

Unclassified

English - Or. English

20 May 2022

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 2 on Competition and Regulation

**Competition and Regulation in the Provision of Local Transportation Services – Note by
Czech Republic**

20 June 2022

This document reproduces a written contribution from Czech Republic submitted for Item 3 of the 73rd OECD Working Party 2 meeting on 20 June 2022.

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<https://www.oecd.org/daf/competition/competition-and-regulation-in-the-provision-of-local-transportation-services.htm>

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1. Introduction

1. Urban transport in the Czech Republic has undergone significant development in the last two decades, which is due to both legislative changes related to the liberalisation of public bus (but also rail) transport, and, more recently, to the significant focus of society on sustainable urban mobility and environmental protection. A key incentive for this development was Regulation (EC) No 1370/2007 of the European Parliament and of the Council of 23 October 2007 on public passenger transport services by rail and by road and repealing Council Regulations (EEC) Nos 1191/69 and 1107/70 (hereinafter referred to as "**Regulation No 1370/2007**"), which liberalised bus transport in the initial phase and subsequently also liberalised rail transport.

2. Given that 15 years will pass this year since the adoption of the aforementioned Regulation, the Office for the Protection of Competition (hereinafter referred to as "**the Office**") has proceeded to carry out a research in the field of urban public passenger transport in the Czech Republic. The Office launched its research during April 2022 and expects to conclude it in the summer months of this year. The aim of the Office is to 1) verify the level of liberalisation in this area, 2) to map the ways of selection of the urban transport operator, including the applied legislation, and, last but not least, 3) to indicate the degree of development of the implementation of modern technologies in passenger transport. The presented text maps the initial findings of the Office's investigation and in the future will be complemented by the final report.

3. Before carrying out the investigation, the Office proceeded on the basis of several hypotheses which it set out to verify. First of all, it was likely that public transport, financed from public budgets, is the dominant solution for provision of local transport services, and the structure of this contribution, which will focus to a significant extent on this area¹, reflects this. In the context of what has just been said, another assumption was that larger localities mainly use their own solution (internal operator) to provide transport services, while smaller municipalities outsource transport services, or there may be a combination of these models. Subsequent assumption is expectation that new technologies enhance the competition in the market², however the implementation and integration of the means of transport linked to sharing economy is still in progress and rather in initial phase; thus they constitutes a complement to tradition public transport.

4. The Office was also interested in identifying the state of the competition environment in the selection of operators within specific municipalities and the legal regime for public procurement. The Office was also motivated by current EU activities on sustainable mobility.

¹ The area where competition for the market takes place.

² For example "classic" and "alternative" taxi services or sharing economy means of transport.

2. Legal framework for the provision of public passenger transport (competition for the market) in the Czech Republic

5. The Office has not examined in detail the legal framework for the functioning of the provision of transport services in settlements that use their "own" solutions. It can only be summarised that these entities use either the form of a company set up and controlled by them or their own public-benefit corporation, etc., and in such cases the direct procurement regime applies (see below).

6. From a competition perspective, the Office considered it essential to analyse those situations where a municipality outsources its own transport services. The legal framework in the Czech Republic allows the selection of operators of public urban transport mainly in the form of a competition tendering procedure or by direct award. The specific legal regime of competition tendering procedure or direct award depends to a large extent on whether the envisaged contract for public passenger transport services has the character of a concession or a public procurement contract.

7. The municipality therefore decides on the nature of the contract it wishes to conclude with the operator before choosing the legal regime for selecting the operator. The characteristics of a concession as set out in Act No. 194/2010 Coll., on Public Services in Public Passenger Transport (hereinafter referred to as "**Act No. 194/2010**") are as follows:

- the passengers pay fares to the operator,
- the operator is granted an exclusive right or compensated under pre-agreed conditions from public budgets,
- the compensation does not exclude the operator's commercial risk associated with the level of fare revenue from the provision of public passenger transport services.

8. It is therefore necessary to assess whether the operator is only paid compensation, the passenger pays the fare (the public service is therefore at least partly financed by third parties) and the agreed compensation does not exclude the operator's commercial risk associated with the amount of fare revenue or, alternatively, does not marginalise it. If the nature of the services provided meets the characteristics of a concession for a service, the provisions of Act No. 194/2010, which is based on Regulation No. 1370/2007, apply. Otherwise, the rules on public procurement shall apply.

9. In practice, there are two basic types of contracts for public passenger transport services. In the case of concession for services, so-called net cost contracts are concluded under which the operator bears the risk of both costs and revenues. On the other hand, for contracts concluded on the basis of public procurement rules, so-called gross cost contracts are typically used, under which the operator usually bears at least the cost risk and the risk of a decrease in revenue is borne by the purchaser (municipality).

2.1. Procedure according to Act No. 194/2010 or Regulation No. 1370/2007

10. The underlying model for selecting an operator under Act No. 194/2010 is a tender proceeding governed by the basic principles set out in Regulation No. 1370/2007, namely the principles of open, fair, transparent and non-discriminatory proceedings. An exception to that general rule is direct award, which by its nature does not fulfil those principles and thus effectively excludes competition for the scope of supply of the contract in question; those aspects of the competition tendering proceeding which are intended to ensure the economic viability of the acquisition of public passenger transport services are excluded.

11. Given the absence of competition, the direct award solution should be rather an exception, which also corresponds to the possibility of using this option only if the exhaustively specified conditions resulting from Regulation No. 1370/2007 are met. These conditions are as follows:

2.1.1. Conclusion of contracts involving small amounts or short distances

12. The purchaser may apply this procedure in case the average annual value of the transport service defined in the contract does not exceed EUR 1 000 000 or the scope of the public service does not exceed 300 000 km per year. In case the contract is concluded with a small or medium-sized operator operating a maximum of 23 vehicles, these limits may be doubled.

2.1.2. Conclusion of a contract due to an emergency situation

13. Direct award may also be used in the event of an emergency situation which threatens or imminently threatens to disrupt the provision of public passenger transport services. See Chapter 2.1 for further details.

2.1.3. Conclusion of a contract with an internal operator

14. The last option of direct award to an operator is to conclude a contract "in-house", i.e. to conclude a contract with an internal operator. This model is enabled on the basis of Article 5(2) of Regulation 1370/2007, according to which a municipality may decide to provide public services itself or to conclude a public service contract directly with a legally autonomous entity over which the competent authority exercises control similar to that exercised over its own departments.

2.2. Procedure according to the rules of public procurement

15. In a situation where the public passenger transport contract is not considered to be a concession for services, the purchaser must follow the rules set out for public procurement in accordance with Article 5(1) of Regulation No. 1370/2007. Czech public procurement legislation is based, inter alia, on Directive 2014/24/EU of the European Parliament and of the Council.

16. In addition to the types of competition tendering procedures³, the public procurement rules also allow for direct award in the form of so-called vertical cooperation, which, however, can only be awarded to internal operators, not to private sector entities. Indeed, one of the basic conditions is 100% ownership by the public contracting authorities (municipalities), which have a decisive impact on the strategic objectives and major decisions of the chosen operator.⁴

³ E.g. open procedure or competitive negotiated procedure.

⁴ In addition to the above-mentioned methods, under the public procurement rules, in exceptional cases it is possible to award contracts without a competition tendering procedure, in a restricted tender procedure (negotiated procedure without prior publication), in which the contracting authority addresses only a limited number of suppliers. However, the use of this method of selecting an operator is subject to strict legal conditions which must be interpreted restrictively with regard to limiting competition. One of the relevant reasons for use of such procedure for the selection of an operator is, for example, the reason of extreme urgency..

3. Practical aspects of public urban transport governance in Czech Republic

17. Based on the research carried out by the Office, the following facts emerge. The legal regime for the selection of operators in the Czech Republic is to a large extent influenced by the size of the municipality in the role of the purchaser. Large settlements usually deal with the selection of the operator providing public urban transport through an internal operator. To a large extent, the operator in question is thus selected on the basis of Article 5(2) of Regulation No. 1370/2007 (on the basis of a net cost contract, i.e. a contract that does not exclude the operator's commercial risk in the event of a drop in revenues), or in rare cases on the basis of vertical cooperation (i.e. on the basis of a gross cost contract).⁵

18. In the case of municipalities which do not use an internal operator for the provision of public transport, and, at the same time, do not meet the conditions for direct award set out in Regulation No. 1370/2007, they typically use gross cost contracts for the contracting of public passenger transport services, usually through competition tendering procedures governed by public procurement rules (specifically in open procedures). One of the reasons for the use of these types of contracts is the greater influence of the municipality on the organisation of urban transport, particularly in the area of fares and also in general in terms of its overall organisation. Some municipalities also stated that they do not want to transfer the risk of revenue loss to the operator, as it is often not dependent on the quality of the services provided, but on other factors beyond the operator's control.

19. However, even though public passenger transport was liberalised more than a decade ago, there are still some contracts in force today that were concluded before the liberalisation and thus may not have been awarded on the basis of fair competition. For example, some municipalities are no longer able to determine exactly how the operator was selected, given the time that has elapsed since the current operator was selected. This is also linked to the fact that a significant majority of municipalities have so far only carried out one public tender (competitive tendering procedure) and thus it is not possible to observe longer-term trends at the present time.

20. In practice, the selection of an operator on the basis of a direct award is very common because of the low amounts or short distances involved (see 1.1.1). In the course of its activities, the Office has encountered cases of the so-called "direct award with competition procedure", which has been used in the Czech Republic in the past, e.g. also as one of the methods of selecting regional rail operators (choosing a railway undertaking).⁶ It is not a codified procedure and its rules vary in practice. However, the directly selected operator is chosen on the basis of a pre-selection process through an informal competition between operators responding, for example, to an informal invitation from the municipality, in which the municipality sets all requirements and selection criteria. This method allows for greater flexibility to clarify contentious issues in the negotiations.

21. Regarding the organisation and planning of public transport in the Czech Republic, it is to a large extent based on cooperation between the operator and the municipality, where the operator can usually propose timetables or suggest changes to them, which are then discussed with the municipality and usually subject to its approval (practice of both gross cost contracts and net cost contracts). However, there are also solutions for the form of public transport, in which the municipality itself proposes the form based on its own

⁵ See introduction in chapter one.

⁶ ŠPETÍK, Ondřej. Impact of various methods for choosing a railway undertaking: Case evidence from the Czech Republic. Case Studies on Transport Policy. Netherlands: Elsevier, 2022, Vol. 10(1), p. 616-624. ISSN 2213-624X. doi:10.1016/j.cstp.2022.01.022.

activities or with the use of transport expertise of private entities (e.g. including cooperation with the academic sphere), according to which the transport operator then operates. When planning the form of public transport, municipalities also consider public comments, both from citizens and, for example, companies operating in the specific municipality.

3.1. Chosen parameters of competition tendering procedures and related remarks

22. The selection of specific operators is in large extent carried out by municipalities on the basis of public procurement according to the rules for public service contracts, whereby suppliers (transport operators) compete on the basis of the offer price (in the form of price per 1 vehicle-kilometre) at which the operator would accept to operate the transport service. Other criteria used are, for example, the proportion of vehicles with alternative propulsion (e-vehicles, CNG, hydrogen) or the average and maximum age of the fleet or other various technical requirements. Environmental criteria are usually also included in the technical and operational standards of the tender documentation, where e.g. emission requirements are specified.

23. National legislation⁷ sets a maximum average age of 9 years for vehicles intended to provide public service. In a situation where the vehicles are new at the beginning of the performance of the contract, the average age of the vehicles during the performance of the contract must not exceed 11 years.

24. The Office addressed the issue in its decision-making practice in the area of supervision over public procurement, in connection with the admissibility of the terms of the tender documentation, which required, for the purpose of using new means of transport, newly acquired vehicles exclusively for the implementation of a specific public contract, the subject of which was the provision of public passenger transport services for a period of 10 years. In this respect, the Office stated that the legislation allows for the requirement of new vehicles, while an important factor for the assessment of the proportionality of the requirement in question is also the duration of the performance of the public contract set at 10 years, when the contracting authority no longer foresees further investments resulting from the replacement of non-compliant vehicles. At the same time, the contractual period of 10 years allow the operator to cover practically the entire lifetime of the buses and the operator will not have to deal with the under-acquisition value of the buses, which is more economically efficient for the operator. The Office therefore assessed, inter alia, the tender condition as legitimate.

25. The maximum average age of the vehicles may therefore also play a role in the choice of the length of the contracts concluded for the operation of public transport. In the vast majority of cases, these are concluded for a period of ten years, which is generally the maximum period under Regulation 1370/2007, and which can be set at up to 15 years in the case of (Article 4(3)) more than half the share of rail or other rail transport. Extension of the duration of the contract is also possible, for example, for exceptional investments with regard to their amortisation.

26. Some of the municipalities justify the length of the 10-year commitment by increasing the attractiveness for potential operators, who will thus obtain a stable commitment, and, at the same time, a reasonable return on the acquisition costs of their

⁷ Government Decree no. 63/2011 Coll. setting the minimum quality and safety standard values and indicators and the manner of their demonstration in connection with providing passenger public transport services.

vehicles. The 10-year period can also serve as a means to increase the attractiveness of the public contract for suppliers.

27. The length of anticipated commitment can therefore present one of possible parameters that may increase competition. Other possible ways to increase competition and thus make the competition more effective include preliminary market consultations, which allow the contracting authority to avoid cases of setting the tender conditions in a discriminatory way so as not to favour any supplier.

28. Subcontracting is also a common solution which is being used by some municipalities to increase level of competition. However, there is a restriction in accordance with Article 4(7) of Regulation No. 1370/2007, according to which the operator is obliged to provide the majority of the public passenger transport services itself. In practice, partial performance by means of a subcontractor is specified in the tender documentation, in which the maximum proportion of subcontracting is also specified by the contracting authority, or a subcontractor may be used in the course of performance with the consent of the contracting authority.

29. In the case of tender procedures or direct award under Regulation No. 1370/2007, the investment protection institute can be used, subject to conditions, to transfer vehicles to a new operator. Such institute aims to enhance the competition while offering the protection of investments in quality at the same time. In accordance with Article 4(6) of Regulation No. 1370/2007, it is also possible to ensure the transfer of staff to the new operator. However, in practice, the Office is not aware of any case where either of these two measures has been included in a contract. Nor is the Office aware of a similar solution introduced in the case of the procedure under the public procurement rules.

30. The quality control of the services provided is carried out in accordance with the contractual provisions between the purchaser and the operator and is thus a verification of the operational and quality standards set out in the contract. One of the means of control is questionnaire surveys addressed to passengers; however this practice is not very common according to research executed by the Office. In particular, contractual penalties are agreed under the contractual arrangements for infringements of the established quality standards.

31. Incumbents do not have an advantage in the event of a follow-up tender, as this would be in contradiction with the principle of equality of suppliers. The information available to the Office shows that public contracts are not divided into several parts, the municipalities' argument being mainly that the subject of the public contract is the provision of a service which constitutes a single functional unit with a factual, local and temporal context. Splitting the public contract into several service areas would thus not be economically or functionally efficient.

3.2. Possible competition issues related to selection of urban transport operator

32. During the research executed by the Office and also within the scope of its supervisory authority in the area of public procurement supervision, the Office encountered possible aspects that were able to hinder the competition in the selection process of urban transport operators and also conducted several administrative procedures where the rules for the selection of transport operator were breached.

33. In general, a relatively large number of municipalities use direct award to select the operator providing service to the municipality because of low amounts or short distances. A healthier competition environment would, in specific cases where a competition procedure would be ineffective, at least lead to the use of the "direct award with competition procedure" mentioned above. In this way, at least an informal competition procedure would

be held in the selection of the operator with the aim of obtaining the most economically advantageous solution for the municipality concerned. However, the most preferable solution from the competition perspective is the use of competition tendering procedures.

34. As a supervisory authority in the area of public procurement supervision, the Office has also encountered cases where the legal conditions for direct award were not met. An example is an administrative proceeding in which the Office, after an assessment, found that the conditions of the concession model were not met, in particular when the risk of a decrease in revenues was not transferred to the operator or this risk was marginalised. The operator, which according to the contract concluded with the municipality, collected fares from passengers, did not bear the commercial risk of a decrease itself, but it was divided as follows:

- in the case of actual revenues between 0 and 50 % of the assumption expressed in the Baseline Financial Model that was part of the contract, the operator shall bear the loss,
- in the case of actual revenues between 50 and 100 % of the assumption expressed in the Baseline Financial Model, the purchaser shall bear the loss.

35. In the given case, the Office found that the operator does not bear the risk of incorrect revenue estimation, as it is highly unlikely that the demand for public transport would decrease by more than 50 % compared to the previous period, on the basis of which the selected tenderer used data to build its financial model, including the estimation of fare revenues, and the design of the compensation payment completely marginalises the risk of incorrect revenue estimation.

36. In addition, the Office has also noted a restriction of competition due to the failure to meet the conditions of the direct award due to an emergency situation. In this respect, the Office stated that a direct award on the grounds of an emergency situation requires that the situation in question must meet the conditions of suddenness which does not normally occur and, on the contrary, occurs unusually, i.e. it must be an exceptional and specific situation, while at the same time it must be a situation in which the provision of public passenger transport services is interrupted or threatened. Therefore, the reason for using this method of award cannot be the expiry of the period for which the contract is valid, regardless of where it expires duly or as a result of the expiry of a notice period.

37. In order to fulfil conditions of emergency situation, the municipality must as well prove it made every effort to provide public transport service following the execution of competition tendering process. The conditions are therefore not met if the municipality took steps to carry out a competition procedure before the expiry of the previous fixed term commitment, which was unsuccessful.

38. In practice, it is also possible to encounter cases where the incumbent has a potential advantage over others due to its ownership of the infrastructure, e.g. if a private operator owns a bus station or other part of the infrastructure.⁸ In such a case, the operator, usually the incumbent, which owns the infrastructure in question, has an advantage over other potential operators, which could face increased costs, e.g. in the form of an entry fee to the station in question. In relation to the incumbent's infrastructure, the Office dealt with a case where the municipality had set a condition in an open tender of a covered parking space that only the incumbent could provide, and the Office assessed such a condition as

⁸ In the past, the Office dealt with a case of abuse of the dominant position of the owner of the railway station, who was also a carrier on the Prague - Liberec line, and who was punished by the Office for abuse of its position against another carrier trying to enter the market.

disproportionate and discriminatory, since the purpose of such a measure, which the contracting authority allegedly wanted to achieve, could be achieved by other means, and it was difficult for suppliers who did not have a covered parking space to provide it within the timeframe foreseen in the draft contract for economic and time reasons.

39. Naturally, bid rigging is also a risk when organising a competition tendering procedure, but the Office has not yet dealt with such an issue in any of the individual cases.

4. New technologies and competition in the market

40. Urban transport is primarily handled through competition for the market, i.e. public transport operated by operators selected by municipalities on the basis of the methods described in Chapter 1. However, new technologies have enabled the extension of competition in the market, especially in larger municipalities, and in addition the integration of different modes of transport. This makes it possible to integrate the mode of public transport and other methods of active transport, such as cycling; the concept of Mobility as a Service (hereinafter referred to as “**MaaS**”) can then theoretically include the integration of taxi services.

41. The methods of transport which operate within the cities of the Czech Republic on the basis of the principle of competition in the market are generally subject to less regulation, which is to a significant extent adopted at the municipal level. In particular, taxi services are regulated and, through regulation, some of the differences between the 'classic' and 'alternative' ones have recently been blurred in some essential aspects; e.g. even the driver of an "alternative" taxi service must comply with the price regulation in force in the municipality, in which prices are set by municipal ordinance and the price charged may not exceed the final price or the maximum price, if regulated by municipal ordinance.⁹ Downward price competition is not restricted.

42. A relevant example of how new technologies have contributed to increased competition in the market is, for example, the increase in price transparency in taxi services, as technology has reduced information asymmetry, thanks to which the customer already knows the price to be paid before the transport takes place.

43. The use of new technologies is one of the ways to contribute to reducing the use of individual car transport, which is why the national Concept of Urban and Active Mobility for the period 2021-2030, which supports both carsharing and bikesharing systems, as well as the MaaS concept and intermodality in general, also envisages their use.

44. However, the use of new technologies and the integration of different modes of transport¹⁰ by municipalities is still in its early stages, and the Office is aware of only a few cases of cities which are currently developing or at least considering the MaaS concept (similar situation applies for the aggregators and platforms facilitating inter-modal competition). At the same time, the Office is not aware of any MaaS app-based platform operated by private sector. However, it can be noted that active mobility is already being promoted, in particular bikesharing, which in some municipalities is partly integrated into integrated transport systems and passengers can, for example, use these services free of charge with a prepaid e-ticket and if they meet specified conditions. Bikesharing is

⁹ Opinion No.4/2020 of the Ministry of Finance of the Czech Republic on the issue of price regulation in taxi services provided on the basis of an order made by electronic means other than a voice service.

¹⁰ Bus and rail transport is largely integrated within integrated transport systems.

currently operated mainly by private entities, but some municipalities are or have been considering their own operation or long-term operation of bikesharing through a competition tendering procedure.

45. The integration of multiple modes of transport, including the promotion of their sustainability, are among other things one of the main principles of Sustainable Urban Mobility Plans (SUMP),¹¹ which are already part of the conceptual planning of urban mobility in cities in the Czech Republic. Although this document is not mandatory under national law, its adoption is one of the conditions for the use of subsidies for transport measures. Therefore, a deeper integration of sustainable transport methods and their influence on urban mobility planning, including a more extensive use of the MaaS concept, can be expected in the near future.

46. In Czech Republic, there is a noticeable tendency of implementation of new technologies and new means of transport that have positive impact on competition in the market, nevertheless the use of such technologies, e.g. MaaS, aggregators or platforms facilitating inter-modal competition enabling integration of new means of transport into the urban transport concept is rather only in the initial phase. Therefore, more significant contribution of new technologies is expected in the near future.

47. As the Office has not yet received relevant data concerning the specific features of the considered models of the MaaS concept, it is not possible to comment on potential or actual competition issues in relation to a specific MaaS project in the Czech Republic, however, at a general level, partial reference can be made to the analysis prepared by Valdani Vicari & Asociaty, which identifies certain competition risks of the MaaS concept, in particular in relation to possible price fixing, market sharing or sharing of sensitive data. Abuse of a dominant position, e.g. by denying access to the MaaS platform or applying discriminatory conditions, may also be a risk.¹² In this respect, the Office adds that the future assessment of potential competition risks depends on the application of the specific MaaS concept. A different level of risk will be present if the MaaS is operated by a municipality, while a different, and usually higher, level will be present if it is operated by a private entity, an undertaking.¹³ It therefore depends on the model which will be applied, i.e. who manages the MaaS and who integrates the various participants in the system. In any case, in general terms, MaaS can be supported as a way towards sustainable and environmentally friendly mobility.

5. Conclusion

48. The aim of this contribution was mainly to present the preliminary conclusions of the Office's analysis within the framework of its research in the area of urban public passenger transport. The Office primarily defined the legal framework for the selection of operators operating urban public transport and then presented how this legal framework is applied in the Czech Republic. It also outlined selected parameters of tenders that have

¹¹ For more information see, *Guidelines for Developing and Implementing a Sustainable Urban Mobility Plan*, Second Edition, 2019. Rupprecht Consult (editor). Available at: https://www.eltis.org/sites/default/files/sump_guidelines_2019_interactive_document_1.pdf

¹² For more information see, *Study on market access and competition issues related to MaaS*, 2019. Available at: https://maas-alliance.eu/wp-content/uploads/2019/07/Market-access-and-competition-issues-related-to-MaaS_final_040719.pdf

¹³ Even if the administration and possible integration of the system participants is managed by the municipality, there is a risk of e.g. abuse of dominant position.

been carried out so far. Subsequently, potential competition problems in the practice of selecting operators were identified and in conclusion, this paper addressed competition in the market and possible applications of new technologies in urban transport in the Czech Republic.