



March 2013
AK Position Paper

Proposal for a Regulation amending Regulation (EC)
No 1370/2007 concerning the opening of the market
for domestic passenger transport services by rail

About us

The Federal Chamber of Labour is by law representing the interests of about 3.2 million employees and consumers in Austria. It acts for the interests of its members in fields of social-, educational-, economical-, and consumer issues both on the national and on the EU-level in Brussels. Furthermore the Austrian Federal Chamber of Labour is a part of the Austrian social partnership.

The AK EUROPA office in Brussels was established in 1991 to bring forward the interests of all its members directly vis-à-vis the European Institutions.

Organisation and Tasks of the Austrian Federal Chamber of Labour

The Austrian Federal Chamber of Labour is the umbrella organisation of the nine regional Chambers of Labour in Austria, which have together the statutory mandate to represent the interests of their members.

The Chambers of Labour provide their members a broad range of services, including for instance advice on matters of labour law, consumer rights, social insurance and educational matters.

Rudolf Kaske
President

More than three quarters of the 2 million member-consultations carried out each year concern labour-, social insurance- and insolvency law. Furthermore the Austrian Federal Chamber of Labour makes use of its vested right to state its opinion in the legislation process of the European Union and in Austria in order to shape the interests of the employees and consumers towards the legislator.

All Austrian employees are subject to compulsory membership. The member fee is determined by law and is amounting to 0.5% of the members' gross wages or salaries (up to the social security payroll tax cap maximum). 560.000 - amongst others unemployed, persons on maternity (paternity) leave, community and military service - of the 3.2 million members are exempt from subscription payment, but are entitled to all services provided by the Austrian Federal Chambers of Labour.

Werner Muhm
Director

The AK position in detail

Planned changes to content:

The purpose of the draft proposal of the European Commission (EC) is to continue to push forward the internal market in the railway sector, and exactly for that reason, authorities and states almost without exception will lose the compromise solution of being able to choose between tendering or directly awarding rail transport services, which they so fought for so hard prior to voting on the current regulation. This means, according to the proposal of the EC, there should be exclusively mandatory tendering for all transport services, apart from if an authority itself provides these transport services or an internal operator, which is controlled by it, or if it concerns a small-volume contract or emergency measures. It would basically no longer be possible to directly award rail passenger transport in Austria to ÖBB (Austrian Federal Railways) and private railways, but Austria would have to subject her domestic railway market to Europe-wide competitive tendering.

In order to increase competition even more, authorities shall also be able to decide to award contracts to various railway companies, by specifying an upper limit concerning the number of contracts to a railway undertaking. At 10 million train-km resp. a third of the entire transportation volume of a Member State's public transport, the size of service contracts shall also be limited.

The Regulation on the Application of a Transfer of Undertakings - i. e. the responsible authority can commit the selected operator of a public service, to grant employees, which were previously

recruited to provide services, the rights to which they would be entitled if a transfer had taken place, even if no such transfer of undertaking has taken place as defined in Directive 2001/23/EC - remains, unchanged, only an optional provision and is thereby left to the discretion of each individual Member State.

According to the proposal, an authority can, apart from quality, also specify social standards, but again, this is only an optional provision, whereby it has become clear in both cases, that the Austrian authorities – in particular the tendering Federal states - do not want to make use of it.

As rolling stock normally outlives service contracts, the authority shall in future be obliged to take over the residual value risk (by guarantee, acquisition or procurement of rolling stock), if this is required by new operators, who want to participate in tenders. Hence, new entrants and also unsuccessful tenderers can be sure, that they are bearing the risk, but that it can be passed on to the public sector.

This clearly demonstrates that the EC's liberalisation efforts are not concerned with improving public transport for passengers, but that the EC is only interested in additional contracts for private railway companies at the expense of state-owned railways and the public sector, which at the same time shall lose all management scope.

According to the draft, from 3 December 2019, public service rail contracts have to be tendered in accordance with the new Regulation and all metro and

tramway contracts have to be tendered by 3 December 2019, unless these concern transport companies, which belong to the community (control comparable to that exercised over their own departments).

Public service contracts for public passenger transport by rail directly awarded between 1 January 2013 and 2 December 2019 may continue until their expiry date; however, they shall, in any event, not continue after 31 December 2022 with the exception of service contracts, which were directly awarded between 26 July 2000 and 3 December 2009. The question remains, which transitional solutions shall apply to the public service contract of the Federation with Austrian Federal Railways (ÖBB) from 12 December 2009.

AK strictly rejects the draft Proposal in principle for the following reasons:

Subsidiarity:

The current Regulation (EC) No 1370/2007 concerning the opening of the market for domestic passenger transport services by rail (PSO) was an arduous compromise, which had been reached after many years of tough negotiations. It came into force in December 2009. Article 8(2) stipulates that within six months after the first half of the transitional period, Member States shall provide the Commission with a progress report, highlighting the implementation of any gradual award of public service contracts in line with Article 5. Hence, this progress report would have to be submitted in the first half of the year 2015. On the basis of the Member States' progress reports,

the Commission may propose appropriate measures addressed to Member States.

After the end of the transitional period specified in Article 8(2), the Commission shall present a report on the implementation of this Regulation and on the developments in the provision of public passenger transport in the community, assessing in particular the development of the quality of public passenger transport services and the effects of direct awards, accompanied, if necessary, by appropriate proposals for the amendment of this Regulation.

The fact that the EC, just three years later – without being able to rely on sufficient experience – and without having available the reports mentioned on the actual effects of the Regulation, is planning massive interventions, is reason enough to strictly reject this from the point of view of subsidiarity alone.

Degree of customer satisfaction versus degree of liberalisation:

It is the general objective of the EC to improve the quality of rail passenger transports and to increase its operative efficiency. The aim of mandatory competitive tendering of public service contracts is to intensify competitive pressure on domestic railway markets in order to increase quantity and quality of passenger transport services.

One could argue that the 2011 Eurobarometer Survey (Flash EB Series #326 Survey on passengers' satisfaction with rail services) clearly shows that the degree of satisfaction of rail passengers is totally independent of the degree of liberalisation of the railway system of

the respective country. Taking all criteria into account, Austria, being in the top third, has a good midfield place.

The market report of the regulation authorities of the Member States (Independent Regulators' Group – Rail, Annual Market Monitoring Report) from February 2013 states that 27 railway undertakings are active in Austria, a large number for a country this size, and that the distance travelled by rail per inhabitant is the third highest after Switzerland and France.

In addition, the final report "Competitive tendering in European regional rail passenger transport - what can Austria learn from tendering experiences in Europe?" of the Zentrum Transportwirtschaft Logistik Schulungs- & Beratungs-GmbH says: If a small country tenders routes for each region, this is unattractive for potential competitors and inefficient for authorities. If larger sub networks are tendered, this is attractive but could put the incumbent at risk. If in addition, as in the case of Sweden, these implement a price dumping policy, there is a danger that both incumbent and competitors, which previously took over routes of the incumbent, have to be rescued resp. their routes have to be taken over or have to be awarded to other tenderers at a higher cost.

This makes it obvious that mandatory competitive tendering is detrimental to existing operators, including state-owned railways, and all other participating railway companies. In all cases, the relevant costs are borne by the general public.

Enterprises in liberalised markets react above all with cost reductions. In particular, in case of sectors requiring a lar-

ger workforce, it seems to be natural for companies to lower their costs by making staff redundant. Hence, it has been proven that mandatory competitive tendering is fraught with dangers, which jeopardize a very large number of jobs.

According to the final report mentioned above, another problem of competitive tendering is associated with long-term falling provider numbers. In Germany, for example, competitive tendering in particular in regional transport, has been going on for years. As an empirical study of the Association of German Transport Companies (Verband Deutscher Verkehrsunternehmen – VDV) shows, competitive tendering is quite often inadequate. Fewer and fewer companies have been participating in individual proceedings over the past years. The declining participation in tenders has already revealed the first tendencies to form oligopolies. This is an indication of high costs and financing difficulties by railway undertakings. Hardly any private undertaking is able to provide the necessary resources for drawing up eligible tenders in the long run.

This tendency can also be observed on the European railway market. For example, most companies on the British market are not part of the private sector. Most providers are former state-owned railways of other states resp. their subsidiaries. In particular state-owned railways from France, Germany and the Netherlands have successfully positioned themselves on the British market over the past years. Due to sometimes significantly lower costs, they are able to put private operators increasingly under pressure. WESTbahn GmbH, which since December 2011, in competition to ÖBB, operates long-distance transport

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between Vienna and Salzburg, is also to 35 percent owned by state-owned railway operator SNCF.

Hence, the mandatory tendering of rail transport is strictly rejected.

Freedom of choice:

Compulsory tendering for public transport services have to be strictly rejected. Municipalities, states or Federation must also in future be free to decide how they want to manage their public transport. The danger is that compulsory tendering results in less flexible traveling and fewer trains, higher prices for customers and a dramatic deterioration of working conditions.

International examples show that private services are no guarantee for better and more cost-effective service provision. Private companies reduce their investments when they take over a public enterprise. In most cases, cheaper prices are only available at the start of the liberalisation, whereas quality is significantly deteriorating at the same time. European examples show: in most cases, the arrival of a new provider resulted only in short term price reductions for customers – if at all. After all, necessary investments, at least in maintenance, cost money.

From the liberalisation of the sector – in particular originating from Great Britain and France – emerged a small number of internationally active private transportation groups, which want to enter the domestic markets.

Other experiences with tendering, made for example by the Munich Transport and Tariff Association MVV, have

shown that this system is very expensive and also extremely time-consuming. Recently, the MVV has decided to return to market-orientated direct award of contracts.

Public services must be accessible (in the same way) and affordable for all. Hence, the AK supports the affordable, high-quality, comprehensive provision of public transport, which can be rendered efficiently and under fair conditions for employees. It cannot be in the interest of consumers, if privatisation takes place at the expense of the workforce. Only satisfied and motivated employees form the basis of well-functioning public services. Public services and services of general interest are the core of an infrastructure, which is required for a business location, which must not be allowed to be put at risk, in order not to affect Austria's and Europe's competitiveness.

We strictly reject the fact that the EC want to take the freedom of choice away from Member States.

Change to the state aid regime:

Based on the current regulations, compensation for the operation of public passenger transport services is exempt from the notification requirement, provided they fulfil certain criteria (Article 9 of the Regulation concerning the opening of the market for domestic passenger transport services by rail - PSO). The EC intends to cancel this general exemption in the PSO Regulation and to extend instead the scope of the Enabling Regulation 994/98 of the Council by "State aid for transport". Based on this, the Commission shall be able (but not obliged) to decide whether and under

what circumstances it declares - by way of a Group Exemption Regulation - such compensation to be compatible with the common market. Adopting such a Group Exemption Regulation would automatically cancel Article 9 of the PSO Regulation after six months.

Based on the clear reasoning of the EC, the proposal to include certain new categories in the Enabling Regulation "entails neither the immediate block exemption of all these categories, nor does it mean that all measures within a category would be block-exempted in their entirety". This differentiated declaration makes it clear already that following the possible cancellation of Article 9 of the PSO Regulation, which exempts compensation granted in agreement with the PSO Regulation unconditionally and directly from the notification requirement, no adequate subsequent regulation shall be applied. This is in particular also expressed by the EC commenting on the proposed amendments to the Enabling Regulation: „The Commission currently expects such a block exemption would however reproduce the substance of the current exemption (Article 9 PSO Regulation), except to the extent that Regulation 1370/2007 is amended by planned legislative proposals relating to the rail sector". Apart from that there are no specific clarifications in respect of Article 9(2) lit. a) and b) of the PSO Regulation. Hence, a number of uncertainty factors remain.

The approach of the EC to put into question without convincing legal substantiation (Article 108(4) and Article 109 TFEU, which are referred to as a legal basis, are purely optional provisions) and without recognisable factual ne-

cessity, the hard-won result of a lengthy discussion process in form the exemption of PSO-conform exemption for transport services from the general state aid regime including the notification requirement, must be strictly rejected within the meaning of legal certainty and proportionality. The accompanying bypassing of the European Parliament, which is a co-legislator of Regulation 1370/2007, also does not seem to be justified in this context.

The AK therefore demands:

- No further liberalisation of domestic passenger transport services
- No compulsory liberalisation of rail passenger transports, but maintaining the freedom of choice for competent authorities, whether they want to award contracts directly or put them out to tender
- No upper limits for the market share of railway companies
- Compulsory social and quality standards for all possible tenders
- Compulsory Transfer of Undertakings with voluntary offer to employees who should join a new operator
- Not the public sector shall carry the economic risk, but the company itself

On the provisions in detail

On Recital 11:

Even though the EC admits that employees of transport companies require social protection, it leaves it to the discreti-

The BAK welcomes the proposal to regard passenger rights, social, employment and environmental protection. This should be embedded in a binding manner.

on of each individual Member State. It is necessary to insist on embedding social protection as a binding requirement already at EU level.

On Article 2 lit c)

The definition of the competent local authority is expanded, however, leaves open the question, whether railway companies, which are owned by a Federal state, which establishes and regularly updates public passenger transport plans covering all relevant transport modes for the territory for which they are responsible, is considered an internal operator.

On Article 2 lit e)

From the point of view of the AK, the amendment in the draft Proposal "The scope of public service obligations shall exclude all public transport services that go beyond of what is necessary to reap local, regional or sub-national network effects" is not clear and must be revised. It should also be clarified that in case of small Member States the domestic network in its entirety is included to fulfil the services of general interest of a Member State and that as such, a comprehensive national network can fall within this scope.

On Article 2a Paragraph 1 and 5

The AK welcomes the proposal that in establishing public transport plans, competent authorities shall have to regard in particular applicable rules regarding passenger rights, social, employment and environmental protection. On a critical note one has to say that this proposal too has the character

of a non-binding recommendation and that it should be embedded in a binding manner.

The EC also proposes "that the competent authorities shall adopt the public transport plans after consultation of relevant stakeholders and publish them. For the purpose of this Regulation, relevant stakeholders to be taken into consideration are at least transport operators, infrastructure managers if appropriate, and representative passenger and employee organisations". The same applies to drawing up the specification of public service obligations. The AK also welcomes this approach.

On Article 2a Paragraph 6

Here the maximum annual volume of a public service contract in terms of train-km shall be the higher value of either 10 million train-km or one third of the total national public rail passenger transport volume under public service contract.

The current direct award of contracts of rail passenger transport services for the section of routes covered by ÖBB-Personenverkehr AG in the overall network of the federal territory (so-called Contract of the federal government concerning public services of ÖBB – GWL Contract) for local rail passenger transport is 58,371 million train-km and for long-distance rail passenger transport 12,742 million train-km. Apart from the general rejection of the draft Proposal, this limit is also strictly rejected.

On Article 4 Paragraph 5

This draft remains unchanged in the new draft and includes an optional pro-

The BAK strictly rejects the proposal that domestic authorities will lose the currently possible freedom of choice between competitive tendering and directly awarding contracts.

vision for the competent Authorities, to oblige the selected operator of a public service to grant employees who were previously recruited to provide services, the rights to which they would be entitled if a transfer had taken place, even if no such transfer of undertaking has taken place as defined in Directive 2001/23/EC.

Since 2009, this provision has not once been applied in Austria and it is to be feared that this will continue in future. The time has come for the EC to show how serious it is in respect of providing employees with social protection. The optional provision must be changed into a binding requirement and once the selected operator of a public service has made a binding offer of transfer of undertaking to the employees of the previous operator, every employee has to agree voluntarily. Only then can it be ensured that all parties apply the same personnel costs to an offer and that competition is not carried out at the expense of employees.

On Article 4 Paragraph 6

It is stated that where competent authorities, in accordance with national law, require public service operators to comply with certain quality and social standards or establish social and qualitative criteria, these standards and criteria shall be included in the tender documents and in the public service contracts. The expansion of quality standards in the current Regulation to include quality and social standards in the draft is welcomed in general; however, this has only created an option, which, is with the exception of Austria not applied by any other Member State. The compliance with social and quality standards and the inclusion of social and qualitative criteria must be a bin-

ding requirement for the Member States; otherwise this is just a dead law, which we will be at the expense of employees throughout Europe.

On Article 4 Paragraph 8

The draft shall ensure that "competent authorities shall make available to all interested parties relevant information for the preparation of an offer under a competitive tender procedure. This shall include information on passenger demand, fares, costs and revenues related to the public passenger transport covered by the tender and details of the infrastructure specifications relevant for the operation of the required vehicles or rolling stock to enable them to draft well informed business plans. Rail infrastructure managers shall support competent authorities in providing all relevant infrastructure specifications". From the point of view of the AK, there is also no information on personnel costs for those employees, to whom, in accordance with the Transfer of Undertaking Directive a binding offer has to be made.

On Article 4 and 5

The Regulation shall be amended to assert that no competitive tendering procedure has to be organised if the operator is an internal operator. The internal operator is defined in accordance with Article 2 lit j), i.e. that the competent authority exercises a control comparable to that exercised over their own departments.

The AK strictly rejects the proposal that domestic authorities will lose the currently possible freedom of choice between competitive tendering and directly awarding contracts.

On Article 5 Paragraph 3 and 6

In the current Regulation, competent authorities are able to decide whether to directly award public service contracts by rail. Hence, it is up to every Member State, to organise and award its rail services as it considers them to be most appropriate.

The AK once again strictly rejects the notion to take away from national authorities the currently possible freedom of choice between competitive tendering and directly awarding contracts.

In addition, the draft proposes in Paragraph 6 to determine that there will also be the option of award public contracts to several railway companies, by limiting the number of contracts, which are awarded to the same railway company.

On Article 5a

To ensure that all operators are having non-discriminatory access to the market, the EC proposes that the Member States bear the residual value risk of the rolling stock, if operators, who want and are able to participate in public tender procedure, apply for this in order to be able to participate in tender procedures.

Three options have been proposed:

In accordance with lit a) the authority becomes the owner by acquiring the rolling stock, lit b) by providing a guarantee for the financing of the rolling stock and in lit c) the authority can assume the function of mediator.

Hence, new market participants and also unsuccessful tenderers can ensure that they do not carry the risk but that it

is passed on to the public sector. The AK strictly rejects these changes.

Furthermore, it has to be noted that the present draft does not include any stipulation concerning the responsibility for servicing and maintenance, so that in the worst case, the authority would have to bear these costs as well. Apart from that, there are probably no competent authorities (i.e. states and communities), which would have the competence to assess the technical condition of the rolling stock; hence, here too the risk is either a costly incorrect assessment or further passing on of cost to the public.

On Article 7 Paragraph 3

Compared to the current text, this Article has not changed; hence one speaks of directly awarding public service rail contracts, even though in future this shall no longer be admissible. As in the opinion of the AK, the freedom of choice has to be maintained, this Article is not to be amended, but this and the Articles mentioned above have to be maintained in their original and currently applicable version.

On Article 8 Paragraph 2, 2a and 3

This determines that public service rail contracts - with the exception of other track-based modes such as metro or tramways - must be awarded in compliance with Article 5(3) by 3 December 2019 at the latest. That means tendering in rail passenger transport from 2019.

On 3 December 2019 at the latest, it must be ensured that all public service contracts, which concern other track-based modes and road transport, have been awarded in compliance with Ar-

ticle 5(3). This means, tendering in respect of metro and tramway transport – provided these are not internal operators - prior to the Regulation coming into force by 2019 at the latest.

Paragraph 2a specifies that public service rail contracts, which are directly awarded between 1 January 2013 and 2 December 2019, may remain valid for the duration intended. However, they may not continue after 31 December 2022.

Paragraph 3 lit d) exempts those public service contracts from the obligation in accordance with Paragraph 2, which were not awarded on the basis of competitive tendering prior to 3 December 2009. This applies to the GWL contract; however, this has been concluded after 3 December 2009, namely on 12 December 2009 and therefore does not come under any transitional periods. This gap must be closed by treating the GWL contract of the Federation like those, which were concluded prior to 3 December 2009.

Should you have any further questions
please do not hesitate to contact

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