Regulation (EU) 2016/2338 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (Text with EEA relevance)

REGULATION (EU) 2016/2338 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 14 December 2016

amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 91 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) Rail transport has the potential to grow and increase its modal share and to play a major role in a sustainable transport and mobility system, creating new investment opportunities and jobs. However, the growth of passenger transport services by rail has not kept pace with the evolution of other modes of transport.

(2) The Union market for international passenger transport services by rail has been open to competition since 2010. In addition, some Member States have opened their domestic passenger services to competition, by introducing open access rights, or tendering for public service contracts, or both. The opening of the market for domestic passenger services by rail should have a positive impact on the functioning of the single European railway area, leading to better services for users.

(3) In its White Paper on transport of 28 March 2011 the Commission announced its intention to complete the internal market for rail services, abolishing technical, administrative and legal obstacles which impede entry to the railway market.

(4) The completion of the single European railway area should further the development of rail transport as a credible alternative to other modes of transport, inter alia, in terms of price and quality.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2016/2338 of the European Parliament and of the Council. (See end of Document for details)*

(5) A specific objective of this Regulation is to enhance the quality, transparency, efficiency and performance of public passenger transport services by rail.

(6) Services at cross-border level provided under public services contracts, including public transport services covering local and regional transport needs, should be subject to the agreement of the competent authorities of the Member States on whose territory the services are provided.

(7) Competent authorities should define specifications of public service obligations in public passenger transport. Such specifications should be consistent with the policy objectives as stated in public transport policy documents in the Member States.

(8) Specifications of public service obligations in public passenger transport should, where possible, generate positive network effects, inter alia, in terms of improved quality of services, social and territorial cohesion or the overall efficiency of the public transport system.

(9) Public service obligations should be in line with public transport policy. However, this does not entitle the competent authorities to receive a specific amount of funding.

(10) When preparing public transport policy documents, relevant stakeholders should be consulted in accordance with national law. Those stakeholders might include transport operators, infrastructure managers, employee organisations and representatives of users of public transport services.

(11) For public service contracts that are not awarded on the basis of a competitive tendering procedure, the fulfilment of public service obligations by the public service operators should be appropriately compensated in order to ensure the long-term financial sustainability of public passenger transport services in accordance with the requirements laid down in public transport policy. In particular, such compensation should 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.

(12) Within the framework of establishing the single European railway area, Member States should ensure an adequate level of social protection for the staff of public service operators.

(13) With a view to an appropriate integration of social and labour requirements into procedures for the award of public service contracts for public passenger transport services, public service operators should, in the performance of public service contracts, comply with obligations in the field of social and labour law that apply in the Member State where the public service contract is awarded and that result from laws, regulations and decisions, at both national and Union level, as well as from applicable collective agreements, provided that such national rules, and their application, comply with Union law.

(14) Where Member States require staff taken on by the previous operator to be transferred to the newly selected public service operator, such staff should be granted the rights to which they would have been entitled if there had been a transfer within the meaning

of Council Directive 2001/23/EC[(4)]. Member States should be free to adopt such provisions.

(15) Competent authorities should make available to all interested parties relevant information for the preparation of offers under competitive tendering procedures, while ensuring the legitimate protection of confidential business information.

(16) The obligation of a competent authority to provide all interested parties with information essential for the preparation of an offer under a competitive tendering procedure should not extend to the creation of additional information where such information does not exist.

(17) In order to take into account the diversity in the territorial and political organisation of Member States, a public service contract may be awarded by a competent authority that consists of a group of public authorities. In such circumstances, there should be clear rules setting the respective roles of each of the public authorities in the awarding process of the public service contract.

(18) Considering the diversity of administrative structures in Member States, in the case of contracts for the provision of public passenger transport services by rail directly awarded by a group of competent local authorities, the determination which local authorities are competent regarding ‘urban agglomerations’ and ‘rural areas’ remains at the discretion of the Member States.

(19) Public service contracts for public passenger transport services by rail should be awarded on the basis of a competitive tendering procedure, except for those cases set out in this Regulation.

(20) Procedures for competitive tendering of public service contracts should be open to all operators, should be fair and should respect the principles of transparency and non-discrimination.

(21) In exceptional circumstances, where public service contracts for public passenger transport services by rail are awarded on the basis of a competitive tendering procedure, new contracts may temporarily be directly awarded in order to ensure that services are delivered in the most cost-effective way. Such contracts should not be renewed to cover the same or similar public service obligations.

(22) Where only one operator expresses interest following the publication of the intention to organise a competitive tendering procedure, competent authorities may enter into negotiations with that operator to award the contract without further publication of an open tendering procedure.

(23) The *de minimis* thresholds for directly awarded public service contracts should be adapted to reflect the higher volumes and unit costs in public passenger transport services by rail compared to other modes of transport covered by Regulation (EC) No 1370/2007 of the European Parliament and of the Council[(5)]. Higher thresholds should also apply to public passenger transport services where rail represents more than 50 % of the value of the services in question.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2016/2338 of the European Parliament and of the Council. (See end of Document for details)*

(24) The establishment of the single European railway area requires common rules on the award of public service contracts in this sector, whilst taking into account the specific circumstances of each Member State.

(25) Where certain conditions related to the nature and structure of the railway market or the railway network are fulfilled, competent authorities should be entitled to award public service contracts for public passenger transport services by rail directly where such a contract would result in an improvement in the quality of services or cost-efficiency, or both.

(26) Competent authorities may take measures to increase competition between railway undertakings by limiting the number of contracts that they award to one railway undertaking.

(27) Member States should ensure that their legal systems provide for the possibility to assess decisions of the competent authority to award public service contracts for public passenger transport services by rail directly on a performance-based approach by an independent body. This might be done as part of a judicial review.

(28) When preparing competitive tendering procedures, competent authorities should assess whether measures are necessary to ensure effective and non-discriminatory access to suitable rail rolling stock. Competent authorities should make the assessment report publicly available.

(29) Certain key features of upcoming competitive tendering procedure for public service contracts need to be fully transparent to enable a better organised market response.

(30) Regulation (EC) No 1370/2007 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1370/2007 is amended as follows:

(1) in Article 1(2), the following subparagraph is added:

> Subject to agreement of the competent authorities of the Member States on whose territory the services are provided, public service obligations may concern public transport services at cross-border level, including those covering local and regional transport needs.;

(2) in Article 2, the following point is inserted:

(aa) "public passenger transport services by rail" means public passenger transport by rail, excluding passenger transport by other track-based modes, such as metros or tramways;;

(3) the following Article is inserted:

Article 2a

Specification of public service obligations

1 The competent authority shall lay down specifications for public service obligations in the provision of public passenger transport services and the scope of their application in accordance with Article 2(e). This includes the possibility to group cost-covering services with non-cost-covering services.

When laying down those specifications and the scope of their application, the competent authority shall duly respect the principle of proportionality, in accordance with Union law.

The specifications shall be consistent with the policy objectives stated in public transport policy documents in the Member States.

The content and format of public transport policy documents and the procedures for consulting relevant stakeholders shall be determined in accordance with national law.

2 The specifications of the public service obligations and the related compensation of the net financial effect of public service obligations shall:

a achieve the objectives of the public transport policy in a cost-effective manner; and

b financially sustain the provision of public passenger transport, in accordance with the requirements laid down in the public transport policy in the long term.;

(4) Article 4 is amended as follows:

(a) in paragraph 1, points (a) and (b) are replaced by the following:

(a) clearly set out the public service obligations, defined in this Regulation and specified in accordance with Article 2a thereof, with which the public service operator is to comply, and the geographical areas concerned;

(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;;

(b) the following paragraphs are inserted: