



CER

The Voice of European Railways

Public Service Rail Transport in the European Union: an Overview



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The Community of European Railway and Infrastructure Companies (CER) brings together more than 70 railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 73% of the rail network length, 80% of the rail freight business and about 96% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policy makers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe.

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Foreword

Public service transport plays a crucial role in passenger transport in the European Union, both from a political and an economic point of view. **The vast majority of passenger transport services in the EU are currently provided within the context of public service contracts**, which in many cases represent substantial revenue for railway undertakings. Moreover, public service transport is unarguably an important social policy instrument for public authorities.

The operation and **organisation of public service transport differs greatly throughout the EU due to the various needs and social backgrounds**. This is why the Community of European Railway and Infrastructure Companies (CER) decided in 2005 to publish the first edition of a brochure illustrating the different approaches in the European Union. At the time, it was striking to see that the conditions for operating public service contracts were divided into two major groups: the EU-15 countries, where public service passenger transport was organised in compliance with a straightforward legal framework and where railway operators were considered as commercial enterprises; and the EU-10 countries, where the situation was much more problematic, with operators being forced to provide public services while receiving inadequate financial compensation in return. In other words, the conditions under which public service transport was provided were multifarious and it was thus clear that homogenous rules could not be applied without taking into account the specific political and economic context in each Member State.

Six years later, at the time of our first update of the brochure in 2011, there was already a marked evolution of the situation in two key areas: competition as evidenced by increased tendering of public service contracts was growing, and some improvement was being made with regards to the financing of public service obligations.

Over the next six years, the evolution on these two fronts continued and has to a certain extent become even more noticeable today. First, **competition has substantially grown, with an increasing number of public service contracts being tendered out**: approximately 17% of regional services are awarded exclusively through a competitive process, while the relevant percentage for long-distance services is 12.5%. Apart from the traditionally competitive markets of Germany, Great Britain, Italy and Sweden, other national markets, such as Bulgaria, the Czech Republic, Denmark, the Netherlands, Norway and Poland have emulated this example and achieved discernible progress. In light of the regulatory overhaul brought about by the Fourth Railway Package – the main thrust of which is to fully liberalise the market for passenger railway services – this trend is likely to become the norm.

On the second front, although there is still vast room for improvement and fuller compliance with EU legislation, **some further progress has been made with regards to the financing of public service requirements**. A significant development to that effect can be detected in the overall increase, particularly within the EU-13 Member States, of the duration of public service contracts. These longer agreements provide some leeway to railway operators to make more efficient long-term plans for their business and allow for the gradual proliferation of leasing markets for rolling stock. Nevertheless, financing levels remain unsatisfactory and fail to unlock the sector's untapped potential in terms of attracting modal shift to rail.

In this context, **CER is publishing the third edition of this brochure which describes the current rail public service landscape in the European Union as well as in Norway and Switzerland**. A general commentary is also included, guiding the reader through the various elements to be taken into account when analysing the provision of public service transport. With this brochure, CER hopes to provide a useful analytical tool to stakeholders in their assessment of the constantly changing legal framework for railway undertakings in Europe.



Libor Lochman
CER Executive Director

“ *Public service transport plays a crucial role in passenger transport in the European Union, both from a political and from an economic point of view. The vast majority of passenger transport services in the EU are currently provided within the context of public service contracts.*

Overview

Overall, passenger railway traffic increased from 2010 to 2015 by 5.6%. In 2014 a total of 429 billion passenger-kilometres were operated across Europe, out of which 404 billion passenger-kilometres on national railway networks and just 25 billion on international routes.¹ However, it should be noted that although the volume of passenger rail demand has grown, its modal share in land transport at EU level has shifted only a half of a percentage point from 7.1% in 2009 to 7.5% in 2014.

In the rail transport sector, governments throughout the world usually co-finance domestic rail passenger transport services as these services are typically not commercially viable, albeit essential for the society's welfare. These payments should be distinguished from any financial support granted to infrastructure managers to provide and maintain infrastructure.

Considering its capital needs, the rail sector depends heavily on public funding which, in the aftermath of the recent economic and financial crisis, is becoming scarce. According to data from 2014, government payments for public service obligations in the EU-28 amounted to approximately EUR 20 billion.²

Traditionally, government payments were provided in the rail transport sector as a means of serving three main objectives. First, the provision of a transport service of general interest to all citizens, with a view to satisfying the fundamental right to mobility, has been an essential element of political agendas throughout the years. Second, securing affordable and continuous rail services has been an important component of governments' social welfare and regional aid programs, aimed at allowing low-income families and those living in remote areas to be mobile and thus have more chance of finding employment within a larger region. Third, with regard to so-called 'external costs' (CO₂ emissions, damages to the environment, congestion, noise, accident-related costs), promoting an alternative mode of transport like rail – that generates considerably lower external costs than road – constitutes an imperative.

In the 1960s it became clear that the traditional form of granting subsidies was hindering the development of efficient and effective operation of domestic passenger rail services for both governments and railways. Governments were defining the level of service requested from the state-owned operator, however, they were not paying for this service up-front, but waiting for the

annual budget discussion on the overall level of the operating subsidy. This in turn gave poor incentives for the state-owned railway company, which rather than concentrating on generating new sources of revenue, or trying to reduce costs, would focus on the annual budget negotiations with the Government.

At the time, the main piece of EU legislation on public service obligations (PSOs) for rail and road was Regulation 1191/69. It was designed to improve transparency and efficiency, and clarify the conditions under which public authorities could impose public service obligations on the incumbent companies in exchange for financing. In other words, the overall aim of the text was to set limits to what public authorities could impose on companies deemed to operate as commercial enterprises in the internal market and to determine how such obligations should be financed. This first Regulation was amended in 1991 by Regulation 1893/91.

The original Public Service Regulation 1191/69 helped railway companies by ensuring that governments had to specify *ex ante* what level of service they required and then also agree with the selected operator on the associated costs. As a result, on the one hand politicians were confronted with the financial consequences

of their political choices; while on the other, operators had strong incentives to meet the quantitative targets listed in the contract in a cost-efficient way.

In 2000, the European Commission voiced its concerns about the fact that this Regulation, last modified in 1991, was not reflecting current needs as it did not fit in with the overall Commission policy of opening up the rail passenger market. The Commission made several attempts to modify this text,³ but failed to gain support from the Council of Ministers as the successive proposals focused essentially on opening the public service transport market to competition. In parallel, heads of state and government expressed their attachment to a broader notion of 'Services of General Economic Interest' (SGEI), which covers a wider range of services than merely public service transport operations.

This preference was expressed at several European summits (Nice in December 2000; Laeken in December 2001 and Barcelona in March 2002) and resulted in the publication of a Green Paper and of a White Paper on Services of General Interest in which the European Commission discussed and reiterated its commitment to the social dimension of such services, whilst recognising

1 See the Commission Staff Working Document accompanying the *Fifth report on monitoring developments of the rail market* (RMMS Report), European Commission, 8 December 2016, page 19.

2 See the Commission Staff Working Document accompanying the *Fifth report on monitoring developments of the rail market* (RMMS Report), European Commission, 8 December 2016, page 78.

3 In 2000 and 2002, the European Commission attempted to review the legal framework, see COM (2000)7 as amended by COM (2002)107.

that they must be adequately financed.⁴ To that effect, the Commission adopted its first SGEI Package in 2005, which was superseded by a new SGEI Package in 2011. This line of thinking is formally confirmed in the Lisbon Treaty, which provides a concrete legal basis for the adoption of legislation related to economic and financial conditions of Services of General Economic Interest.⁵

Finally, a new proposal revising the legal framework of public service obligations was put forward by the European Commission in 2005, aimed at outlining the conditions under which public financing of passenger rail services could be seen as compatible with EU state aid rules. Regulation 1370/2007 was adopted in 2007, repealing Regulation 1191/69.

In 2013, the Commission brought the issue of liberalising the domestic market back to the fore by announcing the Fourth Railway Package. Given that Regulation 1370/2007 and Directive 2012/34 go hand in hand towards this goal, both legal texts were amended by Regulation 2016/2338 and Directive 2016/2370 accordingly. The new Regulation ensures that the open access system – now to be more widely applied to the entirety of domestic traffic – can

be effectively enforced by the European railway passenger operators. Thus, the new Regulation focuses on streamlining, first the process of delineating the specifications of public service obligations in accordance with the relevant ‘public transport policy documents’, and second, the way in which these services are ultimately awarded.

Overall, the vast majority of EU-15 Member States have effectively implemented the EU legal framework with regards to the daily operation of public rail services. However, in several Member States, particularly amongst those falling under the EU-13 bloc, the Regulation is only applicable *de jure*, since, in practice, railway undertakings do not receive adequate compensation. As a result, railway companies are still struggling to finance loss-making passenger services. Since shutting down such services is not an option in terms of social policy and political action, railways without adequate funding are often compelled to use revenue generated from the profitable freight sector to cross-finance the (agreed) losses incurred by the discharge of public services or to resort to short-term borrowing that inevitably leads to mounting debts.

In parallel, in several Member States, governments have introduced domestic

legislation going beyond the minimum requirements foreseen in the EU legal framework, often aiming at fostering competition in the market for the provision of passenger services, in order to lower costs and ameliorate the quality of the services provided. Thus, it is evident that, despite the existence of a general definition of the notion of public service obligation for rail and road transport, in practice, there is a wide variation of nuanced conceptual aspects across the EU. To that effect, it would be extremely simplistic to strictly associate the existence of public service obligations with services that are not profitable or not cost-covering. On the contrary, depending on the regional, geographic and socioeconomic specificities of each particular case, one can come across different types of public service obligations ranging from purely quantitative ones to overwhelmingly qualitative ones, from under-compensated services to services less reliant on subsidies as a source of income.

It is interesting to note that there has been a shift in the concerns of the European institutions over the years. In the early seventies, European leaders aimed at protecting railway companies from the

abusive attitude of public authorities who imposed public service obligations on state-owned incumbent companies without properly financing them. Today policymakers concentrate their attention on competition rules with a view to avoiding any financial overcompensation of companies. The question is whether this change in focus genuinely reflects the actual conditions for providing public service rail transport in the enlarged European Union. Can the focus on dealing with the risk of overcompensation adequately respond to the reality in all EU countries, or on the contrary, does it contribute to further deepening the gap between EU Member States?

This publication, as a merely informative document, does not take a position on such issues. **Part 1** of the brochure can be used as a reference tool for the reader, who will find an overview of the legal, political and economic context in which public service obligations are currently operated, the general content of public service contracts, as well as the manner in which they are awarded. **Part 2** contains individual country reports describing in greater detail the particular legal framework surrounding the public services in each of the countries examined.

⁴ European Commission Green Paper on Services of General Interest, COM (2003)270, and *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a White Paper on services of General Interest*, COM (2004)374

⁵ Article 14 of the Treaty on the functioning of the European Union (TFEU): “Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Union and the member states, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfill their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of member states, in compliance with the Treaties, to provide, to commission and to fund such services.”



PART 1

Legal, political and economic context



PART 1

1

Legal context: from Regulation 1191/69 to Regulation 1370/2007

- 1.1 First steps towards the fair provision of public service transport: Regulation 1191/69
- 1.2 The turning point: the Altmark judgement
- 1.3 Overhaul of the legal framework: Regulation 1370/2007
- 1.4 Application of Regulation 1370/2007: a brief overview of the relevant case law
- 1.5 The Fourth Railway Package: amendment of Regulation 1370/2007

In order to be able to fully assess the complexity of the political and economic context of public service passenger transport, we must first understand the basic legal framework that governs it and the underlying objectives that it seeks to achieve. The very nature of the railway industry as a regulated network industry and the ultimate goal of creating an open and liberalised European market for passenger railway services, have, over the decades, undoubtedly forged the notion of public service obligations. The regulatory steps evolved over time and need to be examined in their chronological order.



1.1 First steps towards the fair provision of public service transport: Regulation 1191/69

One of Regulation 1191/69's main objectives with regards to the railway sector was to tackle a situation in which railway operators were expected to fulfil public service obligations without having the opportunity to object and without receiving compensation. It constituted an unusual piece of Community legislation because it defined situations under which Member States were required to ensure state aid. The rationale was to ensure that operators received a proper level of

compensation in a way that was compliant with the Community state aid norms. It therefore laid down a set of rules to ensure that competent authorities paid neither too much, nor too little compensation.¹

This Regulation defined the conditions under which public authorities could intervene in order to attain a requisite level of public transport. To that effect, it envisaged two different ways to achieve the objective:

- First, through the **conclusion of a public service contract** between public authorities and transport operators, for instance when the former wished to implement social and environmental factors as well as town and country planning, or when they wished to offer specific fares to certain categories of passengers.

It should be noted though that in the initial legal text, as well as in the amending

Regulation 1893/91, there was no clear provision as to the awarding process, thus leaving unresolved the thorny question of whether these services should be directly awarded or tendered. And even though the Regulation broadly described the elements that should be included in the contract, it did not provide rules for the calculation of the level of compensation.

¹ T. Avanzata, *Study on the implementation of the European Regulation (EC) N° 1370/2007 on public passenger transport services by rail and by road of 23 October 2007*, Avanzata Consulting, November 2010, p. 9

1.2 The turning point: the Altmark judgement

- Second, through the imposition of obligations outside of a contractual setting. More specifically, for urban, sub-urban or regional passenger transport services, public authorities could still **unilaterally maintain or impose public service obligations**, provided they respected certain conditions laid down in the Regulation itself.

In that case, the Regulation outlined in great detail the calculation method to be applied in order to finance such obligations or, to put it in other words, to compensate for the 'economic disadvantage' that the railway undertakings concerned would have to endure. In the absence of a negotiated contract, such a detailed outline was considered a necessary safety valve for the status and viability of the operator. The main points were:

- For each service subject to an obligation to operate, the economic disadvantage would be the cost of providing the service minus the revenue earned.
- Allocating rules for shared asset costs, shared overhead costs and shared revenues would have to be set in advance.

Regulation 1191/69 foresaw a strict separation of accounts between services subject to public service obligations – and as such benefiting from public funding – and other services operated on a purely commercial basis.

Until recently, given the absence of international competition, the EU had scarcely been concerned by how public service contracts for inland public transport were awarded. In 2003, the Court of Justice judgment in the Altmark Trans GmbH Case confirmed, among other things, that an international market for the provision of local transport services was developing. It was thus critical that a new Regulation should cover all market segments, including regions and towns, to ensure transparency in the award and execution of public service contracts. The purpose of those rules, if complied with, was to exonerate contracts granted without competitive tendering from any suspicion of state aid.

The 1969 legal background fit the political and economic situation of the six members of the Community at the time. However, the rapidly evolving political and legal framework, for instance the introduction of a proper European rail transport policy in 1991² and, later on, the adoption of successive railway packages, rendered Regulation 1191/69 ill-adapted to the sector as it did not reflect the prevailing market conditions.

The European Commission attempted several amendments to the Regulation in the early years of the millennium, mainly using it as a tool to open up the market to competition. Indeed, the freight market had just been fully opened to competition and plans to liberalise international passenger traffic were ripe for adoption. As public service transport has, over the years, steadily represented close to 90% of the domestic market, in theory, this piece of legislation seemed to be the appropriate vehicle to facilitate the full opening of the passenger rail market. In practice, however, this idea ended up being over-ambitious as the relevant legislative proposals never succeeded in gathering sufficient political support from the Council. Member States were not politically ready at the time to open this market to competition.

The issue appeared to have reached a deadlock until the European Court of Justice delivered its ruling on the Altmark Case³, which paved the way for the adoption of a new legal framework.

The Altmark Trans Case involved two bus companies and examined the conditions under which a German regional authority awarded a regional public service contract to one of them. The ECJ held that funding the discharge of public service obligations (PSOs) would fall outside of the scope of Article 107(1) TFEU⁴, where it merely covered the costs associated with the discharge of the service. For the nature of the compensation to be purely compensatory, four cumulative criteria have to be met:

1. the recipient undertaking must actually have a PSO to discharge, and the obligations must be clearly defined;
2. the parameters on the basis of which the compensation is calculated must be established in advance in an objective and transparent manner;
3. the compensation cannot exceed what is necessary to cover all or part of the costs incurred for the discharge of the PSO, taking into account a 'reasonable profit'; and

² Adoption of Directive 91/440 on the development of the Community's railways

³ Case C-280/00 Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH [2003] ECR 2003, I-7747

⁴ Treaty on the Functioning of the European Union (TFEU)

4. where the undertaking is not chosen pursuant to a public procurement procedure – which would ensure the selection of the most efficient bidder that would be capable of providing those services at the least cost to the community – the adequate level of compensation must be determined on the basis of the costs of a typical, well-run and adequately equipped operator.

Where the aforementioned conditions are satisfied, the compensation is not considered to amount to state aid. As these are cumulative criteria, if just one condition is not met, the compensation constitutes state aid and is subject to the notification requirement to the Commission and standstill obligation laid down in Article 108(3) TFEU. The aid measure can still be declared compatible under Article 107(2), (3) TFEU (or 93 TFEU and secondary legislation where applicable) and Article 106 (2) TFEU further to a favourable assessment by the Commission.

The analysis of the Commission's case law shows that the Commission has

interpreted the Altmark criteria in a strict manner; and as a consequence of the Commission's approach, the Altmark criteria are regularly considered not to be met. The Commission's point of view is comprehensible: while Altmark allows for a self-assessment of PSOs by Member States, the assessment of whether compensation that qualifies as state aid meets the requirements of compatibility under Article 106(2) TFEU falls under the Commission's exclusive competence. In its practice, the Commission has had the tendency to find that the state financing of public service missions does not comply with the Altmark criteria – thereby bringing it within the ambit of Article 107(1) TFEU – and then, subsequently, to declare it compatible with the common market on the basis of Article 106(2) or Article 107(3) TFEU. Hence, by its strict interpretation of the Altmark requirements, the Commission has seized control over Member States' spending in the context of what they consider to be a public service remit.

The main challenge has been the fourth Altmark criterion. In essence,

the Commission's practice appears to be based on the premise that this criterion can only be met in its first alternative, i.e. if the provider is chosen on the basis of a competitive tender. However, even in those cases where the choice of undertaking and the amount of compensation are defined by way of a procurement procedure, in line with competition and public procurement rules, the compensation may fail the Commission's necessity test (or the 'least cost' criterion).⁵ The consequence of the Altmark test as interpreted by the Commission in these cases is that public service contracts require notification whenever they include incentives for the operator to increase its efforts, seek improvements in quality, attract more customers and retain additional revenues. The Commission thus compels the parties to agree on a more or less fixed margin that is not allowed to increase depending on the economic success of the service in question.

Even though, from a legalistic point of view, the Altmark Case does not apply to compensation of public services falling

under the scope of Regulation 1191/69, but rather to services not abiding by those rules, the European Commission took the ruling into account while drafting its proposal for a new Regulation.

⁵ The nexus between the third criterion, i.e. the necessity criterion, according to which the compensation should only cover the costs related to the service plus a 'reasonable profit', and the fourth criterion, i.e. the 'least cost' criterion, according to which the PSO must be assigned to the undertaking requesting the lowest level of compensation and thus ensuring that the transaction will have the least cost for the state, is evident. According to the Commission, where a tender is open, transparent and non-discriminatory, there is a presumption that the outcome of the tender is exempt from any state aid elements. However, the 'least cost criterion' might not be fulfilled if, for instance, 'qualitative elements' define the outcome of the tender, i.e. where the objective is not to assign the discharge of the service for the lowest compensation, but the highest quality of the service at the least cost. In this case, in order for the award of the PSO to be state aid free, the only qualitative standards that can be taken into account during the selection process are the predefined standards set by the awarding authority. If, for instance, the awarding authority instead of choosing the operator that requests the lowest compensation to fulfill the *ex ante* set qualitative standards, irrespectively of whether they foresee a high or a low quality of services, decides to assign the PSO to the operator requesting higher compensation for offering even higher quality of services, then the third criterion, i.e. the necessity criterion, will not be fulfilled and thus the transaction will have to be notified to the Commission.

1.3 Overhaul of the legal framework: Regulation 1370/2007

This new Regulation entered into force on 3 December 2009 covering public passenger transport by road and rail. It differed to that of 1969 in that now the main focus was the 'state aid' nature of the financing of such services and how such financing must be organised in order to be compatible with EU legislation. The purpose of the new Regulation was to define how competent authorities may act in the field of inland public passenger transport in order to ensure that the services are effectively provided. There was a clear shift in the text's focus from a transport policy perspective to a more competition-related approach.

The crux of the Regulation lies in Article 1, which outlines the conditions under which competent authorities have to compensate public service operators for the costs incurred for the discharge of public service obligations. In other words, Article 1 lays down two fundamental points:

- the basic rule that any public service obligation **must be compensated** (the level of compensation and the calculation method are dealt with in other parts of the text); and

- the form this compensation can take: either a direct financial influx and/or the award of exclusive rights.⁶

The scope of the new Regulation was widened to cover international services as well as domestic and thus ensure that the emerging market of cross-border services would also be properly regulated. Thus, the award and operation of these services became subject to exactly the same European rules as local transport. Moreover, the broad definition of the term 'competent authority' foreseen in the Regulation allowed for the possibility of creating an authority formed by two or more authorities established in different Member States, which would be better suited to monitor cross-border public service obligations.

While the previous Regulation left open the question of whether a public service contract must be in place, Article 3 of the new Regulation indicated in an unambiguous way that public transport services must be discharged within the framework of a 'public service contract'. In addition, the Regulation outlined, in a detailed manner, the mandatory content that all public service contracts

must feature, thus safeguarding an adequate level of transparency and non-discrimination. To that effect, the quantitative and qualitative characteristics of the relevant obligations, as well as the associated costs must be determined in advance and clearly stipulated in the contract. Moreover, the calculation method for the compensation payment forms part of the mandatory content of the contract.

The way in which public service contracts can be awarded, i.e. through competitive tendering or through direct award, was a critical and highly debated point of discussion during the decision-making process. More particularly, various conflicting views on the issue of compulsory tendering were expressed. In the initial text, the principle of a compulsory tendering procedure was introduced, according to which direct awards could only be granted to 'internal operators', i.e. within a region. However, a last-minute change to the text was introduced with regard to transport by rail (Article 5 para. 6), whereby, unless prohibited by national law, competent authorities had the leeway to make direct awards. This political compromise was

essential for the final adoption of the text in 2007.

On a concluding note, the Regulation tackled possible incompatibilities with state aid rules by ruling on how public service operations must be compensated in order to avoid any overcompensation. As foreseen in the 1969 framework, if the compensation complies with the Regulation it is deemed to be compatible with EU law and therefore exempted from any prior notification to the European Commission.

⁶ Exclusive rights are defined as rights entitling a public service operator to operate certain public passenger transport services on a particular route or network or in a particular area, to the exclusion of any other such operator.

1.4 Application of Regulation 1370/2007: a brief overview of the relevant case law

The Commission, over the last years, has set the standards regarding public service contracts and 'reasonable profit' in a clear way, following the principles drawn in Regulation 1370/2007. The Regulation itself explicitly foresees a reasonable profit, but delineating the acceptable level in practice is not always a simple matter.

One of the leading cases on this aspect was DB Regio.⁷ The case involved DB Regio and two regional authorities, i.e. the Länder Berlin and Brandenburg, on the question of how the 'reasonable profit' should be determined. Regulation 1370/2007 refers to a comparison with sector averages, taking into account the risk (or absence thereof) of the specific contract. Unfortunately, in light of the very diverse profit margins in a sector historically marked by high deficits, such comparisons are not always straightforward.

In the Landkreis Sachsen-Anhalt Case, the Commission considered a 'profit' (to be understood as turnover margin) of 5% to be reasonable, while in a state

aid case involving the Czech Republic and the relevant compensation granted to Southern Moravia Bus Companies a 'profit' of 7.85 % was also found to be reasonable.⁸

It should be highlighted that the notion of profit has to be seen in light of the prevailing macro-economic conditions, notably inflation. Another important parameter is the appropriate choice of the relevant profit ratio (Regulation 1370/2007 refers to 'return on capital') and the level of risk borne by the operator, which should be firmly determined by the contractual terms.⁹

Regulation 1370/2007 further specifies that the method of calculating the compensation must 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. This found an interesting application in Case C 41/2008 concerning Danish Railways, where the compensation system had been devised

so as to motivate the beneficiary to increase its productivity.¹⁰ In this case, the Commission pointed out the following issues of concern:

- whether the parameters determining the financial compensation were established in advance in an objective and transparent manner;
- whether the level of compensation was limited to the amount necessary to cover all or part of the costs incurred in discharging public service obligations, taking into account the relevant revenues and a reasonable profit;
- the fact that the contracts at stake were negotiated contracts, which raised a general need for clarifications.

According to its decision, a return on capital of 6%, with the potential to increase in case of productivity improvements up to 12% for each particular year and 10% over each period of three years, would be deemed acceptable under Regulation 1370/2007.¹¹

The Commission further found that there had been no overcompensation and that the maximum profit set at 6% was reasonable for the contracts at stake. Despite the fact that the relevant compensation was found to be compatible with EU law, the decision was made dependent upon the implementation of a refund mechanism for the remaining duration of the contracts.

An interesting point was that the Commission based its entire assessment on the new Regulation 1370/2007, while this piece of legislation did not exist at the time when the contested contracts were negotiated and concluded.

The Commission decision was challenged before the Court of First Instance by one of the previous applicants. It was registered on 25 November 2009 under Case T-87/09 Andersen v Commission but the Court decided to dismiss the application as inadmissible.

⁷ Case C 47/2007, DB REGIO AG - Contrat de service public (OJ C 35, 8.2.2008, pp. 13-29)

⁸ Case C 3/2008, Public service compensations for Southern Moravia Bus Companies (OJ L 97, 14.4.2009)

⁹ Commission Staff Working Paper *The Application of EU state aid rules on Services of General Economic Interest since 2005 and the outcome of the public consultation*; Brussels 23.03.2011, p. 11

¹⁰ Case C 41/2008, Public service contracts between the Danish Government and Danske Statsbaner (OJ L 7, 11.01.2011, pp. 1-39)

¹¹ This could be interpreted as implying that, contrary to what is foreseen in the New State Aid Rules for Services of General Economic Interest (Commission's Decision and Framework of 20 December 2011), there is an efficiency requirement for land public passenger transport.

1.5 The Fourth Railway Package: amendment of Regulation 1370/2007

On 30 January 2013, the European Commission published its proposal for a Fourth Railway Package, composed of two main legislative pillars: a so-called Technical Pillar aimed at harmonising technical rules on interoperability and safety and to reform the European Rail Agency, and a so-called Market Pillar aiming to open the domestic passenger market in the years to come, thus completing the process of gradual market opening started with the First Railway Package. Already in its Transport White Paper of 2011,¹² the Commission had set out its vision for establishing a Single European Railway Area (SERA) as well as the necessary steps for ensuring the competitiveness of EU transport and enhancing inter-modal competition in the long term. The main rationale behind the new Railway Package was aptly stated in the Commission's proposal for amending Directive 2012/34: "In the last decade, three legislative 'railway packages' have progressively opened up national markets and making railways more competitive and interoperable at the EU level. However, despite the considerable development of the 'EU acquis', the modal

share of rail in intra-EU transport has remained modest."

In the last months of 2016, the final amendments to the legal texts falling under the Market pillar of the Fourth Railway Package were, after lengthy debate, officially adopted by the European Parliament and then published in the EU Official Journal.

The new Directive 2016/2370 amending Directive 2012/34 established the right of every European railway operator to provide passenger services, at both international and domestic level in every Member State. The only eligible limitation of this general right of access to railway infrastructure is the objective of safeguarding the economic equilibrium of existing public service contracts, as well as the indirect limitation stemming from exclusivity rights granted to operators under PSO contracts concluded before 16 June 2015. Moreover, Member States may limit access to domestic lines when an additional right/license to operate commercial passenger services in competition with another operator

between specific stations was awarded before the end of the transposition period of the new Directive on the basis of a fair competitive tendering procedure.¹³

It was also clear, however, that the objective of opening up the domestic market could not be achieved without addressing the PSO market. To that effect, Regulation 1370/2007 was amended by Regulation 2016/2338. In a nutshell, the new Regulation clearly envisages the idea of facilitating access to the market for the provision of domestic services by establishing compulsory tendering as a general rule and limiting the practice of direct awards only to cases where the contract is awarded to an in-house operator or where one of the particular cases foreseen in the Regulation text is applicable in the given context.¹⁴

The new Regulation on public passenger transport services by rail and road will enter into force in December 2017. However, a transition period of six years after the entry into force is foreseen in a way that Article 5 para. 6 will be

applicable until December 2023. This means that public service contracts awarded directly on the basis of the general exception for heavy rail transport can, in practice, remain valid until December 2033. After the transition period, all directly awarded contracts will have to comply with the conditions set in Article 5 (paras 3a, 4 and 4a).

¹² European Commission White Paper *Roadmap to a Single European Transport Area - Towards a competitive and resource efficient transport system*, COM(2011) 144

¹³ See Article 11 paras 1 and 5 of the amended text of Directive 2012/34/EU.

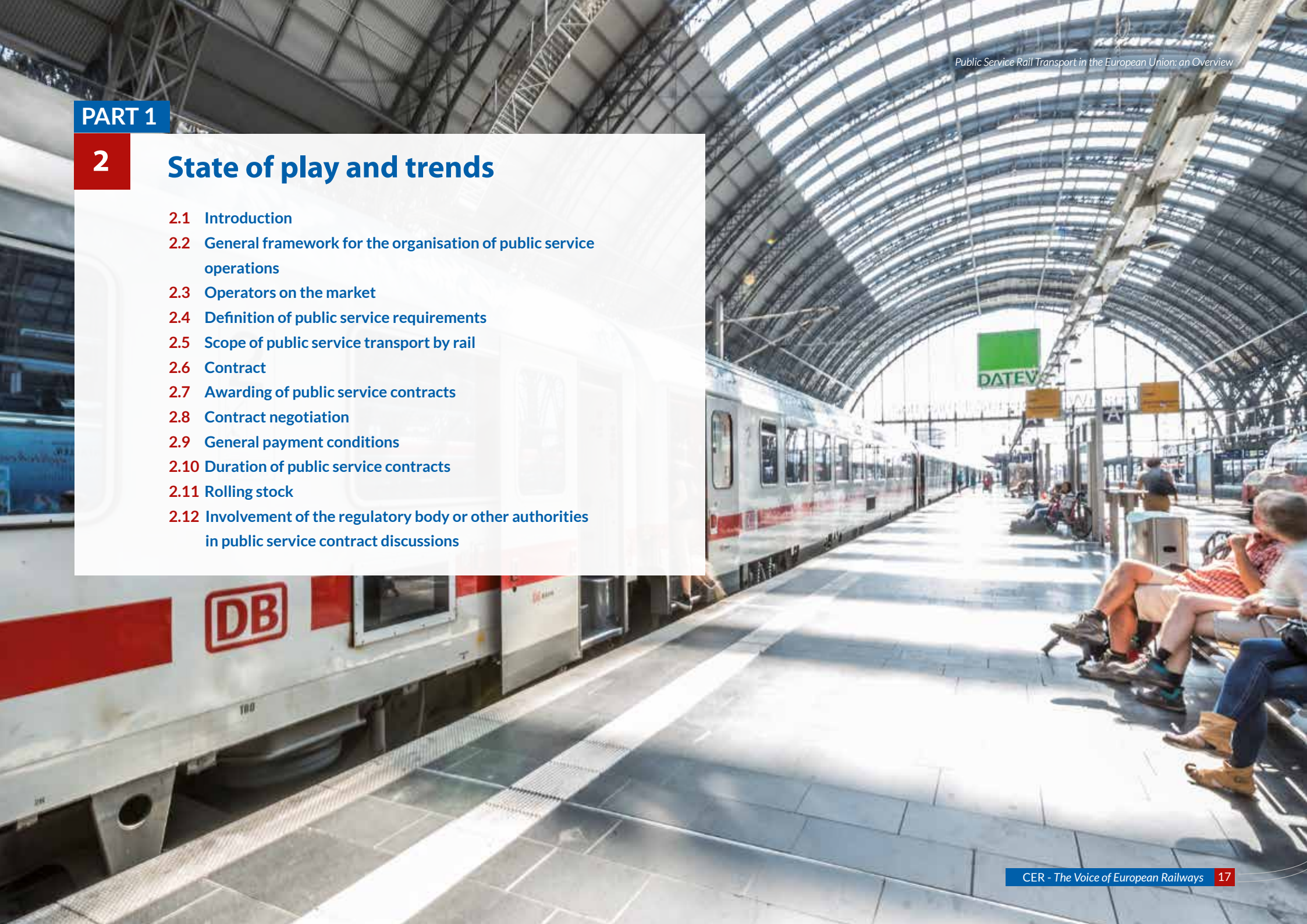
¹⁴ See Article 5 of the amended text of Regulation 1370/2007. With regards to the various exceptions from the general rule of public tendering, see more specifically paras 2, 3a, 4, 4a, 5 and 6.

PART 1

2

State of play and trends

- 2.1 Introduction
- 2.2 General framework for the organisation of public service operations
- 2.3 Operators on the market
- 2.4 Definition of public service requirements
- 2.5 Scope of public service transport by rail
- 2.6 Contract
- 2.7 Awarding of public service contracts
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- 2.12 Involvement of the regulatory body or other authorities in public service contract discussions



2.1 Introduction

Over the past few decades, passenger transport by rail has been organised according to two systems: **open access** and **regulated access**. On the one hand, open access competition involves competition *in the market*, i.e. on the tracks; on the other hand, regulated competition involves competition *for the market*, i.e. for the tracks, through contracted services. The concept of regulated competition is applicable to services which require a contractual basis with a public authority due to the involvement of public service obligations.

These two models allow for the development of competition between operators. In other words, they are not mutually exclusive but complementary. In light of the implementation of the Fourth Railway Package, the dynamics of the interplay between the two systems will be further enhanced; open access rights will be granted to railway undertakings pursuant to the model of competition *in the market*, while, since a large proportion of rail services are provided under public service contracts, those contracts will be

subject to compulsory tendering pursuant to the model of competition *for the market*. Part of the market will still be reserved for direct awards, but only under strictly defined conditions. The current text of Regulation 1370/2007, the so-called PSO Regulation, as amended by Regulation 2016/2338, also serves the objective of opening the domestic market.

The degree of competition in such a regulated market is heavily dependent upon the way in which public service contracts are ultimately awarded. On a general note, competition has been effectively developing throughout the Union, on the basis of competitive tendering or negotiated procedures. The further establishment of this trend, beyond the relevant regulatory initiatives, is naturally directly linked to the adequacy of the funding of public service contracts in each Member State. A tendering procedure will not be successful if it is widespread knowledge that the awarding authority does not respect its financial obligations or is not able to provide adequate funding.



This chapter provides a brief summary of the scope and functioning of public service obligations in 25 European countries.¹ It was drafted on the basis of information gathered through individualised questionnaires addressed to CER member companies in the countries concerned.

The degree of information which was gathered varies greatly from one Member State to another. The major trends are nevertheless described in this part, while

details per country can be found in Part 2 of the report.

In broad terms, this review portrays the wide array of differences within EU countries. There is a diversity of organisational models reflecting the objective of serving the demands of a diverse population living in often very different geographical contexts with different needs.

1 Countries surveyed include most EU Member States as well as Norway and Switzerland. Austria, Ireland and Great Britain have decided not to participate in the latest update of this report.



2.2 General framework for the organisation of public service operations

We can distinguish three different categories for the organisation of public service transport:

- public service operations organised at national level (at central Government level);
- public service operations organised at regional or local level; and
- public service operations organised by both national (central Government) and local (decentralised) authorities in cooperation with each other.

The text of Regulation 1370/2007, as recently amended by the Fourth Railway Package, does not examine the level at which public service operations are dealt with. The Regulation simply indicates that the competent authority is: “any public authority or group of public authorities of a Member State or Member States which has the power to intervene

in public passenger transport in a given geographical area or any body vested with such authority.” Therefore, in application of the subsidiarity principle, Member States have complete discretion over the organisation of public service transport. What should be highlighted is that the notion of ‘competent local authority’ may effectively include an individual authority or a group of authorities, as long as the latter’s geographical scope is not nationwide. The determination of which local authorities are competent regarding ‘urban agglomerations’ and ‘rural areas’ remains at the discretion of the Member States.

It appears that the level at which public service operations are organised often depends upon the size of the country. In large countries, regional or local authorities will often be in charge of regulating public service operations and negotiating and concluding contracts, as

they are better placed to understand the specific needs of their regional or local population. However, over the years, the trend has been for central Governments to get increasingly involved in public passenger railway services by retaining for themselves powers and competencies in parallel to those assigned to decentralised authorities.

When public service contracts and framework financial conditions for the operation of public services are exclusively managed at national level, the contracts are negotiated and concluded with the national Government, which also assumes the associated financial obligations. In the majority of countries, national laws usually outline the general principles, allowing for the necessary specifications to be further developed within the contract.

When competence is shared between national and regional authorities, the core network is managed centrally while the decentralised authorities handle the regional traffic. Given that most public service transport obligations are typically required inside and in the vicinity of major cities, regional authorities own a fair share of responsibilities.

Finally, Germany is the only example of public service rail transport entirely governed by decentralised authorities. It should be noted that the German state nevertheless intervenes by allocating a global financial envelope to the decentralised authorities for passenger public service transport. Its role is however limited to this financial aspect, leaving the Länder entirely competent for delineating the scope of the public transport services required.

Figure 1 Level at which public service transport is organised

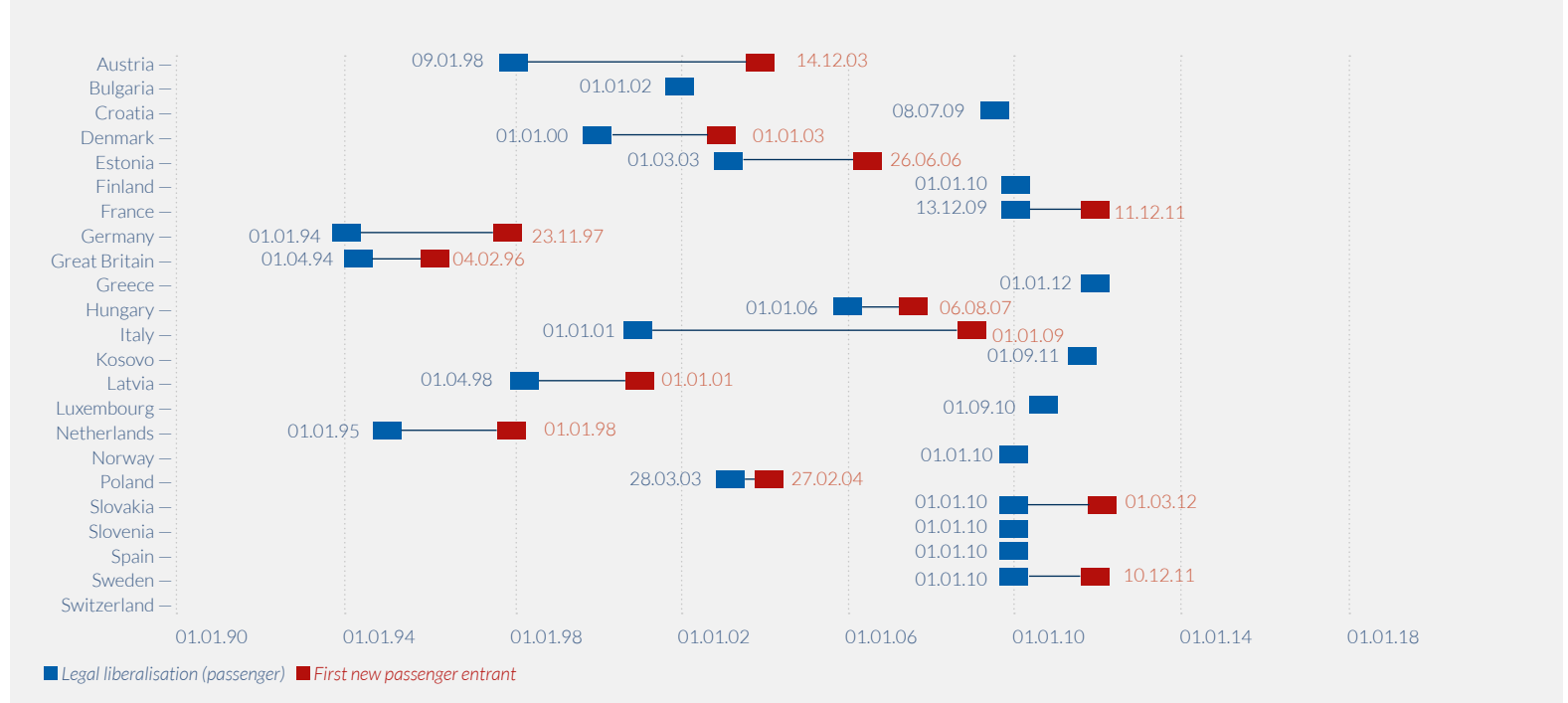
National level	Regional/local level	Mix
Belgium, Bulgaria, Croatia, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Norway, Portugal, Romania, Slovakia, Slovenia, Spain	Germany	Austria, Czech Republic, Finland, France, Great Britain, Italy, The Netherlands, Poland, Sweden, Switzerland

2.3 Operators on the market

Operators on the market for international public service passenger traffic

The rail passenger market went through a major overhaul in 2007 with the adoption of Directive 2007/58, which opened the market for international passenger traffic including cabotage to competition as of 1 January 2010. Member States nevertheless maintained the right to restrict access to their network where the international traffic was likely to distort the economic equilibrium of the related public service contracts. Directive 2007/58 provides that national regulatory bodies are to assess whether the economic equilibrium of a public service contract would be compromised by an international passenger service in a Member State.² The specificities of this process were outlined in more detail in the relevant Implementing Regulation on new rail passenger services.³ Moreover, the European Commission adopted an Interpretative Communication outlining its opinion on the powers of the regulatory bodies regarding this particular aspect.⁴

Figure 2 Entry of the first competitor in passenger traffic



Source: European Commission, *Fifth report on monitoring developments of the rail market* (RMMS Report), 8 December 2016.

² Directive 2007/58, Article 8

³ See Commission Implementing Regulation (EU) No 869/2014 on new rail passenger services, 11 August 2014.

⁴ The Interpretative Communication from the Commission to the European Parliament on certain provisions of Directive 2007/58/EC was published in the Official Journal on 28 December 2010. It sets out the Commission's views on the implementation of Directive 2007/58/EC of 23 October 2007 which regulates opening of the market for international rail passenger transport services, and in particular on the two following points:

- how to determine whether the principal purpose of a rail service is to carry passengers travelling on an international journey;
- how to assess whether the economic equilibrium of public service contracts is compromised by the new service.

According to the Communication, the regulatory bodies may be responsible for determining the principal purpose of a service in specific cases. They should act and take decisions in cooperation with their counterparts in the other Member States, in particular on whether the economic equilibrium of public service contracts is compromised.

The assessment should be based on an objective method and predetermined criteria. Approval by the relevant regulatory body is a prerequisite for limitation of the right of access by Member States. Commission Interpretative Communications bind only the Commission itself. They provide guidance on how it will interpret its own legislation when assessing whether Member States have properly transposed EU legislation.

The amended Regulation 1370/2007 explicitly foresees the possibility for public service obligations to cover public transport services at cross-border level, including those covering local and regional transport needs.

International traffic across borders is, in the majority of cases, already operated under public service obligations, particularly in those regions where there are many cross-border commuters. For example, such agreements exist across the borders of Luxembourg under cooperation agreements concluded with the Belgian and the French operators. These contracts have a complex calculation method whereby each operator finances the share corresponding to the number of national passengers making use of the service. In parallel, other commercial (non-subsidised) international operations exist on those market segments that are viable (Thalys and Eurostar).

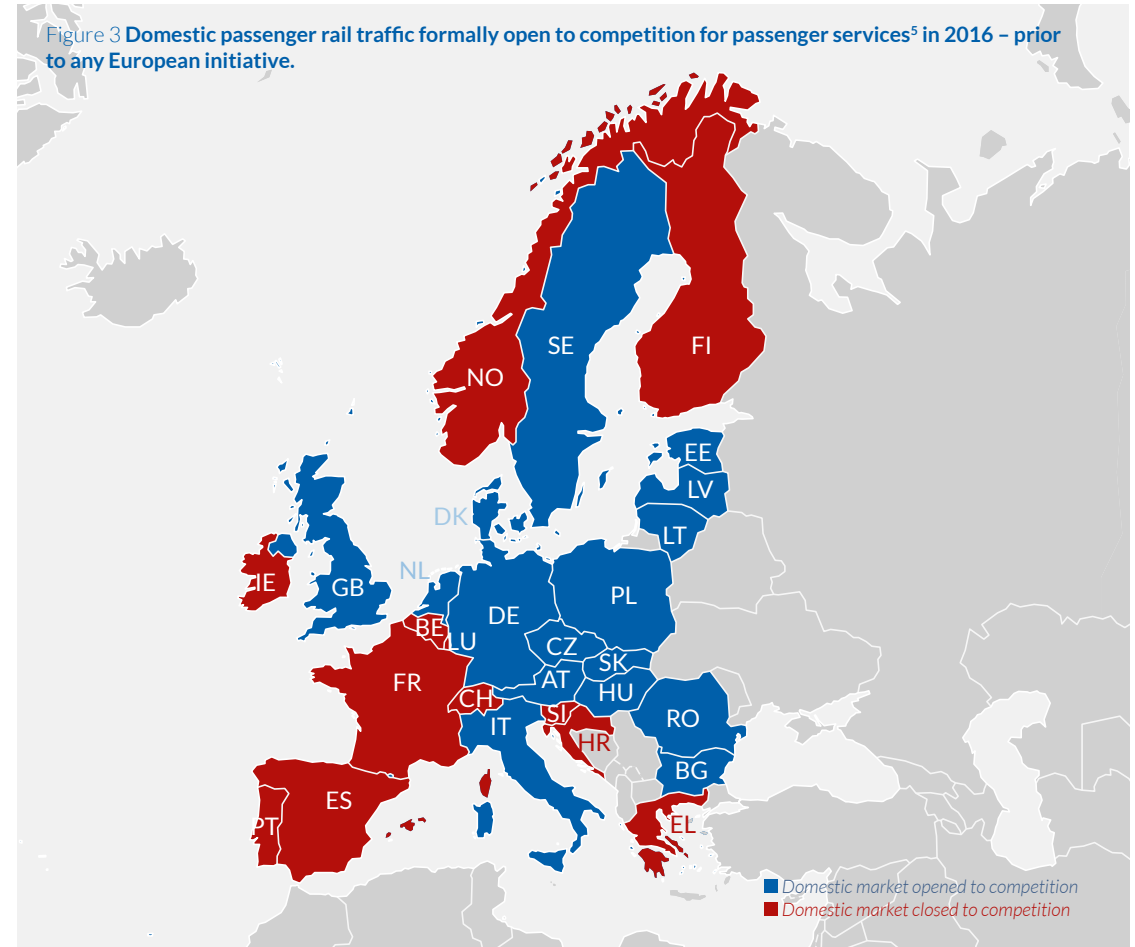
Operators on the market for domestic public service passenger traffic

In December 2016, the amendment of the Recast Directive 2012/34 by the Fourth Railway Package marked the beginning of a new overhaul for the

sector: the opening of the domestic rail passenger market to competition, which will lead to the completion of the progressive liberalisation process. The right to restrict access to the domestic network as a means of safeguarding the 'economic equilibrium' of the existing public service obligations is foreseen in Article 11, and the Commission is also expected to adopt an Implementing Act in this regard.

Prior to the any legislative initiative, which was inaugurated in the Commission's Transport White Paper in 2011, a number of Member States proactively adopted a regime that would allow for the opening of their domestic passenger market to competition. Some started this process some time ago (chronologically: Sweden in 1992/1993, Germany in 1994, Great Britain in 1995, Denmark in 2000 and Italy in 2001), while others emulated this trend more recently (Czech Republic, Bulgaria, Estonia, Latvia, Lithuania, the Netherlands, Poland, Romania and Slovakia).

The process of opening up the domestic passenger market to competition has proven, however, to be more laborious in the newest Member States (EU-13 block). In these countries, the issue is often complicated by the fact that public service obligations are inadequately



Source: CER member data and data from European Commission's Fifth RMMS Report

⁵ Markets opened either through competitive tendering or through open access

compensated and thus unattractive to new entrants. In practice, the opening of the market in those countries often produces no economic effect, as only the historical company responds to the call for tender. The competent authorities therefore directly grant the contract to the historical company. This is more specifically the case in Bulgaria, Estonia, Latvia, Lithuania and Slovakia.⁶

In Great Britain, Sweden and Germany, where the regional and local passenger rail markets were opened up in the first half of the 1990s, competition and new entrants have progressively spread. In Great Britain in particular, all public service transport is currently open to competition (through systematic tendering of contracts: franchise agreements), and approximately 21 private operators are well established on the market. In Germany, almost 33% of the total train-kilometres were in the hands of competitors of DB Regio AG in 2016. In Italy, where the process is more recent, Trenitalia, the incumbent company, competes with approximately 21 operators on the domestic passenger market. In the Czech Republic, the incumbent company competes with 7 new entrants. More examples can be found in the country reports in Part 2.

From a legal perspective, the amended Regulation 1370/2007 foresees the possibility, before the launch of a tender procedure, for the competent authorities to limit the number of contracts to be awarded to the same railway undertaking, in order to increase competition between railway undertakings.

2.4 Definition of public service requirements

As set out in the previous chapter, PSOs are, to a certain extent, regulated in a homogenous way throughout the Member States on the basis of Regulation 1370/2007, which provides the very definition of the services that can qualify as 'public service obligations'. More particularly, the Regulation states that the objective of establishing such obligations should be to ensure that public passenger transport services are provided in the general interest, compelling the provision of services that an operator, if it were considering its own commercial interests, would not undertake or would not undertake to the same extent or under the same conditions without reward. It should be highlighted that this definition should not be narrowly interpreted, allowing also for services that are indeed cost-covering to fall under its scope. To that effect, the recently amended text of the Regulation clearly foresees in Article 2a the possibility of bundling together, under a PSO contract, cost-covering and non-cost-covering services, which must have been envisaged by the legislator as a tool to ameliorate the financial and economic performance of the awarded public service contracts.

Regulation 1370/2007 provides a very general definition of public passenger services: they cover "*services of general*

economic interest" provided to the public on a "*non-discriminatory and continuous basis*". It falls nevertheless within the competence of national public authorities to decide which services should be included in this category. However, it is worth noting that the new Regulation has artfully managed to limit this absolute discretion. In the newly introduced Article 2a, a direct link was drawn between the delineation of the PSO and public transport policy, indirectly imposing on the competent authority to demonstrate, first, that such a link exists and, second, that it exists in a cost-efficient way that ensures the financial sustainability of the service in the long term. Thus, it could be inferred that the competent authorities are compelled to follow a broadly defined pattern.

The main public service obligations that are currently requested from operators in the EU include:

- **tariff obligations** covering tariff reductions for certain categories of passengers. In certain cases the legislation leaves a certain measure of discretion to the operator to increase tariffs. In general, this margin is limited in the sense that railway companies cannot increase prices beyond a level set by the authorities;

⁶ Other EU Member States face similar problems but to a lesser extent.

2.5 Scope of public service transport by rail

- **service frequency** including services between large cities, during peak hours and stopping patterns;
- **quality requirements** are generally included – whether directly in the section relating to public service obligations or indirectly through ‘bonus-penalty’ systems. This constitutes an increasingly important aspect of the economic implications of the contract since quality has a price, and this price needs to be fairly negotiated between the parties. Quality requirements typically include:

- punctuality performance;
- seat reservation;
- services to passengers with reduced mobility;
- client information, including the level of information to be provided in the stations, on board or as general communication;
- requirements relating to ticket sales in train stations and on trains;
- cleanliness of rolling stock;
- number of seats available during peak and off-peak hours;
- presence of staff on the trains;
- characteristics of rolling stock;

- **marketing** of public service transport possibilities/availability at specific tariff levels, which is often imposed by the competent authority;

- **service reliability** including data on the effective circulation of foreseen trains and obligations to ensure a substitute means of transport in case of a rolling stock breakdown.

In some cases, the awarding authorities go far beyond what is reasonable by drafting extremely detailed terms of reference, which contain increasingly stringent specifications regarding personnel deployment, the quality of the provided services, operations management and the quality and features of the vehicles. Such practices, do not allow for lower prices to be established and do not leave much leeway for the tenderers to place competitive offers.

Public service transport in the rail sector within the scope of Regulation 1370/2007 includes all⁷ passenger rail transport agreed with public authorities for which a contract is drawn up. In other words, and in application of the subsidiarity principle, Member States remain free to decide on the type of passenger services to be enshrined in a public service contract, whether it is for local, regional, long-distance or cross-border traffic.

A range of different options can be found throughout the various European markets. Whilst a number of states perceive the remit of public service transport quite narrowly, covering only local and regional services, others also provide public service transport on long-distance journeys. This remains a political choice depending on the geography, the characteristics of the rail network, the train service and the travel market.

Public expectations (and the funding requirement) vary widely: from lightly-used but long-distance rural links (in Sweden for example) to intensively-used commuter services at peak periods (around large cities). In Great Britain, for instance, franchise awards (and, in most cases, public service funding) apply to local, regional and long-distance services. In Finland, long-distance public transport services are provided in less populated areas. While

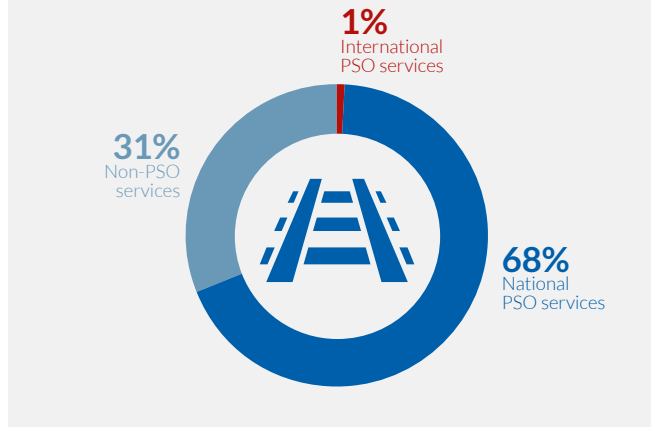
in Germany, only local and regional public transport is financially supported.

In smaller countries, such as Belgium, the Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Slovakia, Slovenia and Switzerland, almost the entirety of internal passenger transport falls within the category of public service transport. This is often due to the size of the country and the density of the population, which establishes the need to offer widespread services to commuters throughout the country.

The Regulation applies to both national and international public transport services for passengers by rail and other track-based modes, as well as by road. Some countries are operating public service lines across their borders to important cities in neighbouring countries to which their citizens commute on a daily basis. These contracts can either be exclusively managed by the competent authority in one Member State or be shared between the relevant Member States (e.g. contracts along the French and Luxembourgish borders). It is worth noting that the percentage of international traffic covered by PSOs in terms of total traffic is marginal (1%), with Luxembourg having the highest share of international lines under PSO.

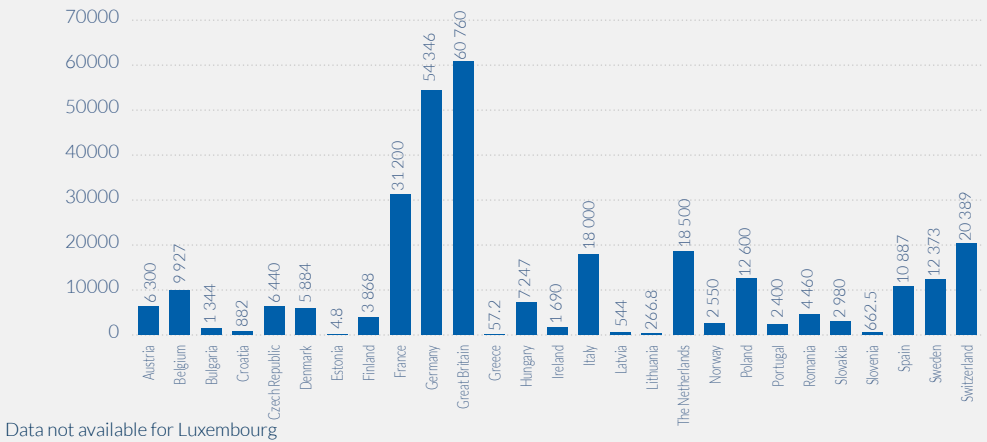
⁷ Services which are operated mainly for their historical interest or their touristic value fall out of the scope of this Regulation.

Figure 4 **Split of national PSO, international PSO and non-PSO services in the EU** (in percentage of passenger-kilometres, 2014, except for IE and NL (2013) and excluding CZ, EL, ES and SE)



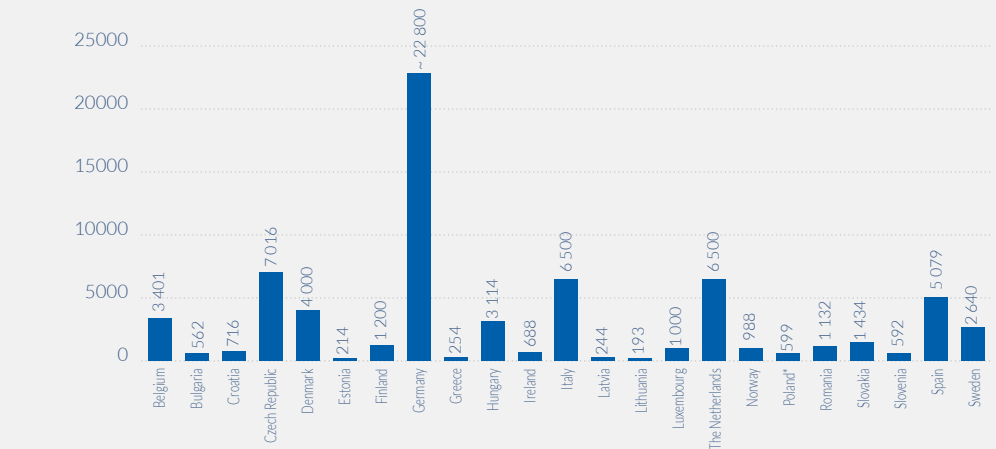
Source: European Commission, Fifth RMMS Report, 8 December 2016

Figure 5 **Scope of national and regional PSO in terms of million passenger-kilometres operated in each country concerned (2015/2016)**



Data not available for Luxembourg

Figure 6 **Scope of national and regional PSO in terms of trains operated per day in each country concerned (2015/2016)**



* Figure for PKP Group only
Data not available for Austria, France, Great Britain, Portugal and Switzerland

Source: CER member data and data from the European Commission's Fifth RMMS Report

Public service transport has always represented a major part of the passenger rail market and this share is expected to grow in light of the increasing road congestion and environmental concerns.

At the time when railway undertakings were in a monopolistic situation, Member States had to resort to public services as an instrument of urban and regional policy without necessarily measuring the financial consequences of such a policy, which eventually ended up as debt. Today, in light of the restructuring of most railway companies and the general trend towards liberalisation, the prevailing conditions have been significantly altered. In some countries, a number of very lightly used services are being either strongly supported financially or simply withdrawn where the cost of operating them is disproportionate compared to the alleged public service benefit. Finally, the development of high-speed rail, generally not falling under public service obligations, is also changing the economic landscape.

In Central and Eastern Europe, in many cases, public authorities continue to request heavy public service obligations on a large part of the network with the duty to maintain the continuity of services, without adequately compensating such obligations. As a result, some of the railway companies concerned have to run the services at a loss, and end up cross-financing from freight to passenger transport or piling up debts. The repercussions of this state-of-play warrant some attention. It will be extremely interesting to observe whether the cost-efficiency perspective that was introduced in the amended Regulation 1370/2007 – and aims at rationalising the process of delineating the specificities of the public service obligation by the competent authorities – can effectively tackle this phenomenon.⁸

Another emerging trend is the conclusion of multimodal public service contracts, on the basis of which integrated rail and bus services are being provided. This is the case in France, the Netherlands, Luxembourg, Slovenia (from 2013) and to some extent in Austria. In

the Netherlands, for instance, the combination of train and bus enables the optimisation of public transport; train and bus lines are being rearranged in such a way that the bus lines function as ‘feeder lines’ and the railway lines function as the backbone of the public transport system. In other cases, one of the requirements stipulated in the contract is to ensure the coordination of schedules, compelling the operator to create, to the best of its ability, a coherent public transport system with coordination between buses, urban transport and trains. This is the case in Denmark and Switzerland.

Finally, Regulation 1370/2007 does not apply to freight transport, contrary to what was foreseen in older legislation. Any public service transport for freight has to be notified to the European Commission under the Treaty⁹ state aid rules for prior approval. In practice, there have been very few freight services provided under public service obligations. In the past, some of these services have for example included night trains delivering food supplies or other essential goods to particularly remote regions.



⁸ See Article 2a para. 2 of the Amending Regulation 2016/2338.

⁹ Treaty on the Functioning of the European Union (TFEU)

2.6 Contract

Level at which the contract is concluded

Article 3 para. 1 of Regulation 1370/2007 clearly states that, where a competent authority decides to grant the operator of its choice an exclusive right and/or compensation, of whatever nature, in return for the discharge of public service obligations, it shall do so within the framework of a public service contract.

The type of public authorities with which the contract has to be concluded is not defined at EU level. The text cites 'competent authorities', which is a vague definition that needs to be further delineated at national level. This will depend upon which authority is competent for which type of traffic. The only important criterion is to have, according to national laws, the power to intervene in public passenger transport in a given geographical area.

Legal form of the contract

The contract does not have to take any specific legal form. In practice, it can be almost any document that clearly and explicitly contains the requested obligations and stipulates the method of calculating the level of compensation

as well as the way in which the relevant payments will be delivered. This facilitates the implementation of the Regulation in each Member State.

Nevertheless, the use of the word 'contract' is of political importance: it conveys a clear message to public authorities that, whatever the legal form of the document, it should be negotiated between the parties and not simply imposed upon the railway undertaking. As will be displayed in more detail in the second part of this brochure, the negotiation process between the railway undertaking and the awarding authority is not always effective.

The amended Regulation 1370/2007 foresees an exception to the norm of concluding a contract, when the public service obligation consists in establishing maximum tariff obligations for all passengers or certain categories of passengers. In other words, such tariff obligations need not be formalised within a contract. In that case, however, they must be formalised in the form of a so-called 'general rule'.¹⁰

It should be stressed that the compensation for such tariff obligations – whether in a general rule or a contract – must be adequate and in line with the

limits set to prevent over-compensation or under-compensation.

Content of the contract

All elements relating to the provision of public services (level of financing, details about the services, etc.) can either be provided in the framework legislation regulating public services in general or in the specific contracts concluded with the relevant authorities in each country. In practice, as noted above, the large majority of countries surveyed have included all details relating to the operation of public service transport in a contract rather than in a legislative act.

The contract must fulfil at least the following requirements:

- clearly define the public service obligations and the geographical areas concerned;
- establish in advance and in a transparent manner the parameters for the calculation of the public service compensation and the nature and extent of the exclusive right, if any;
- determine the arrangements for the allocation of costs connected to the provision of public service transport;
- determine the arrangements for the allocation of revenue from the sale of

tickets (whether they are allocated to the railway undertaking or whether they are paid back to the public authority);

- list qualitative standards, if any;
- describe subcontracting details, if any;
- specify the duration of the contract or general rules;
- lay down social rules as regards the transfer of employees.

The amended Regulation 1370/2007 stretches the scope of Article 4, which delineates the mandatory content and the general rules enshrined in the public service contract, so as to impose the observance of certain social standards. As a general rule, public service operators will have to comply with the obligations foreseen in EU laws and regulations in the field of social and labour law, national law and collective agreements. In addition to the general provision for the consideration of existing social standards, the Regulation seeks to tackle the thorny issue of enforcement of social rights in case of transfer of staff, which, in light of the proliferation of the number of tendered PSO lines, will be of great practical importance. This is done via reference to Directive 2001/23, the scope of which is limited however to cases where the change of operator falls under the notion of 'transfer of undertakings' according to the text of the Directive.

¹⁰ A 'general rule' consists in a measure which applies without discrimination to all public passenger transport services of the same type, in a given geographical area for which a competent authority is responsible. Such general rules apply to tariff obligations. This notion was included in the Regulation to take into account the current legal diversity in Member States and therefore allow for full flexibility when complying with the Regulation.

2.7 Awarding of public service contracts

The European PSO Regulation foresees two general ways of awarding public service contracts: either through competitive tendering or through direct award.

The rule: competitive tendering

In principle, the new text of Regulation 1370/2007 foresees in Article 3 that contracts for public passenger transport services by rail and road should be awarded following a competitive tendering procedure, thus establishing the principle of compulsory tendering.

In other words, such contracts should be awarded in accordance with either national or European public procurement rules, depending on the size of the contracts in question. This provision goes hand in hand with the objective of opening up the domestic market and enhancing the competitive process, which, in the long run, will tilt the scale of modal share in favour of the sector. However, the effective application of this principle is, in practice, limited by the existence of various exceptions to this rule, which are analysed in detail above, as well as a general exemption applying to the heavy rail sector under the original Regulation 1370/2007. In statistical terms, approximately 42% of all

EU passenger-kilometres under PSO are directly awarded.¹¹

It should be noted, though, that the recently amended text of the Regulation has enhanced the wider application of tendering procedures, first by abolishing the general exemption for heavy rail (this provision will cease to apply in December 2023) and, second, by narrowing down the notion of the internal operator (or in-house operator) to an operator that operates solely within the territory of the awarding local authority.

Furthermore, the Regulation defines in an unambiguous way the minimum framework of rules according to which tendering procedures must be carried out in order to safeguard that these procedures:

- are open to all operators;
- are fair;
- observe the principles of transparency and non-discrimination;
- may involve negotiations in accordance with the above principles.

Finally, it is worth noting that a direct link was drawn between providing effective access to sufficient information regarding the tender and the objective of keeping the process open to all operators.

The exceptions: direct award

The amended Regulation foresees several possibilities for directly awarding public service contracts, i.e. contracts that are concluded outside of the ground rule of classical competitive tendering. It should be noted that the new provisions foreseen in Article 5 will apply to passenger transport services by rail as from 3 December 2019. The following situations allow for direct contract award:

- **Provision of services by the internal operator:** a competent local¹² authority (or a group of competent local authorities) can decide to provide public service transport itself or to directly award the contract to a railway operator that it controls, under the following cumulative conditions:
 - The operator is controlled in practice by the public authority in question (even though 100% ownership is not required).
 - The operator (or any other entity upon which this operator exerts influence) provides services only within the geographical area of the competent authority, notwithstanding outgoing lines or other ancillary activities that enter the territory of another competent authority.

- The operator does not take part in competitive tenders related to the provision of services outside of the specific territory allotted to the local authority/group of local authorities. Two years before the end of its directly awarded contract, the operator may participate in other tender procedures, provided that his current contract will not be renewed.

- **Exceptional circumstances:** particularly where, in light of the number of tenders that are already being run, a call for tender of another additional service might not constitute the optimum choice in terms of cost-efficiency. However, in that case the Commission will have to be notified and the directly awarded contract shall not exceed the duration of five years. In any case, the subsequent contract shall be tendered out.
- **Small value contracts:** contracts with an annual average value of less than EUR 7 500 000 (applicable only for public passenger transport services by rail) or contracts concerning the annual provision of less than 500 000 km of public passenger transport services (also applicable only to rail) can be directly awarded.

¹¹ See publication *The Fourth Railway Package: another step towards a Single European Railway Area*, conducted by the European Parliamentary Research Service, March 2016, page 13.

¹² In the absence of a local authority, a national authority may proceed to the direct award of a public service contract, given that all the other requirements are met and that the relevant service is not national in scope.

- **Contracts awarded to small and medium-sized enterprises (SMEs):** contracts concluded with SMEs can be awarded directly. An SME is defined as a company operating not more than 23 vehicles. In this case, the above thresholds can be extended to EUR 2 000 000 or the annual provision of less than 600 000 km of public passenger services.
- **No effective participation in the tender:** in cases where only one operator expressed interest to participate in the tendering procedure and under the strict condition that this result was not artificially provoked and that the relevant operator is able to meet the requested obligations, the contract, in the absence of any alternative solution, can be directly awarded.
- **Where the prevailing conditions suggest to do so:** if two cumulative criteria are met, i.e. if the relevant structural and geographical characteristics of the market and network are prone to a direct award procedure (a pertinent example would be Member States, where the maximum volume is less than 23 million train-kilometres and which have only one competent authority at national level and one public service contract covering the entire network) and

if such an awarding process would effectively optimise the execution of the public service contract (in terms of cost-efficiency or quality of services), then the competent authority may decide to proceed to a direct award. However, it should be highlighted that in these cases, first, there is an obligation to notify the Commission of this decision and, second, detailed and predefined performance requirements must be fulfilled. Finally, the contracts concluded shall not exceed the duration of 10 years.

- **Disruption of service:** in case of disruption of service or imminent risk of such disruption, the public service contract may be directly awarded or extended for a maximum of two years. It should be noted that the public service operator shall have the right to appeal against such a decision.
- **Heavy rail:** public authorities may decide to directly award contracts for heavy rail. It should be highlighted that this provision, foreseen in Article 5(6) of the Regulation, will only temporarily remain in force and will cease to apply as from 6 years after the date of entry into force of this Regulation, i.e. in December 2023.

Today in the European Union, public service transport contracts are being

awarded according to one of the following procedures:

- direct award following negotiations with only one operator;
- direct award following negotiations with several operators on the basis of a restricted procedure (public negotiations);
- full competitive tendering within the framework of a formal open or restricted procedure.

In the past, the norm was for Member States to award contracts directly to the incumbent company. However, in a steadily increasing number of Member States, national or regional authorities are awarding public service contracts further to tendering procedures. When doing so, the contracting authority indicates clearly and in advance, in a transparent manner, the criteria according to which the contract will be awarded. The price proposed by the competing bidders is usually the most important criterion, whereas the quality aspect often does not receive sufficient attention. It should be noted though that the amended text of the PSO Regulation clearly states that the specifications of public service obligations should also, where possible, serve the objective of generating positive network effects, including the improved quality of services.

Figure 7 Overview of contract awarding procedures in Europe in 2016

Country	Formal award procedure	Comment
Austria	Direct award following negotiation and competitive tendering	Current contract awarded directly. The next contract should be tendered.
Belgium	Direct award following negotiation	
Bulgaria	Competitive tendering	Only one company participated in the tender.
Croatia	Direct award following negotiation	<i>De facto</i> direct award. The legal provision might need to be amended in light of the new text of Regulation 1370/2007.
Czech Republic	Direct award following negotiation and competitive tendering depending on the contract	The objective is to award an increasing number of contracts following a tendering procedure. However, given the density of traffic concerned and the shortage of applicants, it was not possible to switch to competitive tendering at once.
Denmark	Direct award following negotiation and competitive tendering	In 2016 approximately 20% of public service contracts were put to tender.
Estonia	Direct award following negotiation and competitive tendering	Given the state and the size of the market and different technical specifications on the network, the ongoing contract was directly awarded.
Finland	Direct award following negotiation	
France	Direct award following negotiation and competitive tendering	In June 2016, the Prime Minister along with the Association of French Regions announced their intention to launch an experimental project of opening up certain regional markets to competition. A law delineating the legal framework for this experimental phase has yet to be passed.
Germany	Direct and public negotiation and competitive tendering	In February 2011, the Federal Supreme Court ruled that direct awards of public contracts for passenger transport services will only be permitted under a few – strictly defined – conditions, so that, gradually, open tendering procedures will become the norm.
Great Britain	Competitive tendering	
Greece	Direct award following negotiation	
Hungary	Direct award following negotiation	The next public service contract in 2023/2024 will be awarded according to the provisions of the relevant regulatory regime at the time.
Ireland	Direct award following negotiation	
Italy	Direct award following negotiation and competitive tendering	Competitive tendering has to date been used by some regional authorities for part or all of their services (Veneto, Lombardia, Liguria, Emilia-Romagna and Piemonte).
Latvia	Competitive tendering	Only one company participated in the tender.
Lithuania	Direct award following negotiation and competitive tendering	Contract <i>de facto</i> directly awarded to the national operator as no other companies participated in the tender.
Luxembourg	Direct award following negotiation	
Netherlands	Direct and public negotiation and competitive tendering	Public service contracts for local railway services are awarded by way of a compulsory public tendering process.

Figure 7 Overview of contract awarding procedures in Europe in 2016 (continued)

Country	Formal award procedure	Comment
Norway	Direct award following negotiation and (gradually) competitive tendering	A Railway Reform White Paper, which was approved by the Parliament in June 2015, will bring about major changes in the Norwegian railway sector in the years to come. To that effect, competitive tendering will be introduced for passenger train services, grouped in bid packages.
Poland	Direct award following negotiation and competitive tendering	The vast majority of local voivodeships – with the exception of only three or four regions – prefer competitive tendering. Interregional and international traffic contracts are awarded directly by the Ministry to the operator of its choice, i.e. PKP Intercity.
Portugal	Direct award following negotiation and competitive tendering	One suburban line tendered so far.
Romania	Direct award following negotiation	
Slovakia	Direct award following negotiation and competitive tendering	Tendering not applied due to shortage of applicants.
Slovenia	Direct award following negotiation	
Spain	Direct award following negotiation	
Sweden	Competitive tendering	Direct negotiation is legally allowed but all contracts are tendered.
Switzerland	Direct award following negotiation and competitive tendering	Since 1996, when the legal basis for open tendering procedures was established, no contract for public services in the railway sector has been attributed through a public tendering procedure.

The table above shows that the single nationwide contracts and most of the regional contracts are awarded directly in a number of cases, however, there are political commitments to move towards an extended competitive tendering procedure in the next round of contracts. For instance, Norway and France are currently undergoing a complete legislative overhaul, which aims at restructuring the market for public passenger railway services towards a more competitive model that will put these public service contracts out to tender. Ten Member States have recourse to the direct negotiation procedure for the time being, while four countries

have a clear legal obligation to award public service contracts following a full competitive tendering procedure. Out of these four countries, two follow direct award procedures *de facto*, as there is only one participant in the tendering process. In any case, the example of Germany, where the process of direct award, although legally permitted, is clearly abandoned, should not be overlooked.

As just noted, there are a number of Member States, notably among the most recently admitted, i.e. Estonia, Latvia, Lithuania and Slovakia, where a tendering procedure is in place but

systematically leads to the incumbent operator 'winning' the tender. This phenomenon can be attributed to the fact that no other company responds to the tenders because it is known *ex ante* that the financial compensation will be inadequate. In such cases and given the obligation of continuity of the service that is borne by the operator, its very own viability might end up being at stake.

2.8 Contract negotiation

In principle, parties should negotiate the content of the PSO contract and come to an agreement regarding their mutual obligations (service provision on one side and payment on the other side). However, in some cases, the actual conditions under which a PSO contract is concluded lag behind these expectations.

When the contract is tendered out, the procedure is usually more straightforward. The operator submits its proposal along the lines of the Terms of Reference. After the submission of bids, negotiations take place in order to determine how specific requirements from both sides can be met. Thus a sort of balance between the contradicting interests of both parties can be achieved. In some cases, part of the requirements from the competent authority can ultimately be revised in light of the generated costs compared to the added value for the service.

When no public bid is held and the contract is directly negotiated between the parties, the railway undertaking submits to the competent authority a detailed analysis of the conditions underlying the running of the service. This analysis includes a breakdown of the foreseeable costs and revenues. This is a situation where some form of disequilibrium in the negotiation

may appear. When a direct negotiation is carried out with the incumbent company, it may be difficult for the latter to effectively discuss the terms of the services required. Consequently, competent authorities often use the direct award procedure to impose their own conditions, whilst not fully compensating the cost of the services required.



2.9 General payment conditions

Payments are generally made on a regular basis, usually through monthly instalments. What should be highlighted is that, in some Member States, for instance Greece, Italy, Portugal, Slovakia and Lithuania, the payment system is unreliable, which leads to liquidity shortages and other problems for the operations in question (see Chapter 3 and individual country reports in Part 2 for more detail).

With regard to the tax burden of this compensation, no clear pattern can be discerned on the application of value added tax (VAT). In some Member States, railway undertakings are exempt of VAT charges for public service transport compensation. In other countries, VAT is imposed but can be recovered. This depends upon the specificities of each jurisdiction in question.

Another important parameter of the PSO system is the provision of services that meet a minimum quality level, as well as, in the majority of cases, the fulfilment of a set of performance indicators.¹³ Observance of the aforementioned quantitative and qualitative criteria is

regularly checked and monitored and affects the level of compensation in a negative or positive way. To that effect, the amended PSO Regulation imposes an obligation on the competent authority – irrespectively of whether the contract was tendered or directly awarded – to periodically assess (at least every five years) and make public whether the railway undertaking has achieved its targets to meet the performance requirements. The competent authority must then adopt effective deterrent mechanisms, i.e. a penalty system, if required improvements in quality of services and/or cost-efficiency are not undertaken.

Apart from the specifications stipulated in the established bonus-malus systems (or any other penalty system), it is important, in order to have an accurate overview of all the possibly associated costs, to examine the degree of application of the EU's Passenger Rights Regulation 1371/2007.¹⁴ Naturally, non-observance of qualitative standards and violations of the Passenger Rights Regulation are interrelated.

Figure 8 Payment conditions in the different Member States

Country	Interval	Regularity	VAT
Austria	Monthly	✓	No
Belgium	Monthly	✓	No
Bulgaria	Monthly	✓	Yes
Croatia	Monthly	✓	No
Czech Republic	Monthly	✓	No
Denmark	Monthly	✓	No
Estonia	Monthly	✓	No
Finland	Monthly	✓	/
France	Monthly	✓	Yes
Germany	Regular	✓	No ¹⁵
Great Britain	Monthly	✓	No
Greece	Every third month	X	Yes
Hungary	Monthly	✓	No
Ireland	Monthly	✓	No
Italy	Yearly	X	Yes
Latvia	Monthly	✓	No
Lithuania	Monthly	✓	No
Luxembourg	Monthly	✓	Yes
Netherlands	Quarterly	✓	Yes ¹⁶
Norway	Quarterly	✓	No
Poland	Monthly	✓	No
Portugal	Discretionary	/	Yes
Romania	Monthly	✓	No
Slovakia	Monthly	✓	No
Slovenia	Monthly	✓	Yes
Spain	Yearly	✓	Yes
Sweden	Monthly	✓	Yes ¹⁷
Switzerland	Quarterly	✓	No

¹³ The performance requirements cover in particular punctuality of services, frequency of train operations, quality of rolling stock and transport capacity for passengers.

¹⁴ Regulation (EC) No 1371/2007 of 23 October 2007 on rail passenger rights and obligations

¹⁵ The payment is regularly exempted from VAT.

¹⁶ VAT can be recovered.

¹⁷ VAT can be recovered.

Figure 9 Overview of the application of EU Regulation 1371/2007 regarding passenger rights and the application of penalty systems for railway undertakings

Country	Full application of Reg. 1371/2007	Penalty system applicable to PSO	Exemption from some articles of Reg. 1371/2007	Full exemption from all non-mandatory articles of Reg. 1371/2007
Belgium	•		•	
Bulgaria		•		•
Croatia		•		•
Czech Republic		•	•	
Denmark	•	•		
Estonia		•	•	
Finland		•	•	
France		•	•	
Germany ¹⁸		•	•	
Great Britain		•		•
Greece			•	
Hungary		•	•	
Ireland		•		•
Italy	•	•		
Latvia		•		•
Lithuania			•	•
Luxembourg		•	•	
Netherlands	•	•		
Norway		•		/
Poland		•	•	
Portugal				/
Romania		•		•
Slovakia		•	•	•
Slovenia	•	•		
Spain		•	•	
Sweden	•	•		
Switzerland		•		/

It is regrettable that, in most cases, penalties are foreseen instead of bonuses for good performance. The granting of incentives would foster service quality and enhanced performance and would encourage positive innovation.

In this context, the quality of the infrastructure plays a major role as it has a direct impact on the performance and quality of services an operator can offer. It is often difficult to account for the effective price of 'quality' when calculating the level of compensation needed. The application of the Passenger Rights Regulation forces operators to face increased costs in cases of delays or cancellations. When such disruptions of service occur due to infrastructure problems, railway operators often have very few means to obtain reimbursement of the fines they had to pay to passengers. This is why a number of Member States have opted for broad exemptions from the application of the Passenger Rights Regulation, as displayed in Figure 9.

¹⁸ Currently, there is only one exemption from the application of the Passenger Rights Regulation for rail transport: regional services are exempted from the obligation to provide food or drinks on board.

2.10 Duration of public service contracts

Regulation 1191/69 did not address the question of the duration of the public service contract; i.e. it did not set a minimum or maximum duration. It simply required for the contract duration to be specified in the contract. As a result, some contracts concluded under the old regime were concluded for quite a long period and are still valid. On the contrary, the amended text of Regulation 1370/2007 sets the maximum duration for public service contracts to 15 years. However, if the contract is awarded directly (i.e. outside of a competitive tendering procedure), the maximum duration is brought down to 10 years.

There is the possibility to extend the duration of a PSO contract:

- by a maximum of 50% of the duration of the initial contract, to take into account the depreciation of assets provided by the operator which are significant for the discharge of the obligation, or when required by the particular geographical situation, i.e. in the remotest regions;
- by more than 50% of the initial contract, if justified by the need to amortise heavy investments (exceptional infrastructure, rolling stock or vehicular investment) and on the condition that it is notified to the Commission. This possibility for extension is limited to contracts awarded following a competitive tendering procedure.

In order not to destabilise the market, the new Regulation 1370/2007 foresees a broad transition period during which existing contracts can continue to be applied within a reasonable period of time. In particular, existing contracts are to remain in place where the termination of the services at stake would entail adverse economic consequences.

The continuation of such contracts is submitted to the European Commission for monitoring and approval.

More specifically, the duration of the contract will vary depending on the date and the procedure according to which it is awarded. The validity rules are summarised in Figure 10.

Figure 10 **Contract duration validity rules according to the amended Regulation 1370/2007**

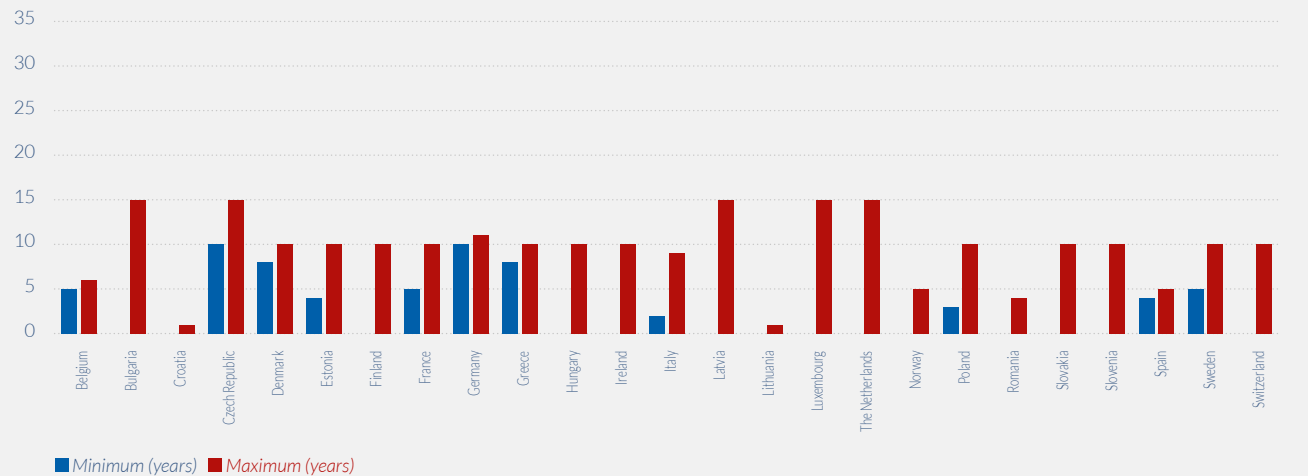
Contract award date	Award procedure	Duration of validity
Before 26 July 2000	Competitive tendering	Until expiration
As of 26 July 2000 and before 3 December 2009	Competitive tendering	Until expiration but no longer than 30 years
As of 3 December 2009	Competitive tendering	Until expiration but no longer than 15 years (without taking into account possible extension of the contract's duration)
Before 26 July 2000	Direct award	Until expiration but no longer than 30 years
As of 26 July 2000 and before December 2017	Direct award	Until expiration provided it is of a limited duration as foreseen in the Regulation
Between December 2017 and 3 December 2019	Direct award	Until expiration but no longer than 10 years, except where Article 4 (4) applies
Between 3 December 2019 and December 2023	Direct award on the basis of Art. 5 (6)	Maximum 10 years

The chart below highlights the discrepancies in duration of public service contracts throughout the EU. In the EU-15, contracts generally have a minimum duration of two to ten years with the majority of contracts having a fixed duration. The duration of the contracts is generally linked to the importance of investments that need to be accomplished by the operating company.

Within the EU-13 bloc there has been a notable change in the duration of public service obligations since 2005, when the first edition of this brochure was published. At the time, most of the contracts were awarded for a one-year period. This was probably due to the fact that contracts were inexistent and that public service transport was organised differently and paid from the central budget as any other expenditure. Any

'contracts' or equivalent arrangements were therefore entirely dependent on the annual outlook for the national budget. Today, however, the situation has evolved as in an increasing number of countries, allowing for investments and reasonable planning aimed at improving passenger services (Slovenia, Slovakia). However, some countries still opt for short-term arrangements (Croatia, Lithuania, Romania and Poland).

Figure 11 Overview of PSO contract duration throughout the EU



No provisions made regarding contract duration in Portugal
Data not available for Austria and Great Britain



2.11 Rolling stock

The attractiveness of passenger services and their ability to trigger modal shift will depend on their reliability and quality. In this regard, the quality of rolling stock in general, and its age in particular, can have a great impact on the overall quality of the service provided to the passenger.

However, profound discrepancies regarding the quality of rolling stock can be traced throughout Europe, since a significant number of companies in various Member States operate public service passenger transport using relatively old rolling stock. Indicatively, it should be noted that in Bulgaria, Croatia, Hungary, Latvia, Lithuania, Poland, Romania, Slovenia and Portugal, a large part of the rolling stock is over thirty years old. On a more positive note, during the past 5-6 years, important investments in renewals and refurbishments have taken place, for instance in the Czech Republic, Estonia, Romania, Slovakia and Slovenia. This process has been substantially boosted through European funding projects.

Quality deficiencies in rolling stock are not of course geographically restricted to the EU-13, but constitute a substantial issue that warrants attention in various countries that form part of the bloc of

EU-15, such as Belgium, Italy, France and Sweden. However, the age of the rolling stock is not in all cases suggestive of its quality, for instance in Sweden the reconditioning/refurbishment of the old fleet used for the provision of long-distance services is to such an extent that passengers cannot spot the difference when compared to new rolling stock. In Sweden almost the entire fleet of vehicles used in the publicly procured local and regional services is no more than 20 years old and a large part not older than 10 years old.

In most cases the rolling stock is the property of the railway undertaking operating the agreed services. There are of course several cases where the awarding authority is the owner of the rolling stock used for the discharge of the PSO, while there is a growing trend for leasing companies that handle the relevant rolling stock, such as Rosco in Germany and Transitio in Sweden.

When the financing of rolling stock forms part of the public service contract, and is thus covered partially through the relevant compensation, the rolling stock remains attached to the services rather than to the company, unless the duration of the contract corresponds to

the amortisation of the rolling stock in question. The technical characteristics in terms of speed, number of seats or level of comfort of any new trains acquired to carry out a PSO is often defined in the contracts alongside the conditions for the use of the trains on specified routes.

Effective and non-discriminatory access to suitable rolling stock is a key parameter for safeguarding open access to competitive tendering procedures, particularly since the technical requirements for the rolling stock used in tendered services have become increasingly demanding. Small operators that do not have access to their own rolling stock or the financial means to engage in costly investments might be reluctant to bid or might be *de facto* deterred from doing so. To that effect, the amended Regulation 1370/2007 clearly imposes on the awarding authorities the obligation to assess whether measures facilitating access to rolling stock need to be adopted and subsequently elaborate a report that should be publicly available. In their assessment the authorities must also take into consideration the presence of rolling stock leasing companies, or of other market actors providing for the leasing of rolling stock in the relevant market.



2.12 Involvement of the regulatory body or other authorities in public service contract discussions

In 2010, railway regulatory bodies were set up in all EU Member States.¹⁹ These bodies are in charge of licensing issues and, as foreseen in Directive 2007/58, are entrusted with the assessment of whether the economic equilibrium of a public service contract would be compromised by the operation of a new international passenger service.

Directive 34/2012 establishing a single European railway area took a step further by clearly instituting these bodies. Article 55 sets out its legal basis: “Member States shall establish a single national regulatory body for the railway sector. This body shall be a stand-alone authority which is, in organisational, functional, hierarchical and decision-making terms, legally distinct and independent from any other public or private entity.”²⁰

Moreover, the Directive sets out the regulatory body’s independence from any infrastructure manager, charging body, allocation body or applicant regarding its organisation, funding decisions, legal structure and decision making. Needless to say, it deems it functionally independent from any competent authority involved in the award of a public service contract.²¹

In addition, the Directive allows for railway undertakings to appeal to the regulatory body if they believe that they have been unfairly treated, discriminated against or aggrieved in any way, and in particular against decisions adopted by the competent authorities.

It should be highlighted that the new text of Directive 34/2012, as amended by the Fourth Railway Package, extends the regulatory bodies’ economic equilibrium assessment duty to all requests for open access rights, irrespectively of whether they concern an international, or, as from January 2019, a domestic service. The assessment should be concluded on the basis of an objective economic analysis, including certain predetermined criteria and following a relevant request submitted by an interested party.

Today, in some Member States, the regulatory body (or another designated body) has specific powers with regard to the operation of public service contracts.

Figure 12 Overview of basic powers exercised by regulatory bodies or other bodies at national level relating to the provision of public service transport

Country	Involvement of the regulatory body or other entity in public service issues
Austria	- Contracting authority on behalf of the Ministry - Controls quality criteria
Czech Republic	- Guarantees the eligibility of an applicant for a PSO contract
Estonia	- Deals essentially with safety-related issues
Germany	- Regulates access fees to stations - Regulates elements of train access fees to infrastructure (‘regional factor’) - Information and coordination of construction measures (track works especially) - Market monitoring
Hungary	- Controls quality criteria set out in the contract
Norway	- Monitors the rail market - Handles competition-related issues and complaints
Poland	- Issues decisions on open access - Assesses the drafts of the PSO contracts - Safeguards the effective implementation of the Passenger Rights Regulation
Slovakia	- Regulates the maximum price level in passenger transport - Regulates the maximum level of track access charges for PSOs - Awards licences and makes inspections
Slovenia	- Carries out safety controls
Switzerland	- Monitors that network access is non-discriminatory

¹⁹ Some Member States set up their rail regulatory body before this date, but others were compelled to do so in 2010 under the pressure of the European Commission infringement procedures launched back in 2009.

²⁰ Directive 34/2012 of 21 November 2012 establishing a single European railway area, Article 55

²¹ Directive 34/2012 of 21 November 2012 establishing a single European railway area, Article 55

PART 1

3 Public service financing: the *'heart of the matter'*

- 3.1 Overview of the provisions foreseen in the amended Regulation 1370/2007
- 3.2 Current state of the art: too much under-compensation
- 3.3 The problem of under-compensation

The financial aspect of public service contracts remains today at the heart of the matter. We can ascertain this from a business or economic perspective, a purely legal one and more importantly, from a political perspective. The prevailing economic conditions in PSO traffic are dictated by political decisions based on national (centralised and/or decentralised) social welfare and environmental policies. Theoretically, these political objectives should be supported by an adequate financial framework. Too often, however, short-term budgetary discretion has an important impact on rail transport, as can be seen from the individual country reports included in this brochure.

The amendments to the PSO Regulation 1370/2007, approved by EU legislators in December 2016 in the text of Regulation 2016/2338 (under the Market Pillar of the Fourth Railway Package), sought to tackle and effectively eliminate any possibility of overcompensation, but did not adequately address the issue of under-compensation. The very vague provision that the level of compensation must adequately ensure the long-term financial sustainability of the public passenger transport service has no particular enforceability, since it leaves the crux of the issue, i.e. the criteria against which the sufficiency of compensation can be assessed, unaddressed.



3.1 Overview of the provisions foreseen in the amended Regulation 1370/2007

Regulation 1370/2007 lays down the basic principle which states that costs incurred through public service obligations must be properly compensated: there must be neither overcompensation nor under-compensation. These principles can be found throughout the Regulation:

- “To this end, this Regulation lays down the conditions under which competent authorities, when imposing or contracting

for public service obligations, **compensate** public service operators **for costs incurred** and/or grant exclusive rights in return for the discharge of public service obligations”¹

- “Public service contracts and general rules shall [...]

b) establish in advance, in an objective and transparent manner:
(i) the 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;²

c) determine the arrangements for the allocation of costs connected with the provision of services. These costs may include in particular the costs of staff, energy, infrastructure charges, maintenance and repair of public transport vehicles, rolling stock and

1 Regulation (EC) No 1370/2007 of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC), Article 1.1
2 Ibid. Article 4 para. 1 point b, as amended by Regulation (EU) 2016/2338 of 14 December 2016

installations necessary for operating the passenger transport services, fixed costs and a suitable return on capital.”³

- “In order to avoid overcompensation or **lack of compensation**, quantifiable financial effects on the operator’s networks concerned shall therefore be taken into account when calculating the net financial effect [of the compensation]”⁴

and

- “the costs of the public service must be balanced by operating revenue and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator’s activity”.⁵

Thus, the level of compensation should, in principle, be subject to discussions and effective negotiations between the parties, regardless of whether the contract is awarded following a tendering process or whether it is directly negotiated with a determined operator.

In principle, the process under the new PSO Regulation is as follows. The public authority outlines its expectations according to its political objectives, while the applicants try to provide the most competitive business offer within a **tendering process**. The price of the offer plays an important role, but it is not paramount, for quality and performance remain increasingly significant criteria including self-initiative (out of the budget). It must be noted that the final price comprises a reasonable profit for the future operator.

The Regulation demands full transparency regarding payment conditions and separation of accounts (as in other EU rail legal texts⁶). The objective pursued by the European Commission with this text is to ensure that Member States do not make use of public service contracts to provide illegal or incompatible state aid to railway undertakings. In other words, public money granted for public service transport obligations cannot flow back to non-subsidised commercial activities.

The national regulatory body is, in general terms, empowered to monitor separation of accounts in application of EU law. In this context, it must ensure that no such overcompensation has been granted, as well as monitor any issues of under-compensation.

When the public service contract is **awarded directly**, compensation must comply with the rules laid down in the Annex of Regulation 1370/2007. It should be noted that the main principles of the Annex correspond to those that should be applicable in any normal and fair tendering process:

- The compensation may not exceed the **net financial effect** equivalent to the total of the effects,⁷ positive or negative, of the public service obligation costs and revenue of the operator;
- In order to avoid cross-subsidies, the **accounts** of the operator must remain **strictly separated**. In particular, the annex requires that “costs are balanced by operating revenue and payments from

public authorities, without any possibility of transfer of revenue to another sector of the public service operator’s activity”.

- **Reasonable profit** is defined as the rate of return on capital that is normal for the sector in a given Member State and that takes account of the risk, or absence of risk, incurred by the public service operator by virtue of the intervention by the public authority.

The new text of Regulation 1370/2007 explicitly foresees that the method of calculating the level of compensation must promote the maintenance or development of effective management by the public service operator and the provision of high quality transport.

On a more general note, the method of payment can have a direct impact on the adequacy of the level of compensation and can be used as an effective tool to avoid not only overcompensation, but also under-compensation. On the basis of the country reports two categories of payment can be discerned:

³ Ibid. Article 4 para. 1 point c, as amended by Regulation (EU) 2016/2338 of 14 December 2016

⁴ Ibid. Annex, Point 3

⁵ Ibid. Annex, Point 5

⁶ In particular Council Directive 91/440/EEC of 29 July 1991 on the development of the Community’s railways as successively amended

⁷ The effects are to be assessed by comparing the situation where the public service obligation is met with the situation which would have existed had the obligation not been met. The net financial effect can be calculated as follows:
Public service obligation costs

- minus any positive financial effects generated within the network operated under public service obligations
- minus ticket revenues (where applicable) or other revenues generated by the public service transport
- plus a reasonable profit

- **Compensation determined *ex ante* and not readjusted depending on the actual costs incurred.** In this case, for directly awarded contracts the assessment relies on historic costs, while for publicly tendered contracts the compensation depends on the price proposed by the winning bidder on the basis of its own assessment of forecast costs. In the vast majority of European countries this is the preferable option.
- **Compensation paid in advance on the basis of a fair estimate and then regularised, at the end of a certain period, on the basis of the actual costs incurred.** This process occurs in very rare cases, i.e. in Lithuania, Luxembourg and Slovakia. It can either lead to a reimbursement of any overcompensation granted to the operator by the awarding authority, if the actual costs are lower than those forecast, or to an additional payment, if the actual costs were higher than expected.

The economic equilibrium of public a service contract is to be determined by its financial structure. There are two basic types of public service financing mechanisms: the so-called 'net' and 'gross' contracts.

- In a **net contract**, revenues generated by ticket sales are accumulated by

the operator as part of its payment for the services required by the public authority. This form of contract is increasingly used in the EU as it provides a strong, natural incentive for the operator to increase ridership and customer satisfaction. It is also often regarded as an appropriate basis for the distribution of responsibilities between the public authority and the operator, leaving the latter some leeway to invest in product and quality innovation. It is also a way for the public authority to have the operator take on the risk of changes in ridership.

- In a **gross contract**, ticket revenues go fully to the public authority, which then rewards the operator to carry out the required services. This form of contract is often used when the public authority wishes to retain the full responsibility for the customers. It can go together with certain economic incentives for the operator.

While a gross contract is rather straightforward in economic terms, the operator's business plan under the net contract is heavily dependent on ticket revenues.

To that effect, net contracts, might be more susceptible to disturbances caused by the entry of a new competitor that will '**cherry pick**' the most profitable

lines of the traffic that falls under PSO. This disequilibrium of the contract could instigate unforeseen and damaging economic consequences for the operator, and may eventually lead to higher costs for passengers and degraded public services.

In some cases, cherry picking is an element of the contract. It may be fully foreseen and it is then for the operator to calculate the degree of risk he can bear. This must be taken into consideration when calculating the level of compensation.

3.2 Current state of the art: too much under-compensation

Public service obligations are to be compensated either through **direct financial input**, including a reasonable profit and/or through the award of **exclusive rights**. In practice it appears that most operators benefit from financial compensations while the exclusive rights are not necessarily provided.

Regulation 1370/2007 requires in its Annex that the “costs of the public service must be balanced by operating revenues and payments from public authorities, without any possibility of transfer of revenue to another sector of the public service operator’s activity.”⁸

Data collected by CER show that in practice a considerable number of Member States, particularly among those belonging to the EU-13 bloc, still under-compensate the requested public service obligations. According to this data, in Eastern European countries only 64.5%, on average, of the net costs incurred for the discharge of the PSO was covered by the compensation granted in 2015. This has undoubtedly marked a significant downturn, which is striking to anyone who would for instance compare this version of the PSO Brochure to the one drafted in 2011, when this percentage

was ‘soaring’ at 71% (according to data from 2009). It is evident that the chasm between the EU-15 and EU-13 as regards the degree of compensation is probably more profound than ever.

It is interesting to note that in some countries, i.e. the Netherlands and Norway, infrastructure charges for public service transport are very low or even non-existent as a deliberate policy decision taken by the awarding authority to help balance the costs incurred by the services. In many countries, track access charges for public service transport operations are lower in order to limit the level of public service compensation. The consequence is that the infrastructure manager has to compensate for that loss by increasing the level of freight access charges, which in return negatively affects the competitiveness of rail freight services.

According to Commission RMMS data,⁹ between 2011 and 2014 PSO compensation increased in absolute terms in eleven countries (Austria, Belgium, Denmark, Germany, Estonia, France, Italy, Luxembourg, Latvia, Poland and Norway) and decreased in seven countries (Bulgaria, the Czech Republic,

Hungary, Lithuania, Portugal, Romania and Great Britain).

The question of **reasonable profit** is also an important issue. What constitutes a reasonable profit is not precisely defined in Regulation 1370/2007. It will obviously depend on the degree of risk the company operating the services is going to take and, in theory, should be the subject of effective negotiations between the parties. A reasonable profit is foreseen in the majority of contracts. However, as can be clearly seen in the individual country reports, a reasonable profit is foreseen even in contracts for which the actual level of compensation does not suffice to fully cover the actual net costs. In these cases, the inclusion of a reasonable profit is therefore a pure formality.

The Commission, in its *Danske Statsbaner* Decision,¹⁰ considered that a reasonable profit of 6% was acceptable given the other circumstances relating to the financing of this specific contract. It should be stressed that the level of reasonable profit will generally correspond to the overall economy of the contract. It is therefore difficult to consider this fixed figure as a principle

likely to be applicable in all cases. On the contrary, it will vary to a certain extent in each case, depending on the specificities of the contract, and in particular on the degree of risk taken by the operator as well as on what is generally considered to constitute a ‘reasonable profit’ in the country in question. In other words, there is no objective standard of what a reasonable profit should be that applies uniformly throughout the EU.

The European Commission, in 2014, published interpretative guidelines concerning Regulation 1370/2007, which outline the Commission’s understanding of the Regulation’s financial aspects. The Court of Justice will, as always, be the ultimate arbiter to rule upon such matters.

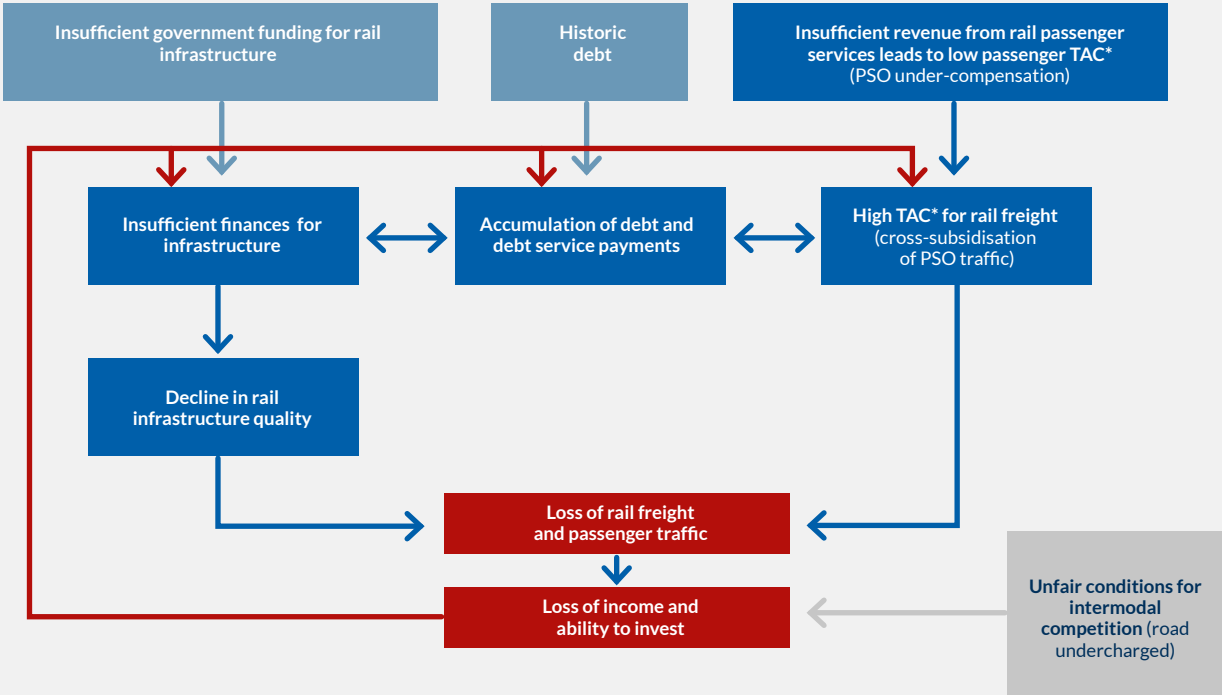
⁸ Annex to Regulation 1370/2007, Point 5, third indent

⁹ See Commission Staff Working document accompanying the *Fifth report on monitoring developments of the rail market*, European Commission, 8 December 2016, page 78.

¹⁰ European Commission Decision C 41/08

3.3 The problem of under-compensation

Figure 13 Consequences of public service under-compensation



* TAC = track access charges

Source: CER

Given that in countries belonging to the EU-13 bloc, where the issue of under-compensation is more widespread, almost the entire scope of rail passenger transport falls under PSOs, the degree of deficit inevitably leads passenger rail companies into a downward spiral of financial losses and reduced competitiveness, thus forcing them into short-term borrowing. Among the various tangled matters of concern, the most compelling include:

- **Implicit obligations not explicitly required by public authorities:** railway undertakings sometimes continue to provide services not covered by a public service contract in order to avoid the likelihood of politically coloured repercussions if they decide to close them.
- **Compensation through commercial revenues:** losses are compensated through the allocation of revenues from freight to public service passenger operations (cross-subsidies) which eventually affects the viability of commercial freight activities. While this could be a valid commercial choice for a healthy railway undertaking, it is unjustified when imposed by a public authority or where an authority's idleness leaves the railway undertaking no choice but to cross-subsidise.

- **Quality implications:** railway undertakings, particularly but not exclusively in the new Member States, suffer from chronically insufficient renewal of their rolling stock. The average age of rolling stock used for public service transport in new Member States is 30 years, which naturally has a negative impact on the quality of services offered to customers.
- **Low availability of rolling stock:** the old rolling stock is costly to manage due to recurrent breakdowns and shortage of spare parts. This affects the overall capacity available to clients.
- **Modal shift:** the low reliability and quality of service results in modal shift to less environmentally friendly transport modes such as road.
- **Competitiveness:** the adversities enumerated above, affect the overall competitiveness of the railway undertakings operating PSO traffic without receiving adequate compensation vis-a-vis new market players and railway undertakings that are properly compensated.

On a concluding note, another indirect repercussion could emerge in relation to competitive tendering procedures. Naturally, the tendering of a public service which is known in advance to be inadequately compensated cannot succeed in any meaningful way. Tendering can be realised in formal terms, but positive effects from competition for the market can only occur if there are competing bids. In other words, the main objective envisaged in the Fourth Railway Package – i.e. the opening of the domestic passenger traffic through the wide application of open access rules and public tendering procedures – has very few chances of being accomplished, without first resolving the issue of under-compensation in a pragmatic way.







PART 2

Country Reports

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Belgium

1. Organisation of public service operations in Belgium

The organisation of public services in Belgium is regulated in accordance with the following pieces of legislation:

- Law of 21 March 1991 reviewing some public enterprises (*Loi portant réforme de certaines entreprises publiques économiques*)
- The Belgian Railway Code of 30 August 2013 (*Code ferroviaire belge*)
- Regulation (EC) No 1370/2007, which entered into application in December 2009.

The Belgian law of 1991 foresees that, in principle, the state can enter into a contract for public service obligations with public enterprises, the so-called '*contrat de gestion*'.

This law of 1991 in fact clarifies the nature of public service operations that may be entrusted to public companies in Belgium. It provides, among other items, for:

- the tasks to be undertaken by the public enterprise to execute public services it has been allocated;

- tariffs applicable to public service missions;
- conduct rules vis-à-vis the consumer;
- setting the level of public financial compensations and payment modalities, whilst taking due account of revenues generated by the operation of public service operations;
- the sanctions to be applied in case one of the parties to the contract does not respect its obligations.¹

It should be noted that the scope – and in particular the financing aspects – of public service obligations are not enshrined in the Law of 1991 but are the object of negotiations between the parties and are stipulated in the contract itself.

Public service transport is managed centrally by the Belgian Federal Authority, which is competent for all railway transport and financing matters.

The domestic passenger rail market is currently not open to competition. Other railway undertakings than the incumbent SNCB/NMBS currently only operate international lines on a commercial basis (Thalys, Eurostar and ICE).

In Belgium, public service rail transport represents 100% of domestic passenger traffic. In other words, local, regional and long-distance traffic is considered as public service transport, bearing specific traffic and tariff obligations. This is mainly due to the size of the country and the number of commuters crossing the country on a daily basis to reach their workplace.

International passenger traffic is open to competition. Up till now, though, no operator has really made more than marginal use of the cabotage possibilities. The only tangible examples of cabotage rights in Belgium are limited to the operation of routes from Brussels to Cologne and Brussels to Amsterdam by Thalys, and from Brussels to Cologne and Frankfurt by DB/ICE. The possibility of offering cabotage on the Belgian market is also conditioned by the fact that domestic passenger traffic falls under public service obligations.

¹ It should, however, be noted that even if an obligation is not respected by one of the parties to the contract, the rest of the obligations must nevertheless be executed. The injured party may receive damages to compensate this, notwithstanding the possible sanctions provided for explicitly in the contract. In practice this means that if the railway operator for example is not properly compensated for the operation of public service operations, it is nevertheless obliged to execute such obligations. The railway operator will then be entitled to receive damages – in theory.

2. Operators on the market for public passenger service transport

The Société Nationale des Chemins de Fer Belge (SNCB/NMBS) is the passenger rail operator on the Belgian market. It is a public law company with limited liability (*société anonyme (SA) de droit public*). It underwent restructuring in 2005 and again in 2014. As of 1 January 2014, two autonomous public companies each have a separate public service contract (*contrat de gestion*) with the state:

- SNCB/NMBS is in charge of passenger transport (national and international) and real estate.
- Infrabel is the infrastructure manager.

Besides these two autonomous public companies, HR Rail, also a public company (but not falling under the 1991 law and thus not considered an economic or autonomous public company), as a daughter company of SNCB/NMBS, Infrabel and the Belgian state, manages the recruitment and personnel affairs for both autonomous companies.

SNCB is the sole operator on the domestic passenger rail market in Belgium. On international commercial

routes, however, competition has developed, various operators having entered the market (Thalys, Eurostar, DB/ICE): DB/ICE operate commercial international traffic in cooperation with SNCB/NMBS, and since 2010, Eurostar International Ltd have been operating international traffic through Belgium. As from 1 April 2015, Thalys (operating before on a cooperative basis) became a distinctive passenger railway undertaking operating international traffic through Belgium.

3. Definition of public service requirements

Public service obligations usually consist in:

- a set of obligations for domestic passenger transport (these obligations detail the type of train to be used for the specific traffic, minimum number of train-kilometres per day, degree of comfort required, scope of information to be provided to the customer, level of quality, access, etc.);
- quality criteria;
- a set of fare obligations (level of fares, scope for increase in level, etc.);
- all fare reductions that must be applied (linked to social criteria, family, public,

patriotic, etc.) that are totally or partially compensated by the state;

- obligations with regard to the management of rail infrastructure;
- investments that are imposed (and financed by the state);
- rules to be followed in case of investment (procedure to be followed, submission of projects to public authorities prior to any decision, etc.).

Quality criteria are an important part of the discussions. The key criteria relate to punctuality, chances for the passenger to get a seat, cleanliness, passenger information in trains and stations, and complaint management.

4. Scope of public service transport by rail

Purely national rail passenger transport in Belgium is run as a whole under public service contract, whereas, in general, cross-border services are run on a commercial basis (see sections 1 and 2 above).

As part of its public service contract with the state, SNCB/NMBS operates its trains to a number of the first cross-border stations in France, Luxembourg, Germany and the Netherlands. To that

effect, SNCB/NMBS coordinates and concludes the necessary agreements with the neighbouring operators or states governing important aspects of these operations, such as fare discussions. With Luxembourg, in particular, the framework agreement is concluded between the two governments. It should be highlighted that there are no private railway undertakings operating on those lines.

Public service rail transport in Belgium – according to data from 2015 – is provided by approximately 3 401 trains per day, which represents 9 927 million passenger-kilometres per year. The average ticket price in 2015 was EUR 2.73, including all fare types, i.e. tickets, passes and cards.

Other modes than rail, i.e. bus, tram, metro, are covered by separate public service contracts between different regional/local authorities and regional/local operators (other than SNCB/NMBS).

5. Contract

Currently, rail public service obligations are included in one single civil law contract – the '*contrat de gestion*' for the whole territory – that covers the following types of services:



Belgium

- public service passenger transport within the territory;
- acquisition, building and maintenance, management and financing of rolling stock;
- services that need to be performed to satisfy 'needs of the Nation';
- cross-border passenger services until the first stop across the border.

The current public service contract was directly awarded to SNCB/NMBS in 2008 and its application extends until the conclusion of a new contract. The new contract, which will be directly awarded, is currently being discussed/drafted. Its content and duration will comply with the prescriptions foreseen in the new PSO Regulation (Regulation 2338/2016 replacing Regulation 1370/2007).

6. Awarding of public service contracts

Rail public service is subject to a contract, thus its particular provisions are not foreseen and specified within a separate general legal framework. The rail public service contracts are negotiated directly with SNCB/NMBS and awarded by the national Government.

7. Contract negotiation

In Belgium these discussions take the form of a negotiation between the parties to the public service contract. In practice, the railway company presents its business case with regard to the extent of the public service operations to deliver on a yearly basis and submits a detailed cost assessment to the Ministry of Transport.

The SNCB/NMBS contract with the state is to be considered as a 'net' contract.

As to the fulfilment of the requisite level of quality stipulated in the contract, various methods of assessment are foreseen. To be more specific, the current PSO contract prescribes quite a number of different reports, to be delivered to the state with different periodicities (yearly/quarterly/monthly), in addition to the overall yearly evaluation process. As regards the requirement for investments, regular financial controls and frequent evaluation meetings take place.

8. Calculation of the level of compensation

Compensation levels are determined in advance, and based on a fixed and a variable component that depends

on the required extent of passenger-kilometres to be operated under a PSO.

The compensation is awarded in the form of both financial influx and exclusive rights on the entire network (with a view to limit the overall level of financial support), thus no 'cherry-picking' is allowed.

9. General payment conditions

Payments are made in regular instalments at determined intervals. The railway company and the infrastructure company bear all risks in relation to the execution of the contract. This means that they will have to cover any deficit developed during the execution of the contract. The payment is not subject to VAT.

There is a bonus/malus mechanism providing for the imposition of a fine to either the railway operator (passenger or freight) or the infrastructure manager, in case of a relatively high amount of minutes of delay caused by deficiencies in their operations. Accordingly, a bonus scheme is foreseen, if the sum of minutes of delay is kept at a relatively low level.

Passengers must also be compensated in case of delays according to the laws

that are currently in force. In Belgium Passenger Rights Regulation 1371/2007 is fully applicable without any exemptions whatsoever.

On a concluding note it should be highlighted that the available public budget for rail has been drastically reduced since 2010.

10. Duration of public service contract

The public service contract is routinely concluded for a duration of up to five/six years.

11. Rolling stock

Rolling stock used in the context of the public service contract is owned by SNCB/NMBS. It is financed through the contract itself and remains allocated exclusively to the operation of the contract. The SNCB/NMBS investment plan is also an integrated part of the contract with the state.

The vast majority of the fleet is relatively old. The average age of the fleet operated by SNCB/NMBS for the discharge of the PSO in 2015 was 20 years old. In more detail: 40.7% of the rolling stock is

more than 30 years old, 4.7% is ranging between 20-30 years of use and 29.5% between 10-20 years, while 25% is newer than 10 years old.

A part of the EMUs is already modernised, while other EMUs are currently being modernised or will be modernised in the near future. However, there are no plans for modernising the coaches, which are in the majority of cases relatively new.

12. Involvement of the regulatory body or other authority

No other authority other than the Transport Ministry is involved in public service contracts.



Bulgaria

1. Organisation of public service operations in Bulgaria

In Bulgaria public passenger railway transport is regulated in accordance with Regulation (EC) No 1370/2007, which is directly applicable, and the Bulgarian Regulation for the Assignment and Execution of the Obligations for Performing Public Service Transport, which has been in force since 1 January 2002.

Public service transport is managed centrally by the Council of Ministers of the Republic of Bulgaria, represented by the Ministry of Transport.

The entire rail passenger market is open to competition:

- The vast majority of domestic passenger traffic falls under the country's single public service contract, representing 95% of passenger-kilometres.
- Long-distance passenger transport operated on long-distance and intercity trains is run on a commercial basis.
- International passenger transport by rail is also operated on a commercial basis. It should be noted that no new operator has made use of the possibility for cabotage since the opening of the international passenger market to competition in 2010.

It is worth noting that only a small percentage of passengers, i.e. 5%, travel by rail in the country, while the market share covered by water and air transport is insignificant. The vast majority has opted for road-based solutions.

2. Operators on the market for public passenger service transport

There is currently only one operator, BDZ Passengers EOOD, in charge of the entire public passenger railway traffic in Bulgaria.

3. Definition of public service requirements

Public service obligations are defined in the aforementioned Railway Act as well as in the contract concluded with the Ministry.

Public service obligations essentially relate to:

- obligation to transport on the entire network;
- tariff obligations (especially with certain categories of population);
- essential quality standards.



Bulgaria

The essential quality standards relate to:

- regularity and punctuality;
- hygiene, elimination of faults.
Cleaning intervals according to type (rough, basic, external, full basic) are determined in the contract;
- monitoring through customer surveys at regular intervals;
- providing the necessary capacity;
- qualification of personnel – personnel must meet the minimal requirements such as politeness, competence, reliability, ability to cope with difficult situations, wear the proper uniform, badge with the name, be of appropriate appearance, etc.;
- collection of complaints – within two years at the latest, a system for submitting complaints has to be introduced.

In the PSO contract, requirements are also included with respect to the intervals of cleaning (general, major, external and full major cleaning).

Qualitative criteria are stipulated in the contract. In case of non-observance of these criteria, there is a penalty system that can be triggered by the Assignor, leading to a corresponding reduction of the compensation to be granted.

The state of the infrastructure has a direct impact on the quality of services

provided. One crucial factor determining the level of quality of public railway services is the average traffic speed that the infrastructure manager proposes.

Infrastructure maintenance works can cause significant delays to train schedules, increase the estimated travel time due to repeated movement of trains onto detour lines and, finally, enhance the volume of passengers travelling by buses in the areas that are temporarily shut down for repair. The negative impact of these factors leads to a decrease in the number of passengers carried and a loss of market position.

4. Scope of public service transport by rail

The domestic passenger rail market is open to competition; 95% of domestic passenger transport (urban, suburban, regional and inter-regional) is defined in the Bulgarian law as public service transport.

In numerical terms, for the discharge of public service transport in Bulgaria, 576 trains (71 high-speed trains and 505 suburban/regional trains) were operated in 2015 and 562 (71 high-speed trains and 491 suburban/regional trains) in 2016, covering a sum of 1 461.4 million passenger-kilometres and 1 344.1 million

passenger-kilometres respectively. According to the contract, railway passenger services are rendered on all lines of the republic's railway network, listed in an annex to the contract.

The average ticket price in PSO traffic has been increased slightly during the past three years to EUR 1.03 (2016).

5. Contract

The Ministry of Transport started concluding contracts for the provision of public service transport in 2004. The second contract is currently ongoing; it was concluded in June 2009 following a tendering procedure and entered into force on 1 January 2010. The duration of the contract was set for a 15-year period, meaning that under normal circumstances it should remain valid until 2025. The way in which the next public service contract is to be awarded is unknown.

This single contract covers the entirety of public passenger railway services in the country.

The contract is drafted on the basis of a template produced by the Ministry of Transport, to which the operator has to adhere. Therefore, there is no actual negotiation between the parties.

The contract establishes the rights and obligations of the parties, the legal, financial and technical conditions for the use of railway infrastructure as well as the definition and financing of the public services through the central budget.

6. Awarding of public service contracts

The Council of Ministers of the Republic of Bulgaria by adopting its Decision No 530 of 18 August 2008 paved the way for carrying out an open tender for the appointment of a carrier that would discharge public transport railway services. The very same decision granted authorisation to the Minister of Transport to determine the specificities of this procedure and execute it. Accordingly, BDZ Passengers EOOD has been appointed the executor of the public service contract for public transport services in the field of railway transport on the territory of the Republic of Bulgaria.

7. Contract negotiation

Public service transport is compensated solely through a financial influx. However, as there is a single contract covering the entire territory, the operator benefits from a 'de facto' exclusivity. Therefore, 'cherry picking' is not an option.

The level of compensation of public service contracts is defined in the contract for the contracted period and is reviewed on a yearly basis.

The contractor elaborates yearly and three-year forecasts making projections regarding the foreseeable necessary level of compensation and submits them to the Contracting Authority and the Ministry of Finance, no later than 30 June of the preceding year. These forecasts are based on preliminary net indicators of costs and revenues for the corresponding period as well as on macroeconomic figures and the Guidelines drafted by the Ministry of Finance.

Each year, in the course of the budget procedure, the Contracting Authority submits to the Ministry of Finance a proposal for the amount of compensation granted for PSOs, to be discussed and further included in the draft Law for the State Budget of the Republic of Bulgaria.

The amount of compensation, determined by the Law for the State Budget for the corresponding year, is included in the Council of Ministers Ordinance for implementation of the State Budget of the Republic of Bulgaria.

Finally, there is an annex to the agreement introducing the qualitative

and quantitative criteria that need to be met and the relevant leeway for deviations (normal and maximum) from the agreed standards referring, *inter alia*, to train-kilometres, train-hours, availability of seats, number of trains, speed, jib, gauges etc.

8. Calculation of the level of compensation

The level of compensation is the result of the difference between the foreseen costs and revenues. According to data from 2015 and 2016, PSO-related expenses reached the sum of EUR 129.81 million in 2015 and EUR 122.61 million in 2016.

The public service contract is a 'net' contract; revenues generated from ticket sales are accumulated by the operator - along with the associated risks - and are taken into account when setting the adequate level of compensation.

For the calculation of the overall costs incurred for the provision of the requested public services, the following costs are, usually, taken into account:

- staff;
- energy and fuel;
- infrastructure charges;
- maintenance and repair of vehicles;

- rolling stock;
- (historic) debt payment¹;
- other fixed costs.

Depreciation deductions are also included in the costs for the purpose of calculating the level of compensation.

Staff-related costs include remuneration of the personnel and locomotive crew, expenses for labour and uniform clothing as well as measures adopted for the safety of the personnel.

The compensation level does take into account a 'reasonable profit' of 3% granted to the operator.

For the discharge of the services requested under the PSO contract, the state, through the Ministry of Finance, provides budgetary funds in the form of compensation for fulfilling the transport obligation and compensation for performing the tariff obligation.

9. General payment conditions

The compensation for executing the transport obligation is paid to the operator by the Ministry of Finance against an invoice issued up to the 15th day of the running month, according to the coordinated annual schedule. This compensation is subject to VAT.

The compensation for free tickets and tickets at reduced prices for traveling within the country is paid every month depending on the actually provided services that are the subject of the contract, on the basis of documents displaying the degree of transport services that were rendered.

These payments are made regularly through monthly instalments. The compensation covers 70-75% of the total costs incurred for the provision of the agreed services.

A penalty system is in place in Bulgaria. To that effect, the amount of compensation granted for the provision of public railway services can be reduced for the relevant trimester, if the requisite level of quality is not met, i.e. with regards to punctuality and regularity of the service. In more detail, deviations of +/-5% are foreseen in relation to the major indicators (train-kilometres, available seats, train-hours). For every violation amounting to a deviation of 0.1% from the major indicators, depending on the category of train, the compensation to be given is reduced by 0.05%. In the case of proven failure to fulfil the minimum sanitary requirements, the compensation can be reduced by 2%. Over the years there have been instances, e.g. a failure to meet quality requirements and performance clauses, where penalties have been

¹ Interest on Holding BDZ EAD loans related to the purchasing of assets (DMU, EMU) under the PSO contract.



imposed. Finally, as foreseen in the contract and the Reference document, in case of a more than 60-minute delay, no compensation is granted.

It should be noted that the poor quality of infrastructure generates damages for the operator, which in turn needs to compensate passengers. These costs are practically entirely born by the operator, due to insufficient measures for successfully enforcing its right of recourse against the infrastructure manager. Further deficiencies stem from low train speed, prolonged repairs, neglected deadlines for construction activities (set by the Reference documents) and restoration of traffic after a repair that actually worsens the state of the railway infrastructure.

The Passenger Rights Regulation (EC) No 1371/2007 is applicable with certain exemptions; the exemptions cover all urban, suburban and regional railway transport, as well as international transport where a significant part of the route – including at least one station – is outside of the EU.

10. Duration of public service contract

The current contract was signed in 2009 and entered into force on

1 January 2010. It was concluded for 15 years. This duration is considered satisfactory since it allows BDZ Passengers EOOD to meet the principal requirement of ensuring quality and safe public transport services at prices that are affordable for passengers.

11. Rolling stock

As regards the age of the rolling stock used for the discharge of PSO, 96% of the rolling stock currently used is more than 30 years old, representing 37.16% of the wagons and 56.64% of the traction rolling stock; naturally, such a high percentage has a negative impact on the overall quality of the services concerned. As regards the newest part of the fleet, 17.73% of the wagons and 22.03% of the traction rolling stock are less than 20 years old, while 4.82% and 17.48% are less than 10 years old respectively.

As of May 2011, following the contract for the transfer of the rolling stock, all rolling stock – including both wagons and traction rolling stock – is the property of BDZ Passengers EOOD.

Under the ongoing PSO contract, 30 new sleeping wagons were purchased through capital contributions from the state budget.

12. Involvement of the regulatory body or other authority

The Railway Administration Executive Agency is the regulatory body in railway transport and the national railway transport safety body. The Agency controls the access to the railway infrastructure and the performance of the PSO.

The control of the performance of the PSO is executed through regular checks of the quality of the service provided, customers' complaints etc. Prescriptions are given for eliminating verified violations, a practice that, generally speaking, has positive effects on the contract performance.



1. Organisation of public service operations in Croatia

Public service transport is organised centrally by the Ministry of the Sea, Transport and Infrastructure. It is based on Article 23 of the Railway Act (Official Gazette 94/13 and 148/13) which defines services of general economic interest for rail transport.

It was organised in line with Regulation (EC) No 1370/2007 even before Croatia became a member of the European Union (1 July 2013).

The Ministry of the Sea, Transport and Infrastructure is in charge of determining the scope of public service operations and of concluding related contracts with the operator. Almost the entirety of domestic passenger traffic falls under public service obligations. Operations on the domestic market are not open to competition for the time being but there are plans to open this market to competition once this becomes mandatory at EU level.

The international commercial passenger market was opened to competition in January 2010, in line with the requirements of Directive 2007/58. However, for the time being, no requests have been made on international routes including cabotage, which would be

likely to impact existing public service operations.

2. Operators on the market for public passenger service transport

For the time being, there is no other operator apart from the national carrier, HŽ Putnicki prijevoz d.o.o. (HŽ Passenger Transport), in charge of public service transport by rail in Croatia.

3. Definition of public service requirements

Public service obligations usually consist in:

- tariff obligations;
- service quantity;
- service quality defined by certain punctuality, regularity and passenger development objectives;
- monitoring of planned or foreseen service disruptions through the agreement with the infrastructure manager.

All of these criteria are imposed by the Ministry of the Sea, Transport and Infrastructure. The railway operator remains free to add further quality criteria to its services to help achieve its

objective of passenger development. In practice, however, the financial margin of manoeuvre of HŽ Putnicki prijevoz d.o.o. is so limited that it cannot improve the services as it would wish.

4. Scope of public service transport by rail

Almost the entirety of domestic passenger rail traffic falls under public service obligations. Since 2013, more than 99.5% of train capacity (covering both national and international traffic) was utilised for the operation of public service obligations. They relate essentially to all national, long-distance, inter-regional and international lines (including all trains except for commercial excursion trains).

In numerical terms, 951 million passenger-kilometres were concluded under a PSO in 2015 and 882 million in 2016, for the discharge of which 713 and 716 trains were operated per day respectively.

The PSO contract covers only rail transport services. Separate agreements are concluded with the relevant companies in relation to other modes of transport. In exceptional circumstances, for instance when planned or unplanned maintenance works disrupt rail services, the operation



Croatia

of bus services in a complementary way, could form part of the contract.

In terms of revenues, public service transport represents about 85% of HŽ Passenger Transport's passenger rail traffic revenue. The average ticket price has decreased during the last three years and was EUR 1.55 in 2016.

5. Contract

Public service operations are defined by the Ministry of the Sea, Transport and Infrastructure in a contract concluded with the sole operator. It is a single contract covering the entirety of the territory of the Republic of Croatia.

The requisite level of quality of services is set and reviewed by the Ministry of the Sea, Transport and Infrastructure on a yearly basis. These quality specifications are not, however, directly foreseen in the contract. The contract focuses on key parameters and the realisation of the prescribed timetable, reflecting only a fraction of the quality requirements. Other quality criteria such as security, accuracy, productivity and quality of services can also be added, albeit outside the scope of the contract.

At the time when this brochure was being updated, the ongoing PSO contract that was directly awarded and came into force

on 12 February 2016 remained valid up until the end of December 2016. In parallel, the general framework of the upcoming contract due to commence in early 2017 could be foreseen with a relative degree of certainty; it would be awarded directly to HŽ Putnicki prijevoz d.o.o. and it would mirror contractual terms set out by previous PSO contracts.

6. Award of public service contracts

Public service transport contracts are *de facto* awarded directly to HŽ Putnicki prijevoz d.o.o., as there is no competition on the market for the time being. The legislation in this regard may need to be amended once compulsory tendering will be required at EU level.

7. Contract negotiation

Upon concluding a contract, the operator proposes and identifies elements required for the realisation of the obligations. In parallel, the Ministry defines according to its own analysis the level of services of general interest it wishes and their related and estimated costs. Further to a discussion between both parties, an agreement is concluded on the final level of compensation to be paid for the services required. The correlation between the two is not necessarily fair for the operator.

Compensation is provided by direct financial influx. The operator bears the risks related to ticket sales. Even though 'cherry picking' is in theory possible, there have to date not been any cases of cherry picking directly affecting the economy of a public service line. In practice, due to the absence of any competition on the market, HŽ Putnicki prijevoz d.o.o. enjoys *de facto* exclusive rights for the operation of its public service traffic.

8. Calculation of the level of compensation

Compensation levels are determined in advance. They are included in the contract.

The level of compensation is the result of the difference between the foreseen costs and revenues and is calculated separately for each single train that operates under a PSO. HŽ Putnicki prijevoz d.o.o. makes a calculation of the overall expenses on a train-by-train basis, also taking into account foreseeable revenues from ticket sales, and thus constructs the plan upon which the level of PSO compensation will be determined in each of the following months.

The calculation of the overall costs for the service in question are based on the totality of all direct and indirect transport costs, namely

- amortisation and maintenance costs;
- train traction;
- power;
- track access charges;
- administrative costs;
- staff costs.

No reasonable profit is foreseen in the contract.

9. General payment conditions

Payment is made monthly upon the terms of payment stipulated in the agreement. The amounts received are not subject to VAT.

The Ministry of the Sea, Transport and Infrastructure retains the right to withhold, partially or totally, the payment of the public service compensation in case the operator is unable to reach or maintain the level of key performance indicators agreed in advance.

The poor quality of infrastructure significantly affects the quality of traffic operations as well as the relevant modal share. It should be noted that in case of decreasing passenger levels compared to those originally forecast, the associated financial and commercial risks are borne by the operator, since the agreed level of compensation is not readjusted accordingly. According to data from 2015-2016, the degree of compensation

ranged from 72.11% to 74.70% respectively.

As to the various ways in which the state of infrastructure affects the discharge of the PSO, it should be noted that every interruption or delay on the railway tracks, for instance due to railroad works, maintenance etc., results in the provision of inadequate services – if provided at all – and subsequently leads to the granting of reduced compensation – if granted at all – for the period during which the impediments to proper functioning appeared.

This outcome should be examined in light of the established process of allocating earmarked public funds on a train-by-train basis, according to projected costs for the operation of each and every train at a certain quality level. Thus, if this requisite level is not met and the quality of services lags behind what was stipulated in the contract, the discharge of the PSO by this particular train will not be compensated at all. To that effect, the operator sends to the Ministry individualised monthly reports concerning every train that was (or was not) run during the previous month and the level of compensation is adjusted accordingly. In addition, monthly reports on the volume of passenger complaints are gathered and reviewed by the Ministry as indicators of quality.

In order to limit the level of compensation to be paid by the operator to passengers, the Government has decided not to apply the Passenger Rights Regulation in the Republic of Croatia. Delays are handled in accordance with the state's Act on Transport Contracts in Railway Transport and accompanying subordinate legislation and internal tariffs. Although the strict implementation of Regulation (EC) No 1371/2007 in national traffic was postponed by the Government, it has been widely applied in international transport during the last 4 years.

10. Duration of public service contract

The contract is concluded on a yearly basis following the railway timetable. This is not felt to be satisfactory, as it does not allow for any long-term investments or quality improvements due to financial instability.

11. Rolling stock

The rolling stock used for the discharge of public service operations is owned by the operator, i.e. HŽ Putnicki prijevoz d.o.o. It should be noted, though, that the rolling stock is not financed through the public service contract. On the contrary,

the operator has to cover all the related expenses and amortisation costs.

The fleet is relatively old, the average age being 34 years old. In more detail, 87.6% is more than 30 years old, 1.9% is less than 20 years old and 4.9% is less than 10 years old.

However, in the past four years, HŽ Passenger Transport went through a process of full modernisation, which included, *inter alia*, the procurement of new rolling stock. By the end of 2016, 24 new trains were already put into traffic, while the deployment of 23 more is planned in the next three years.

12. Involvement of the regulatory body or other authority

The regulatory body is the Rail Market Regulatory Agency. The basic legal framework for the work of this agency is the Act on Rail Market Regulation Agency. It has no powers whatsoever related to the conclusion, negotiation or running of the public service contract.



Czech Republic

1. Organisation of public service operations in the Czech Republic

In the Czech Republic public service railway operations are regulated according to the Act on Public Service in Passenger Transport and amendments of other Acts adopted in April 2010. The Act entered into force on 1 July 2010. Regulation (EC) No 1370/2007 of the European Parliament and of the Council on public passenger transport is fully reflected in the Act. It sets, amongst others, rules relating to the respective responsibilities borne by the state, the regions and municipalities. Another important point relates to the possibility for synchronised public financing – notably by the Ministry of Transport and the region, neighbouring regions, the region and the municipality, etc. – or both public and private financing. Regional operations are carried out without direct state interference.

The Government, together with the Ministry of Transport, is directly in charge of determining the scope of public service rail transport to be provided in the country. Long-distance and inter-regional public transport services are dealt with by the Ministry of Transport, covering 28.8% of operations under a PSO; while the 14 administrative regions (*'kraj'*) are in charge of regional and local transport, covering 71.2% of operations under a PSO.

International passenger traffic as well as domestic passenger traffic were opened to competition as of 2008. Since 2014, three companies established in the Czech Republic (ČD, RegioJet and LEO Express) have been operating the international traffic (mainly to Slovakia).

Finally, it should be noted that distinct public service contracts are concluded for different modes of transport, thus there is no provision for the discharge of integrated public passenger services.

2. Operators on the market for public passenger service transport

There are a number of railway companies operating passenger public transport services in the Czech Republic. They are currently the following:

- České dráhy (ČD), a.s.;
- Die Länderbahn-GmbH DLB;
- GW Train Regio, a.s.;
- KŽC Doprava, s.r.o.;
- Jindřichohradecké místní dráhy, a.s.;
- Arriva Transport Czech Republic, a.s.;
- RegioJet, a.s.;
- LEO Express, a.s.

RegioJet, LEO Express and Arriva operate at their own economic risk (but they are compensated for the state-

mandated discounts on tariffs), all other companies operate services falling within the scope of a public service contract.

It would be worth noting that the market position of private operators has been strengthened over the past few years and it can be speculated that in 2017 they will hold approximately 5% of the market (measured in million passengers).

3. Definition of public service requirements

Public service obligations are defined in the Act on Public Service in Passenger Transport mentioned above, as well as in the public service contract concluded with the railway operator. These obligations include:

- obligations on tariffs and obligatory discounts for particular social groups of the population;
- obligations on tariffs and obligatory discounts for pupils and students;
- service frequencies in regions (regional transport);
- service frequencies throughout the country (long-distance transport);
- qualitative criteria.

Quality is an important element of the negotiation process. Public authorities, whether at centralised level or at

decentralised level, increasingly set high qualitative criteria, which are then taken into account when calculating the overall costs of the services to be provided. They most commonly relate to:

- observing the timetable (95%);
- train connections (95%);
- credibility of operating rolling stock in duty rosters;
- equipping and fitting up rolling stock;
- washing and cleaning rolling stock.

4. Scope of public service transport by rail

The whole range of passenger traffic in the Czech Republic (urban, suburban, regional, inter-regional and nationwide traffic) falls under public service contracts, covering, according to data from 2015, 92% of the market for passenger railway services, rendering 117.8 million train-kilometres and transporting 169 million passengers (96.8%).

It should be highlighted that international long-distance and cross-border lines, i.e. Berlin – Praha – Brno – Wien/ Bratislava – Budapest, Praha – Plzeň – München, Warszawa – Ostrava – Wien, Praha – Ostrava – Košice, are also operated under a PSO. However, private

undertakings (see supra) have developed their private activities on those lines, offering their services in parallel on a commercial basis.

According to the train traffic diagram (TTG) 2016/2017, 7 016 trains per day, on average, are provided by the operator České dráhy in the Czech Republic; the rest of the train capacity is provided by other operators.

The most alarming problem of the Czech railway network relates to the lack of capacity on main lines: Praha – Olomouc – Ostrava and Praha – Česká Třebová – Brno.

As to the average ticket price, this is set at 67 Czech crowns. However, the actual price is even lower in light of the widely available discount schemes. Reckoned revenues from the sale of tickets on lines covered by a PSO totalled EUR 313 185 000 in 2015.

5. Contract

Public service operations are organised through the conclusion of contracts with the competent authorities responsible for the organisation of direct award procedures or tenders and for the definition of required public service obligations.

Each contract is concluded for a specific set of lines. The vast majority of contracts cover several lines, only a limited number of them are concluded for a single line.

ČD has concluded two contracts for nationwide transport that involve a single line: Pardubice – Liberec and Brno – Břeclav – Olomouc. GW Train Regio has concluded a contract for the Plzeň – Most train service.

As regards regional transport, several small lines are operated by different operators under a PSO:

- GW Train Regio operates Sokolov – Kraslice – Zwotenhal, Karlovy Vary – Mariánské Lázně, Trutnov hl.n. – Svoboda nad Úpou, Trutnov hl.n. – Lubawka – Jelenia Góra and Milotice nad Opavou – Vrbno pod Pradědem.
- Die Länderbahn operates Liberec – Hrádek nad Nisou – Zittau (Germany) – Varnsdorf – Rybníště/Seiffhennersdorf (Germany) and Liberec – Dresden (Germany)
- KŽC Doprava operates the line Praha – Čakovice
- Jindřichohradecké místní dráhy has a single line contract for the narrow gauge line Nová Bystrice – Jindřichův Hradec – Obrataň.

To date, ČD has concluded 15 contracts with the administrative regions and three

contracts with the state on nationwide traffic. Similar contracts have been concluded with other operators as well.

Former agreements were concluded in the period of the previous regime. To that effect, they are subject to Regulation 1191/69 and they will be running until terminated in accordance with Regulation 1370/2007. Contracts concluded after the entry into force of Regulation 1370/2007 are already subject to this Regulation.

Trains which are not part of public service contracts are operated by relevant railway companies at their own economic risk.

As of 2005, administrative regions are free to decide upon the share they will get from the public budget earmarked for the financing of bus and rail transport.

On a more general note, the concluded contracts are private law contracts.

6. Awarding of public service contracts

Public service transport contracts are awarded either directly or through competitive tendering. The objective pursued by public authorities is to award



Czech Republic

an increasing number of contracts through competitive tendering in the upcoming years.

It is worth noting that some of the existing contracts¹ contain a clause whereby part of the volume of traffic ordered under a public service obligation (with a maximum cap of 75% of this traffic) can be gradually provided by another operator chosen by the authority before the contract end.

7. Contract negotiation

The level of compensation in public service contracts varies from contract to contract, according to the calculation of costs and revenues for every single contract. 'Cherry picking' is, in principle, possible in the Czech Republic. Most of the risks regarding costs and all of the risks regarding revenues are borne by the operator ('net contract'). The contracts concluded with the Ministry of Transport are net contracts, while in the regions both 'gross' and 'net' contract types can be discerned depending on the region.

In practice, the railway company determines its business case with regard to the extent of public service operations to deliver on a yearly basis and submits

a detailed assessment of costs, revenues and reasonable profit anchored in the contract to the Ministry of Transport or the administrative region concerned. In the new contracts, the jargon referring to 'initial financial model' and 'reasonable profit' has been replaced with a provision for a 'net income from the value of operating assets'.

For many years, compensation has been insufficient to effectively cover the shortfall in revenues from the discharge of public service passenger transport. These shortfalls pile up every year. However, it should be noted that since 2009, the compensation levels have been satisfactory, covering 62% of the total costs incurred in 2015. When taking into account revenues generated from ticket sales, the degree of PSO compensation comes to 100.4%.

In the framework of the 10-year contract concluded between ČD and the Ministry of Transport, apart from the core agreement, a supplementary agreement that is renewed on a yearly basis has been signed, allowing for regular reviews of the estimated costs and funding capacity.

However ČD, the historical company, has 'historical debt' to bear deriving from years of under-compensation.

8. Calculation of the level of compensation

Compensation levels are determined in advance in accordance with contractual provisions. The amount can be renegotiated in case of an increase in the input price.

The level of compensation is the result of the difference between foreseen costs and foreseen revenues, taking into account a 'reasonable profit'.

The calculation of the overall costs for the service in question as a whole is generally based upon the following usual costs:

- energy and fuel use;
- direct material for output of motive power engines;
- on-board staff (train driver and other mobile staff);
- costs generated from the rolling stock (amortisation and interests);
- shunting services;
- assistance to passengers with reduced mobility;
- controlling the service;
- track access charges;
- fixed costs;
- variable costs;
- other passenger-related costs.

A 'reasonable profit' is included in the contract. Its maximum amount is determined by legislation. It differs depending upon the level of risk borne by the operator concerned. In new contracts, 'reasonable profit' is replaced with a provision for 'net income from the value of operating assets'.

9. General payment conditions

Payment is made through monthly instalments and is reviewed on a quarterly and yearly basis. There is no VAT applied to public compensation since it is considered a state aid granted as compensation for the discharge of a PSO. State aid to pupils' and students' fares generates VAT at a reduced rate and it is provided only for trains operated at a company's own economic risk.

The state of infrastructure in the Czech Republic is not optimal, which ultimately affects the quality of services provided by railway operators. As a result, the Czech authorities have decided to apply for derogations from the Passenger Rights Regulation 1371/2007 for domestic traffic, in order to avoid excessive compensation levels to passengers for delays/cancellations attributable to the poor quality of infrastructure on the network.

¹ The existing contracts were fixed with the state and the administrative regions for 10 years and will remain in force until the end of TTG 2018/2019. The contract on long-distance traffic operation that was awarded by the state includes a clause according to which, for the duration of the contract, a market opening of 75% may be enabled. Similar clauses are part of contracts fixed with the administrative regions too, i.e. Jihomoravský region (55%), Jihočeský region (30%) and also Plzeňský and Ústecký regions admit the possibility.

The operator is however likely to pay penalties to the awarding authority in case it does not respect its obligations, in particular as regards the timetable, train connections, types of rolling stock used for given traffic, etc. To that effect, it should be noted that in the public service contract concluded between ČD and the Ministry of Transport, there are clauses foreseeing an exemption from a possible compensation decrease, if the non-observance of quality benchmarks can be imputed to deficiencies in infrastructure.

The Ministry of Transport has established three different methods of assessing whether the requisite service quality levels are met and of monitoring the adequacy of the compensation granted. First, there is the possibility to conduct irregular and unexpected financial inspections of railway undertakings. Second, the Ministry's staff carry out checks on the standard of quality of trains. Last but not least, the railway operators are requested to elaborate and submit regular reports on punctuality, composition of trains and affordability of access charges.

10. Duration of public service contract

Current contracts have been concluded for a duration of 10 years or less. New

contracts based on tendering are concluded for a maximum of 15 years.

In more detail, 14 regional public service contracts carried out by ČD will expire in two years' time. The same applies for one of the general public service contracts signed between ČD and the Ministry of Transport. As regards the other two contracts concluded between ČD and the Ministry of Transport, the one concerning the Pardubice – Liberec line expired and was replaced by a new contract, which was directly awarded to ČD, while the second one on Plzeň – Most line expired as well and was directly awarded to GW Train Regio.

11. Rolling stock

Operators generally own the rolling stock they use for the public service contract. An adequate part of rolling stock depreciation is taken into account in the calculation of the level of compensation for the discharge of public services.

In 2015, the average age of ČD's rolling stock was 21 years old, which marks a significant improvement compared to figures from 2010, when the average age was 30 years old. In more detail, the average age of locomotives is 18 years

old and the average age of carriages is 25 years old.

Further renewal of the rolling stock is based on the medium-term renewal strategy of railway vehicles agreed within governing bodies. In particular, a great deal of new vehicles have been acquired recently with support from EU funds, such as the Stadler Regio-Shuttle, the PESA Link, the Škoda 7Ev RegioPanter and the InterPanter.

12. Involvement of the regulatory body or other authority

Until April 2017, The Rail Safety Authority in the Czech Republic safeguarded the adequacy of safety levels and operated as a regulatory body. Since the amendment of the Railway Act came into force (1 April 2017), the function of regulatory authority has been taken over by an independent regulator. Apart from the functions currently foreseen in EU law, it is in charge of guaranteeing the eligibility of applicants for a public service contract.



Denmark

1. Organisation of public service operations in Denmark

In Denmark, the organisation of public passenger railway services is mainly regulated in the following pieces of legislation:

- Railway Act (No 686, 27 May 2015);
- Act on the Independent Public Corporation DSB (No 1184, last amended on 27 May 2015);
- Regulation (EC) No 1370/2007 on public passenger transport services by rail and road.

Danish legislation and its implementation distinguish between three types of rail passenger services:

- **'negotiated' traffic**, i.e. public services carried out by an operator based on a negotiated contract with the relevant competent authority;
- **'tendered' traffic**, i.e. public services carried out by an operator based on a contract with the relevant competent authority, which have been put out to competitive tendering;
- **'free' traffic**, i.e. non-public service traffic.

There are no monopolies in Denmark. The Danish market is fully open to competition, regardless of the distance, the type and the economic nature (commercial or PSO) of the state-owned network. A few local lines are owned and operated by local authorities and for the time being are not tendered. Free access is provided to all duly licensed EU railway undertakings operating on the Danish rail network for freight traffic since 1999 and for passenger traffic since 2000. This access is utilised by a number of daily long-distance trains running to and from Copenhagen operated by Swedish SJ.

The present international traffic to and from Germany is integrated with the domestic long-distance traffic and covered by a negotiated public service contract concluded in Denmark. The cross-border regional traffic between the eastern part of Denmark and the southern part of Sweden via the Øresund fixed connection is covered by tendered public service contracts concluded with the Danish and Swedish competent authorities. All passenger traffic is covered by PSO contracts, and although an open access system has been established since 2000, no operator has taken advantage of this opportunity.

Public passenger railway services in Denmark are organised by the Danish Ministry of Transport, Building and Housing, which is the competent authority for tendered as well as negotiated public service contracts on the state-owned network. Currently, there is one negotiated contract with DSB covering national rail services (long-distance, the majority of regional traffic, the metropolitan 'S-Bane' train services) in the Greater Copenhagen area. This contract expires in 2024. As of 2016, this contract covers the Danish part of the regional traffic between Denmark and Sweden, which was formerly tendered.

2. Operators on the market for public passenger service transport

DSB has been an independent public corporation since 1 January 1999. It is wholly owned by the Danish Ministry of Transport, Building and Housing. Formally, the state monopoly granted to DSB came to an end on 1 January 2000.

Since 2000, political decisions have been taken to gradually open up the market and put services on a number of railway lines out for open, competitive tendering:

- Arriva won in 2002 the right to provide part of the regional public transport services in the western part of Denmark and subsequently re-won an equivalent contract in 2009, which expires in 2020. These contracts are 'net' contracts.

3. Definition of public service requirements

The public service contracts in Denmark prescribe in great detail the quantitative and qualitative requirements imposed on the operator as well as the specificities of the compensation.

The minimum level of service for each line and station, calculated in trains/stops per hour/day, is determined in advance along with the minimum number of direct connections between major centres. The minimum seating capacity is prescribed through upper limits on standing passengers (overcrowding) per line, duration, and time of day.

The contracts also contain specific requirements on punctuality, reliability, customer satisfaction (general travel satisfaction, information on the train, punctuality, availability of seats, train crew, cleanliness of the train) and seating utilisation (mainly directed towards

peak hours and line sections with high utilisation). Although not officially stipulated as qualitative criteria in the contract, obligations on ticket sales, traffic information, PRM-accessibility and assistance, bicycle transport, compensation schemes in case of delays for both commuters and other travellers, are of importance.

Public service operators have to comply with the general common ticketing system in Denmark and cooperate with bus operators and other rail operators. Fares are regulated along strict limits depending on inflation rates, thus capping the level of revenue that can be accumulated in case of a 'net' contract.

Qualitative criteria are, as mentioned, included in all contracts. Initially, these criteria are defined by the competent authority. The final set of criteria and their precise wording and requirements is, however, the result of negotiations that take place before the signing of the contract – both for tendered and negotiated contracts.

Some criteria are defined in great detail in the contracts. Particularly with regard to ticketing; contracts lay down ticket prices in Greater Copenhagen, stipulate the allowed increase in overall ticket prices (which has to be approved by the Ministry of Transport, Building and Housing),

require prior notification (at least 21 months) of changes in sales system and/or price structures and also define the conditions related to free transport for children as well as other social groups. As regards seating availability, the contracts provide that all passengers shall have a seat available on 90% of the trains during rush hours and 95% of the trains running outside rush hours. In cases where the load factor is above 100%, the operator's planning may allow up to 20% of standing passengers for a maximum of 30 minutes.

In addition, train operators often add further qualitative criteria on their own initiative as a commercial gesture to improve the service and increase performance. Some of these additional qualitative criteria are based on a direct positive business case (such as additional services to first class passengers), while other criteria seek to increase general ridership and are therefore considered to be commercially viable per se.

4. Scope of public service transport by rail

As already mentioned, all passenger transport in Denmark is run under public service contracts. This includes the Öresund region cross-border train services running under public service contracts with the competent Danish and

Swedish authorities, and the cross-border traffic to Germany, the Danish part of which is run as an integrated part of the domestic long-distance traffic covered by a public service contract with the competent Danish authority.

Public service transport in Denmark is currently provided to about half a million passengers per day carried in approximately 4 000 trains per day. According to data from 2016, 5.884 million passenger-kilometres were operated under PSO.

Public passenger railway transport can be divided in four types of transport:

- S-trains (Greater Copenhagen area) and the Metro system, which are stand-alone networks;
- regional transport organised by regional authorities, awarding the relevant contracts to internal operators. Currently, there are 14 small-sized regional railway undertakings spread all over the country. Despite the fact that they are called 'private' operators, they are actually owned by the regional transport authorities;
- regional transport organised by the state authorities;
- long-distance transport (intercity trains).

All four types of passenger transport are covered by public service contracts.



At present, the market for public passenger railway services is divided in the following manner:

- approximately 85% of long-distance and regional services (including those operated by 'private' railways) are negotiated;
- approximately 15% of regional services are tendered out.

The public service bus system is organised separately from the rail system. However, despite the contractual non-integration, both national law and individual contracts prescribe a minimum level of system integration, such as common ticketing systems, customer information etc. As an example, in the Greater Copenhagen area one can use the same ticket for Metro, S-train, all regional trains and all bus services.

5. Contract

Public service operations are organised through the conclusion of legally binding contracts freely negotiated between the railway operator and the competent authority (The Ministry of Transport, Building and Housing, a regional authority or the Metro company).

As a result, there is a multiplicity of contracts (see sections 1 and 2 above). However, there are two major contracts currently ongoing:

- One contract refers to the agreement between DSB and the Danish Ministry of Transport and Building and Housing covering a very large part of the Danish territory, i.e. long-distance traffic as well as a large part of the regional traffic, including DSB S-trains in the Greater Copenhagen area and the Øresund traffic.
- Arriva has been awarded a contract (which was recently renewed) for the provision of regional services in the western part of the country covering approximately 15% of the relevant market.

The main objective of the contracts is to establish a clear operational framework safeguarding that the requested public service obligations will be provided in an efficient and economically sound way, so as to ensure the viability of the railway undertaking in the long run.

6. Awarding of public service contracts

As stated above, there are two awarding processes for a public service contract:

either through direct negotiations or through tendering procedures. The Ministry of Transport Building and Housing is the competent authority for publishing the relevant calls for tenders.

7. Contract negotiation

When a contract is tendered out, the operator submits its proposal in line with the Terms of Reference. After the submission of bids, a round of negotiations to determine the exact content of the proposal and how it corresponds to the Terms of Reference will usually follow.

In the absence of a public bid, direct negotiations might take place. More particularly, the Ministry of Transport, Building and Housing will make a proposal for the conclusion of a public service contract that will clearly stipulate all the relevant economic conditions. To that effect, a detailed analysis of the foreseeable costs and revenues associated with the discharge of the service should be elaborated and negotiated with the Ministry.

There are strict accounting rules in place that prevent cross-subsidisation including a provision for full separation of accounts, according to standard accounting procedures.

8. Calculation of the level of compensation

Financial compensation is provided for in contracts currently running in Denmark through a direct financial influx. The granting of exclusive rights is not foreseen in the national legislation. However, public service traffic enjoys timetabling priority over free traffic in case of capacity restraints.

As there are no exclusive rights, 'cherry picking' is allowed. For the time being, though, no 'cherry picking' has emerged.

The DSB and Arriva contracts are 'net contracts' and the operators bear the full risk regarding the level of revenues generated by ticket sales. There are also very narrow limits for ticket price increases, i.e. according to inflation rates. Railway undertakings can raise the prices of the tickets once a year and they are responsible for the consequences.

Other important financial risks, which are also relevant for gross contracts, relate to energy prices, labour costs, defects in the infrastructure etc. These risks are mainly borne by the operator.

The calculation of the overall costs for the service in question are commonly based upon the following costs:

- energy and fuel costs;
- maintenance of rolling stock;
- on-board staff (drivers and other mobile staff);
- costs generated by the rolling stock (amortisation and interest);
- shunting services, heating and cleaning;
- assistance to passengers with reduced mobility;
- track access charges;
- other passenger-related costs.

A 'reasonable profit' is included in the contracts. Its level is negotiated between the parties. The ongoing contracts foresee a maximum reasonable profit of 6%.

9. General payment conditions

Payment is made through regular instalments at determined intervals on a monthly basis, which is considered reasonable.

There is no VAT on public service contract payment.

The contracts contain different types of key performance indicators (KPIs), however the focus is on efficiency, punctuality and customer satisfaction.

Finally, the Passenger Rights Regulation 1371/2007 fully applies in Denmark to all

traffic, with no exemption. In this regard, quality of infrastructure plays a major role in public service operation. Examples of unsatisfactory quality of infrastructure, which from an operator's perspective is felt as a severe business constraint, include, *inter alia*, speed limitations (both permanent and temporary), closing down a section or a track for a certain period due to maintenance works, (old-fashioned) signalling systems limiting capacity on congested parts of the network, and – above all – failures of signals, points, tracks, catenary etc.

In the contracts concluded between the railway operators and the infrastructure manager, a detailed provision is laid down of the penalties that the infrastructure manager shall pay to the operators in cases where the quality of infrastructure lags behind the agreed minimum. However, in the majority of cases, these penalties do not fully cover the relevant costs borne by the railway operator, i.e. compensations in accordance with the EU Passenger Rights Regulation.

10. Duration of public service contract

The duration of public service contracts varies between 8 and 10 years. However, this length is unsatisfactory, especially

when railway undertakings bear a substantially longer period in mind when assessing expenses related to rolling stock. This situation should be examined against the prevailing conditions in bus tendering, where the duration of the contract and the lifespan of rolling stock are dovetailed.

The main dates for the two contracts are the following:

- The DSB contract concerning long-distance and regional traffic, the Copenhagen S-train and cross-border traffic to Sweden will remain valid until 31 December 2024;
- The Arriva contract (renewed and prolonged) will end on 12 December 2020 (the contract was put into force in 2010, however it was signed under the former legislation).

11. Rolling stock

Rolling stock is generally owned by the operator of the service. It should be noted that there are a number of leased double-decker coaches and DMUs, however, the railway undertaking remains responsible for the contract in every aspect. The specificities of renewal or refurbishment of the rolling stock are foreseen in the public service contract. The contract also

provides for an obligation to make the rolling stock available to operators that will win tenders on certain routes.

DSB's fleet of rolling stock in use is, with minor exceptions, between 10 and 30 years old.

12. Involvement of the regulatory body or other authority

Up till now, the rail regulator (Jernbanenævnet) has played a minor role in relation to public service contracts.



Estonia

1. Organisation of public service operations in Estonia

Public service transport in Estonia is organised by the Railway Act¹ which entered into force on 31 March 2004 and by the Public Transport Act.²

Regulation (EC) No 1370/2007 is directly applicable and serves as a complementary basis for the operation of public service contracts.

Public service transport is managed centrally by the Ministry of Economic Affairs and Communications (hereinafter the Ministry). The Public Transport Act Article 10(13) provides for public service contracts in the railway sphere to be granted directly, within the remit of Regulation 1370/2007 Article 5. Please note that this article in the national legislation was amended in light of the mandate of a seminal court case, following which the Ministry granted a direct contract for national passenger rail transport to a state-owned company, thus terminating an effective agreement with a privately owned company before the termination of the contract.

According to the Railway Act, the passenger transport market is fully open

to competition. In practice, however, there is no actual competition taking place, as the market is not attractive enough for new entrants and also due to the recently established practice of granting direct contracts.

Public service transport is developed on the basis of a long-term national development plan approved by the Estonian Government. The long-term national public transport development plan includes:

- data concerning the calculated need for subsidies for specific purposes, as prescribed in the state budget for the support of public transport, which is determined according to planned changes to the role of public transport and the revenue base of the budget;
- a list of legal, economic, social and technical measures to improve the competitive position of public transport;
- a list of other factors which influence the development of public transport.

2. Operators on the market for public passenger service transport

To date, there are two passenger companies operating passenger transport, one operates passenger

services under a public service contract and the second company operates international lines on a commercial basis.

- The state-owned AS Eesti Liinirongid (former AS Elektriraudtee, operating under trademark “Elron”) provides all rail passenger transport in Estonia, covering both the suburban services in and around Tallinn on the electrified network in Estonia and intercity services on diesel trains;
- AS GoRail, a private operator active on the international market, operates a daily passenger train linking Tallinn to St. Petersburg and Moscow.

AS Eesti Liinirongid operates public service transport as defined by public authorities under the directly awarded contract, whereas AS GoRail operates exclusively international passenger transport outside of any public intervention (so-called ‘free traffic’). The public service market represents 99.9% of the rail passenger market.

3. Definition of public service requirements

Public service obligations include:

- the obligation to operate services; i.e. to provide high-quality and continuous

¹ The Railway Act can be found in English at www.riigiteataja.ee/en/eli/522082014003/consolide

² The Public Transport Act can be found in Estonian at www.riigiteataja.ee/akt/129062014096.

public transport services and, if necessary, additional services. This also includes an obligation to return the public transport vehicles and line facilities which were transferred to the carrier on a contractual basis after the public transport services have been withdrawn;

- the obligation to carry; i.e. to carry passengers under the terms and conditions and for tariffs prescribed by a contract of carriage;
- tariff obligations approved by state authorities.

4. Scope of public service transport by rail

Passenger railway transport has increased in the recent years, which can be attributed to the purchase of new Stadler trains, both electrical and diesel. In addition, the decrease of cargo transport has given more time slots for passenger services and at this moment passenger transport takes up to 75% of the total allocated national rail capacity.

Public passenger rail transport may be provided for all national rail services (international traffic is not covered but currently represents 0.01%: daily connection from Tallinn to St. Petersburg and Moscow). The fact that almost the entire network is covered by public

service transport is due to the size of the territory of Estonia.

In numerical terms, Elron provided 4 846 287 passenger-kilometres in 2015, operating 214 trains per day.

The average ticket price for operations under a PSO was EUR 1.75 in 2016.

5. Contract

There is only one public service contract concluded in Estonia between the Ministry and AS Eesti Liinirongid.

In more detail, the contract foresees:

- a clear description of the overall services required including the specific public service requirements together with the calculation of the distance to be travelled;
- the provision of public transport vehicles and line facilities for the provision of transport services and requirements concerning their use and their return to the authorities;
- the amount of compensation paid to compensate the public service requirements;
- the calculation method used to assess the level of compensation that will be granted;
- a penalty system;

- details about monitoring requirements and details about how and when the information must be submitted to the Ministry;
- provisions concerning the procedures for the expiry, termination and amendment of the contract;
- the period of validity of the contract;
- conditions for insuring passengers and property;
- other conditions, where necessary.

The contract is based on a mixture between public and private law, particularly as regards liability issues.

In addition, it must be stated that AS GoRail also receives a small compensation from the Ministry for offering train tickets at a reduced price on its trains between stations situated in Estonia (e.g. on the Tallinn-Moscow train it is possible to travel with a reduced price ticket from Tallinn to Narva). This type of compensation was introduced in order to attract more passengers to use Tallinn-Moscow trains also for intra-Estonian travel.

6. Awarding of public service contracts

The Railway Act provides that public rail transport services can be awarded directly to an operator. Of course the Ministry may also open a public tendering

procedure (published and organised in conformity with national public procurement rules). However, given the current state of the market, the ongoing single public service contract was directly negotiated with the incumbent operator. Furthermore, the existence of different technical specifications on the network (electrified (132 km)/non-electrified (663 km) network) already limits the variety of potential competitors on the market. Finally, the size of the market is such that it might not likely attract competition in the coming years, although there has been a significant increase in the number of travelling passengers within the past two years.

7. Contract negotiation

In theory, when awarding a PSO contract, the Ministry enters into discussions with each of the operators for the related market.

Negotiations essentially revolve around the amount of compensation that will be granted for the discharge of the PSO. Moreover, qualitative criteria are stipulated, including:

- real-time monitoring of trains;
- electronic information displays and voice communications on trains;
- free Wi-Fi on trains;



Estonia

- cleanliness of trains and stations;
- provision of catering services on certain trains;
- electronic information in some stations;
- waiting rooms in some stations (fixed listing).

In addition, the operator bears limited risks. If there is a substantial fluctuation, as for example in fuel prices or passenger volumes, the public authority may then share the risk and provide additional compensation.

The concluded contract is a 'net' contract, allowing for the accumulation of revenues generated from ticket sales by the operator, who will, however, have to bear the associated risks.

Finally, the average level of track access charges applied to PSO traffic was EUR 6.60 in 2015.

8. Calculation of the level of compensation

The level of compensation is the result of the difference between the foreseen costs and revenues for the services required. The relevant costs include, *inter alia*, infrastructure charges, energy (fuel and electricity), rolling stock (lease and maintenance), management costs, as well as costs

for sales and marketing. In practice, however, the Ministry informs the railway operator of the amount of public money available, which forms the basis for the discussion on the effective range of services that can be provided for the earmarked amount of money.

A 'reasonable profit' is generally foreseen in each contract.

9. General payment conditions

The compensation of public service obligations is paid through the allocation of financial input. A *de facto* exclusivity on lines derives from the specific situation in Estonia; i.e. small network with different technical specifications (electrified network/ privately owned network) etc.

Payment is made on a monthly basis. The sum received as public service compensation is not subject to VAT, while there are no treasury issues.

According to data from 2015-2016, the compensation granted covered approximately 76% of the total costs incurred for the discharge of the PSO.

As mentioned above, a penalty system is foreseen in case of failure by a railway undertaking to provide public rail transport services for passengers as required. It is punishable by a fine.

Elron conducted four service audits in 2015, using the Mystery Shopping technique, in order to check and monitor the fulfilment of the requirements stipulated in the public service contract.

Finally, the state of the infrastructure has a direct impact on the quality of the services provided. When delays are imputable to the infrastructure, the infrastructure manager will compensate the operator, which will in turn compensate passengers. It should be noted that the Passenger Rights Regulation 1371/2007 is applicable with exemptions in Estonia.

On a more general note, the quality of infrastructure is considered satisfactory at this moment, ensuring a requisite level of reliability of the services provided. For instance, maximum speed for passenger trains is guaranteed on the entire network (without any speed restrictions stemming from infrastructure deficiencies) and timetable punctuality was 98.6% in 2016. Nevertheless there are several infrastructure bottlenecks that do not allow for growth, thus capacity allocation for passenger operators is not possible.

10. Duration of public service contract

The Public Transport Act provides that a public service contract with a carrier

may be concluded for a time-frame of up to ten years, which is considered satisfactory as it allows operators to effectively deploy their business plan in advance and to foresee additional qualitative criteria.

The ongoing public service contract between Elron and the Ministry of Economic Affairs and Communications was brought into force on 1 January 2014 for a four-year period. It should be noted that the awarding authority has the right to extend the duration of the contract for an additional period of up to ten years.

11. Rolling stock

The entirety of passenger transport rolling stock used by AS Eesti Liinirongid for the discharge of its PSOs is owned by the state, while AS GoRail owns the rolling stock with which it provides its international services. The entire fleet owned by the state was renewed in 2012 and thus national rail passenger transport is operated using the entire new fleet of Stadler trains (both electrical and diesel). However, the fleet of GoRail is old.

12. Involvement of the regulatory body or other authority

The regulatory body, i.e. the Technical Surveillance Board, deals essentially

with the safety-related aspects of public service contracts.

The Competition Board is also involved in the award process of public service contracts, as it is in charge of issuing activity licences.



Finland

1. Organisation of public service operations in Finland

The organisation of public passenger railway services in Finland is regulated in the following pieces of legislation:

- Regulation (EC) No 1370/2007 on Public Passenger Transport Services by Rail and by Road
- Regulation (EC) No 1371/2007 on Rail Passengers' Rights and Obligations
- Rail Transport Act 15.12.2000/1119
- Act on Public Transport 13.11.2009/869
- Railway Act 8.4.2011/304

The Ministry of Transport and Communications has been appointed the only responsible body for public services in the field of railways. Except for the Helsinki Metropolitan Area, where a municipal authority – the Helsinki Regional Transport Authority called Helsingin Seudun Liikenne (HSL)¹ – is responsible for arranging all public transport (urban and suburban).

There are currently the following public passenger transport contracts in Finland (described in greater detail below):

- a public service contract covering long-distance and urban/suburban traffic concluded with the Ministry of Transport;

- a service agreement covering long-distance and urban/suburban traffic awarded by the Ministry of Transport;

- the Helsinki Metropolitan Area commuter traffic contract.

2. Operators on the market for public passenger service transport

VR Group is a wholly state-owned company. It is currently the only passenger rail operator in Finland.

3. Definition of public service requirements

The definition of public service requirements is made by the Ministry of Transport and the Helsinki Regional Transport Authority (HSL) for their respective contracts.

The definition of services differs from one contract to another. They can be defined, for example,

- by the identification code of each train included in the contract;
- by volumes.

The Helsinki Metropolitan Area commuter traffic contract covers a



¹ <https://www.hsl.fi/en/helsinki-regional-transport-authority>



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number of different qualitative criteria agreed in advance.

4. Scope of public service transport by rail

The Helsinki Metropolitan Area is covered by a public service contract, as is all urban and suburban traffic. Long-distance traffic consists of both PSO and commercial traffic.

In numerical terms and according to data from 2016, 3 868 million passenger-kilometres were discharged under a PSO. VR Group operates 300 long-distance trains per day and 800 commuter-trains per day.

5. Contract

Public service contracts are concluded by the Ministry of Transport and by the Helsinki Regional Transport Authority. Public service contracts for long-distance and urban/suburban traffic include exclusive rights for long-distance traffic in return for carrying out the public service obligation of operating non-profitable traffic. As mentioned above, there are currently three public passenger transport contracts in Finland:

- a public service contract covering long-distance and urban/suburban traffic concluded with the Ministry

of Transport, ending in 2024. This contract concerns only passenger rail traffic and is not a multimodal contract;

- a service agreement covering long-distance and urban/suburban traffic awarded by the Ministry of Transport, running until the end of 2019. This contract concerns only passenger rail traffic and is not a multimodal contract;
- the Helsinki Metropolitan Area commuter traffic contract, ending in 2021. VR Group's contract concerns only passenger rail traffic, however, the Helsinki Regional Transport Authority is in charge of planning all traffic in the metropolitan area.

6. Awarding of public service contracts

The public service contracts in force have been granted directly to the sole railway undertaking on the market, VR Group.

It is expected that the next round of contracts will be awarded following a more competitive process. The Helsinki Metropolitan Area will organise a tendering of its rail services operated under a public service contract. The current contract for long-distance traffic, also including commercial traffic, between VR Group and the

Ministry of Transport is ongoing until the end of 2024.

7. Contract negotiation

There are agreed amounts for compensation provided for public services. These amounts are defined in advance and they meet the requirements stated in Regulation 1370/2007.

The specificities of the quantitative and qualitative criteria of the services provided under the PSO contract are determined on a yearly basis and are the outcome of negotiations between the two parties.

8. Calculation of the level of compensation

In public service contracts, there is an agreed amount for compensation, which is defined in advance. Therefore, all the revenues and costs incurred, as well as the reasonable margins are reflected in the agreed price.

The Helsinki Metropolitan Area contract is a 'gross' contract, meaning that the awarding authority accumulates the revenue generated by ticket sales and also bears the associated costs, thus the railway

operator receives a fixed amount as compensation. The other contracts are 'net' contracts.

9. General payment conditions

In the current agreements, the payments are carried out on a monthly basis. In the Helsinki Metropolitan Area commuter traffic contract, detailed qualitative criteria are included, e.g. regarding cancelled or delayed services etc. There is a penalty system in place, which in case of non-observance of the stipulated criteria usually foresees a decrease in the level of compensation granted as well as other sanctions, depending on the case.

The contract concluded between VR Group and the infrastructure manager includes a penalty scheme that monitors disturbances on the network, which may lead to disruptions to services. In that case, it should be highlighted that liability covers both VR Group and the infrastructure manager.

10. Duration of public service contract

The public service contract covering long-distance and urban/suburban traffic concluded with the Ministry of Transport ends in 2024.

The service agreement covering long-distance and urban/suburban traffic awarded by the Ministry of Transport runs until the end of 2019.

The Helsinki Metropolitan Area commuter traffic contract ends in 2021.

11. Rolling stock

Rolling stock for long-distance traffic is owned or leased by the operator.

In the Helsinki Metropolitan Area, the majority of rolling stock is leased by a joint company owned by Helsinki Metropolitan Area cities and VR Group.

12. Involvement of the regulatory body or other authority

A railway industry regulatory body operates within the Finnish Transport Safety Agency (Trafi), whose task is to ensure the functioning of the market and the non-discriminatory and equal treatment of all operators that are active on the market. The Consumer Rights Agency is the competent authority for safeguarding effective implementation of the Passenger Rights Regulation. The latter is applicable with exemptions, which are stated in the Rail Transport Act 15.12.2000/1119, para. 8a.



France

1. Organisation of public service operations in France

The organisation of rail passenger transport in France is regulated by the LOTI Law¹ and the Law on Solidarity and Urban Renewal,² which was adopted in 2000. These laws are integrated together with all railway legislation and pieces of regulation in the Transport Code (*Code des transports*).

All competencies with regard to the definition, negotiation and financing of public service obligations are transferred to:

- **Regional transport:** the regional authorities (*Conseils régionaux*) of the 13 administrative regions are competent in the field of regional rail passenger transport. Since January 2016, following a territorial reform that resulted in the merging of the 20 pre-existing regions, 13 regions are in place (the relevant decree was published in the Official Journal on 29 September 2016).

1 Loi d'Orientation des Transport Intérieurs (LOTI) of 30 December 1982.

2 Loi Solidarité et Renouveau Urbain, n°2000-1208 of 13 December 2000.



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- **Urban transport:** in the field of rail passenger transport in the Greater Paris area (Paris, suburb and Ile-de-France region), the competent authorities are the agglomerations of a public body called 'Syndicat des Transports d'Ile-de-France' (STIF) which includes, since 1 July 2005, representatives of the region (*Conseil régional d'Ile-de-France*) and of the eight Ile-de-France local authorities (*Départements*) including the City of Paris. The region takes on the chairmanship of the STIF.
- **Intercity trains:** the central administration for infrastructure, transport and the sea (*direction générale des infrastructures, des transports et de la mer – DGITM*) is competent for six lines, and agreements with regions have been or are currently being negotiated with regions to transfer the competence to them on the remaining Intercity lines.

STIF and the regions are called 'organising authorities' (*autorités organisatrices*).

From 2010-2015 the French state was the competent authority for all Intercity conventional trains (average and long-distance). However, in 2015, the Government adopted a roadmap for Intercity trains, on the basis of which

the first decision was adopted in July 2016. In more detail, the central state announced its intention to remain the competent authority for 6 lines (Paris – Orléans – Limoges – Toulouse; Paris – Clermont-Ferrand; Bordeaux – Toulouse – Marseille; Nantes – Bordeaux; Toulouse – Hendaye; Nantes – Lyon). For the residual lines, agreements are gradually being concluded with certain regions, e.g. Normandy was the first region to become the competent authority for Intercity operations in its regions (April 2016), four more agreements followed with Grand Est, Nouvelle Aquitaine, Hauts de France, Occitanie and Centre. The set up defined in the agreement with Occitanie, which was signed in December 2016 and due to be formalised in early 2017, is a specific case: it transfers one line to the region and foresees an experimentation with joint competence of the region and the central state for another line (Clermont-Ferrand – Beziérs) for two years.

As regards the Intercity night trains, in April 2016, the Government launched a call for potential operators interested in offering night train services on a commercial basis. In the absence of candidates, the Government decided to maintain its financial commitment for two lines that were identified as essential (Paris – Briançon; Paris – Rodez/Latour

de Carol). On these two lines, the former regime, including state financing, will remain as it stands.

At the end of 2016, there were 20 contracts for public passenger railway services awarded in France; 18 for the regional trains (one per region,³ before their merging, except Corsica), one with STIF and one with the French state.

The competent authorities finance these public service operations through their own budget, which aggregates:

- an envelope from the national budget (a legacy from the state public service compensation for rail now decentralised since 2002);
- their own envelope raised either through the accumulation of revenues or through loans.

So far, the domestic market is not completely open to competition. Regional trains (TER), Intercity trains and Transilien trains (Ile-de-France region) are not open to competition. Urban and suburban markets are open under the regime of public service delegation with tendering. However, there is a monopoly covering regional rail, trains and regional express trains (RER) in the Ile-de-France region and conventional long-distance rail (Intercity trains). Please note

that the operation of RER trains in Ile-de-France is split between SNCF and RATP.

2. Operators on the market for public passenger service transport

Currently, there is only one main operator on the French rail market, i.e. SNCF, and the regions have a legal obligation to negotiate public service contracts with it. This legal framework is however under review and is to be modified not only to comply with the provisions of the Fourth Railway Package but also with a view to anticipate the mandatory opening of the market (please see below).

Very few private railway companies, such as Transdev, operate regional passenger rail services on the French territory:

- either as a subcontractor of SNCF, for operations on the French National Network (*Réseau Ferré National – RFN*);
- or, directly with local authorities under public service contracts for operations that fall outside of the French National Network (*Réseau Ferré National*).

These operations remain marginal as the domestic rail passenger market is not open to competition by virtue of the LOTI law.

³ Only Grand Est, one of the new regions, has already negotiated a new contract following the merging. There will be 11 contracts when all the regions will have negotiated new ones.

However, it should be noted that the scope of this law is currently being discussed so that it will be fully aligned with Regulation (EU) 2016/2338 amending Regulation (EC) No 1370/2007.

The debate on the introduction of regulated competition in France is underway. In June 2016, the Prime Minister along with the association of French regions announced their intention to launch an experimental project of opening up certain regional markets to competition. A law that will delineate the legal framework for this experimental phase is still to be passed. Two senators have announced their intention to table such a draft bill within the course of 2017 with the aim of having it passed in autumn so as to make it possible to experiment with competition in anticipation of the deadline of the Fourth Railway Package.

In line with EU legislation, the international passenger market has been opened to competition since 2010. However, only marginal competition has emerged; Thello operates one line in the Provence – Alpes – Côte d'Azur region (two trains a day in each direction).

Currently, the rail traffic that falls under PSO is as follows:

- Regional: 100%

- Other rail networks (Paris region, i.e. Ile-de-France, underground in other regions): 100%
- main lines excluding high-speed: 100%
- High-speed (TGV): 0%

Intermodal competition is also growing in light of the development of urban and 'inter-departmental' road services.

3. Definition of public service requirements

The definition of public service obligations varies from one regional authority to the other, depending on its specific needs and contractual specifications. However, such obligations can be generally categorised as follows:

- service specifications;
- tariffs;
- service quality;
- passenger information.

Common qualitative criteria currently included in such contracts relate to:

- punctuality;
- cleanliness and comfort of coaches;
- effective circulation of foreseen trains;
- quality of services in train stations;
- passenger information.

The quality of the service varies from one region to another, depending on the specificities required by the organising authority. Nevertheless, SNCF monitors the general quality levels in a constant manner with a view to maintain and enhance it permanently beyond the minimum requirements stipulated in the contracts.

4. Scope of public service transport by rail

Public service contracts are granted for services throughout the territory. With a sum of roughly EUR 7.7 billion in 2016, public passenger railway services represented 53% of the turnover generated by SNCF's passenger transport services, which resulted in the transportation of 4.3 million passengers (per day).

Intercity trains serve 345 towns in France, including 12 night train lines. Regional services (TER) carry 1 million passengers a day and serve 5 000 stations and stops throughout the territory.

In the Paris region, 6 200 Transilien trains run every day. They carry 3.2 million passengers on each working day.

PSO contracts in France do not necessarily solely cover rail transport. On the contrary, there are some multimodal contracts offering integrated services between trains and the so-called 'substitution buses', which stop at the same cities, following the railway stations on a regional railway line, e.g. during off-peak hours on specific routes where the number of passengers is very small. This mix of train and bus services is foreseen and defined in the PSO contract, thus ensuring the requisite level of flexibility.

The average ticket price on Intercity PSO trains was EUR 20.30 in 2015 and EUR 20 in 2016.

Transdev operates marginal lines (two in Brittany).

5. Contract

Organising Authorities and the railway operator – SNCF – are bound by a type of contract similar to a concession. It is a contract governed by public law on the basis of national regulations. Each renewal procedure allows the authorities and SNCF to renegotiate contractual requirements. Each authority may sign one or several contracts covering its territory, which results in a multiplicity of contracts on the national territory. In the



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majority of cases, the regional authority signs a single contract with a single operator for the provision of regional rail services in its territory.

Each contract between SNCF and the authorities specifies which services, if any, can be subcontracted by SNCF. For instance, rail services that have been provided by Transdev in the past were subcontracted services.

In 2016, 18 regional contracts concluded between SNCF and the respective regions were in force. Following the merging of some regional authorities, the contracts will be merged when they end and be renegotiated.

End of contract	Number of contracts
2024	1 (with a review clause in 2020)
2020	1 (with a review clause in 2018)
2018	6
2017	7
2016	3

The organising authority determines the relevant quality levels, ticket prices and train schedules, but the operator has some leeway to suggest improvements or propose alternative options that, of course, the authority has the discretion to accept or decline.

6. Awarding of public service contracts

Regional trains, Intercity trains and Transilien trains (i.e. in Ile-de-France region) are awarded through direct award. On the contrary, urban and suburban transport is awarded through public tendering (or direct public management by the competent authority, i.e. in house – ‘régie’).

7. Contract negotiation

The level of compensation of public service operations varies from region to region. In practice, the competent authority determines the level of public service obligations for all the regional lines within its territory. SNCF proposes a service covering the public service obligations. The competent authority compensates the costs stemming from the discharge of PSOs that are not covered by revenues.

Current common quality criteria that are included in such contracts refer to:

- punctuality;
- cleanliness and comfort of coaches;
- effective circulation of foreseen trains;
- quality of services in train stations;
- passenger information.

There is a bonus/malus system in place against which observance of the stipulated qualitative criteria and efficiency indicators is measured. To that effect, a detailed report is submitted to the awarding authority every four years, covering various operational aspects.

In case of substantial changes in the conditions surrounding the contract, the contractual terms can be re-negotiated between the parties.

8. Calculation of the level of compensation

The pattern for the delineation of the adequate level of compensation is determined in advance. The PSOs are compensated through a direct financial influx for regional, Intercity and Transilien trains.

The level of compensation is the result of the difference between the foreseen costs and revenues.

Costs involved in calculating PSO levels:

- staff;
- energy;
- infrastructure access charges;
- maintenance and repair of vehicles;
- rolling stock;

- installations necessary for operating passenger transport services.

The financial risks associated with the PSOs are allocated as follows:

- risks which are entirely borne by the operator: production costs;
- risks shared between the operator and the competent authority: revenue;
- risks entirely borne by the competent authority: track access charges, VAT etc.

Moreover, any change in ticket prices leading to lower revenues might be treated differently depending on the specificities of the contract. In the majority of cases, the financial risks associated with revenues are shared between the operator and the regional authority. However, for Intercity trains and urban transport these costs are fully assumed by the operator.

Overall, the degree of compensation only allows for a small profit to be accumulated. It should be noted, though, that in France the concept of ‘reasonable profit’ is not well-established, since organising authorities tend not to perceive public services as a means of accumulating profits (political taboo). This is contrary to the situation in other Member States, such as the UK, where making a reasonable profit is considered the norm.

9. General payment conditions

All payments are based on an SNCF invoice.

All receipts and compensations are subject to a 5.5% VAT, which is subsequently recovered by SNCF.

As regards the operation of the Intercity trains, in 2016, the degree of compensation granted for the discharge of the PSO covered 94.6% of the overall incurred costs.

In France there is a penalty system stipulated in the contract, foreseeing penalties for cancellations or changes in train compositions, i.e. when the railway undertaking discharges a lesser service than agreed.

Regarding train delays, France has decided to apply exemptions from the Passenger Rights Regulation 1371/2007 to PSO traffic.

10. Duration of public service contract

Currently, the duration of PSO contracts is between 5 and 10 years. The length of the relevant contracts allows for reviews to take place.

11. Rolling stock

Rolling stock is financed either by SNCF, or, in the majority of cases, by the competent authorities (sometimes via leasing companies).

In light of the objective to gradually open up regional traffic outside Paris to competition and according to contractual specifications (with justified financial compensation – depending on each case), all types of rolling stock could be placed at the disposal of the region.

12. Involvement of the regulatory body or other authority

The regulatory body is in charge of ensuring effective and non-discriminatory access to the market. In application of Directive 2007/58/EC, the regulatory body is in charge of assessing whether the economic equilibrium of public service contracts is likely to be affected by any potential international or domestic passenger traffic.



Germany

1. Organisation of public service operations in Germany

The organisation of public services in Germany is regulated in the following pieces of legislation:

- Regulation (EC) No 1370/2007;
- General Railway Act (*Allgemeines Eisenbahngesetz* – AEG);
- Federal Regionalisation Act (*Regionalisierungsgesetz des Bundes*);
- Regionalisation Acts of the Federal States (*Regionalisierungsgesetze der Länder*);
- Regulation (EEC) No 1191/69;
- Public Procurement Law (*Vergabeverordnung*);
- Act against Restraints of Competition (GBW).

In Germany, public services have been organised in a decentralised manner since 1996. There is neither a legal nor a *de facto* monopoly in the domestic rail passenger market. Regional rail passenger services are ordered by the competent contracting authority (*Aufgabenträger*), in each of the individual federal states (*Länder*), on the basis of discretionary awards or tender procedures, with a significant increase of the latter in recent years. The *Länder* and other decentralised authorities are institutionally competent to determine public service obligations and to conclude contracts with railway



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operators. Therefore, the German Ministry of Transport is not involved in the conclusion of those contracts. The Ministry will only be consulted if any issues of principle arise. It is, however, responsible for proposing the legal framework, which the Parliament then decides upon.

The so-called 'regional funds' (*Regionalisierungsmittel*) are the major source for financing transport public service obligations. In 2016, an annual funding scheme of EUR 8.2 billion was agreed upon, for a period up to 2030. The funds are provided by the federal government to the states (*Länder*). The latter provide additional funds for the transport of special groups (students, persons with reduced mobility etc.) or the purchase of rolling stock.

Decentralised authorities may retain the entire scope of responsibilities regarding public service contracts themselves, or they may decentralise such tasks even further by granting them partially or totally to local authorities.

Currently, there are 27 regional authorities (PTAs) (*Aufgabenträger*), responsible for procuring and monitoring regional passenger rail services.

The federal states maintain other responsibilities including, *inter alia*, decisions on the general strategy, the allocation of funds to the PTAs, as well as decisions on whether to spend additional money from the federal states' general budgets for regional rail transport.

The German domestic passenger rail market was one of the first markets in Europe to be liberalised. The Railway Reform of 1994 has opened up the rail network to third parties. In 1996, the Federal Regionalisation Act provided the legal basis that was necessary to decentralise the planning and administration of regional transport and to allow for the federal states and the competent authorities to take responsibility in doing so. Today, the rail passenger transport market is open to competing railway undertakings (RUs) operating on both regional and long-distance markets. It should be noted that competition in the regional transport markets is particularly fierce. More specifically, RUs have open access to the entire rail passenger transport market, including cross-border, long-distance and regional services. Access requirements are stated in the General Railway Act (AEG).

Public service contracts for regional transport services are awarded on a non-exclusive basis, thus, in theory, it is possible to offer purely commercial services in competition with services operated under a public service contract ('cherry picking' principle).

2. Operators on the market for public passenger service transport

In 2016, around 93.7 billion passenger-kilometres were provided by RUs in the German passenger rail market, 58% of which were covered by PSO traffic and the rest by commercial (typically long-distance) traffic.

Competitors have penetrated the German market, mainly after the Railway Reform (even though some were already present beforehand, however on a marginal scale), and are currently running on a certain number of lines. Since 2013, the competitors' market share has increased by approximately 7 percentage points reaching 33% of train-kilometres, while DB Regio's market share is 67% (train-kilometres in 2016).¹ Some of the most important competitors of DB Regio are Transdev

(formerly Véolia) as well as subsidiaries of various state incumbents such as Abellio (affiliate of Nederlandse Spoorwegen, NS), Keolis (affiliate of Société Nationale des Chemins de Fer Français, SNCF), Netinera (affiliate of Ferrovie dello Stato, FS), the Schweizerische Bundesbahnen (SBB/CFF/FFS), and Vias (affiliate of Danske Statsbaner, DSB).

DB Regio is the largest operator on the market for public service operations. According to data from 2016, the volume of the regional railway market was about 673 million train-kilometres.² Amongst the largest competitors were Transdev (7%), Netinera (5%), BeNEX (3%), Hessische Landesbahn (HLB) (2%) and Keolis (2%).

Another trend emerging in the German passenger rail market, which can also be traced in the relevant British and Swedish rail markets, is its internationalisation. In 2015, about 45% of all train-kilometres operated by non-DB companies were run by internationally operating companies and foreign national carriers.³

Apart from the intra-modal competition between RUs, intense competition takes place between RUs and long-distance buses and coaches, as well as with low-cost airlines, particularly on longer routes.

¹ Association of German Competent Authorities BAG-SPNV, 30 March 2017

² See 1.

³ See to that effect a case study conducted by Dr Heike Link, *Liberalisation of passenger rail services in Germany*, CERRE, 6 December 2016.

3. Definition of public service requirements

The decentralised authority is solely responsible for the definition of the notion of a public service obligation. Generally, such obligations consist in:

- tariff obligations (usually for gross cost contracts);
- service frequency requirements;
- quality of the services provided, particularly punctuality;
- rolling stock characteristics;
- marketing;
- train staff.

It should, however, be noted that the quality of infrastructure may affect the overall quality of public service traffic, mainly in terms of punctuality and speed. Consequently, this may have a serious impact on the contract, as the EU Passenger Rights Regulation 1371/2007 is nearly fully applicable in Germany.

One of the key challenges in providing high-level rail transport services is access to available and secure infrastructure. At this point, Germany is facing tremendous challenges regarding urgently needed maintenance and renewal works, as well as forecasted bottlenecks relating

to network utilisation. Naturally, when tackling these challenges the respective infrastructure works do not only affect PSOs but the entirety of railway services. For instance, rerouting may be required and can lead to the channelling of services through more time-consuming routes or lines, or may require substitution by bus and coach services. This affects the connectivity of the respective service and of course leads to a perceived degradation in quality of the PSO traffic.

4. Scope of public service transport by rail

The entirety of urban, suburban, regional and inter-regional rail traffic in Germany is covered by public service contracts. By contrast, all long-distance traffic is operated on a commercial basis.

As for DB Regio, in 2015 approximately 22 800 trains commuted daily, with an average travellers' distance of almost 23 km.

The economic equilibrium test and, therefore, the possibility to limit open-access traffic to protect PSO lines is not applicable in Germany.

In principle, current PSO contract requirements cover only rail transport. The contracts regularly foresee substitute services in case of limited access to infrastructure due to, for instance, maintenance work or emergencies. These services are subsequently covered by bus lines.

5. Contract

At the time being, there are approximately 300 public service contracts running, out of which 180 are concluded with DB Regio.

There are no standardised contracts for the discharge of public service obligations. Each competent authority has its own contract form, which reflects the prevailing conditions in the region and has to comply with the legal requirements of EU law (Regulation 1191/69 and, as of December 2009, Regulation 1370/2007) and German public law.

In some cases, the contract concluded with the *Aufgabenträger* will relate to the entirety of public service lines in the relevant area. However, in most cases the contracts cover a group of lines.

Even in 2016 there were, though very few, contracts in Germany that were based on the former regime (Regulation 1191/69). Most contracts, however, are based on the new one (Regulation 1370/2007).

As there are 27 competent authorities in Germany, many different contracts exist in terms of geographical coverage and duration. In the past few years, competent authorities have exercised their competence to reshape their networks, divide them into smaller lots and induce cooperation with other competent authorities.

The contracting authorities are solely responsible for the definition of the obligations stipulated in the PSO contracts. They order local and regional rail passenger services in the German federal states and decide how such services are structured in their regions stipulating which lines and stops should be operated, and at what frequency. These definitions can include niche obligations referring to service specifications such as punctuality, service frequency, operating hours etc., as well as various technical requirements that the rolling stock must meet.



6. Awarding of public service contracts

The contracting authorities have full discretion as to the awarding procedure, i.e. tender or direct award, when concluding PSO contracts. This discretionary leeway has been effectively restrained since February 2011, when the Federal Supreme Court ruled that direct awards of public contracts for passenger transport services will only be permitted under a few – strictly defined – conditions, so that, gradually, open tendering procedures have become the norm for practically all passenger transport services under a public contract.

The *Aufgabenträger* has the possibility to extend the duration of the contract for a limited period of time, without any tendering procedure. Examples have occurred in the past.

The year 2015 has even more resoundingly proven that competition is well-established in the German regional rail market. For instance, in 2015, 117 million train-kilometres were tendered, which, compared to the 63 million train-kilometres that were tendered in 2014, marks a significant increase. Out of

these, approximately 61% was awarded to competitors of DB Regio. In 2016, the share of competitively awarded contracts was 88%; in numerical terms 19 tenders were launched. Within the next 5 years, it is expected that about one third of the total market volume will be tendered out.⁴ It goes without saying that this year to year comparison only serves as an indicative example of the way in which the structure of the market has evolved. The volume of the contracts that are being tendered out is relatively volatile and merely depends on the intensity with which such operations were carried out in the previous years. Thus, any future stagnation in the number of tenders, should not be interpreted as a new trend but as a natural consequence of the preceding intense tendering activity.

7. Contract negotiation

According to both German and European procurement law, there are different procedures for awarding a contract, namely through tendering, negotiation and, finally, direct awards. However, direct awards are only allowed in exceptional cases and thus, tendering

procedures are most commonly executed. Some of the contracts are awarded through negotiation, which often concerns rather complex contracts, i.e. negotiations for the extension of previously tendered contracts.

The tendering procedure is rather rigid, leaving little leeway for introducing innovative or alternative details to already procured tenders. Once published, the tender documents outline very specific technical requirements, schedules, personnel occupation etc. Thus, room for effectively proposing alternative solutions is scarce, if not non-existent.

The contractual elements are regularly set in the tender documents by the competent authorities. There is no room for negotiation other than in cases where the PSO is awarded through the so-called negotiation procedure, which will then cover the following aspects:

- negotiation of qualitative criteria, amendments to foreseen scheduling;
- alternative proposals to the type of rolling material/carriages;
- equipment of rolling material/carriages;
- requirements/quota concerning accompanying train personnel.

The level of compensation for the discharge of public service obligations varies depending on the type of contract and the foreseen services. Choosing a certain type of contract, constitutes a typical means for competent authorities to steer the compensation level. This can vary from so-called 'gross' to 'net' contracts; both types may involve an incentive mechanism. In statistical terms, for DB Regio the ratio between 'gross' and 'net' contracts is approximately 20% and 80%, respectively. On that point, it should be noted that there has been a growing tendency, in the past few years, towards gross contracts. Each public authority defines its priorities and applies them to all operators within its geographic scope of competence.

Throughout their lifetime, PSOs are compensated on the basis of an *ex ante* agreed direct financial influx. The agreed level of compensation will not alter during the course of the contract.

Contracts typically foresee penalty payments in case of documented deteriorating performance; in case of exceptional outperformance few contracts foresee bonus payments.

As the market is open to competition, 'cherry picking' is, in principle, possible

⁴ See DB Regio AG Business Report 2015.

– PSO contracts are awarded on a non-exclusive basis, implying that other competitors can choose to compete on the same route, if they wish.

In general, new market entrants tend to offer very competitive prices, while competitors with experience in implementing the respective contracts set prices at a more solid level. So far, cherry picking has been used by competitors with longer market experience, who have strategically chosen to pursue PSOs with less expected competition. In these cases, a competitor may even bid for more complex PSOs. However, it should be noted that cherry-picking of lines and networks marked the phase during the transition towards an open and competitive market. Since that stage is now well-established, cherry-picking can be considered a bit obsolete as a practice.

If the contract provides that the ticket revenue generated through the operation of the service remains with the railway undertaking (so-called 'net cost contract'), then the railway undertaking takes the associated risk, which, depending on the actual conditions, could constitute an opportunity for the railway undertaking.

In practice, the railway undertaking submits a technical and financial offer for the public service obligation requested to the railway authority. One revenue element is the fixed financial influx paid on the basis of actually delivered train-kilometres if the contract is awarded; another revenue element is generated by ticket sales. The tender documents clearly outline how the two revenue elements relate to each other proportionally. The predefined proportions vary largely and therefore, the financial risk for the RU varies largely. The financial influx may represent between 10 and 90% of the revenues; the remaining percentage has to be covered by the ticket revenues.

In other cases, the competent authority may decide to conclude the so-called 'gross cost contracts', i.e. contracts whereby all revenues generated by the services are given to the authority by the railway operator. In such cases, the contract is paid through a fixed amount agreed upon the conclusion of the contract and thus, no additional incentive elements exist.

Finally, RUs are experiencing a new trend adopted by the competent authorities, which is to offer the so-called incentive-based gross contracts. They basically form

a combination of the two aforementioned contract models containing an incentive element with regard to the growth of revenues. Beyond the gross remuneration the RU may receive a share of the revenues if the growth is exceptionally high, however, this will be clearly defined in the contract. The extent of this 'incentive' element compared to the agreed financial influx may, in practice, be so large that the contract will then function like a net contract.

8. Calculation of the level of compensation

The level of compensation is determined in the offer proposed and part of the contract signed after a competitive tendering.

The calculation of the overall costs for the service in question will be based upon the following costs:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock (depending on the contract);
- installations necessary for operating passenger transport services;
- sales/marketing costs.

With the award of a tendered so-called net contract, the financial influx is fixed for the lifetime of the contract. The agreed financial contribution is calculated on the basis of revenue forecasts. Thus, the eventuality of decreased revenues has to be anticipated and calculated by the RU. If such a risk materialises, the RU fully bears the relevant risk, as well as the associated chance of increased revenues. In the so-called gross contracts, this specific risk is initially borne by the contracting authority; so is the chance for the authority to benefit from unexpectedly higher revenues.

Despite the fact that RUs have had to face increased costs, for example due to higher renewable energy charges ('EEG-charges') or labour costs, ticket prices have only been moderately adjusted each year. Moreover, it is worth noting that for regional passenger services, the infrastructure manager can only increase access charges at the growth rate of regionalisation funds, which is currently 1.8%.⁵

The part of the contracts associated with revenues is often handled on a different organisational level. The so-called *Verbände* (public associations) typically organise ticket tariff schemes in

⁵ See to that effect a case study conducted by Dr Heike Link, *Liberalisation of passenger rail services in Germany*, CERRE, 6 December 2016, page 10.



Germany

the regions they are in charge of. These associations are public organisations that bundle the interests of traffic operators and public authorities in order to offer harmonised ticket schemes.

The PSO compensation level includes a reasonable profit in Germany.

9. General payment conditions

Payment is made through regular instalments at determined intervals. The payment is regularly exempted from VAT. The monitoring of the funding capacity is defined in federal law. In 2016, the foreseen review was concluded on the basis of an external independent assessment of the contracted and planned traffic volume. The financial requirements for each federal state and its respective authorities are defined in national law (*Regionalisierungsgesetz*).

Data on the financial volume of PSOs in Germany is not publicly available. According to a study commissioned by the German Government and published in 2016, the level of compensation - in terms of cost coverage - granted to RUs for the discharge of PSOs in Germany ranged between 105 to 106% in 2012.

A monitoring process is instituted on a per contract basis, whereby the parties to the contract keep track of the achievements made. This includes a monitoring of the quality targets met by the railway undertaking.

A system of bonus/malus is also established. Accordingly, the railway undertaking will obtain premiums or be sanctioned depending on whether it has managed to reach the quality targets stipulated in advance in the contracts.

Penalties relate to the provision and the quality of the requested services. The contracts foresee fixed formulas on how to calculate and deduct the penalties from the direct financial influx. Delays and cancellations are objectively measured and reported to the contracting authority. With regards to the predefined qualitative criteria, apart from the regularly conducted objective assessments, customer surveys are also taken into account.

Typically, there is a scheme indicating a percentage of the direct financial influx to be deducted according to, for instance, the minutes of delay or the low performance as perceived by the customer. Cancellation of trains,

irrespectively of whether it is due to unplanned maintenance works or to scheduled maintenance activities, may lead to a reduction of the financial influx. With few exceptions, sudden delays due to external factors, such as weather conditions or third-party actions, are treated as if the services were not provided at all or too late and lead to a full or partial deduction of the compensation. Failure on the infrastructure side falls into the risk sphere of the railway undertaking. The operators will therefore have to bear the consequences of such delays, in accordance with the provisions of the EU Passenger Rights Regulation, which is fully applicable in Germany.⁶

Qualitative criteria are typically defined by the contracting authorities. Leeway for negotiation is very limited. Common qualitative criteria include, *inter alia*:

- scheduling (synchronised and coordinated timetables);
- punctuality and requests for service frequency;
- equipment/standards of fleet;
- securing connectivity;
- cleanliness;
- customer information/IT;
- travel attendance;

- distribution channels;
- setting up of fleet.

During the past 15 years, competent authorities have put an emphasis on additional qualitative aspects, apart from the basic indicators such as punctuality, cancellation of train services and capacity of the rolling stock. Consequently, the qualitative requirements have been extended in order to cover wider customer criteria and ensure a smooth cooperation between the competent authority and the RUs. To that effect, qualitative criteria commonly foreseen in contracts relate to various fields such as damage recovery, emergency management, travel information to customers, ticket sales through different distribution channels, provision of personnel etc. Observance of the stipulated qualitative standards is monitored systematically – bi-annually or up to twice per year, depending on the contract – on the basis of a detailed scheme, which indicates against what scale to measure the results and what penalty system should be applicable. The quality scheme further outlines whether the criteria are assessed on an objective basis or through customer surveys. The results are directly

⁶ There is only one exemption from the application of the Passenger Rights Regulation for rail transport: regional services are exempted from the obligation to provide food or drinks on board the trains.

sourced in the overall evaluation of compliance with quality criteria and directly lead to penalties for the RUs.

10. Duration of public service contract

The average duration of public service contracts varies between 10-11 years. This lifespan is, in principle, considered to be the minimum, as it merely reflects the entrepreneurial investment perspective in rolling stock and maintenance facilities related to a PSO.

11. Rolling stock

Rolling stock used in public service contracts can be owned by the operator but can also be owned by the federal state and/or leased by a ROSCO, which is a rolling stock company. However, the awarding authority may require the rolling stock to be tailored to the services provided. Moreover, it should be noted that in the vast majority of tenders the use of relatively new rolling stock is required, which accordingly shifts the risk for financing rolling stock to the operators, particularly in light of

the fact that usually the duration of the public service contract is shorter than the lifetime of rolling stock. To mitigate these risks and to enhance participation in tendering procedures, regional authorities have developed various instruments, i.e. leasing models, train pools of PTAs and guarantee schemes.

As for DB Regio, the majority of rolling stock used for the provision of public services is owned and financed by the company itself. Following the requirements of the tendered contracts, the majority of the rolling stock used by DB Regio in the past few years has been relatively new. In more detail, only 7% of its fleet is older than 30 years, while 55% is newer than 20 years and 21% is newer than 10 years.

The way in which competent authorities monitor the provision of rolling stock that they own and finance in the form of the so-called 'fleet-pools' is not transparent to RUs, as it very much depends on the authority itself. The standardisation of rolling stock constitutes an important factor for the development of a functioning second-hand leasing market. It should be highlighted that the standardisation process would be more effective

than mandatory rules for contracting authorities, i.e. obligatory leasing models.

12. Involvement of the regulatory body or other authority

The national rail regulator (BNetzA) does not interfere with the awarding of PSO contracts, since competent authorities are already bound by law. In case of contentious decisions granted by competent authorities in the course of the awarding procedure, affected parties that have *locus standi* may ask for legal review.

The rail regulator has competence on specific points with regard to public service operations:

- access fees to stations;
- determination of the infrastructure fees;
- handling of price disputes;
- elements of train access fees to infrastructure (regional factor);
- information and coordination of construction measures (track works especially);
- market monitoring.



1. Organisation of public service operations in Greece

In Greece public passenger railway services are organised both at centralised and decentralised level. Thus, regional and local authorities have the competence to award public service contracts, along with the central state authorities. However, up until now only the central state authorities have concluded PSO contracts.

For the time being, the content, delimitation and definition of public service obligations is not regulated in great detail. The sole legal basis is Regulation (EC) No 1370/2007 and the respective national legislation.

Public service transport is provided in accordance with prescriptions included in a contract negotiated with the national carrier, TRAINOSE.

The Greek market for domestic passenger railway services will not be open to competition until 2019.

2. Operators on the market for public passenger service transport

TRAINOSE is the only company that operates public service passenger transport in Greece. Currently, there are two licensed private freight operators.

3. Definition of public service requirements

The obligations imposed by the competent authority, i.e. the Ministry of Transport and Communications, include, *inter alia*, obligations on

- schedules;
- rolling stock; and
- special treatment for special categories of passengers.

4. Scope of public passenger transport by rail

TRAINOSE is the only railway undertaking providing suburban, local, regional and long-distance passenger traffic in Greece.

99% of the domestic railway traffic falls under a PSO regime.

In numerical terms and according to data from 2015, TRAINOSE discharged 57 163 364 passenger-kilometres, operating 254 trains per day.

5. Contract

There is a public service contract concluded between TRAINOSE and the state. This ongoing contract is a 'net' contract meaning that the operator can accumulate revenues from the sale of tickets, but will also have to bear the associated costs. A 'reasonable profit' is also foreseen.

6. Awarding of public service contracts

The current public service contract was directly awarded to TRAINOSE.

7. Contract negotiation

According to current legislation, public service operations are to be compensated through financial compensation.

8. Calculation of the level of compensation

The level of compensation is the result of the difference between the foreseen costs and revenues and is delineated on a yearly basis. Elements that are taken into account to determine the cost of the public services relate to the following costs:

- staff (driver and other mobile staff);
- infrastructure charges;
- costs generated from the rolling stock (maintenance, repair, amortisation and interests);
- shunting services;
- installations necessary for operating passenger transport services;
- VAT.¹

9. General payment conditions

In principle, compensation should be paid in advance by the Greek state to the railway undertaking evenly distributed in four instalments. If the undertaking's deficit for the provision of the public service transport requested for the

period considered is higher than the compensation already paid, the state, supposedly, will proceed to an additional payment. If the compensation received is higher than the actual deficit linked to the supply of public services, the recipient is obliged to return the difference without any interest. However, in practice, these provisions are not applicable as public authorities are not in a position to finance the public service obligations they request.

The compensation is subject to VAT.

No penalty scheme is foreseen given the prevailing conditions on the Greek market.

Finally, the EU Passenger Rights Regulation is applicable with exemptions in domestic traffic.

10. Duration of public service contract

The current public service contract entered into force in 2011 and will remain valid until 2019.

11. Rolling stock

The Hellenic State is the owner of the rolling stock. GAIOSE, a state-owned company, has been appointed administrator of the rolling stock.

As regards the age of the rolling stock, 19.6% is less than 30 years old, 74.8% is less than 20 years old and 3.2% is newer than 10 years old.

12. Involvement of the regulatory body or other authority

The rail regulatory body in Greece does not have any powers relating to the provision of public service passenger transport. It should be noted that an independent authority in charge of passenger transport (road and rail) has been recently constituted.

¹ The railway undertaking will have to pay VAT on revenues generated by the sale of tickets. This VAT fully forms part of the costs incurred by the railway undertaking. As the costs must be calculated **prior** to the effective implementation of the service, the railway undertaking will base itself on the average VAT paid the previous year to determine the amount of VAT that must be taken into account in the overall cost of the services.



Hungary

1. Organisation of public service operations in Hungary

The public passenger railway transport in Hungary is regulated by Regulation (EC) No 1370/2007, Act CLXXXIII of 2005 on Railways and Act XLI of 2012 on Passenger Transport Services, as well as Government and Ministerial Decrees issued as implementing regulations.

Public service transport is managed centrally by the Government and the Ministry of National Development, however, the local municipalities are also involved with regard to the discharge of local services. The market for domestic passenger railway services has been opened to competition since 2006. However, the part of the market that is actually contestable is marginal, i.e. approximately 1%, since it covers only traffic that falls beyond the scope of PSO services.

The majority of passenger transport (suburban, regional, national (long-distance), extra-national (long-distance – intercity), and urban) is public service transport. In terms of market segments, MÁV-START is active in all four segments and GYSEV is active in the regional, national and extra-national long-distance segments. The following services fall out of the scope of public service obligations:

- international passenger transportation on international trains;
- national passenger transportation on certain non-public railway lines (traffic on narrow-gauge lines, children's railway);
- non-scheduled national passenger transport on national public railway lines (special trains).
- Fertőszentmiklós (HU) – Pomogy-Pamhagen (AT) (operated by GYSEV)
- Fertőszentmiklós (HU) – Pomogy-Pamhagen (AT) – Neusiedl am See (AT) (operated by GYSEV/Neusiedler Seebahn (NSB))
- Sopron (HU) – Wiener Neustadt (AT) (operated by ÖBB)
- Szentgotthárd (HU) – Graz (AT) (operated by ÖBB)

Up to this point, the opening of international passenger traffic to competition has not affected public service transport in Hungary. To that effect, it should be noted that within the framework of the discharge of Austrian/Hungarian public service obligations, certain trains, whose origin/intermediate and stop destination lie within Hungarian territory, are still considered as Austrian domestic traffic and *vice versa*, in accordance with specific provisions of the relevant cross-border agreement. Therefore, the trains that are operated on these lines are perceived as Austrian/Hungarian domestic trains. However, they do not formally fall under the Hungarian or the Austrian PSO traffic, but rather receive a new train number at the Szentgotthárd (HU) border station. The following cross-border lines constitute a pertinent example:

- Deutschkreutz (AT) – Sopron (HU) – Ebenfurth (AT) (operated by Raaberbahn/ÖBB)

The timetable for public passenger transport services and the alternative timetables are elaborated by MÁV-START and GYSEV, the two exclusive rail passenger operators on the Hungarian market, together with the competent authority. The timetable is then approved by the Minister of National Development. Before the publication of the timetable for public passenger transport services, its content should be consulted with local public authorities and road passenger transporters.

The Railway Act, the Passenger Transport Services Act and the above-mentioned decrees regulate access to infrastructure, the market opening process and the discharge of public service obligations in compliance with community rules.

2. Operators on the market for public passenger service transport

There are currently two railway companies present on the Hungarian market: MÁV-START and GYSEV. MÁV-START is indirectly 100% owned by the Hungarian state and is the major passenger rail transport operator in Hungary, operating approximately 95% of rail services. GYSEV is a smaller company, covering 5% of rail services, its ownership is shared between the Hungarian state (65.6%), the Austrian State (28.2%), and STRABAG SE (6.1%). It operates regional public service passenger lines in the western part of the country.

The public service contracts relating to rail cover the relevant area of operation of the respective infrastructure managers (i.e. MÁV and GYSEV), therefore these are so-called 'area based contracts' where the respective railway undertakings (MÁV-START and GYSEV) provide the public services. The PSO contracts relating to bus services are separate and are handled in separate public service contracts, the procurer (i.e. the Hungarian state) does not order combined traffic timetables.

3. Definition of public service requirements

Public service obligations are defined in the aforementioned Railway Act and Passenger Transport Services Act as well as in the contracts concluded between the railway undertakings and the Hungarian state (represented by the Ministry of National Development).

The public service contracts contain the rights and obligations of the parties; some contractual conditions are determined in Government Regulations and special Annexes on a yearly basis. The main obligations refer, *inter alia*, to:

- tariff obligations and compulsory discounts for social groups of the population;
- service frequencies;
- the content of public service activities and timetable;
- compulsory quality indicators to be reached such as punctuality, cleanliness of rolling stock and passenger areas in stations, provision of information for passengers, elimination of physical obstacles for persons with reduced mobility, etc.;
- separated accounting records according to the 50/2007/GKM-PM Regulation;

- control of the services, sanctions.

Qualitative criteria constitute an important part of the contract. They are negotiated in depth with the Ministry of National Development each year. The criteria are assessed both as a nexus and separately, the common database is evaluated at the end of each year.

The criteria vary for different service segments (suburban, regional, long-distance and long-distance with supplement); the most relevant ones are the following:

- punctuality;
- cleanliness;
- rolling stock technical parameters (heating, air conditioning, rolling stock conformity for service segment);
- passenger information.

Both railway undertakings provide Wi-Fi services in a number of wagons and at stations as a commercial gesture.

Station cleanliness and passenger information in stations also fall within the ambit of PSO under the general parameters of cleanliness and passenger information respectively.

4. Scope of public service transport by rail

Almost the entirety of the national network is covered by public service transport obligations. There are two parallel systems put in place, respectively covering coach and rail transport through separately granted public service contracts. Therefore, no integrated services are ordered; however, the operators are motivated to cooperate.

In numerical terms, in 2016 MÁV-START discharged its public service obligations operating approximately 2 865 trains and transporting 400 000 passengers per day, which amounted to a sum of 6 993 million passenger-kilometres throughout the whole year. Accordingly, during the same time period, GYSEV provided public service transport operating, on average, 90 972 trains (throughout the whole year) and transporting 16 700 passengers per day, which was translated into the rendering of 253.6 million passenger-kilometres in total.

Overall, the railway traffic falling under a PSO represented 95.2% (2015) and 95.4% (2016) of all passenger rail services in the country and covers 100% of the domestic traffic.



5. Contract

The Minister of National Development – with the approval of the Minister for National Economy – concluded a long-term public service contract with MÁV-START and GYSEV on the detailed conditions, as well as the method of financing of public service passenger transport.

Both contracts with GYSEV and MÁV-START entered into force on 1 January 2014.

The contracts cover the operational territory of the operators. As elaborated already in section 2, the public service contracts relating to rail cover the relevant area of operation of the respective infrastructure managers (i.e. MÁV and GYSEV), therefore these are so-called ‘area based contracts’ where the respective railway undertakings (MÁV-START and GYSEV) provide the public services.

6. Awarding of public service contracts

The public service contracts mentioned in section 5 were granted through a direct award process, on the basis of negotiations between the Ministry of National Development and the railway companies. The next public service

contract in 2023/2024 will be awarded according to the provisions of the relevant regulatory regime at the time.

7. Contract negotiation

The contracts between the Hungarian state and MÁV-START Co. and GYSEV were signed in 2013 and entered into force on 1 January 2014. They were concluded under the new public service regime established by Regulation 1370/2007 and the Passenger Transport Services Act. The contracts provide for the rights and obligations of the parties, the legal, financial and technical conditions of the use of railway infrastructure as well as the definition and partial financing of the public services through the earmarked central budget.

During the negotiation process, the railway undertakings determined the conditions under which they are able to provide the services considering both the prevailing financial conditions and the requisite level of qualitative criteria that needs to be met.

At this point, it should be highlighted that ticket prices have remained relatively unchanged since 2012, due to the regressive characteristics of the established tariff system; prices remain

steady irrespectively of the distance or the discharged kilometres. Moreover, there is a great variety of long-lasting social discounts ranging from 20 to 90%. The average price on regional trains was EUR 1.09 in 2016, while a one-way ticket for a 90-km long-distance journey would cost EUR 5.50 (1 680 HUF). However, it can be observed that the proportion of the travel types has slightly altered; tickets producing higher revenue are on the increase as opposed to tickets and passes under a social tariff scheme.

As part of the public service contract, the Service Level Agreement stipulates certain parameters according to which passenger transportation services are being rated. They mainly refer to passenger transportation as such, i.e. on-board passenger information, cleanliness of the wagons, EMUs and DMUs, punctuality and technical compliance of the rolling stock, but some parameters refer to requirements fulfilled by the infrastructure managers, thus having an indirect impact on passenger transportation such as the punctuality of trains, the aesthetic condition of the station buildings, cleanliness of the stations and passenger information provided in the stations.

It is important to note, in order to avoid any confusion when using the term ‘Service Level Agreement’, that in the case of GYSEV there are also so-called Service

Level Agreements between the different business units which ensure their financial and service level sustainability. Such Service Level Agreements are necessary due to the fact that GYSEV is an integrated railway undertaking where financial separation of the different business units exists. These Service Level Agreements are not the same as the ones laid down in the annexes of the PSO contracts of MÁV-START and GYSEV, it is only the terminology which is identical.

8. Calculation of the level of compensation

According to the Passenger Transport Services Act, financing is organised as follows:

- partial compensation for losses made from ticket sales (difference between reduced rate and full fare for domestic tickets);
- additional compensation covering other activities/costs required in the public service contract (partial financing of basic passenger services in the form of supplementation of revenues; this support also includes the monthly compensation of other services ordered by the state, for example students can travel free by train after a visit to certain museums);

- exclusive rights provided on all lines covered by the public service contract, excluding any possibility of ‘cherry picking’.

The rationale of the contract is that the Hungarian state – as a customer of public service operations – determines the volume and quality level of public services, the number of trains and the volume of capacity to be allocated.

According to the public service contracts, the planned justified costs not covered by revenues are calculated by MÁV-START and GYSEV and then approved by the Hungarian state. As regards the accuracy and appropriateness of the claimed amount, the method of calculation that was applied, as well as the correspondence with the registered actual costs, regular checks can be conducted by the awarding authority.

Justified costs are based on the following costs:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock;
- installations necessary for operating passenger transport services.

In the case of MÁV-START, the historical debt deriving from previous unpaid (or inadequately paid) public service obligations falls upon MÁV Co., the sole and direct owner of MÁV-START.

9. General payment conditions

As stipulated in detail in the public service contract, payment is granted through monthly instalments and is planned on an annual basis upon submission of annually and quarterly reports elaborated by the provider of services on the incurred costs and revenues as well as further requirements foreseen in the contract. To be more specific, a cash flow plan forms part of the contract, stipulated as a clause. In the framework of the 10-year public service contract, the state undertakes to cover the justified costs that are not covered by the income. Fulfilment of this obligation takes place annually, after the earmarked state resources are approved and guaranteed in accordance with central budget laws. The monthly reports that are handed down by the service provider also assess the fulfilment of the relevant qualitative criteria (indicators), according to the specifications foreseen in Annex 8 to the agreement. Following this assessment, the customer, i.e. the granting authority, carries out monthly control checks via its commissioned representative (KTI-SZI) in

order to verify the reliability and accuracy of the conducted assessment. The customer operates a bonus-malus system based upon the expected and performed level of service.

The compensation is not subject to VAT, considering the fact that it merely covers the public service costs that are not covered by revenues, thus no taxable income is realised.

The concluded contracts are ‘net’ contracts, allowing for the accumulation of revenues generated by ticket sales, along with the associated risks.

Delays in services are compensated in accordance with Regulation (EC) No 1371/2007 and Government Decree 271/2009. Delays are treated equally, irrespective of the conditions that instigated the inefficiencies, so in case of *force majeure* passengers can still get compensation.

GYSEV is vertically integrated and is therefore subject to various obligations that relate to passengers and infrastructure operations and are foreseen in the Service Level Agreements; when the level of passenger services lags behind the relevant qualitative standards due to the state of infrastructure, the infrastructure unit will

have to bear the cost stemming from the losses in profits.

For the time being, a direct reduction of the compensation granted is not foreseen in the contract concluded with GYSEV, if the services provided do not meet the requisite level of quality. In that case, the only repercussion, is a related decrease in profits.

In the contract concluded with MÁV-START, a bonus-malus system was established reflecting discrepancies between the expected and performed level of services. Accordingly, the level of compensation paid by the Hungarian state shall decrease if the qualitative standards set out in the public service contract are not met due to deficiencies in infrastructure.

Any decrease in the level of quality of the services provided (punctuality, cleanliness, passenger information, vehicle requirements etc.) will naturally worsen the conditions of travelling and will thus lead to lower passenger volumes resulting in a loss in ticket revenues. To that effect, it should be noted that reduced profit levels do not qualify as a justified cost for the calculation of the relevant compensation, while the latter will be negatively affected in case of non-observance of the agreed qualitative criteria. It is thus obvious that



low quality of services will ultimately have a direct impact on profits and on the level of compensation.

In Hungary a 'reasonable profit' is included in the PSO compensation level depending on the efficiency; the amount can be up to 5% of the ticket income. However, the level of the ticket income is low, representing about 18% of all costs covered by ticket sales.

According to data from 2015 and 2016, the compensation granted covered 96% (2015) and 92% (2016) of the total costs incurred by GYSEV for the discharge of the PSO, while for MÁV-START the relevant figures were and 91.2% and 89.2%, respectively.

10 Duration of public service contract

The ongoing public service contracts of GYSEV and MÁV-START were concluded for a duration of 10 years, i.e. they remain valid until 31 December 2023. This duration provides railway undertakings with a foreseeable financial framework and the possibility to deploy a business strategy.

11. Rolling stock

The rolling stock used by GYSEV for the discharge of the public service contract is mostly owned by GYSEV/ Raaberbahn or MÁV. In more detail, GYSEV is in possession of 10 EMUs, which are financed through the PSO contract.

MÁV-START owns 27% of the rolling stock used and rents 73% of the fleet from MÁV Co.

It should be noted that the majority of the rolling stock is financed through the PSO contract, nevertheless a recent procurement of 42 EMUs and 6+15 EMUs has been co-financed by the EU Cohesion Fund.

As regards the age of the rolling stock operated by GYSEV, according to data from 2016, 73.5% was over 30 years old, 17% aged between 20-30 years, while 9.5% was less than 10 years old. The respective percentages for MÁV-START in 2016 were as follows: 84% of carriages and 47% of multiple units were over 30 years old while only 0.1% of carriages and 27% of multiples units were less than 10 years old.

12. Involvement of the regulatory body or other authority

The competent department of the Ministry of National Development (successor of the National Transport Authority since 1 January 2017) does not play any role in the negotiation and awarding process of the public service contracts; its sole task is to check the fulfilment of passenger rights and act as licensing authority. The Transport Organiser Offices (KTI-SZI) act on behalf of the Ministry of National Development and control the quality parameters set out in the contract.



1. Organisation of public passenger service operations in Italy

The legal basis for the award and financing of public service obligations in Italy is Regulation (EC) No 1370/2007. The Regulation is reflected in the following national laws:

- Decree No 422/1997, for regional public services, as amended in 2009 in the course of ensuring, *inter alia*, compliance with Regulation 1370/2007;
- Law No 166/2002, for national public services, as amended in 2007.

As of 2000, no monopoly exists in Italy. To that effect, deviations from the open-market norm related to reciprocity clauses – for foreign railway undertakings – and economic equilibrium safeguards – for PSO services – may apply, conditional upon the review and approval of the regulator.

Up until 2001, the entirety of public service operations was financed by the state. Since then, in application of a general devolution of powers from central to local authorities (Italian Constitutional Law No 3/2001), public service obligations rendered in majority on regional lines are awarded and financed by regional authorities. According to this legal framework, regions are solely

responsible for planning transport activities within their geographic area.

Long-distance day and night intercity trains connecting northern to southern Italy are also operated under a PSO contract, which was directly awarded to Trenitalia by the central government (Ministry of Transport and Infrastructures endorsed by the Ministry of Economy).

All public passenger transport is granted through the conclusion of public service contracts; all urban, suburban, regional and inter-regional traffic falls under public service obligations.

The Italian rail market is fully open to open-access competition on the entire network. Currently, competition takes place mainly on the high-speed network where Trenitalia and NTV operate competing rail services. This situation is unique world-wide, since only in Italy are there two railway undertakings competing on domestic high-speed services.

2. Operators on the market for public passenger service transport

On the regional public service passenger transport market there are several companies operating in Italy:

- Trenitalia, fully owned by Ferrovie dello Stato Italiane, which covers the majority of regional services;
- Trenord, owned by Trenitalia and F.N.M. S.p.A. with a 50% share each, operating in Lombardy;
- another 20 or so railway undertakings, mainly owned by regional authorities (also called 'internal operators') providing regional and local services.

A few long-distance intercity and night trains connecting northern with southern Italy are also operated under a PSO contract, directly awarded to Trenitalia by the central Government.

Some international services are run by Trenitalia in cooperation with SBB for trains to/from Switzerland and with DB/ÖBB for trains to/from Germany and Austria.

SNCF operates high-speed services from Milan to Paris in direct competition and with cabotage between certain stations along the journey.

Thello, a railway undertaking owned by Trenitalia, operates a night train from Paris to Milan/Venice in direct competition and an intercity train from Milan to Marseille with cabotage allowed.



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3. Definition of public service requirements

Public service obligations usually consist in obligations on fares and timetables, traffic levels with regards to regional services and the effective deployment of long-distance rail links between the north and south of Italy.

The PSO contract foresees a monitoring activity through the identification of specific key performance indicators (KPIs) and a provision for conducting train inspections in order to verify the quality of the services provided.

For **regional services**, the main qualitative criteria stipulated in public service contracts relate to:

- punctuality;
- reliability;
- seat composition/offer;
- passenger information (in stations, on board, general communication);
- cleanliness and comfort (in stations and on board);
- rolling stock;
- additional services (ticket offices, etc.).

The economic value of service contracts is based on the hourly cost of train service, calculated on the basis of the following parameters:

- charges for the use of infrastructure;
- transport services;
- additional services.

Each region chooses the minimum quantitative and qualitative standards of service to be provided on the basis of a catalogue.

The qualitative standards foreseen in the public service contract for **long-distance services** negotiated with the state are:

- punctuality;
- reliability;
- cleanliness and comfort;
- rolling stock.

The quantity of services to be provided is decided by the state on the basis of the availability of public funds. The public service contract foresees a price mechanism based on a price cap system linked to the fulfilment of the foreseen standards.

4. Scope of public service transport by rail

Public service contracts essentially cover public passenger transport services by rail. They may, in certain instances, include marginal road transport legs, but only as a substitute for rail traffic along certain traffic routes with reduced load factor,

requiring therefore a more economical solution. Their scope includes:

- all regional and local services;
- all local inter-regional traffic.

As regards the long-distance day and night intercity trains – connecting northern and southern Italy – the service is provided under a public service contract directly awarded by the state for the period 2017-2026.

Finally, certain international cross-border lines are also covered by a PSO. In more detail:

- Switzerland – Italy: there is a PSO that covers Briga – Domodossola, operated by the local authority Regione Piemonte and SBB; there is also a non-PSO service managed by Trenitalia and SBB; other cross-border services are run by Trenord on the Bellinzona-Milan connection, also through the subsidiary company TILO (Ticino Lombardia);
- France – Italy: there is a PSO that covers Cuneo – Ventimiglia (crossing France), operated by the local authority Regione Piemonte and Trenitalia;
- France – Italy: there is a PSO that covers Limone Piemonte – Tende (France), operated by the local authority Regione Piemonte and Trenitalia and another operated by the local authority PACA and SNCF.

Together, Trenitalia and Trenord operate approximately 8 500 regional PSO trains and transport roughly 2 million passengers per day.

In 2016, 6 500 trains per day provided public service transport in Italy, which represented, overall, 18 billion passenger-kilometres. These figures are distributed as follows between regional and long-distance services:

Regional services

6 278 trains per day
18.6 billion passenger-km per year or 150 million train-km

Long-distance services

222 trains included in the public service contract
3.8 billion passenger-km per year or 25.1 million train-km

5. Contract

Public service obligations are fixed through the conclusion of a public service contract between the parties, i.e. the railway undertaking and regional or national authorities, which covers the extra costs needed in order to fulfil the public service requirements. There are several contracts, each region concluding one or more contracts. In some cases smaller parts of the network form the basis for a

competitive award of contract. The state, however, awards a single contract for the services falling under its jurisdiction, i.e. intercity day and night trains.

The majority of public service contracts is in the process of being renewed/re-awarded and, once this has taken place, they will be fully compliant with the regime under Regulation 1370/2007.

According to the norm, public service contracts essentially cover public passenger transport services by rail. However, there are instances (i.e. when having some routes serviced by buses is economically sounder) allowing for marginal road transport legs to be included in the public service contract, but only as substitute traffic for rail.

6. Awarding of public service contracts

In conformity with Regulation 1370/2007, contracts may be awarded either directly or through competitive tendering. So far, competitive tenders have been organised by the regional authorities for all or part of the relevant services in Veneto, Lombardia, Emilia Romagna and Piemonte. Recently, a public service contract covering the region of Emilia Romagna for a referring period of 15 years +50% of the contract duration (2019 – 2041) was

tendered out and won by an association of companies, among which were Trenitalia and Ferrovie Emilia Romagna.

National public service contracts have until now been assigned through direct award. However, it is more likely that the next contract will be subject to a competitive tender.

The Ministry of Transport and Infrastructures is the awarding authority for the few long-distance intercity and night trains connecting northern with southern Italy which are under PSO contract directly awarded to Trenitalia.

The only regions in which PSOs are not yet awarded directly by the regional authority but, as aforementioned, by the state on their behalf, are Valle d'Aosta, Sardinia and Sicily.

Furthermore, due to the special status accorded to the Trentino Alto Adige/ Südtirol region, services in that region are awarded by the Provinces of Bolzano/ Bozen and Trento respectively. All other regions constitute the awarding authority for rail services in their territory.

7. Contract negotiation

Negotiations take place between the railway operator and the awarding

authority. In practice, the company determines its business case with regard to the extent of services required by the authority and presents a detailed cost assessment. The financial plan is then negotiated between the parties in light of the volume of services and level of quality required. This negotiation process may also refer to the level of qualitative and quantitative requirements of services guaranteed.

A review process of the agreed terms is also foreseen; the relevant time frame for contracts awarded by the state is 5 years from the date that the contract came into force, while for contracts covering regional services this process can take place a year after the kick off date, with some exceptions where a 5-year minimum is stipulated. On the basis of this retrospective process, a renegotiation of the contractual terms or a reassessment of the possibility of increasing the financial commitment made by the state or the awarding regional authority may occur in the case of an evident economic/ financial imbalance stemming from the agreed conditions.

Finally, as far as regards tariff obligations, it should be noted that every regional authority promotes its own tariff system and thus there is no point in calculating the average ticket price on regional lines.

8. Calculation of the level of compensation

The compensation granted for discharging the requested public service obligations covers the extra costs of running these services.

Costs incurred for the discharge of the PSOs on the entire network of services or on part of it, depending on the specificities of the contract, are compensated through a mixed system of direct financial influx and exclusive rights. There is therefore no possibility for 'cherry picking' the most profitable bits of a public service contract.

The majority of contracts are 'net' contracts, meaning that the operator can accumulate revenues from ticket sales and therefore have to bear the related risks. It should be noted that in the Province of Bolzano/Bozen the relevant public service contract is a 'gross' contract.

Qualitative constraints (e.g. on punctuality, cleanliness, air conditioning and other standards) and penalties for breach of the contracted quality standards are typically included in the agreements.

All revised and new contracts foresee a 'reasonable profit' when calculating



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the adequate level of compensation, in accordance with Regulation 1370/2007. The PSO contract concluded with the state – covering the intercity day and night trains – provides for a return on invested capital of maximum 6%.

The compensation is subject to a 10% VAT.

In compliance with national laws limiting the allowed coverage of the costs incurred for the discharge of the PSO, the degree of compensation is set to a maximum of 65%, without taking into account the infrastructure costs. To that effect, there are no differentiations or variations depending on the type of service provided.

The following costs are taken into consideration when delineating the adequate level of compensation for the discharge of the PSO:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock;
- installations necessary for operating passenger transport service;
- sales network.

With regard to both national and regional public services, the estimated costs are calculated on a yearly basis (Regulation

1191/69 is applicable for existing contracts and Regulation 1370/2007 for the newly concluded ones) and are subject to subsequent monitoring checks, carried out by the regulator. Accordingly, if the conducted monitoring inspections indicate that financing has exceeded the realised costs, the excess sum will be deducted from the financial plan of the following year.

The financial plan that forms part of the public service contract with the state is related to the actual availability of public funds, thus, in case of financial constraints, the payment cannot be guaranteed.

9. General payment conditions

For the public service contract concluded with the state, payment is granted by the Italian Government on a yearly basis. In the regions, payment is granted on a quarterly basis; the regularity of instalments is not however always satisfactory, thereby causing financial problems to the operators.

Regional authorities finance PSO according to the level of funding that they receive from the state. The state transfers funds for public transport; a fair estimate of the respective sums for the previous two years, not distinguishing between earmarked funding for bus

and train, totalled about EUR 4.9 billion in 2015, as well as 2016. Only a few regional authorities use regional finances in order to marginally increase the level of compensation they grant and consequently the level of services.

There is an established malus system according to which, in case of non-observance of the stipulated qualitative and quantitative criteria, penalties will be imposed on the operator.

Such penalties apply to violations of all relevant conditions. For example, as regards the requirement to provide information on the train, Trenitalia is committed to guarantee the following on regional services:

- the diffusion, on trains equipped with loudspeakers, of information concerning the train stops;
- in the event of delays or prolonged stops, the rapid and efficient diffusion of information related to the situation, where possible by loudspeaker, or anyway directly by on-board personnel. The penalty is not applied if the train makes up for the delay on the route in question. In the case of announcements by the train conductor, delays of over 10 minutes are taken into account.

In the event of delays due to external factors, such as acts of God (landslides, floods, etc.) or orders from a competent

authority, the penalty system will not apply. On that note, it should be added that, although deficiencies in infrastructure can have an impact on the quality of the provided services, there is no direct correlation with the level of compensation. Thus, if the requisite level of quality is not met for reasons attributable to infrastructure, the compensation granted will not be reduced.

Despite the fact that the state and quality of infrastructure in Italy is not optimal (which eventually affects the quality of services provided by railway operators), no derogations to the EU Passenger Rights Regulation 1371/2007 were requested to date by the Italian state.

10. Duration of public service contract

National public service contracts concluded by the state for specific services have a minimum duration of 5 years. The ongoing contract will remain valid until 2026.

Regional public service contracts concluded at regional level have a variable duration depending on what has been negotiated between the parties, in compliance of course with Regulation 1370/2007. Revised contracts have a minimum duration of 2 years and can reach a maximum duration of 9 years, while all

new contracts are concluded for a 9-year period.

Long-standing contracts offer a modicum of economic stability to the railway undertaking, which may undertake relevant investments, such as the acquisition of new rolling stock or major revamping of the existing fleet. In addition, they allow for investments in other commodities, which may ameliorate the passengers' experience, such as the deployment of technologically advanced systems of information and ticket selling.

11. Rolling stock

For the discharge of regional public service obligations, the entire rolling stock is owned by Trenitalia. In rare cases, however, rolling stock is, to a small extent, provided by the regional authorities. Only a part of rolling stock depreciation is taken into account in the calculation of the level of compensation of the contract (see section 10 on the duration of contracts), as it is calculated according to Civil Code rules, which do not correspond to contract duration.

As indicated in the table below, part of Trenitalia's rolling stock used for PSO was more than 30 years old in 2016, while the rest was aged 10 years or less. Certain public service contracts do contemplate the acquisition by Trenitalia of new rolling

stock to be used in regional services, and such activities can also be co-financed by the competent regional authorities.

	>30 years	<10 years
Blocked trains	32%	42%
Engines	7%	50%
Coaches	76%	24%

Trenitalia has already purchased a relevant number of new trains, and has concluded a large tender for the purchase of more than 500 new trains, in order to renew the whole of the regional fleet in the coming years.

Regarding long-distance services, with the conclusion of the new PSO contract -running from 2017 to 2026 - the foreseen investment plan will allow revamping intervention dedicated to rolling stock. The average age of rolling stock used on long-distance lines was 25 years old in 2016.

12. Involvement of the regulatory body or other authority

The rail regulatory body is not involved in the process of the conclusion of public service contracts in Italy. It is however in charge of carrying out checks regarding the economic equilibrium of PSO contracts, in case of competing

open-access domestic or international services, and it has a monitoring role over competitive tenders that are being organised by regional authorities.





1. Organisation of public service operations in Latvia

Public service transport in Latvia is regulated in the Public Transport Services Law (adopted on 14 June 2007, with amendments) and, as regards the railway transport, in the Railway Law (adopted on 1 April 1998, with amendments). The text of the Public Transport Services law has been amended so as to reflect the content of Regulation (EC) No 1370/2007.

Public service operations in rail transport are dealt with in a centralised manner by the state (Council of Public Transport) and the 'Road Transportation Directorate' (VSIA Autotransporta direkcija).

The domestic passenger rail market is open to competition, as well as the international passenger traffic (since January 2010 in application of Directive 2007/58/EC). Up till now however, there has been no international traffic including cabotage operated in Latvia having an impact on existing public service contracts.

2. Operators on the market for public passenger service transport

JSC Pasazieru vilciens ('passenger train'), a state-owned joint stock company, is the only national passenger railway undertaking in the country. Thus the public service contract was directly awarded to Pasazieru vilciens.

3. Definition of public service requirements

Public service obligations are essentially defined in the public service contract concluded with the operator. They are very wide ranging. They include:

- tariff obligations (including limitations to possible tariff increases);
- service frequencies;
- technical specifications for the services required;
- service quality in general (delay, information, etc.);
- alternative services in case of exceptional interruption of services (in cases of *force majeure*);
- availability of appropriate sales staff both on trains and in train stations;
- availability of appropriate rolling stock;

- qualitative criteria (information, various services such as support of staff, luggage space, temperature in coaches, rapid treatment of complaints, etc.).

Quality is an important element of the negotiation, therefore its technicalities are negotiated in great detail. However, as mentioned below, the railway undertaking has limited negotiation power. In practice, the price for meeting the requested qualitative criteria does not correspond to the actual underlying economic conditions for the operation of the requested public service obligations. Thus, negotiation is limited in specifying what JSC Pasazieru vilciens is able to provide under normal working conditions.

4. Scope of public service transport by rail

Due to the size of the country, the public service passenger market represents 100% of the overall passenger rail market.

Public passenger railway services are rendered through approximately 244 trains per day transporting 47 000 passengers per day. In total, 544 million passenger-kilometres were concluded in 2016.

5. Contract

Public service operations are organised through the conclusion of a single contract covering the entire network. The contract is concluded with the state (Council of Public Transport) and executed by the Road Transportation Directorate (VSIA Autotransporta direkcija), which is responsible for the organisation of the award procedure and the definition of the required public service obligations. The current contract was concluded in 2009, based on Regulation 1370/2007. This contract exclusively covers rail transport.

Since 2005, the Government has concluded several longer term public service contracts with JSC Pasazieru vilciens. Indeed, until 2005, public service operations were provided on a yearly basis.

6. Awarding of public service contracts

Public service contracts are granted following a competitive tendering procedure.

Since Pasazieru vilciens is a 100% state-owned company, the public service contract was directly awarded to it.

7. Contract negotiation

In practice, the Ministry of Transport determines the extent of public service operations to be delivered on a yearly basis and the operator submits a detailed cost assessment to the Ministry. In this cost assessment, the railway company includes a 'reasonable profit'. The parties then negotiate the level of compensation on the basis of the public services that are to be provided. There is some leeway for negotiation at this point, however, rather limited.

The compensation of public service obligations is paid through the allocation of financial input. In practice, JSC Pasazieru vilciens also benefits from exclusivity on the lines as no competitor has yet entered the market despite the fact that it is fully open to competition. Moreover, no 'cherry picking' has occurred as no international service including cabotage has been requested since the opening of the international passenger market.

8. Calculation of the level of compensation

Compensation levels must be clearly determined in advance. Compensation can be renegotiated on a case-by-case basis, if particular costs in the cost

structure exceed certain pre-agreed levels. On the other hand, the operator bears all the risk of collecting ticket sale revenue ('net' contract).

The level of compensation is the result of the difference between the foreseen costs and the foreseen revenues.

The calculation of the overall costs for the service in question as a whole will generally be based upon the following costs:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock depreciation;
- installations necessary for operating passenger transport services;
- interest payments;
- other fixed costs – mainly administrative costs.

The calculation of the overall revenue generated by the service is generally based on the following production data:

- number of passenger-kilometres;
- number of passengers per particular line;
- ticket sales per passenger-kilometre.

Track access charges are not lower for public service obligation traffic.

9. General payment conditions

Payment is made monthly upon the terms of payment decided in the agreement. The payments are made directly without JSC Pasazieru vilciens having to send out an invoice.

The amounts received as public service compensation are not subject to VAT.

The state of infrastructure in Latvia is not optimal which eventually affects the quality of services provided by railway operators. This is a particular problem as regards the general condition of stations. As a result, the Latvian Government decided to apply for all derogations from the Passenger Rights Regulation (EC) No 1371/2007 for domestic traffic so as to avoid that the operators have to pay excessive compensation levels to passengers for delays/cancellations imputable to the poor quality of infrastructure on the network, amongst other reasons.

The operator is however likely to pay penalties to the awarding authority in case it does not respect its obligations, in particular as regards the timetable, train connections, rolling stock types used for given types of traffic, etc.



Latvia

10. Duration of public service contract

The current public service contract was concluded in 2009 for a duration of 15 years. A further 7.5 years may be added if requirements relating to new rolling stock are fulfilled by the operator.

This contract duration is satisfactory and differs greatly from previous contracts that were concluded for extremely short durations. However, the current contract duration will not allow the amortisation of existing rolling stock used for the services in question.

11. Rolling stock

All rolling stock is owned by JSC Pasazieru vilciens.

In 2017, 61% of the electric trains and 68% of the diesel-engine trains were older than 30 years old. The rest of the fleet is older than 24 years old.

12. Involvement of the regulatory body or other authority

The authorities in charge of passenger public service transport are the Council of Public Transport and the VSAI Autotransporta direkcija. The

rail regulatory body is the competent institution for freight public service transport, if there were any. Currently, there is no such freight public service transport.



Lithuania

1. Organisation of public service operations in Lithuania

The organisation of public service transport operations in Lithuania is regulated in the following pieces of legislation:

- Regulation (EC) No 1370/2007;
- Republic of Lithuania Law on the Basics of Transport Activities of October 8 1991 No I-1863 (last amendments No XII-1306 of 6 November 2014);
- Republic of Lithuania Railway Transport Code of 22 April 2004 No IX-2152 (last amendments No XII-1725 of 19 May 2015);
- Republic of Lithuania Law on Transport Privileges of March 30 2000 (last amendments No XII-900 of 22 May 2014);
- Republic of Lithuania Government Resolution on implementation of Law on Transport Privileges of 28 April 2000 No 478 (last amendments No 1252 of 24 November 2008);
- Republic of Lithuania Government Resolution on organisation of tender for selection of carriers (operators) for public service obligations and conclusion and termination of contracts on public services of 4 September 2003 No 1132 (last amendments No 1759 of 15 December 2010);
- Republic of Lithuania Government Resolution on the approval of the procedure of compensation for the

loss incurred by the public service obligations of 7 June 2010 No 716 (last amendments No 1177 of 11 December 2013).

As established by Government resolution, the Ministry of Transport and Communications is authorised to implement the functions of the ‘competent authority’ as foreseen in Regulation (EC) No 1370/2007. Therefore, public rail service operations are organised centrally in Lithuania by the Ministry of Transport and Communications.

Local governments also play a role in determining the scope of public passenger rail transport by providing input on their specific needs directly to the Ministry of Transport. This role remains limited however.

The entire national and international passenger network was opened to competition even before 2010. The objectives of this opening coincided with the goals of EU transport policy. However the relevant steps that were adopted, i.e. legislative measures, did not effectively ensure the ability of national railway operators to compete on their historic markets. No new entrant has so far taken the initiative to enter the Lithuanian market, particularly since all public passenger railway services are loss-making and not adequately compensated.

Public service obligations cover the entire domestic passenger rail market, since all national passenger rail services are loss-making and cannot be provided on a commercial basis. To that effect, Joint Stock Company “Lietuvos geležinkeliai” (hereinafter – LG) provides domestic rail transport services suffering great losses.

As mentioned above, national and international rail services were opened to competition even before January 2010, but this did not have any actual impact on the structure of the market, given that other operators have not showed any interest in operating on the passenger service market. LG is the only operator undertaking such activities and for the time being no cabotage rights have been granted nor requested.

2. Operators on the market for public passenger service transport

LG is 100% owned by the state and is the sole public passenger service provider.

The public passenger traffic system in Lithuania is not integrated. Accordingly, separate public service contracts are concluded for different modes of transport, not allowing for the development of operations that would efficiently complement each other. This structure has further prevented the

development of hub stations, impairing optimum connectivity and timetabling, therefore placing the railway passenger market in a disadvantaged position compared to road traffic.

However, there are planned developments aiming to eliminate this gap. More particularly, the passenger transportation directorate of LG and the transport undertaking “Susisiekimo paslaugos” have signed a letter of intent seeking to establish a joint ticketing system that would enable passengers to combine their travel itinerary in the Vilnius Zone. The final contract is to be signed in February 2017.

After successful implementation of this project, comparable initiatives could be advocated in cooperation with other municipalities.

3. Definition of public service requirements

Public service obligations are defined in the Republic of Lithuania Law on Basics of Transport Activities (Article 2). They comprise:

- an **obligation to operate** – an obligation imposed upon a carrier, which is licensed and has the right to operate on any route, to take all necessary measures to ensure the provision of

a transport service satisfying fixed standards of continuity, regularity and capacity;

- an **obligation to carry** – an obligation imposed upon a carrier to accept and carry passengers or goods at specified rates and subject to specified conditions;
- **tariff obligation** – an obligation imposed upon a carrier to apply, in particular for certain categories of passengers, for certain categories of goods, or on certain routes, rates approved by the state or municipal authorities which are contrary to the commercial interests of the carrier.

The Republic of Lithuania Law on Transport Privileges defines compulsory discounts on national railway journeys for particular social groups of the population.

The PSO contract does not clearly define the requisite level of quality of the provided services. However, LG is providing to customers additional services to attract them to railway transport.

Moreover, the quality of the infrastructure affects the quality of passenger traffic, particularly obstructing the deployment of high-speed services. In Lithuania there is no high-speed traffic, there are only a few lines where a speed of 120 km/h is allowed on some sections. Only 122 km



Lithuania

of the total length of the lines (1 767.46 km) are electrified. The electrification of two railway sections Vilnius-Klaipėda, totalling 376 km and, Vilnius-Minsk, which is an international line of 193 km, is underway. The latter has already been concluded, while the due date for completion of the first part is 2030.

4. Scope of public service transport by rail

Public service passenger transport in Lithuania was provided in 2016 to approximately 10 060 passengers per day through the operation of 193 trains per day, which totalled overall 266.8 million passenger-kilometres.

5. Contract

Since 2004 LG concludes a renewable annual single contract with the Ministry of Transport and Communications covering the provision of public service obligations in the entire country. These contracts are not completely compatible with the requirements for public passenger transport service contracts laid down in Regulation 1370/2007.

These yearly contracts define the subject and scope of the agreement, the nature of the public service obligations, the parties' rights and obligations, liability issues, date of expiry, etc. What is substantially unstable

and fluctuates every year is the level of compensation granted for the discharge of these services. It should also be highlighted that there are no quantitative obligations stipulated in the contract.

Under the contract LG undertakes to carry passengers on defined routes at specified rates using appropriate rolling stock.

6. Awarding of public service contracts

In accordance with the Republic of Lithuania Railway Transport Code, the PSO contract can be awarded either through competitive tendering or direct award.

The last contract was granted on 16 March 2016 and expired on 31 December 2016. It was granted via direct award. Currently LG continues to provide services without any legal contract.

7. Contract negotiation

In practice, LG meets on a yearly basis with the Ministry of Transport and Communications to discuss the scope of the public service obligations. In this process, LG has been authorised to close down some lines, in order to

mitigate the degree of generated losses. This, however, remains exceptional since the role of LG in discussions with the competent authority is not effective enough. The most alarming issue that warrants further discussions is the low level of passenger services required by passengers themselves.

There is no bonus-malus system established for the evaluation of the quality of Lithuanian passenger railway transport services. Therefore, no relevant monitors or checks take place.

The average ticket price has been slightly increased during the last five years reaching EUR 3.12 in 2016.

8. Calculation of the level of compensation

The level of compensation should be calculated in accordance with provisions of Regulation 1370/2007 and a formula provided in the relevant Government Resolution.

The formula for the calculation of the overall compensation for the public services is based upon the following criteria:

- number of rail trips;
- length of route;
- average number of wagons on train set;

- foreseen costs;
- foreseen revenues;
- compensation for application of compulsory discounts;
- foreseen reasonable profit (maximum 5%).

The compensation formula was adopted on 7 June 2010.

The costs for operating a PSO contract are:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock;
- installations necessary for operating passenger transport services;
- other fixed costs.

The average level of track access charges in 2016 was EUR 2.10.

9. General payment conditions

PSO is compensated in the form of direct financial influx. However, this compensation covers only about 0.6% of the total costs incurred for the discharge of the PSO. As said herein, there are no profitable routes in Lithuania. In addition, according to the PSO contract LG bears all the risks of under-compensation. The earmarked public funds for the relevant

compensation totalled EUR 296 000 in 2016.

In accordance with the public service contract, payment is made on an annual basis upon submission of an invoice by LG to the Ministry of Transport. In the second part of the year this compensation is readjusted. In case there are some residual amounts from transportation of passengers with concession activity, these amounts are then allocated to cover the costs of loss-making routes.

It should be noted that, up until now, a decrease in the level of compensation is not foreseen in case of delays, cancellations and other deficiencies attributed to the state of infrastructure.

The amounts received as public service compensation are not submitted to VAT¹.

As far as regards the application of Passenger Rights Regulation 1371/2007, it is applicable with exemptions from a number of provisions on domestic rail passenger services. Lithuania has opted out from the Regulation for the provision of international railway passenger services, when a significant part of these services including at least one scheduled stop at a railway station is provided

outside the territory of any European Union Member State. These limitations will remain valid until 3 December 2019.

10. Duration of public service contract

Public service contracts are concluded for one year. The contract duration is not considered satisfactory as it does not allow for any return on investment nor for any long-term planning for the operator.

11. Rolling stock

The railway operator is due to own its rolling stock fleet when discharging public service transport.

Currently, 40.2% of LG's total fleet is 21-39 years old, and 54.3% of LG's total fleet is less than 10 years old.

- The fleet of passenger coaches is comprised of 28 units (manufactured 1982-1994).
- The number of electric passenger trains in operation is 34 (4 manufactured 1976-1982 and 30 manufactured 2008-2016).

- The number of diesel passenger trains in operation is 40 (27 (60%) manufactured 2008-2013 and 13 (40%) manufactured 1988-1995).
- The number of passenger coaches for domestic traffic is 28 (manufactured 1982-1994).

12. Involvement of the regulatory body or other authority

The rail regulatory body does not have any competence with regard to the provision of public service contracts.

¹ The railway undertaking will have to pay VAT on revenues generated by the sale of tickets. This VAT forms full part of the costs incurred by the railway undertaking. As the costs must be calculated **prior** to the effective implementation of the service, the railway undertaking will base itself on the average VAT paid the previous year to determine the amount of VAT that must be taken into account in the overall cost of the services.



Luxembourg

1. Organisation of public service operations in Luxembourg

Public service operations in Luxembourg are organised at a national level by centralised state authorities. The related contracts are based on national and European legislation (Regulation (EC) No 1370/2007).

Other pieces of legislation applicable at national level include:

1) the modified law of 28 March 1997 approving:

- the Rail agreement concluded with Belgium and France on 17 April 1946;
- the CFL Statutes;
- the financial support provided to CFL and the monitoring thereof done by the state; and
- the amendment of the 1995 law relating to the management of rail infrastructure;

2) the Law on Public Transport of 29 June 2004.

In total, 98.9% of the domestic traffic is covered by public service requirements. In other words, the entirety of regional and long-distance traffic falls under a PSO. However, given the size of the country, the notion of 'long-distance' traffic should be interpreted in relevant terms.

The market for domestic passenger services has not been opened to competition for the time being.

Despite the opening of international traffic to competition, there has been no new operator entering the market. In fact, there is no real scope for national cabotage due to the small size of the country and the very low tariffs applicable to public service transport (which covers almost the entirety of the domestic network).

2. Operators on the market for public passenger service transport

CFL is currently the only operator in Luxembourg. It cooperates with companies from neighbouring countries on cross-border passenger services.

3. Definition of public service requirements

Public service obligations are defined in the contract concluded with the national authority. These obligations include, amongst others:

- tariff obligations and compulsory discounts for certain social groups;
- service frequency and timetabling;
- qualitative criteria (safety, punctuality,

continuity of service, passenger comfort, cleanliness, passenger information, attitude of personnel, handling of complaints, etc.).

Qualitative criteria are an important element of the contract. They are thoroughly discussed with the authorities.

Public service contracts represent roughly 98.9 % of the overall passenger traffic based on train-kilometres.

4. Scope of public service transport by rail

The public service contract covers rail and regional bus lines operated by the railway operator in an integrated manner.

On average, in 2016 CFL transported 70 000 passengers daily and operated 1 000 trains under the public service contract. Around 40% of these trains covered cross-border traffic. Moreover, throughout the whole year (2016) CFL transported 22.5 million passengers and covered 8 million train-kilometres under public service obligation.

5. Contract

Public service transport is operated under a public service contract negotiated between CFL and the

national authorities. It is a commercial law contract. The ongoing contract was concluded on 1 January 2010 and will be running until 31 December 2024, in accordance with the provisions laid down in Regulation 1370/2007.

CFL has a single contract covering all rail and road traffic provided under PSO. While CFL is the only railway operator carrying out a PSO contract, there are several other road transport companies operating under PSO contracts in Luxembourg.

6. Awarding of public service contracts

Contracts are, for the time being, directly awarded by the state.

7. Contract negotiation

The Ministry of Transport determines the terms and conditions of the contract, which is signed by CFL. There is not much room for negotiation. Discussions do take place, however, they mainly focus on the level of compensation provided and its correspondence to the scope and quality of services required. It should be noted that there is no provision for the renegotiation or readjustment of the agreed compensation if the underlying conditions and circumstances alter.

The degree of fulfilment of the stipulated qualitative criteria is reviewed on a yearly basis by internal and external auditors that conduct relevant reports and submit them to the Ministry of Transport.

8. Calculation of the level of compensation

Public service operations are compensated through a financial influx, taking into account the revenue generated from ticket sales. Although exclusive rights are not granted, a *de facto* exclusivity exists on most of the national network.

The full cost coverage principle is applied including a 'reasonable profit'. CFL's sophisticated accounting system allows CFL to calculate the precise costs incurred for the discharge of public service obligations.

The main costs that are taken into account when delineating the adequate level of compensation are:

- staff;
- energy charges;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock;
- installations necessary for operating passenger transport services.

On a general note, the level of compensation for the provision of public service operations covers the entirety (100%) of the net costs invoiced to the state after deducting the revenues generated from the sale of tickets.

The change in ticket price that occurred in 2013 did not have any impact on CFL, due to the constant increase of the annual number of passengers each year.

9. General payment conditions

CFL gets advance payments on a monthly basis (in accordance with the approved budget). This frequency is considered to be satisfactory, while no budgetary problems have emerged so far.

At the end of each year, the finance department of CFL sends a final calculation whereby the remaining expenses are invoiced to the state.

Payments are granted against invoices submitted by CFL. The compensation is subject to VAT.

A penalty system is foreseen when the operator does not comply with the performance criteria and the qualitative standards laid down in the contract. This penalty will not lead to a decrease in the compensation, but will rather have a direct impact on profits. Any delays due to

infrastructure or third-party failure, apart from *force majeure* cases, are at the cost of the railway undertaking.

CFL is compelled to maintain the continuity of services. Measures adopted to mitigate the impact of delays or interruption of traffic are the same irrespectively of whether the disruption was due to internal or external factors, and include, *inter alia*, free of charge alternative road transport for passengers (by bus or taxi) and accommodation.

The EU Passenger Rights Regulation is applicable in Luxembourg with certain exemptions on national and cross-border traffic, in line with the provisions foreseen in the Regulation itself. Passengers' complaints for delays are dealt with by a dedicated service (*service réclamations*).

10. Duration of public service contract

The current contract was concluded in accordance with EU public service rules for a duration of 15 years.

11. Rolling stock

Rolling stock used in public service contracts belongs to the operator, it is however financed by the state. In more detail, 25% of the fleet is less than 10 years old, while no parts of the rolling



stock are more than 30 years old. The amortisation costs are also covered by the public service contract.

12. Involvement of the regulatory body or other authority

The rail regulator, i.e. the *Institut Luxembourgeois de Régulation*, has no competences with regard to public service transport apart from those provided by Directive 2007/58/EC.



The Netherlands

1. Public passenger transport services in the Netherlands

In the Netherlands public passenger transport services are regulated in:

- the Passenger Transport Act 2000 (*Wet personenvervoer 2000* or Wp 2000). The Wp 2000 is applicable to all forms of public passenger transport services irrespectively of whether they are provided by rail, road or ferry;
- the Decree on Passenger Transport 2000 (*Besluit personenvervoer 2000* or Bp 2000), which describes in further detail the granting and the content of public service contracts;
- the Railway Act and related decrees and regulations, which set rules for the access to the railway infrastructure, the network statement, allocation of railway infrastructure capacity, track access, charges, services, etc.

This legislation is compliant with the relevant European legislation such as Regulation (EC) No 1370/2007 and Directive 2012/34/EC. To comply with Directive 2012/34/EC, amendments and some new regulation provisions on services to be provided by the railway undertakings and on the levying of charges for the use of railway infrastructure were made and entered into force in July 2015.

Public transport services by rail are granted by the Ministry of Transport and Environment with regard to the so-called national 'trunk network' (*hoofdrailnet*). As from January 2015, this network also includes the Dutch part of the high-speed railway infrastructure from Amsterdam to Brussels. The Ministry has granted to the Dutch Railways (NS) a public service contract (*concessie*) for the operation of this network, which will be valid until 2025.

Regional public transport services by rail and/or road are granted by the competent local (provincial) authorities. For these services, public procurement is compulsory.

International passenger services are operated by NS via commercial groupings. These services include, amongst others, Thalys (with SNCB/NMBS and SNCF), IC-Brussel (with SNCB/NMBS) and IC-Berlin (with DB).

Other railway companies also operate cross-border services along with NS. For instance Arriva runs the cross-border service Groningen – Nieuweschans – Leer (DE) on the basis of an international public service contract, while DB Regio runs the Enschede – Münster/Dortmund lines.

Regarding international passenger services, Regulation (EC) No 869/2014 on open international passenger services is of great importance and has a great impact on the Dutch trunk network, particularly in case of intermediate stops, i.e. cabotage. The national regulatory body (Authority for Consumers and Markets, ACM) is authorised to elaborate an economic equilibrium test, in order to assess the effects that a new international service might have on existing public service obligations (PSOs), if, of course, the eligible entities submit a relevant request.

2. Operators on the market for public passenger service transport

The right to operate on the trunk network is directly awarded to NS by the Ministry of Transport and Environment (the Ministry). The first concession was awarded to NS in 2005 and the second in 2015. This second concession runs until 2024.

Regional railway services have been publicly tendered by regional authorities to the following operators as part of the market for competitive public transport¹ (market share

estimated in terms of train-kilometres in 2017):

- Transdev (Connexion) (market share 0-10%)
- DB (Arriva) (market share 70-80%)
- NS (market share 5-15%)
- Keolis (Syntus) (market share 0-10%)

These railway operators, apart from NS, operate only regional public transport services by rail, sometimes combined with public passenger services by road (coaches).

3. Content of public service obligations

Although the Wp 2000 and Bp 2000 regulate the content of a public service contract (concession) extensively, public service obligations can vary in each concession, depending on the specific needs. Those needs may consist in:

- tariff imposition with a certain margin that is left to the operator to increase such tariffs. This margin is subject to negotiation;
- minimum frequency of trains during peak hours to major cities;
- services to passengers with reduced mobility;

- other requirements such as facilities for bicycles.

Qualitative criteria are set by the competent authorities. These criteria are discussed with various consumer interest groups which, have the right to give their opinion beforehand.

The quality and availability of the railway infrastructure are key parameters for the provision of high-quality public service transport. In some cases, the (lack of) quality of infrastructure or the imposition of capacity restrictions can spark fierce debate. However, overall the quality of the Dutch railway infrastructure is of a high standard. Recently, the Dutch Government decided to harmonise the railway infrastructure with the European Rail Traffic Management System (ERTMS).

4. Scope of public service transport by rail

Public service contracts are concluded for either train, metro, tram or bus services individually or for a combination of these modalities. The so-called multimodal concessions are increasingly being concluded throughout the country. In Amsterdam, for instance, the concession includes a combination of

metro, tram, ferry and bus transport, while in the eastern and southern part of the country there are combined train and bus concessions.

The combination of train and bus enables an optimisation of public transport. For instance, the rearrangement of train and bus lines whereby the bus lines function as feeder lines and the railway lines function as the backbone of the public transport system can be regarded as successful.

Only domestic passenger services are covered by public service contracts, which represent approximately 95% of the total passenger traffic by rail. The residual traffic covers the international passenger services. In numerical terms, public service obligations in the Netherlands amounted to the discharge of approximately 18 500 million passenger-kilometres in 2015, operated approximately by 6 500 trains per day.

5. Public service contracts

Public service operations are granted through the conclusion of two types of public service contract (concession) depending on the type of service:

¹ The relevant market is the market for contestable public transport and includes concessions covering (urban and regional) bus services and possibly also including tram and metro services, concessions containing regional railway services and the concession for high-speed services. It excludes the urban transport system of the three major cities (Amsterdam, Rotterdam and The Hague) as well as the trunk network.



- public service operations for the trunk network, which are included in one single concession for the entire trunk network granted by the Ministry of Transport;
- public service operations for the regional railway network which are included in individual contracts covering one specific line or a set of lines and are granted by the competent local authorities.

All public service contracts are subject to public law and are publically available.

6. Awarding of public service contracts

Public service contracts are awarded through either a competitive public procurement procedure, for regional public transport services, or through a direct negotiation, for the trunk network. As mentioned, public service contracts for local railway services are awarded by way of a compulsory public tendering process. In practice, the competent authority determines the requested public service conditions (in terms of frequency and quality) for specific lines and delineates the maximum price (in terms of compensation). Subsequently, the bidding railway undertakings propose a service covering the public service

conditions. The public service contract for the trunk network was awarded to NS through direct negotiation, in accordance with the Wp 2000. This contract has to be approved by the Dutch Parliament and explicitly accepted by NS.

7. Contract negotiation

For the exclusive right to operate the trunk network, NS pays a concession fee of EUR 80 million per year to the Ministry.

On the other hand, for executing an onerous regional public service contract, railway undertakings receive compensation from the local authority. The level of compensation can vary and is the result of the tendering procedure. Railway undertakings quote in their bid the fee they consider necessary to accomplish the service required.

Every railway undertaking is also obliged to pay charges for the use of the railway infrastructure to ProRail, the Dutch infrastructure manager. Sometimes these charges are directly compensated by the local authority.

In the Netherlands, track access charges are based on the costs directly incurred as a result of operating train services

8. Calculation of the level of compensation

The level of compensation must be clearly determined in advance and should cover the difference between the foreseen costs and revenues. All costs associated with the operation of a train service as well as the relevant revenues are taken into account when delineating the adequate level of compensation. In a public procurement procedure there is no limitation with regard to the different types and combinations of costs and/or revenues that can be considered. In the case of direct award of a contract, the parties negotiate all relevant costs and revenues. All the relevant criteria are negotiated, some of them are even fiercely debated. However, the level of compensation as well as the contractual terms and conditions must meet the minimum standards as foreseen in Regulation (EC) No 1370/2007.

9. General payment conditions

Payment is made through regular instalments at determined intervals (quarterly). The frequency of the payment is considered satisfactory.

The compensation might sometimes be subject to VAT, which can subsequently

be recovered. From a fiscal point of view payment is in some instances, depending on the conditions of the contract, regarded as a source of normal income.

In case of non-observance of the agreed qualitative criteria, the Ministry or the competent regional authority may impose the corresponding penalties that are foreseen in the contract.

Compensation to passengers in cases of delays was already provided by NS prior to the adoption of the EU Passenger Rights Regulation (EC) No 1371/2007. It should be noted that the terms of the compensation granted by NS are more favourable than the standard provisions of Regulation 1371/2007.

10. Duration of a public service contract

The maximum duration of a public service contract depends on whether it is a railway-only, a multimodal (including bus and railway services) or a unimodal bus contract. The maximum duration of contracts covering railway-only services, as well as of multimodal contracts is 15 years, while for unimodal bus contracts the maximum is set to 10 years. In practice, the stipulated duration is often shorter than the maximum.

11. Rolling stock

Most of the rolling stock used by NS is subject to a lease agreement. Other operators also tend to lease their rolling stock. In tendering procedures, the regional authorities often require or have a preference for contractors that are willing to use new rolling stock. In general terms, the age of the rolling stock varies.

12. Involvement of the regulatory body or other authorities

The Authority for Consumers and Markets (ACM), as the national regulatory body, has a supervisory task in the case of bus/tram/metro concessions that are awarded in the main cities outside the scope of a public procurement procedure. Also, as stated above, ACM is authorised to execute a principle purpose test or an economic equilibrium test, to assess the effects of a new international rail service.

Besides these two tasks, ACM has no specific role regarding the award or the content of public service contracts.

The Ministry or a local authority, as the competent authority, has a supervisory role over the concession.



Norway

1. Organisation of public service operations in Norway

Public transport services by rail have traditionally been organised centrally by the Ministry of Transport and Communications.

Public passenger railway traffic is organised fully in line with Regulation (EC) No 1370/2007, which is implemented in Norwegian legislation through Regulation No 1673/December 2010.

As part of the EEA agreement, Norway aligns its transport legislation with EU law.

A railway reform White Paper, which was approved by the Parliament in June 2015, will bring about major changes in the Norwegian railway sector in the years to come.

In more detail, competitive tendering will be introduced for passenger train services, grouped in bid packages. Moreover, in 2017, passenger rail rolling stock, real estate, maintenance of rolling stock and ticketing systems, formerly belonging to NSB Group, will be transferred to separate state-owned companies to promote competition. Finally, a newly established Railway

Directorate will be responsible for proposing long-term development plans for the rail transport sector in Norway, including, *inter alia*, the development of infrastructure, the amelioration of passenger rolling stock and the requisite expertise as well as other input factors necessary to produce a train service.

Bane NOR is the state-owned company responsible for the national railway infrastructure. As infrastructure manager, it oversees the development as well as operations and maintenance of the national railway network, the traffic management and the development of railway property.

The Railway Directorate, as of January 2017, will be in charge of determining the scope of public service operations and concluding related contracts with operators.

2. Operators on the market for public passenger service transport

The following rail operators are active in the Norwegian passenger market:

- NSB AS, a limited company 100% owned by the state is the major passenger rail transport operator;



Norway

- NSB Gjøvikbanen AS, a company owned by NSB AS which operates Gjøvikbanen, a regional line that was put to public tendering in 2004. The new tendered contract started up in June 2006;
- the Airport Express Train named Flytoget, a limited company 100% owned by the state, operates the line to/from Oslo/Drammen to Gardermoen airport in Oslo;
- SJ Norrlandstog AB, providing public service passenger transport on Ofofbanen;
- SJ AB, providing public service passenger transport between Oslo and Stockholm.

NSB AS runs a commercial service between Halden-Gotenburg, in cooperation with a public service between Oslo and Halden.

3. Definition of public service requirements

Public service obligations usually consist in:

- tariff obligations (determining the average level of yearly increase in tariffs);
- service quantity (determined on a yearly basis on every line);
- service quality (given by certain criteria such as punctuality, regularity and passenger development objectives);

- planned or foreseen service disruptions.

NSB reports on its performance and the fulfilment of its obligations on a quarterly basis.

All of these criteria are stipulated in the agreement between the state/Ministry of Transport and NSB. NSB remains free to add further quality criteria to its services to help achieve its objective of passenger development.

4. Scope of public service transport by rail

Almost the entire domestic passenger transport market falls under public service obligations; according to data from 2016, 84% of the total services were operated under a PSO. In numerical terms, the main railway operator rendered 2.55 billion passenger-kilometres of PSO traffic, operating 988 trains per day in 2015.

5. Contract

The largest public service transport agreement in Norway is a negotiated contract between the Ministry of Transport and Communications and NSB AS. The duration of the contract is from 1 January 2012 to 31 December 2017. The contract lays down the level of services provided and the price requirements, i.e. the

level of compensation necessary for the provision of public service rail transport. The contract is a 'net cost' contract and is awarded directly according to Regulation 1370/2007.

6. Awarding of public service contracts

So far, just one line has been tendered out (in 2004). In light of the imminent Railway Reform, The Norwegian Government publicly announced in February 2016 the upcoming organisation of two rail passenger service tenders: Rail Passenger Service Tender 1, 'South', and Rail Passenger Service Tender 2, 'North'. The two packages represent approximately 25% of the revenues generated in the Norwegian passenger train market.

For Tender 1, 'South', the initial ambition is to complete the process in time for the selected bidder to be able to start its traffic on the date of the timetable change in December 2018. For Tender 2, 'North', the goal is to start traffic on the date of the timetable change in December 2019.

The current public service contracts with NSB Gjøvikbanen AS and NSB AS expire in December 2017. In order to safeguard the gradual introduction of competition on the Norwegian rail network, the Ministry has announced that it will directly award contracts to NSB

and NSB Gjøvikbanen. This will ensure further development of all passenger rail services until all the routes have been competitively tendered.

The average ticket price on PSO traffic has slightly increased over the past 3 years reaching EUR 5.32 in 2015.

7. Contract negotiation

No specific information provided.

8. Calculation of the level of compensation

Compensation levels must be clearly determined in advance. For the current agreement with NSB AS, the level of compensation was determined for the whole 6-year period. The compensation is set in the long-term agreement. The difference between the foreseen costs of production, sales and marketing and administration expenses on the one hand, and revenues on the other, defines the level of compensation.

The compensation is based on production volume for each route and the level of investments (capital cost) in rolling stock dedicated to each route that falls under the public service contract. The agreement allows the operator to achieve a 'reasonable profit' from the provision of

services on these routes over time. The operator bears the majority of the financial and operational risks ('net' contract).

Some deviations from the strict 'net' nature of the public service contract are foreseen. To be more specific, in case of substantial changes in public tolls and charges, an adjustment of the compensation might occur. On average, the degree of compensation covers 50% of the costs incurred for the discharge of the PSO.

The contract also contains a provision on reviewing the revenue from tickets sales, in order to prevent any over or under-compensation.

The contract includes a bonus-malus system related to the fulfilment of quality targets such as the operator's regularity. In principle, a penalty is applied if the operator's regularity is below 99.1%. However, the operator is not penalised in cases where the regularity targets are not met due to the failure of infrastructure.

As to possible actions that can be taken with regards to deficiencies in infrastructure and their impact on public passenger services, there are two relevant benchmarks that, if met, may instigate a renegotiation of the contract. If the number of hours of delay, attributed to the state of infrastructure, is below 8 000 or above 13 000 per year, or, alternatively, if the availability of

infrastructure is below 98.2% or above 98.9% per year. However, this provision of the public service contract has never been applied in practice.

The stipulated reduction in compensation is NOK 10 000 for each cancelled departure if the operator provides the customers alternative transportation. If the operator does not provide alternative transportation, the stipulated penalty is NOK 30 000 per cancellation. In addition, breach of contract may result in a reduction in the compensation, award of damages etc.

Until now, infrastructure charges have been set very low (zero for passenger traffic) as a deliberate policy to balance the costs of using roads. One exception is the Gardermoen Line where the infrastructure charge covers the operation and maintenance of this line. The infrastructure manager is financed through the annual state budget.

From 2017 Bane NOR (infrastructure manager) introduced a new regime of infrastructure charges. The operators will contribute to the financing of rail infrastructure through these charges. It should be noted that this additional cost will be taken into account when determining the adequate level of compensation.

VAT paid on ticket sales currently amounts to 10% - which is much less than normal VAT, which is currently 25%. The

compensation, however, is not subject to VAT.

In case of delays, passengers can claim a refund of 50% of the ticket price if the train is delayed by more than 60 minutes on the Oslo-Trondheim, Oslo-Bergen, Oslo-Kristiansand/Stavanger and Trondheim-Bodø lines. On all other trains, customers can claim a refund of 50%, if the train is delayed by more than 30 minutes. Season ticket holders are issued a refund on the ticket cost in accordance with the above principles but divided by the number of days the season ticket is valid for. The maximum total refund for a season ticket is limited to 50% of the ticket's purchase price.

However, passengers will not be compensated if the delay or train cancellation is due to circumstances beyond the control of NSB or Bane NOR, such as extraordinary weather conditions or acts of God, statutory orders and prohibitions, strikes, lockouts, etc.

9. General payment conditions

No specific information provided.

10. Duration of public service contract

The largest ongoing public service transport agreement in Norway was

concluded between the Ministry of Transport and Communications and NSB AS for a duration of 6 years.

11. Rolling stock

The rolling stock used for the public service operations was, according to the past regime, the property of the operator. As of 2017, the rolling stock is leased by a Government-owned rolling stock company.

If the rolling stock is made redundant, the state has issued a guarantee to the rolling stock company for 75% of the book value. The rolling stock company will, however, hold the remaining risks.

As far as concerns the age of the rolling stock used for the discharge of the PSOs, 28% is older than 30 years, while 28.4% and 32.4% is less than 20 and 10 years old respectively.

12. Involvement of the regulatory body or other authority

The Norwegian Railway Authority monitors the railway market to ensure free competition and process complaints related to competition issues.



1. Organisation of public service operations in Poland

Public service transport is regulated in Poland in a series of texts. Regulation (EC) No 1370/2007 has been directly implemented into the Polish legal system. In addition, the public transport market in Poland is regulated by the Act of 16 December 2010 on public transport (Dz. U. 2011 No. 5, pos. 13). Apart from those two, a selection of the most important Polish legal acts relating to passenger railway transport, which were adjusted to the EU law, include:

- The Railway Act of 28 March 2003 (recently amended on 20 October 2016);
- The Regulation of the Minister of Infrastructure of 27 February 2009 on the conditions of access to and use of rail infrastructure;
- The Act of 29 January 2004 on Public Procurement Law;
- The Act of 20 June 1992 on the rights to discounts in means of collective transport.

In Poland, public service transport is organised at two levels:

- **Centrally**, by the Ministry responsible for transport issues, which is competent for long-distance, inter-regional and international public service traffic.

The current transport operator is PKP Intercity;

- In a **decentralised manner**, by the 16 individual regional authorities called Voivodeship Marshals. The Voivodeships are competent for regional traffic within their geographical scope. Przewozy Regionalne sp. z o.o. (hereinafter referred to as PR) is owned by the Voivodeships and Industry Development Agency. Other operators are also active at this level (Koleje Mazowieckie – KM sp. z o.o., PKP SKM w Trójmieście Sp. z o.o., Arriva RP Sp. z o.o., Koleje Dolnośląskie S.A., Szybka Kolej Miejska Sp. z o.o., Koleje Wielkopolskie sp. z o.o., Koleje Małopolskie sp. z o.o., Łódzka Kolej Aglomeracyjna sp. z o.o., Koleje Śląskie Sp. z o.o.), participating in tendering procedures.

The principles of transport organisation in Poland, within the framework of public service obligations, were laid down in the Railway Act of 28 March 2003 on railway transport, which was recently amended on 20 October 2016.

Currently, passenger rail services are provided by 12 carriers, thus rendering the rail passenger market highly diversified.

2. Operators on the market for public passenger service transport

Public service rail transport on the Polish passenger market is executed by:

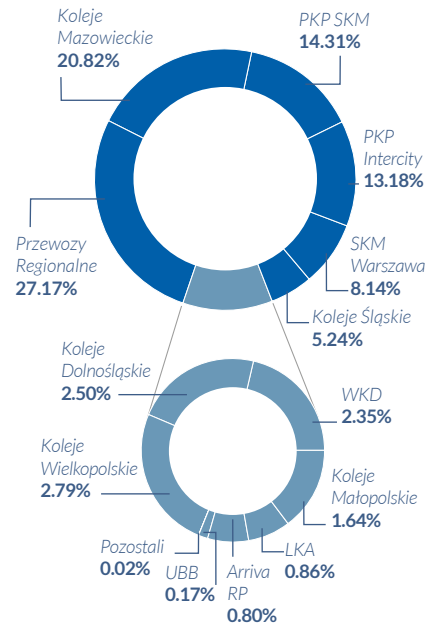
- PKP Intercity S.A. – inter-regional (inter-voivodeship) and international services – based on PSO and commercial services;
- Przewozy Regionalne sp. z o.o. (PR) – regional (voivodeship) and cross-border services;
- PKP Szybka Kolej Miejska w Trójmieście sp. z o.o. (PKP SKM) – regional/urban;
- Warszawska Kolej Dojazdowa sp. z o.o. – urban;
- Koleje Mazowieckie sp. z o.o. – regional/urban, inter-regional during holiday periods;
- Szybka Kolej Miejska w Warszawie sp. z o.o. – urban;
- Arriva RP sp. z o.o. – regional;
- Koleje Dolnośląskie S.A. – regional/urban;
- Koleje Wielkopolskie sp. z o.o. – regional;

- Koleje Śląskie sp. z o.o. – regional/urban;
- Usedomer Baderbahn GmbH – cross-border;
- Łódzka Kolej Aglomeracyjna sp. z o.o. – regional, urban.

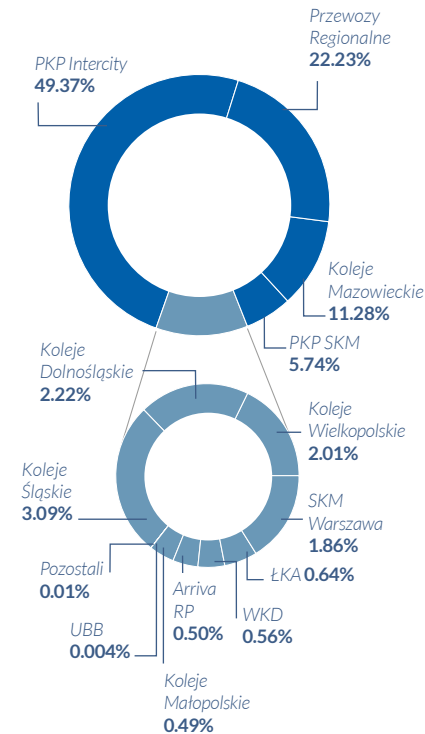
The greatest number of passengers is currently carried by Przewozy Regionalne sp. z o.o.; PR's market share was over 27% in 2016. The second largest operator is Koleje Mazowieckie (KM) sp. with a share of 21% in 2016, the third is PKP SKM sp. z o.o with a market share of over 14% in 2016.

The biggest passenger rail company operating at national level is PKP Intercity SA with a market share of over 13% in 2016 (by number of passengers). The largest market share in terms of passenger-kilometres (49.4%) is currently held by PKP Intercity SA - due to the long-distance nature of the provided services.

Share of rail passenger operators in the market in 2016 (based on number of passengers)



Share of rail passenger operators in the market in 2016 (based on passenger-km)



3. Definition of public service requirements

Public service obligations are defined in the Act of 16 December 2010 on public transport, which makes a direct reference to the definition provided in EU Regulation 1370/2007.

These obligations include:

- obligations on tariffs and obligatory discounts for certain social groups of the population;
- obligations on tariffs and obligatory discounts for pupils and students;
- service frequencies in regions (regional transport);
- service frequencies throughout the country (long-distance transport);
- qualitative criteria.

The average ticket price in inter-regional traffic, operated by PKP Intercity, was EUR 6.99 in 2016, while in regional, urban and suburban traffic, operated by PKP SKM and PR, it was EUR 0.71 and EUR 1.30 respectively.

An increasing number of public authorities, whether centralised or decentralised (voivodeships), set the bar high for the stipulation of the qualitative criteria, which are then taken into account when calculating the overall costs of the services to be provided. Discussions between the operator and



Poland

the public authority relating to the level of qualitative criteria take place on a yearly basis.

Quality criteria included in PSO contracts with the company **PR**:

- punctuality on the level 90-95%;
- delivering a proper level of security, hygiene conditions, comfort and due service;
- delivering proper information (including station announcements);
- information on the timetable;
- ticketing service (at ticket desks, on trains, in other places agreed by operators);
- information on prices;
- in case of rolling stock breakdown, ensuring a substitute means of transport;
- setting special seats in coaches for parents with small children, pregnant women and disabled people;
- personnel.

Quality criteria included in PSO contracts with the company **PKP Intercity**:

- punctuality;
- safety and security conditions, hygiene conditions, comfort and due service;
- delivering proper information (including station announcements);
- information on the timetable;

- ticketing service/organisation of ticket distribution;
- information on prices;
- setting special seats in coaches for parents with small children, pregnant women, disabled people and people with reduced mobility;
- regularity;
- personnel.

In both cases, punctuality is a major concern and given that infrastructure quality is not optimum due to financing restraints, the Polish Government decided to opt for a permanent exemption from the Passenger Rights Regulation for urban, suburban and regional services and to adopt other major exemptions. It should be noted that the quality of infrastructure clearly affects the quality of services provided within the framework of PSO. In case of poor condition of the infrastructure, various speed limits are imposed, which result in limiting the extent of the operation and diminishing the frequency of trains running, causing further deficiencies in capacity and rolling stock. As a consequence, a decrease in the attractiveness and competitiveness of rail transport can be noted.

In addition to these criteria and in order to enhance passenger development, the operator grants additional price reductions for services on certain lines or in certain urban agglomerations. These

reductions must however be discussed and agreed by the public authority in charge of the service.

4. Scope of public service transport by rail

Until 2005, only regional services were carried out on the basis of a public service contract. While, as of 2006, regional services (including urban and suburban traffic), inter-regional and international traffic fall under public service contracts.

Overall, the services performed under public service obligations cover almost 73% of PKP InterCity's operations and 90.5% of PR's operations.

Intercity services (PKP Intercity)

Number of passengers

	2015	Share (%)	2016	Share (%)
PSO	20 969 230	67.2%	28 041 083	72.8%
Commercial	10 218 250	32.8%	10 490 512	27.2%

Passenger/km (in thousands)

	2015	Share (%)	2016	Share (%)
PSO	5 201 644	67%	6 748 438	71.3%
Commercial	2 566 304	33%	2 717 842	28.7%

Regional services (PR)

- 77.6 million train-kilometres in total;
- 90.5% (ca 70.3 million train-kilometres) run as public service;
- 7.3 million train-kilometres (9.5%) run as commercial services (interREGIO trains)

Operations (in train/km)

	PSO (REGIO trains)	Commercial (interREGIO & REGIOexpress trains and interREGIO buses)	TOTAL	Percentage of PSO
2011	65 687 884	7 311 218	72 999 103	89.98%
2012	59 748 066	6 664 425	66 412 492	89.97%
2013	51 128 209	7 387 392	58 515 602	87.38%
2014	47 251 320	5 839 818	53 091 139	89%

5. Contract

Since public service transport is organised at two different administrative levels, there is a multiplicity of contracts depending on the type of traffic.

For centrally-organised traffic, there are two framework contracts concluded with the Ministry responsible for transport

issues, one covering public service obligations relating to inter-regional traffic, and the other covering the international traffic in the entire country. Annual contracts are then concluded on the basis of the relevant framework contract.

Different contracts are concluded with the Voivodeship Marshals (at least one per voivodeship – there are 16 voivodeships). These cover all regional traffic (including urban and suburban traffic). Some regions may decide to split their public service operations in pieces concluding a separate contract for each one. Accordingly, certain lines will be the object of a separate contract.

For PR, the contracts must be concluded no later than 6 months before the timetable enters into force. For PKP Intercity, the scope of an annual agreement needs to be specified no later than 1 month before a given budgetary year starts.

The contracts relate essentially to rail transport. There are some multimodal contracts covering urban transport (bus and metro) with an integrated ticketing system. In such cases, the different operators agree upon their share of the income.

PR and PKP Szybka Kolej Miejska w Trójmieście sp. z o.o., as a result of the

tender that was organised in 2009, procured two out of nine contracts for public transport services carried out in their region.

For PKP Intercity, the existing contract on national services is valid until 2021 and has been concluded with the Ministry responsible for transport issues under the new regime based on Regulation 1370/2007. As far as regards the public service contract on international services, the ongoing contract expires at the end of the year. It should be noted that the Ministry responsible for transport issues has already officially announced its intention to conclude with PKP Intercity the contact covering the coming year.

In general terms, the concluded contracts are governed by commercial and administrative law.

6. Awarding of public service contracts

Polish law provides for a possibility to conclude contracts both following a competitive tendering process as well as direct negotiations with a single contractor.

The vast majority of local voivodeships – with the exception of only three or four regions – prefer competitive tendering.

However, in case a valid application is not submitted, the contract will be directly awarded.

Inter-regional and international traffic contracts are awarded directly by the Ministry responsible for transport issues to the operator of its choice, i.e. PKP Intercity.

PKP SKM is taking part in various tenders, PR took part in open tendering in 11 voivodeships. In one of the voivodeships, there are no public services provided at all.

7. Contract negotiation

Effective negotiations take place between the railway operator and the competent authority. These however relate essentially to qualitative criteria and the leverage on the correlation between the costs of the obligations and the level of compensation provided (or likely to be provided).

The railway undertakings have an effective role/power in the discussion with the competent authority, but limited in scope. For instance, in the case of SKM the qualitative criteria for rolling stock were set out in the tender documents and were not subject to negotiation.

The level of compensation of public service contracts varies from contract to contract, according to the calculation of costs and revenues for each line. ‘Cherry picking’ is not possible in Poland even though exclusive rights are not granted to the operator. In practice, the fact that ‘cherry picking’ is prohibited amounts to a *de facto* exclusive right.

Contract payment is made on the basis of a contract concluded between the relevant authority (the Ministry responsible for transport issues or a voivodeship) and the operator.

8. Calculation of the level of compensation

The level of compensation is defined by the local government in the form of a Budget Resolution for a given year, resolved by the local government assembly (*Sejmik*).

The compensation is composed of financial means earmarked by the local government to cover the deficit generated by the public service obligation to carry. The deficit constitutes the difference between revenues from the sale of tickets and subsidies to statutory discounts on the one hand, and costs of executing regional transport on the other. However, it should be noted that in each



Poland

voivodeship the deficit is higher than local government compensations.

With regard to PKP Intercity, compensation is calculated according to the compensation calculation guidelines (an annex to the contract). The guidelines are elaborated on the basis of Regulation 1370/2007. The sum of compensation comprises costs, revenues and a 'reasonable profit'. The PSO agreements contain a list of trains, instead of sections of railway lines, which are subject to state funding. In the event of a surplus of revenues over costs, the demand for compensation would be reduced. As of 22 February 2011, a reasonable profit is taken into account when delineating the adequate level of compensation. For PKP Intercity the foreseen reasonable profit for 2016 was 2%.

The main costs taken into account when calculating the level of compensation for both inter-regional and regional services relate to:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock, including the associated depreciation costs;
- installations necessary for operating passenger transport services;
- other additional fixed costs.

Regarding the possibility that changes in ticket prices could lead to lower revenues for the railway undertaking, it should be noted that, in the case of PKP SKM, those changes do not result in lower revenues. On the contrary, up until now, any change in ticket prices have led to an increase in revenues. The framework agreement with the Marshal's Office of Pomorskie Voivodeship does not provide for any compensation if changes to ticket price lead to a decrease in revenues. However, PKP Intercity is required to apply the statutory reduced tariffs to all categories of trains (in both PSO and commercial services). Lost revenue on this account is returned to the carrier in the form of grants (alignment to 100% of the ticket price).

The average level of track access charges in 2016 was EUR 2.84 for urban traffic (PKP SKM), EUR 3.11 for regional traffic (PKP SKM) and EUR 1.85 for inter-regional traffic (PKP Intercity).

9. General payment conditions

Payment is made on a regular basis and is generally considered satisfactory by the operators, i.e. it does not lead to lack of liquidity or other financial problems.

The payment is not subject to VAT.

With regard to PKP Intercity, the compensation is delivered through monthly instalments. Payments are settled after presentation of the agreed detailed plan for the particular period. In 2015–2016, there were no incidents of late payments. Moreover, in the case of SKM, payments are made according to the schedule which is an annex to the agreement. Payments are spread evenly over thirteen instalments, which is a satisfactory solution for SKM.

As the state of infrastructure is quite poor in Poland, due to limited financing of the infrastructure manager, it affects the quality of services provided to passengers, particularly in terms of train speed, delays and cancellations. The Government has therefore opted for major exemptions from the Passenger Rights Regulation to avoid additional costs borne by the railway company (see section 3 above). Obviously, this does not have a positive impact on the overall image of the railway operator and substantially affects its marketing policy and therefore its competitiveness compared to other modes of transport.

There are contractual penalties that will have to be paid by the operator if it does not fulfil its contractual obligations. These relate to the following objectives that are included in regional contracts:

- punctuality;
- delivering a proper level of security, hygiene conditions, comfort and due service;
- facilitating access to the services for disabled persons;
- delivering proper information on conditions of services;
- information on timetables;
- ticketing service (at ticket desks, on trains, in other places agreed by operators);
- information on prices;
- delivering a substitute means of transport;
- running all trains listed on the timetable.

For example, in the case of PKP Intercity the penalties are specified in separate annexes to the contract, containing a catalogue that outlines the type and scale of charges. The penalties have already been applied in practice:

- For failing to meet qualified punctuality for inter-regional and international trains in 2016, the company was charged EUR 116 960.
- For improper trainsets (not complying with the provisions of the annual agreement) the company was charged EUR 1 301 450.

As regards delays, the following applies:

- Regional and urban traffic: delays over

10 minutes are treated as inadmissible and result in a contractual penalty of a set percentage of the monthly payment or a fixed amount in the case of PKP SKM, where contractual payment is imposed each time a train leaves or comes from/to the station with 10 minutes' delay.

- Inter-regional (or in case of PKP Intercity) traffic: for delays of services provided under a PSO, Regulation 1371/2007 is applicable.

In case of delays of services under PSO, the Ministry responsible for transport issues imposes penalties on PKP Intercity only if the delay occurred for reasons attributable to the carrier. For delays due to external factors (failure on the infrastructure side, fault of a third party), the situation is treated differently depending on the service. In relation to SKM, agreements with the Marshal's Office of Pomorskie Voivodeship do not foresee contractual penalties in the event of eventualities outside the control of the operator preventing the proper provision of services, e.g. accidents and other unforeseen events on railway line etc.

In order to differentiate the cause of delays, two indicators are taken into account:

- punctuality (an indicator of the percentage of the number of trains

running on time); and

- qualified punctuality (an indicator of the percentage of the number of trains that were delayed due to the fault of the operator).

It should be noted that no compensation is claimed in the following cases:

- if delays are the result of infrastructure works (modernisation, repair, etc.);
- if delays are the result of limits provided for defence matters, security or natural disasters;
- if delays are caused by incidents on lines independent of the operator;
- if delays are caused by a necessity to maintain a change connection with other delayed trains.

Regarding the assumption of the financial risk under the PSO contracts, there are varying situations depending on the contract:

- SKM: As foreseen in the agreements, in the event of a significant change in the rates of access to infrastructure, it is acceptable to renegotiate the amount of the subsidy granted per train-kilometre to better reflect the actual costs. The precondition for renegotiations is for the railway undertaking to effectively prove an increase in the rates of access to infrastructure or in energy prices compared to its original forecasts at

the time of the tender bidding. This provision has already been used by the parties to the agreement.

- PKP Intercity: The amount of funding in a given calendar year depends on the amount of co-financing of rail services, as defined in the Budget Act for the calendar year. The risk of exceeding the set amount is on the operator's part. According to data from 2016, the compensation granted for the discharge of the PSO covered 94.9% of the relevant costs incurred.
- PR: Until 2015 - only one voivodeship committed to covering 100% of the deficit after completing the contract in the financial year in the case of a justified increase of costs or in the case that the planned revenues are not met. In other voivodeships, the financial risk is borne entirely by the operator. However, as of 2015, all voivodeships cover 100% of the deficit incurred after completion of the contract.

10. Duration of public service contract

For inter-regional services, the framework agreement is concluded for a period of 3 to 6 years. This framework agreement constitutes the basis for the conclusion of annual public service contracts.

Despite the long duration of the framework agreement, the conclusion of annual contracts renders the adoption of informed business decisions and the objective of economic efficiency hard to achieve.

Some indicative examples of contract duration in Poland include:

- PKP SKM, which concluded a 1-year agreement from December 2016 to December 2017.
- PKP Intercity, which concluded a 10-year framework contract for the period of 25 February 2011 to 24 February 2021 for the provision of inter-regional services. Since 2014 annual agreements are concluded.

However Polish railway undertakings are not completely satisfied with this situation. In more detail:

- SKM's case – the contract was signed for a period of one year, thus limiting the possibility of obtaining long-term loans and the acquisition of EU funds, ultimately leading to restrained ability to conduct long-term investments.
- PKP Intercity's case – a 10-year contract for inter-regional services is considered relatively short having in mind that the company is subject to the



framework agreement on rolling stock investment projects.

- In the field of international transport, the lack of long-term agreements creates unfavourable conditions for the planning of these services and establishes uncertainty in negotiations with international partners, i.e. without any guarantee that they will be covered by a PSO contract.
- PR's case – Short-term contracts are not satisfactory for the company. Long-term contracts would ensure the continuity of funding for a period of up to 10 or 15 years, which would enable the implementation of the company's investment plan in rolling stock, including co-financing by the EU. A Long-term contract would ensure stability, lower costs and a level playing field in the market. On the contrary, short-term contracts discourage investments in improving the level of comfort and the quality of travel, therefore not allowing for the amelioration of the overall image of rail transport.

11. Rolling Stock

For PR, a part of the rolling stock used for the discharge of the PSO belongs to the company, while another part belongs to

the voivodeships. Its fleet is comprised of 1 233 units, out of which:

- 952 units (77.2%) are owned by PR;
- 6 units (0.5%) are owned by leasing companies;
- 248 units (20.1%) are owned by the voivodeships, the company Metchem and Czech Railways.

In the case of PKP SKM, who owns a big part of the relevant rolling stock, the number of rolling stock units used for providing public services is 73, of which:

- 60 units (80.2%) are owned by PKP SKM
- 13 units (17.8%) are owned by voivodeships

The provisions of the framework agreement concluded with PKP Intercity stipulate the use of rolling stock co-financed by European Funds. By now, implementation of the projects within the framework of the Operational Programme Infrastructure and Environment has been completed. The total spending of these projects amounted to over PLN 3.1 billion (ca EUR 704.5 million) gross, which equates to PLN 2.5 billion (EUR 568.2 million) net.

Regarding the age of the rolling stock used for the discharge of public service

obligations, 58.9% of PKP SKM's fleet is 30 years old or above, while 20.5% is newer than 10 years old. For PKP Intercity, the relevant percentages are 47.7% and 2.6% respectively.

12. Involvement of the regulatory body or other authority

According to Polish law, the regulatory body, i.e. the Railway Transport Office, assesses the drafts of PSO contracts and issues decisions on open access. In addition, it supervises the standards of quality and proper execution of the contracts' provisions as well as effective implementation of the Passenger Rights Regulation.

Moreover, the Competition and Consumer Protection Office – UOKIK – took part in creating the framework agreement for inter-regional services (directly awarded to PKP Intercity) and monitors the provisions of the agreement in terms of monopolistic practices and protection of consumer rights.



Portugal

1. Organisation of public service operations in Portugal

Law 52/2015 of 9 June defines the notion public services as well as the competences of each entity.

The state is the competent authority for national transport, international transport, heavy railway transport, as well as transport in the Metropolitan Areas of Lisbon and Oporto. There is the possibility to delegate these competences to other entities.

The regions are in charge of transport in the municipalities and inter-municipal areas as well as transport in Metropolitan Areas.

Legal provisions for the discharge of public services are mainly foreseen in the following pieces of legislation:

- Legal framework relating to the land transport system (Law No 10/90, of 17 March 1990);
- Legal framework imposing tariff limitations on passenger transport lines (Decree-Law No 8/93 of 11 January 1993 and Decree-Law No 58/2008 of 26 March 2008, amended and republished by Decree-Law No 35/2015 of 6 March 2015);
- Legal framework for the state sector including CP (Decree-Law No 133/2013, of 3 October 2013), which establishes the principles and rules applicable to the state sector and the general basis for the relevant by-laws;
- Legal framework regarding financial provisions, Decree-Law No 167/2008 of 20 August 2008;
- Legal framework providing the basis for public services in every kind of passenger transport, Decree-Law No 52/2015 of 9 June 2015;
- Legal framework providing the provisional basis for public services and the concession agreement until the signing of the public service contract, Decree-Law No 104/73 of 13 March 2013 – already repealed, but bases XXV, paragraph 3, XXVI, XXVII, XXVIII, XIX, paragraphs 1 and 2, XXXI, XXXII, paragraph 4, and LIII remain in force until the conclusion of the public service contract between CP and the state;
- Legal framework for the definition of the conditions for the provision of rail transport services, Decree-Law No 270/2003 of 12 of June 2003, amended, amongst others, and republished by Decree-Law No 231/2007 of 14 June 2007, and Decree-Law No 151/2014 of 13 October 2014;
- Decree-Law No 133/2013 of 3 October 2013 defining the legal regime of Business Sector State that should be taken into account;
- Decree-Law No 137-A/2009 of 12 June 2009, amended and republished by Decree-Law No 59/2012 of 14 March 2012, defines the legal regime applicable to CP and its statutes and foresees the provisions that must be included in the public service contract, referring to:
 - a) rights and duties of the parties, including the public service obligations, prices, financial compensation and exclusive rights;
 - b) criteria for the calculation of the compensation of the public service obligations;
 - c) geographical area covered by each service;
 - d) rules for allocation of costs related to the provision of services;
 - e) rules for allocation of revenue from the sale of tickets;
 - f) duration of the contract;
 - g) dimensioning the offer;
 - h) qualitative requirements and performance levels.



Portugal

2. Operators on the market for public passenger service transport

According to Decree-Law No 270/2003, Article 4, No 2, (as amended and republished by Decree-Law No 231/2007 and Decree-Law No 151/2014 of 13 October), domestic rail passenger transport has not been subject to the liberalisation process yet, therefore it is not open to competition.

For the time being, there are two railway undertakings operating public passenger service transport in Portugal:

- CP – Comboios de Portugal, E.P.E. is the main operator in Portugal and wholly owned by the Portuguese state. The current concession which allows CP – Comboios de Portugal to run trains across the country was granted by law;
- Fertagus is a private company which won an international competitive tender for the operation of a suburban line (54 km long) crossing the Tagus River (north-south axis).

Apart from Fertagus, no other competitor has provided international passenger services, including cabotage, on the Portuguese territory since the opening of the international passenger market to competition in line with Directive (EC) 2007/58.

3. Definition of public service requirements

The definition of public passenger service transport is defined in Law 52/2015 of 9 June 2015.

‘Public passenger transport service’ means a passenger transport service of general economic interest provided to the public on a non-discriminatory basis, according to which vehicles are made available for multiple persons simultaneously, not being exclusively at the service of any of them, who use them paying some remuneration according to a previously approved exploitation regime.

Despite not having a public service contract in place, CP is obliged to fulfil a minimum quantitative and qualitative level of public passenger service transport defined in the aforementioned Law. More particularly, it has to offer services that meet a requisite level of ease of access size and capacity and effective communication of information to the public.

4. Scope of public service transport by rail

CP has been operating all suburban and regional passenger traffic as public services on a historical and legal basis (Law No 88-A/97 of 25 July 1997, with

the amendments introduced by Law No 35/2013 of 11 June 2013 and Law No 17/2012 of 26 April 2012).

The following categories of traffic fall under PSO:

- lines and services with low demand and negative profitability;
- traffic for which timetables and frequency of services are based on public service and non-profit criteria instead of economic ones;
- services with regulated prices.

Long-distance passenger transport is not considered to be run as a public service obligation. So far, there is one international train between Portugal and Spain and a cross-border train split between Spain and France (at Medina del Campo there is a bifurcation; one part goes to Madrid and the other to Hendaye). This cross-border train ensures the connection to the rest of Europe via France.

The operation to Madrid is a partnership between CP and Renfe, the cross-border operation between Spain and France is provided by CP only.

CP also operates an international train between Oporto and Vigo, the so-called Celta Train. The associated costs are allocated between CP and Renfe.

No other competitor has provided international passenger services, including cabotage, in Portugal since the liberalisation of this market in January 2010.

5. Contract

CP is running passenger trains ensuring the continuity of the public service according to Government instructions. It does so without having a public service contract, but in the framework of a concession. The relevant qualitative criteria that services provided by CP have to meet are defined by law.

Fertagus is operating the suburban line referred to above, under a concession guaranteed by a contract, providing services that are considered public services. The relevant contract was extended until 31 December 2019. It should be noted that Fertagus has not received any compensation as of 2011.

6. Awarding of public service contracts

The historic and incumbent company, CP – Comboios de Portugal, E.P.E. is requested to provide the majority of public service transport (approximately 96%) throughout the country according to Decree-law No

137-A/2009 of 12 June 2009, as amended and republished by Decree-Law No 59/2012 of 14 March 2012.

For the time being, the only line to be granted through a public tendering procedure is the one granted to Fertagus.

The awarding authority in Portugal is the Secretary of State for Infrastructure and Planning. There are currently no other decentralised authorities.

Finally, no exclusivity is granted except for the lines awarded to Fertagus on a public service contract basis.

7. Contract negotiation

No further input.

8. Calculation of the level of compensation

No further input.

9. General payment conditions

CP is providing a transport service which is vital to the economic development, territorial cohesion and social welfare without receiving any payments from the state since 2015.

During this time, CP has been providing rail passenger services at prices that do not cover the associated production costs.

As foreseen in Decree-Law No 58/2008, amended and republished by Decree-Law No 35/2015 of 6 March 2015, the operator must bear the compensation costs in case of delays both for regional and long-distance traffic that falls under PSO.

According to Article 16, paragraph 8, of this law, passengers are entitled to ask for reimbursement of the ticket price up to 30 days after the delay.

Where the delay or cancellation is due to failure on the infrastructure side, the railway operator is still obliged to reimburse the price of the ticket, but has a right of recourse against the rail infrastructure manager on the basis of Article 16-A, paragraph 8, of the same Decree-Law.

10. Duration of public service contract

No provision is made as to the duration of the public service lines operated by CP.

11. Rolling stock

Public service transport is provided via rolling stock belonging to the operator.

On average, rolling stock used for regional public service transport is relatively old.

As regards the age of the rolling stock used by CP for the discharge of its public services, the following tables provide detailed data:

Rolling stock in service solely the property of CP:

	<10 years old	>10<20 years old	>20<30 years old	>30 years old
Lisbon	0%	25.49%	41.18%	33.33%
Oporto	0%	100%	0%	0%
Regional	0%	52.38%	0%	47.62%
Long distance	0%	12.88%	56.06%	31.06%

Rolling stock in service including rented rolling stock:

	<10 years old	>10<20 years old	>20<30 years old	>30 years old
Lisbon	0%	25.49%	41.18%	33.33%
Oporto	0%	100%	0%	0%
Regional	0%	44.0%	0%	56.0%
Long distance	0%	12.88%	56.06%	31.06%

Other rolling stock:

	<10 years old	>10<20 years old	>20<30 years old	>30 years old
	0%	0%	100%	0%

On this point, it should be noted that the renewal of all CPA (Pendolino trains) and long-distance trains is underway as well as the rehabilitation of the Schindler and the historic narrow-track (Diesel Locomotive 9004 and three carriages) and other carriages. The associated costs will be assumed by CP.

12. Involvement of the regulatory body or other authority

Competence over regulatory activities is shared between two institutions, the Institute for Mobility and Transport and the Authority for Mobility and Transport.

The Institute for Mobility and Transport supports the Government in exercising its powers to order and grant rail public transport services, e.g. monitoring the relevant contracts including concessions and service contracts.

This regulatory body is also in charge of promoting the development and updating the regulatory framework for the land transport sector. More specifically, it is in charge of any sort of technical regulations, licensing, coordination, supervision and planning



Portugal

in the land transport sector. Moreover, it supports the Government in drafting legislation and regulations and in preparing and conducting pre-contractual procedures. Finally, it participates in the implementation of the adopted tariff policy in public transport, while also authorising, licensing and supervising the performance of operations that form part of land transportation.

The Authority for Mobility and Transports is entrusted with the task of safeguarding the coherence of the legal framework (national, European and international), dealing with issues related to regulation, supervision and protection of the competitive process. Moreover, it sets the rules and general principles concerning the cost structures, the pricing and the imposed tariffs in the regulated sectors, ensuring access to the railway infrastructure on fair, reasonable and non-discriminatory terms. To that effect, it functions as a mediator in order to resolve disputes that may arise within these sectors. It is also in charge of following and monitoring the activities on the railway market with the objective of promoting and enhancing competition in the land transport sector overall. Finally, it acts as an appeal body for matters related to network directory and delineates the applicable tax regime for the use of railway infrastructure.



Romania

1. Organisation of public service operations in Romania

Public service operations in the rail sector are regulated in Romania by Government Decision No 74/2012¹ and Government Decision No 1668/2008, as amended and supplemented in light of the implementation of Government Emergency Ordinance No 12/1998 on Romanian railway transport and the reorganisation of Romanian National Railways. In addition, Government Decision No 74/2012 provides that CFR Călători is part of the PSO framework contract for 2012-2015, which is a 4-year contract. The PSO framework contract is updated yearly with annexes delineating the public service obligations and the compensation awarded for the respective year.

In Romania, public service transport is organised in a centralised manner. As foreseen in Government Emergency Ordinance No 12/1998, the national authority granting the public service contracts on behalf of the Romanian state is the Ministry of Transport.

Since the reorganisation of Romanian National Railways (SNCFR) by field of activity, according to Government Emergency Ordinance No 12/1998,

¹ Government Decision No 74/2012 has been replaced by Government Decision No 231/2016 for public service contract approval, valid between 1 January 2016 and 2 December 2019, for public railway passenger transport.

public passenger railway transport is provided as a public service for which the competent authorities conclude public service contracts with railway undertakings for a period of maximum 5 years. These public service contracts are approved by the Government and updated annually, following the approval of the state budget.

International passenger traffic has been opened up to competition since January 2010, in light of the implementation of Directive 2007/58/EC. Up till now and to CFR's knowledge, no request to enter the Romanian market in order to operate international traffic, including cabotage, has ever been received.

Moreover, it should be noted that legislation does not prohibit the development of competition on the domestic market.

All traffic falls under PSO except for touristic and international trains. Currently, CFR Călători holds 89.4% in terms of passenger-kilometres and 82.2% in train-kilometres of the domestic traffic covered by PSO. The remaining percentage is shared by four private railway undertakings. International traffic is not covered by a public service contract.

Currently, there is no cross-border railway undertaking offering cabotage services on transit in Romania.

The traffic generated by regional and inter-regional trains is covered by the compensation granted according to the applicable public service contract. There are no urban/suburban transport services on the CFR network.

2. Operators on the market for public passenger service transport

In Romania the railway undertakings are:

- CFR Călători, the national passenger railway undertaking, which operates regional and inter-regional trains. As of 2011, the legislation, no longer being restrictive in this respect, allowed for private railway undertakings to operate regional and inter-regional trains on the interoperable mainlines as well as on the non-interoperable lines.
- S.C. Regiotrans S.R.L. (former S.C. Keolis S.R.L.) is a railway passenger operator established in 2004, which operates trains on the non-interoperable infrastructure managed by RC-CF Trans and also on some interoperable lines. The Regiotrans trains pass daily through Bucharest, Braşov, Craiova, Constanţa, Iaşi, Arad, Timişoara, Reşiţa, Sfântu Gheorghe, Botoşani, Bacău, Ploieşti and Buzău.
- S.C. Transferoviar Călători S.A. (T.F.C.) is a railway operator with private stock, established in 2010, which has as its main activity domestic and international railway passenger transport. T.F.C. ensures passenger transport both on non-interoperable lines (Galaţi – Bârlad, Buzău – Nehoişu, Slănic – Ploieşti Sud, Titan Sud – Olteniţa, Oradea – Cordău) as well as on the interoperable infrastructure with connections between Cluj Napoca and Oradea, Bucharest North and Buzău, Bucharest North and Galaţi, Bucharest North and Slănic.
- S.C. InterRegional S.R.L. Cluj Napoca (former SC Regional S.R.L.) is part of the Vai Terra Spedition companies group and operates on lines in the Transylvanian area. It began its activity in 2007, operating trains both on interoperable lines and non-interoperable ones. Its trains pass daily through the cities of Oradea, Holod, Satu Mare, Bistriţa şi Ilva Mică.
- S.C. Softrans S.R.L. Craiova is a freight railway operator established in 2002, which entered the passenger railway market in the beginning of August 2014, when it started operating passenger services with a pair of trains on the Craiova – Bucharest North – Constanţa route and return. During the winter season, these trains travel on the Craiova – Bucharest North – Braşov route and return. The company also operates a pair of regional trains on the Craiova – Motru route and return.

- Astra Trans Carpatic S.R.L. Bucureşti – as of February 2017 provides an inter-regional night service between Bucharest and Arad.

3. Definition of public service requirements

Public service obligations are defined in the aforementioned legislation, according to which the approved public service contract is concluded for a 4-year period between the state, i.e. the Ministry of Transport, and the railway undertakings.

The public service contract regulates the relationship between the passenger railway undertakings and the Ministry of Transport, covering the specificities of the rendering of the social public service, the rights and obligations of the parties to the agreement, as well as the adequate level of compensation granted for the discharge of the services.

The obligations include:

- obligations on tariffs and discounts for certain social groups of the population;
- having trains of a certain rank for national services;
- service frequencies throughout the country;
- qualitative criteria.



Romania

As foreseen in the public service contract, the provided services have to meet the minimum requirements foreseen in the Order of the Minister of Transport and Infrastructure No 153/2011, which establishes the quantitative and qualitative criteria for the passenger rail services. The main criteria refer to commercial speed, on-board services and comfort.

The qualitative criteria are established through normative documents and are the subject of discussions between the competent authority and the railway undertaking, which is actually more aware of the customers' needs.

The quantitative obligations stipulated in the contracts are measured in global parameters like train-kilometres or passenger-kilometres.

The quality of infrastructure considerably affects the quality of transport services. Speed limitations, maintenance works scheduled during day time intervals with increased passenger traffic, failures to meet prolonged deadlines, modification of routes, significant train delays for which the railway undertaking does not receive any reimbursement are some of the examples reflecting the way in which defects in infrastructure lead to a pronounced drop in revenues on top

of the massive loss in passengers, who do not switch back to rail transport once these works are completed.

4. Scope of public service transport by rail

Public service transport by rail in Romania covers the entirety of the domestic traffic. The international cross-border activities are not covered by a public service contract, on the contrary, these are provided by national railway undertakings on a commercial basis.

In numerical terms, CFR Călători operated approximately 1 132 daily trains in 2016, carrying about 53 million passengers, which totalled 4 459 957 588 passenger-kilometres. It should be noted, though, that these figures are provisional.

5. Contract

The public service contract is awarded on the basis of the multiannual contract concluded between the Ministry of Transport and the railway undertaking, which is approved by a Government Decision. Taking into consideration the fact that the compensation value for the public service contract is updated on a yearly basis, these Government Decisions are also updated on a yearly basis.

Both the level of compensation and the obligations imposed are revised once a year depending on the economic and financial situation in Romania. Government Emergency Ordinance (GEO) No 12/1998 has been recently amended by GEO No 83/2016 of 29 November 2016, ensuring enhanced conformity with the provisions of Regulation (EC) No 1370/2007 as follows:

- According to the provisions of Regulation 1370/2007, public service contracts mentioned in Article 5 are concluded between the Ministry of Transport, for and in the name of the state, and the railway undertakings which provide public railway passenger transport and according to the public service obligations.
- These public service contracts must be drafted according to the provisions of Article 4 of Regulation 1370/2007.

The current contract with CFR Călători, which was directly awarded, entered into force at the beginning of 2016 and will remain valid until 2 December 2019.

6. Awarding of public service contracts

The public service contracts are awarded directly.

7. Contract negotiation

The railway company determines its business case with regard to the extent of public service operations to deliver on a yearly basis and submits a detailed cost assessment to the Ministry of Transport. The parties then negotiate the level of compensation in line with the public services to be provided under the public service contract.

8. Calculation of the level of compensation

The contract is paid through financial influx depending on the volume of train-kilometres and passenger-kilometres for each type of service (regional and inter-regional), meaning that there are no exclusive rights on the territory.

According to Article 9 of Government Decision No 584/1998 regarding the establishment of the National Company for Passenger Railway Transport CFR Călători S.A. through the reorganisation of the National Company of the Romanian Railways, public railway passenger transport has a social public service trait. For these services, CFR Călători should receive from the state budget (or from the local budgets) the difference between the fares established with the approval of the competent public

authorities and the actual transport costs, on top of which a profit share of at most 3% of the respective cost is added.

It should be noted however, that the contract is a 'net' contract. In other words, the railway undertaking bears all the risks associated with the ticket revenue. Due to objective reasons, e.g. the state policy on transport modes, the economic crisis, the critical state of railway infrastructure etc., over the past years, the volume of ticket sales has decreased, and the same applies for revenues. However, this development has not yet been reflected in the annual revision of the contract. Thus, financial risks are often the result of under-compensation of the services or delayed payments.

This is where the problem lies in Romania as the calculation of the level of revenues is largely estimated in a vague way, leading to overestimations and accordingly to a lower level of public compensation. Eventually, the railway undertaking is bound to cover the losses 'in full application of the contractual obligations'. These losses have been accumulated on a yearly basis and have been piling up for many years now, thereby increasing the company's historic debt and affecting its overall competitiveness on the European market.

Compensation levels are determined in advance. The compensation is not

renegotiated in case the revenue generated by ticket sales is lower than foreseen. According to data from 2016, the degree of compensation granted to CFR Călători covered 75% of the generated costs (minus the revenue accumulated from the sale of tickets).

The calculation of the overall costs for the service in question as a whole is generally based upon the following usual costs:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- rolling stock;
- installations necessary for operating passenger transport services;
- historic debt payment;
- amortisation;
- other fixed costs (sanitation, taxes paid to the Romanian Railway Authority – AFER, auxiliary services offered by the infrastructure manager etc.).

The average level of track access charges in Romania is EUR 2.10 per train-kilometre.

9. General payment conditions

Compensation payment is made on a monthly basis. It is reviewed according to a regular estimation of the annual public

service compensation. Reports on activity indicators are submitted on a monthly basis and are taken into account for the calculation of the level of compensation, given, of course, that the maximum earmarked amount is not exceeded.

The granting of compensation is approved by the National Authority through the national budget. It should be noted that audit controls safeguarding the accuracy and justifiability of the alleged incurred costs and accumulated revenues also take place annually.

The compensation is not subject to VAT.

The state of the infrastructure negatively affects the achievement of the indicators agreed to in the public service contract by the railway undertakings. The heavy maintenance works and repairs undertaken during daytime, without an exact multiannual schedule, cause losses to all railway undertakings. Thus, programming regular train circulation is a difficult endeavour, as a result some services cannot be provided on a regular basis. The average yearly influence of traffic changes imposed by the quality of the infrastructure is estimated at approximately 2% of the total planned train-kilometres. It is impossible to make any predictions due to the lack of any long-term planning of these maintenance works.

Delays in national traffic can be regarded from case to case as being eligible for commercial compensation. The railway undertaking must compensate the passengers according to the Passenger Rights Regulation if the delay occurred on international services. Then, the railway undertaking can sue the infrastructure manager based on national law or based on the concluded access contract. For other cases, the COTIF-RU CIV or national legislation, depending on the type of transport contract, are applicable.

In the case of delays due to external factors, such as failures or deficiencies in infrastructure, the compensation for any delay is paid by the railway undertaking (eventually recovered from the infrastructure manager based on the Infrastructure Access Contract). The same applies if the delay is caused by a third party. In the case of *force majeure*, until this year, compensation for delays had not been required. However, recent jurisprudence has imposed on railway undertakings a different treatment of such matters.

10. Duration of public service contract

The current contract has been concluded for a 4-year duration. This duration would be satisfactory if the payment scheme



was valid for the entire period (through the provision of a 4-year budget). However, as the public service contract is reviewed on a yearly basis, it does not allow for any long-term plans or for any valuable investment strategy that would improve the quality of services. Investments in the railway sector are commonly made within a timeframe of at least 10-15 years. Due to the short duration of the contract payment scheme, the current system does not encourage sustainable investments in rolling stock or a powerful system of rail passenger services.

11. Rolling stock

In general, the railway undertakings own, and ultimately finance, the rolling stock they use for the discharge of public services.

Currently, the majority of CFR Călători's rolling stock fleet is over 30 years old, but it is being refurbished. In more detail, 65.4% of the coach fleet is of recent build or modernised and 34.6% is not modernised and has to be replaced in the next 4 years, while 63% of the motor rolling stock fleet is modernised and 37% is not modernised and thus has to be replaced in the next 5 to 6 years.

In the next three years CFR Călători intends to purchase at least:

- EMUs and DMUs (hybrids) – 120 trainsets;
- new diesel-electric locomotives – 4 locomotives;
- new electric locomotives – 4 locomotives;
- new sleeping coaches – 40 coaches.

Acquisition of the aforementioned rolling stock will be done in a proportionate way depending on the identification and allocation of the necessary funding for making these investments.

In the case of Regiotrans most of its rolling stock fleet is over 30 years old but refurbished.

12. Involvement of the regulatory body or other authority

The National Railway Supervision Council performs the functions of the railway regulatory body in Romania. In 2011 it was transferred from the Ministry of Transport and Infrastructure to the Romanian Competition Council as an independent authority from the Ministry. The National Railway Supervision Council – among other tasks – monitors the

activity of the railway services markets, handles complaints and adopts decisions assuring non-discriminatory tariffs and access to the railway infrastructure.

The Ministry of Transport, which is one of the contracting parties signing the public service contract as the National Authority, and which is also the ultimate owner of CFR Călători, the other signing party, is solely responsible for the definition, conclusion and functioning of the public service contracts.





1. Organization of public service operations in Slovakia

Public passenger railway transport in Slovakia is regulated by the Act of the National Council of the Slovak Republic No 514/2009 Coll. on operating transport on railway infrastructure, which came into force on 1 January 2010 and was later amended (by the laws No 433/2010 Coll., 547/2010 Coll., 313/2011 Coll., 393/2011 Coll., 547/2011 Coll., 133/2013 Coll., 352/2013 Coll., 402/2013 Coll., 432/2013 Coll., 259/2015 Coll., 91/2016 Coll., 351/2016 Coll.).

These texts specify the terms and conditions, as well as the content of public service contracts and are fully in line with Regulation (EC) No 1370/2007.

Public service transport is managed and financed centrally by the Ministry of Transport and Construction of the Slovak Republic. The timetable is however discussed both with the Ministry of Transport and the regional authorities.

Both domestic and international passenger rail markets are open to competition between railway operators or operate on an open-access basis.

2. Operators on the market for public passenger service transport

To date, two public service contracts have been concluded:

- between ZSSK and the Ministry of Transport and Construction of the Slovak Republic; and
- between RegioJet and the Ministry of Transport and Construction of the Slovak Republic for the line Bratislava – Dunajská Streda – Komárno, covering 3.5% of rail passenger traffic.

There are also a few railway undertakings operating international lines that also carry passengers on domestic routes, without, however, having any cabotage rights. This practice can be justified by the fact that open-access operation is fully liberalised in Slovakia and thus there is no actual need to request cabotage rights.

As far as regards international rail passenger transport, it is provided on a commercial basis by private railway undertakings including:

- RegioJet, operating on the Bratislava – Prague, Košice – Prague and Zvolen – Prague lines;
- LEO Express, operating the Košice – Prešov – Prague line;

- ARRIVA, operating on the Nitra – Prague line.

ZSSK, a company fully-owned by the state, is however the main rail passenger company operating on the domestic market holding a market share of 98%.

3. Definition of public service requirements

The aforementioned Act No 514/2009 defines the general conditions and content of the public service contract, as well as the duties of the transport operator.

The following elements must be included in the contract for operating public passenger railway services:

- extent of the transport performance;
- timetable general requirements;
- territory specifications;
- subcontracting of transport services (if possible) and its extent;
- tariff conditions;
- exclusive rights – if awarded;
- rules for calculation of the compensation;
- rules for inspection of the transport operator (fulfilment of obligations, calculation of costs);
- penalties – if required;
- validity period of the contract.



Slovakia

The basic duties of the transport operator according to the law are:

- obligation to carry, which commits the operator to transport passengers in a non-discriminatory way under the valid tariff conditions;
- obligation to operate, which commits the operator to provide transport services in line with the legal provisions and the awarded licence.

In the past few years the average ticket price for PSO traffic has decreased.

Detailed quality criteria are included in the contract between ZSSK and the Ministry of Transport. They cover:

- reliability and punctuality of trains;
- safety;
- cleanliness;
- functionality (proper functioning) of heating, lighting, opening of windows and doors, etc.;
- following the required train composition;
- other requirements (space for carriage of bicycles, free Wi-Fi access, etc.)

The quality criteria are the object of negotiations between the public authority and the operator.

4. Scope of public service transport by rail

The vast majority of domestic and international traffic in Slovakia, approximately 93.6% of train-kilometres, falls under public service obligations. The few exceptions to the norm are the intercity trains (since 1 January 2012) running on the Bratislava – Košice line (operated by ZSSK), trains operated by private companies (RegioJet, LEO Express and ARRIVA) on the Bratislava – Prague, Košice – (Prešov) – Prague, Zvolen – Prague and Nitra – Prague lines, and trains that are ordered by private individuals or companies.

In numerical terms and according to data from 2015, the total transport volume on the territory of Slovakia was 34.6 million train-kilometres, out of which 31.2 million were operated by ZSSK under a PSO and 1.2 million by RegioJet. In more detail, ZSSK operated 1 434 trains per day in 2015 covering 2 980.4 million passenger-kilometres during that year.

5. Contract

Up until recently, one single contract was concluded between ZSSK and the Ministry of Transport for the entirety of public service transport. The current one is concluded for 10 years (2011–

2020). The volume of train-kilometres required and the budget are revised on a yearly basis.

6. Awarding of public service contracts

Slovak law provides that it is possible to award public service contracts either directly or through a competitive tendering procedure.

As mentioned above, there are two public service contracts concluded in Slovakia. Each of them was granted directly to the railway operator.

According to the contract concluded between ZSSK and the Ministry of Transport, the latter may deallocate part of the transport services and put them up for tendering or directly award them to another operator. The volume of ordered train-kilometres may decrease by up to 35% during the contract period in comparison to 2011. The decrease between two successive years can be up to 10%.

The following justifications for any decrease are possible:

- deallocating to tender or directly award;
- moving competencies to regional authorities;

- other reasons, i.e. scarcity of state resources.

7. Contract negotiation

In the case of ZSSK, the level of compensation and the calculation method is stipulated in the public service contract. However, it should be noted that ZSSK has continuously suffered from under-compensation due to budgetary shortages in the state budget. In the current public service contract there is a provision for a ‘reasonable profit’ that could be invoked in the future. This remains however theoretical due to state budget cuts.

Every year the state sets a maximum amount for the overall compensation of public service obligations, regardless of the actual costs incurred. Thus, ZSSK has to cover this gap through loans. Uncovered loss is the main area for consideration in the future. Negotiations in practice are therefore rather limited due to major budgetary constraints.

8. Calculation of the level of compensation

ZSSK

According to the law, the passenger transport operator is entitled to compensation (including ‘reasonable

profit') for demonstrable loss. However, the compensation is limited to the level of financial means allocated in the state budget for the given year.

The demonstrable loss in passenger transport is the difference between economically eligible costs incurred by the operator when fulfilling the obligations resulting from the public service contract and the revenues that the operator has accumulated from the same obligation, including a 'reasonable profit'. Thus, the concluded contract is of the 'gross' type.

Public service transport has never been compensated in realistic terms since the accession of Slovakia to the EU or even before that. ZSSK has been accumulating debt due to the constant shortage of financial means in the national budget.

The calculation of the overall costs for the service in question as a whole is generally based upon the following costs:

- traction fuel;
- traction electric energy;
- material;
- direct wages;
- direct depreciation/amortisation;
- direct maintenance and repairs;
- levies;
- fare;
- track access charges;
- other direct costs;

- overheads;
- financial charges.

The revenues depend mostly on the transport performance (number of passenger-kilometres) and the tariff policy for the given period. There is a possibility to have a 'reasonable profit' in the contract, but it has never been applied in practice. The accuracy and justifiability of incurred costs and accumulated revenues are subject to independent audits.

The average level of track access charges was EUR 1.50 in 2015.

RegioJet

In relation to RegioJet, there is a fixed compensation per train-kilometre in the contract, which increases every year in accordance with inflation measures.

9. General payment conditions

In practice, advance payments are subject to negotiation every year. There are no problems or implications due to delays in payments, however, there are deficiencies stemming from shortages in the state budget. The advance payments to ZSSK for the discharge of PSOs are made on a monthly basis (1/12 each month, according to the agreed overall advance payment plan). After the year is closed, the real loss is measured, the protocol

on PSO fulfilment is signed and the final clearance is settled.

The compensation is not subject to VAT.

As foreseen in the public service contract (Attachment 5 to the contract), a malus system is established delineating the sanctions and penalties that will be imposed in case of non-observance of the stipulated qualitative criteria. Representatives of the Ministry of Transport and Construction perform regular checks on the ZSSK trains. The scope of applicable sanctions is reviewed and approved by the ordering party and the carrier on a monthly basis. Each standard in the contract has its exact sanction set – i.e. the sanction that would be executed in case the prescribed standard is not met. Within the standards, the minimum percentage of GVD (railway operation schedule) fulfilment is also set. If the reasons for not fulfilling the GVD are objective reasons (such as lock-outs by the infrastructure manager ZSR), The Ministry of Transport and Construction does not necessarily execute the sanctions on ZSSK. The sanctions between the Ministry and ZSSK are settled once a year (within the context of the public service contract assessment for the given year) and executed as a decrease of the recognised loss.

The issue of minor or major deficiencies in the state of the infrastructure directly

affects the quality of passenger services provided and deepens the gap in modal share, thus warranting attention. It should be noted that if, due to exclusions from the tracks (by ZSR, the infrastructure manager), the carrier needs to put supplementary bus transport in place, the costs of the bus transport qualify as economically eligible costs.

Finally, the Passenger Rights Regulation is applicable in Slovakia with certain exemptions from several articles on long-distance domestic traffic (Art. 13, 17, 18 para. 2a, 21, 22 and 23, as well as from all non-mandatory articles regarding urban, suburban and regional services.

10. Duration of public service contract

The ongoing contracts are concluded:

- between ZSSK and the Ministry of Transport for a duration of 10 years (2011-2020);
- between RegioJet and the Ministry of Transport for a duration of 10 years (operation 9 years 2012-2020).

11. Rolling stock

ZSSK is currently operating public service transport with its own rolling stock. Depreciation of rolling stock is taken into



Slovakia

account in the calculation of the level of compensation foreseen in the contract.

The average age of the rolling stock is 22 years old. In more detail, 33% of ZSSK's fleet is older than 30 years old, 9% is newer than 20 years old and 42% is newer than 10 years old.

Part of the modernisation of ZSSK's rolling stock (purchase of new vehicles) was completed with financial support granted by EU funds.

12. Involvement of the regulatory body or other authority

The transport regulatory body plays a certain role with regard to railway public service operation. It regulates the maximum price charged for passenger railway transport as well as the maximum track access charges. In addition, it is the authority awarding licenses and conducting inspections.



Slovenia

1. Organisation of public service operations in Slovenia

Public service transport in Slovenia is regulated by the Railway Transport Act and the Decree on public service obligations in inland and cross-border regional railway passenger transport (Official Gazette of the Republic of Slovenia, No 99/2008) which has incorporated the content of the EU public service regulation. Regulation (EC) No 1370/2007 is fully reflected in the Decree.

Public service operations are in general defined in the above-mentioned Decree.

Public service transport is organised centrally in Slovenia by the state, through the Ministry of Infrastructure.

Public service transport is provided throughout the country, covering almost the entirety of inland and cross-border regional passenger transport; 95.6% of rail passenger transport in Slovenia is organised under public service obligations. There is no distinction made between regional and long-distance travel given the small size of the country.

The market for international passenger traffic has been open to competition since January 2010 including cabotage. However, the domestic market for passenger traffic is not open to competition yet. To date, there has been no request for international paths including cabotage in Slovenia.

2. Operators on the market for public passenger service transport

There is only one passenger rail operator active on the Slovenian domestic market: SŽ-Potniški promet, d.o.o., which is wholly owned by SŽ, d.o.o. under Article 8, second paragraph, of the Slovenian Railway Company Act (Official Gazette of the Republic of Slovenia, No 106/2010).

3. Definition of public service requirements

The public service obligations in railway transport are defined in detail on a yearly basis in the contract concluded between the Ministry of Infrastructure on behalf of the state and the rail operator.

They include:

- passenger transport volume, level of public service;
- obligations on tariffs and obligatory discounts for particular social groups of the population;
- service frequencies (confirmed timetable);
- financial report (monthly);
- counting passengers on all trains (once per year);
- comparison of prices between public service operators (railways and bus companies, once per year or before any price increase);
- quality of passenger services.

Qualitative criteria constitute an important part of the public service obligations. They relate, *inter alia*, to safety, comfort, speed, transport capability of the rolling stock etc. The quality parameters which are specified in the contract are those relating to punctuality (calculated in minutes per 100 kilometres) and customer satisfaction over aspects which include staff, the schedule, arrangement of trains and stations.

4. Scope of public service transport by rail

Almost the entirety of domestic passenger traffic is provided under public service obligations. It covers all of inland and cross-border regional railway passenger transport. Overall, 95.6% of all passenger rail traffic is provided under public service obligations. The other 4.4% represents specific trains, for which no subsidy is received.

In 2016, there were approximately 592 passenger trains operated per day on the Slovenian territory, transporting 36 700 passengers (per day). This represented in 2016 the transportation of approximately 13.4 million passengers, which amounted to the discharge of 10.25 million train-kilometres and 662.5 million passenger-kilometres for inland and cross-border regional passenger transport.

The average fare for a PSO journey between 2013 and 2016 totalled EUR 2.55.

5. Contract

Public service obligations are defined in a statutory manner in the Railway Transport Act and in its implementing Decree. On this basis, a contract is concluded between the railway operator and the Ministry of Infrastructure on behalf of the State. Traditionally the contract covers only transportation by rail, while other modes of transport are dealt with separately. However, there was a plan to integrate all modes of transport in 2016 into one single framework. Up until now, integration of train and bus fare systems for high-school and university students has been completed, while integration with regard to other passenger groups is planned for 2017.

A single contract is concluded for the entirety of the territory.

It is a public law contract based on the Act on public finances, the Act on executing the budget of the Republic of Slovenia and the Decree on the manner of performing the obligatory public services in inland and cross-border regional passenger transport.

6. Awarding of public service contracts

Public service contracts are, for the time being, awarded directly in Slovenia. SŽ is obliged to provide passenger services on the total network and is not allowed to

terminate services that are considered to be commercially non-viable. On certain rare occasions, the railway operator was authorised, on the basis of a decision taken by the contracting authority, to close down certain limited lines.

It should also be noted that as from 2016 an integrated public transport system was introduced.

7. Contract negotiation

Up until 2010, public service obligations, their scope and the relevant compensation were not subject to discussion between the operator and the state. It is only recently that some discussion and negotiation has started taking place, particularly as regards the correlation between the costs and the transport requirements imposed.

The compensation of public service obligations is calculated as the net financial effect following the methodology foreseen in the EU Regulation. Compensation is to be paid in accordance with the performance provided by the operator.

As compensation is provided through a mixture between direct payments and exclusive rights, no 'cherry picking' is authorised on the national territory so as to avoid any revenue losses to the operator. However, the contract contains a partial risk for the operator



Slovenia

as it is based upon the operator's annual business plan. In other words, if the performance is inferior to what was foreseen and agreed with the state, the latter will not compensate the losses in revenue. On the other hand, any exceeding revenues from ticket sales will be accumulated by the operator ('net' contract).

For many years, however, compensation has been insufficient to effectively cover the shortfall in revenues from public service passenger transport. As a result, the operator has seen its historical debt grow substantially. Servicing the historical debt remains an item outside of the public service contract. In numerical terms, the compensation granted in 2015 covered 50.1% of PSO-related costs, while in 2016 a small increase was recorded (54%).

8. Calculation of the level of compensation

The level of compensation is negotiated annually at the end of the previous year. It is based on train-kilometres. Compensation levels must be clearly determined in advance. There is no possibility to renegotiate the compensation in case of excessive loss compared to the forecast.

The level of compensation is the result of the difference between the foreseen costs and revenues.

The calculation of the overall costs for the service in question is based upon the following costs:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles;
- (historic) debt payment – financial costs for interests on credit for rolling stock and others;
- other fixed costs include depreciation costs, insurance premiums, advertising;
- maintenance of computer equipment and facilities, costs for other services (sales, payments, administration, rentals, transport and postal services, cleaning).

Optionally and on a case by case basis, other costs can be included, such as marketing costs, publicity of specific time schedules, etc.

The average level of track access charges in Slovenia is EUR 3.30/train-kilometre.

Overall, revenues from inland and cross-border regional passenger transport public service operations are comprised of:

- revenues from ticket sales;
- subsidies (public service);
- other revenues (promotion, etc.).

The accuracy and justifiability of the submitted costs and revenues are checked and monitored through regular audits and inspections that are carried out throughout the year by the contracting authority.

A 'reasonable profit' is not taken into account when calculating the adequate level of compensation, contrary to what is foreseen in Regulation 1370/2007.

9. General payment conditions

Payment is made on a monthly basis. In the beginning of every month, the estimation of passenger transport volumes (number of passengers and train-kilometres) is sent to the Ministry of Infrastructure.

This is the basis for the calculation of the monthly payment of subsidies. Every following month the final report for the past month has to be sent. The compensation is subject to VAT. In line with the annex to the PSO contract, the train-kilometres operated by the public service operator are billed to the contracting authority on a monthly basis, and include 9.5% VAT, which is deducted after the authority accepts the invoice

and makes payment to the current account of the public service operator.

The infrastructure in Slovenia is operable at a sufficient level of quality and thus does not affect the provision of passenger services.

If the performance of the operator is insufficient, a penalty for all delays, cancellations or partial cancellations of services will be imposed, unless these occurrences are due to *force majeure*. This penalty consists in a reduction of the actual compensation that will be granted, while in the case of a breach of the terms of the PSO contract, the entire subsidy might be held back and granted at a later point without interest, if compliance is ultimately achieved. Moreover, the Passenger Rights Regulation 1371/2007 fully applies to public service transport in Slovenia. However, when delays are attributed to deficiencies in infrastructure, the compensation foreseen in the Passenger Rights Regulation will be borne by the infrastructure unit of the company. In any other case, the operator will deal with all compensations to third parties.

As regards other costs that may occur and be attributed to operations handled by the infrastructure manager, the operator is eligible to seek reimbursement of the cost incurred

for rail replacement transport services – i.e. when a train is cancelled at origin or ‘en route’ and replaced by a road service (bus/minibus) – in the following cases:

- due to maintenance or engineering work on the public rail infrastructure;
- in case of emergencies (serious accident or incident); and
- in special circumstances set out in Articles 7 and 8 of the Rail Transport Act (i.e. industrial actions or natural disasters).

In 2016, a total of EUR 2 385 587.07 (VAT-inclusive) was received as reimbursement of rail replacement transport costs.

The awarding authority assesses the fulfilment of the obligations and the qualitative criteria stipulated in the contract on a monthly basis through the submitted reports on passengers’ comments and complaints. Moreover, a survey on the level of passenger satisfaction and a ridership count is carried out annually.

10. Duration of public service contract

While public service contracts were concluded on an annual basis for many years, the latest contract signed in 2010 was concluded for a duration of 10

years (2010-2019). This is a reasonable development for the operator as it allows for more effective and long-term planning of its business activity.

11. Rolling stock

Rolling stock is entirely owned by SŽ-Potniški promet, d.o.o. A marginal part of rolling stock depreciation is taken into account in the calculation of the level of the PSO compensation of the contract.

In 2016, 72.5% of vehicles and locomotives were more than 30 years old, while 27.5% of the vehicles were newer than 20 years old. It should be noted that public service compensation covers interests on loans for rolling stock and other credits obtained to carry out a PSO, while the main cost for the purchase of rolling stock is not included in the compensation amount.

12. Involvement of the regulatory body or other authority

The Public Agency of the Republic of Slovenia for Railway Transport merely carries out safety controls with regard to the implementation of the public service contract, therefore it does not interfere with the negotiation process or the determination of the level of compensation.



Spain

1. Organisation of public service operations in Spain

Currently, the legal framework regarding the rail public service operations in Spain consists mainly of the following pieces of legislation:

- the Rail Sector Law, Law 38/2015 of 29 September 2015;
- Royal Decree 22/2012 of 20 July 2012), regarding infrastructures and railway services;
- Royal Decree 2387/2004 of 30 December 2004, regulation on the rail sector;
- Renfe Statutes: Royal Decree 2396/2004 of 30 December 2004;
- Regulation (EC) No 1370/2007, which entails direct effect on the Spanish legal system;
- Agreement of the Council of Ministers of 30 December 2010, establishing the rail passenger services that are subject to public service obligations.

2. Operators on the market for public passenger service transport

In 2012, pursuant to Royal Decree 22/2012 of 20 July 2012, Renfe Operadora had to reorganise its activity and was forced to split into four different subsidiary companies. One of which is



Spain

Renfe Viajeros, S.A., which has assumed the role of railway operator in charge of passenger transportation.

International passenger traffic has been open to competition since 2010, according to Directive 2007/58/EC.

To date, Renfe and SNCF have been performing international services between Spain and France as a consequence of a collaboration agreement concluded between the two companies. However, this service is operated on a purely commercial basis on the high-speed lines.

3. Definition of public service requirements

According to Regulation 1370/2007, Renfe's commuter and mid-distance services, as delineated in the appendixes to the Agreement of the Council of Ministers of 30 December 2010, are declared subject to public service obligations.

To that effect, on 16 December 2013 a PSO contract was signed between Renfe-Operadora and the Ministry of Public Works.

Among other issues, this contract regulates the following aspects of the requested service:

- the level of compensation to be paid to Renfe by the Government for the discharge of the public service obligations. Such compensation is capped at EUR 1 507 million;
- Renfe's duty to perform public service obligations and manage the operation and the commercial use of the stations within the commuter railway network in accordance with the agreement signed with the Infrastructure Manager (ADIF);
- the rolling stock to be used in the performance of the contracted services;
- standards for quality, punctuality and satisfaction levels.

4. Scope of public service transport by rail

Public service obligations apply to all Renfe mid-distance and commuter services on the General Interest Railway Network of Iberia and under the competence of the Government, as listed in the appendixes of the Agreement of the Council of Ministers of 30 December 2010, including mid-distance services on the high-speed lines. The latter cover approximately 1.7 % of the PSO traffic and carry 7.4 million passengers per year.

Public service obligations also apply to commuter and regional services in the Catalonian Community. The Government of Catalonia (*Generalitat de Catalunya*)

is competent for the awarding and monitoring of these public service obligations, which were transferred from the competence of the Government through the Royal Decrees 2034/2009 as from 30 December 2009 and 1598/2010 as from 26 November 2010. Thus, apart from the contract signed with the Government, there is a distinct agreement concluded with the Government of Catalonia.

Long-distance services, which cover approximately 6.7 % of railway passenger traffic, are not operated under public service obligations. It should be noted that Renfe is the only railway undertaking offering those services.

According to data from 2015 and some provisional data from 2016, approximately 44.1% of the total domestic passenger market was covered by public service obligations, representing 93.4% of Renfe's passengers or, in numerical terms, 434.39 million passengers for 2015 and 440.6 million passengers for 2016.

In total, 10 887 million passenger-kilometres were rendered under PSO in 2016, which consisted in the operation of approximately 5 079 trains per day.

Finally, it should be noted that the average ticket price in PSO traffic was EUR 1.64 in 2016.

5. Contract

The aforementioned public service contract concluded between the Government and Renfe Operadora for the time period 2013-2015, has been extended for 2016 and 2017.

In Catalonia, Renfe discharges public service obligations on the basis of a distinct agreement concluded with the Government of Catalonia.

The PSO contract is a 'net' contract, thus Renfe can accumulate revenue generated from ticket sales bearing, of course, the associated risks. It should be noted that in the contract with the Government there is no provision for a 'reasonable profit'. On the contrary, in the Community of Catalonia, which, as explained above has distinct competence over the commuter and regional PSO services, the relevant PSO contract foresees a 'reasonable profit' of 3%.

6. Awarding of public service contracts

The ongoing public service contract with the central Government was granted through a direct negotiation process.

7. Contract negotiation

The contract stipulates the qualitative standards that the service should meet. These standards are foreseen in Annex VI of the contract and are negotiated and agreed upon by both parties. They mainly relate to punctuality, comfort, security as well as customer care and are assessed against an index of perceived quality and satisfaction levels.

8. Calculation of the level of compensation

The compensation for the public service obligations is established in the contract between the Government and Renfe Operadora according to Regulation 1370/2007 and the Agreement of the Council of Ministers.

The public service contract that was concluded with the central government includes public service obligations for different types of services covering regional traffic, mid-distance and commuter traffic (*Cercanías*), as well as parts of the high-speed long-distance network. Naturally, the contract foresees accounting separation obligations that ensure fair remuneration for each type of service.

The compensation consists in a direct financial influx as well as exclusive rights.

Thus, there is no possibility for 'cherry picking'.

The various costs that are taken into account when calculating the adequate level of compensation to be granted for the discharge of PSO include, *inter alia*, costs related to staff, energy charges, infrastructure access charges, maintenance and repair of vehicles, rolling stock, necessary installations for operating passenger transport services as well as depreciation and other financial costs.

9. General payment conditions

The general payment conditions are established in the contract signed between the Government and Renfe Operadora. Payments take place on a yearly basis, once the annual accounts are closed and audited.

According to data from 2016, the degree of compensation granted for the discharge of the public service obligation fully covered all the relevant costs incurred.

There is a penalty system established that foresees a decrease in the level of compensation in case of non-observance of the stipulated qualitative criteria.

Finally, it should be highlighted that the Passenger Rights Regulation (EC) No

1371/2007 is applicable with exemptions from some articles.

10. Duration of public service contract

The contract with the central government was initially signed for a two-year period regarding the provision of services from 2013 until 2015. An extension of the said contract was agreed between Renfe Operadora and the Ministry of Public Works for 2016 and 2017. A new contract is currently being negotiated that will enter into force in 2018.

11. Rolling stock

Renfe Viajeros, S.A. operates public service transport with its own rolling stock.

The average age of the rolling stock used for the discharge of public service obligations is 23.7 years old. In more detail, 14.6% of Renfe's fleet is over 30 years old, while 45.2% is under 20 years old and 34.6% is under 10 years old.

Finally, it should be noted that there are no plans for additional purchases or refurbishments in the near future.

12. Involvement of the regulatory body or other authority

The Railway Regulating Committee does not interfere with the process of granting and monitoring public service contracts.

The only authorities involved are the Ministry of Public Works and the Ministry of Economy and Finance.



Sweden

1. Organisation of public service operation in Sweden

In 1988, all train operations were separated from the infrastructure management and thus two separate legal entities were established: SJ as the railway operator and Banverket as the main infrastructure manager. Sweden's regulatory reforms in the railway sector were started with the transfer of responsibility for unprofitable local and regional railway lines to the Public Transport Authorities (PTAs) of the counties. These two fundamental changes made it possible to put the first non-commercial contracts out to tender in 1989-1990. Since then, the Swedish railway system has undergone a complete adaptation to the liberalisation process.

Passenger rail traffic has been progressively deregulated in Sweden since 1990, when it became possible for regional authorities to procure train services through competitive tendering. Until that point, the state-owned incumbent operator SJ (Swedish Railways) enjoyed a monopoly over the entire passenger market. Following the entrance and establishment of private operators in regional traffic, tendering of non-commercial long-distance lines started in 1993.

Between 1999 and 2010, the state agency Rikstrafiken was responsible

for tendering non-commercial services crossing regional borders. This included both ferry and railway services. After 2011, the tasks of Rikstrafiken were integrated into the new government agency Trafikverket (the Swedish Transport Administration, a merger of the previously separate Road and Railway Administrations), primarily in charge of road and railway infrastructure.

The main objective for merging three agencies (Rikstrafiken, Vägverket and Banverket) into one (Trafikverket) was the possible synergies stemming from planning and implementation of road and railway infrastructure construction and maintenance. The restructuring was also part of the government's ambition to reduce the number of central-government agencies.

Even though Regulation (EC) No 1370/2007 has a direct effect in the Swedish legal system, a Government Bill was adopted in 2010 setting up the new Law on Public Transport (2010:1065). This law came into force on 1 January 2012 and thereby superseded the Law on Responsibility for certain Public Transport (1997/734). Further amendments to other related texts were also introduced in the course of 2010.

Currently, local and regional railway services (as well as bus services) are

competitively tendered by regional public transport authorities, which are the contracting parties. However, local PSO contracts, e.g. the tendered contract for Stockholm's commuter trains (MTR Pendeltagen), face competition from operators offering long-distance services on a purely commercial basis. In Stockholm's case, this is of course justified by the fact that Stockholm is the national railway hub. However, similar examples are a reality in other urban areas in Sweden. It is worth noting that the vast majority of passengers transported under public service obligations – almost 50% – use Stockholm's commuter train.

The market for commercial passenger railway traffic has been completely open to competition since October 2010, with full effect from December 2011 as a consequence of the time-tabling process.

Public service operations are organised in Sweden both at national and at regional level.

At national level, the Swedish Transport Administration (Trafikverket) is in charge of public service operations dealing, in principle, with long-distance traffic.

Certain night train operations mainly covering lines connecting the south and the north of the country are the only contracts still tendered by the central government, currently through

Trafikverket. In addition, Trafikverket provides some central-government financial support to some of the contracts tendered by the regions. This includes Norrtåg, Öresundståg, Mälal and Tåg i Bergslagen, all providing train services through two or more counties.

Trafikverket operates under the aegis of the Ministry of Enterprise and Innovation. In terms of railway traffic its tasks consist in:

- defining the long-distance traffic that falls under a public service obligation;
- regulating non-commercial long-distance traffic in the field of rail, sea and air travel;
- awarding and managing contracts concluded with railway undertakings.

At regional level, the regional PTAs (*Regional Kollektivtrafikmyndighet*) are in charge of local/urban and regional public service traffic. According to the new Law on Public Transport, which came into force in 2012, the regional PTAs are more closely linked to the regional political bodies. In addition, the implementation of a complementary Act allowed for commercial operators (bus and/or rail) to penetrate the local and regional markets for passenger transport, complementing and competing with the services procured by the new agencies. However, it should be noted that up until now basically no privately-owned

operators have been active on the market for tendered services.

The tasks of the regional PTAs consist in:

- defining local/regional traffic in the best interest of citizens;
- awarding and managing public service contracts.

The PTAs play an important role on the market as they conclude public service contracts. In that course, they often provide operators with the rolling stock for the services required.

Some regional PTAs have grouped their services to create larger networks of an inter-regional nature. They subsequently tender the services in cooperation and enjoy joint competence over the contracts. At present Mälal, Värmlandstrafik, Tåg i Bergslagen and Norrtåg are run as concessions, receiving financial support from the central government and providing services of a wider scope, spanning two or more counties.

This form of cooperation has substantially increased recently. It allows for a wider region to be covered by the PSO contract, including both local and cross-regional traffic. Furthermore, administrative burdens are allocated between various authorities, since the railway undertaking operating the services will be in charge of

a wider geographical area. However, this development has ultimately shaped the various local commuter traffic bundles into *de facto* monopolies, moving the Swedish policy framework towards *de facto* PSO-based systems for regional and shorter inter-regional traffic.

One pertinent example of this new state of play is a recent decision adopted by Mälal, a company owned by the five counties in the region of Mälardalen that handles regional traffic. SJ AB has been offering regional services on a commercial basis – receiving only a small subsidy in order to deliver more frequent services – in that region for over 20 years. After 2012, when the domestic market, including both commercial and non-commercial services, was fully opened to competition, Mälal, instead of negotiating a deal with the incumbent or with another operator, as would have been expected, ordered its own trains with the objective of offering competing services for the same regional traffic and increasing the service supply. Possible risks for the viability of the commercial services that are currently provided stem from Mälal's alleged leeway to offer services below cost by beefing up ticket revenue with taxes. However, the new trains on order will not be operable before 2019. In the meantime, SJ AB has been awarded the contract for continuing operations based on the current platform until 2020.

Another example of PTAs grouping together their activities is the Öresundståg (Malmö Copenhagen area) operation, a cross-border operation between Sweden and Denmark. The network covers a route of 854 kilometres (531 miles) of railway and is tendered by Öresundståg, which is a cooperation between eight different PTAs, Blekingetrafiken, Hallandstrafiken, Kalmar Länstrafik, Länstrafiken Kronoberg, Skånetrafiken, Västtrafik and DSB.

The trains are operated by DSB Øresund in Denmark and Transdev in Sweden. Passengers can purchase their tickets in both countries. On the Danish side, trains stop often, about every 4 km, like a commuter train. On the Swedish side, the trains stop less often and they function more like intercity trains reaching stations about 300 km from Copenhagen, such as Gothenburg, Kalmar and Karlskrona. Most travellers in Sweden use the service as a regional train for work commuting and shorter journeys. Accordingly, local monthly passes are also issued.

Three trains per hour – in each direction – use the Øresund Bridge, reaching up to six trains per hour during rush hours. Each train consists of up to three sets coupled together, creating 237-metre-long trains with 588 seats, thereby providing a capacity of 1 764 seats per



Sweden

hour. Increasingly, this is turning out to be insufficient and people have to stand up during rush hours travelling to Copenhagen in the morning and Malmö in the afternoon. The differences in salaries and house prices between Copenhagen and Malmö have rendered cross-border commuting more attractive. However, the trains cannot be lengthened due to platform length constraints. Initially, the number of trains was limited to three per hour in each direction since they had to reverse at Malmö Central Station (Malmö C) due to restricted capacity. This restriction has been removed by the opening of the Malmö City Tunnel in 2010. Still, some stations restrict capacity because there are only two tracks shared with other trains (mainly Triangeln, Kastrup Airport and Nørreport). As a consequence, increasing frequency beyond six trains per hour is not possible.

2. Operators on the market for public passenger service transport

SJ AB is the state-owned passenger rail operator. The former Swedish State Railways split into several company groups in 2001, and SJ AB became responsible for passenger traffic. Following the step-by-step market-opening of the passenger rail market, which began in 1990, approximately ten

companies have entered the market. These are typically offering competing services with SJ AB at lower prices, mainly using older and lower-speed rolling stock. The first operator that penetrated the Swedish market was Transdev (previously Veolia) on the route between Stockholm and Malmö.

In the early stages of the transition from subsidising SJ AB, which enjoyed a legal monopoly over all commercial and non-commercial domestic services, to establishing a competitive open-access regime through the organisation of competitive tenders, SJ AB won most of the tendered contracts. SJ AB has subsequently changed its strategy and no longer competes for all contracts. Another new trend is that companies set up subsidiaries for some of the contracts, one example being Västtågen in Göteborg, which is operated by an SJ AB subsidiary. The contract was awarded in 2015 and will be running for a nine-year period.

Most passenger service operators in Sweden are owned by state agencies from Sweden, Germany, Denmark and France. Only a small number of operators of passenger services are privately owned, currently only Tågab, which does not operate on non-commercial lines. Examples of operators in Sweden:

- Arriva
- Arlanda Express/A-Train AB
- DSB Uppland AB
- Svenska Tågkompaniet AB
- MTR Express AB
- MTR Pendeltågen
- Transdev Sverige AB
- Skandinaviska Jernbanor AB/Blå Tåget
- Tågåkeriet i Bergslagen AB
- SJ AB
- SJ Götalandståg
- SJ Norrlandståg
- Snälltåget

In case of overlapping commercial and non-commercial services, the regions have to adapt their strategy to the prevailing market conditions and thus offer more competitive prices. This type of competition however might lead to distortive market results.

On a macro level the result is that the new public transport, when subsidised, renders commercial transport competition unprofitable.

One reason is the extended number of trains in off-peak hours that provide rigid schedules with one or two trains per hour. For instance, the Stockholm – Uppsala line is now operated with 80 trains per day, compared to the nearly 40 trains that used to run this line a couple of years ago. As a result all operators now have less passengers on each train.

Another reason is that passengers prefer to travel by lower-speed subsidised local trains, which are relatively cheaper than the faster ones. Another repercussion, is that the increased journey time (since these trains are slower and have many stops between end points) creates an economic loss from a socio-economic aspect.

3. Definition of public service requirements

Public service obligations awarded by the state or by the regional authorities are mainly limited to tariff obligations, quality requirements and traffic volumes.

The qualitative criteria that need to be met are defined by the procuring authority and constitute prerequisites for placing bids in tenders. Such criteria usually relate to punctuality, cleanliness and staffing.

4. Scope of public service transport by rail

Urban, suburban, regional or inter-regional traffic, which cannot be run under normal commercial terms (i.e. without subsidies), may be contracted out in a public service contract.

In numerical terms, the passenger railway traffic reckoned 12 373 million passenger-kilometres in 2015, which were operated by 963 916 trains. On a more general note, 70% of the total passenger railway traffic, calculated in train-kilometres, was covered by public service obligations.¹

There is an ongoing project called the Doubling Project, seeking to double travelling by public transport (all modes) by 2020 and in the long-run to double the market share. Contract design and incentives are discussed as important elements of reaching these goals. This project involves representatives of both the tendering authorities and the operators. The objective of doubling the traffic will possibly be achieved by the mid-2020s.

The subsidised local and regional transport has seen an increase in the number of passengers. Between 2007 and 2014 the increase was 18.8%.

The state-owned operator SJ AB operates about 30% of the tendered rail traffic services measured by turnover. MTR is a new entrant and covers a significantly large part of the PSO traffic compared to its peers. MTR was recently awarded the PSO commuter services in the Stockholm region – the largest PSO contract in Sweden.

It is worth noting that approximately 45% of PSO contracts are funded through income from taxpayers in the regions.

5. Contract

In general, individual contracts are being concluded for different modes of public transport. Therefore, heavy rail transport is dealt with separately from other modes of transport.

According to the norm there is only one contractor in each region operating the requested local/regional rail services, which may consist in a single line or a network of lines, sometimes reaching into other counties. Long-distance rail services are usually tendered line by line with separate contracts for each line. Currently, the night train services from Stockholm to northern Sweden constitute the only long-distance PSO organised centrally by the state, i.e. the agency Trafikverket.

VAT is applied to this commercial contract. It is, however, a reduced level of VAT at 6%, which can be recovered afterwards by the payer.

The diversity and the abundance of the ongoing contracts, makes it very difficult to define their common threads and thus reach general conclusions.

6. Awarding of public service contracts

Public service transport is normally organised by the region following a tender process. Direct award is possible, however in practice very unusual as public service contracts are continuously being granted through a public tendering procedure.

The contracting authority has the obligation to clearly state in advance and in a transparent manner the criteria according to which the contract will be awarded. The price proposed by the competing bidders is usually the most important criterion.

There have been cases of appeal against the awarded contracts, *inter alia* questioning the way in which quality has been measured.

An example of an unrealistic bid relates to Öresundståg, a train operating between the eastern Danish island Seeland and Sweden's southern region using the Öresund Bridge, which was tendered around 2008. A consortium consisting of the incumbent Danish operator DSB and the private entity FirstGroup won the contract. The winning bid

was, apparently, over-optimistic and quality quickly deteriorated, thus the joint Swedish-Danish PTA had to tender a new more expensive contract. Under this contract, Veolia took over the service in December 2011.

PSOs are normally put to tender either by the Swedish Transport Administration or by the regional PTAs, thus all railway undertakings are entitled to place a bid.

7. Contract negotiation

In practice the public authority launches a public bid for a specific route or network of routes that stipulates the relevant quantitative and qualitative criteria. Interested railway undertakings submit their offers for the transport services requested. On a more general note, the competent authority sets the requirements and applicants submit their bid; thus there is not much leeway for negotiations.

Contracts for local and regional rail services are generally of the 'gross' contract type, compensating the operator for its costs (with some margin) but with no revenue-sharing. On the contrary, contracts for long-distance services are usually stipulated as 'net' contracts, meaning that the operator can also accumulate revenues from ticket fares.

¹ According to data from the European Commission's Fifth RMMS Report (December 2016), the relevant percentage calculated in passenger-kilometres is 50%.



Sweden

Domestic passenger traffic has been opened to on-the-track competition since October 2010 (with full effect from December 2011). Following the adoption and implementation of the new public transport legislation in 2012, any operator has the right to freely start a new local or regional commercial line, i.e. the regional public transport authorities will no longer be able to block such entry. It should also be noted that no exclusive rights are granted, thus allowing for 'cherry-picking'. A recent example would be the case of MTR, which in 2015 initiated open-access inter-regional long-distance services between Stockholm and Gothenburg. Following a tendering process, MTR was then awarded a ten-year concession with an option for a four-year extension to operate on the suburban commuter network serving the Stockholm area with effect from December 2016.

8. Calculation of the level of compensation

The level of compensation of public service operations varies from line to line and service to service. Renegotiation of the level of compensation is very unusual.

Costs typically taken into consideration relate to:

- staff;
- energy;
- infrastructure charges;
- maintenance and repair of vehicles (daily maintenance only).

Sweden's infrastructure manager Trafikverket is a non-profit state agency, operating under the Ministry of Enterprise and Innovation. Commercial and non-commercial operators are treated equally in terms of track access charges. In more detail, the basis upon which the track access charges are being calculated covers merely marginal costs and includes a fair assessment of the following components:

- costs for wear and tear of tracks; per gross tonne-kilometre;
- emission charges; per litre of diesel fuel;
- track use charges; per train-kilometre;
- time and location-specific charges.

Revenue from passenger services in 2016 was estimated at SEK 1 083 million and from freight at SEK 519 million (altogether SEK 1 602 million), while costs for maintenance and operations amounted to approximately SEK 9 000 million. In total, close to SEK 10 000 million was invested. The balance is covered by the public budget.

Normally there is a 'bonus/penalty' system based on performance regimes that is stipulated in the contracts for use of infrastructure.

Railway undertakings determine the price they consider adequate in order to cover the costs incurred for the discharge of the PSO.

Finally, a 'reasonable profit' can be foreseen in the contract. However this will entirely be a result of how the railway undertakings have calculated their bids, depending on the costs that occur, and thus cannot be taken for granted.

9. General payment conditions

When the contract is concluded following a public tendering procedure, the level of compensation has to be agreed in advance.

Payments are made regularly most commonly through monthly instalments, a frequency that is considered to be satisfactory.

In case of deficit stemming from the operation of the PSO, the national or regional authorities will not be called on *a posteriori* to provide extra compensation. This is part of the risk railway undertakings are deemed to take when operating public services.

Contracts usually contain a penalty system linked to the quality criteria to be met. An exemption from the

penalty system is foreseen in case the requisite level of quality is not met due to deficiencies in infrastructure. The underlying rationale is the unlikelihood of being properly indemnified by the infrastructure manager, while it is *de facto* impossible to get compensation from a third party. However, the Swedish government is finalising the transposition of CUI rules on the right of recourse into national law.

It should be noted that the Passenger Rights Regulation 1371/2007 is fully applicable in Sweden.

10. Duration of public service contracts

Generally speaking, the public service contracts for railway services are concluded for a duration ranging between 5 to 10 years, with an option to extend the contract for another 1 to 2 years. Such durations are acceptable provided that the authorities do not require any investment in new vehicles.

11. Rolling stock

All commercial train operators either own or lease the rolling stock that is required for the provision of the relevant services. Each of the PTAs tendering railway services was originally the owner

of vehicles required for supplying the services. In 1999, most PTAs franchising railway services set up a jointly owned subsidiary – Transitio AB – for the purchase and ownership of rolling stock. Today, this organisation partly leases, partly purchases rolling stock by way of commercial loans.

Each regional PTA is charged for leasing the vehicles from Transitio on a cost recovery basis. Leasing charges may be adjusted if and when conditions for Transitio's debt/leasing conditions are changed. Besides benefiting from scale economies in standardisation and purchase of vehicles, the company also handles its own heavy vehicle maintenance, owns spare parts and holds a couple of vehicles of each brand as a backup.

Most of the fleet used in the procured long-distance traffic is rather old (even beyond 30 years old). However, as these vehicles have been 'reconditioned' and modernised rather recently, they may not be considered as old by the passengers.

Almost the entire fleet of vehicles used in the procured local and regional services is newer than 20 years old and a considerable part is newer than 10 years old.

12. Involvement of the regulatory body or other authority

The Regulator is not particularly involved in the process of public service contracting. The Government and the Parliament are charged with the task of delineating the general framework for public service transport in Sweden; while, local and regional PTAs subsequently specify the type of services to be procured (and how) in their regions.



Switzerland

1. Organisation of public service operations in Switzerland

Even though Switzerland is not an EU Member State, it does ensure that its legislation is equivalent to that of the EU in all those fields for which bilateral agreements have been concluded. The Overland Transport Agreement is one of the seven bilateral agreements of 1999 (Bilateral I), which aim at integrating Switzerland into the EU internal market. Since the agreements are based on the equivalence of the laws on both sides, it is in the interest of both parties to maintain this equivalence when there are developments in the law covered by the relevant agreement. It is generally necessary to adopt developments in relevant EU law (*acquis communautaire*) in order to maintain equally competitive conditions (for example avoidance of technical barriers to trade). The agreements and their further development are administered in collaboration between the European Commission and the Swiss government, on the basis of at least one annual meeting of the so-called mixed committees.

The general legal framework for public transport has been largely reformed in the past decade. The latest revision of the legal framework (the so-called Second Railway Reform, second package), which



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came into force on 1 July 2013, aimed at bringing the Swiss law more in line with the 'acquis communautaire'.

The organisation of public services is regulated by a whole set of laws applicable either to the entire sector or more specifically to SBB:

Applicable to the entire sector:

- Railways Act of 20 December 1957 (RailA) – last version in force since 1 January 2017;
- Federal Act of 20 March 2009 on passenger transport (Passenger Transport Act-PTA) – last version in force since 13 September 2016;
- Ordinance of 4 November 2009 on Passenger Transport (PTO) – last version in force since 1 July 2016;
- Ordinance of 11 November 2009 on Subsidies for Regional Passenger Transport (RPTSO) – last version in force since 1 January 2016.

Specific to SBB exclusively:

- Federal Act of 20 March 1998 the Swiss Federal Railways (SBBA) – last version in force since 1 January 2016.

Public service operations are organised both by centralised and decentralised authorities acting jointly. In practice, there is a clear allocation of competencies

between the federal authorities and the decentralised ones (the Cantons). The basic principles are the following:

- **Federal authorities** determine the general transport policy for the country and participate in the financing of public service operations in regional transport. The federal contribution to the financing varies on a case by case basis. The federal authorities are also responsible for awarding the concession for the national long-distance transport services.
- **Cantons** are the leading authorities in negotiating and concluding – together with the federal authorities – public service contracts with railway undertakings in regional transport.

According to the law, the competent local authorities (Cantons/Cities) can decide to award public service contracts on the basis of a competitive tendering procedure, but in practice this possibility has not been used yet. In the year 2000, one call for tender was initiated, but cancelled after the awarding authority reached the conclusion that the corresponding service did not qualify as a PSO. Nonetheless, it is worth noting that 57% of the market share in regional transport services (measured in train-kilometres) is operated by other railway undertakings than SBB, such as BLS, SOB (South-Eastern Railways) or Thurbo.

2. Operators on the market for public passenger service transport

There are several fully integrated companies (passenger/freight services and infrastructure provision) in Switzerland. Currently, 12 railway undertakings supply PSO services on the standard-gauge network (4 of them also on the narrow-gauge network) and a further 29 solely on the narrow-gauge network.

- SBB is by far the largest railway company fully owned by the Swiss government. Since 2010, the passenger division of SBB holds an exclusive concession for long-distance passenger transport valid until 2017. In numerical terms, SBB is in charge of providing 64% of the whole passenger rail traffic, covering both long-distance and regional traffic. In the regional passenger transport market, SBB is responsible for approximately 43% of the market, with the S-Bahn Zürich being by far the largest regional network in Switzerland. In 2015, the total traffic performance of SBB amounted to 13 226 million passenger-kilometres in long-distance and to 4 105 million passenger-kilometres in regional passenger transport services.
- BLS AG (BLS) is the second-largest fully integrated company owned partly

by the Swiss government (22%) and the canton of Berne (56%). BLS is the sole operator on the Berne S-Bahn, Switzerland's second-biggest S-Bahn after Zürich. Overall, the BLS passenger services, including regional express services as well as regional services in the Bernese Oberland and Valais, operate on a network of around 700 km. In 2016, BLS transported 57.8 million passengers on its trains. The traffic performance amounted to 981.3 million passenger-kilometres.

- SOB operates a major part of the St. Gallen S-Bahn and the regional express service between St. Gallen and Lucerne (Voralpen-Express). It is owned by the Swiss government (36%), the canton of St. Gallen (19%), various different cantons and communes (totally 30%) as well as private individuals or institutions (15%). SOB transported in the year 2015 13 million passengers. The traffic performance amounted to 251.1 million passenger-kilometres.

On a more general note and on the basis of data from 2015, Swiss public passenger railway services provided 20 389 million passenger-kilometres, 13 225.6 million passenger-kilometres for long-distance services and 7 163.7 million passenger-kilometres for regional services, transporting 566.1 million passengers in total.

3. Definition of public service requirements

Public service obligations are defined in different concession contracts concluded for specific transport routes. These obligations include:

- service schedule and frequencies;
- quality criteria;
- obligation to participate in the 'direct service' (national fare/distribution network with commonly determined prices including compulsory discounts for specific social groups).

Quality criteria are a key component of public service contracts (punctuality, cleanliness, security, customer information, etc.) and constitute an important element of the negotiation, as quality has a price.

The Transport Ministry has elaborated minimum quality standards (key parameters) and recommends their integration into public service contracts on a nationwide scale.

The level of key performance indicators (KPIs) relating to quality standards is thoroughly discussed with Zürich Transport Authority and the cantons involved in ordering the regional S-Bahn of Basel, as in these two cases they have a direct financial

impact. The federal Act on passenger transport comprises the possibility that the Federal Office of Transport can withdraw the concession in case the concession owner does not meet the public service requirements defined in the performance contract or the obligations of the concession in essential respects.

In addition to these criteria, SBB has introduced monthly quality reporting, the content of which can be adapted on a local basis.

4. Scope of public service transport by rail

The entirety of rail passenger transport services is organised through concessions and covered by public service contracts. The federal government is competent for awarding the concessions.

Regional and inter-regional services are organised through contracts concluded with the federal government and the cantons, acting jointly. In total, 64% of train-kilometres are provided under regional transport services. As regards the level of competition, 57% of this traffic is provided by other railway undertakings than SBB.

National long-distance transport services, which represent 36% of

national train-kilometres, are actually organised through an all-encompassing concession in which service obligations, like the minimum level of services per line, are imposed. It is currently granted to SBB. The Swiss federal administration can award a concession for a new long-distance service to other railway companies, as long as this new service has no negative economic impact on existing long-distance and regional services.

In Switzerland, independent international rail services are *de facto* not provided. Instead, they fall in the realm of national services – covered by a PSO – having an international extension which is operated by one of the neighbouring incumbents and/or regional partners. In 2015, there were only a few – rather small – cross-border PSOs.

5. Contract

Public service obligations in regional transport are organised through the conclusion of commercial law contracts freely negotiated between the parties to the contract, i.e. the cantons concerned, the Confederation and the railway undertaking. In practice, the railway undertaking submits to the cantons concerned an offer for the services requested containing the estimated costs of the service and the estimated

revenues. The estimated revenues are based on the demand estimations and the Swiss through-ticketing fare system defined by the Swiss Public Transport Operators' Association.

It should be noted that the actual concessions for rail transport services within a specific perimeter are delivered by the Ministry of Transport based on the applicable legislation (PTA), specifying the rights and obligations linked to the exclusive rights.

Strictly speaking, the contracts only cover transport by rail. However, cooperation with other modes of transport (integrated mobility solutions) is well institutionalised and part of the trans-modal objectives that are set at Federal level. The different public transport companies (rail, bus, trams, etc.) are legally obliged to cooperate. They have to harmonise for example ticketing, distribution and marketing operations. This framework is called '*Direkter Verkehr*' (direct traffic).

Some specificities apply to SBB exclusively. The Federal Council (as the owner of SBB) defines in its ownership strategy the overall political and strategic objectives for SBB, including the public service objectives for the upcoming four years.

Overall, most of the PSO contracts in Switzerland run for a ten-year duration.



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Their content is in line with the spirit of Regulation (EC) No 1370/2007. The all-encompassing concession for long-distance traffic will expire by the end of 2017. In January 2017, the federal authorities issued a guideline containing criteria as well as a target vision for long-distance traffic. The guideline serves as an input document for the next PSO contract which is subject to ongoing discussions. Unlike today, a split of the concession is being considered.

6. Awarding of public service contracts

Swiss legislation provides for the possibility to grant public service contracts through a public tendering procedure.

Concerning regional railway transport services, the cantons remain free to decide whether to tender or to directly award a public service contract. Since 1996, date of the introduction of this possibility into the legislation, no contract for public services in the railway sector has been attributed through a public tendering procedure. If a railway undertaking submits an offer for an existing service in case of a renewal of a concession, the canton in charge and the Federal Department of Transport have to examine this offer before directly awarding the service.

In public service transport by road, however, tenders have been applied in about thirty cases. Bus services have to be tendered in the cases of a new service, when the public service requirements are not fulfilled by the existing provider or if there are credible indications of qualitatively better and/or more efficient offers.

7. Contract negotiation

Public service contracts are freely negotiated between the parties to the contract, i.e. the relevant canton and the railway undertaking. In practice, the railway undertaking submits to the canton (responsible competent authority) an offer for the public service obligations requested, containing the estimated costs of the service and the estimated revenues. The estimated revenues are based on demand estimations and the Swiss through-ticketing fare system defined by the Swiss Public Transport Operators' Association.

The railway undertaking can be the driving force for the extension or the introduction of new services. All aspects of the contract are discussed in detail. A special focus is provided on discussions relating to:

- qualitative criteria;

- the level of passenger services required by passengers themselves;
- the leverage on the correlation between the costs of the obligations required and the level of compensation provided;
- purchasing of new rolling stock;
- marketing requirements;
- the level of customer information.

Fulfilment of the aforementioned criteria is assessed on an annual basis by the competent authority, which reviews the reports provided by SBB and conducts various checks, i.e. mystery shopping, customer surveys etc. It is worth noting that the S-Bahn services in Zürich and Basel have been distinguished for their outstanding performance.

8. Calculation of the level of compensation

The level of compensation for public service contracts in regional transport is determined in the contract prior to its effective implementation. The compensation is the result of the difference between the foreseen costs and the expected revenues. The railway undertakings are not allowed to include a profit or equity yield rate into their PSO contracts. The only possibility to make a profit in PSO services in regional

transport is by achieving higher revenues or by lowering production costs, compared to the initial costs assumed in the negotiated contracts. Two-thirds of this profit has to be reserved to compensate possible future losses, as long as the reserve is lower than EUR 10 million or half of the annual turnover.

The calculation of the overall costs for the service in question as a whole is based upon the following costs:

- on-board staff (driver and other mobile staff);
- railway police (safety and security);
- cost generated from the rolling stock (amortisation and interests ¹);
- shunting services;
- assistance to passengers with reduced mobility;
- distribution: sale services (staff, offices);
- charges for the use of the infrastructure (track access charges);
- administrative costs for the management of the public service contract;

The calculation of the overall revenues generated by the service will be based on the following production data:

- seats offered-kilometres;
- passenger-kilometres;
- gross revenue per passenger-kilometre.

¹ No reserve is provided for the renewal of rolling stock. The rolling stock is however the property of the railway undertaking.

Optionally and on a case-by-case basis, other costs can be included, such as marketing costs, publicity of specific time schedules, etc.

Costs incurred for public service contracts for **regional services** are compensated through a system of mixture between direct financial influx and the granting of exclusive rights. The principle is the following:

- The contract is concluded for one or several specific lines throughout a specified period of time.
- Exclusivity is granted to the railway undertaking allowing it to run profitable services during the said period of time. Revenue generated by these profitable services is passed onto the costs of the other non-profitable services run during the rest of the day.
- A calculation of the total costs incurred (after deduction of revenue generated) constitutes the amount for which financial compensation will be asked.

The general rule is that of 'net' contracts, i.e. contracts for which the risk is borne by the operator. The level of compensation can be re-negotiated only after a two-year period.

Indeed, any deficit on the service will not be compensated *a posteriori* by national

or cantonal authorities. The only means to compensate potential deficit is through a special fund that will have been constituted by any savings made on previous contracts. Any deficit that may not be compensated by the special fund will have to be covered by the company itself.

PSO costs and their correspondence with the degree of funding capacity made available by the regional authorities are reviewed on a biennial basis.

The concession for **long-distance traffic** is, however, only compensated through the granting of exclusive rights. Under Swiss law, long-distance traffic is to be autonomous from a financial perspective. This explains the absence of any financial flows. Therefore, the revenues generated through the exclusive rights must be sufficient to cover the costs of the railway undertaking's operation of long-distance traffic.

9. General payment conditions

The effective payment is made by regular instalments at pre-determined intervals, as foreseen in the contract itself and is not subject to VAT. This is usually provided on a quarterly basis.

Contrary to many EU Member States, the quality of the infrastructure is not an issue. Long-term public transport policy has constantly been oriented towards massive investments in the infrastructure. The issue of concern in Switzerland is more that of availability of train paths, since, given the size of the country, the network is largely saturated. The SBB network shows the highest capacity utilisation worldwide. With 100.3 trains per kilometre of normal-gauge main-line track per day, SBB according to UIC is top of the international ranking. The complex form of mixed traffic is a big challenge for operation and maintenance of the Swiss rail infrastructure.

There is a bonus/malus system established measuring the degree of fulfilment of the stipulated qualitative criteria, i.e. punctuality, customer information, cleanliness etc. A bonus is granted for positive performance and a malus for negative performance accordingly.

On that point, it should be noted that the Passenger Rights Regulation has not yet been transposed into Swiss law, which is an ongoing legal process; it does however apply to international tickets sold by SBB.

10. Duration of public service contract

Concessions are normally concluded for a ten-year period, which in the case of regional transport services is divided into biennial service agreements. The ten-year framework agreement is however felt to be too short when the railway undertaking has to make important investments in new rolling stock for which amortisation can take between 20 to 30 years.

11. Rolling stock

The rolling stock used in public service contracts is owned by the operator in question and is financed through the public service contract.

Renewal and refurbishment activities take place on a continuous basis. In long-distance traffic, SBB, bears the associated costs, while the public service contract covers the depreciation of rolling stock for regional traffic.

The rolling stock used by SBB for the discharge of the PSO is relatively new and can be divided into the following classification:



Traction vehicles (531):

- Before 2000: 1%
- 2000-2009: 58%
- 2010 and later: 41%

Coaches (2 292, including driving trailers):

- Before 2000: 71%
- 2000-2009: 14%
- 2010 and later: 15%

12. Involvement of the regulatory body or other authority

Under the current legal framework in Switzerland, the Railways Arbitration Commission is not involved in the awarding of public service contracts, in respect to the corresponding concessions. Awards of concessions are subject to appeal to the Federal Administrative Court.

In light of the revision of the Railways Act in the context of the second step of the Second Railway Reform, the Railway Arbitration Commission has been substantially strengthened. It actively monitors network access and track access charges to check that they are free from discrimination.







The Voice of European Railways

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