



## Specific issues linked to tendering rail PSC “The role of regulatory bodies”

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Workshop on the implementation of the 4<sup>th</sup> Railway Package (Regulation (EU) 2016/2338)

TENDERING OF PUBLIC SERVICE CONTRACTS FOR RAIL PASSENGER TRANSPORT:

MEETING THE CHALLENGE

Brussels, 30 May 2018

# OUTLINE OF THE PRESENTATION

## 1. Railway PSCs in Italy

- ✓ Ownership of essential and “indispensable” assets
- ✓ Rolling stock financing
- ✓ Awarding procedures

## 2. Decisions taken by the Italian Regulator

- ✓ Decision no. 49/2015 and no. 48/2017
  - Criteria to define PSC scope and bidding lots (Modal and Multimodal)
  - Regimes of access (or transfer) for essential and “indispensable” assets
  - Competent authorities’ actions to facilitate access to rolling stock and other assets
  - Criteria to set the terminal value of rolling stock/assets and leasing fees
- Joint position by ART, Competition Authority (AGCM) and National Anti-Corruption Authority (ANAC) on direct award of regional public transport services by rail
  - Minimum set of information for tendering

## RAIL PSCs IN ITALY - PRESENT SITUATION

- Depots, maintenance plants and service buildings are owned by railway operators or infrastructure manager, and not by CAs
- No leasing or rental market for passenger rolling stock, no ROSCOs, no secondary market for (used) rolling stock
- No pooling for rolling stock procurement
- Few tenders (1 in progress, 1 closed, 1 expected in 2022 and 1 «comparison procedure» expected in 2018)
- The main incumbent is presently engaged in a massive plan of rolling stock renewal, partly benefiting from public funds



TOTAL PUBLIC SERVICE CONTRACTS 41

DIRECT AWARDS IN FORCE 40

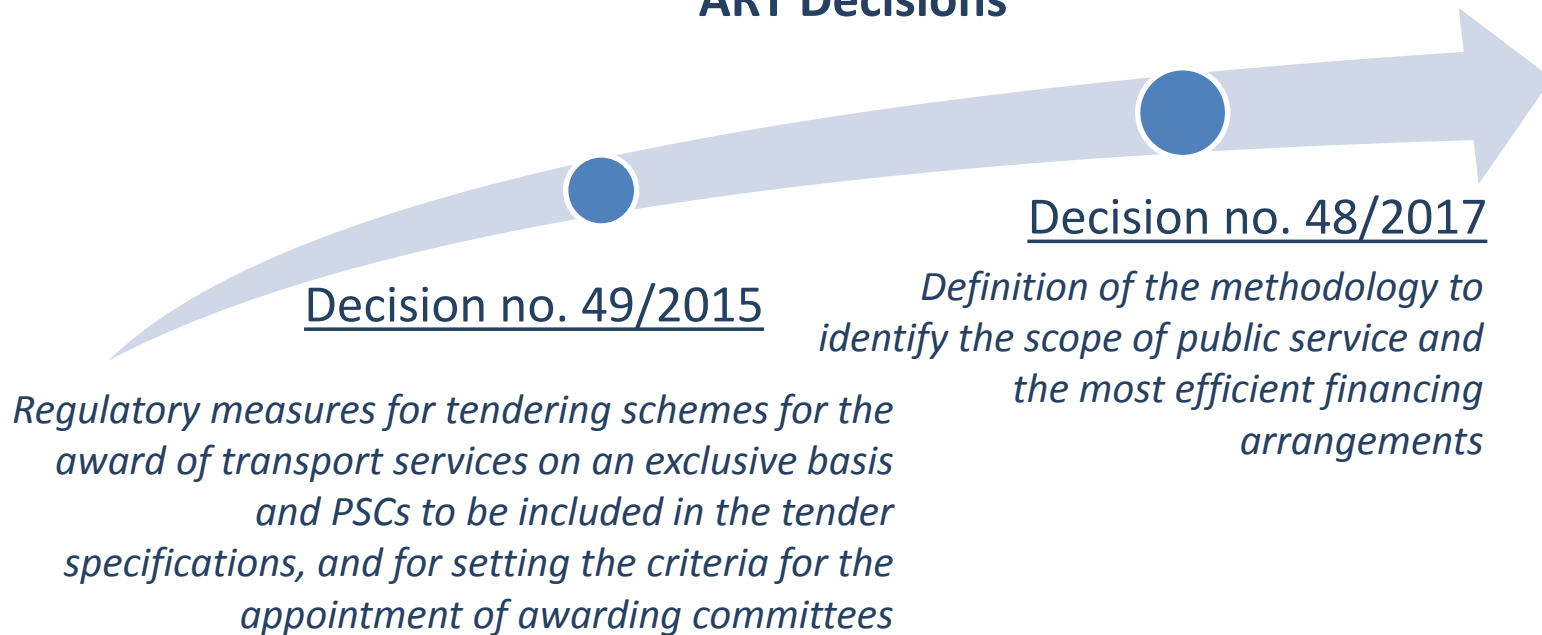
TENDERING PROCEDURES 3

COMPARISON PROCEDURES 1

52% PSCs CONTROLLED BY THE INCUMBENT

## DECISIONS TAKEN BY THE ITALIAN REGULATOR

### ART Decisions



**These Decisions fall within the framework of the implementation of the 4<sup>th</sup> Railway Package**

Both Decisions apply to regional or local authorities that are competent for PSOs awarding and/or planning (=Competent Authorities: CAs)

## CRITERIA TO DESIGN PSC SCOPE AND BIDDING LOTS

A primary condition for level playing field in competitive bidding is:

**Optimal network design: not to be a mirror of the current setting, i.e. to the benefit of the incumbent**

As in fact:

- The network setting affects management costs and service coverage ratio, multimodality, accessibility and replaceability of services and infrastructures
- ✓ *e.g.* depots and maintenance plants may not have the same centrality with a new network setting
- ✓ *e.g.* by requiring new rolling stock, the incumbent's advantage may be undermined

⇒ Decision no. 48/2017 concerning the “**scope of public services**” affects network planning, service planning and also provides measures to identify **bidding franchise areas (lots) on the following criteria**

- Efficient conditions of production: Tender lots must not be too large compared to the operator's «minimum optimal size»
- Conditions of workable competition: at least two-three operators: multimodality has not to be a barrier to entry, but a factor of measurable higher efficiency
- Minimum tender management costs for the CA: large franchise areas are difficult to manage and may be too diverse (i.e. in terms of mobility demand distribution)

# REGIMES OF ACCESS FOR ESSENTIAL AND “INDISPENSABLE” ASSETS (Decision no. 49/2015)

1/3

## Preliminary step:

### Asset identification and classification

ART provides criteria to identify a list of instrumental assets (“essential” and/or “indispensable” for PSO services):

- Network, plants and infrastructure
- Rolling stock
- Other movable assets (HW, SW and other technological systems for fleet, ticketing and plant management)
- **The asset functionality is intended for the new tender design.**
- **Asset identification ≠ asset incumbent inventory by the outgoing service operator**

Not everything in use by the outgoing operator is still functional in the new franchise area set-up

### Asset classification

- “essential” assets: “not replicable at a sustainable cost” + “no rivalry in use”
- “indispensable” assets: “not replicable at a sustainable cost” but “rivalry in use”

## REGIMES OF ACCESS FOR ESSENTIAL AND “INDISPENSABLE” ASSETS (Decision no. 49/2015)

2/3

Different regimes of **asset ownership** by:

- Competent authority (= public ownership)
- Outgoing railway undertaking (RU)
- Rail infrastructure manager (IM)
- “Third parties” (e.g. “operator of service facility” according to Directive 2012/34/EU «Recast»)

Access obligation is in force only in a *third party access regime* (as defined by the Recast) which applies to both specialized suppliers or IM. In the case of public ownership, the CA may lease/transfer its own (publicly funded) assets by constraints on use

**Access obligation is not mandatory in the case of self-financed assets**, BUT the asset may be transferred or leased (even for a limited period of time) if already provided for:

- in public service contract (or other binding acts)
- in a legislative act
- in a legal act for the financing (by constraint on use)
- as a result of negotiations with the outgoing operator/owner.

Moreover ...



# REGIMES OF ACCESS FOR ESSENTIAL AND “INDISPENSABLE” ASSETS (Decision no. 49/2015)

3/3

## ... Cases of Refusal of Access to an “indispensable” asset

- The cases in which access refusal may be opposed should be very limited, on account of constraints on assets (exclusion of intended use) and pursuant the inquiry and public consultation conducted by the CA before launching the tender
- The case of refusal could/may result in a discriminatory/anticompetitive decision, which may be treated as an **abuse of dominant position**, to be referred to the Antitrust Authority, if not objectively justified in accordance with the results of a transparent evaluation and a **consultative process** applied by CA  
This process allows a more comprehensive balance of opposing interests
- The abuse could also concern rental prices or imposed guarantees, or others terms of contract, but Decision no. 49/2015 defines the criteria for setting:
  - Terminal value of assets
  - Leasing fees⇒ (*ex-ante* regulation prevents anti-competitive behavior)  
The infringement of ART rules may be appealed before courts



## COMPETENT AUTHORITIES ACTIONS FOR FACILITATE THE ACCESS

A case of implementation of the 4<sup>th</sup> Railway Package

ART listed a set of actions to be performed by CAs in order to reduce financial barriers to entry (3 measures now provided for by Regulation (EU) 2016/2338 are already included in Decision no. 49/2015):

1. Direct purchase of assets by the CA (also through a controlled asset management company)
2. Provision of specific guarantees designed to cover the risk on the terminal/residual value or acquire the asset prominent part, at the end of the contract, at a market price;
3. Financial measures to mitigate costs and risks related to the investments needed, so that the financial-economic plan (PEF) required to competitors are sustainable and bankable. In any case, the bidding fees have to remunerate the cost of the necessary investment to acquire the capital goods;
4. Another action required to CA in order to create a level playing field is the **provision of assets/dedicated plants or equipped areas**, free from urban constraints, in order to realise infrastructure projects needed to use plants for the operations.
5. An alternative solution impinging on RUs is an obligation to recover from/sell the assets to the new entrant and the outgoing operator, respectively, but it has shortcomings (i.e. it does favour a renewal of rolling stock)

## MINIMUM SET OF INFORMATION FOR TENDERING

CAs shall act to make available and accessible, in accordance with the transparency obligation referred to in Recital 30 of Regulation (EC) No 1370/2007, any data and information on the organization of the service, at least in terms of:



levels and dynamics of demand;



instrumental goods for the provision of the service;



**rolling stock;**



staff to be directly allocated to the service.

In this respect, account may be taken of the data and information referred to in **ART Decision No. 49/2015, Table 1.**

In case of confidentiality requirements, the CA will reconcile these with the right of third parties by defining detailed rules for access to available data, such as conditions for admission, management of questions, procedures to obtain confidential information, commitments and confidentiality requests, etc.

According to the Joint Position by ART, Competition Authority (AGCM) and National Anti-Corruption Authority (ANAC) on direct award of regional public transport services by rail, the above information has to be provided in the case of direct awarding, too.

## FINAL REMARKS

Given the legislative framework in accordance with the 4<sup>th</sup> Railway Package and the Italian market structure, the Italian regulator exercised its specific role to create an effective ***level playing field*** for tendering and promoting ***efficiency***

In line with Regulation (EC) N. 2016/2338, tenders as well as comparison procedures for direct awards in Italy have now to ensure conditions of fair and non-discriminatory access to instrumental assets and rolling stock, as well as to a set of information able to reduce asymmetries between incumbents and new entrants

### *First effects:*

1 ongoing tender (in Valle d'Aosta) compliant with ART regulation received 2 offers (in 2014 and generally in the past years, before ART regulation, tender procedures normally received only one bid from the incumbent)

1 “Comparison procedure”, compliant with ART-AGCM-ANAC Joint position, is ongoing and includes 3 interested operators. Also in this case, ART rules on assets and information access have to be used