CER
The Voice of European Railways

Position Paper

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Simpler and Smarter: Towards a Reform of Public Procurement

CER aisbl – **COMMUNITY OF EUROPEAN RAILWAY AND INFRASTRUCTURE COMPANIES**
Avenue des Arts 53 – 1000 Bruxelles | T: +32 (0)2 213 08 70 | E: contact@cer.be | www.cer.be

EXECUTIVE SUMMARY

The Community of European Railway and Infrastructure Companies (**CER**) is the leading association representing railway operators and infrastructure managers across Europe. Our members operate 78% of the European rail network, 81% of rail freight, and 94% of passenger operations. As major users of public procurement procedures, CER has a concrete interest in ensuring that the EU procurement framework supports both efficient market functioning and Europe's strategic objectives.

The upcoming reform of the EU public procurement framework (Directive 2014/23/EU[1], Directive 2014/24/EU[2], and Directive 2014/25/EU[3]) offers an opportunity to adapt the rules to today's economic and geopolitical challenges. With public procurement representing around 17–19% of EU GDP, it is a key tool to strengthen Europe's industrial base and supply chain resilience. CER welcomes the launch of the process and sets out in this paper its first reflections from the rail sector's perspective.

- **Adapt thresholds to market realities:** CER proposes revising financial thresholds more frequently and flexibly, reflecting inflation and sectoral cost increases.

- **Simplify exclusion rules and procedures**: Fragmented national exclusions, redundant checks, and procedural rigidities related to the Foreign Subsidies Regulation (**FSR**)[4] create uncertainty and inefficiencies. CER calls for reduced administrative burden, and clearer incentives for self-cleaning mechanisms.

- **Preserve flexibility on lot division:** Mandatory lotting is not suited to all procurement contexts and may harm efficiency in complex railway projects. Contracting authorities must retain discretion to define procedures according to technical and operational needs.

- **Ensure fair competition in public service obligation (PSO) tenders:** Public operators competing through open procedures should not face additional procurement constraints. CER calls for public and private bidders to be treated equally under EU law.

- **Promote reciprocity and strategic autonomy:** CER supports conditional third-country access and optional, legally sound European preference clauses in strategic sectors. These tools must be simple to apply, proportionate, and compatible with international obligations.

[1] Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, in OJ L 94, 28.3.2014, p. 1–64.
[2] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, in OJ L 94, 28.3.2014, p. 65–242.
[3] Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, in OJ L 94, 28.3.2014, p. 243–374.
[4] Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, in OJ L 330, 23.12.2022, pp. 1–45

CER and its members stand ready to support the EU institutions in shaping a reform that delivers a more competitive, resilient, and strategically autonomous internal market.

1. INTRODUCTION

1.1. Context of the EU public procurement reform

The international environment has changed rapidly in recent years. Geopolitical crises, trade tensions, and wars have disrupted global trade flows. These developments pose serious challenges to the EU's internal market, affecting supply chains and strategic sectors.

Both the "*Much more than a market*" report by Enrico Letta[5] and the "*The future of European competitiveness*" report by Mario Draghi[6] highlight the importance of public procurement as part of the EU's response. With an annual volume equivalent to 17–19% of the EU's GDP, public procurement plays a key role in supporting the internal market and achieving the EU's policy goals.

Updating the EU's public procurement framework is necessary to reflect today's realities. Some topics, such as improving supply chain resilience, have been discussed for years with no progress. EU procurement rules still reflect yesterday's market conditions rather than today's strategic challenges. It is therefore necessary to simplify and clarify the objectives of EU public procurement. By setting a smaller and clearer number of priorities, public procurement can become a more effective tool, less complex for contracting authorities and bidders, and better aligned with the EU's broader strategic goals.

1.2. Purpose of the position paper

In her 2024 political guidelines[7], President von der Leyen announced the intention to launch a reform of the EU public procurement framework, with the aim of making it simpler, more flexible and more efficient. Following this announcement, the European Commission (**Commission**) opened an initial call for evidence in December 2024 and will continue working on the preparation of a legislative proposal, expected in the fourth quarter of 2026.

In this context, CER wishes to contribute from the outset by identifying the key priorities for the rail sector. Public procurement is a critical tool for supporting Europe's industrial

[5] Enrico Letta, "*Much more than a market*", April 2024, available at the following link: https://www.consilium.europa.eu/media/ny3j24sm/much-more-than-a-market-report-by-enrico-letta.pdf (last visit: 22 September 2025).
[6] Mario Draghi, "*The future of European competitiveness*", September 2024, available at the following link: https://commission.europa.eu/document/download/97e481fd-2dc3-412d-be4c-f152a8232961_en?filename=The%20future%20of%20European%20competitiveness%20_%20A%20competitiveness%20strategy%20for%20Europe.pdf (last visit: 22 September 2025).
[7] Ursula von der Leyen, "*Europe's choice – Political guidelines for the next European Commission 2024 – 2029*", 18 July 2024, available at the following link: https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf (last visit: 22 September 2025).

base and strategic sectors, and the rail industry has a strong interest in ensuring that the reform delivers a more competitive and resilient market environment.

This paper sets out CER's first reflections on the upcoming reform and aims to open a constructive dialogue with the EU institutions**.** CER intends to support this process actively, offering the expertise and perspective of the rail sector to help shape a balanced and effective reform**.**

2. PROCEDURAL FLEXIBILITY AND SMEs PARTICIPATION

2.1. Challenges of the current framework and proposals for streaming and simplification

CER considers that the current EU public procurement framework presents several practical and legal challenges which limit efficiency and legal certainty. A targeted revision should aim to simplify the system and reduce administrative burden, for both bidders and contracting authorities:

- **Financial thresholds.** The financial thresholds set out in Article 4 of Directive 2014/24/EU and Article 15 of Directive 2014/25/EU are currently updated every two years by the Commission through delegated acts. However, given recent inflation trends and the rising costs of construction and services, this biennial revision cycle no longer reflects the pace of market changes. As a result, contracting authorities are often required to initiate full procurement procedures for contracts that are modest in value and unlikely to generate cross-border interest.

CER's position: Upward revision of the existing thresholds on an annual basis, taking inflation into account.

- **Maximum quantities and values**. The Court of Justice's case-law imposes a requirement to specify estimated and maximum quantities or values in framework agreements[8]. Although this requirement is intended to ensure legal certainty and transparency, its practical application should take into account the operational needs of contracting authorities, particularly in cases where future demand is difficult to quantify with precision.

CER's position: Clarify the applicable legal framework to ensure that the requirement to indicate maximum quantities or values strikes an appropriate balance between legal certainty and practical feasibility.

[8] See, *inter alia*, the judgment of the Court of Justice of 19 December 2018, C-216/17 - *Autorità Garante della Concorrenza e del Mercato - Antitrust and Coopservice*, ECLI:EU:C:2018:1034.

- **Exclusions grounds**. The multiplication of grounds for exclusion outside the scope of the EU public procurement framework, introduced unilaterally by some Member States (e.g. additional tax or social security criteria), creates legal uncertainty for both contracting authorities and economic operators. While targeted exclusions on national security grounds should remain possible, this should not justify a fragmented legal framework.

CER's position: Exclusion grounds should be unified and exhaustively listed, while providing a narrowly defined exception for national security concerns.

- **Exclusion periods.** The current exclusion system provides limited incentives for bidders who have committed serious offences to undertake costly and lengthy self-cleaning procedures.

CER's position:
- Maximum exclusion periods should normally remain at today's levels (3–5 years) but may be extended up to 8 years where the operator has not undertaken credible self-cleaning measures.
- Requirements for self-cleaning should be clear and proportionate, to allow contracting authorities a simple and efficient assessment. However, self-cleaning should not be available in cases of significant or persistent deficiencies in prior contract performance.

- **Exclusion checks**. Currently, checking exclusion grounds is burdensome, as it must be carried out separately by each contracting authority for each tender, including verifications such as tax and social security compliance.

CER's position:
- Setting up an exclusion database system at national level to support contracting authorities in verifying exclusion grounds, while leaving flexibility for its use.
- An easier and more user-friendly certification mechanism (Article 64 of Directive 2014/24/EU) made available more broadly.

- **FSR procedures**. The FSR is an important step towards ensuring fair competitive conditions in the EU's internal market. However, its implementation in public procurement must be proportionate and not result in unnecessary delays due to complex and time-consuming checks on financial contributions from non-EU countries. Automatic exclusion of bidders on purely formal grounds, especially when there is no actual distortion of competition, should be avoided.

To maintain legal certainty and procedural efficiency, it is essential that the Commission provides clear and practical guidance to contracting authorities on how to collect and assess information submitted by bidders concerning foreign subsidies.

CER's position: The FSR procedure should not delay the contract award.

2.2. Lot division and SMEs' participation

CER **does not support** the introduction of **mandatory lot division** as a tool to increase SMEs participation in public procurement.

Due to the wide variety of procurement markets and the different types of goods, services, or works being procured, contracting authorities need flexibility to tailor procedures to the specific needs of each case. Making lot division mandatory could reduce efficiency, particularly in complex or integrated projects.

Experience in some Member States suggests that mandatory lotting does not necessarily lead to significantly greater SME participation in terms of contract value[9]. Likewise, setting large-scale projects requires financial stability and risk management capacities that SMEs may not be able to guarantee. Therefore, exceptions to lot division should always remain possible, especially when justified by technical complexity, performance requirements, or the need for coordinated delivery.

CER's position: As a more effective alternative, CER proposes that Member States could be allowed to introduce SME set-asides, meaning voluntary procurement procedures reserved exclusively for SMEs, in order to facilitate their access to public contracts. This voluntary mechanism could be framed under clear conditions, such as:

- Setting a maximum contract value (e.g. €10 million for works).
- Requiring that all subcontractors be SMEs.
- Requiring that any third parties whose capacities are used (e.g. affiliated companies) also qualify SMEs.

3. ENSURING FAIR TREATMENT BETWEEN PUBLIC AND PRIVATE OPERATORS

PSOs are contracts awarded through competitive, open, and transparent tenders, to ensure the provision of essential services (such as public transport). Public and private operators compete on equal terms to win these contracts.

[9] For example, in France, where lot division has been strongly promoted since the 2015 reform to facilitate SMEs access to public procurement, SMEs represent around 60% of awarded contracts by number but only about 30% by value. See the "*Guide Pratique pour faciliter l'accès des TPE/PME à la commande publique*", published by the *Observatoire économique de la commande publique* (Economic Observatory of Public Procurement) of the Legal Affairs Directorate of the French Ministry of Economics and Finance, page 1, available at the following link: https://www.economie.gouv.fr/files/files/directions_services/daj/guide_de_bonnes_pratiques.pdf?v=1749027359 (last visit: 22 September 2025).

Directive 2014/25/EU applies to contracting entities operating in sectors not fully exposed to competition or benefiting from "*special or exclusive rights*" granted by a Member State[10]. Directive 2014/25/EU's rationale is that when upstream competition is lacking, public procurement rules must apply downstream to preserve competitive neutrality. Nevertheless, Article 4(3) Directive 2014/25/EU, explicitly states that rights obtained through a transparent procedure based on objective criteria do not constitute special or exclusive rights. This provision reflects the principle that entities should only be subject to public procurement obligations when they benefit from market privileges not acquired through competition.

In theory, Article 4(3) should exclude from the scope of Directive 2014/25/EU any operator, public or private, whose right to act in the market stems from a competitive tender. **In practice, however, public entities that obtain PSO contracts via open tenders continue to be treated as "*contracting entities*" under the Directive**. This is not because they hold special or exclusive rights (as might have been in the past, before the 4th railway package) but because of their legal status (e.g., as public undertakings or bodies governed by public law) and their presumed obligations under national administrative procurement regimes. As a result, they remain bound by Directive 2014/25/EU's procurement obligations for all purchases related to bid preparation or contract execution, despite operating under competitive conditions. These obligations do not apply to their private competitors, who are free to act commercially, confidentially, and flexibly.

In principle, Articles 34 and 35 Directive 2014/25/EU, provide for formal exemptions where an activity is directly exposed to competition on a market to which access is not restricted. However, these exemptions are designed for entire sectors or activities, not for specific PSO awards. They require complex justification procedures and Commission approval, which are **not suited** to resolving the specific imbalance faced by public operators participating in PSO tenders on an equal footing with private competitors.

The consequences are concrete and well-documented. Public operators must conduct formal procurement procedures, often lasting months or years, for essential inputs such as rolling stock, maintenance services, or IT systems, even under tight timelines preceding a PSO bid. These procedures restrict negotiation and adaptability, while publication obligations may reveal commercially sensitive information. By contrast, private competitors can procure more responsively and confidentially, allowing them to price their bids more accurately and strategically. Public operators must also justify their cost structure, ensure compliance with public funding rules, and document the absence of cross-subsidisation. **All while facing the same market competition as private firms**.

[10] Under Article 4(2) Directive 2014/25/EU, these rights are defined as those granted by legislative, regulatory or administrative acts that limit access to certain activities and confer privileged positions.

CER's position: To ensure a level playing field, public entities, just like their private competitors, should be exempt from the procurement obligations of Directive 2014/25/EU when sourcing goods or services for the preparation or performance of a competitively awarded PSO contract.

4. AWARDING OF CONTRACTS

The EU public procurement framework identifies the Most Economically Advantageous Tender (**MEAT**) as the standard for contract award, balancing price with qualitative, environmental, and social criteria. In the railway sector, where products and services have long life-cycles and strategic importance, focusing only on price risks neglecting innovation, quality, and sustainability. In line with these considerations, CER continues to uphold its 2019 recommendations on this topic[11].

However, CER stresses that **contracting authorities must retain the freedom to determine the most appropriate award criteria according to the specific context of each procurement procedure.** Given the diversity of procurement needs in the rail sector, a one-size-fits-all approach is neither practical nor desirable. Price-only awards should remain possible where justified, particularly when qualitative or sustainability aspects are already addressed in the technical specifications. Overly prescriptive rules at EU level would risk creating unnecessary complexity and administrative burden, without improving procurement outcomes.

CER's position: To promote the use of MEAT criteria without making them mandatory, thus respecting the diversity of procurement contexts and the autonomy of contracting authorities.

5. RECIPROCITY AND STRATEGIC AUTONOMY

5.1. Third-country access

The EU public procurement market remains widely open to third-country operators, even when EU companies do not enjoy reciprocal access to those countries' markets. This asymmetry risks distorting competition, particularly in strategic sectors such as rail and infrastructure, where long-term investment, safety, and sustainability standards are critical. Without equivalent market access, EU operators face unfair competition from third-country companies that may not be subject to comparable environmental, social, or economic obligations. This not only weakens the EU's industrial base but also potentially undermines the strategic autonomy of essential public services.

The case-law of the Court of Justice confirmed that contracting authorities must verify the origin of tenders from third-country operators and assess whether EU bidders have reciprocal access to those countries' procurement markets (via the General Procurement

[11] CER, EIM, UNIFE, "*Recommendation to apply the Most Economically Advantageous Tender (MEAT) & Good practices in the domain of railway procurement*", 12 July 2019, available at the following link: https://www.cer.be/images/publications/positions/20190711_CER_EIM_UNIFE_Recommendation_for_applying_MEAT.pdf (last visit: 3 July 2025).

Agreement or other bilateral agreement of similar nature) [12]. This ruling establishes a clear legal obligation to safeguard fair competition conditions.

CER's proposal: To codify the findings of the Court of Justice. The revised framework should require reciprocity. Participation by third-country companies in EU public procurement markets should be conditional on equivalent market openness for EU companies. In the absence of such an agreement, contracting authorities should be free to accept or reject bids from third-country operators at their discretion (without the need to justify their decision), or to accept them but adjust the evaluation so that the comparison with EU offers remains fair.

5.2. European preference clauses

The introduction of European preference or "Buy Europe" clauses in public procurement has been proposed as a way to strengthen the Union's strategic autonomy and support its industrial base, particularly in critical sectors. These clauses could allow contracting authorities to prioritise European products and suppliers, helping to secure European supply chains and industrial capacity.

CER believes that the introduction of such clauses raises important practical and legal challenges that must be carefully considered:

- First, there is no clear definition of what constitutes a "European" product or supplier. This creates uncertainty for contracting authorities and risks introducing excessive complexity into procurement processes. In CER's view, the definition of European preference should primarily focus on the **origin of the product**, rather than only on the location of the bidder and/or the nationality of its shareholding, since companies from third countries could otherwise bypass the requirement by establishing a subsidiary in the EU. Any verification of origin must be simple and proportionate: contracting authorities should not be required to carry out complex checks on production steps, supply chain structures, or ownership.

- Second, **mandatory European preference clauses would be problematic**. In some sectors, European suppliers do not yet offer solutions that are competitive in terms of quality, maturity or cost. Making preference clauses mandatory would risk limiting competition, increasing costs for public authorities, and potentially undermining service quality or supply security.

- Third, European preference clauses would **conflict with internal international trade agreements**, including WTO.

[12] See, *inter alia*, the judgment of the Court of Justice of 13 March 2025, in case C-266/22, *CRRC Qingdao Sifang and Others*, ECLI:EU:C:2025:178, and the judgment of the Court of Justice (Grand Chamber) of 22 October 2024, in case C-652/22, *Kolin Inşaat Turizm Sanayi ve Ticaret*, ECLI:EU:C:2024:910.

CER's proposal: The introduction of European preference clauses should remain optional, aligned with EU economic policy, and carefully targeted at sectors where European strategic autonomy is essential. Clauses should rely on clear, verifiable criteria. Contracting authorities must retain flexibility, without mandatory obligations or fixed quotas. The Commission should provide voluntary guidance on the collection and assessment of origin-related information from bidders.

6. CONCLUSIONS

Public procurement is a technical tool, but its impact is very real. It shapes how public services are delivered, how industries grow, and how the Union responds to global challenges. Making this tool simpler and more effective is not just a legal exercise, it is a way to make the EU's internal market work better for citizens and businesses.

The reform of the procurement framework is an opportunity to modernise the rules for today's economy. This means removing unnecessary complexity, supporting fair competition, and giving public buyers and suppliers the flexibility they need to respond to fast-changing market conditions.

CER and its members are ready to contribute to this process. The rail sector has a long history of delivering essential services in Europe's public interest, and knows what it means to combine technical excellence, social responsibility, and economic performance.

About CER
The Community of European Railway and Infrastructure Companies (CER) brings together railway undertakings, their national associations as well as infrastructure managers and vehicle leasing companies. The membership is made up of long-established bodies, new entrants and both private and public enterprises, representing 78% of the rail network length, 81% of the rail freight business and about 94% of rail passenger operations in EU, EFTA and EU accession countries. CER represents the interests of its members towards EU policy makers and transport stakeholders, advocating rail as the backbone of a competitive and sustainable transport system in Europe. For more information, visit www.cer.be or follow us on X @CER_railways or LinkedIn.

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