



## The Importance of Direct Awards for the European Railway System

### Key Points

- The railway systems in Switzerland and Austria are widely regarded as the best in Europe. In both countries, most of the railway services are awarded directly. This model has proven to be successful.
- A study by two well-known Austrian legal experts concludes that the [Regulation on public passenger transport services by rail and by road \(PSO Regulation, 1370/2007\)](#) still entitles Member States and authorities to choose equally between direct awarding and competitive tendering.
- The European Commission is currently working on revised interpretative guidelines for the PSO Regulation. A draft of these guidelines does not reflect wording and spirit of the Regulation and sees direct awards as “exceptions” that should be treated “extremely strictly”.
- Forcing countries with well-functioning public transport to change to the “experiment” of competitive tendering would be counter-productive. This freedom of choice has to be maintained as it was foreseen by the European Parliament and the Council.

### Background

The European Green Deal calls for a 90% reduction in greenhouse gas emissions from transport, in order for the EU to become a climate-neutral economy by 2050. The “Sustainable and Smart Mobility Strategy” presented in December 2020 defines measures for a shift to zero-emission transport. To achieve green, smart and affordable mobility, the European railways are an essential backbone both for passenger and freight transport.

The railway systems in Switzerland and Austria are widely regarded as the best in Europe. Many lessons can be learnt: For years, the Swiss railway programme “Bahn 2000” has improved integrated clockface services connecting every Swiss locality and created a synchronised network of bus and train. Austria is famous for good service, moderate ticket prices and an extensive night train system. In both countries this quality can be measured by a wide range of parameters, e.g. [punctuality](#), [passenger satisfaction](#) and passenger kilometres per inhabitant (see figure 1). Austrian railways are also ranked within the EU-Top 3 in the categories: Information of connecting services, cleanliness of stations and trains, parking facilities at stations, frequency of trains, availability of Wi-fi, assistance on trains, and accessibility of stations. Both Austria and Switzerland award railway services directly.

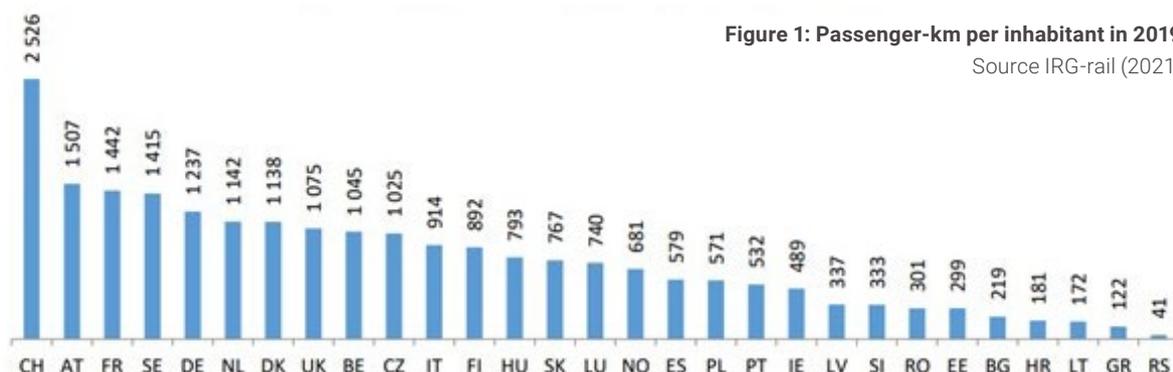


Figure 1: Passenger-km per inhabitant in 2019

Source IRG-rail (2021)

# Main Findings

## The legal situation of direct awards

Good quality public transport is often not cost-covering. It has to be subsidized by public money. [Regulation \(EC\) No 1370/2007](#) 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. The Public Service Obligations (PSO) Regulation rules on EU-level how public transport has to be organised and financed. Three aspects of the Regulation are especially important:

- Cities or regions may decide to provide public passenger transport services themselves or to award public service contracts directly to an “internal operator”. This is an entity over which the competent local authority exercises control similar to that exercised over its own departments. (f.e. City of Vienna which owns “Wiener Linien”)
- Article 5 (6) points out that competent authorities may decide to make direct awards of public service contracts where they concern transport by rail. Therefore, regarding railways, there is the freedom of choice between competitive tendering and direct awards.
- Competent authorities may require the selected public service operator to grant staff previously taken on, to provide services the rights to which they would have been entitled if there had been a transfer within the meaning of [Directive 2001/23/EC](#). The authorities can also require public service operators to comply with certain social standards.

In 2013, the Commission proposed to amend the PSO Regulation, aiming to exterminate the opportunity of direct awards of railway contracts. Among other changes, competitive tendering should be the overall rule. In the following negotiations with the EU Parliament and the Council, the [new PSO \(EU\) 2016/2338](#) adds to Article 5 (6) that “the competent authority may decide to award public service contracts for public passenger transport services by rail directly:

- where it considers that the direct award is justified by the relevant structural and geographical characteristics of the market and network concerned, and in particular size, demand characteristics, network complexity, technical and geographical isolation and the services covered by the contract, and

- where such a contract would result in an improvement in quality of services or cost-efficiency, or both, compared to the previously awarded public service contract.”

A study by Lessiak and Aicher, two well-known Austrian legal experts, concludes that Member States and authorities are still entitled to choose equally between direct awarding and competitive tendering: Article 5 (4a) says that – if certain conditions are met – direct awarding is still possible.

## Direct awards in different Member States

In the year 2018, the market share of the leading domestic railway companies in PSO-railway services was nearly as high as 100 percent in nine EU-countries (Belgium, Croatia, Estonia, Finland, France, Lithuania, Luxembourg, Slovenia, Spain). Partly, this is because directly awarded PSO-contracts are quite widespread.

Switzerland, Austria and France are the leading European railway nations (based on passenger-km per inhabitant; figure 1). In France more than 40 percent of the railway transport cannot be operated economically feasible and is organized in accordance to the PSO-rules. In Switzerland and Austria this share is even higher. In all three countries, PSO-railway services are directly awarded.

In the Netherlands, the contract for passenger services on the core rail network has been awarded to NS (Dutch state-owned operator) until 2025, covering 95 percent of all rail passenger-km country-wide. In Spain, a legal monopoly in PSO services still exists (directly awarded to the incumbent until 2027). In Italy, 18 out of 20 regions choose to directly award PSO-contracts. The same holds true for Croatia and Latvia.

Figure 2 shows that there are not many changes since 2018. According to the 7th Rail Monitor (2021), direct awarding is still dominating. These figures show that direct awards are a successful long-lasting model. It would be counter-productive to change to competitive tendering, an experiment with an unknown outcome. If a high-quality railway company were to lose the tendering procedure, thousands of high-skilled, experienced and well paid railway workers would risk to become redundant.

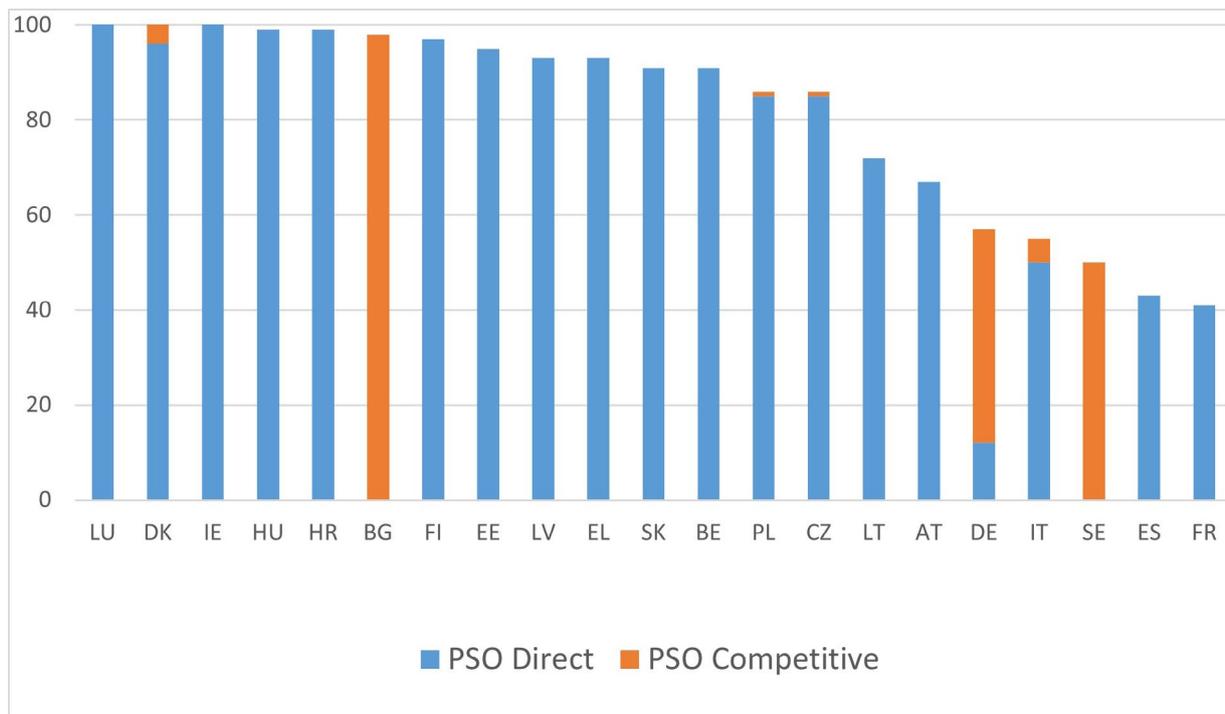


Figure 2: Share of PSO transport (direct awarding as well as competitive tendering)

Source: EC (2021) 7th Rail Market Monitor

International experience has shown that the process of tendering is costly – both for the authorities and for the railway companies. “The winner takes it all”-principle means that one company wins the contract while all the others are losing their invested efforts and money. As a consequence a sufficient number of candidates is often lacking. This makes tendering processes obsolete and leads to the creation of oligopolies. Another experience is that cost savings are often made on the expense of the labour force and quality, as it is only the labour force where companies can reduce expenditures. This would contradict the goal of a just transition which should have the goal to create better jobs. In the end, bad working conditions also affect passengers.

### Problems arising from the draft Interpretative Guidelines

In December 2021, the European Commission sent out draft guidelines to consult with a limited group of stakeholders. The guidelines aim is to explain how to implement and deal with legal texts. Unfortunately, the draft guidelines give the impression that the original demands and ideas of the proposed PSO Regulation should be re-introduced. In many cases, these guidelines do not reflect the wording and spirit of the Regulation agreed by the European Parliament and Council.

The draft states that the competent authority should assess whether there is a demand from customers that cannot be met in part or in full by an operator in the market without a public service obligation. Such a demand would only exist if the need cannot be met by market forces alone. For an ecological and climate-friendly mobility transition, comprehensive and affordable public transport is necessary. As supply creates demand, authorities need a high level of freedom to design public transport. Any restrictions and hurdles are counterproductive. These very strict requirements violate the principle of subsidiarity, especially in public transport. Competent local authorities are in the best position to judge which measures need to be taken for such an assessment.

According to the draft, direct awards are “exceptions” that should be “interpreted restrictively”. Aicher and Lessiak state that no priority of competitive tendering and inferiority of the direct award procedure can be derived from the PSO Regulation. If all conditions for allowing direct awards are met, no additional justification about the type of awarding is required. Regardless of the equality of both awarding types, there remains the need for the objective justification of the chosen procedure for both cases.

## What new Guidelines should clarify

There are many aspects where the PSO Regulation is vague and where guidelines could give more clarification: The PSO Regulation allows competent authorities to require public service operators to comply with certain social standards. This provision can help to protect workers' rights and social standards. Unfortunately, many authorities refrain from using these opportunities. Clear advice within the guidelines on how to implement "social standards" and "transfer of staff in the case of change of operator" in a safe legal framework (e.g. a list of criteria) would be helpful – but is still missing.

Providing a good system of public transport between cities and their suburbs is also essential. Therefore, the aspect of an "internal operator" [Article 5(2b)] and the question of "ancillary service" into neighbouring territory is crucial requiring the guidelines to give clear advice.

## Demands

In accordance with the European Green Deal and the "Sustainable and Smart Mobility Strategy" a dramatic modal shift towards environmentally friendly modes of transport such as railway is needed. This includes:

- Member states should learn "from the best" when promoting railway, as competitive tendering is not automatically the best option.
- The guidelines must not change the content of the PSO Regulation at its discretion: The freedom of choice between direct awarding and competitive tendering has to be retained.
- Disregarding the kind of awarding, interpretive guidelines should present more clarification on how to implement complex issues properly such as "social standards" and "transfer of staff".
- To be in line with the Green Deal and to ensure a just transition, public transport companies must provide fair wages and good working conditions. This also leads to a higher passenger satisfaction.

## Literature

### Josef Aicher & Rudolf Lessiak (2021):

Gutachterliche Stellungnahme zur "leistungsbasierten Direktvergabe" von Schienenverkehrsdienstleistungen nach Art 5 Abs 4a der PSO (*German only*)

**European Commission (2021):** Revised interpretative guidelines concerning Regulation (EC) No 1370/2007 on public passenger transport services by rail and by road (Non-Paper)

**European Commission (2018):** [Survey on passenger satisfaction with rail services](#)

**IRG-rail (2020):** [Eighth Annual Market Monitoring Working Document](#)

**IRG-rail (2021):** [Ninth Annual Market Monitoring Working Document](#)

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