

4th Railway Package – Market Opening

The Reciprocity Clause

Brussels, 30th September 2014

ERFA supports a strong PSO Reciprocity Clause

As one of the changes needed to open up the rail market, the European Parliament proposed a PSO reciprocity clause whose purpose was to allow Member States to exclude from competitive tenders for PSO contracts companies from Member States who had not opened up their domestic passenger market...until the end of the transitional period. The principle of reciprocity is an important means of counteracting distortion of competition.

Reciprocity would also have the benefit of opening up the market to further competition by a little “forced initiative” – excluding bids by operators from countries who have not themselves opened their markets to competitive tendering. Independent passenger operators would benefit directly from this forced incentive to open up domestic markets to competition, as it would directly benefit smaller operators and allow them a bigger European market in which to function on.

ERFA also believes that this should be made obligatory on all member states, as a further incentive to opening up the market.

Current draft clause (as adopted by the European Parliament’s 1st reading) :

Article 5 – paragraph 3 a (new)

*'3a. Until the end of the transitional period referred to in Article 8(2), Member States and, if permitted by national law, competent authorities **may** exclude from competitive tendering procedures for the award of public service contracts by rail organised by the competent authorities in their territory pursuant to paragraph 3 of this Article, any railway undertaking or operator or any subsidiary directly or indirectly controlled by a railway undertaking or its holding company if the controlling railway undertaking, the controlling holding company or their subsidiaries:*

(a) are licensed and operating domestic rail services in a Member State in which the competent authorities are not permitted to award public service contracts through competitive tendering procedures, and

(b) have benefitted from directly awarded public service contracts by rail the share of which in terms of value is higher than 50% of the total value of all public service contracts by rail awarded to that railway undertaking or holding company or their subsidiaries.

For the purposes of this paragraph, 'control' means any rights, contracts or other means which, either separately or in combination, and having regard to any relevant considerations of fact or law, provide the opportunity to exert a decisive influence on an undertaking, in particular through:

(a) ownership or the right to use all or part of the assets of an undertaking;

(b) rights or contracts which confer the right to exert a decisive influence on the composition, voting or deliberations of the social organs of that undertaking.

3b. Member States and, if permitted by national law, competent authorities may exclude from the competitive tendering procedures any operator or undertaking that is directly or indirectly controlled by a legal or natural person or by persons registered in a third country or third countries, save where that country or those countries have taken measures that allow public service contracts to be awarded through competitive tendering to railway undertakings licensed in a Member State.'

ERFA supports the retention of this clause but believes that the word 'may' should be replaced by 'shall'.