



Workshop on tendering of rail public service contracts

Competition aspects

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Benefits of competition

- Open access on **commercial lines**:

Due to competition

➤ fares decrease

➤ innovation, quality increases

- **PSCs**: prices are often regulated - effect of market opening may be more indirect.
- BUT: the **level of subsidies** required to operate non-profitable lines under PSOs dropped by 20% to 30% when PSO contracts were awarded competitively (see Sweden, Germany and the Netherlands).



Remove entry barriers

- Tenders allow for competition "for the market" and grant the right to operate the PSC as "monopolist"
- Correct tender/best bid benefits
 - consumers in terms of price, quality
 - taxpayers

BUT: regulatory frame is not enough to ensure successful tender as entry barriers risk to prevent reasonable participation / offers

- need to remove barriers and ensure level playing field



Non-discriminatory access to rolling stock

- Funding of rolling stock for PSOs is allowed under Reg 1370/2007
Principle: link rolling stock in its entirety (duration and concrete use) to a PSC. Upon expiry of the PSC rolling stock must be properly remunerated or given back to the State.
- Need to prepare the path for future tenders: If in 2023 all rolling stock is in the hands of incumbents, tenders will fail. Therefore,
 - ✓ ensure **functioning second hand rolling stock market** (antitrust cases)
 - ✓ restrict public funding of rolling stock to **tendered** PSCs (draft CPR for ESIF funding)



Access to rolling stock under Regulation 2016/2338

- Reg 2016/2338: competent authorities must assess whether measures ensuring non-discriminatory access to rolling stock are necessary for the success of a competitive tender
- If they identify a problem, competent authorities should endeavour to find a solution.
- Toolbox:
 - Rolling stock pool
 - Financing guarantee to cover residual value risk
 - Take-over guarantee
 - Cooperation with other authorities to create larger rolling stock pool



Remove barriers to entry

- Ensure **open and non-discriminatory access to infrastructure**
 - Vertically-integrated incumbents may set hurdles in the supply of ancillary services – enforcement!
 - Infrastructure project: Slovak light maintenance workshops
 - ✓ Public support for infrastructure projects is not part of the public service compensation (1370/2007 Regulation is restricted to public passenger transport) but needs to be notified
 - ✓ Operation by SPV distinct from incumbent



Remove barriers to entry

- **Financial flows** to publicly owned companies must be market conform or to be notified
- Ensure an **appropriate scope of PSOs**
- Prevent **overcompensation and cross-subsidisation**



Ticket distribution

- Access of new entrants to ticketing systems is key
- Investigation by German competition authority: Deutsche Bahn committed to improve ticket sales possibilities for competitors within train stations and to reduce commission charges.
- 4th RP contains provision empowering Member States and competent authorities to oblige railway undertakings to participate in integrated ticketing schemes.



Tenders: Challenges

- Violation of competition rules by market players
 - Cartels/bid-rigging
 - Predatory pricing - undercutting
- NL/Limburg case: abuse of dominant position by NS
 - Abuse of confidential information by IM
 - Predatory pricing – loss-making bid



Tenders – legal risks

- Challenges for authorities
- Avoid manifest error in the **definition of the public service obligation**
- Proper design of **compensation mechanism**
- Flawed **award procedure** -> risk: appeals by competitors and cancellation of procedure



Aid-free compensation: The four Altmark criteria

1. Clearly defined public service obligations

2. Parameters for compensation must be established **in advance in an objective and transparent manner.**

3. The compensation may not exceed what is necessary to cover all or part of the costs incurred, taking into account revenues and a **reasonable profit.**

4. **Public procurement procedure** allowing to choose bidder capable of providing those services at the least cost, OR level of compensation needed is determined on the basis of an analysis of the costs of a **typical well-run undertaking.**

→ Criteria apply cumulatively



Regulation 1370/2007– compatible aid

- If Altmark criteria not met: State aid
- If criteria of 1370/2007 Regulation are met (genuine SGEI, no overcompensation): aid compatible and block-exempted (Art 9: no obligation to notify)
- Correct tender: compensation presumed to correspond to market price
- In the absence of tender: annex has to be respected (methodology, network effects)



**THANK YOU FOR YOUR
ATTENTION!**