



## EUROPEAN COMMISSION

*Brussels, 31.7.2013  
C(2013) 5056 final*

*Mr Reinhard TODT  
President of the Bundesrat  
Dr Karl Renner-Ring 3  
A – 1017 WIEN*

*Dear President,*

*The Commission would like to thank the Bundesrat for its Reasoned Opinion concerning the Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail {COM(2013) 28 final}, and apologises for the delay in replying.*

*First and foremost, the Commission would like to reassure the Austrian Bundesrat that the aforementioned proposals have been based on thorough impact assessments in line with the Better Regulation agenda. The impact assessments have relied on an in-depth analysis of the national railway markets and structures across Europe and, very importantly, on a broad consultation process with stakeholders, local authorities, social partners and a survey with 25.000 citizens throughout Europe. The subsidiarity assessment of the proposals (necessity test and test of EU value added) has also been documented in the impact assessment reports accompanying the proposals and its annexes, and that for all options considered<sup>1</sup>.*

*The Reasoned Opinion of the Bundesrat states that the proposal to make the competitive award of public service contracts in rail mandatory would be not compliant with Art 5 TEU, Art 4(2) TEU, Art 14 TFEU and Art 1 of Protocol N°26 to the TFEU which infers "the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users". In particular, the Reasoned Opinion lays out that an EU wide tender procedure for the award of local and regional rail transport services would not be warranted due to the geographical limitation of the competence of the awarding competent authorities.*

*The Commission considers that the Commission proposal does not alter the possibilities of Member States and their authorities to define the public transport system according to the preferences and needs of the population. However, the relative degree of freedom of competent authorities in choosing the award procedure for public service contracts is limited by EU case law. The Court of Justice has clearly established, for matters of public procurement, that contracts that are not or only partially subject to the public procurement*

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<sup>1</sup> [http://ec.europa.eu/commission\\_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package\\_en.htm](http://ec.europa.eu/commission_2010-2014/kallas/headlines/news/2013/01/fourth-railway-package_en.htm)

*Directives are subject to the principles arising from Art 49 (right of establishment) and Art 56 (freedom to provide services), at least as far as these contracts are of a “certain cross-border interest”<sup>2</sup>. This means that the award of those contracts has to be subject to transparent procedures. EU case law has already been recognised by Regulation 1370/2007 for modes other than rail, which are already subject to open tendering provisions. The extension of this principle to rail appears thus as a logical step to ensure full compliance of the Regulation with the Treaty and related case law.*

*The Commission would like to stress as well that the award of public service contracts based on open tendering procedures opens up the opportunity to reap the potential for significant savings of public funds and the provision of high quality services. This has been the experience in several Member States which have opened up their domestic market to competition as documented in the Commission impact assessment. In those Member States savings through tendering of public services contracts are estimated between 20% and 30%.*

*Additionally, it should be emphasized that the generalisation of open access for commercial rail services and competitive tendering for public service contracts in the EU will allow Austrian railway undertakings to develop their business activities also in other EU Member States.*

*The Commission hopes that these clarifications address the concerns raised by the Bundesrat and looks forward to continuing the political dialogue in the future.*

*Yours faithfully,*

*Maroš Šefčovič  
Vice-President*

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<sup>2</sup> C-507/03 Commission vs Ireland, judgement of 13.11.2007