



March 2007

Reflections on the procurement features of *Public Passenger Transport Services by Rail and by Road*

INTRODUCTION

BUSINESSEUROPE has taken note of the Council's Common Position on the revised Commission proposal for a *Regulation on Public Passenger Transport Services by Rail and by Road* which was adopted in the Transport, Telecommunications and Energy council meeting on 12th December 2006. We are also taking note of the ongoing discussions in the European Parliament's Transport & Tourism Committee on this issue.

BUSINESSEUROPE recognises that the aim of this regulation is to establish a new legislative framework for the European market in the area of public passenger transport services. This is something we approve of and support. However in providing these comments we wish in particular to highlight a number of points relating to the public procurement aspects of the Council's *Common Position* and the Parliament's *draft recommendation for second reading*¹.

It is our view that as it now stands the public procurement relevant parts of this *Common Position* and the Transport & Tourism committee's *draft recommendation for second reading* are counterproductive to the introduction of free and fair competition in public passenger transport on road and rail. These proposals will result in a widening of the definition of in-house and an extension of the scope of the exemptions from public procurement rules as laid down in the 2004 Public Procurement directives². We would advise members of the Parliament not to allow this come to pass.

THE PRINCIPLES BEHIND PUBLIC PROCUREMENT IN EUROPE

The basic intention of the 2004 procurement directives is to **strengthen the competitive edge of European industry**, to **secure best value for taxpayers' money** and to **improve the quality of public services**.

Public procurement covers contracts for the procurement of goods, services and works by governmental bodies at the national, regional and local levels and within the water, energy and transportation sectors.

The legal requirements for public procurement in the European Union include certain fundamental principles that flow directly from the Treaty of Rome. These fundamental principles are:

- procurement shall as far as possible be based on competition;

¹ Draft Recommendation for a Second Reading on the Council Common Position, EP Committee on Transport and Tourism, 12/02/2007, rapporteur: Erik Meijer.

² Directives 2004/17/EC and 2004/18/EC.



- the process shall be predictable, transparent and traceable throughout the entire procurement;
- qualification and selection of bidders and the award of contracts shall be made on the basis of objective and non-discriminatory criteria;
- there shall be no discrimination by national, regional or ownership preference; technical specifications shall not be used to obstruct fair competition.

SPECIFIC COMMENTS... ON THE COUNCIL COMMON POSITION

BUSINESSEUROPE would like to draw your attention to the following sections of the Council common position. BUSINESSEUROPE has particular concerns regarding these sections and as a result we would ask you to consider whether or not the fundamental Treaty principles and established public procurement rules³ are reflected in these proposals:

- ... any competent local authority, whether or not it is an individual authority or a group or authorities providing integrated public passenger transport services, may decide to... award public service contracts directly to a legally distinct entity over which the competent local authority, or in the case of a group of authorities at least one competent authority exercises control similar to that exercised over its own departments⁴;
- ... recourse to a third party other than an internal operator...⁵;
- ... authorities may decide to award public service contracts directly either where their average annual value is estimated at less than EUR 1 million or where they concern the annual provision of less than 300,000 kilometres of public passenger transport services⁶;
- ... authorities may decide to make direct awards of public service contracts where they concern transport by rail...⁷;

We ask you to consider:

- that these proposals loosen the scope of the public procurement directives by introducing a new framework for procurement of public passenger services;

³ i.e. the 2004 Directives, the Treaty, the case law arising from European Court of Justice clarifications in rulings such as the *Teckal*, *Stadt Halle* and *Coname* decisions, the European Commission's numerous communications and current ongoing initiatives e.g. on concessions and public-private partnerships.

⁴ Council Common Position adopted by the Council on 11 December 2006... 1107/70, Brussels 11 December 2006, Article 5, paragraph 2.

⁵ *ibid.*, Article 5, paragraph 3.

⁶ *ibid.*, Article 5, paragraph 4.

⁷ *ibid.*, Article 5, paragraph 6.



- the direct implications for the use of the public procurement directives given these proposals implicit widening of the scope of the in-house definition;
- that increased recourse to award contracts directly undermines the principles of competition, non-discrimination and transparency;
- and, the objective implications of transition periods of 12 – 15 years for public procurement.

... ON THE EP'S DRAFT RECOMMENDATION FOR SECOND READING

In the *draft recommendation for second reading* tabled for consideration we would like to point out that the following suggested amendments in our opinion actually run contrary to the fundamental Treaty principles outlined earlier and actively seek to undermine the established public procurement rules. We would advise that the following amendments in particular be rejected by the members of the Transport & Tourism Committee:

- Amendment 11: ... “exclusive right” means a right entitling **a single** public service operator, **or several operators controlled by a single operator... without having to assume any risk or responsibility for transport planning...** ;

Why? The European Commission is, at this moment in time, working on an initiative on concessions. It is somewhat misguided to attempt to pre-empt this initiative by introducing amendments such as this.

- Amendment 19: ... **The** competent authorities **shall** require public service operators to comply with certain social standards...;

Why? This issue is already provided for in the 2004 Public Procurement Directives and is in any case the responsibility of Member States not the European Union.

- Amendment 21 & 30: ... service contracts or public service contracts as defined in Directive 2004/17/EC or Directive 2004/18/EC... shall be awarded in accordance with those Directives where such contracts **are not awarded to an internal operator or** do not take the form of *service concession*...;

Why? The proposed amendments again attempt to pre-empt forthcoming Commission initiatives on in-house and concessions. We do not believe that this is appropriate at this time given that these amendments seek to close the market even further by widening the scope of the in-house operator.

- Amendment 22: ... one competent local authority, exercises **dominant** control similar to that exercised over its own departments...;



Why? The definition of in-house has been established by ECJ rulings (*Teckal, Stadt Halle*). It provides for an exception when the supplier, which is being awarded the contract, is an internal operator (defined as an operator over whom the competent local the authority exercises control similar to that exercised over its own departments). This proposed amendment seeks to change this established definition in a way that implies that control can be shared with other entities thus providing mixed operators with a decisive, unfair advantage.

In any case it is not in the EP's responsibility to revise ECJ rulings in this way.

- Amendment 26: ... to award public service contracts directly either where their average annual value is estimated at less than **EUR 2* million** or where they concern the annual provision of less than **500,000 kilometres** of public passenger transport services.

In the case of a public service contract directly awarded to a small or medium sized enterprise **employing** not more than **50 employees**, these thresholds may be increased to either an average annual value estimated at less than **EUR 3* million** or when they concern the annual provision of less than **1,000,000 kilometres** of public passenger transport services.

*** These figures are to be adjusted every year in every Member State to the national inflation rates of the previous year, as provided by Eurostat.**

Why? It is suggested that this amendment will increase protection for small and medium sized enterprises (SMEs). It is our firm contention that it will in reality have the exact opposite effect in the medium to long term. SME access to public procurement can be assisted by a number of measures of which their being directly awarded contracts below a threshold (which the rapporteur with no justification other than to say they are too low, raises even higher) is not one. For an indication of measures which would assist SMEs gain greater access to public procurement contracts please refer to UNICE's position paper: *Improving SME access to Public Procurement*.

- Amendment 33: ***When calculating the value of the public transport service for which they are receiving compensation or enjoy an exclusive right for the purpose of the first subparagraph of paragraph 4, and without prejudice to paragraph 3, the railway undertaking shall be entitled to take into account those public service contracts granted prior to the entry into force of this Regulation, provided they comply with the principles laid down in the Regulation.***

Why? This proposal goes against the Treaty principles. It allows for the contracts to be provided without even a veneer of competition. It also allows for contracts to be amended without tendering for new contracts.



CONCLUSION

BUSINESSEUROPE understands that this Council common position is the result of a protracted process of discussions which have taken nearly seven years to come to a decision. However, we find it hard to believe that it is the actual intention of these proposals to undermine the procurement rules laid down in 2004 (which themselves were the result of an eight year process) and as such we feel it necessary to voice our concerns in advance of any decision being taken in the Parliament.

We would ask that you consider how the fundamental Treaty principles relating to public procurement have been reflected in the Council's common position and the *draft recommendation for second reading* when considering and voting on this draft report.

We would ask that you bear in mind that the aim of public procurement in Europe today is to strengthen the **competitive edge of European industry**, to **secure best value for taxpayers' money** and to **improve the quality of public services**.

The Internal Market is an ongoing project which requires constant attention. While nowhere near completion it is nonetheless the real success story of the European Union. Preserving procurement rules in ways outlined in the *common position* and the *draft recommendation for second reading* risks destabilizing and undermining all three of these goals.