

Brussels, 6 October 2005

## **IRU POSITION ON PUBLIC SERVICE REQUIREMENT**

### **I. ANALYSIS**

The initial European Commission Proposal dates back to the summer of 2000. It aimed to introduce open, fair and transparent rules for the allocation of operating rights and end existing discrimination between public and privately owned operators, in the form of monopolies and exclusive rights, by introducing competition in public transport across the European Union.

In November 2000, the IRU took position in favour of the introduction of “regulated competition” (tendering system) and the ending of discrimination, whilst emphasising that the level of competition already introduced in several EU Member States, should not be detrimentally affected by the new Proposal.

The European Parliament (EP) adopted its Opinion in first reading, in November 2001. The Council started discussing the dossier in 2002 but since July 2002, no progress whatsoever has been obtained.

Following two rulings from the European Court of Justice (Altmark in July 2003 and Combus in March 2004) on discrimination in the field of State aid compensation in public transport and several other pending complaints, the European Commission has adopted a new revised and simplified compromise Proposal to unblock the situation in Council. The European Commission needs legal certainty as soon as possible in order to facilitate the handling of discrimination-related complaints.

The main elements of the new revised Proposal are:

- Introduction of competition for all contracts involving public service obligations with two exemptions which allow authorities to directly award contracts without competition;
- Possibility for direct award to internal operators (municipalities carrying out their own public transport operations or granting contracts to companies affiliated to them) and for regional and long distance railway services;
- Strict definition and operational framework for internal operators, including their branches and entities over which they exercise control, aiming at preventing them to compete outside their territory;
- Limited maximum duration of contracts: 8 years in case of road passenger transport by bus and coach and 15 years in case of railway transport or integrated services of which more than 50% are rail;
- Transitional periods of 8 years in the case of bus and coach contracts and 10 years in the case of railway contracts to implement rules at national level.

The full text of the revised Proposal can be obtained from the EU Commission DG TREN website:

[http://www.europa.eu.int/comm/dgs/energy\\_transport/index\\_en.html](http://www.europa.eu.int/comm/dgs/energy_transport/index_en.html)

The IRU has the following observations relating to the new revised Proposal:

- Lack of compatibility of the terminology used in the different legal texts dealing with contracts and public procurement in public transport could lead to less legal certainty. For example, in the Proposal's definitions (Art 2), the new term "internal operator" is used to define an operator controlled by an authority whereas Directive 93/38 on public procurement already uses two terms: "public undertaking" and "affiliated company".
- The right and ability of private bus and coach operators to "organise and carry out" public transport services is not sufficiently clear.
- A contract duration of 15 years in case of integrated services of which more than 50% are rail, could lead to new distortion of competition between bus, coach and railway services, because the maximum duration for bus/coach contracts is only 8 years.
- Rules relating to subcontracting have been removed from the Proposal. This could lead to discrimination between main and subcontracts and between publicly-owned and private operators (the latter being mostly in the subcontractor position) because main contractors could try to impose less favourable contract conditions on their subcontractors. This will be particularly evident in the case of directly awarded contracts by public authorities without a call for tender.
- The exemptions seem to outweigh the aim to introduce competition for all market players. Too many exemptions from competition, such as those for internal operators and regional and long-distance railways, could reduce the scope of the level playing field for all operators. The average annual service value above which competition becomes compulsory for the granting of operating rights has been increased from 400000 to 1 million euros. This means that a larger number of smaller contracts could end up outside the competitive framework.
- Geographical limits of operating scope for companies with contracts granted without competition and reciprocity rules barring their entry into other markets could prove very difficult and complicated to enforce and could be an insufficient guarantee for a competitive level playing field between all operators, in particular during the transition period when national markets will not open simultaneously.

## **II. IRU POSITION**

The IRU is in favour of open, fair and transparent mechanisms to introduce competition in the public transport market for bus and coach services. Equal market opportunities for operators of all sizes should be provided.

The IRU recognises that "regulated competition", whereby a competent authority grants an exclusive right for a specific period following an open and transparent invitation to tender, functions well and produces positive results.

Distortion of competition arising from the granting of State aid to compensate for public service obligations, should be ended. A level playing field between public and private operators and in addition between bus/coach and railway companies, should be created.

Full compatibility between the different legal texts dealing with contracts and public procurement in public transport will add to the legal certainty.

The IRU is opposed to the granting of exemptions from competition to “internal operators”. The general aim of the Proposal should remain the introduction of competition across the board rather than the extensive granting of exemptions from such competition.

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