



Arbitrating between PSO And open access

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The best of both worlds? Need for a strategic vision

- Open access – **not a residual choice**
- PSO and Open Access offer **different benefits:**



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PSO – pros and cons

THE PROs:

- Control about the whole range of required services
- continuity of service
- provision of desirable but unprofitable services
- minimum quality requirements (but need monitoring)

THE CONs:

- Incentive for innovation/customer orientation must be built in PSC
- authority needs to identify needs
- value for public money only if competitively awarded
- need to handle entry barriers (e.g. right PSC size, access to rolling stock, etc...)

Open Access – the PROs

THE PROs:

- customer orientation
- innovation
- grows the market (higher ridership)
- product differentiation – premium and low-cost
- no need to guess what the market wants
- easier to contest for smaller operators
- cost efficiency
- more effective use of infrastructure
- downward pressure on fares

Open Access – the cons

- THE CONS:

- cherry-picking?
- need to police the competitive playing field (predatory prices, exclusionary behaviour, collusion)
- services can be discontinued
- congestion – scarcity of paths for other types of traffic

What are other Member States doing?

- ITALY: Open Access on High Speed lines
PSO: still many direct awards,
slowly moving towards competition

- SWEDEN: Open Access on High Speed (3
operators)

all PSOs are competitively tendered



What are other Member States doing (2)?

- GERMANY: PSOs systematically tendered;
Open Access on long-distance – not thriving but hope with Flixtrain
- UK: all PSOs are competitively tendered (franchises);
limited Open Access (subject to NPA test)

What are other Member States doing (3)?

- FRANCE: High Speed lines to be operated in Open Access;

PSO: competitive tendering to be introduced gradually by Regions

When is Open Access the obvious choice?

- Open access is **the obvious choice** for

High Speed Services

Connections between large cities with potential for demand development (Prague-Ostrava)

- Open access **possible** wherever there is potential profitability

How does Open Access interface with PSO?

- Some connections in areas covered by PSO may be operated profitably – leading to open access requests
- Open access can co-exist with PSO on same line– e.g. at specific times of day
- Open access may cause only limited revenue abstraction from PSO
- Right to provide open access services can only be restricted if substantial impact on economic equilibrium of the PSO
- Economic Equilibrium Test – carried out by independent Regulatory Body



Economic Equilibrium Test (1)

Objective of EET: arbitrate between

- right to operate open access services EU-wide and
- right of PSO operator/MS to preserve financial equilibrium of PSO contract
- Financial equilibrium is compromised if
 - Substantially reduced profitability of operations and/or
 - Substantial impact on public finances



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Economic Equilibrium Test (2)

EET – how does it work (Implementing Act)

- No uniform definition/threshold of impact, each regulator to set own methodology
- Triggers: new open access request on line covered by existing PSO, or substantially modified service (for RB to assess) AND
- Request for EET by PSO operator, competent authority, IM within set deadline (1 month)

Economic Equilibrium Test (3)

- Regulator can request any information from parties BUT
- Sensitive information is protected
- Principle of legal certainty
 - Strict deadline for regulator's decision (in time to ensure inclusion of the new service in working timetable)
 - once service has been authorised, no revision possible

Economic Equilibrium Test (4)

- **Exception:** open access requests introduced when PSO is being competitively tendered: regulator can delay decision by 1 year to protect tender process – temporary access possible
- Can existing Open Access be protected from new PSO?
- EU law only protects public services, but PSO must be necessary and justified
- Protection possible in national law (FR)

What about cherry-picking?

- Open access has a **short-term** price tag: new commercial services abstract at least some revenue from PSO
- Old model where profitable lines cross-subsidize unprofitable ones: no longer viable
- **BUT:** Open access brings **long-term** societal benefits
- **TOOLS** to minimize extra cost: levy based on Article 12 of Directive 2012/34 – makes open access pay (within limits) for PSO financing
- Levy must not endanger viability of new services, should be non-discriminatory



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THANK YOU!



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