article 4(4) applies.

Contracts awarded in accordance with this paragraph and paragraph 4a shall be published, while taking into consideration the legitimate protection of confidential business information and commercial interests.

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* Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (OJ L 343, 14.12.2012, p. 32).';

(f) Paragraph 5 is replaced by the following:

'5. In the event of a disruption of services or the immediate risk of such a situation, the competent authority may take emergency measures.

The emergency measures shall take the form of a direct award or a formal agreement to extend a public service contract or a requirement to provide certain public service obligations. The public service operator shall have the right to appeal against the decision to impose the provision of certain public service obligations. The period for which a public service contract is awarded, extended or imposed by emergency measures shall not exceed two years.';

(g) The following paragraph is inserted:

‘6a. In order to increase competition between railway undertakings, competent authorities may decide that contracts for public passenger transport services by rail covering parts of the same network or package of routes are to be awarded to different railway undertakings. To this end, the competent authorities may, before launching the competitive tendering procedure, decide to limit the number of contracts to be awarded to the same railway undertaking.’;

(h) in paragraph 7, the following subparagraph is inserted after the first subparagraph:

‘For cases covered by paragraphs 4a and 4b, such measures shall include the possibility to request an assessment of the substantiated decision taken by the competent authority by an independent body designated by the Member State concerned. The outcome of such assessment shall be made publicly available in accordance with national law.’.

(6) The following Article is inserted:

‘*Article 5a*
Rail rolling stock

1. With a view to launching a competitive tendering procedure, competent authorities shall assess whether measures are necessary to ensure effective and non-discriminatory access to suitable rolling stock. This assessment shall take into account the presence of rolling stock leasing companies, or of other market actors providing for the leasing of rolling stock, in the relevant market. The assessment report shall be made publicly available.

2. Competent authorities may decide, in accordance with national law and in compliance with State aid rules, to take appropriate measures to ensure effective and non-discriminatory access to suitable rolling stock. Such measures may include:

(a) the acquisition by the competent authority of the rolling stock used for the execution of the public service contract with a view to making it available to the selected public service operator at market price or as part of the public service contract pursuant to Article 4(1)(b), Article 6 and, if applicable, to the Annex,

(b) the provision by the competent authority of a guarantee for the financing of the rolling stock used for the execution of the public service contract at market price or as part of the public service contract pursuant to Article 4(1)(b), Article 6 and, if applicable, to the Annex, including a guarantee covering the residual value risk,

(c) a commitment by the competent authority in the public service contract to take over the rolling stock at predefined financial conditions at the end of the contract at market price, or

(d) cooperation with other competent authorities in order to create a larger pool of rolling stock;

3. If the rolling stock is made available to a new public transport operator, the competent authority shall include in the tender documents any available information about the cost of maintenance of the rolling stock and about its physical condition.'.

(7) In Article 6, paragraph 1 is replaced by the following:

‘1. All compensation connected with a general rule or a public service contract shall comply with Article 4, irrespective of how the contract was awarded. All compensation of whatever nature connected with a public service contract not awarded according to Article 5(1), (3) or (3b) or connected with a general rule shall also comply with the provisions laid down in the Annex.’.

(8) Article 7 is amended as follows:

(a) Paragraph 1 is replaced by the following:

‘1. Each competent authority shall make public once a year an aggregated report on the public service obligations for which it is responsible. That report shall include the starting date and duration of the public service contracts, the selected public service operators and the compensation payments and exclusive rights granted to those public service operators by way of reimbursement. The report shall distinguish between bus transport and rail transport, enable the performance, quality and financing of the public transport network to be monitored and assessed and, if appropriate, provide information on the nature and extent of any exclusive rights granted. The report shall also take into consideration the policy objectives as stated in public transport policy documents in the Member State concerned. Member States shall facilitate central access to these reports, for instance through a common web portal.’;

(b) In paragraph 2, the following point is added:

‘(d) the envisaged starting date and duration of the public service contract.’.

(9) Article 8 is amended as follows:

(a) paragraph 2 is replaced by the following:

‘2. Without prejudice to paragraph 3,

(i) Article 5 shall apply to the award of public service contracts for passenger transport services by road and by track-based modes other than rail such as metro or tramways from 3 December 2019.

(ii) Article 5 shall apply to public passenger transport services by rail from 3 December 2019.

(iii) Article 5(6) and Article 7(3) shall cease to apply from … [6 years after the date of entry into force of this amending Regulation st11198].

The duration of contracts awarded in accordance with Article 5(6) between 3 December 2019 and... [6 years from the entry into force of this amending Regulation st 11198] shall not exceed 10 years.

Until 2 December 2019, Member States shall take measures to gradually comply with Article 5 in order to avoid serious structural problems in particular relating to transport capacity.

Within six months after … [three years after the date of entry into force of this amending Regulation st 11198], Member States shall provide the Commission with a progress report, highlighting the implementation of any award of public service contracts that comply with Article 5. On the basis of the Member States' progress reports, the Commission shall carry out a review and, if appropriate, submit legislative proposals.';

(b) The following paragraph is inserted:

'2a. Public service contracts for public passenger transport services by rail directly awarded on the basis of a procedure other than a fair competitive procedure as of … [the date of entry into force of this amending Regulation st 11198] until 2 December 2019 may continue until their expiry date. In derogation from Article 4(3), the duration of such contracts shall not exceed 10 years, except where Article 4(4) applies.';

(c) in paragraph 3, point (d) is replaced by the following:

'(d) as from 26 July 2000 and before … [the entry into force of this amending Regulation st 11198] on the basis of a procedure other than a fair competitive tendering procedure.'.

Article 2

This Regulation shall enter into force on … [12 months after the date of its publication in the *Official Journal of the European Union*].

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at...,

For the European Parliament	*For the Council*
The President	*The President*