13th Conference on Competition and Ownership in Land Passenger Transport, Oxford (UK), 15-19 September 2013

Legal and Organisational Developments in the German Land Passenger Transport

Astrid Karl

KCW GmbH, Germany

Workshop 4, Governance, ownership and competition in Deregulated public transport markets

– revised version of the workshop paper, 29 November 2013 –

ABSTRACT

The paper deals with latest developments in the German local passenger transport market. Starting point is a short sketch of the previous governing principles of the local public transport regulation, organisation and financing. In late 2012 the German legal framework for bus and local transport on rails was finally amended according to the requirements of the Regulation (EC) No 1370/2007. The paper describes the resulting legal solution for the bus and local rail market. This will be followed by an evaluation against the backdrop of the existing local public transport organisation and the recent developments since Regulation 1370/2007 entered into force (awarding/financing). The paper then gives an outlook on the possible developments of the German public transport taking thereby into consideration foreseeable diverse interpretations of the new legal situation. Possible conflicts will concern the definition of so called “commercial” and non-commercial transport. As non-commercial transport falls under the rules of either European Procurement Law or under the procuring rules of Regulation 1370/2007, the distinction decides on the possible form of market access, especially on the possibility of a direct award of a public service contract. Potentially the scope of application of general rules fixing maximum tariffs will play a decisive role for the applicable form of market access.

Introduction

In Germany, in January 2013 a new Federal Passenger Transportation Act ("Personenbeförderungsgesetz", PBefG) concerning the road based public transport[1] entered into force.[2] The new law has been mainly noticed by the public due to its deregulating long distance scheduled bus services. Until then, few such services existed because of a protective regulation in favour of existing rail services, a former state monopoly. Far less public notice received the changes of the local public transport regulation made necessary by EU legislation. Regulation (EC) No 1370/2007 entered into force in late 2009, but Germany failed to adjust the legal framework in time. Resulting legal insecurities and contradictions are now in relevant parts overcome with the recent amendment, although the practice has yet to show whether the new framework "works".

After outlining the previous legal and organisational situation (section 1) and a short outline of the relevant European legislation (section 2) the paper describes the amendment process and its outcome (section 3). Section 4 will conclude the paper evaluating the new legal framework.

1 Previous governing principles of the local public transport regulation, organisation and financing

At the Thredbo Conference in 2003 Didier van de Velde (2003) described the German situation as "rather hybrid", which was a mild picture for the very complex governing principles in the local public transport market. The previous governing principles shall be outlined briefly as their perception is necessary to be able to understand the following debates and the developments which led to the recent amendment.

1.1 Authorisations and possible forms of market entry

To be allowed to offer passenger transport services in Germany the operator needs an authorisation ("Genehmigung"). Authorisations are granted for each separate route ("Linie") or for route bundles ("Linienbündel") by state regulatory authorities ("Genehmigungsbehörden"). The regulatory authority assesses whether access to the profession can be granted to the applicant[3] and whether the market entry is necessary from the standpoint of "public transport interests".[4] Court ruling[5] resulted in that normally only one

[1] The paper deals only with the local and regional *road based* public transport, which will be addressed in the following as "public transport" for reasons of simplification. *Road based public transport* includes by legal definition in Germany bus, light rail and rapid transit services.

[2] http://www.gesetze-im-internet.de/pbefg/

[3] E.g. applicant's financial soundness, reliability, professional competence, and establishment; paragraph 13, sections 1 and 1a PBefG.

[4] The authorization can be denied if public interests – like an already existing transport offer meeting the demand – are affected by the new application, Paragraph 13, section 2, number 3 PBefG.

[5] Federal Administrative Court of Germany (Bundesverwaltungsgericht; BVerwG), judgement of 25. October 1968, case no. VII C 12.67

authorisation per route can be obtained – free competition in the market is not allowed.[6] The authorisation implies therefore a de facto-exclusive right over a period of, until recently, up to 8 (bus), or 25 years (light rail, metro).[7] Since 1996 – when the first main reorganisation of public transport due to the railway reform[8] entered into force – two different market access regimes existed in theory: on the one hand the operator initiative for "commercially viable" or "cost covering" services ("eigenwirtschaftliche Verkehrsleistungen") and on the other hand tendering of non-commercial services ("gemeinwirtschaftliche Verkehrsleistungen").

Keeping in mind that public transport services in Germany are heavily subsidised (see the following section 1.2), the distinction between the two market access regimes might surprise, as it seems utterly unnecessary. Routinely conducted tenders of services would be expected. But, even more surprising is that with few exceptions all public transport services were (and still are) run as nominally "commercially viable" services. The reason for this was to be found in the legal definition of those "commercial" services[9] which did not at all exclude specific public funding.[10] This definition was adopted with the 1996 reform with the clear intention[11] to maintain the established forms of subsidy, especially cross-subsidisation by municipal holding companies ("Querverbund"), while avoiding otherwise mandatory tendering and thereby preserving the status quo of the established operators (Wachinger 2006: 1 f.). This "legal trick" led, though indeed protecting effectively insiders from competition, to a market arrangement not easily understood, and still influences profoundly, if maybe not intentionally, future developments of the regulatory regime. In practice, all sorts of public funding were found to be compatible with the definition of "commercial" services (Knauff 2007: 332) – a rather absurd outcome.

The law did not specify which of the two market access regimes was to be prioritised in case of a conflict – like competing initiatives. There were arguments favouring the authority initiative (for instance Barth 2000) because of the public interest in the provision of sufficient services ("ausreichende Verkehrsbedienung"). Others, especially spokespersons of the private business, favoured the priority of "commercial" services as the law stated that public transport services should be operated commercially[12] (Batzill/Zuck 1997). Not until 2006 the Federal Administrative Court of Germany decided that "commercial" services were indeed to

---

[6] Because of that, one cannot speak in Germany of commercial services in the sense of an open competitive market. To underline this distinctive feature, this paper uses the expression in inverted commas ("commercial" services).

[7] Authorisation durations are now (since the 1st of January 2013) maximal 10 years for bus and maximal 15 years for light rail/metro routes.

[8] The Railway reform package ("Bahnstrukturreform") of 1993 included the regionalisation ("Regionalisierung", i.e. decentralisation of responsibility) of local and regional transport services and an amendment of the regulation of road based public transport which entered into force in 1996 (see Karl 2008: 165 ff.).

[9] The law defined "commercial" services as services the costs of which are covered by fares, other operating revenues and 'other income of the undertaking as defined in commercial law' – the latter making it possible to include public compensation.

[10] Very early Fromm (1994: 426) criticized this legal construction as an „adventurous definition" („abenteuerliche Begriffsbestimmung"); see also Knauff (2007) for a comprehensive critical analysis of the history of the definition.

[11] Cf. response of the Federal Government to the comment of the Federal Council, Bundestag-Drucksache 12/5014, S. 52.

[12] Paragraph 8, Section 4, first sentence PBefG, version before 2013

be prioritised over contracted services.[13] And it took another three years until the Court outlined in another decision what the procedure should look like for finding out whether any "commercial" operator was interested in conducting a service the authority intended to tender.[14]

But, in practice, the two conceptual modes of market entry were "outnumbered" by the dominating traditional third model (see Figure 1 below): the monopoly of the incumbent operator. These monopolies were the effect of the privileged market entry for the existing operator (a) combined with exclusive funding (b).

a) In the situation of re-granting of authorisation as described above, the incumbent operator benefited from the legal provision of priority access over competing applicants.[15] The norm was originally meant to give an incentive for the current operator to keep up the service level until the very end of the authorisation duration. But, administrative praxis and case law interpreted the clause predominantly as an absolute prerogative of the incumbent operator (a so called "grandfather right"). In the case of municipal companies an area-wide monopoly was thereby stabilised. In the case of regional services a route monopoly resulted from this practice. Competition was made improbable because no data about the existing authorisations had to be published since the late 1970s – it was virtually not possible to gain information about expiring authorisations.

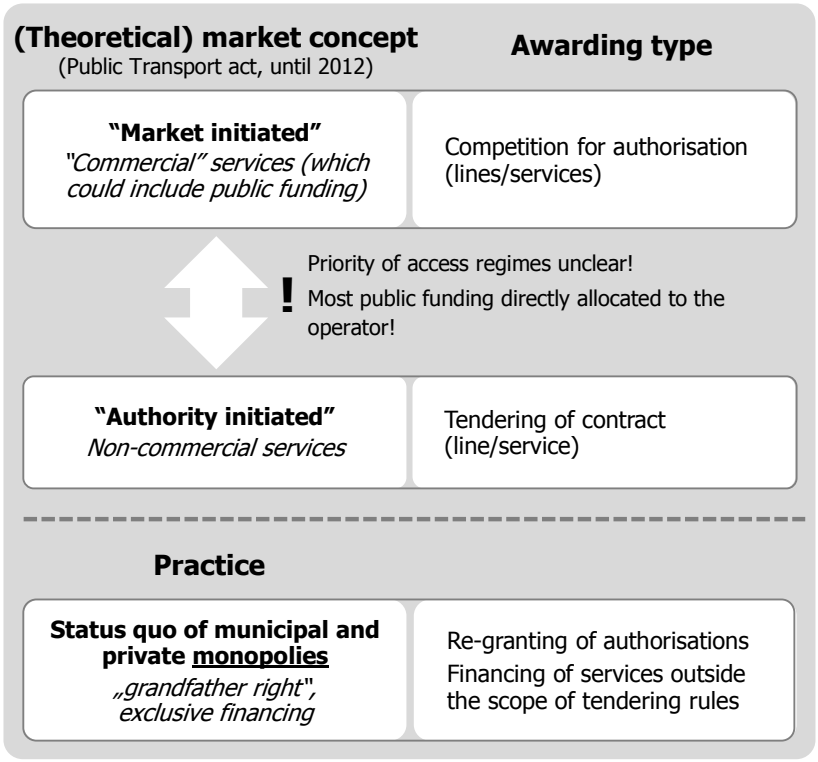
b) Operating public transport services was originally a profitable business. But, since the 1950s, growing car use led to a decline of public transport demand in Germany like in other countries. As a result of this development which threatened to make reduced services and/or higher prices necessary, in the late 1960s and 1970s transport companies were more and more provided with public subsidies. Financial support for investments and tax reductions or exemptions were introduced, subsidies for reduced or free fares for students and for the severely handicapped and other forms of subsidies followed. Deficits grew nevertheless – the owners of public companies – the federal state in the case of the German railway and the municipalities in the case of urban transport companies – usually took over the deficits. This kind of funding was of course connected to the public ownership and therefore "exclusive". In the regional public transport exclusive funding was the result of the quasi route monopolies: Public authorities interested in maintaining or even in improving service levels (coordinated services, etc.) had no other choice but to support the existing (private) operator – if not able or willing to do so, they had to live with a reduced or more expensive public transport.

[13] Federal Administrative Court of Germany, judgement of 19 October 2006, case no. 3 C 33.05

[14] Federal Administrative Court of Germany, judgement of 29 October 2009, case nos. 3 C 1.09/3 C 2.09

[15] Paragraph 13 Section 3 PBefG, version before 2013; the authority had to take 'reasonable account of the circumstance that an operator had been providing the services properly for years'.

Figure 1. (Theoretical) market concept and practice in German public transport before the amended law entered into force



Source: Own illustration

In principle competition for "commercial" authorisations was possible, but there were no established procedures for such a competition: no information about available authorisations; no time limits for applications, no beforehand published "awarding" criteria if more than one operator was interested in gaining the authorisation. Skeleton rules were only developed by case law, yet still leaving questions unanswered (see Berschin/Karl 2012).[16] Re-granting of authorisations to the existing operator was the dominant form of "market access". Therefore, only in theory the responsible public transport authority could contract services if the "operator initiative" did not result in a sufficient service level.

1.2 Financing and operators

By law, the federal states are responsible for financing and organising sufficient public transport ("Regionalisierungsgesetz"). All federal states in Germany – with the exception of the city states Berlin and Hamburg – delegate this responsibility to the urban and rural

[16] Cf. for instance the following decisions of the Federal Administrative Court of Germany: Judgement of 18 June 1998, case no.3 B 223.97; judgement of 2 July 2003, case no. 3 C 46/02; judgement of 29 October 2009, case no. 3 C 1.09 and 3 C 2.09, and of the Federal Constitutional Court of Germany (Bundesverfassungsgericht; BVerfG): Judgement of 11 October 2010, case no. 1 BvR 1425/10.

districts which act as public transport authorities (cf. respective federal state laws on public transport).[17]

Over the past decades a complex public financing system has evolved, with various financing actors (national government, federal states, municipality, etc.), a different (legal) basis (law, allocation of funds, contracts, informal funding, etc.) and a variety of funding purposes (tax exemptions/deductions; compensation payments for rebates; vehicle purchase; cross-subsidisation from other public utilities; capital grants; investment grants, etc.). The funding evolved in a situation of a rather monopolistic structure dominated by public enterprises. Direct subsidies to the companies were very common, thereby – not intentionally – "circumventing" the later established local competent authority. Specification of subsidy conditions and obligations to report about the proper handling of the subsidy were not at all comparable with general contractual requirements, and public service obligations were not specified.

Financing structures vary heavily between the federal states, but, in general not all of the available budgets for road-bound public transport are allocated at the level of the public transport authorities. The level of public funding remains high and amounts to approximately EUR 16 billion annually (here: road based and rail public transport) (Bormann et al. 2010; Peistrup 2010). Roughly 200 Euros are spent per inhabitant and year. No precise contemporary data are available due to the complex and still non-transparent financing structures.

The operator structure in Germany is traditionally very fragmented and has not changed much since the formal opening of the market in 1996: Municipal public companies are typically found in all larger towns and cities. Regional public transport is in contrast operated often by bus companies of Deutsche Bahn AG or by private companies, and, to a lesser extent, with the exception of East Germany, by public operators. There tend to be more private companies in the south of Germany, which – amongst other things – influences interests and positioning of the respective federal states accordingly. Global players like Veolia Transdev (French-based international private public transport operator formed following the merger of Veolia Transport and Transdev), Netinera (owned by the Italian state railways FS and Cube, a French-Luxembourg investment fund), Abellio NS (overtaken by Nederlandse Spoorwegen, the principal passenger railway operator in the Netherlands in 2008) and other players like Rhenus Veniro (a subsidiary of the Rhenus group) and BeNEX (a subsidiary of Hamburger Hochbahn AG (51%) and an English investment trust, 49%) are active in the market.

[17] *Gesetz über die Planung, Organisation und Gestaltung des öffentlichen Personennahverkehrs [Baden-Württemberg]; Gesetz über den öffentlichen Personennahverkehr in Bayern (BayÖPNVG); Gesetz über den öffentlichen Personennahverkehr im Land Brandenburg; Gesetz über die Aufgaben und die Weiterentwicklung des öffentlichen Personennahverkehrs im Land Berlin; Gesetz über den öffentlichen Personennahverkehr im Land Bremen; Niedersächsisches Nahverkehrsgesetz (NNVG); Gesetz über den öffentlichen Personennahverkehr in Hessen; Gesetz über den öffentlichen Personennahverkehr im Land Sachsen-Anhalt (ÖPNVG LSA); Gesetz über den öffentlichen Personennahverkehr in Mecklenburg-Vorpommern (ÖPNVG M-V); Gesetz über den öffentlichen Personennahverkehr in Nordrhein-Westfalen – ÖPNVG NRW; Landesgesetz über den öffentlichen Personennahverkehr [Rheinland Pfalz]; Gesetz über den Öffentlichen Personennahverkehr im Saarland; Gesetz über den öffentlichen Personennahverkehr im Freistaat Sachsen; Gesetz über den öffentlichen Personennahverkehr in Schleswig-Holstein; Thüringer Gesetz über den öffentlichen Personennahverkehr (ThürÖPNVG)*

1.3 Summary of the recent past

Contracting and tendering of such services which needed public subsidies was introduced in Germany with the reform of 1996. But, as a very ambivalent legal definition of "commercial" services was introduced at the same time which protected the traditionally closed markets, and as the financing structures were not adapted (direct funding of companies prevailed), authority initiative/competitive tendering remained in a niche. Only the federal state of Hesse enforced tendering by its interpretation of public finances as necessarily leading to non-commercial services (Achenbach 2006). Therefore, with some other local exceptions (e.g. Munich region), the status quo remained unchanged. The theoretically possible competition for authorisations remained also in a niche due to the established financing structures and the protection of incumbents; where it took place legal disputes were not uncommon as the procedure was very underdeveloped (cf. Berschin/Karl 2012).

Expectations of the newly formed local public transport authorities regarding possible improvements of public transport and control of its further development were high in the beginning of the 1996 reform, but were soon largely disappointed and replaced by seemingly endless debates whether services had to be tendered or not, whether competition could possibly work in public transport, or, more often, how competition could best be avoided.

Despite frequent adjustments of the financial structures and occasional cuts the level of public funding remained high. On the whole, Germany continued the high level of public funding for public transport, despite existing inefficiencies caused by the complex and non-transparent structures and a lack of competitive pressure.

2 Requirements of the European legislation

After almost ten years of debate,[18] the new European regulation on public passenger transport services entered into force on 3rd December 2009 (Regulation (EC) No. 1370/2007)[19].

The Regulation defines the common rules for financing public transport and for the market access to services for which compensation and/or exclusive rights are granted. Competent authorities may intervene in public transport market activities in order to guarantee the provision of services of general interest. The authorities may define public service obligations and can compensate incurred costs and/or grant an exclusive right. Compensation and/or exclusive rights have to be defined within the frame of a *public services contract*. If only maximum tariffs are established by the authority for certain passenger groups or for all passengers compensation can be granted alternatively on the base of *general rules*; exclusive rights cannot be granted in this case. General rules are therefore an instrument to influence the tariff level in an open access regime.

The Regulation defines the mandatory content of public service contracts and general rules and determines for public service contracts which awarding procedure has to be followed. Regulation 1370/2007 allows in addition to the normally required tendering of contracts –

[18] The first proposal was published in 2000, *Proposal for a Regulation of the European Parliament and of the Council on action by Member States concerning public service requirements and the award of public service contracts in passenger transport by rail, road and inland waterway*, 26.7.2000, Com(2000) 7 final. A second followed in 2002 (Com[2002] 107 final), and a third one, from which the current Regulation No 1370/2007 derived, in 2005 (Com[2005] 319 final).

[19] 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, OJ L 315, 3.12.2007, p. 1-13

according to the Public Procurement Directives or according to the special procurement rules of the Regulation 1370/2007 – under certain conditions to directly award the contract. Directly awarded contracts and general rules have to follow the Annex rules which safeguard against a possible overcompensation.

Authorities have to publish their intention to tender or to directly award a contract a year ahead. They have to publish yearly reports stating the established public service obligations, the selected public service operators and the compensation payments and exclusive rights granted. Competent authorities intending to directly award a contract are obliged to forward the reasons for their decision when so requested by an interested party.

Without going into too much detail of the Regulation 1370/2007, the striking contrast between the requirements of the European legislation and the established arrangement in Germany should have become apparent.

3 Amendment of German Public Transport Law and basic principles

European Regulations are directly applicable from the date of application specified. Member states must undertake provisions for their execution and enforcement. Therefore it was necessary to amend the national law accordingly. But, Germany failed to amend the Public Transport Law in time: A first amendment proposal of 2008 was unsuccessful. Opposing views of the stakeholders of the local authorities on the one hand and of the companies, especially of the private businesses – reflected as disagreements between the federal states whose improvement of the amendment was necessary – could not be overcome. The project was dropped as the oncoming Bundestag elections left not enough time to go through with it. (cf. Fiedler/Wachinger 2008: 117; Fiedler/Wachinger 2009: 173; Kardel 2012 41 ff.)

The elections in fall 2009 resulted in a new coalition of CDU/CSU and FDP. The coalition agreement[20] stated the intention to amend the public transport law without further delay. According to this agreement, the amendment should follow the concept of an entrepreneurial and competitive public transport. The priority of “commercial” services should be preserved. Municipalities should remain to be the competent public transport authorities as established by the federal state laws on public transport following the 1996 reform. Participation of small businesses and especially a diversity of operators in the bus industry should be ensured. In addition to that, the new coalition declared its intention to deregulate long distance scheduled bus services. But, of course it was now too late to conclude any amendment process before the 3rd December 2009, the date that the Regulation 1370/2007 entered into force. And so, the old version of the German transport law still applied.

A working group of representatives of the federal states and the transport ministry tried to agree on key points offering (informal) solutions for the most obvious legal problems.[21] But, for some of the problems the working group could only state the different approaches, as no agreement could be reached. Therefore not even a consistent informal interpretation of the new legal situation existed. As implementing public transport legislation falls under federal states’ responsibility most of the federal states subsequently published additional guidelines as a workaround.[22]

---

[20] “Wachstum. Bildung. Zusammenhalt. Koalitionsvertrag zwischen CDU, CSU und FDP, 17. Legislaturperiode”, 2009

[21] Compatibility of the exclusivity of the authorization with Reg. 1370/2007; unsolved priority between “commercial” and non-commercial services, etc.; cf. Fiedler/Wachinger (2010: 171).

[22] See Fry (2010).

3.1 Difficult amending process

Despite the announced promptness regarding the amendment, it took until August 2011 for the disclosure of the draft legislation ("government proposal"). Before that, a joint draft proposal by the business lobby groups VDV[23] and bdo[24] had been published in June 2010 ("lobby group-proposal"). A first internal working draft of a government proposal became public in July 2010, but was not further pursued. In November 2010 a working group consisting of inter-ministry, government, and federal states' representatives agreed informally upon a draft proposal ("working group proposal").[25] The *government proposal*, which relied on some of the positions of the business lobby groups, differed in important points from this *working group proposal* – e.g. no permission to grant exclusive rights as allowed by Regulation 1370/2007 was included; no procedure was provided to deny the authorisation of a "commercial" service not fulfilling the required standards which the authority intended to guarantee by contracting (= unconditional priority of "commercial" services). "Commercial" services would have gained thereby an unconditional priority and would have been allowed to cherry pick profitable sections out of intended contract services.

A common feature of all *proposals* was the new definition of "commercial" services, made necessary by European requirements: Besides fare and other revenue only public financing on the basis of general rules could be included. Therefore substantial parts of the usual public funding aiming at supporting loss-making services would no longer be compatible with a "commercial" service which meant a serious narrowing of the scope of "commercial" services. At least two consequences would have resulted in the logic of the *government proposal*: The normal standards of the German public transport would no longer be maintainable only by "commercial" services, and, necessarily downgraded "commercial" services would nonetheless prevail over intended tendered services of higher quality because of their unconditional priority.

In the context of the unconditional prioritisation of "commercial" services municipal public transport – as mentioned earlier mainly operated by local public companies – felt seriously threatened by the legal scenario of the *government proposal*.[26] Administration representatives, environmental groups, and passengers' associations were in addition worried as no reliable procedure was included which would have enabled authorities to maintain established levels of service and of integration they were willing to pay for. As no deviation from the standard of public transport and no serious cuts of public transport funding[27] were intended by the government – the latter being one of the driving factors of the mid-1980s deregulation of public transport in the UK – the *government proposal's* unconditional priority for "commercial" services lacked plausibility.

Accordingly many severe changes of the *government proposal* were demanded in the formal opinion[28] of the Bundesrat.[29] Following that, the government denied the necessity of the

---

[23] Verband Deutscher Verkehrsunternehmen – Association of German Transport Companies

[24] Bundesverband Deutscher Omnibusunternehmer – Federal Organisation of privately owned Transport Companies

[25] The *working group proposal* was not published; Müller (2012: 3) gives an overview.

[26] Cf. opinion of Deutscher Städetag/Deutscher Landkreistag, Ausschuss für Verkehr, Bau und Stadtentwicklung, Ausschussdrucksache 17. WP, Nr. 17(15)340-G, and the opinion of EVG, Ausschussdrucksache 17. WP, Nr. 17(15)340-K for the hearing in February 2012.

[27] Which would have been anyway difficult to manage because of the complex financing structures.

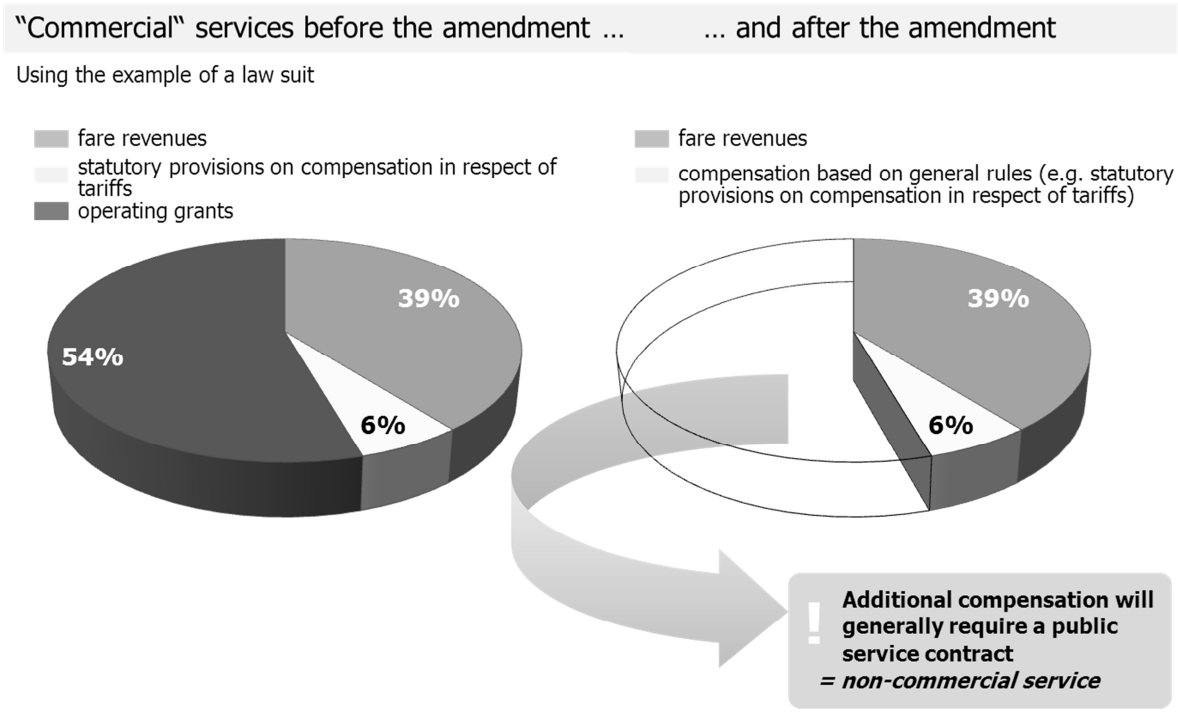
[28] Bundesrat Drucksache 462/11(Beschluss) http://www.bundesrat.de/cln_320/nn_1934482/SharedDocs/Drucksachen/2011/0401-500/462-11_28B_29,templateId=raw,property=publicationFile.pdf/462-11%28B%29.pdf

changes proposed by the Bundesrat. Because of the disagreement between government and Bundesrat the legislative procedure was again threatened with failure. To save the procedure, informal negotiations between the main parliamentary groups which included representatives of the federal states were started.[30] A political compromise was reached in early fall 2012. Approval of the Bundestag followed in September 2012. The approval of the Bundesrat on 2nd November 2012 cleared the way for the long-awaited amendment.

3.2 Basic principles of the amended transport law

The new public transport law defines "commercial" services in compliance with the Regulation 1370/2007 as such services which are supported only by fare revenue and other commercial revenue plus any compensation paid in accordance with general rules.[31] All other forms of compensation and the granting of exclusive rights have to be dealt with in a public service contract (see following Figure 2). Such services are then automatically non-commercial. The awarding of public service contracts has to follow Public Procurement rules or the awarding rules of Regulation 1370/2007.

Figure 2. The modification of the definition of "commercial" services



Source: Own illustration based on the data of Bavarian Administrative Court (Bayerischer Verwaltungsgerichtshof), judgement of 07 Dec. 2011, case no. 11 B 11.928

The law states now a *conditional priority* of "commercial" services – priority depends on the question, whether applications for "commercial" services fulfil the service standards which the authority intends to guarantee by contracting for the service. Applicants have to commit

[29] The upper house of the German parliament that represents the sixteen federal states at the national level.

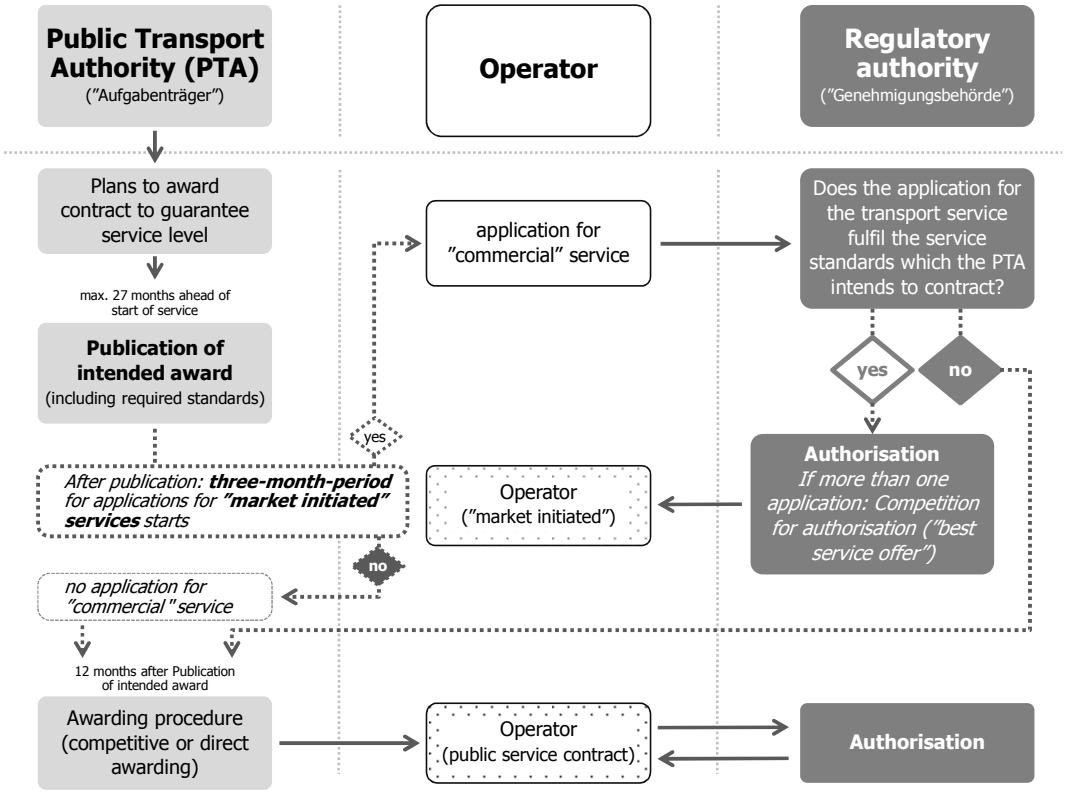
[30] A highly unusual procedure.

[31] Paragraph 8, Section 4 PBefG

bindingly to significant standards, otherwise priority expires unless the authority agrees to minor deviations during the authorisation procedure or other stipulated exceptions apply.[32] The authorisation obligates the operator to continuously operate the service according to the proposed specifications. Only under certain circumstances operators will be released of that obligation (partially or completely). Operators who commit bindingly to the standards required by the authority have to be aware that it will now normally not be possible to be released of the discharge of the relevant service standards even if economically unviable.[33]

The question of priority between "commercial" and non-commercial services is solved by the application of a "time limit procedure" (see the following Figure 3). This means that prior to any contracting the authority has to find out whether any operator is willing to conduct the intended service "commercially". To start the procedure, the authority has to announce its intention to contract for public transport services, and in doing so, has to define the service standards which are required in the public interest. The law defines the pertaining time limits for the "commercial" service application. The authority can start its awarding procedure only in the case that no "commercial" application occurred, or, that ensuing "commercial" applications could not be granted an authorisation by the regulatory authority because of their failing to fulfil the requirements of the authority.

Figure 3. Interaction of authority and operator initiative according to the amended transport law



Source: Own illustration

The public transport law kept its unique feature of allowing only one operator for one route in *local* public transport – it even added another type of reason to deny a competing

[32] Paragraph 13, Section 2a PBefG

[33] Paragraph 21, Section 1 in conjunction with Section 4, Sentence 3 PBefG.

authorisation ("Versagungsgrund") in the case of an already existing transport offer (Barth/Landsberg 2013: 6).[34] It is debated whether or not such special rights can be granted outside of the scope of Regulation 1370/2007 (see lower part of section 3.3). The result is anyway that if more than one "commercial" operator is interested in a service the regulatory authority has to decide which operator's application is granted ("competition for authorisation" – "Genehmigungswettbewerb"). The law defines now binding time limits for such applications and specifies that the operator offering the best transport services has to get the authorisation.[35] In this decision an existing transport plan of the public transport authority has to be taken into account by the regulatory authority. Time limits for the application differ depending on whether the public transport authority has announced an intention to contract services or not.[36]

Another new feature of the transport law lies in that the public transport authority is allowed to grant an exclusive right according to Regulation 1370/2007.[37] Public transport services in Germany can therefore now be protected from competition in the way stipulated by European legislation.

Transparency will grow considerably, as the regulatory authority is obliged to publish the following data at the end of each year about all existing authorisations in its territory in the Official Journal of the European Commission: route alignment, authorisation's duration, and the applicable time limit for applications for the next authorisation (Paragraph 18 PBefG).

As already mentioned: The new law deregulated long distance coach services, attracting thereby much on-going attention among experts and in the media.[38] Operators still have to apply for an authorisation, but, if they meet road safety and occupational requirements the authorisation has to be granted. Long distance coach services have to be upheld at least for three months. Operators are free to set and change fare levels or to change schedules. But, operators of long distance coach services are not allowed to harm publicly financed local and regional services: Transport between stops must exceed 50 km; transport is not allowed if a regional rail service offers a connection of under an hour between two stops (exceptions are possible) (Paragraph 42a PBefG).

3.3 Increase of options

An analysis of the amended law reveals that the market access options have now actually increased. The reason for this lies in that none of the old models were abolished, and, the options offered by the Regulation 1370/2007 – especially options for direct awarding – were

[34] Paragraph 13, Section 2, first sentence, No 3d in conjunction with Section 2b PBefG; *long distance services* are exempted from these norms (cf. Paragraph Paragraph 13, Section 2, second sentence PBefG). See Werner (2013: 226 ff.) for an evaluation of the new "Versagungsgrund" and for the implications of European legislation for the future preservation of the exclusivity of the authorization (76 f.).

[35] Paragraph 13, Section 3b PBefG

[36] In case of the intention to contract Paragraph 12, Section 6 PBefG applies, otherwise Paragraph 12, Section 5 PBefG applies.

[37] Paragraph 8a, Section 8 PBefG

[38] Paragraph 42a in conjunction with Paragraph 13, Section 2, second sentence and Paragraph 45, Section 2 PBefG; for the exemption of de facto-exclusivity see Footnote 34. For further details about the deregulation of long distance coach services and the following dynamic development in Germany cf. Augustin et al. (2013).

added. The following Table 1 gives an overview over the (theoretically) available options of market access.

Table 1. Market concept depending on authority's intention to tender services

Option	*Market organisation model*	*legal norms*
➢ *Authority <u>does not</u> intend to contract services*		
(Preservation of) route monopoly*	(de facto) exclusivity	still possible because of Paragraph 13 (3) and Paragraph 13 (2) I No 3 PBefG
Competition for authorisation	competition for the market market entry: award of (de facto) exclusive right	time limits according to Paragraph 12 (5) in conjunction with Paragraph 13 (2b) PBefG
➢ *Authority <u>does intend</u> to contract services*		
Tendering	competition for the market market entry: winning of contract	Paragraph 8a (2) PBefG/ Paragraph 8b PBefG
(Preservation of) municipal monopoly	market entry without competition direct award of contract	direct awarding according to Paragraph 8a (3) PBefG in conjunction with Article 5 (2) Reg. 1370/2007
(Preservation of) private monopoly	market entry without competition direct award of contract	direct awarding according to Paragraph 8a (3) PBefG in conjunction with Article 5 (4) Reg. 1370/2007**

* At least temporarily until the end of existing authorisations or in cases of only one applicant for a "commercial" service.

** Art. 5 (4) Regulation 1370/2007 allows a direct award of a public service contract below certain thresholds only if it is not prohibited by national law. In Germany constitutional limitations have to be kept in mind arguably precluding a procedure to a (private) operator which makes the participation of interested third parties impossible.

Source: Own illustration

The models differ according to whether or not the authority intends to contract services. The intention to contract has to be published, at the earliest, 27 months ahead of the planned start of the new service. If no such intention exists the incumbent operator might defend the old route monopoly despite potential other interested operators as the law kept also the norm which favours the incumbent (see section 1.1); it is still unclear which role the "grandfather clause" could possibly play against the new rule that the operator offering (bindingly) the best service should be granted the authorisation. In the case that more than one operator is interested in the service competition for the authorisation should be the norm.

If the authority intends to contract a service the authority should normally apply an open procedure either according to Procurement Law, or, in case of a service concession contract the competitive tendering procedure according to Article 5 (3) Regulation 1370/2007.

But, it is very probable that authorities will choose direct awarding procedures whenever possible, as the interest in continuing the established local market organisation is widely spread. In case of municipally owned companies the authority could directly award the contract according to Article 5 (2) Regulation 1370/2007 ("internal operator"), if all conditions

are met.[39] Traditional private route monopolies in regional public transport might also be preserved (or, temporarily, established) as Article 5 (4) Regulation 1370/2007 allows a direct award of a public service contract up to a certain threshold which doubles in case of a small or medium-sized enterprise operating not more than 23 vehicles. It is still being discussed whether or not German constitutional law requires interested third parties to be able to participate in the direct awarding of such a contract.

There is another "hidden" market model which centres on the long debated question of the de facto exclusive effects of the authorisation, described in section 1.1: Any authorisation precludes traditionally – with negligible exceptions – competing operators on the same route. The amended law did not change the pertaining norms; on the contrary the law amplified them, if possible. Regulation 1370/2007 defines the means authorities are allowed to use for intervention in public transport markets; there is a strong argument that the de facto-exclusivity of the authorisation falls within the scope of Regulation 1370/2007.[40] The authorisation should therefore necessitate the conclusion of a public service contract. Alternatively, to produce consistency with European legislation, any protective effects of the authorisation were to be abandoned – this would imply deregulation resulting in "genuine" commercial services. On the whole, one could argue that an opening of the market is technically present in the new law, but was obviously – as the norms that are the reason for the de facto-exclusivity of the authorisation were kept – politically not intended.

4 For better or for worse?

To paraphrase Didier van de Velde, German public transport *continues* to live in a hybrid, if not altogether confusing situation. As was shown in this paper, although public funds and – implicitly – exclusive rights are necessary to operate today's services the distinction between "commercial" and non-commercial services is still the core feature of the public transport law and the cause of a complex "demarcation procedure".

The amendment resulted in a further increased number of market access options for both "commercial" and non-commercial services which shows very clearly that the amendment was primarily a compromise by which all interested parties tried to pave ways to preserve their own market position. To maintain the status quo (informal, monopolistic structures etc.) might be called the main motive of most of the actors of the German public transport branch. It was successful insofar as publicly owned companies profiting from the option of a direct award are now more or less in safe waters; whether direct awards will be notably useful for private companies is still disputed.

Competition is still and widely regarded with suspicion in German public transport, any changes advancing competition of any kind face strong resistance. Fears of low service quality, of bad working conditions, that cost cuts associated with competition will only be gained at employees' expense prevail especially in the public sector. The private sector, mainly formed by small enterprises, opposes competition because of its own perceived lack of competitiveness. Germany remains on the whole unconvinced of the idea to open public

[39] This kind of direct award is as well under the condition that national law does not forbid it. In Germany, the guarantee of local self-government allows local authorities to choose their means for fulfilling their public tasks. They can decide to own and to award the contract directly to their internal operator. All the same representatives of private businesses deny the legitimacy of a direct award to an internal operator (cf. Ipsen/Leonard 2009: 16 ff.).

[40] A growing number of court decisions concludes that the authorisation grants an exclusive right, but, as of yet, no Supreme Court ruling exists whether or not the authorisation procedure happens to be in accordance with European legislation.

transport markets for competitive tendering – and certainly unconvinced of any idea to deregulate the public transport market – as an approach to achieve better services at the same or even at lower public costs.

The amendment nonetheless changed the actors' positions in the market organisation – it especially strengthened the position of the public transport authorities. They are now in a much better situation as there is a clearly defined procedure by which authority initiative can prevail if necessary service levels cannot be offered "commercially". On the other hand this procedure is very demanding – time limits have to be kept, and a correct announcement of the intention to contract is necessary very early on before the authority can start the awarding procedure a year later.

The on-going complexity of the German market model is caused by the phenomenon of clinging to the concept of "Eigenwirtschaftlichkeit" – services which are protected from competition for the duration of the authorisation and are defined as "commercially viable". By law public transport services must be operated "commercially" although nobody seriously denies that fare revenue alone cannot support the costs incurred by the contemporary service level found to be necessary in the public interest. Genuine commercial services do not exist; the given exclusivity of authorisations is considered as fundamental.

Before the recent amendment the concept of "Eigenwirtschaftlichkeit" meant that the operator was virtually protected from any competition and had a strong position against any service improvements perceived as necessary in the public interest (improvements could come at a high price for the authorities if not denied altogether). This concept was to the advantage of both publicly owned and private companies. As the European law changed with the adoption of Regulation 1370/2007 the old concept of "Eigenwirtschaftlichkeit" could no longer be maintained, and a more realistic definition had to be established. The scope of "commercial" services will therefore diminish.

That the new law is retaining the exclusive effects of the authorisation can be regarded as sort of last stronghold of the concept of "Eigenwirtschaftlichkeit" – the market access for "commercial" services is thereby kept outside of the scope of Regulation 1370/2007; no formal awarding procedure has to be followed. Private companies continue consequently to propagate the concept of "Eigenwirtschaftlichkeit" simply as a means to maintain their protected position. Stakeholders of the private business even go so far as to demand that certain public funding must be offered of legal necessity in the form of general rules as that does not danger the status of a "commercial" service. It remains to be seen, whether or not this strategy will be successful as the final decision is left to the courts.

Practice will have to show whether the new rules provide a workable framework for the development of the German local public transport.

On the whole, the new legal framework emerges as a challenge not to be underestimated. Demonstrated weak points – like the exclusivity granted outside of the scope of Regulation 1370/2007 – might soon necessitate the next amendment. Irrespective of that, complex financing structures will have to be tackled eventually.

Until then, a great deal of professional energy has to be spent solving legal and organisational problems instead of dealing with market challenges like demographic changes necessitating new approaches in public transport or finding optimal contract regimes.

ACKNOWLEDGEMENTS

I am grateful to Christoph Schaaffkamp (KCW GmbH) for valuable comments, to Aneka Blödorn (KCW GmbH) for helping with the proof reading, and to Annemone Meyer (KCW GmbH) for improving illustrations.

REFERENCES

Achenbach, Hartmut (2006): Der Wettbewerb im ÖPNV in Hessen am Beispiel des Rhein-Main-Verkehrsverbundes, in: ifmo (Institut für Mobilitätsforschung) (Ed.): Öffentlicher Personennahverkehr. Herausforderungen und Chancen, Berlin Heidelberg, p. 174–194

Augustin, Katrin / Gerike, Regine / Sanchez, Josue / Ayala, Carolina (2013): Analysis of the US intercity coach market / A first evaluation of the young long-distance coach market in Germany, paper to be presented at Workshop Governance, Ownership and Competition in Deregulated Public Transport Markets, Thredbo 13 Conference, 15-19 September 2013

Barth, Sibylle (2000): Nahverkehr in kommunaler Verantwortung – Der öffentliche Personennahverkehr nach der Regionalisierung, Schriftenreihe für Verkehr und Technik, Bd. 90, Bielefeld

Barth, Sibylle / Landsberg, Gerrit (2013): Der neue Rechtsrahmen für den Busverkehr, Chancen für den Mittelstand, edited by IHK Region Stuttgart, Stuttgart

Batzill, Roland / Zuck, Holger (1997): Personenbeförderungsrecht im Spannungsfeld von Bahnstrukturreform, PBefG-Novelle, ÖPNV-Recht der Länder und EG-Recht, Baden-Baden

Berschin, Felix / Karl, Astrid (2012): „Zur Zukunft des Genehmigungswettbewerbs“, in: Verkehr und Technik, No. 4, S. 143-149

Ipsen, Winrich/Leonard, Christiane (2009): Juristisches Grundsatzpapier des bdo zur Anwendung der VO (EG) Nr. 1370/2007 in Deutschland (juristische Handlungsempfehlung), Berlin

Bormann et al. (2010): Neuordnung der Finanzierung des Öffentlichen Personennahverkehrs: Bündelung, Subsidiarität und Anreize für ein zukunftsfähiges Angebot, Bonn. [http://library.fes.de/pdf-files/wiso/07641.pdf]

Fiedler, Lothar H. / Wachinger, Lorenz (2008): Das Recht des straßengebundenen Verkehrs in den Jahren 2008/2009, in: N&R no. 3, S. 116-120

Fiedler, Lothar H. / Wachinger, Lorenz (2009): Das Recht des straßengebundenen Verkehrs in den Jahren 2008/2009, in: N&R no. 3, S. 173-176

Fiedler, Lothar H. / Wachinger, Lorenz (2010): Das Recht des straßengebundenen Verkehrs in den Jahren 2009/2010, in: N&R no. 3, S. 170-174

Fromm, Günter (1994): Zur Neuordnung des Personenbeförderungsrechts; in: TranspR No. 11/12, 425-434

Fry, Victor L. (2010): Leitlinien auf dem Prüfstand. Antwort der Bundesländer zur ausstehenden PBefG-Novellierung, in: Der Nahverkehr No. 11, S. 31-34

Kardel, Johanna (2012): Regelverstoß wider Willen? – Ursachen von Non-Compliance im europäischen Mehrebenensystem. Wie Parlamente bei der Umsetzung europäischen

Rechts gelenkt werden
http://www.euractiv.de/fileadmin/images/Masterarbeit_Kardel_Non-Compliance.pdf

Karl, Astrid (2008): Öffentlicher Verkehr im Gewährleistungsstaat, Berlin

Knauff, Matthias (2007): Legaldefinitionen als Problem, Zeitschrift für Gesetzgebung, No. 4, S. 328-349

Müller, Susanne (2012): Was die Bundesländer wollten und was sie erreicht haben, presentation at the ZVBN-Conference "Die Novellierung des PBefG – Ende gut, alles gut?", on 20 November 2012, Bremen
http://www.zvbn.de/media/data/03_PBefG_aus_Sicht_der_Laender_Susanne-Mueller.pdf

Peistrup, Matthias (2010): Legitimation und Reformpotenziale der ÖPNV-Förderung in Deutschland, Baden-Baden

van de Velde, Didier M. (2003): »Regulation and Competition in the European Land Transport Industry: Some recent Evolutions«, Keynote Paper presented at the 8th Conference on Competition and Ownership in Land Passenger Transport, 14–18 September 2003, Rio de Janeiro (Brazil)

Wachinger, Lorenz (2006): Das Recht des Marktzugangs im ÖPNV. Genehmigung, Vertragsvergabe und Finanzierung im straßengebundenen ÖPNV nach deutschem und europäischem Recht, Berlin

Werner, Jan (2013): A 3 Verkehrsgewerberecht, in: Baumeister, Hubertus (Hrsg.): Recht des ÖPNV – Praxishandbuch für den Nahverkehr mit VO (EG) Nr. 1370/2007, PBefG und ÖPNV-Gesetzen der Länder, Hamburg