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Subject:	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT pursuant to Article 294(6) of the Treaty on the Functioning of the European Union concerning 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

Delegations will find attached document COM(2016) 689 final.

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pursuant to Article 294(6) of the Treaty on the Functioning of the European Union

concerning 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

(Text with EEA relevance)

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1. BACKGROUND

On 30 January 2013, the Commission adopted a comprehensive package of six legislative proposals to deliver better quality and more choice in rail services in Europe.

Improvements in service quality and efficiency are needed to make rail a more attractive choice for passengers and to encourage modal shift. Better value for money and sustainability can be achieved for scarce public funds.

The package also aims to encourage innovation in EU railways to meet user expectations. It does this in three different and interrelated ways by:

(1) opening domestic passenger markets to competition and making tendering for public service contracts compulsory;

(2) strengthening the independence of infrastructure managers so that they control all the core functions of the rail network and ensuring fair access for all to the railway;

(3) strengthening the role of the EU Agency for Railways by making it a 'one stop shop' for issuing EU-wide vehicle authorisations for placing them on the market and EU-wide safety certificates for operators.

Date the proposal was sent to the European Parliament and to the Council (document COM(2013) 28 final — 2013/0028 COD):	31 January 2013
Date of the opinion of the European Economic and Social Committee:	11 July 2013
Date of the opinion of the Committee of Regions:	8 October 2013

Date of the position of the European Parliament, first reading: 26 February 2014

Date of adoption of the position of the Council: 17 October 2016

2. OBJECTIVE OF THE COMMISSION PROPOSAL

The general objective of the Commission proposal for an amendment of Regulation (EC) 1370/2007 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. The aim is to enhance the efficiency and to improve the quality of rail passenger services. These measures are accompanied by provisions to ensure favourable framework conditions for competitive tendering procedures, including rules on the access to rolling stock.

The Commission proposal is closely linked to the proposed amendments to Directive 2012/34/EU of the European Parliament and of the Council of 21 November 2012 establishing a single European railway area (recast) introducing open access rights for railway undertakings and strengthening provisions concerning the governance of infrastructure management in view of enhancing non-discriminatory access to the rail infrastructure.

3. COMMENTS ON THE COUNCIL POSITION

The position at first reading adopted by the Council on 17 October 2016 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:

- The Commission proposed to align award rules for all modes of transport covered by the Regulation and to introduce the principle of mandatory competitive award for public service contracts in rail. 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. In this respect the Council position follows the objective of the Commission to improve the quality of rail passenger services and to enhance their operational efficiency.

- The Commission proposed more stringent rules on the definition of public service obligations (PSOs). They aimed at requiring competent authorities to draw up detailed public transport plans defining the objectives of public passenger transport policy. Competent authorities were required, based on a set of criteria, to justify the kind and extent of PSOs they intend to impose on public transport operators and the scope of the public service contract with a view to achieving the objectives defined in the public transport plans. 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.

- 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.

- The Commission introduced specific upper limits on the value of direct awards for small volume contracts for rail transport. The Council position sets these upper limits higher. However the Commission considers that they still correctly reflect the logic of permitting direct awards if the cost of organising a tender procedure outweighs the expected benefits.

- The Commission proposed the obligation for competent authorities to ensure that non-discriminatory access to rolling stock is guaranteed since this is one of the main obstacles for railway undertakings to participate in tendering procedures. The Council position does not introduce this obligation as it could have an adverse effect on the public finances. However, it sets 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. The Commission acknowledges that, with the obligation to make future assessments on access to rolling stock public, the Council position introduces an important basis for operators and the Commission to check whether the tendering procedures ensured an equal treatment of all operators.

- 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. The Commission can support these provisions as they will clarify the existing applicable social rights and obligations.

- The Commission proposed swift entry into application of the principle of mandatory competitive award. The Council position introduces a longer transition period postponing the deletion of the possibility of unconditional direct awards. The outcome is that the application of the principle of mandatory competitive tendering of public service contracts in rail will apply six years after the entry into force of the new Regulation. 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 and thus avoid any structural problems that could arise.

- The Commission proposed that direclty awarded contracts based on the exception for rail transport should expire at the latest by 31 December 2022. The Commission regrets 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. However, at the same time the Commission notes that the Council position guarantees the protection of existing contractual rights and introduces safeguards for their legal continuity.

4. CONCLUSION

The Commission considers that despite the shortcomings of the Council position, the introduction of new and clearer provisions described above will provide more legal certainty. It will also constitute a solid basis for future enforcement of rail market opening under both transport policy rules and relevant competition rules.

The Commission considers that amending the legislation on the PSOs in transport by rail, introducing the principle of competitive award of rail public service contracts, and provisions on favourable framework conditions for such awards are an essential step towards improving the quality and efficiency of public transport services by rail in the EU. Wider use of competitive tendering for rail contracts could also ensure better value for public money spent on public transport services.

In a spirit of compromise, the Commission accepts the position adopted by the Council thus allowing the European Parliament to adopt the final text in a second reading. Indeed, the Commission considers that adopting both the market and technical pillars would maximise the benefits in terms of the quality of service, efficiency and the competitiveness of the rail transport industry.