

Proposed Implementing Act on the Economic Equilibrium Test for domestic passenger services

Context: 4th Rail Package liberalises domestic open access passenger services from December 2019. However Member States can still block new open access services where they would undermine a PSO contract. This means directly awarded PSO contracts can still block competition in the rail market.

ALLRAIL position: ALLRAIL believes the IA on the EET should support the liberalisation of open access passenger rail services; make it difficult for directly awarded PSO contracts to block new open access services; improve scrutiny and transparency of the “public service” contribution of PSO contracts. A robust EET must be in place in order to avoid Member States unnecessarily blocking open access operators and in order to support the full benefits in terms of jobs, growth and sustainability that more competition on rail can bring.

With that in mind ALLRAIL highlights the following points:

1. The Economic Equilibrium Test should not just look at the pure economic impact of a new Open Access on a PSO contract, but should look at the wider economic implications and also at the wider benefits of the OA for passengers and society.

Narrowing the scope of the EET to just the impact on the profitability or the net cost of the PSO contract increases the risk that new open access services can be blocked.

i) That means that the scope of the profitability or net cost for the competent authority public finance of the PSO contract should be widened to look at:

- Possible cost savings that can be made by the PSO operator, **Article 11,3 (a)**
- The additional passengers that could be generated by the OA for the PSO operator, **Article 11,3 (a)**

ii) That also means that alongside the impact on profitability and the public finance of the PSO contract, the rail regulator should also look at the following:

- Possible competitive responses by the PSO operator, **Article 11,3 (b)**
- Impact on the performance and quality of rail services, **Article 11,3 (f)**
- Existence of net benefits to customers arising from the new service, **Article 11,3 (h)**

iii) The economic equilibrium test can only be considered as compromised when the proposed new service has a substantial negative impact on the profitability and/or net cost for the competent authority.

iv) If there are possibilities to modify the PSO contract the rail regulator should also look at these options. It should not de facto be the OA service that is modified to suit the PSO contract. ALLRAIL therefore supports the possibility for the rail regulator to modify the scope of the PSO contract, **Article 11, 3 (e)**

2. Investments in rolling stock for directly awarded PSO contracts should not be taken into consideration by the EET

ALLRAIL supports rail regulators looking at the impact of an OA service on investments by RUs or by competent authorities. But believes this should exclude investments in rolling stock that have been made under a direct award.

ALLRAIL proposes the following amendment to **Article 11, 3 (c)**

*Impact on investments by RUs or by competent authorities, if appropriate, in particular in rolling stock. **This assessment for rolling stock shall not apply to directly awarded public service contracts.***

3. A PSO operator should not be able to request an EET if it cannot provide evidence that it complies with basic rules on overcompensation and financial transparency

The information requirements for the EET must include the obligation on the PSO operator to demonstrate compliance with the provisions of the Annex of regulation No. 1370/2007. These provisions aim to ensure that overcompensation has been avoided and that the amount of compensation is appropriate and reflect a desire for efficiency and quality of service. The provisions also stipulate strict account separation between services subject to PSOs and other activities that the PSO operator is involved in. This ensures financial transparency and avoids cross-subsidies.

ALLRAIL proposes the following amendment to **Article 8, paragraph 1, f (new)**

(f)(new) evidence that its PSO obligations comply with the Annex of regulation 1370/2007.

4. The regulator, in assessing the economic impact of an OA on a PSO contract, can scrutinise whether the PSO contract really meets public service obligations.

ALLRAIL robustly defends the following as an absolute minimum:

When the Regulator assesses whether an OA service undermines a PSO contract, the regulator has the right to assess whether the public service contract is correctly defined as a public service contract and whether the PSO operator would not be able to provide the service under commercial conditions. **Article 11, paragraph 4**

5. There must be differentiated treatment for PSO contracts awarded under competitive tenders and direct awards

The Regulators must take into account how the PSO contract has been awarded when assessing the economic equilibrium. A contract awarded under a competitive procedure has already undergone an economic analysis.

ALLRAIL fully supports the following:

- Rail regulators should consider whether the PSO contract has been awarded directly or under a competitive tender, **Article 11,3 (d)**

- PSO contracts awarded under a competitive tender should not be scrutinised by rail regulators to check whether the service could be run under a commercial basis, **Article 11,4 (a)**

6. The OA operator should have the right to appeal the decision on the EET to the rail regulator

The current EC draft only foresees the entities that have requested the EET are allowed to appeal the decision. **Article 12, paragraph 3**

The OA operator is not entitled to request an EET, but it should be able to challenge the decision made by the regulator. Otherwise this results in an unbalanced situation. The regulator, knowing that the entities are allowed to challenge the result, but the OA operator not, may be influenced in its decision-making.

7. The strict timelines should be respected to avoid unnecessary delay to the regulator decision, thereby jeopardising the OA operators new service.

It is crucial to stick to the timeframes proposed by the EC draft Implementing Act, as any delays in decisions has a financial impact on a new open access operator and risks their slot in the TT process. Under no circumstances should a new OA operator be penalised by a late decision or by PSO operators delaying the provision of information.

The requests for an EET must be made within 4 weeks of the notification. Otherwise no EET can be requested. **Article 6, paragraph 1**

If the regulator does not receive the information it needs from the PSO operator or competent authority, and within the strict deadlines (12 weeks after receiving the request), the EET shall be rejected. **Article 10, 2.**

8. If the Economic Equilibrium Test is requested already existing open access operators on the particular route, who have a market dominant position, also have to be reviewed.

Therefore additions should be made to Article 8, paragraph 2, e (new)

From other already existing open access operators who have a market dominant position:

- I) business plan;***
- II) forecast of passenger traffic and revenues, including forecast methodology;***
- III) pricing strategies;***
- IV) ticketing arrangements;***
- V) rolling stock specifications (e.g. load factor, number of seats, wagon configuration);***
- VI) marketing strategy;***
- VII) its estimated elasticities of the services (e.g. price elasticity, elasticity with respect to quality characteristics of the services).***